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A FORGOTTEN UNFAIRNESS: TAKING A "BITE" OUT OF STATE OCCUPATIONAL CERTIFICATION AND REGISTRATION REGULATIONS

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I. INTRODUCTION

With the recent *Sensational Smiles, LLC v. Mullen*[1] decision, the Second Circuit has reignited a debate regarding how courts should review state economic regulations, specifically ones affecting employment. This legal dispute, which beckons back to the time of *Lochner v. New York*,[2] has developed a refreshed exposure over the past fifteen years. The *Sensational Smiles* decision upheld a state regulation that permitted only licensed dentists to perform teeth-whitening services. This recent renewal has primarily focused on state regulations that "protect" licensed professionals by allowing only these licensed individuals to perform certain services for consumers. Therefore, much of the commentary surrounding the issue of the appropriate standard of review to apply to such regulations has principally revolved around challenges to such occupational licensing regulations.[3]

Nevertheless, similar, yet somewhat forgotten, state regulations have perhaps even greater implications on the ability of individuals to perform certain occupational services. State occupational certification and registration regulations impose analogous restrictions as licensing schemes on individuals seeking to provide services to society, but these specific regulations repeatedly lack the reasonable connection that should exist between a regulatory regime and the stated governmental purpose. As a result, occupational certification and registration regulations are often more deserving of heightened review than even occupational licensing regulations. Modern courts are increasingly recognizing this in adjudicating these regulatory challenges.[4]

One heightened standard advocated for in reviewing such regulations

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1. 793 F.3d 281 (2d Cir. 2015).

2. 198 U.S. 45 (1905). *Lochner* is generally considered a seminal case involving judicial review of state regulations that interfere with an individual's claim to economic liberty.

3. *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 (2012); Roger V. Abbott, *Is Economic Protectionism A Legitimate Governmental Interest Under Rational Basis Review?*, 62 CATH. U. L. REV. 475 (2013).

4. Bokhari v. Metro. Gov't of Nashville & Davidson Cnty., 2012 U.S. Dist. LEXIS 171103 (M.D. Tenn. Dec. 3, 2012); Bruner v. Zawacki, 997 F. Supp. 2d 691 (E.D. Ky. 2014); Shimose v. Haw. Health Sys. Corp., 345 P.3d 145 (Haw. 2015).

is provided in the Supreme Court's decision in *City of Cleburne v. Cleburne Living Center*,[5] which represented an instance of the Court distancing itself from traditional rational basis review. After reversing the Fifth Circuit's determination that mental disability was a quasi-suspect classification deserving protection under intermediate scrutiny, the Court nonetheless implied that a standard of review less deferential than traditional rational basis was appropriate.[6] A justification for this heightened review was the Court's recognition of the intellectually disadvantaged as a "politically unpopular group."[7] As a result, a zoning ordinance that required permits for the operation of group homes for the intellectually disadvantaged was found not to have satisfied this heightened rational basis review.[8]

Using this "rational basis with bite,"[9] the Court could not find a rational relationship between the individual qualities of the intellectually disadvantaged and the prohibition from them living in a group home, especially when there were no similar restrictions for any other groups of people.[10] Since these homes had already been functioning in a highly regulated atmosphere, the court deemed the ordinance as signifying nothing more than an unfounded prejudice against the intellectually disadvantaged.[11]

In light of *Sensational Smiles*, the current circuit split reflects a conflict over whether traditional rational basis review or some sort of heightened review, such as that set forth in *Cleburne*, is more appropriate when examining occupational licensing regulations.[12] Given the lack of lobbying power of industry outsiders, this comment will argue that courts should view all occupational regulatory schemes under the lens of *Cleburne* when such schemes are challenged pursuant to the Equal Protection Clause. Additionally, this comment will expose

5. 473 U.S. 432 (1985).

6. *Id*. at 442 (1985).

7. *Id.* at 447.

8. *Id.* at 447–50.

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

10. *See id.* at 449–50.

11. *Id.* at 450.

12. Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 284 (2d Cir. 2015) (finding a rational basis exists for the Connecticut regulation under traditional rational basis); St. Joseph Abbey v. Castille, 712 F.3d 215, 227 (5th Cir. 2013) (finding a Louisiana regulation not to have a rational basis and invalidating it); Merrifield v. Lockyer, 547 F.3d 978, 988 (9th Cir. 2008) (upholding a California licensing scheme under traditional rational basis review); Powers v. Harris, 379 F.3d 1208, 1224 (10th Cir. 2004) (finding judicial review pursuant to traditional rational basis appropriate and upholding the Oklahoma licensing scheme under this standard); Craigmiles v. Giles, 312 F.3d 220, 229 (6th Cir. 2002) (finding the Tennessee regulation anticompetitive in nature and that it could not survive rational basis review).

the Second Circuit's misconstruing of Supreme Court precedent,[13] which provided the foundation for that court's misplaced reliance on a heightened degree of judicial deference as being most appropriate in addressing all forms of preferential economic legislation. With the general reasoning behind *Sensational Smiles* in doubt, *Cleburne*'s advocacy of a more searching standard than traditional rational basis review becomes more supportable. The inconsistent review of prior occupational regulations, which has produced illogical and unjustified results, further buttresses this stricter standard.

Furthermore, in terms of occupational certification and registration requirements, an all-too-common lack of valid connection between these regulations and the police power—under which such regulations are often rationalized—demonstrates the need for a broader application of heightened review beyond licensing regulations.[14] Moreover, the modern trend of lower courts scrutinizing state occupational action beyond traditional rational basis review lends credence to the notion that there is increasing momentum for employing an increased form of rational basis review.[15] Finally, given the concern expressed by some regarding a potential lack of proper constraints on the use of such review, the Supreme Court has established an easily adaptable framework that can provide guidelines for courts that would limit heightened rational basis review to anticompetitive occupational regulation schemes.[16]

II. BACKGROUND

In *Sensational Smiles*, the Second Circuit reviewed the Connecticut State Dental Commission's declaratory ruling that only licensed dentists were allowed to offer teeth-whitening procedures. The court explicitly reviewed this ruling under traditional rational basis review, under which a classification must be upheld if there is a rational relationship between the classification set forth in the legislation and a legitimate governmental purpose.[17] First, the Second Circuit recognized the government's legitimate and undisputed interest in maintaining the

13. *Sensational Smiles*, 793 F.3d at 286–87.

14. *See generally* Bokhari v. Metro. Gov't of Nashville & Davidson Cnty., 2012 U.S. Dist. LEXIS 171103 (M.D. Tenn. Dec. 3, 2012); Bruner v. Zawacki, 997 F. Supp. 2d 691 (E.D. Ky. 2014); Shimose v. Haw. Health Sys. Corp., 345 P.3d 145 (Haw. 2015).

15. *Id.*

16. *See* FTC v. Phoebe Putney Health Sys., 133 S. Ct. 1003, 1006 (2013) (looking to whether the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature in determining if a state policy to displace federal antitrust law was sufficiently expressed).

17. *Sensational Smiles*, 793 F.3d at 283–84.

public's oral health.[18] Then, the court found a rational basis for this regulation in its reduction of consumer health risks related to the use of LED lights during such procedures.[19] As support for its deferential approach to this state regulation, the court specifically made reference to the Supreme Court's decision in *Heller v. Doe*,[20] whereby a court should uphold state action if there is any reasonable set of facts that offers a rational basis for the action.[21] The court acknowledged that dentists had the knowledge and experience by which to recognize any oral health issues that could develop while performing these teeth-whitening services.[22] The ruling was thereby perceived as helping to maintain the public health and was partially upheld on this basis.[23]

In its use of rational basis review, the Second Circuit identified other justifications for the ruling, including several that would likely not stand up against a stricter form of review. For example, the court identified economic favoritism as another rational purpose to uphold the regulation's constitutionality, a claim that the Supreme Court supposedly bolstered[24] in its oft-cited cases involving legislation premised upon economic favoritism.[25] The court additionally set forth the justification that the regulation's likely effect of increasing the cost of teeth-whitening services could subsidize the costs of more specialized dental services.[26] The court repeatedly distanced itself from the process of "choosing between competing economic theories" and "politics" in general, yet also provided that courts will "sniff out" improper economic protectionism if they have the preconceived intent to do so.[27] Therefore, in upholding the Commission's exclusionary regulation under traditional rational basis review, the Second Circuit realized the inherent risk of inconsistency in judicial application of this review to state occupational regulations.[28]

In *Powers v. Harris*, which involved a previous application of traditional rational basis review to a similar question, the Tenth Circuit upheld the Oklahoma Funeral Services Licensing Act, which prohibited

18. *Id.* at 284.

19. *Id.*

20. 509 U.S. 312 (1993).

21. *Sensational Smiles*, 793 F.3d at 284.

22. *Id.* at 285.

23. *Id.* at 285.

24. *Id.* at 286–87.

25. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955); New Orleans v. Dukes, 427 U.S. 297 (1976); Nordlinger v. Hahn, 505 U.S. 1 (1992); Fitzgerald v. Racing Ass'n, 539 U.S. 103 (2003).

26. *Sensational Smiles*, 793 F.3d at 287.

27. *Id.*

28. *Id.*

casket sellers located within the state from selling time-of-need caskets if they did not hold a funeral director license.[29] The court provided several justifications for using traditional rational basis review, including the reducing of a "probing review" of state actions, a safeguarding against courts replacing state regulations with their own views, and respecting the concept of federalism.[30] In recognition of the deferential nature of this review, the court explicitly disregarded the parties' arguments concerning the legitimate interests of the statute and also stated that, upon the court's discovery of a legitimate state interest, there would be "little doubt" of the regulation's rational relationship to that interest.[31] The court identified intrastate economic regulation, a state's regulation of economic activity solely within that state, as a proper interest and distinguished it from interstate economic protectionism, the protection of a state's industries from out-of-state industries.[32] The court therefore held that a state has a legitimate interest in protecting one intrastate industry against another.[33]

In *Powers*, the Tenth Circuit claimed that heightened scrutiny of economic-protectionism regulations would have far-reaching consequences. The court did not, however, identify any of these concerns other than a concern that the state could possibly become less attractive to individuals seeking employment as licensed professionals.[34] The court then concluded its rational basis review by simply stating that the Oklahoma Funeral Services Act was rationally related to the interest of protecting the Oklahoma funeral-home industry, thereby satisfying the second part of the rational basis test.[35] No further analysis of the Act's relationship to the stated interest was given.

Also in *Powers*, the Tenth Circuit criticized the Sixth Circuit's rationale in *Craigmiles v. Giles*,[36] where the Sixth Circuit relied on *Cleburne* to apply a heightened standard of review to a Tennessee statute.[37] In *Craigmiles*, the Sixth Circuit addressed the Tennessee Funeral Directors and Embalmers Act, which was similar to the Oklahoma statute in that it allowed only licensed funeral directors to sell caskets within the state.[38] The court considered, and ultimately rejected,

29. Powers v. Harris, 379 F.3d 1208, 1225 (10th Cir. 2004).
30. *Id.* at 1218.
31. *Id.* at 1217–18.
32. *Id.* at 1218–19.
33. *Id.*
34. *Id.* at 1222.
35. *Id*. at 1222–23.
36. *Id*. at 1223–25.
37. Craigmiles v. Giles, 312 F.3d 220, 225–27 (6th Cir. 2002).
38. *Id*. at 222.

Tennessee's justifications for the statute.[39] The illogical rationalizations offered by the state included promoting public health by permitting only licensed funeral providers, who have the proper training, to handle dead bodies and promoting consumer protection by permitting only these same individuals, who have the appropriate education, to dispense advice on the caskets that would be most "protective."[40]

The Sixth Circuit primarily relied on the Supreme Court's holding in *Cleburne* as its main support for rejecting Tennessee's stated purpose of the law. The court specifically focused on the Supreme Court's directions that a municipality should craft its regulations with truly rational bases in order to avoid arbitrary and harmful classifications.[41] Without an explicit legislative reason for the difference in treatment between licensed funeral directors and unlicensed casket sellers, the Sixth Circuit stated that the state's arguments would have to satisfy at least some kind of meaningful review.[42] Since the regulation had such a deep impact on the capitalist structure on which America was built, the court recognized that Tennessee would have to tailor more narrowly such regulation in order to avoid the effect of economically privileging certain individuals at the expense of completely excluding others.[43]

As stated before, the Tenth Circuit was critical of the plaintiffs' proffered reading of *Cleburne* that would require a more exacting rational basis standard.[44] The court acknowledged that one possible reading of *Cleburne* could result in a requirement that this heightened review be applied to laws that are a detriment to unpopular groups, but it ultimately rejected this interpretation in part because the unlicensed casket sellers did not constitute such a group.[45] Additionally, the court did not find that *Cleburne* signified an exception to traditional rational basis review because the Supreme Court did not provide guidelines for the precise circumstances in which such an exception would apply.[46] As a result, the court, in supposedly following the Supreme Court's lack of direction on the matter, refused to give any credence to *Cleburne*'s possible influence in modifying traditional rational basis review.[47] The opinion, in which the court recognized several possible interpretations of *Cleburne*, served little useful purpose in clarifying *Cleburne* for other

39. *Id.* at 225–26.
40. *Id.*
41. *Id.* at 227.
42. *See id.*
43. *Craigmiles*, 312 F.3d at 229.
44. Powers v. Harris, 379 F.3d 1208, 1223 (10th Cir. 2004).
45. *Id.* at 1224.
46. *Id.* at 1225.
47. *Id.*

courts.

In contrast to the Tenth Circuit, the Sixth Circuit in *Craigmiles* fell in line with the Supreme Court's reasoning by finding that *Cleburne* stood as an authorization for courts to be more critical of legislation if there is a more direct path to the legitimate end than the one undertaken by the legislature.[48] Therefore, the *Craigmiles* court was willing to adopt the rational-basis-with-bite standard when reviewing an occupational regulatory scheme and did so in a manner consistent with the true spirit of *Cleburne*, as will be shown below.

III. DISCUSSION

A. Cleburne

As previously mentioned, some courts that have applied heightened rational basis review have justified this application in large part with *Cleburne*'s principle that the choice to use rational basis review must actually be rational itself when the challenged classification significantly impairs a politically unpopular group, such as the intellectually disadvantaged or the politically powerless workforce.[49] However, the Second Circuit completely ignored this principle in *Sensational Smiles* despite the Sixth's Circuit's explicit reliance on *Cleburne* in *Craigmiles*, which served as the catalyst for similar rulings by the Ninth and Fifth Circuits.[50] This overt omission indicates that the Second Circuit has no answer for the Sixth Circuit's use of *Cleburne*, thereby lessening the impact of the Second Circuit's refusal to recognize any heightened form of rational basis review.[51] Only the Tenth Circuit addressed this specific application of *Cleburne* and found that *Cleburne* could represent a number of possibilities, including a budding standard of equal protection review or a simple exception to traditional rational basis review.[52] Ultimately, the Tenth Circuit did not decide what *Cleburne* embodied but instead employed the traditional rational basis standard.[53] This confusion involving *Cleburne* shows the need for affirmative guidance by the Supreme Court on the proper scope of heightened rational basis review.

Cleburne should stand for the proposition that those state

48. *Craigmiles*, 312 F.3d at 227.

49. *Id.*

50. *Id.*; Merrifield v. Lockyer, 547 F.3d 978, 989 (9th Cir. 2008); St. Joseph Abbey v. Castille, 712 F.3d 215, 223 (5th Cir. 2013).

51. Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 285 (2d Cir. 2015).

52. Powers v. Harris, 379 F.3d 1208, 1224 (10th Cir. 2004).

53. *Id.*

classifications that have the effect of impairing a politically unpopular group deserve a review greater than mere traditional rational basis, even if they do not deserve strict or intermediate scrutiny.[54] Professionals prevented from performing certain services due to state occupational regulations certainly constitute a politically unpopular group. Those professionals who are not already established within an industry certainly do not possess the same amount of leverage as industry insiders. Additionally, established industry participants likely have greater access to industry resources by which to restrict competition, including political connections. These insiders can further use this influence to take an active role in crafting regulations and other industry rules, which the Supreme Court recently recognized as dangerous because of the inherent risk of established ethical standards of a profession intermingling with private anticompetitive purposes.[55] Such blending of professional standards and monopolistic intentions can be economically beneficial for only select groups of individuals—those who are already established in an industry.[56] Due to these reasons, industry outsiders undoubtedly constitute a politically unpopular group.

Although *Cleburne* involved the issue of whether state-action immunity can protect a state regulatory board, one can see the same concerns in the context of state regulations that force individuals to comply with occupational requirements in order to be permitted to perform certain services. For example, several individuals who are "private market participants" within the architectural industry compose the Ohio Architects Board.[57] Among its many responsibilities, the Board has the authority to promulgate registration requirements to practice architecture in Ohio.[58] Currently, these requirements include satisfying education, training, and examination requisites.[59] There is little difficulty in envisioning this Board or a similarly constructed regulatory entity crafting regulations with a nefarious underlying purpose, such as setting forth regulations that exclude an entire segment of the population from performing certain services based on factors completely unrelated to the provision of such services.

Even if state officials are overseeing a board's regulatory activity, these officials may be unfamiliar with the particular industry that is

54. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985).

55. N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1111 (2015).

56. *Id.*

57. *Board Members and Staff*, OHIO ARCHITECTS BOARD, http://www.arc.ohio.gov/AboutBoard.aspx (last visited Oct. 4, 2015).

58. *Registration Requirements*, OHIO ARCHITECTS BOARD, http://www.arc.ohio.gov/RegistrationRequirements.aspx#ARC_Registration_by_Examination (last visited Oct. 4, 2015).

59. *Id.*

regulated and therefore may not be able to truly understand the subtle, or perhaps even more obvious, implications of the board's actions. Unless officials are well versed in the competitive landscape of the architectural industry, it is possible that they will defer to the judgments of their peers on the Ohio Architects Board, who they will view as better equipped to fashion appropriate industrial standards due to their specialized knowledge and experience. A board with misguided intentions can easily blur the line between necessary professional standards and inappropriate protectionism of certain groups within an industry.

Legislators directly constructing occupational regulations similar to those previously discussed also exacerbates this anticompetitive concern. Lobbying greatly influences the American political system, resulting in whole industries attaining both economic and noneconomic benefits through legislation.[60] Industrial lobbying effectively eradicates the buffer between those developing the standards for one's profession and the active market.[61] Therefore, legislators may be just as inclined to favor improperly certain groups within industries as the market participants themselves, and only the naïve believe otherwise.

B. Misplaced Reliance

In supporting its application of traditional rational basis review to an occupational licensing scheme, the Second Circuit drew a tenuous connection between certain Supreme Court decisions involving economic favoritism[62] and the occupational regulation at issue before the Second Circuit.[63] These cited Supreme Court decisions involved state and local regulations that were more beneficial only to discrete groups of professionals within specific industries, and the Court accordingly held that legislative economic favoritism within this context is permissible.[64] However, courts must draw a line between legislation that merely benefits portions of industries and legislation that serves to exclude completely entire segments within an industry.

In the first Supreme Court decision to find economic favoritism to be a legitimate state interest, the Court upheld a regulation that prohibited individuals who offered eye examinations or visual care from occupying

60. George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

61. *Id.*

62. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955); New Orleans v. Dukes, 427 U.S. 297 (1976); Nordlinger v. Hahn, 505 U.S. 1 (1992); Fitzgerald v. Racing Ass'n, 539 U.S. 103 (2003).

63. Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 286–87 (2d Cir. 2015).

64. *Williamson*, 348 U.S. 483; *Dukes*, 427 U.S. 297; *Nordlinger*, 505 U.S. 1; *Fitzgerald*, 539 U.S. 103.

space in a retail store.[65] Although *Williamson v. Lee Optical of Oklahoma, Inc.* certainly limited where "eye doctors" could offer their services within Oklahoma, they were still not completely prohibited from practicing their chosen occupation.[66]

In similar fashion, the Court in *New Orleans v. Dukes* later upheld a New Orleans ordinance that banned street vendors from the French Quarter unless the vendor had continuously operated in these premises for at least 8 years.[67] The Court even recognized that this "grandfather provision" was a proper way to preserve the environment of the French Quarter as opposed to an absolute prohibition against all street vendors, which the Court seemed to suggest would constitute an irrational step.[68] Additionally, the Court implied that the street vendors would still be permitted to operate in other locations throughout the city.[69] The Court ultimately found the ordinance a logical means to protect New Orleans' stated interest, even if some of the vendors would be economically disadvantaged by not having direct access to tourists and residents in the French Quarter.[70]

Another Supreme Court case cited by the Second Circuit in *Sensational Smiles* involved the imposition of taxes on some individuals or businesses based on factors that seemed to suggest favoritism. In *Nordlinger v. Hahn*, the Court upheld a California taxing scheme on property owners, despite the differential treatment experienced by similarly situated owners.[71] Specifically, long-term owners could have potentially benefited from lower taxes due to qualifying for rates that reflected historic property values.[72] In finding the tax legislation to be valid under traditional rational basis review, the Court acknowledged that more recent owners, including start-up businesses, would be severely disadvantaged.[73] However, the Court seemed to imply that this economic disadvantage would not be so oppressive as to warrant the overturning of this taxation scheme since these more recent property

65. *Williamson*, 348 U.S. at 491.

66. *Id.*

67. *Dukes*, 427 U.S. at 305.

68. *Id.* ("The city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Vieux Carre and that the two vendors who qualified under the 'grandfather clause'—both of whom had operated in the area for over 20 years rather than only eight—had themselves become part of the distinctive character and charm that distinguishes the Vieux Carre. We cannot say that these judgments so lack rationality that they constitute a constitutionally impermissible denial of equal protection.").

69. *See id.*

70. *See id.*

71. Nordlinger v. Hahn, 505 U.S. 1, 17–18 (1992).

72. *Id.* at 6.

73. *Id.* at 17.

owners, if businesses, would still be allowed to offer their services.[74]

The final case on which the Second Circuit relied entailed a state tax that favored slot machine gambling at riverboats over racetracks.[75] Much like the previous cases, the Court's upholding of the economic legislation in *Fitzgerald v. Racing Ass'n* could easily be justified on the ground that a more difficult financial situation for racetrack gambling does not sound the death knell for the operation of this business. The legislation would not completely prevent racetracks from offering slot machines at their places of business, even if there would be an obstacle making it more difficult to compete with riverboats.

The *Sensational Smiles* court justified its ruling in part on the premise that upholding the State Dental Commission's declaratory ruling simply continued the Supreme Court's long line of deference to regulations aimed at providing economic favoritism.[76] However, there needs to be some qualification between economic protectionism on the one hand and outright exclusion on the other. The Second Circuit offered far too much of a categorical definition of "economic favoritism," which it defined as the shielding of certain groups from economic competition.[77] In the Second Circuit's view, the Supreme Court permitted "state economic favoritism of all sorts," and this recognition provided a mandate by which the Second Circuit must simply give way to preferential economic legislation regardless of the form and purpose.[78] Courts cannot and should not be so willing to shirk completely their duty in reviewing state legislation by effectively exempting an entire class of legislation from their purview.

There are diverse levels within most categories of legislation, and each of the laws and regulations within these classes has its own scope and purpose. The differences between these laws and regulations can range from subtle nuances to explicit distinctions, and the judiciary, due to its objective nature, remains the appropriate forum in which to recognize and judge according to these variances. There remains an essential separation between courts and the business world that does not necessarily exist between legislatures and commercial entities; this division is necessary to place the judiciary in the best position to construe legislation in a disinterested manner. With this proper role of the courts in mind, there needs to be a better recognition of the clear divergence between state legislation that is merely protectionist from an economic perspective and state legislation that prohibits an entire

74. *See id.* at 12–14.

75. Fitzgerald v. Racing Ass'n, 539 U.S. 103, 105 (2003).

76. Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 286–87 (2d Cir. 2015).

77. *Id.*

78. *Id.* at 286.

segment of the population from offering and rendering particular services.

The four Supreme Court cases cited by the Second Circuit exemplify why identifying and appropriately treating these differences is essential. In looking back at *Williamson*, it is clear that limiting where "eye doctors" could practice is not the equivalent of completely preventing these "eye doctors" from offering their services within the state. Presumably, these professionals could still have served the public outside the setting of a retail store. Likewise, the street vendors in *Dukes* were merely precluded from offering their fare in a specific area within New Orleans. While this prohibition would certainly have impaired the vendors because they would lack direct access to the tourists who flock to the French Quarter, they would still have been able to operate elsewhere throughout the city. Any economic disadvantage from this regulation did not rise to the level of an absolute prohibition on operating.

Furthermore, the taxing schemes at issue in *Nordlinger* and *Fitzgerald* similarly imposed simple economic detriments on certain individuals and businesses as opposed to the total exclusion of these people and entities. As shown, the decisions constitute "an unbroken line of precedent"[79] of the Court upholding state action that economically favored certain groups by placing an obstacle in the path of other groups. However, this economic obstacle could be overcome by those determined enough to maintain their way of life or operate their businesses. In turn, legislation that is completely exclusionary in nature is deserving of more critical review since these regulations completely prohibit some individuals from offering services, even in a lessened or impaired capacity.

Occupational licensing, certification, and registration regulations stand on the other end of the spectrum. Several of the cases in the current circuit split demonstrate how the occupational licensing schemes at issue completely excluded individuals from performing certain services. Aggrieved parties could not simply move to a different location within the state or elect to pay higher taxes, as in the Supreme Court cases; these regulations give no middle ground to individuals and businesses and create an all-or-nothing scenario. The definitive finality these types of occupational regulations create should cause the courts to view these regulations under a more exacting lens. The soul of American capitalism relies on businesses' relatively unrestricted ability to offer services and innovations to the consuming public. The extreme results that ensue from exclusionary regulations not only support the

79. *Id.*

contention that the Second Circuit misplaced its reliance on the Supreme Court's cases purporting to support all legislation of economic favoritism, but also justify greater judicial caution in approaching these occupational schemes than the Supreme Court exhibited in those same cases.

C. Consistency

Aside from the obvious inconsistencies alluded to previously, glaring irregularities have also been experienced and, to a certain extent, overlooked in the context of other occupational regulations crafted by other state actors.[80] The Sixth Circuit in *Wardwell v. Board of Education* became entrenched in this conflict when the Board of Education of the City of Cincinnati imposed residency requirements, over and above teaching certification, on the teachers it hired after a certain date.[81] The court, bolstered by the Supreme Court in *Shapiro v. Thompson*,[82] where the Supreme Court asserted that certain residency requirements violate an individual's constitutional right to interstate travel, recognized a distinction between durational residency requirements and continuing residency requirements.[83]

Courts have held that durational residency requirements, which typically entail an individual having to reside in a state for a certain period of time to take advantage of the benefits of that state's citizenship, affect the fundamental right of interstate travel.[84] Therefore, courts must assess these durational residency requirements under strict scrutiny.[85] On the other hand, continuing residency requirements typically mandate that an individual live within a specified area as long as the individual is employed by a public entity.[86] The court in *Wardwell* addressed the Cincinnati Board of Education's requirement that its teachers maintain residency within the Cincinnati School District while employed by the Board.[87]

Instead of applying any form of heightened review, the court essentially utilized traditional rational basis review since the continuing

80. Bokhari v. Metro. Gov't of Nashville & Davidson Cnty., 2012 U.S. Dist. LEXIS 171103 (M.D. Tenn. Dec. 3, 2012); Bruner v. Zawacki, 997 F. Supp. 2d 691 (E.D. Ky. 2014); Shimose v. Haw. Health Sys. Corp., 345 P.3d 145 (Haw. 2015).

81. Wardwell v. Bd. of Ed., 529 F.2d 625, 626 (6th Cir. 1976).

82. Shapiro v. Thompson, 394 U.S. 618 (1969).

83. *Wardwell*, 529 F.2d at 627.

84. Memorial Hospital v. Maricopa Cnty., 415 U.S. 250, 254 (1974).

85. *Id.*

86. Kennedy v. Newark, 148 A.2d 473, 475 (N.J. 1959).

87. *Wardwell*, 529 F.2d at 626.

residency requirement merely affected intrastate travel.[88] The court found a so-called "reasonable" relation between the regulation and its purpose of hiring teachers who would be committed to enhancing urban schooling in Cincinnati and would be more understanding of the multitude of social issues that affected the children they educated.[89]

While courts have unfailingly adhered to this distinction between durational residency requirements and continuing residency requirements, continued adherence has the potential to develop erratic results.[90] For example, a state or local legislative body may decide to implement a durational residency requirement for individuals seeking to teach within that state or municipality. A requirement that the teacher must continuously live in a designated community would likely be upheld under an equal protection challenge; however, given the recognized distinction between durational and continuing resident requirements, it is likely that the requirement that the teacher live in a specified community before being hired would conversely be struck down due to the perceived disparities in how the rights of individuals are affected. Although courts would likely give these similar regulations vastly different constitutional review, there seems to be little practical difference between the two and no reason for such contrasting treatment. Additionally, one could argue that occupational continuing residency regulations also affect interstate travel, especially with communities close in proximity to state or municipal borders.

The incongruities experienced with residency requirements are similar to the treatment courts have given to persons deemed to be nonimmigrant aliens.[91] Although the Fifth Circuit recognized the Supreme Court's application of heightened rational basis review to state classifications based on "resident aliens" or "permanent resident aliens," the court simply refused to utilize this more searching review under an equal protection challenge to a "resident alien" requirement for Louisiana Bar applicants in *LeClerc v. Webb*.[92] The court's reluctance to afford heightened review to a challenge by nonimmigrant aliens was based in large part on distinguishing the status of nonimmigrant aliens from that of permanent residents.[93] The court justified more intensive review for permanent residency classifications based on the perceived unfairness against permanent residents given their lack of political

88. *Id.* at 628.

89. *Id.*

90. McCarthy v. Phila. Civil Serv. Comm'n, 424 U.S. 645, 647 (1976); Salem Blue Collar Workers Ass'n v. City of Salem, 832 F. Supp. 852, 861 (D.N.J. 1993).

91. LeClerc v. Webb, 419 F.3d 405 (5th Cir. 2005).

92. *Id.* at 411–16.

93. *Id.* at 417.

power and their economic, social, and civic similarities to regular citizens.[94]

Nevertheless, the court held that deference to state regulations pursuant to traditional rational basis review was appropriate because of the limited legal status of nonimmigrant aliens, given that their admission into or departure from the United States is dependent on the Attorney General and their inability to take advantage of certain other benefits of full citizenship.[95] In addition, the court noted the absence of any precedent regarding the application of heightened review to such classifications as significant.[96]

However, this contention set forth by the Fifth Circuit was inconsistent with the Supreme Court's prior use of rational basis review in *Plyler v. Doe*,[97] in which the Court deemed children of illegal aliens deserving of "special judicial solicitude."[98] The Fifth Circuit differentiated the plight of these children from the bar applicants in Louisiana because these applicants were merely denied the opportunity to perform certain work, not the opportunity to receive an education as with the children in *Plyler*.[99] One can undoubtedly view the distinction between the ability to work and the opportunity to receive an education as tenuous.

In light of this guidance, the Fifth Circuit has also used *LeClerc* to uphold a permanent residency requirement for licensed practical nurses under a challenge from an individual who applied for, but had not yet received, permanent residency status.[100] The court held that such applicants were more similar to nonimmigrant aliens than actual permanent residents, and the court therefore reviewed the Louisiana State Board of Practical Nurse Examiners' requirement under the traditional rational basis standard.[101] This type of unfairness is magnified when the process to obtain permanent residency status can take up to twelve months, assuming all goes well with the process.[102] One can easily understand how this nurse licensure requirement, in conjunction with an inherently slow bureaucratic process for green card applications, could prejudice applicants. As a result, employment regulations that draw such tenuous distinctions based largely on factors

94. *Id.* at 417–18.

95. *Id.* at 418–19.

96. *Id.* at 419–20.

97. 457 U.S. 202 (1982).

98. *LeClerc*, 419 F.3d at 420.

99. *Id.* at 420–21.

100. Van Staden v. St. Martin, 664 F.3d 56, 57-58 (5th Cir. 2011).

101. *Id.* at 59–60.

102. Abhijit Naik, *How Long Does it Take to Get a Green Card?*, BUZZLE (Aug. 30, 2013), http://www.buzzle.com/articles/how-long-does-it-take-to-get-a-green-card.html.

outside the control of the affected individuals deserve a more involved standard of review than mere traditional rational basis review.

This judicial splitting of state or local occupational regulations allows courts to apply the standard of review they desire based on potentially improper influences in favor of or against the regulation at issue. Such discretion, in either classifying occupational regulations a certain way or in employing one of several standards of review, has led to inconsistency—as demonstrated among the courts of appeals—and will continue to result in confusion for lower courts. For example, like with durational residency requirements, a regulation limiting those who can offer teeth-whitening services may have a negative impact on interstate travel. In a recent case from the Supreme Court of Alabama, an individual terminated expansion plans for his North Carolina-based teeth-whitening business due to Alabama's Dental Practice Act, which would not allow the petitioner to operate this business within the state.[103] Nevertheless, the court disposed of the petitioner's equal protection argument rather abruptly with minimal attention given to the regulation's economic protectionist nature.[104] The court simply provided that questions on the wisdom and utility of laws are exclusively for the legislature and are not to be undertaken by the courts.[105] Without a consistent standard of review, courts, like the Supreme Court of Alabama, are granted the freedom to devote as little attention as they desire to such equal protection claims.

This ultimate judicial deference to an occupational regulation, to the point of essentially refusing to acknowledge an equal protection challenge, poses a problem for the politically weak portion of a state's workforce. Therefore, the Supreme Court should choose one common standard to compensate for the division between applying traditional rational basis standard on one hand and strict scrutiny in certain cases on the other. Heightened rational basis review, alternatively known as "rational basis with bite,"[106] would provide the means by which to bridge the gap between this immense split. This standard would not only provide courts the authority to be increasingly critical of truly irrational bases for occupational regulations, but would also protect against the incongruous outcomes that often occur as the result of expansive judicial discretion.

103. Westphal v. Northcutt, 187 So.3d 684, 686 (Ala. June 5, 2015).

104. *Id.* at 695.

105. *Id.*

106. *See* Pettinga, *supra* note 9.

D. Registration/Certification Requirements vs. Licensure Requirements

Although certification and registration of certain professions typically entail a private organization "accepting" a professional in order to vouch for that professional's qualifications, states have been using the guise of occupational certification and registration to prevent targeted individuals from legally performing certain services.

Occupational regulations presumably have a large impact on a state's economy, and one can see an example in Ohio's certification requirements for a wide range of services, including the ability to provide long-term care consultations regarding nursing facilities, the designing of fire protection systems, and the supplying of electric on a retail basis.[107] Similarly, Ohio mandates that initial real estate appraiser assistants and CPA and PA accountants register to be able to perform services within the state.[108] These regulations and a number of similar laws have at least some effect on most of the industries involved within the state. Court likely can vindicate the cited regulations on police power grounds, due to the regulations' educational and practical experience requirements that ensure quality and ethical services are provided to the state's citizenry. However, greater state action in the form occupational regulations has inherently led to the creation of some less defensible regulatory schemes, as has been demonstrated in the previous part.

One can recognize another such example with an Oregon Department of Transportation requirement that an individual involved in the "moving" industry obtain a "certificate of necessity" to operate these services.[109] This certificate had no relation to an individual's expertise or knowledge within the moving industry but was rather meant to merely give notice to existing moving companies.[110] Historically, legislatures have imposed similar certificate-of-necessity regulations on taxi drivers, certain medical professionals, and car salespersons.[111] Commentators have convincingly argued that these regulations are simply meant to restrict economic activity for the benefit of already-existing industry "players."[112] Such regulations provide additional

107. OHIO REV. CODE ANN. § 173.422 (Lexis 2016), OHIO REV. CODE ANN. § 3781.105 (Lexis 2016), OHIO REV. CODE ANN. § 4928.08 (Lexis 2016).

108. OHIO REV. CODE ANN. § 4763.05 (Lexis 2016), OHIO REV. CODE ANN. § 4701.10 (Lexis 2016).

109. Timothy Sandefur, *Insiders, Outsiders, and The American Dream: How Certificate of Necessity Laws Harm Our Society's Values*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 381, 381–82 (2012).

110. *Id.*

111. *Id.* at 382.

112. *Id.*

illustrations of certification regulations that do not bear any legitimate link to a state's police power, yet courts still generally uphold these regulations under traditional rational basis review. Often, this standard of review allows courts to use their creative intuition in crafting any weak correlation to the police power. Conversely, rational basis with bite will help to keep legislatures accountable and will restrict imaginative judges' use of unbridled discretion.

When compared to licensure requirements, the wide reach of state certification and registration regulations is even more alarming because these regulations often have much less of a reasonable connection to the actual services that the targeted occupation generally provides. Regardless of whether the regulation at issue would survive rational basis with bite, there can be little dispute that the oral health concerns discussed by the Second Circuit in *Sensational Smiles* justify on its face the teeth-whitening restriction. Additionally, the Ninth Circuit supported its use of traditional rational basis review in *Merrifield v. Lockyer* by recognizing that states are given wide latitude in regulating economic activity within the borders of the states.[113] On the other hand, the courts never mentioned any justification offered by the states pursuant to the police power in any of the previously discussed cases involving certification or registration regulations. It is certainly true that states are generally given much deference in the exercise of the police power, and deservedly so due to the beneficial impact of such regulations in maintaining the health, safety, and general welfare of citizens;[114] however, the lack of any reference to the police power in defending certification and registration regulations underlies a lack of true rationality in legislating many of these regulations. As a result, since states often refuse to invoke the police power in justifying their regulations, these regulations have shown themselves to be less deserving of the traditional deference given to state occupational regulations.

E. Recent Trend

Over the course of the past several years, both lower federal and state courts have been more critical of state employment regulations in the form of licensure, certification, and registration requirements. Even before the circuit split developed regarding the appropriate standard of review to apply to state licensing schemes, the Middle District of Tennessee began a lower court movement in *Bokhari v. Metro*

113. Merrifield v. Lockyer, 547 F.3d 978, 989 (9th Cir. 2008) (citing New Orleans v. Dukes, 427 U.S. 297, 303 (1976)).

114. New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

Government of Nashville & Davidson County when it reviewed a county ordinance that would have required limousine and sedan service operators to charge a minimum fee of $45.[115] This ordinance would have directly undermined Metro Livery's business model of providing a luxury car service at prices competitive with taxi companies.[116] In the spirit of *Craigmiles*, the court rejected the county's motion for summary judgment and based its holding on the premise that protection of a certain group from economic competition did not constitute a legitimate purpose for the county to address.[117] The plaintiffs presented effective arguments regarding how the ordinance's primary purpose was to protect "high-end" limousine services, supported by a number of specific actions taken by the Metropolitan Transportation Licensing Committee and the Tennessee Livery Association.[118] By recognizing that rational basis review, "while deferential, is not toothless," the court gave more credence to the plaintiffs' evidence that implied that the government's ordinance was nothing more than an anticompetitive measure.[119]

In similar fashion, the Eastern District of Kentucky invalidated a Kentucky regulation requiring any individuals who provide moving services to obtain a Certificate of Public Convenience and Necessity to be able to legally provide such services.[120] The court heavily scrutinized both the related protest procedures by which any existing certificate holders could protest the granting of a new certificate and the mandatory hearing held by the Kentucky Transportation Cabinet Division of Motor Vehicles in the case of a filed protest.[121] The court determined that the ability of current movers to monopolize the industry in Kentucky by blocking out potential competitors did not have a rational connection to the stated interest of protection of personal property.[122] In fact, the initial application would already satisfy this interest since individuals must show that they are "fit, willing, and able" to operate as movers.[123] The court looked to the effectively empty nature of the protest procedure in that an existing mover could protest an applicant for any purpose, regardless of its correlation to the applicant's

115. Bokhari v. Metro. Gov't of Nashville & Davidson Cnty., 2012 U.S. Dist. LEXIS 6054, at *2–4 (M.D. Tenn. Jan. 19, 2012).

116. *Id.*

117. *Bokhari*, 2012 U.S. Dist. LEXIS 171103, at *10–11.

118. *Id.* at *11–13.

119. *Id.* at *18.

120. Bruner v. Zawacki, 997 F. Supp. 2d 691, 693 (E.D. Ky. 2014).

121. *Id.* at 699.

122. *Id.*

123. *Id.*

ability to be a mover.[124]

Furthermore, the court summarily dispensed the economic protectionist interest as an illegitimate purpose and rejected the government's argument that this process would lower administrative costs as completely false, especially since the mandatory meetings held in the case of a protest would actually increase these expenses.[125] As in *Bokhari*, the court explicitly adopted a version of rational basis review that was less deferential than the traditional form of the standard.[126] In so ruling, the court did not strike down the entire certification process for movers, but it did invalidate the protest aspect of the regulation.[127]

In a final example of this modern movement toward a more exacting standard of rational basis review, the Supreme Court of Hawaii held that employer Hilo Medical Center's rejection of a job applicant due to his prior conviction did not comport with the purpose of a Hawaii statute that allowed employers to consider an individual's criminal convictions when making employment decisions.[128] The statute explicitly provided that employers could base a rejection on such a basis only if the conviction record bore a rational relationship to the job position's duties.[129] Although the court did not invalidate or even review the state legislative action, it did scrutinize Hilo Medical Center's conduct as to this individual plaintiff.[130] In its application of a "rational relationship standard," which was admittedly less deferential than traditional rational basis review,[131] the court looked into not only the plain language of the statute but also its legislative history.[132] Accordingly, the court found that the intent of the legislature did not constitute a grant of complete discretion to employers considering conviction records.[133]

Then, the court evaluated whether the medical center established a rational relationship between the plaintiff's particular conviction of possession with intent to distribute crystal methamphetamine and the responsibilities of the position for which he applied.[134] Based on the formal job descriptions provided by the medical center, a lack of access to controlled substances in that position, and the potential for such a

124. *Id.*

125. *Id.* at 699–701.

126. *Bruner*, 997 F. Supp. 2d at 698.

127. *Id.* at 702.

128. Shimose v. Haw. Health Sys. Corp., 345 P.3d 145, 147 (Haw. 2015).

129. *Id.*

130. *Id.*

131. *Id*. at 150.

132. *Id*. at 150–52 (providing that "the rational relationship standard is not coextensive with the ultra-deferential rational basis test that is used in some equal protection cases").

133. *Id*. at 151–52.

134. *Shimose*, 345 P.3d at 150.

broad reading of the statute to bar individuals with prior drug convictions from having any job dealing with the public, the court held that the medical center's rejection was impermissible under the statute.[135] While this court only looked to the statute's effect on one individual as opposed to the broader impact of the legislation, this case exemplifies a court properly examining the underlying legislative intent and ultimate effects of legislation on individuals seeking employment. Additionally, the case shows that such heightened review, which necessarily entails deeper inquiry into state legislation, would not involve an inappropriately intensive examination of state occupational action.

The recent movement of both federal district and state courts employing heightened rational basis review has occurred in large part due to a recognition of the greater potential for systematic unfairness in occupational licensing, certification, and registration schemes, especially given the highly regulated society in which we live. By maintaining a proper check against such preferential and possibly improper state legislation, courts are beginning to understand that a more involved role helps to guard against anticompetitive regulations.

F. Scope

Like the argument for applying heightened review to occupational licensing schemes, applying rational basis with bite to occupational certification and registration challenges may be seen as a cause of concern regarding the appropriate scope of such review. Specifically, a lack of appropriate boundaries on how such heightened review is used could lead to a "slippery slope" of courts becoming less deferential with all forms of state economic regulation and a return to "Lochnerism."[136]

However, an already-existing test from federal antitrust jurisprudence provides the narrow framework needed to prevent this total lack of judicial restraint.[137] In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, the Supreme Court articulated the standard that a state regulatory scheme must meet in order for the court to apply antitrust immunity to sovereign actors of a state.[138] The first part of this test should provide the proper basis for courts to make a deeper inquiry into

135. *Id.* at 152–54.

136. Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 NYU J.L. & LIBERTY 1055, 1103 (2014).

137. *See* FTC v. Phoebe Putney Health Sys., 133 S. Ct. 1003, 1006 (2013) (looking to whether the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature in determining if a state policy to displace federal antitrust law was sufficiently expressed).

138. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 105 (1980).

state action affecting occupational qualifications. If a court finds that state action satisfies *Midcal*'s clear requirement that the displacement of occupational competition is "the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature," then the court, for the reasons outlined above, should employ heightened rational basis review in determining the constitutionality of these occupational regulation schemes.[139]

IV. CONCLUSION

The underlying split between the courts of appeals has generated much debate and commentary regarding the appropriate standard of review to apply for equal protection challenges to state employment licensing schemes. This narrow focus has resulted in the judicial system largely overlooking state anticompetitive action in the form of employment certification and registration regulations. In light of industry insiders often crafting these certification and registration schemes, the unchecked process has allowed for states to legislate economic protectionism under the guise of "rational" regulations, leaving the already politically powerless even more vulnerable.

The result has been not only the fashioning of regulations that have little, if any, truly rational justification, but also the production of inconsistent results in the application of these regulations. This unfairness, which some modern courts have already recognized, needs to be addressed on a more consistent and effective basis. Therefore, the Supreme Court should take the opportunity to instruct courts that rational basis with bite is the appropriate standard of review for all state anticompetitive action legislated as occupational licensing, certification, and registration schemes. This standard will provide the necessary balance between judicial exposure of truly irrational employment regulations and prevention of a burdensome and inappropriate amount of judicial scrutiny into state action.

139. *See Phoebe Putney Health Sys.*, 133 S. Ct. at 1006.