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CONSTITUTIONAL LAW — ECONOMIC LEGISLATION — D.C. CIRCUIT REJECTS CHALLENGE TO MILK REGULATION. — *Hettinga v. United States*, 677 F.3d 471 (D.C. Cir. 2012) (per curiam), *reh'g en banc denied*, No. 11-5065 (D.C. Cir. June 21, 2012).

Economic liberty, defined broadly as “the right to earn a living through trade or labor,”¹ is protected under the Fourteenth Amendment of the United States Constitution.² Starting in the New Deal era, however, courts have afforded sweeping deference to legislatures when hearing challenges to laws impinging on claimants’ economic freedoms, leaving governments free to “adopt whatever economic policy may reasonably be deemed to promote public welfare.”³ In 1938, the Supreme Court held that economic liberties are not fundamental rights worthy of close scrutiny by the courts.⁴ Today, courts review legislation affecting this class of rights under the highly deferential rational basis test, under which a law is upheld “if there is any reasonably conceivable state of facts that could provide a rational basis” relating the law to a legitimate government purpose.⁵ As a consequence, citizens who have been wronged by their government in the economic sphere are left with no recourse but the inhospitable democratic processes that infringed on their liberties in the first place.⁶

Recently, in *Hettinga v. United States*,⁷ the D.C. Circuit upheld the dismissal of a challenge to a statute regulating dairy markets.⁸ An impassioned concurring opinion by a majority of the panel, however, challenged the blind deference to legislatures that precedent demands, signaling its discontent with the doctrinal status quo in the field of economic liberty.⁹ Democratic processes are sometimes manipulated by special interest politics, and in an effort to be ideologically neutral toward any economic policy, courts may be enabling the “crony capitalism” that afflicts the American economy by foreclosing any meaningful opportunity for citizens to challenge laws curtailing their eco-

¹ See TIMOTHY SANDEFUR, *THE RIGHT TO EARN A LIVING* 1 (2010).

² See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (collecting cases); *Santos v. City of Hous.*, 852 F. Supp. 601, 607 (S.D. Tex. 1994).

³ *Nebbia v. New York*, 291 U.S. 502, 537 (1934).

⁴ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 & n.4 (1938).

⁵ *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

⁶ See *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (“The Constitution presumes that . . . even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.” (footnote omitted)).

⁷ 677 F.3d 471 (D.C. Cir. 2012) (per curiam), *reh'g en banc denied*, No. 11-5065 (D.C. Cir. June 21, 2012).

⁸ *Id.* at 474.

⁹ See *id.* at 480–83 (Brown, J., concurring).

conomic liberties.¹⁰ Given the present concern over the influence of corporate interests on the American political process, the time is ripe for the Supreme Court to reconsider its approach to constitutional challenges to economic legislation as a new way to guard against illegitimate special interest policies.

Dairy farmers and milk processors operate under a complex regulatory scheme established by the Agricultural Marketing Agreement Act of 1937¹¹ (AMAA). Under the AMAA, producers supply raw milk to handlers, who must then pay money into a centralized pool called the "producer settlement fund."¹² These payments are regularly redistributed to producers at a fixed rate based on the quantity of milk sold.¹³ Until recently, the Secretary of Agriculture exempted from participation in the price-control system farmers who operated both as producers and handlers¹⁴ and handlers who sold milk to customers in regions that were not regulated under the federal scheme.¹⁵

Hein and Ellen Hettinga owned two dairies in Arizona that operated under the exceptions present in the AMAA.¹⁶ By operating outside the scope of the AMAA, the Hettingas were able to sell milk to retailers at discounted prices.¹⁷ This advantage evaporated, however, when the U.S. Department of Agriculture (USDA) enacted a Final Rule¹⁸ that eliminated the exceptions underpinning the Hettingas' business advantage.¹⁹ The Hettingas challenged the rule,²⁰ but their case was still pending when Congress passed the Milk Regulatory Equity Act of 2005²¹ (MREA), which amended the AMAA to include the Final Rule's major provisions. The only dairy operations in the country impacted by these laws were those owned by the Hettingas.²²

The Hettingas dropped their USDA challenge and brought suit against the United States, alleging that the MREA was unconstitutional because (1) it was an unlawful bill of attainder, (2) it violated their equal protection rights by singling them out for enforcement, and (3) it denied them due process by mooting their challenge to the USDA

¹⁰ See Joseph E. Stiglitz, *Crony Capitalism American-Style*, PROJECT SYNDICATE (Feb. 11, 2002), <http://www.project-syndicate.org/commentary/crony-capitalism-american-style>.

¹¹ 7 U.S.C. §§ 601-674 (2006).

¹² *Hettinga*, 677 F.3d at 475.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *id.*

¹⁸ Milk in the Pacific Northwest and Arizona-Las Vegas Marketing Areas; Order Amending the Orders, 71 Fed. Reg. 9430 (Feb. 24, 2006) (to be codified at 7 C.F.R. pts. 1124, 1131).

¹⁹ See *Hettinga*, 677 F.3d at 475.

²⁰ See *id.* at 475-76.

²¹ Pub. L. No. 109-215, 120 Stat. 328 (codified at 7 U.S.C. § 608c(5)(M)-(N)).

²² *Hettinga*, 677 F.3d at 477.

rule.²³ The district court dismissed the Hettingas' case for failure to exhaust their administrative remedies pursuant to the AMAA.²⁴ The D.C. Circuit reversed and remanded, holding that facial constitutional challenges are exempt from the AMAA's exhaustion requirements.²⁵ On remand, the district court dismissed the case for failure to state a claim upon which relief could be granted.²⁶

The D.C. Circuit affirmed.²⁷ In a per curiam opinion,²⁸ the panel held that the Hettingas' complaint failed to satisfy the requirement, set forth in *Bell Atlantic Corp. v. Twombly*²⁹ and *Ashcroft v. Iqbal*,³⁰ of "facial plausibility."³¹ "Longstanding Supreme Court precedent readily dispense[d]" with the Hettingas' first claim³² — the MREA did not constitute a bill of attainder because it targeted future conduct by any firm that meets the requirements of the statute.³³ Because courts "grant statutes involving economic policy a 'strong presumption of validity,'"³⁴ the Hettingas' equal protection claim was similarly doomed — the government had provided a justification for the milk legislation "that [was] not only rational on its face, but also has been consistently recognized by the courts as legitimate."³⁵ Specifically, the MREA was designed to further the government's interest in "ensuring the orderly function of milk markets" by preventing dairies like the Hettingas' from "disrupting milk market conditions" through competitive price pressures.³⁶ Finally, the court held that the Hettingas had "failed to plead the threshold requirement of a due process claim: that the government has interfered with a cognizable liberty or property interest,"³⁷ because the Hettingas could continue to operate their dairy

²³ *Id.* at 476. The Hettingas did not make a substantive due process argument. *See id.* at 480 (Brown, J., concurring) ("No doubt they would have preferred a simpler [claim] — that the operation and production of their enterprises had been impermissibly collectivized — but a long line of constitutional adjudication precluded that claim.")

²⁴ *Hettinga v. United States*, 518 F. Supp. 2d 58, 61 (D.D.C. 2007).

²⁵ *Hettinga v. United States*, 560 F.3d 498, 504–05 (D.C. Cir. 2009).

²⁶ *Hettinga v. United States*, 770 F. Supp. 2d 51, 57–60 (D.D.C. 2011).

²⁷ *Hettinga*, 677 F.3d at 474.

²⁸ The panel was composed of Chief Judge Sentelle and Judges Brown and Griffith.

²⁹ 550 U.S. 544 (2007).

³⁰ 129 S. Ct. 1937 (2009).

³¹ *Hettinga*, 677 F.3d at 476 (quoting *Iqbal*, 129 S. Ct. at 1949) (internal quotation marks omitted); *see also Twombly*, 550 U.S. at 570.

³² *Hettinga*, 677 F.3d at 476.

³³ *See id.* at 477–78 (citing *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 471–72 (1977); *Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 86 (1961)).

³⁴ *Id.* at 478 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993)).

³⁵ *Id.* at 479 (citing *Nebbia v. New York*, 291 U.S. 502, 529–37 (1934); *Lamers Dairy, Inc. v. USDA*, 379 F.3d 466, 473 (7th Cir. 2004); *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177, 1183 (9th Cir. 1998)).

³⁶ *Hettinga v. United States*, 770 F. Supp. 2d 51, 59 (D.D.C. 2011).

³⁷ *Hettinga*, 677 F.3d at 479–80 (citing *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)).

subject to the relevant regulations.³⁸ Nor did the statute unlawfully affect their interest in the cause of action against the USDA, for the Hettingas had dropped the claim themselves, believing it moot.³⁹ Moreover, the court said, new statutes often moot existing claims without violating the Constitution.⁴⁰

Judge Brown concurred and was joined by Chief Judge Sentelle.⁴¹ She recognized that, given the judicial precedents in the area of milk regulation, “no other result [was] possible.”⁴² But Judge Brown proceeded to offer a fiery critique of American politics:

[This case] reveals an ugly truth: America’s cowboy capitalism was long ago disarmed by a democratic process increasingly dominated by powerful groups with economic interests antithetical to competitors and consumers. And the courts, from which the victims of burdensome regulation sought protection, have been negotiating the terms of surrender since the 1930s.⁴³

Judge Brown recounted the history of judicial review of economic legislation, rebuking past courts for abdicating their judicial duty to review the propriety of government action in the economic sphere by naïvely choosing to defer to the democratic process.⁴⁴ This trend, she argued, is a dangerous departure from a constitutional structure that was designed to guard against “the political temptation to exploit the public appetite for other people’s money,”⁴⁵ resulting in “the absence of any check on the group interests that all too often control the democratic process.”⁴⁶ The federal milk regulatory scheme — designed to “thwart[] the free market, and ultimately hurt consumers, to protect the economic interests of a powerful faction”⁴⁷ — “just seem[ed] like a crime”⁴⁸ in Judge Brown’s mind, but she argued that such a system is inevitable when the standard of review for economic regulation effectively places “property . . . at the mercy of the pillagers.”⁴⁹

Judge Griffith filed a concurring opinion distancing himself from his colleagues’ concurrence. He stated simply: “Although by no means unsympathetic to their criticism . . . , I am reluctant to set forth my own views on the wisdom of such a broad area of the Supreme Court’s settled jurisprudence that was not challenged by the petitioner.”⁵⁰

³⁸ *Id.* at 480.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 480 (Brown, J., concurring).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *See id.* at 480–81.

⁴⁵ *Id.* at 481.

⁴⁶ *Id.* at 482.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 483.

⁵⁰ *Id.* (Griffith, J., concurring).

Hettinga crystallizes the problem of special interest lobbying in American democracy. Sophisticated organizations with vast resources are better able to procure favorable legislation promoting their economic interests than are smaller competitors or the general public.⁵¹ The result is often legislation that benefits an influential minority to the detriment of the public interest.⁵² Would-be solutions to this problem have embodied concerns regarding the role of corporate interests in the financing of political campaigns.⁵³ However, given the robust First Amendment protections afforded to political campaign expenditures,⁵⁴ this approach may face insurmountable legal obstacles.⁵⁵ Although the law is constrained in its ability to curb this channel for special interest groups to influence decisionmakers, it could limit the ability of interest groups to secure economic rents in legislation. Courts have adopted a standard of review that provides minimal protection for economic liberties.⁵⁶ Simply providing meaningful scrutiny of economic legislation would greatly enhance a citizen's ability to protect herself from competing interests with superior political clout. The fact that the *Hettingas* had no meaningful opportunity to challenge the law that harmed them, and the manifest frustration of Judge Brown and Chief Judge Sentelle in their inability to provide them with one, illustrates the need for the Supreme Court to revisit its economic liberties doctrine.

The *Hettingas'* situation arose because they were out-lobbied. After they reached a deal to supply Costco stores in southern California, average milk prices in that region dropped markedly, counteracting "a brazen case of price gouging" by established suppliers.⁵⁷ Although re-

⁵¹ See Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 219–21, 226–28 (2012) (describing ways that special interest groups influence the political process); John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 378–82 (1999) (same); William F. Shughart II & Robert D. Tollison, *Interest Groups and the Courts*, 6 GEO. MASON L. REV. 953, 953–54 (1998). But see Nicholas W. Allard, *Lobbying Is an Honorable Profession: The Right to Petition and the Competition to be Right*, 19 STAN. L. & POL'Y REV. 23, 28–32 (2008) (arguing that fears of lobbyist influence are overblown and misguided).

⁵² See Hasen, *supra* note 51, at 231.

⁵³ See, e.g., LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS — AND A PLAN TO STOP IT* 264–72 (2011).

⁵⁴ See *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (holding that the First Amendment prohibits restrictions on independent political expenditures by corporations); see also *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (noting that disclosure requirements burden First Amendment interests), *cert. denied*, 131 S. Ct. 553 (2010).

⁵⁵ See, e.g., *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813 (2011) (holding Arizona's public financing system for state elections unconstitutional).

⁵⁶ See William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 375–77 (1988).

⁵⁷ *Hettinga*, 677 F.3d at 482 (Brown, J., concurring) (quoting Dan Morgan et al., *Dairy Industry Crushed Innovator Who Bested Price-Control System*, WASH. POST, Dec. 10, 2006, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/09/AR2006120900925.html>) (internal quotation mark omitted).

tailers and consumers welcomed the drop in milk prices, large milk companies in California and Arizona lobbied to close the “loophole” that permitted the Hettingas to operate outside the federal price-fixing scheme.⁵⁸ The Hettingas responded in kind, but their efforts were in vain, as lawmakers aligned with the Hettingas’ competitors worked diligently to amend the AMAA.⁵⁹

The common strategy of outspending the competition for influence over the lawmaking process is successful in part because there is effectively no cause of action to challenge economic legislation, which courts review under the rational basis test and uphold on any conceivable set of facts that relates the law to a legitimate government interest.⁶⁰ This standard invites judges to accept implausible rationales in order to uphold a statute, resulting in decisions divorced from the reality underlying the dispute.⁶¹ On the surface, rational basis review is a means-ends test: the means taken by the government must be rationally related to a legitimate government end. But because such interests can be reframed at different levels of generality,⁶² courts easily find connections, albeit sometimes tenuous ones, to some government interest that is not “wholly irrelevant”⁶³ to the means chosen in the statute. Thus, the government’s key interest in awarding economic rents to favored dairy companies becomes a less-objectionable interest in promoting stable markets.⁶⁴ Further, rational basis review places the near-impossible burden on plaintiffs to “negative ‘any reasonably conceivable state of facts that could provide a rational basis . . .’”⁶⁵ for the

⁵⁸ See Morgan et al., *supra* note 57. In the course of their lobbying efforts, the dairy companies spent millions of dollars over three years. *Id.*

⁵⁹ See *id.*

⁶⁰ See FCC v. Beach Commc’ns, Inc., 508 U.S. 307, 313 (1993). Courts employ rational basis review in the context of both equal protection claims and due process claims.

⁶¹ See, e.g., N.D. State Bd. of Pharmacy v. Snyder’s Drug Stores, Inc., 414 U.S. 156, 166–67 (1973) (upholding a law requiring that pharmacies be owned by registered pharmacists or corporations the majority stock in which is owned by registered pharmacists; although such arrangements “can have no real or substantial relation to the public health,” *id.* at 164 (quoting Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 113 (1928))).

⁶² See Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) (“The more abstractly one states [an] already-protected right, the more likely it becomes that [a] claimed right will fall within its protection.”).

⁶³ Heller v. Doe, 509 U.S. 312, 324 (1993) (quoting Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 71 (1978)).

⁶⁴ The federal courts are split on whether naked economic protectionism constitutes a legitimate government interest. Compare *St. Joseph Abbey v. Castille*, No. 11-30756, slip op. at 10 (5th Cir. Oct. 23, 2012) (“[N]either precedent nor broader principles suggest that mere economic protection of a pet industry is a legitimate governmental purpose.”), and *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (similar), with *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004) (“[A]bsent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest.”).

⁶⁵ *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (quoting *Heller*, 509 U.S. at 320).

law. Influential interest groups are able to manipulate the democratic process partly because courts have been excessively deferential to legislatures, adopting a standard of review that in practice allows only one result: a ruling for the government.⁶⁶

Courts have avoided the implications of rational basis review by subtly deviating from the test.⁶⁷ The result is an incoherent set of cases with no explicit theoretical framework to explain the disparity in treatment.⁶⁸ Diverging courts continue to justify Justice Marshall's admonition that rational basis review is "rudderless, affording no notice to interested parties of the standards governing particular cases and giving no firm guidance to judges who, as a consequence, must assess the constitutionality of legislation before them on an *ad hoc* basis."⁶⁹

As the unanimous panel in *Hettinga* demonstrates, only the Supreme Court can solve this problem. The Court could rule that naked economic protectionism — that is, "protecting a discrete interest group from economic competition"⁷⁰ — is not a legitimate government end,⁷¹ and it could strengthen rational basis review by grounding the analysis in the facts of the case, by scrutinizing the connection between the government's means and its stated ends, and by determining the appropriate level of generality for the situation.⁷² Such a standard of review would force courts to separate public-spirited economic legislation from anticompetitive special interest legislation, a difficult task given that "the line between public value and naked preference is quite thin."⁷³

⁶⁶ See Neelum J. Wadhvani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 801–04 (2006). See generally Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 1003–20 (1999) (criticizing excessive judicial deference to legislatures).

⁶⁷ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 580 (2003); *Romer v. Evans*, 517 U.S. 620, 635 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); see also Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1494 (2008) (noting *Lawrence's* departure from normal rational basis review); Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 538 & n.292 (2011) (describing *Romer* and *Cleburne* as instances of an enhanced "rational basis with bite" test involving closer-than-normal scrutiny).

⁶⁸ See Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 482, 512–18 (2004). But see *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 682 F.3d 1, 10–11 (1st Cir. 2012) (noting that courts historically have used a heightened rational basis review in cases involving possible discrimination against disadvantaged minorities).

⁶⁹ *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 321 (1976) (Marshall, J., dissenting).

⁷⁰ *Craigsmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002).

⁷¹ See *supra* note 64.

⁷² See Jackson, *supra* note 67, at 493; Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 SYRACUSE L. REV. 917, 963–66 (1999) (advocating a lenient but meaningful form of review for economic legislation, not unlike the arbitrary and capricious review of administrative law); Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday's Rationality Review Isn't Enough*, 24 N. ILL. U. L. REV. 457, 496–98 (2004).

⁷³ Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1728 (1984).

Moreover, many protectionist laws serve some limited public purpose. However, courts perform an analogous sorting task in dormant commerce clause cases, applying a more demanding means-ends test for legislation that protects in-state economic interests to the exclusion or detriment of interstate commerce.⁷⁴ The precise limits of special interest legislation are complex and sometimes nebulous, but the courts could similarly employ heightened scrutiny upon a showing of (1) substantial competitive advantages to an identifiable interest group and (2) the facial implausibility of the legislation's means serving its stated ends.

Interest group involvement is an inevitable and even desirable part of democratic lawmaking. There are winners and losers in virtually all legislation, and Congress must have discretion to choose between alternative national policies. But "[t]he Constitution . . . was meant to provide a bulwark against infringements that might otherwise be justified as necessary expedients of governing."⁷⁵ Judges need not prescribe policy in order to decide whether the government has exceeded its authority. The unwarranted deference afforded to economic legislation currently frees organized interest groups to shape policy to their advantage at the expense of less-connected competitors like the Hettingas, as well as the public at large.⁷⁶ A basis on which to challenge unreasonable economic legislation would help balance the power and influence of special interests in American politics. Such a doctrinal shift could open the floodgates to new litigation, but the cost is that of protecting previously neglected liberties.

The Hettingas might not have won their case even with a more stringent standard of review. The Court might have found that there were no "shenanigans"⁷⁷ involved in the MREA's passage, and that it was designed to promote the government's legitimate interests. The palpable sense of frustration in Judge Brown's concurrence, however, seemed to stem from the fact that the court was not even permitted to ask the appropriate questions. Because the Hettingas' case challenged economic legislation, it was dead on arrival. But even if the liberties that the Hettingas sought to protect are not "fundamental," they are not unimportant, and they should not be rendered meaningless. *Hettinga* demonstrates the need to reassess and redesign the standard of review applicable to economic legislation.

⁷⁴ See *id.* at 1705–08.

⁷⁵ *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 356 (1987) (Brennan, J., dissenting) (criticizing judicial deference afforded to prison officials).

⁷⁶ See Richard A. Epstein, *Modern Republicanism — Or the Flight from Substance*, 97 *YALE L.J.* 1633, 1638 (1988) (distinguishing anticompetitive special interest legislation from "legislation for the national good"); Sandefur, *supra* note 72, at 478.

⁷⁷ *Hettinga*, 677 F.3d at 481 (Brown, J., concurring).