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## The Freedom to Pursue a Common Calling: Applying Intermediate Scrutiny to Occupational Licensing Statutes (note)

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# The Freedom to Pursue a Common Calling: Applying Intermediate Scrutiny to Occupational Licensing Statutes†

Alexandra L. Klein\*

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### *I. Introduction*

The principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments. . . . [T]he theory of experimentation in censorship was not permitted to interfere with the fundamental doctrine

of the freedom of the press. The opportunity to apply one's labor and skill in an ordinary occupation with proper regard for all reasonable regulations is no less entitled to protection.<sup>1</sup>

After the devastation of Hurricane Katrina, the monks at St. Joseph Abbey in Louisiana sought a new source of income.<sup>2</sup> They began producing simple wooden coffins priced at much lower rates than caskets sold in funeral homes.<sup>3</sup> After the Abbey had made a large investment in its business, St. Joseph Woodworks,<sup>4</sup> the Louisiana State Board of Embalmers and Funeral Directors ordered it to close.<sup>5</sup> Although the monks did not provide funeral or embalming services, a Louisiana statute regulating the funeral industry prohibited the monks from selling coffins.<sup>6</sup> Under the statute, "funeral directing" included "any service whatsoever connected with . . . the purchase of caskets or other funeral merchandise."<sup>7</sup> The statute additionally specified that only licensed funeral directors operating out of "duly licensed Louisiana funeral establishment[s]" could engage in funeral

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1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932).

2. *See* *St. Joseph Abbey v. Castille*, 712 F.3d 215, 217 (5th Cir. 2013) (explaining that the hurricane destroyed timberland that was the Abbey's main source of income).

3. *See id.* ("St. Joseph Woodworks offered one product—caskets in two models, 'monastic' and 'traditional,' priced at \$1,500 and \$2,000 respectively, significantly lower than those offered by funeral homes.").

4. *See id.* (noting that the Abbey invested approximately \$200,000).

5. *See id.* at 219 (explaining that, after the Board ordered the Abbey not to sell caskets, a member of the Board who owned several funeral homes subsequently initiated formal complaint proceedings).

6. *See id.* at 218 (discussing restrictions the statute placed on the Abbey); *see also* LA. REV. STAT. ANN. § 37:831(42)–(46) (2013) (providing definitions for funeral directing and funeral establishment and addressing unlawful practices in the funeral industry), *invalidated in part by* *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013). In *St. Joseph Abbey*, the Court invalidated the language of subsection (42) when it found that the provision restricting the right to sell funeral merchandise to licensed funeral directors improperly granted funeral directors exclusive control over intrastate casket sales. *See* *St. Joseph Abbey*, 712 F.3d at 222–23 (discussing the legislative intent behind the statute). At the time *St. Joseph Abbey* was decided, the subsection was numbered (37). *See id.* at 224 n.5 (citing to § 37:831(37)).

7. LA. REV. STAT. ANN. § 37:831(42), *invalidated by* *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013).

directing.<sup>8</sup> Even though Louisiana did not require a casket for burial, nor did any law prevent a customer from building his own or purchasing one out of state,<sup>9</sup> the monks were unable to sell their caskets in Louisiana.<sup>10</sup> Obtaining the necessary credentials was both cost and time prohibitive, leaving the monks out of business.<sup>11</sup> They sought relief from the legislature without success before turning to the courts.<sup>12</sup> The problem St. Joseph Abbey faced is one that many individuals attempting to enter a profession or open a new business share: occupational licensing.

Occupational licensing is a “process where entry into an occupation requires the permission of the government, and the state requires some demonstration of a minimum degree of competency.”<sup>13</sup> Many professionals are licensed, including architects,<sup>14</sup> polygraph examiners,<sup>15</sup> nurses,<sup>16</sup> auctioneers,<sup>17</sup>

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8. *Id.* § 37:848(A)–(C).

9. *See* St. Joseph Abbey, 712 F.3d at 217–18 (“Louisiana does not regulate the use of a casket. . . . Individuals may construct their own caskets for funerals in Louisiana or purchase caskets from out-of-state suppliers via the internet. Indeed, no Louisiana law even requires a person to be buried in a casket.”).

10. *See id.* at 218 (noting that, despite a lack of regulations for casket use and quality, the Abbey was required to shoulder “significant regulatory burdens”).

11. *See id.* at 219 (explaining that becoming a licensed funeral establishment has a number of specific building regulations and requires the establishment to employ a licensed funeral director, who has his own set of regulations: an education requirement, an apprenticeship, and an exam—all to sell coffins).

12. *See id.* at 219–20 (explaining that the Abbey unsuccessfully petitioned the legislature for an exception for “charitable organizations” before bringing a suit for injunctive relief).

13. Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSPS. 189, 191 (2000).

14. *See* VA. CODE ANN. § 54.1-406 (2015) (requiring architects to obtain licenses before practicing).

15. *See id.* § 54.1-1801 (“All polygraph examiners shall be licensed pursuant to this chapter.”).

16. *See id.* § 54.1-3017 (providing licensing guidelines for registered nurses).

17. *See id.* § 54.1-603 (requiring a license for a person or a firm selling at auction).

social workers,<sup>18</sup> cosmetologists,<sup>19</sup> real estate appraisers,<sup>20</sup> and cemetery operators.<sup>21</sup> The list of occupations subject to licensing can be quite absurd; states have required licenses for fortune tellers, manure applicators, and cat groomers, to name but a few.<sup>22</sup> Occupational licensing is the strictest form of employment regulation; it is “often referred to as ‘the right to practice.’”<sup>23</sup> It fits within the state’s right to control commerce and is part of its police powers.<sup>24</sup> Practicing without a license may carry criminal penalties, civil penalties, or both.<sup>25</sup>

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18. See *id.* § 54.1-3706 (“In order to engage in the practice of social work, it shall be necessary to hold a license.”).

19. See *id.* § 54.1-703 (“No person shall offer to engage in or engage in barbering, cosmetology, nail care, waxing, tattooing, body-piercing, or esthetics without a valid license issued by the Board.”).

20. See *id.* § 54.1-2011 (requiring licenses for real estate appraisers).

21. See *id.* § 54.1-2311 (“No person shall engage in the business of a cemetery company in the Commonwealth without first being licensed by the board.”).

22. See Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL’Y 209, 216–18 (2016) (listing occupations subject to licensing).

23. Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing* 1 (Nat’l Bureau of Econ. Research, Working Paper No. 14308, 2008), <http://www.nber.org/papers/w14308>. There are less restrictive means of occupational regulation, such as registration, which requires a practitioner to provide identification before practicing, sometimes with a filing fee. See *id.* (describing registration). Certification allows any person to perform the task, but a government or agency-administered exam certifies an individual’s skill and knowledge. See *id.* (describing certification procedures). The fact that there are other effective state-endorsed methods of occupational regulation is significant because this Note advocates applying intermediate scrutiny to occupational licensing challenges. *Infra* Part IV.D.

24. See, e.g., *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*) (“States are accorded wide latitude in the regulation of their local economies under their police powers.”); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791–93 (1975) (explaining that states have “a compelling interest in the practice of professions within their boundaries and . . . have broad power to establish standards for licensing practitioners and regulating the practice of professions”); *License Cases*, 46 U.S. 504, 583 (1847) (explaining that police powers include “sovereignty, the power to govern men and things within the limits of its dominion”).

25. See VA. CODE ANN. § 54.1-111 (2014) (criminalizing practicing a licensed profession without a license and providing criminal and civil penalties); see also Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1135 n.244

Licensing statutes present a hurdle to entering the workforce because licensed professions usually require significant training hours, exams, and fees to practice.<sup>26</sup> Some statutes also require licenses both for a place of business and for its proprietor, with separate regulations for each.<sup>27</sup> Many requirements may be too expensive, time-consuming, arbitrary, or difficult for some aspirants to meet, locking them out of their intended profession.<sup>28</sup>

Occupations are primarily regulated by state licensing boards composed of active professionals, political appointees, and, occasionally, members of the public appointed by an executive official.<sup>29</sup> Licensing boards operate with a certain amount of self-interest because, by creating restrictive entry criteria and influencing training and education requirements, they can limit competition and control the market for professional services.<sup>30</sup>

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(2014) (referring to research showing that the majority of licensing boards in Tennessee and Florida have criminal sanctions available for individuals practicing without licenses).

26. See DICK M. CARPENTER ET AL., INST. FOR JUSTICE, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING 8 (2012), [https://www.ij.org/images/pdf\\_folder/economic\\_liberty/occupational\\_licensing/lic\\_ensetowork.pdf](https://www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/lic_ensetowork.pdf) (identifying the average requirements for 102 licensed occupations across all fifty states and the District of Columbia).

27. See VA. CODE ANN. § 54.1-2810 (2014) (requiring “funeral establishments” to be licensed and to employ a full-time licensed funeral director); *id.* § 54.1-2811 (providing an exhaustive list of building regulations for “funeral service establishments” and authorizing the Board to adopt further regulations as necessary).

28. See Larkin, *supra* note 22, at 211 n.3 (describing some of the mechanisms states use to limit the number of individuals entering a profession and noting that “[a]t some point, extremely burdensome licensing requirements have the practical effect of excluding most or all potential entrants”); see also THE WHITE HOUSE, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICY MAKERS 8 (2015), [https://www.whitehouse.gov/sites/default/files/docs/licensing\\_report\\_final\\_nonembargo.pdf](https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf) [hereinafter OCCUPATIONAL LICENSING: A FRAMEWORK] (noting the disproportionately harmful impact of occupational licensing on certain populations).

29. See Kleiner, *supra* note 13, at 191 (describing the composition and functionality of licensing boards); see also VA. CODE ANN. § 54.1-2802 (2014) (“The Board of Funeral Directors and Embalmers shall consist of nine members as follows: seven funeral service licensees of the Board with at least five consecutive years of funeral service practice in this Commonwealth immediately prior to appointment and two citizen members.”).

30. See Edlin & Haw, *supra* note 25, at 1107–10 (describing methods that licensing boards use to restrict competition).

Reducing competition can create a significant financial benefit for members of a licensed profession.<sup>31</sup>

The number of professions subject to occupational licensing has expanded dramatically since the 1950s;<sup>32</sup> 29% of workers are now required to obtain a license before beginning employment.<sup>33</sup> States license an average ninety-two occupations.<sup>34</sup> Moreover, the number of professions subject to licensing will likely continue to grow. Colorado, for example, has developed licensing requirements for its now-expanding marijuana industry.<sup>35</sup> The rise of services such as Uber and Lyft may raise additional licensing questions as entrenched industries react to newcomers.<sup>36</sup> Occupational licensing statutes

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31. See Larkin, *supra* note 22, at 235–38 (explaining that members of licensed occupations receive significant financial benefits from limiting the number of entrants to a profession); see also OCCUPATIONAL LICENSING: A FRAMEWORK, *supra* note 28, at 22 (discussing the influential political role of licensed professions).

32. See CARPENTER, *supra* note 26, at 4 (“In the 1950s, only one in twenty US workers needed the government’s permission to pursue their chosen occupation. Today that figure stands at almost one in three.”).

33. See Roger V. Abbott, Note, *Is Economic Protectionism a Legitimate Governmental Interest Under Rational Basis Review?*, 62 CATH. U. L. REV. 475, 476 (2013) (“[T]he percentage of U.S. workers required to obtain state licenses to practice a trade has increased from five percent in 1950 to at least twenty percent in 2000 and to twenty-nine percent in 2006.”). State occupational licenses account for approximately 25% of the United States workforce. See OCCUPATIONAL LICENSING: A FRAMEWORK, *supra* note 28, at 6 (noting that the percentage of workers subject to occupational licensing is higher when local and federal licenses are factored in).

34. See ADAM B. SUMMERS, REASON FOUNDATION: OCCUPATIONAL LICENSING: RANKING THE STATES AND EXPLORING ALTERNATIVES 3 (2007), <http://reason.org/files/762c8fe96431b6fa5e27ca64eaa1818b.pdf> (“The average number of licensed job categories is 92 and the median is 90. Seventeen states license more than 100 job categories.”).

35. See *Occupational Licensing Information—Marijuana Enforcement*, COLO. DEP’T REVENUE, <https://www.colorado.gov/pacific/enforcement/application-and-licensing-marijuana-enforcement> (last visited Feb. 28, 2016) (describing occupational licensing requirements for individuals working in the medical and recreational marijuana industries) (on file with the Washington and Lee Law Review).

36. See Eduardo Porter, *Job Licenses in the Spotlight as Uber Rises*, N.Y. TIMES (Jan. 27, 2015), [http://www.nytimes.com/2015/01/28/business/economy/ubers-success-casts-doubt-on-many-job-licenses.html?\\_r=0](http://www.nytimes.com/2015/01/28/business/economy/ubers-success-casts-doubt-on-many-job-licenses.html?_r=0) (last visited Feb. 28, 2016) (discussing occupational licensing relating to Uber’s increasing popularity) (on



may interfere with economic innovations such as Uber, Lyft, Airbnb, and EatWith.<sup>37</sup>

In recent years, there have been a number of legal challenges to occupational licensing statutes,<sup>38</sup> as well as a movement towards state-level deregulation.<sup>39</sup> Currently, there is a

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file with the Washington and Lee Law Review); *see also* Boris Bindman, Note, *Keep on Truckin', Uber: Using the Dormant Commerce Clause to Challenge Regulatory Roadblocks to TNCs*, 72 WASH. & LEE L. REV. ONLINE 136, 173–74 (2015) (discussing business licensing and ride-for-hire services).

37. *See* Danny Crichton, *How 51 Shades of Licensing Is Killing Our Economy*, TECHCRUNCH (Feb. 28, 2016), <http://techcrunch.com/2015/02/15/how-51-shades-of-licensing-is-killing-our-economy/> (last visited Feb. 28, 2016) (arguing that occupational licensing “has made some fields completely immune to market forces,” making it more difficult for new companies to provide new services and products legally) (on file with the Washington and Lee Law Review). As telecommuting and telemedicine gain popularity, occupational licensing is likely to complicate matters. *See* OCCUPATIONAL LICENSING: A FRAMEWORK, *supra* note 28, at 28–30 (identifying complications of telework and licensing—for example, in some states, medical professionals are required to be licensed in every state they “see” patients).

38. *See, e.g.*, N.C. State Bd. of Dental Exam’rs v. Fed. Trade Comm’n, 717 F.3d 359, 365–66 (4th Cir. 2013) (challenging a North Carolina licensing board that blocked non-dentist teeth whiteners from providing services); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 220 (5th Cir. 2013) (contesting a Louisiana law restricting intrastate casket sales to licensed funeral directors); *Merrifield v. Lockyer*, 547 F.3d 978, 982 (9th Cir. 2008) (challenging California licensing requirements for a non-pesticide-using pest controller); *Powers v. Harris*, 379 F.3d 1208, 1213–14 (10th Cir. 2004) (challenging an Oklahoma statute restricting casket sales to licensed funeral directors); *Craigmiles v. Giles*, 312 F.3d 220, 222 (6th Cir. 2002) (contesting a Tennessee statute that restricted the right to sell caskets to licensed funeral directors); *Locke v. Shore*, 682 F. Supp. 2d 1283, 1286 (N.D. Fla. 2010) (challenging Florida’s licensing requirements for interior decorators); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1103 (S.D. Cal. 1999) (arguing that California’s cosmetology license requirement for hair braiders violated the Due Process and Equal Protection Clauses); *Patel v. Texas Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 73–75 (Tex. 2015) (challenging Texas licensing statutes’ training requirements for eyebrow threaders); *State v. Lupo*, 984 So. 2d 395, 397–98 (Ala. 2007) (challenging Alabama licensing requirements for interior designers).

39. Virginia no longer requires hair braiders to obtain a cosmetology license after a “comprehensive review across state government.” *See Hair Braiding De-regulation FAQs*, DEP’T PROF. & OCCUPATIONAL REG., [http://www.dpor.virginia.gov/BarberCosmo/Hair\\_Braiding\\_Deregulation/](http://www.dpor.virginia.gov/BarberCosmo/Hair_Braiding_Deregulation/) (last visited Feb. 28, 2016) (explaining the rationale and procedures for hair braider deregulation) (on file with the Washington and Lee Law Review). Other states have followed suit on deregulation. Louisiana recently simplified

significant split between the U.S. Courts of Appeal for the Fifth, Sixth, and Tenth Circuits relating to occupational licensing laws and casket sales.<sup>40</sup> On February 25, 2015, the Supreme Court ruled 6-3 in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*<sup>41</sup> that, when a controlling number of members of a state board are market participants, the state must provide active supervision to ensure that any anticompetitive regulations further state policy, rather than board member interests.<sup>42</sup> This ruling provides traction for challenges to other

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its requirements for licensing florists by eliminating the practical exam. See LA. REV. STAT. ANN. § 3:3807(B)(2) (2014) (describing the written exam for a commercial florist license). Some states are considering large-scale deregulation. See Molly Wharton, *Texas Eyes Major Deregulation*, NAT'L REV. (June 27, 2014), <http://www.nationalreview.com/article/381431/texas-eyes-major-deregulation-molly-wharton> (last visited Feb. 28, 2016) (noting that Texas is considering deregulating nineteen professions, some of which are in the healthcare industry) (on file with the Washington and Lee Law Review). At least one state is experimenting with reducing regulations for higher-income professions. Washington is pioneering a "limited legal license" program that allows individuals with one year of legal training to provide family law services. See Leon Neyfakh, *How Requiring Too Much Training Hurts Workers and Consumers Alike*, BOS. GLOBE (Jan. 11, 2015), <http://www.bostonglobe.com/ideas/2015/01/11/how-requiring-too-much-training-hurts-workers-and-consumers-alike/oAXFzNY37P9V9sy9W3WuJM/story.html> (last visited Feb. 28, 2016) (explaining Washington's new limited legal license program) (on file with the Washington and Lee Law Review).

40. *Compare* St. Joseph Abbey v. Castille, 712 F.3d 215, 227 (5th Cir. 2013) (finding that economic protectionism is not a legitimate government purpose and that the act restricting casket sales to licensed funeral homes bore no rational relationship to consumer protection), *and* Craigmiles v. Giles, 312 F.3d 220, 229 (6th Cir. 2002) (finding that a Tennessee statute restricting casket sales to licensed funeral directors did not increase the quality of caskets sold, but did insulate funeral directors from competition), *with* Powers v. Harris, 379 F.3d 1208, 1222 (10th Cir. 2004) (finding that intrastate economic protectionism, absent violations of a statute or the Constitution, is a legitimate state interest and upholding casket sale restrictions).

41. N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n, 135 S. Ct. 1101 (2015). The FTC had charged the Board with violations of antitrust law after it acted to restrict competition in the North Carolina teeth-whitening market. See N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n, 717 F.3d 359, 364 (4th Cir. 2013) (explaining that the FTC's administrative complaint was based on the Board's issuance of "at least 47 cease-and-desist letters," which "exclude[d] the non-dentist teeth whiteners from the market").

42. See N.C. State Bd., 135 S. Ct. at 1106 (holding that a state board with a majority membership of active market participants must comply with active supervision requirements to qualify for state-action antitrust immunity).

licensing boards<sup>43</sup> and requires states to develop clear supervisory policies.<sup>44</sup> It also signals that the Court may be willing to limit unreasonable barriers to employment.<sup>45</sup> The Texas Supreme Court recently upheld a challenge to occupational licensing statutes for eyebrow threaders, concluding that the training requirements were so disproportionately oppressive that they violated the Texas Constitution.<sup>46</sup>

This Note explores whether state occupational licensing statutes that arbitrarily restrict access to a profession violate constitutional protections of economic activity, and whether the existing standard of judicial review is sufficient to guarantee those protections. This Note challenges the assumption that rational basis review is the appropriate standard and argues that the Court should, at a minimum, provide limited guidance as to what constitutes a “legitimate state interest.”<sup>47</sup>

Part II discusses the *Lochner* Era and its impact in establishing the current standard of judicial review for evaluating state economic policies.<sup>48</sup> Part III of this Note reviews the problems caused by arbitrary occupational licensing statutes, particularly licensing that regulates lower-income occupations.<sup>49</sup> Part III also examines core issues in the split between the Fifth, Sixth, and Tenth Circuits.<sup>50</sup> Part IV analyzes whether the current

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43. See Haw & Edlin, *supra* note 25, at 1151 (explaining that lifting the state action ban allows both consumers and competitors to bring antitrust suits).

44. See *N.C. State Bd.*, 135 S. Ct. at 1112 (“The active supervision requirement demands, *inter alia*, that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord state policy.” (quoting *Patrick v. Burget*, 486 U.S. 94, 101 (1988))).

45. See *id.* at 1105–06 (explaining that state licensing boards require active supervision because their members have incentives to engage in anticompetitive conduct).

46. See *Patel v. Texas Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 89–90 (Tex. 2015) (analyzing training hours against training content and the financial and opportunity costs to conclude that the training requirements create an unconstitutional burden).

47. *Infra* Part IV.A.1.

48. *Infra* Part II.

49. *Infra* Part III.A–B.

50. *Infra* Part III.C.

standard of review—rational basis—is appropriate for challenges to occupational licensing statutes.<sup>51</sup> Part IV proposes that courts should apply intermediate scrutiny when reviewing occupational licensing statutes to protect individual economic liberties.<sup>52</sup> This Note concludes that, given the scope of occupational licensing, the importance of the freedom to work, and the harm caused by existing government practices surrounding licensing, courts should review occupational licensing statutes under intermediate scrutiny.

## II. *The Constitution, the Court, and Economic Liberty*

Economic liberty is defined as “the right to acquire, use, and possess private property and the right to enter into private contracts of one’s choosing.”<sup>53</sup> The Constitution encompasses these protections explicitly<sup>54</sup> and implicitly.<sup>55</sup> The freedom to pursue a lawful occupation of one’s choice is an economic liberty.<sup>56</sup>

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51. *Infra* Part IV.A.

52. *Infra* Part IV.D.

53. Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL’Y 5, 5 (2012).

54. *See* U.S. CONST. art I, § 10, cl. 1 (“No state shall . . . pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.”); U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty or property; without due process of law; nor shall private property be taken for public use without just compensation.”).

55. *See* Barnett, *supra* note 53, at 6 (arguing that the Ninth Amendment contains an implicit protection for natural rights and economic freedom). Barnett argues that the reference to “other rights” in the Ninth Amendment was initially intended to refer to natural rights, which historically included property rights. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 55 (2004) (noting that a draft bill found in Madison’s papers referred explicitly to several “natural rights” that are retained by people when they enter society, including acquiring property).

56. *See* *New State Ice Co. v. Liebmann*, 282 U.S. 262, 278 (1932) (explaining that a regulation that “unreasonably curtail[s] the common right to engage in a lawful private business . . . cannot be upheld consistently with the Fourteenth Amendment”); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (noting that Fourteenth Amendment rights include “the right of the citizen . . . to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation”).

It is also a fundamental activity protected by the Privileges and Immunities Clause of Article IV of the Constitution.<sup>57</sup>

### A. *The Lochner Era*

Between the late 1800s and 1937,<sup>58</sup> the Supreme Court played an active role in protecting economic liberties, including the right to pursue an occupation.<sup>59</sup> The state could not excessively regulate private economic affairs unless special circumstances warranted regulation.<sup>60</sup> This doctrine is described as “economic due process.”<sup>61</sup> The Court favored a “liberty of contract” theory that protected an employer’s freedom to contract with employees.<sup>62</sup> *Lochner v. New York*<sup>63</sup> is the most notorious

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57. See *infra* notes 288–99 and accompanying text (discussing the privileges protected by Article IV, § 2 of the Constitution).

58. See ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 131 (1987) (explaining when the “*Lochner* Era” began).

59. See BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 126 (1980) (explaining that the Justices who favored “substantive due process” believed that the Constitution “limited the powers of the federal and state governments over private economic affairs” and government interests had to be significant to survive judicial review).

60. See *Coppage v. Kansas*, 236 U.S. 1, 14 (1915) (finding that interference with the liberty of contract “must be deemed arbitrary” unless it falls within a “reasonable exercise of the police power of the State”); *Muller v. Oregon*, 208 U.S. 412, 421 (1908) (noting that, although the general right to contract is an individual liberty, there are certain circumstances in which a state may restrict individual freedom to contract); *Lochner v. New York*, 198 U.S. 45, 61 (1905) (explaining that statutes that interfere with freedom of contract are not within a state’s police power unless independent grounds exist that suggest there is “material danger” to the public or an employee); *Holden v. Hardy*, 169 U.S. 366, 391–92 (1898) (noting the right to contract is subject to certain legitimate exercises of a state’s police powers); *Allgeyer*, 165 U.S. at 590 (explaining that the legitimate exercise of a state’s police power “must be left for determination as each case arises”).

61. See JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 86 (3d ed. 2008) (explaining that economic due process originated when courts began using the Fourteenth Amendment to protect against arbitrary and unreasonable legislative interference with economic rights).

62. See *Lochner*, 198 U.S. at 64 (arguing that interfering with the freedom for “master and employe[e] to contract with each other in relation to their employment” was a constitutional violation).

63. 198 U.S. 45 (1905).

example of economic due process.<sup>64</sup> In *Lochner*, the Court overturned a statute that restricted the number of hours a baker could work per day because it did not sufficiently relate to protecting the bakers' health, safety, or morals to qualify as a legitimate exercise of the state's police powers.<sup>65</sup> *Lochner* Era judicial opinions maintained an unwavering focus on freedom to contract that sometimes ignored the interests of vulnerable members of society.<sup>66</sup> *Lochner* has since become synonymous with "activist" judges who "did not hesitate to substitute judicial opinions for the judgments of elected representatives of the people."<sup>67</sup>

### B. Abandoning Economic Due Process

The Court finalized its decision to abandon economic due process in 1938 in *United States v. Carolene Products Company*.<sup>68</sup> The appellee, Carolene Products, argued that the Filled Milk Act,<sup>69</sup> which prohibited the interstate shipment of filled milk, infringed on its Fifth Amendment equal protection and due process rights.<sup>70</sup> Justice Stone disagreed, finding instead that the

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64. See DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 1 (2011) (explaining that *Lochner* is "likely the most disreputable case in modern constitutional discourse" and is "shorthand for all manner of constitutional evils").

65. See *Lochner*, 198 U.S. at 57 (finding that there was no reasonable ground for interfering with the bakers' right to contract because the bakers were capable of bargaining for themselves and the law affected neither the "safety, the morals, nor the welfare of the public").

66. See COX, *supra* note 58, at 136 (explaining that the Justices ignored "large-scale industrial organization, urban squalor, and the helplessness of the individual in dealing with organized wealth").

67. *Id.* at 135.

68. 304 U.S. 144 (1938). The Justices had previously signaled the impending end of economic due process when they upheld the constitutionality of minimum wage legislation in *West Coast Hotel Company v. Parrish*. See 300 U.S. 379, 398–99 (1937) (affirming that legislation setting a minimum wage for women legitimately aided state policies protecting public health).

69. Pub. L. No. 67–513, 42 Stat. 1486 (1923) (codified at 21 U.S.C. §§ 61–63 (2012)).

70. See *Carolene Prods.*, 304 U.S. at 146–47 (detailing the appellee's complaints).

Act was an appropriate legislative step to protect public health and safety.<sup>71</sup> He explained that

the existence of facts supporting a legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.<sup>72</sup>

In a footnote, Justice Stone clarified that the presumption of constitutionality may have some limitations, such as when the legislation at issue contradicts the Constitution.<sup>73</sup> “Footnote Four” has since become famous as the place where the Supreme Court established rational basis review as the standard for economic legislation and paved the way for tiers of judicial review.<sup>74</sup>

Rational basis review originated in *McCulloch v. Maryland*<sup>75</sup> when Chief Justice Marshall announced, “Let the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the [C]onstitution, are constitutional.”<sup>76</sup> Rational basis review requires only that a law “be rationally related to a legitimate state interest.”<sup>77</sup> As long as the legislation does not “trammel fundamental personal rights or draw upon inherently

71. *See id.* at 148–49 (discussing the legislative background of the Act and noting Congress’s concerns about public health).

72. *Id.* at 152.

73. *See id.* at 152 n.4 (“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.”).

74. *See* TIMOTHY SANDEFUR, *THE RIGHT TO EARN A LIVING* 125 (2010) (explaining that Footnote Four “was the birth of the legal notion of “tiers of scrutiny”).

75. 17 U.S. 316 (1819).

76. *Id.* at 421.

77. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1978) (*per curiam*).

suspect distinctions” it is presumed to be constitutional.<sup>78</sup> Courts will generally uphold laws under rational basis review “if there is any reasonably conceivable set of facts that could provide a rational basis.”<sup>79</sup> In establishing rational basis as the basic standard for reviewing economic policy, the Court embraced the principles behind Justice Holmes’s dissent in *Lochner* and brought an end to the era of economic due process.<sup>80</sup>

### C. The Modern Impact and Occupational Licensing

Although *Lochner* Era cases often trampled legislative determinations,<sup>81</sup> they also treated economic liberty as an essential freedom.<sup>82</sup> The Supreme Court’s record on economic rights is inconsistent—it was overzealous during the *Lochner* Era, but it has since weakened<sup>83</sup> and abandoned other constitutional protections of economic activity.<sup>84</sup> While returning

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78. See *id.* (explaining that legislative actions are generally presumed to be constitutional).

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

80. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (arguing that the Court’s opinion on economic theories is irrelevant to “the right of a majority to embody their opinions in law”).

81. See *supra* note 67 and accompanying text (discussing the judiciary’s tendency to ignore legislative determinations during the *Lochner* Era).

82. See *Lochner*, 198 U.S. at 57–58 (arguing that legislation that interferes with individual freedom to contract for employment must have a legitimate purpose).

83. See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 502 (1987) (analyzing the Contracts Clause and concluding that “[u]nlike other provisions in the section, it is well settled that the prohibition against impairing the obligation of contracts is not to be read literally”).

84. See *Slaughter-House Cases*, 83 U.S. 36, 74–75 (1873) (finding that national citizenship’s privileges and immunities fall solely within the Constitution and that the Constitution does not extend additional protections to state citizens; rather, state citizens must look to their own states); see also *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 665 (E.D. Tenn. 2000) (noting that the “effect of the *Slaughter-House Cases* was to reduce the Privileges and Immunities Clause to a practical nullity”); BARNETT, *supra* note 55, at 201 (explaining that the majority opinion in the *Slaughter-House Cases* “has long been thought to have gutted the Privileges and Immunities clause of any real significance” and noting that because of that case, it has “ceased to play any important function”).



to economic due process would be unwise, entirely abandoning judicial scrutiny of economic legislation is just as foolish.<sup>85</sup>

*Carolene Products* placed economic regulations—including occupational licensing—in the hands of state legislatures, which have since developed highly protectionist licensing laws that survive rational basis review.<sup>86</sup> This is in large part because the Court’s current policy favors deference to legislative determinations when analyzing economic legislation.<sup>87</sup>

Despite these policies, there have been a handful of decisions suggesting that lower courts are increasingly willing to reject outrageous licensing schemes.<sup>88</sup> There is also a growing trend among commentators<sup>89</sup> towards dismantling arbitrary and

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85. See *infra* notes 246–249 and accompanying text (discussing benefits provided by minimum wage laws and unions).

86. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955) (“[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”); see also *ELY*, *supra* note 61, at 140 (explaining that after 1937, the justices “routinely accepted legislative statements of policy, no matter how implausible, as a basis for upholding regulatory measures”).

87. See, e.g., *Fitzgerald v. Racing Ass’n of Cent. Iowa*, 539 U.S. 103, 108 (2003) (explaining that the Constitution gives legislatures broad discretion in establishing tax policy, regardless of favoritism); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (according legislative action the presumption of constitutionality as long as the conduct furthers a legitimate state interest); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 175 (1980) (explaining that the Fourteenth Amendment does not give federal courts the power to dictate economic or social policies to the states); *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) (*per curiam*) (explaining that the Court defers to legislative determinations and that states have wide freedom in regulating their economies); *Williamson*, 348 U.S. at 487 (noting that “it is for the legislature, not the courts to balance the advantages and disadvantages” of a law).

88. See *supra* note 38 and accompanying text (listing cases challenging occupational licensing regulations).

89. See, e.g., Asheesh Agarwal, *Protectionism as a Rational Basis?*, 3 J.L. ECON. & POL’Y 189, 190 (2007) (discussing the impact of the licensing circuit split on e-commerce and the funeral industry); Edlin & Haw, *supra* note 25, at 1100 (discussing *North Carolina State Board of Dental Examiners* and arguing that a state agency made up of market participants should not be granted state-action immunity when promulgating occupational licensing restrictions); Marc P. Florman, *The Harmless Pursuit of Happiness: Why “Rational Basis with Bite” Review Makes Sense for Challenges to Occupational Licensing*, 58 LOY. L. REV. 721, 725 (2012) (arguing that courts should apply second-order rational basis review in analyzing occupational licensing laws); Lana Harfoush, *Grave*

protectionist occupational licensing statutes.<sup>90</sup> To understand why some courts are willing to place limitations on state regulatory power, it is necessary to examine occupational licensing itself.

### III. The Problem of Occupational Licensing

#### A. Rationales for Occupational Licensing Statutes

Despite its flaws, occupational licensing has social value. It serves as a form of internal professional regulation.<sup>91</sup> Many licensed occupations, including the legal profession, are self-

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*Consequences for Economic Liberty: The Funeral Industry's Protectionist Occupational Licensing Scheme, the Circuit Split, and Why it Matters*, 5 J. BUS. ENTREPRENEURSHIP & L. 135, 136–37 (2011) (analyzing the casket sales circuit split and noting its potential impact on anti-competition licensing laws); Larkin, *supra* note 22, at 238–44 (analyzing the relationship between occupational licensing laws and public choice theory); Timothy Sandefur, *Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries*, 14 WM. & MARY BILL RTS. J. 1023, 1036 (2006) (analyzing rational basis review and legitimate state interests); Anthony B. Sanders, *Casket Regulations Helped Unearth Economic Substantive Due Process in Craigmiles v. Giles*, 88 MINN. L. REV. 668, 669 (2004) (discussing *Craigmiles* and its impact on economic due process); Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065, 1069 (2013) (arguing that licensing and zoning laws should be subject to second-order rational basis tests); Joseph Sanderson, Note, *Don't Bury the Competition: The Growth of Occupational Licensing and a Toolbox for Reform*, 31 YALE J. ON REG. 455, 488 (2014) (proposing statutory reforms to occupational licensing by using federal administrative review as a tool).

90. See *St. Joseph Abbey v. Castille*, 712 F.3d 215, 227 (5th Cir. 2013) (finding that Louisiana's casket sale statute lacks a "rational relation to a constitutionally permissible objective" and affirming the district court's judgment that the statute violated the Equal Protection and Due Process Clauses); see also *Craigmiles v. Giles*, 312 F.3d 220, 228–29 (6th Cir. 2002) (finding that the licensure requirement for Tennessee casket sales poses a barrier to market competition that violates the Equal Protection and Due Process Clauses); note 39 and accompanying text (discussing deregulating licensed professions).

91. See MORRIS M. KLEINER, LICENSING OCCUPATIONS, ENSURING QUALITY OR RESTRICTING COMPETITION 97–98 (2006) (explaining that the objectives of licensing statutes are to "increase competence and reduce negligence of practitioners").

regulating.<sup>92</sup> Licensing fees are sources of state revenue<sup>93</sup> and funding for licensing boards, minimizing the financial impact of regulation on the state.<sup>94</sup> Licensing provides a means to guarantee service quality in settings where the consumer lacks experience or knowledge.<sup>95</sup> The average person on the street is probably incapable of determining whether or not a surgeon can competently perform a kidney transplant. State statutes that create minimum professional qualifications benefit consumers who are unable to assess service quality without expert guidance.<sup>96</sup> These qualifications may incentivize professionals to invest in training and skill development.<sup>97</sup> Self-regulating professions, however, have a greater risk of regulating in their own self-interest because they influence entry criteria and enforce professional regulations.<sup>98</sup>

The primary benefit cited for occupational licensing is that it improves or guarantees service quality.<sup>99</sup> Consumers who use a

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92. See Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 305–06 (2004) (noting that licensing laws for attorneys serve both as a screening mechanism for minimum quality and as a way to govern professional conduct).

93. See Thomas G. Moore, *The Purpose of Licensing*, 4 J. L. & ECON. 93, 96 (1961) (describing the role taxes play in licensing and regulation).

94. See Kleiner, *supra* note 13, at 191 (noting that licensing agencies are “self-supporting by collecting fees and registration charges from persons in the licensed occupations”); OCCUPATIONAL LICENSING: A FRAMEWORK, *supra* note 28, at 22–23 (noting that, because licensing fees are the primary method of funding professional regulation, “legislators considering a new licensing proposal often do not have to grapple with the prospect of finding additional funding”).

95. See Avner Shaked & John Sutton, *The Self-Regulating Profession*, 4 REV. ECON. STUDS. 217, 217 (1981) (discussing the rationale for self-regulating professions).

96. See *id.* (“The whole rationale for self-regulation, however, rests on the notion that it provides a vehicle through which the quality of the service may be maintained in markets where the consumer cannot readily measure this quality himself.”).

97. See OCCUPATIONAL LICENSING: A FRAMEWORK, *supra* note 28, at 11 (discussing the relationship between occupational licensing, training, and quality).

98. See Moore, *supra* note 93, at 97 (arguing that, because entry requirements are more stringent for self-regulated professions, there is “the most reason to believe that they are licensed for their own benefit”).

99. See KLEINER, *supra* note 91, at 7–8 (“The main benefit usually cited for occupational licensing is improving the quality of services received.”); see also

licensed professional's services are more certain of quality, supposedly increasing demand for licensed services.<sup>100</sup> There is little evidence, however, that licensing actually improves quality.<sup>101</sup> Occupational licensing does not guarantee public safety or product quality.<sup>102</sup> Licensing boards may not effectively enforce their own regulations, placing the public at risk.<sup>103</sup>

Regulating certain licensed professions serves important public health and safety goals.<sup>104</sup> Licensing standards should not be universally abolished because ensuring that some professions strictly regulate who may enter and who may continue to practice creates tangible social benefits.<sup>105</sup> Some occupational licensing

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SANDEFUR, *supra* note 74, at 145 (explaining that “[t]he justification for modern occupational licensing is that laws ‘protect the public from dangerous or incompetent practitioners’”); Kleiner, *supra* note 13, at 191 (noting that the suggested primary benefit of occupational licensing is that it improves service quality).

100. See KLEINER, *supra* note 91, at 1 (explaining that one reason for the growth of occupational licensing is the “idea that existence of licenses may minimize consumer uncertainty of the quality of the licensed service and increase the overall demand for the service”).

101. See *id.* at 48–57 (summarizing a number of studies on the relationship between quality of service and occupational licensing and concluding that “there is little to show that occupational regulation has a major effect on the quality of service received by consumers or on the demand for service”); OCCUPATIONAL LICENSING: A FRAMEWORK, *supra* note 28, at 58–59 (summarizing twelve studies of occupational licensing and noting that only two studies showed any improvement in quality with licensing).

102. See *Craigmiles v. Giles*, 312 F.3d 220, 226 (6th Cir. 2002) (“Because nothing prevents licensed funeral directors from selling shoddy caskets at high prices, the licensing requirement bears no rational relationship to increasing the quality of burial containers.”).

103. See KLEINER, *supra* note 91, at 9 (noting that complaints to licensing boards relating to malpractice “found few effects of tougher regulation”); see also SUMMERS, *supra* note 34, at 11–12 (noting that licensing boards may “look the other way” and allow professionals who perform poor work or actively harm clients to continue practicing); OCCUPATIONAL LICENSING: A FRAMEWORK, *supra* note 28, at 13 (noting that, although licensing boards use consumer reports to monitor practitioners, only “a small fraction of consumer complaints result in any kind of disciplinary action”).

104. See KLEINER, *supra* note 91, at 1 (noting that failure to properly train for some occupations can be hazardous, therefore “regulations that require a practitioner to be trained at a minimum may produce positive social payoffs”).

105. See *id.* (explaining that, for some occupations, “poor quality has larger social implications” that may be deadly or dangerous). One example that springs readily to mind is the medical profession. Indeed, the Supreme Court shares

statutes, however, require reevaluation because they establish arbitrary and excessively burdensome entry criteria that unfairly block individuals from pursuing a profession.

### *B. The Dark Side of Occupational Licensing*

#### *1. Who Is Affected by Occupational Licensing Statutes?*

Licensed occupations encompass a wide range, from high-earning professions such as doctors, nurses, and lawyers, to low-earning professions such as daycare workers, cosmetologists, manicurists, and tour guides.<sup>106</sup> Although many professions have complex licensing requirements, lower earners may be disproportionately burdened.<sup>107</sup> Occupational licensing statutes primarily harm individuals who have the greatest need for economic opportunity: minorities, poor workers, the less-educated, and people re-entering the work force.<sup>108</sup> Even as students, law and medical aspirants are more capable of professional advocacy, have access to greater resources, and are more familiar with the political process than an eighteen-year-old high school graduate seeking a cosmetology license.<sup>109</sup>

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this concern. See Transcript of Oral Argument at 31, *N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1105 (Oct. 14, 2014) (No. 13-534) (“Justice Breyer: I don’t want to suddenly destroy all the temptation of medical boards throughout the country to decide everything in favor of letting in the unqualified person, lest he sue them under the antitrust law for treble damages and attorneys’ fees.”).

106. See SUMMERS, *supra* note 34, at 1 (noting the range of professions subject to occupational licensing).

107. See CARPENTER ET AL., *supra* note 26, at 7 (noting that license requirements are “exceptionally burdensome” for lower-income workers because they lack access to the resources that individuals pursuing high-income resources have).

108. See *id.* at 9 (explaining that individuals working in low and moderate-income licensed professions “make less money [and] . . . are also more likely to be male and racial/ethnic minorities and to have less education”).

109. See Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 50 (“[T]he scattered individuals who are denied access to an occupation by State-enforced barriers are about as impotent a minority as can be imagined.”).

## 2. *The Economic Costs of Occupational Licensing*

Licensing has a significant impact on income and earning potential, but may ultimately reinforce economic inequality.<sup>110</sup> Belonging to an occupation may raise wages as much as 15%.<sup>111</sup> But the time and financial investment to earn an occupational license can be prohibitive.<sup>112</sup> This is especially problematic for individuals seeking to re-enter the workforce or open a small business.<sup>113</sup> Low- and middle-income individuals may not be able to enter their chosen profession because the costs of licensing are beyond their means.<sup>114</sup>

Furthermore, there is an increasing income gap between higher-earning and lower-earning occupations.<sup>115</sup> Licensed professions with higher incomes tend to see increases in wage growth, whereas lower-income occupations have smaller than

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110. See KLEINER, *supra* note 91, at 6 (“An analysis of income inequality in the United States has shown that being in an occupation—not just educational attainment—is an important determinant of growing relative wage differences among workers.”).

111. See Kleiner & Krueger, *supra* note 23, at 6 (“The general estimates of cross-sectional studies using [c]ensus data of state licensing’s influence on wages with standard labor market controls show a range from 10 to 15 percent for higher wages associated with occupational licensing.”).

112. See Kleiner, *supra* note 13, at 192–93 (explaining that, due to licensing restrictions, some individuals may not be able to pursue a chosen profession because of artificially inflated costs, training time, or barriers to entry).

113. See CARPENTER, *supra* note 26, at 6–7 (noting that many lower- to moderate-income occupations are ideal for individuals entering or re-entering the economy, or for starting a small business); see also OCCUPATIONAL LICENSING: A FRAMEWORK, *supra* note 28, at 12 (discussing licensing’s impact on entrepreneurship and self-employment and the limits it places on the job market).

114. See SUMMERS, *supra* note 34, at 2 (“[C]ost barriers disproportionately affect the poorest members of society. . . . Occupations with relatively low start-up costs . . . are unattainable because the costs of obtaining a license are too high.”); OCCUPATIONAL LICENSING: A FRAMEWORK, *supra* note 28, at 12 (“Lower-income workers are less likely to be able to afford the tuition and lost wages associated with licensing’s educational requirements . . .”).

115. See Kleiner, *supra* note 13, at 196 (“Since occupational licensing appears to increase earnings, on average for persons in high income occupations relative to persons in lower income ones, this state and local policy may serve to exacerbate income dispersion in the United States.”).

average national growth.<sup>116</sup> Licensing may also have a negative impact on the supply of professionals in the market, driving up service costs without a corresponding increase in quality.<sup>117</sup> Multiple studies find that restrictive licensing laws raise prices on essential services.<sup>118</sup> This harms poor consumers.<sup>119</sup> One expert on occupational licensing estimates that licensing raises the cost of services by \$116 billion per year.<sup>120</sup>

### 3. *The Arbitrary Nature of Occupational Licensing*

The Due Process Clause of the Fourteenth Amendment requires occupational licensing laws to have a “rational connection with the applicant’s fitness or capacity to practice.”<sup>121</sup> But requirements for many licenses are excessive when considered against the reality of the profession.<sup>122</sup> Shampooing hair is not a complex task; millions of people do it daily. Tennessee, however, licenses “Shampoo Technicians,” a profession that requires a minimum of “300 hours in the practice

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116. See KLEINER, *supra* note 91, at 5–6 (discussing the difference in wage growth).

117. See *id.* at 9 (“The dominant view among economists is that occupational licensing restricts the supply of labor to the occupation and thereby drives up the price of labor and of services rendered.”).

118. See OCCUPATIONAL LICENSING: A FRAMEWORK, *supra* note 28, at 14 (noting that more restrictive licensing of nurse practitioners “raises the price of a well-child exam by 3 to 16 percent, and imposing greater licensing restrictions on dental hygienists and assistants increases the average price of a dental visit by 7 to 11 percent”).

119. See KLEINER, *supra* note 91, at 9 (explaining that poorer consumers may forfeit services due to high costs); SUMMERS, *supra* note 34, at 29–30 (noting that the increase in costs due to occupational licensing forces poorer consumers to pay higher prices).

120. See Stephanie Simon, *A License to Shampoo: Jobs Needing State Approval Rise*, WALL ST. J. (Feb. 7, 2011), <http://www.wsj.com/articles/SB10001424052748703445904576118030935929752> (last visited Feb. 28, 2016) (“Kleiner estimates that across the U.S. economy, occupational licensing adds at least \$116 billion a year to the cost of services, which amounts to about 1% of total consumer spending.”) (on file with the Washington and Lee Law Review).

121. *Schwartz v. Bd. of Bar Exam’rs of N.M.*, 353 U.S. 232, 239 (1972).

122. See Larkin, *supra* note 22, at 219–20 (noting that professional demands do not have a relationship with the “stringency of the licensing requirements” for many licensed professions and citing barbers as an example).

and theory of shampooing at a school of cosmetology.”<sup>123</sup> Prospective shampoo technicians must also pass both a written and a practical exam.<sup>124</sup> Although the proper scalp massage for applying conditioner is rationally connected to working as a Shampoo Technician, the excessively burdensome license requirements serve as a barrier to entry.<sup>125</sup>

Education and training requirements may also lack a reasonable connection to the particular profession.<sup>126</sup> Many states require hair braiders to hold a cosmetology license, but few cosmetology schools actually teach hair braiding, and the majority of course hours are simply unnecessary for braiders.<sup>127</sup> Although a handful of states have separate license requirements, or have deregulated the profession, twenty-four states still require braiders to obtain cosmetology licenses.<sup>128</sup> In those states,

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123. *Individual Licensure Requirements*, BD. COSMETOLOGY & BARBER EXAM'RS, <http://www.tn.gov/commerce/article/cosmo-shampoo-technician> (last visited Feb. 28, 2016) (on file with the Washington and Lee Law Review).

124. *See id.* (describing exam requirements for shampoo technicians).

125. *See* RULES OF THE TENN. BD. OF COSMETOLOGY, 0440-1-.03(4)(a)–(c) (2014) (detailing credit hour requirements including instruction in answering the phone, scalp massage, draping, shampooing, and shampoo and conditioner composition).

126. *See* *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1118 (1999) (explaining that the mandatory curriculum that natural hair braiders must complete to practice “does not teach braiding while at the same time it requires hair braiders to learn too many irrelevant, and even potentially harmful, tasks”); *Patel v. Tex. Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 88–89 (Tex. 2015) (noting that over 40% of training hours for eyebrow threaders are unrelated to the profession).

127. *See* Sophie Quinton, *States Don’t Understand African Hair Braiding. That Hurts These Small Business Owners*, NAT’L J. (Oct. 2, 2014), <http://www.theatlantic.com/politics/archive/2014/10/states-dont-understand-african-hair-braiding-that-hurts-these-small-business-owners/431361/> (last visited Feb. 28, 2016) (explaining that most individuals seeking employment as hair braiders must become licensed cosmetologists, which requires over 1,600 hours of education, but most programs do not actually teach African hair braiding) (on file with the Washington and Lee Law Review); *see also* PAUL AVELAR & NICK SIBILLA, INST. FOR JUSTICE, UNTANGLING REGULATIONS: NATURAL HAIR BRAIDERS FIGHT AGAINST IRRATIONAL LICENSING 8 (2014), [http://www.ij.org/images/pdf\\_folder/economic\\_liberty/untangling-regulations.pdf](http://www.ij.org/images/pdf_folder/economic_liberty/untangling-regulations.pdf) (“[U]nlike hairstylists or cosmetologists, natural hair braiders do not singe, cut, bleach or use potentially hazardous chemicals on people’s hair. . . . [T]he vast majority of these hours are unnecessary.”).

128. *See* AVELAR & SIBILLA, *supra* note 127, at 8 (noting that braiders



aspiring braiders are required to spend between \$10,000 and \$20,000 and study from 1,000 to 2,000 hours to earn a license that does not actually prepare them to work in their intended profession.<sup>129</sup>

Occupational licensing schemes also lack rational connections between training requirements and the profession's importance to public health and safety.<sup>130</sup> One commentator effectively contrasts the average requirements to earn an Emergency Medical Technician license with the requirements for a cosmetology license.<sup>131</sup> The fact that it is more difficult, time consuming, and expensive to learn to style hair than it is to learn to properly perform CPR in the back of a moving ambulance suggests that the relationship between these regulations and public health interests is tenuous at best.<sup>132</sup> If anything, the disproportionate nature of these regulations suggests that they are created by industries to reap economic benefits.<sup>133</sup>

The distinction between which professions are regulated and which are not is also arbitrary.<sup>134</sup> Virginia, for example, regulates stylists, but not electrologists—individuals who perform electrolysis.<sup>135</sup> Electrolysis is certainly riskier to a consumer's

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without separate requirements are regulated with cosmetologists and stylists).

129. *See id.* (identifying the average cost of cosmetology training and the range of course hours required for cosmetology training).

130. *See Larkin, supra* note 22, at 220 (noting that the skill and importance of professions to a community are not indicative of the stringency of licensing requirements).

131. *See id.* at 220–21 (comparing the average EMT training requirements for all fifty-one jurisdictions: thirty-three days, with average cosmetologist training requirements: 372 days and concluding that “a budding cosmetologist needs to complete *more than 11 times* the education and training necessary to serve as an EMT”).

132. *See id.* at 222 (“Any state that makes it more difficult to become a cosmetologist than an EMT has clearly acted with something other than the public welfare in mind.”).

133. *See infra* note 141 and accompanying text (discussing occupational associations' interest in becoming regulated professions and the associated benefits).

134. *See infra* note 141 and accompanying text (discussing how occupations become licensed).

135. *See Frequently Asked Questions: Board for Barbers and Cosmetology, DEP'T PROF. & OCCUPATIONAL REG.*, <http://www.dpor.virginia.gov/Boards/BarberCosmo/#forms-barber1> (last visited Feb. 28, 2016) (noting that

health than a bad haircut.<sup>136</sup> The wide discrepancies among states between which professions are licensed and their corresponding training requirements raises the question of whether certain licensing restrictions are even necessary.<sup>137</sup> The number of occupations subject to licensing, as well as the variations in state licensing laws, makes it difficult for members of licensed professions to move between states.<sup>138</sup>

#### 4. Regulatory Capture and Public Choice: Why the Political System Fails

State legislatures enact the laws that create licensing boards and that require various occupations to obtain licenses.<sup>139</sup> Although bringing these problems to a local legislator may seem

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electrologists are an unregulated profession) (on file with the Washington and Lee Law Review); *see generally* Memorandum from Louise Fontaine Ware, Dir. Dep't Prof'l & Occupational Regulation, to Mark Warner, Governor of the Commonwealth of Va., Bruce F. Jamerson, Clerk, House of Delegates & Susan Clarke Schaar, Clerk, Senate of Va. (Nov. 27, 2002) (reporting on the need to regulate electrologists) (on file with the Washington and Lee Law Review).

136. *See Electrolysis for Hair Removal*, WEBMD, <http://www.webmd.com/beauty/hair-removal/cosmetic-procedures-electrolysis> (last updated Nov. 20, 2012) (last visited Feb. 28, 2016) (noting that improperly performed electrolysis can lead to scarring) (on file with the Washington and Lee Law Review). Electrolysis destroys the "growth center of hair with heat or chemical energy" by inserting a probe into the hair follicle and then removing the follicle with tweezers. *See id.* (describing the electrolysis procedure).

137. *See* SUMMERS, *supra* note 34, at 6 (discussing the wide disparity between the numbers of licensed job categories among the various states and arguing that it is difficult to justify the disparity); *see also* CARPENTER, *supra* note 26, at 16–17 (comparing 102 licensed professions across all fifty-one jurisdictions and noting significant differences in licensing).

138. *See* OCCUPATIONAL LICENSING: A FRAMEWORK, *supra* note 28, at 39 (noting that the difference in interstate moves between licensed and unlicensed workers indicates that licensing is a barrier to relocation). This may pose serious challenges for military spouses, who are ten times more likely to have moved across state lines in the preceding year. *See id.* at 10 (discussing licensing and military spouses). In response to pressure from First Lady Michelle Obama and Dr. Jill Biden, all fifty states have simplified the procedure for military spouse license transfers. *See id.* (discussing changes to state policy).

139. *See* VA. CODE ANN. §§ 54.1-702–703 (2014) (requiring a license to practice cosmetology and establishing the Board for Barbers and Cosmetology).

like a logical solution, challenging occupational licensing at the legislative level is problematic for several reasons.

First, many occupations want to be licensed.<sup>140</sup> Licensing allows professionals to restrict competition and control prices.<sup>141</sup> Self-interest often wins out over reasonable regulation.<sup>142</sup> Licensing boards and professionals benefit by restricting consumers' access to unlicensed professionals who offer the same services at lower costs.<sup>143</sup> In North Carolina, for example, the State Dental Board used its regulatory power to drive non-dentist teeth whiteners out of business<sup>144</sup> after the whiteners undercut dentists' prices for teeth whitening.<sup>145</sup> Licensing boards may also use public health as a pretext to establish regulations intended to limit intra-professional competition.<sup>146</sup>

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140. See Larkin, *supra* note 22, at 227 (discussing the work of economist George Stigler in drawing the conclusion that “[i]ncumbent business support licensing requirements because licensing protects incumbents against competition”).

141. See Simon, *supra* note 120 (quoting Morris Kleiner’s statement that “occupations prefer to be licensed because they can restrict competition and obtain higher wages”); CARPENTER, *supra* note 26, at 29 (“Occupational practitioners, often through professional associations, use the power of concentrated interests to lobby state legislators for protection from competition through licensing laws.”); *supra* note 111 and accompanying text (discussing the financial benefits of occupational licensing).

142. See *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) (explaining that “licensure requirements and other restrictions imposed on prospective casket retailers create funeral industry control over intrastate casket sales”).

143. See *Edlin & Haw*, *supra* note 25, at 1113–14 (noting the increase in prices due to occupational licensing).

144. See *N.C. State Bd. of Dental Exam’rs v. Fed. Trade Comm’n*, 717 F.3d 359, 364 (4th Cir. 2013) (explaining that the Board issued cease-and-desist letters to non-dentist whitening practices and engaged in other actions that “successfully expelled non-dentist providers from the North Carolina teeth-whitening market”).

145. See *id.* at 365 (noting that non-dentists offered whitening services at “significantly lower price[s] than dentists,” causing dentists to complain to the Board).

146. See *Edlin & Haw*, *supra* note 25, at 1107 (explaining that one strategy dental licensing boards use in anticompetitive conduct is to restrict the number of hygienists a dentist can hire because “dentist-to-hygienist ratios tend to raise prices but not quality”).

Second, occupational licensing is a prime example of public choice theory.<sup>147</sup> This theory assumes that officials do not abandon self-interest upon election, but will instead engage in whatever conduct is necessary to remain in office.<sup>148</sup> Licensing boards exercise powerful influence over elected officials by providing campaign funding and support.<sup>149</sup> In exchange for that support, private organizations that lobby to either become regulated professions<sup>150</sup> or to set licensing regulations commensurate with organizational membership standards<sup>151</sup> are often successful.<sup>152</sup> Even if multiple small groups of aspiring practitioners lobby for change, it is unlikely that they could defeat a powerful and entrenched licensing scheme.<sup>153</sup> Concerns about public choice and regulatory capture are particularly

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147. See Kleiner, *supra* note 13, at 33 (noting that financial contributions to Minnesota legislature members from industries with interest in occupational regulations are “consistent with capture theory”); Larkin, *supra* note 22, at 229 (explaining that, under public choice theory, legislators engage in “rent extraction” and “obtain the continued support of regulated entities by threatening them with new legislation”).

148. See Larkin, *supra* note 22, at 228–34 (discussing public choice theory and explaining its relevance to elected officials).

149. See KLEINER, *supra* note 91, at 35 (“[I]ndustries that are most impacted by occupational licensing are more likely to contribute to influential individuals in the legislature. Funding for legislative leaders followed the occupational groups with the most at stake in the regulatory process.”).

150. See *id.* at 30–31 (“[L]icensing appears to be responsive to political pressure from occupational associations seeking to become regulated.”).

151. See Clark M. Neily III, *Coaxing the Courts Back to Their Truth-Seeking Role in Economic Liberty Cases*, in ECONOMIC LIBERTY AND THE CONSTITUTION: AN INTRODUCTION, HERITAGE FOUND. SPECIAL REPORT 25, 27 (Paul J. Larkin, Jr. ed., 2014) (noting that the American Society for Interior Design (ASID) has lobbied extensively to establish license requirements for interior designers that happen to correspond with the qualifications for ASID membership and include expensive exams administered by private companies affiliated with ASID).

152. See Larkin, *supra* note 22, at 229 (“Interest groups will trade political rents in the form of votes, campaign contributions, paid speaking engagements, book purchases, and get-out-the-vote efforts in return for the economic rents that cartel-creating or -reinforcing regulations, such as occupational licensing, can provide.”).

153. See *St. Joseph Abbey v. Castille*, 712 F.3d 215, 219 (5th Cir. 2013) (noting that the Abbey petitioned the legislature twice to allow non-profit charities to sell caskets, but the bills never made it past the committee stage).

relevant in analyzing the split between the Fifth, Sixth, and Tenth Circuits over casket sales and economic protection.

*C. The Circuit Split: Casket Sales, Licenses, and Legitimate Interests*

Over the last decade, a split has developed between the Fifth, Sixth, and Tenth Circuits over whether pure economic protectionism is a legitimate government interest for establishing a state occupational licensing scheme.<sup>154</sup> Plaintiffs in each of these cases claimed that state occupational licensing statutes that restricted the right to sell caskets to licensed funeral directors operating out of licensed funeral homes violated the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment.<sup>155</sup>

*1. Craigmiles v. Giles*

In *Craigmiles v. Giles*,<sup>156</sup> Craigmiles operated two casket stores but did not embalm bodies or conduct funeral services.<sup>157</sup>

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154. Compare *St. Joseph Abbey*, 712 F.3d at 222–23 (concluding that economic protection alone is not a legitimate purpose, but an additional public purpose can support protectionist legislation), and *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (noting that legislation designed to protect a specific interest group from economic competition does not serve a legitimate government purpose), with *Powers v. Harris*, 379 F.3d 1208, 1220 (10th Cir. 2004) (concluding that favoring one intrastate industry is a legitimate state interest, provided the favoritism does not violate federal law or the Constitution).

155. See, e.g., *St. Joseph Abbey*, 712 F.3d at 220 (“The complaint asserted that the licensure requirements . . . [deny] the Abbey and Coudrain equal protection and due process under the Fourteenth Amendment because they bear no rational relationship to any valid governmental interest.”); *Powers*, 379 F.3d at 1213 (noting that plaintiffs claimed the law “violates the Privileges and Immunities, Due Process, and Equal Protection clauses of the Fourteenth Amendment”); *Craigmiles*, 312 F.3d at 223 (listing plaintiff’s claims that the statute violated the Due Process and Equal Protection clauses).

156. 312 F.3d 220 (6th Cir. 2002).

157. See *id.* at 222–23 (“Craigmiles and his fellow plaintiffs operate two independent casket stores. . . . The stores offer caskets, urns, grave markers, monuments, flower holders, and other merchandise items. The stores engage in

The Tennessee Funeral Directors and Embalmers Act<sup>158</sup> (FDEA) requires anyone engaging in “funeral directing” to be licensed by the Board of Funeral Directors and Embalmers.<sup>159</sup> A 1972 amendment to the FDEA had modified the definition of funeral directing to include sales of funeral merchandise.<sup>160</sup> The Board issued a cease-and-desist to Craigmiles, claiming that by selling caskets, he was engaging in funeral directing, thereby violating the FDEA.<sup>161</sup> Craigmiles sued under 42 U.S.C. § 1983, claiming violations of the Due Process, Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment.<sup>162</sup>

Writing for the Sixth Circuit, Judge Boggs applied rational basis review and concluded that “protecting a discrete interest group from economic competition is not a legitimate governmental purpose.”<sup>163</sup> He found that the real purpose behind the licensing restriction was to protect the funeral industry from competition,<sup>164</sup> and that the FDEA violated the Equal Protection and Due Process Clauses.<sup>165</sup> Judge Boggs individually tackled and rejected each of Tennessee’s justifications for the law: protecting consumer health and

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no embalming or arranging of funeral services, cremations, or burials.”).

158. TENN. CODE ANN. § 62-5-101 (West 2014).

159. *See Craigmiles*, 312 F.3d at 222 (describing the FDEA’s licensing requirements). The FDEA has strict licensing requirements; applicants must “complete *either* one year of course work at an accredited mortuary school *and* then a one-year apprenticeship with a licensed funeral director *or* a two-year apprenticeship.” *Id.* Candidates must also pass an exam that only peripherally addresses funeral merchandising and caskets. *Id.*

160. *See id.* (explaining the 1972 amendment).

161. *See id.* at 223 (describing the Board’s actions against the plaintiffs’ businesses).

162. *See id.* (explaining Craigmiles’s claims that the FDEA violated the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment).

163. *Id.* at 224.

164. *See id.* at 228–29 (finding that the “licensure requirement imposes a significant barrier to competition in the casket market” and “protect[s] licensed funeral directors from competition” but fails to provide consumer protection). The court found that the regulations actually harmed consumers. *Id.*

165. *See id.* at 222 (affirming that the FDEA violates the Due Process and Equal Protection Clauses). Plaintiffs’ Privileges and Immunities claim did not survive. *See id.* at 223 (noting that the district court rejected the claim).

safety,<sup>166</sup> protecting consumers,<sup>167</sup> applying the Federal Trade Commission's "Funeral Rule,"<sup>168</sup> and helping grieving customers.<sup>169</sup> The court argued that each of these claims was a pretextual excuse that did not have a rational relationship to the law.<sup>170</sup> *Craigmiles* applied an enhanced form of rational basis review by providing an in-depth analysis of the law's justifications and the legislature's motives.<sup>171</sup> The opinion emphasized that it had not embraced *Lochner*<sup>172</sup> but had "invalidat[ed] only the General Assembly's attempts to raise a

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166. See *id.* at 225 (noting that plaintiffs only delivered purchased caskets to funeral homes and did not provide embalming services). Although the court identified casket quality as a reasonable concern, Tennessee law "does not require that any particular type of casket, or any casket at all, be used at burial." *Id.*

167. See *id.* (noting that criminal and civil sanctions already applied to retailer misconduct and that casket retailers would not be "free to 'engage in misrepresentation and fraud' if not covered by the FDEA").

168. See *id.* at 227–28 (finding that the Funeral Rule applied even without the FDEA, that the rule was irrelevant for casket retailers, and that the legislature could have required retailer compliance without licensing). The Funeral Rule defines "funeral providers" and requires that they disclose prices of goods and services as well as avoid deceptive acts or practices as defined by the Rule. See 16 C.F.R. § 453 (2013) (detailing provisions of the Funeral Rule).

169. See *Craigmiles v. Giles*, 312 F.3d 220, 228 (6th Cir. 2002) (rejecting the claim that unlicensed casket retailers will aggravate the survivors' grief because "survivors must deal with a panoply of vendors in order to make funeral arrangements . . . none of whom is required to have [psychological] training").

170. See *id.* at 225 ("The weakness of Tennessee's proffered explanations indicates that the 1972 amendment adding the retail sale of funeral merchandise to the definition of funeral directing was nothing more than an attempt to prevent economic competition.").

171. See *id.* at 228–29 ("Finding no rational relationship to any of the articulated purposes of the state, we are left with the more obvious illegitimate purpose. . . . If consumer protection were the aim of the 1972 amendment, the General Assembly had several direct means of achieving that end."). *But see Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004) (explaining that "rational basis review does not give courts the option to speculate as to whether some other scheme could have better regulated the evils in question" and that motivation is irrelevant because the legislature is not obligated to explain why it enacted a statute).

172. See *Craigmiles*, 312 F.3d at 229 (explaining that the decision "is not a return to *Lochner*").

fortress protecting the monopoly rents that funeral directors extract from consumers.”<sup>173</sup>

## 2. Powers v. Harris

The circumstances in *Powers v. Harris*<sup>174</sup> were similar to *Craigmiles*—namely that a state statute restricted the right to sell caskets and other funeral merchandise to licensed funeral directors operating out of licensed funeral homes.<sup>175</sup> Unlike the Sixth Circuit, the U.S. Court of Appeals for the Tenth Circuit found that the Oklahoma Funeral Services Licensing Act<sup>176</sup> (FLSA) did not violate the Due Process and Equal Protection Clauses.<sup>177</sup>

Applying rational basis review, Judge Tacha held that legislation designed to protect a particular industry from competition was a legitimate state interest, as long as it did not violate the Constitution or federal law.<sup>178</sup> Although the FLSA’s requirements did not correspond to the state’s claimed goal of consumer protection, the law was valid because the court identified another plausible legitimate state interest: protecting the funeral industry from competition.<sup>179</sup>

The plaintiffs had cited *Craigmiles* as favorable precedent, but Judge Tacha disagreed with *Craigmiles* on three points.<sup>180</sup> First, *Craigmiles* paid too much attention to the legislature’s

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173. *Id.*

174. 379 F.3d 1208 (10th Cir. 2004).

175. *See id.* at 1211 (explaining the FLSA’s restrictions).

176. OKLA. STAT. tit. 59, § 395.1 (2014).

177. *See Powers v. Harris*, 379 F.3d 1208, 1225 (10th Cir. 2004) (concluding that economic protectionism of an intrastate industry is a “legitimate state interest and the FLSA is rationally related to this legitimate end”).

178. *See id.* at 1221 (“[A]bsent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest.”).

179. *See id.* at 1216–17 (explaining that the “decision of the legislature must be upheld if ‘any state of facts either known or which could reasonably be assumed affords support for it’” (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938))).

180. *See id.* at 1223 (explaining how the holding diverges from *Craigmiles*).



motives.<sup>181</sup> Second, the opinion incorrectly concluded that economic protection is not a legitimate government purpose.<sup>182</sup> Finally, *Craigmiles* based its decision on precedent that applied second-order rational basis review.<sup>183</sup> Judge Tacha argued that by relying on improper precedent, *Craigmiles* incorrectly applied rational basis review and reached the wrong result.<sup>184</sup>

In a concurring opinion, Judge Tymkovich argued that protectionist legislation, although valid, has always required an accompanying “non-protectionist public good.”<sup>185</sup> He found that Oklahoma had satisfied its burden because the licensing scheme reached consumer protection goals, however imperfectly.<sup>186</sup> Even though the scheme actually appeared to harm consumers, Judge Tymkovich thought the legislature should resolve the inconsistency, rather than the court.<sup>187</sup>

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181. *See id.* (noting that the *Craigmiles* court improperly focused on “the court’s perception of the actual motives of the Tennessee legislature”).

182. *See id.* at 1220 (claiming that the Supreme Court has consistently found that protecting intrastate industries, absent a specific violation of federal statutes or the Constitution, is a “legitimate state interest” (citing *Fitzgerald v. Racing Ass’n of Cent. Iowa*, 539 U.S. 103, 109 (2003))).

183. *See id.* at 1223–24 (criticizing *Craigmiles*’s reliance on *Cleburne v. Cleburne Living Ctr., Inc.* and explaining that even if the court agreed that “laws discriminating against historically unpopular groups” required a stricter form of rational basis review, the plaintiffs do not fall within that category). Second-order rational basis review is a variation of rational basis review that is less deferential to legislative determinations and applies greater scrutiny to the legislators’ motives. *See* Florman, *supra* note 89, at 745 (describing second-order rational basis review). *See infra* Part IV.B (discussing second-order rational basis review).

184. *See* *Powers v. Harris*, 379 F.3d 1208, 1223 (10th Cir. 2004) (explaining that in applying *Cleburne*, *Craigmiles* departed from “traditional” rational basis review because it analyzed the legislature’s motives and failed to identify other “conceivable legitimate state interest[s] on behalf of the challenged statute”).

185. *See id.* at 1226 (Tymkovich, J., concurring) (explaining that the Supreme Court has always “insisted that the legislation advance some public good” (referencing *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955); *Fitzgerald v. Racing Ass’n of Cent. Iowa*, 539 U.S. 103 (2003); *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (per curiam); *Nordlinger v. Hahn*, 505 U.S. 1 (1992))).

186. *See id.* (noting that the licensing scheme “provides a legal club to attack sharp practices by a major segment of casket retailers”).

187. *See id.* (observing that although consumers are harmed by limits on price and choice in the statute, that problem should be addressed by the legislature in its role as the “ultimate arbiter of state policy”).

## 3. St. Joseph Abbey v. Castille

More recently, the Fifth Circuit sided with *Craigmiles* in another casket sale dispute, *St. Joseph Abbey v. Castille*.<sup>188</sup> The monks of St. Joseph Abbey sought to sell wooden coffins, but the Louisiana State Board of Embalmers and Funeral Directors blocked their efforts.<sup>189</sup> As in *Powers* and *Craigmiles*, a state statute restricted the right to sell caskets to licensed funeral directors.<sup>190</sup> The Abbey filed suit under 42 U.S.C. § 1983, alleging violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>191</sup>

Writing for the majority, Judge Higginbotham acknowledged that economic protection is a legitimate purpose—provided it is supported by an additional public good.<sup>192</sup> He explained that the Fifth Circuit’s recent decision in *Greater Houston Small Taxicab Company Owners Association v. City of Houston*<sup>193</sup> upheld taxicab permit requirements favoring larger companies because there was a “legitimate interest” in addition to protecting large taxi companies from competition.<sup>194</sup> To sustain the statute, the court had to find that the law was rationally related to consumer protection.<sup>195</sup>

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188. 712 F.3d 215, 222–23 (5th Cir. 2013) (discussing the difference between *Powers* and the *Craigmiles* court and ultimately siding with *Craigmiles* in determining that “mere economic protection” is not a legitimate purpose).

189. See *supra* notes 2–12 and accompanying text (discussing the facts of *St. Joseph Abbey*).

190. See *supra* note 9 and accompanying text (discussing state law restrictions on casket sales).

191. See *St. Joseph*, 712 F.3d at 220 (describing the complaint).

192. See *id.* at 222–23 (“[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate government purpose, but economic protection, that is favoritism, may well be perceived by a post hoc perceived rationale . . . without which it is aptly described as a naked transfer of wealth.”).

193. 660 F.3d 235 (5th Cir. 2011).

194. See *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) (explaining that even if protectionism was one goal of taxi permit requirements, it was clear that “promoting full-service taxi operations is a legitimate government purpose under the rational basis test” (quoting *Greater Hous. Small Taxicab Co. Owners Ass’n v. City of Houston*, 660 F.3d 235, 240 (5th Cir. 2011))).

195. See *id.* (“[T]he State Board cannot escape the pivotal inquiry of whether

Judge Higginbotham reviewed and rejected the Board's claim that the law protected consumers because the licensure requirements secured funeral industry control over intrastate casket sales;<sup>196</sup> Louisiana does not require a casket for burial, therefore consumers do not need information about caskets;<sup>197</sup> consumers must already pay a service fee for assistance with funeral preparations that can include advice about caskets;<sup>198</sup> and Louisiana's consumer-protection laws apply to casket vendors.<sup>199</sup> Due to these factors, it was clear that "no rational relationship exists between public health and safety and restricting intrastate casket sales to funeral directors."<sup>200</sup>

Judge Higginbotham explained that *Powers* relied on precedent that found that protectionism is not an "illegitimate interest" when it is tied to a public welfare goal.<sup>201</sup> From there, *Powers* had improperly concluded that protectionism alone was a legitimate interest.<sup>202</sup> In finding for the Abbey, the Fifth Circuit engaged in a heightened review similar to *Craigmiles*; both courts

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there is such a rational basis . . . that can now be articulated and is not plainly refuted by the Abbey. . . . [and that the] challenged restrictions are rationally related to protection of public health, safety, and consumer welfare.").

196. *See id.* at 223–24 (explaining that based on the definitions of "funeral establishment" and "funeral directing," casket retailers are forced to meet all the statutory requirements for a funeral establishment and director, ensuring that the funeral industry controls intrastate casket sales).

197. *See id.* at 224 (explaining that a funeral director's expertise relating to caskets is "irrelevant" because Louisiana does not have statutory requirements related to casket use or quality).

198. *See id.* at 225 (explaining that customers are required to pay a mandatory service fee for a funeral director to assist the customer with funeral logistics, regardless of where the customer purchases a casket; because only funeral directors can dispose of bodies, the customer always receives this assistance).

199. *See id.* ("Louisiana's Unfair Trade Practices and Consumer Protection Law already polices inappropriate sales tactics by all sellers of caskets.").

200. *Id.* at 226.

201. *See id.* at 222 (noting that *Powers* relied on precedent "indicat[ing] that protecting or favoring a particular intrastate industry is not an *illegitimate* interest when protection of the industry can be linked to advancement of the public interest or general welfare").

202. *See id.* (explaining that none of the cases cited by the *Powers* court actually support the proposition that intrastate economic protectionism alone is a legitimate interest).

carefully reviewed and rejected the state's rationales.<sup>203</sup> This directly contradicted both *Powers's* conclusion and methodology.<sup>204</sup>

#### 4. *Legitimate Interests and Rational Basis Review*

The circuit split raises two issues for analysis. First, the circuits disagree as to whether licensing restrictions intended solely to protect an intrastate industry from competition are a legitimate state interest that satisfies the rational basis review requirement.<sup>205</sup>

Second, the circuits have differing perspectives about the appropriate scope of rational basis review.<sup>206</sup> Although *St. Joseph* and *Craigsmiles* insisted that they were not resurrecting *Lochnerian* principles,<sup>207</sup> they arguably engaged in a slightly enhanced form of rational basis review.<sup>208</sup> *Powers* followed a more

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203. See *supra* notes 167–169 (discussing *Craigsmiles's* analysis of the FDEA).

204. See *supra* notes 181–184 and accompanying text (discussing *Powers's* disagreement with *Craigsmiles*).

205. See *supra* note 40 and accompanying text (discussing the circuit split). The Ninth Circuit has also considered the issue in *Merrifield v. Lockyer*, when it found that a California statute that required non-pesticide using pest controllers ordinarily exempt from licensing requirements to obtain a license for dealing with the most common vertebrate pests (mice, rats, and pigeons) violated the Equal Protection Clause. See *Merrifield v. Lockyer*, 547 F.3d 978, 991–92 (9th Cir. 2008) (concluding that “singling out” the specific pests violated the Equal Protection Clause because it provided economic favoritism for “certain constituents at the expense of others similarly situated”). The Ninth Circuit concluded that economic protectionism alone is not a sufficient basis to determine if a legislative classification survives rational basis review. See *id.* at 991 n.15 (“[E]conomic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate interest.”).

206. See *supra* notes 183–184 and accompanying text (noting the Tenth Circuit’s criticism of the Sixth Circuit’s reliance on precedents that applied a higher standard of review).

207. See *supra* note 172 and accompanying text (discussing the *Craigsmiles* court’s insistence that it was not reviving *Lochner*); see also *St. Joseph Abbey v. Castille*, 712 F.3d 215, 227 (5th Cir. 2013) (“Nor is the ghost of *Lochner* lurking about. . . . We insist only that Louisiana’s regulation not be irrational.”).

208. See *Florman, supra* note 89, at 749–51 (2012) (arguing that the Fifth Circuit applied “rational basis with bite” in *St. Joseph Abbey* because the court utilized a “means-end” analysis); see *supra* notes 183–184 (discussing the Tenth

traditional format;<sup>209</sup> instead of reviewing a list of rationales offered by the state, the court fulfilled its obligation under rational basis and independently identified a reason to uphold the statute.<sup>210</sup>

The Supreme Court has declined to weigh in on whether economic protectionism is a legitimate state interest.<sup>211</sup> No majority opinion has ever provided specific criteria to determine what constitutes a legitimate state interest.<sup>212</sup> The Court has also recently refused an opportunity to reevaluate whether the existing formulation of rational basis review serves its intended purpose.<sup>213</sup> Due to confusion among the circuits over these issues,

Circuit's disagreement with *Craigmiles's* application of rational basis review).

209. See *Florman*, *supra* note 89, at 734 (explaining that unlike in *Craigmiles*, the *Powers* court did not “examine the nature of the relationship between the occupational licensing statute and public health, consumer protection, or any other legitimate state interest traditionally used to uphold a law under rational basis review”).

210. See *Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004) (“In fact, ‘this Court is *obligated* to seek out other conceivable reasons for validating [a state statute.]’” (quoting *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 146 (1st Cir. 2001))).

211. See *Sandefur*, *supra* note 89, at 1025 (noting that the Supreme Court has chosen not to weigh in on the split between the Sixth and Tenth Circuits, leading to confusion).

212. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834–35 (1987) (“Our cases have not elaborated on the standards for determining what constitutes a ‘legitimate state interest’ . . . They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements.”); see also *SANDEFUR*, *supra* note 74, at 129 (“[A]lthough the rational basis test has been the law of the land for 70 years, courts have yet to articulate what, precisely, *is* a legitimate state interest.”).

213. See Brief for Petitioner at I, *Heffner v. Murphy*, 135 S. Ct. 220 (No. 14-53) (2014) (presenting the question of whether, in applying rational basis review, a court should “evaluate the rationality of enforcing a challenged law under the factual circumstances of the world today” or whether the court should consider rationality at the time the law was enacted, regardless of changed circumstances). The Court denied certiorari. 745 F.3d 56 (3d Cir. 2014), *cert. denied* 135 S. Ct. 220 (Oct. 6, 2014). Interestingly, the Court itself has engaged in fact-based determinations relating to changed circumstances when analyzing a law’s continuing applications. See *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612, 2629 (2013) (finding § 4 of the Voting Rights Act unconstitutional based on current conditions, rather than “40 year-old facts having no logical relation to the present day”). Although *Heffner* might have invalidated some outdated licensing laws, it would not have made a significant impact on the problem of occupational licensing.

the Court should reconsider whether rational basis review is appropriate for evaluating occupational licensing statutes and instead apply a heightened level of scrutiny.

#### IV. Rethinking Rational Basis Review

##### A. Rational Basis Review: A License for Political Favoritism

The primary problem with rational basis review when applied to occupational licensing is its excessive deference; a court can find virtually anything to be a legitimate state interest.<sup>214</sup> It is very unusual for a statute to fail traditional rational basis review.<sup>215</sup> *Craigmiles* and *St. Joseph* are in the minority, and, in both cases, the courts really applied an enhanced form of rational basis review.<sup>216</sup>

Excessive judicial deference makes it more likely that courts will uphold legislation that caters to interest groups at the consumer's expense.<sup>217</sup> *Powers v. Harris* highlighted the problem—the Tenth Circuit essentially held that cronyism is a legitimate state interest.<sup>218</sup> Rational basis review's leniency

214. See *FCC v. Beach Commc'ns*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring) (citation omitted) (“In my view, this formulation sweeps too broadly, for it is difficult to imagine a legislative classification that could *not* be supported by a ‘reasonably conceivable state of facts.’ Judicial review under the ‘conceivable set of facts’ test is tantamount to no review at all.”).

215. See *SANDEFUR*, *supra* note 74, at 138 (explaining that courts so rarely find laws unconstitutional under rational basis review that some commentators suggest that judges who do overturn statutes under rational basis review are applying a different test—“rational basis with bite”).

216. See *supra* note 208 and accompanying text (noting that in both cases, the circuits applied a more searching form of rational basis review).

217. See *Powell v. Pennsylvania*, 127 U.S. 678, 696–97 (1888) (Field, J., dissenting)

If the courts could not in such cases examine into the real character of the act, but must accept the declaration of the legislature as conclusive, the valued right of the citizen would be subject to the arbitrary control of the temporary majority of such bodies, instead of being protected by the guarantees of the Constitution.

218. See *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004) (“[W]hile baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments.”).

allows states to prioritize a small minority over the good of all of its citizens.<sup>219</sup> This is particularly troubling as the individuals most harmed by occupational licensing have limited means and lack ready access to legal or political assistance.<sup>220</sup> It is easy to incentivize legislators to create and support protectionist legislation because of the power that licensing organizations and professional associations can exercise on their behalf.<sup>221</sup>

Granting a state legislature wide discretion paired with extremely permissive judicial scrutiny reverses from the *Lochner* extreme to a situation in which legislative decisions that create a tangible impact on citizens' daily lives are virtually unreviewable.<sup>222</sup> Occupational regulation is further removed from judicial review because education and training requirements, as well as licensing fees, are promulgated by state licensing boards on legislative authorization.<sup>223</sup> When defending occupational licensing, at a minimum, the state should be required to provide justification for the law rather than forcing the court to shoulder the burden.<sup>224</sup> *Carolene Products* was correctly concerned over the lack of deference to the legislature, but the "overreaction to some

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219. See Florman, *supra* note 89, at 735 (noting that occupational licensing is "necessarily rationally related to protecting the economic interests of one group").

220. See *supra* notes 107–115 and accompanying text (discussing economic harms associated with licensing and its impact on vulnerable individuals); see also OCCUPATIONAL LICENSING: A FRAMEWORK, *supra* note 28, at 35–39 (discussing the increased burdens occupational licensing places on individuals with criminal records and immigrants).

221. See *supra* note 152 and accompanying text (discussing the system of economic rents designed to keep legislators in office and licensing control in the hands of the boards).

222. See Florman, *supra* note 89, at 735 (concluding that under decisions similar to *Powers*, all occupational licensing laws would be rational, creating an especially problematic result should the Supreme Court ultimately favor the Tenth Circuit's approach).

223. See VA. CODE ANN. § 54.1-706 (2014) ("The Board shall have the discretion to impose different requirements for licensure for the practice of barbering, cosmetology, nail care, waxing, tattooing, body-piercing, and esthetics.").

224. See SANDEFUR, *supra* note 74, at 130–31 (arguing that the rational basis test places an unfair burden on the plaintiff to "imagine every possible rationale supporting the law and prove that each is unfounded," while granting the court the freedom to create its own "speculative rationalizations").

substantive due process decisions has unfortunately eliminated an important check in the government of checks and balances.”<sup>225</sup>

### 1. *Legitimate State Interests*

Although the rationality of the state’s conduct is important, the central inquiry of rational basis review addresses the conduct’s relationship to a legitimate interest.<sup>226</sup> The Court has found a number of state interests to be legitimate<sup>227</sup> but has provided limited guidance as to how it reached those conclusions.<sup>228</sup> Although the Justices are properly reluctant to set state policy,<sup>229</sup> providing rudimentary guidelines to assist lower courts in identifying legitimate state interests could help curb the worst abuses. Furthermore, failure to provide guidelines grants judges license to create rationales for the legislature, which is at best fiction, and at worst judicial overreach.<sup>230</sup>

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225. SIEGAN, *supra* note 59, at 155.

226. See Sandefur, *supra* note 89, at 1044 (explaining that any analysis of legislative goals always reaches the same central inquiry: “What is a legitimate, or compelling, government interest?”).

227. See, e.g., *Fitzgerald v. Racing Ass’n of Cent. Iowa*, 539 U.S. 103, 109 (2003) (finding that incentives to promote economic development for river communities or promoting riverboat gambling businesses are rational objectives to support legislation that taxed riverboat slot machine revenues at a lower rate than racetrack slot machines); *Nordlinger v. Hahn*, 505 U.S. 1, 35 (1992) (finding that “it is beyond question that ‘inhibiting the displacement of lower income families by the forces of gentrification,’ is a legitimate state interest” (citations omitted)); *City of New Orleans v. Dukes*, 427 U.S. 297, 304–05 (1976) (per curiam) (determining that legislation grandfathering in some pushcart vendors satisfied a legitimate government interest in preserving the “charm and beauty of a historic area,” promoting the tourist industry, and protecting the “economic vitality of that area”).

228. See SANDEFUR, *supra* note 74, at 133 (“In some cases the Court has suggested that the ‘legitimacy’ of a government interest can be judged simply by the amount of support the legislative interest has.”); see also *supra* note 212 and accompanying text (discussing the Court’s failure to define a “legitimate” government interest or provide guidelines).

229. See *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 546 (1985) (explaining that it is improper to allow an “unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes”).

230. See *supra* note 210 (discussing a court’s obligation under rational basis review); see also SANDEFUR, *supra* note 74, at 131 (“[T]he rational basis test allows judges to devise their own, entirely speculative rationalizations for a



Justice Stevens provided a reasonable set of flexible guidelines in a dissenting opinion:

A legitimate state interest must encompass the interests of members of the disadvantaged class and the community at large as well as the direct interests of the members of the favored class. It must have a purpose or goal independent of the direct effect of the legislation and one “that we may reasonably presume to have motivated an impartial legislature.”<sup>231</sup>

The “impartial legislature” requirement directly addresses concerns relating to public choice theory,<sup>232</sup> and applying this standard would resolve the circuit split.<sup>233</sup> Under Justice Stevens’s formulation, legislation designed to insulate an intrastate industry from competition would require an additional public interest element to qualify as a legitimate state interest.<sup>234</sup> The “public good” requirement is logically related to occupational licensing’s roots in state police powers to protect public health and safety.<sup>235</sup> Should the Court choose not to increase the level of scrutiny applied to occupational licensing statutes, at the least it

challenged law, even reasons not offered in the legislature or in court.”).

231. *Nordlinger v. Hahn*, 505 U.S. 1, 34 (1992) (Stevens, J., dissenting) (quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 452 n.4 (1985) (Stevens, J., concurring)).

232. *See supra* Part III.B.4 (discussing occupational licensing and public choice theory).

233. *See supra* note 40 and accompanying text (discussing the split between the Fifth, Sixth, and Tenth Circuits over whether pure economic protectionism is a legitimate state interest).

234. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 222–23 (5th Cir. 2013) (explaining that protectionist legislation that also provides a public benefit is a legitimate interest); *see also Fitzgerald v. Racing Ass’n*, 539 U.S. 103, 109 (2003) (noting potential state interests beyond providing financial assistance to riverboat operators, including promoting economic development for river communities, riverboat history, or “reliance interests” based on the previous tax rate); *City of New Orleans v. Dukes*, 427 U.S. 297, 305 (1976) (*per curiam*) (finding an interest in preserving the historic nature of the French Quarter and enhancing the tourist economy, even though the legislation benefitted certain pushcart vendors over others).

235. *See supra* note 121 and accompanying text (noting that licensing restrictions must be rationally related to an individual’s fitness to practice); *see infra* note 310 and accompanying text (discussing occupational licensing’s relationship to the police power).

should require the state to justify its reason for regulation and require that protectionist legislation bear a direct relationship to public welfare.

### *B. Strict Scrutiny: An Unlikely Alternative*

Strict scrutiny originated in Footnote Four of *Carolene Products*.<sup>236</sup> It applies when government action potentially infringes on a fundamental right.<sup>237</sup> Fundamental rights must be “deeply rooted in this Nation’s history and tradition,” and the Court requires a “careful description” of the interest.<sup>238</sup> Strict scrutiny requires a two-part analysis. First, the court must determine if the government has a compelling interest.<sup>239</sup> If so, then the court determines whether the scope of the law is sufficiently narrow to meet those ends.<sup>240</sup>

Under an originalist interpretation, property rights are fundamental rights and deserve strict scrutiny.<sup>241</sup> The Court, however, has never included property rights in its jurisprudence identifying fundamental rights.<sup>242</sup> It is extremely unlikely that

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236. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800 (2006) (“For laws touching on fundamental rights or discriminating against racial minorities, *Carolene Products* suggested the possibility of a more vigorous judicial role—a ‘more searching judicial scrutiny.’”).

237. See *Reno v. Flores*, 507 U.S. 292, 302 (1993) (explaining that due process “forbids the government to infringe certain ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest”).

238. See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (describing the process for identifying fundamental rights).

239. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (explaining that restrictions that “curtail the civil rights of a single racial group are immediately suspect” and deserve “rigid scrutiny”).

240. See *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 718 (1981) (explaining that the state may justify limitations on religious freedom “by showing that it is the least restrictive means of achieving some compelling state interest”).

241. See Barnett, *supra* note 53, at 11–12 (arguing that the Constitution protects economic rights, even if the Supreme Court has chosen not to enforce those protections).

242. See *Glucksberg*, 521 U.S. at 720 (listing fundamental rights identified

the Court would return to using economic due process as set forth in *Lochner*.<sup>243</sup> Lower courts are reluctant to take such a step<sup>244</sup> (or indeed, to even appear to be taking that step) and commentators consider it far-fetched.<sup>245</sup> Returning to *Lochner* would undermine laws designed to protect workers.<sup>246</sup> *Lochner* Era decisions rejected minimum wage laws<sup>247</sup> and attacked unions,<sup>248</sup> both of which protect individual workers who lack equal bargaining power.<sup>249</sup>

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in Supreme Court precedent, including the right to marry, have children, abortion, contraceptive use, bodily integrity, and privacy within marriage, but not the right to pursue a “common calling”).

243. See *Griswold v. Connecticut*, 381 U.S. 479, 481–82 (1965) (rejecting arguments suggesting that the Court should be guided by *Lochner* and explaining that “[w]e do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems”).

244. See *supra* note 207 and accompanying text (noting that both the courts in *Craigmiles* and *St. Joseph Abbey* were emphatic that they were not backsliding to *Lochner*).

245. See *Florman*, *supra* note 89, at 743 (arguing that the Court is unlikely to find that the right to earn a living is a fundamental right and therefore subject to strict scrutiny).

246. See Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 790–91 (2003) (noting that *Lochner* impeded “social citizenship” and accompanying protections, such as “basic income security, education, health care, and housing”). The minimum wage is one such example. The minimum wage peaked in the 1960s and has since lost purchasing power. See Drew Desilver, *5 Facts About the Minimum Wage*, PEW RES. CTR. (Dec. 4, 2013), <http://www.pewresearch.org/fact-tank/2013/12/04/5-facts-about-the-minimum-wage/> (last visited Feb. 28, 2016) (“Adjusted for inflation, the federal minimum wage peaked in 1968 at \$8.56 (in 2012 dollars). Since it was last raised in 2009 . . . the federal minimum wage has lost about 5.8% of its purchasing power to inflation.”) (on file with the Washington and Lee Law Review). Given that a significant number of Americans work in the lowest-income jobs, invalidating the minimum wage would have major repercussions for the economy. See *id.* (explaining that 17.8% of all wage or salary workers in the United States worked in the lowest-paid jobs in 2011).

247. See *Adkins v. Children’s Hosp.*, 261 U.S. 525, 561–62 (1923) (overruling a District of Columbia statute establishing a minimum wage for women).

248. See *Adair v. United States*, 208 U.S. 161, 180 (1908) (overturning *Adair’s* conviction under § 10 of the Erdman Act for firing unionized employees as “arbitrarily sanction[ing] an illegal invasion of the personal liberty as well as the right of property of the defendant *Adair*”).

249. See LAWRENCE MISHEL & MATTHEW WALTERS, ECON. POL’Y INST.: HOW UNIONS HELP ALL WORKERS, BRIEFING PAPER 143, at 4–5 (Aug. 26, 2003),

The Court is deeply entrenched in a policy of legislative deference.<sup>250</sup> Unbridled economic legislation without judicial oversight arguably leads to political favoritism and legislation that protects industries at the taxpayer's expense.<sup>251</sup> But strict scrutiny allowed the judiciary to improperly substitute its policy preferences for the legislative will of the majority.<sup>252</sup> Therefore, strict scrutiny is no solution at all. It merely trades one problem for another.

### C. Second-Order Rational Basis: A Weak Compromise

Some commentators and scholars have argued that "second-order rational basis review," or "rational basis with teeth," is an appropriate standard for evaluating licensing

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<http://s4.epi.org/files/page/-/old/briefingpapers/143/bp143.pdf> (noting the positive impact that union involvement has on wage growth for low- and middle-income workers); Robert E. Prasch & Falguni A. Sheth, *The Economics and Ethics of Minimum Wage Legislation*, 57 REV. SOC. ECON. 466, 472 (1999) (arguing that a higher minimum wage provides significant assistance to workers who lack bargaining power). Workers in "low-wage markets" are often stuck working in low-paying jobs because of their lack of education and inability to finance a search for better employment. *See id.* (discussing the plight of low-wage workers).

250. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("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 be rectified by the democratic process."); *see also supra* note 87 and accompanying text (noting the deference accorded to legislative decisions on economic policy).

251. *See* Paul J. Larkin, Jr., *Economic Liberty and the Constitution: An Introduction*, in *ECONOMIC LIBERTY AND THE CONSTITUTION*, *supra* note 151, at 1, 6 (arguing that the Court may reconsider its precedents after examining "the economic and political reality underlying exclusionary licensing cases" because those precedents grant "politically powerful groups" the ability to make economic decisions that are harmful to poorer and less powerful individuals).

252. *See COX*, *supra* note 58, at 135

The Lochnerian decisions are often characterized as 'activist.' Plainly the Justices in the majority did not hesitate to substitute judicial opinions for the judgments of elected representatives of the people. . . . The term 'activist' is also fairly applicable . . . insofar as it implies a self-conscious will to reach a social or political result, giving scant weight to recognized sources of law.

restrictions.<sup>253</sup> Second-order rational basis review applies when a law is aimed at a “politically unpopular group” and is more likely to be applied to laws impacting personal relationships than to other situations.<sup>254</sup> For example, the Court applied second-order rational basis in *Lawrence v. Texas*<sup>255</sup> when it struck down a Texas law criminalizing same-sex sexual relations.<sup>256</sup> Second-order rational basis is characterized by reduced deference to legislative determinations and enhanced scrutiny of the legislature’s motivations for passing the law.<sup>257</sup> It is presented as a viable solution because the inquiry requires the court to first determine that the licensing scheme is suspect and then confirm those suspicions by determining whether the state’s justifications are pretextual.<sup>258</sup>

Second-order rational basis, however, is a watered-down version of intermediate scrutiny.<sup>259</sup> It is not particularly clear when it should apply, or what the permissible scope of inquiry is.<sup>260</sup> Applying a standard that lacks clear boundaries creates a

253. See Florman, *supra* note 89, at 768 (proposing that an enhanced rational basis review is appropriate for occupational licensing challenges under the Fourteenth Amendment); Raynor, *supra* note 89, at 1101 (arguing that licensing laws should be subject to second-order rational basis tests).

254. See *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (explaining when the Court is likely to apply “a more searching form of rational basis review”).

255. 539 U.S. 558 (2003).

256. See *id.* at 578 (finding that a Texas statute criminalizing same-sex sexual conduct did not further a legitimate state interest and that the state could not make petitioners’ “private sexual conduct a crime”).

257. See *id.* at 581–83 (reviewing the state’s motivation for criminalizing same-sex sexual relations and addressing each of the state’s contentions in turn); see also *supra* note 183 and accompanying text (discussing and defining second-order rational basis review).

258. See Raynor, *supra* note 89, at 1100 (describing application of second-order rational basis review).

259. See Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 801 (1987) (arguing that the analysis under “rational basis with bite” cases is essentially the same as intermediate scrutiny).

260. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 460 (1985) (Marshall, J., concurring in part and dissenting in part)

[B]y failing to articulate the factors that justify today’s ‘second order’ rational-basis review, the Court provides no principled foundation for determining when a more searching inquiry is to be invoked. Lower

significant risk of abuse, such as expanding the inquiry into economic policies best left to the legislature.<sup>261</sup>

*Craigmiles* and *St. Joseph* both applied a version of second-order rational basis review, which has led to inconsistency across the circuits.<sup>262</sup> Because second-order rational basis is not clearly defined or understood, applying it to occupational licensing statutes will only create more confusion.<sup>263</sup>

#### *D. Intermediate Scrutiny: An Appropriate Balance*

Intermediate scrutiny refers to a standard of review that is less stringent than strict scrutiny, but more thorough than rational basis review.<sup>264</sup> Courts use four balancing characteristics to determine whether intermediate scrutiny protects a particular class: (1) a history of discrimination; (2) a “defining characteristic” that relates to the ability to contribute to society; (3) obvious and distinguishing characteristics that define the class as a distinct group; and (4) the class is either a minority or “politically powerless.”<sup>265</sup> To pass intermediate scrutiny, the challenged legislation must serve an important government

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courts are thus left in the dark . . . and this Court remains unaccountable for its decisions employing, or refusing to employ, particularly searching scrutiny.

261. See *id.* (explaining that second-order rational basis “creates precedent for this Court and lower courts to subject economic and commercial classifications to similar and searching ‘ordinary’ rational basis review—a small and regrettable step back to the days of *Lochner v. New York*”).

262. See *supra* note 208 and accompanying text (discussing the scope of review in *St. Joseph* and *Craigmiles* and noting their deviation from traditional rational basis review).

263. See Pettinga, *supra* note 259, at 802 (“Rational basis with bite, therefore, creates a limitless opportunity for the court to closely scrutinize legislation whenever it sees fit. This unbridled freedom. . . fosters lower court confusion as to what version of the rational basis test to apply in any given case.”).

264. See Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 300 (1998) (explaining the intermediate scrutiny standard).

265. See *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012) (describing the four factors used to determine if a classification qualifies as a suspect class).

objective, and the means must have a substantial relationship to achieving the government objective.<sup>266</sup>

Courts applying intermediate scrutiny must “evaluate the rationality of legislative judgment with reference to well-settled constitutional principles” that address “sufficiently absolute and enduring” constitutional concerns.<sup>267</sup> Under intermediate scrutiny, a court is free to reject a state’s purported legitimate interest.<sup>268</sup> If there is an alternative means of achieving the state’s objectives without harming the protected group, a court may require it.<sup>269</sup> Intermediate scrutiny has been applied to cases dealing with classes such as gender,<sup>270</sup> homosexuality,<sup>271</sup> illegitimacy,<sup>272</sup> or to categories such as commercial speech<sup>273</sup> that do not fall into strict scrutiny’s “fundamental rights” category.<sup>274</sup>

### *1. Individuals Harmed by Occupational Licensing Statutes Fall Within Intermediate Scrutiny’s Ambit*

The social and constitutional importance of a particular interest may warrant a higher level of scrutiny in an equal

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266. See *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980) (explaining how a discriminatory law may survive intermediate scrutiny).

267. *Plyler v. Doe*, 457 U.S. 202, 218 n.16 (1982).

268. See *Wengler*, 446 U.S. at 152 (rejecting administrative convenience as a legitimate state interest that allows a mandatory preference of one sex over another).

269. See *id.* at 151–53 (noting that the state has the burden of showing that the discriminatory conduct substantially serves the statutory end and that the court may invalidate legislation to apply the alternative option).

270. See *United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (applying intermediate scrutiny to classifications based on gender).

271. See *Windsor v. United States*, 699 F.3d, 169, 185 (2d Cir. 2012) (concluding that homosexuals are part of a quasi-suspect class subject to intermediate scrutiny).

272. See *Lalli v. Lalli*, 439 U.S. 259, 264–65 (1978) (applying intermediate scrutiny to classifications based on illegitimacy).

273. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (explaining that intermediate scrutiny applies in commercial speech cases).

274. See *supra* note 242 and accompanying text (discussing fundamental rights that are reviewed with strict scrutiny).

protection inquiry.<sup>275</sup> The state is required to provide strong justifications for laws that exclude its citizens from state protection or assistance.<sup>276</sup> Arbitrary and protectionist licensing laws deny equal protection because “[c]entral to both the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.”<sup>277</sup> Because many occupational licensing restrictions are arbitrary and inimical to persons trying to enter the profession, they deserve to be examined under heightened scrutiny.<sup>278</sup>

The majority of individuals harmed by protectionist licensing statutes are poor, uneducated, or minorities.<sup>279</sup> Although plaintiffs challenging these statutes do not fall neatly within a “suspect” or “quasi-suspect” classification,<sup>280</sup> their lack of political and economic power makes applying intermediate scrutiny reasonable.<sup>281</sup> An easily classifiable minority may be able to

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275. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 460 (1985) (Marshall, J., concurring in part and dissenting in part) (“[T]he level of scrutiny employed in an equal protection case should vary with ‘the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.’” (quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 99 (1973) (Marshall, J. dissenting))).

276. See *id.* (explaining that ordinances designed to exclude mentally retarded individuals from residential areas in a community must be justified as “substantially furthering legitimate and important purposes”).

277. *Romer v. Evans*, 517 U.S. 620, 633–34 (1996) (“‘Equal protection of the laws is not achieved through indiscriminate imposition of inequalities’ . . . Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare.” (citations omitted)).

278. See *Plyler v. Doe*, 457 U.S. 202, 221–22 (1982) (explaining that one goal of the Equal Protection Clause is “the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit”).

279. See *supra* notes 107–109 and accompanying text (discussing the individuals who are harmed the most by arbitrary occupational licensing statutes).

280. See Winkler, *supra* note 236, at 833–34 (explaining that the majority of suspect class discrimination cases between 1990 and 2003 dealt with racial classifications).

281. See *Plyler*, 457 U.S. at 223–24 (noting that the suspect class requirement is unnecessary when the law in question imposes hardship on a



cultivate greater political capital through organization and public sympathy, whereas isolated individuals seeking access to a profession are more likely to be ignored.<sup>282</sup> Due to their unrepresented and disorganized status, it is unlikely that resorting to the political process would prove successful.<sup>283</sup> The only existing remedy, therefore, is a judiciary that currently utilizes a standard of review that upholds occupational licensing laws based on legitimate state interests such as protecting customers from pricking their fingers on a piece of wire in a bouquet.<sup>284</sup>

Occupational licensing is an issue of major social importance because of its rapid expansion; these laws impact nearly one-third of the workforce.<sup>285</sup> They also affect both individuals seeking the right to practice and consumers who are harmed by the lack of market competition.<sup>286</sup> Therefore, applying intermediate scrutiny is appropriate.

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group that is not accountable for its status).

282. See McCloskey, *supra* note 109, at 50 (“[O]ther ‘discrete’ minorities, such as racial groups have occasionally displayed respectable capacities to exert political leverage by virtue of their very discreteness. Not so to the isolated economic man who belongs to no identifiable group at all.”).

283. See SANDEFUR, *supra* note 74, at 140 (noting that bureaucracy, legislative rules, and administrative agencies make it “difficult for voters to remove sitting legislators”).

284. See *Meadows v. Odom*, 360 F. Supp. 2d 811, 824 (M.D. La. 2005), *vacated as moot*, 198 Fed. Appx. 348 (5th Cir. 2006) (noting that Louisiana’s “public safety” rationale for licensing florists was supported by evidence on the record that licensed florists are “very diligent about not having an exposed pick, not having a broken wire, not have a flower that has some type of infection, like, dirt, that remained on it”); see also SANDEFUR, *supra* note 74, at 134 (“[T]he licensing scheme was a legitimate way of protecting the people of Louisiana from *scratching their fingers on the wires that florists use to hold their floral arrangements together*. This conclusion, although insufficient to pass the laugh test, did pass the rational basis test.”).

285. See *supra* notes 32–33 and accompanying text (noting the scope of occupational licensing).

286. See Larkin, *supra* note 151, at 6 (explaining that occupational licensing burdens “fall upon people who could be even poorer than the working class individuals whom modern-day social welfare legislation normally seeks to protect, as well as on the general public, which is denied the benefit of the lower prices that competition can produce”).

*2. The Freedom to Select an Occupation Is a Fundamental Activity Protected by the Privileges and Immunities Clause of Article IV of the Constitution*

Intermediate scrutiny also applies to rights that are considered important, or implicate constitutional concerns.<sup>287</sup> The right to pursue a “common calling” is a fundamental privilege protected by the Privileges and Immunities Clause of Article IV, Section Two, which provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”<sup>288</sup>

This interpretation originated in *Corfield v. Coryell*.<sup>289</sup> Justice Washington elaborated a list of privileges and immunities that included “the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.”<sup>290</sup> According to Justice Washington, the Clause also protected a citizen’s right to travel and live in any state to pursue employment.<sup>291</sup> The Court has consistently found that “the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause.”<sup>292</sup>

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287. See *United States v. Virginia*, 518 U.S. 515, 547 (1996) (explaining that categorical exclusions of one gender are constitutional violations); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (noting that although public education is not a constitutional right, it is important enough that denying access to education implicates the Equal Protection Clause).

288. U.S. CONST. art. IV, § 2; see also *Toomer v. Witsell*, 334 U.S. 385 (1948) (“Thus we hold that commercial shrimping in the marginal sea, like other common callings, is within the purview of the [P]rivileges and [I]mmunities [C]lause.”).

289. 6 F. Cas. 546 (E.D. Pa. 1823).

290. *Id.* at 551–52.

291. See *id.* at 552 (“The right of a citizen to pass through or to reside in any state, for purposes of trade . . . may be mentioned as some of the particular privileges and immunities of citizens.”).

292. *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 219 (1984); see also *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 283 (1985) (“We therefore conclude that the right to practice law is protected by the Privileges and Immunities Clause.”); *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 387 (1978) (describing common callings as “basic and essential activities”); *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978) (noting that the right to pursue a

The language of Article IV, Section Two, is virtually identical to the Privileges and Immunities Clause of the Fourteenth Amendment.<sup>293</sup> The Privileges and Immunities Clause, however, has been considered dead since the *Slaughter-House Cases*.<sup>294</sup> Some scholars argue that the Fourteenth Amendment was intended to incorporate the fundamental privileges identified in *Corfield*.<sup>295</sup> In comparing Justice Washington's opinion in *Corfield* and Congress's intentions when drafting the Fourteenth Amendment, it is evident that the framers considered the right to pursue a common calling of one's choice an important freedom.<sup>296</sup> Based on the Clause's modern interpretation in *Saenz v. Roe*,<sup>297</sup> both the Clause and Article IV, Section Two protect a citizen's right to pursue fundamental activities, regardless of their state of residency.<sup>298</sup>

Although the primary use of Article IV, Section Two is to protect a citizen's right to work in different states without facing unreasonable barriers to entry, the fundamental activity distinction applies in this context.<sup>299</sup> Instead of unjustly blocking

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common calling is protected within Article IV, Section Two).

293. Compare U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."), with U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

294. 83 U.S. 36 (1873); see also *supra* note 84 and accompanying text (discussing the effect that the *Slaughter-House Cases* had on the Privileges and Immunities Clause).

295. See *Saenz v. Roe*, 526 U.S. 489, 526–27 (1999) (Thomas, J., dissenting) (discussing the Fourteenth Amendment's enactment).

296. See *id.* at 524 (explaining that the privileges and immunities language was carried over from the Articles of Confederation to the Constitution and was understood to protect fundamental rights and liberties).

297. 526 U.S. 489 (1999).

298. See *id.* at 503–04 (finding that the Fourteenth Amendment protects "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State" and that those rights are protected by both state and national citizenship); *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 383 (1978) ("When the Privileges and Immunities Clause has been applied to specific cases, it has been interpreted to prevent a State from imposing unreasonable burdens on citizens of other States in their pursuit of common callings within the State.").

299. See *Toomer v. Witsell*, 334 U.S. 385, 396 (1948) ("[I]t was long ago

out-of-state professionals, state-created barriers protect incumbents at the expense of aspiring practitioners and consumers.<sup>300</sup> The state may impose reasonable restrictions when unregulated professions create a risk to public health and welfare.<sup>301</sup> Occupational licensing laws that ensure a supply of competent practitioners with training that is rationally connected to the profession are reasonable laws that are essential for public safety.<sup>302</sup> Restrictions designed solely to lock competitors out of a market are not reasonable; they abuse state power and weaken guarantees of Equal Protection.<sup>303</sup> Given the importance of the right to pursue a common calling, barriers to entry into a lawful profession should be subject to a more thorough scrutiny than rational basis review.

### *3. Intermediate Scrutiny Satisfies the Need for Balance Between the Legislature and the Judiciary*

Occupational licensing laws are part of the state's police power.<sup>304</sup> The state has the right to create its own economic policies, including licensing, but those policies must be subject to

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decided that one of the privileges which the clause guarantees to Citizens of State A is that of doing business in State B on terms of substantial equality with citizens of that state.”).

300. See *supra* notes 147–152 and accompanying text (discussing public choice theory and its relationship to occupational licensing).

301. See *Conn. v. Gabbert*, 526 U.S. 286, 291–92 (1999) (explaining that the right to choose a profession is “subject to reasonable government regulation”); *Dent v. West Virginia*, 129 U.S. 114, 121 (1889) (explaining that deprivation of the right to work is not arbitrary “where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society”).

302. See *Larkin*, *supra* note 22, at 311–12 (arguing that the justification for occupational licensing is to protect the public and statutes that pose only a trivial risk do not fit within that justification).

303. See *supra* note 277 and accompanying text (discussing when government action violates the Equal Protection Clause); see also *supra* note 152 and accompanying text (discussing special interest groups and occupational licensing).

304. See *supra* note 24 and accompanying text (discussing licensing's relationship to a state's police powers).

meaningful judicial review.<sup>305</sup> Courts should balance legislative deference with an awareness of the potential for legislative abuse. According to Jay Wexler, intermediate scrutiny appropriately balances judicial minimalism and oversight because the legislature is required to explain its reasons for enacting a statute and the policies behind the statute.<sup>306</sup> This explanation assists courts in making reasoned determinations based on actual state policies, instead of judicial speculation.<sup>307</sup> Intermediate scrutiny ensures that courts appropriately weigh individual rights against government interests without predetermining the result.<sup>308</sup> Given the scope of occupational licensing and the potential harm it may inflict, it is reasonable to require the state to develop clear reasons for licensing restrictions and to carry the burden in judicial review.<sup>309</sup>

#### *4. Applying Intermediate Scrutiny to Occupational Licensing*

In applying intermediate scrutiny to occupational licensing, a court must first examine the challenged legislation or regulation to determine whether it serves an important government objective. The state should clarify the legislation's intended purpose and provide evidence that the law is necessary to achieve

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305. See SIEGAN, *supra* note 59, at 318–19 (summarizing constitutional support for judicial review of economic legislation and noting the “judicial purpose of providing a forum for persons aggrieved by government and serving as a check on the other branches”).

306. See Wexler, *supra* note 264, at 334 (“Because the intermediate scrutiny standard requires law-making bodies to justify their regulation in terms of actual purposes, it forces them to articulate clearly the interests that the law is intended to serve . . . and invite[s] debate about the true motivations for the legislation.”).

307. See *supra* note 230 and accompanying text (discussing the hazards of allowing courts to rule based on speculative government policy).

308. See Wexler, *supra* note 264, at 300 (explaining that intermediate scrutiny requires courts to balance a number of factors in making a determination).

309. See *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 152 (1980) (noting that the government has failed to make the proper showing to sustain the law in question); see also SIEGAN, *supra* note 59, at 324 (arguing that the government should have to persuade the court that the law serves a legitimate purpose when applying intermediate scrutiny to economic legislation).

the objective. Because occupational licensing is justified as part of a state's power to protect public health and safety,<sup>310</sup> the government objective should arguably bear some relationship to that power.

It is easy to recognize occupations that if left unregulated would pose a threat to public health and safety. Professional regulations for physicians are clearly constitutional under intermediate scrutiny.<sup>311</sup> Licensing requirements for doctors further an important government interest in protecting public health and safety by ensuring that only qualified physicians practice.<sup>312</sup> Medical schools offer curriculum explicitly related to the profession, and the licensing exam is "substantially related" to that interest.<sup>313</sup>

In examining the challenged law, the court would consider whether it has a "rational connection with the applicant's fitness or capacity to practice."<sup>314</sup> For example, if the education and training requirements were unduly burdensome, arbitrary,<sup>315</sup> or

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310. See *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) (explaining that part of the state power to protect public health and safety includes regulating professions).

311. See *Dent v. West Virginia*, 129 U.S. 114, 128 (1889) (finding that the "law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under the authority of the State").

312. See *id.* at 122–23 ("Few professions require more careful preparation by one who seeks to enter it than that of medicine. . . . Due consideration, therefore, for the protection of society may well induce the State to exclude from practice those who have not such a license, or who are . . . not . . . fully qualified.").

313. See *id.* at 123 ("[T]he statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the State as competent to judge of his qualifications.").

314. *Schwartz v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 239 (1972). See also *Dent*, 129 U.S. at 122

If [qualifications] are appropriate to the calling or profession, and attained by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study or application that they can operate to deprive one of his right to pursue a lawful vocation.

315. See *supra* note 151 and accompanying text (discussing the American Society for Interior Designers's multiple attempts to create strict licensing

bore a limited relationship to the actual work of the profession as defined by the state, as in *Cornwell v. Hamilton*,<sup>316</sup> a court could find that the legislation fails to serve the intended government objective.<sup>317</sup> Engaging in comparative analysis of licensing requirements in other states may provide helpful guidelines for courts trying to determine whether a state's licensing scheme is arbitrary or rational.<sup>318</sup>

Another way to determine whether legislation serves its purpose is to analyze its proportional position within the overall state licensing structure.<sup>319</sup> Because the state determines which occupations warrant licensure, inconsistencies in professional regulation without a corresponding public safety connection may suggest that protectionism is the real government objective.<sup>320</sup> The court could then consider whether alternatives such as certification could substantially achieve the same state objectives without creating arbitrary barriers.<sup>321</sup> A state's decision to

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restrictions for interior designers that just happen to correspond with ASID's requirements for membership).

316. 80 F. Supp. 2d 1101 (S.D. Cal. 1999).

317. See *id.* at 1109 (arguing that if a state's regulations limit training in necessary skills for hair braiders, the state cannot argue that its regulations are designed to protect consumers' health because its regulations are irrelevant to developing appropriate safety practices); see also *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 90–91 (Tex. 2015) (finding that Texas's licensing requirements for eyebrow threaders are burdensome due to the number of training hours not related to threading, costs of training, and delayed employment opportunities).

318. See *Cornwell*, 80 F. Supp. 2d at 1113–14 (noting that the rationality of a state's requirements can be determined by comparison to other states and other professions to determine the appropriate relationship to public health and safety).

319. See Larkin, *Public Choice Theory*, *supra* note 22, at 308 n.462 (discussing possible legal inquiries for licensing cases, including proof that licensing requirements in one state are significantly more onerous than requirements of other states).

320. See *id.* at 285 (“A state whose licensing matrices . . . make little (if any) sense as a means of protecting the public safety or welfare has likely adopted that scheme for the very different purpose of keeping safe the financial welfare of a favored group.”).

321. See *supra* notes 23, 39 and accompanying text (noting that there are less burdensome alternatives, such as certification, registration, or regular Department of Health inspections).

deregulate a related profession may provide guidance in determining appropriate alternatives.<sup>322</sup>

Although there is a reasonable concern that applying heightened scrutiny to economic regulations could return courts to the days of *Lochner*,<sup>323</sup> creating a limited exception for occupational licensing does not present a significant risk. The right to pursue a common calling is a fundamental activity<sup>324</sup> and deserves greater protection. States are still free to create and apply their own economic policies. Applying intermediate scrutiny merely ensures that the politically powerless receive assistance from the judiciary to guarantee that the legislature also represents their interests in an area that is central to most people's lives.

#### V. Conclusion: The Way Forward

Occupational licensing statutes serve a useful purpose, but their utility is often clouded by legislation designed to restrict competition and pad incumbents' power, rather than protect the public.<sup>325</sup> These statutes create arbitrary barriers to citizens' exercise of a fundamental activity.<sup>326</sup> The Supreme Court's recent holding in *North Carolina State Board* provides further indication of judicial support for blocking licensing regulations designed to limit market competition.<sup>327</sup> The Texas Supreme Court recently struck down licensing requirements for eyebrow threaders, finding that the training requirement violated Article I, § 9 of the Texas

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322. See *supra* note 39 and accompanying text (discussing state policies surrounding deregulation).

323. See *supra* note 261 and accompanying text (noting Justice Marshall's concerns about applying enhanced scrutiny to economic legislation).

324. See *supra* notes 288–292 and accompanying text (explaining that the right to pursue a profession is a “fundamental activity” protected by Article Four of the Constitution).

325. *Supra* Part III.B.4.

326. *Supra* Part IV.D.2.

327. See *N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101, 1106 (2015) (“When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest.”).



Constitution.<sup>328</sup> In *Patel v. Texas Department of Licensing and Regulation*,<sup>329</sup> the Supreme Court of Texas set forth the standard to overcome a statute's presumption of constitutionality:

The statute's purpose could not arguably be rationally related to a legitimate government interest; or . . . when considered as a whole, the statute's actual real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest.<sup>330</sup>

The first option is traditional rational basis review, but the second standard suggests a form of heightened scrutiny.<sup>331</sup> It is possible that these decisions represent the beginning of a trend away from using traditional rational basis review in "common calling" cases.

Rational basis review is insufficient to protect against harms caused by occupational licensing because it facilitates protectionist legislation and fosters confusion among courts over what constitutes a legitimate interest.<sup>332</sup>

Intermediate scrutiny is the appropriate standard to apply because it considers legislative interests while placing the burden on the law's proponents, limiting the problem of regulatory capture.<sup>333</sup> Enhancing the standard of review protects individual rights and restores a check to the system of checks and balances by requiring that occupational licensing serve its real purpose: protecting public health and safety.

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328. See *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 90 (Tex. 2015) (concluding that unrelated training hours, expenses for training, and the associated delays in practicing prove that "the requirement of 750 hours of training to become licensed is not just unreasonable or harsh, but it is so oppressive that it violates Article I, § 9 of the Texas Constitution"). Article I, § 9 provides that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by due course of the law of the land." TEX. CONST. art. 1, § 9.

329. 469 S.W.3d 69 (Tex. 2015).

330. *Id.* at 124–25 (Boyd, J. concurring).

331. See *id.* at 123–25 (Boyd, J. concurring) (explaining that the standard of review for due course challenges to economic regulation includes the additional consideration of whether the "statute's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest").

332. *Supra* Part IV.A.1–2.

333. *Supra* Part IV.D.3.