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# The (Limited) Constitutional Right to Compete in an Occupation

Rebecca Haw Allensworth

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## THE (LIMITED) CONSTITUTIONAL RIGHT TO COMPETE IN AN OCCUPATION

REBECCA HAW ALLENSWORTH\*

### ABSTRACT

*Is there a constitutional right to compete in an occupation? The “right to earn a living” movement, gaining steam in policy circles and winning some battles in the lower courts, says so. Advocates for this right say that the right to compete in an occupation stands on equal footing with our most sacred constitutional rights such as the right to be free from racial discrimination. This Article takes a different view, arguing that while there is a limited constitutional right to compete in an occupation, it is—and should be—weaker than these advocates claim. Some state licensing laws run afoul of the First and Fourteenth Amendments of the Constitution, and courts are wrong to flatly defer to state regulation of the occupations. But states can have legitimate interests in restricting entry to a profession and setting rules for its practice, and so we should not take an*

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*uncompromising view of occupational liberty. Rather courts should (and most do) chart a middle path in considering due process and free speech challenges to licensing laws. But while this middle path may be right as a constitutional matter, it is too weak to effect real reform in the area of excessive licensing. Solutions to the policy problem of too much licensing must be found elsewhere.*

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## INTRODUCTION

Braden Boucek knew the type and so would anyone who has seen a schoolyard bully at work.<sup>1</sup> Boucek watched the attorney for the Tennessee Board of Cosmetology and Barber Examiners preside over a disciplinary hearing where a handful of unlicensed barbers—almost all lacking representation by a lawyer—would lose their livelihoods.<sup>2</sup> The case that caught his attention was that of Elias Zarate, who told the board that he was sorry that he cut hair without the State's approval, but he was grateful for the board's invitation to the hearing today to help him get a license, especially since his Memphis barber shop was his only means of supporting himself and his baby daughter.<sup>3</sup> The board's attorney explained there would be no help with a license and Zarate owed \$2,100 in fines, including a charge for the board lawyer's time.<sup>4</sup>

To Boucek, a leading attorney in the movement to challenge unjust licensing laws in the courts, this case fit within the typical pattern of disciplinary hearings before licensing boards—if you have a lawyer, you win, if you don't, you lose.<sup>5</sup> It seemed to Boucek the boards do not like an even playing field.<sup>6</sup> So it did not surprise Boucek—who was at the hearing representing someone else—that Zarate lost his hearing, which lasted all of five minutes.<sup>7</sup> What struck Boucek was a detail that Zarate shared when explaining his story: Zarate had never graduated from high school.<sup>8</sup> Boucek watched as Zarate approached a board staff member to ask how to pay the fee and what, if anything, he could do to legally pursue his profession.<sup>9</sup> When the staff member explained that Elias should

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1. Interview with Braden Boucek, Beacon Ctr. of Tenn. in Nashville, Tenn. (May 31, 2017).

2. Cf. Eric Boehm, *Tennessee's Haircut Cops Bust Barbers Who Lack High School Diplomas*, REASON FOUND. (Jan. 19, 2018), <https://reason.com/archives/2018/01/19/barber-cops-bust-high-school-dropouts> [<https://perma.cc/DA6T-K2YF>].

3. *See id.*

4. *See id.*

5. Interview with Braden Boucek, *supra* note 1.

6. *Id.*

7. *Id.*

8. Boehm, *supra* note 2.

9. Interview with Braden Boucek, *supra* note 1.

enroll in barber school, Boucek could not remain silent.<sup>10</sup> He advised Zarate that he should not let the board further deceive him.<sup>11</sup> Zarate could spend over a year in school, incur \$20,000 in debt, and still not be allowed to cut hair.<sup>12</sup> Tennessee law bars all high-school dropouts from barbering.<sup>13</sup> Boucek had hoped to challenge the law in court once he found the right plaintiff.<sup>14</sup>

Elias's case against the State of Tennessee is part of a national movement to invalidate unfair licensing requirements under the Constitution by convincing courts to recognize a constitutional "right to earn a living."<sup>15</sup> The movement is led by lawyers such as Boucek who share a commitment to libertarian values that chafe at the idea of needing a government's permission to work.<sup>16</sup> By far, the largest share of these cases is brought by the Institute for Justice (IJ), a public interest law firm dedicated to vindicating libertarian causes in court.<sup>17</sup> But smaller firms, such as Boucek's Beacon Center in Tennessee, are important contributors. These firms all rely on private donations, because these suits primarily seek injunctive relief rather than damages. And while attorney's fees are awarded in successful cases, winning a judgment is rare.<sup>18</sup>

But is there a constitutional right to compete in an occupation? Lawyers such as Braden Boucek and his colleagues at the IJ will tell you that there is, and that it is no less important than the other rights enshrined in the Constitution, such as religious liberty and the right against self-incrimination.<sup>19</sup> The law on the ground, however, might suggest otherwise. There certainly is a constitutional law of occupational licensing, and the pioneering work of the "right to earn a living" movement has helped define its contours and

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10. *Id.*

11. *Id.*

12. *Id.*

13. Boehm, *supra* note 2.

14. Interview with Braden Boucek, *supra* note 1.

15. For an early use of that phrase, see Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207, 208 (2003).

16. See generally TIMOTHY SANDEFUR, *THE RIGHT TO EARN A LIVING* (2010).

17. See *About Us*, INST. FOR JUST., <http://ij.org/about-us> [<https://perma.cc/ZSY4-6CM7>].

18. Jason M. Wilson, Comment, *Litigation Finance in the Public Interest*, 64 AM. U. L. REV. 385, 412 (2014).

19. See SANDEFUR, *supra* note 15, at 2.

expand it in some important ways.<sup>20</sup> But the constitutional protections offered to plaintiffs such as Elias Zarate have always been limited, and will likely continue to be so.

## I. THE CURRENT STATE OF OCCUPATIONAL LICENSING UNDER THE CONSTITUTION

The U.S. Constitution makes no mention of a right to earn a living, or of a right to engage in an occupation.<sup>21</sup> But attorneys such as Boucek have two main constitutional tools in their kit when challenging an overly burdensome licensing restriction. First, Braden can make claims for his clients under the Fourteenth Amendment.<sup>22</sup> Licensing laws may run afoul of either the provision guaranteeing due process or the provision that assures equal protection under the law.<sup>23</sup> Because the legal inquiry is almost identical under those two provisions, they are often conflated in the cases themselves.<sup>24</sup> These provisions are discussed together in Part I.A. Second, if the profession involves speech, Boucek can make a claim on behalf of his client under the First Amendment, claiming that the licensing restriction infringes free speech rights.<sup>25</sup> Those claims are discussed in Part I.B.

### A. *Fourteenth Amendment Challenges*

The Fourteenth Amendment guarantees a right to “due process of law,”<sup>26</sup> a vague phrase that the Supreme Court has, over the years, interpreted to protect workers from irrational occupational regulations.<sup>27</sup> Initially, constitutional “due process” meant only that the laws would be applied to individuals through processes that

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20. See *Occupational Licensing*, INST. FOR JUST., <https://ij.org/issues/economic-liberty/occupational-licensing/> [<https://perma.cc/3DES-A97C>].

21. See generally U.S. CONST.

22. See *id.* amend. XIV.

23. *Id.* amend. XIV, § 1.

24. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602-03 (2015).

25. U.S. CONST. amend. I.

26. *Id.* amend. XIV, § 1.

27. See, e.g., *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985) (“[T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood.”).

were fair and transparent.<sup>28</sup> Today, this set of protections is referred to as “procedural due process,” distinguished from a more controversial set of protections that became known in the early twentieth century as “substantive due process.”<sup>29</sup> To the extent there is a due process right to compete in an occupation, it is found in the complex and controversial substantive due process doctrine.

The substantive due process doctrine holds that there are constitutionally protected rights that go beyond those expressly listed in the text of the Constitution.<sup>30</sup> A legislature—whether state or federal—cannot make laws that infringe upon these “unenumerated” rights unless there is a legitimate health and safety concern that the law addresses.<sup>31</sup> Today, perhaps the most well-known of these unenumerated rights is the right to privacy, which includes the right to same-sex marriage<sup>32</sup> and the (limited) right to abortion.<sup>33</sup> Early last century, the Supreme Court recognized another right under the due process clause—the right to freedom of contract—and infamously used it to invalidate a state law regulating an occupation.<sup>34</sup>

In 1905, the Supreme Court decided *Lochner v. New York*,<sup>35</sup> one of the most maligned Supreme Court cases in American history. The case challenged the constitutionality of a New York law limiting the hours bakers could work.<sup>36</sup> The State argued that the statute protected bakers’ health, but the Court held that the Due Process Clause of the Fourteenth Amendment prevented states from limiting workers’ freedom of contract without a more compelling health and safety justification.<sup>37</sup> The Court explained that if bakers’ health were reason enough to limit working hours, then state legislatures could regulate any occupation in any way they saw fit:

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28. See Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHI.-KENT L. REV. 1019, 1020-24 (2014).

29. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 545-46 (3d ed. 2006); see also *County of Sacramento v. Lewis*, 523 U.S. 833, 840, 846 (1998).

30. See, e.g., *County of Sacramento*, 523 U.S. at 847.

31. Cf. *id.* at 857-58 (Kennedy, J., concurring).

32. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015).

33. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

34. *Lochner v. New York*, 198 U.S. 45, 59 (1905).

35. *Id.*

36. See *id.* at 52.

37. See *id.* at 57.



No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family.<sup>38</sup>

If *Lochner* were still good law, it is easy to see how its language could be used as a powerful tool against excessive occupational licensing. This passage suggests that there is a constitutional right to earn a living, and that the Due Process Clause can be used to invalidate state occupational regulation that goes too far in limiting that right.

But *Lochner* and the substantive due process right to liberty of contract have not withstood the test of time.<sup>39</sup> Even in 1905, the opinion in *Lochner* was controversial; Justice Holmes dissented from the opinion, saying that the case was “decided upon an economic theory which a large part of the country does not entertain,” and that it was not for the Justices to substitute their economic judgment for a legislature's.<sup>40</sup> That criticism of *Lochner* became especially important during the New Deal era, when the federal government passed sweeping—and popular—economic regulation that reached far into the economic life of the country.<sup>41</sup> New Deal legislation would almost certainly have been invalidated by the Supreme Court Justices that had decided *Lochner*.<sup>42</sup>

By the time many of the New Deal laws came before the Court, however, the Justices controlling its decisions were hostile to *Lochner* and the economic rights it espoused.<sup>43</sup> In part, that was because the Justices saw the need for regulatory flexibility in the face of the Great Depression.<sup>44</sup> Their change of heart may also have been because of a threat made by President Roosevelt.<sup>45</sup> When it

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38. *Id.* at 59.

39. See CHEMERINSKY, *supra* note 29, at 623.

40. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

41. Samuel R. Olken, *Historical Revisionism and Constitutional Change: Understanding the New Deal Court*, 88 VA. L. REV. 265, 266-67 (2002) (book review).

42. See *id.* at 266-68.

43. See CHEMERINSKY, *supra* note 29, at 621.

44. See *id.*

45. See *id.* at 621-22.

became clear that the Court would use substantive due process to invalidate President Roosevelt's New Deal, the President claimed that he would respond by "packing" the Court with up to six new members for a total of fifteen seats.<sup>46</sup> These new members would be hand-selected by Roosevelt and would therefore be friendly to New Deal legislation and adverse to cases such as *Lochner* that threatened it.<sup>47</sup> In the end, one Justice relented.<sup>48</sup> Even though the President's threat may not have been the most important reason for the change of heart,<sup>49</sup> the episode is still commonly known as the "switch in time that saved nine."<sup>50</sup>

The switch was ultimately about what level of scrutiny the courts would apply when reviewing economic regulations.<sup>51</sup> Where *Lochner* applied relatively strict review to state economic regulation, after the switch, courts would use a lighter touch, known as "rationality review."<sup>52</sup> When the Supreme Court abandoned *Lochner*, it left behind the idea that state regulation, such as occupational licensing, required an especially strong governmental justification or a very close means-ends fit to pass constitutional muster.<sup>53</sup> Any economic regulation that was "rationally related" to a legitimate state regulatory interest would survive judicial review.<sup>54</sup> As the Court created higher tiers of review for "fundamental" rights, it left economic rights under substantive due process behind in the "rationality review" bin.<sup>55</sup>

With the substantive due process right to work eviscerated, some plaintiffs added another Fourteenth Amendment claim to their suits challenging licensing laws. The Equal Protection Clause forbids states from passing laws that deny anyone "the equal protection of

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46. *Id.*

47. *Cf. id.*

48. *Id.* at 623.

49. See DAVID E. BERNSTEIN, REHABILITATING *LOCHNER* 164 n.118 (2011).

50. Olken, *supra* note 41, at 266.

51. See CHEMERINSKY, *supra* note 29, at 624.

52. See *id.* at 622, 625.

53. See *id.* at 624.

54. *Id.* at 625.

55. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 40-41 (1973); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution."); CHEMERINSKY, *supra* note 29, at 540-42.

the laws.”<sup>56</sup> But because aggrieved workers were not a specially protected class, such as a racial minority, the equal protection claims were also subjected to “rational basis” review.<sup>57</sup> In practice, Equal Protection and Due Process Clause claims boil down to one question: did the licensing restriction serve, even indirectly or inefficiently, some legitimate state interest?<sup>58</sup>

In regulating the professions, where there is usually at least a thin theoretical public benefit to licensing, rational basis review gave the states a free hand to regulate. In 1955, the Court decided *Williamson v. Lee Optical of Oklahoma, Inc.*,<sup>59</sup> which is still the most important case about the constitutionality of occupational licensing.<sup>60</sup> The case challenged a state statute that prevented opticians from making an eyeglass lens without a new prescription from an ophthalmologist or optometrist.<sup>61</sup> The Court upheld the statute, while acknowledging that the law “may exact a needless, wasteful requirement in many cases.”<sup>62</sup> The Court explained that “it is for the legislature, not the courts” to decide such policy questions.<sup>63</sup> The opinion included a flat rejection of *Lochner*:

The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.<sup>64</sup>

The switch in time saved not only nine, but also most state occupational licensing laws.

Since *Lee Optical*, the rational basis test for state legislation has not been very generous to workers challenging overly restrictive licensing laws. In *Meadows v. Odom*, a Louisiana district court accepted the state board’s contention that licensing florists helped

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56. U.S. CONST. amend. XIV, § 1.

57. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312-13 (1976) (per curiam).

58. *See, e.g., id.* at 308, 314.

59. 348 U.S. 483 (1955).

60. *See id.* at 491.

61. *Id.* at 486.

62. *Id.* at 487.

63. *Id.*

64. *Id.* at 488.

promote health and safety by decreasing the risk of pricks by wires in haphazardly arranged bouquets.<sup>65</sup> Similarly, the Eighth Circuit recently upheld a state’s requirement that African-style hair braiders obtain a cosmetology license, which requires 1500 hours of classroom education—almost none of it relevant to braiding.<sup>66</sup> The court accepted the State’s health and safety justification even though the risks were theoretical and remote, and the licensing scheme had little to do with addressing those risks.<sup>67</sup> And because it is not even necessary under rationality review that the state interest be articulated by the State, the court upheld the law under two other “legitimate government interest[s]” that the court itself contrived.<sup>68</sup>

At least two jurisdictions have found that the State does not need any health and safety justification for occupational licensing laws.<sup>69</sup> In *Powers v. Harris*, the Tenth Circuit considered a constitutional challenge to Oklahoma’s law requiring a funeral license for selling caskets.<sup>70</sup> The court held that economically favoring members of the funeral industry—at the expense of unlicensed sellers and consumers—was itself a legitimate state interest.<sup>71</sup> Thus, the court rejected the State’s flimsy health and safety justification—that the rule protected vulnerable, grieving consumers from sharp dealing at the hands of sellers untrained in funeral service—and upheld the law as rationally related to what the court believed was the State’s true motive: economic protectionism.<sup>72</sup> A naked desire to benefit one politically powerful group (licensed funeral directors) over another (unlicensed sellers) was itself a “legitimate state interest” under the test.<sup>73</sup> The Second Circuit recently joined the Tenth in finding that intrastate economic protectionism is a legitimate state interest.<sup>74</sup>

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65. *Meadows v. Odom*, 360 F. Supp. 2d 811, 824 (M.D. La. 2005), *vacated on other grounds*, 198 F. App’x 348, 350, 353 (5th Cir. 2006).

66. *Niang v. Carroll*, 879 F.3d 870, 872-74 (8th Cir. 2018).

67. *Id.* at 874.

68. *Id.* at 873.

69. *See Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 286 (2d Cir. 2015); *Powers v. Harris*, 379 F.3d 1208, 1225 (10th Cir. 2004).

70. *Powers*, 379 F.3d at 1208, 2011.

71. *Id.* at 1225.

72. *See id.* at 1218, 1225.

73. *Cf. id.* at 1218, 1222.

74. *Sensational Smiles*, 793 F.3d at 286.

That opinion explained that “[m]uch of what states do is to favor certain groups over others on economic grounds.... We call this politics.”<sup>75</sup>

Victories under the rational basis test are few. But they may be increasing, at least in occupational licensing cases. Some observers even believe that the tide is turning in favor of stronger Fourteenth Amendment protections against irrational licensing laws.<sup>76</sup> In 2008, the Ninth Circuit struck down the California Structural Pest Control Board’s requirement that exterminators of rats, mice, and pigeons—but not those of skunks and squirrels—obtain a state license.<sup>77</sup> Similarly, a federal court in Utah struck down that state’s requirement that hair braiders obtain cosmetology licenses.<sup>78</sup> Reaching the opposite conclusion as the Eighth Circuit in considering a similar licensing scheme,<sup>79</sup> the District of Utah concluded that requiring hair braiders to obtain licenses, which required hundreds of hours of instruction on unrelated beauty practices, failed rational basis review.<sup>80</sup>

Three circuits have explicitly held that economic protectionism is *not* a legitimate state interest, striking down legislation where the court finds no plausible benefit to public health and safety.<sup>81</sup> In a repeat of the facts of *Powers v. Harris*,<sup>82</sup> the Sixth Circuit considered whether Tennessee could limit casket selling to licensed funeral directors.<sup>83</sup> Explicitly disagreeing with the holding in *Powers*, the Sixth Circuit held that “protecting a discrete interest group from economic competition is not a legitimate governmental purpose.”<sup>84</sup> The court found only one justification that did not reek with “the

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75. *Id.* at 287.

76. See David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 YALE L.J. F. 287, 287 (2016).

77. *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008) (finding that the regulation violated equal protection because there was no rational basis for distinguishing between these kinds of exterminators).

78. *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1215 (D. Utah 2012).

79. See *supra* notes 66-67 and accompanying text.

80. *Steinagel*, 885 F. Supp. 2d at 1214-15.

81. See *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013); *Merrifield*, 547 F.3d at 992 n.15; *Craigsmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002).

82. 379 F.3d 1208 (10th Cir. 2004).

83. *Craigsmiles*, 312 F.3d at 222.

84. *Id.* at 224.

force of a five-week-old, unrefrigerated dead fish<sup>85</sup>” the scheme would allow funeral directors to collect monopolistic profits in selling coffins.<sup>86</sup> The court struck down the regulation as violating the constitutional guarantees of due process and equal protection.<sup>87</sup> Two other circuits have joined the Sixth in disallowing economic protectionism as a legitimate state purpose.<sup>88</sup> Although these cases put these circuits in clear conflict with those upholding laws only justified by naked protectionism, the Supreme Court has declined to weigh in so far.

### *B. First Amendment Challenges*

This circuit split and the recent rationality review victories in licensing cases have given some hope to those who advocate for stronger Fourteenth Amendment rights against excessive licensing. But the deck is still stacked against plaintiffs raising Fourteenth Amendment claims. Most courts afford states extreme deference in applying rationality review to state licensing regulation.<sup>89</sup> Perhaps for this reason, firms such as IJ have sought other constitutional avenues for redress. They have found some success in a surprising provision: the First Amendment right to free speech.<sup>90</sup>

Many occupations involve speaking. Most obviously lawyers, therapists, and real estate brokers speak for a living. But much of what other professionals do—such as doctors, architects, and accountants—involves speech. And some of the new additions to the list of licensed occupations, such as fortune-tellers or tour guides, are speech-based. By licensing these talking professions, the government literally restricts speech. When the government prevents unlicensed tour guides from speaking to tourists about a historic city, it stops a citizen from saying what he wants to say. And because the restriction is content-based in the sense that it prevents the speaker from standing on a corner and talking about a city’s

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85. *Id.* at 225 (quoting *United States v. Seaman*, 259 F.3d 434, 447 (6th Cir. 2001)).

86. *Id.* at 228.

87. *Id.* at 229.

88. See *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013); *Merrifield v. Lockyer*, 547 F.3d 978, 992 n.15 (9th Cir. 2008).

89. See, e.g., *Powers v. Harris*, 379 F.3d 1208, 1216-17 (10th Cir. 2004).

90. See U.S. CONST. amend. I.

attractions but not about other topics,<sup>91</sup> it seems inherently suspect under the First Amendment. The simplicity of this argument is appealing and may account for some of the success that these suits have had in invalidating regulation of the talking professions. But First Amendment law, and the interests at stake when government restricts occupational speech, are more complicated than this story suggests.

The First Amendment's right to free speech is expressed absolutely; the text says that "Congress shall make no law ... abridging the freedom of speech."<sup>92</sup> But even at the time of the Constitution's drafting it was recognized that reasonable governmental restrictions on speech did not violate the right to free speech, and that there were certain categories of speech—such as yelling "fire" in a crowded theater—that were entirely outside of the Amendment's protection.<sup>93</sup> Over the years, the Supreme Court has developed complicated rules to govern when and how the government can regulate speech.<sup>94</sup>

Restrictions on conduct with only an incidental effect on speech receive intermediate scrutiny, which requires the law be "substantially related" to an "important governmental objective[.]"<sup>95</sup> Direct restrictions on speech fall into two categories.<sup>96</sup> The first, content-neutral restrictions that do not discriminate between one kind of statement or another, also receive intermediate scrutiny.<sup>97</sup> The second, content-based restrictions that do distinguish between the substance or viewpoint of a statement, instead receive "strict scrutiny."<sup>98</sup> Strict scrutiny requires that the law be "narrowly tailored" to achieve a "compelling governmental interest[.]"<sup>99</sup>

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91. *See, e.g.*, *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

92. U.S. CONST. amend. I.

93. *See* CHEMERINSKY, *supra* note 29, at 1017-18, 1021.

94. *See* KATHLEEN ANN RUANE, CONG. RESEARCH SERV., 98-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 1 (2014), <https://fas.org/sgp/crs/misc/95-815.pdf> [<https://perma.cc/W6G3-CE7S>].

95. *Craig v. Boren*, 429 U.S. 190, 197 (1976); *see also* *Lehr v. Robertson*, 463 U.S. 248, 266 (1983).

96. *See* *Turner Broad. Sys., Inc. v. FTC*, 512 U.S. 622, 642 (1994).

97. *See id.*

98. *See id.* at 642, 658.

99. *See* *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

The Supreme Court has not explained where within this doctrinal framework occupational or professional speech is located. In fact, the Supreme Court has not even clearly held that there is such a thing as “professional speech.”<sup>100</sup> The only opinion to squarely recognize “professional speech” as such and to articulate its status under the First Amendment is a concurring opinion, which does not have the force of law.<sup>101</sup> In *Lowe v. SEC*, Justice White opined:

One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client’s individual needs and circumstances is properly viewed as engaging in the practice of a profession.<sup>102</sup>

According to Justice White, such professional speech is subject to governmental regulation without any First Amendment protection, but “[W]here the personal nexus between professional and client does not exist,” the First Amendment applies.<sup>103</sup>

Several lower courts have used Justice White’s concurrence to recognize a “professional speech” doctrine, but they have been inconsistent about what kind of scrutiny it triggers and why.<sup>104</sup> Part of the inconsistency stems from the fact that licensing can restrict speech in several different ways.<sup>105</sup> Some government restrictions forbid unlicensed speech.<sup>106</sup> This category encompasses governmental prohibitions on unlicensed tour guiding and rules preventing unlicensed practitioners from using a title such as “psychologist.”<sup>107</sup> A second category includes government rules that compel or prevent specific statements by licensed professionals.<sup>108</sup> These restrictions include the requirement that abortion providers give certain

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100. See *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

101. See *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring in the result).

102. *Id.*

103. *Id.*

104. Compare *Moore-King v. County of Chesterfield*, 708 F.3d 560, 568-69 (4th Cir. 2013), with *King v. Governor of New Jersey*, 767 F.3d 216, 228, 230 (3d Cir. 2014); *Locke v. Shore*, 634 F.3d 1185, 1195-96 (11th Cir. 2011).

105. See *Lowe*, 472 U.S. at 228.

106. *Cf. id.*

107. See, e.g., *Rosemond v. Markham*, 135 F. Supp. 3d 574, 586 (E.D. Ky. 2015).

108. See *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018).



information to their patients<sup>109</sup> and the prohibition on lawyers advising clients to commit crimes.<sup>110</sup> Each of these scenarios may involve different answers to the two most important questions under First Amendment law: does the restriction primarily restrict speech or conduct, and if it regulates speech, is it content-neutral?

The fact that the Supreme Court has never squarely answered these questions provides an opportunity for firms such as IJ to try out new theories of occupational speech under the First Amendment, and they have had some notable successes.<sup>111</sup> For example, IJ brought a successful suit challenging the District of Columbia's requirement that tour guides acquire a license, which required passing a 100-question test about the District's history.<sup>112</sup> The court found it unnecessary to address the tour guide's argument that it was a content-based restriction on speech demanding strict scrutiny, because the court held the restriction failed even intermediate review.<sup>113</sup> The court found the government's argument, that the history test helped prevent unscrupulous tour guides from treating tourists unfairly or unsafely, was unsupported by "studies, anecdotal evidence, history, consensus or common sense."<sup>114</sup>

IJ also won a case against the Kentucky Board of Psychology, which had issued a cease and desist letter to a nationally syndicated advice columnist whose parenting advice appeared in Kentucky newspapers.<sup>115</sup> John Rosemond had no other contacts with Kentucky, but he was a licensed psychologist in North Carolina.<sup>116</sup> The Board claimed that his column constituted the unlicensed practice of psychology, because it provided parenting advice to Kentucky citizens and because it did not identify him as a "family therapist."<sup>117</sup> The court concluded that because the restriction took issue with the substance of his column and with his use of the title "psychologist," it was content based and therefore subject to strict scrutiny.<sup>118</sup>

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109. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885, 900-01 (1992).

110. *See Nix v. Whiteside*, 475 U.S. 157, 167 (1986).

111. *See, e.g.*, *Edwards v. Dist. of Columbia*, 755 F.3d 996, 1009 (D.C. Cir. 2014).

112. *See id.*

113. *See id.* at 1000.

114. *See id.* at 1004.

115. *See Rosemond v. Markham*, 135 F. Supp. 3d 574, 578, 589-90 (E.D. Ky. 2015).

116. *Id.* at 586.

117. *See id.* at 585.

118. *See id.* at 581, 585.

Finding little in the way of a “compelling government[] interest” for the Board’s action against Rosemond, the court sustained the First Amendment challenge.<sup>119</sup>

The uncertainty of the law here is illustrated by the contradictory outcomes in other cases.<sup>120</sup> For every case IJ has won in this area, it has lost a similar case in a different jurisdiction.<sup>121</sup> For example, the Fifth Circuit upheld New Orleans’s licensing scheme for tour guides, finding the restriction to be content-neutral and a reasonable means to protect tourists.<sup>122</sup> Although IJ convinced the court in *Rosemond* to apply strict scrutiny to occupational speech,<sup>123</sup> it could not convince the court in another case challenging a licensing scheme for interior designers to use *any* review whatsoever.<sup>124</sup> In *Locke v. Shore*, the court held “professional speech” was like yelling “fire” in a theater—it was simply outside the scope of the First Amendment’s protections.<sup>125</sup>

### C. A Constitutional Right to Earn a Living?

Some commentators see the recent successes in these constitutional suits as a crack in courts’ commitment to defer to states’ economic legislation.<sup>126</sup> They argue there is some judicial support—especially in the circuits that have condemned economic protectionism as a legitimate state interest—for a constitutional “right to earn a living” that stands on equal footing with any other right found in the Constitution.<sup>127</sup> As one commentator explains, the right is “as ‘central to individual dignity and autonomy’ as the freedom to speak, marry, travel, vote, or exercise any other right that the Court has held ‘fundamental.’”<sup>128</sup>

119. *See id.* at 586-89.

120. *See Kagan v. City of New Orleans*, 753 F.3d 560, 562 (5th Cir. 2014).

121. *Id.* (holding licensing regulation for tour guides valid).

122. *Id.*

123. *See Rosemond*, 135 F. Supp. 3d at 585.

124. *See Locke v. Shore*, 682 F. Supp. 2d 1283, 1290 (N.D. Fla. 2010).

125. *See id.* at 1290, 1292.

126. *See* Evan Bernick, *Towards a Consistent Economic Liberty Jurisprudence*, 23 GEO. MASON L. REV. 479, 505-06 (2016).

127. *Cf. SANDEFUR*, *supra* note 16, at 24.

128. Bernick, *supra* note 126, at 498-99 (footnote omitted) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015)).

According to its advocates, the right to earn a living may be experiencing a recent resurgence, but the right itself is hardly new.<sup>129</sup> Timothy Sandefur, a leading advocate of the right to earn a living and the author of a book by that name, traces the origins of that right back to the founding.<sup>130</sup> The American Revolution had been fought to vindicate American economic liberty from the British,<sup>131</sup> and so the Constitution specifically protected economic liberty in clauses such as the Contracts Clause and Privileges and Immunities Clause.<sup>132</sup> This commitment to economic freedom was likewise a driving force behind the Fourteenth Amendment.<sup>133</sup> According to Sandefur, the Reconstruction-era Congress was keen to protect former slaves' economic rights, especially their right to earn a living, given the long history of these rights being denied entirely to African-Americans.<sup>134</sup> Advocates such as Sandefur argue the modern interpretation of the Fourteenth Amendment—that privileges other rights above economic liberty—is a fundamental misunderstanding of Congress's original intent.<sup>135</sup>

Within the movement, there is disagreement about what doctrinal changes are needed to resurrect this once-vibrant right.<sup>136</sup> Some call for a revision of the rational basis test that would place a heavier burden on the government to justify economic regulation as “rational.”<sup>137</sup> Others see the rational basis test as beyond salvation and call for a different tier of review, such as intermediate scrutiny, for economic rights such as the right to be free from unreasonable licensing laws.<sup>138</sup> Within this debate lies another controversy: what to do about the specter of *Lochner*? Some advocates claim that increased scrutiny of economic regulation does not risk a return to

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129. Cf. SANDEFUR, *supra* note 16, at 23-24.

130. *Id.* at 17; Telephone Interview with Timothy Sandefur, Vice President for Litig., Goldwater Inst. (Feb. 12, 2018).

131. SANDEFUR, *supra* note 16, at 23-25.

132. U.S. Const. art. I, § 10, cl. 1; *id.* art. IV, § 2, cl. 1.

133. SANDEFUR, *supra* note 16, at 39.

134. *Id.* at 3-5.

135. *Id.* at 83-84.

136. See Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 GEO. J.L. & PUB. POL'Y 373, 399 (2016).

137. *Id.* at 399-400.

138. Cf. John O. McGinnis, *Reforming Constitutional Review of State Economic Legislation*, 14 GEO. J.L. & PUB. POL'Y 517, 525 (2016).

the bad old days where courts lightly invalidated state regulation.<sup>139</sup> These commentators observe that the wide gulf between modern rationality review and *Lochner* leaves plenty of middle ground for judicial approaches that would take the right to compete in an occupation seriously.<sup>140</sup> Others unapologetically call for a return to *Lochnerism* and its commitment to strong economic rights against the State.<sup>141</sup>

If you ask the advocates of the right to earn a living about its prospects, most are optimistic about the future.<sup>142</sup> Rob Johnson of IJ, for example, says things are moving in the right direction, citing a long and growing string of federal cases where courts have shown a willingness to apply meaningful review to state economic regulation.<sup>143</sup> Sandefur agrees, but notes real change will come when this, and the next generation of federal judicial appointees, begin to shape constitutional law.<sup>144</sup> Sandefur hopes these judges will shed the old conservative idea that resisting incorrect precedent—such as Fourteenth Amendment jurisprudence since the New Deal—is improper judicial activism.<sup>145</sup>

All these advocates agree that the recent developments in both Fourteenth and First Amendment cases challenging occupational licensing laws are good news.<sup>146</sup> According to the leading right-to-earn-a-living advocate in the legal academy, the current “doctrinal chaos” created by the *Powers-Craigsmiles* circuit split presents “an opportunity for advocates of greater occupational freedom to nudge courts beyond the collapsing fundamental/nonfundamental rights

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139. *Id.* at 530.

140. *Id.*

141. BERNSTEIN, *supra* note 49, at 125-29.

142. See *Economic Liberty*, INST. FOR JUST. (Dec. 2016), <https://ij.org/ll/december-2016-volume-25-issue-6/economic-liberty/> [<https://perma.cc/GV4N-J3PQ>] (explaining the recent success of economic liberty cases in Texas).

143. See Telephone Interview with Rob Johnson, Inst. for Justice (Feb. 9, 2018); see also *St. Joseph Abbey v. Castille*, 712 F.3d 215, 226-27 (5th Cir. 2013) (striking down the regulation); *Merrifield v. Lockyer*, 547 F.3d at 978, 991 (9th Cir. 2008) (holding that the regulation failed rational basis review); *Craigsmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) (finding the regulation could not pass “even rational basis review”).

144. Telephone Interview with Timothy Sandefur, *supra* note 130; see also SANDEFUR, *supra* note 16, at 292-93.

145. Telephone Interview with Timothy Sandefur, *supra* note 130.

146. Bernstein, *supra* note 76, at 302-03.

dichotomy that dominated due process jurisprudence for decades.”<sup>147</sup> And the litigators agree.<sup>148</sup> In fact, Rob Johnson says one of the current goals of IJ is to deepen the circuit split in the hopes that the Supreme Court will take the case and resolve it in their favor.<sup>149</sup>

## II. THE FUTURE OF OCCUPATIONAL RIGHTS UNDER THE CONSTITUTION

Proponents of the right to earn a living champion the *Powers-Craigmiles* circuit split and the recent First Amendment victories against licensing regulation as cracks in the long-standing judicial deference to legislative choices about licensing.<sup>150</sup> There is reason to doubt, however, that courts will—or should—recognize a strong First or Fourteenth Amendment right to occupational freedom.<sup>151</sup> A correction in the direction of stronger constitutional review of occupational regulation is appropriate, and the right to earn a living movement has been instrumental in bringing that about.<sup>152</sup> But courts will not and ought not go as far as advocates of the right demand.

### A. Rationality Review and the Circuit Split

Right to earn a living advocates are correct that mere economic protectionism is not a constitutionally acceptable justification for a state law.<sup>153</sup> But they are wrong to suggest that the three circuit court opinions saying so have opened a new path to stronger economic rights under the Constitution.<sup>154</sup> The Constitution places

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147. *See id.*

148. *See* William H. Mellor, *Turning the Spotlight on Economic Liberty*, INST. FOR JUST. (Aug. 2014), <https://ij.org/ll/liberty-law-august-2014/1-1-8-14-turning-the-spotlight-on-economic-liberty/> [https://perma.cc/A45P-VCKE].

149. Telephone Interview with Rob Johnson, *supra* note 143.

150. *See* Sandefur, *supra* note 15, at 256.

151. *See* Bernstein, *supra* note 76, at 302.

152. *See id.* at 302-03.

153. *See* Roger V. Abbot, Comment, *Is Economic Protectionism a Legitimate Governmental Interest Under Rational Basis Review?*, 62 CATH. U. L. REV. 475, 492 (2013).

154. *See* *St. Joseph Abbey v. Castille*, 712 F.3d 215, 226-27 (5th Cir. 2013) (finding that the health and safety justifications for the regulation was “irrational”); *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008) (“Needless to say, this type of singling out, in connection with a rationale so weak that it undercuts the principle of noncontradiction, fails to meet the

some minimal restrictions on the government's ability to enact unfair and irrational laws.<sup>155</sup> If these restrictions are to have any meaning, then judicial review of a law must at least ask if it is aimed at some public-regarding goal.<sup>156</sup> But holding so hardly portends the collapse of the distinction between fundamental and economic rights under the Constitution or a return to the kind of second-guessing the Court did in *Lochner*.<sup>157</sup>

### 1. *Naked Preferences and Economic Protectionism*

The Constitution, in both its structural provisions establishing the process of creating law and its provisions creating rights against unfair laws, mostly enumerated in the Bill of Rights, protects minority interests from the tyranny of the majority.<sup>158</sup> These commitments reflect the idea that, while self-governance is the touchstone of democratic decision making, not all decisions by a majority are fair.<sup>159</sup> Rights of the minority need some protection against pure majoritarian decision making.<sup>160</sup> Substantive rights against unfair laws, such as those found in the First and Fourteenth Amendments, operate as a check against laws that unfairly burden the minority.<sup>161</sup> Sometimes, majoritarian decision making is unfair because it harms groups who have traditionally been victims of discrimination, such as racial minorities.<sup>162</sup> In these instances, government action is closely scrutinized.<sup>163</sup> But sometimes, majoritarian decision making is unfair not because of discrimination, but

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relatively easy standard of rational basis review.”); *Craigsmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) (“This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review.”).

155. *Cf. Romer v. Evans*, 517 U.S. 620, 631 (1996) (implying that a court may strike down a law that “burdens a fundamental right [or] targets a suspect class”).

156. *See id.* at 635 (discussing how the objective must serve a public interest).

157. *See Craigmiles*, 312 F.3d at 229 (stating that the decision was not a return to *Lochner*).

158. *See, e.g.*, U.S. CONST. amends. XIII-XV.

159. *See, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948).

160. *See id.*

161. Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POLY 401, 409 (2016).

162. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

163. *See id.* at 11.

because the decision benefits a group with raw political power.<sup>164</sup> When the majority rewards political power for no public-regarding reason, they are acting on what Professor Cass Sunstein calls “naked preferences.”<sup>165</sup>

A naked preference for one politically powerful group is not a constitutionally legitimate reason for legislation.<sup>166</sup> Thus, the Court has struck down regulation—even economic regulation—where it seemed motivated by nothing more than animus for a group adversely affected by it.<sup>167</sup> In the context of occupational licensing, the Court has tethered the legitimacy of licensing schemes to their effect on the public welfare.<sup>168</sup> As far back as 1889, the Court held that while every citizen has the right “to follow any lawful calling, business, or profession he may choose,” that right is not infringed by licensing regulation aimed at “the protection of society.”<sup>169</sup> This notion that laws must be justified by some public purpose should seem unobjectionable, both as a matter of common sense and as a matter of Constitutional design.<sup>170</sup> Public representation and checks on political power were obviously meant to ensure public-regarding regulation.

Yet, as the circuit split indicates, this notion is controversial.<sup>171</sup> And, although the controversy is couched in terms of whether naked preference for one group over another is a legitimate state

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164. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1727-28 (1984).

165. *Id.* at 1689, 1723 (defining the term “naked preference” to mean the “underlying evil” of “the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want”).

166. See *id.* at 1727-28.

167. See, e.g., *Romer v. Evans*, 517 U.S. 620, 635-36 (1996) (holding that an amendment to the Colorado Constitution effectively barring homosexuals from participating in the political process violated the Equal Protection Clause); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (invalidating an amendment to the Food Stamp Act that purposefully discriminated against hippies because the discrimination was not a legitimate government interest justifying the amendment).

168. See, e.g., *Dent v. West Virginia*, 129 U.S. 114, 128 (1889).

169. *Id.* at 121-22.

170. See U.S. CONST. pmb1.

171. Compare *Powers v. Harris*, 379 F.3d 1208, 1222-23 (10th Cir. 2004) (applying rational basis scrutiny and holding that economic protectionism is a legitimate state interest), with *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) (deciding to use a more rigorous form of rational basis).

interest,<sup>172</sup> the actual controversy lies in the difficulties of sorting out naked preferences from all other kinds of legislation.<sup>173</sup> As long as one has a right to petition the government, exertion of raw political power in the form of lobbying will always be a part of legislative action.<sup>174</sup> The circuits that have held naked economic protectionism to be a legitimate state interest defend such protectionism not because they believe it serves some good, but rather because they believe a rule asking courts to sort out naked protectionism from protectionism mixed with a public benefit (which probably describes most legislation) is impossible.<sup>175</sup> They are concerned that using the Constitution to weed out legislation that does not benefit the public is so error-prone as to be futile.<sup>176</sup>

These concerns are overblown. First, courts make difficult judgments about legislative motivations all the time, including in the constitutional context.<sup>177</sup> For example, when the Supreme Court invalidated state bans on gay marriage in *Obergefell v. Hodges*, it proceeded one-by-one with each proffered public-regarding justification and found each lacking, leaving animus towards gays as the only plausible reason for the regulation.<sup>178</sup> Courts can, and in at least three circuits do, apply such reasoning to occupational licensing schemes.<sup>179</sup> This was the approach taken by the court in *Craigmiles* when it rejected the State's health and safety justifications leaving naked protectionism as the last standing justification.<sup>180</sup> Second, rationality review does not require courts to discern the *most important* or *real* reason for the legislation.<sup>181</sup> If there is a plausible public-regarding reason for the regulation, it

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172. See Sunstein, *supra* note 164, at 1695.

173. See *id.* at 1696.

174. See *id.* at 1697.

175. See, e.g., *Powers*, 379 F.3d at 1222-23; see also *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 290 (2d Cir. 2015) (Droney, J., concurring in part and concurring in the judgment).

176. Cf. *Sensational Smiles, LLC*, 793 F.3d at 284 (majority opinion).

177. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (holding a ban on same-sex marriage unconstitutional).

178. See *id.* at 2605-08.

179. See *St. Joseph Abbey v. Castille*, 712 F.3d 215, 226-27 (5th Cir. 2013); *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008); *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002).

180. *Craigmiles*, 312 F.3d at 228-29.

181. See *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 175-77 (1980).



will pass.<sup>182</sup> The process-of-elimination method used in *Craigmiles* and *Obergefell* is a workable way to establish whether the legislation is appropriately public-regarding.<sup>183</sup>

## 2. *Are Weaker Rights Against Economic Regulation Justified?*

Giving *some* protection to people harmed by irrational regulation that confers economic benefits on one group with no public benefit is both desirable and plausible. But how much? Legislation that prefers one race over another gets reviewed strictly by courts.<sup>184</sup> Should regulation that economically benefits one politically powerful group over another get the same standard? In other words, is it appropriate to be more deferential to states in the economic context than in the context of racial discrimination? The advocates of the “right to earn a living” movement think that both kinds of regulation implicate fundamental rights, and the distinction the Court currently makes between “economic” and “personal” rights under the constitution is wrong.<sup>185</sup>

Higher deference for economic regulation is justifiable on many grounds, and the case of licensing illustrates them.<sup>186</sup> First, states have strong, legitimate interests in regulating the economic sphere, where unequal bargaining power can make pure market outcomes unfair or free competition may result in dangerous or low quality products for consumers.<sup>187</sup> The latter is a justification for occupational licensing that places reasonable limits on the right to compete in an occupation.<sup>188</sup> Stricter forms of review tie states’ hands too strongly to a libertarian philosophy of the marketplace.<sup>189</sup> This was the concern that leveled *Lochner*, and it is still powerful today.<sup>190</sup> Second, market regulation concerns public life, which most view as a more legitimate area for regulation than the private lives of

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182. *Cf. id.* at 176.

183. *See* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015); *Craigmiles*, 312 F.3d at 229.

184. *See* *Shelley v. Kraemer*, 344 U.S. 1, 21-23 (1948).

185. *Economic Liberty Backgrounder*, INST. FOR JUST. (2018), <https://ij.org/issues/economic-liberty/backgrounder/> [<https://perma.cc/LT5T-RF8U>].

186. *See* Chemerinsky, *supra* note 161, at 409.

187. *Cf. id.* at 407.

188. *Cf. id.* at 409.

189. *See id.* at 408-09.

190. *See id.* at 408.

citizens, which are usually implicated by rights that receive stricter scrutiny under the Constitution.<sup>191</sup> Finally, as a historical and cultural matter, most Americans have stronger gut reactions to limitations on their personal freedom as compared to their professional freedom.<sup>192</sup>

If states have a relatively strong interest in regulating the economic sphere, then courts are understandably wary of invalidating economic regulation such as occupational licensing.<sup>193</sup> *Lochner* was and is unpopular because it substituted the policy judgement of unaccountable federal judges for that of elected state officials.<sup>194</sup> Licensing regulation requires trading off incommensurable values, because the costs of licensing are typically economic while the benefits inure to health and safety—values notoriously difficult to quantify.<sup>195</sup> The courts' ongoing commitment to leaving *Lochner* in the past is at least partly motivated by a recognition that these trade-offs are political and best left to an elected body with the democratic legitimacy to speak for the people.<sup>196</sup>

Perhaps even more fundamentally, courts recognize that economic regulation is poorly suited to federal courts hearing one case at a time,<sup>197</sup> and this is no less true about occupational regulation. First, state legislatures and agencies are superior to federal courts in making decisions about licensing because they have the ability to collect and analyze data about the costs and benefits of regulation.<sup>198</sup> A state agency can set up complaint centers where consumers can

191. See Suzanna Sherry, *Selective Judicial Activism: Defending Carolene Products*, 14 GEO. J.L. & PUB. POL'Y 559, 571-72 (2016).

192. *Cf. id.* at 572 (arguing that rational basis review has substantive justification in part because Americans are not as personally invested in economic regulation as they are in regulation addressing private rights).

193. See, e.g., *Powers v. Harris*, 379 F.3d 1208, 1222-23 (10th Cir. 2004).

194. David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 375 (2003).

195. See CAROLYN COX & SUSAN FOSTER, FED. TRADE COMM'N, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION 41 (1990), [https://www.ftc.gov/system/files/documents/reports/costs-benefits-occupational-regulation/cox\\_foster\\_-\\_occupational\\_licensing.pdf](https://www.ftc.gov/system/files/documents/reports/costs-benefits-occupational-regulation/cox_foster_-_occupational_licensing.pdf) [<https://perma.cc/FF9Q-JE4G>].

196. See Keith E. Whittington, *Congress Before the Lochner Court*, 85 B.U. L. REV. 821, 822-23 (2005).

197. See *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

198. See JASON A. SCHWARTZ, INST. FOR POLICY INTEGRITY, 52 EXPERIMENTS WITH REGULATORY REVIEW: THE POLITICAL AND ECONOMIC INPUTS INTO STATE RULEMAKINGS 23, 38, 423 (2010), [http://policyintegrity.org/files/publications/52\\_Experiments\\_with\\_Regulatory\\_Review.pdf](http://policyintegrity.org/files/publications/52_Experiments_with_Regulatory_Review.pdf) [<https://perma.cc/9XF9-2QTW>].

describe unsafe or unsatisfactory experiences with service providers, providing the state agency with information about the possible benefits of a licensing restriction on providing that service. Agencies can also collect data about the costs of a licensing restriction through a similar mechanism by soliciting comments or complaints from would-be providers about their intent to enter the market but-for licensing rules barring their practice.<sup>199</sup> And agencies can employ economists and other data analysts to predict the effect of licensure restrictions on the relevant outcomes, although states rarely do so at the moment.<sup>200</sup>

Second, states have a bigger and more systemic perspective on the regulatory need than that of a judge considering one suit involving one aspect of a licensure scheme.<sup>201</sup> All regulation will be over- and under-inclusive, and may involve some arbitrariness on the margins. Robust constitutional protection for access to an occupation would sacrifice the big-picture vision with which agencies approach problems. Where imperfections in a regulatory scheme have outsized harm—such as when a regulation discriminates based on race—vindicating an individual’s rights through constitutional suits makes sense. But as the Court has recognized by creating tiers of scrutiny, not all regulatory imperfections implicate strong rights to redress.

Does *Williamson v. Lee Optical of Oklahoma, Inc.*<sup>202</sup> strike the right balance between the limited right to compete in an occupation and deference to states’ economic regulation? Yes and no. The outcome of the case was probably reasonable, but the reasoning went too far and has been used by courts to abdicate their role in policing the constitutional right to compete.<sup>203</sup> The boundary between the practice of optometrists and opticians—what each professional can and cannot do—is a question properly answered by a state legislature. And the rule that opticians cannot make lenses without a prescription has some rational basis in public health and

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199. *See id.* at 133 (“Small Business Regulatory Fairness Board reviews new rules and whether existing rules create barrier to business that outweigh public benefit.”).

200. *Id.* at 143.

201. *See Dukes*, 427 U.S. at 303.

202. 348 U.S. 483, 487, 491 (1955).

203. *See, e.g., Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004).

safety.<sup>204</sup> The rule could have been upheld on those grounds, but instead the Court used the case to make grand pronouncements against *Lochner*-style review. By its own words, the Court seemed to uphold a “needless, wasteful” requirement,<sup>205</sup> inviting future courts to find rationality where there is none. This overcorrection away from *Lochner* has been the unfortunate legacy of *Lee Optical*.

### 3. *The Supreme Court and Economic Rights under the Fourteenth Amendment*

Given that the *Powers-Craigsmiles* split implicates all of these important questions about rationality review for economic regulation,<sup>206</sup> why has the Supreme Court declined to weigh in? Part of the reason may be that the Court does not like its options. It can affirm *Powers*, and reduce rationality review to a nullity; all legislation benefits some group, and if that benefit itself is a legitimate state interest, then rational basis review goes away.<sup>207</sup> Or it can affirm *Craigsmiles*, but doing so will also probably require the Court to grapple with the more difficult questions that the cases present about how far a court can look into a state’s motives.<sup>208</sup> As evidenced by the volumes of scholarly literature dedicated to that question, it is hard to answer, and the Court has given mixed signals.<sup>209</sup>

Another reason why the Court may have avoided addressing the *Powers-Craigsmiles* split is that bad facts make bad law. The debate between *Powers* and *Craigsmiles*—whether states could justify regulation as economic protection without appeal to public-regarding purposes—was only possible in a context where state interests are so flimsy and the regulation so onerous. It is no coincidence that

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204. See *Lee Optical*, 348 U.S. at 491.

205. *Id.* at 487.

206. Compare *Powers*, 379 F.3d at 1222-23 (holding that the regulation was consistent with the Fourteenth Amendment), with *Craigsmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) (deciding to use a more rigorous form of rational basis review).

207. See *Powers*, 379 F.3d at 1222-23.

208. See *Craigsmiles*, 312 F.3d at 229.

209. See generally, Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297 (1997); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843; Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784 (2008).

both cases concerned occupational licensing, which, as we have seen, represents some of the worst of state regulation.<sup>210</sup> If the Court agrees that occupational licensing has gone too far in some circumstances—which its holding in 2015’s *North Carolina State Board of Dental Examiners v. FTC*<sup>211</sup> suggests—then it may not want to clarify constitutional rules in this particularly fraught area of regulation. The Court may be sympathetic to the reasoning of *Craigmiles* because of the abuses consumers and workers have suffered in the name of licensing. But some Justices may be concerned that affirming *Craigmiles* would have ripples beyond occupational licensing. Such a holding could subject all state economic regulation to more intense judicial scrutiny and raise the specter of *Lochner*.

For the same reason, the “right to earn a living” enthusiasts who see the recent successes in occupational licensing schemes as opening a door to strong economic rights under the Constitution are likely to be disappointed. Occupational licensing is increasingly outrageous and increasingly unpopular.<sup>212</sup> Successes in these suits hardly portend a return to strong economic rights as a general matter. As Professor Suzanna Sherry has said, when conservative libertarians focus on occupational licensing victories to claim success for stronger economic rights in general, they “are using a very small tail to wag a very large dog.”<sup>213</sup>

### *B. The First Amendment and Professional Speech*

There are also reasons to be skeptical about locating a right to earn a living in the First Amendment. The First Amendment can only be used when a licensing scheme implicates speech, and only a subset of inefficient licensing regulations do so.<sup>214</sup> Perhaps more

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210. *Rosemond v. Markham*, 135 F. Supp. 3d 574, 586-90 (E.D. Ky. 2015) (finding no compelling government interest in an attempt by the Kentucky Board to identify and regulate a nationally syndicated advice columnist as a “family therapist”); *see also* *Edwards v. District of Columbia*, 755 F.3d 996, 999, 1009 (D.C. Cir. 2014) (finding the District of Columbia’s requirement that tour guides acquire a license too restrictive).

211. *Cf.* 135 S. Ct. 1101, 1110 (2015).

212. *See Occupational Licensing*, *supra* note 20.

213. Sherry, *supra* note 191, at 568.

214. *See supra* Part II.B.

fundamentally, states have strong interests in regulating professional speech, and will inevitably receive deference in most First Amendment inquiries.<sup>215</sup>

The recent First Amendment jurisprudence of “professional speech” percolating through the lower courts—and the Supreme Court’s recent foray into the subject—is contradictory and complex, but a fair reading of the cases reveals a common theme: the government has the right to restrict professional speech to professionals and, at times, to restrict what professionals can say.<sup>216</sup> Cases applying strict scrutiny to licensing schemes are few, and seem to be triggered, as in the Fourteenth Amendment context, by bad facts.<sup>217</sup> Once one recognizes that there is a legitimate government purpose for restricting professional speech, it follows that whatever “professional speech” doctrine comes out of the current jurisprudential morass will need to afford legislatures some flexibility in deciding what kinds of professional speech threaten public health and safety.<sup>218</sup> Intermediate scrutiny best captures the kind of balancing of rights and regulatory efficiency that licensing regulation entails.

### *1. Locating Professional Speech in the First Amendment Framework*

The dominant approach in the lower courts has been to apply intermediate scrutiny to licensing rules that restrict speech and to uphold restrictions if they are substantially related to an important governmental interest.<sup>219</sup> Although there are cases that purport to apply strict scrutiny to a restriction on professional speech,<sup>220</sup> and those that purport to apply no scrutiny at all,<sup>221</sup> the emerging trend has been to use intermediate scrutiny to trade off a professional’s

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215. *See supra* Part II.B.

216. *See, e.g.*, *Kagan v. City of New Orleans*, 753 F.3d 560, 562 (5th Cir. 2014).

217. *See, e.g.*, *Rosemond v. Markham*, 135 F. Supp. 3d 574, 581, 585 (E.D. Ky. 2015).

218. *See supra* Part II.A.2 (discussing strong state interest in economic regulation and public life).

219. *See, e.g.*, *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 168 (2002).

220. *See Serafine v. Branaman*, 810 F.3d 354, 361-62 (5th Cir. 2016); *Rosemond*, 135 F. Supp. 3d at 585.

221. *See Moore-King v. County of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013); *Locke v. Shore*, 634 F.3d 1185, 1191-92 (11th Cir. 2011).

speech rights against a state's regulatory interest.<sup>222</sup> This level of scrutiny is appropriate because it allows some regulatory flexibility in an area where a state's interest in regulation is high, while also recognizing that professional speech implicates free speech values, albeit in a limited way.

For every way in which a state can restrict professional speech, it has a theoretically legitimate interest in doing so.<sup>223</sup> First, if licensure is appropriate for a profession, then governments should be able to restrict who can claim to be a member of that profession. In this circumstance, an unlicensed individual claiming to be a member of a licensed profession is committing fraud. An unlicensed physician is not a "physician" at all, and claiming so invites detrimental reliance by members of the public who would have no particular reason to doubt that claim. The professional circumstance is thus different from the political sphere, where one's false claims to military honors,<sup>224</sup> for example, do not invite consumers to make themselves vulnerable to professional malpractice.

Second, if licensing is appropriate, then it follows that, for "talking" professions, the licensing scheme will necessarily prevent some unlicensed individuals from speaking freely.<sup>225</sup> For example, almost all of a lawyer's practice is verbal, whether providing advice to clients or making arguments to courts. If the profession passes the test for whether licensing is appropriate—and the legal profession probably does—then limiting who can act as a lawyer necessarily entails limiting who can say what. Unlicensed "lawyers" who claim that the First Amendment protects their right to provide clients with legal advice are, at bottom, saying that the state cannot regulate entry into the practice of law at all.

Third, if licensing is appropriate for a given "talking profession," then the state also has at least some interest in controlling what licensed professionals can say. For the talking professions, the speech itself is the service provided. The quality of that service

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222. See, e.g., *Kagan v. City of New Orleans*, 753 F.3d 560, 562 (5th Cir. 2014); *King v. Governor of N.J.*, 767 F.3d 216, 229, 234-35 (3d Cir. 2014); *Wollschlaeger v. Governor of FL.*, 760 F.3d 1195, 1203 (11th Cir. 2014).

223. See *supra* notes 107-10 and accompanying text.

224. See generally *United States v. Alvarez*, 567 U.S. 709 (2012).

225. See, e.g., *Kagan*, 753 F.3d at 562 (upholding New Orleans's licensing scheme for tour guides).

depends on what is said, and so if the government has a legitimate interest in regulating service quality in the public interest, then it must also have the right to prescribe and proscribe categories of statements.

The recent gay conversion therapy cases illustrate this point. California and New Jersey passed laws prohibiting therapists from providing “sexual orientation conversion efforts” (SOCE) to minors, subjecting offenders to professional discipline or license revocation.<sup>226</sup> SOCE, like all talk therapy interventions, is wholly comprised of speech, but both the Third and Ninth Circuits upheld the bans as advancing a legitimate state interest in safe therapy for minors.<sup>227</sup> The restrictions easily passed intermediate scrutiny since the states were able to point to scholarly research and a professional consensus showing that conversion therapy can trigger depression, anxiety, and even suicide.<sup>228</sup> Restrictions on what professionals can say can also implicate other legitimate state interests besides consumer protection. The ethical rules that prevent lawyers from advising clients to commit crimes or to abuse the bankruptcy laws<sup>229</sup> protect the state’s own legal institutions against abuse. The public has a strong interest in fewer crimes and in a functional, fair bankruptcy system.

Note that these legitimate state interests in restricting speech through licensing all depend on a good reason to use licensing in the first place. Several of the recent professional speech cases foundered on this requirement, although the cases typically do not say so explicitly. For example, the DC Circuit opinion that struck down a licensing exam for tour guides seemed hostile to the idea that tour guiding was the kind of occupation that needed licensing to protect the public.<sup>230</sup> Likewise, in *Byrum v. Landreth*, the Fifth Circuit rejected a “title use” scheme for interior designers on First Amendment grounds.<sup>231</sup> Again, the court seemed to reject the idea that the

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226. CAL. BUS. & PROF. CODE § 865.1 (West 2018), N.J. STAT. ANN. § 45:1-55 (West 2018).

227. *King v. Governor of N.J.*, 767 F.3d 216, 237-38 (3d Cir. 2014); *Pickup v. Brown*, 728 F.3d 1042, 1056-57 (9th Cir. 2013).

228. *King*, 767 F.3d at 236-39; *Pickup*, 728 F.3d at 1057.

229. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 246, 248 (2010).

230. *Edwards v. District of Columbia*, 755 F.3d 996, 1007 (D.C. Cir. 2014).

231. 566 F.3d 442, 447, 449 (5th Cir. 2009).



public needed protection from the unlicensed practice of interior design.<sup>232</sup>

Because of the strong state interests in restricting professional speech where licensing is appropriate, the few cases applying First Amendment strict scrutiny to a licensure restriction are wrong.<sup>233</sup> Examining the facts of these cases, however, may explain courts' overzealousness. One of these cases is the *Rosemond* case, where the Kentucky Board of Psychology sent a cease-and-desist letter to a syndicated advice columnist.<sup>234</sup> The Board's conduct there was so outrageous, and so antithetical to First Amendment values, that the court quite understandably wanted to throw the book at the Board.<sup>235</sup> But the board's conduct would have also failed intermediate scrutiny. Something similar may have motivated the court in *Serafine v. Branaman*, in which the Texas State Board of Examiners of Psychologists demanded that a professor of psychology refrain from describing herself as a "psychologist" in campaign materials.<sup>236</sup> There, the court applied strict scrutiny and found a First Amendment violation.<sup>237</sup> To the extent that case was about professional speech, rather than campaign speech, intermediate scrutiny would have been more appropriate, and would have led to the same outcome.

The cases that afford professional speech no First Amendment protection at all are also wrong.<sup>238</sup> Professional speech can implicate important First Amendment values. Most professions that pass the test for licensing require their members to not only know but also to contribute to a vast, complex, and growing store of knowledge.<sup>239</sup> Affording no speech protection at all to professionals may limit the information sharing and debate necessary to develop this knowledge. Forcing or prohibiting the speech of professionals also creates the risk that the government will use professionals as mouthpieces

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232. *See id.* at 447-48.

233. *See, e.g., Serafine v. Branaman*, 810 F.3d 354, 361 (5th Cir. 2016); *Rosemond v. Markham*, 135 F. Supp. 3d 574, 588 (E.D. Ky. 2015).

234. *Rosemond*, 135 F. Supp. 3d at 580.

235. *Cf. id.* at 587-88.

236. 810 F.3d at 357-58.

237. *See id.* at 361, 370.

238. *See, e.g., Locke v. Shore*, 682 F. Supp. 2d 1283, 1290 (N.D. Fla. 2010).

239. Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1241 (2016).

for their own message or to suppress the free flow of information.<sup>240</sup> The free speech of professionals also implicates autonomy values, as professionals tend to closely identify with their work. Unjustified governmental intrusion in what professionals can and cannot say diminishes individual liberty and autonomy.

Justice White is wrong that “professional speech” is undeserving of First Amendment protection.<sup>241</sup> His concurrence provides a useful framework, however, in applying First Amendment scrutiny. Where there is a “personal nexus between professional and client,” and the professional “takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client,” the state’s interest in regulating speech is relatively high.<sup>242</sup> The intimacy of that relationship invites reliance, and makes the consumer vulnerable to low quality service, unethical practice, or fraud. Reasonable speech restrictions within these relationships are likely to pass intermediate scrutiny. But where that nexus does not exist, as in the case of the syndicated advice columnist or the “psychologist” candidate, the state’s interest in protecting the public is low.<sup>243</sup> The claims of these individuals are not offered to individual clients in an attempt to induce their reliance, but are rather offered to the general public and subject to public approbation or ridicule. Here, government intrusion into speech, even nominally professional speech, is likely to run afoul of the First Amendment.

## *2. Content-Neutral? Conduct Not Speech? Or a New Category of Speech?*

Although the emerging view among the circuit courts is that professional speech should receive intermediate scrutiny,<sup>244</sup> there is significant variation in how courts arrive at that conclusion and the

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240. See, e.g., *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2374 (2018).

241. See *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring in the result).

242. *Id.*

243. See *Serafine v. Branaman*, 810 F.3d 354, 354, 357-58 (5th Cir. 2016); *Rosemond v. Markham*, 135 F. Supp. 3d 574, 586 (E.D. Ky. 2015).

244. See, e.g., *King v. Governor of N.J.*, 767 F.3d 234 (3d Cir. 2014); *Wollschlaeger v. Governor of Fl.*, 760 F.3d 1195, 1230 (11th Cir. 2014); *Kagan v. City of New Orleans*, 753 F.3d 560, 562 (5th Cir. 2014).

Supreme Court's recent abortion speech case has only further muddied the waters.<sup>245</sup> Some lower courts have held that restrictions on occupational speech are really restrictions on conduct with only an incidental effect on speech, and thus should receive intermediate scrutiny.<sup>246</sup> Another lower court has arrived at intermediate scrutiny by holding that the restrictions in question were content-neutral.<sup>247</sup> Neither of these approaches is satisfactory.

The best approach can be found in the Third Circuit's opinion in *King*, which upheld New Jersey's ban on gay conversion therapy for minors.<sup>248</sup> That case avoids the mistake of the Ninth Circuit in a similar case in concluding that therapy is "conduct" and not speech at all.<sup>249</sup> It also avoids the fiction, espoused by the Fifth Circuit in its tour guide case, that restrictions on occupational speech are content-neutral.<sup>250</sup> Rather than using these specious ways of getting to intermediate scrutiny, the Third Circuit in *King* drew on Justice White's *Lowe v. SEC* concurrence to define "professional speech" and assign it, categorically, to intermediate scrutiny under the First Amendment.<sup>251</sup>

Unfortunately, the Court's decision this term in *National Institute of Family and Life Advocates v. Becerra*<sup>252</sup> puts the reasoning of *King* on shaky ground. There, the plaintiffs challenged a California statute that required pro-life "crisis pregnancy centers" to notify women that California provides free or low-cost family planning services, including abortion.<sup>253</sup> The Ninth Circuit had categorized the restriction as implicating "professional speech," subjecting it to lighter scrutiny, but the Supreme Court rejected this approach and found that the law violated the First Amendment.<sup>254</sup> The Court simply said that its "precedents do not recognize ... a category called

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245. See *Family & Life Advocates*, 138 S. Ct. 2361.

246. See, e.g., *Wollschlaeger*, 760 F.3d at 1203; *Pickup v. Brown*, 728 F.3d 1042, 1055 (9th Cir. 2013).

247. *Kagan*, 753 F.3d at 562.

248. *King*, 767 F.3d at 220.

249. See *Pickup*, 728 F.3d at 1055.

250. See *Kagan*, 753 F.3d at 562.

251. *King*, 767 F.3d at 229, 234-35.

252. 138 S. Ct. 2361 (2018).

253. See *id.* at 2368.

254. *Id.* at 2370, 2378.

‘professional speech.’”<sup>255</sup> The opinion in *Family and Life Advocates* also breaks with the *King* approach by endorsing the nonsensical idea that regulating professional speech is actually regulating professional conduct, when it used that logic to distinguish the speech restriction at issue in *Casey v. Planned Parenthood*.<sup>256</sup>

Yet the Court in *Family and Life Advocates* hardly forecloses the *King* approach to professional speech rights under the First Amendment. First, the law at issue in *Family and Life Advocates* did not directly relate to occupational licensing—it regulated clinics and not individual providers<sup>257</sup>—unlike *King* and the typical professional speech case. Second, the fact that the disclosures related to abortion—a lightning rod for public opinion and Supreme Court jurisprudence—makes the case easily distinguishable from the run-of-the-mill occupational licensing case.<sup>258</sup> Finally, while the opinion rejected the *King* approach of recognizing a “professional speech” category under the First Amendment in the instant case, it explicitly reserved the possibility of recognizing such a category in the future.<sup>259</sup> Lower courts should follow the *King* line of reasoning in applying First Amendment scrutiny to licensing restrictions that implicate speech. With enough thoughtful cases such as *King* on the books, perhaps the Court will recognize that intermediate scrutiny for professional speech strikes the right balance between individual speech rights and regulatory flexibility.

#### CONCLUSION: THE FUTURE OF THE “RIGHT TO EARN A LIVING” MOVEMENT

All this illustrates why the First and Fourteenth Amendments should provide some minimal protection for the right to compete in

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255. *Id.* at 2372.

256. *Id.* at 2372-73.

257. *See id.* at 2368.

258. *Compare id.* at 2368 (considering a challenge to a California statute that required pro-life pregnancy “crisis centers” to notify women that California prices free low-cost family planning services), *with* *Edwards v. Dist. of Columbia*, 755 F.3d 996, 998 (D.C. Cir. 2014) (considering a challenge to the District of Columbia’s requirement that tour guides acquire a license).

259. In the words of the Court, “[w]e do not foreclose the possibility that some such reason [to treat professional speech as a unique category under the First Amendment] exists.” *Family & Life Advocates*, 138 S. Ct. at 2375.

an occupation, but cannot alone combat the problem of excessive licensing. Nor should they be reinterpreted to do more. The prevailing doctrine—even with several circuits holding with *Craigmiles* that states must advance a public-regarding justification for licensing<sup>260</sup>—has not been very effective at curbing licensing abuses. Most cases uphold the licensing schemes, and the successes have been on the margins, addressing occupations—such as hair braiding<sup>261</sup> and tour guiding<sup>262</sup>—that account for a relatively small amount of the services market. Changing that doctrine to apply strict scrutiny to licensing laws provides states with too little leeway in pursuing legitimate uses of licensing. The judiciary has left *Lochner* and its second-guessing of state choices about economic regulation behind, and rightly so.

Right to earn a living advocates underestimate the unpopularity of *Lochner* and the strength of resolve that almost all judges have to avoid its resurrection. They also fail to recognize that the few cases that seem to invoke what they call a “right to earn a living” do so in the context of an unpopular area of regulation that many agree has run amok: occupational licensing. Licensing gives courts the kinds of extreme examples that should fail rationality review, or put courts in the position of even asking whether naked economic protectionism is a legitimate state interest. When seen this way, the cases that advocates of the right to earn a living champion are really just tinkering at the margins of what many recognize as illegitimate regulation.<sup>263</sup> It is too small a hook on which to hang a new constitutional economic right.

So where does this leave Elias Zarate and his lawyer Braden Boucek? Barbering is not a talking profession, so Zarate cannot bring a First Amendment claim. He and Boucek are stuck with rationality review, the outcome of which, as most lawyers will tell you, depends on the judge you get. Perhaps the judge in Zarate’s

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260. *Craigmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002); see *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013); *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008).

261. *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1214-15 (D. Utah 2012).

262. *Edwards*, 755 F.3d at 1009.

263. See, e.g., *St. Joseph Abbey*, 712 F.3d at 226-27 (striking down the regulation); *Merrifield*, 547 F.3d at 978, 991 (holding the regulation failed rational basis review); *Craigmiles*, 312 F.3d at 229 (finding the regulation could not pass “even rational basis review”).

case will recognize that requiring high school degrees for barbers is irrational, and that it erects real barriers to employment and entrepreneurship for those already at the margins of society. Or perhaps they will get a judge who sees a legitimate state interest in regulating barbering in general, and refuses to examine the specifics of that regulation for fear of reprising *Lochner*.

Win or lose, these suits are an important part of the fight against excessive licensing. Every successful suit puts not only the plaintiff back to work, but also the many others in that state who were excluded by licensing, and increases competition to the benefit of consumers. These suits are also symbolically important. They send a message to licensing boards and legislatures that there can be consequences to dealing out rents without regard to public benefit. Organizations such as IJ and the Beacon Center have been pivotal in raising the battle cry against licensing, by increasing awareness through press releases, white papers, and social media.<sup>264</sup> This publicity is essential because a healthy public outrage is necessary for what will be the most effective avenue to reform: forcing states to take direct responsibility for regulating the occupations.

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264. See Boehm, *supra* note 2; *About Us*, *supra* note 17.