TOWARDS A CONSISTENT ECONOMIC LIBERTY JURISPRUDENCE

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INTRODUCTION[**]

The constitutional status of the right to earn a living has been unresolved for more than half a century. On the one hand, the Supreme Court has consistently affirmed that the Constitution protects Americans' right to choose and pursue a lawful calling.[1] On the other hand, the Court does not consistently seek to determine whether governmental burdens on that right serve constitutionally proper ends.

The Court's practical abdication of its duty to "say what the law is"[2] has fostered the proliferation of occupational licensing laws that often have nothing to do with protecting the public from incompetence or fraud and everything to do with protecting politically powerful economic interests from competition in the marketplace. It has also eroded rights that the Court otherwise vigorously protects. Thus, while the Court's protection of freedom of speech is at an historical high-water mark in some regards, the Court has provided virtually no guidance about how the First Amendment applies to restrictions on occupational speech: the speech of tour guides, therapists, and others who earn their living through vocations that consist almost entirely of speaking.

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[**] For a response to this Essay, see Ian Millhiser, *The Most Incompetent Branch*, 23 GEO. MASON L. REV. 507 (2016).

[1] *See, e.g.*, Examining Bd. of Eng'rs v. Otero, 426 U.S. 572, 604 (1976) (quoting Truax v. Raich, 239 U.S. 33, 41 (1915)) (reaffirming the right to work for a living in a common occupation under the Fourteenth Amendment); Greene v. McElroy, 360 U.S. 474, 492 (1959) ("[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment."); Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 246-47 (1957) (holding that the Fourteenth Amendment's Due Process Clause prohibits states from excluding people from the practice of law when there is "no evidence in the record" that "rationally justifies a finding" that they are unfit to pursue that occupation); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (stating the "liberty" protected by the Fourteenth Amendment includes right "to engage in any of the common occupations of life"); *Truax*, 239 U.S. at 41 ("[T]he right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.").

[2] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

The Court's inconsistency has given rise to immense confusion below. While some federal courts of appeals have subjected restrictions on occupational speech to heightened scrutiny, others have concluded that such restrictions do not implicate the First Amendment and have applied rational basis review. And some lower courts reviewing occupational licensing laws under the "rational basis test" have even concluded that legislatures may engage in "mere protectionism" (i.e., pass regulations that exclusively serve to confer economic benefits upon preferred classes of businesspeople).[3]

Parts I and II of this Essay give an overview of the Supreme Court's treatment of occupational licensing and occupational speech, respectively, and discuss the splits of authority that have developed. Part III points the way towards an economic liberty jurisprudence that consistently protects Americans' right to earn a living. This Essay argues that the Court should hold that mere protectionism is constitutionally impermissible, drawing upon the Court's longstanding rejection of government actions that serve only to impose the preferences of the politically powerful. It also contends that the rational basis test should be replaced with a more rigorous standard of review. Lastly, this Essay explains why the reasoning of the Court's decision in *Reed v. Town of Gilbert*[4] requires a rule of strict scrutiny for content-based restrictions on occupational speech.

I. OCCUPATIONAL LICENSING: HISTORY AND RECENT DECISIONS

An occupational license is nothing more or less than permission from the government to earn a living in a particular field. To receive permission to work in a licensed vocation, aspiring entrepreneurs must clear various hurdles: earn a certain amount or type of education, complete specialized training, pass an exam, attain a certain grade level, pay fees, and more.[5] While the Supreme Court once scrutinized occupational licensing laws to determine whether they were truly designed to protect the public, the Court in the 1930s adopted a highly deferential approach to economic regulations and later established an effectively irrebuttable presumption of constitutionality under rational basis review. So deferential has the Court been in cases involving economic regulations that a split has developed concerning whether occupational licensing laws that only serve the anticompetitive goals of entrenched economic interests are constitutionally legitimate.

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[3] *See* Sensational Smiles, LLC. v. Mullen, 793 F.3d 281, 286 (2d Cir. 2015) (concluding after "rational basis" review that economic favoritism is a legitimate purpose under the Fourteenth Amendment's Equal Protection and Due Process Clauses), *cert. denied*, No. 15-507, 2016 WL 763255 (U.S. Feb. 29, 2016).

[4] 135 S. Ct. 2218 (2015).

[5] *See generally* DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING (2012), https://www.ij.org/licensetowork.

A. *The Supreme Court and Occupational Licensing*

Although legal actions arising from the negligence and incompetence of professionals have existed for centuries,[6] the licensing of common occupations only became widespread in America towards the end of the nineteenth century.[7] Greater urbanization, technological innovation, and the desire of occupational groups to protect themselves against competition prompted states to pass occupational licensing laws for pharmacists, barbers, blacksmiths, and other trades.[8]

As modern licensing emerged, state and federal courts used both the Due Process of Law and Equal Protection Clauses of the Fourteenth Amendment to review claims that states had unjustifiably singled out particular groups for burdens or benefits. The courts distinguished between *lawful* exercises of the states' police power to protect the lives, liberty, and property of all, on the one hand, and *arbitrary* government actions that serve only to impose the preferences of the politically powerful, on the other. As the Court explained in *Hurtado v. California*,[9] to be considered valid "law," a legislative act needed to be "something more than mere will exerted as an act of power."[10] It could not be "special" or "partial" but, rather, needed to be "in furtherance of the general public good."[11]

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6 *See* Nicola A. Boothe-Perry, *No Laughing Matter: The Intersection of Legal Malpractice and Professionalism*, 21 AM. U. J. GENDER SOC. POL'Y & L. 1, 17-19 (2012) (tracing legal malpractice back to the late eighteenth century); Theodore Silver, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 WIS. L. REV. 1193, 1196-97 (noting the first reported recovery brought for damage by a physician's faulty practice took place under the fourteenth-century reign of Henry IV).

7 *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 256 (3d ed. 2005) ("It is naive to think of these laws as hostile regulation, or as laws passed by legislators devoted to the 'public interest.'"); Morris M. Kleiner, *Reforming Occupational Licensing Policies* 7 (Hamilton Project, Discussion Paper 2015-01, Jan. 2015), http://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/reforming_occupational_licensing_morris_kleiner_final.pdf.

8 FRIEDMAN, *supra* note 7, at 256.

9 110 U.S. 516 (1884).

10 *Id.* at 535.

11 *Id.* at 537. Although it is beyond the scope of this Essay to offer a full defense of the distinction between law and arbitrary power, I believe that this distinction is firmly grounded in the Fifth and Fourteenth Amendments' guarantees of "due process of *law*." This language is properly understood to incorporate a concept of law which holds that government actions must conform to certain normative criteria. *See*, *e.g.*, Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 640 (2009) ("[B]y 1790 when Madison set out to draft the Fifth Amendment . . . the notion of the 'due process of law' . . . was understood to include a residual guarantee of substantive liberty against arbitrary actions of government."); Timothy Sandefur, *In Defense of Substantive Due Process, Or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL'Y 283, 288 (2012) (stating that "[the] distinction between willful government force and reasoned law echoes throughout the history of due process of law."); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 416 (2010) (adducing evidence that

In its first major occupational licensing case, *Dent v. West Virginia*,[12] the Supreme Court upheld a requirement that every practitioner of medicine in the state of West Virginia graduate from medical college. The Court began by affirming that the "liberty" protected by the Fourteenth Amendment's Due Process of Law Clause encompasses "the right of every citizen of the United States to follow any lawful calling."[13] The Court went on to explain that lawful callings may be regulated in order to "secure [the public] against the consequences of ignorance and incapacity as well as of deception and fraud."[14] But, the Court noted, "when [regulations] have no relation to such calling or profession . . . they can operate to deprive one of his right to pursue a lawful vocation."[15]

While the Court extended a measure of deference to legislative choices about how to protect public health and safety,[16] it also made genuine efforts to determine whether legislation was actually *designed* to serve public-oriented ends. For example, in *Yick Wo v. Hopkins*,[17] the Court invalidated a San Francisco ordinance that allowed a board of supervisors unlimited discretion to either permit or forbid the use of wooden buildings as laundries. Most of the city's laundry businesses applied for a permit, but Chinese owners of wooden laundries were denied such licenses, while almost all white applicants were approved. Finding that "[n]o reason whatever, except the will of the supervisors, is assigned why [the Chinese applicants] should not be permitted to carry on . . . their harmless and useful occupation, on which they depend for a livelihood,"[18] the Court recognized that the ordinance, although defended as a fire-safety measure, was not actually designed to protect public safety—it was designed to facilitate discrimination against the Chinese.

By the mid-1930s, however, the Court had adopted a new approach to judicial review of economic regulations. In *Nebbia v. New York*,[19] the Court set forth what has become known as the "rational basis test," asserting that

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the drafters of the Fourteenth Amendment understood due process of law as "a guarantee of general and impartial laws").

12 129 U.S. 114 (1889).

13 *Id.* at 121.

14 *Id.* at 122.

15 *Id.*

16 *See, e.g.*, DAVID E. BERNSTEIN, REHABILITATING LOCHNER 126 (2011) (concluding that the Supreme Court's due process decisions during this time period, which have been criticized as "laissez faire constitutionalism," were "far more deferential to regulatory legislation than the standard myth would have it"); Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 944 (1927) (surveying 150 Supreme Court cases "involving substantive legislation of a social or economic character" decided between 1913 and 1927 and finding that the Court invalidated the challenged laws in 22 of them).

17 118 U.S. 356 (1886).

18 *Id.* at 374.

19 291 U.S. 502 (1934).

states are "free to adopt whatever economic policy may reasonably be deemed to promote public welfare,"[20] so long as "the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory."[21] The Court emphasized that "every possible presumption" should be extended in "favor of [the] validity" of economic regulations.[22] Subsequently, in the famous Footnote Four of *United States v. Carolene Products Co.*,[23] the Court held out the possibility that "more searching judicial inquiry" might be called for when enumerated rights (those specifically listed in the Bill of Rights) are infringed or legislation either interferes with the political process or targets "discrete and insular minorities."[24] Footnote Four's provision for "more searching judicial inquiry" in certain contexts anticipated the development of heightened scrutiny,[25] which places the burden on the government to demonstrate—with evidence—that its actions are calculated to achieve a proper governmental end.[26] By contrast, rational basis review requires challengers to demonstrate the *unconstitutionality* of the government's actions, and does not require the government to put forward any evidence at all or exercise any care in tailoring its regulations to achieve public-oriented ends.

In subsequent years, the Court showed little interest in identifying the true ends of economic regulations when applying rational basis review. The Court would uphold blatantly protectionist legislation effectively denying Mississippi River pilotage licenses to anyone who was not a friend or relative of an incumbent river pilot; barring people who were not licensed optometrists or ophthalmologists from replacing broken eyeglass lenses; and banning all pushcart vendors from New Orleans' French Quarter except those who had been there for more than eight years.[27] The Court has articu-

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20 *Id.* at 537.

21 *Id*.

22 *Id.* at 538.

23 304 U.S. 144 (1938).

24 *Id.* at 152 n.4.

25 Although the Court initially applied heightened scrutiny only to textually enumerated rights, it later conferred "fundamental" status on certain unenumerated rights, including the right of married couples to use contraceptives, the right to marry, the right to travel, and the right of both married and unmarried individuals to choose whether to have children. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972) (privacy right regarding decision to bear children); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Loving v. Virginia, 388 U.S. 1 (1967) (right to marry); Griswold v. Connecticut, 381 U.S. 479 (1965) (privacy right regarding contraceptives for married couples). Footnote Four's reference to "discrete and insular minorities" anticipated heightened scrutiny in cases involving "suspect classifications," including national origin, race, alienage, and sex. *See* Frontiero v. Richardson, 411 U.S. 677 (1973) (sex); Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Bolling v. Sharpe, 347 U.S. 497 (1954) (race); Oyama v. California, 332 U.S. 633 (1948) (national origin).

26 Heightened scrutiny would later become subdivided into "strict" and "intermediate" scrutiny.

27 *See* City of New Orleans v. Dukes, 427 U.S. 297 (1976) (eight-year pushcart exemption); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955) (only licensed optometrists or ophthal-

lated the rational basis test in terms that, taken at face value, would establish an effectively *irrebuttable* presumption of constitutionality.[28] Lower courts have understood the rational basis test to require judges to actively disregard the government's true ends, ignore evidence concerning those ends, and even assist the government in hypothesizing justifications for its actions.[29]

Incongruously, however, the Court continues to affirm that the right to earn a living is constitutionally protected[30] and to distinguish between law and arbitrary power (albeit not in the same terms as one finds in *Hurtado*). To borrow a term from Professor Cass Sunstein, the Court has rejected "naked preferences"—the "distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want"[31]—in a number of areas of law.[32] The so-called "dormant" Commerce Clause has long been held to forbid states from discriminating against businesses from other states solely on the basis of a political desire to promote local industry—a naked *economic* preference.[33] Similarly, the Privileges and Immunities Clause of Article IV is understood to prohibit discrimination against out-of-staters that serves only to benefit state residents—including discrimination that burdens their "fundamental" right to pursue a calling.[34] The Court has

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mologists); Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552 (1947) (nepotism in pilotage-license issuance).

28 *See* Randy E. Barnett, *Judicial Engagement Through the Lens of* Lee Optical, 19 GEO. MASON L. REV. 845, 857, 860 (2012) (arguing that the rational basis test's presumption of constitutionality became irrebuttable in *Lee Optical*); *see also* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (explaining that challengers in rational basis cases must "'negative every conceivable basis which might support'" a legislative classification; that "it is entirely irrelevant . . . whether the conceived reason . . . actually motivated the legislature"; and that "a legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data" (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973))).

29 *See, e.g.*, Powers v. Harris, 379 F.3d 1208, 1217 (10th Cir. 2004) ("[W]e are not bound by the parties' arguments as to what legitimate state interests the statute seeks to further."); Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 146 (1st Cir. 2001) ("Even if Soto's stated justification for enforcing Market Regulation No. 13 is insufficient . . . this Court is obligated to seek out other conceivable reasons.").

30 *See, e.g.*, Conn v. Gabbert, 526 U.S. 286, 292 (1999) (citing *Dent*, *Truax*, and *Schware* for the proposition that the Fourteenth Amendment protects a "generalized due process right to choose one's field of private employment" and acknowledging "the Fourteenth Amendment's liberty right to choose and follow one's calling").

31 *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984).

32 *See id*. at 1689-70.

33 *See, e.g.*, Energy Reserves Grp., Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412 (1983) (distinguishing between legitimate state interests and "providing a benefit to special interests").

34 *See, e.g.*, Supreme Court of N.H. v. Piper, 470 U.S. 274, 281 (1985) (describing the opportunity to practice law as a "fundamental right"); Toomer v. Witsell, 334 U.S. 385, 396 (1948) (stating that the function of the Privileges and Immunities Clause is to "bar discrimination against citizens of other

used the Equal Protection Clause to invalidate a law imposing higher taxes on out-of-state insurance companies, denying that the promotion of domestic industry, standing alone, constituted a legitimate state interest.[35] Finally, the Court has, in a number of cases, held that the Fifth and Fourteenth Amendments prohibit government actions calculated only to benefit politically powerful groups or disadvantage unpopular groups—even in cases that do not involve rights deemed "fundamental" or groups deemed to be "discrete and insular minorities."[36]

B. *Recent Occupational Licensing Decisions*

In recent years, occupational licensing has exploded. In the 1950s, only five percent of American workers required a license; today between twenty and thirty percent do.[37] A growing body of research has documented how occupational licensing increases customer costs and reduces opportunities for workers without improving the quality of services.[38] Many licensing laws effectuate naked preferences—they are enacted solely to distribute benefits to licensed practitioners.[39]

As discussed above, while the Supreme Court has invalidated legislation that discriminates against out-of-state economic actors, it has upheld a number of patent examples of *intra*state protectionism. Federal circuit courts are divided on the question whether mere protectionism can qualify as a legitimate government interest for the purposes of rational basis review. This Section summarizes the two most recent cases: *St. Joseph Abbey v. Castille*[40] and *Sensational Smiles, LLC v. Mullen*.[41]

States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States").

35 *See* Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 878 (1985).

36 *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675 (2013) (homosexual married couples); Lawrence v. Texas, 539 U.S. 558 (2003) (gay men); Romer v. Evans, 517 U.S. 620 (1996) (homosexual and bisexual persons); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (intellectually disabled persons); Plyler v. Doe, 457 U.S. 202 (1982) (children of illegal immigrants); Zobel v. Williams, 457 U.S. 55 (1982) (invalidating a benefit to more-established Alaska residents); Department of Agric. v. Moreno, 413 U.S. 528 (1973) (invalidating a legislative classification effectively discriminating against poor households).

37 U.S. DEP'T OF THE TREASURY, COUNCIL OF ECONOMIC ADVISERS & U.S. DEP'T OF LABOR, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 17 (2015).

38 *See* Kleiner, *supra* note 7, at 14 (summarizing recent research).

39 There is abundant scholarship on occupational licensing abuse. *See generally* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962); David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89 (1994); David Fellman, *A Case Study in Administrative Law—The Regulation of Barbers*, 26 WASH. U. L.Q. 213 (1941); Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976); Alex Maurizi, *Occupational Licensing and the Public Interes*t, 82 J. POL. ECON. 399 (1974).

40 712 F.3d 215 (5th Cir. 2013).

1. *St. Joseph Abbey v. Castille*

Needing financial support, the Benedictine monks of St. Joseph Abbey in Covington, Louisiana in late 2007 converted an old cafeteria building on their property into a well-equipped woodshop, intending to produce and sell caskets to the public.[42] But no sooner had the monks announced their venture than a cartel of state-licensed funeral directors mobilized.

The Louisiana State Board of Embalmers and Funeral Directors informed the Abbey that Louisiana law made it a crime for anyone but a licensed funeral director to sell "funeral merchandise."[43] The monks had to apprentice at a licensed funeral home for one year, pass a funeral-industry test, and install equipment for embalming before being permitted to sell caskets.[44] Failure to comply would subject the monks to lawsuits, crippling fines, and possibly even jail time.[45] The monks decided to sue first, arguing that the licensing law deprived them of liberty without due process of law, because it served only to protect the economic interests of the funeral cartel.

In *St. Joseph Abbey*, the Fifth Circuit began by surveying prior decisions involving casket regulations by federal courts of appeals. In *Craigmiles v. Giles*,[46] the Sixth Circuit ruled that "protecting a discrete interest group from economic competition" is not a legitimate government interest, and it invalidated a Tennessee law forbidding anyone to sell a coffin without a funeral director license because the law lacked any connection to public health or safety.[47] By contrast, the Tenth Circuit in *Powers v. Harris*[48] upheld a similar Oklahoma prohibition, citing several highly deferential rational basis cases to conclude that intrastate economic protectionism *is* a constitutionally legitimate interest.[49] Thus, even if the Oklahoma law bore no relationship whatsoever to protecting public safety, it was constitutional because it promoted the economic interests of a preferred group of businesspeople.

The Fifth Circuit followed the Sixth Circuit in *Craigmiles* and the Ninth Circuit's 2008 decision in *Merrifield v. Lockyer*,[50] holding that mere

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41 793 F.3d 281 (2d Cir. 2015), *cert. denied*, No. 15-507, 2016 WL 763255 (U.S. Feb. 29, 2016).

42 Conor Friedersdorf, *How 38 Monks Took on the Funeral Cartel and Won*, ATLANTIC (July 22, 2011), http://www.theatlantic.com/national/archive/2011/07/how-38-monks-took-on-the-funeral-cartel-and-won/242336/.

43 *See* LA. STAT. ANN. § 37:831(42) (2011).

44 *See id.* § 37:842.

45 *See id.* § 37.850.

46 312 F.3d 220 (6th Cir. 2002).

47 *Id.* at 224.

48 379 F.3d 1208 (10th Cir. 2004).

49 *Id.* at 1220.

50 547 F.3d 978 (9th Cir. 2008). In *Merrifield*, the Ninth Circuit, following *Craigmiles* (and rejecting *Powers*), invalidated a licensing requirement for persons offering structural pest-control services

protectionism is not a legitimate government interest.[51] Judge Patrick Higginbotham, writing for a three-judge panel, noted that even in its most deferential rational basis cases, the Supreme Court has never failed to link challenged economic regulations "to [the] advancement of the public interest or general welfare" in upholding them.[52] The panel proceeded to evaluate Louisiana's proffered health, safety, and consumer protection justifications in light of the evidence presented, and it found none plausible.[53]

The Fifth Circuit's holding soon bore fruit for Texas entrepreneurs. When the state of Texas created a "specialty" occupational license for hairbraiders in 2007, it wedged that licensing scheme into the state's barbering statutes.[54] Would-be hairbraiding instructors like Isis Brantley, a world-renowned, duly licensed African hairbraider, had to spend thousands of dollars to create a fully equipped barber college with at least 2,000 square feet of floor space, ten barber workstations, and five sinks.[55] Following *St. Joseph Abbey*'s "nuanced articulation and application of the rational basis test," Judge Sam Sparks of the Western District of Texas invalidated the mandatory minimums after concluding that they did not advance any of the state's proffered health and safety interests.[56]

2. *Sensational Smiles, LLC v. Mullen*

Teeth-whitening services are increasingly popular at spas, salons, and shopping malls. In 2008, Lisa Martinez opened Connecticut White Smile in the Crystal Mall in Waterford, "where she sold an over-the-counter [teeth-]whitening product and provided a clean, comfortable place for customers to apply the product to their own teeth."[57] Tasos Kariofyllis and Steve Barraco, co-owners of Sensational Smiles, offered teeth-whitening services in spas and salons.[58]

In 2011, the Connecticut Dental Commission issued a ruling that only licensed dentists were allowed to provide certain teeth-whitening services; the ruling threatened non-dentist teeth whiteners with fines and jail time.[59]

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after finding that it was "designed to favor economically certain constituents at the expense of others similarly situated." *Id.* at 991 & n.15.

51 St. Joseph Abbey v. Castille, 712 F.3d 215, 222-23 & n.38, 227 (5th Cir. 2013).

52 *Id.* at 222.

53 *Id.* at 223-27.

54 *Texas Hairbraiding Instruction*, INST. FOR JUST., http://ij.org/case/txbraiding/ (last visited Apr. 2, 2016).

55 *See* TEX. OCC. CODE ANN. § 1601.353(1)(A), (2)(A)-(B) (West 2013).

56 Brantley v. Kuntz, 98 F. Supp. 3d 884, 891 (W.D. Tex. 2015).

57 *Connecticut Teeth Whitening*, INST. FOR JUST., http://ij.org/case/ct-teeth-whitening/ (last visited Apr. 2, 2016).

58 *Id.*

59 *Id.*

Martinez, Kariofyllis and Barraco filed a lawsuit, arguing that this prohibition served only to protect dentists from competition. Only after the lawsuit was filed did the Dental Commission adopt an interpretation of its initial ruling that effectively transformed it from a flat ban on non-dentist teeth-whitening to a requirement that only licensed dentists can position low-wattage light-emitting-diode ("LED") lamps in front of customers' mouths during teeth-whitening procedures.[60] Customers (even non-dentists!) were free to shine LED lights into their *own* mouths, thus exposing themselves to whatever hypothetical risks are associated with LED lights—but any unlicensed teeth-whitener who positioned an LED light in front of a customers' mouth would be guilty of a felony.[61]

The Second Circuit upheld the prohibition. Writing for himself and another judge on the Second Circuit panel, Senior Judge Guido Calabresi conceded that the challengers "forcefully argue[d] that the true purpose of the Commission's LED restriction is to protect the monopoly on dental services enjoyed by licensed dentists."[62] But he concluded that a "simple preference for dentists over teeth-whiteners" could justify the restriction, even if the LED restriction did not protect oral health and was not designed to do so.[63] Judge Calabresi, like the Tenth Circuit in *Powers*, cited a number of highly deferential rational basis decisions in support of his conclusion.[64] Also like the *Powers* court, he urged that the consequences of a different holding would be intolerable because "[m]uch of what states do is to favor certain groups over others on economic grounds."[65]

II. OCCUPATIONAL SPEECH: HISTORY AND RECENT DECISIONS

Occupational licensing laws that require Americans to secure a license before they may speak for pay raise profound constitutional concerns under well-settled First Amendment precedent. So, too, do regulations of advice delivered by licensed professionals like therapists and physicians.

But the Supreme Court has provided little specific guidance about occupational speech.[66] Lower courts struggling to reconcile the Court's curso-

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60 *Id.*

61 *Id.* (noting the maximum penalty of five years in jail and a $25,000 fine per customer).

62 Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 285 (2d Cir. 2015), *cert. denied*, No. 15-507, 2016 WL 763255 (U.S. Feb. 29, 2016).

63 *Id.* at 287.

64 *Id.*

65 *Id.*; *cf.* Powers v. Harris, 379 F.3d 1208, 1221 (2004) ("[W]hile baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments.").

66 *See* David T. Moldenhauer, *Circular 230 Opinion Standards, Legal Ethics and First Amendment Limitations on the Regulation of Professional Speech by Lawyers*, 29 SEATTLE U. L. REV. 843, 843

ry review of economic regulations with its solicitude for free speech are divided on the question of whether occupational speech is protected by the First Amendment at all.

A. *The Supreme Court and Occupational Speech*

During the latter half of the twentieth century, courts became increasingly protective of freedom of speech. Today, speech on a wide variety of topics, through a wide variety of media, receives robust constitutional protection.[67] The Court has held that speakers do not lose their First Amendment protection when they are paid for their speech.[68] The Court has held that a given category of speech must be found to have been historically unprotected before that category of speech can be excluded from the First Amendment's scope.[69] Finally, the Court has insisted that regulations that are triggered by the communicative content of speech—what the speakers say—are *always* subject to strict scrutiny.[70] Importantly, the Court's rule of strict scrutiny for content-based speech restrictions is animated by concerns about naked preferences. Such restrictions are thought to present a particularly high risk that the government is seeking to impose the ideological and expressive preferences of politically powerful groups rather than protecting the rights of all.[71]

(2006) (describing professional speech as "one of the least developed areas of First Amendment doctrine").

67 *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011) (violent videogames); United States v. Stevens, 559 U.S. 460 (2010) (dog-fighting videos); Texas v. Johnson, 491 U.S. 397 (1989) (flag desecration); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (commercial advertising); Cohen v. California, 403 U.S. 15 (1971) (profane jackets); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (motion pictures). *But see* Holder v. Humanitarian Law Project, 561 U.S. 1, 28, 39 (2010) (finding that the government may restrict the provision of material support—in the form of speech—to terrorist groups, even though such speech limitations warrant strict scrutiny).

68 *See* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak."); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) ("That the Times was paid for publishing the advertisement is as immaterial . . . as is the fact that newspapers and books are sold.").

69 *Stevens*, 559 U.S. at 471.

70 *See* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) (applying strict scrutiny to a picketing ordinance that "describe[d] permissible picketing in terms of its subject matter").

71 *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (reaffirming that content-based burdens "raise[] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace"); *Mosley*, 408 U.S. at 96 ("[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."); *Cohen*, 403 U.S. at 21 (stating that allowing government to silence "offensive" speech in public would "effectively empower a majority to silence dissidents simply as a matter of personal predilections").

How does occupational speech fit into this jurisprudence? Occupational speech can be defined as the compensated communication of information, ideas, or advice, tailored by the speaker to the needs of a customer or client. The fact that occupational speech is compensated does not mean that it is unprotected.[72] Because occupational licensing did not become widespread until long after the First Amendment was enacted, it is implausible to contend that occupational speech has historically been unprotected.[73] Lastly, any law that restricts speech about some subjects and not others is necessarily content-based. Those who would argue that occupational speech should receive anything less than strict scrutiny would seem to have a heavy burden to carry.

But the most explicit guidance on occupational speech from the Supreme Court—a three-Justice concurrence from the 1985 case *Lowe v. SEC*[74]—suggests that imposing a licensing requirement on certain kinds of occupational speech poses no First Amendment problem. *Lowe* concerned a former investment advisor, Christopher Lowe, who had lost his registration with the Securities and Exchange Commission ("SEC") and been prohibited from acting as an investment advisor following a conviction on various felony offenses.[75] Despite his conviction, Lowe continued to publish newsletters containing his thoughts on investment strategies, and the SEC sought to enjoin him from doing so on the grounds that he was not registered.[76]

While a majority of the Court concluded on statutory grounds that the registration requirement did not apply to Lowe,[77] Justice Bryon White, writing for himself and two other justices, believed that it did—and therefore reached the question whether requiring newsletter publishers to be registered with the SEC violated the First Amendment.[78] Justice White stated that "[o]ne who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession," and he then concluded that "generally applicable li-

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72 *See supra* note 68.

73 *See* Robert Kry, *The "Watchmen for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885, 957 (2000) ("[T]he historical practices at the time of the ratification of the First and Fourteenth Amendments show that the rendering of personalized advice to specific clients was not one of the 'well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem.' Viewed in this light, the licensure of professional advice is inconsistent with the original understanding of the First Amendment." (footnote omitted) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942))).

74 472 U.S. 181 (1985).

75 *Id.* at 183.

76 *Id.* at 184.

77 *Id.* at 211.

78 *Id.* at 211 (White, J., concurring).

censing provisions limiting the class of persons who may practice [a] profession" do not implicate the First Amendment.[79]

The Supreme Court's content-based jurisprudence has further complicated matters. The first major cases to focus on content-based speech restrictions held that speech restrictions were content based (and subject to strict scrutiny) if government officials had to inspect the content of speech to determine how it should be regulated.[80] But as the Court began to review First Amendment challenges to local zoning rules concerning adult businesses, it departed from this categorical test.[81] Although these zoning rules clearly required content inspection, the Court treated them as "content neutral" (and, therefore, subject to intermediate scrutiny) because they were designed to ameliorate undesirable "secondary effects" upon cities' quality of life, not simply to suppress disfavored speech.[82] Eventually, in *Ward v. Rock Against Racism*,[83] this focus on censorial intent in determining whether speech restrictions are content based migrated out of the context of adult businesses and into other cases. In *Ward*, the Court declared that the "[t]he principal inquiry in determining content neutrality" is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[84] The Court would later treat certain laws as content neutral even if they explicitly classified and restricted speech based on its communicative content.[85]

Justice White's *Lowe* concurrence—never cited by a Court majority—continues to serve as a framework for evaluating burdens on occupational speech. Lower courts have continued to rely on this concurrence even after the Supreme Court held in 2010 that restrictions on speech—including individualized expert advice—are subject to strict scrutiny if "the conduct triggering coverage under [a] statute consists of communicating a message."[86] Meanwhile, some lower courts have applied intermediate scrutiny to speech restrictions that target specific subject matters, if the government

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79 *Id.* at 232.

80 *See, e.g.*, Carey v. Brown, 447 U.S. 455, 462 (1980) (applying strict scrutiny to a residential picketing statute because "it is the content of the speech that determines whether it is within or without the statute's blunt prohibition"); *Mosley*, 408 U.S at 95, 98-99.

81 *See, e.g.*, City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) (applying intermediate scrutiny to an ordinance targeting theatres that specialize in adult films).

82 *Id.* at 48-49.

83 491 U.S. 781 (1989).

84 *Id.* at 791.

85 *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 720-25 (2000) (treating as content neutral a law making it illegal to approach someone to engage in "protest, education, or counseling" but not to discuss other subjects).

86 Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010).

claims that the restriction in question was enacted for non-censorial reasons.[87] The result: conflicted, incoherent precedents.

B. *Recent Occupational Speech Decisions*

Given the Court's mixed signals on the concept of "content based," and the almost total lack of guidance on the question of occupational speech, it is unsurprising that lower courts have splintered on how to evaluate burdens on occupational speech. For example, the Fifth Circuit[88] and the District of Columbia Circuit[89] have both applied intermediate scrutiny to licensing laws for tour guides, but have done so in dramatically different ways and reached different conclusions. The Ninth[90] and Third Circuits[91] have split on the question whether outright bans on certain forms of "talk therapy" by licensed therapists implicate the First Amendment. The Eleventh Circuit handed down three opinions concerning a law that limited physicians' speech to patients. In the first, it denied that the First Amendment was implicated.[92] In the second—vacating the first a year later, the court treated the law as a speech restriction subject to intermediate scrutiny but ultimately upheld it.[93] And in the third—vacating the second only a few months later, the court decided that since the law actually survived strict scrutiny, it was simply unnecessary to determine whether intermediate or strict scrutiny is the proper standard of review for occupational speech.[94] Finally, the Fifth Circuit applied rational basis review to a law prohibiting veterinarians from giving veterinary advice unless they have physically examined the animals to which their advice pertains.[95]

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87 *See, e.g.*, Reed v. Town of Gilbert, 707 F.3d 1057 (9th Cir. 2013), *rev'd*, 135 S. Ct. 2218 (2015); Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 365 (4th Cir. 2012).

88 Kagan v. City of New Orleans, 753 F.3d 560, 561-62 (5th Cir. 2014) (finding the licensing law to have no effect on the tour guides' speech—upholding its constitutionality), *cert. denied*, 135 S. Ct. 1403 (2015).

89 Edwards v. District of Columbia, 755 F.3d 996, 1001 (D.C. Cir. 2014) (assuming, arguendo, that the licensing law was content neutral but still determining it to be overbroad).

90 Pickup v. Brown, 740 F.3d 1208, 1229 (9th Cir. 2013) (holding that sexual orientation conversion therapy is actually conduct that may be regulated without implicating the First Amendment), *cert. denied*, 134 S. Ct. 2871 (2014).

91 King v. Governor of N.J., 767 F.3d 216, 246 (3d Cir. 2014) (rejecting the idea that sexual orientation conversion therapy is conduct but nonetheless finding the prohibiting statute valid under intermediate scrutiny review), *cert. denied*, 135 S. Ct. 2048 (2015).

92 Wollschlaeger v. Governor of Florida, 760 F.3d 1195, 1217 (11th Cir. 2014), *vacated*, 797 F.3d 859 (11th Cir.), *vacated en banc*, No. 12-14009, 2015 WL 8639875 (11th Cir. Dec. 14, 2015).

93 *Wollschlaeger*, 797 F.3d at 896-901.

94 *Wollschlaeger*, 2015 WL 8639875, at *24.

95 Hines v. Alldredge, 783 F.3d 197, 201 (5th Cir.), *cert. denied*, 136 S. Ct. 534 (2015).

1. Tour Guide Speech: *Kagan v. City of New Orleans* and *Edwards v. District of Columbia*

Both New Orleans and the District of Columbia are popular tourist destinations, and, in 2014, it was illegal to speak to paying customers about history and points of interest in either city without securing a license. The cities' licensing laws were quite similar: both compelled would-be tour guides to pass a history exam and pay a fee, and both threatened unlicensed tour guides with fines and jail time.[96]

In *Kagan v. City of New Orleans*,[97] the Fifth Circuit upheld New Orleans' licensing law in a terse, four-page opinion. Drawing upon *Ward*, Judge Thomas Reavley, writing for a three-judge panel, reasoned that the licensing law was not actually a content-based speech restriction because the law was "justified without reference to content or speech."[98] The panel went on to apply intermediate scrutiny, doing so in so cursory a fashion as to render its analysis indistinguishable from rational basis review. Although the Supreme Court has held that intermediate scrutiny requires the government to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree,"[99] the Fifth Circuit made no effort to determine whether unlicensed tour guides posed any threat of harm at all.[100]

By contrast, the District of Columbia Court of Appeals invalidated the District of Columbia's tour guide licensing law in *Edwards v. District of Columbia*.[101] Judge Janice Rogers Brown, joined by the other two judges on the panel, began by denying that the tour-guide license was "merely an occupational license subject only to rational basis review."[102] Drawing upon *Lowe*, she reasoned that tour guides do not "'take[] the affairs of . . . client[s] personally in hand [or] purport[] to exercise judgment on behalf of . . . client[s] in the light of the client's individual needs and circumstances,'" but, rather, "provide virtually identical information to each customer."[103] The court did not reach the question whether the licensing law was content based and therefore subject to strict scrutiny, as it found that the law could not survive intermediate scrutiny. There was no evidence in the record that ill-informed guides harmed the District's tourism industry or that, even assuming that such harms existed, the exam regulation would alleviate them.

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96 *See* D.C. MUN. REGS. tit. 19, §§ 1200-1209 (2010); N.O. CITY CODE § 30-1551 (2011).

97 753 F.3d 560 (5th Cir. 2014), *cert. denied*, 35 S. Ct. 1403 (2015).

98 *Id.* at 562.

99 *See* Edenfield v. Fane, 507 U.S. 761, 771 (1993).

100 *Kagan*, 753 F.3d at 561-62.

101 755 F.3d 996 (D.C. Cir. 2014).

102 *Id.* at 1000 n.3.

103 *Id.* (quoting Lowe v. SEC, 472 U.S. 181, 232 (1985)).

2. Therapist Speech: *Pickup v. Brown* and *King v. Governor of New Jersey*

Besides requiring people to secure licenses before they may speak for pay, states have imposed restrictions on what licensed professionals may say. In the later-amended case *Pickup v. Brown*,[104] a Ninth Circuit Court of Appeals panel evaluated a California law that banned state-licensed therapists from engaging in sexual-orientation change efforts ("SOCE") with minors.[105] Although these practices consist solely of verbal communication, the panel treated SOCE efforts as "professional conduct" subject to rational basis review and upheld the ban.[106]

Following a motion for rehearing en banc, the panel amended its opinion[107] to address the Supreme Court's decision in *Holder v. Humanitarian Law Project*.[108] *Humanitarian Law Project* involved a federal statute that forbade "material support"[109] to terrorist groups—which the statute defined to include "instruction or teaching designed to impart a specific skill" or "expert advice or assistance."[110] The Court treated that as a content-based speech restriction and applied strict scrutiny, rejecting the government's argument that the statute only targeted "conduct." As the Court put it, because the plaintiffs "want to speak to [designated terrorist groups], and whether they may do so . . . depends on what they say. . . . [T]he conduct triggering coverage under the statute consists of communicating a message."[111] But in the amended opinion in *Pickup*, Judge Susan Graber distinguished *Humanitarian Law Project* on the grounds that it involved "political speech," whereas the California law only prohibited therapists from "*practicing* SOCE."[112]

In a vigorous dissent from the rehearing, Judge Diarmuid O'Scannlain took the panel to task for allowing California to play the same "labeling game" that the Supreme Court had seen right through. The SOCE ban, he wrote, "prohibits certain 'practices,' just as the statute in *Humanitarian Law Project* prohibited 'material support'; but with regard to those plaintiffs as well as to the plaintiffs here, those laws targeted speech. Thus, the First Amendment still applies."[113]

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104 728 F.3d 1042 (9th Cir. 2013).

105 *See* CAL. BUS. & PROF. CODE § 865.1-.2 (West 2012).

106 *Pickup*, 728 F.3d at 1057.

107 Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2871 (2014).

108 561 U.S. 1 (2010).

109 *Id.* at 7 (quoting 18 U.S.C. § 2339B(a)(1) (2012)).

110 *Id*. at 12 (quoting 18 U.S.C. § 2339A(b)(2)-(3)).

111 *Id*. at 27-28.

112 *Pickup*, 740 F.3d at 1230.

113 *Id.* at 1218 (O'Scannlain, J., dissenting from denial of rehearing en banc).

In *King v. Governor of New Jersey*,[114] the Third Circuit, evaluating a nearly identical ban on SOCE,[115] endorsed Judge O'Scannlain's view of the matter, even while it upheld the New Jersey statute. Judge D. Brooks Smith, who wrote for the panel, expressly rejected the argument that verbal counseling is subject only to rational basis review.[116] But that court went on to hold that even though the law was a content-based speech restriction, "professional speech" merits only intermediate rather than strict scrutiny.[117]

3. Physician Speech: *Wollschlaeger v. Governor of Florida*

Doctors routinely ask patients questions about sensitive matters, from drug use to sexual activity. In 2011 however, Florida legislators concluded that gun ownership was a peculiarly sensitive topic and passed the Firearm Owners Privacy Act,[118] which threatens doctors with professional discipline if they ask patients whether they own guns or record the resulting information in a patient's file—if doing so is not "relevant" to the patient's medical care. Florida physicians and physician advocacy groups challenged the law, arguing that it violated physicians' First Amendment rights to express their views about the hazards of firearms to their patients.

In July 2014, a three-judge panel of the Eleventh Circuit upheld the law.[119] Adopting the Ninth Circuit's reasoning in *Pickup*, the majority treated the law as a regulation of conduct rather than speech and applied rational basis review.[120] Stating that it would not "pass on the wisdom of the legislature's motivations"[121] nor "evaluate the extent to which the Act furthers the legislature's stated interests,"[122] the majority hypothesized that patients "might be concerned"[123] about disclosing information about gun ownership and that they "may feel powerless"[124] not to answer doctors' questions about firearms.

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114 767 F.3d 216 (3d Cir. 2014), *cert. denied,* 135 S. Ct. 2048 (2015).

115 *See* N.J. STAT. ANN. §§ 45:1-54 to -55 (West 2013).

116 *King*, 767 F.3d at 228.

117 *Id.* at 237.

118 Act of June 2, 2011, ch. 2011-112, 2011 Fla. Laws 1776 (creating FLA. STAT. § 790.338 (2011) and amending §§ 381.026, 456.072).

119 Wollschlaeger v. Governor of Florida, 760 F.3d 1195, 1226 (11th Cir. 2014), *vacated*, 797 F.3d 859 (11th Cir.), *vacated en banc*, No. 12-14009, 2015 WL 8639875 (11th Cir. Dec. 14, 2015).

120 *Id.* at 1224.

121 *Id.* at 1214 n.10.

122 *Id.*

123 *Id.* at 1214.

124 *Id.*

A year later, the Eleventh Circuit vacated and replaced its initial opinion.[125] This time around, the panel rejected the notion that the law regulated mere conduct, and it applied intermediate scrutiny. Even so, the substance of its analysis was indistinguishable from rational basis review. Pointing to "a number of anecdotes and references to constituent complaints regarding unwelcome questioning" and emphasizing the "highly disparate power balance of the physician-patient relationship," the court concluded that the laws "directly advance[d] the State's substantial interest in regulating the medical profession."[126]

But only a few months later, in December of 2015, the Eleventh Circuit vacated its second opinion en banc.[127] In this final iteration, the court recognized that the Supreme Court's recent decision in *Reed v. Town of Gilbert* might suggest "that any and all content-based regulations, including commercial and professional speech, are now subject to strict scrutiny."[128] But since it also found that this particular law survived strict scrutiny, the court opined that it did not need to "determine conclusively whether a lesser form of scrutiny ever applies to regulations of professional speech."[129]

4. Veterinarian Speech: *Hines v. Alldredge*

Interference with professional judgment was again front-and-center in the case of Dr. Ron Hines, a licensed Texas veterinarian who has provided care for animals since 1966.[130] Dr. Hines retired in 2002 after his age and disabilities made it difficult to remain in practice.[131] Because he still wanted to help pet owners, he launched a website to disseminate his articles on pet care, and responded to emails and phone calls from pet owners around the world who sought advice about their animals.[132] Dr. Hines helped hundreds of people who had no other access to veterinary care due to either geography or poverty, and no one ever accused him of incompetence.[133]

In 2012, the state's Board of Veterinary Medical Examiners informed Dr. Hines that he was running a criminal enterprise. Three years after Hines launched his website, the Texas Veterinary License Act had been amended

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125 Wollschlaeger v. Governor of Florida, 797 F.3d 859 (11th Cir.), *vacated en banc*, No. 12-14009, 2015 WL 8639875 (11th Cir. Dec. 14, 2015).

126 *Id.* at 898-99.

127 Wollschlaeger v. Governor of Florida, No. 12-14009, 2015 WL 8639875 (11th Cir. Dec. 14, 2015).

128 *Id.* at *24.

129 *Id.*

130 *Texas Veterinary Speech*, INST. FOR JUST., http://ij.org/case/txvetspeech/ (last visited Apr. 2, 2016).

131 *Id.*

132 Hines v. Alldredge, 783 F.3d 197, 199 (5th Cir.), *cert. denied*, 136 S. Ct. 534 (2015).

133 *Texas Veterinary Speech*, *supra* note 130.

to forbid a veterinarian client-patient relationship from arising solely via electronic means.[134] On March 25, 2013, the Board punished Dr. Hines for violating the law, fining him $500, suspending his license for a year, and forcing him to retake the jurisprudence portion of the veterinarian-licensing exam[135]—even though no one alleged that his advice harmed any animal (or any person) anywhere. Dr. Hines challenged the law.

The Fifth Circuit upheld the law under rational basis review. Judge Higginbotham, writing for a three-judge panel, treated the law as content-neutral regulation of the "practice of a profession" with "an incidental impact on speech."[136] The court concluded that the Texas law was rational because "it is reasonable to conclude that the quality of care will be higher, and the risk of misdiagnosis and improper treatment lower, if the veterinarian physically examines the animal in question before treating it."[137] The court cited no record evidence in support of the proposition that online veterinary advice harms (or threatens to harm) animals in Texas or anywhere else at rates beyond what would be expected in a brick-and-mortar setting.[138] No effort was made to determine whether the true end of forbidding qualified, Texas-licensed veterinarians from providing veterinary advice through electronic means was protecting the financial interests of brick-and-mortar veterinary practices—a strong possibility, given the disconnect between the state's purported ends and how the challenged law actually operated. It is difficult to imagine how prohibiting Hines from offering veterinary advice online or over the phone promotes the health of animals in Texas. Texas residents can recommend folk remedies for their pets' ailments to one another via phone; but Hines cannot provide expert advice to them through the same means.[139]

III. RESOLVING THE SPLITS

The Fifth Circuit's decision in *Hines* vividly illustrates the need for enforcement of constitutional prohibitions on naked preferences in cases in-

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134 *See* TEX. OCC. CODE ANN. § 801.351(a) (West 2005).

135 *Hines*, 783 F.3d at 200.

136 *Id.* at 201.

137 *Id.* at 203.

138 *Id.* at 199-203.

139 *See* Paul Spradley, Comment, *Telemedicine: The Law is the Limit*, 14 TUL. J. TECH. & INTELL. PROP. 307, 319-20 (2011) (predicting that as the use of telemedicine—the use of telecommunication and information technology to evaluate, diagnose, and treat patients (in Hines' case, animals)—grows, it will "aggravate the selfish interests of those who support trade protectionism"). Texas's law adopted a 2003 amendment to the Model Veterinary Practice Act of the American Veterinary Medical Association—the largest professional umbrella group for veterinarians in the United States. *See Model Veterinary Practice Act—January 2013*, AVMA, https://www.avma.org/KB/Policies/Pages/Model-Veterinary-Practice-Act.aspx#vcpr-requirement (last visited Apr. 1, 2016) (Section 5).

volving economic regulations, as well as for definition of the constitutional status of occupational speech. Because Texas was deemed to be regulating the "practice of a profession," not "speech," and because the court made no effort to identify the government's true ends in applying the rational basis test, neither Dr. Hines' right to speak freely nor his right to earn a living received any meaningful protection against arbitrary power. The Supreme Court can forge a consistent, economic liberty jurisprudence by drawing upon its longstanding rejection of naked preferences and its decision in *Reed v. Town of Gilbert.*

A. *The Court Should Hold That Mere Protectionism is Unconstitutional*

Longstanding precedent holds that naked preferences are constitutionally prohibited. As Sunstein puts it, the Court understands numerous constitutional clauses to require that government action "result[] from a legitimate effort to promote the public good rather than from a factional takeover."[140] But because the Court has by-and-large failed to enforce this requirement in rational basis cases involving economic regulations, it is easy to understand why lower courts have concluded otherwise.

The Court should clarify that *every* arbitrary exercise of government power partakes of the same vice. What is objectionable about naked preferences—and why the Court is correct to reject them—is that that they betray the essential purpose for which governments are "instituted among men,"[141] namely, ensuring that might does not trump individual rights.[142] As noted above, the Court's content-based speech jurisprudence is animated by concerns about protectionism in the marketplace of ideas—concerns that content-based speech regulations will be used to impose the ideological and expressive preferences of the politically powerful. Regulations of the marketplace of goods and services that are not calculated to protect the public from incompetence or fraud but merely to impose the *economic* preferences of the politically powerful are equally contrary to the core purpose of government—and equally improper.

While naked preferences are always constitutionally objectionable, it bears emphasizing that the Court's repeated affirmation of the right to a living is not just a patriotic shibboleth. The right that Justice William O. Douglas once referred to as "the most precious liberty that man possess-

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140 *See* Sunstein, *supra* note 31, at 1690.

141 *See* THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

142 As James Madison observed, the "end of government" is to establish justice by "protect[ing] all parties, the weaker as well as the more powerful." THE FEDERALIST No. 51, at 271 (James Madison) (Liberty Fund 2001). But "[i]n a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may . . . truly be said to reign," and "the weaker individual is not secured against the violence of the stronger." *Id.*

es"[143] is as "deeply rooted in this Nation's history and tradition"[144] and as "central to individual dignity and autonomy"[145] as the freedom to speak, marry, travel, vote, or exercise any other right that the Court has held "fundamental."[146] Americans spend most of their daily lives at work, and they do not work simply to make ends meet. For many people, it is a form of self-expression and central to their self-definition. Isis Brantley's hairbraiding, for instance, is an expression of her philosophy; she describes it as her "religion."[147] The importance of the freedom at stake highlights the pressing need for consistent judicial enforcement of constitutional safeguards against naked economic preferences.

B. *The Court Should Replace the Rational Basis Test with a More Rigorous Standard of Review*

The Court's recognition that the Constitution prohibits mere protectionism would be of little value if courts did not consistently enforce that prohibition. The Court should therefore make plain that judicial engagement—a genuinely impartial, evidence-based inquiry into the government's true ends and the law's relationship to those ends—is required whenever the government burdens a person's right to earn a living.[148] There are two ways the Court could accomplish this important goal: it could strengthen rational basis review, or it could adopt a new standard of review.

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143 *See* Barsky v. Bd. of Regents of Univ. of N.Y., 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

144 Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)) (internal quotation marks omitted); *accord* TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING 2-3 (2010) (tracing the right to earn a living back through English common law and finding that it was "among those that America's Founders regarded as the natural rights of all humanity").

145 Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015).

146 *See* SANDEFUR, *supra* note 144, at 136 ("[M]any people would place a higher value on their freedom to make a living for themselves and their families than on their right to travel to Washington for a chance to lobby a member of Congress."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 779 (2d ed. 1988) ("[T]he attempt to distinguish [economic] rights . . . from the preferred rights . . . in terms of a supposed dichotomy between economic and personal rights must fail." (footnote omitted)); Suzanna Sherry, *Property Is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452, 1472 (2015) (reviewing RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION (2014)) (finding that scholars have advanced "no successful sustained defense of the bifurcated standard of review [distinguishing between "economic" and "personal" liberty] that has served as the framework for our constitutional jurisprudence for the past seventy-five years"). It should be stressed, however, that the Court need not classify the right to earn a living as fundamental in order to hold that mere protectionism is unconstitutional. *See* cases cited *supra* notes 33-36.

147 *See* Linda Jones, *Braiders Locked in Legal Knots*, FREE-LANCE STAR, Nov. 27, 1997, at C2.

148 *See* CLARK M. NEILY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT 2 (2013) (defining the concept of judicial engagement).

I favor the second alternative. Rational basis review has long been understood to require reflexive judicial deference, and it will be difficult to persuade courts to abandon that understanding. Further, since its inception, rational basis review has *always* included a presumption of constitutionality. Any presumption of constitutionality is improper. A presumption is typically laid on the party best suited to discharge it—the party also bearing the lesser risk in the event that the burden is not discharged.[149] In cases challenging the constitutionality of economic regulations, the relevant evidence concerning officials' true ends is primarily within the government's control. Further, it is a far graver thing to deprive people of their ability to put food on their table than it is to require the government to justify burdens on their ability to do so with credible evidence.[150]

To ensure consistent judicial engagement, the new standard of review should (1) require judges to make a genuine effort to identify the government's true ends; (2) require judges to determine whether there is a factual nexus between the government's chosen means and constitutionally proper ends; and (3) make the government bear the risk of non-persuasion on the merits. The standard could be modeled after the "*Central Hudson* test" currently applied to restrictions on commercial speech. Judges applying the *Central Hudson* test determine whether (1) the government has a substantial interest in regulating speech; (2) the challenged regulation advances that interest in a direct and material way; (3) the regulation is reasonably narrowly tailored to that interest.[151] The government bears the burden of proof on each prong of this test,[152] and it may not rely upon "speculation and conjecture," only credible, admissible evidence.[153] Further, judges may neither invent justifications that the government has not articulated nor ignore evidence concerning the government's true ends—as they presently do under rational basis review.[154] Applying a *Central Hudson*-like test to burdens on the right to earn a living would resolve a paradox that exists under the current regime: Americans' freedom to *advertise* their businesses receives far more judicial protection than their freedom to *operate* their businesses.

It might be objected that judges are poorly equipped to identify mere protectionism. But judges *routinely* identify improper ends in many differ-

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149 *See, e.g.*, Medina v. California, 505 U.S. 437, 455 (1992) (O'Connor, J., concurring in judgment) (listing considerations for allocation of burden of proof); Sikes v. Teleline, Inc., 281 F.3d 1350, 1362 (11th Cir. 2002) ("A presumption is generally employed to benefit a party who does not have control of the evidence on an issue.").

150 *See* SANDEFUR, *supra* note 144, at 130 ("It is better to presume innocence than guilt because the severity of error operates more harshly on the wrongly accused innocent than on the wrongly acquitted guilty person . . . . [T]he presumption in favor of freedom protects innocent people's liberty to act.").

151 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564-5 (1980).

152 *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 71 n.20 (1983).

153 *See* Edenfield v. Fane, 507 U.S. 761, 770-71 (1993).

154 *Id.* at 768.

ent areas of our constitutional law.[155] The Court *has* in fact identified and invalidated naked economic preferences in many cases.[156] The principal evil against which our dormant commerce clause and Privileges and Immunities doctrine is directed is *inter*state protectionism, but there is no reason that *intra*state protectionism would present unique epistemological problems.

Another potential objection is that judicial engagement in cases involving economic regulations will, as Judge Calabresi put it in *Sensational Smiles*, be "destructive to federalism."[157] On the contrary, fulfilling the ends of federalism requires meaningful enforcement of constitutional prohibitions against naked preferences of all kinds. In our constitutional system, federalism—the distribution of government power between the federal government and the states—is a means of securing individual rights, specifically, by preventing any governmental entity from exercising unchecked power.[158] If it would be "destructive" of the status quo for the federal judiciary to consistently enforce the Fourteenth Amendment, that says more troubling things about the status quo than about judicial engagement.

A related objection is that enforcing constitutional prohibitions on naked economic preferences will return us to the dreaded "*Lochner* era," named for a decision that has long served as an illustration of how judicial review should *not* be performed. In *Lochner v. New York*,[159] the Supreme Court held that a provision of New York's Bakeshop Act that prohibited the employment of biscuit, cake, and bread bakers[160] for more than ten hours in one day or sixty hours in one week arbitrarily deprived bakers and their employers of "their liberty of contract as well as of person"[161] and thus vio-

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155 *See* Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 21 (1992) ("[P]urpose is precisely what matters under the Establishment Clause of the First Amendment, the Commerce Clause and Article IV's Privileges and Immunities Clause, in addition to the Equal Protection Clause."); Sunstein, *supra* note 31.

156 *See, e.g.*, Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 878 (1985); Toomer v. Witsell, 334 U.S. 385, 396 (1948).

157 Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 287 (2d Cir. 2015), *cert. denied*, No. 15-507, 2016 WL 763255 (U.S. Feb. 29, 2016).

158 *See* THE FEDERALIST No. 51, at 270 (James Madison) (Liberty Fund, 2001) ("In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.").

159 198 U.S. 45 (1905).

160 The hours provision exempted many bakers who worked in pie bakeries, hotels, restaurants, clubs, and boarding houses, and it did not apply to family-operated bakeries. BERNSTEIN, *supra* note 16, at 32. Lochner's attorneys emphasized this inconsistent coverage in arguing that the hours provision, despite being included in an act that contained a number of important sanitary measures, was an example of arbitrary class legislation—that it imposed burdens on a particular group for no public-oriented reason. *Id.*

161 *Lochner*, 198 U.S. at 61. "Liberty of contract" was a well-established doctrine by the time *Lochner* was decided, and was derived from a broader right to pursue a calling free of arbitrary interfer-

lated the Fourteenth Amendment's Due Process of Law Clause. The Court found that there was "no reasonable foundation for holding [the hours provision] to be necessary or appropriate as a health law"[162] and determined that it was "in reality, passed from other motives."[163] *Lochner* was vigorously denounced by legal Progressives, who believed that it epitomized a "mechanical" jurisprudence rooted in *laissez-faire* ideology and indifference to the reality of social conditions.[164] The Progressive account of *Lochner* would become dominant in the academy.[165] Today, Justice Oliver Wendell Holmes's pithy dissent is canonical—generations of lawyers have been instructed that the Constitution "is not intended to embody a particular economic theory."[166]

The ghost of *Lochner* should not scare judges away from doing what they routinely do today in wide areas of law. We have learned much since John Hart Ely declared that comparisons to *Lochner* should be alone enough to damn a decision.[167] Even Judge Calabresi in *Sensational Smiles* took note of a wealth of revisionist scholarship supporting the proposition that the hours provision invalidated in *Lochner* "was probably a rent-seeking, competition-reducing measure supported by labor unions and large bakeries for the purpose of driving small bakers and their large immigrant workforce out of business"[168]—that is, that the provision was in fact de-

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ence. *See* Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) ("The liberty mentioned in [the Fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person . . . [but] the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.").

162 *Lochner*, 198 U.S. at 58.

163 *Id.* at 64.

164 *See, e.g.*, Ernst Freund, *Limitation of Hours of Labor and the Federal Supreme Court*, 17 GREEN BAG 411 (1905); Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 497 (1908); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

165 *See* BERNSTEIN, *supra note* 16, at 2 ("By the late 1980s, [*Lochner*] was perhaps the leading case in the constitutional 'anti-canon,' the group of wrongly decided cases that help frame the proper principles of constitutional interpretation.").

166 *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting); *accord* Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 782 (2000) ("Every law student in the country has read or at least heard of *Lochner*, and Holmes's clairvoyance therein.").

167 *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 940 (1973). For an overview of *Lochner*'s recent scholarly rehabilitation, see Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527 (2015).

168 Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 287 (2d Cir. 2015) (quoting Rebecca L. Brown, *Constitutional Tragedies: The Dark Side of Judgment*, *in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 139, 142 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998)) (internal quotation marks omitted), *cert. denied*, No. 15-507, 2016 WL 763255 (U.S. Feb. 29, 2016); *accord* BERNSTEIN, *supra note* 16, at 23, 27 (finding that the bakers' union conceived and promoted the hours provision "to drive small bakeshops that employed recent immigrants out of the industry").

signed to impose a naked economic preference. Further, as Professor David Bernstein has observed, even if one disagrees with the Court's decision in *Lochner*, "the principle . . . that the police power is not infinitely elastic—is a sound one, well rooted in long-standing American principle."[169] Indeed, as we have seen, the Supreme Court has affirmed that principle again and again, identifying and invalidating legislation grounded in naked preferences in decisions spanning the last several decades.[170] That people hold "fundamentally differing views"[171] concerning the subject matter of such legislation has not stopped the Court from doing so.[172] Those who would argue that judges suddenly lose the capacity that Holmes once attributed to dogs—the capacity to distinguish between being stumbled over and being kicked—as soon as the legislation at issue can be characterized as "economic" have yet to convincingly explain why they do so.[173]

C. *The Court Should Apply Strict Scrutiny to Content-Based Restrictions on Occupational Speech*

Rejecting mere protectionism and replacing the rational basis test with a more rigorous standard of review would go a long way towards ensuring meaningful judicial review of economic regulations. But it would not settle the question of how courts should treat occupational speech, upon which the livelihoods of millions depend. Recently, a municipal sign code in Gilbert, Arizona, provided the Supreme Court with a vehicle for clarifying its content-based speech jurisprudence. The Court's reasoning in *Reed v. Town of Gilbert* can be used to define the constitutional status of occupational speech as well.

The Good News Community Church—a small, cash-strapped entity that owns no buildings—held its services at elementary schools or other locations, and advertised its services through temporary signs.[174] Under Gilbert's sign code, the church's signs were subjected to far greater restrictions than were temporary signs featuring political, ideological, and other messages.[175]

A unanimous Supreme Court invalidated the sign code. Writing for the Court, Justice Clarence Thomas stated unequivocally that "[a] law that is

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169 BERNSTEIN, *supra* note 16, at 127.

170 *See* cases cited *supra* notes 33-36.

171 *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

172 *See, e.g.*, Romer v. Evans, 517 U.S. 620, 624, 632 (1996) (determining that Amendment 2 to Colorado's constitution—adopted through a statewide referendum—that prohibited the state or any of its subdivisions from granting to homosexuals "'any minority status, quota preferences, protected status or claim of discrimination'" was "inexplicable by anything but animus" and therefore unconstitutional).

173 O.W. HOLMES, JR., THE COMMON LAW 3 (Boston, Little, Brown & Co. 1881).

174 Reed v. Town of Gilbert, 135 S. Ct. 2218, 2225 (2015).

175 *Id.* at 2225-26.

content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[176] In *Reed*, the Court clarified that a speech restriction is content based if it is either content based on its face *or* if its purpose and justification are content based—and courts must inquire into each question.[177] Because Gilbert's sign code expressly classified signs based "entirely on the communicative content of the sign," strict scrutiny applied.[178]

The reasoning put forward in *Reed* should be applied to restrictions on occupational speech. Licensing laws that force people to secure the government's permission before they speak about specified subjects for pay are necessarily content based; receiving compensation for speech makes no constitutional difference; and there is no plausible case that occupational speech has historically been unprotected. Thus, such laws should be subjected to strict scrutiny. Indeed, following *Reed*'s logic, any judge who scrutinized burdens on occupational speech less rigorously than burdens on political or ideological speech would be engaging in impermissible content-based discrimination.

Some commentators have expressed concern that *Reed* will destabilize First Amendment law. Dean Robert Post has argued that because innumerable regulations widely assumed to be constitutional classify speech on the basis of its content, *Reed* will force courts either to dilute the strict scrutiny standard, to rethink what counts as speech, or to "roll consumer protection back to the 19th century."[179] In separate concurrences in *Reed*, Justices Steven Breyer and Elena Kagan made similar arguments that a rule of strict scrutiny for facially content-based speech restrictions was unwarranted and would prove unworkable. Justice Breyer argued that because "[r]egulatory programs almost always require content discrimination. . . . to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity."[180] A proposed rule of strict scrutiny for occupational speech might seem to vindi-

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176 *Id.* at 2228 (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

177 *Id.*

178 *Id.* at 2227.

179 Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html (last visited Apr. 2, 2016) (internal quotation marks omitted); *see also* Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 179-82 (2015) (arguing that because "[v]irtually everything humans do requires the use of language," a rule of strict scrutiny for content-based speech restrictions would "destroy the very democratic governance the First Amendment is designed to protect"). To review what the First Amendment explicitly protects, see U.S. CONST. amend. I (referring to "the freedom of speech, [and] of the press" among other individual rights, but not "democratic governance").

180 *Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring).

cate these concerns. Would such a rule make it impossible to regulate speaking professions?

In a word, no. Applying *Reed* to occupational speech would not mean that *every* burden on occupational speech would be subjected to strict scrutiny. Speech may sometimes do more than merely communicate information or advice.[181] When doctors write prescriptions, they give patients the right to make a purchase that would otherwise be illegal.[182] When financial advisors invest funds on behalf of clients, they transmit an order that creates an entitlement to property.[183] The fact that these activities take place through speech does not mean that regulation aimed at the non-expressive legal *effect* of that speech must receive strict scrutiny.

Nor would the proposed rule doom all occupational licensing laws to which it applies. Strict scrutiny, despite its reputation, is not "fatal in fact."[184] Further, courts would not have to invalidate an occupational licensing law simply because some of its applications are unconstitutional. First Amendment overbreadth doctrine would require wholesale invalidation only when a "substantial number" of an occupational licensing law's applications "are unconstitutional, judged in relation to [that law's] plainly legitimate sweep."[185] Applying *Reed* to occupational speech will ensure that the government makes a compelling showing of necessity when it regulates in a manner that raises grave concerns about naked preferences—no more, but certainly no less.

CONCLUSION

In a separate concurrence in the Connecticut teeth-whitening case, *Sensational Smiles*, Judge Christopher Droney observed, "If even the deferential limits on state action fall away simply because the regulation in question is economic, then it seems that we are not applying any review, but only disingenuously repeating a shibboleth."[186] Judge Droney's observation applies to our jurisprudence more generally. It is disingenuous to affirm that Americans possess a constitutional right to earn a living if judges must

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181 *See* Kry, *supra* note 73, at 894; Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 193 (2015).

182 Kry, *supra* note 73, at 894.

183 *Id.* at 895.

184 *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, 795-96 (2006) (finding that 30 percent of all applications of strict scrutiny by the district, circuit, and Supreme courts between 1990 and 2003 resulted in the challenged law being upheld).

185 United States v. Stevens, 559 U.S. 460, 473 (2010) (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008)) (internal quotation marks omitted).

186 Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 290 (2d Cir. 2015) (Droney, J., concurring), *cert. denied*, No. 15-507, 2016 WL 763255 (U.S. Feb. 29, 2016).

place their seal of approval upon occupational licensing laws that are supported by nothing but raw political will. It is disingenuous to insist that the government may not single out groups for burdens and benefits on the basis of raw political will if judges are forbidden to make any serious inquiry into the true ends of economic regulations. It is disingenuous to affirm that content-based restrictions on Americans' speech must receive strict judicial scrutiny if the government can silence speech about certain subjects simply by calling that speech "professional" or mere "conduct."

The proposals advanced in this Essay can be used to lay the foundations for an economic liberty jurisprudence that gives effect to constitutional safeguards against arbitrary power and is consistent with the Supreme Court's repeated pronouncements. If adopted, they would provide long-overdue judicial protection to the entrepreneurial endeavors of countless Americans who are striving even now to create a better life for themselves and their families.