

VIRGINIA LAW REVIEW

VOLUME 102

NOVEMBER 2016

NUMBER 7

ARTICLES

THE RATIONALITY OF RATIONAL BASIS REVIEW

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*Through the “rational basis” test, the Supreme Court asserts the authority to assess whether laws are “rationally related to a legitimate governmental interest.” Although it gives the Court an effective substantive veto over all legislation, rationality review is poorly understood and under-theorized. Developed haphazardly over time, rationality review is not the product of either a considered formula or a particular theory of constitutional law, and though it is clothed in the language of rationality, it represents the Court’s own decidedly intuitive understanding of the proper sphere of state regulation. At one time, that understanding was based in a widely held conception of the “police power,” but the connection to the police power was severed after the Court’s decision in *United States v. Carolene Products*. Since then, the Court has developed *ad hoc* a conception of the proper role of government that has become almost entirely utilitarian in nature.*

This Article examines the Court’s view of how rationality should (and by virtue of the power of judicial review must) feature in legislation by tracing the development of rationality review and comparing it to more rigorous understandings of political rationality. Comparison reveals the Court’s limited conception of rationality, which allows the Court to avoid difficult questions in pursuit of seemingly uncontroversial instrumental ends. Examination of the Court’s approach to ra-

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tionality demonstrates the need for a broader conception of legislative rationality – one that includes “constitutive ends.” Recognizing constitutive legislative ends, combined with an information-forcing rule for revealing those ends, can both improve democratic discourse in the legislature and lead to a richer and more intellectually honest form of rationality review.

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INTRODUCTION

RATIONAL basis review is the poor stepchild of judicial review. Requiring only that regulations (as a matter of due process¹) and classifications (as a matter of equal protection²) be rationally related to a legitimate governmental interest, it is widely regarded as virtually “no review at all.”³ It is reserved for those equal protection and substantive due process cases least likely to implicate important issues of equal protection and substantive due process. But rational basis is the one form of review that completely pervades the legal system by virtue of its combination of substantive review and general applicability. It is a substantive standard that the U.S. Supreme Court applies to *all* government regulation, providing at least the opportunity for the Court to exercise a judicial veto over any piece of legislation. Nor is rational basis review necessarily so toothless. Rationality review served as the basis for both what is frequently viewed as the Court’s dramatic overreaching during the *Lochner*⁴ era and some of the most contentious constitutional cases of

¹ *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (“The Constitution also requires, however, that Washington’s assisted-suicide ban be rationally related to legitimate government interests.”).

² *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533 (1973) (“Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest.”).

³ *FCC v. Beach Commc’ns*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring in judgment). See also Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 *Colum. L. Rev.* 1689, 1713 (1984) (“[R]ationality review under the equal protection clause, as elsewhere, is highly deferential and almost always results in the validation of statutory classifications.”); Shoshana Zimmerman, Note, *Pushing the Boundaries?: Equal Protection, Rational Basis, and Rational Decision Making by District Courts in Cases Challenging Legislative Classifications on the Basis of Sexual Orientation*, 21 *S. Cal. Interdisc. L.J.* 727, 733 (2012) (“Supreme Court precedent is replete with strong language suggesting that it is almost entirely impossible for a plaintiff to prevail on equal protection grounds under the rational basis standard.”); *id.* at n.37 (collecting similar statements of rationality review’s “softness”).

⁴ *Lochner v. New York*, 198 U.S. 45 (1905).

the last two decades, prompting deep division on the Court and vocal dissents as to both the nature of the rational basis test itself and the outcomes it has generated.⁵

Rationality review is highly problematic as a constitutional matter. There is no textual basis in the Constitution to justify reviewing legislation for its rationality.⁶ 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 lawmaking.⁷ But even if rationality is itself a good thing, rationality review is a potentially limitless and unprincipled usurpation of legislative authority by the judiciary.⁸ 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. One could just as easily imagine the Court following a Burkean approach to representative rationality—to inquire whether the legislature actually attempted to further what it considers to be common national interest⁹ as opposed to today’s atomistic inquiry into the propensity for a particular statute to do so.

Although rational basis review presents an opportunity for the Court to intrude into virtually any regulatory sphere, its origins, premises, and scope remain almost completely unexamined. The Court has neither justified rationality review nor provided a theoretical foundation to explain

⁵ Compare *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (finding “no legitimate purpose” for the Defense of Marriage Act without applying heightened scrutiny), with *id.* at 2706 (Scalia, J., dissenting) (criticizing the majority’s application of rational basis framework), and *id.* at 2716 (Alito, J., dissenting) (same); and compare *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (striking same-sex sodomy law for lack of “legitimate state interest” as due process violation), with *id.* at 580 (O’Connor, J., concurring in judgment) (arguing for a “more searching form” of rational basis scrutiny and finding equal protection violation), and *id.* at 586, 601 (Scalia, J., dissenting) (criticizing the majority for its application of due process rational basis review and Justice O’Connor for her application of equal protection rational basis review).

⁶ Hans A. Linde, *Due Process of Lawmaking*, 55 *Neb. L. Rev.* 197, 222 (1976) (“One might, indeed, imagine a constitution in which one clause simply instructs judges to set aside unreasonable, unjust, or outmoded laws, and as institutionalists we might say that this describes exactly the kind of constitutions we in fact have. But the actual clauses that we are discussing instruct government itself to act by due process of law, not simply to legislate subject to later judicial second-guessing.”).

⁷ *Id.* at 254 (“[T]he misdirection of due process to the substance of enactments diverts it from testing the process of enactment itself.”).

⁸ Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *Yale L.J.* 1672, 1801 (2012).

⁹ See Edmund Burke, *Speech to the Electors of Bristol* (Nov. 3, 1774), in 2 *The Writings and Speeches of Edmund Burke* 93, 95–98 (1901).

the practice¹⁰ and is apparently content to carry on exercising the power to strike statutes under the doctrine without doing so.¹¹ The seeming deference of rationality review, especially combined with the seemingly uncontroversial appeal of rationality, has masked the considerable influence of rationality review in constitutional law. Rational basis review not only assumes rationality is the objective of legislation, it makes means-ends rationality a constitutional condition of all legislation.¹² 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.

This Article reconsiders rationality review by examining its historical development and the Court's fidelity to the rationality that serves as both the rule's defining characteristic and its justification.

The means-ends structure of rationality review is hardly new; the Supreme Court has been conducting means-ends review of legislation since the nineteenth century when evaluating whether legislation was a valid exercise of the police power—the power “to protect the public health, the public morals, or the public safety.”¹³ That connection to the police power formed the core of the Court's equal protection and substantive due process jurisprudence from *Mugler v. Kansas*¹⁴ in 1877 through the contentious *Lochner* era. *United States v. Carolene Products Co.*, and its promise of a process-oriented approach to judicial review, broke the connection to the police power as a substantive basis for rationality review.¹⁵ The Court eventually returned to the means-ends structure of its police power cases, substituting for the police power a different concep-

¹⁰ Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481, 490 (2004) (“[W]hile the Court regularly explains its approach to rational basis review, it has not offered a theory for making collective sense of its variable lot of decisions.” (footnote omitted)); Neelum J. Wadhvani, *Rational Reviews, Irrational Results*, 84 Tex. L. Rev. 801, 802 (2006) (“Underlying rational basis review are few of the normative principles that would lend it coherence, guidance, or a relatively high degree of certainty and predictability.”).

¹¹ *U.S.R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 177 n.10 (1980) (“The most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles.”).

¹² Linde, *supra* note 6, at 204 (arguing rational basis review “not only assumes that a law is always a means to an end, but it also asserts that law is constitutionally required to be a means to an end, and a rational means at that”).

¹³ *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

¹⁴ *Id.*

¹⁵ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (plurality opinion).

tion of “legitimate governmental interest”—one informed by the nature of the means-ends structure of rationality review itself.¹⁶

Close examination of rationality review reveals many aspects of the practice that have largely gone unnoticed and, consequently, unquestioned. While the “rational basis” of rationality review is ostensibly an evaluation of means, the Court uses rationality review almost exclusively to identify and evaluate legislative ends, thus imposing upon legislatures the Court’s own understanding of the legitimate objectives of republican government. At the same time, rationality review imposes this vision of government not as a matter of contestable premises like “policy” but rather as a requirement of “rationality,” masking the normativity underlying rationality review. But the Court has never comprehensively described, much less defended, the conception of rationality it applies when conducting rationality review. Although necessarily tied to reason, rationality comes in many forms. The Court has adopted a very limited approach to rationality, one that has fundamentally, although silently, shifted the nature of what the Court will accept as legitimate governmental interests toward those that can be expressed in instrumentalist, utilitarian terms, ignoring (not even rejecting) noninstrumentalist governmental ends. But noninstrumentalist ends are not only rational, they are ubiquitous throughout law. Law not only regulates behavior, it necessarily defines it, and the legislative goal of altering the social meaning of conduct through law—a “constitutive end”—is legitimate as an act of collective self-determination through representative government. Only by acknowledging the role of constitutive ends can the Court hope to make sense of what has become its hopelessly convoluted doctrine of rationality review.

This Article proceeds in five Parts. Part I traces the development of rationality review from its earliest uses, which pre-date the equal protection and substantive due process mandates it currently implements, through the *Lochner* era, in which means-ends review was used to evaluate whether legislation was a valid exercise of the police power. Part II continues the chronological development of rationality in the years following *Carolene Products*, which signaled a departure from the Court’s previous emphasis on the police power, and describes the modern rational basis test, along with some implications. Part III reconsiders the Court’s rationality within the larger field of rational thought and high-

¹⁶ U.S. Dept. of Agric. v. Moreno, 413 U.S. 528, 533 (1973).

lights how rationality review employs a narrow, instrumental understanding of rationality, ignoring other ways in which acts (including social acts like laws) can be rational. With a broader understanding of rationality in hand, Part IV explains how the development of modern rationality review has shifted the Court toward a singular focus on governmental ends that are themselves instrumental to broad utilitarian objectives. Part V describes the ways in which legislation is often intrinsically rather than instrumentally rational, and introduces the concept of a “constitutive end” as a way for the Court to consider noninstrumentally rational legislation within the framework of rationality review along with some suggestions for implementation. A brief conclusion follows.

Two brief caveats: First, the Article’s focus is on the doctrine of rationality review, not on theories of substantive due process or equal protection that the test is intended to implement. Although the underlying theory clearly informs rationality review,¹⁷ rationality review has a distinct legal meaning,¹⁸ and it is that meaning I address. Realists might argue that the rational basis test should not be taken seriously and serves only as doctrinal cover for what the Court wishes to do in particular cases, but the Court (and litigants) take the doctrine seriously and, consequently; so do I. Second, while the rational basis test works somewhat differently in substantive due process than it does in equal protection, the uses in both contexts have far more in common than not, and, for my purposes, the similarity under the two doctrines approaches unity. I will address the differences when material, but for the most part I will treat equal protection and substantive due process rational basis cases together, as the Court itself has done. See caveat #1.

I. THE DEVELOPMENT OF RATIONAL BASIS REVIEW

Although my primary focus is on rationality review as enshrined in the “familiar ‘rational basis’ test,”¹⁹ rationality has been a feature of Supreme Court review of legislation since the earliest exercises of constitutional judicial review. Indeed, the case that serves as the foundation for modern rational basis review, *United States v. Carolene Products*, cites

¹⁷ Linde, *supra* note 6, at 207.

¹⁸ See Richard H. Fallon, Jr., *Implementing the Constitution* 76 (2001) (“For better or for worse, it is largely through the formulation (and subsequent application) of tests that the Court discharges its responsibilities for constitutional implementation.”).

¹⁹ *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981).

McCulloch v. Maryland in its illustrious Footnote 4,²⁰ and citations to *McCulloch* for the means-ends structure of rational basis review are common.²¹ Following the means-ends analysis in *McCulloch*,²² rationality has become the applicable standard for determining whether a purported exercise of an enumerated federal power is in fact authorized by that power.²³

One should quickly note an important distinction between the enumerated-powers and equal-protection/due-process flavors of rational basis scrutiny, though. Although *McCulloch* is frequently cited in rationality review cases, the inquiry in enumerated powers cases like *McCulloch* is necessarily much more limited than full rationality review because the number of “legitimate governmental interests” is confined to the universe of those enumerated in Article I, Section 8 of the Constitution. There is no explicit limit to either the permissible means or the permissible ends in broader rationality review, and, while enumerated powers cases must determine what is encompassed by the enumerated powers, they need not consider whether the powers themselves are legitimate. Thus, enumerated powers cases match the “means” half of rationality review with a different “ends” inquiry: an interpretive one into the meaning of terms like “commerce among the several States,”²⁴ overlapping with rationality review for only the former half of the analysis.

Lacking defined categories and their accompanying categorical rules, the rational basis test provides very few constraints on the Court’s consideration of the rationality (of both means and ends) of legislation. Although traditionally typified as deferential, the rational basis test is the

²⁰ See *Carolene Products*, 304 U.S. at 152 n.4 (plurality opinion) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819)).

²¹ See, e.g., John F. Manning, Book Review, *The Necessary and Proper Clause and Its Legal Antecedents*, 92 B.U. L. Rev. 1349, 1349 (2012) (“Chief Justice Marshall’s reasoning - upon which the Court now bases its very forgiving rational basis approach to federal legislation . . .” (footnote omitted)).

²² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

²³ See *Golan v. Holder*, 132 S. Ct. 873, 889 (2012) (“Congress rationally could have concluded that adherence to Berne ‘promotes the diffusion of knowledge.’”) (copyright power); *Gonzalez v. Raich*, 545 U.S. 1, 22 (2005) (“We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”) (interstate commerce power).

²⁴ See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) (“We are now arrived at the inquiry—What is this power?”).

best place to observe the Court applying its own conception of law, even if that conception is infrequently exercised to invalidate legislation.

Today's rational basis test has developed over the course of 200 years, weathering some of the greatest upheavals in U.S. constitutional law, while providing a touchstone for those on both sides of the debates that gave rise to our understanding of equal protection and substantive due process. The test retains much of its original substance, although it has changed dramatically in form. Previously implicit in the concept of "reasonable" government, the means-ends structure of the test has been around for almost 150 years, and although that structure has not changed substantially over that time, its underlying rationality has.

A. Arbitrariness, Reasonableness, and the Police Power

1. Developing the Practice of General Substantive Review

Although rationality review today serves primarily as a means of enforcing the Due Process and Equal Protection Clauses, the Court struck on a non-specific rationality requirement not as an explicit constitutional mandate, but, rather, as a rejection of the alternative of arbitrariness. In 1829, almost forty years before the ratification of the Fourteenth Amendment, the Court in *Wilkinson v. Leland* considered and rejected the possibility that States could engage in the "uncontrolled and arbitrary exercise" of power.²⁵ Lacking an applicable clause in the Constitution, Justice Story founded the requirement on both an abstract conception of freedom and the "sacred" nature of personal liberty and property:

That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require; that the rights of personal liberty and private property should be held sacred.²⁶

The Court engaged in judicial review to determine whether state laws infringed *specific* constitutional rights throughout the antebellum period,²⁷ but the adoption of the Fourteenth Amendment required the Court

²⁵ *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829).

²⁶ *Id.*

²⁷ See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 91–92 (1810) (Contracts Clause). The Court did subject a *federal* statute to substantive review for violation of a property right under the Fifth Amendment Due Process Clause in *Dred Scott v. Sandford*, 60 U.S. (19 How.)

to develop its understanding of *general* restrictions on state action. Those restrictions gradually took on the form of modern rationality review, although they retained a strong connection to conceptions of government power (and restraint) pre-dating the Constitution. That development took place through fits and starts, with what appear in hindsight to be several detours and distractions along the way.

There was, as an initial matter, the question of what, if any, provision of the Constitution justified general constitutional judicial review of state laws. The matter was considerably unsettled by the *Slaughter-House Cases*, in which the Court effectively negated the possibility that either the Due Process Clause²⁸ or the Equal Protection Clause²⁹ provided a basis for federal courts to engage in general substantive review of state laws, at least as a matter of restraining the liberty to practice a trade. Instead, the Court pointed to the Fourteenth Amendment's Privileges or Immunities Clause, which provided a basis for substantive review but a rather limited one.³⁰ For regulations regarding "property," though, the Court had a somewhat more ready ear. Just four years after *Slaughter-House*, in *Munn v. Illinois*, the Court found in the Due Process Clause a substantive limitation "old as a principle of civilized government,"³¹ denying to government a rather large and previously (at least as a matter of Supreme Court constitutional jurisprudence) unrecognized area of regulation: "power upon the whole people to control rights which are purely and exclusively private[.]"³² In *Munn*, the Court found the grain elevators at issue "affected with a public interest" (and not "purely and exclusively private") and, therefore, subject to state price regulation, but the principle of substantive limits on state regulatory power, and its constitutional basis in the Due Process Clause, was established.³³ It would take several more years for the Court to undertake serious sub-

393, 450 (1856). The line of reasoning announced in *Dred Scott* was not developed beyond *Dred Scott* itself, and did not serve as a significant basis for the set of substantive restraints that were eventually applied to the States through the Due Process Clause of the Fourteenth Amendment.

²⁸ 83 U.S. (16 Wall.) 36, 80–81 (1872).

²⁹ *Id.* at 67–74, 81.

³⁰ *Id.* at 77–80.

³¹ *Munn v. Illinois*, 94 U.S. 113, 123–24 (1876).

³² *Id.* at 124 (citing *Thorpe v. Rutland & Burlington R.R. Co.*, 27 Vt. 140, 143 (1855)).

³³ *Id.* at 124, 130–32.

stantive review based on equality considerations,³⁴ and, even then, the Equal Protection Clause's role would be unclear.

2. *The Development of Means-Ends Review*

The first signs of the means-ends test that we have come to associate with rationality review appeared in *Patterson v. Kentucky*, a case in which a federal patent holder asserted that his patent right in lighting oil prevented Kentucky from enforcing a prohibition against any lighting oil that would burn below 130 degrees,³⁵ a claim reminiscent of the successful defense in *Gibbons v. Ogden*.³⁶ In examining whether the State's regulatory authority was limited by the federal patent right, the Court highlighted the "appropriate and direct connection with that protection to life, health, and property, which each State owes to her citizens[.]"³⁷ holding that federal patent rights did not effectively preempt state laws of general application. Like the principle that it implemented, the means-ends test developed somewhat awkwardly, with the Court more comfortable with the conclusion than the process. In *Barbier v. Connolly*, the court effectively conducted means-ends analysis without describing a test.³⁸ The Court eventually cited *Barbier* when finally it formulated the test in *Mugler v. Kansas*, identifying both the ends and the necessary relationship of the means to those ends: "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects," the Court would strike it as a violation of due process.³⁹

Even before means-ends analysis became a staple of general Supreme Court review of state laws, it began its association with the concept of "reasonableness." Justice Harlan associated the two in *Mugler* itself,⁴⁰ and "reasonable" eventually became an expression of alternatively the

³⁴ See *id.* at 134–35 (dismissing equal protection claim).

³⁵ *Patterson v. Kentucky*, 97 U.S. 501, 502–03 (1878).

³⁶ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 1 (1824).

³⁷ *Patterson*, 97 U.S. at 506.

³⁸ *Barbier v. Connolly*, 113 U.S. 27, 30 (1885) ("It may be a necessary measure of precaution in a city composed largely of wooden buildings like San Francisco, that occupations, in which fires are constantly required, should cease after certain hours at night until the following morning . . . [.]").

³⁹ *Mugler v. Kansas*, 123 U.S. 623, 661 (1887); see also *id.* at 662 ("not fairly adapted"); *id.* ("having no relation to the general end sought to be accomplished").

⁴⁰ See *id.* at 663 ("No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.").

degree of the necessary relationship⁴¹ and the outcome of the combined means-ends analysis.⁴²

3. *The Law of the Land and Police Power Jurisprudence*

The concepts that gained the most traction during the period, though, were not semi-empirical inquiries like reasonableness but, rather, two historically derived and closely related understandings of state power: the “law of the land” and the scope of the “police power.”

Just a year after *Munn*, in *Davidson v. New Orleans*, the Court identified the law of the land as the primary source of the restrictions embodied in the Due Process Clause:

The equivalent of the phrase “due process of law,” according to Lord Coke, is found in the words “law of the land,” in the Great Charter, in connection with the writ of *habeas corpus*, the trial by jury, and other guarantees of the rights of the subject against the oppression of the crown.⁴³

Those “other guarantees” included, according to the Court, “that neither their lives nor their property should be disposed of by the crown, except

⁴¹ See, e.g., *Holden v. Hardy*, 169 U.S. 366, 398 (1898) (“reasonable grounds for believing that such determination is supported by the facts”).

⁴² See, e.g., *Adair v. United States*, 208 U.S. 161, 172 (1908) (“reasonable regulations, as the safety of the general public may demand” (internal quotation marks and citation omitted)); *Holden*, 169 U.S. at 398 (“The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion . . .”).

⁴³ *Davidson v. New Orleans*, 96 U.S. 97, 101 (1877). See also *Dent v. West Virginia*, 129 U.S. 114, 123–24 (1889) (“As we have said on more than one occasion, it may be difficult, if not impossible, to give to the terms ‘due process of law’ a definition which will embrace every permissible exertion of power affecting private rights and exclude such as are forbidden. They come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law. They were deemed to be equivalent to ‘the law of the land.’ In this country, the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property.”); Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of American Union* 353 (Boston, Little, Born, and Co. 1868) (“[T]he language employed is always nearly identical, except that the phrase ‘due process [or course] of law’ is sometimes employed, and sometimes ‘the law of the land,’ and sometimes both; but the meaning is the same in every case.”); Lucius Polk McGehee, *Due Process of Law Under the Federal Constitution* 1 (1906) (“The phrase [“due process of law”] is and has long been exactly equivalent to and convertible with the older expression ‘the law of the land.’”).

as provided by the law of the land, they meant by ‘law of the land’ the ancient and customary laws of the English people, or laws enacted by the Parliament.”⁴⁴

The law of the land is itself a somewhat problematic concept as applied to substantive judicial review. There is the initial matter that the law of the land protected the subject “against the oppression of the crown.” Protection from legislative oppression—in context, from Parliament—was a matter of politics, not judicial review, suggesting little if any role for courts to review legislative enactments.⁴⁵ Moreover, the content of the law of the land is both contested and could potentially touch upon any number of state actions, including many having little to do with reviewable regulation.⁴⁶ It is perhaps unsurprising, then, that the Court quickly shifted in *Davidson* from “ancient and customary laws” to modern, positive law, citing the occasion of the adoption of the Fourteenth Amendment as justification for applying the law of the land to review regulation by representative legislatures.⁴⁷

When the law of the land is considered together with the police power, though, judicial review doesn’t seem like such a leap. The Court had been reviewing the scope of state police power since *Gibbons*,⁴⁸ frequently in juxtaposition to a federal enumerated power⁴⁹—the same context in which Justice Harlan had formulated means-ends analysis in *Patterson*.⁵⁰ While it was conceivable that a federal patent right could preempt generally applicable state law, such a broad construction of the federal right did not fit with the Court’s understanding of the relationship between the state’s power and the individual’s federal rights. Just as the patentee’s right in *Patterson* was held subject to the valid exercise of the police power, federal due process and equal protection rights were similarly subject to—and in part demarcated from—valid exercises of

⁴⁴ *Davidson*, 96 U.S. at 102.

⁴⁵ See McGehee, supra note 43, at 24–26; Chapman & McConnell, supra note 8, at 1681.

⁴⁶ See Chapman & McConnell, supra note 8, at 1692–97 (discussing the role of the law of the land in debates over Parliament’s power to refuse to seat elected members).

⁴⁷ *Davidson*, 96 U.S. at 102.

⁴⁸ See *Gibbons*, 22 U.S. at 1; see also Rodney L. Mott, *Due Process of Law: A Historical and Analytical Treatise of the Principles and Methods Followed by the Courts in the Application of the Concept of the “Law of the Land”* 301 & n.3 (1926) (discussing the Court’s police power analysis in *Gibbons*).

⁴⁹ See, e.g., *Passenger Cases*, 48 U.S. (7 How.) 283, 308 (1849) (police power juxtaposed to regulation of foreign commerce); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 625 (1842) (police power juxtaposed to fugitive slave laws).

⁵⁰ *Patterson*, 97 U.S. at 505.

the States' police powers, and that is how the Court viewed such claims from before the *Lochner* era and throughout it.⁵¹ A claim that an enactment violated due process or equal protection (or "law of the land" claims as they might have been called) was identical to a claim that the state had asserted authority it did not have, much like a claim against a state law that attempted to regulate interstate or foreign commerce.⁵²

Connecting equal protection and due process review to the law of the land and inherent limits on the police power connected the Fourteenth Amendment with centuries of law developed prior to the Amendment's (or indeed the Constitution's) ratification. In so doing, it suggested (in line with the Court's concern over arbitrary legislation in *Wilkinson*) that the Fourteenth Amendment is not necessary as a source of whatever substantive limitations on state power are imposed by federal courts pursuant to rationality review.⁵³

Police-power-based review also placed much more emphasis on the nature of the state's interest in regulation than on the nature or the gravity of the right in question. Although the *Lochner* majority did not paint economic rights as "fundamental," previous cases had. The Court had not yet developed its tiered approach to substantive due process or equal

⁵¹ See *Barbier*, 113 U.S. at 31:

But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.

See also *Coppage v. Kansas*, 236 U.S. 1, 16 (1915) ("But no attempt is made, or could reasonably be made, to sustain the purpose to strengthen these voluntary organizations, any more than other voluntary associations of persons, as a legitimate object for the exercise of the police power."); *Lochner*, 198 U.S. at 56 (asking whether the statute is a "fair, reasonable and appropriate exercise of the police power of the State"); *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 29 (1889) ("But the clause does not limit, nor was it designed to limit, the subjects upon which the police power of the State may be exerted.").

⁵² Treatises of the time recognized that such claims could be framed interchangeably as limits inherent in the police power itself or as limits imposed by the Fourteenth Amendment. See Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* 56–60 (1904); McGehee, *supra* note 43, at 305; Mott, *supra* note 48, at 314; Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States: Considered from Both a Civil and a Criminal Standpoint* 4 (St. Louis, The F.H. Thomas Law Book Co. 1886); see also David N. Mayer, *The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the Lochner Era*, 36 *Hastings Const. L.Q.* 217, 261–62 (2009) ("[T]he [operative] distinction referred to the traditional scope of the police power as a protection of public health, safety, order, and morality: 'reasonable' laws fit within one or more of these traditional categories, while 'arbitrary' laws did not.").

⁵³ McGehee, *supra* note 43, at 305.

protection, and so the analogy to present-day uses of “fundamental” is imperfect at best, but the “fundamental” nature of those rights was no answer to a valid exercise of the police power.⁵⁴ A complete deprivation of a vested property right (even in summary fashion⁵⁵) or the absolute denial of the right to practice a trade⁵⁶ was permissible so long as the object fell within the reach of the police power. While necessarily determining the scope of individual rights, the cases before and during the *Lochner* era approached the problem from the perspective of divining the nature of the state’s interest in regulation, not the nature of the individual’s rights to liberty and property. John Locke made a single appearance in the U.S. Reports in the forty years from *Allgeyer v. Louisiana*⁵⁷ to *West Coast Hotel v. Parrish*,⁵⁸ in a case unrelated to due process, equal protection, or property rights.⁵⁹ The Court’s conception of economic rights as being held “subject to” the police power⁶⁰ essentially merged inquiries into due process and the scope of the police power into a single inquiry. In equal protection cases as well, the Court sought to connect the nature of the discrimination to the state’s purported interest in regulating, which again merged the inquiry with the content of the police power because discrimination along substantively valid lines was not a violation of equal protection.⁶¹ As a result, the primary inquiry be-

⁵⁴ *Powell v. Pennsylvania*, 127 U.S. 678, 685 (1888) (“[The State’s] discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property . . .”). In the modern sense, one could view the “rights” to contract and property as subject to the police power and the “fundamental right” to be free from unreasonable or arbitrary regulation.

⁵⁵ *Lawton v. Steele*, 152 U.S. 133, 140–41 (1894) (holding it permissible for legislature to regulate destruction of fishing nets using summary abatement).

⁵⁶ *Dent v. West Virginia*, 129 U.S. 114, 122 (1889).

⁵⁷ 165 U.S. 578 (1897).

⁵⁸ 300 U.S. 379 (1937).

⁵⁹ See *Myers v. United States*, 272 U.S. 52, 234 (1926) (McReynolds, J., dissenting) (“And [Blackstone] defines ‘prerogative’ as ‘consisting (as Mr. Locke has well defined it) in the discretionary power of acting for the public good, where the positive laws are silent.’” (citation omitted)).

⁶⁰ See, e.g., *Adair v. United States*, 208 U.S. 161, 174 (1908) (“[T]he rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require . . .”). The Court was not alone in this conception; it was nearly universal among commentators as well. See, e.g., Cooley, *supra* note 43, at 358 (“All vested rights are held subject to the laws for the enforcement of public duties and private contracts, and for the punishment of wrongs; and if they become divested through the operation of these laws, it is only by way of enforcing the obligations of justice and good order.”).

⁶¹ *Lochner v. New York*, 198 U.S. 45, 57, 59 (1905) (“The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker.” “To

came one into the nature of the police power, with the logical (but not constitutional) assumption being that in any domain not reached by the police power, the state simply had no authority to act.

B. The Police Power Applied

The mirrored relationship of the police power and substantive due process and equal protection rights made a solid definition of the police power a necessity for general substantive judicial review. The problem of precisely defining the police power proved perplexing and the results less than satisfying. Neither the Court nor commentators ever fully agreed on either the scope of or the underlying justification for the police power, although the incomplete definition the Court did eventually settle on was serviceable for most purposes.

1. Commentary and the Nuisance Justification

Commentators of the time tended to start their analysis⁶² of the police power with Blackstone:

The last species of offences which especially affect the commonwealth are those against the public police and economy. By the public police and economy I mean the due regulation and domestic order of the kingdom: Whereby the individuals of the state, like members of a well governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.⁶³

the common understanding the trade of a baker has never been regarded as an unhealthy one.”); *Mo. Pac. Ry. Co. v. Mackey*, 127 U.S. 205, 210 (1888) (“The business of other corporations is not subject to similar dangers to their employes, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities.”).

⁶² See Cooley, *supra* note 43, at 572; Freund, *supra* note 52, at 2; Tiedeman, *supra* note 52, at 2; Markus Dirk Dubber, “The Power to Govern Men and Things”: Patriarchal Origins of the Police Power in American Law, 52 *Buff. L. Rev.* 1277, 1299 (2004) (“As a matter of course, every major treatise on the police power quoted, in its introduction, Blackstone’s definition of police from his discussion of police offenses in volume four of the *Commentaries*.”).

⁶³ 4 William Blackstone, *Commentaries* *162 (emphasis omitted). For his own part, Blackstone included several felonies within the police power. *Id.* at *162–66.

Ernst Freund apparently believed that Blackstone's influence was felt among lawmakers as well, shaping police laws in several States.⁶⁴

Thomas Cooley translated Blackstone's view of the police power as authorizing the state:

to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others.⁶⁵

Most commentators adopted the “public order” conception, keying particularly on the possibility that one person's conduct could interfere with others' enjoyment of their rights – what we today would call externalities – frequently brandishing the maxim *sic utere tuo ut alienum non laedas*.⁶⁶

By focusing on the possibility of a “conflict of rights,” as Cooley called it,⁶⁷ commentators adopted a nuisance understanding of the police power.⁶⁸ A nuisance understanding of the police power faced considerable difficulties explaining many state laws that regulated conduct with little effect on others, and commentators were consequently driven to devote disproportionate attention to liquor and gambling laws, among others. Christopher Tiedeman felt the need to justify regulation of vices by connecting them to a public harm—a process he likened to causation in tort.⁶⁹ Thus, Tiedeman could explain laws against drunkenness by the effect of drunkards on “the sensibility of the public,”⁷⁰ a move that allowed him to explain not only laws against public drunkenness but also those outlawing overly revealing clothing and cross-dressing, the latter on grounds both that it “tends to public immorality” and increases the likelihood of fraud.⁷¹ He did not tackle the problems posed by laws regulating gambling or sex.

⁶⁴ Freund, *supra* note 52, at 2.

⁶⁵ Cooley, *supra* note 43, at 572.

⁶⁶ “[S]o use his own as not to injure others.” Cooley, *supra* note 43, at 573; see Freund, *supra* note 52, at 5–6; Tiedeman, *supra* note 52, at 2.

⁶⁷ Cooley, *supra* note 43, at 572.

⁶⁸ Noga Morag-Levine, *Common Law, Civil Law, and the Administrative State: From Coke to Lochner*, 24 *Const. Comment.* 601, 650–52 (2007).

⁶⁹ Tiedeman, *supra* note 52, at 151.

⁷⁰ *Id.*

⁷¹ *Id.* at 156.

Despite the considerable intellectual energy devoted to it, the nuisance understanding of the police power provided little information about its boundaries, externalities being both socially contingent and without logical limit.

2. *The Court's Intuitive Conception of the Police Power*

The Court's treatment of the police power would never approach anything that would satisfy a treatise writer or academic looking for a readily discernible, systematic approach,⁷² but the Court's understanding of the police power was nevertheless both serviceable and durable. When the Court first used the term in 1827 (in the context of upholding state inspection laws despite an effect on foreign commerce), it did so without citation, noting only that "[t]he power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States."⁷³ When the Court began general substantive review of state laws (that is, review for reasons not specific to the federal structure), it, like *Cooley*, turned initially to state court decisions to fill in its understanding of the police power. Even before the Court settled on the Due Process and Equal Protection Clauses as the source of its authority to generally review state laws, in *Slaughter-House* it looked to pre-amendment history and state-court understandings of the police power, citing *Kent's Commentaries* and two leading state law cases: *Commonwealth v. Alger* and *Thorpe v. Rutland & Burlington Railroad*.⁷⁴ In *Munn*, Chief Justice Waite's majority opinion keyed on *Thorpe*, the *sic utere* maxim,⁷⁵ and Chief Justice Taney's opinion in the *License Cases* describing the police power as "nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things,"⁷⁶ before landing on its

⁷² Cf. Joshua D. Hawley, *The Intellectual Origins of (Modern) Substantive Due Process*, 93 *Tex. L. Rev.* 275, 283–91 (2014) (attempting to describe the Court's police jurisprudence in systematic theoretical terms).

⁷³ *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827).

⁷⁴ *Slaughter-House Cases*, 83 U.S. at 62 (citing and quoting 2 *Kent Commentaries* 340 (New York 1848) and *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851)); *id.* at n.15 (citing and quoting *Thorpe v. Rutland & Burlington R.R. Co.*, 27 Vt. 140, 149 (1855)).

⁷⁵ See *Munn*, 94 U.S. at 124. The *sic utere* maxim also appears in *Thorpe*, 27 Vt. at 149. Justice Field's dissent cited both cases. See *Munn*, 94 U.S. at 147 (Field, J., dissenting) (citing *Alger* and *Thorpe*).

⁷⁶ *Munn*, 94 U.S. at 125 (quoting *License Cases*, 46 U.S. (5 How.) 504, 583 (1847)) (ellipses in *Munn*).

own description: “Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good[,]” but the Court did not (beyond the question of whether grain elevators were “affected with a public interest”) explain what composes “the public good.”⁷⁷ Over the five decades running from *Munn* to *Nebbia v. New York*,⁷⁸ the Court would address the question of the police power dozens of times, but it would never get closer to a complete definition. When it had to define the police power in *Nebbia*, the Court, as in *Munn* fifty years earlier, quoted Chief Justice Taney’s (now-ninety-year-old) language in the *License Cases*.⁷⁹ The Court became (indeed started out⁸⁰) sanguine about the impossibility of such a definition while remaining confident in the suitability of its conception of the police power for the Court’s particular purpose.⁸¹

The Court did not even attempt to develop either a test for applying police-power-based limits nor a justification for the police power that would help explain its scope. Most notably, the Court eschewed the convoluted analysis that marked then-prevalent nuisance-based views of the power,⁸² relying on an intuitive understanding of the power rather than a formulated one. It would follow a similar path when it reviewed “morals” legislation, accepting the protection of public morals as within

⁷⁷ Id. at 124–25.

⁷⁸ 291 U.S. 502 (1934).

⁷⁹ Id. at 524.

⁸⁰ See *Slaughter-House Cases*, 83 U.S. at 62 (“This is called the police power; and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.” (footnote omitted) (citing *Alger*, 61 Mass. at 84)).

⁸¹ In 1897, the Court quoted a case from twenty years earlier highlighting both the difficulty in precisely defining, and the broad common understanding of, the police power, suggesting both little progress and few resulting problems in the ensuing decades:

Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals.

St. Louis & S.F. Ry. Co. v. Matthews, 165 U.S. 1, 23 (1897) (quoting *Boston Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877)).

⁸² In *Mugler v. Kansas*, for instance, counsel for the brewery argued explicitly for a nuisance-based limitation on the police power—“The state cannot deprive the citizen of the lawful use of his property if it does not injuriously effect [sic] others,” 8 S. Ct. at 292—a claim the Court neither accepted nor denied, taking the argument as being about the lack of compensation for the brewery’s diminution in value, which the Court held was limited to exercise of the power of eminent domain. Id. at 300–02.

the police power without further justification.⁸³ While nuisance was a valid way of understanding the police power (and was applied frequently in cases readily lending themselves to an analogy to nuisance), it was not the only way. Like nuisance, though, morality was a potentially limitless justification for the police power—the Court in *Nebbia* cited “destructive and demoralizing competitive conditions and unfair trade practices,”⁸⁴ and the statute at issue in *West Coast Hotel* tied minimum wages to the preservation of workers’ “health or morals.”⁸⁵ Unlike the power to effect economic reallocations—the bread and butter of the *Lochner* era cases—use of the police power to affect morals was never tested to its limits in the Court.

In the end, the Court accepted an expanded understanding of the police power justified by changed social circumstances in *Nebbia* and *West Coast Hotel*, expanding on an approach it had taken forty years earlier in *Holden v. Hardy*, in which it had accepted an expanded police power justified by changed industrial technology.⁸⁶ The Court giving up its earlier understanding of the inherent substantive limitations of the police power presented an important question: What, if anything, would the Court replace it with? To the extent there was an immediate answer to that question, it came the year after *West Coast Hotel* in the form of Justice Stone’s political process approach in *Carolene Products*,⁸⁷ which suggested essentially no room for substantive review by the courts, at least in cases not calling for “more exacting judicial scrutiny.”⁸⁸ But that answer proved to be a temporary one, and the Court would find itself engaged in rigorous review of legislative purpose within twenty-five years of deciding *Carolene Products*.

The political process approach could have potentially cabined due process review the way Justice Stone envisioned (perhaps allowing the Court to instead focus on constitutional constraints on the process of lawmaking), but for the Equal Protection Clause. As the Court’s repeated conflation of the two forms of review demonstrates, the distinction between substantive due process and equality review is frequently illu-

⁸³ See *Champion v. Ames*, 188 U.S. 321, 356 (1903).

⁸⁴ *Nebbia*, 291 U.S. at 530.

⁸⁵ *W. Coast Hotel*, 300 U.S. at 386–87.

⁸⁶ *Holden v. Hardy*, 169 U.S. 366, 393 (1898).

⁸⁷ *Carolene Products*, 304 U.S. at 152 n.4 (plurality opinion).

⁸⁸ *Id.* See generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 77 (1981) (describing Justice Stone’s political-process-based approach to constitutional review).

sory, since equality review requires the Court to distinguish between those *substantive* bases on which the state may discriminate and those on which it may not. The political process approach to review might work as a test for identifying candidates for heightened scrutiny and for forms of discrimination themselves founded in problems of political process (such as representation reinforcement as a basis for dormant Commerce Clause jurisprudence), but it could never suffice for answering the most fundamental questions regarding the bases the state may use to distinguish among its citizens. In the post-*Lochner* era, the Court attempted to answer that question as a matter of first principles, without much attention to its (or anyone's) intuitive understanding of state power.

II. MODERN RATIONAL BASIS REVIEW

Although the modern rational basis test is firmly rooted in the Court's police-power jurisprudence, the end of the *Lochner* era and the shift in approach exemplified by *Carolene Products* resulted in a deep discontinuity between those earlier cases and the modern test. Tracing the development of the test after *Carolene Products* can tell us much about the nature of the test.

A. *The Halting Development of the Rational Basis Test*

The degree to which *Carolene Products* destabilized general due process and equal protection review is demonstrated by how long it took for the Court to develop a replacement methodology. In the 1940s and 1950s, the Court seemed to enter into a sort of *Lochnerian* hangover period—displaying in a number of cases more aversion to *Lochnerism* than any affirmative theory of judicial review. A typical case is *Olsen v. Nebraska*, concerning a statute setting maximum fees for employment agencies.⁸⁹ The Supreme Court of Nebraska had relied on a *Lochner* era case, *Ribnik v. McBride*,⁹⁰ in holding the statute a due process violation. Perhaps driven by the context (the state supreme court's reliance on *Ribnik*), Justice Douglas wrote a particularly negative opinion, pointing out that “[t]he drift away from *Ribnik v. McBride* . . . has been so great that it can no longer be deemed a controlling authority,”⁹¹ without offer-

⁸⁹ 313 U.S. 236, 245–46 (1941).

⁹⁰ 277 U.S. 350 (1928).

⁹¹ *Olsen*, 313 U.S. at 244.

ing an alternative approach—he suggested the state need make no showing at all.⁹² The lack of a test, or citations to *Lochner* era cases,⁹³ became a staple of due process and (more frequently) equal protection review for some time.⁹⁴

The means-ends structure of rationality review had pre-dated *Caroline Products* in police-power form,⁹⁵ and it was perhaps only a matter of time before the Court returned to that conceptual structure. It started with the means portion of the modern test—rational relationship—long before it formulated the ends portion—legitimate governmental ends. Several early modern cases reference the necessary rationality of the means without questioning the legitimacy of the ends. As early as 1947, in *Kotch v. Board of River Port Pilot Commissioners*,⁹⁶ the Court keyed on the possibility that a particular regulatory means might be “wholly irrelevant to achievement of the regulation’s objectives” or discrimination might have “no rational relation to the regulated activities,”⁹⁷ although the Court simultaneously disclaimed the existence of a test for equal protection review.⁹⁸ Similarly, in *Railway Express Agency v. New York*, the Court applied only half of the modern test, understandably taking the legitimacy of the end of traffic regulation as a given.⁹⁹ The Court remained focused on the rationality of means for some time. The case frequently cited for the birth of the modern rational basis test, *Williamson v. Lee Optical*, only contains the rational means half of the analysis, albeit not really in “test” form, quoting without comment the police-

⁹² Id. at 246 (“There is no necessity for the state to demonstrate before us that evils persist despite the competition which attends the bargaining in this field.”).

⁹³ See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

⁹⁴ Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection, 86 Harv. L. Rev. 1, 42 (1972) (“The modern revulsion to the *Allgeyer-Lochner-Adair-Coppage* constitutional doctrine is so broad and indiscriminate that it might inhibit due process inquiries even directed solely at legislative means.” (footnote and internal quotation marks omitted)).

⁹⁵ E.g., *Gorieb v. Fox*, 274 U.S. 603, 609 (1927) (“no rational relation to the public safety, health, morals, or general welfare, and cannot be sustained as a legitimate exercise of the police power”).

⁹⁶ 330 U.S. 552 (1947).

⁹⁷ Id. at 556.

⁹⁸ Id. (“The constitutional command for a state to afford ‘equal protection of the laws’ sets a goal not attainable by the invention and application of a precise formula.”).

⁹⁹ 336 U.S. 106, 109 (1949) (asking whether the restriction “had no relation to the traffic problem of New York City”).

power-derived test the district court (which it reversed) used.¹⁰⁰ Like in *Kotch*, the Court was focused on the nature of the relationship, not the nature of the ends.¹⁰¹ The closest the Court came to a full-fledged formulation characterized the end as the abatement of an “evil,” an end that is practically tautologically legitimate.¹⁰² Rather, the Court in *Lee Optical* relied not on the rational basis test but on a Holmes-authored *Lochner*-era decision (*Roschen v. Ward*) in which the Court had summarily rejected two challenges to eyeglass regulation without describing any particular connection to any particular governmental power,¹⁰³ along with the then-fashionable negative citation to *Lochnerism*.¹⁰⁴

The Court did not match rational means to legitimate ends until 1961 in *Braunfeld v. Brown*, using the formulation to distinguish the First Amendment scrutiny it was conducting in *Braunfeld* from the broader rationality test.¹⁰⁵ Justice Harlan was the first to apply the test (citing *Lee Optical*), the following year in his dissent in *Baker v. Carr*, a voting rights case,¹⁰⁶ and the first to mention it in the context of economic regulation, in his concurrence in 1963’s *Ferguson v. Skrupa* (on the restriction of the debt adjustment trade to lawyers).¹⁰⁷ The formulation appeared in a majority opinion conducting general equal protection or due process review the same year, in *Florida Lime & Avocado Growers v.*

¹⁰⁰ 348 U.S. 483, 486 (1955) (“reasonably and rationally related to the health and welfare of the people”); *id.* at 489 (“rationally related to the public health and welfare”); *id.* at 490 n.4 (“rationally related to the public health”) (all quoting *Lee Optical of Okla., Inc. v. Williamson*, 120 F. Supp. 128, 136, 140, 142 (W.D. Okla. 1954)).

¹⁰¹ See *id.* at 491 (The prohibition of optometrists resident in retail stores is “a legislative program which aims to raise the treatment of the human eye to a strictly professional level. We cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds.”).

¹⁰² *Id.* at 488 (“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.”).

¹⁰³ *Id.* at 486–87 (citing *Roschen v. Ward*, 279 U.S. 337 (1929)).

¹⁰⁴ *Id.* at 488 (“The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”).

¹⁰⁵ 366 U.S. 599, 611 (1961) (“The Court in such cases is not confined to the narrow inquiry whether the challenged law is rationally related to some legitimate legislative end.”).

¹⁰⁶ *Baker v. Carr*, 369 U.S. 186, 334 (1962) (Harlan, J., dissenting) (“All that is prohibited is ‘invidious discrimination’ bearing no rational relation to any permissible policy of the State.” (quoting *Lee Optical*, 348 U.S. at 489)).

¹⁰⁷ *Ferguson v. Skrupa*, 372 U.S. 726, 733 (1963) (Harlan, J., concurring in the judgment) (“Mr. Justice Harlan concurs in the judgment on the ground that this state measure bears a rational relation to a constitutionally permissible objective.”).

Paul.¹⁰⁸ The test was firmly established by the time the Court decided *U.S. Department of Agriculture v. Moreno*, in which the Court announced what has become the classic formulation of the test: “Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest.”¹⁰⁹ Even after *Moreno*, which struck a federal statute due to the illegitimacy of its ends,¹¹⁰ the Court occasionally ignored the ends portion of the test, focusing instead on the rationality of the means.¹¹¹ Today, the test stands where it did in 1961: “a rational relationship between the disparity of treatment and some legitimate governmental purpose.”¹¹²

B. The Rational Basis Test

Refined in form from its early development, the modern rational basis test has several key features, most obviously those of a rational relationship and a legitimate governmental end. Having taken on a life of its own, the test insists upon a particular understanding of rationality—one divorced from actual legislative reasoning. Despite decades of development, the test provides no greater determinacy today than it did in 1961.

1. Rationally Related

The first part of the test—rational relationship—is largely uncontroversial except at its margins. Rationality is a widely attractive concept, leaving little reason to question its use anywhere in government, including in judicial review. Rationality requires some kind of causal connection between a regulation and some outcome,¹¹³ but that is about as far

¹⁰⁸ 373 U.S. 132, 152 (1963) (“devoid of rational relationship to a legitimate regulatory interest”) (equal protection case).

¹⁰⁹ 413 U.S. 528, 533 (1973).

¹¹⁰ *Id.* at 534–35 (“[A] purpose to discriminate against hippies cannot . . . justify the 1971 amendment.” (citation and internal quotation marks omitted)).

¹¹¹ See *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 592 (1979) (holding that “the special classification created by [the Transit Authority’s] rule serves the general objectives of safety and efficiency” without evaluating whether safety and efficiency are legitimate governmental interests).

¹¹² *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (citation and internal quotation marks omitted) (citing both equal protection and due process cases for the test).

¹¹³ See Deborah Hellman, *When is Discrimination Wrong?* 115 (2008) (describing rationality for equal protection review as requiring mere positive correlation); *id.* at 116 (“All that is required is that it is accurate in more instances than it is inaccurate.”). But see Scott H.

as the doctrine goes. Rationality permits a considerable amount of both over- and under-inclusiveness, and to the extent there is controversy in the cases, it is to the degree of over- and under-inclusiveness the Court will permit. Thus, in *New York City Transit Authority v. Beazer*, the Court split (between majority, concurrence, and dissent) over the degree to which the provision (the exclusion of certain methadone users from employment at the Transit Authority) had to serve the stated regulatory end of employability.¹¹⁴ The Court has never provided a test for determining the degree of “fit” required.

2. *Actual or Conceivable Rationality*

The distance between what qualifies as a rational relationship under the rational basis test and the actual furtherance of any particular end can be considerable. Most significantly, it is not necessary that the legislature itself hold the particular rational relationship so long as it *could have concluded* that relationship existed at the time. *Lee Optical*, frequently cited as the origin of the rational basis test, is far more explicit on this point than it is on the nature of the rational basis test itself:

[T]he legislature *might have concluded* that one was needed often enough to require one in every case. Or the legislature *may have concluded* that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert.¹¹⁵

Bice, *Rationality Analysis in Constitutional Law*, 65 Minn. L. Rev. 1, 7 n.10 (1980) (distinguishing between a probabilistic likelihood of a relationship and a “common sense” one). Hellman may be overstating the requirements of rationality. It is entirely possible for either a rule or a distinction to be rational even if it is grossly inaccurate. Thus, security screening of *all* airline passengers may be rational even if only 1 in 1,000,000 possesses both a dangerous article and either the intent or carelessness to use it on an aircraft. Here there may be an important difference between due process and equal protection concerns. Rationality for the purposes of due process would seem to require only some kind of correlation between the regulation and the avoidance of some harm while equal protection would make a comparative demand, requiring that a distinction be drawn between those who are more likely to possess a relevant trait or present a particular risk of harm and those that do not. On the rationality of comparative generalizations, see Frederick Schauer, *Profiles, Probabilities, and Stereotypes* 11 (2003).

¹¹⁴ 440 U.S. at 589 (majority opinion); *id.* at 596–97 (Powell, J., concurring); *id.* at 608–09 (White, J., dissenting).

¹¹⁵ *Lee Optical*, 348 U.S. at 487 (emphasis added).

....

If the advertisement of lenses is to be abolished or controlled, the advertising of frames must come under the same restraints; *or so the legislature might think*.¹¹⁶

Modern rational basis cases are rife with examples of a hypothetically inclined “conceivable basis”¹¹⁷ review standard, and although far from uncontroversial, the Court has never required evidence that a proffered rational inference be one held by the legislature enacting the provision in question.¹¹⁸

But the Court’s willingness to accept reasons the legislature did not itself consider severely undermines the Court’s ability to inquire into the rationality of the legislature’s passage of a piece of legislation. Rationality is a characteristic of a decision, not the act resulting from the decision,¹¹⁹ so if one wishes to evaluate the rationality of an act (or a statute), it is necessary to evaluate the rationality of the decision underlying that act. If “it is up to legislatures, not courts, to decide on the wisdom and utility of legislation,”¹²⁰ limiting rationality review to the legislature’s own reasons is the only way to do so. Accepting a reason the legislature did not rely on may further the quest for “reasonable” outcomes in the sense that one applying reasons might agree with the outcome but it does nothing to assure the decision was itself “reasoned,” much in the way that we might say a product is “reasonably” priced as a comparison between the price of a product and its value without knowing anything about the process by which the price was determined. Accepting a rational basis without evidence the legislature actually relied on that ra-

¹¹⁶ *Id.* at 490 (emphasis added).

¹¹⁷ See *FCC v. Beach Commc’ns*, 508 U.S. 307, 309 (1993) (“any conceivable rational basis”); see also *Golan v. Holder*, 132 S. Ct. 873, 889 (2012) (“Congress rationally could have concluded that adherence to Berne ‘promotes the diffusion of knowledge.’” (citation omitted)).

¹¹⁸ *U.S.R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (“It is, of course, ‘constitutionally irrelevant whether this reasoning in fact underlay the legislative decision . . .’” (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1960))). Cf. *Wadhvani*, *supra* note 10, at 806 (“Justices have disagreed as to whether the government’s proffered justification for the law must be the actual purpose behind the official conduct or whether it may be any conceivable purpose that meets the standards for legitimacy under the test.”) (citing a series of concurrences and dissents but no majority opinions).

¹¹⁹ Joseph Raz, *Practical Reason and Norms* 66 (2d ed. 1990).

¹²⁰ *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963).

tional basis could simply be part of a general policy of deference to the legislature, but if so, it is an irrational one.¹²¹

The Court's approach of accepting reasons the legislature did not consider presents deep institutional problems by effectively shifting the responsibility for rational thinking from the legislature to the Court. In *Minnesota v. Clover Leaf Creamery Co.*, for instance, the Court alternated between insisting that relevant information be presented to both it and the legislature, disclaiming a role in reviewing the wisdom of legislative determinations while simultaneously asserting one:

Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, they cannot prevail so long as “it is evident from all the considerations presented to [the legislature], *and those of which we may take judicial notice*, that the question is at least debatable.”¹²²

If the Court is not bound to reasons considered by the legislature, then the passage of time between enactment and review also shifts responsibility away from the legislature and toward the Court. The Court acknowledged the possibility that time might affect the rationality of a provision in *Carolene Products* itself,¹²³ and the Court made clear in *Shelby County v. Holder* that a statute could be rational at the time enacted but become irrational with changed circumstances.¹²⁴ Like the Court's willingness to consider arguments the legislature did not, its willingness to reconsider the rationality of laws over time suggests that the Court is more concerned with the current reasonableness of regulation than the form of rationality employed at its enactment,¹²⁵ and places the Court in the position of superimposing its own rationality on legislative action.

¹²¹ Linde, *supra* note 6, at 210–16.

¹²² 449 U.S. 456, 464 (1981) (brackets in original) (emphasis added) (footnote omitted) (quoting *Carolene Products*, 304 U.S. at 153–54).

¹²³ 304 U.S. at 153 (“[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.”).

¹²⁴ 133 S. Ct. 2612, 2623–31 (2013).

¹²⁵ See Linde, *supra* note 6, at 216–17; see also Bice, *supra* note 113, at 26 (distinguishing between formal irrationality, which is evaluated at the time of the decision and with the information then available to the decisionmaker and empirical irrationality, which includes considerations of circumstances outside the decisionmaker's knowledge, including changed circumstances).

The role that rationality analysis of means truly plays, though, only becomes apparent when one considers the other half of rational basis analysis: legitimate governmental ends.

3. *Legitimate Governmental Interests*

If the doctrine on what constitutes a rational basis is murky, the doctrine on what constitutes a legitimate end is almost nonexistent. Before and during the *Lochner* era, the Court relied on an extra-constitutional conception of the police power as the source of the ends that would justify regulation. Because the police power supplied the affirmative grant of power to the state, the limits of the police power similarly defined the ends that would be considered legitimate for purposes of general substantive review and so the Court addressed itself to the question of ends from the perspective of the affirmative reach of the police power rather than from that of the negative restrictions of due process or equal protection. The Court's conception of the ends covered by the police power was remarkably stable over time. In *Mugler v. Kansas*, the Court identified the ends of the police power as "the protection of the public morals, the public health, or the public safety;"¹²⁶ in *Carolene Products*, it cited protection of "the public health, morals or welfare."¹²⁷ Generally, both before and during the *Lochner* era, the police power was identified (with some variation) as authorizing the state to pursue the ends of protecting public health, safety, morals, and general welfare.¹²⁸

In the modern era of rational basis review, the Court has neither enumerated a list of legitimate governmental interests nor provided a rule for evaluating whether a purported end is legitimate for the purposes of rationality review.¹²⁹ Rather, the Court has generally evaluated particular

¹²⁶ 123 U.S. 623, 661 (1887).

¹²⁷ 304 U.S. at 147.

¹²⁸ See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) ("Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people."); *Lochner v. New York*, 198 U.S. 45, 53 (1905) ("Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public."); *Holden v. Hardy*, 169 U.S. 366, 397 (1898) ("promote the health, safety, or comfort of the people, or to secure good order or promote the general welfare"); *Lawton v. Steele*, 152 U.S. 133, 136 (1894) ("the public safety, health, and morals").

¹²⁹ Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. Chi. L. Rev. 281, 304 (2011) ("The Court has not defined what constitutes a legitimate

ends on a case-by-case basis. For instance, in *Lee Optical* the Court considered the benefits of the various restrictions at issue in turn, without applying a rule of validity to them (even though the district court had repeatedly done so, citing the “public health and welfare”), instead hypothesizing about the potential benefits of frequent eye examinations.¹³⁰ In *Clover Leaf Creamery*, the Court accepted the justifications of protecting the environment, reducing energy consumption, and conserving landfill space without commenting on why they were legitimate.¹³¹

The Court has done only slightly better¹³² identifying *illegitimate* ends. Neither “a bare congressional desire to harm a politically unpopular group”¹³³ nor the purpose of restricting the exercise of fundamental rights¹³⁴ are legitimate ends,¹³⁵ nor is discrimination for the purposes of reinforcing discriminatory attitudes,¹³⁶ but that is the entirety of the list of prohibited ends. Given the breadth of governmental power, it might seem that it would be easier to negatively identify obviously illegitimate ends than to affirmatively list all the legitimate ones, but even inquiry into prohibited ends is muddled by the nature of rationality review. The nature of rationality review—whose deference calls upon the Court to search for *any* legitimate end¹³⁷—makes it difficult to identify many other clearly illegitimate ends. We only know that “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest” because in the case where the Court announced that rule—*Moreno*—the Court had refused to credit the other interests

interest other than to acknowledge that it encompasses a very broad range of interests within the state’s power to regulate for the public interest or general welfare.”).

¹³⁰ See 348 U.S. at 487 (regarding fitting and duplication of lenses); *id.* at 490–91 (on advertising restrictions).

¹³¹ 449 U.S. at 465–70.

¹³² Forde-Mazrui, *supra* note 129, at 303 (“The guidance the Court has provided has more often focused on what is illegitimate.”).

¹³³ *Moreno*, 413 U.S. at 534; see also *Beazer*, 440 U.S. at 593 n.40 (describing illegitimate “‘invidious discrimination’” which is that “‘motivated by ‘a feeling of antipathy’ against, a specific group of residents” (citations omitted)).

¹³⁴ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion).

¹³⁵ Linde, *supra* note 6, at 202–03.

¹³⁶ *Loving v. Virginia*, 388 U.S. 1, 11 (1967); Forde-Mazrui, *supra* note 129, at 330; Sunstein, *supra* note 3, at 1715.

¹³⁷ Forde-Mazrui, *supra* note 129, at 318–19 (“Applying ‘rational basis review,’ the Court presumes that the great majority of classifications are valid unless no legitimate purpose is served by a classification, raising an inescapable inference of illegitimate motives.”).

offered by the government.¹³⁸ The government frequently advances several justifications, and by looking for any legitimate interest to support regulation, the Court avoids ruling on the legitimacy of most proffered (or possible) justifications.

4. *Continuing Indeterminacy*

Almost seventy years after the decision in *Carolene Products*, we are still far from a comprehensive picture of rational basis review. Bemoaning its own inability to devise a test, the Court lamented in 1980 that “[t]he most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles,”¹³⁹ a complaint reminiscent of the Court’s attitude a century earlier regarding its inability to define the precise contours of the police power in cases following *Slaughter-House*.¹⁴⁰

That is not to say that nothing can be gleaned from study of the cases. Perhaps imperfectly specified, rational basis review has been practiced by the Court for decades, and we can learn quite a bit about the test by watching the test in operation even if the Court itself cannot perfectly describe it.

C. *Implications of Modern Rational Basis Scrutiny*

While I would be the last to argue that rationality review has been applied consistently, it has displayed at least three consistent features, some of which may have become so familiar as to be taken for granted.

1. *The Role of Irrational Means*

The first has to do with the consequences of identifying an irrational means, that is a means not rationally related to a particular end. When confronted with a stated means to a stated end, and concluding that the means does not serve that end, the rational basis test would require the Court to strike the regulation for the lack of the necessary rational relationship. It’s not clear that this would be a particularly helpful thing for the Court to do, since it is unlikely that a legislature would be so oblivious as to the consequences of its actions as to adopt a means *not* rati-

¹³⁸ 413 U.S. at 535–37.

¹³⁹ U.S.R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 177 n.10 (1980).

¹⁴⁰ See *supra* text accompanying note 81–87.

ally related to its chosen end. Moreover, it's not clear that the courts need to fill the role of correcting such mistakes; if the legislature is just mistaken as to the relationship between its acts and its ends, there is no reason to think the political process won't function to correct such errors. In any event, the Court's willingness to consider the conceivable rather than the actual basis for the legislature's action negates this possibility; the Court has emphatically chosen *not* to require that legislatures think rationally so long as (the Court's) rational thought can be used to justify the legislature's actions.

The infrequency with which the Court strikes statutes with legitimate ends (both in the modern era and in the "police power" era) is some indication that the Court sees a small role for itself here. The most likely candidates for such treatment are tax regulations, since they all feature a singular and uncontroversially legitimate end—raising revenue—leaving an evaluation of the rationality of the means as the only work for the Court to do. Logically, any imposition of any tax is rationally related to raising revenue, and so the Court has been particularly deferential to legislatures in tax-related equal protection cases. But there are limits. In *Allegheny Pittsburgh Coal Co. v. Webster County Commission*, the West Virginia Constitution had required that "all property, both real and personal, shall be taxed in proportion to its value."¹⁴¹ The local tax commission had escalated the assessed value based on recent sales, but had increased the assessed value of adjacent, unsold property at only nominal rates, resulting in tax disparities as high as 3500% among comparable properties.¹⁴² The West Virginia Supreme Court, finding a lack of "intentional and systematic discrimination," had upheld the assessment system as rational,¹⁴³ but the Supreme Court disagreed. Essentially, the West Virginia Constitution had conclusively limited Webster County's end to "taxation according to present value," and thus the Court was able to identify an irrational deviation from the State's own standard.¹⁴⁴

Other than *Allegheny Pittsburgh*, I have been able to identify no rational basis cases involving economic regulation since *Carolene Prod-*

¹⁴¹ 488 U.S. 336, 338 (1989) (quoting W. Va. Const. art. X, § 1) (internal quotation marks omitted).

¹⁴² *Id.* at 338, 341.

¹⁴³ *Id.* at 342.

¹⁴⁴ *Id.* at 338 (quoting W.Va. Const. art. X § 1). Even in this limited instance, the Court was careful to note that, had the State generally taxed recently sold property differently than long-held property it would present a different case, *id.* at 344 n.4, and the Court upheld just such a scheme three years later in *Nordlinger v. Hahn*, 505 U.S. 1, 10–18 (1992).

ucts in which the Court plainly accepted a proffered end as legitimate but found the relationship between the means and end to be irrational.¹⁴⁵ Even during the whole of the *Lochner* era, there were only a handful of cases in which the Court struck down a statute because of the lack of a close enough relationship between a means and an uncontroversial end.¹⁴⁶ Rather than an inquiry into the legislature's ability to understand the consequences of its actions, the Court uses the first part of the rational basis test almost exclusively to either identify or exclude potential ends for legislation.

Even this limited construction of the "rationally related" portion of the test is only uncommonly operative. In the typical rational basis case, either the legislature or the litigant defending the statute (or both) will provide the Court with ends, which the Court simply has to verify could be rationally furthered by the statute. It is either when the Court has been offered no end (which, given the incentives of litigants and their presence at oral argument is virtually impossible¹⁴⁷) or when the Court wishes to test the credibility of proffered justifications that it analyzes means in order to deduce ends.

¹⁴⁵ Another case involving economic legislation, *U.S. Department of Agriculture v. Murry*, purported to accept a stated, economic end and found a lack of rational relationship. See 413 U.S. 508, 512–14 (1973). Although *Murry* does contain some language calling upon rationality review ("Tax dependency in a prior year seems to have no relation to the 'need' of the dependent in the following year."), *id.* at 513, what drove the case was that the lack of an appeal process created a constitutionally prohibited irrebuttable presumption. See *id.* at 514. The Court has consistently interpreted *Murry* as being about irrebuttable presumptions, not the rational basis test more broadly. See, e.g., *Lavine v. Milne*, 424 U.S. 577, 583–84, 584 n.9 (1976) ("Since nothing is conclusively presumed against the applicant, who is clearly required to prove his eligibility if he is to receive relief, this Court's prior cases dealing with so-called irrebuttable presumptions [including *Murry*] are not in point."). On the development of the *Murry* majority and the concurrences and the (non)impact of *Murry* on the rational basis test, see Thomas B. Nachbar, Rational Basis "Plus" 10–11 (unpublished manuscript dated Sept. 8, 2016) (on file with the author).

¹⁴⁶ I have found three: *Weaver v. Palmer Bros. Co.*, 270 U.S. 402, 411, 415 (1926) (even granting the applicability of the health and safety justification, finding a complete ban on the use of recycled fibers overly burdensome); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 517 (1924) (fraud justification for regulating bread weights permits regulation of minimum but not maximum weights); *S. Covington & Cincinnati St. Ry. Co. v. City of Covington*, 235 U.S. 537, 548–49 (1915) (regulation setting streetcar temperature requirements that are physically impossible to achieve held to be "unreasonable").

¹⁴⁷ Although there are many cases in which the legislature has failed to record the ends of a statute, I have found none in which litigants have rested on legislative silence when arguing for the rationality of the statute.

The use of means to uncover ends is apparent in the interplay between the majority and dissent in *Beazer*. At issue in that case was the Transit Authority's refusal to employ individuals who use narcotics, which the Transit Authority interpreted to include use of methadone, a drug frequently prescribed to those recovering from heroin addiction.¹⁴⁸ Justice Stevens writing for the majority recognized the relationship between the provision and the (uncontroversially legitimate) ends of safety and efficiency in the operation of the transit system,¹⁴⁹ and accepted the necessarily imperfect coverage of the rule (which would necessarily ban many methadone users who posed no safety or efficiency threat to the transit system).¹⁵⁰ Justice White's dissent spends considerable time pointing out the many ways that the distinction is necessarily arbitrary, especially at the margins,¹⁵¹ a point the majority essentially conceded but found inapposite because *every* distinction becomes increasingly arbitrary at the margins.¹⁵² But the mere irrationality of the rule was not enough for Justice White, who found that discrimination against former heroin users, as opposed to former alcoholics, for instance, revealed invidious motives:

Heroin addiction is a special problem of the poor, and the addict population is composed largely of racial minorities that the Court has previously recognized as politically powerless and historical subjects of majoritarian neglect. . . . On the other hand, the afflictions to which petitioners are more sympathetic, such as alcoholism and mental illness, are shared by both white and black, rich and poor.¹⁵³

Analyzing the rationality of means to develop a conclusion about ends is also evident in the Court's cases addressing discrimination on the basis of sexual orientation. In *Romer v. Evans*, Colorado justified a constitutional amendment prohibiting the use of sexual orientation as a basis for "minority status, quota preferences, protected status or claim of discrimination,"¹⁵⁴ by arguing "it puts gays and lesbians in the same position as all other persons."¹⁵⁵ Justice Kennedy simultaneously analyzed

¹⁴⁸ *Beazer*, 440 U.S. at 571–73.

¹⁴⁹ *Id.* at 592 ("As the District Court recognized, the special classification created by [the Transit Authority's] rule serves the general objectives of safety and efficiency.").

¹⁵⁰ *Id.* at 590–92.

¹⁵¹ *Id.* at 606–07 (White, J., dissenting).

¹⁵² *Id.* at 591 (majority opinion).

¹⁵³ *Id.* at 609 n.15 (White, J., dissenting).

¹⁵⁴ 517 U.S. 620, 624 (1996) (quoting Colo. Const. art. II, § 30b).

¹⁵⁵ *Id.* at 626.

the rationality of the means while supplying an alternative, illegitimate end for the amendment: “[I]ts sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”¹⁵⁶ In so combining the two steps of rationality review, he drew the most direct connection conceivable between the (ir)rationality of the means and the existence of an illegitimate end.

Largely overlooked, this use of rationality is quite problematic. In the hands of the modern Court, rationality analysis has turned on its head the traditional refusal of courts to look into legislative motivation,¹⁵⁷ a dramatic development in its own right. Cass Sunstein has taken the next step, arguing that rationality review “serves largely as a check on illegitimate motivations.”¹⁵⁸ I would not go so far, but would simply highlight that modern rationality review focuses almost exclusively on ends, with the rationality of the means chosen being used in furtherance of the inquiry into ends.

2. *The Instrumental Nature of Both Means and Ends*

The second consistent feature of modern rationality review is its pervasively instrumental approach to regulation. By virtue of its means-ends structure, rationality review necessarily views means as instrumental to particular legislative ends. But the practice of rationality review extends that same instrumental approach to the ends themselves. In *Carolene Products*, the legitimate end was the assurance of the nutritional content of milk and the prevention of fraud.¹⁵⁹ In *Railway Express*, it was to reduce traffic congestion.¹⁶⁰ In *Lee Optical*, it was to assure that glasses were properly prescribed and to prevent eye disease.¹⁶¹ In *Beazer*, it was to further the safety and efficiency of the transit system.¹⁶² In *Clover Leaf Creamery*, it was to reduce landfill usage and energy

¹⁵⁶ *Id.* at 632.

¹⁵⁷ See Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. Rev. 1784, 1879 (2008).

¹⁵⁸ Sunstein, *supra* note 3, at 1707 n.80; see also *id.* at 1713 (“Although the rationality test is highly deferential, its function is to ensure that classifications rest on something other than a naked preference for one person or group over another.”).

¹⁵⁹ 304 U.S. at 148.

¹⁶⁰ 336 U.S. at 110.

¹⁶¹ 348 U.S. at 487.

¹⁶² 440 U.S. at 592.

consumption.¹⁶³ All of these ends are extrinsic to the legal system; it is not necessary that a legal system further any of these ends in order to be recognized as a legal system, and these ends could be pursued in a variety of ways other than through law. Not that this is a substantial departure from past practice. Earlier cases had frequently emphasized the instrumental impact of regulation as part of its justification, such as the safety justifications advanced by the Court in *Holden v. Hardy* when upholding the regulation of working hours in mines.¹⁶⁴ Approaching laws instrumentally makes sense because law itself is instrumental. It is hard to justify law except as an instrument to some higher social purpose, and so it similarly makes sense to connect particular laws to particular ends that are themselves beyond the legal system.

But the Court's approach to deciding rationality cases since *Carolene Products* has raised the instrumentalist inquiry to a new level by refusing to identify affirmative criteria for a legitimate governmental end. Prior to *Carolene Products*, that affirmative understanding of state power was provided by a widely held conception of the police power, which provided the basis not only for the Court's power to review (since an exercise of power beyond the police power was illegitimate) but also the basis for the legislature's power to regulate. Footnote 4 suggested a shift in approach by adopting tiers of review for different types of cases; but in its rush to clarify (and justify) its own role in reviewing legislation, the Court paid little attention to the nature of the legislature's power to promulgate that legislation in the first place. The Court would never replace the police power with another affirmative conception of legislative power to inform rationality review. In the first few years following *Carolene Products*, the Court was consumed with running from charges of Lochnerism. By the time it started re-employing the means-ends test that it had been using to connect regulations to the police power, it seemingly modestly evaluated legislative ends according not to its own conception of the police power (which would have smacked of resurrecting economic substantive due process) but rather to their potential to contribute to social welfare—a consequentialist, utilitarian value.¹⁶⁵

¹⁶³ 449 U.S. at 468–69.

¹⁶⁴ See 169 U.S. 366, 393, 395 (1898).

¹⁶⁵ Of course, consequentialism itself does not define social purposes, just evaluation according to consequences. Given the forgiving nature of rationality review, it would be impossible to determine the exact nature of the Court's consequentialism. In general, the Court takes an instrumental approach to ends that it believes will generally increase social wealth,

Whether evaluating regulations for their rational connection to utilitarian ends rather than to the police power was actually modest is an open question. Justice Black (perhaps the most deferential member of the *Carolene Products* Court¹⁶⁶) refused to join the portion of the case containing Footnote 4¹⁶⁷ because he read that portion of the case as permitting juries to consider the policy wisdom of legislative enactments, which he felt overstepped the judicial role.¹⁶⁸ What is certain, though, is that doing so necessarily changes the nature of the inquiry, relying less on the Justices' intuitive understanding of the police power and much more on the Justices' intuitive understanding of social wealth maximization. Whether that was a good trade is a subject I consider below.¹⁶⁹

3. Means-Ends Rationality Itself

By far the most prevalent feature of modern rationality review, though, is the Court's use of means-ends rationality itself. As suggested immediately above, the Court has taken means-ends rationality to a new level, evaluating not only whether a regulatory means serves the stated regulatory end but evaluating the end itself according to its ability to further some other (generally utilitarian) interest. The Court's choice of rationality as the criterion by which it will evaluate regulation seems self-justifying; few are prepared to make the argument against rationality. But to the extent the Court is relying on the value of rationality to justify its role in general judicial review of legislative enactments, then the Court's conception of rationality deserves close examination. In order to do so, we first need to explore rationality and in particular the types of political rationality that underlie ordered society.

and that is what I mean by "consequentialist." Similarly, I use "utilitarian" in the loosest sense of increasing social wealth without distinction among its various forms. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare* 4–5 (2002).

¹⁶⁶ Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. Rev. 881, 995 (2005).

¹⁶⁷ 304 U.S. at 152 (indicating that Third portion of opinion contains Footnote 4); *id.* at 155 (Black, J., concurring in the result and in all of the opinion except the part marked 'Third.').

¹⁶⁸ Cushman, *supra* note 166, at 994–95.

¹⁶⁹ See *infra* Section IV.D.

III. RATIONALITY

The role that rationality plays in rationality review is hardly extraordinary; rationality is prominent throughout legal thought. Rationality is frequently offered as both a justification and an explanation for law,¹⁷⁰ complete with a decades-running debate over whether the common law is simply an implementation of a particular form of rationality seeking to maximize social wealth.¹⁷¹ Some believe that the criminal law, for instance, can be justified only by utilitarian ends (deterrence, incapacitation, and rehabilitation) and therefore insist on rationality between specific criminal laws and those ends,¹⁷² while others point out the necessarily normative character of retribution,¹⁷³ which calls for a different kind of relationship.

A. The Instrumental Rationality of Law

As the structure of rationality review suggests, law is commonly understood to be instrumental to some other end—a “social purpose.” There is little argument for law for the sake of law—society adopts laws in order to serve some other end. But law does not serve rationality writ large; it serves a somewhat more specific political rationality that supplies the social purposes for law.¹⁷⁴ And if the legal system exists to serve social, political ends, legal rationality must at some level be subject to the social purposes it serves.

B. Rationality More Generally

Of course, legal rationality is merely one form of rational thought more broadly. This broader concept of rational thinking has many fea-

¹⁷⁰ See, e.g., Roscoe Pound, *The Theory of Judicial Decision*, 36 *Harv. L. Rev.* 641, 656 (1923).

¹⁷¹ Compare Richard A. Posner, *Economic Analysis of Law* § 8.1 (9th ed. 2014) (arguing that the common law can be explained through concepts of economic rationality and efficiency), with Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 *Geo. L.J.* 583, 583 (1992) (arguing that attempts to equate the common law with economic rationality or efficiency have been unpersuasive).

¹⁷² Posner, *supra* note 171, at § 7.1.

¹⁷³ E.g., H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 234–35 (2d ed. 2008).

¹⁷⁴ Of course, there is nothing natural about labeling instrumental rules “laws” and the next higher-order norms as “social purposes.” They are terms I have chosen for convenience, and the path of abstraction is potentially limitless. Cf. Raz, *supra* note 119, at 49 (discussing the increasingly arbitrary distinctions at the margin between “principles” and “rules”).

tures readily recognizable to lawyers steeped in the rationality of the law. Rationality is, at its most general, resort to reason,¹⁷⁵ and reason is itself rooted in logical thought¹⁷⁶ and requires the articulation of the *relationships* between a series of inferences and a conclusion.¹⁷⁷

But rationality is more than just action based on reasons—my hunger provides an adequate reason for my desire to eat lunch, but we would not call my hunger itself either “reasoned” or “rational.” Rationality focuses on the nature of relationships between reason and belief or reason and action. I have reason to believe (based on my experience) that eating lunch will quell my hunger, so my decision to eat lunch is rational even if my hunger itself is not.

1. Instrumental Rationality: Means and Ends

One relationship particularly prominent in the thinking on rationality is the instrumental relationship between means and ends. “Broadly speaking, an action will qualify as rational if, on the basis of the given information, it offers optimal prospects of achieving its objectives.”¹⁷⁸ This is the form of rationality evident in rationality review. Means-ends rationality generally requires both a particular relationship between means and end and a reasoned justification for the end being served. We would not, for instance, call a policy of human sacrifice to please a dictator’s sadistic tastes “rational” even though doing so would actually please her tastes because the end being served is not a reasoned one,¹⁷⁹

¹⁷⁵ See John Ladd, *The Place of Practical Reason in Judicial Decision*, in *NOMOS VII: Rational Decision* 126, 127–28 (Carl J. Friedrich ed., 1964) (“By a ‘rational decision’ I mean a decision for which the agent can give good reasons. A nonrational decision would be one for which the agent has no reasons, whereas an irrational decision would be one for which he has only bad reasons, that is, one which, though ostensibly rational, actually violates the norms of rationality and thus conflicts with rationality.”).

¹⁷⁶ Raz, *supra* note 119, at 17 (“Reasons must, of course, be subject to logical analysis since they figure in practical reasoning . . .”).

¹⁷⁷ See Thomas Hobbes, *Leviathan* ch. 5 (London, Andrew Crooke 1651):

The Use and End of Reason, is not the finding of the sum[], and truth of one, or a few consequences, remote from the first definitions, and settled significations of names; but to begin at these; and proceed from one consequence to another. For there can be no certainty of the last Conclusion, without a certainty of all those Affirmations and Negations, on which it was grounded, and inferred.

¹⁷⁸ Carl G. Hempel, *Rational Action*, in *Proceedings and Addresses of the American Philosophical Association* 5 (1962).

¹⁷⁹ See Abraham Kaplan, *Some Limitations on Rationality*, in *NOMOS VII*, *supra* note 175, at 55, 57 (“Rationality, I should suppose, is more than a matter of acting so as to secure

and some accounts of rationality suggest the connection to reason is so strong that reason provides its own justification for action.¹⁸⁰

Although focused on outcomes, the instrumental nature of means-ends rationality demands more than a probabilistic relationship between means and ends. John Dewey's account of the rationality of preparing roast pork by putting a pig in one's house and setting fire to the house (based in turn on Charles Lamb's story¹⁸¹) highlights the problem.¹⁸² Few would describe such an act as rational, even though the "end" seems valid and the means reliable. The preparation of roast pork satisfies our (decidedly unreasoned) tastes for pork and our (also unreasoned but nevertheless compelling) need for food and thereby seems justified in furtherance of those two ends. The means is one that could be logically calculated to produce the desired ends. The problem is that burning down one's house is both extremely costly and carries with it a meaning other than that of food preparation, rendering it an irrational way to prepare roast pork. Thus, determinations of fit require valuation, both quantitative and qualitative. Dewey valued not only the cost of burning down one's house to get roast pork but also the choice to do so by pointing out that pork produced in an accidentally burned-down house is more enjoyable than pork so produced by choice because the choice of means itself has value, affecting the total value of the activity.¹⁸³

Like Dewey's example of roast pork, means-ends rationality as embodied in rationality review is not entirely consumed with probabilistic fit between means and ends. Some forms of rationality, such as attributing characteristics on the basis of race, are generally prohibited (or subjected to the most exacting scrutiny even in the absence of race-related motives¹⁸⁴) under U.S. constitutional law for reasons unrelated to their likelihood to produce good or accurate results.¹⁸⁵ These political

the values pursued. Would we not also want to say that reason judges them to be worth pursuing?").

¹⁸⁰ Raz, *supra* note 119, at 182 ("One has reason to do whatever will facilitate conformity with reason. More narrowly, one has reason to do whatever is a sufficient condition for the realisation of some good, including the good of conformity with reason.").

¹⁸¹ Charles Lamb, *A Dissertation Upon Roast Pig* (Boston, D. Lothrop Co. 1888).

¹⁸² John Dewey, *Theory of Valuation* in 2 *International Encyclopedia of Unified Science* 1, 40–41 (Otto Neurath et al. eds., 1939).

¹⁸³ *Id.* at 41–42.

¹⁸⁴ *Johnson v. California*, 543 U.S. 499, 502, 509 (2005).

¹⁸⁵ See Hellman, *supra* note 113, at 115, 117. Of course, that limitation could itself be described as means-ends rational if reason demands attention to some value other than maximizing the likelihood of achieving a particular end (what Joseph Raz called a "second-order

limits on rationality are arguably as important as the logical limits on rationality.

2. Intrinsic Rationality and Value-Rational Acts

But not all forms of rationality are instrumental in their structure. Thought can be intrinsically rational if it represents a coherent, ordered system,¹⁸⁶ and it is likewise possible to rationally think about a relationship between action and ends that is not necessarily instrumental if it is ordered by reason or principle.¹⁸⁷ To take a practical constitutional example, the Constitution's assignment of two Senators to each State¹⁸⁸ is rational without regard to any particular theory or practical consequence of that representation; it is rational by virtue of being part of the ordered system of representative government contained in the Constitution. The underlying instrumental theory of representation could completely change (as it did with the Seventeenth Amendment), and with those changes could come a completely different instrumental relationship between the assignment of Senators and the end of representation without affecting the rationality of assignment within the constitutional system. That is not to say that the constitutional order exists in a vacuum. There may still be some exogenous norm served by the system, but it would not be necessary for us to agree on either what that norm is,¹⁸⁹ or the specific relationship between the constitutional system and that norm in order for us to agree that the constitutional system itself is rational.¹⁹⁰ In the case of a legal system like that embodied in a written constitution, it is inconceivable that it would be unrelated to the broader social purpose, but a requirement that every aspect of the legal system *further* that social purpose is beyond the demands of rationality. A legal system incon-

reason"), although the Court has never approached the problem in this way. See Raz, *supra* note 119, at 39 ("A second-order reason is any reason to act for a reason or to refrain from acting for a reason."); *id.* at 47–48 (discussing the exclusionary nature of second-order reasons).

¹⁸⁶ See Morton A. Kaplan, Means/Ends Rationality, 87 *Ethics* 61, 62 (1976).

¹⁸⁷ Charles Fried, An Anatomy of Values: Problems of Personal and Social Choice 17–18 (1970).

¹⁸⁸ U.S. Const. art. 1, § 3.

¹⁸⁹ For instance, the purpose of the Constitution may be considered by some to be the maximization of personal liberty; for others it may be to solve collective action problems among the States.

¹⁹⁰ Indeed, the decision to form a democratic republic itself is not necessarily instrumental to anything. See Jeremy Waldron, Law and Disagreement 239–43 (1999).

sistent with social purpose would be irrational given that social purpose, but so long as the legal system is ordered according to reasons made cognizable by social purpose, it is intrinsically, if not instrumentally, rational.

This form of intrinsic rationality is most closely associated with Max Weber, who considered law to be rational if it is systematized.¹⁹¹ For Weber, the rationality of the law was determined by the degree to which substantive rules can be reliably and intellectually determined and compared to the social order from which the legal system emanates, distinguishing between formal and substantive irrationality:

Both lawmaking and lawfinding may be either rational or irrational. They are *formally* irrational when one applies in lawmaking or lawfinding means which cannot be controlled by the intellect, for instance when recourse is had to oracles or substitutes therefor. Lawmaking and lawfinding are *substantively* irrational on the other hand to the extent that decision is influenced by concrete factors of the particular case as evaluated upon an ethical, emotional, or political basis rather than by general norms.¹⁹²

An intrinsic conception of rationality is hardly unique to Weber. Even John Rawls, by most accounts then (if not later) a utilitarian, acknowledged that practices can embody their own rationality without regard to whether the practice serves some other principle.¹⁹³ For those who would argue that such a strictly internal form of rationality is overly formalistic, it can be strictly internal and still have a normative component—a game can exist, as Joseph Raz put it, as an “autonomous normative system.”¹⁹⁴ Nor is it necessary that one surrender an instrumental account of rationality in order to embrace an intrinsic one; any particular practice can serve both instrumental and intrinsic ends.¹⁹⁵ Moving my feet in dance is both intrinsically rational to the act of dancing and instrumentally rational to the act of annoying and embarrassing my children.¹⁹⁶

¹⁹¹ 2 Max Weber, *Economy and Society* 655–56 (Guenther Roth & Claus Wittich eds., 1978).

¹⁹² *Id.* at 656.

¹⁹³ John Rawls, *Two Concepts of Rules*, 64 *Phil. Rev.* 3, 27 (1955).

¹⁹⁴ See Raz, *supra* note 119, at 117–18.

¹⁹⁵ 1 Weber, *supra* note 191, at 26.

¹⁹⁶ See Fried, *supra* note 187, at 28 (using the somewhat more romantic example of playing a sonata).

Weber accepted instrumental rationality as a form of “social action”:

instrumentally rational (*zweckrational*), that is, determined by expectations as to the behavior of objects in the environment and of other human beings; these expectations are used as “conditions” or “means” for the attainment of the actor’s own rationally pursued and calculated ends¹⁹⁷

But he also acknowledged another form of rationality, one unrelated to efficacy, in the form of “value-rational” acts:

value-rational (*wertrational*), that is, determined by a conscious belief in the value for its own sake of some ethical, aesthetic, religious, or other form of behavior, independently of its prospects of success¹⁹⁸

Entirely outside the means-ends structure of instrumental rationality, value-rational acts are intrinsically rational social acts. The rationality of a value-rational act is not in “the achievement of a result ulterior to it, but in carrying out the specific type of action for its own sake.”¹⁹⁹ Weber posited that value-rational acts are rational by virtue of both their internal rationality (their systemization) and their reasoned connection to social purpose.²⁰⁰

Weber also included two forms of irrational social acts:

affectual (especially emotional), that is, determined by the actor’s specific affects and feeling states;

traditional, that is, determined by ingrained habituation.²⁰¹

A value-rational act is distinct from an affectual act not by virtue of its ability to bring about some desirable end, but “by its clearly self-conscious formulation of the ultimate values governing the action and the consistently planned orientation of its detailed course to these values.”²⁰² Unlike affectual acts, value-rational acts do have a relationship

¹⁹⁷ 1 Weber, *supra* note 191, at 24.

¹⁹⁸ *Id.* at 24–25.

¹⁹⁹ *Id.* at 25. See also Laurence H. Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. Cal. L. Rev. 617, 618 (1973) (discussing the differences between Weber’s purpose-rational and value-rational acts).

²⁰⁰ 1 Weber, *supra* note 191, at 26.

²⁰¹ *Id.* at 25.

²⁰² *Id.*

to social purpose, but, unlike an instrumentally rational act, that relationship is not to further social purpose but rather to embody it in rationalized and systematized form.²⁰³ Weber's categories are not exclusive—a single act can be both instrumentally rational and value-rational,²⁰⁴ so he can easily accommodate means-ends rationality.²⁰⁵ The converse is not true; the means-ends rationality favored by consequentialists like Rawls²⁰⁶ and the legal realists,²⁰⁷ would necessarily label value-rational acts as irrational, since they do not serve an identifiable end.

C. The Limited Rationality of Rationality Review

Consideration of the broader concept of rationality reveals the many deficiencies in the Court's use of rationality in rationality review. As an initial matter, the "conceivable basis" approach, with its emphasis on outcomes as opposed to decision-making, is essentially at war with any rigorous conception of rationality—the requirement that action be based in reason prohibits consideration of a reason introduced *after* the action has taken place.

The Court's approach also artificially treats means and ends as distinct. As Dewey's example explains, means and ends are frequently intermixed. Dewey emphasized that the means can transform the ends, but there is also the common problem of distinguishing between means and ends. Doing so is not merely a matter of semantics; how one arranges

²⁰³ Stephen Kalberg, *Max Weber's Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History*, 85 *Am. J. Soc.* 1145, 1166–67 (1980). Thus, I would distinguish what John Hart Ely termed regulation of "good taste," which he deemed "nonrational," making the "demand" for rationality inapposite. See John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *Yale L.J.* 1205, 1239–43 (1970). Objects of good taste (in Ely's cases, sneakers vs. loafers) are generally not reasoned, or if they are, the reasons for them have no particular relation to social purpose. Consequently, a preference based on mere taste would more likely be affectual or, if value-rational, value-rational to some social purpose unrelated to the legal system.

²⁰⁴ 1 Weber, *supra* note 191, at 26.

²⁰⁵ Indeed, the choice between two instrumentally rational acts may itself be a value-rational one. See *id.* ("Choice between alternative and conflicting ends and results may well be determined in a value-rational manner. In that case, action is instrumentally rational only in respect to the choice of means.").

²⁰⁶ See John Rawls, *A Theory of Justice* 143 (1971).

²⁰⁷ See Oliver Wendell Holmes, *The Path of the Law*, in Oliver Wendell Holmes, *Collected Legal Papers* 167, 167 (1920).

means and ends can affect how one evaluates the rationality of a particular act.²⁰⁸

Properly distinguishing means and ends is particularly important for a field like law, where actions frequently carry several meanings and are inherently normative. The effect of choice of means on the rationality of a legislative act is highlighted by the considerable work on the expressive function of law,²⁰⁹ which addresses the effects of choices among means in ways other than in their ability to bring about a particular end. For instance, given the end of preventing the theft of food, the state can either outlaw theft or enact an entitlement program that supplies its citizens with all the food they need. Either regime may be equally effective for ending theft, but the chosen means represent and reinforce dramatically different understandings about the relationship between the citizens and the state (and among citizens, one emphasizing property rights and the other emphasizing mutual dependence and obligations of support). The Court actually does pay attention to the effect of a particular means when the means imposes a classification that generally requires heightened scrutiny, but under rationality review, the Court does not generally consider the effect among equally effective means on the rationality of a regulation.

Acknowledging that rationality does not necessarily require means-ends justification highlights just how contingent modern rationality review truly is. The Court's choice of means-ends scrutiny necessarily carries with it a mandatory form of legislative reasoning,²¹⁰ one that the Court will enforce through judicial review. Given the almost accidental history of rationality review's development since *Carolene Products*, there is little reason to credit instrumental rationality as the Court's considered, exclusive theory of constitutional action.

But the most profound effect of the Court's limited conception of rationality is on the range of ends available to the state as "legitimate" for the purposes of rationality review. The Court's repeated and exclusive use of instrumental rationality in rationality review has led to a singular-

²⁰⁸ Kaplan, *supra* note 186, at 63 ("There is a multiplicity of ways of arranging means and ends depending on what questions are asked and how they are analyzed.")

²⁰⁹ Joel Feinberg, *The Expressive Function of Punishment*, 49 *Monist* 397, 400 (1965). See generally Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 *U. Pa. L. Rev.* 1503 (2000) (providing an overview of expressive theories of practical reason and then arguing that the law is expressive in nature).

²¹⁰ Bice, *supra* note 113, at 17 ("[I]n using rationality to *evaluate* legislative enactments an important assumption must be made about how legislatures *should behave*.").

ly utilitarian conception of legitimate governmental ends; one that ignores a host of ends that cannot readily be expressed in utilitarian terms. Of course, instrumental rationality itself does not necessarily demand utilitarian ends; a means can be instrumental to ends that are aesthetic or deontological. How the Court's application of instrumental rationality in rationality review has led utilitarian ends to displace all other "legitimate governmental interests" is the subject of the next section.

IV. THE RACE TO A UTILITARIAN CONCEPTION OF LEGITIMATE GOVERNMENTAL INTERESTS

In 2014, when considering the constitutionality of Indiana and Wisconsin's refusal to recognize same-sex marriage, Judge Posner, of the U.S. Court of Appeals for the Seventh Circuit, found opposite-sex-only marriage failed to rationally further a number of interests offered by the state, including prevention of accidental births out of wedlock (marriage being necessary only for couples whose union could potentially produce a child),²¹¹ the "go slow" approach of gradualism,²¹² that allowing same-sex marriage would result in a decline in heterosexual marriage,²¹³ and that allowing same-sex marriage would make marriage "fragile and unreliable."²¹⁴ The court also rejected as illegitimate Wisconsin's purported end of preserving "tradition."²¹⁵ On this last point, the court was careful to distinguish "tradition" and "morals": "Arguments from tradition must be distinguished from arguments based on morals. Many unquestioned laws are founded on moral principles that cannot be reduced to cost-benefit analysis. Laws forbidding gratuitous cruelty to animals, and laws providing public assistance for poor and disabled persons, are examples."²¹⁶ The court did not consider the "morality" justification for refusing to recognize same-sex marriage because neither Indiana nor Wisconsin advanced it.²¹⁷

In refusing to advance morality as a justification for the distinction between homosexual and heterosexual marriage, Indiana and Wisconsin were understandably gun-shy. In *Lawrence v. Texas*, the Supreme Court

²¹¹ *Baskin v. Bogan*, 766 F.3d 648, 660–66 (7th Cir. 2014).

²¹² *Id.* at 668.

²¹³ *Id.*

²¹⁴ *Id.* at 666.

²¹⁵ *Id.* at 666–68.

²¹⁶ *Id.* at 668.

²¹⁷ *Id.*

had condemned Texas's effort to "demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime"²¹⁸ as illegitimate, and many, including Justice Scalia in his dissent in *Lawrence* itself,²¹⁹ have taken that conclusion as an attack on the use of sexual morality as a legitimate governmental interest for the purposes of rationality review.²²⁰ The Court's position in *Lawrence*, combined with the States' collective refusal to advance morality as a justification for their prohibitions on same-sex-only marriage laws, prompted Judge Posner to speculate that "Wisconsin like Indiana does not base its prohibition of same-sex marriage on morality, perhaps because it believes plausibly that *Lawrence* rules out moral objections to homosexuality as legitimate grounds for discrimination."²²¹

A. Morality and the Police Power

Justice O'Connor was certainly correct when she noted in her concurrence in *Lawrence* that "we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons,"²²² but the Court has similarly never disapproved of the use of morality as a legitimate governmental interest,²²³ and has ex-

²¹⁸ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); see also *id.* at 585 (O'Connor, J., concurring in judgment) ("A law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review.").

²¹⁹ *Id.* at 599 (Scalia, J., dissenting) (disagreeing with the majority and arguing that a statute may "further the belief of its citizens that certain forms of sexual behavior are 'immoral and unacceptable'" (quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986))).

²²⁰ See Forde-Mazrui, *supra* note 129, at 322 ("[E]ven under rational basis review, the Court in *Lawrence v. Texas* held that morality alone was insufficient to justify the criminal ban on same-sex sodomy absent some showing of likely harm.").

²²¹ *Baskin v. Bogan*, 766 F.3d 648, 670 (7th Cir. 2014).

²²² *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring in judgment).

²²³ It came close in *United States v. Windsor*, 133 S. Ct. 2675, 2693–95 (2013) (rejecting the "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws" as an illegitimate attempt to "demean those persons who are in a lawful same-sex marriage" (first internal quotation marks and citation omitted)), but Justice Kennedy is far from clear on exactly what the nature of the harm is, and his primary focus is on the harm to individuals and their (state-law-solemnized) relationships rather than the moral basis of the Congress's contrary intuition. Similarly, the *Lawrence* majority disclaimed morality as an adequate justification for a criminal ban on behavior, see *Lawrence*, 539 U.S. at 578, but if identifying the right at issue as fundamental, the Court would have required far more than a legitimate governmental interest to support the ban.

plicitly accepted it in the context of the regulation of obscene speech.²²⁴ That leaves wide open the question of whether morality can serve as a legitimate governmental interest, the timidity of Wisconsin and Indiana in *Baskin v. Bogan*²²⁵ notwithstanding.

Prior to *Carolene Products*, the question of whether morality could serve as a legitimate governmental interest would have been answered through the lens of the police power.²²⁶ While the police power would certainly have reached the regulation of “public morals,”²²⁷ it is not clear how the Court would have confronted a regulation of “private morals.” Commentators such as W.W. Willoughby contended that “purely private” rights were outside the reach of the police power,²²⁸ and the regulation of private sexual conduct not known to others would have raised problems for those like Freund, who espoused a nuisance-based understanding of the police power.²²⁹ The terms of the debate, though, would have been defined by the police power, the content of which the Court agreed provided the test for separating legitimate and illegitimate exercises of state authority. But, as explained above,²³⁰ the Court has not in the post-*Carolene Products* era announced *any* particular theory of legitimate or illegitimate governmental ends.

B. Explaining Legitimate Governmental Interests

With fairly little information from the Court and little evidence of a single approach to rationality review in the cases, scholars have been prompted to advance their own theories to explain and define rationality review, including definitions of legitimate governmental ends. Theories of rationality review are varied, and most of them are really applications

²²⁴ See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60–61 (1973); Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 Penn St. L. Rev. 139, 147–48 (2012).

²²⁵ 766 F.3d 648 (7th Cir. 2014).

²²⁶ See *supra* text accompanying notes 82–84.

²²⁷ See *Boston Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877) (The police power “does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals.”). But see *Nebbia v. New York*, 291 U.S. 502, 526 (1934) (“Laws passed for the suppression of immorality, in the interest of health, to secure fair trade practices, and to safeguard the interests of depositors in banks, have been found consistent with due process.”).

²²⁸ 3 Westel Woodbury Willoughby, *The Constitutional Law of the United States* 1699 (2d ed. 1929).

²²⁹ Cf. Freund, *supra* note 52, at 225 (explaining the necessary public connection justifying the regulation of sexual morality).

²³⁰ See *supra* text accompanying notes 132–39.

of broader theories about equal protection or due process review generally or even judicial review writ large, while many theories of equality or due process do not consider the specific problem of legitimate ends in rationality review.²³¹ For instance, John Hart Ely's political-process approach to judicial review reflected the approach outlined in *Carolene Products*' Footnote 4,²³² but is applicable to a host of contexts outside rational basis. Such theories are, like Footnote 4 itself, more about when to apply particular levels of scrutiny than they are about the content of any particular form of analysis, including rationality review. That is, Ely would have much to say about whether to accept mere rationality or insist on something more stringent, but he does not have much to say about the nature of the rationality that should be required by the Court or whether any particular legislative end is legitimate. Premised as they are on the need to police the *process* of lawmaking,²³³ political process theories of judicial review have little direct bearing on the content of rationality review, which evaluates the product, not the process, of lawmaking. Indeed, although it is commonplace that a desire to discriminate against a politically unpopular minority is illegitimate, process theories would pose no obstacle to discrimination against politically popular ones (or against majorities generally).²³⁴

Similarly, Cass Sunstein has alternatively suggested that the Equal Protection Clause implements an "anticaste principle," which prevents the use of "morally irrelevant differences" for the purpose of discrimination, particularly in a way that creates a "second-class citizenship,"²³⁵

²³¹ For instance, Ronald Dworkin's theory of "equal concern and respect" and Bruce Ackerman's general requirement of "neutrality" do not address themselves to the types of ends the government may pursue. See Bruce A. Ackerman, *Social Justice in the Liberal State* (1980); Ronald Dworkin, *Taking Rights Seriously* (1977). Such theories may be relevant to arguments that particular governmental ends are legitimate and clearly underlie several of the theories of ends discussed below, but it is difficult to identify any limit on ends based on "equal concern and respect" or "neutrality." Indeed, the best reading of *Lochner* itself is as judicial enforcement of neutrality on the part of the state. See Cushman, *supra* note 166, at 934–36.

²³² See Ely, *supra* note 88, at 75–76 (discussing Footnote 4).

²³³ *Id.* at 77 ("[B]oth *Carolene Products* themes are concerned with participation: they ask us to focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted.").

²³⁴ Sunstein suggests exactly this, albeit by substituting rationality for process. See Sunstein, *supra* note 3, at 1711–12.

²³⁵ Cass R. Sunstein, *The Anticaste Principle*, 92 *Mich. L. Rev.* 2410, 2411, 2429 (1994).

which he combines with a prohibition against the use of “naked preferences”—an anti-pluralist conception of the entire Constitution, including equal protection and due process rationality.²³⁶ Like many of the broadly applicable theories of equal protection, such as Ely’s representation reinforcement idea, Sunstein’s anticaste, anti-naked preferences theory is as much about the criteria for heightened scrutiny as it is about legitimate and illegitimate ends for governmental action.²³⁷ Such power-conscious theories of equal protection are contingent on power relationships, not rationality, morality, or any particular government purpose or means. They can provide only an incomplete picture of what is prohibited and virtually no information about what is permitted.

Lacking a principle (in either law or commentary) for distinguishing legitimate from illegitimate ends, the Court has developed its approach to legitimate governmental interests on a case by case basis, not with the help of commentators or a theory of legitimate governmental action, but with the help of litigants.

C. Rationality Creep

In 1942, in *Skinner v. Oklahoma*, the Supreme Court famously rejected Oklahoma’s attempts to justify sterilizing thieves but not embezzlers because the State had failed to demonstrate “that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks.”²³⁸ What seems most remarkable about *Skinner* is not that the Court applied “strict scrutiny”²³⁹ on the sterilization question but that it confessed to applying essentially no scrutiny to the question of whether larceny could be *punished* more severely than embezzlement.²⁴⁰ This was not a blip on the constitutional radar; John Hart Ely argued almost thirty years later that criminal pun-

²³⁶ Sunstein, *supra* note 3, at 1732.

²³⁷ See *id.* at 1711 (“One reason for heightened scrutiny is a belief that when a statute discriminates on its face against racial minorities, a naked preference is almost certainly at work.”).

²³⁸ 316 U.S. 535, 541 (1942).

²³⁹ Although the Court said it would undertake “strict scrutiny” of the sterilization classification, it did not articulate any particular test associated with that type of scrutiny. See *id.*

²⁴⁰ *Id.* at 540 (“Thus, if we had here only a question as to a State’s classification of crimes, such as embezzlement or larceny, no substantial federal question would be raised.”).

ishments were not subject even to rational basis scrutiny, relying in part on *Skinner*.²⁴¹

One can understand why the Court might be hesitant to apply rationality analysis to the problem of punishment, since instrumental forms of rationality do not readily fit punitive acts. It is possible to construct a means-ends relationship between the means of incarceration and the ends of retributive justice, but the difficulty of accurately and objectively specifying either the quantitative or qualitative attributes of retribution presents several problems for instrumental rationality. First, it may be difficult for members of society (or the Court) to agree on the weight to be given to retributive ends in the first place. Justice Marshall, for instance, thought retribution was not a legitimate end at all.²⁴² Second, even if there is agreement on the end of retribution, difficulty in specifying its demands makes it hard to assess the degree of fit between a particular punishment and a particular retributive end. With regard to sterilization, though, the end was readily specifiable—prevention of inheritable traits. Once that end was given, the Court could easily evaluate whether the distinction between sterilizing thieves and embezzlers was rational with regard to that particular end. There being no reason to think that larceny is more inheritable than embezzlement, it was easy for the Court to reject the statute, which it could have done even under rational basis review.

Although the “rational” of the “rational basis” test is limited by its terms to the rationality of the means, the inherent instrumentality of rationality review necessarily privileges instrumentality more generally, as a principle of both means and ends. Utilitarian ends are widely attractive and generally require little additional justification.²⁴³ In *Minnesota v. Clover Leaf Creamery Co.*, for instance, the end of the law was to limit plastic containers in service of reducing landfill waste,²⁴⁴ but reducing

²⁴¹ Ely, *supra* note 203, at 1235 (“A legislature can punish burglary more harshly than battery (or vice versa) without a rational explanation for the disparity.”) (citing and distinguishing *Skinner*, 316 U.S. 535).

²⁴² See *Furman v. Georgia*, 408 U.S. 238, 343 (1972) (Marshall, J., concurring) (“Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society.”).

²⁴³ See Forde-Mazrui, *supra* note 129, at 323 (“[T]hose defending a law, whether in politics or litigation, have every incentive to identify the instrumental benefits of the law.”); Frank I. Michelman, *Politics and Values or What’s Really Wrong with Rationality Review?*, 13 *Creighton L. Rev.* 487, 501 (1979) (“Social wealth maximization has the look of a neutral, uncontroversial norm, if any norm has.”).

²⁴⁴ 449 U.S. 456, 469–70 (1981).

landfill waste itself was accepted as a social purpose not requiring further justification. Similarly, some social purposes are more readily describable than others. Broadly utilitarian social purposes, such as reducing landfill waste, are frequently easier to describe and compare than morally contingent ones, such as punishing the use of recreational drugs.²⁴⁵ Thus the attractiveness to turn-of-the-century treatise writers of limiting the reach of the police power to vices that affect social wealth, not merely moral values.²⁴⁶ If rationality review means anything, it means that litigants must be able to readily articulate both the attractiveness (read: legitimacy) of the end served by the statute and an objectively determinable relationship between the statute and that end. When confronted with an instrumentalist test and a range of potential ends, litigants facing rationality review will tend to advance ends that are both uncontroversial and most easily communicated to the Court, a situation that favors repeated reliance on utilitarian ends like increased social wealth.

Path dependence may also play an important role. The cases in which the Court developed rationality review dealt largely with economic regulation, in which the government's interest is largely utilitarian. The sale of filled milk (regulated in *Carolene Products*) is not generally a matter of moral consequence. When economic regulation has been mixed with relationships imbued with normative or constitutional meaning though, the Court has been more rigorous in its review. In *U.S. Department of Agriculture v. Moreno*, the Court invalidated a restriction of food stamp benefits to households in which all the residents were related.²⁴⁷ The government argued that the distinction was justified to prevent fraud.²⁴⁸ Under the Court's analysis, because fraud was still *possible*,²⁴⁹ "the classification here at issue is not only 'imprecise,' it is wholly without any rational basis."²⁵⁰ Of course, requiring that the statute absolutely prevent

²⁴⁵ See Laurence H. Tribe, *Policy Science: Analysis or Ideology?*, 2 *Phil. & Pub. Aff.* 66, 84 (1972) ("[T]he policy analyst who must compare two alternative courses of action first focuses on the *consequences* of each alternative (the initial or 'process' reduction) and then on *objectively comparable features* of those consequences." (emphasis in original)).

²⁴⁶ See *supra* text accompanying notes 69–71.

²⁴⁷ 413 U.S. 528, 529–30 (1973).

²⁴⁸ The government also argued that the provision would ameliorate the moral hazard of "voluntarily remaining poor" in order to continue to benefit from the program, *id.* at 535, which the Court implicitly rejected but did not address.

²⁴⁹ See *id.* at 537.

²⁵⁰ *Id.* at 538.

fraud is a standard far more rigorous than rationality, and *Moreno* is frequently held out as an example of heightened scrutiny.²⁵¹ What led Justice Brennan to impose so exacting a standard does not appear to have been a lack of confidence in fraud justifications. The government had argued (unsuccessfully) in the lower court that Congress could refuse to give food stamps to unrelated cohabitants on moral grounds, and Justice Brennan had intended to strike the statute by following the lower court's reasoning that such an end would require an exacting standard and, the provision not being "narrowly drawn" to serve such an end, it would be wrong to input such an end to Congress.²⁵² The government dropped the morals argument at the Supreme Court, though, relying instead on the (utilitarian) fraud justification, denying Justice Brennan that rationale for striking the statute.²⁵³

The government's singular focus on a utilitarian justification did not work in *Moreno*, but Justice Brennan's willingness to strike a statute on utilitarian grounds that he had originally planned to strike on moralistic ones suggests that the government merely employed the strategy too late. Once the Court smelled a rat,²⁵⁴ rationality review proved pliable enough to allow the Court to strike the statute on purely utilitarian grounds. We'll never know if the government might have saved the stat-

²⁵¹ See, e.g., Goldberg, *supra* note 10, at 514 n.121.

²⁵² Memorandum from Justice William J. Brennan to Justice William O. Douglas 1–2 (May 11, 1973) (on file with the Library of Congress) (William J. Brennan Papers, box I:302, folder 10) [hereinafter Brennan-Douglas Memo].

²⁵³ Opinions of William J. Brennan, Jr., Notes 73 (October Term, 1972) (on file with the Library of Congress) (William J. Brennan Papers, box II:6, folder 16) [hereinafter Brennan Notes].

²⁵⁴ Justice Douglas drafted a majority opinion calling for heightened scrutiny because the statute implicated the First Amendment right of association, which eventually became a concurrence after Justice Brennan talked him out of that position in favor of the (later-abandoned) approach of striking it as failed morals legislation. Brennan Notes, *supra* note 253, at 71–72. Although he argued against Justice Douglas's invocation of a fundamental right in *Moreno*, Justice Brennan would also have preferred to apply strict scrutiny because the legislation involved welfare, see Brennan-Douglas Memo, *supra* note 252, at 1, suggesting another reason why Justice Brennan might have been drawn to apply something more rigorous than typical rational basis scrutiny. *Moreno*, 413 U.S. at 541–43 (Douglas, J., concurring). As it happens, although Justice Brennan argued Justice Douglas out of the freedom-of-association rationale, he also keyed on discrimination against particular relationships in his majority opinion. See *id.* at 534 (majority opinion) ("The legislative history that does exist, however, indicates that that amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."). See generally Nachbar, *supra* note 145, at 11–13 (describing the interaction between Justices Brennan and Douglas in the decision of *Moreno*).

ute if it had not advanced a moral justification in the first place, but a future litigant would surely know better than to go down the “morals” road at all. Rational litigants seeking to uphold regulation should rightly be anxious to present the state’s interest as merely utilitarian and to disclaim even the hint of ends that might prompt the Court to engage in more searching review. Unlike repeat players, such as legislators (and the Justices themselves), litigants have little incentive to risk losing a case in order to set a precedent recognizing the legitimacy of a previously untested legislative end. If any legitimate governmental interest will do, better to advance a plausible utilitarian end than to risk heightened scrutiny by even suggesting a potentially controversial one. Fear of searching inquiry may be a better explanation for Indiana and Wisconsin’s disclaimer of “morality” in *Baskin* than the belief that *Lawrence* so conclusively foreclosed morality as a legitimate governmental interest related to same-sex marriage as to put the point beyond argument. It is little surprise then, that the following year, in the course of arguing *Obergefell v. Hodges*, it was the *opponents* of Ohio’s same-sex marriage ban, not Ohio, who advanced a morality justification for the ban,²⁵⁵ likely in an attempt to induce the Court to increase its scrutiny, much as it had done in *Moreno*.²⁵⁶

D. A Poverty of Ideas and a Wealth of Review

The well-trod path of litigants drawn to utilitarian ends has led us to a rather odd place. Believing that the state has only an instrumental interest in marriage regulation, for instance, is like believing that the state has only an instrumental interest in preventing cruelty to animals. It is possible to take an exclusively instrumental approach to marriage, but given the emotional and normative content of marriage, one would have to ignore most of marriage’s social meaning in order to do so. Nor is it clear why we would want to so hobble the state in its attempts to accommodate and regulate marriage or other similarly central social practices.

²⁵⁵ See Brief for Petitioners at 21–24, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556). Morality appeared in Ohio’s brief only as part of a claim that the petitioners were trying to use the case to impose their own moral code on the people of Ohio. Brief for Respondent at 28–29, *Obergefell*, 135 S. Ct. 2584 (No. 14-556).

²⁵⁶ As it happens, the Court avoided the question of what the legitimate governmental interest might be of a same-sex marriage ban by finding marriage to be a fundamental right and therefore not subject to rationality review. *Obergefell*, 135 S. Ct. at 2605–06.

The privileged place that instrumentalism has come to enjoy in rationality review has major consequences for the constitutional order and for rationality review itself. Most directly, the Court's instrumentalist focus fails to adequately accommodate ends that are either difficult to state in instrumentalist terms, such as retributive justice or the regulation of morally charged institutions like marriage, or simply are not instrumentalist in the first place, such as value-rational acts. Instrumental rationality does not ignore value-rational reasoning, it affirmatively rejects it. From the perspective of instrumental rationality, "value-rationality is always irrational. Indeed, the more the value to which action is oriented is elevated to the status of an absolute value, the more 'irrational' in this sense the corresponding action is."²⁵⁷ If we think there is a sphere of legitimate social action that fits Weber's concept of value-rationality, then it will require a conscious commitment on the part of the Court to accommodate it within rationality review.

The Court's focus on utilitarian justifications also forces parties (and the Court) to re-state normative ends as utilitarian ones, leading either to the sort of contorted reasoning exhibited by treatise writers attempting to explain morals legislation in terms of nuisance²⁵⁸ or to intellectual dishonesty, or both, what Hans Linde called "a labyrinth of fictions."²⁵⁹ One can explain the prevention of animal cruelty in farming as encouraging the consumption of meat,²⁶⁰ but doing so deprives the law of both clarity and content. The tendency to shift away from normative justifications (and their problems) is likely to affect both legislators and the Court. Legislators, for their part, will be tempted to either misstate their normative ends as utilitarian ones or, more likely given the availability of conceivable basis review,²⁶¹ simply provide no information at all about their ends. The Court, for its part, can avoid difficult conversations about what are and are not legitimate governmental interests by focusing on the rational relationship of an act to a set of invented but uncontro-

²⁵⁷ Weber, *supra* note 191, at 26.

²⁵⁸ See *supra* text accompanying notes 67–71.

²⁵⁹ Linde, *supra* note 6, at 208 ("[T]he effort to phrase this debate as a scrutiny of reasons rather than of values—of rationality rather than of legitimacy—leads court and counsel into a labyrinth of fictions.").

²⁶⁰ See *id.* at 231 ("Earlier, in legislating for humane methods of slaughter, a Senate committee felt obliged to add to the goal of preventing needless suffering an assertion that inhumane slaughter adversely affected public acceptance of meat products.") (citing S. Rep. No. 85-1724, at 2 (1958)).

²⁶¹ See *supra* Subsection II.B.2.

versial utilitarian ends. That is problematic in its own right, since it obfuscates debate and makes it difficult to police the Court's reliance on principles with controversial constitutional meaning.²⁶² But the consequences for the rationality of rationality review are doubly troubling. Like the conceivable basis standard itself, an approach to crediting ends driven by the desire to reach a particular outcome rather than by ordered reasoning renders rationality review inherently irrational.

The shift toward instrumentalism also has an institutional dimension, leading the Court to assert itself more aggressively in evaluating the rationality of both means and ends. Utilitarian ends lend themselves to a (frequently false) sense of determinacy, providing additional justification for the Court to insist that statutes comply with its own conception of instrumental rationality.²⁶³ Whether a statute furthers a utilitarian end is a question at least marginally more objective than whether a statute furthers another kind of normative (or expressive) end, partly because the ends themselves are contingent and partly because normative values are necessary for measuring the degree to which the statute furthers even an agreed end.²⁶⁴ Once the Court coaxes a utilitarian end out of the state, its evaluation of the statute's efficacy is at least superficially objective. Thus, once Oklahoma asserted that the end of its sterilization program was to prevent the inheritance of fraudulent tendencies rather than to promote marginally stronger social condemnation of fraud, which would have been adequate to justify longer prison sentences for fraudfeasors, the Court could easily reject the causal claim underlying the legislation as irrational. It would have been much harder to reject causation between any particular means and increased social condemnation, since what expresses increased social condemnation is itself largely subjective. The more frequently legislatures are required to provide utilitarian justifications, the more completely the Court can retain a seemingly objective attitude while reviewing the substantive content of legislation, encouraging the Court to take a more intrusive approach to rationality review than it would if it had to explain its review in more contingent,

²⁶² Peter J. Smith, *New Legal Fictions*, 95 *Geo. L.J.* 1435, 1482–84 (2007) (discussing judicial candor in relation to substituting factual determinations for normative ones).

²⁶³ Tribe, *supra* note 199, at 627 (“[T]he users of policy-analytic techniques are under constant pressure to reduce the many dimensions of each problem to some common measure in terms of which ‘objective’ comparison seems possible . . .”).

²⁶⁴ See Ely, *supra* note 203, at 1239 (“Unlike claims of increased safety or economy, [the] ‘validity’ [of subjective claims such as ‘good taste’] depends on no reasoned elaboration of the choice’s actual or projected results.”).

normative terms. Thus, in *Moreno*, Justice Brennan increased scrutiny of the government's instrumental ends, avoiding a debate about the role of morality in regulating cohabitation.

The Court's singularly instrumental approach to rationality review has resulted in a process that fundamentally mischaracterizes the ends of much legislation. Whether that mischaracterization is accidental or intentional is largely beside the point. Ignoring much of the normative content of law renders rationality review irrational in a host of important ways, and invites intellectual dishonesty on the part of legislatures, litigants, and the Court itself. Forcing both legislatures and litigants to restate many normative goals in instrumental terms both reduces the fidelity of rationality review and entices the Court to assert a more substantive form of review than it claims to. Yet, it is unlikely the Court will abandon rationality review, nor should we want it to. The question is how to accommodate the existence of noninstrumental ends, and the related strain such ends place on means-ends rationality, within the existing structure of rationality review.

V. CONSTITUTIVE ENDS

As suggested above, rationality review constrains legislative power largely by limiting the legitimate ends of regulation; rare is the rational basis case that accepts an end as legitimate but finds the means not rationally related to that end.²⁶⁵ Consequently, any adjustment to rationality review in order to accommodate noninstrumental ends requires attention to the ends cognizable in rationality review.

A. Intrinsic Rationality, Constitutive Rules, and Social Meaning

As suggested above, intrinsic rationality has the capacity of accommodating noninstrumental ends while retaining a commitment to rationality. What rationality review requires, then, is a better conception of how intrinsic rationality can operate legitimately in a legal system.

1. Intrinsic Rationality and Constitutive Rules

Intrinsic rationality is a prominent feature of rules that define a practice—what John Searle called “constitutive rules.”²⁶⁶ A constitutive rule

²⁶⁵ See *supra* text accompanying note 145.

²⁶⁶ See John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* 33 (1970).

(as opposed to a “regulative” rule) defines and regulates new behaviors rather than regulating existing behaviors.²⁶⁷ The rules of chess, for instance, are constitutive rules,²⁶⁸ which both define the game of chess and regulate its play. Such rules may be instrumental to a principle outside the practice to which they apply, but they need not be in order to be rational—chess is internally rational as chess,²⁶⁹ although, Weber would press the distinction somewhat in cases of social acts, in which the intrinsic rationality of the act must maintain some connection with social purpose more generally.²⁷⁰ Chess in which the victor summarily decapitates the loser would be irrational in practically any modern society because, even if a game is internally reasoned and ordered, the social purpose of games does not generally extend to the violent death of one of the players.

Joseph Raz rejects the distinction between constitutive and regulative rules, arguing that all constitutive rules also regulate behavior.²⁷¹ The point is well-taken, since virtually any rule defining a practice will also affect behavior in accordance with that practice. But the converse is also true—regulative rules also define behaviors in addition to regulating them. Regulative rules can display both an instrumental rationality with regard to their regulative aspects (whether the law actually brings about a desired behavior or end), and an intrinsic, constitutive rationality with regard to their constitutive aspects (how the law defines or redefines the meaning of a particular behavior or practice).

2. Constitutive Rationality and Social Meaning

The effect of regulative rules on the meaning of behaviors has been the focus of expressive approaches to understanding law.²⁷² Law both

²⁶⁷ Id.

²⁶⁸ Id.

²⁶⁹ See Raz, *supra* note 119, at 108.

²⁷⁰ See Kalberg, *supra* note 203, at 1166–67.

²⁷¹ Raz, *supra* note 119, at 108–09, 117.

²⁷² See Richard H. McAdams, *The Expressive Powers of Law: Theories and Limits* (2015) [hereinafter McAdams, *Expressive Powers*]; Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 Va. L. Rev. 1649, 1650–51 (2000) [hereinafter McAdams, *A Focal Point Theory*] (describing how laws can solve coordination problems in altering social norms); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, 2024–25 (1996) (describing ways in which laws can alter norms by affecting how people evaluate behavior); *supra* text accompanying note 210.

regulates and defines behavior,²⁷³ and regulatory rules themselves can redefine behavior by what they express through the way they regulate—that is why imprisonment, for instance, redefines behavior in a different way than fines might.²⁷⁴ But law does not only alter social meaning as a matter of what it expresses—law can alter the social meaning of a practice by virtue of the change in the practice it brings about.²⁷⁵

For example, a ban on smoking in restaurants can alter the social meaning of smoking in several ways. The existence of the ban can express social condemnation of smoking.²⁷⁶ The existence of the ban can also provide information about the wisdom of smoking²⁷⁷—that smoking is dangerous to both the smoker and those around him (much as warning labels do). But the banning of smoking also alters the social meaning of smoking by altering the geography of smoking. Merely providing smoking and non-smoking sections allows both smokers and nonsmokers to coordinate their behavior and reinforce their preferences by segregating themselves from each other.²⁷⁸ An absolute ban goes even further, reinforcing the preferences of nonsmokers and making smoking less apparent. Those of us who have lived through an era of increasing regulation of smoking might be likely to emphasize the expressive effects of smoking regulation, but today's children (at least those growing up in non-smoking households), who are growing up in a world in which smoking in restaurants is uncommon, may simply not witness smokers on a regu-

²⁷³ Fried, *supra* note 187, at 123 (“Since legal relations, then, may be expressive relations, certain rational ends men pursue are partially defined by law.”).

²⁷⁴ Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591, 620 (1996).

²⁷⁵ Thus, I consciously adopt the term “social meaning” to describe the meanings affected by the *substance* (and expressive content) of a rule rather than the “expressive dimension” of a rule, which more precisely describes just its expressive content. Compare Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943, 946–47 (1995) (“It makes sense to speak as if government does not ‘prescribe’ orthodoxy only so long as we ignore the ways in which governments, as well as others, act to construct the social structures, or social norms, or what I will call here, the *social meanings* that surround us.”), with Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 Minn. L. Rev. 1, 3 n.10 (2000) (explaining the distinction between “expressive dimension” and “social meaning” [which] is understood by some readers as calling attention to the effects of laws rather than to their expressive character”).

²⁷⁶ Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 Or. L. Rev. 339, 371–72 (2000); McAdams, *Expressive Powers*, *supra* note 272, at 137.

²⁷⁷ McAdams, *Expressive Powers*, *supra* note 272, at 138; Sunstein, *supra* note 272, at 2035.

²⁷⁸ McAdams, *A Focal Point Theory*, *supra* note 272, at 1718–19.

lar basis, making the behavior less available to them than if they had witnessed it frequently.²⁷⁹

These examples demonstrate that rules can be instrumental to altering social meaning, but they need not be in order to exhibit constitutive rationality. In the United States, it is illegal to “take” a bald eagle, a national symbol of the United States.²⁸⁰ Even if it were found that the statute did not have the effect of increasing the number of bald eagles, or that the statute was unnecessary because bald eagles are not in any serious danger from hunting, prohibiting the taking of bald eagles could exhibit constitutive, if not instrumental, rationality. The act of defining the bald eagle as outside the proper scope of hunting would be a constitutive, value-rational end of the statute.

Of course, many if not most provisions will have a mix of instrumental and constitutive ends. When Congress dropped the prohibition against homosexuals in the U.S. Armed Forces,²⁸¹ it could have had a mix of instrumentalist and constitutive ends. At an instrumental level, Congress may have been seeking to make the armed forces a more effective fighting force by expanding the pool of potential service members or by altering the culture of the armed forces to make them more open to diversity of all kinds. But dropping the exclusion also likely changed the social meaning of what it means to be both a service member and a homosexual in the United States.²⁸² The question is whether one or the other of those ends is either constitutionally privileged or constitutionally prohibited.

²⁷⁹ See Amos Tversky & Daniel Kahneman, Availability: A Heuristic for Judging Frequency and Probability, in *Judgment Under Uncertainty: Heuristics and Biases* 163, 164 (Daniel Kahneman et al. eds., 1982); see also Fried, *supra* note 187, at 124–25 (discussing the effects of the practice of regularly paying one’s taxes).

²⁸⁰ Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 (2012).

²⁸¹ Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3515, 3516 (repealing 10 U.S.C. § 654).

²⁸² See Lessig, *supra* note 275, at 987–88 (“There is a picture of the ‘military man’—a stereotype, no doubt, but extant nonetheless—as the holder of ‘unambiguously male’ virtues (not unambiguous virtues, but unambiguously *male* virtues)—strong, disciplined, emotionless, and (crucially) heterosexual. . . . Homosexuality is perceived to be inconsistent with this image. Again, the point is about perception. . . . [O]pening the ranks of the military to homosexuals would *ambiguate* the social meaning of membership in the military, as well as ambiguate the meaning of being gay for those who hold this stereotypical view.”).

B. Social Meaning as a Governmental Interest

In constitutional law, much of the work in this area emphasizes expressive harms from law or the possibility that equal protection itself requires consideration of the expressive content of laws;²⁸³ by accommodating constitutive rationality as one basis for legal rules, I am making not quite the converse claim of such accounts of the expressive dimension of law. The point is not that one must *account for* expressive effects of law on social meaning but that the definition of social meaning *is itself* a legitimate end—a constitutive end—of legislative action.²⁸⁴

On brief examination, it is easy to uncover any number of ways in which social meaning is a legitimate end of government action. When the government names a building or makes spending decisions,²⁸⁵ it is free to do so in an attempt to affect social meaning. The only real question is as to what form such action can take. Freund distinguished acts of “restraint and compulsion”²⁸⁶ from other forms of state action, which means that we may very well want to treat coercive laws differently from other acts of the state, although if retribution has any constitutional role to play in the criminal law, then it would seem that constitutive ends can be supported by the means of compulsion as well. While I think it is safe to say that support for that proposition is widespread in the law, I will confess that it is intuitively rather than explicitly so. In 2012, the First Circuit confidently announced that “[f]or generations, moral disapproval has been taken as an adequate basis for legislation,” but despite

²⁸³ See Hellman, *supra* note 275, at 2; Richard H. Pildes, Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism, 27 J. Legal Stud. 725, 726 (1998).

²⁸⁴ See Richard H. Pildes & Cass R. Sunstein, Reinventing the Regulatory State, 62 U. Chi. L. Rev. 1, 69–70 (1995) (describing how law affects social meaning); Sunstein, *supra* note 272, at 2032–33 (describing the appropriate use of law to alter social norms by solving collective action problems in norm creation); *id.* at 2035 (use of bans to convey information about the banned activity).

²⁸⁵ In *Maher v. Roe*, 432 U.S. 464, 478 (1977), the Court evaluated Connecticut’s Medicaid spending decision to provide benefits for obstetric care for carrying a child to term but not for nontherapeutic abortion along instrumental rationality lines—the legitimate end being “the State’s strong interest in protecting the potential life of the fetus,” which was acknowledged as potentially compelling in *Roe v. Wade*, 410 U.S. 113, 162–63 (1973). But the Court also recognized the State’s authority “to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds,” *Maher*, 432 U.S. at 474, which suggests a value-rational justification for the spending restriction. See also *Rust v. Sullivan*, 500 U.S. 173, 192–93 (1991) (applying the *Maher* “value judgment” framework to a First Amendment challenge to spending regulation affecting speech).

²⁸⁶ Freund, *supra* note 52, at 3.

“generations” of cases sentencing individuals for violating criminal laws, the court provided no citations for the proposition.²⁸⁷

It is not my enterprise to either describe the limits to which constitutive ends can be used to justify legislation, nor to argue for any particular application of constitutive ends to sustain legislation that otherwise might fail the current, instrumentalist form of rationality review. Rather, my goal is the much more modest one of providing a way for courts to discuss explicitly what they have been doing intuitively for “generations” while realigning the relationship between the Court and legislatures that has shifted as a result of the open-ended, instrumentalist inquiry the Court has undertaken in the post-*Carolene Products* era.

Allowing for constitutive ends raises the question of how the Court can retain its ability to serve as a meaningful check on legislative power without having anything more to rely on than its own value-rationality (which is to say value judgments) regarding legitimate governmental ends. The answer lies in the Court’s approach to its review of enactments pursuant to enumerated powers, an approach it has already adapted to rationality review.

C. Actual Constitutive Ends Review

The difficulty of adjudicating the legitimacy of value-rational, constitutive ends arises largely from the contingent and contested nature of such ends, so the question for equal protection and due process review is how to generate the information necessary to evaluate the legitimacy of particular constitutive ends. One advantage of instrumentally focused rationality review is that instrumental ends are both limited in number and can be inferred from the means chosen. As suggested above, the Court’s primary use of rational means analysis in rationality review is to identify ends, both legitimate and invidious.²⁸⁸ Because value-rational acts cannot be assessed by their likelihood of effecting any particular end, it is not possible for the Court to similarly deduce the ends of a statute that is either primarily or largely constitutive in nature. As with the Bald Eagle Protection Act, it is possible to deduce any number of constitutive ends the statute may seek: to express reverence for fish-eating raptors or perhaps to acknowledge the role the bald eagle has played in inspiring

²⁸⁷ *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 682 F.3d 1, 15 (1st Cir. 2012).

²⁸⁸ See *supra* Subsection II.C.1.

Americans by virtue of its presence on the seals of many federal agencies. At some level of generality, though, the instrumental end is plain: to increase the number of bald eagles.

The best way to obtain information about constitutive ends from legislatures is for the Court to encourage legislatures to include legislative statements of purpose within legislation. Currently, legislatures are actively discouraged from stating their ends in legislation. There is no upside because the conceivable basis approach means that the Court will search for any permissible end, while there is a considerable downside because the statement of an illegitimate end will likely prompt the Court to increase the level of scrutiny until it becomes effectively impossible to satisfy even a purely instrumental form of rationality, as happened in *U.S. Department of Agriculture v. Moreno*.²⁸⁹

The Court can encourage legislatures to include such statements if it alters the calculus of doing so—by giving legislatures deference for *stated* constitutive ends while at the same time refusing to infer unstated, conceivable constitutive ends. Doing so would reflect a recognition on the Court's part of its comparative disadvantage in evaluating value-rational acts, as opposed to marginally more objective instrumental acts. It would also increase the rationality of rationality review by using the legislature's actual reasons as the basis for determining whether the act was reasoned, responding to criticisms of conceivable basis review generally.

Encouraging legislatures to state constitutive ends in legislation would also increase political accountability for ends that are likely to be politically controversial. Like clear statement rules in other contexts where increased political accountability is thought to further constitutional interests,²⁹⁰ a rule favoring clear statements of constitutive ends will encourage increased political discourse²⁹¹ when the legislature is pursuing ends not readily subject to obvious, instrumental justifications.

²⁸⁹ 413 U.S. 528 (1973).

²⁹⁰ On the constitutional function of clear statement rules and their ability to enforce constitutional limits, see William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 *Vand. L. Rev.* 593, 635 (1992).

²⁹¹ See Linde, *supra* note 6, at 230 n.83 (citing Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" — How Long a Time Is That?*, 63 *Calif. L. Rev.* 601, 645–55 (1975)) (arguing for explicit legislative enactments for "policies of major importance or touching sensitive rights").

Those conversations, had in the legislature, will also provide fodder for the Court to not only debate the validity of particular constitutive ends, but also for the Court to develop concepts applicable in heightened scrutiny. For instance, a ruling that a particular constitutive end is illegitimate is tantamount to concluding that defining a particular aspect of social meaning is beyond the legislature's control. If so, then status or conduct associated with that social meaning may very well deserve protection as a fundamental right, and the Court can more clearly do so (as it has in the context of its modern fundamental rights jurisprudence) if it has explicitly stated legislative ends to rule upon.

CONCLUSION

Although at first blush the rational basis test presents itself as both uncontroversial and judicially modest, it is neither. By evaluating legislation for its rationality, the Court has imposed upon lawmakers a very specific, if largely uncontroversial, form of legislative decision-making: a means-ends approach. The Court's application of means-ends rationality could remain coherent only to the degree that there is a consensus to the appropriate ends of state regulation. In the years prior to *Carolene Products*, that consensus existed in the form of the Court's conception of the police power, but when the Court attempted to distance itself from substantive due process review in *Carolene Products*, it jettisoned the police-power basis for its earlier rulings. *Carolene Products'* rejection of a substantive vision of judicial review created a vacuum: a rejection of substantive review associated with *Lochnerism* but without a replacement understanding of legitimate governmental ends. The instrumental structure of means-ends rationality eventually led the Court (prompted by risk-averse litigants who are required not to describe the actual basis for legislation but any qualifying basis) to fill that vacuum with a utilitarian conception of legitimate governmental ends, extending the instrumental rationality inherent in means-ends review to the ends themselves, an unconscious and unexamined extension of instrumental rationality to all aspects of rationality review and (because of rationality review's universal applicability) to all aspects of legislation.

The inability of the instrumental rationality applied by the Court to accommodate many legitimate governmental interests we take as given has driven the Court to simply ignore a host of governmental ends and to re-state them in utilitarian terms. Many laws can be upheld on utilitarian bases without inquiring into their normative or expressive content, and

so the Court has been able to largely avoid difficult questions of the reach of government power by agreeing on a set of uncontroversial utilitarian ends by which to evaluate legislation under the rational basis test.

One solution to rationality review's limitations would be to reject it wholesale, but it is virtually inconceivable that the Court is going to cease conducting general substantive review of state and federal laws—a practice it has been conducting for almost 200 years. Instead of rejecting rationality review, we should expand the Court's conception of legitimate ends to include noninstrumental ends—constitutive ends—that account for law's ability to define and shape social understandings. Recognizing the existence of constitutive ends within rationality review does not necessarily answer difficult normative questions about the reach of government power, but it does provide a language for doing so. By insisting that the Court recognize that much of what legislatures do is not instrumental in nature, we can engage the Court and legislatures in an honest, and decidedly more rational, dialogue about the proper scope of state power.