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PHOTOGRAPHING THE GHOST OF *LOCHNER*: WHY ORIGINALISM AND ECONOMICS DON'T MIX

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Introduction

The Roberts Court's emphasis on history has led to speculation about resurrection of *Lochner*, based on concepts of "economic liberty" from the late Eighteenth Century.[1] And those ideas have allure: "For more than two centuries, economic opportunity and the prospect of upward mobility have formed the bedrock upon which the American story has been anchored . . . ."[2]

That said, the appeal of those ideas must be measured against reality—the fact that modern-day economics did not truly exist until the Twentieth Century.[3] Because of insights from that discipline, we now know that the Founders' "economic liberty" was part of a far more diverse and complex reality than they knew or even suspected.[4]

In a rare opinion striking down a state economic regulation under rational-basis review, the U.S. Court of Appeals for the Fifth Circuit recently assured: "Nor is the ghost of *Lochner*

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[1] *See infra* Part II.

[2] Isabel V. Sawhill & John E. Morton, *Economic Mobility: Is the American Dream Alive and Well?*, BROOKINGS RSCH. (May 1, 2007), https://www.brookings.edu/articles/economic-mobility-is-the-american-dream-alive-and-well/.

[3] *See infra* Part III.

[4] *See id.*

lurking about."[5] Consistent with that reassurance, this essay argues that the Roberts Court's most recent history-based opinions warn against continued flirtation with *Lochner*. The essay likens those opinions to photographs, intended to capture both modern laws and historic analogs, and argues that such photos should be avoided when a good image of both subjects can't meaningfully be captured.

I. Photographing History

History is central in how the Roberts Court interprets the Constitution. Full discussion of that Court's history-focused opinions—part of its commitment to "originalism"—could fill volumes.[6] This section has a more modest goal: to identify landmarks from the Supreme Court's most recent cases about history, and by so doing, attempt to helpfully frame modern-day discussion of *Lochner*.

Towards that end, this section borrows a concept from photography. When a photographer chooses to include two subjects in an image, instead of one, that choice can add depth and nuance to the photographed scene.[7] But that choice is not without risk. Adding the second subject adds technical complexity that can derail the overall effectiveness of the image with problems of composition and camera focus.[8] The two-subject image only works if both parts of it are clear and understandable.

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[5] St. Joseph Abbey v. Castille, 712 F.3d 215, 226–27 (5th Cir. 2013).

[6] *See generally* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777 (2022) (describing the methodology of originalism and making reference to modern cases relying on the doctrine).

[7] Ian Plant, *Photo Composition Tip: It Takes Two*, OUTDOOR PHOTOGRAPHY GUIDE (March 15, 2017), https://www.outdoorphotographyguide.com/post/photo-composition-tip-takes-two/.

[8] Eric Kim, *Street Photography Composition Lesson #13: Multiple-Subjects*, ERIC KIM PHOTOGRAPHY (Dec. 16, 2013), https://erickimphotography.com/blog/2013/12/16/street-photography-composition-lesson-13-multiple-subjects/.

This idea captures the basic requirement for an effective analogy: it must try to compare two similar things.[9] And it adds an additional feature, drawn from the long and sketchy history of "ghost photography."[10] If part of an image isn't clear, personal bias can encourage both viewer and photographer to see things in the picture that really aren't there.[11] The infamous "face on Mars" photo from NASA is a modern-day extension of that phenomenon.[12]

With that "photo" concept as its starting point, this essay next examines four cases from the Supreme Court's 2023–24 term that turned on historical comparison. The essay then groups them in three categories: (a) clear picture; (b) picture in need of adjustment; and (c) "picture fail," where no meaningful image appeared.

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[9] *See* Cass R. Sunstein, *Analogical Reasoning* 4 (Harv. L. Sch., Harvard Pub. L. Working Paper No. 21-39, 2021), https://papers.ssrn.com/sol3/papers.cfm abstract_id=3938546 (stating that an effective analogy requires (1) a subject with a specific characteristic or characteristics, and (2) a second object that "shares that characteristic or some or all of those characteristics"); *see also* Paul Bartha, *Analogy and Analogical Reasoning*, STAN. ENCYC. PHIL. (2019), https://plato.stanford.edu/entries/reasoning-analogy/#AriThe (describing theories of analogies throughout history).

[10] Joe Nickell & Kenny Biddle, *So You Have a Ghost in Your Photo*, 44 SKEPTICAL INQUIRER (2020), https://skepticalinquirer.org/2020/06/so-you-have-a-ghost-in-your-photo/.

[11] *Id.* ("Although science has never authenticated a single ghost, spirits of the dead have posed for elaborate studio portraits, strolled casually into mundane photographic scenes, and darted into the snapshots of hopeful ghost hunters—or so it seems.").

[12] Phil Plait, *The Face on Mars and Other Cases of Cosmic Pareidolia*, SCI. AM. (June 28, 2024), https://www.scientificamerican.com/article/the-face-on-mars-and-other-cases-of-cosmic-pareidolia/.

A. Clear Picture

SEC v. Jarkesy[13] arose when the U.S. Securities and Exchange Commission ("SEC") began an enforcement action against George Jarkesy and a fund that he managed, alleging violations of the federal securities-fraud statutes.[14] The SEC wanted to proceed with the case before an internal administrative law judge, but Jarkesy argued that the Seventh Amendment entitled him to a jury trial in an Article III court to resolve the SEC's claims.[15]

Under a long-standing test, federal courts implement the Seventh Amendment with a history-focused test that asks whether a claim is "legal in nature"—in other words, whether the claim resembles a recognized common-law claim when this Amendment was ratified.[16] Applying that test, the *Jarkesy* Court noted that a claim for money damages was customarily tried to a jury in the 1790s,[17] and the civil-penalty remedy sought by the SEC was directly analogous to such a claim.[18] Also, the substance of today's securities laws was derived from the elements of common-law fraud.[19] A jury trial was thus required.[20]

Jarkesy gives an example of a clear picture that allows a meaningful comparison of past and present. The statutes sued upon by the SEC were well-known and easily described, as were

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[13] 144 S. Ct. 2117 (2024).

[14] *Id.* at 2124–25.

[15] *Id.* at 2127.

[16] *Id.* at 2128 (citing, *inter alia*, Curtis v. Loether, 415 U.S. 189, 193–94 (1974)).

[17] *Id.* at 2129.

[18] *Id.*

[19] *Id.* at 2130 ("Congress's decision to draw upon common law fraud created an enduring link between federal securities fraud and its common law 'ancestor.'").

[20] *Id.* at 2131; *see also id.* at *2132–34 (rejecting the SEC's argument for application of the "public rights" exception to the Seventh Amendment).

the historic principles about money damages and common-law fraud liability.

B. Potentially Clear Picture

Like *Jarkesy*, the next two cases from the 2023–24 Supreme Court term turned on the comparison of past and present laws. But unlike *Jarkesy*, where the Supreme Court and Court of Appeals agreed about the content of the historic law, in these cases those courts differed about the correct level of generality at which to view the historic laws. Those differing perspectives illustrate the importance of properly focusing the image of the two laws under consideration in a historical analysis.

1. In *CFPB v. CFSA*,[21] the plaintiff argued at the Fifth Circuit that the CFPB's funding mechanism was "double insulated" from the Congressional appropriations process.[22] The Fifth Circuit accepted the plaintiff's argument that this mechanism violated the Appropriations Clause of the Constitution.[23]

The Supreme Court disagreed, concluding that the Appropriations Clause only requires Congress to authorize "expenditures from a specified source of public money for designated purposes."[24] The Court then identified several "flexible" funding schemes in the country's early years, such as fee-based funding for the newly created Customs Service,[25] and held that those

[21] Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416 (2024) [hereinafter *CFPB*].

[22] Cmty. Fin. Servs. Ass'n of Am., Ltd v. Consumer Fin. Prot. Bureau, 51 F.4th 616, 623 (5th Cir. 2022).

[23] *Id.* at 635–38 (reviewing U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.")).

[24] *See CFPB*, 601 U.S. at 424.

[25] *Id.* at 432–35.

historic devices were enough like the CFPB's funding mechanism to satisfy the Appropriations Clause.[26]

2. *United States v. Rahimi*[27] began when a state court issued a restraining order against Zackey Rahimi, finding that he posed a threat to the safety of his former girlfriend and their child.[28] Prosecutors then charged him under federal law for possessing a firearm while subject to a domestic violence restraining order.[29]

Relying on the history-focused test established by *New York State Rifle & Pistol Association, Inc. v. Bruen*,[30] Rahimi challenged the law as violating the Second Amendment. The Fifth Circuit agreed with him and rejected the government's analogies to historic laws that could restrict the ability to "go armed" in the countryside or require a surety bond as a condition for carrying a firearm.[31]

The Supreme Court saw the historical laws differently. It observed that "the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed."[32] The Court acknowledged that the federal firearms statute was by no means identical to these founding era regimes, but did not need to be, because only a "historical analogue" is required, rather than a "historical twin."[33] Accordingly, it held that Rahimi could be prosecuted.[34]

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[26] *Id.* at 435.

[27] United States v. Rahimi (*Rahimi I*), 61 F.4th 443 (5th Cir. 2023).

[28] *Id.* at 449.

[29] *Id.*

[30] 597 U.S. 1 (2022).

[31] *Rahimi I*, 61 F.4th at 457–60; *see also id.* at 456–57 (rejecting an additional historical set of laws about disarming certain "dangerous" people).

[32] United States v. Rahimi (*Rahimi II*), 144 S. Ct. 1889, 1901 (2024).

[33] *Id.* at 1901, 1903 (internal quotations omitted).

[34] *Id.* at 1902.

In both cases, today's laws—the CFPB's funding mechanism and the federal firearms statute under which Rahimi was charged—were in clear focus. And the relevant past laws—funding mechanisms and firearms laws—were well established by the historic record. The challenge in creating an effective overall image was the appropriate level of magnification to apply to those historic laws—and how to optimally adjust the image before the judges.

C. No Picture Possible

A preview of the fourth case appeared in the Supreme Court's 2014 opinion in *Riley v. California*,[35] which addressed a Fourth Amendment issue about the seizure of a smart phone. *Riley* aptly summarized the challenge of applying precedent to new technologies:

> These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy. A smart phone of the sort taken from Riley was unheard of ten years ago; a significant majority of American adults now own such phones.[36]

Accordingly, "[a]bsent more precise guidance from the founding era," the Court applied a balancing test that compared individual and government interests, and ultimately held in favor of suppression of the evidence from the phone.[37]

Riley's direct influence has been limited to Fourth Amendment issues.[38] But the underlying problem that it addressed—the

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[35] 573 U.S. 373 (2014).

[36] *Id.* at 385.

[37] *Id.* at 358–56.

[38] *See* Carpenter v. United States, 138 S. Ct. 2206, 2211–12 (2018) (adjudicating a Fourth Amendment dispute about 127 days of historical "cell-site location information"); Birchfield v. North Dakota, 579 U.S. 438, 461 (2016) ("Blood and breath tests to measure BAC are not as new

inability to meaningfully compare past and present—is what led to *Moody v. NetChoice*[39] in the 2023–24 Supreme Court term.

During 2021, Texas and Florida enacted sweeping laws about large social-media companies. Both states' laws "limit[ed] the platforms' capacity to engage in content moderation" and "require[d] a platform to provide an individualized explanation to a user if it removes or alters her posts."[40]

The Eleventh Circuit affirmed an injunction against Florida's laws,[41] while the Fifth Circuit reversed a similar injunction.[42] History was central to the Fifth Circuit's analysis, which emphasized the absence of a "prior restraint," as understood in the late Eighteenth Century,[43] as well as "half a millennium" of authority about the concept of a "common carrier"—a business such as a transportation service or a hotel that has a duty to serve the general public.[44] Because the Texas laws weren't a prior

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as searches of cell phones, but here, as in *Riley*, the founding era does not provide any definitive guidance as to whether they should be allowed incident to arrest."); *see also* Kyllo v. United States, 533 U.S. 27, 33–34 (2001) (concluding, pre-*Riley*, that thermal imaging of a home was a Fourth Amendment "search," and observing: "It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."); *see generally* Frank Chambers, *An Ongoing Seizure: The Struggle to Uniformly Protect Fourth Amendment Interests from Unreasonable Searches of Legally Seized Digital Data*, 61 HOUS. L. REV. 153 (2023) (summarizing *Riley*'s influence over time).

[39] 144 S. Ct. 2383 (2024).

[40] *Id.* at 2393.

[41] NetChoice, LLC v. Att'y Gen. ("*Florida NetChoice Case*"), 34 F.4th 1196, 1203 (11th Cir. 2022).

[42] NetChoice, LLC v. Paxton ("*Texas NetChoice Case*"), 49 F.4th 439, 445–47 (5th Cir. 2022).

[43] *Id.* at 453–54.

[44] *Id.* at 469–73. *Cf. Florida NetChoice Case*, 34 F.4th at 1220 ("[I]n point of fact, social-media platforms are not—in the nature of things, so to speak—common carriers.").

restraint, and were consistent with historical regulation of common carriers, they were constitutional.

The Supreme Court reversed and remanded both circuit decisions, focusing on the fact that NetChoice brought a facial First Amendment challenge. That kind of challenge asks whether "a substantial number of the law's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[45] Because the parties had focused on "certain heartland applications" of the laws (primarily, content moderation of Facebook's and YouTube's main feeds), they had not fully cataloged all the things that the laws did, much less how the First Amendment protected them.[46] In other words, a meaningful picture that compared past and present wasn't possible. The potential relevance of common-carrier regulation was an issue for another day when the picture was clearer.[47]

However, like in *CFPB* and *Rahimi*, the Court did decide one key issue, using history to reject Texas's claimed interest in regulating Facebook and YouTube's user feeds. Acknowledging that the technology was new, the Court held that the controlling principle was still clear—the government could not tell private actors what to say.[48]

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[45] Moody v. NetChoice, 144 S. Ct. 2383, 2397 (2024) (quoting Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2372, 2390 (2021)) (cleaned up).

[46] *Id.*

[47] *See id.* at 2413 (Thomas, J., concurring) ("[T]he same factual barriers that preclude the Court from assessing the trade associations' claims under our First Amendment precedents also prevent us from applying the common-carrier doctrine in this posture.").

[48] *Id.* at 2399 (majority opinion) ("Despite the relative novelty of the technology before us, the main problem in this case—and the inquiry it calls for—is not new."); *id.* at 2403 ("'[W]hatever the challenges of applying the Constitution to ever-advancing technology, the basic principles' of the First Amendment 'do not vary.'") (quoting Brown v. Ent. Merchs. Assn., 564 U.S. 786, 790 (2011)) (alteration in original).

Moody is a counterpoint to *Jarkesy*, where both present and past were clear to both the Supreme Court and Courts of Appeals. Other than the issue of Texas's regulatory interest, too much of the picture was missing to allow a meaningful comparison of past and present.[49]

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The Roberts Court has used history in many other cases,[50] and the question of how to structure a proper historic analogy is complex and subtle.[51] But case holdings are the bedrock of a system based on precedent,[52] and the structure of these holdings provides some straightforward and simple landmarks about the effective use of history in constitutional interpretation.

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[49] This is a recurring phenomenon. *See, e.g.*, Health & Hosp. Corp. v. Talevski, 599 U.S. 166, 179 (2023) ("Something more than ambiguous historical evidence is required before we will flatly overrule a number of major decisions of this Court.") (quoting Gamble v. United States, 587 U.S 678, 691 (2019)) (cleaned up).

[50] *See, e.g.*, *Haaland v. Brackeen*, 599 U.S. 255, 289–90 (2023) (reviewing history of anti-commandeering issues); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 242–50 (2022) (reviewing history of anti-abortion laws); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 33 *et seq.* (2022) (reviewing history of laws related to firearm-licensing requirements). *But see* Eric Segal, *An Originalism Scorecard Since Justice Barrett Arrived on the Court: Living Constitutionalism is Way Ahead*, DORF ON LAW (Dec. 20, 2023), https:///www.dorfonlaw.org/2023/12/an-originalism-scorecard-since-justice.html (reviewing case holdings to argue "how little originalism actually drives the Roberts Court").

[51] *See* Sunstein, *supra* note 9, at 51–64 (summarizing the approaches of various legal philosophies to analogies).

[52] *See, e.g.*, David S. Coale, Essay, *A Common Law for the Age of Amici: How the Party-Presentation Principle Can Help Identify Binding Precedent*, 109 CORNELL L. REV. ONLINE 1, 2–3 (2024), https://www.cornelllawreview.org/2024/05/01/a-common-law-for-the-age-of-amici-how-the-party-presentation-principle-can-help-identify-binding-precedent/.

II. *Lochner* Reawakens

The "*Lochner* era" in constitutional law ran from the late nineteenth century to 1937.[53] During that time, the Supreme Court used the Fourteenth Amendment's guarantee of substantive due process to invalidate dozens of state laws as infringements on economic liberties.[54]

The era is named for the Court's 1905 opinion in *Lochner v. New York*.[55] That case struck down a work-hours limit for bakers, reasoning that "[s]tatutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual."[56]

The Supreme Court abandoned *Lochner* in the 1930s[57] when the Court faced significant backlash against its repeated invalidation of New Deal economic programs—a change often called the "switch in time that saved nine," given President Roosevelt's aggressive plans to add Justices to the Court if it did not change its review of economic regulation.[58]

Since the abandonment of *Lochner*, federal courts have reviewed economic regulation with a highly deferential standard.[59]

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[53] *See* Matthew J. Lindsay, *"In Search of 'Laissez-Faire Constitutionalism"*, 123 HARV. L. REV. F. 55, 55 (2010).

[54] *See id.* at 55–56.

[55] 198 U.S. 45 (1905).

[56] *Id.* at 61.

[57] *See* Lindsay, *supra* note 53, at 55 ("Scholars generally agree that this so-called '*Lochner* era' continued until 1937, when the New Deal Court finally relaxed constitutional scrutiny of police regulations, thus setting the state legislatures free.") (citing W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding the constitutionality of a minimum wage law)).

[58] *See* John Q. Barrett, *Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll Save Nine"*, 73 OKLA. L. REV. 229, 230–31 (2021).

[59] *See, e.g.*, Armour v. City of Indianapolis, 566 U.S. 673, 680 (2012) ("'[A] classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause

The standard is not entirely toothless, as shown by the Fifth Circuit case cited at the start of this essay, which held that a Louisiana law that barred a monastery from making burial caskets had no rational purpose when no state law actually required burial in a casket.[60] And a smattering of cases have examined the constitutional limits of professional licensing rules.[61] But those cases are the exceptions, and the vast majority of state economic regulations survive constitutional scrutiny under rational-basis review.

That background sets the stage for the 2022 case of *Golden Glow Tanning Salon, Inc. v. City of Columbus*.[62] The Fifth Circuit rejected a tanning salon's constitutional challenge to a Mississippi town's COVID-19 restrictions, holding that the town had a plausible reason for the public-health law and thus satisfied rational-basis review.[63]

Judge James Ho went a step further in a concurrence. He noted that when the Supreme Court overruled *Roe v. Wade*[64] earlier that year, it focused on rights that are "deeply rooted in this Nation's history and tradition."[65] Applying that focus to

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if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.' . . . [W]here 'ordinary commercial transactions' are at issue, rational basis review requires deference to reasonable underlying legislative judgments.") (first quoting Heller v. Doe, 509 U.S. 312, 319–20 (1993), and then quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938)).

[60] St. Joseph Abbey v. Castille, 712 F. 3d 215, 223–27 (5th Cir. 2013).

[61] *Compare* Hines v. Quillivan, 982 F.3d 266, 274–76 (5th Cir. 2020) (finding several rational bases for a Texas law that differentiated between doctor and veterinarian usage of telemedicine) *with id.* at 276 (Elrod, J., concurring in part and dissenting in part) (arguing that the state "failed to demonstrate a rational basis" for this legislation).

[62] 52 F.4th 974 (5th Cir. 2022).

[63] *Id* at 979–80.

[64] 410 U.S. 113 (1973).

[65] *See* Golden Glow Tanning Salon, 52 F.4th at 982 (Ho, J., concurring) (first quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997), and

economic regulation, he suggested, could involve the consideration of Eighteenth Century thinking about the "right to earn a living," and lead to less deference to laws that are claimed to interfere with economic liberty.[66]

Quoting the *Lochner*-era case of *Truax v. Raich*,[67] Judge Ho's opinion is obviously provocative. In tandem with a more general exploration of economic liberty by now-Judge Don Willett when he was on the Texas Supreme Court,[68] it has stimulated some direct scholarly commentary[69] and highlights a broad and expanding body of scholarship that has noted the potential for history-focused courts to re-examine *Lochner*.[70]

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then citing Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242, 2246 (2022)).

[66] *See id.* at 982–84 (noting, *inter alia*, that "Parliament enacted the Statute of Monopolies in 1623").

[67] 239 U.S. 33 (1915).

[68] Patel v. Tex. Dep't of Licensing & Regul., 469 S.W.3d 69, 92–93 (Tex. 2015) (Willett, J., concurring) ("What *are* the outer-boundary limits on government actions that trample Texans' constitutional right to earn an honest living for themselves and their families?").

[69] *See, e.g.*, Arif Panju et al., *"Every Safeguard Known to Constitutional Law": The History and Tradition of Economic Liberty in Texas*, 28 TEX. REV. L. & POLS. 177, 232 (2023) (acknowledging *Golden Glow* as explaining that "'the right to earn a living' requires meaningful judicial protection because it has 'deep roots in our Nation's history and tradition'"); Jeffrey S. Sutton, *21st Century Federalism: A View from the States*, 46 HARV. J. L. & PUB. POL'Y 31, 35 & n.14 (2023) (crediting *Golden Glow* as "suggesting there is more historical support for a federal right to earn a living than many substantive due process rights that the federal courts recognize"); *see also* Alexander T. MacDonald, *Originalism, Social Contract, and Labor Rights: What the Reawakening of Natural Law Means for Exclusive Union Representation*, 99 N.D. L. REV. 27, 31 & n.12 (2024).

[70] *See generally, e.g.,* Wilson Huhn, *Another Lochner Era?*, 62 DUQUESNE L. REV. 345 (2024); David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 YALE L.J. F. 287 (2016); Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527 (2015).

III. Why *Lochner*'s Ghost Can't Be Photographed

When Adam Smith published *The Wealth of Nations* in 1776, he introduced the powerful metaphor of an "invisible hand" that guided free economic activity in efficient ways.[71] His work was well known to the drafters of the Constitution and significantly influenced the economic policy of the young United States.[72]

But Eighteenth-Century enthusiasm for Smith's metaphor is not the same as Twenty-First Century understanding about how the "invisible hand" works—and how it can fail.[73] Three particular topics illustrate that gap: (1) development of the basic analytic tools used by modern economics; (2) development of the accepted economic reasons to regulate; and (3) development of schools of thought within economics about how to best implement those tools and rationales in government policy.

1. Basic Concepts. We understand today that "[i]n any market transaction between a seller and a buyer, the price of the good or

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[71] ADAM SMITH, 4 AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, VOL. II 35 (1776) ("[E]very individual . . . neither intends to promote the public interest, nor knows how much he is promoting it. . . . [H]e intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.").

[72] *See generally, e.g.*, GLORY M. LIU, ADAM SMITH'S AMERICA: HOW A SCOTTISH PHILOSOPHER BECAME AN ICON OF AMERICAN CAPITALISM (2022); ROY C. SMITH, ADAM SMITH AND THE ORIGINS OF AMERICAN ENTERPRISE: HOW THE FOUNDING FATHERS TURNED TO A GREAT ECONOMIST'S WRITINGS AND CREATED THE AMERICAN ECONOMY (2004).

[73] *See* Paul J. McNulty, *A Note on the History of Perfect Competition*, 75 J. POL. ECON. 395, 395 (1967) (observing that "the Smithian concept of competition was of a fundamentally different character than that which was later perfected by economic theorists").

service is determined by supply and demand."[74] And we can explain that price-setting process by examining the interaction of supply and demand curves—"[u]ndoubtedly the simplest and most frequently used tool of microeconomic analysis."[75] But those concepts weren't fully developed until Alfred Marshall described each as "one blade of a pair of scissors" in his 1890 landmark, *Principles of Economics*.[76]

We also know how supply and demand curves interact to produce an efficient price. Under the right conditions, when businesses compete to sell goods and services to consumers, an efficient price results and efficient resource allocation follows (and absent those conditions, there's no guarantee of those efficient outcomes). Those conditions are called the criteria for "perfect competition."[77] The groundwork for this concept was established by scholar Leon Walras in the late 1890s and was developed quickly thereafter.[78]

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[74] Irena Asmundson, *Supply and Demand: Why Markets Tick*, IMF FIN. & DEVEL. MAG., imf.org/en/Publications/fandd/issues/Series/Back-to-Basics/Supply-and-Demand (last visited July 8, 2024).

[75] Thomas M. Humphrey, *Marshallian Cross Diagrams and Their Uses Before Alfred Marshall: The Origins of Supply and Demand Geometry*, 78 FRB RICHMOND ECON. REV. 3, 3 (1992).

[76] ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 535 (1st ed. 1890); *see also* Patrick Julius, *The Scissors of Supply and Demand*, HUM. ECON. (Oct. 3, 2015), https://patrick.juli.us/2015/10/03/the-scissors-of-supply-and-demand/ (explaining Marshall's contribution to the scholarly discussion of this topic); Humphrey, *supra* note 75, at 4 *et seq.* (describing Marshall's predecessors on this topic earlier in the 1800s).

[77] *See* Asmundson, *supra* note 74 ("Economists have formulated models to explain various types of markets. The most fundamental is *perfect competition*, in which there are large numbers of identical suppliers and demanders of the same product, buyer and sellers can find one another at no cost, and no barriers prevent new suppliers from entering the market. In perfect competition, no one has the ability to affect prices.").

[78] *See generally* Kenneth J. Arrow & Gerard Debreu, *Existence of an Equilibrium for a Competitive Economy*, 22 ECONOMETRICA 265 (1954) (building off

2. Reasons to Regulate. Economics entered the Twentieth Century with an understanding of what free markets did and why. But the economic case for government regulation was yet to be written. Consider three common justifications for economic regulation: externalities, information asymmetry, and imperfect competition.[79] None of those reasons were fully understood—if at all—until the Twentieth Century.

An "externality" arises from a transaction's collateral effects on strangers to that transaction.[80] For example, even if the buyer and seller of electricity generated by an energy plant reach a fair price, pollution from the plant may impose costs on neighbors that the sale doesn't account for.[81] Arthur Pigou fully developed this concept in the 1920s and noted how it augmented Eighteenth-Century ideas:

> Adam Smith had not realised fully the extent to which the System of Natural Liberty needs to be qualified and guarded by special laws, before it will promote the most productive employment of a country's resources.[82]

Another example of regulating an externality is the shutdown order in *Golden Glow*, discussed above. The gathering of people in the plaintiff's tanning salon risked imposing costs (infection)

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the work of Walras and presenting the analysis that is largely credited as fully developing the perfect-competition criteria).

[79] *See, e.g.*, OSHA, *Market Failure and the Need for Regulation*, Docket No. 2010-0034-4247, at II-4 (2010) [hereinafter "OSHA"].

[80] *See, e.g.*, E. Donald Elliott & Daniel C. Esty, *The End Environmental Externalities Manifesto: A Rights-Based Foundation for Environmental Law*, 29 N.Y.U. ENV'T L.J. 505, 523 *et seq.* (2021) (describing the evolution of externality-based justifications for economic regulation); OSHA, *supra* note 79, at II-8.

[81] *Externalities of Electricity Generation*, WORLD NUCLEAR ASS'N (May 2, 2024), https://world-nuclear.org/information-library/economic-aspects/externalities-of-electricity-generation.

[82] ARTHUR C. PIGOU, THE ECONOMICS OF WELFARE 128 (4th ed. 1932).

on people not involved in the sale or purchase of the salon's services.[83]

Information asymmetry arises when all the participants in a market don't know the relevant facts. While that seems intuitive, the specific problems that it creates weren't fully developed in economic literature until 1970, in George Akerlof's landmark essay about the market for "lemon" cars.[84] He would win the Nobel Prize for that work in 2001, along with two other scholars building on his insights in other areas affected by information asymmetry.[85]

Issues about market power arise when the conditions for perfect competition, as discussed above, either don't or can't exist in a particular marketplace. While the Sherman Act was enacted in 1890, its economic underpinnings took decades more to develop, and weren't fully explored in the case law until well into the Twentieth Century.[86] And while "anti-monopoly" laws were well known to the Founders, what those laws addressed—royal decrees that drastically limited the practice of certain trades[87]—had nothing to do with economic analysis.

3. Schools of Thought. With the development of economic technique and its applications came serious thinking about the

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[83] *See* Peter T. Leeson & Louis Rouanet, *Externality & COVID-19*, 87 S. ECON. J. 1107, 1108 (2021) ("In the context of infectious disease, behaviors that may create externalities are those that affect other people's risk of infection.").

[84] *See generally* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970); *see also* Jonathan Levin, *Information and the Market for Lemons*, 32 RAND J. ECON. 657, 657 (2001) (describing the significance of Akerlof's work).

[85] *See* All Prizes in Economic Sciences, THE NOBEL PRIZE, https://www.nobelprize.org/prizes/lists/all-prizes-in-economic-sciences/ (last visited July 4, 2024).

[86] *See generally* GEORGE L. PRIEST, THE RISE OF LAW AND ECONOMICS: AN INTELLECTUAL HISTORY (2020).

[87] *See* Golden Glow Tanning Salon, Inc. v. City of Columbus, 52 F.4th 974, 982–84 (5th Cir. 2022) (Ho, J., concurring).

overall strategy for, and philosophical implications of, those technical matters. All of that work is of recent vintage.

From the left, the argument for strong fiscal policy was not fully developed until John Maynard Keynes published *The General Theory of Employment, Interest, and Money* in 1936.[88] From the right, Milton Friedman's epic *Monetary History of the United States* was published in 1963.[89] Indeed, the awarding of an annual Nobel Prize in "economic science" did not start until 1969.[90]

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The English economist Joan Robinson gracefully described her work as creating a "box of tools" for policymakers.[91] But neither that toolbox, nor the tools in it, existed in 1791 when the Constitution was ratified.

To be sure, the concept of "economic liberty" was widely recognized, and trailblazing thinkers began adding material details to that concept early in the Nineteenth Century. But for any issue involving serious economic analysis, particularly as to economic regulation, there is simply no historic analog. On that topic, the "invisible hand" is just a disembodied body part of no particular use.[92]

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[88] *See* STEPHEN A. MARGLIN, RAISING KEYNES: A TWENTY-FIRST-CENTURY GENERAL THEORY 50 (2021) (acknowledging that "[t]he mainstream may have had the wrong [economic] theory and lacked a clear exposition" prior to the publication of *The General Theory*).

[89] *See* Robert L. Hetzel, *The Contributions of Milton Friedman to Economics*, 93 FED. RESERVE BANK OF RICHMOND ECON. Q. 1, 14 (2007).

[90] *See* THE NOBEL PRIZE, *supra* note 85.

[91] JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 1 (2d ed. 1969) ("Among persons interested in economic analysis, there are tool-makers and tool-users.") (internal citations omitted).

[92] *See Thing (The Addams Family)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Thing_(The_Addams_Family) ("The Addamses called it "Thing" because it was something that could not be identified, being originally an unseen creature in the original cartoons but starting with the live-action television series it was settled to be a

And the issue is more hazardous than a mere lack of source material. As shown by *CFPB* and *Rahimi*, historical comparison can go the wrong way if it proceeds in a flawed framework. The temptation to tease meaning out of historical trivia leads directly to the "ghost photography" problem described at the start of this essay—seeing what you want in a picture simply because that's what you want to see. That's a poor way to craft legal precedent.

Conclusion

The 2023–24 Supreme Court term provided four examples of constitutional decision-making based on comparison of a present law with its historical antecedent. Those cases illustrate a straightforward comparison (*Jarkesy*), an attempted comparison that failed (*Moody*), and comparisons where the past was easy to see but hard to clarify (*CFPB* and *Rahimi*).

All those cases caution against history-based enthusiasm for revisiting *Lochner*. Economics is a new field. For most issues involving government regulation, there is no meaningful comparison to make between present laws and the world of 1791. Given that reality, straining to make comparisons is more likely to lead to outcomes based on observer bias rather than valid legal principles.

disembodied hand.") (last visited July 3, 2024); *see also, e.g.*, *Daniel 5:5* (New International) ("Suddenly the fingers of a human hand appeared and wrote on the plaster of the wall . . . .").