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### Cover Page Footnote

J.D. Candidate, May 2013, The Catholic University of America, Columbus School of Law; MPhil, 2008, Oxford University; B.A., 2006, Oxford University. The author would like to thank Prof. Sarah H. Duggin for her guidance and advice, and his colleagues on the Catholic University Law Review for their diligence. The author is also grateful to Robert McNamara, of The Institute for Justice, for providing copies of two briefs that the Plaintiff submitted to the District Court in the St. Joseph Abbey case. Finally, the author would also like to thank his parents, Alden and Lou Abbott, grandmother, Annamaria Visich, and fiancée, Margaret Ochocinska, for their love, support, and encouragement.

# IS ECONOMIC PROTECTIONISM A LEGITIMATE GOVERNMENTAL INTEREST UNDER RATIONAL BASIS REVIEW?

*Roger V. Abbott*<sup>+</sup>

Should states be allowed to require Benedictine monks to learn how to embalm corpses in order to sell wooden caskets?<sup>1</sup> In many states, prospective hair braiders,<sup>2</sup> casket retailers,<sup>3</sup> interior designers,<sup>4</sup> shampoo specialists,<sup>5</sup> music

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1. For several alternative perspectives, see Timothy Sandefur, *Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries*, 14 WM. & MARY BILL RTS. J. 1023, 1023–24 (2006) (examining the scope of state regulation on an individual’s occupational freedom) and Anthony B. Sanders, Comment, *Exhumation Through Burial: How Challenging Casket Regulations Helped Unearth Economic Substantive Due Process in Craigmiles v. Giles*, 88 MINN. L. REV. 668, 670 (2004) (arguing that some economic laws violate the Due Process Clause).

2. Currently, thirty states require a minimum of one thousand hours of training or class time to obtain a license to practice hair braiding. See Valerie Bayham, *A Dream Deferred: Legal Barriers to African Hairbraiding Nationwide*, INST. FOR JUSTICE, <http://www.ij.org/a-dream-deferred> (last visited Jan. 4, 2013).

3. The following states require a funeral directing or mortician’s license to sell caskets: Alabama, Delaware, Idaho, Louisiana, Maine, Minnesota, Mississippi, Oklahoma, South Carolina, Tennessee, Vermont, and Virginia. See *The Right to Urn an Honest Living: Challenging Tennessee’s Casket Monopoly*, INST. FOR JUSTICE, <http://www.ij.org/tennessee-caskets-background> (last visited Jan. 4, 2013).

4. According to the American Society of Interior Designers, twenty-seven states and the District of Columbia have enacted interior design licensure requirements. See *State Licensing Regulations*, AM. SOC’Y OF INTERIOR DESIGNERS, <http://www.asid.org/content/state-licensing-regulations> (last visited Jan. 4, 2013).

5. The Wall Street Journal reports that in Texas, shampoo specialists must take “150 hours of classes, 100 of them on the ‘theory and practice’ of shampooing, before they can sit for a licensing exam,” which awards points for things like hand sanitization, water temperature regulation, and thorough hair rinsing. Stephanie Simon, *A License to Shampoo: Jobs Needing State Approval Rise*, WALL ST. J., Feb. 7, 2011, at A1; see also *Shampoo License Examination Candidate Information Bulletin*, TEX. DEP’T OF LICENSING AND REGULATION (Dec. 2012), available at [https://candidate.psiexams.com/bulletin/display\\_bulletin.jsp?ro=yes&actionname=83&bulletinid=169&bulletinurl=.pdf](https://candidate.psiexams.com/bulletin/display_bulletin.jsp?ro=yes&actionname=83&bulletinid=169&bulletinurl=.pdf) (outlining the shampoo-licensing examination procedures and requirements).

therapists,<sup>6</sup> teeth whiteners,<sup>7</sup> and massage therapists<sup>8</sup> must meet arduous and expensive licensing requirements in order to go into business.

These onerous regulations on professionals have multiplied over the past fifty years.<sup>9</sup> According to one study, the percentage of U.S. workers required to obtain state licenses to practice a trade has increased from five percent in 1950 to at least twenty percent in 2000 and to twenty-nine percent in 2006.<sup>10</sup> Many of these new regulations do not have a strong public health or safety rationale, but were passed at the behest of special interest groups seeking to keep competitors out of the market.<sup>11</sup> For example, until 2010, prospective florists in Louisiana were required to pass a subjective floral exam administered by incumbent florists interested in keeping potential competitors out of the market.<sup>12</sup> Similarly, prospective barbers in California are obligated to spend over \$10,000 and achieve 1,500 hours of class credits to obtain a barber's license.<sup>13</sup>

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6. In 2011, “[h]istory was made” when North Dakota and Nevada became the first two states to pass music therapy licensure legislation. *Music Therapy Licensure Legislation Signed into Law*, AM. MUSIC THEORY ASS'N, [http://www.musictherapy.org/music\\_therapy\\_licensure\\_legislation\\_signed\\_into\\_law/](http://www.musictherapy.org/music_therapy_licensure_legislation_signed_into_law/) (last visited Jan. 4, 2013).

7. In June 2011, the Connecticut State Dental Commission passed a measure that allows only dentists to perform “on-site teeth whitening,” even though similar teeth-whitening products are available over the counter. Jennifer Levitz, *4 out of 5 Dentists Think They Should Whiten Teeth*, WALL ST. J., Nov. 16, 2011, at B1. In 2010, the Federal Trade Commission (FTC) filed a lawsuit against the North Carolina Dental Board, alleging that prohibiting non-dentists from offering teeth-whitening services was anti-competitive behavior. See Press Release, Fed. Trade Comm'n, Federal Trade Commission Complaint Charges Conspiracy to Thwart Competition in Teeth-Whitening Services (June 17, 2010), <http://www.ftc.gov/opa/2010/06/ncdental.shtm>.

8. The vast majority of states and the District of Columbia have enacted massage therapy licensure or certification legislation. See *Massage State Regulation Guide*, ASS'N. BODY WORK AND MASSAGE PROFS, available at [http://www.massagetherapy.com/\\_content/careers/MTreg.pdf](http://www.massagetherapy.com/_content/careers/MTreg.pdf) (last visited Jan. 4, 2013).

9. See Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. OF INDUS. REL. 676, 676 (2010) (providing statistics from the Department of Labor and the U.S. Census).

10. *Id.* at 678.

11. See discussion *infra* Part II.B (discussing interest groups' desire to maintain their market advantages by limiting competition).

12. See Leslie Turk, *Jindal Strikes down Blooming Nonsense*, INDEP. MEDIA GRP. (July 12, 2010), <http://www.theind.com/business/6564-jindal-strikes-down-blooming-nonsense> (noting the abolishment of the subjective demonstration portion of the floral exam); see also Dick M. Carpenter II, *Blooming Nonsense: Experiment Reveals Louisiana's Florist Licensing Scheme as Pointless and Anti-competitive* (Mar. 2010), [http://www.ij.org/images/pdf\\_folder/other\\_pubs/laflowerreportfinalsm.pdf](http://www.ij.org/images/pdf_folder/other_pubs/laflowerreportfinalsm.pdf) (indicating that Louisiana's “licensing scheme” simply shields current license holders from legitimate competition).

13. Simon, *supra* note 5 (describing California's requirements for obtaining a barber's license).

Supreme Court precedent affords states significant latitude to regulate occupations and implement intrastate licensing schemes.<sup>14</sup> Nevertheless, public interest firms engaging in strategic advocacy, such as the Institute for Justice, are contesting the outer limit of the states' power to restrict the ability of individuals to enter an occupation.<sup>15</sup> As a result, a three-way circuit split has emerged over whether pure economic protectionism of a particular industry is a legitimate government interest sufficient to withstand rational basis scrutiny or whether such measures violate the Equal Protection Clause of the Fourteenth Amendment.<sup>16</sup> In *Craigmiles v. Giles*, the Court of Appeals for the Sixth Circuit struck down a Tennessee law requiring casket merchants to obtain a funeral-directing license.<sup>17</sup> Although the Sixth Circuit stressed that rational basis review is a deferential standard, it relied in part on the Supreme Court's ruling in *City of Cleburne v. Cleburne Living Center*, which adopted an unusually rigorous form of rational basis scrutiny.<sup>18</sup>

In contrast, in *Powers v. Harris*, the Court of Appeals for the Tenth Circuit rejected the reasoning in *Craigmiles* and held that a similar funeral-directing license requirement was consistent with the Equal Protection Clause.<sup>19</sup> The

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14. See *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791–93 (1975) (acknowledging that the states have “a compelling interest in the practice of professions within their boundaries, and . . . have broad power to establish standards for licensing practitioners and regulating the practice of professions.”); see also *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) (per curiam) (noting that the state police powers give states broad authority to regulate their local economies); *Kotch v. Bd. of River Port Pilot Comm'rs*, 330 U.S. 552, 555 (1947) (upholding a Louisiana law that conditioned receiving a harbor pilot's license on completion of an apprenticeship term, even though “with occasional exception, only relatives and friends of incumbent[]” pilots were selected as apprentices).

15. According to Chip Mellor, co-founder of the Institute for Justice, such strategic advocacy entails:

[A] carefully planned, long-term program to restore constitutional protection for economic liberty. It will be essential to identify licensing and permitting laws and other government-created barriers to entry that frame the economic liberty issue most compellingly. We have high confidence in our ability to do this since we have been very successful in all of our cases in identifying the best possible factual settings and the most sympathetic clients.

STEVEN M. TELES, *RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 238 (2008) (footnote omitted).

16. *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).

17. *Craigmiles*, 312 F.3d at 222, 228–29 (finding the provisions violative of the Fourteenth Amendment).

18. *Id.* at 227 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)) (following the principle that legislation should employ the most direct and efficient means for achieving otherwise legitimate ends), *superseded by statute*, Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601–3616, as recognized in *Human Res. & Mgmt. Grp. v. Cnty. of Suffolk*, 687 F. Supp. 2d 237, 256 n.15 (E.D.N.Y. 2010); see also *infra* Part I.A.2.ii (discussing *Cleburne*).

19. *Powers v. Harris*, 379 F.3d 1208, 1221–23 (10th Cir. 2004) (holding that “absent a violation of a specific constitutional provision or other law, intrastate economic protectionism constitutes a legitimate state interest”); see *infra* Part I.C.2 (discussing the *Powers* court's

*Powers* Court held that as long as protectionist state licensing regulations did not violate an express constitutional prohibition, or the Dormant Commerce Clause,<sup>20</sup> they were *per se* constitutional under rational basis review.<sup>21</sup>

In *Merrifield v. Lockyer*, the Court of Appeals for the Ninth Circuit rejected the *per se* rule adopted in *Powers*, striking down a pest-control licensing provision on the ground that it was “irrational” and thus in violation of the Equal Protection Clause.<sup>22</sup> However, unlike *Craigsmiles*, the Ninth Circuit did not rely on *City of Cleburne*, but rather adopted the more deferential form of rational basis review.<sup>23</sup>

Finally, in March 2013, the Court of Appeals for the Fifth Circuit in *Abbey v. Castille* joined the Sixth and Ninth Circuits in holding that a licensing scheme, enacted solely to exclude competitors, was unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>24</sup> Like the Ninth Circuit, the *St. Joseph Abbey* court rejected the highly deferential approach taken by the *Powers* court.<sup>25</sup>

This Comment will examine whether pure economic protectionism is a legitimate government interest sufficient to satisfy rational basis review. Part I introduces the three standards of review that the Supreme Court has used to resolve due process and equal protection issues and highlights the contrasting approaches for applying rational basis review. Part I also discusses the

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Fourteenth Amendment analysis, which concluded that economic protectionism constituted a legitimate state interest).

20. Under the Court’s Dormant Commerce Clause jurisprudence, a state law that is not explicitly preempted by federal law may be unconstitutional if it discriminates against or imposes a burden on interstate commerce. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 424–30 (4th ed. 2011) (discussing the Supreme Court’s Dormant Commerce Clause jurisprudence).

21. See *Powers*, 379 F.3d at 1221–22 (discussing the Tenth Circuit’s rejection of the *Craigsmiles* approach and the application of deferential rational basis review with regard to licensing laws). The Fourth and Eleventh Circuits have followed suit. See *Locke v. Shore*, 634 F.3d 1185, 1196–97 (11th Cir. 2011) (upholding a Florida licensure requirement for commercial interior design), *cert. denied*, 132 S. Ct. 1004 (2012); *Brown v. Hovater*, 561 F.3d 357, 367–69 (4th Cir. 2009) (upholding Maryland’s Morticians Act, which prohibits corporate ownership of funeral establishments, with an exception for the fifty-eight existing corporations).

22. See *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) (finding that “mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review”).

23. *Merrifield*, 547 F.3d at 985–86 & n.10 (finding that the Court’s approach in *City of Cleburne* was inapplicable).

24. *Abbey v. Castille*, No. 11-30756, 2013 WL 1149579, at \*7–9 (5th Cir. Mar. 20, 2013) (finding that the State’s purported health and safety explanations for the regulation were “nonsensical” and “irrational”); see also *Merrifield*, 547 F.3d at 991–92 (holding that a state licensing scheme for pest removal irrationally exempted certain types of pest removal companies); *Craigsmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (affirming that a Tennessee statute requiring funeral retail stores to employ a funeral director violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

25. *Abbey*, 2013 WL 1149579, at \*5–6.

evolution of rational basis review within the context of economically protectionist state legislation and considers the developing circuit split regarding state licensing schemes passed solely to prevent competitors from entering the market. Part II argues that the rationale for automatic deference under rational basis review is no longer justified in light of recent precedent. Part II also draws on public choice economic theory, arguing that the courts have the important ability to prevent licensing abuses that result from institutional weaknesses in the state legislative process. Part III suggests that economic protectionism is not a legitimate state interest and proposes a two-part test for determining the constitutionality of such legislation. Part IV concludes by arguing that this two-part test is consistent with Supreme Court precedent and can be cabined to prevent undue judicial interference with the legislative process.

## I. EQUAL PROTECTION JURISPRUDENCE AND THE EVOLUTION OF RATIONAL BASIS REVIEW

### A. *The Interpretive Challenge Posed by the Equal Protection Clause of the Fourteenth Amendment*

Generally, plaintiffs rely on both the Due Process and Equal Protection Clauses of the Fourteenth Amendment when challenging the constitutionality of occupational licensing regulations.<sup>26</sup> Section One of the Fourteenth Amendment states, in relevant part, “No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>27</sup> The “any person” language of the Equal Protection Clause presents a difficult challenge for courts: because many laws draw distinctions among citizens, courts must determine not whether the law in question creates classifications, but whether the classifications are justified in light of the purpose behind the legislation.<sup>28</sup>

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26. See, e.g., *Craigmiles v. Giles*, 110 F. Supp. 2d 658 (E.D. Tenn. 2000) (addressing plaintiffs’ challenge to a Tennessee law requiring a license to sell funeral equipment on grounds that the statute violates their Due Process and Equal Protection rights under the Fourteenth Amendment), *aff’d*, 312 F.3d 220 (6th Cir. 2002).

27. U.S. CONST. amend. XIV, § 1. The Privileges and Immunities Clause was also included in the Fourteenth Amendment to protect individual rights, but it was essentially written out of the Constitution by the Slaughter-House Cases. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74–75 (1873). See Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 627–28 (1994) (arguing that Justice Samuel Miller incorrectly weakened the Privileges and Immunities Clause of the Fourteenth Amendment).

28. See *Trimble v. Gordon*, 430 U.S. 762, 779–80 (1977) (Rehnquist, J., dissenting) (arguing that the proper determination under the Equal Protection Clause is whether a legislative classification can be justified by the state’s legitimate purpose). The use of the Equal Protection Clause to invalidate legislation is a relatively recent development. Before *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court “rarely found any state or local action to violate the equal protection clause” of the Fourteenth Amendment. CHEMERINSKY, *supra* note 20, at 668

*1. The Supreme Court Has Gradually Developed Three Standards of Review to Test the Constitutionality of State Legislation Under the Fourteenth Amendment*

Between 1897 and 1937, a historical period known as the *Lochner* Era, the Supreme Court recognized the “freedom of contract” under the Due Process Clause of the Fourteenth Amendment<sup>29</sup> and allowed states to regulate contracts only if such regulations directly affected certain policy interests, such as the health, safety, or morals of its citizens.<sup>30</sup> In determining whether this requirement was met, the Court weighed the public policy rationales behind the legislation and reached its own conclusions as to the wisdom or necessity of the law.<sup>31</sup>

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(noting that the “promise” of the Equal Protection Clause “went unrealized for almost a century . . .”). Until the Warren Court Era, the Supreme Court only applied the Equal Protection Clause to racial and ethnic minorities. *See, e.g., Slaughter-House Cases*, 83 U.S. (16 Wall.) at 81 (construing the Equal Protection Clause “in light of the history of these amendments,” which was the protection of “the newly emancipated negroes”); *see also Yick Wo v. Hopkins*, 118 U.S. 357 (1886) (invalidating a facially neutral law that was only enforced against Chinese persons, expanding the reach of the Equal Protection Clause to other minority groups); *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (invalidating a law that only allowed white males to serve on juries, but suggesting that the state could “confine the selection to males, freeholders . . . or persons having educational qualifications” without violating the Equal Protection Clause). Nevertheless, the Court’s understanding of the Equal Protection Clause was very narrow. *See, e.g., Plessy v. Ferguson*, 163 U.S. 537, 550–52 (1896) (upholding a law mandating the segregation of railway accommodations because it was enacted in “good faith,” was not disparaging to African Americans, and did not confer “arbitrary power” on municipalities, as in *Yick Wo*), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Despite the Court’s constrained and deferential approach to the Equal Protection Clause, the Court adopted a much broader interpretation of the Due Process Clause. *See infra* text accompanying notes 29–32.

29. *See Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (striking down a Louisiana law on freedom of contract grounds); *see also* CHEMERINSKY, *supra* note 20, at 610–20 (discussing economic substantive due process).

30. *Lochner v. State of New York*, 198 U.S. 45, 53 (1905) (invalidating a New York law on maximum hours for bakery workers on “liberty of contract grounds”), *overruled in part by Ferguson v. Skrupa*, 372 U.S. 726 (1962). In fact, one scholar describes the *Lochner* decision as an “outlier,” stating that the Supreme Court “generally deferred to legislative innovation.” DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 1* (2011). Bernstein argues that substantive due process was more aggressively advanced in the 1920s, when the Court not only invalidated economic legislation, but also struck down state laws abridging freedom of speech and parents’ right to raise and educate children. *Id.* at 92–93.

31. According to *Lochner*, the role of the Court is to ask whether the law in question is “a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts . . . necessary for the support of himself and his family.” *Lochner*, 198 U.S. at 56 (rejecting the New York legislature’s conclusion that limiting the length of the bakers’ work week relates to the public health). According to Justice James McReynolds, the Court “must have regard to the wisdom of the enactment. At least, we must inquire concerning its purpose and decide whether the means proposed have reasonable relation to something within legislative power—whether the end is legitimate, and the means appropriate.” *Nebbia v. New*



By the mid-1930s, the Court became more reluctant to question legislative prudence and generally presumed that all state legislation was constitutional, as long as it was not “arbitrary or capricious.”<sup>32</sup> This presumption, which foreshadowed the modern rational basis test, was very deferential to the states, although the Court suggested in *United States v. Carolene Products Co.* that it might apply closer scrutiny under certain circumstances.<sup>33</sup>

Eventually, the Supreme Court developed three levels of judicial scrutiny.<sup>34</sup> The Court applies “strict scrutiny” to laws that distinguish individuals on the basis of invidious or “suspect” classifications—namely race, national origin, and alienage.<sup>35</sup> Under strict scrutiny, the Court upholds a law only if it is the least restrictive means necessary to accomplish a compelling governmental interest.<sup>36</sup> The Court applies a more flexible “intermediate scrutiny” to legislation based upon “quasi-suspect” classifications, such as gender,

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York, 291 U.S. 502, 556 (1934) (McReynolds, J., dissenting). Justice McReynolds also noted that the legislation in question, which would establish a price floor regime for milk, would not help dairy farmers, since the price-floor would not help reduce production. *Id.*; *cf.* *W. Coast Hotel Co. v. Parish*, 300 U.S. 379, 402 (1937) (Sutherland, J., dissenting) (contending that “[s]elf-restraint belongs in the domain of will and not of judgment. The check upon the judge is that imposed by his oath of office, by the Constitution, and by his own conscientious and informed convictions”).

32. See *W. Coast Hotel Co.*, 300 U.S. at 399; see also *United States v. Darby*, 312 U.S. 100, 115 (1941) (holding that “[w]hatever the motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause”).

33. In a famous footnote in *United States v. Carolene Products Co.*, the Court stated that a “narrower scope of the operation of the presumption of Constitutionality” might apply if: (1) “legislation appears on its face to be within a specific prohibition of the Constitution,” (2) it “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,” and (3) if it is motivated by “prejudice against discrete and insular minorities.” 304 U.S. 144, 152–53 n.4 (1937). Over time, the Supreme Court crafted stricter standards of review “to protect . . . fundamental rights that were too important to be enforced only by a rational-basis test, but that the Supreme Court could not reasonably define as wholly categorical or unyielding.” Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. REV.* 1267, 1270 (2007); see *McLaughlin v. Florida*, 379 U.S. 184, 191–92 (1964).

34. Compare *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (applying rational basis review to mental disability discrimination), *superseded by statute*, Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601–3616, as recognized in *Human Res. & Mgmt. Grp. v. Cnty. of Suffolk*, 687 F. Supp. 2d 237, 256 n.15 (E.D.N.Y. 2010), with *Craig v. Boren*, 429 U.S. 190 (1976) (adopting intermediate scrutiny to gender discrimination), and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (applying strict scrutiny to racial classification).

35. See, e.g., *Grantz v. Bollinger*, 539 U.S. 244, 331 (2003) (stating that “all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny”); see also CHEMERINSKY, *supra* note 20, at 671–73.

36. *Adarand Constructors, Inc.*, 515 U.S. at 227 (holding that race classifications are “only constitutional if they are narrowly tailored measures that further compelling governmental interests”); see also CHEMERINSKY, *supra* note 20, at 687 (noting that discrimination based on race and national origin is analyzed under strict scrutiny).

sexual orientation, and illegitimacy.<sup>37</sup> Under intermediate scrutiny, such classifications are upheld only if they are substantially related to a significant government purpose.<sup>38</sup> Finally, the Court reviews all other laws, including occupational licensing laws, under “rational basis scrutiny” and upholds a law as long as the classification employed is “rationally related to a legitimate state interest.”<sup>39</sup>

## 2. Two Approaches to Rational Basis Review

### i. The Supreme Court Takes the “Scrutiny” out of Rational Basis Scrutiny in *Williamson v. Lee Optical*

When the Court eventually rejected the interventionist approach of the *Lochner* Era, it adopted a method of reviewing whereby it applied a rebuttable presumption of constitutionality to state laws or ordinances passed pursuant to the police powers of the state.<sup>40</sup> However, in *Williamson v. Lee Optical of Oklahoma, Inc.*, the Court altered its approach to a formalistic application of rational basis review.<sup>41</sup>

In *Lee Optical*, the plaintiffs challenged an Oklahoma regulation that prohibited opticians from making prescription eyeglasses without a valid prescription from an ophthalmologist or optometrist.<sup>42</sup> The law also made it illegal for eyeglass retailers to lease space to “any person purporting to do eye examination or visual care.”<sup>43</sup> Although the district court applied a presumption of constitutionality, it nevertheless held that the statute was invalid for three reasons.<sup>44</sup>

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37. See e.g., *Craig*, 429 U.S. at 197 (applying intermediate scrutiny to gender discrimination).

38. *Id.*

39. See, e.g., *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (per curiam) (1976) (defining rational basis review); see also CHEMERINSKY, *supra* note 20, at 672 (describing the rational basis test as the “minimum level of scrutiny”).

40. Under this standard, the Court only questions legislation if the plaintiff succeeded in affirmatively establishing that it was “unreasonable or arbitrary.” *Nebbia v. New York*, 291 U.S. 502, 530 (1934). Thus in *Carolene Products*, the Court held 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 . . . it is of such a character as to preclude the assumption that it rests upon some rational basis with the knowledge and experience of the legislators.

*United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 (1938) (footnote omitted).

41. 348 U.S. 483, 487–88 (1955) (stating that the legislature, rather than the courts, should determine the advantages and disadvantages of a law).

42. *Lee Optical of Okla., Inc. v. Williamson*, 120 F. Supp. 128, 131 & n.4 (W.D. Okla. 1954), *aff’d in part, rev’d in part sub nom.* 348 U.S. 483 (1955).

43. *Id.* at 131, 142.

44. *Id.* at 142.

First, the district court reasoned that the prohibition against making and repairing glasses without a prescription bore “no . . . rational relation to the actual vision of the public.”<sup>45</sup> Grinding lenses was “strictly artisan in character” and “require[d] no unusual professional judgment” associated with ophthalmology and optometry.<sup>46</sup> In addition, the court held that the law violated the Equal Protection Clause because it unreasonably discriminated against opticians by barring them from selling glasses without a prescription, but allowed the unsupervised sale of ready-to-wear glasses.<sup>47</sup> Finally, the court found that forbidding eye-care professionals from renting retail space was “an arbitrary interference with the right of contract.”<sup>48</sup>

On appeal, the Supreme Court reversed the district court’s decision and held that, under rational basis scrutiny, a court should not evaluate legislation unless it engages in “invidious discrimination.”<sup>49</sup> The Court reasoned that “[t]he Oklahoma law may exact a needless, wasteful requirement . . . [b]ut it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.”<sup>50</sup> The Court also held that a law is constitutional as long as its hypothetical purpose can be conceived, stating that “[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”<sup>51</sup> Thus, the Court’s rationale in *Lee Optical* suggests that the constitutionality of legislation is only limited by the Court’s power of imagination.<sup>52</sup>

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45. *Id.* at 135, 143.

46. *Id.* at 135–37 (noting that the skills required in the present case do not require professional supervision).

47. *Id.* at 138–39 (finding no significant difference between purchasing new frames versus buying duplicate prescription eye glasses).

48. *Id.* at 142.

49. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

50. *Id.* at 487 (holding that economic legislation “need not be in every respect logically consistent with its aims to be constitutional”). Justice William Douglas also made a scathing reference to the *Lochner* Era, stating that “[t]he 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.” *Id.* at 488.

51. *Id.* at 488. The Court identified several potential purposes:

The legislature might have concluded that the frequency of occasions where a prescription is necessary was sufficient to justify this regulation. . . . [Or] the legislature might have concluded that eye examinations were so critical . . . that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert.

*Id.* at 487.

52. *See McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961) (holding that “[t]he constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective. . . . Statutory discrimination will not be set aside if any state of facts *reasonably may be conceived* to justify it” (emphasis added) (citation omitted)).

*ii. The Development of a More Searching Form of Rational Basis Review*

Occasionally, the Supreme Court deviates from the lenient approach to rational basis review that it applied in *Lee Optical* by applying a more searching form of rational basis scrutiny.<sup>53</sup> For instance, the Court has been less deferential to legislation that specifically targets unpopular groups.<sup>54</sup>

In *City of Cleburne*, the Court purported to apply rational basis review to an ordinance that denied a permit for a group home for individuals with mental disabilities.<sup>55</sup> The *Cleburne* Court—like the *Lochner* Court—looked to the legislature’s motive and held that the law was “irrational” and not pursuant to any “legitimate [state] interest.”<sup>56</sup>

*B. The Application of Rational Basis Review to Protectionist State Legislation*

It is well established that the power to regulate professions falls within the states’ police power.<sup>57</sup> This principle comports with the Supreme Court’s modern understanding of the Equal Protection Clause: that state economic legislation is constitutional as long as it is rationally related to a legitimate state purpose.<sup>58</sup>

Although the *Lee Optical* Court held that the judiciary should review state economic legislation challenged under the Equal Protection Clause in a very deferential manner, it was unclear on the extent to which the Court would apply this relaxed framework to state licensing regulations.<sup>59</sup> In *Morey v. Doud*, a decision rendered just two years after *Lee Optical*, the Court invalidated an Illinois licensing requirement under the Equal Protection

53. See Robert C. Farrell, *Legislative Purpose and Equal Protection’s Rationality Review*, 37 VILL. L. REV. 1, 65 (1992) (concluding that “two distinctly different standards are at work in the Court’s rational basis analysis, causing unpredictable results depending upon which standard the Court chooses to apply in a particular case”); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 802 (1987) (contending that “rational basis with bite . . . is merely intermediate scrutiny by another name”).

54. See, e.g., *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (abrogating a Colorado constitutional amendment that barred the passage of anti-discrimination laws designed to protect homosexuals); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985) (invalidating an ordinance that denied a permit for a group home for people with mental disabilities), *superseded by statute*, Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601–3616, *as recognized in* Human Res. & Mgmt. Grp. v. Cnty. of Suffolk, 687 F. Supp. 2d 237, 256 n.15 (E.D.N.Y. 2010); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (striking down a provision of the Food Stamp Act that excluded households in which unrelated individuals lived).

55. *Cleburne*, 473 U.S. at 435, 447 (finding that “a lesser standard of scrutiny is appropriate, but . . . under that standard the ordinance is invalid as applied in this case”).

56. *Id.* at 448–50.

57. See *supra* note 14 and accompanying text (explaining that states have the discretion to create their own licensing laws).

58. See *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (stating that the Court “consistently defers to legislative determinations” when “local economic regulation is challenged solely as violating the Equal Protection Clause . . .” (citations omitted)).

59. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955).

Clause.<sup>60</sup> In fact, the Court did not apply the logic of *Lee Optical* to licensing regulations until 1976 in *City of New Orleans v. Dukes*, when it overturned *Morey*.<sup>61</sup>

*1. The Court Establishes the Modern Deferential Approach to Protectionist State Legislation in City of New Orleans v. Dukes*

In *City of New Orleans v. Dukes*, the Supreme Court rejected *Morey*'s holding that suggested the possibility of challenging licensing laws on equal protection grounds.<sup>62</sup> In *Dukes*, the Court considered the constitutionality of a New Orleans permit scheme that prohibited the operation of pushcart vendors with an exception for vendors who had been in business for at least eight years.<sup>63</sup> The Fifth Circuit, following *Morey*, invalidated the ordinance on the ground that the grandfather provision violated the Equal Protection Clause.<sup>64</sup>

Characterizing the grandfather clause as “solely an economic regulation,” the Supreme Court reversed, reasoning that states enjoy “wide latitude in the regulation of their local economies under their police power.”<sup>65</sup> The Court concluded that states must be afforded discretion even if the solutions they adopt are imperfect, or only partly address a “perceived evil.”<sup>66</sup> Reverting to the broad discretion allowed in *Lee Optical*, the Court held that “in the local economic sphere, only invidious discrimination” is inconsistent with the Fourteenth Amendment.<sup>67</sup>

*2. Recent Supreme Court Decisions Undermine the Approach Outlined in Dukes and Lee Optical*

Recent Supreme Court decisions invalidating state economic regulations on equal protection grounds, despite the absence of any invidious classifications,

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60. *Morey v. Doud*, 354 U.S. 457, 469 (1957) (invalidating the Illinois Community Currency Act on equal protection grounds because the law exempts American Express from the license requirement for firms dealing in money orders), *overruled by* *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (per curiam).

61. *Dukes*, 427 U.S. at 306 (reversing *Morey* because it “departs from proper equal protection analysis”); *see infra* Part I.B.1 (discussing *Dukes*).

62. In *Dukes*, the Court pointed out that *Morey* “was the only case in the last half century to invalidate a wholly economic regulation *solely* on equal protection grounds.” *Dukes*, 427 U.S. at 306 (emphasis added); *see also* *Morey*, 354 U.S. at 469.

63. *See Dukes*, 427 U.S. at 298–99.

64. *Dukes v. City of New Orleans*, 501 F.2d 706, 711–13 (5th Cir. 1974) (following *Morey* by holding that the ordinance violated the Equal Protection Clause by conferring a monopoly on a “favored class member,” thereby engaging in “statutory discrimination” against other vendors), *rev'd*, 427 U.S. 297 (1976).

65. *Dukes*, 427 U.S. at 303.

66. *Id.* at 303–04.

67. *Id.*; *see also supra* note 49 and accompanying text.

have undermined the deferential precedents established by *Dukes* and *Lee Optical*.<sup>68</sup>

*i. The Court Invalidates a Facially Neutral Valuation System that Results in the Disproportionate Treatment of Similarly Situated Properties*

In *Allegheny Pittsburgh Coal Co. v. County Commission*, a group of landowners challenged the method used by the West County assessor to value their property.<sup>69</sup> The assessors valued the property based on the most recent purchase price and made only small adjustments for land not recently sold.<sup>70</sup> This system resulted in grossly disproportionate tax rates because it valued recently purchased properties higher than other comparative properties in the same county.<sup>71</sup> In two cases (consolidated on appeal), the Circuit Court of Webster County found that the valuation violated the West Virginia Constitution and the Equal Protection Clause of the Fourteenth Amendment.<sup>72</sup> The West Virginia Supreme Court of Appeals reversed, finding no “intentional and systematic” discrimination.<sup>73</sup>

On appeal, the Supreme Court agreed with the Webster County Circuit Court and reversed the Court of Appeals, finding that even if the valuation was accurate, it violated the Equal Protection Clause by subjecting the property owners to discriminatory treatment by taxing them at a much higher rate than similarly situated property owners.<sup>74</sup> In contrast to *Dukes* and *Lee Optical*, the

68. See *supra* notes 49–52, 66–67 and accompanying text (discussing the deferential holdings in *Dukes* and *Lee Optical*); *infra* part I.B.2.i–iii (highlighting recent Supreme Court decisions that undermine the deferential approach of *Dukes* and *Lee Optical*).

69. *Allegheny Pittsburgh Coal Co. v. Cnty. Comm’n*, 488 U.S. 336, 338 (1989).

70. *Id.*

71. See *id.* at 338, 340–41 (noting that, although minor adjustments were made in the valuation of properties not recently sold, they did not amount to significant increases).

72. See *id.* at 339–40 (concluding that “petitioners’ tax assessments over the years were dramatically in excess of those for comparable property in the county”); see also W. VA. CONST. art. X, § 1 (requiring that “[s]ubject to the exceptions in this section contained, taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law”).

73. *In re 1975 Tax Assessments Against Oneida Coal Co.*, 360 S.E.2d 560, 564–65 (W. Va. 1987) (internal quotations omitted), *rev’d sub nom. Alleghany Pittsburgh Coal Co.*, 488 U.S. 336 (1989).

74. *Alleghany Pittsburgh Coal Co.*, 488 U.S. at 345–46 (holding that “the fairness of one’s allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others . . . . The relative undervaluation of comparable property in Webster County over time . . . denies petitioners the equal protection of the law”). The Court also found that the discrepancies were not temporary, but had continued “for more than [ten] years with little change.” *Id.* at 344.

However, the Supreme Court has been inconsistent with this decision: just three years later, it upheld a California law that was almost identical in its effects to the tax commissioner’s practice in *Allegheny*. See *Nordlinger v. Hahn*, 505 U.S. 1, 4–6, 17–18 (1992) (Thomas, J., concurring in part and concurring in judgment) (noting the similarities of the California statute and the practice by the Commissioner in *Allegheny*, but upholding the California statute on the ground that

Court did not attempt to identify the motive behind the state employees' adoption of the particular assessment method in question.<sup>75</sup>

*ii. The Court Holds that Discriminating Against Out-of-State Firms to Promote Domestic Industry Is Not a Legitimate State Purpose*

In *Metropolitan Life Insurance Co. v. Ward*, the Court held that an Alabama statute violated the Equal Protection Clause by imposing a much lower tax on the gross premiums of in-state insurance companies than on out-of-state companies, even though the statute allowed foreign firms to reduce the tax differential by acquiring Alabama assets and securities.<sup>76</sup> Because both parties stipulated that this law was rationally related to the state's purpose of promoting the domestic insurance industry and encouraging capital investment in Alabama, the only issue before the Court was whether this purpose was legitimate under the Equal Protection Clause.<sup>77</sup> The Court held that promoting these goals "by discriminating against nonresident competitors is not a legitimate state purpose" and thus unconstitutional, even under rational basis review.<sup>78</sup>

*iii. The Court Invalidates an Arbitrary Zoning Condition as Unconstitutional Under the Equal Protection Clause*

In *Village of Willowbrook v. Olech*, the plaintiff alleged that the Village of Willowbrook had arbitrarily conditioned her request to connect her property to the municipal water supply on her granting a thirty-three-foot easement to the

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judicial interference is generally unwarranted unless it is found that the law in question is arbitrary); see also CHEMERINSKY, *supra* note 20, at 642 (supporting the Supreme Court's decision in *Nordlinger* and stating that a law should be upheld as long as the Court can conceive of a legitimate purpose and rational basis for the law). Nonetheless, the Court did not directly overturn *Allegheny*. See *Nordlinger*, 505 U.S. at 18, 21, 28. In fact, the Court revived *Allegheny* by relying on its reasoning in a subsequent case. *Id.*; see *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

75. See *City of New Orleans v. Dukes*, 427 U.S. 297, 304–05 (1976) (identifying hypothetical reasons that would support the city ordinance's constitutionality); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955) (highlighting the rationales of the Oklahoma legislature that would support the state law's constitutionality); see also *Allegheny Pittsburgh Coal Co.*, 488 U.S. at 344–46 (noting that the county assessor appeared to apply the method on her own initiative, rendering the method in violation of the Equal Protection Clause).

76. 470 U.S. 869, 871–72, 883 (1985).

77. See *id.* at 871, 875–76, 882 (stating that the issue in this case was whether Alabama's domestic preference tax statute violated the Equal Protection Clause because the appellant had waived his right to an evidentiary hearing on the rationality of the law, resulting in a stipulation that the law was rationally related to its purpose).

78. See *id.* at 875, 882–83. The contrast between *Metropolitan Life* and earlier Supreme Court decisions is striking. For instance, the Court had previously stated that "[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961) (upholding Maryland's Sunday-closing laws); see also *supra* note 52.

Village.<sup>79</sup> Previously, the Village had only required a fifteen-foot easement from other similarly situated property owners.<sup>80</sup> The plaintiff brought suit against the Village, alleging that the demand for an additional easement violated the Equal Protection Clause.<sup>81</sup> The Supreme Court held that although the plaintiff “did not allege membership in a class or group,” the Equal Protection Clause provided a cause of action for “a class of one.”<sup>82</sup> Therefore, despite the absence of any invidious classifications, the Court affirmed the judgment of the Seventh Circuit and found that the plaintiff sufficiently stated a cause of action under the Equal Protection Clause.<sup>83</sup>

*C. A Circuit Split Emerges over the Appropriate Form of Rational Basis Review to Be Applied to Protectionist Licensing Regulations*

Although the Court has not yet determined what limits exist on states’ power to regulate professions within state boundaries, a three-way circuit split between the Sixth, Ninth, and Tenth Circuits has emerged on the issue.<sup>84</sup>

*1. The Sixth Circuit Rules that “Naked” Protectionism Is Not a Legitimate State Purpose Under Rational Basis Review*

In *Craigsmiles v. Giles*, the Sixth Circuit held that a Tennessee law requiring casket retailers to be licensed funeral directors violated the Equal Protection and Due Process Clauses because it had no plausible health or consumer protection justification.<sup>85</sup> The facts in *Craigsmiles* are striking.<sup>86</sup> In order to become a licensed funeral director, plaintiffs—who simply wished to sell caskets—were required to complete either: (1) a two-year apprenticeship; or

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79. *Olech*, 528 U.S. at 563.

80. *Id.*

81. *Id.* *Olech* also alleged that the Village’s demand was motivated by her previous, successful action against the Village in an unrelated lawsuit. *Id.* Her claim was further strengthened by the Village eventually agreeing to only a fifteen-foot easement. *Id.*

82. *Id.* at 564–65 (citation and internal quotations omitted).

83. *Id.* at 563–65 (affirming the judgment below, but refusing to consider the appellant’s alternative theory of “subjective ill will” relied on by the Seventh Circuit).

84. See *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004); *Craigsmiles v. Giles*, 110 F. Supp. 2d 658 (E.D. Tenn. 2000), *aff’d*, 312 F.3d 220 (6th Cir. 2002).

85. See *Craigsmiles*, 312 F.3d at 227–29.

86. William Mellor, President of the Institute for Justice (which provided pro-bono counsel to the plaintiff in *Craigsmiles*), stated that the facts of the case offered “the perfect opportunity to ask a court to examine the full scope of the privileges or immunities clause.” Steve France, *Dusty Doctrines*, 87 ABA J. 46, 47 (May 2001). Although the Sixth Circuit remarked that the Supreme Court appeared to be open to the possibility of revitalizing the Privileges and Immunities Clause of the Constitution, it found it unnecessary to reach that argument because the case could be decided on other grounds. *Craigsmiles*, 312 F.3d at 229 (citing *Saenz v. Roe*, 526 U.S. 489, 510–11, 521–23 (1999)) (holding that the due process and equal protection claims were sufficient to decide the case but recognizing that the Supreme Court may re-evaluate the scope of the Privileges and Immunities Clause).



(2) one-year of course work at an accredited mortuary school, followed by a one-year apprenticeship and an examination.<sup>87</sup>

The State of Tennessee argued that the licensing requirement was needed to safeguard the public health from poor quality caskets and to protect consumers who may be vulnerable to aggressive sales tactics after the loss of a loved one.<sup>88</sup> Despite applying rational basis review, the Sixth Circuit rejected both rationales, noting that the Tennessee law did not advance the state's health and safety interests because the law did not regulate casket design or quality, and moreover, because casket sellers did not engage in funeral services, such as arranging funeral ceremonies or embalming corpses.<sup>89</sup> As a result, the court invalidated the requirement, noting that it was merely designed to protect "the monopoly rents that funeral directors extract from consumers."<sup>90</sup>

## 2. *The Tenth Circuit Rejects Craigmiles and Applies the Deferential Rational Basis Test of Lee Optical to Interstate Licensing Laws*

In *Powers v. Harris*, the Tenth Circuit reversed an Oklahoma law that, like the law in *Craigmiles*, required individuals to obtain a license to sell caskets.<sup>91</sup> The court did not consider whether the means chosen was rationally related to the purpose articulated by the state,<sup>92</sup> but simply held that "intra-state economic protectionism, absent a violation of specific federal statutory or constitutional provision, is a legitimate state interest."<sup>93</sup> Moreover, the *Powers* court criticized the Sixth Circuit for "focus[ing] heavily on the . . . actual

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87. *Craigmiles*, 312 F.3d at 222. For candidates who opted to attend mortuary school, classes included embalming, "restorative art," and the performance of funeral services. *Id.*; see TENN. CODE ANN. § 62-5-305 (West 2009) (defining the requirements for a funeral-directing license).

88. *Craigmiles*, 312 F.3d at 225–26.

89. *Id.* at 228–29 (holding that "to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational-basis review").

90. *Id.* at 229. The court found that "dedicating two years and thousands of dollars" to obtain a license is a substantial barrier to entry. *Id.* at 226. It concluded, in light of the dubious justifications offered by the defendants, that "the 1972 amendment adding the retail sale of funeral merchandise to the definition of funeral directing was nothing more than an attempt to prevent economic competition." *Id.* at 225.

91. OKLA. STAT. tit. 59, § 396.3a (2010); 379 F.3d 1208, 1211 (10th Cir. 2004). According to the Oklahoma Funeral Services Licensing Act (FLSA), a funeral director is "a person who: sells funeral service merchandise to the public . . ." OKLA. STAT. tit. 59, § 396.2(2)(d); see *Powers*, 379 F.3d at 1211 n.2. The law only applies to caskets and not other funeral merchandise, such as urns. *Id.* at 1212.

92. The only issue the court chose to address was "whether protecting the intrastate funeral home industry, absent a violation of a specific constitutional provision or a valid federal statute, constitutes a legitimate state interest." *Powers*, 379 F.3d at 1218.

93. *Id.* at 1222. As the *Powers* court colorfully noted, "while 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." *Id.* at 1221 (footnote omitted).

motives of the Tennessee legislature<sup>94</sup> and asserted that the Supreme Court allows states to protect favored domestic interests.<sup>95</sup>

*3. The Ninth Circuit Rejects Powers but Purportedly Relies on Traditional Rational Basis Review to Invalidate a California Licensing Scheme*

In *Merrifield v. Lockyer*, the Ninth Circuit confronted a California law that required practitioners of non-pesticide-based pest control<sup>96</sup> to obtain a license through a two-year process.<sup>97</sup> A 1995 amendment exempted from this requirement those operators “engaged in the live capture and removal or exclusion of vertebrate pests, bees, or wasps from a structure without the use of pesticides,” defining vertebrates narrowly to include animals such as “bats, raccoons, skunks, and squirrels,” but not “mice, rats, or pigeons.”<sup>98</sup> The Structural Pest Control Board ordered the plaintiff, who fell outside the exemption, to cease and desist practicing his trade.<sup>99</sup>

The plaintiff argued that the licensing law, as applied to structural pest control, violated the Privileges and Immunities, Due Process, and Equal Protection Clauses because the required training and a majority of the examination questions were irrelevant to his line of work.<sup>100</sup> He also asserted that the licensing requirement arbitrarily did not apply to pest control of bats, raccoons, skunks, and squirrels, but applied to mice, rats, and pigeons.<sup>101</sup>

Although the Ninth Circuit held that California’s licensing law was rationally related to the legitimate public safety interests of the state,<sup>102</sup> the court held that the selective definition of “vertebrates” violated the Equal Protection Clause.<sup>103</sup> The court found that “this type of singling out . . . fails to

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94. *Id.* at 1223 (citing *Craigmiles v. Giles*, 312 F.3d 220, 227 (6th Cir. 2002)).

95. *See id.* at 1220 (citing *Ferguson v. Skrupa*, 372 U.S. 726, 730–31 (1963)).

96. The law regulates “structural pest control,” which includes non-pesticide-based pest control operators because the definition of structural pest control includes the use of mechanical devices used to eliminate pests. *Merrifield v. Lockyer*, 547 F.3d 978, 981 (9th Cir. 2008).

97. CAL. BUS. & PROF. CODE § 8520 (West 2008). Practicing without a license is a misdemeanor offense, with each offense punishable by fines up to \$1,000 and six months’ imprisonment. CAL. BUS. & PROF. CODE § 8553 (West 2008); *see Merrifield*, 547 F.3d at 980–81.

98. CAL. BUS. & PROF. CODE § 8555(g) (West 2008); *see Merrifield*, 547 F.3d at 981–82.

99. *Merrifield*, 547 F.3d at 981 (requiring the plaintiff to obtain a “Branch II license” before Board officials would consider his bid “to birdproof the Trans Bay Terminal in San Francisco”).

100. *Id.* at 982–83.

101. *Id.* at 988–89. The plaintiff argued that the licensing requirements were irrelevant because they applied predominantly to pesticide-based pest control rather than pesticide-free pest control. *Id.*

102. *Id.* at 988 (concluding that the requirements “have a connection to competence in the field, and therefore satisfy rational basis review”).

103. *Id.* at 992. In doing so, the court dismissed the plaintiff’s privileges and immunities claim. *Id.* at 983–84 (finding that the Privileges and Immunities Clause of the Fourteenth Amendment only protects the right to travel).

meet the relatively easy standard of rational-basis review.”<sup>104</sup> Looking at the legislative history, the court also found that the exclusion of mice, rats, and pigeons from the exemption “was designed to favor economically certain constituents at the expense of others similarly situated.”<sup>105</sup> The court refused to follow the rationale in *Powers*, and accordingly invalidated the licensing requirement—to the extent it excludes mice, rats, or pigeons—on equal protection grounds.<sup>106</sup>

Although the Ninth Circuit recited quotes from the Supreme Court’s opinions in *Lee Optical* and *Dukes*, its reasoning more closely resembled the district court in *Lee Optical*, which stated: “The legislature must not blow both hot and cold! If it be desirable for the public protection that opticians sell merchandise and service only upon written prescriptive authority, the legislature cannot at the same time permit the unsupervised sale of ready-to-wear . . . eyeglasses.”<sup>107</sup> Rather than allowing the legislature to reform “one step at a time,” the Ninth Circuit struck down the exemption.<sup>108</sup> Although one might argue that Oklahoma’s failure to regulate ready-to-wear eyeglasses is more likely to be an oversight than the kind of intentional decision of the California legislature to selectively define “vertebrates,” *Merrifield* runs counter to the sweeping language of the Supreme Court in *Lee Optical*.<sup>109</sup>

#### 4. *The Fifth Circuit Follows the Sixth and Ninth Circuits and Holds that Economic Protectionism Is Not a Legitimate State Purpose*

The facts in *St. Joseph Abbey v. Castille* are almost identical to those in *Craigsmiles* and *Powers*.<sup>110</sup> In *St. Joseph Abbey*, Benedictine monks wanted to support their abbey by manufacturing and selling wooden coffins, but were obstructed by a Louisiana law that required individuals to obtain

104. *Id.* at 991.

105. *Id.* (highlighting the law’s irrational exclusion of three types of vertebrate pests from all other vertebrates).

106. *Id.* at 991 n.15, 992 (holding that economic protectionism for its own sake cannot stand as a basis for furthering a legitimate government interest).

107. *Id.* at 988–89; *Lee Optical of Okla., Inc. v. Williamson*, 120 F. Supp. 128, 139 (W.D. Okla. 1954), *aff’d in part, rev’d in part sub. nom.* 348 U.S. 483 (1955).

108. *Lee Optical*, 348 U.S. at 489 (noting that legislatures enact reforms that “may take one step at a time”).

109. According to *Lee Optical*, “the law need not be in every respect logically consistent with its aims to be constitutional. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others.” *Id.* at 487–89 (citation omitted). Moreover, it is doubtful that the failure of the Oklahoma legislature to regulate ready-to-wear eyeglasses was simply an oversight—the legislation as a whole was clearly designed to protect ophthalmologists and optometrists from the competition of opticians. See CHEMERINSKY, *supra* note 20, at 642 (speculating that “[i]n all likelihood, the Oklahoma law was adopted to protect business for optometrists and ophthalmologists and was not motivated by a desire to improve health”).

110. See *Abbey v. Castille*, No. 11-30756, 2013 WL 1149579, at \*1–3 (5th Cir. Mar. 20, 2013); text accompanying *supra* notes 85–95 (describing the facts of *Craigsmiles* and *Powers*).

funeral-directing licenses in order to become casket retailers.<sup>111</sup> The Abbey invested two-hundred thousand dollars to build “Saint Joseph Woodworks,” but shortly before it was due to open, the state Board of Embalmers and Funeral Directors ordered it to cease and desist for violating the licensing law.<sup>112</sup> The Abbey attempted to obtain a legislative concession, but the funeral lobby successfully blocked the effort.<sup>113</sup>

The U.S. District Court for the Eastern District of Louisiana followed *Craigmiles* and found that “economic protectionism standing alone does not provide a *per se* rational basis to pass constitutional muster.”<sup>114</sup> In so doing, the court rejected the claim made in *Powers* that state legislation should be upheld simply because it protected an industry.<sup>115</sup> The district court contrasted the facts of *St. Joseph Abbey* from *Dukes*<sup>116</sup> and *Lee Optical*,<sup>117</sup> holding that the Louisiana law did not support any colorable health or consumer safety purpose.<sup>118</sup> Thus, the court concluded that “the only protection afforded by the Act is the economic protection of the funeral directors . . . .”<sup>119</sup>

On appeal, the Fifth Circuit initially withheld judgment “in the interest of federalism and constitutional avoidance” and sua sponte certified the following question of state law: “Whether Louisiana law furnishes the Louisiana State Board of Embalmers and Funeral Directors with authority to regulate casket sales when made by a retailer who does not provide any other funeral services.”<sup>120</sup> However, after the Louisiana Supreme Court denied

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111. Under Louisiana law, “funeral directing” includes “the purchase of caskets or other funeral merchandise, and retail sale and display thereof . . . .” LA. REV. STA. § 37:831(37) (2012); see *Abbey*, 2013 WL 1149579, at \*1, 6.

112. *St. Joseph Abbey v. Castille*, 835 F. Supp. 2d 149, 153–54 (E.D. La. 2011), *aff’d*, No. 11-30756, 2013 WL 1149579 (5th Cir. Mar. 20, 2013). Under the law, persons who engage in unlicensed casket retail sales face fines up to \$2,500 and 180 days imprisonment per casket. *Id.*

113. *St. Joseph Abbey v. Castille*, No. 10-2717, 2011 WL 1361425, at \*3 (E.D. La. Apr. 8, 2011).

114. *Id.* (emphasis in original).

115. Compare *St. Joseph Abbey*, 835 F. Supp. 2d at 153 (finding “no basis to create a *per se* rule of law that economic protectionism is a legitimate state interest”), with *Powers v. Harris*, 379 F.3d 1208, 1225 (10th Cir. 2004) (holding that “intrastate economic protectionism, absent a violation of a specific federal statutory or constitutional provision, is a legitimate state interest”).

116. The district court noted that anti-pushcart legislation upheld in *Dukes* had a legitimate objective of promoting the tourism industry, even though a grandfather clause exempted several vendors from the regulation. See *St. Joseph Abbey*, 2011 WL 1361425, at \*8.

117. The district court similarly approved of the Oklahoma legislation in *Lee Optical*, holding that it had a public health care objective, including encouraging frequent eye examinations. See *St. Joseph Abbey*, 2011 WL 1361425, at \*8–9.

118. See *St. Joseph Abbey*, 835 F. Supp. 2d at 158–59 (holding that there was no rational relationship between the licensing requirement and the public health and consumer protection purposes because Louisiana residents could purchase caskets online and were not even required to use caskets for burial).

119. *Id.* at 160.

120. *St. Joseph Abbey v. Castille*, 700 F.3d 154, 168–69 (5th Cir. 2012), (“Should the Louisiana Supreme Court accept the certification and find a lack of authority its ruling will

certification,<sup>121</sup> the Fifth Circuit unanimously affirmed the district court's judgment.<sup>122</sup>

## II. THE RATIONALE FOR AUTOMATIC DEFERENCE UNDER RATIONAL BASIS REVIEW CANNOT BE JUSTIFIED

### A. Supreme Court Precedent Does Not Require a Per Se Rule Upholding Protectionist Laws

#### 1. The Court Has Been Skeptical of Laws that Target or Single out Groups for No Rational Purpose

According to the Tenth Circuit in *Powers*, “[h]ornbook constitutional law provides that if Oklahoma wants to limit the sale of caskets to licensed funeral directors, the Equal Protection Clause does not forbid it.”<sup>123</sup> The expansive dictum in *Lee Optical* and *Dukes* supports *Powers*' implication that under rational basis review, the government always wins.<sup>124</sup> Under this understanding, state economic legislation not expressly forbidden by the Constitution or preempted by federal law is constitutional, unless it employs one of the narrowly defined “suspect” or “quasi-suspect” classifications.<sup>125</sup>

However, the Court has also been skeptical of laws that target or single out groups for no rational purpose.<sup>126</sup> For instance, in *Allegheny Pittsburgh Coal Co.*, the Court struck down a county tax assessor's practice that resulted in widely divergent tax assessments for properties of similar value.<sup>127</sup> In *Olech*, the Court rejected a law that arbitrarily demanded an easement that was twice

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resolve the case in its entirety. Should it reach a contrary conclusion, this Court will no longer stay its hand but will promptly proceed to judgment.”), *certification denied*, 106 So. 3d 542 (La. 2013).

121. *St. Joseph Abbey v. Castille*, 106 So. 3d 542 (La. 2013).

122. The Fifth Circuit, like the district court, found that the State's proffered health and safety justifications failed to withstand even rational basis scrutiny. *Abbey v. Castille*, No. 11-30756, 2013 WL 1149579, at \*8 (5th Cir. Mar. 20, 2013) (“The funeral directors have offered no rational basis for their challenged rule and, try as we are required to do, we can suppose none.”); see *supra* note 118 and accompanying text.

123. *Powers*, 379 F.3d at 1211 (citation omitted).

124. See *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (“When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discrimination.”); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–89 (1955).

125. Constitutional law scholar, Erwin Chemerinsky, reaches a similar conclusion: “The reality is that virtually any law can meet this very deferential requirement.” CHEMERINSKY, *supra* note 20, at 641.

126. See, e.g., *St. Joseph Abbey v. Castille*, 835 F. Supp. 2d 149, 153 (E.D. La. 2011), *aff'd sub nom. Abbey v. Castille*, No. 11-30756, 2013 WL 1149579 (5th Cir. Mar. 20, 2013).

127. See *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*, 488 U.S. 336, 345–46 (1989); see also *supra* Part I.B.2.i (discussing the Supreme Court's ruling).

the size of what had been demanded of similarly situated neighbors.<sup>128</sup> These cases are not mere outliers; between 1970 and 2010, plaintiffs have prevailed under rational basis scrutiny in seventeen equal protection cases decided by the Supreme Court, despite the absence of any “invidious” discrimination.<sup>129</sup>

Overinclusive laws can also violate the Equal Protection Clause because “sometimes the grossest discrimination can lie in treating things that are

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128. See *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (holding that a homeowner, who had been subject to an arbitrary demand by the village zoning authorities, could assert an equal protection claim as a class of one); see also *supra* Part I.B.2.iii.

129. *Olech*, 528 U.S. at 565; *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (striking down a Colorado constitutional amendment that barred the passage of anti-discrimination laws designed to protect homosexuals); *Quinn v. Millsap*, 491 U.S. 95, 108–09 (1989) (holding that the property requirement for serving on a government board violated the plaintiff’s equal protection rights); *Allegheny Pittsburgh Coal Co.*, 488 U.S. at 345–46 (invalidating a county tax assessor’s practice that resulted in widely divergent tax assessments for properties of similar value); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985) (invalidating a zoning ordinance excluding group homes for mentally handicapped persons), *superseded by statute*, Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601–3616, *as recognized in* *Human Res. & Mgmt. Grp. v. Cnty. of Suffolk*, 687 F. Supp. 2d 237, 256 n.15 (E.D.N.Y. 2010); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985) (invalidating a New Mexico tax exemption for honorably discharged Vietnam veterans that only applied to veterans who were New Mexico residents before May 8, 1976); *Williams v. Vermont*, 472 U.S. 14, 24–25 (1985) (striking down a Vermont tax exemption that applied to Vermont residents who had purchased a car in-state); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880–81 (1985) (invalidating a state law that taxed in-state insurance companies at much lower rates than out-of-state companies); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that Texas had no substantial interest in barring the children of illegal aliens from attending public schools); *Zobel v. Williams*, 457 U.S. 55, 64–65 (1982) (striking down an Alaskan dividend distribution program that favored established residents over new residents); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977) (striking down a freeholder qualification to be a commissioner on the Greater Baton Rouge Airport Commission); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (striking down a provision of the Food Stamp Act that excluded households containing individuals unrelated to each other); *James v. Strange*, 407 U.S. 128, 141–42 (1972) (invalidating a recoupment statute that compelled indigents to pay for counsel in civil cases); *Lindsey v. Normet*, 405 U.S. 56, 77–78 (1972) (holding that the double-bond prerequisite for appealing an Oregon Forcible Entry and Wrongful Detainer action violated the Equal Protection Clause by classifying real property tenants differently than other tenants); *Mayer v. City of Chicago*, 404 U.S. 189, 196 (1971) (holding that the distinction between felony and non-felony drawn by Illinois Supreme Court Rule 607(b) was an “unreasoned distinction proscribed by the Fourteenth Amendment”); *Reed v. Reed*, 404 U.S. 71, 76–77 (1971) (holding that, under rational basis review, an Idaho probate statute governing the designation of administrators of an estate violated equal protection by favoring men over women); *Turner v. Fouche*, 396 U.S. 346, 363–64 (1970) (holding that the freeholder requirement for school board membership was invidiously discriminatory and violated the Equal Protection Clause). In a concurring opinion, Justice O’Connor argued that the Texas anti-sodomy statute should be struck down on equal protection grounds rather than substantive due process. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O’Connor, J., concurring); see also Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 357–58 (1999).

different as though they were exactly alike.”<sup>130</sup> Licensing regulations passed to confer special privileges on political favorites is one such example.<sup>131</sup> Although the state may have some colorable health or safety interest in regulating certain occupations (such as vision care or embalming),<sup>132</sup> its interest in the regulation of ancillary occupations or the sale of merchandise incidental to the regulated occupation (such as eyeglasses or caskets) is dubious.<sup>133</sup>

## 2. *The Supreme Court Has Been Appropriately Skeptical of Protectionist Legislation*

Supreme Court precedent does not support the holding in *Powers* that protectionism is a legitimate state purpose.<sup>134</sup> In *Metropolitan Life Insurance Co.*, the Court struck down an Alabama law that taxed out-of-state insurance companies at a much higher rate than in-state companies.<sup>135</sup> Although the Court has struck down similar legislation as incompatible with the Dormant Commerce Clause,<sup>136</sup> its decision to invalidate the Alabama statute on equal protection grounds evinces a clear hostility toward economic protectionism.<sup>137</sup>

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130. *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1103 (S.D. Cal. 1999) (quoting *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)) (internal quotation marks omitted) (invalidating a California regulation that compelled hair braiders to obtain a cosmetology license).

131. See *supra* note 93 and accompanying text.

132. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–89 (1955) (vision care); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (embalming).

133. Licensing requirements on purveyors of tangentially related goods or services are frequently added well after the original licensing scheme is implemented. See, e.g., *Craigmiles*, 312 F.3d at 222 (noting that the law was amended to include regulation of the sale of merchandise). Although the Sixth Circuit in *Craigmiles* conceded that the legislature is not required to be perfectly consistent or logical, the court found that “[b]y specifically amending the Act . . . to cover the sale of funeral merchandise, the legislature specifically brought casket retailers under the coverage of the licensing scheme . . . . This specific action . . . appears directed at protecting licensed funeral directors from retail price competition.” *Id.* at 227 (discussing *inter alia* how regulations passed under the guise of protecting certain industries or consumers have been struck down).

134. See *infra* notes 135–53 and accompanying text.

135. *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985) (finding that “acceptance of [the state’s] contention that promotion of domestic industry is always a legitimate state purpose under equal protection analysis would eviscerate the Equal Protection Clause in this context. A State’s natural inclination frequently would be to prefer domestic business over foreign.”).

136. For example, in *City of Philadelphia v. New Jersey*, the Court observed that “where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.” 437 U.S. 617, 624 (1978) (invalidating a New Jersey statute that barred importing out-of-state solid or liquid waste on commerce clause grounds).

137. The Court has employed similar language in other constitutional contexts. For instance, in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, the Court held that “[i]f the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation . . . . The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to

3. *The Circuit Split over the Constitutionality of Protectionist Licensing Laws Highlights Two Requirements for Constitutionality Under Rational Basis Review*

Under rational basis review, legislation is constitutional if it is passed pursuant to a legitimate government interest and is rationally related to that interest.<sup>138</sup> In addressing the licensing restrictions, the Fifth, Sixth, Ninth, and Tenth Circuits blurred these two components together, or emphasized one to the near exclusion of the other.<sup>139</sup>

In *Merrifield*, the Ninth Circuit attempted to avoid questioning the purpose of the legislature.<sup>140</sup> Although most of the licensing requirements related to pesticide rather than non-pesticide pest controllers, the court found a sufficient nexus in that the non-pesticide pest-controllers might encounter pesticides in the course of their work.<sup>141</sup> The court questioned the government's asserted objective only after finding that the exemption at issue bore no rational relation to the asserted health and safety interests of the state.<sup>142</sup>

In contrast to the Ninth Circuit's approach, the Sixth Circuit in *Craigmiles* focused heavily on the purpose behind the legislation.<sup>143</sup> The court began by stating that the "[c]ourts have repeatedly recognized that protecting a discrete

special interests." 459 U.S. 400, 411–12 (1983) (citation omitted) (upholding a Kansas law challenged under the Contracts Clause).

138. See *supra* Part. I.A.2 (discussing the two different approaches to rational basis review). This approach is similar to the test enunciated in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

139. See *infra* notes 140–53 and accompanying text.

140. *Merrifield v. Lockyer*, 547 F.3d 978, 989–91 (9th Cir. 2008) (discussing the wide latitude courts should afford the legislative purpose). Since the New Deal, courts have been particularly reluctant to look to the government purpose or interest behind legislation. See *supra* notes 32–40 and accompanying text. According to Justice William H. Rehnquist, actual purpose review "assumes that individual legislators are motivated by one discernable actual purpose, and ignores the fact that different legislators may vote for a single piece of legislation for widely different reasons." See *Kassell v. Consol. Freightways Corp.*, 450 U.S. 662, 702–03 (1981) (Rehnquist, J., dissenting). Justice Antonin Scalia is skeptical of considering legislative history, for similar reasons. See *Zedner v. United States*, 547 U.S. 489, 509–11 (2006) (Scalia, J., concurring in part and in judgment) (stating that "when the language of the statute is plain, legislative history is irrelevant" (citation omitted)).

141. *Merrifield*, 547 F.3d at 986–89. Based on this reasoning, roofers and gutter cleaners should also be required to obtain training in the safe handling and disposal of pesticides. *Id.* at 987.

142. *Id.* at 991–92.

143. Compare *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (rejecting the state's proffered explanations for the licensure requirement, finding them to be mere pretext for protections of funeral directors from competition), with *Merrifield*, 547 F.3d at 986–91 (acknowledging that the state had a legitimate purpose for requiring pest controllers to take a licensing exam, but, nevertheless, striking down the law because the exemption scheme had no rational basis).



interest group from economic competition is not a legitimate governmental purpose.”<sup>144</sup> The court ultimately found that the requirement had no bearing on public safety, but instead had been passed for the purpose of protecting “licensed funeral directors from retail price competition.”<sup>145</sup>

The Fifth Circuit, like the Sixth Circuit, took into account the purpose of the state legislature in determining whether the legislation was passed pursuant to a legitimate state interest.<sup>146</sup> According to the court, “[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 regulation.”<sup>147</sup> Although the Fifth and Sixth Circuits<sup>148</sup> both held that states do not have a legitimate interest in “mere economic protection of a particular industry,” the Fifth Circuit emphasized that under rational basis scrutiny “economic protectionism . . . may well be supported by a post hoc perceived rationale as in *Williamson*—without which it is aptly described as a naked transfer of wealth.”<sup>149</sup> Nonetheless, under the Fifth Circuit’s approach, the government does not necessarily win. “[A]lthough rational basis review places no affirmative evidentiary burden on the government, plaintiffs may . . . negate a seemingly plausible basis for the law by adducing evidence of irrationality.”<sup>150</sup>

Oddly, the Tenth Circuit took the same approach as the Sixth Circuit, but reached the opposite conclusion.<sup>151</sup> The court considered only whether the funeral directing licensing requirement was enacted pursuant to a legitimate state purpose, finding that once the state meets the “legitimate state interest” condition, it also satisfies the “rational relationship” requirement.<sup>152</sup>

The “legitimate purpose” and “rational basis” requirements are not simply tautological. An approach that emphasizes the former potentially sweeps more broadly: if the legislation in question is not passed pursuant to a legitimate

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144. *Craigsmiles*, 312 F.3d at 224 (citations omitted). According to the Sixth Circuit, “the question before this court is whether [the licensing requirement] . . . bears a rational relationship to any legitimate purpose other than protecting the economic interest of licensed funeral directors.” *Id.* at 225.

145. *Id.* at 227–28; *see supra* notes 89–90 and accompanying text.

146. *See supra* notes 143–45 and accompanying text.

147. *Abbey v. Castille*, No. 11-30756, 2013 WL 1149579, at \*8 (5th Cir. Mar. 20, 2013).

148. *See supra* notes 143–45 and accompanying text.

149. *Abbey*, 2013 WL 1149579, at \*5. *See supra* notes 49–52 and accompanying text (discussing the reasoning in *Williamson*). *Cf. Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 487 (1955).

150. *Abbey*, 2013 WL 1149579, at \*6.

151. *Powers v. Harris*, 379 F.3d 1208, 1223–24 (10th Cir. 2004) (finding the *Craigsmiles* decision “unsupportable”).

152. *See id.* at 1223–24.

governmental interest, there is no need to consider whether it is rationally related to that interest.<sup>153</sup>

*B. Judicial Intervention Is Required Because State Legislatures Are Frequently “Captured” by Those They Seek to Regulate and Because They Are Poorly Suited to Check Licensing Excesses*

The rationale for judicial deference toward economic legislation is two-fold: (1) bad policies can be corrected at the ballot box,<sup>154</sup> and (2) unelected judges should avoid questioning the elected representatives of the people on the basis of their own “economic theory.”<sup>155</sup> According to the “public interest” view of regulation prevalent during the New Deal,<sup>156</sup> legislatures impose regulations on industries in “the public interest” to prevent or correct market failures.<sup>157</sup> However, the rapid expansion of licensing regulations has encouraged economists to re-examine this view.<sup>158</sup>

Since the 1960s, a number of regulatory economists have pointed out that there is “no plausible claim of market failure in certain regulated industries,

153. See *supra* Part I.C. The *Merrifield* opinion hence appears to be more narrowly decided than *Craigmiles*, because the Ninth Circuit questions the state’s true motivation only after finding that the exemption ran counter to the asserted purpose of the state.

154. See *Ferguson v. Skrupa*, 372 U.S. 726, 730–32 (1962) (holding that the Court should not “sit as a super legislature to weigh the wisdom of legislation” and that changes to the statute lie “not with us but with the body constituted to pass the laws . . . .”) (internal quotation marks omitted).

155. See *Lochner v. New York*, 198 U.S. 45, 75 (Holmes, J., dissenting), *overruled in part, as recognized in Ferguson*, 372 U.S. at 730; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 861–62 (1992) (explaining how the “clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of [*Lochner*]”). According to David E. Bernstein, “[l]eading Progressive lawyers believed in strong interventionist government run by experts and responsive to developing social trends, and were hostile to countervailing claims of rights-based limits on government power.” BERNSTEIN, *supra* note 30, at 4.

156. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1243–48 (1986) (explaining that federal regulation for the public good under Roosevelt’s New Deal “applied to any sector of the economy that was malfunctioning [and] needed government-endorsed controls . . . to ‘make things right’” and that “comprehensive government intervention was not only useful . . . but an essential ingredient for maintaining a general state of equilibrium in the economy”).

157. See Douglas Ginsburg, *A New Economic Theory of Regulation: Rent Extraction Rather than Rent Creation*, 97 MICH. L. REV. 1771, 1771 (1999) (reviewing FRED S. MCCHESENEY, *MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION* (1997)); see also BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* 3 (2008) (summarizing the public interest view that democracy works because it provides voters with what they want).

158. See *supra* notes 2–8 and accompanying text (illustrating the broad scope of licensure regulations); see also George J. Stigler & Claire Friedland, *What Can Regulators Regulate? The Case of Electricity*, 5 J.L. & ECON. 1, 11 (1962) (challenging the purpose of regulations for investor-based utilities after studying the effect of regulations on the electric power industry and finding no significant variations in rates).

such as motor carriers and airlines.”<sup>159</sup> In his seminal work, George J. Stigler, a Nobel Laureate economist, postulated that regulation, “as a rule . . . is acquired by the industry and is designed and operated primarily for its benefit.”<sup>160</sup> In a similar vein, Walter Gellhorn noted that, although licensing occasionally has been imposed on an unwilling industry (for instance, on the securities industry after the financial scandals of 1929),<sup>161</sup> it has more often been “eagerly sought—always on the purported ground that licensure protects the uninformed public . . . but invariably with the consequence that members of the licensed groups become protected against competition from newcomers.”<sup>162</sup> Stigler’s economic theory of regulation explains why many new licensing regulations that tighten or create additional qualifications have grandfather clauses excusing those already in the business from having to comply with the reissued regulations.<sup>163</sup> Where interest groups are able to

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159. See Ginsburg, *supra* note 157, at 1771; see also Stigler & Friedland, *supra* note 158, at 1. Occupational licensing may have initially improved the quality services in the late 19th and early 20th centuries, arguably due to the asymmetry of information in a period of rapid urbanization and migration. MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 20–24 (2006). However, Morris M. Kleiner argues that during the second half of the 20th century, the expansion of occupational licensing has provided little consumer benefit, and was pushed through the legislature largely to restrict competition in labor markets in a time when trade unions were in decline. *Id.* at 12–13, 31, 44, 48–58, 97–98.

160. George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971); see JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 286 (1965) (tying the rise of special interest lobbying to the expansion of government, and arguing that “interest-group activity, measured in terms of organizational costs, is a direct function of the ‘profits’ expected from the political process”); Ginsburg, *supra* note 157, at 1772 (“The new learning that emerged in the early 1970s as ‘the economic theory of regulation’ can justly be attributed to George Stigler . . . . It proceeds from the historical observation that regulation was in many instances sought by, rather than imposed upon, the regulated industry, which is fundamentally inconsistent with the public interest story. In the new learning, regulation, whether sought by industry or imposed upon it, ‘is designed and operated primarily for [the regulated firms’] benefit,’ and to the consumers’ detriment.”).

161. Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 11–12 (1976-1977) (providing, as an example of an unwilling industry, the securities industry after the financial collapse of 1929).

162. *Id.* Walter Gellhorn’s historical finding was recently reaffirmed by Kleiner’s extensive monograph on the subject, which includes a detailed case study of Minnesota and Wisconsin, as well as a fifty-state survey of state licensing practices and their effects. In Minnesota, for instance, Kleiner found that “licensing appears to be responsive to political pressure from occupational associations seeking to become regulated.” See KLEINER, *supra* note 159, at 31.

163. For example, a recently enacted massage therapy licensing requirement—passed after fifteen years of lobbying—includes a grandfather clause exempting current therapists. *Pennsylvania Department of State Reminds Massage Therapists of Licensing Deadline*, PR NEWSWIRE.COM (July 14, 2011), <http://www.prnewswire.com/news-releases/pennsylvania-department-of-state-reminds-massage-therapists-of-licensing-deadline-125585403.html>. A similar law passed in Michigan exempted incumbent massage therapists from meeting the stringent new standards, which included five hundred hours of class time. See Simon, *supra* note

obtain a competitive advantage by lobbying for special privileges, and where the costs created by those privileges are distributed broadly, the rationally ignorant voter is unlikely to even know about, let alone fight against, protectionist regulations.<sup>164</sup> Meanwhile, potential competitors not yet in the market are poorly situated to lobby against such legislation.<sup>165</sup>

A recent study of the Florida funeral industry demonstrates how industry lobbyists can advance their interests by capturing state licensing regimes.<sup>166</sup> In 1979, the Florida legislature “shook up the funeral industry” by passing legislation allowing “direct disposers” to perform cremations, a service that had previously been reserved for licensed funeral directors.<sup>167</sup> This change

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5 (noting that some of the exempted massage therapists may have never taken a class at an accredited school); *see also* *Massage Therapy Certification: States that Regulate Massage and Licensing Info*, NAT. HEALERS, <http://www.naturalhealers.com/qa/massage.html> (last visited Jan. 5, 2013) (indicating that the use of grandfather clauses is a common state practice). The Supreme Court has upheld such provisions because they protect the reliance interest of those who have already been in the field for a significant period of time. *See* *City of New Orleans v. Dukes*, 427 U.S. 297, 305 (1976).

164. *See* CAPLAN, *supra* note 157, at 5, 97 (noting that voters, in contrast to interest groups, are “rationally ignorant” due to the influx of information, their limited ability to absorb it, and that their individual votes are highly unlikely to sway elections); *see also* Gellhorn, *supra* note 161, at 12 & n.19 (noting that the citizenry likely has no special interest, and, therefore, is a less effective political force than special interest groups); Daniel B. Klein, *The Demand for and Supply of Assurance*, ECONOMIC AFFAIRS 4–11 (2001) (embracing the free enterprise system).

165. *See* KLEINER, *supra* note 159, at 10.

166. *See* Judith Chevalier et al., *Regulating Direct Cremations: The Cost of Seemingly Small Regulatory Changes* (AEA 2011 Annual Meeting, Working Paper) (Jan. 2011), available at <http://www.aeaweb.org/aea/2011conference/program/retrieve.php?pdfid=419>; *see also* Adam Ozibek, *Cremation Wars*, MODELEDBEHAVIOR.COM (May 31, 2011), <http://modeledbehavior.com/tag/occupational-licensing/>. The anti-competitive use of licensing laws has been prevalent in the funeral industry. *See* Plaintiffs’ Reply to Opposition to Motion for Preliminary Injunction at 5–6, *St. Joseph Abbey v. Castille*, No. 10-2917“K”(S) (E.D. La. Nov. 12, 2010) (citing Trade Regulation Rule; Funeral Industry Practices, 47 Fed. Reg. 42260, 42260–71 (Sept. 24, 1982) (codified at 16 C.F.R. § 453)). The Federal Trade Commission (FTC) studied the industry for seven years and in 1982 enacted 16 C.F.R. § 453 to counteract the exploitative practices of the funeral industry, which leveraged its control of state licensing boards to engage in deceitful practices harmful to consumers. *Id.*; Amicus Curiae Brief on Behalf of the United States Federal Trade Commission in Support of Neither Party at 4, 9–14, *St. Joseph Abbey v. Castille*, No. 11-30756 (5th Cir. Dec. 16, 2011) (taking no position on the constitutional issues presented, the FTC submitted the brief “to refute any suggestion that LEFDA’s licensing requirements further the purposes of the Funeral Rule,” and argued that the licensing requirement in *St. Joseph Abbey* was an anti-competitive measure). Because the *Goldfarb v. Virginia State Bar* decision opened the door to litigation under the Sherman Act, *see supra* note 14, the FTC and the Antitrust Division of the Department of Justice (DOJ) have sued a number of boards for engaging in anti-competitive practices, including the American Medical Association, the American Institute of Certified Public Accountants, and the National Society of Professional Injuries. *See* KLEINER, *supra* note 159, at 24–25 (noting the FTC and DOJ’s broad enforcement program designed to encourage competitive business practices).

167. *See* Chevalier et al., *supra* note 166, at 3, 10 (noting that, in Florida, direct disposal facilities, unlike licensed funeral directors, were only allowed to offer direct or “no-frills” cremation).

introduced competition into the market, as direct disposal licenses were easier to obtain than funeral directing licenses.<sup>168</sup> By 1999, direct disposal technicians performed approximately twenty percent of cremations in the state.<sup>169</sup> In an effort to “wipe out” this source of competition, the Florida Funeral Directors Association (FFDA) began a lobbying effort that eventually led to legislation that required direct disposers to have a licensed funeral director in charge of their facilities.<sup>170</sup>

Finally, many licensing laws not only curb competition, but also stunt social mobility.<sup>171</sup> Licensing regulations are particularly harmful to low-income workers who have the requisite skills to compete, but lack either formal training or financial resources to meet the onerous licensure requirements.<sup>172</sup> Additionally, licensing examinations are often only offered in English, which poses an additional hurdle for ethnic minorities.<sup>173</sup> State licensing laws also give an extraordinary amount of discretion to independent boards<sup>174</sup> that have historically abused their power by keeping ethnic minorities out of many markets.<sup>175</sup>

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168. *Id.* at 3. Although individuals could become licensed direct disposers with only a high school degree and a few courses, prospective funeral directors were required to complete two years of college education, one year in mortuary school, and an apprenticeship. *Id.*

169. *Id.* at 6, 11.

170. *Id.* at 3–4 (detailing a series of amendments to the funeral directing and direct disposal licensing regimes, passed at the behest of the Florida Funeral Directors Association between 2000 and 2010). Such legislation increased cremation costs for consumers. *Id.* at 7–8 (finding that consumers were forced to pay an additional \$3.5 million in 1996 due to the new regulations).

171. See Gellhorn, *supra* note 161, at 18 (noting that “[m]any economically deprived young people cannot easily meet the qualifications demanded of applicants, such as paying tuition to pseudo-professional schools or undergoing needlessly prolonged period of apprenticeship”).

172. *Id.* Even if licensing laws are enacted with the best intention, they have been particularly harmful to black skilled workers. David Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89, 90 (1994). For instance, “[o]nce the [American Medical Association] took control of the licensing procedure . . . state physician licensing . . . forced five of seven existing black medical schools—those that educated most black doctors—to close.” *Id.* at 93.

173. See Gellhorn, *supra* note 161, at 18 (noting the difficulties for Spanish speakers and foreign-born workers).

174. Licensing boards frequently seek to protect members during times of economic stress by increasing barriers to entry, such as expanding training or apprenticeship requirements or by raising the passing mark to reduce the percentage of applicants who pass the entrance exam. See KLEINER, *supra* note 159, at 44.

175. See Bernstein, *supra* note 172, at 93–102 (noting how licensing boards, which frequently required membership in white-only unions, excluded African Americans and other ethnic minorities from many occupations, such as plumbing and hair-cutting). Even during the Progressive Era, the judiciary often upheld state licensing authority without considering how the licenses were administered: “The judges of the day, infused with Progressive optimism about the benevolence of government and the value of institutionalized expertise, seem to have had little or no awareness of the misuses to which licensing laws could so easily be put.” *Id.* at 95.

### III. THE COURT SHOULD APPLY HEIGHTENED RATIONAL BASIS REVIEW TO PROTECTIONIST STATE LAWS

Unlike intermediate and strict scrutiny, “heightened” rational basis review is poorly defined.<sup>176</sup> Regardless of the terminology used, the Supreme Court needs to address the issue of whether protectionism that favors domestic industries is a legitimate governmental interest.

Holding that such protectionism is not a legitimate government interest would be consistent with Supreme Court precedent in two respects. First, the Court has moved away from the expansive approach used in *Lee Optical* and *Dukes* by rejecting state laws and economic regulations that single out individuals or groups by arbitrarily imposing a special hardship or capriciously denying them some benefit enjoyed by similarly situated groups.<sup>177</sup> These cases are analogous to licensing laws that arbitrarily include or exclude a particular group. For example, the laws in *Craigmiles* and *St. Joseph Abbey* violated the Equal Protection Clause by arbitrarily imposing regulations of one group (funeral morticians) on an unrelated group (casket retailers).<sup>178</sup> Similarly, the valuation method at issue in *Allegheny Pittsburgh Coal Co.* arbitrarily treated dissimilar groups alike by relying heavily on the most recent sales price.<sup>179</sup> In contrast, the provision at issue in *Merrifield* arbitrarily treated similar groups differently by selectively defining the word “vertebrates,”<sup>180</sup> just as the Village in *Olech* arbitrarily imposed a more burdensome easement requirement on the plaintiff than on similarly situated neighbors.<sup>181</sup>

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176. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (applying a “heightened” form of rational basis review in a case involving a permit to construct a home for the mentally handicapped), *superseded by statute*, Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601–3616, *as recognized in* *Human Res. & Mgmt. Grp. v. Cnty. of Suffolk*, 687 F. Supp. 2d 237, 256 n.15 (E.D.N.Y. 2010).

177. *See supra* Part I.B.2.i.

178. *See* *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002); *St. Joseph Abbey v. Castille*, 700 F.3d 154, 168–69 (5th Cir. 2012), *question certified for the Louisiana Supreme Court by* 700 F.3d 154 (5th Cir. 2012), *certification denied by* *St. Joseph Abbey v. Castille*, 106 So. 3d 542 (La. 2013); *see also supra* Parts I.C.1, I.C.4 (discussing the two courts’ determinations that the arbitrary regulations essentially gave funeral directors a monopoly on cremations, without any benefit to the public).

179. *See* *Allegheny Pittsburgh Coal Co. v. Cnty. Comm’n*, 488 U.S. 336, 345–46 (1989) (failing to incorporate the assessment of land not recently sold, which resulted in grossly disproportionate tax rates); *see also supra* Part I.B.2.a.

180. *See* *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008) (evaluating a California law that exempted practitioners of non-pesticides-based pest control from a two-year licensing process only if they captured and removed *vertebrate* pests, which narrowly included animals such as “bats, raccoons, skunks, and squirrels,” but not “mice, rats or pigeons”); *see also supra* Part I.C.3.

181. *See* *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 563 (2000) (addressing a village law that required the plaintiff to grant the village a thirty-three foot easement onto her property, but only required similarly situated property owners to grant a fifteen-foot easement).

Second, economic research and historical developments have undercut the rationale for extreme deference to licensing regulations.<sup>182</sup> Empirical studies, such as the one conducted by Morris Kleiner, have bolstered the contention that industries often shape the manner in which they are regulated to their own advantage.<sup>183</sup> This theory, known as “industry capture,” is particularly pertinent to protectionist state licensing laws because the benefits of such regulations are highly concentrated and the costs to consumers are widely dispersed.<sup>184</sup> Moreover, individuals seeking to enter the market frequently lack the power to resist or challenge such legislation.<sup>185</sup> Although judges should proceed with caution,<sup>186</sup> complete judicial abstention in these circumstances is inappropriate due to the institutional weaknesses of the political process and the vulnerability of regulators to political capture.<sup>187</sup>

In light of these two considerations, the Court should adopt a two-step approach to evaluate licensing regulations. First, the Court should ask whether the regulation in question was enacted pursuant to a legitimate government interest.<sup>188</sup> If no legitimate interest exists, the Court should invalidate the law. Second, if the end is legitimate, the Court should determine whether the law itself is rationally related to that end.<sup>189</sup>

This two-step analysis need not entail a “return to *Lochner*,”<sup>190</sup> for the reach of rational basis review under this approach would be limited by the following

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182. See *infra* notes 183–87 and accompanying text.

183. See *supra* notes 162–65 and accompanying text.

184. See *supra* note 166 and accompanying text.

185. See *supra* notes 164–65 and accompanying text (discussing the effect that licensing requirements have on minorities).

186. Under the suggested method of review, judges would not substitute their policy preferences for those of legislators, but instead would merely ensure that legislators do not arbitrarily discriminate, in violation of the Equal Protection Clause.

187. See *supra* Part II.B; see also KLEINER, *supra* note 159, at 32–35 (describing how a case study that examined how licensing regulations are passed found that the health industry in Minnesota, which saw the greatest expansion of licensing requirements between 1981 and 2003, was also the greatest source of campaign contributions at the state level).

188. In a constitutional system of limited government, the Court should begin by considering the purpose the governmental interest. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

189. In reality, many courts may apply a sliding-scale approach, in which the presence of provisions that strongly undermine the state interest promoted by the legislation may be taken as evidence that the real (and illegitimate) purpose of the legislation is to protect favored interests. See, e.g., *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008) (holding that the legislature’s exemption of certain pests was arbitrary and, therefore, improper).

190. *Craigsmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002). This approach is consistent with the shift away from the extreme stance taken in *Dukes* and *Lee Optical*. In fact, in his dissent in *Lochner*, Justice John Marshall Harlan endorsed a similar approach:

If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not

two principles. First, even if a law advances multiple interests, the “legitimate interest” test may be satisfied as long as one of the interests advanced by the state is legitimate.<sup>191</sup> Second, a law may satisfy the “rational relationship” test as long as it is not contrary<sup>192</sup> or irrelevant<sup>193</sup> to the government interest advanced by the law.<sup>194</sup> These two limitations are consistent with the presumption that economic legislation is constitutional, unless it employs some invidious classification.<sup>195</sup>

In the case of the most onerous licensing regulations, such as the requirement that casket retailers become licensed morticians, the courts should hold that the law fails to meet the “legitimate interest” requirement.<sup>196</sup> Most legislation that meets the first hurdle will likely be upheld, although many individual provisions that are contrary to the legislation, such as grandfather clauses, will be invalidated.<sup>197</sup>

This will allow courts to check abusive legislation, while respecting the state legislatures’ role by upholding the licensing regulation as a whole. In *Merrifield*, the Ninth Circuit took this approach by preserving the pest control licensing law but striking the discriminatory amendment that was added after the initial enactment of the legislation.<sup>198</sup> In some instances, however, there would be no legitimate interest in striking down one individual provision,

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plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the *burden of proof*, so to speak, is upon those who assert it to be unconstitutional.

*Lochner v. New York*, 198 U.S. 45, 68 (1905) (Harlan, J., dissenting) (emphasis added), *overruled in part, as recognized in Ferguson v. Skrupa*, 372 U.S. 726, 730 (1962).

191. For instance, if a state passes a licensing requirement with the dual intentions of protecting incumbent professionals from competition and addressing some public health concern, the law satisfies the “legitimate purpose” test, and it is constitutional as long as it also meets the “rational relationship” test.

192. *See, e.g., Merrifield*, 547 F.3d at 981–82 (noting that the selective definition of “vertebrates” that exempt pest controllers who dealt with “bats, raccoons, skunks, and squirrels” but not “mice, rats, or pigeons” ran counter to the logic of the licensing requirement).

193. Presumably, obtaining a license in cosmetology is irrelevant to the profession of hair braiding, and learning to embalm corpses is irrelevant to the profession of crafting and selling caskets. *See supra* note 2 and accompanying text (discussing the licensing requirements in many states for hair braiding); Parts I.C.1–2, I.C.4 (discussing cases challenging licensing requirements for selling caskets).

194. As the Court has often stated, a law need not be perfectly constructed as long as it is rationally related to some legitimate governmental purpose. *See, e.g., City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) (per curiam).

195. *See supra* note 67 and accompanying text.

196. In such extreme cases, no “sophisticated economic analysis will be necessary to see the pretextual nature of the state’s proffered explanations.” *Craigsmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002).

197. *See* 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.9.4 (3d ed.) (providing an overview of the Supreme Court’s approach to severability).

198. *See supra* Part I.C.3.



unless the law contained a constitutional severability clause, because the legislation may never have passed in the first place without such a clause.<sup>199</sup>

#### IV. CONCLUSION

The Fifth, Sixth, and Ninth Circuits correctly held that intrastate protectionism is not a legitimate purpose under rational basis review. Given the disagreement among the circuits on the issue, the Supreme Court should resolve the issue by adopting the two-step approach proposed in this Comment. This approach would result in the wholesale invalidation of the most abusive laws, without undermining the states' role in passing licensure laws. Further, by providing victims of protectionist licensing regimes the opportunity to challenge provisions that run counter to the interest asserted by the state (such as the grandfather clauses), this test would reduce the incentives to pass such legislation and ensure that the proper sphere of the judiciary is not exceeded.

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199. See *Champlin Ref. Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932) (indicating that the courts should avoid leaving the remainder of an act in place when "it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not."). *But see* *United States v. Booker*, 543 U.S. 220, 244–46 (2005) (holding that the Court should preserve the constitutional portions of an act, as long as they are capable of functioning independently, and in a manner consistent with congressional intent).

