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## Note

### Economic Protectionism and Occupational Licensing Reform

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Consider the case of Tasos Kariofyllis and Steve Barraco—two entrepreneurs who started a successful teeth whitening business in Connecticut.<sup>1</sup> The company, aptly named Sensational Smiles, sold over-the-counter whitening products in a mall. Sensational Smiles had comfortable seating for customers, and its employees helped purchasers enhance their new whitening products through the application of LED lights.<sup>2</sup> Both the products sold and the services provided were safe.<sup>3</sup> The Connecticut State Board of Dental Examiners, composed of practicing dentists and therefore the direct competitors of businesses like Sensational Smiles, decided that teeth whitening is a form of dentistry.<sup>4</sup> The Board sent Kariofyllis and Barraco a cease and desist letter.<sup>5</sup> Unwilling to risk criminal prosecution or to attend dental school, the entrepreneurs closed Sensational Smiles.<sup>6</sup> Kariofyllis and Barraco brought suit in federal court, alleging a deprivation of their due process rights to engage in a

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1. *Connecticut Teeth Whitening*, INST. FOR JUST., <http://ij.org/case/ct-teeth-whitening> (last visited Mar. 17, 2017).

2. *Id.*

3. *Id.* (“There is no health or safety reason to make it illegal for anyone other than a dentist to offer teeth-whitening services.”).

4. See CONN. STATE DENTAL COMM’N, DECLARATORY RULING: TEETH WHITENING (2011), [http://www.ct.gov/dph/lib/dph/phho/dental\\_commission/declaratory\\_rulings/2011\\_teeth\\_whitening\\_declaratory\\_ruling\\_-\\_corrected.pdf](http://www.ct.gov/dph/lib/dph/phho/dental_commission/declaratory_rulings/2011_teeth_whitening_declaratory_ruling_-_corrected.pdf).

5. *Connecticut Teeth Whitening*, *supra* note 1.

6. *Id.*

lawful profession and a denial of equal protection under the law.<sup>7</sup> To what result?

Under the Supreme Court's post-*Lochner* economic liberties cases, almost-certain victory awaited the government.<sup>8</sup> Indeed, the Court said as much in *Ferguson v. Skrupa*, noting that "relief, if any be needed, lies not with us but with the body constituted to pass laws for the [state]."<sup>9</sup> The district court granted summary judgment in favor of Connecticut,<sup>10</sup> and the Second Circuit affirmed on appeal.<sup>11</sup> Although Sensational Smiles lost their suit, litigants across the country have persuaded federal district courts to strike down a number of occupational licensing laws,<sup>12</sup> and these surprising cases have led to a circuit split.<sup>13</sup>

The disagreement between the circuits centers on the type of interests that may justify government action, like occupa-

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7. *Martinez v. Mullen*, 11 F. Supp. 3d 149, 152 (D. Conn. 2014), *aff'd sub nom.* *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1160 (2016).

8. For many years, *Lochner* served as popinjay for critics of the "activist" Supreme Court in the early twentieth century. *See, e.g.*, Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 ALASKA L. REV. 209, 280 n.169 (1998) ("The ghost of *Lochner* has haunted the Court ever since, with justices invoking the case to accuse their opponents of unjustified judicial activism."). The Court at that time protected economic liberties by applying rather searching scrutiny to laws interfering with the now-disfavored freedom of contract. *See Lochner v. New York*, 198 U.S. 45 (1905), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (holding a law limiting work hours to be unconstitutional restriction on the right to freedom of contract). But *Lochner* is not without its defenders. *See, e.g.*, David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003) (suggesting that the academy should reassess *Lochner*-style jurisprudence).

9. *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963).

10. *Martinez*, 11 F. Supp. 3d at 170 (granting Connecticut's motion for summary judgment).

11. *Sensational Smiles*, 793 F.3d at 283 (affirming on appeal).

12. *See, e.g.*, *Brantley v. Kuntz*, 98 F. Supp. 3d 884 (W.D. Tex. 2015) (invalidating a requirement that African hair braiders become licensed cosmetologists); *Waugh v. Nev. State Bd. of Cosmetology*, 36 F. Supp. 3d 991, 997 (D. Nev. 2014) (striking down a requirement for those who teach makeup artistry to be cosmetologists); *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 693 (E.D. Ky. 2014) (striking down a competitor's veto law for moving trucks); *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1213 (D. Utah 2012) (invalidating another African hair-braiding statute); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999) (same).

13. *See infra* Part I.C (discussing the current circuit split on the validity of economic protectionism as a legitimate government interest).

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tional licensing laws. In these cases, states have defended occupational licensing laws by arguing that such regulations may be justified out of pure economic protectionism—i.e., favoring one set of favored constituents over others, even if the public does not benefit from the law.

The Second and Tenth Circuits have explicitly held that laws may be passed out of economic protectionism, while the Fifth, Sixth, and Ninth disagree.<sup>14</sup> Not only did those three circuits reject economic protectionism as a basis for government action, they also struck down occupational licensing laws under the rational basis standard.<sup>15</sup> This result is surprising considering that the Supreme Court abandoned economic substantive due process in 1937 and has not since invalidated a single piece of economic legislation under the Fourteenth Amendment.<sup>16</sup> This raises a series of interesting questions. Does Supreme Court precedent justify striking down laws after a showing of economic protectionism? And if not, should courts extend heightened scrutiny to occupational licensing laws motivated by such a purpose?

This Note seeks to answer those questions. Part I introduces background materials on occupational licensing, equal protection and due process jurisprudence, and the circuit split over economic protectionism. Part II of this Note breaks with a growing body of scholarship by arguing that even if the economic protectionism principle is constitutionally illegitimate, Supreme Court precedent does not support the invalidation of licensing statutes. Part III argues that heightened judicial scrutiny should not be extended to create a strong anti-economic protectionism principle for three reasons. First, courts lack the institutional capacity to determine when a licensing law exhibits this illegitimate motive. Second, an aggressive anti-economic protectionism principle would call into question much state and federal legislation, leaving courts with the heady task of rooting out special interest influence. Third, by denying litigants relief under the Fourteenth Amendment, courts promote efficiency by routing challenges into other legal areas—namely

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14. See *infra* Part I.C.

15. See *infra* note 24 and accompanying text (collecting studies which show that occupational licensing laws provide little in the way of consumer benefits).

16. See Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 266 (stating that the Supreme Court abandoned economic substantive due process in 1937).

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state constitutional and administrative law and federal anti-trust law. Finally, Part IV contends that Congress is the appropriate branch of government to remedy restrictive licensing laws and sets forth a grant program that could supply this remedy.

#### I. ECONOMIC CHALLENGES UNDER THE FOURTEENTH AMENDMENT AND ECONOMIC PROTECTIONISM

This Part begins by laying groundwork for a discussion of the role an anti-economic protectionism principle would play under the Equal Protection Clause of the Fourteenth Amendment. Section A provides context about occupational licensing laws and the trouble they cause the American economy. Section B supplies the Fourteenth Amendment principles that would govern a challenge to an occupational licensing law. Finally, the last Section introduces the circuit split over economic protectionism in the federal courts of appeal. Together, these three Sections will provide the context for evaluating whether Supreme Court precedent justifies striking down occupational licensing laws that are motivated by economic protectionism.

##### A. OCCUPATIONAL LICENSING

An occupational license is a government-issued credential that enables a person to engage in a profession.<sup>17</sup> In theory, federal, state, and local governments use this regulatory tool to protect consumers.<sup>18</sup> To be sure, many occupational licenses do protect the public. Consider, for instance, the licensing requirements imposed on doctors and airline pilots. But the benefits of many licensing laws are not so clear. Why should hair shampooers, interior decorators, and horse teeth floaters need permission from the government to earn a living?<sup>19</sup>

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17. DEP'T OF TREASURY, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 6 (2015), [https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing\\_report\\_final\\_nonembargo.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf) [hereinafter WHITE HOUSE REPORT].

18. *Id.* at 3.

19. *See, e.g.*, *Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011) (upholding an onerous requirement on interior designers); *Shampoo Technician*, TENN. DEP'T COM. & INS., <https://www.tn.gov/commerce/article/cosmo-shampoo-technician> (last visited Mar. 17, 2017) (requiring anyone who “brushes, combs, shampoos, rinses and conditions upon the hair and scalp” to undertake “not less than 300 hours in the practice and theory of shampooing at a school of cosmetology”); *Texas Equine Dentistry*, INST. FOR JUST., <http://ij.org/case/mitz-v-texas-state>

Occupational licensing is prevalent across the country. Over the past half-century, the percentage of professions licensed in the United States increased sharply from about five percent in the 1950s to around thirty percent today.<sup>20</sup> This rise is at least partially explained by an increasingly service-oriented American economy and an American workforce belonging to fewer labor unions.<sup>21</sup> Without question, licensure is good for those in the licensed profession, “rais[ing] their wages by as much as 15 percent and enhanc[ing] other benefits such as health coverage and pensions.”<sup>22</sup> That said, overly restrictive licensing laws are not good for the economy.

A recent study—endorsed by the Obama Administration—concluded that over-licensure adds nearly three million people to the unemployment rolls, while costing American consumers about \$300 billion per year in excess prices.<sup>23</sup> But there is little evidence to suggest that consumers receive anything in return.<sup>24</sup> Economists refer to this type of situation as rent-seeking, a practice by which a group of professionals join together to lobby legislators to raise their occupation’s entry requirements.<sup>25</sup> Heightened barriers to entry restrict competition, which allows professionals to raise their rates, free from the inconveniences of an open market.<sup>26</sup>

To make matters worse, the negative effects of occupational licensing often form an insurmountable hurdle for entrepreneurs and for disadvantaged workers. As many as thirty-five percent of military spouses practice licensed professions, which

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-board-of-veterinary-medical-examiners (last visited Mar. 17, 2017) (describing the practice of horse tooth floating, which involves the filing of horse teeth).

20. Douglas Clement, *The Rise of Occupational Licensing*, FED. RES. BANK MINNEAPOLIS (June 1, 2008), <https://www.minneapolisfed.org/publications/the-region/the-rise-of-occupational-licensing>.

21. *Id.*

22. Morris M. Kleiner, *Reforming Occupational Licensing Policies* 6 (Brookings Inst.: Hamilton Project, Discussion Paper 2015-01, 2015), [https://www.brookings.edu/wp-content/uploads/2016/06/THP\\_KleinerDiscPaper\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/THP_KleinerDiscPaper_final.pdf).

23. Morris M. Kleiner, *Occupational Licensing: Protecting the Public Interest or Protectionism?* 3 (Upjohn Inst. Emp. Res., Policy Paper No. 2011-009, 2011), [http://research.upjohn.org/cgi/viewcontent.cgi?article=1008&context=up\\_policypapers](http://research.upjohn.org/cgi/viewcontent.cgi?article=1008&context=up_policypapers).

24. See WHITE HOUSE REPORT, *supra* note 17, at 58 (collecting studies).

25. See Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 194 (2012) (discussing “the costs of lobbyist-driven rent-seeking on the national economy”).

26. See WHITE HOUSE REPORT, *supra* note 17, at 14.

means they need additional training or to pay additional fees every time their family moves across state lines.<sup>27</sup> Immigrants also struggle to meet the licensing requirements for jobs for which they are otherwise qualified.<sup>28</sup> Furthermore, in many states, a person with a past criminal conviction may be denied a license.<sup>29</sup> There may also be some evidence that occupational licensing laws disproportionately harm minority workers.<sup>30</sup> It is then no surprise that states with the most onerous licensing laws have significantly lower rates of entrepreneurship by low-income citizens.<sup>31</sup>

#### B. FOURTEENTH AMENDMENT CHALLENGES TO LEGISLATION

The Supreme Court uses a tiered framework for evaluating challenges brought under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>32</sup> Courts apply heightened scrutiny to laws impinging on a fundamental right or drawing a classification that includes a suspect group.<sup>33</sup> Fundamental rights include marital privacy, parental child-rearing decisions, a woman's right to an abortion, and marriage.<sup>34</sup> Suspect classifications are most commonly thought of as

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27. *Id.* at 4.

28. *Id.* at 5.

29. *Id.*

30. See Timothy Sandefur, *Can You Get There from Here?: How the Law Still Threatens King's Dream*, 22 *LAW & INEQ.* 1, 6–16 (2004) (detailing how occupational licensing laws hurt minority communities).

31. STEPHEN SLIVINSKI, *BOOTSTRAPS TANGLED IN RED TAPE: HOW STATE OCCUPATIONAL LICENSING HINDERS LOW-INCOME ENTREPRENEURSHIP* 6 tbl.4 (2015).

32. The multi-tiered framework is often attributed to the most famous footnote in all of constitutional law, footnote four of *United States v. Carolene Products*. 304 U.S. 144, 152 n.4 (1938); see also Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 *U. PA. J. CONST. L.* 739, 751 (2014) (“Rather than being based in *Brown* or any of the seminal race cases, the most prominent doctrinal features of contemporary equal protection jurisprudence—suspect classification analysis and the tiers of scrutiny—trace their intellectual heritage back to a law-clerk-drafted footnote in a six-page decision about filled milk.”).

33. See *Heller v. Doe*, 509 U.S. 312, 319 (1993) (rational basis scrutiny applies when “a classification neither involv[es] fundamental rights nor proceed[s] along suspect lines”).

34. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (defining a fundamental right to marital privacy); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (defining a fundamental right of parents to make child-reading decisions); *Myers v. Nebraska*, 262 U.S. 390 (1923) (same).

those involving race and gender.<sup>35</sup> When heightened scrutiny applies, it often results in courts striking down state action.<sup>36</sup> All other challenges, including those to occupational licensing laws, receive rational basis scrutiny, which almost always results in a victory for the government.<sup>37</sup>

Rational basis review is not demanding. The Supreme Court describes it as a “paradigm of judicial restraint.”<sup>38</sup> In reviewing legislation under this standard, a court first asks whether the government is pursuing a permissible objective, then whether the governmental action bears any rational relationship to achieving that objective.<sup>39</sup> At both steps of the inquiry, the challenged action comes cloaked in a strong presumption of constitutionality.

Unlike the federal government, which has only enumerated powers, state governments possess the general police power, permitting them to act in the promotion of public health, safety, or welfare.<sup>40</sup> Courts do not inquire into the motivation behind a particular action, and nearly any piece of legislation can be described as benefitting the public in some way.<sup>41</sup> As a result, it is the rare case where improper purpose leads to invalidation.<sup>42</sup>

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35. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (listing race, alienage, national origin, and sex as classes receiving heightened scrutiny).

36. Professor Gerald Gunther famously referred to strict scrutiny as “strict’ in theory and fatal in fact.” Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). But see Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006) (“Thirty percent of all applications of strict scrutiny—nearly one in three—result in the challenged law being upheld.”).

37. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (“In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some ‘reasonable basis,’ it does not offend the Constitution simply because the classification ‘is not made with mathematical nicety or because in practice it results in some inequality.’” (quoting *Lindsley v. Nat. Carbonic Gas Co.*, 220 U.S. 61, 78 (1911))).

38. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314 (1993).

39. See, e.g., *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994) (“First, are they directed at the achievement of a legitimate governmental purpose? Second, do they rationally further that purpose?”).

40. *Beach Commc’ns, Inc.*, 508 U.S. at 314.

41. *Id.*

42. See *id.*; cf. Clark Neily, *One Test, Two Standards: The On-and-Off Role of “Plausibility” in Rational Basis Review*, 4 GEO. J.L. & PUB. POL’Y 199, 208 (2006) (“[T]he Supreme Court has repeatedly held the legislature’s actual

The rational connection between the challenged action and real or hypothesized governmental objective is easy to satisfy. The government need not prove that the legislation actually works, and the government's decision is not "subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."<sup>43</sup> Nor must the government solve an entire problem at once. Under rational basis review, partial solutions suffice and legislatures may leave the rest of the issue for another day.<sup>44</sup>

It is nearly impossible for litigants to prevail under the traditional rational basis standard. To do so, one must show that *every* possible justification for the challenged action fails.<sup>45</sup> And if proving a negative is not hard enough, courts help the government by proposing reasons for upholding challenged actions.<sup>46</sup>

The Supreme Court's rational basis jurisprudence is not always so deferential. On four occasions, the Court has invalidated laws motivated by "a bare congressional desire to harm a politically unpopular group" under the rational basis standard.<sup>47</sup> Scholars call this more demanding form of review "rational basis with bite."<sup>48</sup> Although a majority of the Supreme Court has never formally recognized that such a second rational basis standard exists, individual Justices and commentators have done so repeatedly.<sup>49</sup> Because economic protectionism

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intent in passing the challenged law is irrelevant under the rational basis test.").

43. *Beach Commc'ns, Inc.*, 508 U.S. at 315.

44. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 485–87 (1955).

45. *See Heller v. Doe*, 509 U.S. 312, 320 (1993) (stating that a litigant must negate every possible justification for the legislation).

46. *See Aaron Belzer, Putting the "Review" Back in Rational Basis Review*, 41 W. ST. U. L. REV. 339, 339 (2014) (describing the use of hypothetical justifications to survive judicial review).

47. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *see also United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013); *Lawrence v. Texas*, 539 U.S. 558, 582–84 (2003) (O'Connor, J., concurring); *Romer v. Evans*, 517 U.S. 620, 633 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435 (1985).

48. *See, e.g., Note, Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 (1987) (referring to this more aggressive form of review as "rational basis with bite").

49. *See Kenji Yoshino, The New Equal Protection*, 124 HARV. L. REV. 747, 759–63 (2011) (describing the rational basis with bite doctrine).

might be a form of impermissible animus, a brief but deeper dive into these cases is necessary.

Rational basis with bite first appeared in 1973 with the *United States Department of Agriculture v. Moreno*.<sup>50</sup> There the Court struck down food stamp requirements because legislative history revealed that animus against hippies motivated the law.<sup>51</sup> Twelve years later, the Court invalidated a zoning ordinance after determining that a city denied a permit to a home for cognitively disabled persons out of irrational prejudice.<sup>52</sup> Next, rational basis with bite continued to appear in a trilogy of gay rights decisions. First, in *Romer v. Evans*, the Court struck down a Colorado constitutional amendment that stripped legal protections from homosexuals.<sup>53</sup> Second, Justice O'Connor wrote separately in *Lawrence v. Texas*, arguing that an anti-sodomy law was invalid under the Equal Protection Clause because it exhibited animus.<sup>54</sup> Finally, the Court in *United States v. Windsor* relied on rational basis with bite to invalidate the Defense of Marriage Act.<sup>55</sup>

These five cases provide the best evidence that a rational basis with bite standard exists. In each, the government should have prevailed, but ultimately failed to do so under rational basis review.<sup>56</sup> Whether it was saving financial resources by increasing restrictions on the availability of food stamps in *Moreno* or keeping a home for the disabled off of a flood plain in *Cleburne*, each case presented a possible—albeit flimsy—justification for the challenged law.<sup>57</sup> If such a standard of review exists, then how does it work?

In the few cases thus far, triggering the rational basis with bite standard requires a showing that government officials act-

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50. *Moreno*, 413 U.S. at 534–35 (stating that animus “against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify” the law (alteration in original) (quoting *Moreno v. U.S. Dep’t of Agric.*, 345 F. Supp. 310, 314 n.11 (D.D.C. 1972))).

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

52. *Cleburne*, 473 U.S. at 435.

53. *Romer v. Evans*, 517 U.S. 620, 623 (1996).

54. See *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring).

55. *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013).

56. Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 192 (2014) (describing the rationales that could have justified the challenged laws).

57. *Id.* at 207.

ed out of animus or a “bare . . . desire to harm.”<sup>58</sup> This type of purpose scrutiny is common in Fourteenth Amendment jurisprudence.<sup>59</sup> Indeed, facially neutral laws are subject to strict or intermediate scrutiny only after a showing that state actors targeted a suspect group.<sup>60</sup> In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court laid out factors for determining legislative motive: whether a law has a disparate impact on a class of persons, whether the government departed from its normal procedural processes or substantive considerations, the legislative or administrative history, and “[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes.”<sup>61</sup> These factors all relate to the process through which legislators pass laws, making them the best indicia of legislative intent. The Supreme Court, in turn, used these factors to determine whether government action was motivated by animus.<sup>62</sup>

Although the Supreme Court has firmly established that laws cannot be motivated by animus, the Court has not clearly defined exactly how the rational basis with bite standard applies. The cases thus far indicate that after a litigant shows animus to have been the primary motivation of state action, heightened judicial scrutiny will apply but the precise nature of that scrutiny remains undefined. The Court in *Cleburne* suggested, in dicta, that the government might still prevail after a showing of animus, but that flimsy or hypothetical justifications are no longer sufficient.<sup>63</sup> Instead, courts should search for the actual reasons that motivated the challenged state action

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58. Yoshino, *supra* note 49, at 760.

59. See generally Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297 (1997) (discussing the Supreme Court’s purpose scrutiny in constitutional law cases).

60. *Washington v. Davis*, 426 U.S. 229, 240 (1976) (“[T]he basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.”).

61. 429 U.S. 252, 267 (1977). See generally Robert C. Farrell, *Legislative Purpose and Equal Protection’s Rationality Review*, 37 VILL. L. REV. 1 (1992) (compiling the methods used by the Supreme Court to analyze legislative purpose). Statutory statements of purpose have also been used to determine legislative purpose. *Cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 465 (1981) (examining the articulated statutory purposes).

62. See *Carpenter*, *supra* note 56, at 246–48 (describing the Supreme Court’s animus methodology).

63. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435 (1985).

and determine if they are legitimate.<sup>64</sup> In other words, the cloak of presumed constitutionality is removed. The government must show that the law rationally serves a legitimate, non-animus-based objective. Whether these same principles apply to laws motivated by economic protectionism is a question for a later Section.

### C. CIRCUIT COURTS DISAGREE OVER WHETHER ECONOMIC PROTECTIONISM SERVES A LEGITIMATE GOVERNMENT INTEREST

Recall that when courts examine state action under the rational basis standard, they ask whether the action serves a valid government purpose. A question divides the courts of appeal: is economic protectionism—that is, favoring one group of citizens against competition—such a valid purpose? Two circuits have held economic protectionism is legitimate; three others disagree.

The Fifth, Sixth, and Ninth Circuits all hold economic protectionism to be an illegitimate interest. In the first of those decisions, the Sixth Circuit struck down a licensing statute that limited casket sales to funeral home directors.<sup>65</sup> In reaching that conclusion, the court cited cases involving the Contracts and Dormant Commerce Clauses, stating “[c]ourts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose.”<sup>66</sup> Indeed, the Supreme Court has held that providing a benefit to special interests is not a valid exercise of the police power.<sup>67</sup> The term “police power” refers to the authority of a state to enact legislation.<sup>68</sup> Later the Fifth and Ninth Circuits would cite this line of reasoning with approval.<sup>69</sup> All three of these decisions are similar in one other way: after rejecting

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64. See Farrell, *supra* note 61, at 24–25 (referring to *Cleburne* and *Moreno* as searching for the government’s “actual purpose”).

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

66. *Id.* at 224.

67. *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412 (1983).

68. For an early Supreme Court discussion of the police power, see *New Orleans Gas-Light Co. v. Louisiana Light & Heat Producing & Manufacturing Co.*, 115 U.S. 650, 660 (1885).

69. *St. Joseph Abbey v. Castille*, 700 F.3d 154, 161 (5th Cir. 2012) (“Notably, we approve[] of the *Craigsmiles* court’s reasoning . . . .”); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) (“[W]e agree with the Sixth Circuit in *Craigsmiles* and reject the Tenth Circuit’s reasoning . . . .”).

economic protectionism as a legitimate government interest, they all struck down regulations under the “traditional rational basis review.”<sup>70</sup>

On the other side of the ledger, both the Tenth and Second Circuits have held that economic protectionism is a legitimate state interest.<sup>71</sup> In *Powers v. Harris*, the Tenth Circuit began by distinguishing the cases cited by the Sixth Circuit.<sup>72</sup> The court noted that different state interests may survive judicial review depending on the clause of the Constitution at issue.<sup>73</sup> Thus, while economic protectionism may not pass muster under the dormant Commerce Clause, it might do so under the Equal Protection Clause. To support this conclusion, the court cited a whole string of Fourteenth Amendment cases—including those involving occupational licensing—where the Supreme Court upheld protectionist regulations based on the recognition of reliance interests or simply to “[free a] profession, to as great an extent as possible, from all taints of commercialism.”<sup>74</sup> In *Sensational Smiles v. Mullen*, the Second Circuit agreed that economic protectionism is a legitimate interest.<sup>75</sup> Striking down regulations motivated by rent-seeking, according to the court, would be “destructive to federalism and to the power of the sovereign states to regulate their internal economic affairs.”<sup>76</sup> After accepting economic protectionism as a legitimate interest, both of these courts went on to uphold the challenged regulations under the rational basis standard.<sup>77</sup>

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70. *St. Joseph*, 712 F.3d at 227; *Merrifield*, 547 F.3d at 992; *Craigsmiles*, 312 F.3d at 229.

71. *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1160 (2016); *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004).

72. *Powers*, 379 F.3d 1219–21.

73. *Id.* at 1220.

74. *Id.* at 1221 (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955)); *see also* *Fitzgerald v. Racing Ass’n of Cent. Iowa*, 539 U.S. 103 (2003); *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

75. *Sensational Smiles*, 793 F.3d at 286 (“We join the Tenth Circuit and conclude that economic favoritism is rational for purposes of our review of state action under the Fourteenth Amendment.”).

76. *Id.* at 287.

77. *Id.* at 288; *Powers*, 379 F.3d at 1225.

## II. WHY EXISTING SUPREME COURT PRECEDENT IS INADEQUATE FOR REMEDYING LICENSING LAWS MOTIVATED BY ECONOMIC PROTECTIONISM

As the last Part discussed, the courts of appeal are divided on whether economic protectionism is a legitimate government interest. Several circuits, rejecting such an interest, have struck down occupational licensing regulations under the traditional rational basis standard.<sup>78</sup> A large body of scholarship already asks whether economic protectionism is a legitimate government interest.<sup>79</sup> Stepping back from the legitimacy question, assume instead that economic protectionism is an illegitimate government interest and may not serve as a justification for state action. This nevertheless leaves open a question: How can or should courts enforce an anti-economic protectionism principle? The answer to this question largely determines whether the Equal Protection Clause serves as a proper vehicle for occupational licensing reform.

This Part assumes that economic protectionism cannot justify state action and proceeds by examining two possible roles that an anti-economic protectionism principle could play in Fourteenth Amendment jurisprudence. A weak version of such a principle would consist of applying rational basis review, while rejecting any attempt by state actors to justify their choices out of protectionism. In other words, passing rational basis muster requires that a law serve some non-protectionist justification. A strong principle, however, would treat economic protectionism as a constitutionally forbidden motivation, much like animus, and would trigger rational basis with bite.

This Part analyzes these possibilities under Supreme Court precedent. Ultimately, the weak version is irrelevant; rational basis review is so deferential that any occupational

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78. See *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223–28 (5th Cir. 2013); *Merrifield v. Lockyer*, 547 F.3d 978, 990–92 (9th Cir. 2008); *Craigsmiles v. Giles*, 312 F.3d 220, 225–29 (6th Cir. 2002).

79. For commentators arguing in favor of increased judicial scrutiny of occupational licenses, see, for example, Lana Harfoush, *Grave Consequences for Economic Liberty: The Funeral Industry's Protectionist Occupational Licensing Scheme, the Circuit Split, and Why It Matters*, 5 J. BUS. ENTREPRENEURSHIP & L. 135 (2011) (arguing against protectionist occupational licensing); Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 N.Y.U. J.L. & LIBERTY 1055, 1085–96 (2014); Timothy Sandefur, *The Right To Earn a Living*, 6 CHAP. L. REV. 207 (2003) (arguing for heightened protection of economic liberties).

licensing law should pass muster. Yet the strong version, treating economic protectionism like animus, is not supported by the principles underlying rational basis with bite. As a result, an anti-economic protectionism principle should not, under current Fourteenth Amendment precedent, provide a basis for striking down overly restrictive licensing regimes.

A. ECONOMIC PROTECTIONISM AS AN ILLEGITIMATE END UNDER TRADITIONAL RATIONAL BASIS REVIEW

An anti-economic protectionism principle could serve a weak role in constitutional jurisprudence where courts continue to apply rational basis review to licensing challenges but do not allow state actors to justify legislation with respect to that interest. In essence, courts would demand that state actors provide a legitimate public health, safety, or welfare goal for challenged action.<sup>80</sup> This weak version of the principle is what the Fifth, Sixth, and Ninth Circuits purported to use in striking down occupational licensing laws.<sup>81</sup> The problem with this approach lies with the rational basis standard itself.<sup>82</sup>

Taking protectionism off the table does little for those harmed by occupational licensing because the government will prevail if it can come up with *any* justification for its actions—real or hypothetical.<sup>83</sup> Making matters worse, there are several hypothetical rationales that will always apply to licensing laws.

Many forms of onerous occupational licensing may be justified as a recognition of reliance interests. The Supreme Court has twice blessed this line of reasoning. In *City of New Orleans v. Dukes*, the Court found the recognition of established push cart vendors' contributions to the French Quarter sufficient to

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80. See *supra* notes 40–42 and accompanying text.

81. This is precisely what the Fifth, Sixth, and Ninth Circuits claimed to do. See *St. Joseph*, 712 F.3d at 227 (claiming to apply rational basis review and expressly denying that the court was reviving *Lochner*); *Merrifield*, 547 F.3d at 992 (claiming to apply rational basis review in striking down a statutory scheme that exempted some pest control operators from licensing but not others); *Craigmiles*, 312 F.3d at 228 (claiming to apply rational basis review and expressly denying that the court was reviving *Lochner*).

82. Critics of deferential rational basis review mock the standard by referring to it as the “rationalize-a-basis-test.” See, e.g., Timothy Sandefur, *Rational Basis Scrutiny Is Just a Stupid Rock*, CATO UNBOUND (Feb. 18, 2014), <http://www.cato-unbound.org/2014/02/18/timothy-sandefur/rational-basis-scrutiny-just-stupid-rock> (crediting Clark Neily with coining the phrase).

83. See sources cited *supra* note 42 and accompanying text.

uphold a grandfather clause.<sup>84</sup> The Court applied the same reasoning in *Fitzgerald v. Racing Association of Central Iowa* by upholding a steep tax differential between slot machines on riverboats and at racetracks because the boats were heavily invested in the Mississippi communities.<sup>85</sup>

This same line of reasoning can be applied to occupational licensing laws. The protection of reliance interests rationale commonly arises when an existing profession seeks to expand the scope of activities covered under its definition.<sup>86</sup> For example, dentists may wish to define teeth whitening as dentistry,<sup>87</sup> doctors may seek to constrict the procedures conducted by nurse practitioners,<sup>88</sup> and cosmetologists may wish to stop unlicensed hair braiders.<sup>89</sup> At first blush, it might seem preposterous to require teeth whiteners to be dentists. But as Judge Calabresi recently noted, there are several ways in which these regulations meet the minimal rationality standard.<sup>90</sup> Increasing the cost of one type of service, say teeth whitening, might subsidize the cost of other dental procedures.<sup>91</sup> But at a more basic level, if a legislature wants citizens to undergo arduous training for a profession—assuming that the licensure of that underlying profession is rational—then any expansion of the profes-

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84. *City of New Orleans v. Dukes*, 427 U.S. 297, 305 (1976) (explaining that “newer businesses were less likely to have built up substantial reliance interests” and that the older businesses “had themselves become part of the distinctive character and charm that distinguishes the Vieux Carre”).

85. 539 U.S. 103, 109 (2003) (“[L]egislators may have wanted to encourage the economic development of river communities or to promote riverboat history, say, by providing incentives for riverboats to remain in the State . . .”).

86. Many of the successful challenges described in the Introduction arise when one profession (usually cosmetologists) lobby legislators to impose new or additional licensing requirements on their hair-braiding competitors. See cases cited *supra* note 12.

87. See, e.g., *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 283–85 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1160 (2016) (describing how a state dental board changed the definition of dentistry).

88. See generally Benjamin J. McMichael, *Occupational Licensing and Legal Liability: The Effect of Regulation and Litigation on Nurse Practitioners, Physician Assistants, and the Healthcare System* (May 2015) (unpublished Ph.D. dissertation, Vanderbilt University), <https://law.vanderbilt.edu/phd/students/files/McMichael.pdf> (describing how lobbying efforts by doctors affect the range of activities that nurse practitioners may undertake).

89. See cases cited *supra* note 12.

90. *Sensational Smiles*, 793 F.3d at 287–88.

91. *Id.*

sion's scope should also be rational.<sup>92</sup> Forcing a discrete group of citizens to bear the brunt of subsidizing a profession may be unjust, but the Supreme Court has found it to be permissible.<sup>93</sup>

There are several other broad rationales, aside from recognizing reliance interests, that will almost always provide a justification for occupational licensing laws. First, state boards of examiners supervise many licensed occupations.<sup>94</sup> Often these boards investigate consumer complaints and may levy disciplinary sanctions.<sup>95</sup> In this way licensing laws may provide some degree of consumer protection.<sup>96</sup> Second, states may try to combat potential problems created by asymmetrical information in the marketplace.<sup>97</sup> With some professions, consumers may lack sufficient information about the quality of a firm's services, which creates the possibility that unrestrained competition may lead to a race to the bottom.<sup>98</sup> Finally, a state might believe that the training required for licensure provides value to consumers, even if it is not strictly necessary. For example, the Supreme Court upheld a regulation that required adjusters to hold law degrees because customers might have legal questions.<sup>99</sup> The Court even declined to confront the appellee's argument that debt adjusting requires no legal knowledge.<sup>100</sup> Just

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92. This follows as a matter of basic logic. If, as is commonly accepted, barriers to entry raise salaries, then restrictive licensing laws act as a form of subsidy for the licensed profession. *See supra* Part I.A (describing the economic effects of licensing laws).

93. *See Ferguson v. Skrupa*, 372 U.S. 726, 732–33 (1963) (upholding a statute requiring debt collectors to be lawyers even though debt collection requires no legal training).

94. *See* WHITE HOUSE REPORT, *supra* note 17, at 45.

95. *See, e.g.*, NAM D. PHAM & ANIL SARDA, THE VALUE OF COSMETOLOGY LICENSING TO THE HEALTH, SAFETY, AND ECONOMY OF AMERICA 12 (2015), <https://static1.squarespace.com/static/52850a5ce4b068394a270176/t/54ca482ee4b04bc79092e6da/1422542894461/PBA+Report+-+February+2015.pdf>.

96. *But see* *St. Joseph Abbey v. Castille*, 712 F.3d 215, 225–27 (5th Cir. 2013) (rejecting the consumer protection argument); WHITE HOUSE REPORT, *supra* note 17, at 58 (collecting studies showing that licensure has limited effects on quality).

97. *See* CAROLYN COX & SUSAN FOSTER, COSTS AND BENEFITS OF OCCUPATIONAL REGULATION 5–8 (1990), [https://www.ftc.gov/system/files/documents/reports/costs-benefits-occupational-regulation/cox\\_foster\\_-\\_occupational\\_licensing.pdf](https://www.ftc.gov/system/files/documents/reports/costs-benefits-occupational-regulation/cox_foster_-_occupational_licensing.pdf) (describing the asymmetry problem).

98. *Id.* at 6 (suggesting that firms may let the quality of their services deteriorate if consumers lack the ability to discern quality).

99. *Ferguson v. Skrupa*, 372 U.S. 726, 732–33 (1963).

100. *Id.* The Court was aware of this argument because the appellee made it in his brief. *See* Brief for Appellee at 14, *Ferguson v. Skrupa*, 372 U.S. 726

as the Court posited a hypothetical benefit to legal knowledge in the debt adjuster case, so also can courts find hypothetical value in the education requirements imposed by many licensing laws.<sup>101</sup> And if that is true, then such licensing laws must pass rational basis muster.

In conclusion, a weak anti-economic protectionism principle, if widely adopted, would not serve as vehicle for occupational licensing reform. Laws survive rational basis review whenever a court can find that such law serves *any* public health, safety, or welfare rationale.<sup>102</sup> With most licensing laws, this low standard will be met easily. In other cases, this Section shows that judges have a whole menu of fallback options, including recognizing reliance interests, added value, or consumer protection—none of which are subject courtroom fact-finding.<sup>103</sup> This means that for an anti-economic protectionism principle to have teeth, it must trigger rational basis with bite.

#### B. A STRONG ANTI-ECONOMIC PROTECTIONISM PRINCIPLE: APPLYING RATIONAL BASIS WITH BITE

A strong anti-economic protectionism principle would work similarly to the Supreme Court's rational basis with bite cases. In fact, one might think of economic protectionism as "economic animus."<sup>104</sup> To recap, the Supreme Court's rational basis with bite standard involves two steps. First the Court applies the factors from *Arlington Heights* to determine whether (economic) animus was the primary motivation for the challenged legislation. Second, the Court removes the cloak of presumed constitutionality that normally accompanies rational basis challenges and instead searches for a legitimate purpose for the law.<sup>105</sup>

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(1963) (No. 111), 1963 WL 106151 at \*14 (arguing that the practice of law is unrelated to debt collection).

101. For example, a hair braider who attends cosmetology school may have increased knowledge of sanitation procedures.

102. See *supra* notes 42–46 and accompanying text.

103. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (stating that there is no courtroom fact-finding of legislative purpose).

104. To the author's knowledge, Judge O'Scannlain of the Ninth Circuit was the first judge to use this phrase as a substitute for economic protectionism. See *Merrifield v. Lockyer*, 547 F.3d 978, 989 (9th Cir. 2008).

105. See *Carpenter*, *supra* note 56, at 246–48 (describing the Supreme Court's animus methodology).

Thus far, the Court has not upheld any challenges at the second step.<sup>106</sup>

This Section argues that the Supreme Court cases establishing rational basis with bite review for laws motivated by animus do not justify applying that same standard to those motivated by economic protectionism. In short, traditional animus cases bear two characteristics that justify heightened review: the targeting of a distinct and disfavored social group and a break down in the democratic process.<sup>107</sup> Because laws motivated by economic protectionism, like occupational licensing, do not bear those same traits, heightened judicial scrutiny is not justified under Supreme Court precedent.

#### 1. Lack of Present or Historical Societal Antipathy and Economic Protectionism as Business as Usual

The Supreme Court's rational basis with bite cases involve the invalidation of legislation motivated by a bare desire to harm a politically unpopular minority. The idea that government may not single out a disfavored group for unequal treatment traces its origins to the anti-caste beginnings of the Fourteenth Amendment.<sup>108</sup> The Equal Protection Clause commands that state actors must treat each citizen with equal regard.<sup>109</sup> And if "equal protection of the laws means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."<sup>110</sup> Although the Supreme Court has not been clear about when or why rational basis with bite review applies, two principles are present in each case.

First, each of the cases involved discrete social groups that suffered from present or historical social disapproval. Although

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106. See *supra* notes 67–70 and accompanying text.

107. See discussion *infra* Parts II.B.1, II.B.2.

108. See Carpenter, *supra* note 56, at 229–32; see also Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887 (2012) (discussing the Supreme Court's animus cases and caste-based legislation). For a thorough treatment of the history of the Equal Protection Clause's anti-caste origins, see Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 *U. MIAMI L. REV.* 648 (2016) (concluding that an original understanding of the anti-caste mandate of the Equal Protection Clause justifies the invalidation of same-sex marriage bans).

109. See *Nabozny v. Podlesny*, 92 F.3d 446, 456 (7th Cir. 1996) ("The Equal Protection Clause does, however, require the state to treat each person with equal regard, as having equal worth, regardless of his or her status.").

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

none of the rational basis with bite cases involve formally recognized suspect classifications, all four of the injured plaintiffs were members of groups suffering from longstanding or existing social stigma. In *Moreno*, for instance, the congressional record explicitly stated that keeping “hippies or hippy communes” off of food stamps was an aim of the legislation.<sup>111</sup> The facts of *Cleburne*, *Romer*, and *Windsor* drive this point home. Society long stigmatized both homosexuals and cognitively disabled persons.<sup>112</sup> Even though the Court did not explicitly rely on quasi-suspect group status as an explicit factor for triggering rational basis with bite, each case nevertheless involved such a group.

Second, the rational basis with bite cases involved judicial prevention of state actors turning disfavored social group membership—i.e., cognitive disability, homosexuality, member of a hippy community—into “systemic social disadvantage.”<sup>113</sup> Each case involved an attempt to systematically disadvantage those groups. *Moreno* involved a denial of food stamps benefits to hippies in need.<sup>114</sup> *Cleburne* concerned the denial of a zoning permit that would not have impeded others.<sup>115</sup> *Romer* and *Windsor* restored legal benefits and protections to homosexuals.<sup>116</sup> These cases show that once the government decides to provide legal protections or benefits, it cannot deny them to groups of disfavored citizens purely out of dislike.<sup>117</sup>

Economic protectionism, if treated as a form of unconstitutional animus, would depart from both these principles. With some exceptions, occupational licensing laws do not target any

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111. *Id.* at 543.

112. *See* Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 314–15 (D. Conn. 2012) (providing a thorough analysis of materials supporting the longstanding societal discrimination against homosexuals); Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 419–25 (2000) (summarizing the findings of fact contained within the Americans with Disabilities Act, which detail longstanding societal prejudices against the cognitively disabled).

113. *See supra* notes 50–56 and accompanying text (discussing the Supreme Court animus cases).

114. *See* cases cited *supra* note 47.

115. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435 (1985).

116. *See supra* notes 53, 55–56.

117. *Cf.* *Vacco v. Quill*, 521 U.S. 793, 800 (1997) (“Generally speaking, laws that apply evenhandedly to all ‘unquestionably comply’ with the Equal Protection Clause.” (quoting *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979))).

particular group.<sup>118</sup> To be sure, the effects of licensing restrictions often fall most heavily on low-income entrepreneurs.<sup>119</sup> Yet in no way do these individuals form a distinct social group. The Supreme Court once described wealth discrimination as involving “a large, diverse, and amorphous class . . . [bearing] none of the traditional indicia of suspectness.”<sup>120</sup>

Licensing laws also differ from traditional rational basis with bite cases because they are evenhanded regulations. Anyone may join a profession, provided that they fulfill the requirements.<sup>121</sup> More crucially, each of the rational basis with bite cases involved the denial of a government benefit or legal protection that the state actor provided broadly—i.e., food stamps, municipal zoning rules, discrimination protections, recognition of state marriages for federal benefits.<sup>122</sup> In contrast, states do not provide occupational licenses as a matter of entitlement; they set out generally applicable requirements for entering a profession. And a lack of unequal treatment weighs against applying rational basis with bite to evenhanded but unjust occupational licensing laws.<sup>123</sup>

## 2. Laws Passed out of Economic Protectionism Are Subject to Political Correction in Ways Laws Passed out of Animus Are Not.

Licensing laws motivated by economic protectionism are subject to democratic reform in ways that laws motivated by animus are not.<sup>124</sup> At the outset, it is worth noting that occupa-

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118. So far no court dealing with an occupational licensing challenge has entertained the possibility that licensing laws “target” any particular, identifiable group. *See* cases cited *supra* note 12.

119. *See generally* DICK M. CARPENTER II ET AL., LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING (2012), [https://www.ij.org/images/pdf\\_folder/economic\\_liberty/occupational\\_licensing/licensetowork.pdf](https://www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/licensetowork.pdf) (studying common occupational licensing laws that affect low-income workers).

120. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

121. Again, licensing challenges do not rely on claims that state officials are treating prospective professionals unequally. *See supra* note 12 (collecting cases).

122. *See supra* notes 47–58 and accompanying text (describing the rational basis with bite cases).

123. *See* *Vacco v. Quill*, 521 U.S. 793, 800 (1997); *see also* *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 271–72 (1979) (“Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law.”).

124. The *Carolene Products* framework relies in part on the assumption

tional licensing laws are difficult to reform through the political process.<sup>125</sup> The analysis in this Subsection is comparative and seeks to establish that laws motivated by economic protectionism *are more likely* to be reformed politically than those laws passed out of animus, making judicial intervention in the economic sphere less justified.

The primary distinction between laws passed out of economic protectionism and those passed out of animus is the party bearing the costs of state action. In the rational basis with bite cases, the group suffering from government mistreatment internalized the effects of mistreatment. Whether it was going without food stamps or being denied anti-discrimination protections, the plaintiffs in those cases bore the brunt of the harm. The same is not true of licensing laws motivated by protectionism.

Excessive licensing regimes function differently. Just like the animus cases, the parties injured by economic protectionism who cannot practice their profession are most acutely injured. Unlike the animus cases, however, excessive barriers to entry create artificially inflated prices, and those dead-weight losses are passed on to the consumers.<sup>126</sup> For any one licensing law, the amount by which prices are inflated is too small for consumers to notice. This naturally leads to rational ignorance—i.e., the problem is too small for citizens to care about fixing it—which then hampers reform efforts.<sup>127</sup> In the aggre-

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that judicial intervention is most justified when a law harming a minority group will not be subject to democratic reform. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST* 75–77, 151–53 (1980) (building the *Carolene Products* footnote four into a theory of judicial review).

125. See Alexandra L. Klein, *The Freedom To Pursue a Common Calling: Applying Intermediate Scrutiny to Occupational Licensing Statutes*, 73 WASH. & LEE L. REV. 411, 435–38 (2016) (claiming that the individuals harmed by licensing laws are politically powerless); Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065 (2013) (same).

126. Kleiner, *supra* note 23 (estimating the amount of deadweight losses passed on to consumers by occupational licensing laws).

127. Because the negative effects of any particular license only have a small impact on consumers, citizens are “rationally ignorant” about this form of overregulation. Cf. Ilya Somin, *DEMOCRACY AND POLITICAL IGNORANCE*,

gate, however, licensing laws increase the price of goods and services between three and sixteen percent, amounting to an overall \$ 200 billion yearly transfer from consumers to licensed workers.<sup>128</sup> To put that figure in perspective, for the fiscal year 2015 the federal government spent \$ 102 billion on education and \$ 85 billion on transportation.<sup>129</sup> This is not to say that occupational licensing laws are as salient an issue as federal education spending, but rather that hundreds of billions of dollars per year is a sufficient amount over which to fight. Based on their aggregate effects, licensing laws have the potential to reach a level of political salience that laws motivated by animus cannot normally achieve.<sup>130</sup>

Economic protectionism is also more susceptible to political reform in a second way: lawmakers enacting licensing requirements are acting out of rational self-interest rather than irrational prejudice. Indeed, public choice theory predicts the very existence of overly restrictive licensing laws.<sup>131</sup> Professionals form associations, pool resources, and lobby their local legislators.<sup>132</sup> For the legislator, it is a good deal. They create barriers to entry that help the association—receiving, of course, political support—while the costs passed onto consumers are too small to be noticed.<sup>133</sup> It is predictable and rational for politicians to support these laws, provided their efforts go unnoticed.<sup>134</sup> Although the same conditions that lead to overregulation make deregulation difficult, the fact that legislators act out of rational self-interest suggests that they may be convinced to change their minds, assuming, of course, that the political winds shift.

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CATO UNBOUND (Oct. 11, 2013), <https://www.cato-unbound.org/2013/10/11/ilya-somin/democracy-political-ignorance> (discussing rational ignorance).

128. See Kleiner, *supra* note 23.

129. *Federal Spending: Where Does the Money Go*, NAT'L PRIORITIES PROJECT, <https://www.nationalpriorities.org/budget-basics/federal-budget-101/spending> (last visited Mar. 17, 2017).

130. One might point to the gay rights movement as undercutting this point, but twenty years of advocacy never led to the legislative repeal of DOMA.

131. See generally Brief of Professor Todd J. Zywicki as Amicus Curiae in Support of Plaintiff-Appellant, Sensational Smiles, LLC v. Mullen, 793 F.3d 281 (2d Cir. 2015) (No. 14-1381), 2014 WL 4795938 (providing background on public choice economics and arguing that occupational licensing is a classic example of rent-seeking behavior).

132. *Id.*; see also McMichael, *supra* note 88 (describing how this process enables doctors to change the functions performed by nurse practitioners).

133. See WHITE HOUSE REPORT, *supra* note 17, at 14.

134. See *supra* note 127.

There is some empirical evidence that increased public awareness of an issue may dampen the effects of lobbying efforts.<sup>135</sup> If that is correct, then the longer occupational licensing reform remains an issue of national significance, the better chance that reform efforts will succeed in the future. And the desirability of a solution through the political process weighs against aggressive judicial review.

In the traditional rational basis with bite cases, lawmakers, acting out of animus, were not driven by the same rational self-interest that leads to economic protectionism, but instead by prejudice towards the cognitively disabled, homosexuals, and even hippies. Indeed, it is the very type of animosity giving rise to “the classification [that] blocks any self-correction.”<sup>136</sup> This is either because legislators “do not see a problem in the classification, or perhaps regard its animus-based vices as virtues.”<sup>137</sup> In a comparative sense, the difference between needing to convince legislators to reverse course and act in the general public interest should be easier than asking them to treat a historically or currently disfavored group with equal regard.<sup>138</sup> The litigants in the animus cases fought uphill against irrational

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135. See Nathan Grasse & Brianne Heidbreder, *The Influence of Lobbying Activity in State Legislatures: Evidence from Wisconsin*, 36 LEG. STUDIES Q. 567, 579 (2011) (finding that the increased salience of an issue decreases the effectiveness of lobbying efforts). Partisan support in Congress and increased media attention have already led to increased political salience. See, e.g., *Editorial: A License To Braid Hair? Come On*, DES MOINES REG. (Jan. 19, 2016), <http://www.desmoinesregister.com/story/opinion/editorials/2016/01/19/editorial-license-braid-hair-come/78901608>; *Roll Back Regulation, Break Barriers to Economic Mobility*, PIONEER PRESS (Jan. 4, 2016), <http://www.twincities.com/2016/01/04/roll-back-regulation-break-barriers-to-economic-mobility>; Cass R. Sunstein, *Business as Usual in D.C.? Not in the Age of Low Growth*, BLOOMBERG VIEW (Jan. 27, 2016), <http://www.bloombergvew.com/articles/2016-01-27/business-as-usual-in-d-c-not-in-the-age-of-low-growth>; Josh Zumbrun, *Occupational Licenses May Be Bad for the Economy, But Good for Workers Who Have Them*, WALL ST. J. (Apr. 18, 2016), <http://blogs.wsj.com/economics/2016/04/18/occupational-licenses-may-be-bad-for-the-economy-but-good-for-workers-who-have-them>; see also *Hillary Clinton Will Make Life Easier for Small Business at Every Step of the Way*, HILLARY FOR AM., <https://www.hillaryclinton.com/briefing/factsheets/2016/08/23/hillary-clinton-will-make-life-easier-for-small-business-at-every-step-of-the-way> (last visited Mar. 17, 2017) (discussing occupational licensing reform as part of Hillary Clinton’s campaign agenda).

136. Carpenter, *supra* note 56, at 222.

137. *Id.*

138. The White House Report on licensing reform lays out many reasons why it is in the public interest to reform such laws. See generally WHITE HOUSE REPORT, *supra* note 17.

prejudice and perhaps that justifies heightened judicial intervention.

### III. WHY COURTS SHOULD NOT EXTEND HEIGHTENED SCRUTINY TO LAWS MOTIVATED BY ECONOMIC PROTECTIONISM

If Supreme Court precedent does not justify striking down occupational licensing laws under the rational basis with bite standard, then this Part goes a step further, arguing that courts should not extend heightened judicial review to include occupational licensing laws motivated by economic protectionism. It does so by proceeding in three Sections. The first Section explains that courts should not adopt an aggressive anti-economic protectionism principle based on the degree of difficulty in detecting such a purpose. As past cases comprising the circuit split on this issue demonstrate, judges do not have a reliable set of factors available for detecting such a motivation. They have instead relied on a lack of fit between licensing requirements and the public regarding values they purport to serve.<sup>139</sup> This is a trend likely to continue into the future as other indicia of legislative intent are either unavailable or unreliable in occupational licensing cases. The second Section follows a strong anti-economic protectionism principle to its logical conclusion, pointing out that much contemporary legislation and regulation would come under heightened judicial scrutiny, were courts to take such a principle seriously. Finally, the third Section suggests that aggressively policing economic protectionism under the Fourteenth Amendment is at least partially unnecessary as plaintiffs have other legal claims available. Indeed, rejecting heightened judicial review carries the benefit of directing occupational licensing challenges towards those other claims that have often been ignored as interest groups push an economic liberties agenda in federal court.<sup>140</sup> This Part will unpack these arguments against extending heightened review to laws motivated by economic protectionism in turn.

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139. See *infra* Part III.A.

140. See *infra* Part III.C.

## A. INSTITUTIONAL COMPETENCY AND ECONOMIC PROTECTIONISM

Federal courts lack the institutional competency to adopt a strong anti-economic protectionism principle, or at least one that could be consistently applied with some measure of predictability. Under traditional Fourteenth Amendment jurisprudence, courts use factors related to the legislative process for ferreting out illegitimate purposes.<sup>141</sup> Building on those cases, scholars have called for using those same factors to detect economic protectionism.<sup>142</sup> This Section works through several of these possibilities, explaining why they are not reliable indicators of economic protectionism.

The unreliability of traditional purpose scrutiny factors in economic protectionism cases causes another problem—one that has already arisen in several occupational licensing cases. Left without other indicia of economic protectionism, courts must fall back on means-ends scrutiny as a way of detecting illegitimate motivation.<sup>143</sup> This blending of purpose and means-end scrutiny always carries an unintended consequence of implicitly applying intermediate scrutiny to occupational licensing challenges. This Section first attacks several possible indicators of economic protectionism as either unreliable or unavailable and then explains why detecting purpose through means-end analysis necessarily leads to intermediate scrutiny.

Traditional indicia of legislative purpose, set forth by the Supreme Court in *Arlington Heights*, are largely ineffective when searching for economic protectionism.<sup>144</sup> The courts of appeal that struck down occupational licensing laws did not rely on legislative history—the most natural source of legislative intent—in ascribing protectionist motives to the challenged regulations.<sup>145</sup> This trend of determining intent without legislative history will likely continue into the future. States do not produce the same volume of legislative history as their federal

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141. See *supra* notes 63–65.

142. See Menashi & Ginsburg, *supra* note 79, at 1098 (laying out the factors).

143. See *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223–27 (5th Cir. 2013); *Merrifield v. Lockyer*, 547 F.3d 978, 990–92 (9th Cir. 2008); *Craigsmiles v. Giles*, 312 F.3d 220, 225–29 (6th Cir. 2002).

144. See *supra* notes 60–62.

145. See generally *St. Joseph Abbey*, 712 F.3d 215; *Merrifield*, 547 F.3d 978; *Craigsmiles*, 312 F.3d 220.

counterparts.<sup>146</sup> And even where such history exists, it is unlikely that representatives will publically document a desire to push legislation out of economic protectionism. For legislative history to be useful in economic protectionism cases, legislators will need to fail, as Justice Scalia put it, “the stupid staffer test.”<sup>147</sup>

Judges Douglas H. Ginsburg and Steven Menashi have suggested that courts might use two other *Arlington Heights* factors for detecting economic protectionism, such as “the evolution of the legislation through a series of amendments, and the structure of the resulting law.”<sup>148</sup> To be sure, these factors work well when a profession seeks to expand the range of activities covered by its licensing law as a means of restricting competition, i.e., funeral home directors seeking an amendment to their governing licensing to prevent others from selling funeral merchandise.<sup>149</sup> When a legislature amends licensing requirements with the clear effect of restricting competition for the benefit of a group but providing no special value it smacks of protectionism. Those same expansive amendments also result in a legislative structure that indicates bad intent. When a law effectively combines two professions, the party squeezed out of business will often be able to show how the new licensing requirements demand more training than is required for their profession. For example, those selling funeral merchandise could point out all of the funeral home director educational requirements that do not concern selling goods.

Although the structure of legislation and the existence of amendments may reveal economic protectionism in some cases, these factors are ultimately of limited import. In cases where one profession uses legislation to squeeze out another, they will be helpful.<sup>150</sup> Yet there are thousands of occupational licensing

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146. Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 29 (1995) (“Yet another crucial distinction between state courts and federal courts interpreting statutes is the quantity of the legislative history that is available.”).

147. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025–26 n.12 (1992) (Scalia, J., dissenting) (stating that if “the test . . . is whether the legislature has recited a harm-preventing justification for its action,” then “this amounts to a test of whether the legislature has a stupid staff”).

148. Menashi & Ginsburg, *supra* note 79, at 1098.

149. See, e.g., *Craigmiles*, 312 F.3d at 222 (using an amendment to a definition of a profession as evidence of economic protectionism).

150. Menashi & Ginsburg, *supra* note 79, at 1098.

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laws nationwide, and many of them likely do not result from heavy-handed amendments. When an occupational licensing law serves only as a general barrier to entry and not as a direct means of attacking competition, the amendment and structural factors do not carry any weight. In such cases, amendments do not carry the same weight or do not exist, and the structural argument looks more like traditional means-ends scrutiny because rather than comparing two professions, the analysis would center on the burdens imposed by licensing requirement relative to the public interest served.

Moving beyond factors related to the legislative process, courts may instead look to whether the burdens imposed by a licensing law can be justified in light of the public interests served by such regulations. In other words: is the cost to economic liberty at least rationally related to the benefits enjoyed by the greater public? The problem with this approach, however, is that it necessarily demands at least rough quantification of the benefits and burdens imposed by licensing laws, which is not easily accomplished.

For starters, defining the public-regarding values that might justify occupational licensing laws is difficult. Courts could opt for a narrow definition which might only include values like increased quality of service or a reduction in safety problems.<sup>151</sup> These are not the only possibilities given that restrictive licensing laws could lead to increased financial investment by businesses or increased policing of consumer complaints by licensing boards.<sup>152</sup> Economic liberty proponents are unlikely to be satisfied by any definition that includes consumer complaints or financial investments as there are other, more direct means of achieving those benefits through consumer protection statutes or tax relief.<sup>153</sup>

Even if courts could agree on the proper range of public values that licensing laws could legitimately serve, then there would still be an unresolved empirical question about how much particular professions serve such values. Answering this

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151. See ADAM B. SUMMERS, OCCUPATIONAL LICENSING: RANKING THE STATES AND EXPLORING ALTERNATIVES 36 (2007), <http://reason.org/files/762c8fe96431b6fa5e27ca64eaa1818b.pdf>; see also *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223–25 (5th Cir. 2013) (rejecting consumer protection as a valid justification for licensing a profession where other consumer protection statutes exist).

152. Kleiner, *supra* note 23, at 4.

153. See SUMMERS, *supra* note 151, at 36–37.

question proves elusive. Consider two commonly licensed professions, dentists and teachers, for which most people could raise non-protectionist based reasons for licensing. Even for these professions, empirical studies about the effects of licensure on performance are a mixed bag with some showing that higher requirements do not lead to improved student or patient outcomes.<sup>154</sup> If not even teachers and dentists can back up their licensing requirements with strong empirical data, then it's likely that most others cannot either.

Compared with determining the public value served by a particular license, the burdens imposed by licensing requirements can be more easily measured. Occupational licensing statutes often require some combination of easily quantifiable factors like schooling, exams, and fees.<sup>155</sup> The trouble comes from how one defines burdensome. For instance, doctors must undergo extensive training but receive substantial compensation. In an absolute sense, licensing requirements for that profession are burdensome but perhaps justified based on financial incentives. Ultimately, the relative burden of licensing requirements turns not only on the requirements imposed but also on the value provided to the public and to the licensed party. As previously discussed, the problem ultimately rests on the difficulty in determining which values properly serve the public and how such values should be measured. Without solving the public-regarding values problem, describing a licensing regime in terms of burdens imposed is not helpful.

One way of avoiding the difficulties associated with quantifying the benefits and burdens of occupational licensing regimes is to use a comparative approach that considers the requirements of a challenged profession in comparison with the requirements of other similar professions within that state or the requirements imposed on the same profession in another state.<sup>156</sup> The problem with comparative analysis arises from the substantial variation in how states license the same professions.<sup>157</sup> For instance, the amount of education required to be-

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154. See WHITE HOUSE REPORT, *supra* note 17, at 58 (collecting studies).

155. CARPENTER II ET AL., *supra* note 119, at 13 (providing a summary of farm laborer contract licensing requirements).

156. This type of proportionality analysis in constitutional cases is popular in Europe. See generally G. Brinton Lucas, *Structural Exceptionalism and Comparative Constitutional Law*, 96 VA. L. REV. 1965 (2010) (describing constitutional analysis based on proportionality principles).

157. See, e.g., Menashi & Ginsburg, *supra* note 79, at 1098.

come an EMT varies from zero to over 140 days, with twenty unique variations in between.<sup>158</sup> To provide another example, preschool teachers must undergo between 365 and 1825 days of training, with four distinct variations between.<sup>159</sup> The Institute for Justice's *License To Work* study reveals similar variations among most licensed professions.<sup>160</sup> As a result, comparing professional requirements across state lines does not provide an objective basis for separating the degrees of licensing burden imposed by various statutory schemes. In many instances, courts would just be replacing a standardless inquiry into burdens with a standardless comparison between different state licensing regimes. To avoid this subjectivity, courts would need to compare a particular licensing regime to the state with the least restrictive licensing regime. But such an analysis would transform an anti-economic protectionism principle into a constitutional mandate for uniform licensing requirements. That cannot be right.

These differences across state lines extend beyond how professions are licensed to which professions are licensed, and thus courts cannot use the number of states licensing a profession as a strong indicator of protectionism. There are 1100 licensed occupations nationwide, but only sixty professions require licensure in every state.<sup>161</sup> According to a White House report filed in the summer of 2016, the variation in professions licensed is a matter of state policy and not a matter of professions existing in some states rather than others.<sup>162</sup> Looking to the data provided by the *License To Work* report reveals the scattershot nature of occupational licensing requirements. The data from that study shows no correlation between the requirements for licensure and the number of states licensing any particular profession.<sup>163</sup> In other words, the professions with the most training

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158. *Emergency Medical Technician*, INST. FOR JUST. (Apr. 24, 2012), <http://ij.org/report/license-to-work/ltw-occupation/?id=26>.

159. *Preschool Teachers*, INST. FOR JUST. (Apr. 24, 2012), <http://ij.org/report/license-to-work/ltw-occupation/?id=69>.

160. See generally CARPENTER II ET AL., *supra* note 119.

161. See WHITE HOUSE REPORT, *supra* note 17, at 4.

162. See *id.*

163. This observation is based on a linear regression of the data provided on the Institute for Justice website. Such a regression procures a correlation coefficient of less than 0.10. Other regressions similarly reveal no correlation between frequency of licensure and licensing requirements. See *Table 4: Breadth and Burden of Licensure: Occupations Ranked by Number and Average Burden of Licensed States Combined*, INST. FOR JUST. (Apr. 2012), <http://ij.org>.

required, which should, in theory, provide the most public benefit, are not more likely to be licensed in a higher number of states.

Left without a solid empirical basis for making determinations about benefits and burdens of licensing requirements or without traditional indicia of legislative intent, courts are left in the position of using means-ends analysis for finding economic protectionism—an approach silently used by the Fifth, Sixth, and Ninth Circuits.<sup>164</sup>

Otherwise stated, courts might look at how well a legislature tailored a licensing regime in pursuit of a public health, safety, and welfare goal. Under such an approach, poorly tailored requirements would serve as an indicator of economic protectionism, but this also leads to unintended consequences.

Collapsing purpose scrutiny with a means-end determination, if widely adopted, would result in elevating occupational licensing challenges to heightened judicial scrutiny.<sup>165</sup> This implicit jump to intermediate scrutiny follows logically. Suppose that courts were to presume economic protectionism motivates laws that fail a means-ends standard equal to or less demanding than traditional rational basis review.<sup>166</sup> Under those circumstances, an anti-economic protectionism principle does not guard economic liberties any more than current constitutional law. For such a principle to provide protection against overly restrictive licensing laws, the means-ends inquiry used to smoke out economic protectionism must be greater than the rational basis standard, which necessarily implies a level of heightened judicial scrutiny.<sup>167</sup>

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.org/report/license-to-work/tables/table-4-breadth-and-burden-of-licensure-occupations-ranked-by-number-and-average-burden-of-licensed-states-combined.

164. See *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223–28 (5th Cir. 2013); *Merrifield v. Lockyer*, 547 F.3d 978, 990–92 (9th Cir. 2008); *Craigsmiles v. Giles*, 312 F.3d 220, 225–29 (6th Cir. 2002).

165. This would be the preferred result of some commentators. See, e.g., Will Clark, Comment, *Intermediate Scrutiny as a Solution to Economic Protectionism in Occupational Licensing*, 60 ST. LOUIS U. L.J. 345 (2016); Harfoush, *supra* note 79 (arguing against protectionist occupational licensing); Klein, *supra* note 125 (same); Sandefur, *supra* note 79 (arguing for heightened protection of economic liberties).

166. The past circuit court cases relied almost exclusively on a lack of means-ends fit. See *St. Joseph Abbey*, 712 F.3d at 223–28; *Merrifield*, 547 F.3d at 990–92; *Craigsmiles*, 312 F.3d at 225–29.

167. This assumes that courts do not have other tools besides means-ends

As it stands, courts lack the tools to determine when a legislature passes occupational licensing requirements based primarily on economic protectionism. The unavailability of traditional purpose scrutiny tools and the implicit jump to heightened scrutiny that comes with a search for economic protectionism should give courts pause before adopting such a principle. The idea that a legislative act should be subject to presumptively heightened judicial review under the Fourteenth Amendment without a showing of improper purpose would be foreign to constitutional law and would create a bizarre world in which economic liberties would receive automatic heightened review while those alleging as-applied race or sex discrimination would need to first show bad legislative intent.<sup>168</sup>

B. A SERIOUS ANTI-ECONOMIC PROTECTIONISM PRINCIPLE CALLS INTO DOUBT MUCH STATE AND FEDERAL REGULATION

Enforcing a strong anti-economic protectionism principle would call into question much government legislation and regulation. Such a theory would rest on the idea that a state actor denies citizens equal protection of the law when it creates classifications based only on a desire to help a favored interest group and nothing more.<sup>169</sup> Proponents of heightened judicial scrutiny suggest that courts should police this illicit motivation based on *Carolene Products* grounds as well, arguing that public choice theory supports the futility of remedying protectionist legislation through the political process.<sup>170</sup> Yet the same public choice principles that would support judicial review of licensing laws cannot be cabined to only those types of regulation. If heightened judicial review is *really* about bad motivation, then any regulation based on economic protectionism should be vulnerable—and that includes a lot of state action.

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scrutiny to use when ferreting out economic protectionism. *See supra* Part III.A.

168. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 241 (1976) (holding that as-applied race discrimination requires a showing of discriminatory purpose).

169. As the Court in *Craigmiles* stated: “[W]e invalidate only the General Assembly’s naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers.” 312 F.3d at 229.

170. Neil Katsuyama, *The Economics of Occupational Licensing: Applying Antitrust Economics To Distinguish Between Beneficial and Anticompetitive Professional Licenses*, 19 S. CAL. INTERDISC. L.J. 565, 565 (2010) (describing political process failure that trenches licensing laws); *see also* Raynor, *supra* note 125, at 1085–86 (same).

To see why an economic protectionism principle would call into question much of modern state action, one needs only to look to the prevalence of lobbying in American society. Lobbying is a three or four billion dollar-per-year industry.<sup>171</sup> Corporations and trade associations represent more than eighty-five percent of those expenditures.<sup>172</sup> Studies have shown lobbying can be successful, notably in areas like corporate taxes, telecommunications prices, trade association entry barriers, and many others.<sup>173</sup> Assuming that firms advocate in their own self-interest and the public choice theory is correct, then there is simply a lot of economic protectionism at play in government today. Judge Posner once observed that “much governmental action is protectionist or anticompetitive” and that the Constitution “does not outlaw the characteristic operations of democratic (perhaps of any) government, operations which are permeated by pressure from special interests.”<sup>174</sup> So where is the limiting principle?

The most natural stopping point for an anti-economic protectionism principle would be occupational licensing. Advocates of heightened judicial review might suggest that one’s interest in engaging in a lawful profession is more worthy of judicial protection than harms suffered as a result of economic protectionism. True enough, citizens undoubtedly have a greater interest in pursuing their lawful occupation than they do in avoiding artificially high telecommunications rates or paying the costs associated with trade association rent-seeking.<sup>175</sup> But it is hard to see why that should matter. If an anti-economic protectionism principle is worried about legislative process, then it is only relevant that a legislature failed to consider the public good and acted instead to protect a faction.<sup>176</sup> But policing all economic legislation and regulation for protectionist intent is surely not an endeavor that courts wish to undertake.

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171. John M. Figueiredo & Brian Kelleher Richter, *Advancing the Empirical Research on Lobbying*, 2014 ANN. REV. POL. SCI. 163, 178 (2014).

172. *Id.* at 165.

173. *Id.* at 168.

174. *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988).

175. See *infra* notes 171–73 and accompanying text.

176. Carpenter, *supra* note 56, at 231 (describing the rational basis with bite doctrine as “not concerned as much with the legislature’s substantive conclusion . . . as it is with the kinds of considerations (desire to harm the disadvantaged group) that materially influenced the outcome”).

On the other hand, if courts are not really worried about intent, then this ongoing conversation about economic protectionism should be about the appropriate standard of review for occupational licensing laws.

The problems with an anti-economic protectionism principle raised by these last two Sections also suggests another underlying difficulty: the push for heightened judicial review of economic protectionism is a stalking horse for reviving the protections afforded to economic liberties by the Supreme Court during the *Lochner* era.<sup>177</sup> The lack of purpose scrutiny tools available to detect protectionism leaves courts to use means-ends analysis. This type of analysis strongly resembles *Lochner* itself where the Supreme Court used inconsistencies in the challenged legislation to determine that the public health justifications offered by New York were only pretext.<sup>178</sup> What is more, if courts are not willing to extend an anti-economic protectionism principle to all legislation primarily motivated by special interests, then in a sense they will have fashioned a constitutional doctrine affording heightened scrutiny to a subset of economic liberty claims that would have been protected during the *Lochner* era.<sup>179</sup> There are compelling arguments in favor of ending the distinction between personal and economic liberties, but courts should face that issue head-on, rather than smuggling it under the guise of an anti-economic protectionism principle.<sup>180</sup>

### C. RATIONAL BASIS REVIEW ROUTES CHALLENGES INTO OTHER EXISTING DOCTRINAL AREAS

There is an often overlooked benefit of denying a Fourteenth Amendment solution to occupational licensing challenges. By denying constitutional relief, courts provide a switching

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177. See *supra* note 8 and accompanying text.

178. See *Lochner v. New York*, 198 U.S. 45, 53–64 (1905), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

179. See, e.g., *Mugler v. Kansas*, 123 U.S. 623, 626 (1887) (“[L]egislatures cannot, under the guise or pretext of a police regulation . . . strike down innocent occupations and invade private property . . .”).

180. There are legitimate and compelling originalist arguments in favor of applying heightened judicial review to occupational licensing challenges and to other efforts by state actors to impinge upon economic liberties. See generally Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 580–600 (2015) (providing a summary of originalist arguments in favor of *Lochner*).

function by pushing public interest groups into bringing challenges under alternative legal doctrines or in other courts. Among those other options, bringing suit under state constitutional and administrative law or under the federal antitrust statutes are the most promising. As long as the federal judiciary continues to invalidate licensing laws on a semi-regular basis, interest groups will continue to expend resources attempting to vindicate economic liberties under the Fourteenth Amendment—stunting the development of these alternative jurisprudential solutions. The goal of this Section is to briefly sketch several alternative paths to attacking overly restrictive licensing laws. Litigants should not believe that their only remedy lies in the Fourteenth Amendment; judges should not decide rational basis review cases as though they are the litigant's last hope.

### 1. State Constitutional Law

State constitutional law can be used to strike down occupational licensing laws. Although the United States Constitution provides a floor in terms of individual liberties, states are free to provide their citizens additional protections.<sup>181</sup> This has been especially true for economic liberties. Over seventy years have passed since the Supreme Court last struck down a piece of economic legislation under the Fourteenth Amendment.<sup>182</sup> Meanwhile, state courts have done so over three hundred times, in over thirty different states.<sup>183</sup> Not only are state courts

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181. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986) (“As is well known, federal preservation of civil liberties is a minimum, which the states may surpass so long as there is no clash with federal law.”).

182. See Phillips, *supra* note 16 (stating that the Supreme Court abandoned economic substantive due process in 1937).

183. See Anthony B. Sanders, *The “New Judicial Federalism” Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for Its Recent Decline*, 55 AM. U. L. REV. 457, 512–39 (2005) (identifying the many instances that state courts have employed due process to strike down regulations but also noting the judicial retreat from substantive due process after *Roe v. Wade*); see also *State v. Lupo*, 984 So. 2d 395 (Ala. 2007) (striking down occupational licensing requirements for interior designers); *Red River Constr. Co. v. City of Norman*, 624 P.2d 1064 (Okla. 1981) (striking down a regulation on truck specifications when they carry sand on a particular route); *Patel v. Tex. Dep’t of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015) (striking down state regulations requiring eyebrow threaders to be licensed cosmetologists).

open to these challenges, they are also much better suited to handle them.<sup>184</sup> State courts can look to the licensing environment of their particular jurisdiction, gauge the openness of the political process to reform, and craft an appropriate standard of review.<sup>185</sup> And states have recently invalidated licensing laws.

In the past decade, several state courts have employed a more searching form of rational basis review to strike down occupational licensing laws. In 2003, the Supreme Court upheld an Iowa statute that taxed slot machines differently based on whether they were part of a casino or racetrack.<sup>186</sup> On remand, the Iowa Supreme Court interpreted the Iowa Constitution as providing for more than a “toothless” standard of rational basis review—ultimately invalidating the statute.<sup>187</sup> Similarly in 2007, the Supreme Court of Alabama struck down an interior decorator licensing provision as unconstitutionally overbroad.<sup>188</sup> More recently, the Texas Supreme Court invalidated a regulation that required hair threaders to become cosmetologists, and in doing so the Court interpreted its constitution to provide heightened protection of economic liberties.<sup>189</sup> Texas courts now look to the real-world effects of statutes in determining whether there is a real rather than hypothetical rational basis.<sup>190</sup> As one scholar put it: “More than in any other field, except perhaps for review of local land use regulation, state courts in the post-*Lochner* era have utilized economic substantive due process to protect the right to make a living.”<sup>191</sup> Litigants should put that past precedent to use.

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184. Jeffrey S. Sutton, *Why Teach—and Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 173 (2009) (“Does anyone doubt that the Alaska Supreme Court might look at privacy issues differently from other States or for that matter the United States Supreme Court? Or that the Montana Supreme Court might look at property rights differently from other States or the United States Supreme Court?”).

185. *Id.*

186. *See* Fitzgerald v. Racing Ass’n of Cent. Iowa, 539 U.S. 103 (2003).

187. Racing Ass’n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1, 9 (Iowa 2004).

188. *See Lupo*, 984 So. 2d at 404.

189. Patel v. Tex. Dep’t of Licensing & Regulation, 469 S.W.3d 69 (Tex. 2015) (striking down state regulations requiring eyebrow threaders to be licensed cosmetologists).

190. *Id.* at 87.

191. Sanders, *supra* note 183, at 484.

## 2. State Administrative Law

State administrative law is a second possibility for challenging a limited subset of excessive licensing laws. This solution is of limited reach because many licensing requirements are statutorily defined, leaving agencies to serve only a straightforward enforcement function.<sup>192</sup> When state agencies act with little discretion, there is not much regulatory activity to challenge. Yet, when state agencies issue regulations or declaratory rulings that expand the definition of one profession to cover another, administrative law becomes a viable option for judicial review.

A recent example illustrates both the possibilities offered by state administrative law and how a potential Fourteenth Amendment solution leads to neglect of state law remedies. In *Sensational Smiles v. Mullen*, teeth whiteners—represented by the Institute for Justice—brought suit in federal court challenging a dentistry board declaratory ruling which mandated that only dentists may whiten teeth.<sup>193</sup> The district court dismissed the suit on summary judgment, and the Second Circuit affirmed.<sup>194</sup> Under the Uniform Administrative Procedure Act, adopted by Connecticut, declaratory rulings by agencies must be supported by “substantial evidence.”<sup>195</sup> This standard is not particularly high but does require some documentable proof.<sup>196</sup> The teeth whiteners’ theory of the case rested on a total lack of evidence showing that LED lights posed a risk to public health. Indeed, the agency’s expert testimony contained no reference to the safety of such lights.<sup>197</sup> Had the teeth whiteners demon-

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192. See, e.g., *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (2013) (describing the licensure requirement as “built on the statute’s interlocking definitions of ‘funeral establishment’ and ‘funeral directing’”).

193. *Martinez v. Mullen*, 11 F. Supp. 3d 149, 150 (D. Conn. 2014), *aff’d sub nom.* *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 116 (2016).

194. *Martinez*, 11 F. Supp. 3d at 169 (granting Connecticut’s summary judgment motion); *Sensational Smiles*, 793 F.3d at 288 (affirming on appeal).

195. See generally *Samperi v. Inland Wetlands Agency of W. Haven*, 628 A.2d 1286, 1292 (Conn. 1993) (discussing the substantial evidence standard).

196. Cf. *Lane v. Comm’r of Env’tl. Prot.*, 43 A.3d 821, 828 (Conn. App. Ct. 2012), *aff’d*, 100 A.3d 384 (Conn. 2014) (describing the substantial evidence standard as deferential). But see *AvalonBay Cmtys., Inc. v. Inland Wetlands & Watercourses Agency of Stratford*, 23 A.3d 37, 48 (Conn. Ct. App. 2011) (overturning a declaratory ruling when the agency’s determination was not supported by any evidence).

197. Reply Brief of Appellant at 3 n.1, *Sensational Smiles, LLC v. Mullen*,

strated this lack of evidence in state court, they would have stood an excellent chance of success. Instead, the Second Circuit dismissed their appeal in several paragraphs.<sup>198</sup> To be sure, not every onerous licensing law comes into being through agency action. But when they do, administrative law provides a powerful attack on restricting licensing requirements.

### 3. Federal Antitrust Law

Finally, the Supreme Court's decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* has opened up new and exciting possibilities for challenging licensing board activities.<sup>199</sup> The Court's decision requires states to actively supervise licensing boards when they are comprised of market participants.<sup>200</sup> At least one significant challenge has already relied heavily on *North Carolina State Board*. In *Teladoc, Inc. v. Texas Medical*, plaintiffs sued the Texas Medical Board under the Sherman Act when the Board adopted a regulation prohibiting the diagnosis of medical conditions via video conference.<sup>201</sup> The state of Texas did not raise antitrust immunity in the case.<sup>202</sup> Judge Pittman did, however, grant a preliminary injunction in favor of the plaintiffs based on antitrust law.<sup>203</sup> Ultimately, the ability of antitrust law to curb overreaching licensing boards is not yet clear, but if *Teledoc* is any indication, it is off to a promising start.

None of these alternative avenues of attacking occupational licensing laws is a silver bullet. Some state constitutions protect economic liberty; others do not. State administrative and federal antitrust laws are similarly narrow. Between these three possibilities, however, a fair number of restrictive licensing laws could be defeated. Both the difficulties in discerning economic protectionism and the existence of alternative solu-

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793 F.3d 281 (2d Cir. 2015) (No.14-1381), 2014 WL 7335956, at \*2 ("None of this out-of-court testimony speaks at all to the issues in this case. Indeed, in the more than 150 pages of documentation he attached to his report, there is only a single statement about LED lights.").

198. Cf. *AvalonBay Cmty's, Inc.*, 23 A.3d at 48 (overturning a declaratory ruling when the agency's determination was not supported by any evidence).

199. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1107 (2015).

200. *Id.* at 1116–17.

201. *Teladoc, Inc. v. Tex. Med. Bd.*, 112 F. Supp. 3d 529, 532 (W.D. Tex. 2015).

202. *Id.* at 535.

203. *Id.* at 544.

tions counsel against adopting heightened review of illegitimately motivated licensing laws. The final Part of this Note concludes by arguing that Congress needs to spur licensing reform efforts and lays out a plan describing how it might do so.

#### IV. REFORMING OCCUPATIONAL LICENSING LAWS WITHOUT FEDERAL JUDICIAL INTERVENTION: REVIVING THE INDIANA PLAN

This Note argues throughout that existing Supreme Court precedent does not support federal courts striking down occupational licensing laws and that heightened review should not be extended to reach such a result.<sup>204</sup> Closing the doors to federal courts does not also foreclose the possibility of licensing reform. Congress can encourage states to take action. This Part proposes a grant program wherein Congress would fund state sunset laws to study and eliminate occupational licensing requirements. First, Section A explains why federal intervention is necessary. Second, Section B introduces two current efforts at the national level and argues that neither will lead to significant changes. Third, Section C concludes by describing a grant program that would promote sunset commissions while leaving plenty of discretion to state governments.

##### A. WHY FEDERAL INVOLVEMENT IS NEEDED TO SOLVE THE OCCUPATIONAL LICENSING PROBLEM

Congress should promote occupational reform not because federal intervention into state economic policy is desirable, but because it is the best of competing alternatives. States have had little success in solving this problem on their own;<sup>205</sup> interstate travel has not spurred a race to the top.<sup>206</sup> Nor is it desirable to charge judges with conducting the case-by-case cost-benefit analysis required.<sup>207</sup> A grant program that promotes re-

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204. See *supra* Parts II, III.

205. See generally *The De-Licensing of Occupations in the United States*, BUREAU LAB. STATS. (May 2015), <http://www.bls.gov/opub/mlr/2015/article/the-de-licensing-of-occupations-in-the-united-states.htm> (summarizing reform efforts at the state level) [hereinafter *De-Licensing of Occupations*].

206. There are two sources for this conclusion. First, licensing laws have not been reformed. See *id.* Second, most states maintain a similar level of overall licensure. See *infra* notes 216–17 and accompanying text.

207. This Note previously rejected such a possibility. See *supra* Part III.

form efforts, while leaving a wide berth for state innovation, is the best of competing alternatives.

The states have created a mess of overly restrictive, inconsistent, and economically damaging licensing requirements.<sup>208</sup> Just as they have created the problem, state governments have failed to lead reform efforts. Indeed, only eight professions have ever had their licensing requirements removed.<sup>209</sup> Over the past five years, several efforts to enact broad reform bills have died in state legislatures.<sup>210</sup> States may be vulnerable to interest group capture, and for legislation involving occupational licensing, interest groups have strong incentives to fight against reform.<sup>211</sup> Making matters worse still, state governments collect substantial revenue from licensing fees, and thus deregulation can create short-term budget shortfalls.<sup>212</sup> Whatever the main barriers to deregulation efforts that engender bi-partisan support might be, they have thus far blocked any meaningful reforms.

Another possible solution would be to continue letting states compete for new entrepreneurs that arrive via interstate travel. As mentioned earlier, there is very little variation between states on practicing professions, but there is substantial variation in whether states license any particular profession.<sup>213</sup> Ilya Somin points out that forty-three percent of Americans have lived in two or more states, and that those with low incomes are twice as likely to move interstate.<sup>214</sup> Further, economic considerations are the most likely factor to motivate interstate movers.<sup>215</sup> Despite an environment that appears favorable to interstate migration putting pressure on legislatures to

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208. See WHITE HOUSE REPORT, *supra* note 17, at 4.

209. See *De-Licensing of Occupations*, *supra* note 205.

210. See *id.* (“[A] number of recent attempts have occurred at the state level—nine as of 2014—to de-license collectively certain groups of occupations . . . these attempts were unsuccessful.”).

211. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1730 (1984) (stating that state legislatures may be particularly susceptible to capture when legislation affects wealth distribution).

212. See *State Tax Collection Sources 2000–2013*, TAX POL’Y CTR., <http://www.taxpolicycenter.org/statistics/state-tax-collection-sources-2000-2013> (last visited Mar. 17, 2017) (showing that states collect substantial revenues from occupational licensing).

213. See WHITE HOUSE REPORT, *supra* note 17, at 4.

214. See ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* 144 (2013).

215. See *id.* at 144–45.

deregulate, however, there is little difference in how many low-income professions are licensed per state. According to the Institute for Justice's *License To Work* study, the average state licenses forty-three low-income professions, with a standard deviation of only ten.<sup>216</sup> Indeed, rather than leading to deregulation, the patchwork of licensing laws nationwide has given rise to a substantial increase in licensure over the past fifty years.<sup>217</sup>

Judges—either state or federal—could be a third option for reforming licensing laws. This could come by way of legislatures creating an occupational licensing cause of action that permits courts to apply intermediate scrutiny,<sup>218</sup> or it could come via constitutional interpretation. This Note previously argued against the latter. But any cause of action requiring heightened scrutiny will also require both an economic estimation (how much public value) and a corresponding policy determination (how much regulation is appropriate).<sup>219</sup> Judges have limited resources, clogged dockets, and most of them are not labor economists.<sup>220</sup> All things being equal, it seems unobjectionable that it would be better for elected or appointed officials to conduct the required cost-benefit analysis. They are not limited to the record evidence presented by the parties and are politically accountable for the choices they make about the level of regulation that should be imposed.

Finally, Congress could pass an aggressive program that federalizes occupational licensing requirements or that gives a federal agency the power to preempt licenses on a case-by-case basis. A law like this would easily survive a Commerce Clause challenge based on the overall economic effects of licensing

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216. See CARPENTER II ET AL., *supra* note 119. *But see* WHITE HOUSE REPORT, *supra* note 17, at 4 (claiming there is wide variation among the states).

217. See WHITE HOUSE REPORT, *supra* note 17, at 3.

218. See, e.g., Allow Act, S. 3158, 114th Cong. (2016) (introducing such legislation).

219. For instance, the Allow Act would prohibit licenses placing “a substantial burden on a person” unless “the government has an important interest” and “the regulation is substantially related to achievement of” that interest. *Id.* § 207 (b)(1)–(2); see also *Model Economic Liberty Law*, INST. FOR JUST., <http://ij.org/activism/legislation/model-legislation/model-economic-liberty-law-1> (last visited Mar. 17, 2017).

220. See generally Diarmuid F. O’Scannlain, *Striking a Devil’s Bargain: The Federal Courts and Expanding Caseloads in the Twenty-First Century*, 13 LEWIS & CLARK L. REV. 473 (2009) (describing the “crushing caseloads” of the federal courts).

laws and their impact on interstate migration.<sup>221</sup> But states have long managed their own licensing regimes. The Supreme Court observed in *Dent v. State of West Virginia*: “[I]t has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely. . . .”<sup>222</sup> States have always maintained their own licensing laws. Any national solution should thus respect federalism to the greatest extent possible. This counsels against aggressive federal intervention.

A grant problem avoids some of difficulties present in each of the alternatives rejected in this Section. A federal grant program respects federalism by allowing states to decide whether to participate and by allowing states to fashion their own reform efforts. Any such program would require cost-benefit analysis to be conducted by democratically accountable public officials. And finally, a grant program can be designed to counteract the political process failures at the state level that currently make reform impossible. Before turning to what such a federal program should look like, we will turn briefly to a discussion of why existing federal reform efforts are inadequate.

#### B. THE CURRENT REFORM PROPOSALS IN CONGRESS AND THE WHITE HOUSE PLAN ARE BOTH INADEQUATE

There are two main proposals in place for reforming occupational licensing laws. The first is a program established by the Obama administration that gives independent groups money to work with state legislatures.<sup>223</sup> The second is a bill proposed by Mike Lee and Ben Sasse that operates primarily by

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221. If Congress can regulate homegrown marijuana for personal consumption, the intrastate killing of wolves on private property, and a cat at the Ernest Hemmingway Museum, then licensing laws affecting the national economy by billions of dollars should be no problem. See *Gonzales v. Raich*, 545 U.S. 1 (2005) (homegrown marijuana); *907 Whitehead St., Inc. v. Sec’y of U.S. Dep’t of Agric.*, 701 F.3d 1345 (11th Cir. 2012) (a cat at a museum); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (intrastate wolves).

222. *Dent v. West Virginia*, 129 U.S. 114, 122 (1889).

223. Press Release, Office of the Press Sec’y, White House, FACT SHEET: New Steps To Reduce Unnecessary Occupation Licenses that Are Limiting Worker Mobility and Reducing Wages (June 17, 2016), <http://obamawhitehouse.archives.gov/the-press-office/2016/06/17/fact-sheet-new-steps-reduce-unnecessary-occupation-licenses-are-limiting> [hereinafter White House Fact Sheet].

reforming licensure in the District of Columbia.<sup>224</sup> Neither of these options show much promise.

The White House program is unlikely to be effective because it targets the wrong part of occupational licensing reform. In its current form, the grant program gives funds to non-profit organizations to work with state governments.<sup>225</sup> But the problem over the past several years is not getting licensing reform bills to legislatures; it is getting legislatures to pass them.<sup>226</sup> Indeed, the Bureau of Labor Statistics reports that collective reform bills made it to committee in nine states over the past five years, yet each time the bill either died or was passed without removing licensing requirements.<sup>227</sup> A program designed to send more bills into the dysfunctional political process seems doomed to run up against the same resistance that defeated past reform efforts in the first place.

Senator Mike Lee proposed the Allow Act in 2016.<sup>228</sup> This legislation would institute licensing reform measures in the District of Columbia.<sup>229</sup> It provides for increased state supervision of licensing board activities; creates a requirement that cost-benefit analysis be conducted on every licensing law every fifth year; and provides for a statutory cause of action, which imposes intermediate scrutiny on licensing requirements.<sup>230</sup> Lee's proposal is unlikely to change licensing practices nationwide. Widespread consensus about the economic benefits of deregulation and potential competition for interstate migration have not led to reform.<sup>231</sup> Why would reducing the licensing burden in the District be any different?

Both of these reform efforts are unlikely to precipitate needed changes at the state level. They both fail to account for factors that defeated past efforts to reform licensing laws. To make a non-trivial difference, the federal government needs to increase its commitment to this issue. The next and final Section of this Note proposes an alternative federal grant program.

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224. Allow Act, S. 3158, 114th Cong. (2016).

225. See White House Fact Sheet, *supra* note 223 (announcing a grant of \$7.5 million for states and organizations to work together to pursue licensing reform efforts).

226. See *supra* notes 205–06 and accompanying text.

227. See *supra* notes 205–06 and accompanying text.

228. See S. 3158.

229. See *id.* § 205.

230. See *id.* § 206.

231. See *id.* § 207.

C. LETTING THE SUN SET ON LICENSING LAWS BY TAKING THE FAILED INDIANA PLAN NATIONAL

Congress should invest additional resources in occupational licensing reform through a more aggressive grant program than the one currently in place. Congress should encourage states by providing monetary incentives substantial enough to defray the costs of setting up reform commissions and to offset the short-term licensing fee losses. Morris Kleiner suggests that because reform committees do not run heavy administrative costs, take-up incentives for states would not need to exceed ten million dollars. He further notes that “every dollar spent on those incentives is likely to generate more than a dollar in new economic activity: the plan will more than pay for itself.”<sup>232</sup> But what should such a grant program look like?

A failed effort in Indiana provides a model. In 2013, a bipartisan group of senators introduced S.B. 520.<sup>233</sup> The bill created an appropriately titled Eliminate, Reduce, and Streamline Employee Regulation (ERASER) Committee to analyze occupational licensing laws. A number of low-income professional licenses in Indiana would be reviewed through cost-benefit analysis on a five-year cycle.<sup>234</sup> All licensing laws would automatically expire during their designated year unless reauthorized by the state legislature.<sup>235</sup> The bill put licenses for auctioneers, interior designers, and beauty culture on the chopping block; it passed the senate thirty-six to thirteen.<sup>236</sup> After moving to the house of representatives, the bill died in committee—where it remains buried today.<sup>237</sup>

Congress should use the failed ERASER Committee as a model for a grant program. Sunset legislation provides important benefits. First, by setting an expiration date on a par-

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232. Kleiner, *supra* note 22, at 19.

233. ERASER Committee, S.B. 520, 118th Gen. Assem., Reg. Sess. (Ind. 2013).

234. *Id.* §§ 9–14 (putting a number of licenses on sunset).

235. *See, e.g., id.* § 10 (b) (“The licenses listed in this section are terminated July 1, 2014, unless the general assembly takes action in the 2014 legislative session to retain the licenses.”).

236. *SB 520*, OPEN STATES, <http://openstates.org/in/bills/2013/SB520> (last visited Mar. 17, 2017).

237. Maureen Hayden & Scott Smith, *Pence’s ‘ERASER’ Bill Appears Dead*, HERALD BULL. (Apr. 2, 2013), [http://www.heraldbulletin.com/news/local\\_news/pence-s-eraser-bill-appears-dead/article\\_f4143c37-d175-5fc9-86c9-d7e1733c0147.html](http://www.heraldbulletin.com/news/local_news/pence-s-eraser-bill-appears-dead/article_f4143c37-d175-5fc9-86c9-d7e1733c0147.html).

ticular law, state legislatures force themselves to actually vote on reauthorization. By shifting the default rule from reauthorization to deregulation, politicians lose the ability to kill legislation in committee.<sup>238</sup> Second, by singling out each profession for an individual vote, sunset legislation stops interest groups from joining forces to defeat broader legislation.<sup>239</sup> Third, periodic review of many licenses promotes fairness. Professions should not be reviewed for deregulation based on the clout of their respective trade association.

To put this ERASER grant proposal into place, a federal agency—perhaps the Department of Labor—should be charged with administering the program.<sup>240</sup> Any such agency should conduct a study that recommends a set of professions that do not need licensing laws—identifying as well those professions where registration or certification would suffice.<sup>241</sup> Subject to a minimum requirement, states should be able to choose the professions to be put on sunset. States should also be able to propose the composition of their ERASER committees, subject to agency approval.<sup>242</sup> Finally, commissions should be required to conduct cost-benefit analysis and make the results public. This requirement helps reform-minded legislators argue in favor of deregulation. But public cost-benefit analysis would also help state and even federal courts conduct informed judicial review in the future if necessary.<sup>243</sup>

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238. Niki Kelly, *Deregulation of Engineers Draws Fire*, J. GAZETTE (July 25, 2015), <http://www.journalgazette.net/news/local/indiana/Deregulation-of-engineers-draws-fire-7899670> (quoting a state legislator as stating “due to the pressure from groups it’s very difficult to get anything done” and noting that he “took heat from the cosmetologists and barbers for being involved in the effort”).

239. States have delicensed a few professions when such efforts are undertaken individually. See *De-Licensing of Occupations*, *supra* note 205 (noting eight professions have been deregulated).

240. The Department of Labor seems the natural choice because the White House charged it with administering the current program. White House Fact Sheet, *supra* note 223.

241. This should take some of the heat off of state legislatures when they are picking and choosing between professions to deregulate. For more information on certification and registration, see Kleiner, *supra* note 22, at 22–23.

242. Indiana, for instance, proposed to use a mix of appointed officials, government actors, the Indiana University Dean of Public Affairs, and some licensed professionals. See ERASER Committee, S.B. 520, 118th Gen. Assem., Reg. Sess. §§ 7–8 (Ind. 2013).

243. Indeed, this fits nicely with this Note’s earlier suggestion of bringing more licensing claims in state court. See *supra* Part III.C.1.

Finally, the timing could not be more perfect for Congress to pass meaningful legislation addressing occupational licensing reform. Both Democrats and Republicans support deregulation.<sup>244</sup> State governments are trying and failing to pass comprehensive deregulation measures.<sup>245</sup> A grant program that promotes the Indiana model would be relatively inexpensive, easy to manage, and would force states to confront their most onerous licensing laws.

### CONCLUSION

Occupational licensing laws enacted by state governments at the behest of special interest groups pose a serious problem in the United States. They are a drag on the economy. They push workers into unemployment and deny citizens their freedom to engage in their chosen profession. Three courts of appeals have decided that economic protectionism cannot support state action. Rather than engage with the soundness of that determination, this Note asks a different question: If economic protectionism is illegitimate, then what role should such a principle play under the Fourteenth Amendment?

Under Supreme Court precedent, a finding of economic protectionism cannot result in the invalidation of occupational licensing laws. The rational basis standard is simply too deferential to support that result; nor is economic protectionism the kind of bad motive, like animus, that supports heightened judicial review. This Note also argues that courts should not extend heightened review to laws motivated by economic protectionism. Such a principle would ask too much of the judiciary, encompass too much state action, and would stunt the development of other doctrinal areas that can already provide a remedy for restrictive occupational licensing laws. To be sure, compelling arguments exist for increased judicial protection of economic liberties, but a strong anti-economic protectionism principle is both pragmatically and theoretically unsound.

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244. Bi-partisan support exists at both the federal and state levels. See Steven Greenhut, *California's Bipartisan Push Against Occupational Licensing*, REASON (Feb. 22, 2016), <http://reason.com/archives/2016/02/22/californias-bipartisan-push-against-occu>; Ali Meyer, *Bipartisan Support Builds for Occupational Licensing Reform*, WASH. FREE BEACON (Feb. 3, 2016), <http://freebeacon.com/issues/bipartisan-support-builds-for-occupational-licensing-reform>.

245. See *De-Licensing of Occupations*, *supra* note 205.

This Note concludes that Congress is the correct branch of government to solve the nationwide occupational licensing problem. State governments have failed and continue to fail in deregulation efforts. A federal grant program that encourages the adoption of sunset commissions could spur deregulation at the state level, while at the same time maintaining respect for the historical role of state governments in licensing their citizens. This would also take the pressure off of the federal judiciary. Democrats and Republicans agree on the importance of occupational licensing reform. Congress should transform that widespread agreement into meaningful legislation that breaks down unnecessary barriers to the American Dream.