Do Your Job: Judicial Review of Occupational Licensing in the Face of Economic Protectionism

Despite efforts to challenge certain occupational licensing schemes as impermissibly driven by naked economic protectionism, federal appellate courts disagree on the legitimacy owed to the protectionist motivations that commonly prompt these regulations. To eliminate the current confusion, this Note advocates for the application of rational-basis-with-judicial-engagement review. The Supreme Court has demonstrated a willingness to engage in such analysis before—in both its animus jurisprudence over the past decades and more recently in its meticulous cost-benefit inquiry in Whole Woman's Health v. Hellerstedt*—thereby weakening its claims of incompetence in evaluating the motivations of lawmakers. To avoid hindering the economic wellbeing of all Americans, the Court should do its job in order to protect your right to do yours.*

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INTRODUCTION

Imagine you already hold a full-time job but want to earn some extra money by working at your friend's hair salon in downtown Nashville. The salon owner offers you a job shampooing clients before she cuts their hair. Just before starting, however, you learn that the State of Tennessee will not let you shampoo hair without a shampoo technician license from the state Board of Cosmetology.[1] Yet to acquire a shampoo technician license, you must complete three hundred hours in the "practice and theory of shampooing" at a certified cosmetology school, a thought even more troubling for your financial wellbeing.[2] What is the likelihood that you will incur the expense and undertake the effort to get the required licensing for this part-time side job? Slim to none.[3] Alternatively, what is the likelihood that you will successfully be able to lobby the state legislature to change this burdensome and arbitrary licensing law that is keeping you from working, particularly in light of your busy schedule due to your primary full-time job? Next to zero.[4]

Unfortunately, Tennessee's "shampoo technician" license typifies only one of dozens of occupational licensing laws that state legislatures enact in the name of consumer safety or public health,

1. BD. OF COSMETOLOGY & BARBER EXAMINERS, *Shampoo Technician*, TENN. DEP'T COM. & INS., https://www.tn.gov/commerce/article/cosmo-shampoo-technician (last visited July 9, 2017) [https://perma.cc/9Y6C-AZFE].

2. *Id.*

3. *See* MORRIS M. KLEINER, THE HAMILTON PROJECT: REFORMING OCCUPATIONAL LICENSING POLICIES 6 (2015) ("[S]tudies have . . . shown that licensing reduces employment growth and limits job opportunities, especially for low-income individuals . . . .").

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

many of which nonetheless unjustifiably burden the economic liberties of Americans to earn a living.[5] Specifically, the onerous requirements of occupational licensing tend to disproportionately burden racial minorities and the poor.[6] While certain licensing requirements generally do serve the important purpose of protecting public health and safety[7]—particularly for occupations in the medical or legal field that entail large information asymmetries[8]—the growth of licensing laws and the professions they regulate has entered the realm of the absurd.[9] Requiring government permission to lather and rinse another's hair—a task that virtually every American does every single day—is ludicrous.[10] With only arguably dubious connections to public health and safety, states now regulate and require licensing for interior designers,[11] florists,[12] lightning rod installers,[13] eyebrow threaders,[14]

5. Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL'Y 209, 216 (2016).

6. *See* KLEINER, *supra* note 3, at 6 (noting the negative economic effects of occupational licensing requirements on low-income individuals); David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89, 89–90 (1994) (discussing how occupational licensing laws have hindered the economic success of black Americans); James C. Cooper & William E. Kovacic*, U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 B.U. L. REV. 1555, 1566 (2010) (noting that a significant number of occupational licensing restrictions "harm those who are at the bottom of the economic pyramid"); Joseph Sanderson, Note, *Don't Bury the Competition: The Growth of Occupational Licensing and a Toolbox for Reform*, 31 YALE J. ON REG. 455, 460 (2014) ("[E]ven commentators generally friendly to regulation often criticize licensure: its burdens fall disproportionately on the economically disadvantaged . . . ."). For a different perspective on a classic constitutional law case, see also *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), where a San Francisco ordinance required a license from the city to run a laundry business, with the effect of excluding all Chinese-owned laundries.

7. Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 101 (Tex. 2015) (Willett, J., concurring) ("Government understandably wants to rid society of quacks, swindlers, and incompetents. And licensing is one of government's preferred tools, aiming to protect us from harm by credentialing certain occupations and activities.").

8. Cooper & Kovacic, *supra* note 6, at 1566 ("In most cases it is difficult, if not impossible, for a consumer to judge the quality of her physician or attorney, and these practitioners are unlikely to internalize the full costs of their mistakes. Some level of state credentialing and regulation makes sense.").

9. *See id.* ("No one seriously disputes the need for *some* form of professional regulation in the presence of large information asymmetries and serious spillover effects." (emphasis added)).

10. *See id.* (recognizing numerous areas where "the need for stringent licensing requirements and regulations seems less obvious").

11. *E.g.*, FLA. STAT. § 481.213 (2016).

12. *E.g.*, LA. STAT. ANN. §§ 3:3804(A)(2), 3:3809 (2017).

13. *See* VT. STAT. ANN. tit. 26, § 905 (2016).

14. *E.g.*, LA. STAT. ANN. § 37:582 (2017).

fortune tellers,[15] milk samplers,[16] upholsterers,[17] auctioneers,[18] and home entertainment installers,[19] just to name a handful.[20]

As legislatures pass increasing numbers of licensing laws, resulting in them becoming some of the most pervasive and ubiquitous statutes enacted in recent years,[21] occupational licensing laws thus offer a prime lens through which to analyze economic regulations more broadly and the standards of review to which they are subjected.[22] Part I of this Note begins with a discussion of the historical context of judicial review of potentially economic protectionist occupational licensing during the *Lochner* Era and its aftermath, including a brief examination of the current oversight to which "merely" economic regulations, such as occupational licensing, are subjected. It then dissects the current division among the circuit courts regarding whether economic protectionism, without something more, is a legitimate state interest for purposes of rational basis review.

Next, Part II addresses the underpinnings of these occupational regulations through the lens of public choice theory. Less than altruistic motives drive the passage of many of these regulatory schemes, and some are indeed passed with naked economic protectionism in mind.[23] Economic protectionism is typically described as a restraint on trade, commerce, or competition designed to benefit a particular group or industry.[24] Because the mere presence of economic protectionism suggests a potential breakdown of the political process, otherwise voiceless individuals can instead seek relief from overly burdensome regulations through the judiciary. Section II.B elaborates on the blurring of the traditional tiers of scrutiny used by the judiciary over

15. *E.g.*, MASS. GEN. LAWS ch. 140, § 185I (2016).

16. *E.g.*, N.D. CENT. CODE § 4-30-12 (2017).

17. *E.g.*, CAL. BUS. & PROF. § 19052 (2017).

18. *E.g.*, VA. CODE ANN. § 54.1-603 (2016).

19. *See* KLEINER, *supra* note 3, at 10 (listing home-entertainment installer as an occupation for which many states require a license).

20. Larkin, *supra* note 5, at 216–18 (citing KLEINER, *supra* note 3, at 9).

21. *See* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1102 (2014) ("Once limited to a few learned professions, licensing is now required for over 800 occupations."); Clark Neily, *Beating Rubber-Stamps into Gavels: A Fresh Look at Occupational Freedom*, 126 YALE L.J. FORUM 304, 304 (2016) (observing that about twenty-five percent of "American workers must obtain a government-issued license to do their job, up from less than five percent in the 1950s").

22. *See* Larkin, *supra* note 5, at 284 (discussing the various ways courts review occupational licensing).

23. *See id.* (discussing and critiquing the rationales behind occupational licensing); *infra* Section II.A.

24. *See, e.g.*, Craigmiles v. Giles, 312 F.3d 220, 224 (2002) ("Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose.").

the past decades,[25] and how the tiers have lacked clarity from inception.[26] More recent decisions demonstrate that the Court has become even more opaque in explaining which test it is applying, leaving lower courts to wonder.[27] Additionally, while some commentators have posited heightened tiers of scrutiny as possible standards of review for economic regulations, this Part concludes with a critique of why advocating for intermediate or strict scrutiny for these regulations would likely subject them to excessive judicial oversight and be too great a burden on the judicial branch,[28] especially given the prevalence of occupational licensing requirements.[29]

Finally, Part III of this Note proposes a solution: a new take on rational basis—rational-basis-with-judicial-engagement review—to address occupational licensing regulations. This type of judicial review would empower courts to do their jobs: to engage with the record and analyze the purported rationales that motivated the decisionmaker, without blindly deferring to the legislature and the justifications that it puts forward.[30] Courts should not concoct their own justifications to save an economic regulation if the government, as the party who enacted the legislation, cannot articulate a legitimate, substantiated rationale on its own.[31] Instead, a court, if it suspects economic protectionist motivations are behind the law, should practice "judicial engagement" in examining the evidence put forth by the parties.[32]

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25. *See* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 485–91 (2004) (critiquing the Court's application of differing standards of review); Susannah W. Pollvogt, *Marriage Equality,* United States v. Windsor*, and the Crisis in Equal Protection Jurisprudence*, 42 HOFSTRA L. REV. 1045, 1062 (2014) (recognizing "an embarrassing degree of doctrinal sloppiness").

26. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 109 (1973) (Marshall, J., dissenting) ("[I]t seems to me inescapably clear that this Court has consistently adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification.").

27. *See* Pollvogt, *supra* note 25, at 1045 (discussing the reasons for the "lack of doctrinal consolidation" amongst lower courts*); infra* Section II.B.

28. James M. Buchanan, *Good Economics–Bad Law*, 60 VA. L. REV. 483, 490–92 (1974).

29. *See infra* Section II.C.

30. *See* Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 93 (Tex. 2015) (Willett, J., concurring) (discussing the court's role in "[i]nvalidating irrational laws"); *infra* Section III.A.

31. *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (describing the current state of rational basis review of economic regulations: "[B]ecause [the Court] never require[s] a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant . . . whether the conceived reason for the challenged distinction actually motivated the legislature"); Neily, *supra* note 21, at 308 ("Blind acceptance of asserted—but unsubstantiated—justifications for government regulation is the *sine qua non* of the rational basis test that the Supreme Court applies to most occupational-licensing challenges.").

32. *See Patel*, 469 S.W.3d at 93–97 (discussing "judicial engagement" in the context of occupational licensing); *see also* John O. McGinnis, *Reforming Constitutional Review of State Economic Legislation*, 14 GEO. J.L. & PUB. POL'Y 517, 522 (2016) (arguing that the judiciary is particularly well suited to examine the record due to "its salient institutional structure . . . the

Naked economic protectionism, this Note argues, fails as a legitimate government interest, specifically for purposes of rational basis review, and therefore should trigger a more searching inquiry by the reviewing court.[33] If a challenger can produce substantial evidence of economic protectionism, without corresponding non-trifling public health or safety benefits, the court should strike the regulation if it unreasonably burdens an individual's economic liberty.[34] The Supreme Court recently demonstrated that the judiciary is indeed capable of an evenhanded and meaningful review of state legislation purportedly enacted in the name of public health.[35] Moreover, utilizing a judicial engagement standard of review would likely prompt state legislators to be more thoughtful in their lawmaking, thereby improving the evidentiary record that the court reviews.

While this solution may have seemed more of a fool's errand leading up to the 2016 presidential election, the application of rational basis-with-judicial-engagement now appears more viable. The possible shift to a more conservative-leaning Supreme Court favoring the idea of judicial engagement seems plausible, making the constitutional challenge of occupational licensing less of a Sisyphean task.

I. CHALLENGING LICENSING REQUIREMENTS: THEN AND NOW

The following Part first presents a discussion of the historical context of the Supreme Court's examination of occupational licensing and other general economic regulations.[36] With that historical context lingering in the background, it then details the stark division that has developed between the federal appellate courts over the past decade

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adversarial proceeding where each side has incentives to scrutinize relentlessly the factual claims of its opponent"); *infra* Section III.A.

33. *See* Larkin, *supra* note 5, at 285 ("Favoring groups for reasons that are unrelated to, and do not advance, the overall public welfare should not be deemed 'legitimate' in a system devoted to the even-handed application of the law."); Katharine M. Rudish, Note, *Unearthing the Public Interest: Recognizing Intrastate Economic Protectionism as a Legitimate State Interest*, 81 FORDHAM L. REV. 1485, 1503–04 (2012) (discussing "[w]hat constitutes a legitimate government purpose"); *infra* Part III.

34. *See* City of Philadelphia v. New Jersey, 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 also* Alden F. Abbott, *Raisins, Teeth, Coffins, and Economic Liberty*, 10 N.Y.U. J.L. & LIBERTY 130, 148–49 (2016) (arguing that recent trends point to a more expansive application of the rational basis test "when it comes to analyzing anticompetitive licensing restrictions and related affronts to one of the most basic civil rights of all: the right to earn a living"); *infra* Section III.A.

35. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2313 (2016) (evaluating the reasons purportedly motivating a Texas statute restricting the number of abortion facilities in the state); *infra* Section III.A.2.

36. *See infra* Section I.A.

with regard to whether pure economic protectionism, without something more, constitutes a legitimate government interest.[37] Additionally, this Part evaluates a well-publicized case decided by the Supreme Court of Texas and the resulting treatise on economic liberty.[38]

A. The Phantom of the Lochner *Era*[39]

The names of only a handful of cases in the history of American jurisprudence reek of notoriety, and "*Lochner*" is one of them.[40] According to the typical understanding of the case, *Lochner v. New York* is easily dismissed as a clear-cut example of the Court exceeding its authority and inappropriately acting as a "super-legislature" in striking a piece of economic legislation.[41] Consequently, "[s]ince the New Deal Era, the Court had largely treated *Lochner* like the plague."[42] However, what if the true story behind *Lochner* is more complicated than it appears at first glance?[43]

The law at issue in *Lochner*, the New York Bakeshop Act of 1895, limited the working hours in bakeries to ten hours per day and sixty hours per week.[44] In defending the law, the State justified the limitations on hours worked as a protection for bakers' health.[45] Still, in a 5-4 decision, the Supreme Court held that this limitation on

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37. *See infra* Sections I.B.1, I.B.2.

38. *See infra* Section I.B.3.

39. Amanda Shanor, *Business Licensing and Constitutional Liberty*, 126 YALE L.J. FORUM 314, 315 (2016) ("Often called the *Lochner* Era, that period from the end of the Gilded Age through much of the Great Depression has come to symbolize the judicial striking down of economic regulation.").

40. *See* Paul Kens, Lochner v. New York*: Tradition or Change in Constitutional Law?*, 1 N.Y.U. J.L. & LIBERTY 404, 405 (2005) ("The decision is commonly ranked along with *Dred Scott* as a prime example of judicial malfunctioning and as the most discredited decision in Supreme Court history."); Ian Millhiser, *The Most Incompetent Branch*, 23 GEO. MASON L. REV. 507, 510–11 (2016) ("Short of *Dred Scott v. Sanford* or *Plessy v. Ferguson*, there is literally no decision in American history that is less rooted in accepted legal traditions than *Lochner*."); Casey C. Sullivan, *13 Worst Supreme Court Decisions of All Time*, FINDLAW (Oct. 14, 2015, 11:51 AM), http://blogs.findlaw.com/supreme_court/2015/10/13-worst-supreme-court-decisions-of-all-time.html [https://perma.cc/S37Z-QWMU] (naming *Lochner v. New York* as one of the "most terrible, horrible, no good, very bad Supreme Court decisions").

41. Neily, *supra* note 21, at 306 (describing *Lochner* as a "one-word argument against robust judicial review . . . more than a century later").

42. Paul J. Larkin, Jr., *A Tale of Two Cases*, 73 WASH. & LEE L. REV. 467, 471 (2016).

43. *See, e.g.*, DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 125 (2011) (suggesting that "*Lochner* and liberty of contract jurisprudence more generally have been unfairly maligned . . ."); *see also infra* Section II.A.

44. *See* Kens, *supra* note 40, at 409 (explaining the specific provisions of the New York Bakeshop Act of 1895 and the legislative history surrounding its passage).

45. Lochner v. New York, 198 U.S. 45, 59–61 (1905).

working hours unconstitutionally infringed upon the freedom to contract, as guaranteed by the Fourteenth Amendment of the Constitution.[46] Because "the trade of a baker, in and of itself, is not an unhealthy one," the Court reasoned, the New York state legislature possessed no authority to "interfere with the right to labor" in such a way.[47] However, the *Lochner* Court did not fully investigate the rationales proffered by the State for the regulations,[48] instead flatly invalidating the law without necessarily considering the interests served by the legislation.[49]

After more than three decades under the reign of *Lochner*, the Court signaled its move away from the fervent protection of economic due process with its endorsement of a minimum wage law for women in *West Coast Hotel v. Parrish*.[50] Refusing to pay a chambermaid the difference between the wages already paid to her and the minimum wage fixed by law,[51] a hotel operator in the State of Washington then challenged the state's minimum wage law for women as unconstitutional and violative of his due process rights.[52] The State defended the law as necessary to shield "women and minors . . . from conditions of labor which have a pernicious effect on their health and morals,"[53] and the Court agreed.[54] The freedom to contract was not absolute,[55] the Court suggested, but in fact, the legislature "has necessarily a wide field of discretion" in passing measures to protect worker health and safety and ensure "wholesome conditions of work."[56] Notably, however, while the Court approved restrictions on the freedom

46. *Id.* at 53.

47. *Id.* at 59.

48. *But see id.* at 70–72 (Harlan, J., dissenting) (describing in detail the maladies that afflicted bakers at the time as a result of their occupation, which could have served as the impetus for the law at issue); Millhiser, *supra* note 40, at 518–19 (elaborating on the working conditions of bakeries in New York City at the time of *Lochner*).

49. *See* ARCHIBALD COX, THE COURT AND THE CONSTITUTION 136 (1987) (explaining that the justices of the *Lochner* Era grew up in an America ignorant of "large-scale industrial organization, urban squalor, and the helplessness of the individual in dealing with organized wealth").

50. *Compare* Adkins v. Children's Hosp., 261 U.S. 525, 562 (1923) (striking a minimum wage law for women and children working in the District of Columbia), *with* W. Coast Hotel v. Parrish, 300 U.S. 379, 400 (1937) (upholding the State of Washington's minimum wage law for women and overruling *Adkins*).

51. *W. Coast Hotel*, 300 U.S. at 388.

52. *Id.*

53. *Id.* at 386 (citing language from Washington's Minimum Wages for Women Act).

54. *Id.* at 393 (detailing other state statutes regulating contracts between employer and employee that the Supreme Court had already upheld).

55. *Id.* at 391 ("The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty.").

56. *Id.* at 399 ("Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the Legislature is entitled to its judgment.").

to contract between employers and employees, it also emphasized that this was a minimum wage law applicable only to *women*, "in whose protection the state has a special interest."[57]

By 1938, however, the Court had fully changed course and abandoned the full-throated protection of the freedom to contract and economic due process with its decision in *United States v. Carolene Products*.[58] The issue in *Carolene Products* implicated the Filled Milk Act of 1923, a federal statute proscribing the shipment of so-called "filled" milk, or skimmed milk combined with a non-milk fat to resemble milk or cream.[59] Despite Congress's urging that the law was intended to protect the public from "adulterated . . . food, injurious to the public health,"[60] a manufacturer of the cheaper milk alternative challenged the law as an unconstitutional violation of due process rights.[61] This time, however, the Court was not persuaded.[62] Writing for the Court, Justice Stone drove the final nail into *Lochner*'s coffin, admonishing the challengers that

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon *some rational basis* within the knowledge and experience of the legislators.[63]

Although not part of the Court's official holding, another result of the Court's decision in *Carolene Products* was its "Famous Footnote Four," which recognized the existence of particular instances in which the presumption of constitutionality would be inapplicable and where

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57. *Id.* at 394.

58. 304 U.S. 144 (1938).

59. 21 U.S.C. §§ 61–63 (2012). Interestingly, even in 2017, the Filled Milk Act still remains a valid, though unenforced, part of the U.S. Code. *See* Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397, 426 ("After a period of relatively vigorous enforcement, the executive branches of the state and federal governments grew lax about prosecuting violations of the filled milk statutes [and the] Department of Agriculture eviscerated the federal statute through interpretation . . . ."). Many of the canned milk products widely available today in grocery stores across the country are manufactured and sold notwithstanding the prohibition against them.

60. § 62. *But see* Miller, *supra* note 59, at 406 (detailing the history of the Filled Milk Act of 1923 and clarifying that in actuality, "filled milk" was "simply a compound of skimmed milk and vegetable oil").

61. *Carolene Prods.*, 304 U.S. at 146–47.

62. *Id.* at 154. For alternative explanations for why the Supreme Court changed course, see, for example, BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998).

63. *Carolene Prods.*, 304 U.S. at 152 (emphasis added).

the law would be "subjected to more exacting judicial scrutiny,"[64] including in cases involving discrete and insular minorities. Indeed, the Court's later reliance on tiers of scrutiny to justify decisions originated in "Footnote Four."[65]

Rational basis review sits on the lowest rung of the Court's tiers of scrutiny. Employed for any law or regulation deemed "merely economic," rational basis review invariably ends with the reviewing court upholding the law, with few exceptions.[66]

For the purposes of traditional rational basis review, courts typically conduct the following two-part inquiry: (1) Is there a legitimate government interest, and (2) does the law in question bear a rational relation to that legitimate state purpose?[67] For a caricature of this lenient standard, one need only look to the Supreme Court's rationale in *Railway Express v. New York*.[68] There, a New York City ordinance forbade the operation of certain types of "advertising vehicles," purportedly as a public safety measure aimed at preventing distraction to vehicle drivers and pedestrians.[69] Despite failing to address "even greater [distractions] in a different category, such as the vivid displays on Times Square," the law passed constitutional muster,

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64. *Id.* at 152 n.4:

> There may be [a] narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny . . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities [or] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. (internal citations omitted);

see also Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 GEO. J.L. & PUB. POL'Y 373, 375 (2016) (noting that "Footnote Four" clarifies that "certain rights . . . would receive real judicial scrutiny, while all others would be reviewed under the nascent rational-basis test").

65. *See* Alexandra L. Klein, Note, *The Freedom to Pursue a Common Calling: Applying Intermediate Scrutiny to Occupational Licensing*, 73 WASH. & LEE L. REV. 411, 424 (2016) (" 'Footnote Four' has since become famous as the place where the Supreme Court established rational basis review as the standard for economic legislation and paved the way for tiers of judicial review.").

66. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955) (upholding a statute regarding licensing for visual care). *But see* Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 290 (2d Cir. 2015) (Droney, J., concurring) ("If even the deferential limits on state action fall away simply because the regulation in question is economic, then it seems that we are not applying any review, but only disingenuously repeating a shibboleth.").

67. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) ("To withstand equal protection review, legislation . . . must be rationally related to a legitimate government purpose.").

68. 336 U.S. 106 (1949).

69. *Id.* at 109.

according to the Court, because it had a "relation to the purpose for which it [was] made."[70]

Six years later, the Court again demonstrated its penchant for extremely deferential review of economic regulations in *Williamson v. Lee Optical*, where an Oklahoma statute prohibited any individual not licensed as an optometrist or ophthalmologist from selling or replacing eyeglasses without a prescription.[71] Acknowledging that the law "may exact a needless, wasteful requirement in many cases," Justice Douglas, writing for the majority, nevertheless declined to further investigate the rationales behind the law.[72] Instead, the Court speculated about the various possibilities that *may* have motivated the state legislature, settling on the state's interest in encouraging visits to the eye doctor for the "detection of latent ailments or diseases" as a sufficient justification.[73] Notably, however, the Court did not address economic protectionism and has not given its blessing to naked economic protectionism as a legitimate state interest, in *Lee Optical* or since.

The Court's approach in *Railway Express* and *Lee Optical* epitomizes the most deferential, borderline-lackadaisical, method of review, and consequently these case names are commonly used as shorthand for this hands-off approach to judicial scrutiny.[74] As Justice Douglas emphasized in *Lee Optical*, "[F]or protection against abuses by legislatures the people must resort to the polls, not to the courts."[75] Moreover, both *Railway Express* and *Lee Optical* exemplify typical iterations of the Supreme Court's review of what it deems to be "merely economic" regulations, including occupational licensing laws.

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70. *Id.* at 109–10. *But see id.* at 117 (Jackson, J., concurring) ("While I do not think highly of this type of regulation, that is not my business . . . .").

71. The law had the (perhaps intended) effect of putting opticians—non-doctor "artisans qualified to grind lenses, fill prescriptions, and fit frames"—out of business, while requiring consumers to obtain a prescription before having their eyeglasses repaired or refitted. *Lee Optical*, 348 U.S. at 484–86.

72. *Id.* at 488 ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.").

73. *Id.* at 487.

74. *See* Clark Neily, *Litigation Without Adjudication: Why the Modern Rational Basis Test Is Unconstitutional*, 14 GEO. J.L. & PUB. POL'Y 537, 542 (2016) (noting that *Lee Optical* "has become a shorthand way of referring to the rubber-stamp form of rational basis review").

75. *Lee Optical*, 348 U.S. at 488 (citing Munn v. Illinois, 94 U.S. 113 (1876)); *see infra* Section II.A. This tacit separation of powers argument typifies the thinking behind courts' and judges' reluctance to engage in meaningful judicial review of economic regulations.

B. The Circuit Split: Is Economic Protectionism a Legitimate State Interest?

Over the past decade, a distinct circuit split has developed regarding whether naked economic protectionism, without something more, is a legitimate government interest.[76] Applying rational basis review in assessing constitutional challenges, some circuits have invalidated state occupational licensing requirements, while others have upheld the regulations, notwithstanding evidence that pure economic protectionism drove the state legislature to enact the requirements.[77] This Section summarizes the federal appellate cases on each side of the economic protectionism schism, followed by a discussion of the widely publicized Texas Supreme Court eyebrow threading case that resulted in a treatise on economic liberty and judicial engagement.

1. Casketing Economic Protectionism: Fifth and Sixth Circuits

A Tennessee statute served as the impetus for the first of the "casket cases" in *Craigmiles v. Giles*.[78] The Tennessee Funeral Directors and Embalmers Act ("FDEA") required that any individual engaged in "funeral directing" be licensed as a funeral director by the Board of Funeral Directors and Embalmers.[79] However, the FDEA also included the sale of caskets and other funeral merchandise in that definition of funeral directing.[80] In order to be eligible to sit for the Tennessee Funeral Arts Examination, an applicant had to "undergo two years of education and training, very little of which . . . pertains to casket design or selection."[81] As such, any individual interested in entering the business of casket sales would first need to learn how to embalm a body before she could simply sell the box.[82]

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76. *See* Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 285 (2d Cir. 2015) (holding that there were "rational grounds for the Dental Commission to restrict the use of [LED] lights to trained dentists"); St. Joseph Abbey v. Castille, 712 F.3d 215, 226 (5th Cir. 2013) (holding that no rational basis existed for a rule restricting sale of caskets); Powers v. Harris, 379 F.3d 1208, 1225 (10th Cir. 2004) (holding that "intrastate economic protectionism . . . is a legitimate state interest"); Craigmiles v. Giles, 312 F.3d 220, 222 (6th Cir. 2002) (holding that a provision limiting the sale of caskets "lacked a rational basis").

77. *Sensational Smiles*, 793 F.3d at 285; *Powers*, 379 F.3d at 1225.

78. *Craigmiles*, 312 F.3d at 222.

79. *Id.*

80. *See* TENN. CODE ANN. § 62-5-101 (2017) (exempting the sale of "funeral merchandise" from the definition of "funeral directing" as a result of *Craigmiles*).

81. *Craigmiles*, 312 F.3d at 222.

82. *Id.* ("Applicants may . . . complete *either* one year of course work at an accredited mortuary school *and* then a one-year apprenticeship with a licensed funeral director *or* a two-year apprenticeship.").

Forbidden from operating their businesses, Tennessee-based casket retailers ultimately challenged the FDEA on constitutional grounds, as violative of the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment.[83] Remarking that "judicial invalidation of economic regulation under the Fourteenth Amendment has been rare in the modern era," the United States Court of Appeals for the Sixth Circuit nonetheless held the statute to be a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[84] To support its holding, Judge Boggs, writing for the unanimous panel, emphasized that "[c]ourts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose"[85] and that the Tennessee law bore no rational relationship to any of the myriad of government purposes the State proffered.[86] Despite acknowledging that it was applying rational basis review, the court nevertheless delved earnestly into the effects, justifications, and actual motivation of the law.[87]

The United States Court of Appeals for the Fifth Circuit elaborated on the *Craigmiles* line of reasoning in its review of a similar provision adopted in Louisiana.[88] Prohibited from selling their monastic wooden caskets by a rule of the Louisiana Board of Funeral Directors, a group of Benedictine monks challenged the Board's rule granting funeral homes the exclusive right to sell caskets.[89] Finding "no rational relationship . . . between public health and safety and restricting intrastate casket sales to funeral directors," the court struck the rule.[90] The unanimous decision in *St. Joseph Abbey v. Castille* articulated the potential problems that arise from a state rule untethered to a "constitutionally permissible objective"[91] and held that "mere economic protection of a particular industry" is not a legitimate governmental purpose.[92] Notwithstanding the general deference given to legislatures

83. *Id.* at 223.

84. *Id.* at 229.

85. *Id.* at 224 (citing City of Philadelphia v. New Jersey, 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.")).

86. *Id.* at 228.

87. *Id.* at 227 (referencing the Supreme Court's suspicion of a "legislature's circuitous path to legitimate ends" in City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)); *see also infra* Section III.A.1.

88. St. Joseph Abbey v. Castille, 712 F.3d 215, 222–23 (5th Cir. 2013).

89. *Id.* at 217–19.

90. *Id.* at 226.

91. *Id.* at 227.

92. *Id.* at 222.

and rulemakers under rational basis review, the Fifth Circuit stressed that its examination of the "rational relation" between the regulation and the stated purpose was "well within Article III's confines of judicial review."[93]

2. Resuscitating Economic Protectionism: Second and Tenth Circuits

In contrast to the Sixth and Fifth Circuits in *Craigmiles* and *St. Joseph Abbey*, the United States Courts of Appeals for the Second and Tenth Circuits have staked out ground on the opposite side of the chasm, finding no constitutional issue with naked economic protectionism. Much like the facts in *Craigmiles*, the State of Oklahoma passed a nearly identical prohibition on casket sales, which an Oklahoma-based couple challenged as unconstitutional after being barred from selling caskets over the internet.[94] The business owners sued the Oklahoma State Board of Embalmers and Funeral Directors, alleging violations of their constitutional rights.[95] However, despite acknowledging that obtaining a license was "no small feat," the Tenth Circuit held that intrastate economic protectionism indeed was not only a legitimate state interest,[96] but a legitimate state hobby: "[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."[97] While standing with the other judges on the panel in the judgment upholding the Oklahoma casket sales restriction as "rationally related to [that] legitimate end," now-Chief Judge Tymkovich filed a separate concurring opinion to express his view that economic protectionism may be a legitimate state

93. *Id.* at 227.

94. Powers v. Harris, 379 F.3d 1208, 1211 (10th Cir. 2004).

95. *Id.*

96. Under its extensive Dormant Commerce Clause jurisprudence, the Supreme Court has come to the opposite conclusion regarding economic protectionism for *inter*state commerce. In essence, the Dormant Commerce Clause prohibits states from enacting protectionist legislation that would burden out-of-state participants, and the Court has demonstrated a penchant for uncovering such economic protectionism affecting interstate commerce. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 567 (1995) (holding that the Gun-Free School Zones Act exceeded Congress's power to regulate interstate commerce under the Commerce Clause); City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978) (holding unconstitutional a New Jersey law banning the importation of out-of-state waste, inferring that it was enacted for "protectionist reasons" when the state could offer no legitimate justification). The plaintiffs in *Powers* alleged an alternative claim that Oklahoma's restriction on casket sales violated the Dormant Commerce Clause, but to no avail. *Powers*, 379 F.3d at 1214 n.11; *see also* Edlin & Haw, *supra* note 21, at 1135–36 (noting that the outcome in *Powers v. Harris* "eviscerates constitutional law's ability to safeguard robust competition and its benefits to consumer welfare").

97. *Powers*, 379 F.3d at 1221.

interest, but only if it "advances either the general welfare or a public interest."[98]

The Second Circuit has likewise given its blessing to naked economic protectionism, or what it pithily deems "politics."[99] In 2011, the Connecticut State Dental Commission issued a rule empowering only licensed dentists to provide certain teeth-whitening procedures, specifically those services involving a light-emitting diode ("LED") light to enhance the whitening process.[100] Sensational Smiles, a non-dentist teeth-whitening business, filed suit, arguing that the Connecticut regulation prohibiting them from shining LED lights at consumers' teeth was unconstitutional because there was no rational relationship between the rule and the state's interest in the public's oral health.[101] The business owners instead alleged that the true motive for the passage of the rule was not protection of consumers' dental health but "protect[ion] [of] the monopoly on dental services enjoyed by licensed dentists in the state of Connecticut."[102]

However, in reviewing the constitutional challenge to the Connecticut Dental Commission's rule, the Second Circuit found no merit in the allegations of "naked economic protectionism."[103] Judge Calabresi, writing for himself and one other judge on the panel, asserted that a rational basis existed for the regulation and therefore it survived the challenge, notwithstanding that the regulation was likely passed with the "sole purpose [of] shield[ing] a particular group from intrastate economic competition."[104]

The divergence in the outcomes of these cases from those of the Fifth and Sixth Circuits illuminates the deep split on this issue. Moreover, that the cases upholding economic-protectionist licensing regimes are themselves fractured opinions bolsters the seriousness of this fundamental disagreement within the federal appellate courts. To elucidate, both *Powers* and *Sensational Smiles* issued two opinions each for the three-judge panels, while the circuits condemning naked

98. *Id.* at 1225–26 (Tymkovich, J., concurring) (noting that the Supreme Court has insisted that "pure economic parochialism" must "advance some public good" (citing Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955))).

99. Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 285–87 (2d Cir. 2015).

100. *Id.* at 283.

101. *Id.* at 283–84.

102. *Id.* at 285.

103. *Id.* at 285, 288.

104. *Id.* at 286–87 ("Much of what states do is to favor certain groups over others on economic grounds. We call this politics."). *But see supra* note 96 (discussing the Supreme Court's concern for interstate economic protectionism).

economic protectionism issued single unified opinions.[105] Thus, even the judges on the reviewing courts cannot agree whether economic protectionism alone is a sufficient justification for upholding regulations under rational basis review.[106] Clearly, then, given the inter- and intra-circuit nature of the split, the issue warrants Supreme Court clarification.[107]

3. Don't Thread on Me: A Treatise on Economic Liberty[108]

A recent case from the Texas Supreme Court, *Patel v. Texas Department of Licensing & Regulation*, offers another compelling data point on this circuit split. In a case filed in 2009, the Texas Supreme Court ultimately issued a ruling in 2015 regarding the state's 750-hour training requirement for eyebrow threaders.[109] The case went up to the state's highest court after the Texas Department of Licensing and Regulation ("TDLR") ordered several salon owners to complete the 750 hours of training to obtain the required certificate or else shutter their eyebrow threading businesses.[110] The threaders challenged the licensing requirement as an unconstitutional infringement on their due process liberties under both the state and federal constitutions.[111]

Unlike the approach courts typically take when reviewing economic regulations,[112] the Texas Supreme Court conducted a much more rigorous review of the record, the rationales put forth by the state licensing board for enacting the requirements, and the burdens imposed

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105. *Compare* St. Joseph Abbey v. Castille, 712 F.3d 215, 227 (5th Cir. 2013) (unanimous opinion), *and* Craigmiles v. Giles, 312 F.3d 220, 229 (6th Cir. 2002) (unanimous opinion), *with Sensational Smiles*, 793 F.3d at 282 (separate concurring opinion by Judge Droney), *and* Powers v. Harris, 379 F.3d 1208, 1225 (10th Cir. 2004) (separate concurring opinion by Judge Tymkovich).

106. *See Sensational Smiles*, 793 F.3d at 288 (Droney, J., concurring) (emphasizing that "there must be at least some perceived public benefit for legislation . . . to survive rational basis review under the Equal Protection and Due Process Clauses").

107. *See* SUP. CT. R. 10(a) (identifying cases where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" as a compelling reason for Supreme Court review); Melanie DeFiore, Note, *Where Techs Rush In, Courts Should Fear to Tread: How Courts Should Respond to the Changing Economics of Today*, 38 CARDOZO L. REV. 761, 765 (2016) ("By explicitly stating that such economic protectionism was constitutionally viable, the Second Circuit amplified an existing disagreement amongst the federal circuit courts.").

108. Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 95 (Tex. 2015) (Willett, J., concurring).

109. *Id.* at 73 (majority opinion).

110. *Id.* at 74.

111. *Id.* (quoting the challengers' complaint against the law that it "violated their constitutional right 'to earn an honest living in the occupation of one's choice free from unreasonable governmental interference' ").

112. *See id.* at 100 (Willett, J., concurring) (describing the traditional rational basis test as "tantamount to no test at all; at most it is pass/fail, and government never fails").

on salon owners and practitioners.[113] In evaluating the "actual, real-world effect" of the law, the Texas Supreme Court held that a law may be deemed unconstitutional if "the statute's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest."[114] Regarding the regulation at issue, the majority opinion examined the large number of training hours unrelated to the practice of eyebrow threading, the out-of-pocket costs expended to enroll in the training, and the foregone employment opportunities while acquiring the hours.[115] In light of the regulation as a whole, the Texas Supreme Court ultimately determined that the requirements made the regulation, "not just unreasonable or harsh," but oppressively burdensome.[116]

Admittedly, Justice Willett, in his fifty-seven-page concurrence, emphasized how the state's constitution offered more expansive protections of economic liberty than the U.S. Constitution: "One of our constitutions (federal) is short, the other (state) is long—like *really* long—but both underscore liberty's primacy. . . ."[117] Nevertheless, the *Patel* decision demonstrates that when it comes to investigating the governmental interest behind the passage of a law and the subsequent burdens imposed on average citizens, courts are not entirely impotent.[118]

II. UNDERSTANDING THE RATIONALES FOR AND THE JUDICIAL REVIEW OF OCCUPATIONAL LICENSING LAWS

This Part analyzes the rise of protectionist occupational licensing schemes through the lens of public choice theory, positing that powerful special interest groups motivate state legislatures, not concerns for the public good.[119] Next, this Part addresses the impenetrable haze surrounding the Supreme Court's use of tiers of scrutiny, contending that the obscurity of the standards furnishes an

113. *Id.* at 87 (majority opinion) ("Although whether a law is unconstitutional is a question of law, the determination will in most instances require the reviewing court to consider the entire record, including evidence offered by the parties.").

114. *Id.*

115. *Id.* at 90.

116. *Id.*

117. *Id.* at 92, 110 (Willett, J., concurring) ("The economic-liberty test under . . . the Texas Constitution is more searching than the minimalist test under the Fourteenth Amendment to the United States Constitution." (emphasis omitted)).

118. *See id.* at 120 ("[A]n independent judiciary must *judge* government actions, not merely rationalize them. Judicial restraint doesn't require courts to ignore the nonrestraint of the other branches, not when their actions imperil the constitutional liberties of people increasingly hamstrung in their enjoyment of 'Life, Liberty and the pursuit of Happiness.' ").

119. *See infra* Section II.A.

opportunity for a more significant role for judicial engagement when reviewing occupational licensing regimes.[120] Noting the inadequacy of the judiciary's tradition of near-blind deference, this Part concludes with a discussion of the futility of advocating for a heightened standard of review for all economic regulations.[121]

A. Neither the Public Choice nor for the Public Good: Understanding Occupational Licensing Through Public Choice Theory

As legal scholar Paul J. Larkin, Jr.[122] explains in his recent article, public choice theory best explains the rise in occupational licensing requirements, at least in part.[123] Using basic economic principles, public choice theory posits that politicians and other lawmakers are generally motivated not by altruistic concerns for their constituents but by economic self-interest.[124] In an ideal world, only a general concern for the public at large and a sense of civic duty would inspire law and decisionmakers. By questioning this illusory dream, public choice theory presents a more realistic vision of the world, recognizing that lawmakers are human, too, and thus not infrequently motivated by self-interest.[125]

Public choice theory not only uncovers the general motives of legislators but also helps to explain the prevalence of occupational licensing laws for even the most mundane and arguably harmless

120. *See infra* Section II.B.

121. *See infra* Section II.C.

122. Senior Legal Research Fellow, Heritage Foundation; M.P.P., the George Washington University (2010); J.D., Stanford Law School (1980); B.A., Washington & Lee University (1977).

123. Larkin, *supra* note 5, at 227–28 ("By applying principles of microeconomics and game theory to politics, Public Choice Theory explains why regulated businesses, not consumers, prefer and seek out licensing requirements.").

124. As the founding economist James M. Buchanan has described it, public choice theory brings to light the realities of political institutions, exposing "politics without romance": "Public choice theory has been the avenue through which a romantic and illusory set of notions about the workings of governments and the behavior of persons who govern has been replaced by a set of notions that embody more skepticism about what governments can do and what governors will do . . . ." JAMES M. BUCHANAN, *Politics Without Romance*, *in* 1 COLLECTED WORKS OF JAMES M. BUCHANAN: THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY 45, 46 (1999). *See also* Steve Mariotti, *What Every Voter Should Know About Public Choice Theory*, HUFFINGTON POST BLOG (Sept. 29, 2015, 8:31 PM), http://www.huffingtonpost.com/steve-mariotti/what-every-voter-should-k_b_8217650.html [https://perma.cc/8TYH-6UT7] (explaining the importance of public choice theory in the context of the 2016 presidential election).

125. *But see* Cooper & Kovacic, *supra* note 6, at 1590 (suggesting that "it would be a purely subjective judgment to say that a state legislature adopted the anticompetitive [occupational licensing] policy because its members were 'captured,' rather than because they believed the adopted policy was in the public interest").

professions.[126] The combination of public choice theory and restraints on occupational freedom is no modern development.[127] For instance, returning to the *Lochner* case, "subsequent analysts . . . have demonstrated that the law at issue in *Lochner*, despite its guise as a health regulation, was probably a rent-seeking, competition-reducing measure supported by labor unions and large bakeries for the purpose of driving small bakeries and their large immigrant workforce out of business."[128]

Almost always, legislatures tout consumer health and safety as the justification for enacting many of these occupational licensing laws, but who exactly is the group pushing their passage?[129] Consumer safety groups? Public health institutes? Peel away the veneer of "public health and safety" and, ironically enough, it is usually the trade organizations themselves that push for these licensing requirements.[130] Essentially, these trade groups are saying, "Look how dangerous we are, you must regulate us!"[131]

But really, these are special interest groups—the cosmetology lobby, in the case of eyebrow threaders or shampoo technicians—exerting their influence on state legislatures to stifle competition and prevent newcomers from capitalizing on services that cosmetologists already provide.[132] Once the beauticians have eliminated the possibility

126. *See* Klein, *supra* note 65, at 465 ("Occupational licensing statutes serve a useful purpose, but their utility is often clouded by legislation designed to restrict competition and pad incumbents' power, rather than protect the public.").

127. *See* Larkin, *supra* note 5, at 226 (marking private firms' involvement in licensing as "not an aberration caused by unique modern developments").

128. Rebecca L. Brown, *Constitutional Tragedies: The Dark Side of Judgment*, *in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 139, 142 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998); *see supra* Section I.A. *But see* Kens, *supra* note 40, at 409 (noting that the suggestion that the law was a form of rent-seeking is based not on primary sources from the time, "but rather on a set of assumptions growing out of modern economic theory").

129. Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 104 (Tex. 2015) (Willett, J., concurring) ("As Nobel economist Milton Friedman observed, 'the *justification*' for licensing is always to protect the public, but 'the *reason*' for licensing is shown by observing who pushes for it—usually those representing not consumers but vested, already-licensed practitioners." (citing MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE 240 (1980))).

130. *See* Edlin & Haw, *supra* note 21, at 1111 (noting that "unlike other regulatory bodies, licensing boards became dominantly comprised of practitioners themselves . . . but self-dealing is inevitable when the regulated act as regulators"); Larkin, *supra* note 5, at 227 ("Incumbent businesses support licensing requirements because licensing protects incumbents against competition.").

131. *See* Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890–1910: A Legal and Social Study*, 53 CALIF. L. REV. 487, 497 (1965) ("Friendly licensing legislation was almost invariably suggested and drafted by groups within the affected occupation. We have here, then, a situation in which the regulated group was responsible for its own public regulation.").

132. Larkin, *supra* note 5, at 226–27 ("Private individuals rarely urge governments to adopt licensing regimes, but private firms often do . . . . '[F]riendly licensing' [is] almost invariably suggested and drafted by groups within the affected occupation.").

of new competition by erecting barriers to enter the cosmetology profession, they can maintain higher prices.[133] By "hijack[ing] state power for the benefit of a few,"[134] this cronyism benefits only the cosmetology lobby and the legislators. Forced to pay higher prices to compensate for inflated wages, the consumer public suffers, while would-be beauticians are excluded from the profession.[135]

For direct evidence of this, one need only look to the Tennessee shampoo technician example.[136] Tennessee, in addition to being one of only four states requiring shampoo technicians to undergo training and pass an examination,[137] boasts the highest annual mean wage in the country for individuals who wash hair for a living, nearly twice as much as neighboring states.[138] To illustrate, a hair shampooer in the Memphis metropolitan area, where a license is required, can make an average of $33,620 per year, while an individual doing the same job in neighboring North Carolina, where no license is required, earns an average of $17,790.[139] It is no wonder that occupational licensing is estimated each year to siphon off $100 billion from the economy in annual cost to consumers.[140] While some may praise this nearly two-fold increase in earnings, it is also not a big leap to suggest that the inflated discrepancy in the salaries for hair washers is passed onto consumers in the form of higher prices.[141] Further, the increased wages for the licensed few

133. Cooper & Kovacic, *supra* note 6, at 1566 (detailing empirical study findings that occupational licensing barriers "lead to higher prices, reduce consumer choice, and provide few if any consumer benefits in terms of increased quality"); Larkin, *supra* note 5, at 227 ("Licensing requirements thereby enable [existing practitioners] to receive 'economic rents'—that is, supracompetitive profits made available by laws limiting rivalry.").

134. Larkin, *supra* note 5, at 235.

135. *Id.* at 235–37; *see also infra* notes 137–144 and accompanying text.

136. *See supra* Introduction and *infra* Section III.B.

137. In addition to Tennessee, other states requiring some combination of education or examination in order to legally wash hair include New Hampshire, Louisiana, and Texas. Alabama has no schooling or examination requirement, but does require would-be shampooers to pay a fee to the state. *License to Work: A National Study of Burdens from Occupational Licensing*, *Shampooer*, INST. FOR JUST., http://ij.org/report/license-to-work/ltw-occupation/?id=76 (last visited July 12, 2017) [https://perma.cc/EG5J-FSKN].

138. *See* BUREAU LAB. STAT., U.S. DEP'T OF LABOR, *Occupational Employment Statistics – Shampooers* (Mar. 31, 2017), https://www.bls.gov/oes/current/oes395093.htm [https://perma.cc/7L4E-6F8S].

139. *Id.* ($33,620 in Memphis and $31,370 in Nashville metropolitan area, compared with $18,240 and $17,790 in Alabama and North Carolina, respectively).

140. MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 150 (2006); *see also* Rudish, *supra* note 33, at 1530 (recognizing that deeming "pure economic protectionism as a legitimate state interest may result in the establishment and maintenance of certain in-state monopolies and drive up prices for consumers").

141. Larkin, *supra* note 5, at 235–38; *see* KLEINER, *supra* note 3, at 12:

> Policy makers need to examine and determine whether these increases in economic status to licensed workers are a result of increased quality caused by greater training

arguably come at the expense of numerous potential hair washers barred from working, who earn no wages.[142]

Proponents of occupational licensing regimes would likely suggest that anyone unhappy with the requirements solicit their local or state representative.[143] However, examined through the lens of public choice theory, majoritarian rule and the political process offer inadequate protection for this widely dispersed group of excluded practitioners.[144] Supreme Court precedent suggests that "discrete and insular minorities" deserve enhanced safeguards because of their relative inability to effectively organize and spur legislative reform.[145] However, this example of excluded practitioners calls into question the validity of that suggestion. Simply because these excluded individuals are not a "discrete and insular minority"[146]—in reality, such a group is likely to be widely dispersed and diverse—does not then imply that it is a group that can organize and effectuate change through representative government.[147]

In fact, the compact and homogenous special interest groups tend to enjoy more political success than their size might suggest,[148] oftentimes due to the impact of money and its disproportionately large ability to influence legislation.[149] While a political actor's self-interests

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that result in higher-quality services, or whether they are a result of restricted competition through the limiting of entry into the occupations, or both.

142. Cooper & Kovacic, *supra* note 6, at 1567 ("Not only do these barriers make purchasing certain services more expensive, but they also eliminate yet another option to earn a living for those who already have so few.").

143. *See* Shanor, *supra* note 39, at 325 ("Whether or not licenses improve health and safety or promote protectionism are important questions for the political branches. But the fact of legislative line drawing or 'speech as such' does not make them ones for heightened constitutional review.").

144. *See* Larkin, *supra* note 5, at 324 ("Elected officials will be most responsive to whatever groups increase their prospects for reelection, which favors established, small, tightly knit, single-issue groups that benefit from laws granting them economic rents.").

145. *See supra* notes 64–65 and accompanying text.

146. *See* Larkin, *supra* note 5, at 324:

> [T]he parties seeking to enter most such [licensed] professions are precisely the type of individuals for whom seeking relief through the ballot box is generally a futile endeavor. Injured but disorganized individuals are powerless to prevent a compact, organized minority's interests from swaying the political process to work in its favor.

147. *Id.* ("The identification and coordination costs necessary to obtain the repeal of a statute are prohibitive even though the total number of members of the first group greatly outnumbers the latter."); *see also* McCloskey, *supra* note 4, at 50 (discussing the "prejudices against [discrete minorities]" present in the political processes).

148. *See* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 42 (1991) ("[C]ertain groups enjoy organizational advantages that enable them to exercise 'disproportionate' influence on politicians and regulators and thus secure laws favoring their interests even when those laws injure large groups with diffuse interests (e.g., the general public) and impose a net loss on society.").

149. Will Clark, Comment, *Intermediate Scrutiny as a Solution to Economic Protectionism in Occupational Licensing*, 60 ST. LOUIS U. L.J. 345, 359 (2016) (emphasizing collective action

may be checked by her concern for re-election, "there is nothing to channel outcomes towards the needs of the non-median voting groups," or in this case, the groups harmed by these occupational licensing laws who are unlikely to organize in such a way as to serve as the proper check on a political actor's self-interest.[150]

Consequently, when the representative process falters and politically powerless groups suffer, the courts should intervene. Theoretically, as the "least dangerous branch,"[151] the judiciary is not political[152] and should be less motivated by the rent-seeking that sways other public actors.[153] However, by applying the least rigorous form of review to occupational licensing laws, the courts have effectively turned a blind-eye to the political failure.[154] And by withholding meaningful judicial review, "the rational basis test allows politically well-connected participants to exploit the legislative and regulatory processes for their own profit, with only flimsy pretexts of benefitting the general public. The result is to deprive those with little political influence of rights that ought to be constitutionally secured."[155]

B. "An Unworkable Morass": The Current State of the Court's Tiers of Scrutiny[156]

While the Supreme Court has never been particularly transparent in opining which test it is using and why—the

problems when "[e]stablished industry groups are in a better position to lobby legislatures, [and c]onsumers do not spend time or money opposing protectionist laws because the negative effects of those laws are widely dispersed among consumers").

150. BUCHANAN, *supra* note 124, at 56.

151. THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

152. Whether the Court is truly as apolitical as presumed is the subject of scholarly debate. *See* RICHARD L. PACELLE, JR., THE ROLE OF THE SUPREME COURT IN AMERICAN POLITICS: THE LEAST DANGEROUS BRANCH? 9 (2002) (questioning whether "the view that courts are neutral arbiters who do not make the law but find the law" accurately describes the Supreme Court). Additionally, several states continue to select some or all of their state judges through partisan elections, theoretically subjecting the candidates to some of the same interest group pressures from which an unelected judiciary is otherwise insulated. *See, e.g.*, TEX. CONST. art. V, § 2 (authorizing the election of the justices of the Supreme Court of Texas, the same court that penned the *Patel* decision, discussed *supra* Section I.B.3).

153. McGinnis, *supra* note 32, at 522 ("[T]he judiciary is relatively insulated from the preferences of constituents and less subject to partisan bias and interest group pressure.").

154. *See* James M. Buchanan, *Market Failure and Political Failure*, 8 CATO J. 1, 4 (1988) (comparing "theories of market failure" with "theories of political failure").

155. Timothy Sandefur, S*tate "Competitor's Veto" Laws and the Right to Earn a Living: Some Paths to Federal Reform*, 38 HARV. J.L. & PUB. POL'Y 1009, 1016 (2015).

156. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2328 (2016) (Thomas, J., dissenting).

Constitution, of course, "does not prescribe tiers of scrutiny"[157]—the divisions on the spectrum between rational basis and strict scrutiny has only continued to deteriorate in recent years.[158] In some cases, the Court has arguably applied a more rigorous form of rational basis,[159] while in others it has employed a more forgiving version of strict scrutiny.[160] In other cases, the Court has cited no test at all.[161] Further, the Court has never articulated its criteria for determining what it considers to be a "fundamental" right worthy of this more exacting judicial review.[162] Indeed, it seems that "[t]he label the Court affixes to its level of scrutiny in assessing whether the government can restrict a given right . . . is increasingly a meaningless formalism."[163]

Given the split not only amongst the circuits but within the circuit panels themselves, the Supreme Court's answer to the question

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157. *Id.* at 2327.

158. Goldberg, *supra* note 25, at 518–20.

159. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting) ("As nearly as I can tell, the Court agrees with [reviewing this classification only for its rationality]; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases . . . . But the Court certainly does not *apply* anything that resembles that deferential framework."); Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) (holding that "the record does not reveal any rational basis" for the zoning ordinance); *see also infra* Section III.A.1. Scholars and commentators have labeled this more onerous variation of rational basis as "rational basis plus," "rational basis with bite," or "rational basis with teeth." Thomas B. Nachbar, *Rational Basis "Plus*,*"* 32 CONST. COMMENT. 449, 449–50 (2017).

160. *See, e.g.*, Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016) (upholding the University of Texas's college admission program despite its use of race holistically as a qualifying factor). As it is traditionally understood, strict scrutiny applies to government actions that infringe on "fundamental rights" or that discriminate on the basis of a suspect classification, such as race or national origin. Pollvogt, *supra* note 25, at 1050.

161. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015) (failing to cite a test in its decision recognizing the right to marry as a "fundamental right"); Pollvogt, *supra* note 25, at 1045–46 ("Specifically, [in *Windsor*,] Justice Kennedy, writing for the majority, did not invoke any of the traditional doctrinal structures of equal protection analysis, such as suspect classification analysis, fundamental rights analysis, or the associated mechanism of heightened scrutiny.").

162. Joel S. Nolette, Comment, Whole Woman's Health v. Hellerstedt*: Judicial Review When the Court Wants To*, 14 GEO. J.L. & PUB. POL'Y 633, 640 (2016):

> [T]here is very little one can say about the 'personal' liberty that the Court has recognized to be 'fundamental' that cannot equally be said about other liberty interests that the Court has recognized but nevertheless decided to protect less (or not at all), such as the right to earn a living in a lawful occupation. (internal citations omitted);

see also Evan Bernick, *Towards a Consistent Economic Liberty Jurisprudence*, 23 GEO. MASON L. REV. 479, 498–99 (2015) ("The importance of the freedom at stake highlights the pressing need for consistent judicial enforcement of constitutional safeguards against naked economic preferences."); Pollvogt, *supra* note 25, at 1061 (addressing, in the context of the question of same-sex marriage, the Court's failure to "model a disciplined approach to framing the fundamental rights inquiry").

163. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2326–27 (2016) (Thomas, J., dissenting).

of the constitutional validity of protectionist economic regulations is long overdue.[164] As many of the judges in these cases recognize, the Court need not "resurrect *Lochner*"[165] in order to reject the proposition that naked economic protectionism serves a legitimate state interest.[166] Although states may proffer legitimate public benefit justifications when challenged, "it is quite different to say that protectionism for its own sake is sufficient to survive rational basis review."[167]

C. Intermediate and Strict Scrutiny: Heightened Review as a Non Sequitur

Some commentators have suggested that intermediate scrutiny is the appropriate framework under which to review economic regulations,[168] while others have suggested that economic liberties are inherently "fundamental,"[169] a distinction which would trigger strict scrutiny.[170] However, both of these levels of review are unworkable. Existing precedent suggests that arguments advocating the application of heightened scrutiny to economic regulations are unlikely to persuade the Court.[171]

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164. *See* Miller, *supra* note 59, at 428 (posing the question, more than thirty years ago, if it is "time to re-examine the wisdom of 'see-no-evil, hear-no-evil' as the prevailing philosophy in economic regulation cases"). *But see* Sensational Smiles, LLC v. Mullen, 793 F.3d 281 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1160 (2016).

165. *Sensational Smiles*, 793 F.3d at 289 (Droney, J., concurring). *See generally* Lochner v. New York, 198 U.S. 45 (1905); *see also* Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 94 n.11 (Tex. 2015) (Willett, J., concurring) ("The *Lochner* bogeyman is a mirage but a ready broadside aimed at those who apply rational basis rationally.").

166. *See* St. Joseph Abbey v. Castille, 712 F.3d 215, 226–27 (5th Cir. 2013) ("Nor is the ghost of *Lochner* lurking about."); *see also* David Bernstein, *Do Laws that Embody "Naked Economic Protectionism" Violate the Equal Protection Clause?*, VOLOKH CONSPIRACY (Sept. 14, 2015) https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/14/do-laws-that-embody-naked-economic-protectionism-violate-the-equal-protection-clause/?utm_term=.c7909c412b74 [https://perma.cc/RA8M-2Z5E] ("[O]ne need not revive *Lochner* or indeed change modern equal protection jurisprudence at all to find that naked economic protectionism violates the equal protection clause.").

167. *Sensational Smiles*, 793 F.3d at 289 (Droney, J., concurring) ("[A]nd I do not think the Supreme Court would endorse that approach.").

168. Clark, *supra* note 149, at 355–56; Klein, *supra* note 65, at 461 ("Given the importance of the right to pursue a common calling, barriers to entry into a lawful profession should be subject to a more thorough scrutiny than rational basis review.").

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

170. Strict scrutiny has often been described as "strict in theory, but fatal in fact," underscoring the difficulty of surviving such stringent judicial review. *See infra* notes 174–178 and accompanying text.

171. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756–58 (2011) (suggesting that "pluralism anxiety" is the cause of the Court's "closure of the heightened scrutiny canon").

First, strict scrutiny is particularly inappropriate for the review of economic regulations or economic rights.[172] Although the ability to pursue a common calling is certainly an important right,[173] deeming it a "fundamental right" for purposes of strict scrutiny review is a futile exercise.[174] Many scholars have suggested that the Court's application of strict scrutiny is a death-knell for the law at issue.[175] In fact, strict scrutiny has been described as "strict in theory, fatal in fact,"[176] a characterization with which Justice Sandra Day O'Connor took issue in *Adarand Constructors v. Pena*.[177] However, despite the criticism of the catchy phrase, it is accurate nonetheless. Subjecting an economic regulation to the narrow-tailoring requirement of strict scrutiny would result in near-certain invalidation, as only a handful of laws have ever survived the Court's strict scrutiny scythe.[178]

Moreover, advocating for the application of intermediate scrutiny for economic regulations and occupational licensing raises similar challenges. While proponents of utilizing intermediate scrutiny submit that the standard is "well-defined"[179]—an arguably dubious claim following the Supreme Court's portrayal of intermediate scrutiny in *United States v. Virginia*[180]—subjecting all occupational licensing laws to intermediate scrutiny would be asking too much of the judiciary. Additionally, there is the concern that applying too stringent of a

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172. *See* DeFiore, *supra* note 107, at 787 ("By undertaking a 'probing review' of each action taken by state legislators, courts would cripple governments and hinder their ability to experiment with new forms of regulation."); Shanor, *supra* note 39, at 324 (highlighting the difficulties in defining the limits of the "right" worthy of more stringent judicial review).

173. *See, e.g.*, Barsky v. Bd. of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting) (describing the right to work as "the most precious liberty that man possesses"); Dent v. West Virginia, 129 U.S. 114, 121–22 (1889) ("It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition.").

174. Shanor, *supra* note 39, at 325 ("Without a principled limit on when and how the Constitution can be invoked as a shield against economic regulation, we will embrace a world sharply tilted against democratic governance.").

175. Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

176. *Id.*

177. *See* 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' ").

178. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 826 (2006) (questioning the validity of the traditional characterization, yet noting that only approximately twenty-five percent of laws subjected to strict scrutiny by the Supreme Court survive).

179. Clark, *supra* note 149, at 361 (advocating for the categorical application of "the well-defined intermediate scrutiny test to occupational licensing laws").

180. Justice Ginsburg, writing for the majority, depicted a more muscular iteration of the intermediate scrutiny standard, requiring an "exceedingly persuasive" and genuine justification, where "[t]he burden of justification is demanding and . . . rests entirely on the State." United States v. Virginia, 518 U.S. 515, 533 (1996).

standard to licensing laws would put all licenses in jeopardy,[181] even those that govern surgeons or other healthcare professions, and would upset the balance between the judicial and legislative branches of government.[182] Further, applying intermediate scrutiny categorically to occupational licensing laws[183] would pose the problem of determining which laws specifically qualify for categorical scrutiny and which are not occupational licensing but just traditional economic regulations. This sort of confounding cherry-picking underscores the unworkability of applying a fixedly heightened standard of review.

III. THE NEW STANDARD OF REVIEW: JUDICIAL ENGAGEMENT

As discussed above, the status quo of using toothless rational basis for occupational licensing fails to uncover the pure economic protectionism that often motivates these licensing schemes.[184] Public choice theory helps to explain the proliferation of these sorts of regulations,[185] and indeed underscores the reality that genuine concerns for consumer health and safety do not always occupy the forefront of the drafters' or proponents' minds.[186] Additionally, the current inter- and intra-circuit split over whether pure economic protectionism, without something more, constitutes a legitimate state interest highlights the serious shortcomings of the existing judicial reviewing framework for occupational licensing.[187]

As an alternative, this Part proposes a solution, recommending continued adherence to the traditional labels of the standards of review, by combining rational basis review with judicial engagement. To demonstrate the judiciary's capacity for judicial engagement, this Part examines the Supreme Court's animus jurisprudence and the Court's ability to uncover illicit motivations, followed by a study of its balancing

181. David Crump, *How Do Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL'Y 795, 846–47 (1996) (recognizing that the consequence of a "free-enterprise penumbra" deserving of stricter scrutiny "would be the indiscriminate destruction of every kind of economic regulation, including those that no one otherwise would regard as unconstitutional").

182. Larkin, *supra* note 5, at 321 (positing that "even if there is a sound theoretical justification for heightened judicial review [of economic regulations], do we ask too much of the judiciary to undertake that responsibility?").

183. *See* Clark, *supra* note 149, at 356 (arguing as such).

184. *See* Sandefur, *supra* note 155, at 1018 (explaining that the application of a lenient rational basis review "means closing the judiciary's eyes to the rent-seeking shenanigans that result in anti-competitive laws").

185. Larkin, *supra* note 5, at 228–35.

186. *Id.* at 215 ("[M]any occupational licensing schemes are the product of practitioners' self-serving political efforts, rather than a considered attempt to improve the public welfare.").

187. Klein, *supra* note 65, at 438–48.

of interests in *Whole Woman's Health v. Hellerstedt*. Additionally, this Part applies the Court's *Whole Woman's Health* and animus reasoning to Tennessee's shampoo technician licensing in order to demonstrate the practicality of asking judges to do their job and engage with the record before them.[188]

A. Rational Basis-with-Judicial-Engagement

Courts should continue to apply rational basis review to occupational licensing regulations, but combine that review with "judicial engagement" when they suspect that economic protectionism motivated the law. As discussed more fully in Justice Willett's *Patel* concurrence, judicial engagement is the idea that "courts meaningfully enforce constitutional boundaries, lest judicial restraint become judicial surrender."[189] However, judicial engagement does not mean that a judge should merely substitute her preference for that of the legislature, but rather that a court need not "put a heavy, pro-government thumb on the scale."[190] Instead, in defending a statute, the government must provide, and a court must examine, an honest, reasoned explanation for the law[191] in order to determine whether the benefits bestowed on the public outweigh the costs.[192] Additionally, unlike the application of heightened scrutiny, the use of rational basis-with-judicial-engagement would not jeopardize those licensing regimes that serve genuine legitimate public health or safety purposes, like those in the medical field.[193] For instance, the benefits of requiring licensing for surgeons—preventing an untrained individual from taking a scalpel to the flesh of an unsuspecting "patient"—undoubtedly outweigh the potential burdens of requiring individuals to attend medical school and pass board exams. Licensing, such as those for doctors or dentists, would pass the cost-benefit inquiry with ease, even if there were an element of economic protectionism, because the benefits

188. Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 104 (Tex. 2015) (Willett, J., concurring) ("Degree of difficulty aside, judges exist to be judgmental, hence the title.").

189. *Id.* at 96; *see supra* Section I.B.3.

190. *Patel*, 469 S.W.3d at 95.

191. McGinnis, *supra* note 32, at 524 ("The [state] thus has the burden of articulating the constitutionally justifiable interest the statute advances and the evidence for that proposition, not because the Constitution puts a particular burden on the [state], but because it represents the *defendant* . . . .").

192. *Cf.* DeFiore, *supra* note 107, at 793 (advocating for "near absolute deference" to the legislature for economic regulations, while simultaneously suggesting that a reviewing court may examine the court record for "clear and convincing evidence that [the regulation] is morally offensive and contrary to the interests of justice").

193. *Cf.* Rudish, *supra* note 33, at 1530 (warning that a refusal to recognize economic protectionism as a legitimate state interest "would invalidate a wide range of legislation").

of protecting life and limb so greatly dwarf the burdens of obtaining a license.

Despite the general conservative disparagement of judicial activism,[194] "[t]he great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulations."[195] Traditionally, the Court claims ineptitude in its ability to review legislation deemed economic.[196] Yet despite these pleas of impotence, the Supreme Court has recently demonstrated that it is most certainly not helpless when it comes to evaluating the legitimacy or value of legislation enacted ostensibly to protect the public health and safety.[197] In fact, the Court has already applied iterations of the type of judicial engagement that this Note advocates for.

1. Detecting Illicit Motives: The Court's Animus Jurisprudence

For an example of the Court's ability to "engage forthrightly"[198] during a rational basis analysis, we have only to look to its jurisprudence concerning animus.[199] Specifically, precedent indicates that there are two ways to establish the presence of animus: (1) "by pointing to direct evidence of private bias" in the record, or (2) "by supporting an inference of animus based on the structure of a law."[200]

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194. *See* Barry K. Arrington & Richard A. Epstein, *Right-Wing Judicial Activism?*, CLAREMONT REV. BOOKS, Winter 2011/12, at 7, 8, http://www.claremont.org/crb/article/arguing-natural-law/ [https://perma.cc/NF3J-AJC5] ("The essence of conservative constitutional jurisprudence is that where the Constitution does not speak, judges must also remain silent and defer to the democratic process . . . ."); *see also Patel*, 469 S.W.3d at 97 (Willett, J., concurring) ("A prominent fault line has opened on the right between traditional conservatives who champion majoritarianism and more liberty-minded theorists who believe robust judicial protection of economic rights is indispensable to limited government.").

195. St. Joseph Abbey v. Castille, 712 F.3d 215, 226 (5th Cir. 2013); *see also Patel*, 469 S.W.3d at 96–97 (Willett, J., concurring).

196. Nolette, *supra* note 162, at 640 ("[I]t seems that only in cases involving economic regulation do judges claim to lack the acumen to recognize corruption, self-interest, and arbitrariness or insist on deferring to the majoritarian imperative.").

197. *Id.* at 635 ("[T]he Court proved itself quite capable of actually reviewing, and striking down, what superficially appeared to be classic health and safety regulations, but were in fact provisions enacted to interfere with the exercise of individual rights without sufficient justification . . . .").

198. *Patel*, 469 S.W.3d at 96 (Willett, J., concurring).

199. *See* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 928 (2012) ("Rather than provoking the Court to apply a form of heightened scrutiny, we can read the cases as providing plaintiffs with an opportunity to challenge rational basis review with affirmative evidence.").

200. *Id.* at 926; *see also* Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2093 (2015) (cataloging the Supreme Court's animus jurisprudence).

Although the Court has never conclusively defined animus as a matter of doctrine,[201] the concept is generally understood to mean, in its broadest terms, an impermissible desire to harm a politically unpopular group, either directly[202] or indirectly by instead benefiting the favored group.[203]

The Supreme Court first grappled with unconstitutional animus in 1973 in *USDA v. Moreno*,[204] where it found direct evidence of animus in the legislative record.[205] While ostensibly applying only rational basis review,[206] the Court nonetheless "proceeded to reject various justifications for the statute that would have plainly passed muster under the lenient rational basis test."[207] The congressional statute at issue in *Moreno* excluded from participation in the federal food stamp program "any household containing an individual who is unrelated to any other member of the household."[208] In defending the limitation on food stamp eligibility, the government argued that its law was "rationally related to the clearly legitimate governmental interest in minimizing fraud in the administration of the food stamp program."[209]

However, by investigating the legislative history of the amendment to the Food Stamp Act, the Court determined that Congress specifically drafted the legislation to prevent "so-called 'hippies' or 'hippy communes' from participating in the food stamp program."[210] Instead of furthering the legitimate purpose of preventing fraud and abuse within the food stamp program—surely a legitimate

201. Pollvogt, *supra* note 199, at 887 (recognizing that beyond discussions in moral philosophy, "neither precedent nor scholarship has stated conclusively how animus is properly defined"). *But see* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (characterizing unconstitutional animus as a "fit of spite").

202. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2693 (2013); *Romer*, 517 U.S. at 634; USDA v. Moreno, 413 U.S. 528 (1973).

203. Pollvogt, *supra* note 199, at 925 (describing Plyler v. Doe, 457 U.S. 202, 207–08 (1982), as an "instance[] where the government merely sought to preserve resources for a favored social group, not harm the excluded group").

204. *Moreno*, 413 U.S. at 529.

205. Pollvogt, *supra* note 199, at 927 (describing USDA v. Moreno as an "easy case" given the direct evidence of the true purpose of the law).

206. *Moreno*, 413 U.S. at 533 (referring to "legitimate" governmental interests and "rational" relations to that interest, hallmarks of traditional rational basis review).

207. Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065, 1082–83 (2013).

208. *Moreno*, 413 U.S. at 529 (discussing the 1971 amendment to the Food Stamp Act of 1964, 7 U.S.C. § 2012(e) (2012)).

209. *Id.* at 535.

210. *Id.* at 543 (Douglas, J., concurring) (noting that for purposes of eligibility, the definition of "household" was designed to "prevent 'essentially unrelated individuals who voluntarily chose to cohabit and live off food stamps' . . . from participating in the food stamp program" (quoting 116 CONG. REC. 42003 (1970))).

and sufficient interest for purposes of rational basis review[211]—the restriction unconstitutionally excluded a group of individuals disliked by those charged with drafting the law, and therefore served no purpose at all.[212] Ultimately, the Court evaluated the government's proffered—albeit superficial—defense, but weighed that purpose against what it viewed as "a bare congressional desire to harm a politically unpopular group."[213] Animus toward a politically unpopular group, therefore, is not a permissible governmental purpose.[214] Notably, the Court in *Moreno* also did not distinguish between "personal" liberties and "economic" liberties, but rather required that any law predicated on animus be struck as unconstitutional.[215]

The specter of a purpose to harm a politically powerless and ostracized group again emerged in *City of Cleburne v. Cleburne Living Center*, where the Cleburne City Council denied a request for a special-use permit to build a group home made by an organization for the developmentally disabled.[216] The city had enacted a zoning ordinance that required such a permit for the construction of, among other types of homes, "hospitals for the insane or feeble-minded."[217] While the law on its face did not specifically burden or disadvantage those individuals with developmental disabilities or the organizations that served them, the Court nevertheless concluded that an illicit motive was at play.[218] Because there was no direct proof of animus or disdain for this particular group, unlike the damaging material available in *Moreno*, the structure of the law itself served as evidence of animus.[219]

Ultimately, Justice White, writing for the majority, found that "[t]he record [did] not reveal any rational basis for believing that the proposed group home would pose any special threat to the city's legitimate interests," and that therefore the law appeared to "rest on an

211. Berliner, *supra* note 64, at 376 ("Courts are mortally afraid of saying that something is an illegitimate interest . . . .").

212. *Moreno*, 413 U.S. at 538; *see also* Andrew Koppelman, *Beyond Levels of Scrutiny:* Windsor *and "Bare Desire to Harm,"* 64 CASE W. RES. L. REV. 1045, 1060 (2014) (reviewing the *Moreno* and *Romer* decisions).

213. *Moreno*, 413 U.S. at 534.

214. Pollvogt, *supra* note 199, at 888 ("The Court has held on numerous occasions that . . . animus . . . is never a valid basis for legislation or other state action.").

215. *See* Raynor, *supra* note 207, at 1068 ("*Moreno*'s plain language, for instance, requires heightened review of *all* regulations predicated on animus, regardless of whether they target an economic or personal liberty interest.").

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

217. *Id.* at 436 (quoting Cleburne, Texas, zoning regulations).

218. *Id.* at 450 (concluding that an "irrational prejudice" against the developmentally disabled undergirded the city's action in denying the special-use permit).

219. Pollvogt, *supra* note 199, at 927.

irrational prejudice" against the developmentally disabled.[220] Here again, despite ostensibly utilizing the traditional rational basis review,[221] the Supreme Court engaged with the record in order to uncover evidence of an illicit purpose, notwithstanding the city's call for concern over location within a floodplain, overcrowding, and harassment by students from a nearby middle school.[222]

More than two decades later, the Court again invoked animus as its justification for invalidating a law under rational basis review,[223] this time involving an amendment to the Colorado state constitution that prohibited any claims of discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."[224] Despite the State's attempts to justify the amendment as a law of general applicability aimed at denying only *special* treatment for gays,[225] Justice Kennedy's opinion for the Court suggested that the amendment "raise[d] the inevitable inference that the [law] is born of animosity toward the class of persons affected."[226] Professor Andrew Koppelman[227] summarized the Court's holding in *Romer v. Evans* as follows:

> If a law targets a narrowly defined group and then imposes upon it disabilities that are so broad and undifferentiated as to bear no discernible relationship to any legitimate governmental interest, then the Court will infer that the law's purpose is simply to harm that group, and so will invalidate the law.[228]

Notably, the Court conducted its evaluation of the law in *Romer* using only rational basis review, yet still managed to uncover the illicit motivation underlying its passage.[229]

Much like the Court's animus rationale in *Romer*, the Court's review of the Defense of Marriage Act ("DOMA") in *United States v.*

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220. *Cleburne*, 473 U.S. at 433; *see also* Pollvogt, *supra* note 199, at 927 (suggesting that "animus may be inferred" from a lack of logical connection between the law and the government's purported interest).

221. *But see Cleburne*, 473 U.S. at 458 (Marshall, J., concurring in the judgment in part and dissenting in part) ("[T]he rational basis test invoked today is most assuredly not the rational-basis test of *Williamson v. Lee Optical* . . . and [its] progeny.").

222. *Id.* at 448 (majority opinion) (detailing justifications offered by the city for denial of the permit).

223. Romer v. Evans, 517 U.S. 620 (1996).

224. *See* COLO. CONST. art II, § 30b, *invalidated by* Romer v. Evans, 517 U.S. 620 (1996).

225. *Romer*, 517 U.S. at 637–40 (Scalia, J., dissenting) (discussing in greater detail the justifications proffered by the State of Colorado).

226. *Id.* at 634 (majority opinion) (quoting USDA v. Moreno, 413 U.S. 528 (1973)).

227. John Paul Stevens Professor of Law and Professor of Political Science, Northwestern University.

228. ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 8 (2002); *see also* Koppelman, *supra* note 212, at 1058–61 (discussing the Court's animus jurisprudence).

229. *Romer*, 517 U.S. at 638 (Scalia, J., dissenting).

Windsor displays the Court's ability to "smoke out" the illicit purposes motivating lawmakers.[230] DOMA, which was passed by Congress in 1996 and subsequently signed into law by President Bill Clinton, explicitly defined marriage as "a legal union between one man and one woman," with the effect of excluding same-sex couples from the receipt of any federal benefits based on marital or spousal status.[231] DOMA's defenders argued that the federal statute avoided difficult choice-of-law issues with its uniform federal definition of marriage, and maintained the current applicability of federal laws in light of the potential for changing circumstances at the state level.[232] Under traditional rational basis review, this law quite clearly maintained a rational nexus to the government's proffered justifications.[233] However, despite this arguably rational relationship between the purpose and the law, the Court exposed "a bare congressional desire" to stigmatize and injure same-sex couples, meaning the law could not stand.[234] As Koppelman notes, "*Windsor* indicates that the Constitution is violated when a group is deliberately singled out for broad harm for the sake of an insignificant benefit."[235]

The animus jurisprudence suggests that the Court has the intellectual wherewithal—and the willingness—to detect the presence of animus behind a slew of other rational governmental purposes. The Court can likewise use these skills to ferret out illicit purposes in the government's passage of occupational licensing restrictions, chiefly naked economic protectionism and rent-seeking on the part of existing practitioners. While economic protectionism is not precisely the same beast as animus, for the purposes of reviewing occupational licensing, animus serves as an adequate analog for economic protectionism. Just as the Court disavows laws motivated by animus, so too should it condemn laws motivated by naked economic protectionism.

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230. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013); *see also* Koppelman, *supra* note 212, at 1059–61 (discussing the "telling similarities" between the Colorado amendment in *Romer* and the Defense of Marriage Act ("DOMA") in *Windsor*).

231. 1 U.S.C. § 7 (2012), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

232. *Windsor*, 133 S. Ct. at 2707–08 (Scalia, J., dissenting) (taking issue with the majority's disregard of the "arguments put forward" by DOMA's defenders and suggesting that the majority "affirmatively conceal[ed] from the reader the arguments that exist in justification").

233. *Id.* at 2707 ("[T]here are many perfectly valid—indeed, downright boring—justifying rationales for this legislation.").

234. *Id.* at 2681 (majority opinion); *see also* Koppelman, *supra* note 212, at 1068:

> A law that bans the driving of blue Volkswagens on Tuesdays is rationally—indeed, perfectly—related to the purpose of preventing blue Volkswagens from being driven on Tuesdays. The real issue is whether some goals are impermissible or too costly to be worth pursuing, a question that cannot be answered on the basis of "rationality."

235. Koppelman, *supra* note 212, at 1068; *cf. infra* Section III.A.2 (discussing the insignificant benefits of the law in *Whole Woman's Health*).

2. Demonstrating Ability to Balance Interests: *Whole Woman's Health*

Paradigmatic of this type of judicial engagement was the Court's review of the Texas legislature's regulation of abortion providers in *Whole Woman's Health v. Hellerstedt*,[236] which established that the Court is "quite capable of doing all the things that it disclaims the responsibility or competency to do in the context of . . . rational basis cases."[237] In *Whole Woman's Health*, the Court applied the undue burden test for abortion regulations from *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[238] which requires that a court strike as unconstitutional any law that has the "*purpose* or effect of presenting a substantial obstacle to a woman seeking an abortion."[239] Despite assurances that it was merely applying existing precedent, the Court in *Whole Woman's Health* seemed to turn this undue burden test into more of a cost-benefit inquiry.[240] The Court looked to the two main requirements of the challenged Texas House Bill 2: (1) that all abortion providers have active admitting privileges at a hospital within thirty miles of the clinic,[241] and (2) that all abortion facilities meet the standards for ambulatory surgical centers under Texas law.[242] Ultimately, the Court examined the adjudicated facts from the lower court and determined that the burdens imposed outweighed the purported health benefits to women, and thus invalidated the entire law as an unconstitutional undue burden.[243]

Despite Texas's arguments that the surgical-center and admitting-privileges provisions of the law were enacted to protect women,[244] the Court did not merely accept these rationales with blind deference like it theoretically would have were the laws "merely

236. 136 S. Ct. 2292 (2016).

237. Nolette, *supra* note 162, at 638.

238. 505 U.S. 833, 877 (1992).

239. *Whole Woman's Health*, 136 S. Ct. at 2296 (emphasis added).

240. *Id.* at 2300 (determining whether the new law conferred medical benefits sufficient to outweigh the burdens on access that it imposed).

241. *Id.* at 2310 (noting that the prior statute was less onerous, requiring either admitting privileges or a working arrangement with a physician with admitting privileges, should complications arise).

242. *Id.* at 2314 (comparing the prior law that "required abortion facilities to meet a host of health and safety requirements" with the new law that also required "detailed specifications relating to the size of the nursing staff, building dimensions, and other building requirements").

243. *Id.* (finding as well supported by the record that women would "not obtain better care or experience more frequent positive outcomes" under the new law as compared to a previously licensed facility).

244. *Id.* at 2311 (citing the State's brief that the purpose of House Bill 2 was "to help ensure that women have easy access to a hospital should complications arise during an abortion procedure").

economic" and reviewed under rational basis.[245] Instead, the Court thoroughly assessed the government's evidence that these provisions would protect women and would justify the closure of all but eight abortion providers in the entire state.[246] Unconvinced after its meticulous examination of the statistical and expert-witness evidence, the Court determined that the new law did not benefit patients[247] and that it was simply "beyond rational belief that [the law] could genuinely protect the health of women."[248]

To be clear, this type of judicial engagement and meaningful review of a legislature's action does not hail the resurrection of the "*Lochner* monster."[249] In *Lochner*, the majority opinion paid no attention to any of the evidence put forth by the State that the law truly would benefit the health and well-being of bakers before striking the law.[250] In actuality, it seems that the five Justices in the *Lochner* majority did not thoughtfully engage with the record, but instead declared a blanket prohibition on interference with the right to contract.[251] In contrast, in *Whole Woman's Health*, the Court did not simply take the government at its word, but instead inquired into the actual consequences of the legislation.[252] Although the Court applied the abortion-specific undue burden test, the comprehensive rationale and the meticulous analysis of the *Whole Woman's Health* opinion serves as a model for the success of judicial engagement.

B. Application: The Benefits and Burdens of Shampooing in Tennessee

Relating this meaningful, evenhanded review to the occupational licensing context, the Supreme Court has revealed its willingness to expose impermissible animus motivations and weigh the potential benefits of legislation against the purported justifications.[253] The Court has demonstrated that it is perfectly capable of determining whether the alleged benefits to public health and safety actually

245. *See id.* at 2309–20 (devoting nearly a dozen pages to an examination of the statistical evidence and testimony).

246. *Id.* at 2316.

247. *Id.* at 2311 (finding nothing in the record that demonstrated that "the new law advanced Texas' legitimate interest in protecting women's health").

248. *Id.* at 2321 (Ginsburg, J., concurring); Nolette, *supra* note 162, at 638.

249. *See* Crump, *supra* note 181, at 846; *supra* note 165 and accompanying text.

250. Lochner v. New York, 198 U.S. 45, 59 (1905).

251. *Id.*; *see supra* note 48 (discussing the factual background of the *Lochner* decision).

252. *Whole Woman's Health*, 136 S. Ct. at 2311.

253. *See* Bertrall L. Ross II, *The State as Witness:* Windsor*, Shelby County, and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. REV. 2027, 2038 (2014) ("In recent decades, [scholars] have noted that the Court has increasingly examined the adequacy of the state's factual record supporting the law's purpose and chosen means for achieving that purpose.").

materialize to justify the additional burdens imposed by the law.[254] Moreover, through its animus jurisprudence, the Court has confirmed its aptitude for uncovering unlawful motivations for laws, despite seemingly lawful justifications proffered by the government.[255]

To demonstrate the practicality and viability of the rational-basis-with-judicial-engagement review standard, the Tennessee shampoo technician statute serves as a case study for scrutinizing an existing occupational licensing law using a combination of the strategies employed by the Court in its animus jurisprudence and in *Whole Woman's Health*.[256] The Tennessee law and corollary criminal offense were enacted presumably to protect the public from rogue shampooers[257]—as many of the occupational licensing and economic regulations passed by state legislatures are enacted in the name of consumer safety.[258] In reviewing this occupational licensing requirement,[259] a court following the *Whole Woman's Health* cost-benefit analysis would need to weigh the burdens imposed by the rule and whether they are sufficiently outweighed by the benefit the public receives.[260] Ultimately in conducting this calculus, "[i]f the benefit is trivial by comparison with the cost, then it is appropriate to infer that

254. *Whole Woman's Health*, 136 S. Ct. at 2311 (finding nothing in the record that demonstrated that "the new law advanced Texas' legitimate interest in protecting women's health"); *see supra* Section III.A.2.

255. *See supra* Section III.A.1.

256. As this Note goes to publication, the Tennessee legislature is currently considering a remedial bill to exempt the practice of shampooing from the shampooing licensing requirement. The legislation is likely to pass and has been labeled a "high priority" on the legislative agenda, likely as a result of a public interest litigation challenge filed by the Beacon Center of Tennessee against the State Board of Cosmetology. Despite possible fixes to the law, the proposed changes lend credence to the plea for judicial intervention: although the lawsuit challenging the constitutionality of the licensing did not reach the point of final judgment, the mere possibility of an adverse judgment and the accompanying negative publicity galvanized the Tennessee legislature to finally consider addressing this issue.

257. *See* KLEINER, *supra* note 3, at 12–13, 17. *But see Hearing on H.B. 745 Before the H. Health & Human Res. Comm.*, 1995 Leg., 99th Sess. (Tenn. Apr. 11, 1995) (transcript on file with author) (statement of Rep. Cantrell) ("From previous discussions, we kind of heard that if a grandmother down the road shampoos a neighbor's hair, then the cosmetologists aren't going to like that.").

258. Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 106 (Tex. 2015) (Willett, J., concurring) ("As Nobel economist Milton Friedman observed, 'the *justification*' for licensing is always to protect the public, but 'the *reason*' for licensing is shown by observing who pushes for it—usually those representing not consumers but vested, already-licensed practitioners." (citing MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE 240 (1980))).

259. The author acknowledges that certain licenses bearing an arguably less tenuous connection to protecting public health or consumer safety would have a more delicate balancing analysis. However, the example of the shampoo technician license highlights the ease with which a reviewing court may conduct the judicial engagement/*Whole Woman's Health* analysis for particularly absurd licensing requirements.

260. *See* Koppelman, *supra* note 212, at 1069 (discussing the limits of judicial deference in light of the concern of judicial policymaking).

the decision has an improper purpose."[261] And analogous to animus, the Court has the capacity to uncover potential improper purposes, like naked economic protectionism.

On the "burden" side of the equation, there is the initial cost of the shampoo technician license itself, along with the biennial renewal fee.[262] However, before an applicant may even register to take the $140 two-part exam (a practical exam and a theory of shampooing exam),[263] she must complete "300 hours in the practice and theory of shampooing at a school of cosmetology."[264] Unfortunately, not a single school in the State of Tennessee offers such a shampoo technician curriculum.[265] Instead, any applicant hoping to obtain a shampoo technician license must acquire the broader cosmetologist license—requiring 1,500 hours of training at a school of cosmetology,[266] equivalent to more than nine months of forty-hour work weeks.[267] Tuition and other costs for such cosmetology training can run upwards of $14,000 and take nearly a year to complete. [268] Failure to comply with the shampoo training and licensing requirements is a Class B misdemeanor, punishable by up to six months in jail,[269] in addition to any civil penalties the Board of Cosmetology chooses to impose.[270]

Turning to the inquiry regarding the purported benefits of the law, three hundred hours of training would arguably improve the quality of hair washing services, perhaps resulting in fewer instances

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261. *Id.*

262. TENN. CODE ANN. § 62-4-117(a) (2017).

263. BD. OF COSMETOLOGY & BARBER EXAMINERS, *Examination Information*, TENN. DEP'T COM. & INS., https://www.tn.gov/commerce/article/cosmo-examination-information (last visited July 14, 2017) [https://perma.cc/UCG8-JT2D].

264. § 62-4-110(e).

265. Nick Sibilla, *Shampooing Hair Without a License Could Mean Jail Time in Tennessee*, FORBES (May 5, 2016, 9:15 AM), http://www.forbes.com/sites/instituteforjustice/2016/05/05/shampooing-hair-without-a-license-could-mean-jail-time-in-tennessee/2/#f230a88424c3 [https://perma.cc/NWB6-SCFW].

266. § 62-4-110(a)(2).

267. This chain of logic, of course, assumes that the individual indeed possesses a strong passion for shampooing and would not be dissuaded by such a large outlay of time and money.

268. *See Cosmetology Program – Cosmetology Tuition*, TENN. SCH. BEAUTY, https://tennesseeschoolofbeauty.com/cosmetology-program/ (last visited July 14, 2017) [https://perma.cc/ANU8-WBB7] (charging $14,995 for tuition for the forty-five–week cosmetology course); *Prospective Students: Cosmetology*, FRANKLIN HAIR ACAD., http://franklinhairacademy.com/prospective-students/ (last visited July 14, 2017) [https://perma.cc/95QR-JXYX] ($12,425 for tuition for a similar program).

269. *See* § 62-4-129(a) ("A violation of this chapter or any rules promulgated under this chapter is a Class B misdemeanor."); *see also* § 40-35-111(2) (detailing authorized terms of imprisonment and fines for various felonies and misdemeanors).

270. TENN. COMP. R. & REGS. 0440-01-.14(1) (2015) (authorizing the Board to assess civil penalties not to exceed $1,000 per violation where each day of continued violation may constitute a separate violation).

of soap suds in clients' eyes.[271] Additionally, shampoo trainees would also likely gain broader knowledge about general sanitation procedures. While these are certainly not unhelpful skills for hair shampooers to have, the purported benefits must be considered in light of not only the disproportionate cost of acquiring those skills—hundreds, if not thousands of dollars and months of instruction—but also all of the other skills that are not part of the shampoo technician license.[272] That is not to say that there are *no* public health benefits from three hundred hours of training in the practice and theory of shampooing. However, the benefit should be measured in relation to the cost of time and money imposed on the individual.

Additionally, the potential for health and safety benefits must be considered alongside the fact that a licensed cosmetology manager must be present and supervising at all beauty salons in Tennessee, which are themselves governed by a whole slew of other statutory safety and sanitation requirements.[273] These redundancies in regulations further undermine the state's purported interest in safety or public health. Comparing the benefits reaped from the law with the burdens imposed by it suggests that passage of the licensing requirement may have been motivated by an illegitimate purpose, perhaps naked economic protectionism.

CONCLUSION

An awareness of the overwhelming breadth of occupational licensing schemes and the potential downsides has entered the national consciousness in recent years. Yet despite a myriad of attempts to challenge these regimes as the impermissible product of naked economic protectionism, no comprehensive solution has yet emerged. Instead, a glaring divide has arisen amongst the federal appellate courts regarding the legitimacy of the economic protectionism that so frequently drives these regulations. To eliminate the current confusion, the Supreme Court should review these licensing schemes using rational basis-with-judicial-engagement. The Court has demonstrated a willingness to engage in such analysis before, thereby weakening its

271. However, the Board of Cosmetology can point to no consumer complaints regarding shampooing so horrific to be worthy of filing a complaint. *See* Sibilla, *supra* note 265 (referencing a quote from the spokesman for the Tennessee Board of Cosmetology and Barber Examiners); *see also supra* Section II.A. and notes 129–131.

272. *Compare* § 62-4-102(a)(22) (clarifying that, for purposes of licensing, shampooing means only "brushing, combing, shampooing, rinsing or conditioning upon the hair and scalp"), *with* § 62-4-102(a)(3) (including in the definition of cosmetology the comparatively riskier tasks of singeing, bleaching, cutting, coloring, waxing, and using antiseptics, tonics, and depilatories).

273. §§ 62-4-118 to -125, -129.

claims of incompetence in evaluating the motivations of lawmakers. In order to avoid hindering the economic wellbeing of all Americans, the Court should do its job in order to protect your right to do yours.

*Nicole A. Weeks**

* J.D. Candidate, 2018, Vanderbilt University Law School; B.A., 2011, University of Massachusetts–Boston. First and foremost, I thank Braden Boucek of the Beacon Center of Tennessee for affording me the opportunity to work directly in this area of law and for his thoughtful comments and suggestions along the way. I would also like to thank the editors and staff of the *Vanderbilt Law Review* for their diligent, thorough work. And finally, I thank my parents, Kenny & Cindy Weeks, for supporting me unconditionally in whatever I chose to do, even if that meant moving all the way to Tennessee. Thank you for making this possible.