

CLASS LEGISLATION, PUBLIC CHOICE, AND THE STRUCTURAL CONSTITUTION

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With a naively literal-minded attention to text, I'm embarrassed to confess, I've attempted to answer the questions that have been set for us: Does the Constitution of 1789 embody structural economic principles, and can they be usefully elaborated by law and economics or traditional originalism? As to the first question, I'll argue that the Constitution of 1789 and the Constitution of 1868 are both centrally concerned with a single structural economic principle: Congress and the States have the power to regulate economic liberties in the public interest, but regulations that benefit private interests are *ultra vires* and unconstitutional. This suspicion of economic "class legislation" was of such pressing concern to the Framers and ratifiers of the original Constitution and the Civil War amendments that it is reflected throughout the text, in power-granting provisions as well as rights-reserving ones, including the Taxation Clause of Article I, Section 8; the Contracts Clause of Article I, Section 10; the Due Process and Just Compensation Clauses of the Fifth Amendment; and the Privileges or Immunities Clause, Due Process Clause, and Equal Protection Clause of the Fourteenth Amendment. As to the second question, I'll argue that public choice theory calls into question the foundations of our structural economic constitution, by challenging the eighteenth- and nineteenth-century confidence that it is possible to distinguish regulations in the public interest from naked rent-seeking.

Traditional originalism, moreover, is no more helpful in reconstructing the formalistic categories that the Founders thought they had constitutionalized, for it refers judges back to extra-textual economic principles whose factual premises are increasingly difficult to sustain. Far from "usefully elaborating"

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our structural economic constitution, in short, law and economics theory undermines and subverts it.

The idea that laws should be general rather than special, and oriented toward public rather than private interests, was central to the eighteenth-century Founders' conception of valid laws as equal laws. During the Revolution, several state bills of rights, including Virginia's, prohibited "exclusive or separate Emoluments or Privileges from the Community, but in Consideration of public Services":¹ the fear was that economic interests separate from the common interests of society would try to enrich themselves through legislation.² The suspicion of special laws pervades the original Constitution and the Bill of Rights, and there clearly are fewer opportunities for rent-seeking during moments of constitutional politics, as opposed to normal politics. The purpose of a Constitution, Justice Brewer wrote in 1893, is for "Peter sober to control Peter drunk."³ Nevertheless, it is at least arguable that rent-seeking special interests scored some constitutional victories. Charles Beard, for example, pointed to the power to tax, the power to conduct war, the power to control commerce, and the power to dispose of the western lands as textual evidence that the original Constitution was designed to benefit the interests of capitalist creditors at the expense of farmers and debtors.⁴ Conversely, Charles Wolfram invoked the Seventh Amendment's guarantee of civil jury trials as evidence of the anti-Federalist backlash, when debtors were able to constitutionalize procedures that protected *their* economic interests against unscrupulous creditors.⁵

The suspicion of economic "class legislation," laws that in the nineteenth-century jargon took property away from A and gave it to B, was refined and extended during the antebellum period, which is why I don't feel guilty about expanding the focus of this panel beyond the founding. Jacksonian judges and treatise

1. VA. DECLARATION OF RIGHTS OF 1776, § 4.

2. See Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate about Equal Protection and Equal Civil Rights*, 8 SUP. CT. REV. 295, 346 (1992).

3. David J. Brewer, *An Independent Judiciary as the Salvation of the Nation*, in PROCEEDINGS OF THE NEW YORK BAR ASSOCIATION (1893), reprinted in 11 ANNALS OF AMERICA 423, 428 (1968).

4. See CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 176 (Free Press 1986) (1913).

5. See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 673-705 (1973).

writers pointed to state due process, equal protection, and special legislation clauses to argue that states were not free to pass "special" laws, or "class legislation," but had to legislate in the "public interest," or "for the purpose of benefiting the polity as a whole."⁶

The greatest nineteenth-century theorist of class legislation was Thomas Cooley, whose thought reflected the Jacksonian era's strong aversion to monopolies and special privileges. In leafing through the 1880 edition of Cooley's *General Principles of Constitutional Law*, it is hard not to be struck by how often he returns to what he calls the "general principle of constitutional law," that Congress and the States can only regulate economic liberties in the public interest, and that special or privately-oriented laws are unconstitutional.⁷ Let us quickly review the range of textual provisions from which Cooley derives this economic structural principle.

In Chapter IV, "The Powers of Congress,"⁸ he locates it in the enumerated taxing power, Article I, Section 8, Clause 1, and also in the "implied restrictions" on Congress's power.⁹ "Constitutionally," Cooley writes in his discussion of Article I, Section 8, "a tax can have no other basis than the raising of a revenue for public purposes, and whatever governmental exaction has not this basis is tyrannical and unlawful. . . . Where, however, a tax is avowedly laid for a private purpose it is illegal and void."¹⁰ But distinguishing private from public purposes was no easy task. Cooley offers a list of illustrations of taxes for private purposes—from a tax to supply seed to farmers who have lost their crops to a tax to help corporations establish themselves in business as manufacturers¹¹—but the lines he draws between public and private purposes are often murky. A tax on imports, for example, may be constitutionally questionable if its purpose is to benefit "some home manufacture"; but the tax may be saved if any public income is derived from it, even if the home

6. HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 33-45 (1993).

7. See THOMAS COOLEY, *GENERAL PRINCIPLES OF CONSTITUTIONAL LAW* (1880).

8. See *id.* at 54.

9. See *id.* at 58-60, 98.

10. *Id.* at 57-58.

11. See *id.* at 58.

industry is incidentally benefited.¹² Conversely, "sometimes the public purpose is clear, though the immediate benefit is private and individual";¹³ the government pays pensions, Cooley notes, but only in consideration of services rendered, and so pension benefits are no different than the payment of salaries to public officers.¹⁴ Throwing up his hands after surveying the case law, Cooley concludes that "primarily, the determination what is a public purpose belongs to the legislature, and its action is subject to no review or restraint so long as it is not manifestly colorable."¹⁵

Later in the same chapter, Cooley identifies the public interest principle not only as an incident of the taxing power, but as one of the "implied restrictions" on the powers of Congress.¹⁶

Every legislative body is to make laws for the public good, and not for the benefit of individuals; and it is to make them aided by the light of those general principles which lie at the foundation of representative institutions. Here, however, we touch the province of legislative discretion. What is for the public good, and what is required by the principles underlying representative government, the legislature must decide under the responsibility of its members to their constituents.¹⁷

Restrictions on Congress's power to regulate in the public interest are found not only in the power-granting Taxing Clause, but in its mirror image, the rights-reserving Just Compensation Clause.¹⁸ "The line of distinction between the purposes that are to be deemed public and those which cannot be, is not very accurately drawn by the authorities," Cooley writes in his discussion of the Just Compensation Clause of the Fifth Amendment.¹⁹ But he stresses that the Fifth Amendment's declaration that "private property shall not be taken for public use without just compensation" is a declaration of the

12. See COOLEY, *supra* note 7, at 58-59.

13. *Id.* at 58.

14. *See id.*

15. *Id.* at 58-59.

16. *Id.* at 97.

17. COOLEY, *supra* note 7, at 98.

18. U.S. CONST. amend. V.

19. COOLEY, *supra* note 7, at 335.

“underlying principle of the law of eminent domain,” which is the inherent authority of any sovereignty “to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand.”²⁰ The requirement of just compensation, in short, was part of the requirement of equality that underlay the eighteenth- and nineteenth-century vision of public purposes. Cooley emphasized that

[t]axation takes property from the citizen for the public use, but it does so under general rules of apportionment and uniformity, so that each citizen is supposed to contribute only his fair share to the expenses of government, and to be compensated for doing²¹ so in the benefits which the government brings him.²¹

The right of eminent domain, by contrast, takes some particular item of property of which the government has special need, and direct compensation is the only “possible” mode of “equalization.”²²

Cooley’s discussion of powers granted and denied to the States follows the same pattern. Both explicitly and implicitly, he concludes, the States can only tax and spend in the public interest. In his chapter on “Protections to Contracts and Property,”²³ he begins with Article I, Section 10, which denies to the States the power to pass any law impairing the obligation of contracts. *Federalist* No. 44 singled out the Contracts Clause, he notes, as a “constitutional bulwark in favor of personal security and private rights” against laws which are “contrary to the first principles of the social compact and to every principle of sound legislation.”²⁴ Cooley goes on to emphasize that the limitation embodied by the Contracts Clause is merely one example of the inherent, and inalienable, police power of the state, which permits regulation in the public interest.²⁵ Reflecting the anti-monopolistic sentiments of classical political economy, Cooley

20. *Id.* at 332.

21. *Id.* at 333.

22. *Id.* at 333-34.

23. *See id.* at 300.

24. COOLEY, *supra* note 7, at 300 (quoting THE FEDERALIST, No. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961)).

25. *See id.* at 310-11 (noting that the exercise of the police power over charter contracts must have reference to the comfort, safety, or welfare of society).

stresses that "exclusive privileges are to some extent invidious and very justly obnoxious, and it is not reasonable to suppose that the State would grant them, except when some important public purpose or some necessary public convenience cannot be accomplished or provided without making the grant exclusive."²⁶ In his discussion of monopolies under the heading of the police power, Cooley stresses that:

It is certain that [monopolies] cannot be granted in such ordinary vocations as can be left open to all to the common benefit; but they sometimes may be given as a matter of regulation, where the business is such that the public interest can be best subserved and protected by confiding it to one person, or association of persons, who shall manage it exclusively. For example, the exclusive right to supply water or gas-light in a city or part of a city is sometimes granted, or the exclusive right to lay railway tracks in its streets; and it has been held that a corporation may be given the exclusive right to slaughter cattle for the markets of a city, it being required to do so impartially for all who apply, and at reasonable rates. This obligation to serve the public impartially would seem to be an essential incident to any grant of a monopoly, since without it it would be impossible to justify the grant on public grounds.²⁷

By the same logic, Cooley stresses in his discussion of the police power, price regulations of businesses affected with the public interest were permissible, whereas those of the common occupations of life were not.²⁸

Cooley's discussion of the Fourteenth Amendment is the culmination of his vision of the scope of permissible economic regulation, for he locates the principle that regulation must be in the public interest in the Equal Protection and Due Process Clauses.²⁹ As he writes in his discussion of "the Guaranties of Life, Liberty, and Equality," "[t]he theory of our institutions is, that every man's civil liberty is the same with that of others,—that all men are equal before the law in rights, privileges, and legal capacities. This theory is expressed and emphasized in the Fourteenth Amendment. A State, therefore, has no business to

26. *Id.* at 306.

27. *Id.* at 235-36.

28. *See id.* at 234-35 (noting that price regulation may be justified when the state grants exclusive privileges "in consideration of some special return to the public" or when the businesses affected are "quasi public").

29. *See* COOLEY, *supra* note 7, at 221.

bestow favors or to establish unjust discriminations."³⁰ As class legislation, such privately-oriented regulations were arbitrary, unreasonable, and unconstitutional.

The textual pegs in the Fourteenth Amendment, in other words, did not *create* the prohibition on class legislation; rather, they merely *reflected* the scope of the police power, which was an inalienable attribute of state sovereignty. As William Sutherland put it in his 1904 *Notes on the United States Constitution*, "[t]he police power was reserved by the states at the time the original constitution was adopted, and the Fourteenth Amendment was not designed to interfere in the least with the exercise of that power."³¹ Sutherland accurately summarized the two tests that courts used by the beginning of the Twentieth Century to distinguish valid exercises of the police power from invalid class legislation. To avoid conflict with the Equal Protection Clause, Sutherland wrote, exercises of the police power

must be reasonable and extend only to such laws as are enacted in good faith for the promotion of the public good and not for the oppression of a particular class; it must appear that the interests of the public, as distinguished from those of a class, require interference, and that the means adopted are reasonably necessary, and not unduly oppressive on individuals. A legitimate police regulation enforced so as to operate only against one class will be declared void.³²

Faithfully applying these tests, late nineteenth-century judges carefully enumerated the range of permissible public purposes, which included public safety, health, and morals, but did not include efforts to redistribute economic benefits from one group to another.³³ Thus, when Gilded Age lawyers challenged zoning regulations, special assessments, disaster relief, tax exemptions and subsidies for businesses, and railroad regulations, judges scrupulously tried to apply the formalist

30. *Id.* at 226.

31. WILLIAM A. SUTHERLAND, *NOTES ON THE CONSTITUTION OF THE UNITED STATES* 698 (1904).

32. *Id.* at 732-33.

33. *See, e.g.*, *Attorney General v. Pingree*, 79 N.W. 814, 818 (Mich. 1899) (holding that establishment of municipal street railway is not within police power); *People v. Warden of City Prison*, 51 N.E. 1006, 1010 (N.Y. 1898) (holding that state may not grant exclusive sales monopoly to corporate agents absent showing of public necessity); *Stockton v. Powell*, 10 So. 688, 690 (Fla. 1892) (holding that state may not construct internal improvements solely for the benefit of private entities).

categories distinguishing permissible from impermissible purposes.³⁴

So the prohibition on class legislation and the constitutional requirement that Congress and the States can only pass economic regulations in the "public interest" are not an invention of *Lochner*-era³⁵ substantive due process cases, but are basic structural principles, reflected in Article I of the original Constitution, and in the Fifth and Fourteenth Amendments. According to the familiar story of the demise of *Lochner*-era police powers jurisprudence, told by Herbert Hovenkamp in *Enterprise and American Law, 1836-1937*, the Jacksonian premises of economic classicism were swept away by marginalist revolution at the end of the Nineteenth Century.³⁶ For example, Hovenkamp suggests, one of the foundations of the anti-regulation view at the turn of the century was the wage-fund theory of classical economics, which held that the demand for workers, expressed in wages, was fixed and limited by the amount of accumulated capital in the country, less other costs of production.³⁷ This theory had dramatic implications for regulation; for it held that any efforts, such as minimum wage or maximum hour laws, to increase real wages beyond their natural proportion would reduce the net income to capital and labor, and would ultimately hurt the workers they were designed to help.³⁸ But the wage-fund theory, whose premises were uncontested background assumptions in the late-Nineteenth Century, became contested at the beginning of the Twentieth Century. According to the marginalists, the wage-fund theory was based on an economic mistake: it failed to recognize that the value of labor or capital is determined by the marginal contribution of the last laborer or last unit of capital entering the market, rather than by the previously invested costs of production.³⁹ Thus, when Justice Sutherland, in *Adkins v.*

34. See, e.g., *Chicago, B. & Q. R.R. Co. v. Nebraska*, 170 U.S. 57, 72-73 (1898) (holding that parties cannot, by contract, withdraw matters of "public safety, health and morals" from police power); *Cleveland, C., C. & St. L. Ry. Co. v. People*, 51 N.E. 842, 844-45 (Ill. 1898) (police power encompasses "[w]hatever is necessary to provide for the public welfare and the general security").

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

36. See HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937*, 193 (1991).

37. See *id.*

38. See *id.* at 195-96.

39. See *id.* at 197.

Children's Hospital,⁴⁰ quaintly invoked the wage-fund theory as a justification for his conclusion that raising wages without raising the productivity of invested capital "must lead to ultimate failure,"⁴¹ he was resurrecting a doctrine whose premises had become hotly contested if not entirely discredited. By the 1930s, according to the familiar story, the economic reality of the Depression had dislodged the nineteenth-century assumptions about the equal bargaining power of labor and capital in the common occupations of life. Progressives in the *Blaisdell* case⁴² were able to present a barrage of economic facts to argue that a Minnesota debtor relief statute was not a form of class legislation benefiting debtors and burdening creditors, but was instead, as the Court held, a "reasonable means to safeguard the economic structure upon which the good of all depends."⁴³

The familiar accounts of the demise of classical economics hold that courts should give legislatures broad discretion to expand the notion of permissible public purposes beyond its nineteenth-century roots. *Blaisdell* suggests that after the Depression unsettled the vision of a perfectly functioning labor market, economic redistribution, which had previously been considered class legislation, could now plausibly be viewed as regulation in the public interest. More recent theories of interpretative translation have emphasized that courts should simply defer to legislatures now that the distinction between class legislation and regulation in the public interest has become contested.⁴⁴ Today, there are post-classical economists, such as Milton Friedman, who reach the same conclusion as the nineteenth-century classicists about the efficiency of minimum wage laws,⁴⁵ but their views are no longer uncontested.⁴⁶ As a result, the argument goes, it is inappropriate for courts to second-guess legislatures on a controversial question of

40. 261 U.S. 525 (1923).

41. *Id.*: at 557.

42. *Home Building Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

43. *Id.* at 442. See also Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 457-58 (1995) (arguing that changes in economic reality necessitated *Blaisdell's* expansion of the police power).

44. See *id.* at 461-72.

45. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 180-81 (1962).

46. See, e.g., DAVID CARD & ALAN B. KRUEGER, *MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE* 13 (1995) (arguing that current minimum wages do not systemically contribute to unemployment).

economic policy. As long as there is a plausible argument that minimum wage laws, for example, serve the public interest, rather than representing naked wealth transfers, courts should uphold them.

The insights of public choice theory, however, make it hard to accept the notion that the range of permissible "public purposes" should be infinitely expanded, and that legislatures should be given broad discretion to decide which economic regulations are in the "public interest." Public choice theory, of course, is highly skeptical of the claim that the whole public has any common interests at all. "In the face of observable pressure-group activity," Buchanan and Tullock write,

with its demonstrable results on the outcome of specific issues presented and debated in legislative assemblies, the behavioral premise that calls for the legislator to follow a selfless pursuit of the 'public interest' or the 'general welfare' as something independent of and apart from private economic interest is severely threatened.⁴⁷

The formalist public interest jurisprudence may have been appropriate in the Nineteenth Century: "In an era when the whole of governmental activity was sharply limited and when the activities that were collectivized exerted a general impact over substantially all individuals and groups, the relative absence of organized special interest is readily explainable."⁴⁸ But because of the increased opportunities for rent-seeking that have accompanied the expansion of the public sector in the post-New Deal welfare state, Buchanan and Tullock conclude that "constitutional rules that were 'optimal' in 1900 are probably not 'optimal' in 1960."⁴⁹

Buchanan and Tullock's skepticism about the existence of an objectively discernible public interest has important implications for American constitutional interpretation. For if Article I of the original Constitution, and the Fifth and Fourteenth Amendments, embody a general structural command that judges must distinguish economic regulations in the public interest from those designed for special interests, and if, in light of the insights of public choice theory, the category of

47. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 283 (1962).

48. *Id.* at 286.

49. *Id.* at 290.

regulations in the public interest has shrunk to something like a null set, then much of the structural Constitution of the Eighteenth and Nineteenth Centuries is untranslatable in the Twentieth.

Imagine the range of doctrinal problems that arise if Buchanan and Tullock are correct that the only pareto-optimal changes "in the public interest" are those that command unanimous support by all members of the relevant group. Consider, for example, the Supreme Court decisions striking down legislative price regulations of the railroads and other industries around the turn of the century.⁵⁰ Under the "public interest view" of regulation, championed by progressives such as Louis Brandeis, the regulations were passed to control monopoly pricing by various industries and should have been upheld.⁵¹ But public choice insights on regulatory capture suggest today that the businesses themselves were the main beneficiaries of price regulation, and that they sought the relief from competition that regulation brings.⁵² As for debtor relief laws—the question at issue in *Blaisdell*—Judge Posner has suggested that wealth redistribution, like protection against crime or pollution, is a public good, and that free-rider problems may thwart private efforts to effect wealth transfers.⁵³ At the same time, laws that transfer wealth from one group to another—formerly condemned as "class legislation"—are now seen as the classic example of rent-seeking legislation. As Jonathan Macey has suggested, "it is extremely difficult to distinguish between those governmental activities that involve 'amorally redistributive' rent-seeking (and therefore should be prohibited) and those that represent wealth-increasing 'public interest' governmental activities (and therefore should be encouraged)."⁵⁴ Thus, the benefit of distinguishing interest-group legislation from public-interest legislation often will not be worth the cost.

50. See, e.g., *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U.S. 418 (1890).

51. See Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017, 1021 (1988).

52. See *id.* at 1023-25.

53. See Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982).

54. Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 472-73 (1988).

Originalism, alas, provides no easy escape from this difficulty. I have argued elsewhere that the “policy soaked” pragmatism” of law-and-economics scholars such as Richard Posner is difficult, at least in the constitutional sphere, to reconcile with concerns of democratic legitimacy and institutional competence.⁵⁵ By looking backward, and applying principles rooted in constitutional text, history, and structure, rather than looking forward, and adjudicating on the basis of “instinct yoked to empirical analysis,” judges at least have a plausible answer to the counter-majoritarian difficulty. But I am increasingly skeptical that the boundary between originalism and pragmatism is possible to sustain. If originalism commands that the textual provisions of the Constitution must be interpreted in light of how they would have been reasonably understood by their ratifiers in 1789 and 1868, and if the ratifiers in 1789 and 1868 would have reasonably understood the Taxation Clause, Contracts Clause, Just Compensation Clause, and Privileges or Immunities, Due Process and Equal Protection Clauses as an abstract mandate for judges to strike down class legislation that served private rather than public interests, then the constraining virtue of originalism—namely, its democratic link to historically determinate rules rather than amorphous, policy-soaked standards—seems to evaporate before our eyes.

For someone (like me) with originalist sympathies, there are, it seems to me, two possible responses to this dilemma, and both of them are unsatisfying. One possibility is to retreat back to what Larry Lessig has called untranslated, one-step originalism,⁵⁶ resurrecting the formalistic nineteenth-century categories of legislation in the public interest where health, safety, and morals are permissible public purposes, and redistribution is not. This, of course, means a return to *Lochner*, and a resurrection of precisely the kind of rampant judicial activism that most self-styled originalists purport to reject. The second possibility is to expand (or translate) the scope of permissible public purposes so broadly that it ceases to be a very meaningful constraint on economic regulation. It means rational basis review with perhaps

55. Jeffrey Rosen, *Overcoming Posner*, 105 YALE L.J. 581, 593 (1995) (reviewing RICHARD A. POSNER, *OVERCOMING LAW* (1995)).

56. See Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1368-70 (1997).

a little more bite than the regime of *Williamson v. Lee Optical*⁵⁷—the most naked wealth transfers from one group to another might be struck down as class legislation, but everything else would be upheld as legislation in the public interest. This is perfectly consistent with judicial restraint, and has a plausible (if attenuated) link to original understanding, but it is hard to reconcile with the subversive insights of public choice theory. In any event, it is hard to take any joy in the Hobson's choice between originalism on the one hand and public choice theory on the other, because public choice theory exposes the economic fictions underlying the Founders' understanding of our structural Constitution, and originalist decisions such as *Lochner* show the danger of applying undiluted public choice theory in the constitutional sphere.

57. 348 U.S. 483 (1955) (using rational basis review to uphold regulation requiring prescription before reframing eyeglass lenses).

