A LICENSE TO SELL CASKETS? PREVELENT LICENSING LAWS ON THE LABOR MARKET AND JUDICIAL CONTROL

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I. INTRODUCTION

After Hurricane Katrina destroyed the timber of St. Joseph Abbey, thirty-eight monks decided to make a living by selling caskets. The monks had a tradition of making wooden caskets for dead monks, so they decided to run this business by investing $200,000 in "St. Joseph Woodworks" which offered one product—caskets in two models, "monastic" and "traditional."[1] Much to their surprise, the monks found that it was impossible to operate this business without a state-licensed funeral director and a state-licensed funeral home.[2] The Louisiana State Board of Embalmers and Funeral Directors ("Louisiana Board") requires anyone planning for casket sale to build a layout parlor for thirty people, a display room for six caskets, an arrangement room, and embalming facilities.[3] Additionally, a full-time funeral director was also required.[4]

The caskets-selling case is not alone in modern American economy. United States society has witnessed a dramatic rise in the number of occupational licenses; from less than five percent of occupations in the early 1950's[5] to over twenty-five percent in the 21st century (only the State level).[6] This percentage would be higher if it included occupational licenses from the federal and local level. [7] Not only do traditional professionals, like lawyers or doctors need a license to practice, but now new professionals and middle/lower-income occupations, such as animal masseuses in Arizona.[8] The

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[1] St. Joseph Abbey v. Castille, 700 F.3d 215, 217 (5th Cir. 2013).

[2] *See Id.* at 218. *See also* LA. STAT. ANN §§ 37:831(37)–(39) (2015).

[3] *See* LA. STAT. ANN § 37:842(D)(3) (2015).

[4] LA. STAT. ANN § 37:842(D)(1) (2015).

[5] Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON., S173, S175 (2013).

[6] *See* DEP'T OF TREASURY OFFICE OF ECON. POLICY, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICY MAKERS (2015) p.3.

[7] *Id.*

[8] ARIZ. REV. STAT. ANN. § 32-2212 (2017); *See also* Patricia Cohen, *Moving to Arizona Soon? You Might Need a License*, N.Y. TIMES (July 17, 2016)

Bureau of Labor Statistics announced that licensing is prevalent in occupation groups like natural resources, cleaning, food preparation and transportation.[9] Licensing rates can reach thirty percent in some states.[10]

According to Professor Morris Kleiner, occupational licensing is a "process where entry into an occupation requires the permission of the government, and the state requires some demonstration of a minimum degree of competency."[11] An occupational license becomes a precondition to make a living for those who want to enter the workforce. Without the occupational licensing, people may face a cease-and-desist order that deprives them from their career opportunities.[12] Additionally, practice without licensing may constitute criminal behavior in some states.[13]

Occupational licensing is not easy to obtain, and sometimes becomes a hurdle for ordinary people. Obtaining occupational licensing nearly always requires training hours, exams, education degree and fees.[14] For example, in many states, an applicant seeking a hair braiding license is required to attend cosmetology school, and could spend more than $20,000 in over 2000 hours.[15]

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http://www.nytimes.com/2016/06/18/business/economy/job-licenses.html?_r=1.

[9] *See* Jason Furman, *New Data Show that Roughly One-Quarter of U.S. Workers Hold an Occupational License*, THE WHITE HOUSE (June 17, 2016, 10:30 AM), https://obamawhitehouse.archives.gov/blog/2016/06/17/new-data-show-roughly-one-quarter-us-workers-hold-occupational-license.

[10] *Id.*

[11] Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSP. 189, 191 (2000).

[12] *See* Cohen, *supra* note 8.

[13] *See* VA. CODE ANN. § 54.1-111 (2017).

[14] *See* DICK M. CARPENTER ET AL., INST. FOR JUST., LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING 9 (2012), http://www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/licensetowork.pdf

[15] *Braiding*, INST. FOR JUST., http://ij.org/issues/economic-liberty/braiding/ (last visited Oct. 28, 2017).

Since occupational licensing is the strictest form of labor and occupational regulation, and affects basic rights, such as the right to earn a living and the right to substantive due process, numerous lawsuits have been filed to challenge states licensing boards.[16] In the shadow of the *Lochner* era[17], the U.S. Supreme Court upheld the government regulatory scheme as constitutional in the *Nebbia*[18] and *West Coast Hotel Co*. cases.[19] Since then, courts have upheld most licensing laws as constitutional, even if the licensing law itself is economic protectionism. [20]In current lawsuits, however, the courts have been split on occupational licensing laws.[21] The courts employ different levels of scrutiny to review the constitutionality of those licensing laws, which leads to inconsistent results across the United States.[22]

This article explores possible solution to these lawsuits that involve occupational licensing. Not only will it focus on defining a

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[16] *See*, *e.g.*, St. Joseph Abbey v. Castille, 712 F.3d 215, (5th Cir. 2013); Craigmiles v. Giles, 312 F.3d 220, (6th Cir. 2002); Merrifield v. Lockyer, 547 F.3d 978, (9th Cir. 2008); Powers v. Harris, 379 F.3d 1208, (10th Cir. 2004); N.C. Bd. of Dental Exam'rs v. Fed. Trade Comm'n, 717 F.3d 359 (4th Cir. 2013); Casket Royale, Inc. v. Mississippi, 124 F. Supp. 2d 434 (S.D. Miss. 2000); Locke v. Shore, 682 F. Supp. 2d 1283 (N.D. Fla. 2010).

[17] The Lochner era is a period in American legal history when the Supreme Court would typically strike down economic regulations using substantive due process under the Constitution. This era takes its name from the case Lochner v. New York, 198 U.S. 45 (1905).

[18] Nebbia v. New York, 291 U.S. 502, 537-540 (1934).

[19] West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).

[20] See Joseph Sanderson*, Don't Bury the Competition: The Growth of Occupational Licensing and A Toolbox for Reform*, 31 YALE J. ON REG. 455, 456 (2014).

[21] The Sixth Circuit and the Fifth Circuit respectively ruled that occupational licensing laws was not rationally related to a legitimate government interest, see Craigmiles v. Giles, 312 F.3d 220, 222 (6th Cir. 2002) and St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013). However, the Tenth Circuit ruled that licensing law, even it is economic protectionism, is a legitimate governmental interest in Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004).

[22] *Id.*

better scrutiny level to evaluate licensing, but it will also argue that Licensing laws should be reformed. Part I discusses the nature and justification of licensing. Part II reviews current scrutiny levels that might be applied to challenge licensing laws and the split opinions of federal courts. Part III argues that the rational basis test is the possible solution for these lawsuits under the current legal system, and proposes licensure reform in the future.

II. PREVALENCE OF OCCUPATIONAL LICENSES

A. Licensing as a Governmental Regulatory Method

Some scholars trace the regime of licensing back to ancient Egypt and Greece.[23] In modern times, licensing has become one of three basic forms of occupational regulation, along with certification and registration.[24] Licensing has a strong connection with professional skills.[25] "Registration" requires a practitioner to provide information such as name, address, education, working experience, qualifications, and perhaps involves the need to pay a fee or post a bond.[26] "Certification" sets higher requirements than "registration," issuing a certificate to a practitioner, if he/she can pass an examination, which identifies his/her professional skills and educational level.[27] Compared to these two forms of regulation, licensing is the most rigorous. The government forbids anyone entering into a specific field to provide any services, unless he/she has obtained a license when it is required.[28] Licensed practitioners must also meet further requirements, such as pursuing further training or maintaining professional ethic, otherwise he or she may

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[23] Stanley J. Gross, *The Myth of Professional Licensing*, AM. PSYCHOL., 1009, 1010 (1978).

[24] *See e.g.,* Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUS. REL. 676 (2010).

[25] *See Id.* at 676-77.

[26] Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J. L. & PUB. Pol'y 209, 210 (2016).

[27] *Id.*

[28] *Id.*

be deprived of their license, fined, and in some cases, prosecuted and incarcerated.[29]

B. Justifications of Occupational Licensing

The traditional justification for licensing is information asymmetry.[30] The idea is that the public does not have enough information to make the best decisions when facing various service providers.[31] Highly specialized society makes it difficult for ordinary people to distinguish high quality service from the lower ones.[32] Licensing regulation sets the minimum requirements for the service provider or the practitioner, and can remediate this shortcoming.[33]

Quality enhancement is another justification for occupational licensing. Minimum requirements set by licensing laws may lead to two positive influences on service quality: (1) low quality service is excluded from the market,[34] and (2) practitioners are encouraged to invest human capital through additional education and training without fear of being underpriced by less qualified rivals.[35] This can generate positive results, because consumers will be released from

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[29] DEP'T OF TREASURY OFFICE OF ECON. POLICY, *supra* note 6.

[30] *See, e.g.*, George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970) (George A. Akerlof was the first one to use the "lemon market" analogy to discuss information asymmetry. Thereafter, "lemon market" became a prevalent theory for information asymmetry research); Hayne E. Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 J. POL. ECON. 1328, 1329-30, 1342 (1979); Carl Shapiro, *Investment, Moral Hazard, and Occupational Licensing*, 53 REV. ECON. STUD. 843, 843 (1986).

[31] *Id.*

[32] *Id.*

[33] *Id.*; *see also* MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 5-10 (2006).

[34] *See* Larkin, *supra* note 26, at 209.

[35] Leland, *supra* note 30, at 1339-40.

the fear of low quality service, and can be motivated to increase demand.[36]

C. Results of Licensure Prevalence: Economic Protectionism

In the name of protecting public interest, occupational licensing is increasingly prevalent. Just as a report describes, "[i]n Tennessee, a license is required to shampoo hair; in Florida, to sell a yacht. In Montana, you need the state's approval to be an egg candler; in Utah, to repair upholstery; in Louisiana, to be a florist."[37]

Although there are justifications for licensing laws, these justifications are weakening. In the case of Florida's roofers, Florida chose to relax licensing law after Hurricane Katrina and little evidence of significant detrimental effect has been found, even if asymmetry information is supposed to worsen during the disaster.[38] More importantly, the evolution of the Internet provides a great variety of services to reduce the classical asymmetry information.[39] Changing technology and increasing access to information is rendering many licensing laws obsolete (since websites such as Yelp.com offers rating systems for products and services).[40] Additionally, empirical studies show that licensing laws actually have little impact on quality enhancement of various professionals[41] such

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[36] Larkin, *supra* note 26, at 223.

[37] Cohen, *supra* note 8.

[38] *See* David Skarbek, *Occupational Licensing and Asymmetric Information: Post-Hurricane Evidence from Florida*, 28 CATO J. 73, 73-82 (2008).

[39] Tyler Cowen et al., *The End of Asymmetrical Information*, CATO UNBOUND, (Apr. 6, 2015), https://www.cato-unbound.org/issues/april-2015/end-asymmetric-information/(last visited Dec. 1, 2017).

[40] Bill Peacock, *The Realities of Occupational Licensing, Policy Perspective*, TEX. PUB. POL'Y FOUND., (Sept. 2015), https://www.texaspolicy.com/library/doclib/PP-The-Realities-of-Occupational-Licensing-1.pdf.

[41] Morris M. Kleiner, *Occupational Licensing: Protecting the Public Interest or Protectionism*? (W.E. Upjohn Inst. for Emp't Research, Paper No. 009, 2011).

as teachers,[42] dentists,[43] mortgage brokers,[44] and TV repairers.[45] Even if licensing laws can enhance service quality, not every consumer demands the same level of service quality.[46]

In fact, licensing laws bury the competition[47] and protect those who already hold licenses.[48] Licensing is prevalent not only in high-income professions, but also in low-income professions.[49] The huge cost (e.g., tuition, time, education, language, citizenship) of obtaining licensing creates hurdles for most workers wishing to enter into a licensed market,[50] which is recognized as "designed to give some profession or occupation monopoly power."[51] Licensing also reduces worker mobility among states, leading to less competition and a misallocation of labor resources.[52] On the one hand, new entrants are hurdled; on the other hand, licensed practitioners are

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[42] *See generally*, Robert Gordon et al., *Identifying Effective Teachers Using Performance on the Job* (Hamilton Project, Paper No. 01, 2006).

[43] *See generally*, Morris M. Kleiner & R. T. Kudrle, *Does Regulation Affect Economic Outcomes? the Case of Dentistry*, 43 J. OF LAW & ECON. 547 (2000).

[44] Morris M. Kleiner & R. M. Todd, *Mortgage Broker Regulations that Matter: Analyzing Earnings, Employment, and Outcomes for Consumers* (Nat'l Bureau of Econ. Research, Working Paper No. 13684, 2009).

[45] KLEINER, *supra* note 33, at 424-425.

[46] Morris M. Kleiner et al., *Occupational Licensing Matters: Wages, Quality and Social Costs*, 8 CTR. FOR ECON. STUD. 29, 31 (2010).

[47] Sanderson, *supra* note 20, at 458.

[48] Kleiner, supra note 33, at 55.

[49] *See* Furman, *supra* note 9.

[50] Walter Gellhom, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 13-14 (1976).

[51] Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 953 (1985).

[52] *See* Morris M. Kleiner, *Border Battles: The Influence of Occupational Licensing on Interstate Migration*, (W.E. Upjohn Institute for Employment Research, Kalamazoo, Minn.), Oct. 2015.

well-protected.[53] Empirical studies show that occupational licensing raises the income of licensed practitioners by fifteen percent in the U.S., [54] and by thirteen percent in the U.K.[55] Practitioners without licensing will be sued for civil and criminal liability. Licensing boards or professional associations file the majority of these complaints,[56] which are made up of licensed practitioners, so that they can protect their own interest.[57]

Considering all these facts, licensing law is a form of economic protectionism. Licensing restrictions reduce millions of job opportunities across the U.S., and cost consumers more money (estimated over one hundred billion dollars).[58] If any one occupation had not been regulated, its growth would have been 12 percent from 1990 to 2000, instead of the 10 percent growth that occurred.[59] If there is nothing done with these licensing laws, they may end up as a *de facto* cartel that is formed through legitimate state action.[60]

III. JUDICIAL CONTROL ON LICENSING LAWS

A. History of Judicial Control

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[53] *See generally* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1135 n.244. (2014).

[54] Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market* 1–35 (Nat'l Bureau of Econ. Research, Working Paper No. 14979, 2009).

[55] Amy Humphris et al., *How Does Government Regulate Occupations in the UK and US? Issues and Policy Implications* in D. Marsden, ed., Labour Market Policy for the 21st Century, Oxford University Press, Oxford (2010).

[56] Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 43 (1981).

[57] *See* Edlin & Haw, *supra* note 53, at 1139.

[58] Morris M. Kleiner, *Reforming Occupational Licensing Policies* (The Hamilton Project, Paper No. 2015-01).

[59] Kleiner, *supra* note 33, at 424-25.

[60] *See generally* Edlin & Haw, *supra* note 53.

The United States experienced a long history of laissez-faire economics when the government was not willing to intervene in social and economic activities.[61] When the country was on the rapidly-industrialized train in the late 19th century, social issues like welfare, labor protection, and monopolies attracted government's attention.[62] Therefore, the government began to intervene in and made numerous efforts to regulate society.[63] The United States Supreme Court, on the other hand, was reluctant to validate these economic regulations, considering one's "liberty of contract" rights would be exceedingly limited by the government.[64] The landmark case of this period is the *Lochner* case.[65]

The *Lochner* era ended when the United States Supreme Court upheld the government regulatory scheme in the *Nebbia*[66] and *West Coast Hotel Co.* cases.[67] Deference to state regulatory regimes and presumption of constitutionality became the law.[68] The test employed in these two cases developed into the rational basis review employed by modern courts.

Due to this deference theory, most licensing regimes meet the rational basis test.[69] However, the state intervenes so deeply in economic life that industries that aren't traditional professions, like casket sales or barbering now requires an expensive and potentially

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[61] *See* U.S. Department of State, *Outline of the U.S. Economy*, THOUGHTCO. (Nov. 15, 2017), https://www.thoughtco.com/government-involvement-in-the-us-economy-1148151; *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 611-12 (3d ed. 2006).

[62] *Id.*

[63] *Id.*

[64] Sorrell v. IMS Health Inc., 564 U.S. 552, 585, 131 S. Ct. 2653, 2675, 180 L. Ed. 2d 544 (2011)

[65] Lochner v. N.Y., 198 U.S. 45, 56-57, 64 (1905).

[66] Nebbia v. N.Y., 291 U.S. 502, 537 (1934).

[67] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[68] *See* Joseph Sanderson, *supra* note 20, at 470.

[69] *Id.*

unnecessary license.[70] The requirements for the license are always extremely high, and few people can meet all these requirements.[71] Public interest groups like the Institute for Justice, Cato Institute, and the Pacific Legal Foundation criticized this regulatory scheme.[72] Recently, several lawsuits have been brought to challenge these licensing laws.[73]

B. Traditional Levels of Scrutiny

"Level of scrutiny" is a term used to describe the test that courts may apply when deciding if a law is constitutional or not.[74] The level of scrutiny can be considered as a kind of balance.[75] This balance is between the government "police power" and economic liberty.[76] There are three levels of scrutiny: the minimal level, or "rational basis test"; the middle level, or "intermediate scrutiny"; and the highest level, known as "strict scrutiny."[77]

Under the "rational basis test," the courts will assume that the law is constitutional, unless the challenger proves that the law is not *rationally related to a legitimate government purpose*.[78] All laws that are challenged under the Fourteenth Amendment will need to meet the minimal level scrutiny.[79]

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[70] *See* Kleiner, *supra* note 33 at 29.

[71] *Id.* at 5.

[72] *See e.g.*, S. DAVID YOUNG, THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA (1987).

[73] *See* supra note 16.

[74] *See* CHEMERINSKY, *supra* note 61, at 539.

[75] *See Id.*

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

[77] *See generally* CHEMERINSKY, *supra* note 61, at 539-540.

[78] Williamson v. Lee Optical, 348 U.S. 483, 486 (1955).

[79] *See* CHEMERINSKY, *supra* note 61, at 672.

Under "intermediate scrutiny," a law is constitutional if it is *substantially related to an important government purpose*.[80] This test is applied when the courts decide cases like gender discrimination, discrimination against non-marital children, regulation of commercial speech, and so on.[81]

The "strict scrutiny" test requires the challenged law to be *necessary to achieve a compelling government purpose* so as to maintain its constitutionality.[82] This strictest test is rarely applied, since laws will generally be declared unconstitutional when it is applied, which may raise the memory of court's over-aggressive role during the *Lochner* era. Therefore, some scholars said that it is "strict in theory and fatal in fact."[83]

C. Recent Federal Courts Split on Economic Protectionism

There is a series of cases discussing whether licensing laws of casket-selling are constitutional, as the economic protectionism is a constitutional government interest. The first one was *Craigmiles v. Giles* in 2002.[84] In this case, the Sixth Circuit held that the Tennessee's statute of prohibition on sale of caskets by the unlicensed shall be subject to rational basis review, and the statute failed to pass the review, because the prohibition bore no rational relationship to any legitimate purpose.[85] Further, the court decided that protecting discrete interest group from economic competition through licensure was not a legitimate government purpose.[86] It reasoned that the "obvious illegitimate purpose to which licensure provision is very well tailored . . . [is] protecting licensed funeral

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[80] Lehr v. Robertson, 463 U.S. 248, 266 (1983).

[81] *See* CHEMERINSKY, *supra* note 61, at 541.

[82] Sugarman v. Dougall, 413 U.S. 634 (1973).

[83] 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).

[84] Craigmiles v. Giles, 312 F.3d 220, 222 (6th Cir. 2002).

[85] *Id.* at 220.

[86] *Id.* at 224.

directors from competition on caskets[,]"[87] and that this "naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers . . . cannot survive even rational basis review."[88]

The second case was *Powers v. Harris* in 2004, which reached the opposite conclusions.[89] The Tenth Circuit in this case held that economic protectionism was a legitimate governmental interest if there was not a statutory or constitutional violation.[90] The court also cited Supreme Court cases suggesting that states could favor one intrastate industry for another.[91] Thus, Oklahoma's licensing law was rationally related to funeral directors, so that it could survive the rational basis test.[92] Additionally, the court criticized the Sixth Circuit's decision in the *Craigmiles* case, and its inquiry into the legislation's history and actual motive.[93]

The third case was *St. Joseph Abbey v. Castille* in 2013.[94] The Fifth Circuit ruled that Louisiana's prohibition on sales of caskets was not rationally related to a legitimate government interest in protecting consumers, nor to public health and safety.[95] In this case, the court assumed that "the State Board's chosen means must

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[87] *Id.* at 228.

[88] *Id.* at 229.

[89] Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004).

[90] *Id.* at 1224.

[91] *Id.* at 1221.

[92] *Id.* at 1222-24.

[93] *Id.* at 1218-20, 1223-24. The Tenth Circuit's disagreement can be concluded to three points: the Supreme Court foreclosed the inquiry that heavily focused on the court's perception of the motives of licensing laws; the conclusion that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose" is unsupportable; and the Craigmiles court relied heavily on Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) to define the actual motivation of state legislature was misplaced.

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

[95] *Id.* at 223-26.

rationally relate to the state interests it articulates[,]" therefore the court reviewed "the State Board's proffered rational bases[,]" which were consumer protection and public health safety.[96] Clearly, the court demonstrated that courts shall take the history and context of the challenged statute into account when reviewing it. The court stated that, "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."[97]

The right to pursue a lawful occupation is defined as an economic liberty,[98] which is protected by the Constitution.[99] These three cases involved the freedom to sell caskets without a funeral director license required by the state licensing law. The federal courts, all applying a rational basis test, reached different results. This circuit split shows some problems within the rational basis test, making clear that some reforms should be undertaken.

IV. POSSIBLE SOLUTION: RETURN TO THE RATIONAL BASIS TEST

Under the current legal framework, a statute affecting fundamental rights, usually substantive due process and equal protection rights under the Fourteenth Amendment in the case of licensing dispute, may be challenged and is required to pass judicial review.[100] However, the courts frequently warrant judicial deference to the statute that may affect economic or social privileges, especially when they apply the rational basis test.[101] Additionally, the aforementioned federal cases employ a rational basis test to review the constitutionality of licensing laws, leading to a circuit split.[102]

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[96] *Id.* at 223.

[97] *Id.* at 226.

[98] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 278 (1932).

[99] Barnett, *supra* note 76, at 5.

[100] *See Castille*, 712 F.3d at 220.

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

[102] *See* Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002); Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004); St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013).

This test, therefore, is criticized and various authors have claimed it should be abandoned.[103]

A. The Rational Basis Test Should Be Applied

1. After The *Lochner* Era, The Rational Basis Test Became Toothless

The rational basis test has long been established as the standard for the constitutionality of the economic legislation.[104] The test was clarified by the famous footnote 4 in the *Carolene Products* case.[105] Economic and social regulation, under this framework of judicial review, is presumed to be constitutional, as long as it is rationally related to a legitimate government interest.[106] Compared to *strict scrutiny* and *intermediate scrutiny*, the requirement of "legitimate government interest" in the rational basis test is easier to meet.[107] However, under this test, a court shall still determine whether the law serves a legitimate government interest.[108] It encompasses the assumptions of "what ends are sensible or legitimate to pursue."[109]

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[103] *See, e.g.*, Marc P. Florman, *The Harmless Pursuit of Happiness: Why "Rational Basis with Bite" Review Makes Sense for Challenges to Occupational Licenses*, 58 LOY. L. REV. 721, 729-30 (2012); Austin Raynor, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065, 1069 (2013); Will Clark, *Intermediate Scrutiny as a Solution to Economic Protectionism in Occupational Licensing*, 60 ST. LOUIS L.J. 345, 360 (2016).

[104] *See* TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW 125 (2010).

[105] *Carolene Prods. Co.*, 304 U.S. at 152 n.4.

[106] *See* CHEMERINSKY, *supra* note 61, at 540.

[107] *See* generally CHEMERINSKY, *supra* note 61, at 540-541.

[108] *See* Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049, 1070 (1979).

[109] Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923, 932 (2010).

The *Lochner* era had a long-term impact on judicial review practice. During the *Lochner* era, courts struck down legislation by employing "economic substantive due process."[110] This era lasted almost thirty years and drew criticism.[111] The main reason for criticism was that the court aggressively struck down "laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy."[112] The *Lochner* era ended in the 1930s with the *Nebbia* case[113] and the *West Coast Hotel* Co. case.[114] Since then, the Fourteenth Amendment has rarely been used to strike down legislation.[115] The Supreme Court has tended to invalidate legislation only if the "varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."[116]

In reaction to the *Lochner* era, and as a consequence of its demise, the rational basis test became toothless.[117] Although the court applied it to review the constitutionality when an economic regulation was challenged, it actually warranted review of the constitutionality of all the economic or social regulations in most

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[110] Lochner v. N.Y., 198 U.S. 45 (1905) (signaling the era when courts aggressively intervened in social and economic regulatory schemes).

[111] *See, e.g.*, FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE 95 (1986); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 873-74 (1987).

[112] Ferguson v. Skrupa, 372 U.S. 726, 729 (1963).

[113] Nebbia v. N.Y., 291 U.S. 502, 537 (1934).

[114] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[115] For legal scholar comments that liberty of contract's special status had been for all intents and purposes killed by the Nebbia case (1934), and buried by the Parrish case (1937) *See* Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 RICH. L. REV. 491, 519, 524 (2011)

[116] Vance v. Bradley, 440 U.S. 93, 97 (1979).

[117] *See* Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1485 (2008).

cases.[118] *Williamson v. Lee Optical of Oklahoma, Inc.*,[119] was an extreme example that almost pushed rational basis test to the brink of insignificance.[120] Oklahoma passed a statute prohibiting opticians from replacing eyeglass lenses without a prescription from an ophthalmologist or optometrist.[121] This case was contentious, since from the point view of a normal person, replacing eyeglasses was just to fit lenses to a face or to duplicate them into frames, which had nothing to do with an ophthalmologist or optometrist's professional skill of eyes care.[122] However, the Supreme Court upheld this regulation.[123] Although it applied the rational basis test by verifying the existence of "an evil at hand for correction," it came to the following result: "But the 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."[124]

Following this philosophy, the courts are reluctant to strike down economic regulations, even if they seem absurd to a normal person. Also, the court not require the goal of the regulation to actually be a government interest: rather, any conceivable legitimate purpose is sufficient, even if it is not the purpose the legislator or the

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[118] *See* Sanderson, *supra* note 20 (concludes that "courts have upheld even the most egregiously protectionist licensing schemes as constitutional. And, in the post-New Deal constitutional order, it is difficult to see how they could do otherwise: whether or not intrastate economic protectionism per se is a legitimate state interest"). Only in a few cases have the regulations failed the rational basis test. *see e.g.* United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973); Zobel v. Williams, 457 U.S. 55 (1982); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).

[119] Williamson v. Lee Optical, 348 U.S. 483 (1955).

[120] *See* Barnett, *supra* note 117, at 1485.

[121] *Williamson*, 348 U.S. at 485.

[122] The Supreme Court acknowledged that "in many cases the optician can easily supply the new frames or new lenses without reference to the old written prescription" and "the Oklahoma law may exact a needless, wasteful requirement in many cases", *see Williamson*, 348 U.S. 483.

[123] *Id.* at 487.

[124] *Id.* at 487-88,

agency had in mind initially.[125] Additionally, the burden of proof is on the challenger.[126] That means the challenger needs to prove that the regulation is deprived of any conceivable legitimate government interest, which is so broad that challengers actually rarely succeed.[127] Therefore, a researcher, by reviewing the Supreme Court attitudes, [128] evaluates rational basis test as "nothing more than a pseudonym for judicial inactivity."[129]

2. The Rational Basis Test Has Teeth

Although the rational basis test was formally applied for the first time in the *Nebbia* case,[130] it is rooted in the due process clause, which can be traced back to the English law.[131] The due process doctrine was employed by the courts to decide constitutionality before the *Lochner* era.[132] At that time, the rule of due process was practiced by the Supreme Court to presume the constitutionality of the challenged legislation and to put on the challenger the burden to prove the law was unconstitutional.[133]

However, traditionally when the rule of due process was applied by the Supreme Court to review constitutionality, it had

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[125] CHEMERINSKY, *supra* note 61, at 541.

[126] *Id.* at 540.

[127] *Id.*

[128] Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 39.

[129] Miles O. Indest, *Walking Dead: The Fifth Circuit Resurrects Rational Basis Review*, 88 TUL. L. REV. 993, 995 (2014).

[130] *Nebbia*, 291 U.S. 502, 537 (stating that "a State is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose").

[131] Jackson, *supra* note 115, at 491-501.

[132] *See* generally Indest, *supra* note 129, at 995.

[133] *See e.g.*, Sweet v. Rechel, 159 U.S. 380, 392-93 (1895); Mugler v. Kansas, 123 U.S. 623, 661 (1887).

teeth.[134] The Court first presumed the validity of the legislation.[135] Then the Court addressed the question of whether the legislation was reasonably related to the public interest.[136] If the challenger could show facts that the legislation was not reasonably related to the public interest, then the Court would strike down the legislation based on the Constitution.[137]

Before the *Lochner* era, the substantive due process test had teeth.[138] These teeth were not that sharp. Using this test, with it's duller teeth, worked well, not only judging the rule itself, but also by using empirical studies.[139] From 1887 to 1912, seven legislative items were considered unconstitutional among ninety-eight cases that were decided by the Supreme Court.[140] Even at the beginning (from 1913 to 1920) of the *Lochner* era, the Court overturned five pieces of legislations in ninety-seven cases that regarded substantive due process.[141] Only after the Court entered the so-called "heyday" of the *Lochner* era, would more legislation be struck down as unconstitutional under the substantive due process test.[142] Nevertheless, there were more pieces of legislation being upheld than struck down.[143] By the end of the *Lochner* era, the attitude of the Supreme Court changed. As one commentator puts it, the liberty of contract's special status had been for all intents and purposes killed by the *Nebbia* case and buried by the *Parrish* case.[144]

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[134] *See Sweet,* note 133, *see also Mugler,* infra note 133.

[135] *Sweet*, 159 U.S. at 392-93.

[136] *Mugler*, 123 U.S. at 661.

[137] *Id.*

[138] *See generally* Jackson, *supra* note 115, at 511-19.

[139] *Id.*

[140] *Id.* at 508.

[141] *Id.*

[142] CHEMERINSKY, *supra* note 61, at 616.

[143] *Id.*

[144] Jackson, *supra* note 115, at 519.

Although the tendency of the Supreme Court changed, its spirit remains: outwardly, the Court expressed that no showing could overturn the licensing laws under the rational basis test, but faintly the test still has teeth.[145] In the case of *Sproles v. Binford* (1932),[146] it was stated that the Court should defeat the useful purposes that the legislation based on if it finds the legislation was unequivocally arbitrary or unreasonable.[147]

Going back to the *Carolene Products* case, although most challenged laws were reviewed under the minimally restrictive rational basis test so that the constitutionality of the purpose as well as the laws themselves were presumed, the Court did not view the rational basis test as a "rubber stamp," since the Court declared:

> We may assume for present purposes that no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.[148]

Even in the *Williamson* case, which was considered as an extreme case turning the rational basis test into "rubber stamp," the Court still inquired into whether the evidence presented could establish "an evil at hand for correction."[149] And whether this legislation was a rational way to eliminate it.[150] This logic pattern shows that the Court did not blindly presume the rationality, but

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[145] Indest, *supra* note 129, at 996.

[146] Sproles v. Binford, 286 U.S. 374, 388-89 (1932).

[147] Morris v. Duby, 274 U.S. 135, 145 (1927).

[148] U.S. v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

[149] Williamson v. Lee Optical, 348 U.S. 483, 487 (1955).

[150] *Id.* at 488.

actually needed to inquire into this rationality to some extent.[151] The current circuit split on the economic protectionism also illustrates that the rational basis test could actually bite the economic regulation if it is intrusive enough, though the test needs to be clarified, which will be demonstrated in Part B.

3. Why Apply the Rational Basis Test Rather Than Other Tests?

Some studies argue that a new kind of test shall be introduced, that the "rational basis with bite" test shall be adopted for judicial review.[152] Others argue that the rational basis test shall no longer apply due to its blindness for the licensing law's unconstitutionality, so that heightened scrutiny, the intermediate scrutiny test, should be applied to review the licensing law.[153]

Within the three-tier scrutiny system (strict scrutiny, intermediate scrutiny, rational basis test), strict scrutiny is designed to protect "fundamental rights" from legislation intrusions, which means if it is to pass the scrutiny, the challenged laws must be narrowly tailored to achieve a compelling government interest, and rational basis test is designed to review legislations that does not concern "fundamental rights."[154] In intermediate scrutiny, the challenged law must further an important government interest by means that are substantially related to that interest.[155] The intermediate scrutiny itself is vague enough because of its

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[151] *See generally* Jackson, *supra* note 115, at 511-19.

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

[153] *See, e.g.,* Indest, *supra* note 129, at 995; Alexandra L. Klein, *The Freedom to Pursue A Common Calling: Applying Intermediate Scrutiny to Occupational Licensing Statutes*, 73 WASH. & LEE L. REV. 411 (2016).

[154] *See* Williamson v. Lee Optical, 348 U.S. 483, 488 (1955) (and quoting Munn v. Illinois, 94 U.S. 113, 134 (1876)).

[155] *See generally* CHEMERINSKY, *supra* note 61, at 541 (argues that the intermediate scrutiny is usually used to evaluate laws that concern gender discrimination, discrimination against non-marital children, discrimination against undocumented alien children regarding education, and regulation of commercial speech).

indeterminate language.[156] Compared to the rational basis test, the intermediate scrutiny is more unpredictable and offers leave more space for the courts to interpret.[157] Judicial interpretation based on each specific case is not the wrong standard, but the intermediate scrutiny is actually more evidently a "balancing mode" where the courts are required to weigh multitude factors.[158]

The proposed "rational basis test with bite" is not an effective solution either. Based on the assumption that the rational basis test is toothless, the "rational basis test with bite" test was recommended by many commentators.[159] This new type of test means that a court, "while purporting to use the rational basis test, actually applies some form of heightened scrutiny and invalidates the challenged law after a close examination of the law's purpose and effects."[160] The downfall of the test remains that it is ill defined.[161] Furthermore, the test is more likely to look like intermediate scrutiny without an articulation of the factors to trigger it.[162] This kind of use of intermediate scrutiny, therefore, is indefensible. It will confuse "legislatures and lower courts and leaving courts unaccountable for their decisions."[163] Besides, the three-tiered scrutiny system is already confusing, which can be clearly illustrated from split between

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[156] *See* George C. Hlavac, *Interpretation of the Equal Protection Clause: A Constitutional Shell Game*, 61 GEO. WASH. L. REV. 1349, 1375 (1993).

[157] *See* CHEMERINSKY, *supra* note 61, at 541.

[158] Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 293-94 (1922).

[159] *See* Clark, *supra* note 103 at 345; Jackson, *supra* note 115, at 491; Clark Neily, *No Such Thing: Litigation Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 898, 913 (2005); Menashi & Ginsberg, *supra* note 152 at, 1055.

[160] Kevin H. Lewis, Note, *Equal Protection After Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175, 180 (1997).

[161] *See* Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 779-80 (1987).

[162] *Id.* at 779.

[163] *Id.* at 780.

the Circuits. Creating a new type of test could contribute no more than just confusion to the legal system.

If we look into the casket cases at hand, we could find that even if the court applies a traditional rational basis test, it can also deter economic protectionism to some extent. The *Craigmiles* and *St. Joseph Abbey* cases are good examples.[164] Also, the Court confirmed that if legislation can be negated on every conceivable basis, it would invalidate the legislation.[165] It demonstrates that rational basis test requires the courts to inquire into reasons behind legislature purpose.[166] As a result, the traditional test already has teeth and no more teeth are needed.[167]

B. Proposed Formula When Applying Rational Basis Test

In the *Armour* case, the Indianapolis city's funding sewer improvement project distinguished residents who had already paid their share of project costs and those who had not.[168] Homeowners challenged the classification for its unconstitutionality. [169] The Supreme Court employed the rational basis test to review the state statute and reaffirmed that "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it" which was quoted from the *Madden* case.[170] To what extent it can include "every conceivable basis" experts are still not sure.[171] This vague language may lead to circuit split over the constitutionality of the licensing law again.

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[164] In both cases, the courts applied rational basis test to evaluate the challenged laws and ruled they were unconstitutional because of their economic protectionism. See general Craigmiles v. Giles, 312 F. 3d 220 (6th Cir. 2002); St. Joseph Abbey v. Castille, 700 F.3d 215 (5th Cir. 2013)

[165] Armour v. City of Indianapolis, 132 S. Ct. 2073, 2082 (2012).

[166] *Id.* at 2080.

[167] *Id.*

[168] *Id.* at 2073.

[169] *Id.*

[170] Madden v. Kentucky, 309 U.S. 83, 88 (1940).

[171] Armour v. City of Indianapolis, 132 S. Ct. 2073, 2077(2012) (quoting Heller v. Doe, 509 U.S. 312, 319–320, 113 S.Ct. 2637, 125 L.Ed.2d 257).

To survive a rational basis test, a licensing law should be *reasonably related to a legitimate state interest*.[172] This definition sets some standards for determining the challenged law's constitutionality. Firstly, there is a "*reasonableness*" requirement. Then, the licensing law should at least "*relate*" to the government purpose. Finally, the government intent must be "*legitimate*."

However, these standards were not strictly applied in the casket selling cases.[173] It is because the standards are also not clear enough so that the courts can make judgments on their own.[174] In order to clarify the standards, therefore, some factors urgently need to be taken into consideration when applying the rational basis test. The formula is proposed as following:

1. Whether Consumers Will Be Frequently Injured By The Unlicensed Practitioners

The licensing board contends that licensing laws are designed to protect consumers or to promote public health and safety.[175] We must admit that the modern society is full of risks. This does not mean that our legal system should control every corner of the society. Only when the risk is high enough can the legislature intervene.[176] Take the casket licensing as an example. Although the licensing board contends that casket-selling licensing aims at protecting consumers and public health, the FTC actually finds that there is no evidence of significant consumer injury that is caused by the sale itself.[177] Conversely, the licensing boards file the majority of complaints toward unlicensed practitioners.[178] It could demonstrate

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[172] City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

[173] *See supra* note 102.

[174] *Id.*

[175] *See* the arguments in the casket selling cases, *supra* note 102; *See also* Kleiner et al., *supra* note 46, at 30.

[176] *See infra* note 179.

[177] St. Joseph Abbey v. Castille, 712 F.3d 215, 219 (5th Cir. 2013); Regulatory Review of the Trade Regulation Rule on Funeral Industry Practices, 73 Fed. Reg. 13,740, 13,745 (Mar. 14, 2008).

[178] *See generally* Rhode, *supra* note 56.

that consumers are rarely unsatisfied or injured toward the services provided, but the licensing boards cares more about the regulatory monopoly. Therefore, the "frequency" of injury caused by the unlicensed practitioners should be an important factor when the courts consider the legitimate government interest.

2. Whether The Assumptions Of Injury Actually Exist

When the interest groups persuade the legislature to pass licensing laws, they argue that the unlicensed practitioners will injure consumers.[179] Although the board assumes these injuries and risks, scrutinizing the legislature's intent is required to fit the licensing law's means and ends.[180] In the casket-selling case, the licensing board contended that licensing was needed in order to prevent the spread of disease from faulty coffins.[181] Preventing the spread of diseases is a legitimate government interest, however, there is no evidence to prove that faulty caskets-selling will actually cause that problem.[182] The deposition of Lisa Carlson in the *Craigmiles* case showed that "caskets serve no public health or safety purpose or environmental health or safety purpose whatsoever."[183] Further, the study presented in the deposition demonstrated that "bodies buried in mass graves after the plague directly in the soil were less of a health risk than some in caskets."[184] A serious inquiry into the factual justifications proposed by the licensing board can sometimes show that some assumptions are only presumptions, which should not turn into facts. The courts should take this evidence into consideration when reviewing the existence of a legitimate government interest. If the evidence does not support the assumptions, then the alleged consumer protection and public health intent may not be an actual legitimate government interest.

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[179] *See* N. Carolina State Bd. of Dental Examiners v. F.T.C., 135 S. Ct. 1101, 1108, 191 L. Ed. 2d 35 (2015) (Argument from North Carolina State Board of Dental Examiners argues that practice of whitening teeth by non-dentist will harm consumers).

[180] Raynor, *supra* note 103, at 1074

[181] *See* Craigmiles v. Giles, 312 F. 3d 220, 225 (6th Cir. 2002).

[182] Craigmiles v. Giles, 312 F. 3d 220, 225 (6th Cir. 2002).

[183] Transcript of Deposition at 13, Craigmiles v. Giles, 110 F. Supp. 2d 658 (E.D.Tenn. 2000) (No. 1:99-CV-304), 2000 WL 34618720.

[184] *Id.*

3. Whether The Licensing Law Is Related To The Government Interest

If the licensing law is not related to the government interest, then it may not be constitutional. Take the casket-selling case as an example. The casket selling business is like any other business subject to the consumer protection laws.[185] Although the casket selling business might have some specificities compared to other daily transactions, the consumer protection law could set some special requirements for the casket selling business without setting irrelevant occupational licensing requirements.[186]

For instance, the State of Tennessee has already passed regulations to regulate casket retailers.[187] These regulations are generally applicable to retailers and would be enforced by civil and criminal sanctions.[188] Besides, even if casket retailers would not be covered by the requirements under these regulations, "it would be a symptom of the structure of the Act, not the unconstitutionality of requiring licensure for casket retailers."[189] The legislature should develop equivalent standards to regulate these casket retailers.[190]

Also, the existence of a government interest does not mean the law is actually related to this particular interest. The casket seller does not actually handle dead bodies, therefore the reasoning that preventing the spread of disease from improper handling of dead bodies could not support the licensing law's constitutionality.[191] The "relation" does not need to be "substantial" which may lead to the heightened scrutiny, however, there should be at least some direct relation.[192] In the casket selling case, public health and casket

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[185] Clark, *supra* note 103, at 357.

[186] *Id.*; *Castille*, 712 F.3d at 225; *Craigmiles*, 312 F.3d at 226.

[187] *See* TENN. CODE ANN. § 62-5-317(b).

[188] *Craigmiles*, 312 F.3d at 226.

[189] *Id.*

[190] *Id.*

[191] Clark, *supra* note 103, at 357.

[192] *See supra* note 183.

transaction clearly do not have any direct relation; therefore this licensing law should not survive the rational basis test.

C. The Law Will Not Return Back to the *Lochner* Era

Applying the proposed formula within the rational basis test can clarify the uncertainty of the traditional rational basis test. The courts, when reviewing the licensing laws could use this formula. However, there may be some concerns that the application of the proposed formula might lead the courts back to the *Lochner* era.

This should be the last thing to worry about. The proposed formula is still within the rational basis test context. That means the plaintiff who challenges the licensing laws should always take the burden of proof.[193] On the other hand, the courts should still assume the constitutionality of the licensing law unless the challengers presenting evidence to prove the licensing law fails the proposed formula. Under these circumstances, most of licensing laws will still survive the review. What the proposed formula might do is to clarify the ambiguities under the rational basis test so that the courts could apply it appropriately and strike down those licensing laws, which is purely economic protectionism.

V. Conclusion

As discussed above, occupational licensing is prevalent. However, is occupational licensing justified under all circumstances? From a public policy point view, it is not, since most of these license requirements are a form of economic protectionism for the practitioners. Nor is it from a legal point of view. The licensing laws should at least have a legitimate government interest to justify. This requirement is exactly why the licensing regime was established.

If the licensing law's only purpose is to protect the practitioners and to limit the number of new entrants without any other legitimate government interest, then this "only-purposed" licensing law shall be struck down. To have a better occupational licensing system and end the circuit split over the licensing law's constitutionality, the courts should responsibly apply the "rational basis test" to scrutinize licensing laws.

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[193] *See* CHEMERINSKY, supra note 61, at 540.