

## NOTE

### ECONOMIC LIBERTY AND THE SECOND-ORDER RATIONAL BASIS TEST

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#### INTRODUCTION

THIS Note proposes that certain constitutional economic liberty claims should be analyzed under a more stringent standard of scrutiny than they currently receive. In the industrializing period of the early twentieth century, the Supreme Court employed a rigorous mode of judicial review to invalidate a tapestry of regulations that arguably impinged on economic freedom.<sup>1</sup> The case of *Lochner v. New York*, in which the Court voided a state law regulating maximum work hours, epitomizes this methodology.<sup>2</sup> The New Deal, however, prompted judicial acquiescence to a revolutionary vision of legislative authority in the economic realm.<sup>3</sup> The doctrinal sea change occurred in *United States v. Carolene Products Co.*, where the Court, in response to the perceived judicial activism of the *Lochner* era, announced in its famous Footnote Four that it would henceforth abstain from micromanaging social and economic regulation.<sup>4</sup> Footnote Four also reflected the Court's intention to devote its future efforts primarily to safeguarding certain personal rights and defending vulnerable populations against invidious discrimination.<sup>5</sup>

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<sup>1</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>2</sup> *Id.* at 64–65.

<sup>3</sup> David N. Mayer, The Myth of “Laissez-Faire Constitutionalism”: Liberty of Contract during the *Lochner* Era, 36 *Hastings Const. L.Q.* 217, 280–82 (2009).

<sup>4</sup> 304 U.S. 144, 152 n.4 (1938); see also *id.* at 152. Although *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937), is “widely seen as signaling the end of the *Lochner* era,” David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 *Tex. L. Rev.* 1, 11 (2003), *Carolene Products* marks the explicit advent of the Court’s post-*Lochner* doctrinal framework. See Katharine M. Rudish, Note, Unearthing the Public Interest: Recognizing Intrastate Economic Protectionism as a Legitimate State Interest, 81 *Fordham L. Rev.* 1485, 1502–03 (2012).

<sup>5</sup> *Carolene Products*, 304 U.S. at 152 n.4.

*Carolene Products* precipitated a bifurcated model of judicial review characterized by strict scrutiny at one extreme and rational basis scrutiny at the other. In the due process context, the Court affords strict scrutiny to those rights deemed fundamental and minimal rational basis review to all others.<sup>6</sup> This tiered framework mirrors modern equal protection jurisprudence, which accords strict scrutiny to suspect classifications and rational basis to laws burdening unprotected classes.<sup>7</sup> Economic rights categorically fail to qualify as fundamental and typically do not implicate the special considerations associated with vulnerable minorities. Consequently, statutes governing economic affairs are universally subject to the rational basis test.<sup>8</sup> The judiciary's lenient approach in this respect has resulted in "near per se validation" of challenged economic regulations.<sup>9</sup>

In the decades following *Carolene Products*, the policy of deference to legislative judgments on matters of economic import became entrenched as a cornerstone of judicial decision making. Supervision of economic affairs was completely forsaken in the Court's effort to distance itself from the perceived excesses of the *Lochner* era.<sup>10</sup> The Court's approach in this respect is trans-substantive: Economic regulations of every stripe are subject to minimum rational basis scrutiny, regardless of the importance of the infringed liberty interest or the legislative motivation underlying the particular statute. Minimum wage laws, child labor standards, and occupational licensing regulations all receive identical treatment.

Recent case law, however, suggests an erosion of the general *Carolene Products* architecture. Although the two primary elements of post-*Lochner* equal protection and substantive due process jurisprudence—tiered scrutiny and the discrepant treatment of personal and economic liberties—remain largely intact, modern case law has effected subtle but

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<sup>6</sup> See *id.* at 152 & n.4; see also Anthony B. Sanders, Comment, Exhumation Through Burial: How Challenging Casket Regulations Helped Unearth Economic Substantive Due Process in *Craigmiles v. Giles*, 88 Minn. L. Rev. 668, 672 (2004).

<sup>7</sup> *Romer v. Evans*, 517 U.S. 620, 631 (1996).

<sup>8</sup> Sanders, *supra* note 6, at 672. There are some tangential exceptions; for instance, the permissibility of a punitive damages award is evaluated according to a tripartite standard of review. *BMW of N. Am. v. Gore*, 517 U.S. 559, 574–75 (1996).

<sup>9</sup> Jessica E. Hacker, Comment, The Return to *Lochnerism*? The Revival of Economic Liberties from David to Goliath, 52 DePaul L. Rev. 675, 730 (2002).

<sup>10</sup> Some commentators have argued that the Court's reaction to *Lochner* was in fact an overreaction. See, e.g., Walter Dellinger, The Indivisibility of Economic Rights and Personal Liberty, 2003–2004 Cato Sup. Ct. Rev. 9, 13 (2003).

significant inroads on these features. Constitutional doctrine has become too complex and multifaceted to support a simplistic bifurcation of economic and personal liberty interests. In short, the Court's hasty retreat from *Lochner* has been neither complete nor uniform.

Parts I and II of this Note will focus on two important, and related, developments that have substantially corroded the *Carolene Products* bulwark. The first is the breakdown of the rigid two-tiered model of scrutiny. Under the framework spawned by *Carolene Products*, "if a law neither burdens a fundamental right nor targets a suspect class, [the Court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end."<sup>11</sup> In recent decades, however, the clear dichotomy between rational basis and strict scrutiny has evaporated with the proliferation of multiple intermediate standards of review.<sup>12</sup> This deterioration is evident not only in the Court's adoption of an explicitly intermediate level of scrutiny,<sup>13</sup> but also in its unpredictable exposition of the rational basis standard. On several occasions, while purporting to apply the traditional rational basis test, the Court has implicitly engaged in a more searching inquiry than is characteristic of that mode of review.<sup>14</sup> This heightened level of scrutiny has been informally termed the "second order" rational basis test.<sup>15</sup>

The second, related trend is the Court's formulation of doctrinal tenets unbounded by the simplistic dichotomy between economic and personal liberties. This Note will focus on two salient principles of modern substantive due process and equal protection case law, neither of which is cabined by any rigid limiting construct. The first principle, implicit in *Lawrence v. Texas*,<sup>16</sup> establishes the constitutional significance of those autonomy interests that are central to personhood.<sup>17</sup> The second princi-

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<sup>11</sup> *Romer*, 517 U.S. at 631.

<sup>12</sup> See R. Randall Kelso, Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice, 4 U. Pa. J. Const. L. 225, 226 (2002) (arguing that "actual Supreme Court cases" reflect six standards of review rather than the mere three standards officially acknowledged by the Court).

<sup>13</sup> See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (announcing a standard of review for gender classifications that is less stringent than strict scrutiny but more stringent than rational basis review).

<sup>14</sup> See *infra* notes 37–42 and accompanying text.

<sup>15</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 458 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

<sup>16</sup> 539 U.S. 558 (2003).

<sup>17</sup> See *infra* Section II.A.

ple, derived from *U.S. Department of Agriculture v. Moreno*,<sup>18</sup> reaffirms *Carolene Products*' commitment to the protection of vulnerable minorities while also representing a special commitment to eradicating laws predicated on animus.<sup>19</sup> Regulations that contravene certain specified autonomy interests or that are motivated by animus merit review under the second-order rational basis test described above. The scope of the principles espoused by these cases is broad; neither postulate is delimited by the Court's traditional practice of categorizing a particular activity as personal or economic. *Moreno*'s plain language, for instance, requires heightened review of *all* regulations predicated on animus, regardless of whether they target an economic or personal liberty interest.<sup>20</sup> *Lawrence* and *Moreno* thus present substantial opportunities for reordering the traditional approach to economic freedom.

This doctrinal evolution suggests that certain economic regulations should be subject to a more rigorous form of review than merely traditional rational basis scrutiny. The two principles enumerated in *Lawrence* and *Moreno* are directly applicable to a particular subset of economic liberty claims, thereby necessitating scrutiny under the second-order rational basis test. In effect, the Court's capacious protection of personal liberties and vulnerable minorities has provided the tools for the rejuvenation of economic freedom.

It is difficult to appreciate the potential impact of this thesis, however, without considering its application in a concrete setting. Part III of this Note will therefore examine the ramifications of these principles in the context of occupational licensing, which serves as an ideal case study for several reasons. First, both strands of doctrine discussed in this Note are fully applicable in the licensing setting. As Section III.C will attempt to demonstrate, occupational liberty, despite its nominal classification as an economic right, is as central to personhood as the liberty interests protected in *Lawrence*. Furthermore, as explained in Section III.D, the Court's policy of closely scrutinizing laws that it suspects are predicated on animus is directly implicated by occupational licensing regimes whose major purpose is to suppress competition by restricting entry into a particular profession. Licensing regulations are therefore strong candidates for review under the second-order rational basis test.

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<sup>18</sup> 413 U.S. 528, 534 (1973); see *infra* Section II.B.

<sup>19</sup> *Cleburne*, 473 U.S. at 446–47, *Romer*, 517 U.S. at 634–35, and *United States v. Windsor*, 133 S. Ct. 2675 (2013), which follow *Moreno*'s holding, also espouse this principle.

<sup>20</sup> See *infra* note 70 and accompanying text.

Licensing laws also serve as a useful case study insofar as they constitute a pervasive and highly consequential form of economic regulation. An estimated twenty-nine percent of American workers are required to obtain a government license in order to pursue their livelihood.<sup>21</sup> The economic effects of this state of affairs are considerable.<sup>22</sup> Altering the standard of scrutiny for such laws could potentially have a profound impact not only on the millions of producers currently complying with onerous licensing statutes, but also, and more significantly, on the countless individuals excluded from the profession of their choice by burdensome entry requirements. As a practical matter, elevating the standard of scrutiny applicable in this context is not implausible: Licensing is an area in which the courts have been increasingly willing to abandon their traditional deference to legislative economic policies.<sup>23</sup> The occupational licensing setting therefore constitutes a vivid, and highly topical, illustration of this paper's thesis.

Part IV provides a short summary of the foregoing analysis and then proceeds to chart some of the broader implications of implementing the second-order rational basis test in cases involving various forms of economic regulation outside the realm of occupational licensing. The Note concludes with a brief sketch of the arguments in favor of applying heightened review to a second form of widespread economic legislation: zoning laws.

#### I. SECOND-ORDER RATIONAL BASIS REVIEW

Modern constitutional law is characterized by a doctrinal framework in which economic regulations are universally subject to a minimal level of judicial oversight.<sup>24</sup> As the Court in *Williamson v. Lee Optical Co.* noted, "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, improv-

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<sup>21</sup> Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market 4* (Nat'l Bureau of Econ. Research, Working Paper No. 14979, 2009).

<sup>22</sup> See *infra* notes 143–49 and accompanying text.

<sup>23</sup> See, e.g., *St. Joseph Abbey v. Castille*, 712 F.3d 215, 217 (5th Cir. 2013) (invalidating a state law requiring casket sellers to be licensed as funeral directors); *Craigmiles v. Giles*, 312 F.3d 220, 222 (6th Cir. 2002) (similar).

<sup>24</sup> See, e.g., *Carolene Products*, 304 U.S. at 152.

ident, or out of harmony with a particular school of thought.”<sup>25</sup> On the heels of *Lee Optical* and a slew of decisions upholding economic regulations that would have been invalidated under the former regime, “Lochnerism” became a derisive epithet signifying judicial overreaching and usurpation of legislative authority.<sup>26</sup>

The fact that the rational basis test applies to a particular subject matter does not, however, necessarily preordain the precise level of scrutiny that the Court will actually employ. The Court’s exposition of the rational basis test has, at times, been both varied and unpredictable. Several modern cases purporting to apply the traditional rational basis test have engaged in a more rigorous review of the challenged statute than that test would ostensibly permit.<sup>27</sup> As a result, two levels of rational basis review have emerged in practice.<sup>28</sup> In a sense, the rational basis test has become implicitly bifurcated, thereby permitting the Court to protect certain favored values without formally altering its doctrinal framework.<sup>29</sup> This flexible approach to the rational basis test represents a significant erosion of the *Carolene Products* schema of judicial review.

The traditional formulation of the rational basis standard accords the challenged statute “a strong presumption of validity”<sup>30</sup> and mandates that the law be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis” for it.<sup>31</sup> The state has “no obligation to produce evidence to sustain the rationality” of the challenged statute,<sup>32</sup> instead, the plaintiff is required to “negative every conceivable basis which might support it.”<sup>33</sup> The legislature’s actual motive or intention in passing the law is irrelevant.<sup>34</sup> Finally, although every law must further a legitimate governmental interest, the Court has failed to pro-

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<sup>25</sup> 348 U.S. 483, 488 (1955).

<sup>26</sup> Thomas B. Colby, Clearing the Smoke from *Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages, 118 Yale L.J. 392, 402 (2008); see also Michael J. Phillips, Another Look at Economic Substantive Due Process, 1987 Wis. L. Rev. 265, 265 n.3.

<sup>27</sup> See *infra* note 44.

<sup>28</sup> Robert C. Farrell, Legislative Purpose and Equal Protection’s Rationality Review, 37 Vill. L. Rev. 1, 65 (1992).

<sup>29</sup> See *infra* note 69 and accompanying text.

<sup>30</sup> *Heller v. Doe*, 509 U.S. 312, 319 (1993).

<sup>31</sup> *FCC v. Beach Commc’ns*, 508 U.S. 307, 313 (1993).

<sup>32</sup> *Heller*, 509 U.S. at 320.

<sup>33</sup> *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (citing *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)).

<sup>34</sup> *Beach Commc’ns*, 508 U.S. at 315.

vide an explicit definition of what constitutes such an interest.<sup>35</sup> As a result, arguably dubious state purposes—such as economic protectionism—have at times been sanctioned under the rational basis test.<sup>36</sup>

Although the Supreme Court officially recognizes only one level of rational basis scrutiny, it is widely acknowledged—both by a growing body of literature<sup>37</sup> and by several Justices in non-majority opinions—that at least two levels of rational basis scrutiny exist in practice. As Justice O'Connor observed in *Lawrence*, for instance, statutes predicated on animus are subject to “a more searching form of rational basis review.”<sup>38</sup> Along similar lines, Justice Marshall, writing separately in *City of Cleburne v. Cleburne Living Center*,<sup>39</sup> noted that although the majority did “not label its handiwork heightened scrutiny,” “the rational basis test invoked today is most assuredly not” the traditional rational basis test applicable to social and economic regulations.<sup>40</sup> He designated the Court’s uncharacteristically rigorous approach “second order” rational basis review.<sup>41</sup> Justice Marshall spelled out the point more elaborately in *Massachusetts Board of Retirement v. Murgia*, where he wrote:

The model’s two fixed modes of analysis, strict scrutiny and mere rationality, simply do not describe the inquiry the Court has undertaken—or should undertake—in equal protection cases. Rather, the inquiry has been much more sophisticated and the Court should admit as much. It has focused upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the state interests asserted in support of the classification. . . . Time and again, met with cases touching upon the prized rights and burdened classes of our society, the Court has acted only after a reasonably

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<sup>35</sup> See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 834 (1987) (“Our cases have not elaborated on the standards for determining what constitutes a ‘legitimate state interest’ . . .”).

<sup>36</sup> *Powers v. Harris*, 379 F.3d 1208, 1218–22 (10th Cir. 2004) (holding that intrastate economic protectionism constitutes a legitimate state interest and surveying other cases that reach the same result).

<sup>37</sup> *Id.* at 1223 n.21 (listing articles); see also Kelso, *supra* note 12, at 230–31.

<sup>38</sup> *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring in the judgment).

<sup>39</sup> 473 U.S. 432 (1985). *Cleburne* applied the principles espoused in *Moreno*.

<sup>40</sup> *Id.* at 458 (Marshall, J., concurring in the judgment in part and dissenting in part).

<sup>41</sup> *Id.*

probing look at the legislative goals and means, and at the significance of the personal rights and interests invaded.<sup>42</sup>

Second-order rational basis review,<sup>43</sup> which the Court has implicitly applied in both equal protection and due process cases,<sup>44</sup> involves a more demanding inquiry into the means and ends of a challenged statute.<sup>45</sup> Although the Court has never enumerated its precise features, this standard of review is nevertheless typically characterized by several key elements, including a willingness to consider the actual rationale underlying the challenged statute, a rejection of speculative justifications, and the imposition of an evidentiary burden on the state to defend its law.<sup>46</sup> Furthermore, in relation to traditional rationality review, the second-order rational basis test is characterized by a more exacting conception of legitimate governmental interests<sup>47</sup> and a more stringent tailoring inquiry.<sup>48</sup>

*Lawrence* and *Moreno*<sup>49</sup> represent the paradigmatic examples of second-order rational basis review. These decisions are discussed extensively in Part II. For the moment, two federal appellate cases serve to demonstrate neatly the courts' unpredictable application of the allegedly unitary rational basis test. This pair of cases also illustrates the signifi-

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<sup>42</sup> 427 U.S. 307, 318, 320 (1976) (Marshall, J., dissenting).

<sup>43</sup> Heightened rational basis review is also sometimes referred to as "rational basis with teeth" or "rational basis with bite."

<sup>44</sup> Part II will explore, in detail, the use of second-order rational basis in *Lawrence* and a trio of cases beginning with *Moreno*. See also *Murgia*, 427 U.S. at 321 (Marshall, J., dissenting) (noting the Court's "verbal adherence to the rigid two-tier test, despite its effective repudiation of that test in the cases"); Clark Neily, No Such Thing: Litigating Under the Rational Basis Test, 1 N.Y.U. J.L. & Liberty 898, 911 (2005) (examining cases "in which the Supreme Court has arguably strayed from the literal commands of the rational basis test").

<sup>45</sup> For a discussion of what second-order rational basis review might look like in the occupational licensing context specifically, see Michael J. Phillips, Entry Restrictions in the *Lochner* Court, 4 Geo. Mason L. Rev. 405, 451–54 (1996).

<sup>46</sup> See *infra* Part II for an extensive discussion of the characteristics of second-order rational basis review as it has (ostensibly) been applied in several equal protection and due process cases.

<sup>47</sup> See *Powers v. Harris*, 379 F.3d 1208, 1223 (10th Cir. 2004) (rejecting several features of what it perceives to be the application of second-order rational basis review by a sister circuit).

<sup>48</sup> See Timothy Sandefur, Equality of Opportunity in the Regulatory Age: Why Yesterday's Rationality Review Isn't Enough, 24 N. Ill. U. L. Rev. 457, 496 (2004) (drawing on case law to articulate a multipronged method for implementing heightened rational basis review).

<sup>49</sup> *Moreno*'s progeny, *Cleburne*, *Romer*, and *United States v. Windsor*, 133 S. Ct. 2675 (2013), are also relevant.



cant implications of adopting an elevated standard of review for constitutional challenges to certain economic regulations.

In *Powers v. Harris*, the Tenth Circuit applied the traditional rational basis test in upholding a state statute governing casket dealers.<sup>50</sup> The regulation at issue prohibited retailers from selling caskets unless they obtained licensure as a funeral director and satisfied the prerequisites for operating an official funeral establishment.<sup>51</sup> The standards for obtaining a license were onerous: The applicant was required to “complete both sixty credit hours of specified undergraduate training and a one-year apprenticeship during which the applicant [had to] embalm twenty-five bodies” and to “pass both a subject-matter and an Oklahoma law exam.”<sup>52</sup> Retailers had to satisfy additional, extensive requirements in order for their place of business to qualify as a funeral establishment.<sup>53</sup> The district court in the action concluded, “Less than five per cent of the education and training requirements necessary for licensure in Oklahoma pertain directly to any knowledge or skills necessary to sell caskets.”<sup>54</sup>

The Tenth Circuit, however, was unconcerned with the apparent irrationality of the training requirements or the possibility that the licensing regime constituted a thinly-veiled attempt at suppressing competition under the guise of protecting public health. After glibly noting that “while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments,”<sup>55</sup> the court declared that “intrastate economic protectionism constitutes a legitimate state interest.”<sup>56</sup> Since the licensing regime was obviously “very well tailored”<sup>57</sup> to this end, the court concluded that the statute passed muster under the rational basis test. The court noted in closing that even if second-order rational basis did exist as a discrete mode of scrutiny, it did not apply to economic regulations.<sup>58</sup>

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<sup>50</sup> 379 F.3d at 1225.

<sup>51</sup> *Id.* at 1211.

<sup>52</sup> *Id.* at 1212.

<sup>53</sup> *Id.* at 1212–13.

<sup>54</sup> *Id.* at 1213–14 (quoting *Powers v. Harris*, No. CIV–01–445–F, 2002 WL 32026155, at \*5 (W.D. Okla. Dec. 12, 2002)).

<sup>55</sup> *Id.* at 1221.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 1223 (quoting *Craigsmiles v. Giles*, 312 F.3d 220, 228 (6th Cir. 2002)).

<sup>58</sup> *Id.* at 1224.

In *Craigmiles v. Giles*, the Sixth Circuit, facing a nearly identical fact pattern, applied a significantly more rigorous version of the rational basis test to invalidate the challenged law.<sup>59</sup> The court, citing *Cleburne* and *Romer v. Evans*<sup>60</sup> for support, subjected the statute to aggressive scrutiny and declared that the attenuated rationalizations offered by the state “come close to striking us with ‘the force of a five-week-old, unrefrigerated dead fish.’”<sup>61</sup> After rebuffing the contention that pure economic protectionism might constitute a legitimate state interest,<sup>62</sup> the court closely analyzed and rejected the state’s “pretextual”<sup>63</sup> public health and consumer protection rationales.<sup>64</sup> Despite its stated intention of applying the canonical rational basis test,<sup>65</sup> the court’s analysis differed from the traditional approach in three respects: it required a tighter fit between statutory means and ends; it scrutinized the actual motivations of the legislature; and it enunciated a stricter definition of legitimate state purposes.<sup>66</sup> *Craigmiles* is thus best read as having employed the second-order rational basis test.<sup>67</sup>

The juxtaposition of *Craigmiles* with *Powers* serves to delimit neatly the contours of the relevant debate. The contrasting standards of review employed by the two courts highlight the differing features of the traditional and second-order rational basis tests. The *characteristics* of second-order review, however, did not serve as the focal point of dispute in the two cases;<sup>68</sup> instead, it was the *Craigmiles* court’s willingness (and the *Powers* court’s unwillingness) to employ heightened scrutiny in the licensing context that provided the basis for the discrepant outcomes.

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<sup>59</sup> *Craigmiles*, 312 F.3d at 222, 228–29. For additional examples of lower courts using rational basis with teeth to evaluate occupational licensing regimes, see *Cornwell v. Cal. Bd. of Barbering & Cosmetology*, 962 F. Supp. 1260, 1273 (S.D. Cal. 1997); *Santos v. City of Hous.*, 852 F. Supp. 601, 608 (S.D. Tex. 1994).

<sup>60</sup> 517 U.S. at 631. *Cleburne* and *Romer*, which both follow *Moreno*’s holding, are discussed further in Section II.B.

<sup>61</sup> *Craigmiles*, 312 F.3d at 225 (quoting *United States v. Searan*, 259 F.3d 434, 447 (6th Cir. 2001); *United States v. Perry*, 908 F.2d 56, 58 (6th Cir. 1990)).

<sup>62</sup> *Id.* at 224.

<sup>63</sup> *Id.* at 229. In contrast, under traditional rational basis review, a legislature’s actual motivations are irrelevant. Brianne J. Gorod, *Does Lochner Live?: The Disturbing Implications of Craigmiles v. Giles*, 21 *Yale L. & Pol’y Rev.* 537, 542 (2003).

<sup>64</sup> *Craigmiles*, 312 F.3d at 224–29.

<sup>65</sup> *Id.* at 224.

<sup>66</sup> See *Powers*, 379 F.3d at 1223.

<sup>67</sup> Gorod, *supra* note 63, at 541.

<sup>68</sup> Even the *Powers* court refused to conclude that the second-order rational basis test did not exist as a discrete mode of inquiry. *Powers*, 379 F.3d at 1224–25.

Consequently, Part II identifies the relevant principles for determining the situations in which the second-order rational basis test should apply under current Supreme Court precedent.

## II. THE TWO PRINCIPLES

As Part I illustrates, the crystallization of an elevated level of rational basis scrutiny has placed a gloss on the Court's retreat from *Lochner* by eroding the traditional, bifurcated model of judicial review. Part II will complete this portrait of the second-order rational basis test by identifying the circumstances in which it may be properly invoked. *Lawrence v. Texas* and *Department of Agriculture v. Moreno* serve as the principal source material on this point. These cases provide the paradigmatic examples of the Court's cautious departure from the two-tiered model of scrutiny: Each employs an unusually rigorous version of the rational basis test, despite the fact that the challenged statutes neither targeted a protected class nor infringed a fundamental liberty interest. *Lawrence* and *Moreno* thus represent an implicit value judgment "that there remain rights, not now classified as 'fundamental,' that remain vital to the flourishing of a free society, and classes, not now classified as 'suspect,' that are unfairly burdened by invidious discrimination unrelated to the individual worth of their members."<sup>69</sup>

The values recognized and protected by these cases define the circumstances in which the second-order rational basis test may be applied. Specifically, *Lawrence* mandates heightened protection for autonomy interests central to personhood, while *Moreno* and its progeny require judicial sensitivity to regulations that burden vulnerable minorities, particularly when those regulations are predicated on animus towards the targeted class. When a statute impinges crucial personal autonomy interests or targets a group on the basis of mere animus, the second-order rational basis test applies. *Lawrence* and *Moreno*'s enshrinement of certain values in the constitutional lexicon is therefore functionally instantiated by the application of heightened scrutiny.

Importantly, the principles espoused in these cases have wide applicability and are not confined by the traditional distinction between economic and noneconomic liberty interests. *Lawrence* and *Moreno*'s broad propositions are simply not subject to the *Carolene Products* dichotomy; no endogenous feature of either principle suggests that any

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<sup>69</sup> *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 320 (1976) (Marshall, J., dissenting).

particular class of regulation falls beyond its purview. *Moreno*'s plain language, for instance, requires heightened review of *all* regulations predicated on animus, regardless of whether they target an economic or personal liberty interest.<sup>70</sup> Categorically treating economic regulations under a lenient standard of scrutiny therefore artificially circumscribes the principles' scope in a way that is not consistent with the broad language in which they are framed. A corollary to this proposition is that the second-order rational basis test is not confined in its application to statutes impinging purely personal rights. The remainder of this Part will explore each of these principles in turn.

#### A. *Lawrence and Liberty Interests Central to Personhood*

*Lawrence v. Texas* involved a constitutional challenge to a Texas law prohibiting same-sex sodomy.<sup>71</sup> The *Lawrence* Court expressly rejected the reasoning of *Bowers v. Hardwick*, which had characterized the asserted liberty interest in a similar case as a right of "homosexuals to engage in sodomy."<sup>72</sup> After declaring that the *Bowers* approach failed to "appreciate the extent of the liberty at stake,"<sup>73</sup> the *Lawrence* Court proceeded to conceptualize the relevant right at a far higher level of generality, observing that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."<sup>74</sup> With sweeping language, the Court invalidated the Texas law under the Due Process Clause, holding that the "State cannot demean [petitioners'] existence or control their destiny by making their private sexual conduct a crime."<sup>75</sup>

Strict scrutiny was not applicable in *Lawrence* because the Court declined to recognize the relevant conduct as a fundamental right.<sup>76</sup> Although the Court failed to provide a precise label for its approach,<sup>77</sup> the opinion is read most naturally as employing the second-order rational basis test. Scholarly commentators widely acknowledge *Lawrence*'s uti-

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<sup>70</sup> See *Moreno*, 413 U.S. at 534–35.

<sup>71</sup> 539 U.S. at 562–63.

<sup>72</sup> 478 U.S. 186, 190 (1986).

<sup>73</sup> *Lawrence*, 539 U.S. at 567.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 578.

<sup>76</sup> *Id.* at 586 (Scalia, J., dissenting).

<sup>77</sup> Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1916 (2004).

lization of such an elevated standard.<sup>78</sup> Justice Scalia, in dissent, also commented on the uncharacteristic stringency of the Court's methodology, observing that although the majority ostensibly applied the rational basis test,<sup>79</sup> its rigorous analysis did not comport with that standard's traditional formulation.<sup>80</sup> Indeed, the opinion was sufficiently divergent from the canonical approach to prompt Justice Scalia to declare it "so out of accord with our jurisprudence . . . that it requires little discussion."<sup>81</sup>

As the opinion's extended discourse on freedom suggests, application of second-order rational basis in *Lawrence* was ostensibly triggered by the importance of the infringed liberty interest. Unfortunately, the Court failed to clarify precisely which conduct warrants such elevated protection. Interpretations of *Lawrence*'s implications have thus varied wildly in both the literature and the case law. Some commentators,<sup>82</sup> for instance, interpret *Lawrence* as protecting a privacy right in accord with the holdings in *Roe v. Wade*<sup>83</sup> and *Griswold v. Connecticut*.<sup>84</sup> Professor Randy Barnett, in contrast, reads *Lawrence* as enacting a virtual constitutional revolution by instituting a universal "presumption of liberty."<sup>85</sup> This Note strikes a middle course by contending that *Lawrence* is best understood as protecting those liberty interests central to personhood and human flourishing.

*Lawrence*'s focus on personal autonomy is evident even from its initial description of the issue presented: "The instant case involves liberty

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<sup>78</sup> See, e.g., Michael A. Scaperlanda, Illusions of Liberty and Equality: An "Alien's" View of Tiered Scrutiny, Ad Hoc Balancing, Governmental Power, and Judicial Imperialism, 55 Cath. U. L. Rev. 5, 5 (2005) (noting that the *Lawrence* Court "applied rational basis review in an uncharacteristically nondeferential way"); Jeremy B. Smith, Note, The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation, 73 Fordham L. Rev. 2769, 2770 (2005) (arguing that the *Lawrence* Court applied a "more searching form of rational basis review").

<sup>79</sup> *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

<sup>80</sup> Id. at 586, 599.

<sup>81</sup> Id. at 599.

<sup>82</sup> See, e.g., Yishai Blank & Issi Rosen-Zvi, The Geography of Sexuality, 90 N.C. L. Rev. 955, 963 (2012); cf. Tribe, supra note 77, at 1917; id. at 1922 ("[T]he claim *Lawrence* accepted—the claim that had been pressed upon the Court as long ago as *Bowers*—is that intimate relations may not be micromanaged or overtaken by the state.").

<sup>83</sup> 410 U.S. 113 (1973).

<sup>84</sup> 381 U.S. 479 (1965).

<sup>85</sup> Randy E. Barnett, Justice Kennedy's Libertarian Revolution: *Lawrence v. Texas*, 2002–2003 Cato Sup. Ct. Rev. 21, 35–36 (2003).

of the person both in its spatial and in its more transcendent dimensions.”<sup>86</sup> The Court repeatedly describes the protected conduct in terms of self-sovereignty, personal dignity, and the ability to make fundamental life choices for oneself.<sup>87</sup> *Lawrence*’s characterization of major substantive due process precedents also evinces a preoccupation with those liberty interests central to personhood.<sup>88</sup> According to the Court, for instance, “*Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny.”<sup>89</sup> The Court also quotes a telling passage from *Planned Parenthood of Southeastern Pennsylvania v. Casey*:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>90</sup>

The relevant point here is the Court’s framing of the asserted liberty interest at a particular level of abstraction. The *Lawrence* opinion refuses to describe the claim as one of a right to sodomy,<sup>91</sup> while at the same time declining to characterize it as invoking a generic liberty interest indistinguishable from any other. Instead, the Court portrays the right to engage in certain sexual conduct as “an integral part of human freedom.”<sup>92</sup> This phraseology tracks the dissent in *Bowers*, where Justice Blackmun contended that certain personal rights are protected under the Due Process Clause because “they form so central a part of an individual’s life[,] . . . alter[] so dramatically an individual’s self-definition, . . . [and] contribute[] so powerfully to the happiness of individuals.”<sup>93</sup>

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<sup>86</sup> 539 U.S. at 562.

<sup>87</sup> *Id.* at 567, 574, 577–78.

<sup>88</sup> The vast majority of substantive due process cases “involve[] an individual attempting to determine for herself some important aspect of her own identity.” Christopher T. Wonnell, *Economic Due Process and the Preservation of Competition*, 11 *Hastings Const. L.Q.* 91, 113 n.111 (1983). Thus, the entire substantive due process line of precedents may be conceived of as undergirding the project undertaken by *Lawrence*.

<sup>89</sup> *Lawrence*, 539 U.S. at 565.

<sup>90</sup> *Id.* at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

<sup>91</sup> *Id.* at 567.

<sup>92</sup> *Id.* at 577.

<sup>93</sup> 478 U.S. at 204–05 (Blackmun, J., dissenting).

The language in both instances, and particularly in *Lawrence*, is quite explicitly *not* cabined by any rigid limiting principle. The *Lawrence* Court's reliance on the "right of privacy" is surprisingly minimal, suggesting that the decision should not be construed as a mere extension of the *Griswold* line of cases.<sup>94</sup> The opinion's refusal to designate the infringed liberty interest as "fundamental"<sup>95</sup> also significantly distances its holding from the privacy cases, all of which depend upon such a classification.<sup>96</sup> Furthermore, the central principle espoused in *Lawrence* makes no reference to the traditional distinction between economic and noneconomic liberty interests. The opinion's broad language simply does not admit the importation of the *Carolene Products* dichotomy.

The logic of the opinion, if not filtered through exogenous doctrinal structures, expresses a heightened level of judicial solicitude for liberty interests that are crucial to individual flourishing, *regardless* of the specific content of those interests. As Professor Tribe has noted, *Lawrence*'s broad "mode of exposition hardly seems inapt for a decision laying down a landmark that opens vistas rather than enclosing them."<sup>97</sup> *Lawrence*'s "extreme individualism" and the "generality" of its methodology thus render it an ideal test for enhancing protection of certain economic liberties.<sup>98</sup> As a formal matter, economic freedoms clearly are not disqualified from inclusion in the category of rights "central to personal dignity and autonomy."<sup>99</sup> And, as a practical matter, many economic liberties—such as freedom of occupation—arguably are fundamental to personhood.<sup>100</sup>

### *B. Moreno and the Protection of Vulnerable Minorities*

*Department of Agriculture v. Moreno* and its progeny identify the second category of statutes subject to the second-order rational basis test. *Moreno* evidences the Court's heightened sensitivity to regulations that burden minority groups and its complementary focus on laws that are motivated by animus towards the disadvantaged class. These strands

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<sup>94</sup> Barnett, *supra* note 85, at 34–35.

<sup>95</sup> *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

<sup>96</sup> See Barnett, *supra* note 85, at 21, 31.

<sup>97</sup> Tribe, *supra* note 77, at 1898.

<sup>98</sup> Cf. Phillips, *supra* note 26, at 297.

<sup>99</sup> *Casey*, 505 U.S. at 851.

<sup>100</sup> The applicability of *Lawrence*'s holding to economic liberties is discussed in the specific context of occupational licensing regulations in Part III.

of doctrine were spawned by Footnote Four of *Carolene Products*, where the Court suggested that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”<sup>101</sup> The Court has repeatedly recognized its unique role in protecting those individuals “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>102</sup> *Moreno*’s focus on animus is an outgrowth of this special concern for minorities; the fact that a group has relatively minimal political influence increases “the danger that the statute in question was the product of an impermissible motivation.”<sup>103</sup>

*Moreno*, *Cleburne*, and *Romer* each implicitly apply the second-order rational basis test to laws that do not target a suspect class but nevertheless single out a particularly vulnerable group for inferior treatment.<sup>104</sup> In all three of these cases, the Court’s approach is informed by its perception of the actual legislative motivation underlying the challenged statute. When the Court suspects that a law is predicated on animus towards the targeted class, it frequently invalidates it—even if alternative, conceivable rational bases exist. Speculative state interests that are normally sufficient to sustain a challenged enactment under traditional rationality review are insufficient when the Court’s approach is colored by suspicions of animus. In essence, a nontrivial prospect of animus triggers the application of the second-order rational basis test.

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<sup>101</sup> 304 U.S. at 153 n.4.

<sup>102</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

<sup>103</sup> Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 *Colum. L. Rev.* 1689, 1715 (1984).

<sup>104</sup> As noted above, *United States v. Windsor*, 133 S. Ct. 2675 (2013), which invalidated the federal Defense of Marriage Act, also employs the animus principle announced in *Moreno*. *Windsor* represents a relatively straightforward application of *Romer*, with an additional federalism gloss. *Id.* at 2689–95. The *Windsor* Court ostensibly applied the rational basis test to the non-suspect classification at issue there, though its analysis betrays the higher standard of scrutiny typical of animus cases. *Id.* at 2706–08 (Scalia, J., dissenting) (noting the unusually exacting nature of the Majority’s inquiry in light of its refusal to explicitly apply any form of heightened scrutiny). On its face, the *Windsor* decision does not purport to rework the preexisting logic of animus jurisprudence. It neither adds to nor subtracts from the basic analytical concepts established in *Moreno*, *Cleburne*, and *Romer*. Consequently, this Note does not address the *Windsor* decision in detail. The three aforementioned cases are sufficient to provide the necessary conceptual framework.



*Moreno* considered the constitutionality of a provision of the Food Stamp Act excluding “any household containing an individual who [was] unrelated to any other member of the household.”<sup>105</sup> Despite the fact that the traditional rational basis test deems it “entirely irrelevant for constitutional purposes whether the conceived reason for the challenged [regulation] actually motivated the legislature,”<sup>106</sup> the Court focused heavily on the statute’s legislative history, which indicated that the provision “was intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.”<sup>107</sup> In a line that was later echoed by both *Cleburne* and *Romer*, the Court declared that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group<sup>108</sup> cannot constitute a legitimate governmental interest.”<sup>109</sup>

The significant probability that the statute in *Moreno* was underlain by animus ostensibly prompted the Court to apply a more rigorous level of scrutiny to the State’s proffered justifications than it otherwise would have.<sup>110</sup> The government argued that the provision was necessary to prevent individuals from forming “households” for the simple purpose of fraudulently obtaining government benefits;<sup>111</sup> as Justice Rehnquist pointed out in dissent, this justification quite plainly provided a conceivable rational basis for the law.<sup>112</sup> Nevertheless, the Court rejected the State’s contentions and invalidated the provision, employing a method-

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<sup>105</sup> 413 U.S. at 529.

<sup>106</sup> *FCC v. Beach Commc’ns*, 508 U.S. 307, 315 (1993).

<sup>107</sup> *Moreno*, 413 U.S. at 534.

<sup>108</sup> The Court’s reference to “politically unpopular” groups here parallels some of the language in equal protection cases in which the Court applied strict scrutiny. For instance, in *Frontiero v. Richardson*, in addressing gender discrimination, the Court based its decision in part on women’s political underrepresentation and resulting vulnerability in the political process. 411 U.S. 677, 686 n.17 (1973).

<sup>109</sup> *Moreno*, 413 U.S. at 534 (emphasis omitted).

<sup>110</sup> The Court in *Moreno*, *Cleburne*, and *Romer* never explicitly admits that its suspicions of animus justify the application of second-order rational basis. The Court’s overt concern with the possibility of animus, however, and its implicit utilization of a heightened standard of review nevertheless plainly suggest a causal connection between the two. See *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring in the judgment); Neily, *supra* note 44, at 910.

<sup>111</sup> *Moreno*, 413 U.S. at 535.

<sup>112</sup> *Id.* at 545–46 (Rehnquist, J., dissenting); see also Neily, *supra* note 44, at 911 (noting that the justifications for the law in *Moreno* were “plainly ‘rational’ in the strictest sense of the word”).

ology that failed to comport with the traditional approach on a number of levels.<sup>113</sup>

In *Cleburne*, plaintiffs challenged an ordinance requiring a permit for the construction of a home for mentally disabled individuals.<sup>114</sup> As in *Moreno*, the Court in *Cleburne* was fundamentally concerned with the possibility that the challenged law was predicated on an “irrational prejudice” towards the targeted group.<sup>115</sup> This likelihood of animus consequently triggered the Court’s implicit application of the second-order rational basis test.<sup>116</sup> In striking down the statute, the Court rejected numerous conceivable justifications—including concerns with population density and a desire to lessen street congestion—on the grounds that these rationales failed to legitimize treating a home for mentally disabled people differently from any other high-occupancy residency, such as a fraternity house.<sup>117</sup> The Court’s reasoning in this regard was patently inconsistent with the traditional approach, which permits a legislature to attack a problem piecemeal.<sup>118</sup>

*Romer*’s methodology, like that of *Moreno* and *Cleburne*, was motivated by the prospect that the challenged law—a state constitutional amendment prohibiting the enactment of any antidiscrimination measures intended to protect gays and lesbians<sup>119</sup>—was predicated on mere hostility towards the disadvantaged class. The Court declared forthrightly that the law’s features, particularly its severe overbreadth,<sup>120</sup> “raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”<sup>121</sup> It then proceeded to reject various justifications for the statute that would have plainly passed

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<sup>113</sup> See *Cleburne*, 473 U.S. at 459 n.4 (Marshall, J., concurring in the judgment in part and dissenting in part) (arguing that *Moreno* “generally [has] been viewed as [an] intermediate review decision[] masquerading in rational-basis language”).

<sup>114</sup> 473 U.S. at 436–37 (majority opinion).

<sup>115</sup> *Id.* at 450; Neily, *supra* note 44, at 911 (noting that the Court in *Cleburne* “swept aside plainly rational explanations for the challenged provision[] and . . . chose to focus on what ‘really’ seemed to be going on: namely, a bare desire to disfavor mentally retarded” people).

<sup>116</sup> Cf. Gorod, *supra* note 63, at 540; Neily, *supra* note 44, at 910–12.

<sup>117</sup> *Cleburne*, 473 U.S. at 448–50.

<sup>118</sup> *Ry. Express Agency v. New York*, 336 U.S. 106, 110 (1949).

<sup>119</sup> *Romer*, 517 U.S. at 624.

<sup>120</sup> *Id.* at 632.

<sup>121</sup> *Id.* at 634. The Court also declared that its role was to “ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.” *Id.* at 633.

muster under the lenient rational basis test,<sup>122</sup> including the State's claim that the law conceivably furthered its interests in conserving resources to fight discrimination against other groups and in protecting freedom of association.<sup>123</sup>

The relevant point in these three cases is that the Court afforded heightened protection to a disadvantaged minority without extending suspect status to the targeted group.<sup>124</sup> It is crucial to note that in each case, in contrast to the Court's insinuation that the challenged statute was predicated *solely* on animus, alternative rational bases for the law existed.<sup>125</sup> The prospect that a particular law is motivated at least *in substantial part* by animus is thus sufficient to trigger the application of second-order review.<sup>126</sup> Furthermore, none of these cases required conclusive evidence of legislative prejudice prior to invoking elevated scrutiny. The Court's suspicions of animus in both *Cleburne*<sup>127</sup> and *Romer*<sup>128</sup> were grounded exclusively in circumstantial evidence. These cases therefore suggest that any nontrivial prospect that a law is motivated to a substantial degree by animus will justify the application of heightened review.

As in *Lawrence*, *Moreno*'s central holding was formulated without reference to the traditional distinction between economic and noneconomic regulations. Under *Moreno*, a statute predicated on animus is subject to elevated review, regardless of whether it targets an economic or personal liberty interest. *Moreno*'s fundamental holding, like that of *Lawrence*, is broad and trans-substantive; it applies without regard to subject matter. It is not cabined by the artificial *Carolene Products* di-

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<sup>122</sup> Neily, *supra* note 44, at 912 (arguing that the *Romer* Court "brushed aside the state's admittedly dubious"—though "technically rational"—justifications and "focused instead on what it considered to be the essence of the provision in question: 'a bare desire to harm a politically unpopular group'").

<sup>123</sup> *Romer*, 517 U.S. at 635.

<sup>124</sup> See Gorod, *supra* note 63, at 544.

<sup>125</sup> See Neily, *supra* note 44, at 911 (noting that the Court "ignored perfectly rational justifications while purporting to apply the rational basis test" in both *Cleburne* and *Romer*).

<sup>126</sup> See *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in the judgment) (citing *Moreno*, *Cleburne*, and *Romer*, and noting that "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause").

<sup>127</sup> 473 U.S. at 450.

<sup>128</sup> 517 U.S. at 632. In *Moreno*, by contrast, the legislative history indicated directly that the challenged provision was motivated by hostility towards the affected group. 413 U.S. at 534.

chotomy. The anti-animus principle thus carries enormous significance for certain categories of economic regulation. Forms of protectionist legislation, designed to harm particular economic groups, are especially likely to fall within *Moreno*'s ambit. These implications are discussed in the following Part.

### III. OCCUPATIONAL LICENSING

*Lawrence* and *Moreno* demonstrate that the simplistic dichotomy between personal and economic freedoms, as well as between strict scrutiny and rational basis, is no longer tenable. Modern doctrine is too nuanced and textured to support a unilateral derogation of economic liberty. The *Carolene Products* model of judicial review has been corroded in subtle but significant ways. In the abstract, however, it is difficult to appreciate the full import of this thesis. Thus, in order to demonstrate the relevance of these principles in a concrete setting, the following Sections explore their applicability to one salient category of economic legislation: occupational licensing. After explaining the significance of entry requirements from an economic perspective, this Part proceeds to elaborate on the implications of *Lawrence*, *Moreno*, and second-order review in the licensing context.

#### A. A Primer on Occupational Licensing

The feature common to all occupational licensing regimes is the requirement that an individual obtain governmental approval prior to engaging in a particular activity in exchange for compensation.<sup>129</sup> A typical licensing statute imposes a variety of requirements that must be satisfied prior to practicing the specified trade. These requirements commonly include formal education, a specified level of professional experience, certain personal characteristics (for example, citizenship), and successful completion of an examination.<sup>130</sup>

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<sup>129</sup> This Note is limited to the examination of entry restrictions on otherwise lawful callings. Statutes that prohibit a particular trade entirely do not implicate the principles addressed here; for instance, while licensing laws raise equal protection concerns insofar as they discriminate between licensed and unlicensed individuals, complete prohibitions on a particular activity present no such problems.

<sup>130</sup> Phillips, *supra* note 45, at 410.

Licensing laws have exploded at all levels of government over the course of the past century.<sup>131</sup> In 1950, only five percent of U.S. workers were required to obtain state licenses prior to entering a particular trade; in contrast, by 2012, approximately twenty-nine percent of all workers were government-licensed.<sup>132</sup> Not only has the percentage of the population subject to licensing requirements expanded, but the number of professions regulated by licensure has also increased. Twenty-five years ago, “800 professions were licensed in at least one state”; that figure has since risen to 1100.<sup>133</sup> The catalogue of licensed trades is necessarily diverse and includes taxidermists,<sup>134</sup> elevator operators, auctioneers, florists, fortune tellers, interior designers, junkyard dealers, motion picture projectionists, hair braiders, upholsterers, ticket brokers, and turtle farmers.<sup>135</sup> Members of the traditionally “learned” professions, such as lawyers and doctors, also populate the list.<sup>136</sup>

The most common public justification for imposing licensing requirements on a profession is to provide protection to consumers against “unethical or incompetent practitioners.”<sup>137</sup> Interestingly, however, the impetus for licensure typically originates with the occupational class itself, rather than with the general public or legislators particularly sensitive to consumer needs.<sup>138</sup> The primary motivation for seeking licensure is economic: Licensing requirements limit new entrants to the regulated market, thereby suppressing competition for established firms.<sup>139</sup> Restrictions on supply result in elevated wages for existing producers. Estimates suggest that individuals working in a licensed market earn four-

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<sup>131</sup> Milton Friedman, *Capitalism and Freedom* 137 (1962) (arguing that “[t]he overthrow of the medieval guild system was an indispensable early step in the rise of freedom in the Western world,” but noting that in “recent decades, there has been a retrogression” in this respect).

<sup>132</sup> See Kleiner & Krueger, *supra* note 21, at 3–4.

<sup>133</sup> Stephanie Simon, *A License to Shampoo: Jobs Needing State Approval Rise*, *Wall St. J.*, Feb. 7, 2011, available at <http://online.wsj.com/article/SB10001424052748703445904576118030935929752.html>.

<sup>134</sup> Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 *U. Chi. L. Rev.* 6, 6 (1976).

<sup>135</sup> Adam B. Summers, Reason Found., *Occupational Licensing: Ranking the States and Exploring Alternatives* 43–44 (2007), available at <http://reason.org/files/762c8fe96431b6fa5e27ca64eaa1818b.pdf>.

<sup>136</sup> See Gellhorn, *supra* note 134, at 7.

<sup>137</sup> Phillips, *supra* note 45, at 411.

<sup>138</sup> Friedman, *supra* note 131, at 140; Phillips, *supra* note 26, at 305. In fact, “Licensing has only infrequently been imposed upon an occupation against its wishes.” Gellhorn, *supra* note 134, at 11.

<sup>139</sup> See, e.g., Gellhorn, *supra* note 134, at 11–12; Phillips, *supra* note 26, at 305.

teen percent more than their unlicensed counterparts in the same market in other states.<sup>140</sup> These monopolistic effects are magnified by the fact that licensing laws often include grandfather clauses exempting existing practitioners from the new requirements.<sup>141</sup> Additionally, occupational licensing boards are frequently composed of members of the regulated occupation, thereby endowing established producers with the discretion to exclude their own potential competitors.<sup>142</sup>

Many licensing regimes thus serve as forms of economic protectionism, belying their consumer protection justifications. The consequences of restrictive licensing are, unsurprisingly, akin to the consequences of monopoly.<sup>143</sup> The coercive exclusion of producers from a particular market has obvious and destructive consequences: Consumer prices increase at the same time that consumer choices decrease.<sup>144</sup> Job growth slows as markets become calcified. This fossilization of the labor market is accompanied by significant sclerotic effects: Inconsistent state licensing regimes make it extremely difficult and costly for service providers to conduct business in more than one state or to move their businesses across state lines.<sup>145</sup>

A host of ancillary effects are also spawned by the artificial reduction in supply engendered by licensing regimes. As prices rise, the underprivileged lose access to the service provided by the licensed class. The existence of fewer practitioners decelerates innovation in the field. Finally,

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<sup>140</sup> Kleiner & Krueger, *supra* note 21, at 13.

<sup>141</sup> Phillips, *supra* note 26, at 305 n.207.

<sup>142</sup> Friedman, *supra* note 131, at 140. For instance, the state of Louisiana—until a recent lawsuit spurred legislative change—required aspiring florists to undergo a four-hour practical examination in which they were instructed to assemble various floral arrangements. These arrangements were then subjectively evaluated and graded by other licensed florists (that is, the applicant's future competitors). Pass rates in the past decade for this examination have hovered around forty percent. *Let a Thousand Flowers Bloom: Uprooting Outrageous Licensing Laws in Louisiana*, Inst. for Justice, [www.ij.org/louisiana-florists-old-background](http://www.ij.org/louisiana-florists-old-background) (last visited June 17, 2013).

<sup>143</sup> See Friedman, *supra* note 131, at 148 (noting that “[t]he most obvious social cost” of licensure is that it “almost inevitably becomes a tool in the hands of a special producer group to obtain a monopoly position”); Wonnell, *supra* note 88, at 97 (“One common form of maintaining cartel conditions is the occupational license.”).

<sup>144</sup> Phillips, *supra* note 45, at 412.

<sup>145</sup> Simon, *supra* note 133 (noting that “[m]ore than 1,100 professions require a license in at least one state, but only about 60 trades are licensed in every state”).

licensing distorts comparative advantages by precluding certain individuals from practicing the trade for which their talents are best suited.<sup>146</sup>

Unfortunately, evidence is scarce that the costs associated with licensure are outweighed by the benefits.<sup>147</sup> Regarding its purported benefits, some commentators have suggested that the confluence of several features characteristic of licensing regimes—such as reduced competitive pressure and a false sense of consumer confidence—may actually reduce service quality in licensed professions.<sup>148</sup> On the costs side, the depressive effects of protectionist licensing on the labor market are particularly pernicious in the current economic climate.<sup>149</sup>

The characteristics of particular licensing laws, like the motivations that underlie them, vary wildly. In some instances, the requirements imposed by occupational licensing statutes have a relatively clear connection to the public interest. Regulations governing entry to the medical profession provide a conspicuous example of this category of restriction.<sup>150</sup> Frequently, however, licensing laws include educational and other requirements with only attenuated, or even nonexistent, connections to professional fitness and the public good.<sup>151</sup> This subset of statutes achieves the goal of inflating wages for the protected class while

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<sup>146</sup> Phillips, *supra* note 45, at 412; Simon, *supra* note 133; Summers, *supra* note 135, at 9–22.

<sup>147</sup> Morris M. Kleiner, A License for Protection, 29 Reg. 17, 20 (Fall 2006), available at <http://www.cato.org/doc-download/sites/cato.org/files/serials/files/regulation/2006/10/v29n3-2.pdf>.

<sup>148</sup> Summers, *supra* note 135, at 11–13.

<sup>149</sup> See Simon, *supra* note 133 (noting that licensing laws may be “restricting job growth at a time when the U.S. can scarcely afford it”). In May 2013, the national unemployment rate was 7.6%. Historical Household Data, Bureau of Labor Statistics, <http://www.bls.gov/web/empsit/cpseea01.pdf> (last visited June 17, 2013). For regularly updated statistics, see Labor Force Statistics from the Current Population Survey, Bureau of Labor Statistics, <http://www.bls.gov/cps/home.htm> (last visited Mar. 6, 2013).

<sup>150</sup> But see Friedman, *supra* note 131, at 158 (“I am myself persuaded that licensure has reduced both the quantity and quality of medical practice. . . . I conclude that licensure should be eliminated as a requirement for the practice of medicine.”).

<sup>151</sup> *Id.* at 141. In *Cornwell v. California Board of Barbering and Cosmetology*, for example, the challenged licensing regime classified traditional African hair braiders as “cosmetologists” and required them to complete 1600 hours of training prior to practicing the trade. 962 F. Supp. 1260, 1263 (S.D. Cal. 1997). Despite the fact that African hair braiding consists exclusively of physical manipulation of the hair, without the use of chemicals, the majority of the required curriculum was devoted “to topics such as manicures, pedicures, eyebrow arching and removal, facials, makeup, hair coloring, bleaching, permanent waving, chemical straightening, . . . thermal styling, [and] theory of electricity in cosmetology.” *Id.* at 1272 n.7.

failing to promote the stated aim of advancing public welfare. The literature suggests that a significant proportion of the licensing regimes currently in effect are designed primarily to suppress competition.<sup>152</sup>

The judiciary's deferential post-*Lochner* approach to occupational licensing has permitted the tremendous proliferation of arbitrary entry requirements. Implementing a heightened standard of scrutiny, to the extent it resulted in the invalidation of overtly protectionist licensing statutes, would therefore have potentially widespread ramifications. Local industries would be freed from the grip of anticompetitive guilds, and entrepreneurs would be permitted to establish businesses without running a gauntlet of expensive and irrelevant red tape. Although overtly protectionist regimes are capable of surviving minimal rationality review,<sup>153</sup> they are far less capable of withstanding second-order rationality review.<sup>154</sup> Application of the second-order rational basis test thus could reorder the ground rules for one of the most widespread forms of economic regulation in the country. Even this relatively minor recalibration of the proper standard of scrutiny could therefore produce significant practical consequences.

Advocating for judicial revision of the standard of scrutiny applicable to licensing statutes is not a quixotic enterprise. Licensing regimes have been subject to a barrage of constitutional challenges in the past decade.<sup>155</sup> Cases such as *Craigmiles v. Giles*<sup>156</sup> indicate that courts may be increasingly willing to closely scrutinize overtly protectionist licensing laws. It is therefore plausible that barriers to entry will constitute the first major category of economic regulation in the post-*Lochner* era to be revolutionized by the application of heightened judicial review.

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<sup>152</sup> See, e.g., Simon Rottenberg, Introduction to Occupational Licensure and Regulation 1, 7–8 (Simon Rottenberg ed., 1980); Timothy Sandefur, Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries, 14 Wm. & Mary Bill Rts. J. 1023, 1027–28 (2006); Wonnell, supra note 88, at 97.

<sup>153</sup> See supra notes 50–58 and accompanying text.

<sup>154</sup> See supra notes 59–67 and accompanying text.

<sup>155</sup> The Institute for Justice, a libertarian public interest firm, has spearheaded this movement and has documented many such challenges on its website. See Economic Liberty, Inst. for Justice, <http://www.ij.org/cases/economicliberty> (last visited Feb. 28, 2013).

<sup>156</sup> See supra notes 59–67 and accompanying text; see also *St. Joseph Abbey v. Castille*, 712 F.3d 215, 226–27 (5th Cir. 2013).



*B. Occupational Licensing and Judicial Review*

Under the *Carolene Products* model of judicial review, occupational licensing statutes are subject to the traditional rational basis test. Licensing laws, which constitute a form of economic regulation, neither target a suspect class nor infringe a fundamental liberty.<sup>157</sup> In *Williamson v. Lee Optical Co.*, the classic post-*Lochner* case addressing the constitutional status of occupational licensing regimes, the Court upheld an entry requirement under the traditional rational basis test despite its observation that the “law may exact a needless, wasteful requirement in many cases.”<sup>158</sup> The decision in *Lee Optical* rested on the proposition that “it is for the legislature, not the courts, to balance the advantages and disadvantages” of economic regulations: “For protection against abuses by legislatures the people must resort to the polls, not to the courts.”<sup>159</sup>

The dilution of the *Carolene Products* paradigm by *Lawrence* and *Moreno* suggests that the outcome reached by the *Lee Optical* Court is no longer correct. The two major trends discussed in this paper—the breakdown of the two-tiered model of judicial review and the formulation of doctrinal principles unfettered by the distinction between economic and noneconomic liberty interests—are fully applicable in the context of occupational licensing. Licensing statutes infringe autonomy interests central to personhood and are frequently predicated on animus towards the excluded class. The second-order rational basis test should therefore apply.<sup>160</sup> The following two Sections will outline these arguments in greater detail.

*C. Lawrence Applied to Occupational Licensing*

Occupational freedom falls squarely within the range of liberty interests protected by *Lawrence*. The right to pursue one’s vocational calling free from arbitrary interference by the state is “central to personal digni-

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<sup>157</sup> See supra notes 6–9 and accompanying text.

<sup>158</sup> 348 U.S. 483, 487 (1955).

<sup>159</sup> Id. at 487–88 (quotation marks omitted).

<sup>160</sup> Logically, the fact that a licensing statute violates *either* of these two principles is sufficient to warrant heightened review. In light of the historical resistance to according elevated scrutiny to economic regulations, however, this Note attempts to demonstrate that licensing laws implicate *both* principles, thereby building a cumulatively stronger case for the application of the second-order rational basis test.

ty and autonomy.”<sup>161</sup> A career is central in most people’s lives for the simple reason that it consumes a vast portion of their waking hours.<sup>162</sup> A freely chosen career also affects an individual’s existence in a far more profound sense, though, because it enables her to fully realize her interests and aspirations. Depriving a person of the right to pursue her calling may deny her the ability to give effect to her most cherished values. In this light, “the determination of one’s vocation” is an “essential aspect[] of personhood.”<sup>163</sup> Not all occupations, of course, can accurately be described as “callings,” but the purpose of protecting personal autonomy is to invest the individual with control over the most significant aspects of her life—regardless of how she might eventually choose to exercise that control.

To the average citizen, the freedom to enter a trade may be at least as important as many liberty interests currently included in the pantheon of personal rights.<sup>164</sup> “For a great many in our society, the opportunity to engage freely in a business, trade, occupation, or profession is the most important liberty society has to offer.”<sup>165</sup> Indeed, the lawyerly preference for certain personal rights, such as the freedom of expression, may reflect nothing more than class bias:

Judges and professors are talkers both by profession and avocation. It is not surprising that they would view freedom of expression as primary to the free play of their personalities. But most men would probably

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<sup>161</sup> *Lawrence*, 539 U.S. at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)) (referring to liberty interests associated with the family); see, e.g., Phillips, *supra* note 45, at 414 (arguing that if criteria such as “central[ity] to an individual’s life, self-definition, happiness, and personal development” determine the level of constitutional protection a particular liberty interest receives, “the right to pursue a trade or calling should qualify”); Sandefur, *supra* note 48, at 488 (contending that “economic freedom is central to self-definition”).

<sup>162</sup> Bernard H. Siegan, *Economic Liberties and the Constitution* 250 (1980) (“During the foreseeable future most members of society will have to devote a considerable part of their lives to pursuing economic opportunities, and for them freedom of choice in areas of employment, investment, and consumption is fully as important as freedom of discussion and participation in government.”).

<sup>163</sup> Laurence H. Tribe, *American Constitutional Law* 1303–04 (2d ed. 1988).

<sup>164</sup> See, e.g., Jim Thompson, Note, *Powers v. Harris*: How the Tenth Circuit Buried Economic Liberties, 82 *Denv. U. L. Rev.* 585, 599 (2005).

<sup>165</sup> Siegan, *supra* note 162, at 4.

feel that an economic right, such as freedom of occupation, was at least as vital to them as the right to speak their minds.<sup>166</sup>

Despite this potential taint of methodological bias, several Supreme Court cases explicitly recognize the deep significance of occupational liberty. In *Truax v. Raich*, for instance, the Court declared that “[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.”<sup>167</sup> At various times, individual Justices have been even more forthright in their views on the importance of occupational freedom.<sup>168</sup> Dissenting in *Barsky v. Board of Regents*, Justice Douglas wrote:

The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. . . . For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man.<sup>169</sup>

Justice Brandeis echoed this sentiment when he argued, “Those who won our independence believed that the final end of the State was to make men free to develop their faculties.”<sup>170</sup>

Apart from its intrinsic importance to the individual, various secondary considerations also weigh in favor of protecting occupational freedom. First, securing an individual’s right to pursue the trade of her choice may safeguard certain expressive interests she has in associating

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<sup>166</sup> Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Sup. Ct. Rev. 34, 46; see also Wonnell, *supra* note 88, at 120 (“Any claim that more individuals define themselves by their ideas than by their occupations must be considered speculative.”). For commentary on the manifestation of a similar style of class bias in the commercial speech context, see Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 Tex. L. Rev. 777, 783–84 (1993) (referencing a “vocational bias . . . likely to be found in many academics and others who live by and for words and ideas”).

<sup>167</sup> 239 U.S. 33, 41 (1915).

<sup>168</sup> See, e.g., *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 323 (1976) (Marshall, J., dissenting).

<sup>169</sup> 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

<sup>170</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

herself with a particular profession.<sup>171</sup> The “freedom to have impact on others—to make the ‘statement’ implicit in a public identity—is central to any adequate conception of the self.”<sup>172</sup> Second, the ancillary benefits of employment, such as the independence that flows from a source of income, permit an individual to give definition to her vision of the good life. Vocational freedom is thus valuable both intrinsically and instrumentally.

One potential objection to this line of reasoning is that occupational liberty cannot qualify as a “personhood” right of the variety protected in *Lawrence* because licensing regimes do not preclude individuals from engaging in any activities per se, but merely from doing so for money.<sup>173</sup> This line of reasoning is rooted in the historical judicial preference for economic over noneconomic liberty interests, and fundamentally misconstrues the nature of occupational liberty. The ability to acquire wealth is inherent in the practice of an occupation and renders it qualitatively distinct from uncompensated conduct. As a practical matter, the alternative to engaging in a particular activity for money (that is, as an occupation) is to engage in it as a hobby. For a number of reasons, however, hobbies are consistently less central to self-definition—and therefore less deserving of protection under *Lawrence*—than occupations.

Occupations tend to be the locus of a person’s primary skill set and more frequently serve as self-identifiers than do hobbies. Occupations are also imbued with a host of social and moral connotations that hobbies simply lack. A hobby rarely attains the normative cachet—with its implications of autonomy, self-sufficiency, and dignity—associated with an “honest trade.” Careers, in contrast to hobbies, tend to signal a special kind of personal responsibility and self-reliance; consequently, employment generally accords a level of dignity and social stature that hobbies cannot.

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<sup>171</sup> See Wonnell, *supra* note 88, at 118–20.

<sup>172</sup> Tribe, *supra* note 163, at 1303.

<sup>173</sup> This is the same type of distinction often used to justify the discrepant constitutional treatment of private sexual conduct and prostitution. *Lawrence* itself appears to make such a distinction when it comments that “[t]he present case . . . does not involve public conduct or prostitution.” 539 U.S. at 578. This statement is irrelevant to the instant inquiry for two reasons. First, it is dictum. Extraneous observations on issues not before the Court do not have precedential force. Second, this Note is limited to a discussion of restrictions on occupations otherwise legal. Prostitution is uniformly prohibited. The ban on prostitution thus raises regulatory and equal protection issues of a different nature than those raised by licensing statutes. Any analogy between the two is therefore inapt.

In short, the addition of a monetary element to what might otherwise constitute a mere hobby fundamentally changes the character of the activity. It is the full bundle of attributes associated with an occupation *per se*—attributes that do not attach to the underlying, uncompensated conduct—that renders occupational liberty suitable for protection under *Lawrence*. To accord judicial protection to the underlying conduct alone would fail to safeguard the array of values that arise only when that conduct is performed in exchange for compensation—that is, when it forms the basis of a career. The fact that occupations necessarily involve monetary transactions therefore does not indicate that they fall beyond *Lawrence*'s central holding.

In sum, the freedom to select and pursue a particular occupation permits an individual to exercise her talents, to express her values, to realize her aspirations, and to acquire economic independence. Work is a crucial ingredient in a person's self-conception: For many, a career places behind only religion and family in importance.<sup>174</sup> An individual's choice of occupation affects the most fundamental aspects of her life: where she chooses to live, the time she may devote to her family, her income level, and her sense of personal fulfillment.<sup>175</sup> The "'personal' dimensions" of this right are evident.<sup>176</sup> *Lawrence*, with its mandate of heightened protection for those autonomy interests central to personhood, thus sweeps occupational liberty within its broad purview.

#### *D. Moreno Applied to Occupational Licensing*

##### *1. Licensing Laws Target Vulnerable Minorities*

*Moreno* further bolsters the case for according heightened scrutiny to licensing statutes. The individuals who seek to enter an occupation but are excluded by onerous licensing requirements constitute precisely the type of minority meriting protection under the second-order rational basis test. Three considerations support this conclusion. First, such indi-

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<sup>174</sup> Cf. Leonard W. Levy, Property as a Human Right, 5 Const. Comment. 169, 183 (1988) ("With the exception of freedom of religion, nothing is more important than work and a chance at a career or a decent living.").

<sup>175</sup> See Phillips, *supra* note 26, at 298–99 ("Since the choice of occupation may affect personal capacities, values, style of life, social status, and general life prospects in innumerable ways, this freedom is arguably more central to the individual than the rights already classed as fundamental."). Note that Phillips's argument, however, in contrast to the approach taken in this Note, conceptualizes occupational liberty as a fundamental right.

<sup>176</sup> Phillips, *supra* note 45, at 406.

viduals are politically powerless to an extreme degree. Second, licensing laws amplify the vulnerability of excluded individuals by depriving them of opportunities for advancement, thereby further reducing their socioeconomic heft and introducing process defects. Third, licensing laws are frequently predicated on animus towards the excluded class. This Subsection and the next will address each of these contentions in turn.

As explained in Part II, the Court accords heightened protection to certain vulnerable minorities because members of those groups “have no realistic chance of influencing the majority to rescind the law that does them harm.”<sup>177</sup> The import of this line of reasoning in the occupational licensing context was noted succinctly by Professor Robert McCloskey when he observed that “the scattered individuals who are denied access to an occupation by State-enforced barriers are about as impotent a minority as can be imagined.”<sup>178</sup> Those excluded by licensing restrictions are, by definition, the antithesis of vested interests. Unlike many other economic regulations, occupational licensing requirements tend to affect individual practitioners of a particular craft rather than powerful corporations.<sup>179</sup> Individuals and small businesses excluded at the entry stage typically lack wealth and influence for the obvious reason that they are barred from entering the market in which they hope to earn a profit.<sup>180</sup>

Furthermore, licensing regimes tend to have a disparate impact on individuals burdened with a preexisting disadvantage in the marketplace. The poor, for instance, can least afford to satisfy educational requirements,<sup>181</sup> while non-native English speakers are ill-equipped to excel at standardized tests written exclusively in English.<sup>182</sup> Thus, unlike other

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<sup>177</sup> McCloskey, *supra* note 166, at 50.

<sup>178</sup> *Id.*; see also Siegan, *supra* note 162, at 188 (noting that “in a representative government premised on majority rule, many economic minorities have little recourse at the ballot box or in the legislative halls. They too can be the victims of perverse, arbitrary, and capricious measures.”); Tribe, *supra* note 163, at 1374 (referencing “the political impotence of the isolated job-seeker who has been fenced out of an occupation”).

<sup>179</sup> Phillips, *supra* note 26, at 313 (noting that “most [occupational liberty] claims . . . will be made by physical (as opposed to corporate) persons, or at least by small businesses whose fates are closely bound up with the fate of a determinate individual”).

<sup>180</sup> See Wonnell, *supra* note 88, at 124 (noting that “an economy permeated with barriers to entry into a variety of occupations will be inhospitable to economic ‘newcomers’ who have not obtained a protected niche”).

<sup>181</sup> Summers, *supra* note 135, at 29. The right to earn a living is, of course, most important to the poor and disadvantaged. Sandefur, *supra* note 48, at 485.

<sup>182</sup> Gellhorn, *supra* note 134, at 18.

interest groups, which may possess substantial weight in the legislative process, excluded individuals are not positioned to lobby or otherwise instigate democratic change.<sup>183</sup> In short, “To speak of their power to defend themselves through political action is to sacrifice their civil rights in the name of an amiable fiction.”<sup>184</sup>

In some ways, however, the class excluded by occupational licensing restrictions plainly does not resemble those minority groups traditionally accorded heightened judicial protection. Many of the Court’s strict scrutiny cases, for instance, focus on whether the targeted group is “discrete and insular”<sup>185</sup> and whether it has historically been subject to persecution.<sup>186</sup> Individuals harmed by licensing regimes, because they are not united by any single trait other than their desire to enter a particular market, tend to be diffuse rather than discrete and insular. Furthermore, although licensing regimes have, at certain points in history, been employed to “exclude oppressed racial minorities from economic opportunity,”<sup>187</sup> it is difficult to argue that the individuals excluded by any particular licensing statute are themselves members of a group historically subject to persecution.

These differences are inconclusive for several reasons. First, as a threshold matter, this Note does not contend that licensing regimes merit strict scrutiny. Incompatibility with the various characteristics of suspect classifications therefore cannot be dispositive. The sole reason this Note addresses the strict scrutiny decisions is that they constituted substantial elements of the doctrinal milieu in which *Moreno* and its progeny arose. Second, *Moreno*, *Cleburne*, and *Romer* all applied heightened scrutiny to protect certain vulnerable minorities without requiring either discreteness or historical persecution.<sup>188</sup> These cases, which form the relevant

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<sup>183</sup> See McCloskey, *supra* note 166, at 50 (contrasting excluded individuals with vested interests and noting that “[p]erhaps it is true that a prosperous corporation can effectively plead its case at the bar of legislative judgment by resort to publicity and direct lobbying. Economic power may be an adequate surrogate for numerical power; no tears need be shed for helpless General Electric.”).

<sup>184</sup> *Id.*

<sup>185</sup> *Carolene Products*, 304 U.S. at 152 n.4.

<sup>186</sup> See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 685–87 (1973).

<sup>187</sup> *Sandefur*, *supra* note 152, at 1046.

<sup>188</sup> Although gays and lesbians and the mentally disabled arguably constitute discrete groups subject to historical persecution, the Court did not rely on this possibility. The *Cleburne* Court even went so far as to specifically reject the suggestion that the targeted group constituted a suspect class. 473 U.S. at 442.

template for the inquiry here, thus suggest that such characteristics should not be considered prerequisites for receiving elevated protection.

Third, the fact that individuals excluded by licensing laws do not comprise a discrete group is not necessarily indicative of the degree of their political vulnerability. Members of discrete minorities, because they tend to share a visible characteristic, have fewer obstacles to overcome in identifying one another and organizing effectively than do individuals excluded by licensing regimes.<sup>189</sup> The diffuse nature of the class, therefore, is precisely the characteristic that makes it difficult for its members to unite and effectively lobby for legislative change.<sup>190</sup> Diffusion may exacerbate the vulnerability of the class in a related way, as well: Because the unifying trait of the group is invisible, excluded individuals will rarely attract the attention of legislators as a separate demographic in need of heightened protection.<sup>191</sup> In this sense, “the class of would-be producers excluded from a particular occupation is a politically invisible class of isolated individuals. . . . The political system does not merely reject their claim; to a considerable extent it fails even to recognize it.”<sup>192</sup>

Finally, although the segment of the population currently excluded by occupational restrictions is not coterminous with any demographic group subject to a historical pattern of oppression, licensing regimes have traditionally served as tools of subjugation. For instance, in the wake of the Civil War and throughout the twentieth century, “white interest groups used occupational licensing laws to stifle black economic progress. While generally not Jim Crow laws per se, the laws were used both in the South and the North to prevent blacks from competing with established white skilled workers.”<sup>193</sup> Arbitrary licensing requirements were utilized to discourage minorities from entering certain professions even into the modern era.<sup>194</sup> Thus, historical grounds do exist for treating licensing laws with particular suspicion, even if the relevant historical pedigree attaches to the type of law rather than the type of individual affected by the law.

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<sup>189</sup> See McCloskey, *supra* note 166, at 50.

<sup>190</sup> See Siegan, *supra* note 162, at 251.

<sup>191</sup> Wonnell, *supra* note 88, at 110.

<sup>192</sup> *Id.*

<sup>193</sup> David E. Bernstein, Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans, 31 *San Diego L. Rev.* 89, 90 (1994).

<sup>194</sup> Gellhorn, *supra* note 134, at 18.



In addition to targeting a particularly vulnerable group, entry requirements also raise process concerns to the extent that they diminish the ability of the excluded class to influence legislation in the future. Licensing statutes are not simply the result of a legislative process that fails to take minority concerns into account—they also heighten majoritarian disregard for minority interests as a prospective matter.<sup>195</sup> Licensing restrictions reduce the income level (and, as a corollary, the social status and professional connections) of excluded individuals, thus further curtailing their already negligible political clout. In this sense, licensing regimes track the language in Footnote Four of *Carolene Products*, where the Court noted its heightened concern with laws that restrict “those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.”<sup>196</sup>

These process defects also parallel certain dimensions of the Court’s second-order rational basis precedents. *Romer* provides a pertinent example. By constitutionally banning the enactment of antidiscrimination measures protective of gays and lesbians, Colorado imposed a special handicap exclusively on the targeted class: Unlike other groups that might seek recognition under antidiscrimination laws, gays and lesbians were required to amend the state constitution before attempting to obtain redress in the regular legislative process.<sup>197</sup> As the *Romer* Court noted, “A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”<sup>198</sup> The procedural effects of the challenged law thus arguably provided an additional trigger for the Court’s application of heightened review.

Licensing laws, of course, do not impose a formal procedural hurdle on the affected class, as the amendment in *Romer* did. Nevertheless, by reducing the political influence of an already vulnerable group, they do make it more difficult for members of that group to obtain relief via the legislative process; this point is crucial in light of the fact that the equal protection “doctrinal framework is based on the functional rather than

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<sup>195</sup> See Phillips, *supra* note 45, at 416.

<sup>196</sup> *Carolene Products*, 304 U.S. at 152 n.4.

<sup>197</sup> *Romer*, 517 U.S. at 631 (1996) (noting that gays and lesbians “can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution”).

<sup>198</sup> *Id.* at 633.

literal absence of a political remedy.”<sup>199</sup> From this perspective, the process defects spawned by licensing regimes implicate yet another area of modern doctrine where the Court has applied heightened review.

## 2. Licensing Laws Are Predicated on Animus

Finally, licensing laws fall within the ambit of *Moreno*, *Cleburne*, and *Romer* to the extent that they are likely to be motivated, at least in part, by a simple desire to harm a particular group.<sup>200</sup> As noted, licensing restrictions, which typically originate within the protected class, provide preferred status to licensees by raising barriers to entry.<sup>201</sup> By excluding aspiring producers from the market, licensing laws suppress competition, thereby elevating the prices that established practitioners may charge.<sup>202</sup> The tendency of many licensing statutes to concentrate power in the hands of current market participants is magnified by the fact that these laws frequently include grandfather clauses exempting existing businesses from the new requirements.<sup>203</sup> Courts have repeatedly recognized the rent-seeking aspects of certain licensing regimes: The Sixth Circuit in *Craigmiles v. Giles*, for instance, acknowledged that the challenged provision in that case was “very well tailored” to “protecting licensed funeral directors from competition on caskets.”<sup>204</sup> In some cases, economic protectionism is even the stated purpose of the contested law;<sup>205</sup> in others, government officials candidly admit that they support licensing restrictions at the behest of professional interest groups.<sup>206</sup>

The mere fact that a statute is intended to benefit one group, though, does not necessarily indicate that it is also intended to harm another

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<sup>199</sup> Sunstein, *supra* note 103, at 1711.

<sup>200</sup> See *Romer*, 517 U.S. at 632 (noting that laws may not be “drawn for the purpose of disadvantaging the group burdened by the law”).

<sup>201</sup> See *supra* notes 138–43 and accompanying text.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> 312 F.3d at 228. Even Justice Stevens has recognized the rent-seeking nature of many occupational licensing regimes. *Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting) (noting that “private parties have used licensing to advance their own interests in restraining competition at the expense of the public interest”).

<sup>205</sup> See, e.g., *Santos v. City of Houston*, 852 F. Supp. 601, 603 (S.D. Tex. 1994).

<sup>206</sup> See, e.g., Neily, *supra* note 44, at 909 (citing a promise made by the Louisiana Agriculture Commissioner to state-licensed florists that “he would support whatever they wanted by way of licensing”).

group.<sup>207</sup> A special interest organization might quite plausibly seek self-enrichment without any regard whatsoever to the effects—whether positive or negative—on others. In the case of restrictive licensing laws, however, any increased profit that accrues to the protected class is a direct function of the harm of exclusion imposed on the disadvantaged class.<sup>208</sup> Licensing laws raise the wages of the members of a favored group *solely* by excluding (and therefore harming) their potential competitors. A desire to enrich a particular category of producers by suppressing its competitors *is* a desire to harm those competitors; harm to the competitors is itself an integral feature of the scheme, rather than simply a necessary consequence. The tight correspondence in the licensing context between the injury inflicted on the excluded class and the spoils bestowed on the protected class thus justifies application of the *Moreno* anti-animus principle.<sup>209</sup>

Not every licensing regime, of course, is intended merely to confer private benefits. *Moreno*, *Cleburne*, and *Romer*, however, indicate that any nontrivial prospect that a law is motivated to a substantial degree by animus will trigger application of the second-order rational basis test.<sup>210</sup> Several characteristics of licensing statutes suggest that this minimal threshold is satisfied with respect to licensing laws as a class. First, vested interests have powerful economic incentives, stemming from the prospect of inflated profits, to seek licensing requirements. The universal presence of such incentives suggests that even those licensing laws engendered primarily by a desire to advance the public good are likely to

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<sup>207</sup> Timothy Sandefur, who has also considered the applicability of the animus principle in the occupational licensing context, questions the usefulness of this distinction. See Sandefur, *supra* note 152, at 1047.

<sup>208</sup> Cf. *Bacchus Imports v. Dias*, 468 U.S. 263, 273 (1984) (“A discrimination claim, by its nature, requires a comparison of the two classifications, and it could always be said that there was no intent to impose a burden on one party, but rather the intent was to confer a benefit on the other.”).

<sup>209</sup> The Court’s anti-animus principle is not *categorically* relevant to legislation predicated on economic favoritism. Subsidies, for instance, which confer a benefit without imposing a direct harm on any identifiable group, potentially represent a form of economic favoritism not covered by the principle. Thus, the court’s focus in *Powers v. Harris*, 379 F.3d 1208, 1218 (10th Cir. 2004), on economic protectionism as a single, undifferentiated concept is insufficiently nuanced.

<sup>210</sup> See *supra* Section II.B.

be influenced at least in part by special interest lobbying.<sup>211</sup> As one commentator notes:

There is a fairly substantial literature on the economics of occupational licensing, most of which appears in the professional economic journals. The consensus of that literature can be summarized in the following statements:

Occupational licensing is primarily promoted by practitioners of the occupation rather than by consumers of its services. Licensing primarily serves the interests of practitioners rather than the interests of consumers.<sup>212</sup>

Furthermore, the issues discussed earlier in this Part—the composition of licensing boards, the inclusion of grandfather clauses in licensing statutes, and the recognition by both courts and legislatures of the rent-seeking dimensions of occupational licensing—also evidence the pervasiveness of protectionist motivations in the licensing universe.<sup>213</sup> Additionally, many licensing requirements bear only attenuated relationships to their asserted purposes, implying that the true justifications for such requirements are less savory than their proponents admit.<sup>214</sup> These considerations, in the aggregate, suffice to raise a plausible inference of animus with respect to licensing restrictions as a class.

Categorically treating licensing regimes as presumptively based on animus is not equivalent to concluding that all licensing laws—or even a substantial percentage of them—are constitutionally defective. The application of the second-order rational basis test will only result in the invalidation of a challenged statute when the Court's subsequent inquiry confirms its initial suspicions of animus by revealing that the state's proffered justifications are merely pretextual.<sup>215</sup> In essence, second-order rational basis simply requires the government to refute—by demonstrat-

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<sup>211</sup> See, e.g., Friedman, *supra* note 131, at 149–60 (discussing medical licensing); Wonnell, *supra* note 88, at 96–98.

<sup>212</sup> Rottenberg, *supra* note 152, at 7–8 (listing sixteen total statements comprising the consensus about occupational licensing).

<sup>213</sup> See *supra* notes 138–42, 201–06, and accompanying text.

<sup>214</sup> See *supra* notes 51–54, 142, 151, and accompanying text.

<sup>215</sup> See Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 *Alaska L. Rev.* 209, 250 (1998) (“*Moreno*, *Cleburne*, and *Romer* weave a consistent thread. In each case, the Court had some reason to suspect that the government was acting out of improper motives. And, in each case, poor fit between the classification and the government's purpose did not dispel that suspicion.”).

ing, for instance, that the law is reasonably well-tailored to its alleged public purposes—the Court’s suspicion that animus was the predominant legislative motivation.<sup>216</sup> Licensing laws imbued with the public interest, such as those that restrict entry into the medical profession, will easily satisfy this requirement. Thus, even if not all licensing regimes are underlain by animus, as a class they should nevertheless be subject to heightened review.

#### CONCLUSION

The doctrinal trends described in this Note suggest that the bifurcated approach of *Carolene Products* no longer represents the exclusive means of evaluating restrictions on economic liberty. Developments in Supreme Court case law have significantly eroded the traditional principles governing judicial review in this area. Two cases in particular—*Lawrence v. Texas* and *Department of Agriculture v. Moreno*—have spearheaded this revolution. Any statute that contravenes the two principles espoused in these cases merits review under the second-order rational basis test. Certain economic regulations, such as occupational licensing restrictions, violate the fundamental holdings of both *Lawrence* and *Moreno*, and therefore deserve an elevated standard of scrutiny.

Although occupational licensing is arguably the strongest candidate for heightened review under existing precedent,<sup>217</sup> the Court’s current doctrinal framework provides the tools for a comprehensive reevaluation of the traditional bifurcation of economic and personal liberties. Zoning laws, for instance, constitute yet another category of economic regulation potentially subject to the second-order rational basis test. Zoning laws implicate essential autonomy interests to the extent that they affect where an individual may live<sup>218</sup>: A person’s decision to reside in a particular area or to purchase a particular piece of property is typically one of the most significant decisions she will make. Additionally, zoning regulations are often predicated on animus insofar as they are designed

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<sup>216</sup> See *Santos*, 852 F. Supp. at 608 (finding that the challenged statute was intended to suppress competition and declaring that the city’s post hoc justifications for the law did “not whitewash the illegality of the ordinance as it was originally enacted”).

<sup>217</sup> Cf. Phillips, *supra* note 26, at 313 (arguing that occupational freedom is the most fundamental of the economic liberty interests).

<sup>218</sup> Cf. Margaret Jane Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957, 991–92, 996–97, 1005–06 (1982) (arguing that certain spaces, like the home, are central to personhood and should therefore receive enhanced legal protection against government invasion).

to exclude “undesirable” entities or residents from particular areas.<sup>219</sup> The confluence of these two principles, as in the occupational licensing context, indicates the propriety of applying a heightened standard of scrutiny.

Thus, under the proposed framework, a cursory classification of a regulation as economic is insufficient to determine the applicable level of review. Not all economic rights implicate the same constitutional values;<sup>220</sup> to hold otherwise defies reality and subverts established precedent. Instead of universally deferring on issues of economic policy, courts should carefully evaluate the effects and underlying motivations of a challenged statute and the characteristics of an asserted liberty interest in order to determine whether heightened scrutiny is appropriate.<sup>221</sup> Such a nuanced approach would represent an overdue recognition of the revolution that has quietly occurred in modern constitutional law.

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<sup>219</sup> See, e.g., *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 736–43 (N.J. 1975) (Pashman, J., concurring) (discussing the use of zoning as a tool of exclusion).

<sup>220</sup> See Wonnell, *supra* note 88, at 93.

<sup>221</sup> Consequently, different types of economic regulations may appropriately be subject to different levels of review. See *id.* at 129 n.209 (rejecting the proposition that “the Court should apply a uniform level of scrutiny for all economic legislation”).