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Does *Lochner* Live?:
The Disturbing Implications of *Craigmiles v. Giles*

Brianne J. Gorod†

*Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).

The Fourteenth Amendment has long presented interpretive challenges for the courts.1 Although its ratification was a direct response to the problems of Reconstruction, the Amendment’s broad language made its application outside the context of race at least possible, if not probable.2 Yet literal application of the Amendment’s broad language presented a paradox in the Equal Protection context: Since virtually all legislation creates classifications, and classifications almost necessarily entail differential treatment between groups, broad, literal application of the Amendment would invalidate nearly all legislation.3

In part to resolve this tension, the Supreme Court has adopted differing standards against which to test the validity of legislation that is challenged under the Amendment’s Equal Protection and Due Process Clauses.4 While legislation that classifies on the basis of race or other “suspect” characteristics or that involves fundamental rights is subject to some heightened form of scrutiny, most legislation is subject only to rational basis review. Rational basis review, designed to be minimally searching and maximally deferential to legislative judgment, requires only that there be a “rational relationship between the disparity of treatment and some legitimate governmental purpose.”5 Thus, the application of rational basis review under this standard almost invariably results

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1. See Trimble v. Gordon, 430 U.S. 762, 780 (1977) (Rehnquist, J., dissenting) (“The essential problem of the Equal Protection Clause is therefore the one of determining where the courts are to look for guidance in defining ‘equal’ as that word is used in the Fourteenth Amendment.”). The Amendment provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.


4. See Eugene Doherty, *Equal Protection Under the Fifth and Fourteenth Amendments: Patterns of Congruence, Divergence and Judicial Difference*, 16 Ohio N.U. L. Rev. 591, 592-93 (1989). Different standards of review also made it possible for the Court to uphold racial classifications under certain circumstances. Korematsu v. United States, 323 U.S. 214, 216 (1944) (“That is not to say that all such restrictions [which curtail the civil rights of a single racial group] are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.”).

Yet in a recent decision, *Craigmiles v. Giles*, the Sixth Circuit reached the surprising result that a piece of ordinary economic legislation, subject only to rational basis review, was unconstitutional under the Fourteenth Amendment’s Equal Protection and Due Process Clauses. This Case Note will argue that this decision is an unwarranted extension of the Supreme Court’s 1985 decision in *City of Cleburne v. Cleburne Living Center, Inc.* and illustrates the need for Supreme Court clarification of the appropriate standards of review under the Equal Protection and Due Process Clauses to provide guidance to lower court judges and to litigants.

I. THE CASE

Although most Tennessee citizens will be affected by the dictates of the Funeral Directors and Embalmers Act (FDEA) only when they or a loved one passes away, there are a few Tennessee citizens for whom the Act is of much more continuous consequence: Tennessee funeral directors, embalmers, and casket salesmen. It was a group of the latter that challenged the FDEA’s application to their businesses. The FDEA, originally passed in 1951, required that all individuals engaged in “funeral directing” be licensed by the Board of Funeral Directors and Embalmers. In 1972, at the behest of the funeral home industry, the Tennessee General Assembly amended the legislation, so the term “funeral directing” would include those who sold caskets and funeral merchandise. As a result, the Board issued a cease and desist order to Nathaniel Craigmiles and the other plaintiffs to prevent them from operating their funeral merchandise stores without employing a licensed funeral director.

Craigmiles and the other plaintiffs sought an injunction against the Board’s order, claiming that the FDEA, to the extent that it restricted the sale of funeral merchandise, violated the Due Process, Equal Protection, and Privileges and

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See also, e.g., Craig v. Boren, 429 U.S. 190 (1976).


7. 312 F.3d 220 (6th Cir. 2002).


10. TENN. CODE ANN. § 62-5-309 (1997). Licensing required passing the Tennessee Funeral Arts Examination and completing either one year of course work at an accredited mortuary school and a one-year apprenticeship with a licensed funeral director or completing a two-year apprenticeship. TENN. CODE ANN. § 62-5-305.


12. *Craigmiles*, 312 F.3d at 223.
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Immunities Clauses of the Fourteenth Amendment. The U.S. District Court for the Eastern District of Tennessee granted their request, holding that the FDEA violated plaintiffs’ due process and equal protection rights. On appeal, the Sixth Circuit affirmed, with Judge Boggs writing for a unanimous panel. The Sixth Circuit’s opinion quickly disposed of the question of the proper level of review, recognizing that the legislation could only be subjected to rational basis review. Yet the rational basis review it employed was hardly typical.

II. "RATIONAL BASIS WITH BITE"

Near the conclusion of its opinion, the Sixth Circuit’s panel acknowledged the obvious: “Judicial invalidation of economic regulation under the Fourteenth Amendment has been rare in the modern era.” Indeed, not since 1937 has the Supreme Court regularly invalidated economic regulation. In the opinion that epitomizes the judicial activism of the pre-1937 period, *Lochner v. New York,* the Supreme Court refused to defer to legislative judgments about the proper uses of economic regulation. Both Justices Harlan and Holmes challenged the majority’s position in dissents that would be validated in the post-1937 period. While Justice Harlan challenged the majority for not according appropriate deference to legislative judgments, Justice Holmes attacked the very notion of substantive due process that underlay *Lochner.* He argued that the Fourteenth Amendment was being used to elevate a particular economic theory to the level of Constitutional right: “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”

In 1937, the Court’s decision in *West Coast Hotel v. Parrish* brought the era of economic substantive due process to an abrupt end. Subsequent cases, such as *United States v. Carolene Products* and *Williamson v. Lee Optical Co.,* showed just how deferential rational basis review would be in this new period. Yet despite this disavowal of substantive due process in 1937, it soon reemerged. In *Griswold v. Connecticut* and *Roe v. Wade,* the Supreme Court

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13. Id.
15. Judge Boggs somewhat sardonically noted, “While feared by many, morticians and casket retailers have not achieved the protected status that requires a higher level of scrutiny under our Equal Protection jurisprudence.” Craigmiles, 312 F.3d at 224.
16. Id. at 229.
18. 198 U.S. 45 (1905).
19. Id. at 68, 75-76.
20. Id. at 75.
22. 304 U.S. 144 (1938).
ushered in the modern era of substantive due process in a non-economic context when it recognized the right to privacy, thereby evincing a renewed willingness to recognize rights not explicitly grounded in the Constitution.\textsuperscript{26}

Just as the Court breathed new life into non-economic substantive due process in the 1960s, it gave new bite to rational basis review in a non-economic context in the 1980s. In the 1985 case \textit{City of Cleburne v. Cleburne Living Center, Inc.},\textsuperscript{27} the Supreme Court applied rational basis review to a city ordinance that required a special-use permit for the construction of a home for the mentally ill, but found the ordinance unconstitutional as applied. The Court acknowledged that “when social or economic legislation is at issue, the Equal Protection Clause allows the states wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.”\textsuperscript{28} Yet while it acknowledged in words the deference that is supposed to accompany rational basis review, it did not apply it in practice. As Justice Marshall noted in his concurrence, the Court’s analysis in \textit{Cleburne} seemed at odds with traditional rational basis review in almost every respect. The Court acted as though the legislature had the burden of proving the act’s constitutionality, sifted through the record to determine whether there was a firm factual foundation for the ordinance’s policy, and acted as though legislation was not permitted to allow reform to proceed incrementally.\textsuperscript{29}

Justice Marshall did more than simply point out the Court’s deployment of heightened rational basis review; he also criticized it. While the Court’s use of this heightened review might have produced a welcome result in \textit{Cleburne}, he cautioned that “by failing to articulate the factors that justify today’s ‘second order’ rational basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked.”\textsuperscript{30} The result of such doctrinal ambiguity would be, he feared, an open invitation to lower court judges to invoke this “second order rational basis review” in reviewing legislation involving economic and commercial classifications where heightened scrutiny would traditionally have been deemed inappropriate. The majority’s decision was, he warned, “a small and regrettable step back toward the days of \textit{Lochner v. New York}.”\textsuperscript{31}

\begin{thebibliography}{9}
\bibitem{25} 410 U.S. 113 (1973).
\bibitem{27} 473 U.S. 432 (1985).
\bibitem{28} \textit{Id.} at 440 (citations omitted).
\bibitem{29} \textit{Id.} at 458-9 (Marshall, J., concurring in the judgment and dissenting in part).
\bibitem{30} \textit{Id.} at 460.
\bibitem{31} \textit{Id.}
\end{thebibliography}
III. LOCHNERIZING?

The Sixth Circuit’s opinion is, if not itself a return to *Lochner*, an even larger step in that direction. Despite the Sixth Circuit’s explicit rejection of this notion, its decision is fundamentally at odds with the traditional paradigm of rational basis review. The Sixth Circuit’s opinion reads much more like the Supreme Court’s opinion in *Cleburne* than like the more traditional rational basis review epitomized by cases like *Williamson v. Lee Optical*. In *Williamson*, the Court upheld an Oklahoma law that made it unlawful for anyone who was not a licensed optometrist or ophthalmologist to fit lenses to a face or to duplicate or replace into frames lenses or other optical appliances, except with a written prescription. A comparison between *Craigmiles* and *Williamson* is illustrative of just how great a departure the review in *Craigmiles* is from traditional rational basis review.

In *Craigmiles*, the court conceded that the justifications given by the state (the promotion of the public health and consumer protection) were legitimate interests, but it argued that there was no reasonable relationship between those interests and the legislation in question. The court rejected the state’s argument that the legislation would contribute to the public health since the plaintiffs’ businesses were not involved in the handling of dead bodies. In *Williamson*, however, the Supreme Court rejected the argument that an eyeglass frame could not be regulated because it was only casually related to the visual care of the public. According to the Court, “an eyeglass frame is not used in isolation... it is used with lenses; and lenses, pertaining as they do to the human eye, enter the field of health. Therefore, the legislature might conclude that to regulate one effectively it would have to regulate the other.”

While conceding that the state could have achieved legitimate casket-safety goals by requiring that funeral directors be experts, instead of by directly regulating corpse containers, the Sixth Circuit found that the licensed funeral directors were not expert enough to support this justification. It noted the absence of evidence establishing that the caskets they sold were systematically more protective than those sold by independent casket retailers. In reaching these conclusions, the *Craigmiles* court disregarded the admonitions of *Carolene Products* that there is no need for an evidentiary record under rational basis review and that empirical judgments are best left to the legislature.

The Sixth Circuit also rejected Tennessee’s consumer protection analysis,

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32. *Craigmiles*, 312 F.3d at 229 (“Our decision today is not a return to *Lochner*, by which this court would elevate its economic theory over that of legislative bodies.”).
34. *Craigmiles*, 312 F.3d at 225.
arguing that the legislation was not fitted to the state’s proffered interests. It did this despite the fundamental tenet of rational basis review that legislation may be over-inclusive or under-inclusive. Under the Fourteenth Amendment, legislatures need not “prohibit all like evils, or none.”\(^{38}\) Under rational basis review, the determination of the appropriate breadth of legislation is left to the legislature.\(^{39}\) In *Williamson*, for example, the Supreme Court observed, “The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.”\(^{40}\) In fact, the *Craigmiles* court acknowledged that rational basis review “does not require the best or most finely honed legislation to be passed.”\(^{41}\)

Why then was the *Craigmiles* court so concerned about the over-breadth of the Tennessee legislation? Clearly, it believed the reasons the state gave were mere pretext, and that the real reason for the legislature’s actions was “protecting licensed funeral directors from competition on caskets.”\(^{42}\) The court, citing a series of cases under the Commerce Clause, argued that “protecting a discrete interest group from economic competition is not a legitimate governmental purpose.”\(^{43}\) Yet this point is relevant only if there is no other legitimate state interest to which the legislation might reasonably be related. If there is, it does not matter if that was not the interest the legislature had in mind. As the court itself acknowledged elsewhere in the opinion, legislative motivations are irrelevant to determinations of legislation’s constitutionality under rational basis review.\(^{44}\) This point was made in *Williamson* where the legislature was almost certainly motivated by a desire to provide economic protection to optometrists, yet the Supreme Court upheld the legislation.\(^{45}\) In that case, the Court simply speculated as to other legitimate state interests to which the legislature might have been responding.\(^{46}\)

While traditional rational basis review does not require an inquiry into legislative motivations when evaluating the constitutionality of overbroad legislation, rational basis review is no longer defined exclusively by cases like *Williamson* v. *Lee Optical*. Instead, lower courts can look to cases like *Cleburne* in deciding how closely to scrutinize legislation. Unlike *Williamson*, *Cleburne* seemed to require, or at least to encourage, this inquiry into legislative motiva-

\(^{38}\) *Id.* at 151.

\(^{39}\) *Id.*

\(^{40}\) *Williamson*, 348 U.S. at 487.

\(^{41}\) *Craigmiles*, 312 F.3d at 227.

\(^{42}\) *Id.* at 228.

\(^{43}\) *Id.* at 224.

\(^{44}\) *Id.* (quoting Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980)).


\(^{46}\) *Williamson*, 348 U.S. at 487.
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tions. In deciding that the city council was really motivated by animus toward the disabled, the *Cleburne* Court noted that the city could have passed better-tailored regulations if its proffered reasons were anything more than pretext.\(^47\) *Cleburne* is, unsurprisingly, the one case the *Craigmiles* court cites for the proposition that the Supreme Court has been "suspicious of a legislature's circuitous path to legitimate ends when a direct path is available."\(^48\)

Because the Sixth Circuit panel believed the state's proffered interests were mere pretext, it argued that there was no reasonable relationship between those interests and the FDEA. Yet an Oklahoma district court judge found otherwise when he upheld similar legislation a few weeks later.\(^49\) It is in precisely this type of situation—where reasonable people can disagree about whether there is a reasonable relationship between the legislation and the governmental purpose—that Justices Harlan and Holmes believed the courts should defer to the legislative judgment.\(^50\)

In fact, the court's excoriation of the "General Assembly's naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers" reveals what was likely the court's real motivation in this case: its strong disapproval of the legislature's economic choices.\(^51\) Thus, both *Craigmiles* and *Lochner* are ultimately based on laissez-faire principles; in *Lochner*, the Supreme Court invalidated the legislature's interference with individuals' "freedom of contract" and, in *Craigmiles*, the Sixth Circuit invalidated the legislature's attempt to accord protection to a particular economic group. In *Williamson*, by contrast, the Court allowed a clearly protectionist statute to stand despite its harm to consumers.

While the anti-protectionism policy expressed in *Craigmiles* might make for better economic policy, the post-*Lochner* line of cases clearly repudiate judicial efforts to enshrine economic policies, even if ultimately wise, as constitutional rights. Under traditional rational basis review, the legislation would stand, and it would be the Tennessee General Assembly that would be held accountable.

**IV. THE CLEBURN LEGACY**

In its opinion, the *Craigmiles* panel noted that the Sixth Circuit has previously observed that "rational basis review, while deferential, is not toothless."\(^52\) *Cleburne* gave rational basis review teeth, and since that decision, lower courts,
litigators, and legal scholars have all struggled to make sense of that decision and the reasoning behind it. They have sought to understand when more searching scrutiny of classifications that involve neither fundamental rights nor "suspect" groups is appropriate. It is possible that the Court’s use of "second order" rational basis review was an effort to provide greater rights to groups to whom it was unwilling to extend suspect status.\textsuperscript{53} It is also possible that the Court’s use of "second order" review was a step toward the granting of "suspect" status to these groups.\textsuperscript{54} Arguably, the Supreme Court’s application of more traditional rational basis review in a subsequent case involving the mentally disabled undercuts those justifications.\textsuperscript{55} Yet the dissenters in that case criticized the majority for failing to apply the level of review applied in \textit{Cleburne} since legislation involving the mentally disabled was once again at issue. The dissent thereby suggested that the Court’s use of "second order" review in \textit{Cleburne} was based on the fact that the class challenging the legislation was mentally disabled.\textsuperscript{56}

Thus, if the Supreme Court’s use of "second order" rational basis review has been predicated on the Court’s heightened concern for specific groups, its use should be limited to those contexts. Although the Supreme Court did not articulate its reasoning for using a heightened form of rational basis review in \textit{Cleburne}, neither did it express an intention to fundamentally alter the way rational basis review is applied in all contexts. Furthermore, subsequent decisions reaffirmed that "second order" review should be the exception, not the norm.\textsuperscript{57}

Thus, \textit{Cleburne} and subsequent decisions have left the Supreme Court’s Equal Protection and Due Process Clause jurisprudence unclear, both as to the number of standards of review and as to how those standards should be applied.\textsuperscript{58}


\textsuperscript{56.} See \textit{Heller}, 509 U.S. at 336-37 (Souter, J., dissenting).

\textsuperscript{57.} \textit{E.g.}, \textit{Heller}.

\textsuperscript{58.} See Ashutosh Bhagwat, \textit{Purpose Scrutiny in Constitutional Analysis}, 85 CAL. L. REV. 297, 312-7 (1997) (arguing that the Court has shown a "renewed interest in government purposes" of which "rational basis with bite" may provide the "clearest example."); R. Randall Kelso, \textit{Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice}, 4 U. PA. J. CONST. L. 225, 226 (2002) (arguing that there are not three, but seven standards of review).
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Since *Cleburne*, legal commentators have been urging the Court to provide clarification on both these issues.\(^59\)

The decision in *Craigmiles* was an unwarranted use of the “second order” rational basis review articulated in *Cleburne* that, despite the court’s disavowals, seems to bear a closer resemblance to cases like *Lochner* than to cases like *Williamson v. Lee Optical*. It was just this consequence that Justice Marshall feared would result from the doctrinal confusion created by the *Cleburne* Court’s use of “second order” rational basis review. If the members of the current Court share Justice Marshall’s apprehension about a return to the days of *Lochner*, they should heed the warning he provided in his *Cleburne* concurrence and provide some much needed clarification of the proper standards of review under the Equal Protection and Due Process Clauses. Such clarification should help ensure that *Craigmiles* is only an anomaly and not a sign that *Lochner* lives.
