COMMENT

THE HARMLESS PURSUIT OF HAPPINESS: WHY "RATIONAL BASIS WITH BITE" REVIEW MAKES SENSE FOR CHALLENGES TO OCCUPATIONAL LICENSES

I. INTRODUCTION

> *The patrimony of a . . . man lies in the strength and dexterity of his hands; and to hinder him from employing this strength and dexterity of his hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper without injury to his neighbor is a plain violation of [his] most sacred property*.[1]

A person's right to pursue the profession of her choosing—a right implicit in the inalienable right to pursue happiness—is under attack in the United States, and the Supreme Court can no longer afford to turn a blind eye. Consider the plight of the thirty-eight monks who live at Saint Joseph Abbey:

Saint Joseph Abbey is a self-sufficient Catholic monastery in Covington, Louisiana that receives no financial assistance from the Catholic Church.[2] Like so many other Louisianans, the monks at the Abbey were confronted with personal and financial disaster in 2005, when Hurricane Katrina decimated the harvestable timberlands upon which they depended for financial subsistence.[3] In the wake of the disaster, the ever-resourceful monks thought of a new business by which they could support the Abbey—the sale of simple wooden caskets similar to those they

1. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, bk. 1, ch. 10, part 2 (Edwin Cannan ed., 1904) (1776).

2. St. Joseph Abbey v. Castille, No. 10–2717, 2011 WL 1361425, at *2 (E.D. La. Apr. 8, 2011) (*St. Joseph Abbey I*).

3. St. Joseph Abbey v. Castille, 835 F. Supp. 2d 149, 153 (E.D. La. 2011) (*St. Joseph Abbey II*).

have been constructing to bury their dead for generations.[4] Unfortunately for the monks, their attempt to claw their way out of financial peril was stymied by protectionist legal restrictions on their ability to sell caskets. The monks did not meet the requirements to become licensed funeral directors, and therefore, under Louisiana law, their artisan casket business carried substantial criminal liability—up to a $2,500 fine and 180 days in jail for each casket sold.[5]

On December 11, 2007, the Louisiana State Board of Embalmers and Funeral Directors ordered the Abbey to cease and desist the advertisement and sale of caskets pursuant to Louisiana's Embalming and Funeral Directors Act (the Act),[6] which provides inter alia that only state licensed funeral directors operating out of state licensed funeral establishments may engage in the retail sale of caskets.[7] The monks never engaged in, or intended to engage in, any funeral direction services or the handling of human remains.[8] They only sold caskets; yet, under the Act, they were still mandated to comply with the requirements for becoming licensed funeral directors (thirty credit hours, an exam, and a one-year full-time apprenticeship) and for establishing a licensed funeral establishment (a display room, a layout parlor for thirty people, and fully equipped embalming facilities).[9] All this to sell wooden boxes to willing purchasers.[10]

The monks challenged and defeated the licensing regime on Equal Protection and Due Process grounds in the United States District Court for the Eastern District of Louisiana.[11] The United States Court of Appeals for the Fifth Circuit heard the case on appeal and strongly hinted in its recent opinion that it would

4. *St. Joseph Abbey II*, 835 F. Supp. 2d 149, 153 (E.D. La. 2011).

5. *See* LA. REV. STAT. ANN. § 37:850 (2012).

6. *Id.* § 37:831-885.

7. *St. Joseph Abbey II*, 835 F. Supp. 2d at 154; *see also* LA. REV. STAT. ANN. §§ 37:831(37), :842(D) (2012).

8. *St. Joseph Abbey II*, 835 F. Supp. 2d at 154.

9. *Id.*

10. Caskets are, obviously, harmless to their deceased occupants, and, at least according to the Louisiana legislature, caskets are also harmless to the general public. Louisiana law does not even require the use of caskets to bury the dead. *Id.* at 158.

11. *Id.* at 160. Note that the plaintiffs also challenged the regulation on Privileges or Immunities grounds, but only to preserve the claim for appeal. *Id.* at 161 n.2.

uphold the monks' constitutional challenges if the matter were not resolved by the Louisiana Supreme Court under a certified question of Louisiana state law.[12] But even if the full precedential value of the Fifth Circuit's opinion is as of yet unclear,[13] the monks' case nonetheless illustrates an important issue of constitutional law, which must be resolved by the Supreme Court, an issue that has already led to a circuit split between the Sixth and Tenth Circuits over cases involving nearly identical funeral director licensing regimes in Tennessee and Oklahoma.[14]

This comment argues that the *St. Joseph Abbey* courts got it right—that occupational licensing legislation that limits a person's ability to earn a living without benefiting the public (i.e., occupational licensing that amounts to economic protectionism) should be declared unconstitutional, even under rational basis review.[15] This comment distinguishes the possible constitutionality of licensing requirements for potentially harmful professions (e.g., electricians and doctors[16]) from what might be

12. *See* St. Joseph Abbey v. Castille, 700 F.3d 154 (5th Cir. 2012). The Fifth Circuit's opinion is replete with strong language condemning the regulatory regime and supporting the monks' constitutional claims. *See*, *e.g.*, *id.* at 159 ("After examining the record, we have doubts about the constitutionality of the State Board's regulation of intrastate casket sales."); *id.* at 163 ("[W]e find it doubtful that the challenged law is rationally related to policing deceptive sales tactics."); *id.* at 162 ("Of course, this [consumer protection] is a perfectly rational statement of hypothesized footings for the challenged law. But we question whether it is betrayed by the undisputed facts as pretextual."). However, citing the principles of federalism and the doctrine of constitutional avoidance, the Fifth Circuit has thus far deferred issuing a final decision to allow the Louisiana Supreme Court to resolve the matter under Louisiana state law. *Id.* at 168. Specifically, the Fifth Circuit certified the following question to the Louisiana Supreme Court: "Whether Louisiana law furnishes the Louisiana State Board of Embalmers and Funeral Directors with authority to regulate casket sales when made by a retailer who does not provide any other funeral services." *Id.* Thorough statutory analysis in the Fifth Circuit's opinion seems to imply that this question should be answered in the negative, which would effectively render the monks' constitutional claims moot. *See id.* at 165-68.

13. I.e., if *St. Joseph Abbey* were resolved on state law grounds, the Fifth Circuit's constitutional musings would likely be viewed by future courts as strong dicta only.

14. *Compare* Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002) (declaring the Tennessee funeral director licensing regime unconstitutional as applied to the plaintiff casket retailers), *with* Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (upholding a nearly identical regulation in Oklahoma). For more on the *Craigmiles-Powers* circuit split, see *infra* Sections II.C and V.C.

15. *See* discussion *infra* of rational basis review in Section II.B.

16. *See* Dent v. West Virginia, 129 U.S. 114 (1889) (recognizing that occupational licensing requirements for doctors do not violate the Fourteenth Amendment).

termed the per se unconstitutionality of licensing requirements for professions that pose no rational risk to the welfare of society (e.g., florists[17] and hair braiders[18]), and proposes that courts should use the heightened rational basis scrutiny the Supreme Court employed in *City of Cleburne v. Cleburne Living Center*[19] and *Lawrence v. Texas*[20] ("rational basis with bite" scrutiny) whenever any liberty interest is at stake—including the freedom to pursue employment. This proposal need not trigger a return to the so-called "*Lochner* era," during which the Court invariably invalidated economic regulations, drawing criticisms for substituting its own economic views for that of the legislature and improperly acting as a "superlegislature" from the bench.[21] Instead, this proposal merely suggests that the Court should act consistently in recognizing that a person's pursuit of happiness cannot be impinged upon by a state acting under its police power unless such impingement is rationally related to the legitimate exercise of that power—the protection of the health, safety, and welfare of the public.

Section II of this comment explores the jurisprudential history of occupational licensing and economic regulation in the United States. Section III examines the jurisprudence related to fundamental rights and substantive Due Process more generally and briefly highlights how the recognition of economic liberty as a fundamental right is a possible, but unlikely, path to the protection of one's right to pursue harmless employment. Next, Section IV shows how the rational basis with bite level of scrutiny that the Supreme Court employed in *Cleburne*, *Lawrence*, and other recent cases has opened the door to a new avenue for protection of economic liberty under the Fourteenth Amendment.[22] Finally, Section V of this comment defends the

17. *See* Meadows v. Odom, 360 F. Supp. 2d 811 (M.D. La. 2005), *vacated as moot* by Meadows v. Odom, 198 Fed. Appx. 348 (5th Cir. 2006).

18. *See* Cornwell v. Hamilton, 80 F. Supp. 2d 1101 (S.D. Cal. 1999).

19. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

20. Lawrence v. Texas, 539 U.S. 558 (2003).

21. *See* Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 278 (1987); Gayle Lynn Pettinga, *Rational Basis With Bite: Intermediate Scrutiny By Any Other Name*, 62 IND. L.J. 779, 802 (1987) (arguing that any return to *Lochner*-era judicial review would be a regrettable "step backwards"); *see also infra* Section II.A.

22. The Fourteenth Amendment provides, in relevant part, that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST.

use of rational basis with bite scrutiny in the specific context of restrictions on the right to enter one's chosen profession. Additionally, Section V briefly weighs in on the current circuit split regarding the constitutional legitimacy of economic protectionism and concludes with a specific proposal for how courts can review occupational licensing schemes in a way that simultaneously protects the rights of individuals and the welfare of the public.

II. THE HISTORY OF JUDICIAL REVIEW OF STATE ECONOMIC REGULATIONS: FROM ONE EXTREME TO THE OTHER

Occupational licensing, the legal requirement that one obtain a government permit before practicing a certain profession, has long been a part of the American common law legal tradition.[23] As far back as 1889, in *Dent v. West Virginia*,[24] the Supreme Court held that while the Fourteenth Amendment "undoubtedly [protects] the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose," such a right is always subject to non-arbitrary and reasonable restrictions necessary for the protection of society.[25] This section briefly examines the history of how courts have dealt with challenges to state occupational licensing statutes and other economic regulations under the Fourteenth Amendment.[26]

amend. XIV.

23. Timothy Sandefur, *Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries*, 14 WM. & MARY BILL RTS. J. 1023, 1025-29 (2006) [hereinafter Sandefur, *Four Recent Cases*] (providing a general overview of occupational licensing).

24. Dent v. West Virginia, 129 U.S. 114 (1889).

25. *Id.* at 121-23 (upholding as constitutional West Virginia statutes requiring state licensing for the practice of medicine). Note that as recently as 1999, the Supreme Court reaffirmed that the Fourteenth Amendment guarantees the right "to engage in any of the common occupations of life." Conn v. Gabbert, 526 U.S. 286, 291 (1999) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)) (internal quotations omitted). *See also* Schware v. Bd. of Bar Exam'r of N.M., 353 U.S. 232 (1957) (holding that the New Mexico Bar's refusal to grant admission to an applicant based on his past affiliations with the Communist Party violated Due Process, and maintaining that the "[r]efusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause"). *Id.* at 249 (Frankfurter, J., concurring).

26. Note that many of the cases discussed herein involve challenges under the Due Process and Equal Protection Clauses of the Fourteenth Amendment (and some even contain challenges raised under the Privileges or Immunities Clause), and that courts often handle the Due Process and Equal Protection claims together. *See*, *e.g.,*

Subsection A begins with a cursory exploration of the view of the *Lochner*-era Court, which has been criticized for its judicial activism and lack of deference to the legislature. Subsection B moves on to analyze the increasingly deferential rational-basis standard of review that marked the end of the *Lochner* era and that the Court still uses today. Finally, Subsection C explores the current circuit split between *Craigmiles v. Giles* (Sixth Circuit) and *Powers v. Harris* (Tenth Circuit), and posits the idea that if the Supreme Court adopts the supremely deferential position taken by the Tenth Circuit in *Powers*, it may, in effect, have moved from one extreme in the *Lochner* era to the other extreme today.

A. THE RISE AND FALL OF THE *LOCHNER* ERA

During the brief, yet infamous, *Lochner* era, lasting from roughly the turn of the twentieth century until the mid-1930s,[27] the Court placed a rather heavy burden on the government to justify a restriction on the economic acts of individuals.[28] Maintaining that one's "liberty of contract" rights can only be limited by laws that have a "direct relation" to the protection of the welfare and safety of the public,[29] the *Lochner*-era Court repeatedly invalidated economic regulations,[30] and, much to the dismay of modern commentators, often substituted its own opinions about what was necessary for the health and welfare of

Powers v. Harris, 379 F.3d 1208, 1215 (10th Cir. 2004) (noting that "a substantive due process analysis proceeds along the same lines as an equal protection analysis"); *see also* Craigmiles v. Giles, 312 F.3d 220, 223-24 (6th Cir. 2002). *But see, e.g.*, Merrifield v. Lockyer, 547 F.3d 978, 985 (9th Cir. 2008) (handling the plaintiff's Equal Protection and Due Process challenges completely separately, and noting that most challenges to regulatory schemes, such as that in *Craigmiles*, fit more appropriately under a Due Process claim).

27. While *Lochner v. New York* was not decided until 1905, many scholars mark the *Lochner* era as beginning sometime around 1890 and continuing until 1937, when *West Coast Hotel Company v. Parrish* overturned *Adkins v. Children's Hospital*, a prominent *Lochner*-era decision. *See, e.g.,* Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101, 108-09 (2002); *see also* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Adkins v. Children's Hospital, 261 U.S. 525 (1923).

28. *See generally* Jim Thompson, Powers v. Harris: *How the Tenth Circuit Buried Economic Liberties*, 82 DENV. U. L. REV. 585, 587 (2005).

29. *See* Lochner v. New York, 198 U.S. 45, 56-57 (1905). Note that the *Lochner* decision predates, and may even be the cause of, the split between rational basis scrutiny and strict scrutiny.

30. *See* Thompson, *supra* note 28, at 587 (noting that "[i]n the years following *Lochner*, the Court invalidated hundreds of state laws").

society for those of the legislature.[31] For example, in *Lochner* itself, the Court concluded that a New York statute that limited the number of hours a baker could work to ten hours per day and sixty hours per week could not survive a constitutional challenge.[32] In the majority's opinion, "the trade of a baker . . . is [simply] not an unhealthy one," and so state legislation that limited the number of hours a baker could work was not sufficiently related to the protection of public health to satisfy the Due Process Clause of the Fourteenth Amendment.[33] The dissent disagreed and maintained that, based on the available evidence, it was reasonable for the legislature to believe that "more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health and shorten the lives of the workmen."[34]

In many ways, the difference between the majority and dissent in *Lochner* boiled down to a difference in opinion over who bears the burden of proof in a Due Process challenge to state legislation. To the *Lochner* majority, the right of an individual to contract for labor was on at least equal footing with the right of the state to limit such activity, and so the Court's task was to balance the individual's rights under the Due Process Clause against the state's rights under the police powers doctrine.[35] Contrarily, according to *Lochner*'s dissenting justices, a state's legislation was presumed to be constitutionally valid, and so a heavy burden of proof fell squarely upon the individual challenging that legislation.[36]

The next era of Due Process jurisprudence embraced the *Lochner* dissent's approach. By the mid-1930s, following *Nebbia v. New York* (upholding a New York regulatory scheme fixing the price of milk)[37] and *West Coast Hotel Co. v. Parish* (upholding a Washington minimum wage law for women and minors),[38] the majority opinion on the Supreme Court had changed, the burden

31. *See, e.g.*, Phillips, *supra* note 21, at 278.

32. Lochner v. New York, 198 U.S. 45, 58 (1905).

33. *Id.* at 59.

34. *Id.* at 72.

35. *Id.* at 54.

36. *Id.* at 68 (Harlan, J., dissenting).

37. Nebbia v. New York, 291 U.S. 502, 537 (1934) ("[A] state is free to adopt whatever economic policy may *reasonably* be deemed to promote public welfare.") (emphasis added).

38. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

of proof for challenges to economic regulations had shifted, and the *Lochner* era had come to an end.[39] Deference to state legislatures became the law; the presumption of constitutionality became the standard of review, and the Supreme Court famously held that "regulation which is *reasonable* in relation to its subject and is adopted in the interests of the community *is* due process."[40]

B. THE MODERN COURT: INCREASINGLY DEFERENTIAL UNDER RATIONAL BASIS REVIEW

The presumption of constitutionality and deferential standard of review used in *Nebbia* and *West Coast Hotel* eventually developed into the modern Court's rational basis review, the level of scrutiny currently used to evaluate occupational licensing statutes and other economic regulations challenged under the Fourteenth Amendment.[41] Under rational basis review, a court will uphold an economic regulation as long as it bears some rational relation to a legitimate state interest.[42] While this standard of review is deferential to state legislatures, the rational basis test has become increasingly deferential throughout the years, at times pushing the very definition of what "rational" means.[43] If the *Lochner*-era Court can be fairly

39. There are many explanations as to why the *Lochner* era ended, such as the emergence of the Great Depression, see Thompson, *supra* note 28, at 596-97, the rise of Progressivism, see Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1482 (2008), and, eventually, political pressure from President Roosevelt and the New Deal.

40. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) (emphasis added). *See also* Nebbia v. New York, 291 U.S. 502, 537-38 (1934):

> Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

41. *See, e.g.,* Craigmiles v. Giles, 312 F.3d 220, 223 (6th Cir. 2002).

42. *See, e.g.*, *St. Joseph's Abbey I,* No. 10–2717, 2011 WL 1361425, at *5 (E.D. La. Apr. 8, 2011) (citing Romer v. Evans, 517 U.S. 620, 632 (1996)).

43. *See, e.g.*, Meadows v. Odom, 360 F. Supp. 2d 811 (M.D. La. 2005), *vacated as moot* by Meadows v. Odom, 198 Fed. Appx. 348 (5th Cir. 2006). In *Meadows*, the district court held that a Louisiana occupational licensing regime that required retail florists to pass an examination before selling their daffodils was rationally related to the state's interest in protecting the health and safety of the public. *Id.* at 823-24. Brushing aside the plaintiffs' argument that "people handle millions of unlicensed floral arrangements around the world every year without being harmed," the court somehow managed to convince itself that "a floral licensing examination is rationally related to the state's desire that floral arrangements will be assembled properly in a manner least likely to cause injury [like a finger prick] to a consumer." *Id.* at 824.

characterized as an activist judiciary that over-stepped its proper bounds into the realm of a superlegislature, then perhaps the modern judiciary can just as fairly be characterized as extremist in its deference to state legislatures passing economic legislation.

For example, while *Nebbia* and *West Coast Hotel* may have established the presumption of constitutionality for state legislation and shifted the burden of proof to those attempting to assert their Due Process rights, even those Progressive-era decisions never went so far as to say that the state police power to pass economic regulations was *unlimited*.[44] And even *United States v. Carolene Products Company*,[45] the seminal case commonly credited for ushering in the current incarnation of rational basis review, contained passages asserting that the presumption of constitutionality *could* be rebutted by a showing that the statute in question was irrational:

> [A] statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis . . . . [W]e recognize that the constitutionality of a statute . . . may be assailed by proof of facts tending to show that the statute . . . is without support in reason.[46]

Compare this with the more recent decision in *Williamson v. Lee Optical of Oklahoma, Incorporated*,[47] in which the Supreme Court upheld, against Due Process challenges, a state statute prohibiting an optician, "an artisan qualified to grind lenses . . . and fit frames," from placing old lenses into new frames, or fitting those frames to the face of a customer, without a prescription from a licensed ophthalmologist or optometrist.[48] The *Williamson* Court held that despite the seemingly "needless" nature of the regulatory regime as applied to opticians, "the 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."[49]

44. *See* Barnett, *supra* note 39, at 1484.
45. United States v. Carolene Products Co., 304 U.S. 144 (1938).
46. *Id.* at 152-54; *see also* Barnett, *supra* note 39, at 1484.
47. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).
48. *Id.* at 486.
49. *Id.* at 487-88 (emphasis added).

Since *Williamson*, courts undertaking rational basis review are charged with imagining *any possible reason* a state regulation *could* be rational, and then supplying that reason to the state in order to uphold the statute.[50] Therefore, a plaintiff can only meet her burden of persuasion under rational basis review if she can "negat[e] every *conceivable* basis which might support [the challenged statute]."[51] At least one scholar has asserted that, following *Williamson*, the presumption of constitutionality under rational basis review has become, for all practical purposes, irrebuttable.[52]

C. THE *CRAIGMILES-POWERS* CIRCUIT SPLIT: THE RISK OF UNLIMITED STATE POWER

Williamson may have closed the door most of the way on Fourteenth Amendment challenges to state economic regulations, but some restrictions on entry into a profession are so irrational that even the rational basis test as mandated in *Williamson* cannot be satisfied. For example, in *Schware v. Board of Bar Examiners*,[53] decided just two years after *Williamson*, the Supreme Court found that a New Mexico Bar applicant's former membership in the Communist Party was not rationally-related enough to his fitness for the practice of law so as to justify his exclusion from the Bar.[54] More recently, a handful of lower court challenges to economic regulations more closely resembling the one upheld in *Williamson* have tested the limits of the rational

50. *See*, *e.g.*, Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002); Powers v. Harris, 379 F.3d 1208, 1217 (10th Cir. 2004); *see also* Barnett, *supra* note 39, at 1485. In applying this version of the rational basis test, courts have been forced to get fairly creative in stretching the meaning of the word "rational," sometimes in ways that barely pass the laugh test. *See, e.g.,* Meadows v. Odom, 360 F. Supp. 2d 811, 823-24 (M.D. La. 2005) (finding a "rational" relation between the regulation of florists and public safety because of the dangers to the public from unregulated flower arrangements: "an exposed prick," "a broken wire," "a flower that has some type of infection," or, of course, "dirt.").

51. *Powers*, 379 F.3d at 1217 (emphasis added) (internal quotations omitted).

52. Barnett, *supra* note 39, at 1485. *See also* City of New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976) (rejecting an Equal Protection challenge to a New Orleans city ordinance that prohibited some food vendors from doing business in the French Quarter but not others, noting that "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations . . . ; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendmt [sic].") (internal citations omitted).

53. Schware v. Bd. of Bar Exam'rs of N.M., 353 U.S. 232 (1957).

54. *Id.* at 246-47.

basis test.[55] Licensing restrictions on hair braiding,[56] jitney operation,[57] non-pesticide pest control,[58] and casket retail,[59] have all been declared unconstitutional by lower federal courts—all while applying rational basis review.[60] For example, in *Cornwell v. Hamilton*, a federal district court held that it is simply irrational for a state to legally mandate that a natural hair braider undergo extensive and expensive cosmetology training, only "well below ten percent" of which is relevant to hair braiding and none of which adequately prepares a hair braider for the safe and professional exercise of her craft.[61]

Post-*Williamson* victories against occupational licensing legislation, like *Cornwell*, are few and far between, but they at least provide a little hope that the State is not unlimited in its power to restrict one's entry into her chosen profession. However, the Tenth Circuit's recent decision in *Powers v. Harris*[62] threatens to quash that hope. Picking up right where *Williamson* left off, at the far reaches of what constitutes a rational relation, the *Powers* decision pushes the limits of what constitutes a legitimate state interest as well.

The Tenth Circuit in *Powers* was actually the second federal appellate court to hear a challenge to a casket retail licensing statute similar to that challenged by the monks in *St. Joseph's*

55. *See* Anthony B. Sanders, *Exhumation Through Burial: How Challenging Casket Regulations Helped Unearth Economic Substantive Due Process in* Craigmiles v. Giles, 88 MINN. L. REV. 668, 678 (2004); *see also infra* Section V.B.

56. *See generally* Cornwell v. Hamilton, 80 F. Supp. 2d 1101 (S.D. Cal. 1999).

57. *See generally* Santos v. City of Houston, 852 F. Supp. 601 (S.D. Tex. 1994).

58. Merrifield v. Lockyer, 547 F.3d 978 (9th Cir. 2008) (holding that a California pest-control licensing scheme violated the Equal Protection clause, but not the Due Process Clause, of the Fourteenth Amendment).

59. *See generally* Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002); *see also St. Joseph Abbey II*, 835 F. Supp. 2d 149 (E.D. La. 2011); Casket Royale, Inc. v. Mississippi, 124 F. Supp. 2d 434 (S.D. Miss. 2000); Peachtree Caskets Direct, Inc. v. State Bd. of Funeral Service of Ga., No. Civ.1:98–CV–3084–MHS, 1999 WL 33651794 (N.D. Ga. 1999). *But see* Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (finding that a licensing requirement for casket sales did not violate Due Process or Equal Protection).

60. For a more in-depth discussion about how these challenges were able to prevail under rational basis review, see *infra* Section IV.

61. *Cornwell*, 80 F. Supp. 2d at 1110, 1112 (noting that "the licensing regimen . . . aggravates the very harms the State seeks to avoid . . . [because] braiding, and its associated dangers, is essentially not taught in the standard cosmetology curriculum"); *see also infra* Section V.B.

62. Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004).

Abbey.[63] Just days before the district court's decision in *Powers*,[64] the Sixth Circuit, in *Craigmiles v. Giles*,[65] enjoined the enforcement of a Tennessee statute mandating that only licensed funeral directors could sell caskets in the state.[66] After finding that there was no rational way the licensing statute could serve any legitimate state interest,[67] namely public health and safety or consumer protection,[68] the *Craigmiles* court determined that the only possible interest to which the law could rationally relate was the economic protection of funeral home operators, who regularly marked up the prices of caskets 250-600% and were beginning to be threatened by the presence of new casket retailers in the

63. *See St. Joseph Abbey II*, 835 F. Supp. 2d 149; *see also supra* Section II.

64. Sandefur, *Four Recent Cases*, *supra* note 23, at 1033.

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

66. *Id.* at 222. Similar to the Louisiana law challenged in *St. Joseph Abbey*, the Tennessee Funeral Directors and Embalmers Act (FDEA) required anyone seeking a funeral director's license to undergo two years of education and training and to pass an examination, neither of which pertained more than a nominal amount to caskets and urns. *Id.*

67. The court stated:

> Tennessee's justifications for the 1972 amendment come close to striking us with the force of a five-week-old, unrefrigerated dead fish, a level of pungence almost required to invalidate a statute under rational basis review. Only a handful of provisions have been invalidated for failing rational basis review. We hold that this case should be among this handful.

Craigmiles, 312 F.3d at 225 (internal quotations and citations omitted).

68. In addressing the lack of a rational connection between the licensing regime and public health and safety, the court noted that casket retailers never came into contact with any bodies, and, as far as the quality of caskets was concerned (to prevent leakage, etc.), the court noted that, under Tennessee law, caskets were not even required to be used in burying the dead. *Id.* at 225. In fact, the court maintained that if the licensing regulation had any effect on health and safety at all, it actually had a negative effect, as it made the market for caskets less competitive, and therefore raised the cost of "more protective caskets." *Id.* at 226.

In response to the possibility that oversight provided under the licensing regime would help protect consumers by preventing casket retailers from "making fraudulent misrepresentations, making solicitations after death or when death is imminent, or selling a previously used casket," the court highlighted that other more rational and direct methods for accomplishing this goal were available to the legislature. Furthermore, the court noted that the fact that the funeral director licensing statute was specifically amended to include casket retailers was very suspicious and completely undermined the possibility that "[t]he overinclusiveness of the statute . . . [was] simply . . . a byproduct of legislative efficiency." *Id.* at 226-27. At least one commentator has posited that this part of the *Craigmiles* decision left it most open to criticisms of *Lochner*-esque overreaching, and that the court would have done better by focusing on the inherent irrationality of the relation between the required two years of education (little to none of which related to selling caskets) and customer protection. Sanders, *supra* note 55, at 688-92.

market.[69] The court therefore reasoned that because "protecting a discrete interest group from economic competition is not a legitimate governmental purpose," the occupational licensing requirements were unconstitutional as applied to the plaintiff casket retailers.[70]

The Tenth Circuit in *Powers* disagreed. When presented with a Fourteenth Amendment challenge to a nearly identical statute in Oklahoma,[71] the *Powers* court not only found that the occupational licensing regime satisfied the rational basis test, but that it did so because the statute was rationally related to the state's interest in "protecting the intrastate funeral home industry."[72] Directly accusing the *Craigmiles* court of improperly applying the rational basis test[73] and of using "selective quotation,"[74] the Tenth Circuit in *Powers* found it unnecessary to 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.[75] Instead, the court opted to stretch the limits of the rational basis test itself by declaring that "intrastate economic protectionism, absent a violation of a specific federal statutory or constitutional provision, *is* a legitimate state interest."[76]

69. Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002).

70. *Id.*

71. Under the Oklahoma Funeral Services Licensing Act (FSLA), only licensed funeral directors operating out of a funeral establishment are permitted to sell caskets, and one can only become a licensed funeral director after completing sixty credit hours of undergraduate education, participating in a one-year apprenticeship, and passing a licensing exam. *See* Powers v. Harris, 379 F.3d 1208, 1211-12 (10th Cir. 2004).

72. *Id.* at 1218.

73. *See id.* at 1224. The *Powers* court found it inappropriate that the *Craigmiles* court focused on the legislature's motives while conducting rational basis review, and also questioned the Sixth Circuit's reliance on *City of Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432 (1985). *Id.* This article contends that the type of rational basis review used in *Cleburne* is *exactly* the sort of analysis a court reviewing a challenge to an economic regulation should undertake. *See infra* Section V.

74. *See Powers*, 379 F.3d at 1219. Specifically, the *Powers* court criticized the *Craigmiles* decision for improperly applying concepts and passages pertaining to regulations of *inter*state commerce in a case involving a regulation of *intra*state commerce. *Id. See also infra* Section V.C.

75. *See Powers*, 379 F.3d at 1218.

76. *Id.* at 1225 (emphasis added). While the Due Process Clause may not mention "the right to sell caskets" explicitly, the Supreme Court has *specifically* held that the "federal right to pursue one's chosen profession" is a liberty interest

If *Williamson* closed the door on Due Process challenges to occupational licensing statutes, then *Powers* threatens to lock the deadbolt. The reasons why economic protectionism is not, and cannot be, a legitimate state interest are discussed in some depth in Section V.C of this comment. However, it is worth briefly mentioning here that if the Supreme Court adopted the Tenth Circuit's position[77] it would grant nearly absolute power to state governments to pass economic legislation at will,[78] thus completing the shift from the *Lochner*-era extreme to the other extreme today. Logically speaking, any occupational licensing restriction is necessarily rationally related to protecting the economic interests of at least one group—those already licensed and engaged in the restricted profession (or its competition). Therefore, under the *Powers* paradigm, any occupational licensing restriction *necessarily* satisfies the rational basis test.

The Supreme Court has yet to expand the deferential nature of rational basis review beyond that articulated in *Williamson*. But as has been shown, even under current doctrine, occupational regulatory schemes, including those that could hardly be said to have more than a pretextual relation to the protection of the

protected by the substantive portion of the Due Process Clause. *See* Merrifield v. Lockyer, 547 F.3d 978, 983 (9th Cir. 2008). Perhaps by "specific" constitutional provisions, the *Powers* court really means only "enumerated" constitutional provisions and non-enumerated "fundamental rights" that the Supreme Court has recognized. The Supreme Court used similar language in *Carolene Products*, the basis for modern-day fundamental rights jurisprudence: "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." United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (emphasis added). For more on fundamental rights generally, see *infra* Section III.

77. Note that the Ninth Circuit has also weighed in on the circuit split. *See Merrifield*, 547 F.3d at 991 n.15 (explicitly siding with the Sixth Circuit and noting that "economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest"). In *St. Joseph Abbey v. Castille*, the Fifth Circuit also indicated its inclination towards siding with the Sixth and Ninth Circuits. 700 F.3d 154, 161 ("As we see it, neither precedent nor broader principles suggest that mere economic protection of a pet industry is a legitimate governmental purpose"). If the Fifth Circuit ends up adopting this position in a final decision, *see infra* note 12, the Supreme Court will have another opportunity to grant certiorari on the issue and resolve the circuit split.

78. Of course, it could be argued that because states already act as if they have this power, the Tenth Circuit's decision merely recognizes it, rather than grants it. *See* Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004).

public, have proven extremely difficult to challenge under the Fourteenth Amendment. The sections that follow explore two possible avenues still available for the protection of one's right to engage in harmless economic activity: (1) the doctrine of fundamental rights and (2) scrutiny under rational basis with bite. Ultimately, the latter approach has the most momentum and potential for success. But first, a quick look at the path that could have been: the recognition of one's freedom to earn a living as a fundamental right.

III. FUNDAMENTAL RIGHTS: THE ROAD NOT TAKEN

In its oft-celebrated footnote four, *United States v. Carolene Products Company*[79] established that while most challenged government regulations are to be given deferential treatment under minimal rational basis review, government enactments that conflict with "a specific prohibition of the Constitution, such as those of the first ten Amendments," should be "subjected to more exacting judicial scrutiny" that involves a "narrower scope for operation of the presumption of constitutionality."[80] The more exacting scrutiny called for in footnote four is now termed "strict scrutiny," and places the burden on the government to show that the challenged legislation is "narrowly tailored" for achieving a "compelling government purpose."[81] While it has been the subject of great debate whether strict scrutiny is as much a death sentence for government enactments as rational basis is a rubber stamp,[82] what is undeniable is that the mere shift of the burden of proof—from the person attempting to defend her liberties to

79. United States v. Carolene Products Co., 304 U.S. 144 (1938).

80. *Id.* at 152 n.4. Footnote four also hinted that "more searching judicial inquiry" may be appropriate whenever "discrete and insular minorities" are affected, and whenever "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" is challenged on constitutional grounds. It may be interesting to explore whether, given the overwhelming importance money plays in politics today, occupational licensing laws that restrict one's right to earn a living may be justifiably construed as legislation that disrupts the ability to bring about political change.

81. *See* Craigmiles v. Giles, 312 F.3d 220, 223 (6th Cir. 2002). In addition to rational basis scrutiny and strict scrutiny, the Supreme Court has more recently recognized "intermediate scrutiny," and generally applies it in the Equal Protection context when there are allegations of gender discrimination. *See id.* Under intermediate scrutiny, a "regulation need only serve an 'important' state interest and the means employed need only be 'substantially related' to that interest." *Id.* (citations omitted).

82. *See, e.g.,* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

the government attempting to infringe on them—makes it much more likely that a judge using strict scrutiny will find a piece of state legislation unconstitutional.

The Court initially limited the use of strict scrutiny to protecting those freedoms explicitly enumerated in the Bill of Rights.[83] But, in the 1960s, the Court decided that such a limitation was insufficient for protecting the fundamental liberties and natural rights the Constitution was drafted to protect, or, perhaps, that the sitting Justices wanted to protect, most notably the right to privacy.[84] Perhaps unfortunately, the Supreme Court opted not to expand the application of strict scrutiny to all non-enumerated rights the Constitution was designed to protect (e.g., by broadening the "substantive" protections of the Due Process Clause[85] or by reinvigorating the Privileges or Immunities Clause[86]). Instead, in *Griswold v. Connecticut,*[87] the Court expanded the application of strict scrutiny exclusively to the right to privacy, finding it sheltered

83. *See* Barnett, *supra* note 39, at 1483. As Randy Barnett interestingly points out, this decision by the Court seems itself unconstitutional: "Elevating some rights to be protected solely because they were enumerated, while denying or disparaging others solely because they were not, is a direct violation of the injunction of the Ninth amendment." *Id.* at 1483 n.15. The Ninth amendment provides that "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend IX.

84. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down a law prohibiting the use of contraceptives as an unconstitutional violation of the fundamental right of marital privacy); *see also* Wolf, *supra* note 27, at 111 (referring to "the judiciary's 1960s fundamental rights explosion").

85. The doctrine of substantive due process is premised on the idea that "[t]he Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." Washington v. Glucksberg, 521 U.S. 702, 719 (1997). Note that the *Lochner*-era Court repeatedly spoke to this idea and is largely credited with helping develop it. *See, e.g.,* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

86. Note that since the *Slaughter-House Cases*, 83 U.S. 36 (1873), enormously reduced the scope of the Privileges or Immunities clause of the Fourteenth Amendment, that clause has only rarely been successfully used to protect personal liberties. *See* Saenz v. Roe, 526 U.S. 489 (1999) (discussing one of these rare exceptions). However, some constitutional scholars seem to favor the use of the Privileges or Immunities Clause to the use of substantive due process for the protection of non-enumerated constitutional rights. *See*, *e.g.*, McDonald v. Chicago, 130 S. Ct. 3020, 3061-86 (2010) (Thomas, J., concurring) (referring to the substantive due process doctrine as a dangerous legal fiction, and suggesting that the Privileges or Immunities clause is a more historically and intellectually principled approach).

87. Griswold v. Connecticut, 381 U.S. 479 (1965).

within the "penumbras" of the Bill of Rights.[88] In so doing, the Court was able to create a new category of liberties to which strict scrutiny applies—fundamental rights—without having to return to the dreaded days of the *Lochner* era.[89]

This section briefly explores where the right to earn a living fits, or potentially could fit, within the doctrine of fundamental rights. If economic liberties were recognized as fundamental rights, state occupational licensing statutes would be subject to strict scrutiny, and challenges to frivolous or protectionist regulatory schemes would be far more likely to prevail. Subsection A briefly surveys the fundamental rights doctrine as it stands today, explaining how the modern court determines whether or not a right is fundamental. Then, Subsection B suggests that while valid reasons exist for the Court to recognize the right to pursue one's profession as fundamental, it will not likely do so.

A. *WASHINGTON V. GLUCKSBERG*: HOW THE MODERN COURT DETERMINES WHICH RIGHTS ARE "FUNDAMENTAL"

Eventually, the Supreme Court's conception of the fundamental right to privacy grew so expansive that it could no longer be found entirely within the shadows of other enumerated rights. In *Roe v. Wade*,[90] the Court leaned more directly on the substantive component of the Due Process Clause to support its holding that a woman's fundamental right to privacy includes a qualified right to have an abortion.[91] Yet *Roe* did not signal the beginning of a full convergence of the Court's treatment of fundamental rights and those liberties historically protected by the Due Process Clause. After all, to the modern Court, not all

88. "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

89. *Id.* at 481-82:

> Overtones of some arguments suggest that *Lochner* . . . should be our guide. But we decline that invitation . . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

90. Roe v. Wade, 410 U.S. 113, 164 (1973) (invalidating a Texas "criminal abortion statute . . . [as] violative of the Due Process Clause of the Fourteenth Amendment").

91. *Id.* at 153-54; *see also* Barnett, *supra* note 39, at 1487.

substantive due process rights are fundamental,[92] and so its task has become determining which non-enumerated rights are fundamental (and therefore worthy of protection by strict scrutiny) and which non-enumerated rights are not.[93]

The governing case for that determination is *Washington v. Glucksberg*.[94] In *Glucksberg*, the Court considered whether the right to commit physician-assisted suicide was a fundamental right.[95] In so doing, the Court developed a two-step approach for determining whether a given non-enumerated right is fundamental: (1) present a "careful description"[96] of the right in question; then (2) inquire whether that right is "deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty . . . such that neither liberty nor justice would exist if [it] were sacrificed."[97] In applying this test to the liberty interest alleged to be fundamental in *Glucksberg*, the Court first "carefully" defined the interest as the "right to commit suicide which itself includes a right to assistance in doing so,"[98] rejecting other, broader formulations of the right, such as "the right to choose a humane, dignified death."[99] Then, in applying the second prong of the test, the Court explored the "Nation's history, legal traditions, and practices," and concluded that because the common law traditionally criminalized suicide and almost every modern state still criminalizes assisting suicide, the right to physician-assisted suicide is not a fundamental right protected by

92. *Compare* Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997) (listing the due process rights that have been recognized as fundamental: "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion") (internal citations omitted), *with* Conn v. Gabbert, 526 U.S. 286, 291-92 (1999) (recognizing a "generalized due process right to choose one's field of private employment," a right notably absent from the fundamental rights list in *Glucksberg*).

93. *See generally* Barnett, *supra* note 39, at 1487.

94. *Glucksberg*, 521 U.S. 702.

95. *Id.* at 708.

96. Note that in subsequent cases, "courts have interpreted 'careful' to mean 'narrow' or 'specific.'" Barnett, *supra* note 39, at 1492.

97. *Glucksberg*, 521 U.S. at 720-21 (internal citations and quotation marks omitted). Note that in the opinion itself, the order of the inquiries is actually reversed.

98. *Id.* at 723.

99. *Id.* at 722. The Supreme Court also rejected other formulations of the right that were accepted by the court of appeals ("a liberty interest in determining the time and manner of one's death" and "a right to die") and that were proposed by the parties claiming the right ("a liberty to choose how to die"; "a right to control of one's final days"; and "the liberty to shape death"). *Id.*

the Due Process Clause of the Fourteenth Amendment.[100]

Glucksberg is still binding law, but its method for identifying fundamental rights is not immune to criticism. For one thing, there are as many versions of "history and tradition" as there are Justices of the Court, and so the *Glucksberg* test dangerously invites an agenda-driven majority to use its own (revisionist) version of history to grant or deny Americans constitutional rights.[101] Another issue with *Glucksberg*'s amorphous analysis is that it fails to adequately address whether rights that are implicit in the concept of ordered liberty, but have *not* traditionally received explicit legal protection—such as "new" rights (e.g., access to information on the internet)—are possible candidates for fundamental rights status. Furthermore, and perhaps more fundamentally, one must question whether American history is even a valid source for answering questions about liberty.[102]

Even the initial step in the *Glucksberg* analysis, "carefully defining" the right, invites lack of precision or, even worse, manipulation and abuse. The way in which the Court chooses to define the liberty interest in question directly impacts its likelihood of finding that right fundamental.[103] For example, consider the monks at St. Joseph Abbey. One could just as accurately define the right the monks are attempting to assert in broad terms (economic freedom or liberty of contract), in narrow terms (the right to sell wooden caskets), and in terms somewhere in between (e.g., the right to work in one's chosen profession without unnecessary regulation).[104] Some courts may be willing to find liberty of contract as a fundamental right, and even those opposed to a broad recognition of economic liberty may be willing to recognize a more limited fundamental right to enter a lawful profession.[105] But it is difficult to imagine that any court would find something as specific as the right to sell wooden caskets so fundamental "that neither liberty nor justice would exist if [it]

100. Washington v. Glucksberg, 521 U.S. 702, 710-19 (1997).

101. *See* Wolf, *supra* note 27, at 103-04.

102. *See generally id.*

103. *See* Barnett, *supra* note 39, at 1490.

104. For a similar analysis, see Barnett, *supra* note 39, at 1489-92 (discussing the various ways one could describe the right to use marijuana for medical purposes).

105. *See* Phillips, *supra* note 21, at 298-301 (generally opposed to broad economic liberty, but more hospitable to the idea that "choice of occupation" may be a fundamental right).

were sacrificed."[106] Therefore, under the test for determining fundamental rights under *Glucksberg*, "a court may rule however it wishes simply by choosing how to describe the right."[107]

B. IS THE RIGHT TO EARN A LIVING A "FUNDAMENTAL" RIGHT?

There are certainly some compelling reasons to think that the right to enter one's chosen profession is a fundamental right,[108] even under the *Glucksberg* paradigm.[109] Earning a living is an essential part of the pursuit of happiness,[110] a value indisputably deeply rooted in the American tradition, and just as indisputably central to both the founding generation and the Reconstruction generation that drafted the Fourteenth Amendment.[111] Our country has historically valued and encouraged free trade and free enterprise, and it seems inconsistent to enforce strict antitrust laws with one legal doctrine, yet show absolute deference to state sanctioned monopolies with another.[112] Furthermore, even if upholding expansive economic regulations may have made sense during one period of our history, for instance, in response to the Great Depression, the sometimes necessary infringement of rights during a state of emergency does not strip those rights of their importance or potency.[113] Consider also that restrictive licensing laws may actually compound and perpetuate our current economic troubles—high levels of unemployment—by making it increasingly more difficult for would-be entrepreneurs to start

106. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

107. Barnett, *supra* note 39, at 1490.

108. This is especially true if the profession is harmless to the general public.

109. *See generally* Thompson, *supra* note 28, at 596-97.

110. Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday's Rationality Review Isn't Enough*, 24 N. ILL. U. L. REV. 457, 463 (2004) [hereinafter Sandefur, *Equality of Opportunity*].

111. In many ways, the Fourteenth Amendment can be seen as an attempt to fulfill the promise of the Declaration of Independence—the inalienable right to life, liberty and the pursuit of happiness.

112. *Compare* the Sherman Anti-Trust Act, 15 U.S.C §§ 1-7 (2004), *with* using deferential rational basis review for state regulatory schemes that prevent entry into a profession or industry. *Cf.* Santos v. City of Houston, 852 F. Supp. 601 (S.D. Tex. 1994) (finding that a city ordinance banning the use of jitneys violated the Sherman Anti-Trust Act).

113. *See Santos*, 852 F. Supp. at 609 (citing Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924)) (noting that "a law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even if valid when passed").

businesses in the field of their choice. Indeed, while the Court has not yet recognized the right to earn a living as a *fundamental* right, it has never ceased recognizing that this right has at least *some* protection under the Due Process Clause,[114] and there is reason to believe that if any aspect of economic liberty is to achieve fundamental rights status, it will be one's freedom to pursue a lawful profession without arbitrary or unreasonable government interference.[115]

But this is still unlikely to happen. Opponents of the recognition of the fundamental right to earn a living are quick to point out that, despite our lip-service to the value of free markets, state-sponsored monopolies and economic protectionism are as much a part of the American tradition as the Ford pickup,[116] and that the "obvious" qualitative difference between economic liberties and more personal freedoms justifies the modern Court's selective retention of some of the substantive due process rights recognized by the *Lochner*-era Court, and its near-abandonment

114. *See* Conn v. Gabbert, 526 U.S. 286, 290 (1999); Schware v. Bd. of Bar Exam'r of N.M., 353 U.S. 232, 238-39 (1957); *see also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923):

> Without doubt, [the liberty protected by the Due Process Clause] denotes not merely freedom from bodily restraint but also the right of the individual . . . to engage in any of the common occupations of life . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Note that while many *Lochner*-era decisions regarding substantive due process have been overruled or ignored, the modern Court continues to rely on *Meyer* as authority. *See, e.g.,* Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

115. *See* Phillips, *supra* note 21, at 298-99 (distinguishing professional entry restrictions from other economic regulations, and noting that "[s]ince the choice of occupation may affect personal capacities, values, style of life, social status, and general life prospects in innumerable ways, this freedom is arguably more central to the individual than the rights already classed as fundamental").

116. *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."); *see also* Nebbia v. New York, 291 U.S. 502, 529 (1934) ("The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, which have been upheld. On the other hand, where the policy of the state dictated that a monopoly should be granted, statutes having that effect have been held inoffensive to the constitutional guarantees"; *Slaughter-House Cases*, 83 U.S. 36 (1873) (holding that a city ordinance granting a monopoly over the operation of slaughterhouses did not violate the Fourteenth Amendment). *But see* Sandefur, *Equality of Opportunity*, *supra* note 110, at 459-66 (arguing that the philosophical underpinnings of America are entirely hostile to monopolies, and that the Founders considered government sanctioned economic protectionism a form of theft).

of those rights relating to the right to work or contract.[117] As will be shown in Section V.B., this body-wallet distinction may make sense with regards to many economic regulations, but it loses its force when pertaining to something as intimately personal as choosing one's profession.[118] However, the fear of being labeled an activist judiciary and of taking the slippery-slope to *Lochner*[119] is forefront in the minds of all modern Justices rendering fundamental rights decisions.[120] Also, because the result of a *Glucksberg* analysis is determined less by whether a certain liberty *is* a fundamental right, and more by whether the Court's majority *wants* it to be a fundamental right, it is hard to imagine the modern Court taking the fundamental rights approach to protecting one's freedom to earn a living in a lawful profession.

IV. A NEW OPPORTUNITY FOR ECONOMIC LIBERTY: JUDICIAL REVIEW UNDER "RATIONAL BASIS WITH BITE"

Because the Court will not likely recognize the right to earn a living as fundamental, occupational licensing schemes that restrict that liberty will probably never be subjected to strict scrutiny. Therefore, those who wish to challenge state licensing statutes under the Fourteenth Amendment have to find a way to prevail under rational basis review. Luckily, some recent Supreme Court decisions seem to indicate that a new, heightened version of rational basis scrutiny—often referred to as rational

117. *See* Phillips, *supra* note 21, at 286, 293-94; Griswold v. Connecticut, 381 U.S. 479, 481-82 (1965) (acknowledging that differential deference is to be given to "laws that touch economic problems" and laws that impact more "intimate" areas of one's life). *But see* Barnett, *supra* note 39, at 1486 (positing that the whole "[fundamental rights] doctrine is a vexatious solution to the problem of the post-New Deal Supreme Court's own making," namely, how to "preserv[e] the judicial protection of 'personal liberties'" without returning to the *Lochner* Court's laissez faire approach to the marketplace).

118. *See infra* Section V.B. *See* Phillips, *supra* note 21, at 293-301. *But see* Washington v. Glucksberg, 521 U.S. 702, 727 (1997) ("That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . .").

119. For a great example of this "*Lochner* Paranoia", see Phillips, *supra* note 21, at 322-23.

120. *See*, *e.g.*, *Glucksberg*, 521 U.S. at 720 ("We must therefore exercise the utmost care whenever we are asked to break new ground in this field, [i.e., substantive due process/fundamental rights,] . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.") (internal quotations and citations omitted); *see also* Sanders, *supra* note 55, at 696.

basis with bite[121]—is available to plaintiffs under certain, as of yet unclear, circumstances. This section briefly outlines the development of rational basis with bite review and shows how some lower federal courts, like the district court in *St. Joseph's Abbey*, have already begun using this type of analysis when reviewing Fourteenth Amendment challenges to occupational licensing regimes. The following sections then make a case in support of this use of heightened rational basis review and offer a proposal for what rational basis with bite review of occupational licensing statutes should look like in the future.

A. A RATIONAL RETREAT FROM EXTREME DEFERENCE

As discussed in Section II.B, since *Williamson* expanded the deference afforded legislatures under rational basis review, it has become nearly impossible to prevail in a constitutional challenge against a statute passed under the state police power. Perhaps in response to *Williamson*'s extremist position, or perhaps simply out of sheer pragmatism, courts have more recently begun to employ the heightened rational basis with bite standard of review to overturn various state statutes challenged under the Fourteenth Amendment.[122] While rational basis with bite has most often been applied in Equal Protection claims,[123] it seems to have made an appearance in the substantive due process context as well.[124] And although commentators and courts alike seem a bit confused about when this new heightened scrutiny applies, what it entails, and even whether it serves as a new form of scrutiny at all,[125] what is indisputable is that rational basis with

121. Other times, this standard is referred to as "rational basis with teeth." *See* Matthew v. Lucas, 427 U.S. 495, 510 (1976) (stating that the rational basis test is not "toothless").

122. For one commentator's support of the pragmatism theory, see Sandefur, *Equality of Opportunity*, *supra* note 110, at 475 ("The Court has already found the simple rational basis/strict scrutiny dichotomy insufficient to address many cases.").

123. *See, e.g.,* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Romer v. Evans, 517 U.S. 620 (1996); Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

124. *See* Lawrence v. Texas, 539 U.S. 558 (2003). While "[t]he [*Lawrence*] Court notably avoided reference to standards of scrutiny at all," Sandefur, *Equality of Opportunity*, *supra* note 110, at n.85, it certainly "seemed to employ the same rational basis [with bite] scrutiny it had used previously in . . . *Romer v. Evans*." Barnett, *supra* note 39, at 1494. *See also Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (accusing the majority of applying "an unheard-of form of *rational-basis review*") (emphasis added).

125. *See generally* Pettinga, *supra* note 21, at 800-02 (criticizing the Court for creating rational basis with bite scrutiny merely to apply intermediate scrutiny "under the guise of traditional rational basis review," and commenting that the

bite scrutiny has completely changed the landscape of constitutional challenges brought against state statutes affecting non-fundamental rights.

Rational basis with bite review differs from garden-variety rational basis review in two important ways: (1) reduced deference to state legislatures and (2) increased scrutiny into the motives behind state legislation.[126]

Because rational basis with bite is a *heightened* form of scrutiny, the presumption of constitutionality afforded state statutes is greatly reduced, and, at least according to some scholars, the burden of proof may even flip from the individual challenging the statute in question to the state in defending the statute's constitutionality.[127] In fact, in *Lawrence v. Texas*, the Court seemed to extract a general "presumption of liberty" from the Due Process Clause of the Fourteenth Amendment, a presumption that must be rebutted by the government attempting to justify a statute under a standard of review that is less deferential than traditional rational basis review but does not quite rise to the level of strict or intermediate scrutiny.[128] In

Court's lack of clarity "fosters confusion in lower courts as to what version of the rational basis test to apply in any given case); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 460 n.4 (1985) (Marshall, J., dissenting) (referring to decisions using rational basis with bite review as "intermediate review decisions masquerading in rational-basis language"); Powers v. Harris, 379 F.3d 1208, 1223 n.21 (10th Cir. 2004) (noting that "at least one commentator has argued that the Court employs at least six versions of rational-basis review"). Interestingly, the *Craigmiles* and *Powers* circuit split may be reduced to a disagreement over whether rational basis with bite applies to challenges of economic regulations. *Compare* Craigmiles v. Giles, 312 F.3d 220, 227 (6th Cir. 2002) (yes), *with Powers*, 379 F.3d at 1224 (no).

126. Rational basis with bite scrutiny also differs from intermediate scrutiny and strict scrutiny in significant ways. See *infra* Section V.A.

127. *See, e.g.,* Pettinga, *supra* note 21, at 797-98 (discussing the shifted burden of proof in Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985)); *Cleburne*, 473 U.S. at 459 (Marshall, J., concurring in part and dissenting in part) (accusing the majority of improperly putting the burden "on the legislature to convince the Court that the lines it has drawn are sensible"). *But see Craigmiles,* 312 F.3d at 224 (maintaining that "a statute is subject to a 'strong presumption of validity' under rational basis review" while applying the heightened rational basis with bite standard).

128. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.") (internal quotations and citations omitted); *see also* Barnett, *supra* note 39, at 1493-95; *cf.* Sandefur, *Equality of Opportunity*, *supra* note 110, at 503 n.245 (noting that a presumption of

Lawrence, the Court struck down a Texas statute prohibiting homosexuals from engaging in oral or anal sex,[129] basing its decision heavily on the "fundamental significance" of the protection of liberty afforded by substantive due process, which "counsel[s] against attempts by the State, or a court, to define the meaning of [a] relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[130] Highlighting that the behavior that the Texas statute criminalized involved only the voluntary acts of two consenting adults who did not seek assistance or recognition from the government, the Court found that the statute was not related to any legitimate state interest,[131] such as protection of the public, national security, or even "preserving the traditional institution of marriage,"[132] and, therefore, was unconstitutional.

The *Lawrence* Court's emphasis on searching for a legitimate state interest furthered by the Texas anti-sodomy statute, especially in Justice O'Connor's concurrence,[133] highlights a

liberty need not conflict with the historical presumption of constitutionality for state statutes "because the [former] presumption requires the legislature to proffer some rational and legitimate justification of the statute, while the [latter] means only that after such a justification has been proffered, a reasonable doubt as to the constitutionality of that law must be solved in favor of the legislative action") (internal citations and quotations omitted).

129. Lawrence v. Texas, 539 U.S. 558, 563 (2003) (citing TEX. PENAL CODE ANN. § 21.06(a) (2003)).

130. *Id.* at 565-67. Note that the entire *Lawrence* opinion is framed with language expressing the expansive protections of liberty afforded by the Fourteenth Amendment. The opinion begins with:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.

Id. at 562. The opinion concludes by stating:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Id. at 578-79.

131. *Id.* at 578.

132. *Id.* at 585 (O'Connor, J., concurring).

133. *Lawrence*, 539 U.S. at 579-82.

second important difference between rational basis with bite and traditional rational basis review. Unlike courts using a traditional rational basis inquiry, which seems to accept just about any asserted government interest as "legitimate,"[134] courts employing rational basis with bite scrutiny tend to identify *illegitimate* government interests that are furthered by the statutes they overturn, such as moral disapproval,[135] animus,[136] "the promotion of domestic business by discriminating against nonresident competitors,"[137] and the "desire to harm a politically unpopular group."[138] While some commentators believe that the identification of an illegitimate government purpose behind the challenged statute may be a required component of rational basis with bite scrutiny,[139] the "smoking out" of illegitimate interests may simply be a byproduct of the depth with which courts employing rational basis with bite scrutiny will analyze the relation between the challenged statute and the asserted state interest.

For example, unlike courts employing traditional rational basis review, which in their deference to state legislatures often seem to equate "rational" with "*imaginable*,"[140] courts using rational basis with bite review actually perform a "means-ends" analysis, and do not take it for granted that actions taken by state legislatures are rational.[141] Inquiries into legislative purpose and the greater regulatory regime within which a challenged statute fits are not off the table,[142] and a legislative

134. *See*, *e.g.*, Powers v. Harris, 379 F.3d 1208, 1225 (10th Cir. 2004) (intrastate economic protectionism); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955) ("free[ing] the profession . . . from all taints of commercialism"); Meadows v. Odom, 360 F. Supp. 2d 811, 823 (M.D. La. 2005) (discussing enhancement of the reputation of the floral industry).

135. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

136. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Romer v. Evans, 517 U.S. 620 (1996).

137. Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 882 (1985) (applying a heightened version of rational basis review in striking down an Alabama taxation scheme for violating the Equal Protection Clause).

138. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

139. *See* Barnett, *supra* note 39, at 1495; Sanders, *supra* note 55, at 686.

140. *See supra* Section III.

141. *See* St. Joseph Abbey v. Castille, 700 F.3d 154, 165 (5th Cir. 2012) (refusing "to accept nonsensical explanations for naked transfers of wealth"); *see also* Sandefur, *Equality of Opportunity*, *supra* note 110, at 477.

142. Sandefur, *Equality of Opportunity*, *supra* note 110, at 477; *see* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (analyzing whether,

enactment will be found unconstitutional if its "relationship to an asserted goal is so attenuated as to render [it] arbitrary or irrational."[143] With its bar set low at the level of mere rationality, rational basis with bite review is still quite deferential to policy decisions, but by requiring *some* level of reasonableness in the fit between the means the legislature chooses and the ends to be achieved, rational basis with bite review at least "allows the Court to discern pretextual exercises of political power from legitimate regulations."[144]

B. LOWER COURTS BITE INTO IRRATIONAL OCCUPATIONAL LICENSING

It still remains to be seen whether rational basis with bite review represents a paradigm shift in how the Court will apply the rational basis test across the board, or merely "the embryonic stages of a new category of . . . review"[145] to be used only when scrutinizing laws that affect certain "quasi-suspect" groups, such as homosexuals and the mentally retarded.[146] This uncertainty

under the state's asserted reasons, it was rational to require a house for the mentally retarded, but not fraternity houses, to apply for a special permit). *But see* Powers v. Harris, 379 F.3d 1208, 1223 (10th Cir. 2004) (noting that *Cleburne* "constitutes a marked departure from 'traditional' rational-basis review's prohibition on looking at the legislature's actual motives"); *cf*. St. Joseph Abbey v. Castille, 700 F.3d 154, 165 (5th Cir. 2012) ("The great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption.").

143. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985); *see also* Romer v. Evans, 517 U.S. 620, 635 (1996). ("The breadth of the [challenged law] is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that [the law] is directed to any identifiable legitimate purpose."). The question of "How attenuated is too attenuated?" is discussed in the specific context of occupational licensing laws in Section IV.B. *See infra*, note 167 and accompanying text. But note that hinging the constitutionality of a legislative enactment on the degree of attenuation between the statute and the interest it purports to further is not unique to the analysis of an exercise of state police power. *See, e.g.,* United States v. Morrison, 529 U.S. 598 (2000) (maintaining that the effect violent crime may have on interstate commerce is too attenuated to regulate such crime under the Commerce Clause).

144. Sandefur, *Equality of Opportunity*, *supra* note 110, at 477; *see also Romer*, 517 U.S. at 633 ("By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the [improper] purpose of disadvantaging the group burdened by the law").

145. *Powers*, 379 F.3d at 1224.

146. *See* Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review"); *see also Powers*, 379 F.3d at 1224 ("[P]erhaps *Cleburne* and *Romer* are merely exceptions to traditional rational basis review fashioned by the Court to correct perceived inequities unique to those

has led to much debate over whether rational basis with bite review is appropriate for challenges to economic regulations,[147] and even over whether the Supreme Court has already used this heightened scrutiny when analyzing economic legislation in the past.[148] Despite this apparent confusion, over the past few decades, an increasing number of federal district courts have begun using rational basis with bite review to scrutinize state occupational licensing statutes challenged under the Fourteenth Amendment.[149] Consistent with the Supreme Court jurisprudence regarding rational basis with bite, most of these lower courts tend to use a similar two-prong test when conducting their analyses: "(1) whether the regulation has a legitimate governmental purpose; and (2) whether there is a rational relationship between that purpose and the means chosen by the State to accomplish it."[150]

With regards to the first prong, federal courts applying rational basis with bite to occupational licensing schemes have generally found that consumer protection and public health and safety are legitimate state interests,[151] but that economic protectionism,[152] promoting customer service,[153] and regulating

cases."). *But see* Sanders, *supra* note 55, at 676-77 (casting doubt on the theory that courts only invalidate irrational laws using rational basis review in "quasi suspect" cases); Sandefur, *Equality of Opportunity*, *supra* note 110, at 477 (citing examples of rational basis with bite applied in the economic context).

147. *Compare* Sandefur, *Equality of Opportunity*, *supra* note 110 (appropriate), *with* Pettinga, *supra* note 21, at 799, *and* Phillips, *supra* note 21 (inappropriate).

148. *See* Powers v. Harris, 379 F.3d 1208, 1224 (10th Cir. 2004) ("[T]he Court itself has never applied *Cleburne*-style rational-basis review to economic issues"). *But see* Pettinga, *supra* note 21, at 796 ("The Supreme Court's most questionable use of rational basis with bite . . . occurred in *Metropolitan Life Insurance Co. v. Ward* in which the Court used the . . . test to invalidate economic legislation."). It is unclear whether the *Powers* court simply forgot about *Ward's* use of the rational basis test, see Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 881 (1985), or if it thinks that the type of rational basis review in *Ward* is somehow different from other courts' versions of rational basis with bite.

149. *See, e.g., St. Joseph Abbey II,* 835 F. Supp. 2d 149; Casket Royale, Inc. v. Mississippi, 124 F. Supp. 2d 434 (S.D. Miss. 2000); Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002); Merrifield v. Lockyer, 547 F.3d 978 (9th Cir. 2008); Cornwell v. Hamilton, 80 F. Supp. 2d 1101 (S.D. Cal. 1999); Santos v. City of Houston, 852 F. Supp. 601 (S.D. Tex. 1994); *see also* Sanders, *supra* note 55, at 678.

150. *St. Joseph Abbey II*, 835 F. Supp. 2d at 156.

151. *See id.*; *Craigmiles*, 312 F.3d at 225; *see also Merrifield*, 547 F.3d at 986.

152. *See, e.g.*, *Craigmiles*, 312 F.3d at 224 ("[P]rotecting a discrete interest group from economic competition is not a legitimate governmental purpose."); *St. Joseph Abbey I*, No. 10–2717, 2011 WL 1361425, at *9 (E.D. La. Apr. 8, 2011) ("The Court sees no basis to create a per se rule of law that economic protectionism is a legitimate

the quality and conduct of professionals[154] are not, by themselves (i.e., unless also logically related to the protection of the health, safety, or welfare of the public), legitimate state interests.[155] In applying the second prong of the test, courts have tended to perform a rather careful means-ends analysis to ensure that the state regulatory scheme bears at least a minimally rational relation to the proposed legitimate government purpose(s).[156] For example, in *St. Joseph Abbey*, the Eastern District Court of Louisiana held that the requirement that Louisiana casket makers, but not out-of-state or Internet retailers,[157] become licensed funeral directors before selling their caskets was in no way rationally related to the state's interest in promoting public health and safety.[158] The court reasoned that there was no evidence of any effect of casket quality on public health,[159] and

state interest."); Merrifield v. Lockyer, 547 F.3d 978, 991 n.15 (9th Cir. 2008) ("[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 governmental interest.").

153. *See St. Joseph Abbey II*, 835 F. Supp. 2d at 158 (citing Casket Royale, Inc. v. Mississippi, 124 F. Supp. 2d 434, 439 (S.D. Miss. 2000)).

154. *See* Cornwell v. Hamilton, 80 F. Supp. 2d 1101, 1106 n.15 (S.D. Cal. 1999) (noting that the state's "interest [in regulating the conduct of its professions] is *not self-supporting*" and must ultimately be related to the protection of the public) (emphasis added); *cf.* Meadows v. Odom, 360 F. Supp. 2d 811, 817 (M.D. La. 2005) (using far more deferential rational basis review and asserting, without citing authority, that "[t]he law is clear that state legislatures may choose which industries, professions, or occupations require regulation and to what degree they should be regulated").

155. *But see* Merrifield v. Lockyer, 547 F.3d 978, 991 n.15 (9th Cir. 2008) (noting that while "mere economic protectionism for the sake of economic protectionism is irrational . . . there might be instances when economic protectionism might be related to a legitimate governmental interest and survive rational basis review"); *cf.* St. Joseph Abbey v. Castille, 700 F.3d 154, 161 (5th Cir. 2012) ("[E]conomic protection, that is favoritism, may well be supported by a post hoc perceived rationale as in Williamson"). For more about what should or should not be considered as a legitimate government interest in the occupational licensing context, see *infra* Section V.C.

156. *See, e.g.,* St. Joseph Abbey v. Castille, 700 F.3d 154, 162 (5th Cir. 2012) ("[A] hypothetical rationale, even post hoc, cannot be fantasy, and . . . chosen means must rationally relate to the state interests it articulates . . . . Our analysis does not proceed with abstraction for hypothesized ends and means do not include post hoc hypothesized facts.").

157. Note that the Louisiana law only applies to in-state sales because otherwise Dormant Commerce Clause issues would be implicated. *See St. Joseph Abbey II*, 835 F. Supp. 2d at 157.

158. *Id.* at 159.

159. *Id.* The lack of rational relation between casket quality and public health, or at least the lack of any legislative concern about the possibility of any such relation, is, as previously mentioned, evidenced by Louisiana burial law itself, which does not

even if there was, the court noted that the licensing regime did *nothing* to ensure that higher quality caskets would be constructed, used, or sold.[160]

Similarly, in *Cornwell*, in analyzing the constitutionality of a California cosmetologist licensing statute[161] as applied to a natural hair braider, whom the court held "cannot reasonably be classified as a cosmetologist,"[162] the court emphasized that the extensive education and training requirements imposed by the statute[163] were so minimally related to the actual exercise of the plaintiff's profession, let alone to the state's interest in protecting the public, that they were, in effect, irrational.[164] Notably, the *Cornwell* court did not hold that *any* regulation of hair braiders would violate the Fourteenth Amendment,[165] only that the regulation requiring would-be hair braiders to complete 1,600 hours of training unrelated to their profession crossed into the

require that caskets even be used for burial at all, let alone that caskets be constructed with any specific design, material, or sealing method. *See St. Joseph Abbey II*, 835 F. Supp. 2d at 155.

160. *St. Joseph Abbey II*, 835 F. Supp. 2d at 159 ("[Any hypothetical health] 'concerns' with respect to coffins themselves are not included in the requirements to become a licensed funeral director. There are no requirements concerning the construction or design of caskets contained in the Act. There are no requirements concerning the seals for coffins contained in the Act.").

161. *See* CAL. BUS. & PROF. CODE §§ 7301-7457 (2012) (requiring any person engaging in cosmetology for compensation to obtain a cosmetology license, which requires extensive schooling and the passage of a licensing examination*); see also* Cornwell v. Cal. Bd. of Barbering and Cosmetology, 962 F. Supp. 1260, 1263 (S.D. Cal. 1997).

162. Cornwell v. Hamilton, 80 F. Supp. 2d 1101, 1108 (S.D. Cal. 1999). The plaintiff in *Cornwell* defined natural hair braiding as "consisting . . . of twisting, braiding, or otherwise physically manipulating the hair . . . without the use of chemicals that alter the physical characteristics of the hair." *Id.* at 1107.

163. In order to be eligible to take the California cosmetology licensing examination, people who have not completed an apprenticeship or practiced cosmetology out of state must complete 1,600 hours of technical instruction at an approved cosmetology school, which takes nine months of full-time study and costs up to $7,000. *See* Cornwell v. Cal. Bd. of Barbering and Cosmetology, 962 F. Supp. at 1263; *see also* CAL. BUS. & PROF. CODE § 7321 (2012).

164. *See Cornwell*, 80 F. Supp. 2d at 1108. Specifically, the court found that "well-below ten percent" of the cosmetology curriculum was even remotely applicable to natural hair braiding, *id.* at 1110, and, therefore, "[b]ecause the licensing regimen requires would-be braiders to spend scarce time and resources on learning irrelevant skills, it actually impedes development of knowledge in their own craft. Thus it aggravates the very harms the State seeks to avoid [i.e., potential injury to hair braiding customers]." *Id.* at 1112.

165. *Id.* at 1109, 1118.

realm of irrationality.[166] Applying rational basis with bite review, the *Cornwell* court did not blindly accept the government's assertion that the occupational licensing statute was rationally related to the protection of the health and welfare of the public, and instead looked deeper into the regulatory regime itself, noting that

> while a perfect fit is not required, . . . [t]here must be some congruity between the means employed and the [government's] stated end or the [rational basis] test would be a nullity . . . . There are limits to what the State may require before its dictates are deemed arbitrary and irrational."[167]

166. By way of analogy, the court highlighted that "to require would-be lawyers and architects to take course work and pass a licensing exam in cosmetology would [likewise] be irrational." Cornwell v. Hamilton, 80 F. Supp. 2d 1101, 1106 (S.D. Cal. 1999).

167. *Cornwell*, 80 F. Supp. 2d at 1106; *see also* Sanders, *supra* note 55, at 691 ("Regulations do reach a point . . . where they are so attenuated from furthering their purported purposes that legislators could not think them rationally related to those purposes"). The bright-line border between rational and irrational licensing requirements has yet to be determined and may never be precisely defined. But given the long history of the presumption of constitutionality for state statutes, courts should probably err on the side of finding statutes rational in situations that present a close call. Of course, this simply begs the same question, When is a statute so irrational that it is no longer "a close call?" A detailed exploration of the contours of this question is probably best left to another survey, but, for present purposes, this comment proposes that even if no fine line separating rational regulations from irrational regulations exists, there are some occupational licensing requirements that are so far past the line that it would not be reasonable to call them rationally related to a legitimate government interest. The regulations invalidated in *St. Joseph Abbey* and *Cornwell* are two such examples.

A related and equally difficult question arises out of the tension between the desire to let state legislatures solve problems step by step, see F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 316 (1993) (stating that "legislature[s] must be allowed leeway to approach a perceived problem incrementally"), and the desire to protect citizens' rights from arbitrary, irrational, or pretextual infringement by the government. For example, imagine a hypothetical variation of the facts from *St. Joseph's Abbey* in which the Louisiana legislature learned that decomposing bodies posed a health risk to society, but, for whatever political reason, there were not enough votes to get a statute out of committee that would require that all bodies be buried using caskets that never leak. Imagine a clever legislator who realized that almost everyone who buries a body purchases a casket (rather than forgoing one entirely or making his own), and came up with a pragmatic, two-step solution to the public health issue: (1) Pass Law A, which mandates that only licensed funeral directors can sell caskets; then (2) Pass Law B, which modifies the funeral director education curriculum to include extensive training on how to select the safest casket for customers. By itself, Law A may not have any rational relation to public health or safety, but when seen as a step in an incremental solution to a very real public

While rational basis with bite review makes it easier for courts to find state regulatory regimes unconstitutional, not every occupational licensing statute reviewed using rational basis with bite has been, or should be, "deemed arbitrary and irrational."[168] Heightened rational basis scrutiny does not rise to the level of judicial oversight exercised by the Court during the *Lochner* era, and even the statute challenged in *Lochner* itself likely would be upheld today by a court using rational basis with bite review.[169] Consider also the Ninth Circuit's recent decision in *Merrifield v. Lockyer*,[170] in which a plaintiff who professionally protected buildings from raccoons, pigeons, rats and other vertebrate pests without using pesticides (e.g., by "installing spikes, screens, and other mechanical devices")[171] brought Fourteenth Amendment challenges against a California regulatory scheme that required all structural pest controllers, whether or not they used

health concern, it seems far less irrational.

Perhaps one solution to this problem is for courts performing rational basis review to look for an "obvious illegitimate purpose to which [a] licensure provision is very well tailored," and to be "suspicious of a legislature's circuitous path to legitimate ends when a direct path is available." Craigmiles v. Giles, 312 F.3d 220, 227, 228 (6th Cir. 2002); *see supra* Section IV.A. If an illegitimate purpose is readily discernible, it may very well be appropriate for the court to require an explanation like the one in the hypothetical above. However, even if such an explanation is provided, and even if no bad faith by the government is apparent, there still must be some point at which an individual piece of an incremental legislative solution is so attenuated from the end goal that personal liberties prevail, and the government must come up with a better, more narrowly tailored, and indeed more rational approach to its legitimate end. This is the very idea of rational basis with bite review, an idea that has already been embraced by the Supreme Court. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985); *see also supra* Section IV.A.

168. Cornwell v. Hamilton, 80 F. Supp. 2d 1101, 1106 (S.D. Cal. 1999).

169. *See* Lochner v. New York, 198 U.S. 45, 65-74 (1905) (Harlan, J., dissenting) (analyzing the challenged statute using scrutiny somewhat resembling modern rational basis with bite review). After all, it seems at least *rational* that the health of bakers may be adversely affected by too many hours in a bakery. *See id.* at 70 ("[T]he air constantly breathed by [bakers] is not . . . pure and healthful . . . . Nearly all bakers are palefaced [sic] and of more delicate health than the workers of other crafts, which is chiefly due to their hard work and their irregular and unnatural mode of living"). Therefore, limiting the number of hours a baker can work to sixty per week can be seen as *rationally related* to the state's legitimate interest in protecting the health and welfare of workers. *See id.* at 69 ("I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the state and the end sought to be accomplished by its legislation.") (internal citations omitted).

170. Merrifield v. Lockyer, 547 F.3d 978 (9th Cir. 2008).

171. *Id.* at 980.

pesticides, to obtain state licenses or face criminal penalties.[172] The *Merrifield* plaintiff's argument, similar to that of the hair braider in *Cornwell*, was that because the training and testing requirements for the pest control license were almost exclusively focused on the safe handling of pesticides (which he did not use), the licensing requirements were so unrelated to his work that it was irrational to make him comply with them.[173] However, the Ninth Circuit disagreed, and rejected the plaintiff's Due Process claims.[174] Applying rational basis with bite review, the court looked at the details of the pest-control licensing prerequisites, and, unlike the completely unrelated cosmetology training required of the hair braider in *Cornwell*, the court determined that the training and examination requirements for the pest control license were *relevant enough* to the plaintiff's actual work to satisfy the minimal requirement of rationality.[175] It did not matter to the court that the licensing requirements were not perfectly tailored to the plaintiff's specific specialization within the pest control industry.[176] The occupational licensing requirements were found to be rationally related to the state's

172. *See* Merrifield v. Lockyer, 547 F.3d 978, 980-89 (9th Cir. 2008); *see also* CAL. BUS. & PROF. CODE § 8553 (2012) (practicing structural pest control without a license carries penalties of up to $1,000 and six months imprisonment per violation). In order to obtain the proper licensing, a potential California pest controller must have at least three years of training and experience and pass an exam. *Merrifield*, 547 F.3d at 982, 987. Note that by statutory exemption, pest controllers who protected buildings from bats, raccoons, skunks, and squirrels—but not pigeons, rats, and mice—without the use of pesticides were not required to obtain the license. *Id.* 981-82. Because the plaintiff's work included pigeons and rats, he was not covered by the statutory exemption, which became the focus of his successful Equal Protection claim. *Id.* at 988-91.

173. *See id.* at 987.

174. *Id.* at 988. Note, however, that the Ninth Circuit nonetheless found the licensing regime unconstitutional under an Equal Protection analysis because "the irrational singling out of three types of vertebrate pests from all other vertebrate animals [in the statutory exemption] was designed to favor economically certain constituents at the expense of others similarly situated." *Id.* at 991.

175. *Merrifield*, 547 F.3d at 987-88. For example, the court highlighted that it would be possible for the plaintiff to complete the training required to obtain the license without ever touching a pesticide, and that the public safety concerns regarding pest control that necessitate proper training extend beyond the profession's use of dangerous chemicals: "The work of non-pesticide pest controllers is not without risk of harm. Like other structural pest controllers, [a non-pesticide pest controller] must climb on people's roofs to install his pigeon wires and apparatuses; he must enter businesses and homes; he must deal with pests that can spread disease." *Id.* at 987. The court used similar reasoning with regards to the examination component of the licensing requirement. *See id.* at 988.

176. *Id.* at 988.

legitimate interest in promoting public health and safety through the proper training of potentially dangerous professionals,[177] and that is all that is required of the state—even under rational basis with bite review.

V. A DEFENSE OF RATIONAL BASIS WITH BITE REVIEW AND A PROPOSAL FOR THE FUTURE

Having explored the features of rational basis with bite review, as well as how and when courts have applied it, this final section explains why the heightened standard of review is an appropriate judicial tool for balancing the presumption of constitutionality for state regulations with the protection of individual liberties—including the freedom to pursue harmless employment. Subsection A begins with a general defense of rational basis with bite review, and Subsection B explains why rational basis with bite review should be used for challenges to occupational licensing regulations. Subsection C argues that, under rational basis with bite review, pure economic protectionism is *not* a legitimate government interest, and finally, accepting this premise, Subsection D offers a sketch for how courts may apply rational basis with bite review to challenges of state occupational licensing statutes in the future.

A. A MORE BALANCED APPROACH FOR ANALYZING FOURTEENTH AMENDMENT CLAIMS

Some scholars and jurists view even a minimal amount of "bite" under rational basis review as an abuse of judicial power.[178] They characterize rational basis with bite review as the improper action of a judicial superlegislature imposing its own views over that of the public's democratically elected representatives.[179] While there may be some merit to the claim that a court overturning a statute under rational basis with bite review in effect substitutes its own judgment for that of the legislature, such is the case whenever *any* statute is overturned on constitutional grounds—and rationality does not seem too great a burden to impose on legislation that comes into conflict with the prohibitions of the Fourteenth Amendment. Even though a state legislature has the power to experiment, and indeed to make

177. Merrifield v. Lockyer, 547 F.3d 978, 988 (9th Cir. 2008).

178. *See generally* Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004); Pettinga, *supra* note 21.

179. *See generally Powers* 379 F.3d 1208; Pettinga, *supra* note 21.

mistakes, the Fourteenth Amendment places limits on this power, and when courts simply take the legislature's word for it, and employ a toothless rational basis review, they abandon the public with no legal defense against the illegitimate or pretextual use of government power.[180]

Critics are correct that there is greater danger for judicial activism under rational basis with bite review than under more deferential versions of the test, and they are equally correct that it is inappropriate for a court to stealthily employ intermediate or strict scrutiny under the guise of rational basis review.[181] But rational basis with bite, appropriately applied, need not rise to the level of strict, or even intermediate, scrutiny. Unlike these other heightened scrutiny levels, rational basis with bite review does not require the government to produce independent evidence proving why its asserted interest is legitimate or why a statute's enactment has been, or will be, effective at furthering that interest. It need only show how the relation between the legislation and the legitimate state interest is *rational*.[182] The legitimate government interest standard also sets a notably lower hurdle for the government than the important or compelling

180. Of course, one may argue that in a democracy the public is never totally defenseless because it is always possible to elect new legislators. Therefore, the argument continues, the proper forum for challenging an irrational statute is the voting booth, and not the courtroom. *See*, *e.g.,* Powers v. Harris, 379 F.3d 1208, 1225 (10th Cir. 2004). This argument is not without merit, and it is addressed in greater depth in the specific context of occupational licensing laws. *See infra* Section V.B. However, by way of general rebuttal, one must remember that the possibility of an electoral remedy in no way changes the fact that if judges are prohibited from using their judgment under the rational basis test, there is, in effect, no Fourteenth Amendment remedy for state infringements on "non-fundamental rights." Under toothless rational basis review, if the challenged statute interferes with a non-fundamental right, the court would be more honest if it dismissed the challenge for no cause of action rather than applying a pretextual form of constitutional scrutiny. Yes, electoral solutions may (theoretically) always be available, but this does not change the fact that the Constitution provides a legal solution for Due Process violations as well.

181. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 459 n.4 (1985) (Marshall, J., concurring in part and dissenting in part) (criticizing "intermediate review decisions masquerading in rational-basis language").

182. *See* Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002) (applying rational basis with bite scrutiny and yet maintaining that "[a] proffered explanation for the statute need not be supported by an exquisite evidentiary record; rather we will be satisfied with the government's rational speculation linking the regulation to a legitimate purpose, even unsupported by evidence or empirical data.") (internal quotations and citations omitted).

interest standards of intermediate and strict scrutiny.[183] Furthermore, just like under traditional rational basis review, courts applying rational basis with bite scrutiny should still presume that a state action is constitutional, and perhaps should even continue to assist government lawyers in coming up with explanations in support of that presumption.[184] The only difference is, under rational basis with bite review, the reasoning used to explain the relation between a regulation and a legitimate government interest must be more than just imaginable—it must be rational.

A court applying rational basis with bite review should not invalidate a statute merely because it disagrees with the law or thinks it might be ineffective. Such invalidation would, indeed, be the improper behavior of a court acting as a superlegislature, and would simply shift the harmful imbalance in judicial review from one extreme (total deference to state legislatures) back to the other (policy-making from the bench). But if the only rational purpose of a statute is illegitimate, or if the asserted relation between the statute and a legitimate state interest is so attenuated as to cross the line into the absurd or the irrational, then a judge reviewing a Fourteenth Amendment challenge has the power and the duty to find that the statute fails the rational basis test and declare it unconstitutional. Insofar as this is all rational basis with bite review stands for, it seems appropriate to apply rational basis with bite scrutiny *any* time a statute is alleged to violate an equality or liberty interest protected by the Fourteenth Amendment—including the right to pursue employment.[185]

183. For a more in-depth discussion on which government interests should or should not qualify as legitimate, see *infra* Section V.C.

184. *See* Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002). *But see* Sandefur, *Equality of Opportunity*, *supra* note 110, at 477 (taking a more extreme position and asserting that under rational basis with bite review "the Court should not invent rationales for a law").

185. This is not to say that rational basis with bite scrutiny is appropriate for *all* constitutional challenges of state statutes—only that it may always be appropriate with regards to Fourteenth Amendment claims. Challenges under other provisions of the Constitution, such as the Dormant Commerce Clause, or challenges to statutes that do not interfere with equality or individual liberties, may still be appropriately reviewed under the traditional, completely deferential, rational basis test. For another, related approach, see Barnett, *supra* note 39, at 1495-1500 (outlining a proposal for protecting individual liberty that would analyze all actions taken under the state police power under a rebuttable presumption of liberty).

B. THE HARMLESS PURSUIT OF HAPPINESS: WHY RATIONAL BASIS WITH BITE MAKES SENSE FOR CHALLENGES TO OCCUPATIONAL LICENSING REGIMES

Some critics of rational basis with bite review are less concerned about the use of the heightened form of scrutiny altogether, and more concerned about the possibility of its expanded application within the context of economic legislation.[186] While there are many good arguments in support of the use of rational basis with bite review whenever *any* economic regulation enacted under the state police power is challenged, this comment takes a much narrower position: that *occupational licensing statutes* (i.e., regulations that infringe on the specific part of economic liberty that encompasses the right to pursue one's chosen profession) should be subjected to rational basis with bite review.

As previously discussed in Section III.B, the modern Court recognizes that the Fourteenth Amendment protects one's right "to engage in any of the common occupations of life,"[187] a right that is, to many, as personally important and fundamental to the pursuit of happiness as any other right protected by the Constitution.[188] Still, some believe that while heightened rational basis review may be appropriate for the protection of certain "quasi-suspect" minority groups, like homosexuals or the mentally retarded, it is not appropriate for the protection of the smallest minority group of all: the individual.[189] Objections to the application of rational basis with bite review to occupational licensing statutes generally fall into one of three categories—

186. *See, e.g.,* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 459-60 (1985) (Marshall, J., concurring in part and dissenting in part) (expressing grave concern that the heightened form of rational basis review used by the majority "creates precedent for this Court and lower courts to subject economic and commercial classifications to similar and searching . . . rational-basis review—a small and regrettable step back toward the days of *Lochner*"); s*ee also* Pettinga, *supra* note 21, at 796-800 (expressing general dissatisfaction with rational basis with bite review, but mostly a concern about the "beginning of a jurisprudence of rational basis with bite in the economic context").

187. Conn v. Gabbert, 526 U.S. 286, 291 (1999).

188. *See, e.g.,* Phillips, *supra* note 21, at 298-99.

189. *See generally* Phillips, *supra* note 21, at 323-24 (concluding that, "[o]n balance, . . . it [is] inadvisable to revive substantive due process in the entry restriction/occupational freedom context."); *see also* Powers v. Harris, 379 F.3d 1208, 1223-24 (10th Cir. 2004).

doctrinal objections, pragmatic objections, or theoretical objections—each of which is addressed in turn.

1. DOCTRINAL OBJECTIONS

Doctrinal objections to the application of rational basis with bite scrutiny to occupational licensing regulations generally take the following form: based on footnote four from *Carolene Products*,[190] "a more searching form of rational basis review" is only appropriate when scrutinizing laws that "harm a politically unpopular group"[191] because historically unpopular minority groups are "losers in the political process" and could not achieve justice by appealing directly to the legislature.[192] Therefore, while rational basis with bite review may be appropriate in cases such as *Romer* and *Lawrence*, where the rights of homosexuals were implicated, it is not appropriate in cases involving occupational licenses, where the people whose rights are affected by the legislation cannot claim membership in any distinct and historically unpopular group.[193] Some occupational licensing laws may be unfair, but, based on the jurisprudence, those who are affected by them are simply out of luck—they "must resort to the polls, not to the courts for protection against [improper occupational licensing regimes]."[194]

There are some problems with the assumptions underlying this doctrinal objection. First, while people affected by occupational licensing regimes may not always fall neatly into an already existing minority group, the very enactment of a licensing statute creates a new minority group of "want-to-be-but-excluded professionals," a group historically quite powerless against entrenched professionals who often wield their political influence to shield themselves from competition in the marketplace.[195]

190. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

191. Lawrence v. Texas, 539 U.S. 558, 580 (O'Connor, J., concurring).

192. *See* Pettinga, *supra* note 21, at 799.

193. *See id.*; *see also* Powers v. Harris, 379 F.3d 1208, 1224 (10th Cir. 2004).

194. *Powers*, 379 F.3d at 1225; *see also Lawrence*, 539 U.S. at 579-80 (O'Connor, J., concurring) ("Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster, since the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.") (internal quotations omitted).

195. *See* Sandefur, *Four Recent Cases*, *supra* note 23, at 1028 ("Unfortunately, as with virtually all legislation, occupational licensing is subject to rent-seeking. This means that government power to regulate professions often falls into the hands of ambitious or politically adept groups who would try to use that power to enrich

Related to this notion is the idea that the Constitution and the courts are not only necessary to protect minorities from the will of the majority; they are just as necessary to protect the minority from the will of the more powerful minority—the "factions" so hated and feared by the Founding Generation.[196]

Modern "public choice" scholars recognize that in the political arena "[a] well-knit special interest group is likely to prevail over an amorphous 'public' whose members are dispersed," so the chance that individual would-be casket retailers could ever achieve political success against a powerful funeral directors lobby is, for all practical purposes, non-existent.[197] It should not matter that many of the people affected by illegitimate occupational licensing regimes are not members of any traditionally prejudiced racial, ethnic, or sexual minority group. Without the assistance of the courts, which at the very least can hold the legislature to the minimal standards of rationality, people like the monks at St. Joseph's Abbey have no way of enforcing their Fourteenth Amendment rights against arbitrary and improper infringement by powerful special interest groups who think that only *they* have the right to pursue happiness.

2. PRAGMATIC OBJECTIONS

Those who have pragmatic objections to the use of rational basis with bite review for occupational licensing regulations are concerned that the heightened standard of review would cause major upheaval in state legislatures[198] and result in a huge influx of federal litigation that courts may not be able to handle in

themselves at the expense of others."). Also note that while large businesses may yield political power and therefore not require the assistance of the courts, occupational licensing regulations often disproportionately affect individuals, and so it is unfair to paint all those affected by economic legislation (broadly construed) with the same political influence brush. *See, e.g.*, Pettinga, *supra* note 21, at 799.

196. *See* Sandefur, *Equality of Opportunity*, *supra* note 110, at 478 ("One of the framers' primary concerns was to prevent factions from usurping government power "solely to distribute wealth or opportunities to one group or person at the expense of another.") (internal citations omitted). In a constitutional republic, no single person (or privileged minority) should be able to limit the rights of another upon his whim alone.

197. Sandefur, *Four Recent Cases*, *supra* note 23, at 1028.

198. Powers v. Harris, 379 F.3d 1208, 1222 (10th Cir. 2004) ("adopting a rule against the legitimacy of intrastate economic protectionism and applying it in a principled manner would have wide-ranging consequences").

terms of time or expertise.[199] With regards to the latter objection, it must be noted that judges hear complex litigation with far-reaching public consequences every day, and there is little reason to believe that an occupational licensing challenge requires any greater expertise than a medical malpractice claim or an environmental mass tort. Also, a judge can always appoint expert witnesses to assist her in making her determinations.[200] As for the objection that subjecting occupational licensing statutes to more exacting scrutiny would lead to increased litigation, this objection may be overstating the caseload crisis in the federal courts.[201] But even if such a caseload problem does exist, the burden should not be on those whose rights have been violated to endure such violations because society does not want to pay to protect their rights. Furthermore, it is unclear that increased litigation over occupational licensing statutes would necessarily result in a net financial loss to society. Fewer licensing restrictions would lead to greater competition in the marketplace, which translates to lower prices for consumers. It is certainly plausible that these decreased prices would more than outweigh the costs of a few judges and courtrooms in the long run.

The same reasoning applies to the first objection—that a change in judicial oversight of occupational licensing regimes may force state legislatures to revamp entire regulatory schemes and change the way they do business with special interest groups looking for economic protection. Yes, requiring occupational licensing statutes to actually bear a rational relation to the protection of the health, safety, and welfare of the public will likely result in a period of instability and uncertainty within state legislatures as they struggle to comply with the new regime, but change is often a good thing. Just as few people today would complain that the repeal of Jim Crow was not worth it because it was expensive and caused instability, future generations of Americans may look back on the era following the Court's mandate that occupational licensing statutes be subjected to

199. *See* Phillips, *supra* note 21, at 313-15, 321-23 (noting a general problem of judicial incapacity with regards to economic litigation, and expressing fear that "judicial misjudgments in occupational licensing cases can imperil the public health, safety, and well-being.").

200. *See* FED. R. EVID. 706.

201. *See generally* Michael C. Gizzi, *Examining the Crisis of Volume in the U.S. Courts of Appeals*, 77 JUDICATURE 96, 103 (1993).

heightened judicial scrutiny as a time when the country put justice ahead of comfort and ideals ahead of pragmatism.

3. THEORETICAL OBJECTIONS

Those who object to the use of heightened rational basis scrutiny to review occupational licensing laws on theoretical grounds generally focus on their perception that there is some essential metaphysical difference between the right to pursue one's chosen profession and other more personal rights, such as the right to engage in consensual sexual encounters.[202] A theoretical objector may, for instance, accept that the *Lawrence* Court established a presumption of liberty for one's non-enumerated/non-fundamental right to engage in harmless sexual activities in the privacy of his home,[203] but yet maintain that this presumption does not extend to one's non-enumerated/non-fundamental right to engage in lawful and harmless professional activities in the free market. [204]

To the extent that economic liberty, broadly speaking, encompasses more than the right to be free from irrational or illegitimate barriers to entry into a lawful profession (e.g., the right to advertise, the right to freely contract for wages, the right to corporate status, etc.), the distinction between economic liberty and personal liberty may, indeed, make some sense. But the distinction makes far less sense when talking about the narrow right to pursue one's chosen profession. Just because the right to earn a living may be found within the category of economic liberty, it does not necessarily follow that this right cannot *also* be found within the category of personal liberty—there is some overlap between the two categories of rights. Even scholars who object to broad economic substantive due process rights recognize that "[s]ince the choice of occupation may affect personal capacities, values, style of life, social status, and general life

202. *See* Phillips, *supra* note 21, at 294; *cf.* Lawrence v. Texas, 539 U.S. 558, 579-80 (2003) (O'Connor, J., concurring); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 470-71 (1985) (Marshall, J., concurring in part and dissenting in part) (noting that because discrimination cannot exist in the economic context, the government is not constrained by the Constitution with regards to economic legislation).

203. *See Lawrence*, 539 U.S. at 564 ("We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.").

204. *E.g.*, selling harmless wooden caskets.

prospects in innumerable ways, this freedom is arguably more central to the individual than [other personal] rights already classified as fundamental."[205]

By way of further illustration, consider how the same reasoning the Court used in *Lawrence* to strike down the Texas sodomy statute applies equally to the Louisiana restriction on monks selling caskets. The *Lawrence* Court observed that the Texas sodomy statute unconstitutionally prohibited behavior that did not involve "injury to a person or abuse of an institution the law protects":[206]

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused . . . . [Instead, it] involves two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.[207]

Similarly, no one was, or could be, hurt by purchasing a wooden box sold by the monks at St. Joseph Abbey (especially not the corpse). Also, just like consensual sex, the relationship between casket retailers and their customers is a consensual one that, under normal circumstances, does not involve coercion or undue influence. Finally, even though force or fraud is always a possibility in the commercial setting, the same can be said about sexual encounters, and just as the right of Texans to engage in sodomy does not include the right to rape one's partner, the right of Louisianans to engage in casket retail should not include the right to defraud one's customer. In either case, a person who abuses his rights can, and should, receive criminal sanctions, but it does not therefore follow that a person does not have those rights to begin with, or that the government can infringe on those rights unless doing so has some rational relation to the protection of the health, safety, or welfare of society.

Also, while a technical distinction may be drawn between the quintessentially private nature of sexual intercourse and the somewhat more public nature of casket retail, it is important to note that the *Lawrence* Court did not resolve the case with an appeal to the fundamental rights doctrine or the incorporation of

205. Phillips, *supra* note 21, at 298-99.

206. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

207. *Id.* at 578.

the right to sodomy into the fundamental right of privacy.[208] Rather, the *Lawrence* Court applied rational basis with bite review, and the private nature of the *Lawrence* defendants' sexual acts only mattered insofar as the criminalization of those acts could not be found to be rationally related to any public purpose, such as "preserving the traditional institution of marriage" or protecting society.[209] In this sense, a harmless commercial interaction between consenting adults is just as private as a consensual sexual encounter. If the St. Joseph Abbey monks wished to sell their caskets in the streets of the French Quarter during a crowded march for cancer awareness, perhaps the government could legitimately argue that it had a public interest rationale for prohibiting their commercial activity. But the monks' pursuit of happiness by selling artisan wooden caskets, and their customers' reciprocal pursuit of happiness by purchasing them, is just as harmless to the general public as two men getting it on in their bedroom.[210]

C. WHY *CRAIGMILES* GOT IT RIGHT: PURE ECONOMIC PROTECTIONISM IS *NOT* A LEGITIMATE GOVERNMENT INTEREST

In its thus-far non-binding opinion in *St. Joseph Abbey*, the Fifth Circuit sided with *Craigmiles* rather than *Powers* in maintaining that intrastate economic protectionism, by itself, is *not* a legitimate government interest.[211] This is an important development because, even under rational basis with bite review,

208. *See* Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting). *Cf.* Roe v. Wade, 410 U.S. 113, 153 (1976) (holding that the right to terminate one's pregnancy is included within the fundamental right of privacy); Eisenstadt v. Baird, 405 U.S. 438, 453 (1973) (finding that the right to use contraceptives is included within the fundamental right of privacy).

209. *Lawrence*, 539 U.S. at 567, 585.

210. Of course, one could argue that the government always has a legitimate public interest rationale for regulating the sale of caskets because every commercial act affects the marketplace. However, while state governments may often have a legitimate interest in regulating intrastate commercial markets, this interest is not self-supporting, and must eventually be tied to the promotion of the public good. *See infra* Section V.C. Furthermore, this very sort of consumer protection rationale was explicitly rejected by the district court in *St. Joseph's Abbey*, which noted that "consumer protection with respect to the cost of funeral items is not aided by a state-protected monopoly" that leaves the consumer with fewer choices at higher prices. *St. Joseph's Abbey II*, 835 F. Supp 2d. 149, 157 (E.D. La. July 21, 2011).

211. St. Joseph Abbey v. Castille, 700 F.3d 154, 161 (5th Cir. 2012) (noting that without a public interest rationale, intrastate economic favoristim is "aptly described as a naked transfer of wealth").

the monks and those similarly situated would be without relief if pure economic favoritism were deemed a legitimate function of state legislatures. Consider that both the Sixth Circuit in *Craigmiles* and the Tenth Circuit in *Powers* found that regulations like Louisiana's Embalming and Funeral Directors Act are "very well tailored to protecting licensed funeral directors from competition on caskets."[212] It follows, then, that if "protecting a discrete interest group from economic competition" is found to be a legitimate government interest,[213] statutes like those challenged in *St. Joseph Abbey* would have no difficulty surviving even a rigorous application of rational basis review.

The Supreme Court has never directly addressed the issue of whether intrastate economic protectionism is, by itself, a legitimate state interest sufficient to uphold an exercise of the state police power under rational basis review. As such, much of the debate involved in the *Craigmiles-Powers* circuit split is over which court more appropriately applied the Supreme Court jurisprudence that is seemingly applicable but not directly on point.[214] For example, in finding that "protecting a discrete interest group from economic competition is *not* a legitimate governmental purpose,"[215] the *Craigmiles* court relied on several Supreme Court cases[216] that the *Powers* court later criticized for being off-topic because they did not address fact patterns involving *intra*state economic protectionism, but rather *inter*state economic protectionism.[217] Accusing the *Craigmiles* court of "selective quotation,"[218] the *Powers* court went on to cite a string of cases it claimed supported its own contention—that pure intrastate economic protectionism *is* a legitimate state interest.[219]

212. Powers v. Harris, 379 F.3d 1208, 1218 (10th Cir. 2004) (quoting Craigmiles v. Giles, 312 F.3d 220, 228 (6th Cir. 2002)).

213. *Id.* (quoting Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002)).

214. *See, e.g.*, Thompson, *supra* note 28, at 599-606.

215. *Craigmiles*, 312 F.3d at 224 (emphasis added).

216. *See id.* (citing City of Philadelphia v. N. J., 437 U.S. 617, 624 (1978)) ("Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected."); *see generally* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1983); Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400 (1983).

217. *Powers*, 379 F.3d at 1218-20.

218. *Id.* at 1219.

219. *See id.* at 1220-21 (citing Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 109 (2003); Ferguson v. Skrupa, 372 U.S. 726, 730-31 (1963), New Orleans v. Dukes, 427 U.S. 297, 304 n.5 (1976); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955)).

However, the cases the *Powers* majority cited as precedent have also been criticized for not actually standing for the *Powers* court's proposition.[220] For example, consider the criticisms of the concurring judge in the *Powers* decision: "The majority is correct that courts have upheld regulatory schemes that favor some economic interests over others . . . . But all of the cases [cited by the majority] rest on a fundamental foundation: the discriminatory legislation arguably advances either the general welfare or a public interest."[221]

While a full exploration of the doctrine upon which the *Craigmiles* and *Powers* courts relied is beyond the scope of this comment,[222] it should suffice to say that even if both courts misapplied Supreme Court jurisprudence, the *Craigmiles* position has more than just Supreme Court doctrine to support its contention that economic protectionism is not a proper use of the state police power.[223] The very philosophical foundation behind our constitutional democracy mandates a finding that the passage of legislation that benefits one group at the expense of another—without even tangentially benefiting the public at large—is an improper and illegitimate use of the coercive power of the state.[224] According to John Locke's social compact theory of government, which provided the philosophical orientation for much of the Founding Generation, the whole purpose of government is to protect the rights of individuals, who remain

220. *See, e.g.,* St. Joseph Abbey v. Castille, 700 F.3d 154, 161 (5th Cir. 2012) ("[N]one of the Supreme Court cases *Powers* cites stands for [the] proposition . . . that protecting or favoring one particular intrastate industry . . . is a legitimate state interest.") (internal quotations omitted); *see also* Thompson, *supra* note 28, at 602 (accusing the *Powers* court of misinterpreting the cases it relied on).

221. Powers v. Harris, 379 F.3d 1208, 1225 (10th Cir. 2004) (Tymkovich, J., concurring); *see also* St. Joseph Abbey v. Castille, 700 F.3d 154, 161 (5th Cir. 2012) ("[T]he cases [cited in *Powers*] indicate 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.").

222. For an in-depth discussion on the circuit split, see generally Asheesh Agarwal, *Protectionism as a Rational Basis? The Impact on E-Commerce in the Funeral Industry*, 3 J.L. ECON & POL'Y 189 (2006); Sandefur, *Four Recent Cases*, *supra* note 23; Thompson, *supra* note 28.

223. Note also that in siding with *Craigmiles,* the Fifth Circuit relied on both precedent *and* "broader principles." *See* St. Joseph Abbey v. Castille, 700 F.3d 154, 161 (5th Cir. 2012).

224. *See generally* Sandefur, *Four Recent Cases*, *supra* note 23, at 1035-44 (discussing how the philosophical underpinnings of American constitutionalism require that economic protectionism not be deemed a legitimate state interest).

sovereign.[225] Therefore, "the legislature's power is limited to the publick [sic] good of the Society,"[226] and, at least according to one scholar, a legislative enactment that does not bear any rational relation to the health, safety, or welfare of the public is a mere act of force that should not even be called a "law" at all.[227] Indeed, even in *Plessy v. Ferguson*, the Court recognized that "every exercise of the [state] police power must be reasonable, and *extend only to such laws as are enacted in good faith for the promotion of the public good*."[228]

This is not to say that all state statutes that result in economic protectionism are necessarily unconstitutional—only those that result in economic protectionism and nothing else. Some statutes with important public purposes (including some occupational licensing statutes) also have economic protectionist effects, yet should nonetheless be found legitimate. However, to protect the public from the pretextual and improper use of government power, courts must demand that all laws passed pursuant to the state police power, at the very minimum, bear some rational relation to the health, safety, or welfare of the people—any other government interest is only legitimate if it somehow relates back to the public good.[229] Under this standard,

225. *See* Sandefur, *Four Recent Cases*, *supra* note 23, at 1036-37.

226. *Id.* at 1038-39 (internal quotations omitted).

227. *Id.* at 1039 ("A law differs from a mere act of force in that the former has a public justification.").

228. Plessy v. Ferguson, 163 U.S. 537, 550 (1896) (emphasis added).

229. *Cf.* St. Joseph Abbey v. Castille, 700 F.3d 154, 162 (5th Cir. 2012) (mandating that the challenged regulations be "rationally related to protection of public health, safety, and consumer welfare").

One may argue that all occupational licensing necessarily contributes to the public good in that it raises revenue for the state (e.g., in the form of licensing fees, taxation on instructors' income, etc.). However, it is uncertain that any licensing fees would ever make it to the general public (i.e., they may simply go towards paying for the administration of the licensing regime itself), and it is equally uncertain that any increased revenue would offset the loss of potential taxable income from would-be workers who are restricted by the regime (some of these potential workers may even be receiving state assistance, further offsetting any financial gain to the state because of the licensing regime). Furthermore, occupational licensing restrictions, at least for harmless professions, may result in a net financial loss for the general public by artificially reducing competition in the marketplace and driving up costs to consumers.

More fundamentally, under rational basis with bite review, tangential benefits so attenuated from the state's policy simply cannot justify palpably improper government interests at work, and allowing the state to restrict people's freedom based solely on an indirect revenue generation rationale would essentially grant the state unlimited power to restrict any activity that does not touch upon a fundamental

pure intrastate economic protectionism is not a legitimate government interest, and so regulations that serve no purpose other than to protect the economic interests of a small, privileged group should always be declared unconstitutional.

D. A PROPOSAL FOR FUTURE REVIEW OF OCCUPATIONAL LICENSING STATUTES

Having established that (1) heightened rational basis scrutiny is appropriate for reviewing challenges to occupational licensing statutes and that (2) the only legitimate government interests under the state police power are those that relate (at least indirectly) to the protection of the health, safety, or welfare of the public, this comment concludes with a rough sketch for how future courts may review Fourteenth Amendment challenges to state regulations that limit a person's entry into a profession. As mentioned in Section IV.B, several federal courts have already begun using rational basis with bite review when scrutinizing occupational licensing statutes.[230] The following proposal is intended to augment and not replace such an approach, as it is meant only to assist courts in narrowing their focus under heightened rational basis scrutiny of occupational licensing regimes. Specifically, the proposal is that courts engage in a three-prong inquiry:

> Prong 1: Is it rational to conclude that the health, safety, or welfare of the public may be harmed if this profession is not regulated?
>
> Prong 2: What is the specific potential harm(s) to the health, safety, or welfare of the public?
>
> Prong 3: Is the state's regulatory scheme a rational means for preventing that specific potential harm(s)?[231]

right. Also, the legislature's decision to target a particular harmless behavior for "societal revenue generation" but not another may raise Equal Protection concerns as well. *See infra* note 230.

230. Recall that these courts generally engage in a two-step inquiry: "(1) whether the regulation has a legitimate governmental purpose; and (2) whether there is a rational relationship between that purpose and the means chosen by the State to accomplish it." *St. Joseph's Abbey II*, 835 F. Supp. 2d 149, 156 (E.D. La. July 21, 2011).

231. Note that for Equal Protection challenges, a fourth prong may sometimes be necessary: Is the exemption of profession X, but not a similarly situated profession Y, from the regulatory scheme rationally related to preventing the specific potential harm(s)? *See*, *e.g.*, Merrifield v. Lockyer, 547 F.3d 978, 989-92 (9th Cir. 2008)

It shall be left to a future survey to fully explore the implications of using this three-step method of review. However, for present purposes, several general features of this proposal for scrutinizing occupational licensing regulations should be noted.

First, the addition of Prong 1, a threshold inquiry of sorts, would enable courts to reject outright attempts by state legislatures to restrict access to professions that are so harmless that there is no rational way people engaged in them could even potentially harm the public. Casket retail certainly comes to mind, as does floristry, interior decorating, and fashion advising. Of course, given enough time and motivation, the state could probably conjure up some minimally rational health or safety risk involved in every profession. But even if the threshold inquiry is always satisfied, it is still preferable to a vague "legitimate state interest" inquiry because it focuses the court only on those state interests that are *directly* tied to the public good, rather than allowing courts to be distracted by more tangential interests, such as "to ensure that professional Xs are well-trained."

Taken together, Prongs 2 and 3 call on the court to perform a rather detailed means-ends analysis of the challenged regulation,[232] with Prong 2 supplying the ends, and Prong 3 determining the rationality of the means. Most notable about Prong 2 is the specificity it requires. Vague assertions that a statute is necessary "to protect consumers" or "to further public safety" would not suffice to answer the question in Prong 2, as it would always be appropriate for the court to ask the follow-up question, Protect them from what?

Prong 3 is where most of the action is, as it asks the court to determine whether the specific requirements of the occupational

(upholding the licensing requirement for pest controllers generally, but sustaining the plaintiff's Equal Protection claim, because the exemption from licensing requirements given to some non-pesticide pest controllers, but not to the plaintiff, could not rationally further the state's public safety concerns and was obviously "designed to favor economically certain constituents at the expense of others similarly situated"); *cf.* New Orleans v. Dukes, 427 U.S. 297, 305 (1976) (exempting established pushcart vendors from the statutory prohibition because it is rational that such vendors contributed to the "distinctive character and charm that distinguishes the Vieux Carre," the preservation of which constituted the state's legitimate goal because of its importance to the city's economy).

232. As such, this part of my proposal may be more appropriately characterized as *descriptive* of what courts that have already applied rational basis with bite review to occupational licensing statutes have done in the past, see *supra* Section IV.B, rather than as *prescriptive* as to what future courts should do.

licensing regime are actually rationally related to the specific potential harm to public health or welfare identified in Prong 2. For example, even if a court reviewing a licensing regime for florists[233] found that the potential for a pricked finger from a poorly pruned flower or a broken wire is a legitimate public safety concern (thus satisfying Prong 2),[234] the court, under Prong 3, would have to further investigate whether the actual florist licensing requirements were rationally related to preventing finger pricks (e.g., extensive training on thorn detection and rogue wire tucking)—a step that the court in *Meadows*, applying traditional rational basis review, declined to take.[235]

Under this proposal, the permissible amount of attenuation between statute and public interest will likely still be a point of contention, but I anticipate that Prong 2's requirement that courts identify *specific* harms to be prevented will make for a cleaner analysis regarding whether the licensing requirements analyzed in Prong 3 are too attenuated from a legitimate interest of the state. For example, while a regulation requiring daycare workers to complete 300 hours of Emergency Medical Technician (EMT) training may seem rationally related to a vague interest like "*the promotion of child safety*," if the interest were instead something specific like "*protecting children from sex-offenders, open outlets, and choking hazards*," a 300-hour EMT training requirement may no longer seem rationally justified.[236] There will always be gray-areas, and there will always be close calls, but as one scholar put it, "Although such an evaluative method is hardly exact, it is certainly more effective than total deference [to the state]."[237]

233. *See, e.g.,* Meadows v. Odom, 360 F. Supp. 2d 811 (M.D. La. 2005).

234. *See id.* at 824, citing the following testimony in support of the state's regulation of florists:

> I believe that the retail florist does protect people from injury, the public and their own people. We're 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 when it's inserted into something they're going to handle, and I think that because of this training, that prevents the public from having any injury.

235. *See id.* (holding that "the floral licensing examination is rationally related to the state's desire that floral arrangements will be assembled properly in a manner least likely to cause injury" without actually looking into the details of the exam itself).

236. *Cf.* Cornwell v. Hamilton, 80 F. Supp. 2d 1101, 1107-09 (S.D. Cal. 1999).

237. Sandefur, *Equality of Opportunity*, *supra* note 110, at 499.

VI. CONCLUSION

The mere incantation of the words "to protect the health and welfare of the citizenry" is not a panacea for the constitutional ills of an occupational licensing statute that serves only to protect the economic interests of a few at the expense of the liberty interests of many. Chief Justice John Marshall warned about the dangers of such a "pretextual" use of government power, but he also assured us that "the danger of the abuse [would] be checked by the judicial department."[238] While it is certainly not the place of the judiciary to act as a superlegislature and second-guess the wisdom of every law from the bench, it is also not the place of the judiciary to completely abdicate its responsibility under the separation of powers doctrine.[239]

While there are compelling reasons for the Supreme Court to recognize that the right to earn a living is on equal footing with other fundamental rights, the Court need not even go that far in order to protect people like the monks of St. Joseph Abbey. All the monks ask for is the opportunity to support themselves through the labor of their hands and the ingenuity of their minds. And if the Supreme Court were to review occupational licensing regulations using heightened rational basis with bite scrutiny—a standard of review the Court has already deemed appropriate when other harmless acts made in the pursuit of happiness have been purposelessly impinged upon—then, perhaps, the monks will get their chance.

Marc P. Florman[240]

238. McCulloch v. Maryland, 17 U.S. 316, 359 (1819).

239. "[T]he minimum requirement that government decisions be something other than a raw exercise of political power has been embodied in constitutional doctrine under the due process clause before, during, and after the Lochner era." Thompson, *supra* note 28, at 605 (quoting Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1697 (1984)).

240. Special thanks to my family, especially Shelly, without whom I would forget to eat and would have no reason to dream of a more just society.