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RATIONALIZING RATIONAL BASIS REVIEW

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ABSTRACT—As a government attorney defending economic legislation from a constitutional challenge under the Fourteenth Amendment—How would you rate your chances of success? Surely excellent. After all, hornbook constitutional law requires only the assembly of a flimsy underlying factual record for economic legislation to pass rational basis review.

But the recent uptick in courts questioning the credibility of legislative records might give pause to your optimism. As a growing body of scholarship has identified, the Supreme Court and federal courts of appeals increasingly invalidate laws under rational basis review despite the presence of an otherwise constitutionally sufficient legislative record. Under this "credibility-questioning" rational basis review, courts both ignore post hoc rationales that would legitimate a government interest and scrutinize the fit between the challenged statute's means and ends. Nevertheless, recent scholarship has overlooked why courts have, and should, engage in credibility-questioning rational basis review, particularly of economic legislation.

This Note proposes an answer: Courts should apply credibility-questioning rational basis review to economic legislation that (1) impedes liberty interests central to personhood, (2) burdens politically unpopular minority groups, or (3) benefits concentrated interest groups at the expense of diffuse majorities.

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It is not to be forgotten that what we call rational grounds for our beliefs are often extremely irrational attempts to justify our instincts.

—Thomas H. Huxley[†]

INTRODUCTION

Under the traditional model of rational basis review, courts defer to the credibility of legislative records when reviewing the constitutionality of laws touching on economic interests—a form of constitutional scrutiny this Note refers to as "deferential" rational basis review. But should courts occasionally view the credibility of such records with skepticism, rather than deference? And if so, when? As precedent now stands, the factual records underlying every type of economic legislation are subject only to deferential rational basis review, from child labor measures to minimum wage standards. Yet the liberty interests that these and other regulations infringe, and the legislative motivations behind them, are often vastly different.[1] This Note argues that courts should view the factual records

[†] THOMAS H. HUXLEY, ON THE NATURAL INEQUALITY OF MEN (1890), *reprinted in* METHODS AND RESULTS: ESSAYS 309, 310 n.1 (New York, D. Appleton & Co. 1899).

[1] Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065, 1066 (2013) (describing the Supreme Court's "policy of deference to legislative judgments on matters of economic import" as "trans-substantive" in that "[e]conomic regulations of every stripe

underlying economic legislation skeptically when that legislation (1) impedes liberty interests central to personhood, (2) burdens politically unpopular minority groups, or (3) benefits concentrated interest groups at the expense of diffuse majorities.

Supreme Court and circuit court case law suggest a breakdown of deferential rational basis review of certain economic legislation. Since 2002, three federal courts of appeals have questioned the credibility of the factual records underlying economic legislation before invalidating that legislation under rational basis review.[2] Given the Court's decades-long application of this alternative to deferential rational basis review to noneconomic legislation—a form of constitutional scrutiny this Note refers to as "credibility-questioning" rational basis review[3]—uses of it might otherwise seem to border the unremarkable.[4]

Nevertheless, five courts of appeals are divided as to whether the factual records underlying certain economic legislation, including occupational licensing measures, ought to be treated skeptically under rational basis review. Three courts of appeals have engaged in such credibility-questioning rational basis review of economic legislation,[5] while two have disavowed it in favor of deferential rational basis review.[6] That split deepened when the Supreme Court recently denied a petition for a writ of certiorari to review a Second Circuit case holding that economic

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are subject to minimum rational basis scrutiny, regardless of the importance of the infringed liberty interest or the legislative motivation underlying the particular statute").

[2] St. Joseph Abbey v. Castille, 712 F.3d 215, 223–24 (5th Cir. 2013); Merrifield v. Lockyer, 547 F.3d 978, 989–91 (9th Cir. 2008); Craigmiles v. Giles, 312 F.3d 220, 226–27 (6th Cir. 2002).

[3] *See* Bertrall L. Ross II, *The State as Witness:* Windsor*,* Shelby County*, and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. REV. 2027, 2031–32 (2014) (coining the phrase "credibility-questioning review" and describing how, under that form of review, "the Court questions whether the state's record can be believed as a complete and unbiased presentation of evidence related to the constitutionality of the law"). Commentators and courts have also referred to this enhanced style of review as "higher-order rational-basis review," "rational basis with bite," and "the second-order rational basis test," among other names. *See, e.g.*, Powers v. Harris, 379 F.3d 1208, 1223 n.21 (10th Cir. 2004) ("higher-order rational-basis review"); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 (1987) ("rational basis with bite"); Raynor, *supra* note 1, at 1065 ("second-order" rational basis review).

[4] Despite at least eighteen applications of a skeptical form of rational basis review, *see infra* note 91, the Supreme Court has yet to demarcate such a form of review from traditional rational basis review. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 459 n.4 (1985) (Marshall, J., concurring) (explaining that the Supreme Court's rational basis analysis in *Zobel v. Williams*, 457 U.S. 55 (1982), and *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), is generally "viewed as intermediate review . . . masquerading in rational-basis language").

[5] *See St. Joseph Abbey*, 712 F.3d at 223; *Merrifield*, 547 F.3d at 991; *Craigmiles*, 312 F.3d at 224–25.

[6] Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 284 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1160 (2016); *Powers*, 379 F.3d at 1224–25.

legislation is subject only to deferential rational basis review.[7] The Court's denial leaves unresolved the question of whether all economic legislation is subject only to deferential rational basis review or whether certain economic legislation is subject to credibility-questioning rational basis review.

This Note argues that a per se rule against the application of credibility-questioning rational basis review to certain economic legislation is inappropriate. The normative premises behind the Supreme Court's previous applications of credibility-questioning rational basis review require such review when economic legislation implicates those premises. These premises include a presumption against legislation that impedes liberty interests central to personhood or that burdens politically unpopular minority groups. Courts should thus apply credibility-questioning review to economic legislation that does either. Furthermore, principles from other sources—the "law of nations," or *ius gentium*,[8] and public choice theory—support the application of credibility-questioning review to certain economic legislation.

This Note proceeds in three parts. Part I discusses the constitutional framework the Supreme Court historically used to evaluate economic legislation. It then introduces the modern approach to rational basis review of economic legislation and finally examines the emergence of credibility-questioning rational basis review. Part II discusses the circuit split between the courts of appeals for the Second, Fifth, Sixth, Ninth, and Tenth Circuits regarding whether economic legislation, including occupational licensing measures, should be subject to deferential or credibility-questioning rational basis review. Part II also briefly discusses a related split between those courts of appeals as to whether pure economic protectionism is a legitimate government interest.

Next, Part III argues that Supreme Court precedent requires courts to treat the factual records underlying economic legislation skeptically under rational basis review if such legislation either impedes liberty interests central to personhood or burdens politically unpopular minority groups. Part III further argues that the *ius gentium* and public choice theory support a heightened review of the factual records underlying economic legislation enacted solely to benefit concentrated interest groups at the expense of diffuse majorities. Finally, Part III concludes by arguing that credibility-

[7] Sensational Smiles, 136 S. Ct. 1160.

[8] This Note's use of the Latin phrase "ius gentium" refers to "the law of nations in the more comprehensive sense—a body of law purporting to represent what various domestic legal systems share in the way of common answers to common problems." Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 133 (2005).

questioning review of such legislation need not entail a return to *Lochner v. New York*[9] or be used as a tool for judges to imprint their personal judgments on the law.

I. THE HISTORY AND EVOLUTION OF THE SUPREME COURT'S TREATMENT OF ECONOMIC LEGISLATION

The Supreme Court has charted two courses in its treatment of economic legislation. In the first several decades of the twentieth century, known as the *Lochner* era, the Court overturned a wide range of economic legislation on substantive due process grounds. The Court then retreated from the *Lochner* era by outlining a deferential model of judicial review under which it would presume the constitutionality of economic regulations so long as they were rational.

A. The History and Development of Rational Basis Review

1. Substantive Due Process and the Lochner *Era*

In the four decades between 1897 and 1937, the Supreme Court employed a rigorous form of judicial review to strike down a wide range of statutes that it found to have violated individuals' freedom of contract.[10] The Court first developed these arguments in several decisions in the 1890s,[11] and the reasoning underlying these cases continued into the twentieth century. In the 1905 case of *Lochner v. New York*, for example, the Court held that a New York statute regulating the hours bakery employees could work unduly interfered with their liberty of contract, a right the *Lochner* Court found was inherent in the Fourteenth Amendment's Due Process Clause.[12] The *Lochner* decision largely encapsulated the Court's review of economic legislation during this forty-year period,[13] in which the Court invalidated a wide range of state economic regulations on substantive due process grounds.[14]

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[9] 198 U.S. 45 (1905).

[10] *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (striking down a Louisiana statute on liberty of contract grounds); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 642–53 (5th ed. 2015) (discussing economic substantive due process).

[11] *See* David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 28 (2003).

[12] 198 U.S. at 53.

[13] *See* Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 21 (1991) (explaining that "despite the close vote in *Lochner*, *Lochner* era constitutionalism was widely popular among jurists in late nineteenth and early twentieth century America").

[14] *See supra* note 10 and accompanying text.

In *Lochner*, the Supreme Court emphasized that only a valid exercise of a state's police power could interfere with one's freedom of contract.[15] Because the challenged statute limited bakers to working ten hours a day and sixty hours a week,[16] the Court concluded that "[t]he statute necessarily interfere[d] with the right of contract between the employer and employés."[17] And because the statute had no relationship to public health—"[c]lean and wholesome bread does not depend upon" the number of hours bakers work—it was not a valid exercise of the state's police power.[18]

Lochner thus established what has been called a "classic substantive due process" regime: rather than using the Due Process Clause to ensure that laws would correctly follow constitutional procedure, the Supreme Court instead used the clause to ensure that laws have a satisfactory purpose.[19] The approach that *Lochner* established resulted in the striking down of nearly 200 laws as unconstitutional violations of the Due Process Clause.[20] Over the next three decades, the Court would employ this fundamental rights analysis in declaring unconstitutional laws protecting unionizing,[21] setting state minimum wages,[22] regulating prices,[23] and regulating business entry,[24] among others. However, a moribund economy that led to a markedly different approach to governance would end the *Lochner* era faster than it was created.[25]

2. *The Death of* Lochner *and the Emergence of Rational Basis Review*

Judicial chinks in the doctrine of *Lochner* first opened in the 1934 case of *Nebbia v. New York*, in which the Supreme Court upheld a statute

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[15] 198 U.S. at 53.

[16] *Id.* at 46 n.1.

[17] *Id.* at 53.

[18] *Id.* at 57.

[19] CHEMERINSKY, *supra* note 10, at 644.

[20] *Id.*

[21] Adair v. United States, 208 U.S. 161, 174 (1908) ("[I]t is not within the functions of government . . . to compel any person in the course of his business and against his will to accept or retain the personal services of another.").

[22] Adkins v. Children's Hosp., 261 U.S. 525, 561–62 (1923) (finding that a minimum wage law interfered with freedom of contract and did not serve a valid public purpose).

[23] Ribnik v. McBride, 277 U.S. 350, 355, 359 (1928) (overturning a law that set the maximum price for employment agencies); Tyson & Brother–United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 431 (1927) (invalidating a law that placed a ceiling on the price of theater tickets because it interfered with the freedom of contract).

[24] New State Ice Co. v. Liebmann, 285 U.S. 262, 278–79 (1932) (invalidating a law that prohibited the sale of ice without a permit because it intentionally created a monopoly).

[25] *See* CHEMERINSKY, *supra* note 10, at 649.

that set prices for milk.[26] The statute in question was designed to protect the purchasing power of milk producers by establishing a state milk control board.[27] In what has been recognized as the ushering in of a different standard to economic regulation,[28] the Court announced that "[p]rice control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."[29] By couching its opinion in such broad language, the *Nebbia* Court questioned the *Lochner* era principle of aggressively reviewing regulations' alleged purposes as valid exercises of a state's police power.[30] But what began in *Nebbia* as little more than a whisper would in three years turn into a shout.

The Supreme Court abandoned a fundamental rights style of analysis in 1937,[31] when it upheld as a reasonable exercise of the police power legislation setting minimum wages for female employees.[32] In *West Coast Hotel Co. v. Parrish*, the Court explicitly rejected freedom of contract as a substantive due process right and instead held that the government could regulate economic activity for a legitimate purpose.[33] The Court also explained that courts were to defer to the choices of legislatures so long as those choices were reasonable.[34]

Having introduced a new policy of judicial deference to economic legislation by abandoning its fundamental rights analysis, the Supreme Court, in the 1938 case of *United States v. Carolene Products Co.*,[35] then established the now-familiar levels of scrutiny used to analyze legislation

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[26] 291 U.S. 502, 519–20, 539 (1934).

[27] *Id*. at 518.

[28] *See, e.g.*, David N. Mayer, *The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the* Lochner *Era*, 36 HASTINGS CONST. L.Q. 217, 278 (2009) (describing the new standard as one "that seemed to turn on its head the general presumption in favor of liberty").

[29] *Nebbia*, 291 U.S. at 539.

[30] *See* CHEMERINSKY, *supra* note 10, at 650.

[31] *See, e.g.*, David E. Bernstein, Lochner*'s Legacy's Legacy*, 82 TEX. L. REV. 1, 11 (2003) (explaining that *West Coast Hotel Co. v. Parrish*, 300 U.S. 397 (1937), is "widely seen as signaling the end of the *Lochner* era"). *But see* Alan J. Meese, *Will, Judgment, and Economic Liberty: Mr. Justice Souter and the Mistranslation of the Due Process Clause*, 41 WM. & MARY L. REV. 3, 56 (1999) (arguing that *West Coast Hotel* "did not . . . overrule *Lochner* or any liberty of occupation case not involving an attempt to require [employers to pay their employees] a subsistence wage").

[32] W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) ("What is this freedom [of contract]? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law . . . . [R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.").

[33] *Id.* at 392–93.

[34] *See id* at 393.

[35] 304 U.S. 144 (1938).

under the Fourteenth Amendment.[36] In *Carolene Products*, the Court reaffirmed its holding in *West Coast Hotel* and articulated a dual standard of review that marked a doctrinal revolution.[37] In its famous Footnote Four, the Court outlined a bifurcated model of review characterized by strict scrutiny on the one hand and rational basis review on the other.[38] While the Court would generally presume the constitutionality of laws so long as they were rational, "a more searching judicial inquiry" would replace such deference in two circumstances[39]: when a law violated individual rights within the Constitution[40] or discriminated against a "discrete and insular minorit[y]."[41] And while the Court explained that the rationality threshold was low,[42] it further lowered it in the years to come.

3. Modern Rational Basis Review

Unlike strict or immediate scrutiny, in which courts actively assess the credibility of the factual record underlying the challenged statute,[43] the hallmark of rational basis review is the absence of skeptical treatment of the record. Under rational basis review, a plaintiff can win by showing one of two things. First, the plaintiff can show the statute does not further a legitimate government interest.[44] Second, the plaintiff can demonstrate that the government's legitimate interest—its end—is unconnected to its

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[36] *See* CHEMERINSKY, *supra* note 10, at 652.

[37] *See* Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1289–90 (1982) (describing how "[t]he terms of the modern debates on judicial activism were thus spawned" by *Carolene Products*, in which "[t]he Court committed itself to the now familiar dichotomy between the scope of review for economic legislation—a nearly absolute majoritarianism—and that afforded legislation affecting a vague and dimly perceived set of other 'personal' rights"); *see also* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 758 (2011) (explaining that *Carolene Products* is "[v]iewed by many as the fountainhead of the heightened scrutiny framework"). *But see* Sugarman v. Dougall, 413 U.S. 634, 656 (1973) (Rehnquist, J., dissenting) ("[Footnote Four] did not refer to 'searching judicial inquiry' when a classification is based on alienage, perhaps because there was a long line of authority holding such classifications entirely consonant with the Fourteenth Amendment."); Kovacs v. Cooper, 336 U.S. 77, 90–91 (1949) (Frankfurter, J., concurring) (arguing that *Carolene Products* "did not purport to announce any new doctrine").

[38] Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 496 (2004) ("*Carolene Products Co.* pronounced . . . that certain forms of governmental discrimination warrant closer review than others . . . ."); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3128 (2015) (stating that *Carolene Products* signaled "the initial development of the two-tiered structure of review").

[39] 304 U.S. at 152 n.4.

[40] *Id.*

[41] *Id.*

[42] *See id.* at 154 (noting that the threshold simply requires "any state of facts either known or which could *reasonably* be assumed" (emphasis added)).

[43] *See* LEE J. STRANG, CASES AND MATERIALS ON FEDERAL CONSTITUTIONAL LAW 221 (6th ed. 2013).

[44] *See* CHEMERINSKY, *supra* note 10, at 709.

means.[45] Nevertheless, because under deferential rational basis review courts largely defer to the underlying record, making either showing is virtually impossible.

Since the emergence of the deferential rational basis standard, plaintiffs have consistently failed to demonstrate that the challenged statute does not further a legitimate government interest.[46] This is largely because plaintiffs are required to "negative every conceivable basis which might support" the challenged statute.[47] By definition, then, deferential rational basis review does not require an assessment of the underlying record, and courts do not treat the government's evidence skeptically.[48] Because of this, courts have repeatedly followed the Supreme Court's lead in upholding challenged statutes on the basis of any number of imagined legitimate interests behind the statute.[49]

Plaintiffs have also consistently failed to demonstrate an unconstitutional disconnect between the means and ends of the challenged statute. As Professor Bertrall Ross has noted, the Supreme Court has repeatedly found a sufficient connection between the means and ends of both under- and overinclusive statutes.[50] The Court has given both the state and federal governments significant leeway in pursuing incremental reform for underinclusive statutes that target fewer amounts of individuals than

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[45] *See id.* at 714.

[46] *See, e.g.*, Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships*, 86 WASH. L. REV. 281, 288 (2011) (describing the inquiry into the legitimacy of a state's interest as "amount[ing] to virtually no review at all," because "[e]ven the most egregiously unfair laws could survive this kind of scrutiny"); 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) (referring to rational basis review as "minimal scrutiny in theory and virtually none in fact").

[47] Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973) (citation omitted).

[48] *See* Heller v. Doe, 509 U.S. 312, 319–20 (1993) (explaining that statutes which feature "a classification neither involving fundamental rights nor proceeding along suspect lines" are given "a strong presumption of validity," because states have "no obligation to produce evidence to sustain the [statute's] rationality").

[49] *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) (explaining that courts must uphold a challenged statute "if there is any reasonably conceivable state of facts that could provide a rational basis" for it); *see also, e.g.*, Locke v. Shore, 682 F. Supp. 2d 1283, 1290 (N.D. Fla. 2010) (upholding a Florida law banning the unlicensed practice of interior design on the grounds that the law "protect[ed] consumers from incompetent or poorly trained interior designers"); Meadows v. Odom, 360 F. Supp. 2d 811, 824 (M.D. La. 2005), *vacated as moot*, 198 F. App'x 348 (5th Cir. 2006) (upholding a Louisiana florist-licensing scheme on the grounds that broken wires, exposed picks, and infected flowers could "cause injury to a consumer").

[50] Ross, *supra* note 3, at 2064–65; *see also, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) ("The legislature may select one phase of one field and apply a remedy there, neglecting the others.").

would otherwise be constitutionally required.[51] Moreover, the Court has done the same for overinclusive statutes that target greater amounts of individuals than would otherwise be constitutionally required.[52] The takeaway is that in nearly every instance that the Court purportedly checks the means–end fit of a challenged statute under deferential rational basis review, it fails to question the government's motives by treating the underlying record skeptically.[53]

Modern constitutional law's doctrinal framework of subjecting economic legislation to a negligible level of judicial review—a level this Note argues is at odds with the judiciary's responsibility to protect liberty interests central to personhood, politically unpopular minority groups, and diffuse majorities—is perhaps best characterized by the Supreme Court's treatment of an occupational licensing measure twenty years after *Carolene Products*. In the 1955 case of *Williamson v. Lee Optical of Oklahoma, Inc.*, the Court deferentially reviewed the underlying record in upholding an Oklahoma statute that required a prescription from an ophthalmologist or optometrist to fit eyeglass lenses into frames.[54] The Court deferred to the record while ignoring evidence that the law was likely enacted at the behest of ophthalmologists and optometrists.[55]

The *Lee Optical* Court underscored this deference by providing a wide range of post hoc rationales as to why the Oklahoma legislature may have enacted the statute.[56] In doing so, it explained that "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a

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[51] *See, e.g.*, *Heller*, 509 U.S. at 321 ("A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." (internal quotation marks omitted)).

[52] *See* Ross, *supra* note 3, at 2065 n.175.

[53] *Cf.* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 357 (1999) (noting that from 1971 to 1996, the Supreme Court decided ten "successful rational basis claims under the Equal Protection Clause" while "reject[ing] rational basis arguments on one hundred occasions").

[54] 348 U.S. at 488.

[55] Indeed, the district court noted that the statute "serve[d] to prohibit the wearers of eyeglasses from exchanging their frames either to obtain more modern designs or because the former frames are broken, without first visiting an ophthalmologist or optometrist; and, which in turn divert[ed] from the optician a very substantial, as well as profitable, part of his business." Lee Optical of Okla., Inc. v. Williamson, 120 F. Supp. 128, 135 (W.D. Okla. 1954), *aff'd in part*, *rev'd in part*, 348 U.S. 483 (1955).

[56] 348 U.S. at 487 ("The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses . . . . But the legislature might have concluded that one was needed often enough to require one in every case. Or the legislature may have concluded that eye examinations were so critical . . . that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert.").

particular school of thought."[57] Because of this, the Supreme Court strongly suggested that economic legislation would be found unconstitutional only if a government attorney or Justice could not think of any conceivable rationale as to why the legislature passed it.[58]

That the rationale the Supreme Court offered in *Lee Optical* strained credulity was not lost on early observers, both in the academy and in the judiciary. On the academic side, the literature following *Lee Optical* tended to agree that the case was "[p]erhaps the best illustration[] of the extent to which the Court will go to uphold statutes attacked as unreasonable."[59] On the judicial side, courts were more than willing to engage in such acts of legal fiction. Take, for example, the South Carolina Supreme Court, which referenced the mythological Pierian Spring of Macedonia in providing its own post hoc rationale behind a naturopath licensing scheme.[60]

But decisions of both the Supreme Court and several courts of appeals have strained this rigid, if not fanciful, approach to judicial review.[61] While *Lee Optical* is but one of numerous examples of this tiered approach, "it [is] a fact," as Justice Ruth Bader Ginsburg noted at an oral argument in 2016, "that in the decisions of this Court, those tiers are not what they once were."[62]

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[57] *Id.* at 488.

[58] *See id.* at 487–88 ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

[59] Note, *Supreme Court Review of State Findings of Fact in Fourteenth Amendment Cases*, 14 STAN. L. REV. 328, 335 & n.34 (1962); *see also* Guy Miller Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463, 1471 & n.36 (1966) (criticizing the Court's review in *Lee Optical* as "effectively irrebuttable," given how it "interpreted literally" *Carolene Products*'s command that legislation should be assumed to "rest[] upon some rational basis within the knowledge and experience of the legislators" (internal quotation marks omitted)); Note, *Racial Discrimination in Housing*, 107 U. PA. L. REV. 515, 532 (1959) (describing how the Court in *Lee Optical* "indulge[d] in the presumption of the legislature's having determined some rational factual distinction which is not suggested by the statute itself or by common knowledge").

[60] Dantzler v. Callison, 94 S.E.2d 177, 187 (S.C. 1956) (explaining that the legislature, "[f]or good and sufficient reasons . . . may have concluded that 'a little learning is a dangerous thing' and that those who would undertake to treat or manipulate the human body must 'drink deep or touch not,'" which referenced, without citation to, Alexander Pope's description of the Pieran Spring of Macedonia—known in Greek mythology as a source of knowledge—in lines 217 and 218 of his poem, "An Essay on Criticism"). *But see* Gen. Motors Corp. v. Blevins, 144 F. Supp. 381, 398 (D. Colo. 1956) (stating that, notwithstanding *Lee Optical*'s deferential standard of review, "a state may not, under the guise of protecting the public interest, arbitrarily interfere with private business by the use of unusual and unnecessary restrictions upon lawful occupations").

[61] *See infra* Sections I.B, II.A–D.

[62] Transcript of Oral Argument at 12–13, Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017) (No. 15-606).

B. A More Searching Inquiry: Credibility-Questioning Rational Basis Review

While the Supreme Court has not officially recognized credibility-questioning rational basis review,[63] a large body of literature has steadily developed over the past four decades suggesting that it has all but done so.[64] The idea is that the Court, in evaluating the constitutionality of a statute under the rational basis test, sometimes gives a more demanding inquiry into whether the government's interest is legitimate and into whether the challenged statute's means appropriately fit its ends.[65] When the Court utilizes this approach, it goes beyond mere speculation regarding the government's supposed interest and looks for evidence in the underlying record that demonstrates the government's motive. When reviewing the record, the Court becomes skeptical of post hoc rationales and does not shy away from marking the outer boundaries of the federal government's interests or the states' police power.

Three Supreme Court cases—*Department of Agriculture v. Moreno*,[66] *Lawrence v. Texas*,[67] and *United States v. Windsor*[68]—continued to fill in the details of the Court's portrait of credibility-questioning rational basis review that it first began to sketch decades ago.[69] Each case represents a

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[63] Powers v. Harris, 379 F.3d 1208, 1223–24 (10th Cir. 2004) ("Despite the hue and cry from all sides, no majority of the Court has stated that the rational-basis review found in *Cleburne* and *Romer v. Evans* . . . differs from the traditional variety . . . .").

[64] *See, e.g.*, Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049, 1055 n.35 (1979) (discussing a line of cases in which the Court applied a heightened standard of review to find legislation unconstitutional); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 312–16 (1997) (same); R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 225–26 (2002) (arguing that the Court applies not just four standards of review—strict scrutiny, intermediate scrutiny, heightened rational basis review, and rational basis review—but seven).

[65] *See, e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting) ("The [equal protection] model's two fixed modes of analysis, strict scrutiny and mere rationality, simply do not describe the inquiry the Court has undertaken—or should undertake—in equal protection cases. Rather, the inquiry has been much more sophisticated and the Court should admit as much.").

[66] 413 U.S. 528 (1973).

[67] 539 U.S. 558 (2003).

[68] 133 S. Ct. 2675 (2013).

[69] Commentators generally agree that the Supreme Court's modern use of credibility-questioning rational basis review began in *Reed v. Reed*, 404 U.S. 71 (1971). *See, e.g.*, Gunther, *supra* note 46, at 32 (explaining that *Reed* "provide[s] some evidence that the Court is ready to employ a vitalized old equal protection more broadly" and represents a step "into less accustomed terrain"). In *Reed*, the Court struck down as a violation of the Equal Protection Clause of the Fourteenth Amendment an Idaho statute that gave preference to men over women as administrators of estates. 404 U.S. at 76–77. It did so despite an otherwise rational basis for the law: "reducing the workload on probate courts by eliminating one class of contests." *Id.* at 76.

departure from the Court's traditional approach to the review of legislation, whereby legislation would either survive all but the most significant constitutional challenges under rational basis review or be struck down by less robust challenges under strict scrutiny.

First, in 1973, the Supreme Court expanded its skepticism of regulations burdening minority groups that it first espoused in *Carolene Products* by striking down a provision of the Food Stamp Act in *Department of Agriculture v. Moreno*.[70] That provision excluded households containing individuals unrelated to other household members from acquiring food stamps.[71] In holding the challenged provision of the Act unconstitutional, the Court implemented the two primary features of credibility-questioning review: ignoring post hoc rationales that would otherwise legitimate a government interest[72] and scrutinizing the fit between the challenged statute's means and ends.[73]

The *Moreno* Court first examined the underlying record, which explained that the provision "was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."[74] In evaluating this portion of the record, the Court ignored the government's proffered rationale of the statute, which was to prevent fraud.[75] The Court then held that the means–end fit of the Food Stamp Act was unconstitutionally attenuated.[76] It noted that the means of the Act excluded those "who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility."[77] According to the Court, this overinclusiveness could not pass constitutional muster.[78]

Next, in 2003, the Supreme Court in *Lawrence v. Texas* struck down as a violation of due process a Texas law that prohibited same-sex sodomy.[79] Because the Court did not recognize same-sex sodomy as a fundamental right, strict scrutiny was not applicable.[80] Instead, the Court employed what has been widely acknowledged as a heightened standard of review more similar to credibility-questioning than deferential rational

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[70] 413 U.S. at 538.

[71] *Id.* at 529.

[72] *Id.* at 534–35.

[73] *Id.* at 536–38.

[74] *Id.* at 534. The Court was quoting a statement made by Senator Spessard Holland, as reflected in the Act's Conference Report. 116 CONG. REC. 44,439 (1970).

[75] *Moreno*, 413 U.S. at 535–36.

[76] *Id.* at 536–38.

[77] *Id.* at 538.

[78] *Id.*

[79] 539 U.S. 558, 562, 578–79 (2003).

[80] *Id*. at 586 (Scalia, J., dissenting).

basis review.[81] As in *Moreno*, the Court ignored several of the rationales the state offered to justify its interest in passing the law.[82] While the state argued that the legislature passed the law due to its legitimate interest in avoiding litigation, promoting morality, and protecting the family,[83] the Court found none of these motives constitutionally sufficient.[84] In addition, the Court rejected at least five other post hoc rationales, explaining that the case did not "involve minors," "public conduct or prostitution," or other purported interests offered to justify the law's purpose.[85]

Finally, in 2013, the Supreme Court in *United States v. Windsor* followed the credibility-questioning approach it took in *Moreno* and *Lawrence* in explaining that it would carefully consider, by examining the record, whether the interest behind the challenged law was legitimate.[86] In *Windsor*, the Court invalidated the Defense of Marriage Act's (DOMA) definition of marriage as "a legal union between one man and one woman as husband and wife."[87] As Justice Antonin Scalia noted in dissent, the majority did not apply a fundamental rights analysis and thus strict scrutiny did not guide its decision.[88] Nevertheless, the Court paid particular attention to the DOMA House Report, a portion of which stated that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage."[89] The Court also highlighted two other portions of the Report: first, a statement that labeled a same-sex conception of marriage as "a truly radical proposal that would fundamentally alter the institution of marriage"; and second, a statement describing DOMA as a "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."[90]

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[81] *See, e.g.*, Michael A. Scaperlanda, *Illusions of Liberty and Equality: An "Alien's" View of Tiered Scrutiny, Ad Hoc Balancing, Governmental Power, and Judicial Imperialism*, 55 CATHOLIC U. L. REV. 5, 6 (2005) (explaining that the *Lawrence* Court's rational basis review typified a "new regime of ad hoc or sliding scale balancing"); Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2770 (2005) (explaining that the *Lawrence* Court's use of rational basis review was "a type of heightened scrutiny").

[82] *Lawrence*, 539 U.S. at 578.

[83] Brief of Respondent at 41–48, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

[84] *Lawrence*, 539 U.S. at 578.

[85] *Id.*

[86] 133 S. Ct. 2675, 2693 (2013).

[87] *Id.* at 2683 (quoting 1 U.S.C. § 7 (2012)).

[88] *Id.* at 2706–07 (Scalia, J., dissenting) ("The majority never utters the dread words 'substantive due process,' perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements mean.").

[89] *Id.* at 2693 (quoting H.R. REP. NO. 104-664, at 12 (1996)).

[90] *Id.* (quoting H.R. REP. NO. 104-664, at 12, 16).

These three cases illustrate how the Supreme Court occasionally colors its rational basis review of a challenged statute with the statute's underlying motivation and ignores the varying rationales and interests the government provides as justifications for the statute at issue.[91] In such circumstances, evidence of legislative intent to prejudice the class of regulated persons need only be circumstantial, rather than conclusive.[92] Several of the Justices' concurring opinions have expressly acknowledged that the Court sometimes applies credibility-questioning rational basis review.[93] The critical question, then: when does, and when should, the "sometimes" occur?[94] Five federal courts of appeals are divided on that question.

II. A CIRCUIT SPLIT ENDURES

The Supreme Court has opaquely used credibility-questioning rational basis review since at least 1971,[95] a type of review this Note argues should apply to economic legislation that (1) impedes liberty interests central to personhood, (2) burdens politically unpopular minority groups, or (3) benefits concentrated interest groups at the expense of diffuse majorities. But given the Court's failure to precisely contour the boundaries of credibility-questioning rational basis review, inconsistency over its application has plagued the federal courts of appeals for decades. This inconsistency is captured by a current circuit split regarding two closely related issues: first, whether statutes infringing on economic liberty should

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[91] *See* Raynor, *supra* note 1, at 1080.

[92] *See id.* at 1083.

[93] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review."); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 458 (1985) (Marshall, J., concurring) ("[T]he rational-basis test invoked today is most assuredly not the rational-basis test of [prior cases] and their progeny.").

[94] *See* Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 898, 911, 912 n.75 (2005) (citing four cases "in which the Supreme Court has arguably strayed from the literal commands of the rational basis test"). Add to the list an additional fourteen cases. *See* Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2076 (identifying the following eighteen cases in which the Court treated the record skeptically: United States v. Windsor, 133 S. Ct. 2675 (2013); Romer v. Evans, 517 U.S. 620 (1996); Quinn v. Millsap, 491 U.S. 95 (1989); Allegheny Pittsburgh Coal Co. v. Cty. Comm'n, 488 U.S. 336 (1989); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612 (1985); Williams v. Vermont, 472 U.S. 14 (1985); Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985); Plyler v. Doe, 457 U.S. 202 (1982); Zobel v. Williams, 457 U.S. 55 (1982); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973); James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Lindsey v. Normet, 405 U.S. 56 (1972); Reed v. Reed, 404 U.S. 71 (1971)).

[95] *See supra* note 65 and accompanying text.

be subjected to credibility-questioning rational basis review; and second, whether pure economic protectionism is a legitimate government interest. Courts of appeals have diverged widely on these two issues, producing many close decisions, concurrences, and dissents.[96] Further complicating the circuit split is the Supreme Court's 2016 denial of a petition for a writ of certiorari to review *Sensational Smiles, LLC v. Mullen*, a Second Circuit case holding that economic legislation is not subject to credibility-questioning rational basis review and that pure economic protectionism is a legitimate government interest.[97]

Of the five courts of appeals that have considered which form of rational basis review courts should apply to economic legislation, only the Sixth Circuit has affirmatively supported credibility-questioning review.[98] Nevertheless, the Ninth Circuit, while purportedly relying on deferential rational basis review to invalidate economic legislation, has strayed more closely to credibility-questioning review than it has led on.[99] The Fifth Circuit has employed similar reasoning—deferential rational basis review in name only.[100] The Tenth and Second Circuits, however, have expressly disavowed credibility-questioning review.[101]

The issue of whether pure economic protectionism is a legitimate government interest is also the subject of a circuit split, though narrower. Aside from the Second Circuit, only the Tenth Circuit has concluded that pure economic protectionism is a legitimate government interest. The Fifth, Sixth, and Ninth Circuits have found the opposite. The scorecard on these issues currently stands as follows:

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[96] *See* Sensational Smiles, LLC v. Mullen, 793 F.3d 281 (2d Cir. 2015); St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013); Merrifield v. Lockyer, 547 F.3d 978 (9th Cir. 2008); Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004); Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002).

[97] *See Sensational Smiles*, 793 F.3d 281 (2d Cir.), *cert denied*, 136 S. Ct. 1160 (2016).

[98] *See Craigmiles*, 312 F.3d at 228–29 ("None of the justifications offered by the state satisfies the slight review required by rational basis review under the Due Process and Equal Protection clauses of the Fourteenth Amendment. As this court has said, 'rational basis review, while deferential, is not toothless.'" (citation omitted)).

[99] *See Merrifield*, 547 F.3d at 991 (explaining that the "singling out" of one class of producer "in connection with a rationale so weak that it undercuts the principle of non-contradiction, fails to meet the relatively easy standard of rational basis review . . . . Needless to say, while a government need not provide a perfectly logically solution to regulatory problems, it cannot hope to survive rational basis review by resorting to irrationality." (emphasis omitted)).

[100] *See St. Joseph Abbey*, 712 F.3d at 226. ("The great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation.").

[101] *See Sensational Smiles*, 793 F.3d at 285 ("[I]t is not the role of the courts to second-guess the wisdom or logic of the State's decision to credit one form of disputed evidence over another."); *Powers*, 379 F.3d at 1221 (declining to skeptically review the record of a licensing statute and stating that a "mere[] . . . citation to [*Lee Optical*] would have sufficed to dispose" of the case).

Court of Appeals	Should statutes that limit occupational freedom be subject to credibility-questioning rational basis review?	Is pure economic protectionism a legitimate government interest?
Sixth Circuit: *Craigmiles v. Giles* (2002)	Yes	No
Ninth Circuit: *Merrifield v. Lockyer* (2008)	Maybe	No
Fifth Circuit: *St. Joseph Abbey v. Castille* (2013)	Maybe	No
Tenth Circuit: *Powers v. Harris* (2004)	No	Yes
Second Circuit: *Sensational Smiles, LLC v. Mullen* (2015)	No	Yes

A. The Sixth Circuit: Craigmiles v. Giles

The strongest use of credibility-questioning rational basis review of economic legislation in the federal courts of appeals came in *Craigmiles v. Giles*, in which the Sixth Circuit held that a licensing statute violated the Due Process and Equal Protection Clauses because it served no other purpose than to impose an entry barrier to market competition.[102] That statute, the Tennessee Funeral Directors and Embalmers Act (FDEA), forbade non-state-licensed funeral directors from selling funeral merchandise.[103] The plaintiffs, who sold caskets but did not engage in any funeral services,[104] successfully sought an injunction against the FDEA's enforcement in the district court.[105]

[102] 312 F.3d at 228–29.

[103] *See id*. at 222. The FDEA's requirements for obtaining a license were onerous, requiring either a two-year apprenticeship or the completion of one year of academic study at an accredited mortuary school and a one-year apprenticeship with a licensed funeral director. *See id.*

[104] *Id*. at 222–23.

[105] The district court issued an injunction on the grounds that no health or safety reason—the ostensible purpose of the FDEA—was rationally related to the FDEA's licensing requirements. *See* Craigmiles v. Giles, 110 F. Supp. 2d 658, 665, 667 (E.D. Tenn. 2000), *aff'd*, *Craigmiles*, 312 F.3d 220.

The Sixth Circuit affirmed the district court's decision after reciting the traditional requirements of deferential rational basis review.[106] But in doing so, it aggressively scrutinized the underlying record and the rationales that the state offered in support of the FDEA.[107] After surveying the legislative history of the FDEA, the court held that the legislature's rationales—public health and safety and consumer protection—"come close to striking us with the force of a five-week-old, unrefrigerated dead fish."[108] This was the case, the court stated, because the FDEA licensing requirements were a plain attempt to prevent competition.[109]Acknowledging that while "only a handful of provisions have been invalidated for failing rational basis review," the court expressly stated that the case before it should be among that handful.[110] In two important respects, the court departed from deferential rational basis review: the court (1) heavily focused on the motivation of the state legislature as evidence of the state's interest and (2) conducted a means–end analysis by examining the fit between the FDEA and its ostensible purpose.[111] It thus engaged in the two primary features of credibility-questioning rational basis review.[112]

Having found no rational relationship between the FDEA and the state's proffered interests, the court was left to consider the legitimacy of the FDEA's plain purpose of economic protectionism.[113] While the court did not engage in a detailed analysis of what renders economic protectionism "obvious[ly] illegitimate,"[114] it suggested that its illegitimacy derives from a state's attempt to protect monopoly rents that state-privileged businesses can extract from consumers.[115] In addition, the court explained that protectionist measures such as the FDEA are illegitimate because they "harm[] consumers in their pocketbooks" by protecting businesses from competition.[116]

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[106] Under such review, statutes are entitled to a "strong presumption of validity," *Craigmiles*, 312 F.3d at 224, and will survive challenges if they bear "some rational relation to a legitimate state interest," *id*. at 223 (citing *Romer v. Evans,* 517 U.S. 620, 632 (1996)).

[107] *See id*. at 225–28.

[108] *Id*. at 225 (internal quotation marks and citations omitted).

[109] *Id.*

[110] *Id*. Significantly, the court cited both *Romer v. Evans* and *City of Cleburne v. Cleburne Living Center*, two prominent credibility-questioning rational basis cases, for support. *Id.*

[111] *See id*. at 227 ("The Supreme Court, employing rational basis review, has been suspicious of a legislature's circuitous path to legitimate ends when a direct path is available." (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985))).

[112] *See supra* notes 69–70.

[113] *Craigmiles*, 312 F.3d at 228.

[114] *Id*.

[115] *See id*.

[116] *Id*.

B. The Ninth Circuit: Merrifield v. Lockyer

In *Merrifield v. Lockyer*, the Ninth Circuit purportedly relied on deferential rational basis review to strike down a California law that required nonpesticide pest control operators to obtain licenses through a two-year process.[117] However, like the Sixth Circuit in *Craigmiles*, its analysis resembled the application of credibility-questioning rational basis review.

While the court approvingly quoted *Lee Optical* and other deferential rational basis review cases, it nevertheless engaged in credibility-questioning review by examining the statute's underlying record, the state's supposed interest, and whether the statute's means fit its supposed end.[118] The record demonstrated that the challenged law was amended to exempt from the licensing requirement certain pest control operators but not others, including the plaintiff,[119] which led California's Structural Pest Control Board to order the plaintiff to cease and desist his pest control operation.[120] The court explained that while the licensing law was connected to the state's interest in public health and safety, it "was designed to favor economically certain constituents at the expense of others similarly situated, such as [the plaintiff]."[121] Moreover, the court expressly questioned the record's credibility by noting that the exemption at issue was protectionist in nature.[122] According to the Ninth Circuit, the law violated the Equal Protection Clause; it noted without further explanation that "economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest."[123] So the court, while professing to rely on the deferential rational basis review à la *Lee Optical*, employed credibility-questioning review to strike down a purely protectionist licensing measure.

C. The Fifth Circuit: St. Joseph Abbey v. Castille

Similar to *Merrifield*, the Fifth Circuit in *St. Joseph Abbey v. Castille* did not expressly rely on credibility-questioning review but nevertheless

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[117] 547 F.3d 978 (9th Cir. 2008).

[118] *See id.* at 988.

[119] Specifically, the amendment exempted operators "engaged in the live capture and removal or exclusion of vertebrate pests," defining vertebrates narrowly to include "bats, raccoons, skunks, and squirrels," but not "mice, rats, or pigeons." *Id.* at 981–82.

[120] *Id.* at 981.

[121] *Id*. at 991.

[122] The court noted that "the record highlights that the irrational singling out of three types of vertebrate pests from all other vertebrate animals was designed to favor economically certain constituents at the expense of others similarly situated, such as Merrifield." *Id.*

[123] *Id*. at 992 n.15.

struck down a Louisiana licensing measure by examining the state's supposed interest and whether the measure's means fit its end.[124] Like the licensing regulation in *Craigmiles*,[125] the Louisiana regulation forbade unlicensed funeral directors from selling caskets.[126] The plaintiffs, Benedictine monks, had invested $200,000 into their casket-selling business to support their abbey.[127] However, shortly before their business was to open, the Louisiana Board of Embalmers and Funeral Directors ordered the monks to cease and desist their casket operation,[128] an action the district court found unconstitutional.[129]

The Fifth Circuit openly questioned the credibility of the underlying record. The court justified its skeptical approach by explaining that "[t]he great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation."[130] It thus agreed with the *Craigmiles* court that "neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose."[131] Despite the fact that, pursuant to *Lee Optical*, "economic protection, that is favoritism, may well be supported by a post hoc perceived rationale,"[132] the court engaged in a more rigorous inquiry into the state's rationales that could warrant the licensing regulation.[133] Finding no rational basis for the casket-licensing regulation, the court affirmed the district court's holding that the regulation denied the monks equal protection and due process of law.[134]

D. The Tenth Circuit: Powers v. Harris

Unlike the Sixth, Ninth, and Fifth Circuits, the Tenth Circuit in *Powers v. Harris* did not engage in credibility-questioning rational basis review when it upheld an Oklahoma licensing regulation.[135] Similar to the

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[124] St. Joseph Abbey v. Castille, 712 F.3d 215, 226–27 (5th Cir. 2013).

[125] *See supra* notes 101–02 and accompanying text.

[126] *St. Joseph Abbey*, 712 F.3d at 217–18.

[127] *Id.* at 217.

[128] St. Joseph Abbey v. Castille, 835 F. Supp. 2d 149, 154 (E.D. La. 2011), *aff'd* 712 F.3d 215 (5th Cir. 2013).

[129] *Id.* at 160.

[130] *St. Joseph Abbey*, 712 F.3d at 226.

[131] *Id.* at 222.

[132] *Id.* at 222–23.

[133] *See id*. at 223–26.

[134] *Id.* at 227.

[135] *See* 379 F.3d 1208, 1225 (10th Cir. 2004).

licensing regulations in *Craigmiles* and *St. Joseph Abbey*,[136] the Oklahoma regulation provided that only licensed funeral directors could sell funeral merchandise, including caskets.[137] The plaintiffs sought to sell their caskets over the internet and asserted on appeal that because the licensing regulation's sole purpose was to prevent them and other would-be casket sellers from entering the funeral-merchandise market, it did not serve a legitimate government interest.[138]

The court declined to treat the underlying record skeptically, explaining that its role was not to question the motives of the legislature and that "no majority of the [Supreme] Court" has expressly recognized nondeferential rational basis review.[139] Deferring to the record, the court noted that if pure economic protectionism was a legitimate state interest, then the regulation would satisfy rational basis review because its various requirements were related to such an interest.[140] And because, in its view, the Supreme Court has held that "favoring one particular intrastate industry, absent a specific federal constitutional or statutory violation, is a legitimate state interest," so too was pure economic protectionism.[141] Having concluded that such protectionism was a legitimate state interest, the court held that the licensing measure did not fail rational basis review.[142]

E. The Second Circuit: Sensational Smiles v. Mullen

Given the existing split, the Second Circuit in 2015 had an opportunity to either render the Tenth Circuit's reasoning in *Powers v. Harris* an outlier or join it, thereby further muddling the picture. In *Sensational Smiles*, the

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[136] *See supra* notes 102–103, 121 and accompanying text.

[137] *Powers*, 379 F.3d at 1211. To obtain a funeral director's license, the regulation required an applicant to complete sixty hours of undergraduate coursework and a one-year apprenticeship. *Id.* at 1212. Moreover, the regulation required licensees' businesses to "have a fixed physical location, a preparation room that meets the requirements for embalming bodies, a funeral-service merchandise-selection room with an inventory of not less than five caskets, and adequate areas for public viewing of human remains." *Id*. at 1212–13.

[138] *Id.* at 1213, 1215–16.

[139] *Id*. at 1223–24.

[140] *See id.* at 1222.

[141] *Id.* at 1220. Chief Judge Timothy Tymkovich's concurrence took a nondeferential approach to arrive at the same conclusion. He noted that that the four Supreme Court decisions the majority relied on rested on a foundation that was missing in the regulation at issue: "the discriminatory legislation arguably advance[d] either the general welfare or a public interest." *Id.* at 1225 (Tymkovich, C.J., concurring). He noted that even in *Lee Optical*, the Court rested its holding on consumer protection and health-related interests. *Id.* at 1225–26. Consequently, he stated that no Supreme Court case "holds that the bare preference of one economic actor while furthering no greater public interest advances a 'legitimate state interest.'" *Id.* at 1226.

[142] *Id*. at 1211 (majority opinion).

Second Circuit chose the latter, holding that economic legislation is subject only to deferential rational basis review and that pure economic protectionism is a legitimate state interest.[143] Given the Supreme Court's denial of certiorari to review the case,[144] its holding remains law and the circuit split has deepened.

The regulation at issue in *Sensational Smiles* was a declaratory ruling issued by Connecticut's State Dental Commission establishing that only licensed dentists could provide certain teeth-whitening procedures, including pointing a light-emitting diode (LED) at someone's teeth.[145] After receiving a cease-and-desist letter from the Connecticut State Department of Health, the plaintiffs, who operated a nondentist teeth-whitening business, sought injunctive relief.[146] The plaintiffs asserted that the declaratory ruling was not rationally related to the state's proffered public safety rationale, pointing to the undisputed evidence in the record demonstrating that using LED lights for teeth whitening was harmless.[147] The district court disagreed.[148]

Like the district court, the Second Circuit upheld the constitutionality of the declaratory ruling under deferential rational basis review.[149] The court expressly declined the plaintiffs' invitation to review the underlying record critically by focusing on the State Dental Commission's motivation as evidence of the state's interest.[150] The court also deferred to the record when it examined the fit between the declaratory ruling's means and its supposed end.[151] The court offered several post hoc rationales, including the hypothetical conclusion on behalf of the dental commission that customers seeking to use LED lights for teeth-whitening purposes "should first

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[143] 793 F.3d 281, 284, 286 (2d Cir. 2015).

[144] Sensational Smiles, LLC v. Mullen, 136 S. Ct. 1160 (2016).

[145] Martinez v. Mullen, 11 F. Supp. 3d 149, 153–54 (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).

[146] *Sensational Smiles*, 793 F.3d at 283–84.

[147] *See* Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 1–2, Martinez v. Mullen, 11 F. Supp. 3d 149 (D. Conn. 2014) (No. 3:11-CV-01787-MPS) ("[L]iterally millions of people worldwide have had their teeth whitened in this manner without a single reported incident of significant or permanent harm.").

[148] *Martinez*, 11 F. Supp. 3d at 160, 169. In reviewing the plaintiff's claim, the district court noted the possibility of applying credibility-questioning rational basis review but opted to apply the deferential version instead. *Id.* at 160 (quoting Windsor v. United States, 699 F.3d 169, 180 (2d Cir. 2012)). Indeed, the court noted that rational basis review's "teeth are dull and [its] bite rare." *Id*.

[149] *Sensational Smiles,* 793 F.3d at 283.

[150] *Id.* at 286.

[151] *See id*. at 284 ("[W]e are required to uphold the classification 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" (quoting Heller v. Doe, 509 U.S. 312, 320 (1993))).

receive an individualized assessment of their oral health by a dentist."[152] Finding "*some* relationship (however imperfect) between the Commission's rule" and inconclusive evidence that LED lights may harm consumers, the court deferred to the record and held that the licensing rule did not deprive the plaintiffs of due process or equal protection.[153]

In dicta, the court assumed for the sake of argument that the licensing regulation's sole purpose was economic protectionism to weigh in on the issue of whether such protectionism constitutes a legitimate state interest.[154] It joined the Tenth Circuit by concluding that pure "economic favoritism is rational for purposes of our review of state action under the Fourteenth Amendment," explaining that its decision was "guided by precedent, principle, and practicalities."[155]

In short, the courts of appeals disagree over the normative premises that have motivated, and should motivate, the Supreme Court to engage in credibility-questioning rational basis review. Part III seeks to resolve that disagreement.

III. CREDIBILITY-QUESTIONING RATIONAL BASIS REVIEW AND ECONOMIC LEGISLATION

The specter of implicit normative premises looms behind every application of rational basis review.[156] A shift from deferential rational basis review to credibility-questioning review, then, is a shift of normative priorities.[157] The "invocation of 'rationality' masks the processes that are actually at work," because virtually any statute can be upheld as rational.[158] As such, an issue courts confront when subjecting economic legislation to rational basis review—be it of the deferential or credibility-questioning variety—is whether such legislation promotes a goal worth pursuing.

Determining which normative premises have and should lead the Supreme Court to apply credibility-questioning rational basis review is the

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[152] *Id*. at 285.

[153] *Id*.

[154] *See id.* at 286.

[155] *Id*. Regarding precedent, the court explained that "[t]he simple truth is that the Supreme Court has long permitted state economic favoritism of all sorts." *Id.* It also pointed out that "much of what states do is to favor certain groups over others on economic grounds. We call this politics." *Id.* at 287.

[156] *See, e.g.*, Andrew Koppelman, *DOMA,* Romer*, and Rationality*, 58 DRAKE L. REV. 923, 932 (2010) (stating that several cases challenging the Defense of Marriage Act "display[] the implicit normative premises of rational basis analysis").

[157] *Cf. id*. at 924 (explaining that the cultural "shift is really one of normative priorities").

[158] *Id.* at 924; *see id*. at 932 ("A law that bans the driving of blue Volkswagens on Tuesdays is rationally—indeed, perfectly—related to the purpose of preventing blue Volkswagens from being driven on Tuesdays.").

issue that needs solving. This Part proposes a solution. It first argues that the normative premises behind the Supreme Court's use of credibility-questioning rational basis review justify its use for economic legislation that implicates those premises. These premises include a presumption against legislation that impedes liberty interests central to personhood and legislation that burdens politically unpopular minority groups. Next, this Part argues that the *ius gentium* and public choice theory support credibility-questioning review of economic legislation that results from industry capture.

A. The Normative Premises Currently Behind the Supreme Court's Application of Credibility-Questioning Rational Basis Review

Two premises have formed the basis of the Supreme Court's application of credibility-questioning rational basis review: a presumption against legislation that impedes liberty interests central to personhood and a presumption against legislation that burdens politically unpopular minority groups. The three cases discussed in Part I—*Department of Agriculture v. Moreno*, *Lawrence v. Texas*, and *United States v. Windsor*[159]—evidence these two concerns. While *Lawrence* and *Windsor* require credibility-questioning review of legislation that restricts liberty interests central to personhood, *Moreno* and *Windsor* demand such review of legislation that burdens politically unpopular minority groups.[160] The decisions thus represent a shift in normative priorities and of goals worth pursuing that did not previously exist within the rigid architecture of *Carolene Products*.

1. A Presumption Against Legislation that Impedes Liberty Interests Central to Personhood

Only after the *Lawrence* and *Windsor* majorities explained that the legislation at issue restricted liberty interests did they apply credibility-questioning review. In both cases, the Supreme Court repeatedly described the regulated behavior at issue by referencing personal dignity and autonomy. *Lawrence*, for example, opens not by cabining the discussion to same-sex private conduct but by explaining in broad language that "[t]he instant case involves liberty of the person both in its spatial and in its more transcendent dimensions."[161] Building on the themes of dignity and

[159] *See supra* Section I.B.

[160] *See* Raynor, *supra* note 1, at 1089–101. While Raynor characterizes what this Note identifies as credibility-questioning rational basis review as "second-order" review, he argues that "[r]egulations that contravene certain specified autonomy interests or that are motivated by animus merit review under the second-order rational basis test." *Id.* at 1068.

[161] 539 U.S. 558, 562 (2003). The Court also quoted a similarly broad statement regarding liberty interests from *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992), further underscoring

autonomy, the *Lawrence* Court explained that the restriction at issue violated the Fourteenth Amendment not because of the specific conduct it prohibited but because it "demean[ed] [petitioners'] existence" and "control[led] their destiny" by criminalizing their private conduct.[162] In addition, the *Windsor* Court explained that the *Lawrence* Court's concern with the challenged law demeaning the petitioners' existence was related not just to sexual choices but also to other moral choices as well.[163] The Court's endorsement of credibility-questioning review of legislation that restricts liberty interests central to personhood is further underscored by *Windsor*'s recognition that under both the Fifth and Fourteenth Amendments, the government does not have "the power to degrade or demean."[164]

While *Lawrence* and *Windsor* address statutes related to same-sex behavior, the broad descriptions of liberty interests in both cases extend to several economic liberty interests, including occupational freedom. Commenting on *Lawrence*, Austin Raynor correctly notes that the decision "expresses a heightened level of judicial solicitude for liberty interests that are crucial to individual flourishing, *regardless* of the specific content of those interests."[165] So too of *Windsor*, which is replete with references to dignity.[166] Thus, as Raynor notes, "economic freedoms clearly are not disqualified from inclusion in the category of rights 'central to personal dignity and autonomy.'"[167]

Indeed, the Supreme Court has recognized that the right to work is "of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."[168] This makes sense, given that the ability to choose one's career free from entry barriers often

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the notion that the Court has not sought to cabin its descriptions of personal dignity and autonomy solely to any one issue. *See Lawrence*, 539 U.S. at 574 ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.").

[162] *Id.* at 578.

[163] 133 S. Ct. 2675, 2694 (2013) (explaining that DOMA "demeans the couple, whose moral and sexual choices the Constitution protects").

[164] *Id.* at 2695.

[165] Raynor, *supra* note 1, at 1079.

[166] *See, e.g.*, 133 S. Ct. at 2694 ("Responsibilities, as well as rights, enhance the dignity and integrity of the person.").

[167] Raynor, *supra* note 1, at 1079 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

[168] Truax v. Raich, 239 U.S. 33, 41 (1915).

brought about by inside groups is, in the words of the *Lawrence* Court, "central to personal dignity and autonomy."[169] That is at least in part because careers are often at the center of many persons' lives. As such, the ability to freely choose an occupation absent undue state interference enables one to fully realize his or her interests and ambitions. Because occupational freedom is tied to liberty interests central to personhood, *Lawrence* and *Windsor* support the application of credibility-questioning rational basis review to certain economic legislation, including occupational licensing measures.

2. A Presumption Against Legislation that Burdens Politically Unpopular Minority Groups

Moreno and *Windsor* require credibility-questioning review of legislation that burdens politically unpopular minority groups. Central to the Court's holding in *Moreno* was the idea that "if the constitutional conception of '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."[170] This idea—colloquially referred to as the "animus principle"[171]—reflects the fact that the lower a group's political influence, the higher "the danger that the statute in question was the product of an impermissible motivation."[172] The animus principle was also central to the Court's decision in *Windsor*,[173] as it was in at least two other credibility-questioning cases.[174] In sum, both *Moreno* and *Windsor* indicate that laws motivated by animus or the desire to harm a politically unpopular group justify the application of credibility-questioning rational basis review.

Moreno and *Windsor* instruct that the politically unpopular groups the Constitution protects from harm and animus include those individuals

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[169] 539 U.S. 558, 574 (2003) (citation omitted).

[170] 413 U.S. 528, 534 (1973).

[171] *See, e.g.*, Jane S. Schacter, Romer v. Evans *and Democracy's Domain*, 50 VAND. L. REV. 361, 379–81 (1997).

[172] Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1715 (1984).

[173] The *Windsor* Court began its discussion by explaining that "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." 133 S. Ct. 2675, 2693 (2013) (quoting *Moreno*, 413 U.S. at 534–35).

[174] *See* Romer v. Evans, 517 U.S. 620, 632 (1996) (striking down a state constitutional amendment because "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests"); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985) ("[S]ome objectives—such as a bare desire to harm a politically unpopular group—are not legitimate state interests." (internal quotation marks, alterations, and citations omitted)).

locked out of economic opportunities due to laws motivated by animus or the desire to harm a politically unpopular group. Take occupational licensing measures, for example. When protected classes seek enrichment by advocating for occupational licensing measures, members of the nonprotected class are harmed. And harm to would-be competitors is a necessary component of many occupational licensing measures, given that such measures are often primarily motivated by the desire to protect existing providers' profits by restricting market entry and competition. Frequently, then, there is an essential connection between the enrichment of the protected class and the injury to the nonprotected class.

Nevertheless, it may be argued that an intent to protect an "in-group" from competition is not itself an intent to harm "out-groups" and thus that occupational licensing measures fall outside of the animus principle's ambit.[175] However, the Supreme Court itself has recognized that benefits in-groups obtain from occupational licensing measures such as the one at issue in *Sensational Smiles* require injury to out-groups. In *Metropolitan Life Insurance Co. v. Ward*, for example, the Court labeled the distinction between benefits to the in-group and harm to the out-group as "a distinction without a difference."[176] The Court did so by citing *Bacchus Imports, Ltd. v. Dias*, in which the Court noted that a law's constitutionality "does not depend upon whether one focuses upon the benefited or the burdened party . . . . [I]t could always be said that there was no intent to impose a burden on one party, but rather the intent was to confer a benefit on the other."[177] This plainly squares with the fact that increases in in-group profits that result from occupational licensing measures are directly correlated with harm to out-groups.[178] Harm to the out-group, then, is a necessary component of licensing regimes. Such regimes should thus be analyzed under credibility-questioning rational basis review.

One may further argue that *Moreno* and *Windsor* cannot be stretched to cover routine legislative classifications, such as those made by economic regulations like occupational licensing measures. After all, legislation inherently classifies. As an initial matter, however, economic regulations, including licensing measures, routinely exceed their seemingly benignant

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[175] A similar argument was made in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), a case in which the Supreme Court struck down a law that taxed out-of-state insurance companies at a higher rate than in-state insurance companies. The intervenors argued that a clear distinction existed between benefit to the in-group (domestic insurers) and harm to the out-group (foreign insurers). *See* Brief for Appellee-Intervenors at 42, Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (No. 83-1274).

[176] 470 U.S. at 882.

[177] 468 U.S. 263, 273 (1984).

[178] *See id.*

economic classifications. Licensing measures have been used to subjugate minority groups since the Civil War. Since then, "white interest groups [have] used occupational licensing laws to stifle black economic progress."[179] For example, labor unions once refused to admit African-Americans into apprenticeship programs,[180] and evidence suggests that similar strategies have continued in the modern era.[181] Because many of those seeking to enter licensed industries are a type of politically unpopular group that the Constitution aims to protect from harm and animus, *Moreno* and *Windsor* require credibility-questioning rational basis review of occupational licensing measures.

Furthermore, as Raynor notes, nowhere in *Moreno* did the Court phrase its central holding by referencing "the traditional distinction between economic and noneconomic regulations."[182] The same is true of *Windsor*. The two decisions thus reflect the "broad and trans-substantive" nature of the animus principle: "it applies without regard to subject matter."[183]

B. The Normative Premises that Support the Application of Credibility-Questioning Rational Basis Review to Certain Economic Legislation

Having identified what normative premises *have* led the Supreme Court to apply credibility-questioning rational basis review, the inquiry thus turns to what additional premises *should* lead the Court to do so. The following identifies two such premises: the *ius gentium* and public choice theory, each of which supports credibility-questioning review of economic legislation that benefits concentrated interest groups at the expense of diffuse majorities.

1. The Ius Gentium

In *Roper v. Simmons*, Justice Anthony Kennedy, writing for the majority, stated that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[184] Justice Kennedy's reference to

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[179] David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89, 90 (1994).

[180] *Id*.

[181] Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 18 (1976) (explaining that licensing exams are often administered only in English to the detriment of citizens that speak Spanish and that "economically deprived young people cannot easily meet the qualifications demanded of applicants, such as paying tuition to pseudo-professional schools").

[182] Raynor, *supra* note 1, at 1083.

[183] *Id.*

[184] 543 U.S. 551, 578 (2005).

foreign law in that decision—"the stark reality [is] that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty"[185]—generated significant controversy.[186] However, prior to *Roper*, the Court had referenced foreign law for nearly 200 years. Chief Justice John Marshall, for example, authored several decisions that did so.[187] Since 1804, at least thirty-five Supreme Court decisions have considered foreign law, with seventeen occurring after 1940.[188] So at least in the positivist sense, the *Roper* majority's reference to foreign law was not out of bounds.[189]

Recent scholarship has discussed the relevance of foreign law in American courts.[190] Professor Steven Calabresi and Bradley Silverman, for example, argue that "there is inherent value in looking to other sovereign nation states' courts to see how they have resolved the difficult questions that have arisen in our own legal system."[191] The idea is that when foreign statutes, constitutional provisions, and precedents converge into a "law of nations," or *ius gentium*, a normative consensus has emerged that can provide American judges with a wider knowledge base upon which certain constitutional ambiguities may be resolved.[192]

As an initial and important caveat, the *ius gentium* is applicable as an interpretive modality only if the meaning of the constitutional provision at issue is "underdeterminate".[193] The content, and thus the meaning, of the

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[185] *Id.* at 575.

[186] *See* Steven G. Calabresi & Bradley G. Silverman, *Hayek and the Citation of Foreign Law: A Response to Professor Jeremy Waldron*, 2015 MICH. ST. L. REV. 1, 4.

[187] *See* Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 763 (2005).

[188] Calabresi & Silverman, *supra* note 186, at 7–8. Calabresi and Silverman have noted that "[s]even majority opinions and one dissent used foreign law between 1804 and 1840," and that "[b]etween 1840 and 1890, at least four majority opinions relied on foreign law." *Id.* at 5–6. Moreover, "[b]etween 1890 and 1940, at least seven Supreme Court opinions cited foreign law." *Id.* at 6.

[189] *Cf.* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2408 n.5 (2015) (describing legal positivism as the view that "the content of the law is determined by certain present social facts and that moral considerations do not necessarily play a role in making legal statements true or false").

[190] *See, e.g.*, Calabresi & Silverman, *supra* note 186.

[191] *Id.* at 17–18.

[192] *See, e.g.*, *id.* at 18–19, 65 ("We posit that the *ius gentium*'s development is analogous to a spontaneous order in that it 'constantly adapts itself, and functions through adapting itself, to millions of facts which in their entirety are not known to anybody.' For this reason, as Hayek makes clear, it may be information and knowledge superior in the way that a market is superior to a Soviet-style planned economy.") (quoting 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 13 (1973))).

[193] *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) ("The law is *underdeterminate* with respect to a given case if and only if the set

constitutional text is determined, or "fixed," at the time the portion of that text is framed and ratified, and that fixed content must limit, or "constrain," subsequent interpretations of the constitutional text.[194] But when there is an "absence of determinate" meaning in the constitutional text, that "meaning must be 'constructed.'"[195]

With the above caveat in mind, the *ius gentium* is an appropriate method of constitutional construction so long as the meaning of the constitutional text "incorporates or permits" it.[196] So, while foreign law does not, and should not, bind American judges,[197] it can serve a useful purpose in constitutional construction when the meaning of the constitutional text "runs out";[198] namely, "as a system of spontaneous legal order [better] able to process larger amounts of disparate bits of information than any central planner could."[199]

The *ius gentium* is particularly relevant for this Note's argument that courts should apply credibility-questioning rational basis review when scrutinizing certain types of economic legislation for two reasons.[200] First,

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of results in the case that can be squared with the legal materials is a nonidentical subset of the set of all imaginable results.").

[194] Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 459 (2013).

[195] *Cf.* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 611 (2004).

[196] *Cf.* Baude, *supra* note 189, at 2355 (explaining that "judges can look to precedent, policy, or practice, but only to the extent that the original meaning incorporates or permits them").

[197] Calabresi & Silverman, *supra* note 186, at 31 ("The Framers of the Constitution and of the Reconstruction Amendments can hardly be supposed to have consented to be governed by the law of other twenty-first century sovereign nation states, and the U.S. Constitution, unlike other foreign constitutions, does not allow for international or foreign law to be made binding in the United States.").

[198] *See* Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 69 (2011).

[199] Calabresi & Silverman, *supra* note 186, at 64.

[200] The justification for judicial reference to the *ius gentium* is outside of the scope of this Note and may be found elsewhere. *See, e.g.*, Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 111 (2005) ("[C]onsidering foreign and international law within a framework of learning by engagement . . . is a legitimate interpretive tool that offers modest benefits . . . ."); Bradley Silverman, *The Legitimacy of Comparative Constitutional Law: A Modal Evaluation*, 24 MICH. ST. INT'L. L. REV. 307, 354 (2016) ("[A]s a general matter, it is constitutionally legitimate to cite foreign law for persuasive purposes, but not as binding authority."); Jeremy Waldron, *Foreign Law and the Modern* Ius Gentium, 119 HARV. L. REV. 129, 144 (2005) ("[T]o ignore foreign solutions, or to refrain from attending to them because they are foreign, betokens not just an objectionable parochialism, but an obtuseness as to the nature of the problems we face."). *But see* John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1246 (2007) ("Only those international obligations that have been validated by domestic political processes should be part of our law because they alone can avoid the democracy deficit of raw international law.").

But the caveat that judges may refer to the *ius gentium* only when the meaning of the constitutional text at issue is underdeterminate bears repeating. *See supra* notes 193–198 and accompanying text.

the Supreme Court has invoked the *ius gentium* in discussing when credibility-questioning rational basis review is appropriate. *Lawrence*, for example, pointed to a 1957 British Parliamentary report that recommended the repeal of laws punishing same-sex conduct.[201] The opinion also discussed the European Court of Human Rights's invalidation of a Northern Irish law that forbade same-sex conduct.[202] Moreover, the *Lawrence* Court explained that the right the plaintiff in that case sought "has been accepted as an integral part of human freedom in many other countries," and that "[t]here ha[d] been no showing that . . . the governmental interest in circumscribing personal choice is somehow more legitimate or urgent" in the United States.[203] Second, among the constitutional democracies of the world, the United States' failure to protect occupational freedom is "almost exceptional."[204] Other constitutional democracies—including Germany, Japan, South Africa, Israel, the European Union, and Brazil—do so energetically.[205]

Examining the consensus of foreign law in cases implicating underdeterminate—and only underdeterminate—constitutional provisions can prove useful, because "[t]he fact that so many nations, markedly different in other respects, all reach the same legal outcome may indicate that there is something inherently wise, just, or efficient about it."[206] One such underdeterminate constitutional provision is the Equal Protection Clause,[207] the alleged violations of which are often subject to rational basis review. And a normative global consensus, though hardly unanimous, is forming regarding the judicial review of one particular type of economic legislation: that which regulates occupational freedom. While the concept of credibility-questioning review of economic legislation does not form the entire basis of foreign consensus, the various explicit protections of occupational freedom in foreign constitutions and other legal sources suggest that a more searching judicial review of certain economic legislation in American courts is sometimes warranted.

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[201] 539 U.S. 558, 572–73 (2003).

[202] *See id.* at 573 (discussing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 19–20 (1981)).

[203] *Id.* at 577.

[204] STEVEN GOW CALABRESI ET AL., THE U.S. CONSTITUTION AND COMPARATIVE CONSTITUTIONAL LAW: TEXT, CASES, AND MATERIALS 1446 (2016).

[205] *Id*. at 1441.

[206] Calabresi & Silverman, *supra* note 186, at 68.

[207] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 98 (1980) (describing the text of the Equal Protection Clause as "unforthcoming with details").

a. Germany

In Germany, occupational freedom is constitutionally protected and is a foundational right central to other freedoms.[208] Article 12 of the German Basic Law provides that "[a]ll Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training."[209] For the most part, the right to occupational freedom in Germany can only be limited by statute.[210] Germany's Federal Constitutional Court has held that purely protectionist measures that are enacted solely to protect entrenched practitioners from competition cannot alone provide a basis for restrictions on job entry.[211] Thus, the normative premise behind Germany's Basic Law is individual autonomy.[212] This premise has guided the Federal Constitutional Court's review of occupational restrictions, which resembles credibility-questioning rational basis review.[213]

In a case with facts nearly identical to *Lee Optical* and decided only thirty-nine months later, the Federal Constitutional Court stated that purely protectionist licensing measures are "crude and most radical."[214] The licensing measure at issue was said to protect public health, but the Court skeptically addressed the underlying record and found the measure to be a thinly veiled attempt to prevent competition, explaining that "[e]very individual has the right to take up any activity that he or she feels prepared to undertake as an 'occupation.'"[215] While the Court held that occupational regulations were not per se unconstitutional—"[t]he practice of an occupation may be restricted by reasonable regulations predicated on considerations of the common good"—it explained that pure economic protectionism was not a common good.[216] This was particularly the case,

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[208] DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 299 (1994).

[209] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW] art. 12 (Ger.), *translated in* BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ [FEDERAL MINISTRY OF JUSTICE AND CONSUMER PROTECTION], http://www.gesetze-im-internet.de/englisch_gg/index.html [https://perma.cc/6KWM-X6NP].

[210] CURRIE, *supra* note 208, at 299–300.

[211] *Id*. at 300–01. In American judicial terms, to the German Federal Constitutional Court, pure economic protectionism is not a legitimate government interest. *See supra* note 114 and accompanying text.

[212] *See* CURRIE, *supra* note 208, at 299 ("Like the right to property, occupational freedom is taken very seriously in Germany as an element of individual autonomy . . . .").

[213] *Cf.* DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 659 (3d ed. 2012) (explaining that the German Constitutional Court "has been extremely active in reviewing the constitutionality of laws" affecting market entry).

[214] *Id.* at 669.

[215] *Id.* at 666.

[216] *Id.* at 668.

the Court reasoned, because occupational choice represents "an act of self-determination" and "must be protected as much as possible from state encroachment."[217] As such, the Court critically evaluated the record to find the licensing measure unconstitutional.[218]

b. Japan

Similar to Article 12 of the German Basic Law, Japan's Constitution expressly protects occupational freedom. Article 22 of the Constitution of Japan stipulates that "[e]very person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare."[219] Like Germany's Federal Constitutional Court, the Supreme Court of Japan has also engaged in credibility-questioning review of economic legislation.

In 1972, the Supreme Court of Japan considered the requirements of Article 22 when it treated with skepticism the underlying record of a law that authorized the denial of licenses to pharmacies situated near existing pharmacies.[220] The Japanese Supreme Court employed a framework of judicial review similar to the credibility-questioning review the Fifth, Sixth, and Ninth Circuits applied in *St. Joseph Abbey*, *Craigmiles*, and *Merrifield*, respectively.[221] Regarding occupational licensing measures, the Japan Supreme Court noted that "the purpose, necessity, content and the nature and content of the freedom of the occupation being restricted by [the licensing measures], as well as the extent of the restriction, must be studied, and the decision made cautiously after comparative consideration."[222] After examining the record, the Court upheld the law as a valid exercise of the government's police power to protect the public welfare because it was a "necessary and reasonable measure[] for an important public interest."[223] In upholding the law as necessary and reasonable, the Court suggested that pure economic protectionism was not a legitimate government interest.[224]

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[217] *Id.*

[218] *Id*. at 670.

[219] Nihonkoku Kenpō [Kenpō] [Constitution], art. 22, para. 1 (Japan).

[220] CALABRESI ET AL., *supra* note 204, at 1461–64.

[221] For a discussion of these cases, see *supra* Sections II.A–C.

[222] CALABRESI ET AL., *supra* note 204, at 1462.

[223] *Id.* at 1463.

[224] *See id.* at 1462, 1464 ("The purpose of the regulation [must] be in accord with the public welfare . . . . Prevention of excessive competition among pharmacies and of instability of business operations contemplated therein, are not themselves the aims [of the regulation] . . . .").

c. South Africa

South Africa provides similar protections against economic legislation that regulates occupational freedom.[225] Like Article 12 of the German Basic Law and Article 22 of the Japanese Constitution, Article 22 of the South African Constitution provides that "[e]very citizen has the right to choose their trade, occupation or profession freely."[226] And like the high courts of Germany and Japan, South Africa's has thoroughly reviewed such legislation in a manner similar to credibility-questioning rational basis review.

In 1997, the Constitutional Court of South Africa reviewed a challenge to a liquor licensing law that the plaintiffs argued interfered with their constitutional right to work.[227] The Court looked to the underlying record when it reviewed both the legitimacy of the government's purpose and the fit between that purpose and the means of achieving it.[228] Ultimately, the Court held that the law, which required a license for a grocer to sell liquor, was rationally related to the government's purpose of "combatting the adverse effects of alcohol consumption" and was thus constitutional.[229]

d. Brazil

Finally, Article 5 of Brazil's Constitution secures the right to freedom of occupation with its declaration that "the practice of any work, trade or profession is free, observing the professional qualifications which the law shall establish."[230] In 2011, the Brazilian Supreme Federal Court examined the constitutionality of a statute that required lawyers to successfully pass a

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[225] So too do Israel and the European Union. In 1994, Israel's Knesset enacted a Basic Law—the equivalent to a constitutional provision, given that the Knesset sits both as a legislative and constitution-writing body—with the purpose of "protect[ing] freedom of occupation." *See* Freedom of Occupation, 5754–1994, SH No. 1454, p. 90 (Isr.). Only occupation-restricting laws that are "enacted for a proper purpose . . . to an extent no greater than is required" are valid. *Id.* In addition, Article 15 of the European Union's Charter of Fundamental Rights expressly protects the right to freedom of occupation by providing that "[e]veryone has the right to engage in work and to pursue a freely chosen or accepted occupation." Charter of Fundamental Rights of the European Union, art. 15, 2010 O.J. C 83/389.

[226] S. AFR. CONST., 1996, art. 22.

[227] *State v. Lawrence* 1997 (4) SA 1176 (CC) at 1 paras. 1, 7 (S. Afr.). Their right to work derived from a portion of South Africa's interim constitution similar in content to Article 22 of South Africa's current constitution. *Compare* S. AFR. (INTERIM) CONST., 1993, ch. 3, § 26(1) ("Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory."), *with* S. AFR. CONST., 1996, art. 22 ("Every citizen has the right to choose their trade, occupation or profession freely.").

[228] *Lawrence*, (4) SA 1176 paras. 66–69.

[229] *Id.* at para. 69.

[230] CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION], art. 5 (Braz.).

national bar.[231] After engaging in a credibility-questioning style of review, the Court held that the licensing measure was constitutional because it did not "reach the core of the constitutional guarantee of freedom of work."[232]

The Brazilian Supreme Federal Court also examined the legitimacy of the government's purpose in enacting the statute and the fit between that purpose and the means of achieving it. In doing so, the Court explained that "the free exercise of profession is a fundamental right of high significance in the constitutional context" because "the guarantee is closely linked to the construction of personality."[233] The Court stated that while one's "freedom of profession is a part of setting up personal life, without which free personal development would be unimaginable," the licensing measure was constitutional because the profession of law is "beyond the subjective dimension."[234] It therefore directly questioned *why* the government chose to restrict entry into the practice of law before upholding the licensing measure as constitutional, a critical component of credibility-questioning rational basis review.

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The nondeferential review that the highest courts of these and other countries have applied to economic legislation is an example of an emerging normative consensus that American courts may consider in reviewing economic legislation that implicates underdeterminate constitutional provisions. The Supreme Court has previously referenced the *ius gentium* when employing credibility-questioning review,[235] and nondeferential judicial review of economic legislation has increased globally since then.

2. Public Choice Theory and Industry Capture

The "new realism" of the political process—what Judge Richard Posner has described as a process in which much legislation is the result of "a pure power struggle" won by "pressure groups"[236]—seriously undermines the application of deferential rational basis review to economic legislation, which is often the result of industry capture. This insight,

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[231] *See* CALABRESI ET AL., *supra* note 204, at 1469.

[232] *Id.* at 1470.

[233] *Id*. at 1469.

[234] *Id.*

[235] *See supra* notes 185–86 and accompanying text.

[236] Richard A. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 1, 27, 28 & n.51.

perhaps best encapsulated by public choice theory, cuts against the Supreme Court's decades-long confidence that "political processes . . . can ordinarily be expected to bring about repeal of undesirable legislation."[237]

Public choice theory explains that "*homo economicus* and *homo politicus* are one and the same."[238] That is, the rational and self-interested nature of a free market actor does not change when he or she assumes public office. Instead, elected officials' motivations largely track those of individuals in the market. As such, public choice theory brings with it the "presumption that persons do not readily become economic eunuchs as they shift from market to political participation."[239] In both contexts, parties seek to promote their welfare, either by maximizing monetary profits in the private sector or by maximizing power in the public sector. Consequently, "[a]ll reasonably sophisticated persons know that a well-knit special interest group is likely to prevail over an amorphous 'public' whose members are dispersed and, as individuals, are not in sharp conflict with the organized interest."[240]

Public choice theory is particularly relevant in the context of occupational licensing, which over the past several decades has grown exponentially. In 1950, about a decade before public choice theory was born,[241] less than 5% of workers were required to obtain state licenses before entering a profession.[242] In 2008, however, 29% of all workers were licensed by the government.[243] And while licensed professions include the more obvious ones such as doctors and lawyers,[244] such professions now include innocuous trades ranging from interior designing to

[237] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[238] Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL'Y 209, 228 (2016).

[239] James M. Buchanan, *What is Public Choice Theory?*, IMPRIMIS (Hillsdale College, Hillsdale, Mich.) 1, 6, (March 2003) https://archive.org/details/hillsdale_imprimis_200303 [https://perma.cc/YK23-JHAT].

[240] Gellhorn, *supra* note 181, at 16.

[241] *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 19 (1962) (defining what is recognized as the first thorough explanation of public choice theory as follows: "The individual enters into an exchange relationship in which he furthers his own interest by providing some product or service that is of direct benefit to the individual on the other side of the transaction. At base, political or collective action under the individualistic view of the State is much the same").

[242] Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 14979, 2009).

[243] *Id*. at 4.

[244] *See* Gellhorn, *supra* note 181, at 6–7.

auctioneering.[245] That the number of professions licensed in at least one state has grown by more than 37% percent since the 1980s underscores the explosion in the licensing of these and other similarly benign professions.[246]

Public choice theory explains that many licensing regimes belie their consumer protection justifications and are instead economically protectionist and prone to industry capture. For example, typically it is the occupational class itself, rather than the legislature or public, who argues for the enactment of licensing measures.[247] And professional licensing board members are often members of the regulated occupation, an arrangement that permits board members to exclude potential market entrants.[248] Indeed, market exclusion and suppression of competition is often the primary motivation for established firms to advocate for the imposition of licensing measures.[249] Moreover, the social and economic costs of widespread licensing measures bring into serious doubt the Second and Tenth Circuits' judicial approach to the review of such measures.[250] Licensing regulations decrease consumer choice and increase prices.[251] Because of increased prices, the most disadvantaged in society become even more disadvantaged.[252] Furthermore, because market entry is restricted, employment growth declines.[253]

With the spate of recent circuit court cases applying credibility-questioning rational review to economic regulations, the implications of the new realism may be forming the basis of a normative shift away from the application of deferential rational basis review to special interest economic legislation. Professor Steven Menashi and Judge Douglas Ginsburg have noted that a similar normative shift occurred in antitrust law in the late 1970s.[254] Until then, the Supreme Court promoted "vague and frankly anti-

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[245] MORRIS M. KLEINER, THE HAMILTON PROJECT, REFORMING OCCUPATIONAL LICENSING POLICIES 10 (2015), https://www.brookings.edu/wp-content/uploads/2016/06/THP_KleinerDiscPaper_final.pdf [https://perma.cc/67QW-U4TK].

[246] *See* Stephanie Simon, *A License to Shampoo: Jobs Needing State Approval Rise*, WALL ST. J. (Feb. 7, 2011, 12:01 AM), http://www.wsj.com/articles/SB10001424052748703445904576118030935929752 [https://perma.cc/Z98J-EA8J] ("In the mid-1980s, about 800 professions were licensed in at least one state. Today, at least 1,100 are . . . .").

[247] MILTON FRIEDMAN, CAPITALISM AND FREEDOM 140 (1962).

[248] *Id*.

[249] *See, e.g*., Gellhorn, *supra* note 181, at 11–12.

[250] *See supra* Sections II.D–E.

[251] Simon, *supra* note 246.

[252] *Id*.

[253] KLEINER, *supra* note 245, at 6.

[254] Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 N.Y.U. J.L. & LIBERTY 1055, 1086 (2014).

competitive social and political goals."[255] But a "new learning" in antitrust economics was developed by a group of scholars who argued that antitrust laws should focus on economic efficiency and consumer welfare rather than economic protectionism for its own sake.[256] This idea eventually gained institutional favor as the Court interpreted antitrust laws to reflect the new learning by focusing on the promotion of consumer welfare and economic efficiency.[257] Originalists and nonoriginalists have welcomed this shift, which has "broad and nonpartisan agreement" throughout the legal profession and the courts.[258] A similar evolution appears to be at work regarding the judicial review of interest group economic legislation, perhaps partially evidenced by judicial acquiescence to the "great transformation" of regulated industries that began several decades ago.[259]

While inserting public choice theory into the mix of judicial review may seem unmoored from judicial and constitutional tradition, the idea of scrutinizing economic legislation that results from industry capture does not require great leaps to new judicial heights. Instead, once the insight of public choice theory is acknowledged—that small, concentrated interest groups can, and frequently do, dominate diffuse majorities—enhanced judicial review of particular types of economic legislation comports with and is arguably required by *Carolene Products*' concern with, as John Hart Ely put it, "clearing the channels of political change."[260] Professor Bruce Ackerman has explained, for example, that "the concerns that underlie *Carolene* should lead judges to protect . . . groups that are 'anonymous and diffuse' rather than 'discrete and insular.' It is these groups that . . . are systematically disadvantaged in a pluralist democracy."[261]

For purposes of the task at hand, the key implication of public choice theory is that the negative effects that can result from protectionist legislation, including occupational licensing measures, are often preserved like flies in amber. Because the negative costs of such measures are widely dispersed, the legislative process is generally unable to "bring about repeal of undesirable legislation."[262] When such legislative reform is unlikely or

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[255] *Id*.

[256] Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 218 (2010).

[257] *Id*. at 218, 223.

[258] *See id.* at 222, 237.

[259] *See* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1324–25 (1998).

[260] *See* ELY, *supra* note 207, at 102, 105.

[261] Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 724 (1985).

[262] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

impossible, then, courts should apply credibility-questioning rational basis review.

3. The Ghost of Lochner

While a "bad constitutional odor" may be associated with credibility-questioning rational basis review of economic legislation,[263] such review is not akin to *Lochner*. Rather, the application of credibility-questioning rational basis review to the type of legislation this Note discusses gets at "the problem of faction," which commentators have recognized as "central to the American constitutional design."[264] In addition, credibility-questioning review of economic legislation that results from concentrated interest groups satisfies the non-Lochnerian reason courts apply rational basis review in the first place, which is "to filter out naked preferences."[265] Both rational basis review and credibility-questioning review of occupational licensing measures are therefore "closely related to the central constitutional concern of ensuring against capture of government power by faction."[266]

Credibility-questioning rational basis review of certain economic legislation does not, and need not, reflect a return to *Lochner*-style review. Such review does not supplant legislatures' regulatory agendas, nor does it ask courts to "elevate [their] economic theor[ies] over [those] of legislative bodies."[267] This is partially the case, as the Sixth Circuit has noted, because credibility-questioning review does not require "sophisticated economic analysis," but instead only a recognition of "naked attempt[s] to raise . . . fortress[es] protecting" entrenched interests at the expense of diffuse majorities.[268]

Moreover, credibility-questioning rational basis review is not a tool judges can easily use to imprint their personal judgments on the law. Enhanced review does not result in per se findings that all economic regulations, including occupational licensing measures, are unconstitutional. Rather, such regulations can pass constitutional muster by satisfying the two requirements of credibility-questioning review: First, the court must determine that the government's asserted interest is constitutionally permissible and that the asserted interest is what actually motivated the legislature. Second, the court must then determine that "the

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[263] *Cf.* RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 370–71 (2014).

[264] Menashi & Ginsburg, *supra* note 254, at 1090.

[265] *See* Sunstein, *supra* note 172, at 1690.

[266] *Id.*

[267] Craigmiles v. Giles, 312 F.3d 220, 229 (6th Cir. 2002).

[268] *Id.*

relationship between the government's stated objective and the means chosen to pursue it" fit snugly together.[269] Investigations into legislative motives and means–end fits are not novel concepts of judicial review that would introduce previously nonexistent judicial freewheeling.

The ghost of *Lochner* does not haunt credibility-questioning rational basis review. Rather, such review is a proper means of determining whether, as Justice John Marshall Harlan stated, "[the] measure bears a rational relation to a constitutionally permissible objective."[270] The answer to "that question is well within Article III's confines of judicial review."[271]

CONCLUSION

The courts of appeals are divided over whether the factual records underlying certain economic legislation should be analyzed under credibility-questioning rational basis review. Such review of economic legislation that impedes central liberty interests and burdens politically unpopular groups is warranted, given the normative premises behind the Supreme Court's reasoning in *Department of Agriculture v. Moreno*, *Lawrence v. Texas*, and *United States v. Windsor*. In addition, the "law of nations," or *ius gentium*, and public choice theory support credibility-questioning review of economic legislation that benefits concentrated interest groups at the expense of diffuse majorities. Consequently, courts should treat the records of these types of economic legislation with a healthy dose of skepticism.

[269] CLARK M. NEILY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT 35 (2013).

[270] Ferguson v. Skrupa, 372 U.S. 726, 733 (1963) (Harlan, J., concurring).

[271] St. Joseph Abbey v. Castille, 712 F.3d 215, 227 (5th Cir. 2013).