A BALANCING ACT: PUBLIC HEALTH, COVID-19, AND THE ECONOMIC DUE PROCESS "RIGHT TO WORK"

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ABSTRACT

During the infamous Lochner *era (1897–1937), courts invalidated hundreds of regulatory measures on economic liberty grounds, doing untold damage to public health. Two vehicles have recently emerged by which the Supreme Court could re-enter this long-dead line of "economic due process" jurisprudence: first, via challenges to particularly burdensome professional licensing requirements; and second, via challenges to business closure orders resulting from the COVID-19 pandemic. This article concludes that the Supreme Court's re-entry into the "right to work" conversation, albeit unlikely, could help prevent certain unduly burdensome licensing requirements from surviving simply on protectionist grounds. Nonetheless, to protect the public's health, the Court must avoid a full return to* Lochner.

INTRODUCTION

"The context of people's lives determine[s] their health."[1] The World Health Organization's simple statement contextualizes determinants of health, or the "things that make people healthy or not."[2] These determinants can be generalized as certain factors within an individual's physical, social, and economic environments which influence health outcomes.[3] Employment is one such key determinant.[4] Economic security and additional benefits arising

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1 *Determinants of Health*, WORLD HEALTH ORG. (Feb. 3, 2017), https://www.who.int/news-room/q-a-detail/determinants-of-health.

2 *Id.*

3 *Id.*

4 Per the U.S. Department of Health and Human Services, "social determinants of health" are "the conditions in the environments where people are born, live, learn, work, play, worship, and age that affect a wide range of health, functioning, and quality-of-life outcomes and risks." *Social Determinants of Health*, U.S. DEP'T OF

from employment, including health insurance, improve health access for individuals,[5] while unemployment can negatively impact mental and physical health, causing stress, anxiety, and other complications.[6] Moreover, workers in low-paying jobs generally may work longer hours or take on additional jobs to make ends meet, further increasing stress levels and impacting health.[7]

Obtaining a job in a professional field presents additional intricacies. The path towards professional employment is often locked behind state occupational licensing schemes, as doctors, lawyers, pharmacists, and more all must obtain state licenses before they can lawfully practice.[8] State licensing schemes exist in large part to protect the public by ensuring that only qualified individuals can provide relevant services.[9] Nevertheless, overly restrictive requirements can operate as barriers to entry.[10] Individuals seeking to challenge these barriers may raise substantive due process arguments (i.e., arguments that the government is not justified in interfering with life, liberty, or property interests),[11] alleging that overly

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HEALTH & HUM. SERVS., OFF. OF DISEASE PREVENTION & HEALTH PROMOTION, https://health.gov/healthypeople/objectives-and-data/social-determinants-health (last visited Feb. 10, 2021).

[5] *How Does Employment—or Unemployment—Affect Health?*, ROBERT WOOD JOHNSON FOUND. (Mar. 2013), http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2013/rwjf403360.

[6] *Employment*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF DISEASE PREVENTION & HEALTH PROMOTION, https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/employment (last visited Feb. 10, 2021).

[7] *Work Matters for Health*, ROBERT WOOD JOHNSON FOUND., COMM'N TO BUILD A HEALTHIER AMERICA (Dec. 2008), http://www.commissiononhealth.org/PDF/0e8ca13d-6fb8-451d-bac8-7d15343aacff/Issue%20Brief%204%20Dec%2008%20-%20Work%20and%20Health.pdf.

[8] *See generally* Nick Robinson, *The Multiple Justifications of Occupational Licensing*, 93 WASH. L. REV. 1903 (2018).

[9] *See id.* at 1936 ("The most commonly and widely invoked justification for occupational licensing is protecting consumers and the public from harm by ensuring that practitioners have a certain degree of expertise or competence. . . . For example, a primary justification of licensing medical professionals is because of perceived information and capacity asymmetries and the potentially significant health consequences of improper care.").

[10] *See* Shoshana Weissmann & C. Jarrett Dieterle, *Louisiana is the Only State that Requires Occupational Licenses for Florists. It's Absurd.*, USA TODAY (Mar. 28, 2018, 7:00 AM), https://www.usatoday.com/story/opinion/2018/03/28/louisiana-only-state-requires-occupational-licenses-florists-its-absurd-column/459619002/ (assessing Louisiana's florist licensing scheme and one woman's unsuccessful attempt to gain licensure, who later perished in poverty).

[11] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 570 (5th ed. 2015).

burdensome requirements infringe the "right to work" protected by the Fourteenth Amendment to the U.S. Constitution.[12]

As discussed in Part I, federal right to work jurisprudence has been largely dead on arrival in the United States Supreme Court since the *Lochner* era.[13] In 1905's *Lochner v. New York*, the Supreme Court struck down a New York law limiting working hours for bakers, concluding that the law interfered with the freedom of contract protected by the due process clause of the Fourteenth Amendment.[14] This substantive due process right relating to economic liberties (economic due process or "EDP") was used by the Court throughout the *Lochner* era (1897–1937) to limit laws or regulations infringing economic freedoms.[15] The end of the *Lochner* era was a clear victory for public health: during that period, the Court had invalidated "nearly two hundred social welfare and regulatory measures" in the span of a few brief decades.[16]

Federal and state approaches to EDP have evolved irregularly in the jurisprudential vacuum left after the *Lochner* era closed. As discussed in Part II, federal circuit courts are split in their approaches to EDP claims, and cases with similar facts reach opposing outcomes.[17] Perhaps because of the lack of uniformity or clarity in the federal approach, litigants may be turning to state, rather than federal, resolution. State supreme courts have increasingly

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[12] *See, e.g.*, Craigmiles v. Giles, 312 F.3d 220, 224–25 (6th Cir. 2002) (striking down Tennessee's Funeral Directors and Embalmers Act requirement forbidding sale of caskets by anyone not licensed as a "funeral director," concluding that the requirement violated the Due Process Clause of the Fourteenth Amendment and failed to satisfy rational basis scrutiny).

[13] *See* infra Part I; *see generally* Rebecca Haw Allensworth, *The (Limited) Constitutional Right to Compete in an Occupation*, 60 WM. & MARY L. REV. 1111, 1119 (2019).

[14] Lochner v. New York, 198 U.S. 45, 52–53, 64 (1905).

[15] *See, e.g.*, Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926); Adkins v. Child.'s Hosp., 261 U.S. 525 (1923); Adair v. United States, 208 U.S. 161 (1908).

[16] David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003).

[17] *Compare* Powers v. Harris, 379 F.3d 1208, 1218–19, 1225 (10th Cir. 2004) (upholding Oklahoma's funeral services laws on the basis of economic protectionism), *with Craigmiles*, 312 F.3d at 224–25, 229 (striking down a provision of Tennessee's Funeral Directors and Embalmers Act, concluding that economic protectionism fails to satisfy rational basis scrutiny).

concluded that a substantive due process "right to work," housed in state constitutional due process clauses, can invalidate unduly burdensome regulations.[18]

As discussed in Part III, Coronavirus-19 ("COVID-19"), a highly transmissible communicable disease which plunged the world into a global pandemic in 2020–21,[19] has raised the stakes. As states enacted executive orders to shutter businesses and protect the public, business owners sued, arguing that the orders denied various EDP rights, including the right to work, operate a business, or earn a living.[20] As more and more orders are challenged and initial determinations appealed, it becomes more likely that one or more of these cases will reach the United States Supreme Court. Whether or not the Court will choose to take on one of these cases is another matter.

The makeup of the current Court represents an important consideration. The confirmation of Justice Amy Coney Barrett on October 26, 2020, has resulted in a conservative super-majority.[21] This makeup could have important impacts on both the Court's willingness to take up these cases, as well as the ultimate outcome, as certain late stage *Lochner*-era decisions were driven largely by a voting bloc of four conservative Justices known as the "Four Horsemen."[22] Given these circumstances, and the increase in attention to EDP arguments of late, the Supreme Court is more likely than ever to revisit EDP arguments and re-evaluate its approach to the Fourteenth Amendment's "right to work." Whether the Court decides to shift course could certainly impact right to work arguments with respect to both occupational licensing and state abilities to enact social distancing measures during emergencies. The Court

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[18] *See, e.g.*, Patel v. Tex. Dep't of Licensing & Regul., 469 S.W.3d 69 (Tex. 2015).
[19] *Coronavirus*, WORLD HEALTH ORG. https://www.who.int/health-topics/coronavirus#tab=tab_1 (last visited May 14, 2021).
[20] *See, e.g.*, Cnty. of Butler v. Wolf, 486 F. Supp. 3d 883 (W.D. Pa. 2020).
[21] Sarah Binder, *Barrett Is the First Supreme Court Justice Confirmed Without Opposition Support Since 1869*, WALL ST. J. (Oct. 27, 2020, 6:45 AM), https://www.washingtonpost.com/politics/2020/10/27/barrett-is-first-supreme-court-justice-confirmed-without-opposition-support-since-least-1900/.
[22] Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 201–02 (1994).

must tread carefully, as a full return to *Lochner*-era principles would do untold damage to public health.

I. THE RISE AND FALL OF *LOCHNER*

EDP arguments began to gain traction in constitutional jurisprudence more than 120 years ago in 1897's *Allgeyer v. Louisiana*. In striking down a Louisiana statute requiring individuals and corporations to deal only with marine insurance companies that complied with Louisiana law,[23] the Court reasoned that the "liberty" protected by the Fourteenth Amendment's Due Process Clause encompassed economic liberty:

> The "liberty" mentioned in that amendment . . . is deemed to embrace the right of the citizen to b[e] free in the enjoyment of all his faculties; to be free to use them in all lawful ways; *to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation . . . .*[24]

Allgeyer's reasoning and language clearly conceptualized a constitutional right to pursue one's calling.[25] Nevertheless, the decision remained consistent with a previous determination that such a right could reasonably be limited by licensing regulation aimed at the protection of public welfare.[26]

The Court's embrace of laissez-faire economic principles drove fuurther development of EDP jurisprudence for the next several decades. In the era's namesake case, *Lochner v. New York*, the Court invalidated working hour limits for bakers as violating the freedom of contract.[27] The law at issue (the "Bakeshop Act") could survive only if it represented a "fair, reasonable, and appropriate exercise of the police power of the state."[28] This specific language may sound akin to rational basis scrutiny, a deferential standard by which a law will be upheld

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[23] Allgeyer v. Louisiana, 165 U.S. 578 (1897).
[24] *Id.* at 589 (emphasis added).
[25] *Id.*
[26] Dent v. West Virginia, 129 U.S. 114, 128 (1889).
[27] Lochner v. New York, 198 U.S. 45, 52–53, 64 (1905).
[28] *Id.* at 56.

"if it is rationally related to a legitimate government purpose."[29] The comparison to rational basis scrutiny, however, ends there. Indeed, the Court *could not* have been applying rational basis scrutiny—the traditional tiers of scrutiny did not exist at the time *Lochner* was decided.[30]

Even in the absence of the traditional tiers of scrutiny, it is clear the *Lochner* Court was not applying a deferential standard. Rather, *Lochner*'s language reveals that the Court was highly suspicious of the Bakeshop Act, searching for a heightened level of justification.[31] The opinion takes great pains to explain that the occupation of baking was not considered "an unhealthy one," and that any and all trades *could* arguably affect health, but that is not a *sufficient* reason to support state interference.[32] In sum, *Lochner* rested on its express determination that the Bakeshop Act could not be characterized as a health law, and therefore could not be supported as a valid exercise of state police power.[33]

Despite the Court's penetrating review, in the public health context, the Court's reasoning was invalid. Scholarship has since demonstrated that the Bakeshop Act contained sanitation requirements and was meant to limit health complications faced by bakers, including "a frequently fatal ill-health experience characterized by, inter alia, fever, shortness of breath, pallor, expectoration of blood, and a progressive wasting away of the body."[34] Even without considering the specific risks to bakers at that time, the U.S. Occupational Safety and Health Administration today acknowledges that work shifts extending beyond eight hours a day, five

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[29] CHEMERINSKY, *supra* note 11, at 565.

[30] *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to *more exacting judicial scrutiny* . . . ." (emphasis added)).

[31] *See* CHEMERINSKY, *supra* note 11, at 642–44, 648.

[32] *Lochner*, 198 U.S. at 59.

[33] *Id.* at 58 ("We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker.").

[34] Matthew S.R. Bewig, *Laboring in the "Poisonous Gases": Consumption, Public Health, and the Lochner Court*, 1 N.Y.U. J.L. & LIBERTY 476, 479 (2005).

days a week with at least an eight-hour rest are considered "extended or unusual" and can lead to fatigue, stress, injuries, and accidents.[35] Simply put, the Bakeshop Act was, indeed, a health law.

For the benefit of additional health laws across the nation, the *Lochner* line of jurisprudence came to a screeching halt in 1937 when a change in vote by Justice Owen Roberts effectively ended the era in *West Coast Hotel Co. v. Parrish*.[36] With Justice Roberts casting the deciding vote, the Court reversed course and upheld a Washington law setting a minimum wage for women.[37] This decision expressly erased the "freedom of contract" on the basis that there was no such freedom enshrined in the Constitution.[38]

The *West Coast Hotel* Court thus firmly cemented a new, deferential approach to economic regulation, but two additional decisions, *Ferguson v. Skrupa* and *Williamson v. Lee Optical of Oklahoma, Inc.*, finally and fully sounded the death knell for the constitutional "right to work," at least as protected by the federal Constitution.[39] At issue in *Williamson* was an Oklahoma law only allowing licensed optometrists or ophthalmologists to fit eyeglass lenses.[40] Reasoning that these kinds of decisions fall to the legislature, rather than to courts, the Court upheld the law, even though it likely imposed a "needless, wasteful requirement in many cases."[41] Finally, in *Ferguson*, the Court upheld a Kansas statute making it illegal to operate as a debt collector, except as incident to the practice of law.[42] In a succinct, unanimous decision,

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[35] *Frequently Asked Questions: Extended Usual Work Shifts*, U.S. DEP'T OF LAB., OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/OshDoc/data_Hurricane_Facts/faq_longhours.html (last visited Feb. 10, 2021).

[36] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). There has been much debate as to whether the switch was caused by President Franklin Delano Roosevelt's proposal to pack the Supreme Court to combat *Lochner*-era analyses which threatened New Deal policies. Whether or not this was the cause, the switch was made. *See* CHEMERINSKY, *supra* note 11, at 651.

[37] *West Coast Hotel Co.*, 300 U.S. at 400.

[38] *Id.* at 386–87, 391, 400.

[39] Williamson v. Lee Optical, 348 U.S. 483 (1955); Ferguson v. Skrupa, 372 U.S. 726 (1963).

[40] *Williamson*, 348 U.S. at 484–86.

[41] *Id.* at 487–88, 491.

[42] *Ferguson*, 372 U.S. at 726–27, 730–31.

and despite the clear interference with the *Lochner* era's "freedom of contract," the law passed muster.[43]

These decisions signaled a new era in which the Court would defer to state legislatures and avoid using the Due Process Clause to nullify economic regulation. Since 1937, the Court has adhered unwaveringly to this approach—not since the *Lochner* era has the Court invalidated an economic law or regulation on substantive due process grounds.[44] In the resulting vacuum, federal circuit courts of appeal have interpreted the Court's jurisprudence, at times reaching irreconcilable results.

II. CURRENT FEDERAL AND STATE APPROACHES TO ECONOMIC DUE PROCESS

In *Lochner*'s absence, governmental agencies have enacted regulations that may have been found contrary to the "freedom of contract" in the early 20th century, including certain licensing requirements promulgated to protect public health and safety. While these kinds of regulations clearly benefit public health in a general sense, some of the more burdensome of these requirements can create barriers to entry that may hinder certain individuals on the path to professional employment. For example, Louisiana is currently the only state to require an occupational license for florists.[45] Obtaining that license at one point required passage of a subjective practical exam with passage rates below 50 percent, during which applicants would arrange four bouquets in four hours.[46] This requirement has been done away with, but while it was in place, at least one woman failed the test five times, lost her job as a grocery store florist, and perished in poverty.[47]

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[43] *Id.*
[44] CHEMERINSKY, *supra* note 11, at 656.
[45] *See* Weissmann & Dieterle, *supra* note 10.
[46] *Id.*
[47] *Id.*

Federal courts do not generally provide a uniform answer to this conundrum. Since 1937, federal courts assessing EDP arguments have applied rational basis scrutiny,[48] but in the absence of additional guidance from the Supreme Court post-*Lochner*, circuits have approached this review in distinct ways.

The first means of approach is a rational basis review with no bite. Both the Second Circuit Court of Appeals and the Tenth Circuit Court of Appeals have concluded that economic protectionism—i.e., benefiting one group over another purely for economic reasons—satisfies rational basis scrutiny in these cases.[49] Specifically, in 2004, the Tenth Circuit upheld a licensing scheme limiting the sale of caskets in Oklahoma to licensed funeral directors, concluding that intra-state economic protectionism was a sufficient interest to satisfy rational basis review.[50] More recently, the Second Circuit in 2015 upheld a Connecticut dental regulation providing that, during a teeth-whitening procedure, only a licensed dentist could shine a light emitting diode on a customer's teeth.[51] In expressly determining that economic protectionism is rational for purposes of EDP analysis, the court explained, "[m]uch of what states do is to favor certain groups over others on economic grounds. We call this politics."[52]

This justification is not sufficient in all circuits. Indeed, under the second approach to EDP analysis, several other circuits have expressly concluded precisely the opposite—that economic protectionism is *not* sufficient to satisfy rational basis scrutiny.[53] Thus, whether states can use a theory of economic protectionism in designing occupational licensing restrictions largely depends on which federal circuit decides the case.

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[48] *See* CHEMERINSKY, *supra* note 11, at 564–67.
[49] Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 286 (2d Cir. 2015); Powers v. Harris, 379 F.3d 1208, 1218–19, 1225 (10th Cir. 2004).
[50] *Powers*, 379 F.3d at 1225.
[51] *Sensational Smiles, LLC*, 793 F.3d at 283.
[52] *Id.* at 287.
[53] St. Joseph Abbey v. Castille, 712 F.3d 215, 222 (5th Cir. 2013); Merrifield v. Lockyer, 547 F.3d 978, 991 n.15 (9th Cir. 2008); Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002).

An approach that legitimizes economic protectionism indicates that rational basis review operates as a mere formality. Validating economic protectionism in this way could very well result in additional anecdotes like the Louisiana grocery store florist. Those seeking professional employment should not have to face unnecessarily burdensome and costly barriers. Differentiating between regulations that protect the public's health, and regulations that provide only profit, allows for invalidation of the latter alongside preservation of the former. This kind of differentiation is a necessary step towards achieving equity.

EDP arguments, taken up to a certain point, could help to invalidate some of these unduly burdensome requirements while still preserving those that truly serve to protect public health. Yet court determinations upholding economic protectionism eliminate EDP as a viable constitutional option. Perhaps because of this, individuals making these arguments have focused in on a different source for EDP analysis: state constitutions.

Certain state supreme courts have begun to strike down some particularly burdensome regulatory requirements based on state constitutional due process guarantees. In 2015, the Texas Supreme Court struck down a requirement that commercial eyebrow threaders, who use thread to remove excess eyebrow hair, obtain esthetician licenses to practice threading.[54] The particular license required a minimum of 750 hours of approved training and passage of a mandated exam.[55] Texas' Department of Licensing and Regulation conceded that almost half of these hours were inapplicable to the work performed by threaders.[56] This requirement was too onerous, without sufficient justification, and thus ran contrary to the Texas Constitution's due course of law provision.[57]

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[54] Patel v. Tex. Dep't of Licensing & Regul., 469 S.W.3d 69, 91 (Tex. 2015).
[55] *Id.* at 88.
[56] *Id.* at 89.
[57] *Id.* at 80, 90.

Following that same logic, the Georgia Supreme Court affirmed in May 2020 that the state constitution protects a right to work in one's chosen occupation free from unreasonable government interference.[58] The case concerned a Georgia law regulating the practice of "lactation care and services," which provided that licenses could only be issued to privately-accredited International Board-Certified Lactation Consultants ("IBCLCs"), to the exclusion of privately-accredited Certified Lactation Counselors ("CLCs"), despite the fact that "CLCs and IBCLCs are equally competent to provide lactation care and services to mothers and babies."[59] The trial court had dismissed a CLC's substantive due process claim on the basis that Georgia's constitution did not recognize a right to work in a chosen profession; the state supreme court reversed that decision, sending the case back to the trial court for reconsideration.[60]

Finally, in a May 2020 Pennsylvania Supreme Court case, a short-term vacation rental manager was held to have raised a colorable claim that the broker licensing requirements of Pennsylvania's Real Estate Licensing and Registration Act ("RELRA") were unconstitutional as applied against her.[61] Pennsylvania's Supreme Court had previously clarified that the state constitution's due process clause protects "the right to pursue a chosen occupation."[62] RELRA's requirements would have imposed at least 165 hours of coursework relating to buying, selling, and leasing real-estate on the manager in question, none of which were contemplated by her business model.[63] The manager also would have been required to (1) complete a three-year apprenticeship before licensure and (2) establish a brick and mortar establishment to secure the license.[64] Considering all of this, the manager at the very least had

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[58] Jackson v. Raffensperger, 843 S.E.2d 576, 580–81 (Ga. 2020).
[59] *Id.* at 578–79; GA. CODE ANN. §§ 43-22A-1 to -13 (2016).
[60] *Jackson*, 843 S.E.2d at 578.
[61] Ladd v. Real Est. Comm'n., 230 A.3d 1096, 1116 (Pa. 2020).
[62] *Id.* at 1108.
[63] *Id.* at 1101, 1112.
[64] *Id.* at 1099, 1106.

a justifiable claim that the requirements as applied against her were unduly oppressive and violated due process.[65]

These cases represent a select few examples of courts using state constitutional guarantees to operate as a check on onerous occupational licensing requirements, even through the application of rational basis scrutiny. The lack of uniformity in the federal approach to this analysis indicates that without further elaboration by the Supreme Court, EDP arguments may more often be forwarded through state constitutional due process protections, as seen in Texas, Georgia, and Pennsylvania. That said, because state constitutional interpretations often mirror federal interpretations,[66] forthcoming federal decisions could have lasting effects on future state EDP jurisprudence.

The Supreme Court could certainly take up an occupational licensing case to address the current circuit split on economic protectionism, though it fairly recently decided against doing so when it denied cert in *Sensational Smiles, LLC* in 2016.[67] Nevertheless, the Court that denied cert in 2016 was a vastly different Court. Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, all conservative appointees of President Trump, now sit on the Court in the vacated seats of conservative Justices Antonin Scalia and Anthony Kennedy and liberal Justice Ruth Bader Ginsburg. This alignment is important. The *Lochner*-era Court, after all, was hallmarked by conservativism.[68] With the confirmation of Justice Amy Coney Barrett by Senate conservatives, the sitting Court looks to be more ideologically conservative than it has been for roughly 70 years,[69] indicating the real potential for a jurisprudential shift.

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[65] *Id.* at 1112–16.

[66] *See generally, e.g.*, Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 725–26 (2016) ("[S]tate court interpretations of state constitutions have tended to follow federal court interpretations of the U.S. Constitution, even to the point of adopting the Supreme Court's tests and interpretive methodologies.").

[67] Sensational Smiles LLC v. Mullen, 577 U.S. 1137 (2016) (denying cert).

[68] Lawrence O. Gostin, *Public Health Theory and Practice in the Constitutional Design*, 11 HEALTH MATRIX 265, 288 (2001).

[69] Michael A. Bailey, *If Trump Appoints a Third Justice, the Supreme Court Would Be the Most Conservative It's Been Since 1950*, WASH. POST (Sept. 22, 2020, 6:00 AM), https://www.washingtonpost.com/politics/2020/09/22/if-trump-appoints-third-justice-supreme-court-would-be-most-conservative-its-been-since-1950/.

III. COVID-19 AND ECONOMIC DUE PROCESS

State occupational licensing schemes may provide one vehicle for Supreme Court re-visitation of EDP jurisprudence, but the Court may also seek to re-enter the fray via challenges of state COVID-19 closure orders. Throughout 2020, COVID-19, a highly infectious and deadly communicable disease, spread worldwide, setting off shelter-in-place, stay-at-home, and other emergency social distancing orders at all levels of government.[70] Governors across the United States ordered non-essential businesses to close to prevent unnecessary contact between people and reduce spread of the virus.[71]

It was not long after governments operationalized these closure orders that litigants began challenging them in court.[72] Business owners put forward a variety of challenges in quests for reopening, including equal protection, takings clause, and EDP challenges.[73] Many courts made quick work of these arguments, but the Pennsylvania federal district court's *County of Butler v. Wolf* decision bears further analysis.[74] Business owners and other interested parties in Pennsylvania filed this suit after Governor Tom Wolf and Department of Health Secretary Rachel Levine issued orders requiring closure of "non-life-sustaining" businesses in the Commonwealth.[75]

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[70] Rebecca L. Haffajee & Michelle M. Mello, *Thinking Globally, Acting Locally—The U.S. Response to Covid-19*, 382 NEW ENG. J. MED. e75, e75(2) (2020).

[71] Mike Snider, *What Is Essential and Non-Essential During a Pandemic?*, USA TODAY, https://www.usatoday.com/story/money/business/2020/03/21/coronavirus-conditions-lead-state-decisions-essential-businesses/2884758001/ (Mar. 23, 2020, 2:20 PM).

[72] Jeff Thaler, *The Next Surges Are Here: What Can American Governments Lawfully Do in Response to the Ongoing COVID-19 Pandemic?*, 42 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 165, 208 (2020) ("The wave of religious challenges to COVID-19 restriction orders was followed by a wave of challenges by a variety of businesses, from fitness centers to gentlemen's clubs, hairdressers to bratwurst festivals, and firearms dealers.").

[73] *See, e.g.*, Xponential Fitness v. Arizona, No. CV-20-01310-PHX-DJH, 2020 WL 3971908 (D. Ariz. July 14, 2020) (asserting procedural and substantive due process, equal protection, takings clause, contracts clause, and vagueness challenges to COVID-19 business closure orders); Savage v. Mills, 478 F. Supp. 3d 16 (D. Me. 2020) (asserting takings clause, substantive and procedural due process, right to travel, and dormant commerce clause challenges to COVID-19 business closure orders).

[74] Cnty. of Butler v. Wolf, 486 F. Supp. 3d 883 (W.D. Pa. 2020).

[75] *Id.* at 890, 894.

In addressing the plaintiffs' arguments, the court explained that the Fourteenth Amendment *does* guarantee a citizen's right to support himself or herself, supporting this statement surprisingly with citations to *Lochner*-era cases.[76] After acknowledging that the Supreme Court "recalibrated and de-emphasized" EDP after the *Lochner* era, the district court nevertheless suggested that the Supreme Court "has never repudiated the recognition that a citizen has the right to work for a living and pursue his or her chosen occupation."[77] Pushing even further, the court elaborated on a potential jurisprudential shift in a footnote:

> In recent years, a growing chorus of cases and commentators have questioned whether the general deference afforded to economic regulations of the right to pursue one's occupation should be reexamined, and that governmental action be subjected to greater scrutiny.[78]

Despite the suggestion that a heightened level of scrutiny could have been warranted here, the court found itself bound by precedent to apply rational basis scrutiny.[79] In doing so, the court reasoned that the order closing all "non-life-sustaining" businesses was so arbitrary as to fail rational basis scrutiny, as the definition of "non-life-sustaining" was never fully confirmed, and the state's listing of "life-sustaining" businesses changed several times between March 19, 2020, and May 28, 2020.[80] The court explained:

> Although jurisprudence may not afford the right to pursue one's occupation the same weight as others in our hierarchy of liberties, it cannot be given such short shrift as to allow it to be completely subordinated to an *ad hoc* and arbitrary regimen that cannot even be reduced to an objective, written definition—even where that regimen is based on good intent.[81]

The court's thorough discussion in *County of Butler* indicates that it was conducting a rather searching rational basis review, much like the analysis conducted by the Supreme Court more than 100 years ago in *Lochner*. Under the circumstances presented, Pennsylvania's Governor

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[76] *Id.* at 920.
[77] *Id.*
[78] *Id.* at 921 n.27.
[79] *Id.* at 921–22.
[80] *Id.* at 922–26.
[81] *Id.* at 926.

and Health Secretary found themselves acting amid an unprecedented global pandemic and "undertook their actions in a well-intentioned effort to protect Pennsylvanians from the virus."[82] Many other courts faced with similar challenges concluded that business closure orders clearly satisfied rational basis scrutiny against EDP arguments.[83]

The *County of Butler* court did something else entirely. While acknowledging the limitations the Supreme Court had imposed after the conclusion of *Lochner* era, the *County of Butler* court nevertheless implemented a *Lochner*-esque approach in its analysis, re-weighing the actions taken by the executive branch and making its own determination that the actions were not justified. The *County of Butler* court came to this conclusion despite the contrary determinations of the Governor and Health Secretary, implicating serious separation of powers concerns.[84]

The public health impacts of this holding are clear. Limiting executive power to take social distancing actions recommended by public health officials during a pandemic is not a favorable public health outcome; while closures and other actions should certainly be scientifically justified,[85] the importance of controlling a highly contagious and deadly

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[82] *Id.* at 890.

[83] *See, e.g.*, Xponential Fitness v. Arizona, No. CV-20-01310-PHX-DJH, 2020 WL 3971908, *7 (July 14, 2020) ("Plaintiffs' frustrations that the June 29, 2020 Executive Order does not close every business in which the virus might easily spread is also understandable; however, the Order need not be the most effective or least restrictive measure possible to attempt to stem the spread of COVID-19 to be rational."); TJM 64, Inc. v. Harris, 475 F. Supp. 3d 828, 836 (W.D. Tenn. 2020) ("Shelby County's Order is reasonably related to the legitimate government goal of fighting the COVID-19 virus."); PCG-SP Venture I LLC v. Newsom, No. EDCV 20-1138 JGB (KKx), 2020 WL 4344631, *7 (C.D. Cal. June 23, 2020) ("The risk of attracting geographically diverse patronage is only enhanced by the inherently communal and indoor nature of hotels . . . This 'reasonably conceivable' state of facts gives Defendants a rational basis to shutter and restrict California's hotels." (quoting Angelotti Chiropractic, Inv. v. Baker, 791 F.3d 1075, 1085 (9th Cir. 2015))).

[84] *See* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (U.S. 2020) (Roberts, J., concurring) (explaining that broad latitude should be extended to the "politically accountable officials" of the states in acting to protect safety and health in areas fraught with uncertainty, and that these officials "should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 545 (1985))).

[85] Wendy F. Hensel & Leslie E. Wolf, *Playing God: The Legality of Plans Denying Scarce Resources to People with Disabilities in Public Health Emergencies*, 63 FLA. L. REV. 719, 724 (2011) ("[P]ublic health interventions must be both necessary and effective to address the public health issue.").

communicable disease cannot be overstated. Furthermore, were the Supreme Court to accept *County of Butler*'s invitation to implement a heightened level of scrutiny in assessing EDP rights, then the United States could see a return to the impacts of the *Lochner* era, during which public safety regulations and laws were re-weighed by the Court based on pre-determined outcomes and struck down in favor of the free market.[86]

CONCLUSION

A few topically relevant pathways present the Supreme Court with the means to re-enter the EDP debate. The new makeup of the Court increases the potential for the Court to revisit *Lochner*-era principles, whether via occupational licensing scheme challenges, COVID-19 emergency order challenges, or both. The problems with being too deferential are clear: economic protectionism and "politics" can justify legislative or regulatory actions that limit occupational access and do not provide clear public health benefits. On the other hand, a full return to *Lochner*-era rebalancing would be a mistake for public health, as it would place judges in the position of second-guessing public health experts, rather than allowing those experts to take swift and decisive action. The *County of Butler* decision has been appealed to the Third Circuit, so it may only be a matter of time before it, or another case like it, reaches the Supreme Court.[87] To ensure the best possible outcome, the Court must tread softly, or else risk unanticipated damage to the public's health.

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[86] Bryan J. Leitch, *Where Law Meets Politics: Freedom of Contract, Federalism, and the Fight over Health Care*, 27 J.L. & POL. 177, 192 (2011) ("[T]he Lochner Court viewed market regulation as both an impermissible centralization of economic power as well as the illegitimate and unseemly attempt of legislatures to redistribute economic resources.").

[87] Brief of Appellants, Cnty. of Butler v. Wolf (3d Cir. Nov. 18, 2020) (No. 20-2936).