

UNSPoolING THE FURROWED BROW: HOW EYEBROW THREADERS WILL PROTECT ECONOMIC FREEDOM IN TEXAS

Comment

*Kevin C. Smith**

I.	TEDDY THREADER ATTEMPTS TO START A BUSINESS—A HYPOTHETICAL STORY WITH VERY REAL IMPLICATIONS AND AN INTRODUCTION.....	72
II.	GETTING A GOVERNMENT PERMISSION SLIP: A REVIEW OF OCCUPATIONAL LICENSURE	74
	<i>A. Why License an Occupation?</i>	75
	<i>B. Recent Licensure Battles in Texas Courts</i>	76
III.	THE IRRATIONAL EVOLUTION OF THE RATIONAL BASIS TEST.....	78
	<i>A. Carolene Products and Lee Optical String Up the Rational Basis Test</i>	79
	<i>B. Caskets and Legitimate State Interests</i>	80
	<i>C. Economic Liberty Messes with Texas</i>	83
	<i>1. Very Real and Quite Substantial</i>	83
	<i>2. The Lone Star Test</i>	85
	<i>3. Adopting a No-Scrutiny Standard of Review</i>	86
	<i>4. Keeping Ambiguity Alive: Trinity and Garcia</i>	88
IV.	A NEW HOPE: <i>PATEL V. TEXAS DEPARTMENT OF LICENSING AND REGULATION</i>	90
V.	THREADING THE NEEDLE: AN EVALUATION OF <i>PATEL</i> 'S POSSIBLE OUTCOMES	92
	<i>A. The Automatic Loss</i>	92
	<i>B. Applying the Texas Approach</i>	94
	<i>C. Finding the Real and Substantial Connection</i>	96
VI.	RESTORING ECONOMIC LIBERTY WHILE PROTECTING PUBLIC HEALTH AND SAFETY	97

[Editor's Note: This Comment was written prior to the Supreme Court of Texas's decision in *Patel v. Dep't of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015). As such, it takes a prescriptive approach to the case rather than a reactive approach. Any identical ideas found herein and not directly attributed to the case are coincidental.]

* J.D. Candidate, Texas Tech University School of Law, 2016; B.A., Political Science, Arizona State University, 2005. This Comment is dedicated to my wife, Nicole. Without her love, encouragement, and support, this Comment would not exist. Every day she unintentionally supports the merits of state licensing, at least with respect to the state's endorsement of our promise to love and honor each other.

A. <i>Deferring to Economic Liberty</i>	98
1. <i>Leading By Example</i>	98
2. <i>Where the Wind Blows</i>	99
3. <i>Occam’s Razor</i>	101
B. <i>Certifying Liberty</i>	101
1. <i>Barrier to Entry Removed</i>	102
2. <i>Change at the Expense of the Poor?</i>	104
VII. CONCLUSION.....	106

I. TEDDY THREADER ATTEMPTS TO START A BUSINESS—A
HYPOTHETICAL STORY WITH VERY REAL IMPLICATIONS AND AN
INTRODUCTION

Teddy Threader is an immigrant from South Asia who recently purchased a home in Lubbock, Texas.¹ Teddy is industrious and has an entrepreneurial spirit. Unfortunately, he also lacks job prospects in his new city, as he only attained a high school education before moving to the United States. Teddy realizes that his best opportunity for building a life in his adopted home will be to start a new business providing a form of facial care called eyebrow threading, a practice he learned long ago.² Although not a practice known to most Americans, Teddy knows the eyebrow threading industry is booming in Texas.³

Teddy pools together every dollar he has, finds a prime location near downtown Lubbock, and opens a shop. He advertises that he will practice eyebrow threading only, and that his service avoids the use of chemicals, dyes, and sharp objects.⁴ Teddy believes this will attract customers who desire safe facial care methods, unlike some techniques practiced by cosmetologists and estheticians.⁵ Teddy plans to work alone initially, but as his business grows he intends to add more employees that will learn his craft. If everything goes as planned, the Lubbock location will be the first of many in Texas, and Teddy will finally realize the dream most Texans share by attaining a level of financial independence that provides families with adequate comfort and economic security.

Unfortunately for Teddy, his dreams will have to wait. What he will soon realize is that he violated Texas law by practicing cosmetology

1. This hypothetical example is fictional and was developed based loosely on facts from the Supreme Court of Texas case *Patel v. Texas Department of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015).

2. See *infra* Part IV.

3. See *Texas Eyebrow Threading*, INST. FOR JUST., <http://www.ij.org/patel-v-tx-department-of-licensing-and-regulation> (last visited Nov. 17, 2015).

4. See *infra* Part IV.

5. See *About Threading*, BROW BOUTIQUE, <http://ibrowboutique.com/about-threading/> (last visited Nov. 17, 2015).

without a license.⁶ Teddy was unaware that he was required to take between 750 and 1,500 hours of cosmetology classes at a state-approved school to secure a license to practice the craft he learned years before.⁷ Even more disheartening, those classes do not require even one hour of eyebrow threading instruction.⁸ Teddy did not realize that he must take multiple licensing exams or that the entire process would cost approximately \$20,000.⁹ Teddy simply believed that he had a constitutional right to earn an honest living, unencumbered by arbitrary rules established to protect the economic interests of existing practitioners by keeping entrepreneurs, like Teddy, out of the business of eyebrow care.¹⁰

Arguably more unfortunate for Teddy, the odds are stacked against him should he choose to challenge the licensing scheme in Texas courts.¹¹ Prevailing against the rational basis test, as interpreted by the United States Supreme Court in *Williamson v. Lee Optical of Oklahoma, Inc.*, presents an enormous obstacle, as the extreme deference afforded to legislatures creates a hurdle so high that even judges are allowed to advocate for the government and invent reasons why licensing schemes rationally relate to legitimate state interests.¹² In Texas, a three-way split in the Texas Courts of Appeals stands in the way of protecting Teddy's rights, as some courts apply the federal standard of review, while others provide two different, although more strenuous, levels of heightened review.¹³

Fortunately, all hope is not lost for Teddy. Although twice in the last two decades the Supreme Court of Texas has had an opportunity to pick a level of review for economic substantive due process claims, the Court chose instead to kick the proverbial can down the road.¹⁴ Now, the Court has another opportunity to address the issue in *Patel v. Texas Department of Licensing & Regulation*.¹⁵ Should the Court adopt a heightened level of review, Texans will gain much needed protection from economic interests determined to maintain the status quo and avoid competition.¹⁶ Ultimately, all Texans, including Teddy, stand to benefit through greater employment opportunities, lower prices of goods, and greater economic liberty.¹⁷

This Comment explores occupational licensing in Texas, along with the irrational barriers created by the rational basis test as applied to

6. See *infra* Part IV.

7. See *infra* Part IV.

8. See *infra* Part IV.

9. See *infra* Part IV.

10. See *infra* Part VI.B.1.

11. See *infra* Part III.A–B.

12. See *infra* Part III.A.

13. See *infra* Part III.B.

14. See *infra* Part III.C.4.

15. See *infra* Part IV.

16. See *infra* Part VI.

17. See *infra* Part VI.

economic substantive due process challenges under the Texas Constitution; it also demonstrates the need for a heightened level of judicial scrutiny coupled with the adoption of certification as an alternative form of economic regulation. Part II provides the historical background and modern context of occupational licensing as the most popular form of economic regulation in the nation. Part III discusses the history of the rational basis test, both federally and in Texas, along with a review of the multiple tests adopted by Texas courts that have created a three-way split in the Texas Courts of Appeals. Part IV introduces *Patel v. Texas Department of Licensing & Regulation*, a case currently before the Supreme Court of Texas involving eyebrow threaders who have challenged cosmetology licensure regulations as violating their constitutional right to earn an honest living. Part V analyzes the potential outcomes of *Patel* along with the impact each test could present to future economic liberty challenges under the new precedent. Finally, Part VI urges the Supreme Court of Texas to adopt a heightened standard of review while also suggesting that certification is a more desirable form of economic regulation.

II. GETTING A GOVERNMENT PERMISSION SLIP: A REVIEW OF OCCUPATIONAL LICENSURE

Texas has a rich history of occupational licensing and currently ranks as the thirty-second “most broadly and onerously licensed state.”¹⁸ The actual licensure laws in Texas qualify as the seventeenth most burdensome.¹⁹ Texas licensing schemes cost an average of \$304 in fees, require 326 days of training, and demand two exams for candidates looking to enter licensed occupations.²⁰ In fact, Texas is one of only five states that require someone to pay a fee and pass two tests just to shampoo someone else’s hair.²¹ Several licenses take months, or even years, to obtain.²² Preschool teachers and athletic trainers round out the two occupations with the most burdensome licensure requirements.²³ The two professions combined require nearly \$800 in fees, 3,300 days of training, and 5 exams to obtain licenses.²⁴

18. DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING 122 (May 2012), <http://ij.org/wp-content/uploads/2015/04/licensetowork1.pdf>.

19. *Id.* As an illustration, licensed Texas fishers are required to pay ten times the average fee of their counterparts in other states. *See id.*

20. *Id.*

21. *Id.*

22. *See id.* It takes 117 days to become a licensed massage therapist, 140 days to become a manicurist, 175 days to become a skin care specialist, and 350 days to become a barber. *Id.*

23. *Id.*

24. *See id.*

Texas is not the only state to impose broad and onerous licensing schemes.²⁵ The Lone Star State actually mirrors a national trend that has lasted for over half of a century.²⁶ All states have some form of licensure, with more than 800 total occupations licensed in at least one state and nearly fifty occupations licensed in every state.²⁷ In 1950, only 5% of workers required an occupational license issued by the state.²⁸ Today, nearly 30% of workers require licensure for employment.²⁹ Nationally, licensed occupations range from tour guides and funeral attendants to attorneys and doctors.³⁰ Yet, many of the licensure requirements impact low-income professions, acting as a barrier to entering the workforce.³¹

A. *Why License an Occupation?*

Traditionally, occupational licensing rationales included protecting the public health and safety of consumers, along with increasing levels of product or service quality.³² Increasingly, proponents of licensure over alternative forms of regulation hold ulterior motives that do not comport with these rationales.³³ Interestingly, calls for occupational licensure come from well-organized interest groups within the occupations seeking licensure, not from consumer advocacy or policy groups.³⁴ These special interest groups lobby state legislatures to adopt broad licensing schemes that prevent unlicensed individuals from practicing in the industry.³⁵ Finally, once states license an occupation, state regulatory boards are created to promulgate rules and generally oversee the industry.³⁶

25. See generally *id.* at 6–7 (analyzing state licensing schemes from all fifty states and the schemes' impact on consumers).

26. See *id.* at 6 (citing Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUS. REL. 676, 676–87 (2010)).

27. MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 5 (2006).

28. CARPENTER II ET AL., *supra* note 18, at 6.

29. *Id.*

30. See *id.* at 7, 43, 122; see also *Edwards v. District of Columbia*, 755 F.3d 996, 1000–09 (D.C. Cir. 2014) (detailing a lawsuit by tour guides that challenged licensing laws based on commercial free speech); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 218–22 (5th Cir. 2013) (detailing a lawsuit by casket-makers that challenged laws allowing only licensed funeral directors to sell caskets), *cert. denied*, 134 S. Ct. 423 (2013).

31. MORRIS M. KLEINER, HAMILTON PROJECT, REFORMING OCCUPATIONAL LICENSING POLICIES 6 (Jan. 2015), http://www.hamiltonproject.org/files/downloads_and_links/reforming_occupational_licensing_morris_kleiner_final.pdf; CARPENTER II ET AL., *supra* note 18, at 6.

32. KLEINER, *supra* note 31, at 5.

33. See *id.* at 5, 7–8 (discussing the dichotomy between the stated rationales of public licensing and the actual aims of those getting licensed). The fact that the use of occupational licensing varies so widely from state to state, including the large variations in licensing requirements, supports the argument that licensing is not necessarily about health and safety. *Id.* at 11.

34. See *id.* at 7–8.

35. See KLEINER, *supra* note 27, at 31–35.

36. Cf. MORRIS M. KLEINER, STAGES OF OCCUPATIONAL REGULATION: ANALYSIS OF CASE

This process creates a system that rejects potential members of an occupation.³⁷ The reduction in the overall supply of the occupation's practitioners simultaneously increases their demand, which drives up practitioners' fees.³⁸ This wage increase creates a transfer of wealth from the consumer to the licensee that would not exist otherwise.³⁹ Meanwhile, employment growth and job opportunities vanish, especially for low-income workers when costs to attain licensure make entering many occupations prohibitive.⁴⁰ One might argue that some of these results would be acceptable if quality increased, but evidence overwhelmingly suggests otherwise.⁴¹ Yet, professional lobbying groups and regulators disfavor less burdensome forms of economic regulation, such as certification or registration.⁴² These forms of regulation actually present the consumer with greater choices, like whether to hire a credentialed practitioner (who charges more) or someone else (who charges less).⁴³ Ultimately, regulatory boards, comprised of members within the occupation they regulate, implement occupational licensing as a means to better police and protect their own.⁴⁴

B. Recent Licensure Battles in Texas Courts

Nationwide, the increase in litigation instituted by plaintiffs seeking vindication of economic rights under both state and federal constitutions has coincided with the recent increase in burdensome economic regulation.⁴⁵ With this resulting in more occupations requiring licensure, it

STUDIES 173–74, 213–14 (2013) (discussing the various roles of dentistry and real estate licensing boards).

37. See KLEINER, *supra* note 31, at 15.

38. See *id.*

39. See *id.*

40. See KLEINER, *supra* note 27, at 6. Although Professor Kleiner suggests that any barriers into high-income professions have contributed to income inequality, not just licensure, he also noted that from 1990 to 2000, “the greatest wage growth occurred in licensed occupations with the highest levels of income.” *Id.* at 3–5.

41. See KLEINER, *supra* note 31, at 12 (“Economic studies have found little impact of occupational licensing on service quality in occupations that are not widely licensed; even in occupations that are widely licensed, studies have found few impacts of tougher requirements for licensing on . . . quality outcomes.”).

42. See *id.* at 8.

43. See *id.*

44. See TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW 149 (2010) (arguing that agencies in charge of licensing are typically “captured by businesses that stand to gain from controlling competition”).

45. See, e.g., *Byrum v. Landreth*, 566 F.3d 442, 444 (5th Cir. 2009) (interior design); *Patel v. Tex. Dep’t of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015) (eyebrow threading); *Mitz v. Tex. State Bd. of Veterinary Med. Exam’rs*, 278 S.W.3d 17, 20 (Tex. App.—Austin 2008, pet. dism’d) (equine dentistry); *Texas Computer Repair*, INST. FOR JUST., <http://ij.org/rife-v-texas-private-security-board-economic-liberty> (last visited Nov. 18, 2015) (computer repair technicians); *Texas Hairbraiding Instruction*, INST. FOR JUSTICE, <http://ij.org/txbraiding> (last visited Nov. 18, 2015) (African hair

stands to reason that some regulatory agencies may have gone too far.⁴⁶ Not surprisingly, the sheer level of regulatory overreach through licensing may surprise the average Texan.⁴⁷

In 2007, Texans practicing a centuries-old vocation known as equine dentistry (historically referred to as “teeth floating”) faced new regulations requiring teeth floaters to secure a veterinary license.⁴⁸ In response, several equine dentists filed suit to secure declaratory and injunctive relief.⁴⁹ The equine dentists alleged that the arbitrary requirement in the Veterinary Licensing Act, allowing only licensed veterinarians to provide equine dental care, violated their substantive due process rights under the Texas Constitution.⁵⁰ Ultimately, the trial court found for the teeth floaters and prevented the Board of Veterinary Medical Examiners from redefining veterinary dentistry, which would have effectively dismantled the storied profession.⁵¹

The Texas regulatory agencies’ zeal for licensing has even led to restrictions on commercial speech when the licensing regulations themselves proved inadequate to insulate licensed interior designers. In *Byrum v. Landreth*, several experienced and accomplished interior designers brought suit in federal court to enjoin the Texas Board of Architectural Engineers’ enforcement of a “titling” law.⁵² Although the interior designers were able to practice interior design, the statute prevented unlicensed interior designers from calling themselves “interior designers.”⁵³

braiding).

46. See CARPENTER II ET AL., *supra* note 18, at 25–30 (arguing that not only are licensing regimes as onerous as they are arbitrary, the effect of licensing usually protects entrenched economic interests at the expense of consumers).

47. See *Mitz*, 278 S.W.3d at 20 (litigating requirement for equine dentists to secure a veterinary license); *Texas Computer Repair*, *supra* note 45 (detailing requirement for computer repair technicians to secure a private investigator’s license); *Texas Hairbraiding Instruction*, *supra* note 45 (detailing requirement for African hair braiders to secure a barber license to practice, and teach, African hair braiding).

48. See Clark Neily, *Going Rogue: The Texas Vet Board’s War on Horse Owners and Entrepreneurs in the Lone Star State*, DAILY CALLER (Aug. 31, 2010, 9:29 AM), <http://dailycaller.com/2010/08/31/going-rogue/>. See generally *Mitz*, 278 S.W.3d at 20 (discussing the regulatory history underpinning the changes to equine dentists in 2007).

49. See *Mitz*, 278 S.W.3d at 20.

50. See *id.* at n.4.

51. *Texas Equine Dentistry*, INST. FOR JUST., <http://ij.org/mitz-v-texas-state-board-of-veterinary-medical-examiners> (last visited Nov. 17, 2015). Originally, the trial court granted the State Board of Veterinary Medical Examiners’ plea to the jurisdiction and abated the case pending the exhaustion of administrative remedies; however, the Texas Court of Appeals reversed on an interlocutory appeal and remanded for the further proceedings that produced this result. See *Mitz*, 278 S.W.3d at 19, 27.

52. See *Byrum v. Landreth*, 566 F.3d 442, 444 (5th Cir. 2009). “Titling” laws have been described as “little-known regulations that require people practicing certain professions to gain government permission to use a specific title.” DICK M. CARPENTER II, INST. FOR JUSTICE, DESIGNING CARTELS: HOW INDUSTRY INSIDERS CUT OUT COMPETITION (Nov. 2007), http://www.ij.org/images/pdf_folder/economic_liberty/Interior-Design-Study.pdf.

53. See Act of June 17, 2001, 77th Leg., R.S., Ch. 1421, § 1, 2001 Tex. Sess. Law Serv. (amended 2009) (current version at TEX. OCC. CODE ANN. § 1053.151 (West 2012)); *Byrum*, 566 F.3d at 444.

Fortunately for the interior design professionals, the Texas Legislature amended the statute after the Fifth Circuit granted a preliminary injunction enjoining enforcement of the statute.⁵⁴

III. THE IRRATIONAL EVOLUTION OF THE RATIONAL BASIS TEST

Economic rights, including the right to work, do not receive the same level of judicial scrutiny as other substantive rights protected by the United States Constitution or the Texas Constitution.⁵⁵ This is hardly a new revelation, as courts since the New Deal have only applied heightened levels of scrutiny to those non-economic rights the United States Supreme Court deems “fundamental,” while affording less stringent review elsewhere.⁵⁶ Consequently, most federal and many state courts evaluate legislation infringing on substantive economic rights under the rational basis test.⁵⁷ Under this test, courts begin the review by presuming the constitutionality of legislation.⁵⁸ Then, judicial review is limited to finding a mere rational relationship between the law and a legitimate state interest.⁵⁹ Some Texas courts have adopted the federal rational basis test, while others have applied varying levels of review, leading to inconsistent results.⁶⁰

This Part discusses the evolution of economic substantive due process challenges both federally and in Texas. Part III.A highlights how *United States v. Carolene Products Co.* and *Williamson v. Lee Optical of Oklahoma, Inc.* have impacted the current application of the rational basis test as interpreted by the United States Supreme Court. In contrast, Part III.B highlights *St. Joseph Abbey v. Castille*, a recent Fifth Circuit decision that adopted heightened scrutiny and rejected economic protectionism as a legitimate state interest. Part III.C introduces the Texas tests applied to economic substantive due process challenges. Part III.C.1 explores cases when courts adopted a heightened level of review labeled the “real and substantial” test. Cases in Part III.C.2 distinguish the Texas version of the rational basis test, adopted by some Texas courts, from its federal counterpart. These are contrasted with cases noted in Part III.C.3, which show that some Texas courts have simply adopted the federal “no scrutiny” level of rational basis review. Finally, Part III.C.4 highlights *Trinity River*

54. See *Texas Interior Design*, INST. FOR JUST., <http://ij.org/byrum-et-al-v-landreth-et-al> (last visited Nov. 10, 2015). The statute now prohibits the use of “registered interior designer” to those not licensed by the state. See TEX. OCC. CODE § 1053.151.

55. See Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 285–86 (discussing the heightened level of scrutiny afforded to substantive due process rights such as those that are familial, procreational, and sexual).

56. See *id.*

57. See SANDEFUR, *supra* note 44, at 127.

58. See *id.* at 128.

59. *Id.* at 127.

60. See *infra* Part III.C.

Authority v. URS Consultants, Inc. and *Texas Workers' Compensation Commission v. Garcia*, which are two relatively recent cases when the Supreme Court of Texas recognized the split of authority but did not adopt a clear and uniform test.

A. *Carolene Products and Lee Optical String Up the Rational Basis Test*

Any discussion regarding the potential pitfalls of unchecked occupational licensing schemes must first begin by looking at the history of the modern rational basis test, specifically as it relates to economic regulation.⁶¹ At issue in *United States v. Carolene Products Co.* was the federal Filled Milk Act of 1923.⁶² *Carolene* alleged that the Act's prohibition of the shipment of "filled" milk in interstate commerce violated equal protection, due process, and Congress's interstate commerce power.⁶³ In upholding the constitutionality of the Act, the Court held:

[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.⁶⁴

Commentators argue that this decision has since allowed judges to forgo their responsibility to apply meaningful judicial review.⁶⁵ *Carolene* allows courts to rubber-stamp legislative enactments unless plaintiffs refute "every conceivable justification for the government's action."⁶⁶ Clark Neily, an attorney with the Institute for Justice, argues that the Supreme Court's characterization of the rational basis test in *Carolene* gave legislatures a free pass to create nakedly anticompetitive regulations including occupational licensing laws.⁶⁷

Nearly two decades later, the Supreme Court further expanded the level of judicial deference afforded to legislatures with the modification to the rational basis test outlined in *Williamson v. Lee Optical of Oklahoma*,

61. The modern rational basis test arguably originated in *M'Culloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *M'Culloch v. Maryland*, 17 U.S. 316, 421 (1819).

62. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 145 (1938).

63. *See id.* at 145–47.

64. *Id.* at 152.

65. CLARK M. NEILY III, *TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT* 50 (2013).

66. *Id.* (emphasis omitted).

67. *Id.* at 57.

*Inc.*⁶⁸ The case involved a challenge to the constitutionality of an Oklahoma law that required licensed optometrists or ophthalmologists to fit eyeglass lenses to customers' faces.⁶⁹ Lee Optical argued, and the trial court agreed, that the licensure requirement did not reasonably relate to the health and welfare of Oklahomans, and thus violated the Due Process Clause.⁷⁰ Although the Court acknowledged that the "law may exact a needless, wasteful requirement" upon opticians not licensed by the state, it held that the legislature, and not the courts, should "balance the advantages and disadvantages" of the law.⁷¹ The Court then outlined several hypothetical considerations that the legislature may have considered when determining the rationality of the Oklahoma law.⁷² The Court suggested that laws "need not be in every respect logically consistent with [their] aims to be constitutional."⁷³ Rather, "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."⁷⁴ The Court essentially determined that the law was an attempt to "free the profession . . . from all taints of commercialism."⁷⁵ Ultimately, the Court held that the contrived hypotheticals qualified as the support necessary to hold that the challenged legislation rationally related to the objective the court presumed.⁷⁶ The Supreme Court effectively took the "scrutiny" out of rational basis review.⁷⁷

B. Caskets and Legitimate State Interests

In the early stages of occupational licensing, during the late nineteenth century, the policy justification for the practice of licensure centered on protecting the public from the dangers attributed to incompetent practitioners.⁷⁸ The Supreme Court agreed when, in 1889, the Court addressed occupational licensing for the first time and held that licensure

68. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 485 (1955).

69. *Id.*

70. *Id.* at 486.

71. See *id.* at 487.

72. See *id.* (suggesting that the frequency a customer may need a new prescription could have justified the regulation; that the frequency a customer may need to duplicate a lens could have justified the regulation; and that eye examinations are so critical as to require exams before every new pair of glasses could justify the regulation).

73. *Id.* at 487–88.

74. *Id.* at 488.

75. *Id.* at 491.

76. See *id.*

77. Roger V. Abbott, Comment, *Is Economic Protectionism a Legitimate Governmental Interest Under Rational Basis Review?*, 62 CATH. U. L. REV. 475, 482–83 (2013) (positing that the constitutionality of legislation subject to rational basis review is limited solely by the Court's imagination).

78. See SANDEFUR, *supra* note 44, at 145; see also MILTON FRIEDMAN, CAPITALISM AND FREEDOM 140 (2002) ("[T]he pressure [to license] comes from members of the occupation itself. . . . [T]hey are more aware than others of how much they exploit the customer.").

was a legitimate state interest.⁷⁹ The Court warned, however, that should “licensing requirements [bear] ‘no relation to such calling or profession,’ or if licenses were ‘unattainable by . . . reasonable study and application’” the licensing laws would “violate the Constitution.”⁸⁰ Despite the stated goals and lofty aspirations, however, occupational licensing has in many ways become a weapon to prevent competition and secure economic protection for favored groups.⁸¹ Through a handful of cases in the last fifteen years, federal circuit courts have attempted to answer whether economic protectionism qualifies as a legitimate state interest.⁸² Arguably, these cases are the most important decisions related to economic liberty and occupational licensing since the New Deal because they may eventually force the Supreme Court to resolve this issue; several of these cases involved licensure as a requirement to sell funeral caskets.⁸³

Although the facts for each case are substantially similar, a review of the Fifth Circuit’s recent decision in *St. Joseph Abbey v. Castille* is particularly illustrative.⁸⁴ Benedictine monks at St. Joseph Abbey (the Abbey) began selling simple wooden caskets (previously used to bury their own) to the public as a way to gain revenue for their church. There was only one problem: the costs of the simple casket models sold by the Abbey were significantly cheaper than the competition. In 2007, the Louisiana State Board of Embalmers and Funeral Directors (State Board) ordered the Abbey to cease producing caskets to sell to the public.⁸⁵ The Abbey pursued both equal protection and substantive due process challenges, claiming that the casket regulations cannot withstand federal rational basis

79. See *Dent v. West Virginia*, 129 U.S. 114, 122 (1889) (“The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud.”); SANDEFUR, *supra* note 44, at 145 (discussing *Dent*, 129 U.S. at 122).

80. See SANDEFUR, *supra* note 44, at 145 (second alteration in original) (quoting *Dent*, 129 U.S. at 122).

81. See *id.*

82. See Abbott, *supra* note 77, at 488–94.

83. See SANDEFUR, *supra* note 44, at 150; see also *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013) (“[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose.”); *Powers v. Harris*, 379 F.3d 1208, 1222 (10th Cir. 2004) (“[I]ntra-state economic protectionism, absent a violation of a specific federal statutory or constitutional provision, is a legitimate state interest.”); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (“Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose . . .”). In another licensing case that involved pest control instead of casket sales, the Ninth Circuit held that the rationale behind classifying different types of pest control practitioners “undercuts the principle of non-contradiction” and concluded that “mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review.” *Merrifield v. Lockyer*, 547 F.3d 978, 991 & n.15 (9th Cir. 2008).

84. *St. Joseph*, 712 F.3d at 217.

85. *Id.* at 219.

review.⁸⁶ The State Board answered by claiming that naked economic protectionism qualified as a legitimate state interest.⁸⁷

Following the standard federal rational basis analysis, the court began by affording appropriate deference to the Louisiana legislature.⁸⁸ The rest of the analysis, however, took another path.⁸⁹ In fact, Judge Higginbotham openly rejected the analysis found in *Lee Optical*, stating that the court's review of the State Board's arguments would not include "fantasy" and "does not proceed with abstraction for hypothesized ends and means do not include post hoc hypothesized facts."⁹⁰ The court addressed, and rejected, the primary argument that economic protectionism is a legitimate state interest based on history and principle, and it adopted the Sixth Circuit's reasoning from *Craigmiles v. Giles*—another funeral casket case.⁹¹ Judge Higginbotham thoroughly rejected the reasoning from the Tenth Circuit's casket case, *Powers v. Harris*, which held that economic protectionism was "the favored pastime of state and local government," because the precedent cited by the Tenth Circuit did not ultimately support its adopted proposition.⁹²

Finally, the Fifth Circuit rejected the State Board's alternative arguments that the regulation increased consumer protection and protected public health and safety.⁹³ Although Louisiana required individuals selling caskets to secure a license, the court noted that the state did not require caskets upon burial, did not require a specific design or mode of construction, and did not require licensed funeral directors to acquire any "special expertise" in caskets.⁹⁴ A careful review of the evidence, along with an actual inquiry into the purpose and effect of the regulation, led to the rejection of a license to sell what was no more than a box.⁹⁵ "The great deference due state economic regulation," the court held, "does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation."⁹⁶ The meaningful analysis exemplified greater judicial review than the test forged in *Carolene* and *Lee Optical*, and the Fifth Circuit ultimately created a blueprint for Texas to adopt when analyzing similar challenges that could resolve its very own circuit split.

86. *Id.* at 220.

87. *Id.* The State Board argued alternatively that protecting consumers and the public health and safety also constituted legitimate state interests. *Id.* at 223–27.

88. *Id.* at 221.

89. *See id.* at 222–23.

90. *Id.* at 223.

91. *Id.* at 222–23.

92. *Id.* at 222.

93. *Id.* at 223–27.

94. *Id.* at 226.

95. *See* NEILY III, *supra* note 65, at 145–46; *see also* *Craigmiles v. Giles*, 312 F.3d 220, 226 (6th Cir. 2002) (referring to a casket as a "mere 'box' for human remains").

96. *St. Joseph*, 712 F.3d at 226.

C. Economic Liberty Messes with Texas

For decades, Texas courts have utilized multiple tests to analyze substantive due process claims brought under the Due Course of Law Clause in article I, § 19 of the Texas Constitution.⁹⁷ The tests apply different levels of scrutiny, from the heightened scrutiny of the real and substantial test to the no-scrutiny level of review modeled after the federal rational basis test.⁹⁸ Unfortunately, the Supreme Court of Texas recognized this problem on multiple occasions and chose to avoid providing much needed guidance to lower courts.⁹⁹ Until the Court decides to adopt a clear and uniform test, lower courts will continue to utilize the separate tests, leading to uncertainty and, in many ways, an uneven interpretation of the Texas Constitution.¹⁰⁰

1. Very Real and Quite Substantial

In 1957, the Supreme Court of Texas applied the real and substantial test to a constitutional challenge in *State v. Richards*.¹⁰¹ In *Richards*, the Court addressed whether the legislature, by including innocent property owners in a civil asset forfeiture statute, violated the Equal Protection Clause when property owners were forced to forfeit property used in an illegal act.¹⁰² Additionally, assuming the legislature did intend to include innocent property owners within the statute's reach, the Court then addressed whether the statute violated the substantive due process rights of Texans.¹⁰³

97. See *Trinity River Auth. v. URS Consultants, Inc.-Tex.*, 889 S.W.2d 259, 263 (Tex. 1994). Compare *State v. Richards*, 301 S.W.2d 597, 600–01 (Tex. 1957) (holding that classifications of persons for the purposes of regulatory legislation “must be based on a real and substantial difference having relation to the subject of the particular enactment”), with *Lens Exp., Inc. v. Ewald*, 907 S.W.2d 64, 70 (Tex. App.—Austin 1995, no writ) (“Accordingly, we continue to follow our conclusion in *Massachusetts Indemnity* that the federal rational-relationship standard applies to challenges under the Texas Constitution as well.”). The Due Course of Law Clause somewhat parallels the Due Process Clauses contained within the U.S. Constitution’s Fifth and Fourteenth Amendments. See *Tex. Workers’ Comp. Comm’n v. Garcia*, 862 S.W.2d 61, 74 (Tex. App.—San Antonio 1993) (citing *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983)), *rev’d*, 893 S.W.2d 504 (Tex. 1995). The clause differs in two important ways: first, by granting affirmative rights; second, by expanding due process protection to privileges and immunities, along with any other manner that might disenfranchise. See *id.*

98. See *infra* Part III.C.1–3.

99. See *infra* Part III.C.4.

100. See *infra* Part III.C.

101. See *Richards*, 301 S.W.2d at 600–01 (adopting the real and substantial test articulated in *Friedman v. Am. Sur. Co. of N.Y.*, 151 S.W.2d 570, 577 (Tex. 1941), which held that the Texas Constitution would allow the classification of subjects and people in the context of regulatory legislation, however, the legislation could not be arbitrary or unreasonable and the classifications must relate to the subject of a specific enactment based on a real and substantial difference).

102. *Id.* at 599.

103. *Id.*

The Court explicitly applied the real and substantial test to the equal rights claim and implicitly applied the test to the subsequent substantive due process claim.¹⁰⁴ The regulatory classifications were real and substantial because a common carrier must accept all passengers if accommodations are sufficient, and lien claimants generally have no control over the vehicles that they secure.¹⁰⁵ Therefore, the statute's exception for common carriers and lien claimants did not violate the equal protection rights of innocent owners because the exceptions were reasonable and the law operated equally among all classified parties.¹⁰⁶ Shifting to the substantive due process claim, the Court analyzed the purpose and effect of the statute.¹⁰⁷ As a standard, the state needed to balance the use of police power to provide for the real health, safety, and comfort of people against other citizens' private property rights.¹⁰⁸ Additionally, the legislature's vested discretion in police powers allowed for latitude regarding the reasonableness of legislative acts.¹⁰⁹ The purpose of the legislation, curbing the traffic of narcotics, clearly fell within the state's police power.¹¹⁰ The effect of the legislation, although harsh, prevented narcotics dealers from avoiding forfeiture by simply borrowing someone else's vehicle, constituting a substantial connection to the statute's purpose.¹¹¹ Even with heightened scrutiny, the statute passed constitutional muster.¹¹²

Recently, the Austin Court of Appeals refined the standard by indicating that when reviewing whether the "exercise of police power is proper, we ask if the statute in question bears a real and substantial relation to the public health, safety, morals, or general welfare of the public."¹¹³ In striking down a legislative act aimed at barring asbestos related tort claims, the court found the lack of legislative findings significant to conclude that the defendant's stated legislative purpose was insufficient.¹¹⁴ Additionally, the effect of the statute, retroactively barring litigants from seeking recovery, was too harsh if the police powers were "to have any meaningful limitations."¹¹⁵ Not to be outdone, however, other courts choose to apply another standard that does not quite meet the level of scrutiny that the real

104. *See id.* at 600–03.

105. *See id.* at 601.

106. *Id.*

107. *See* Petitioners' Brief on the Merits at 18–19, *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015) (No. 12-0657), 2013 WL 5235065.

108. *See id.*; *Richards*, 301 S.W.2d at 602.

109. *See Richards*, 301 S.W.2d at 602.

110. *See id.*; Petitioners' Brief on the Merits, *supra* note 107, at 18.

111. *See Richards*, 301 S.W.2d at 602; Petitioners' Brief on the Merits, *supra* note 107, at 19.

112. *See Richards*, 301 S.W.2d at 603.

113. *Satterfield v. Crown Cork & Seal Co.*, 268 S.W.3d 190, 216 (Tex. App.—Austin 2008, no pet.) (emphasis omitted).

114. *Id.* at 220.

115. *Id.* at 219.

and substantial test requires, but still provides a heightened level of review above the federal rational basis test.¹¹⁶

2. *The Lone Star Test*

Litigants in *Patel v. Texas Department of Licensing and Regulation* identified a level of scrutiny often employed by Texas courts that falls between federal rational basis review and the real and substantial test.¹¹⁷ The “Texas rational basis test” shares similarities with the real and substantial test in that courts consider a challenged law’s purpose and effect, even though the courts provide a greater level of deference to the legislature.¹¹⁸ As Justice Doggett noted in his dissenting opinion in *HL Farm Corp. v. Self*, “Texas permits a court to look beyond the stated rationale for legislation and to examine its true factual basis.”¹¹⁹

In 1981, the University Interscholastic League (UIL) denied John Sullivan, a high school athlete who recently moved to Texas with his family, the ability to play basketball due to the league’s “one-year transfer rule” adopted by member public schools.¹²⁰ Sullivan filed suit and claimed that the transfer rule violated his right of equal protection under the Fourteenth Amendment because it was not rationally related to the stated purpose of preventing the recruitment of student athletes.¹²¹ The Supreme Court of Texas noted that discouraging the recruitment of student athletes was a legitimate state purpose, but then sought to determine whether student athlete classifications (students who transferred versus those who did not) were reasonable in respect to their purpose.¹²² The Court determined that the classifications burdened high school athletes that were not recruited and, through no fault of their own, were forced to move with

116. See discussion *infra* Part III.C.4.

117. See Petitioners’ Brief on the Merits, *supra* note 107, at 22–23.

118. *Id.* at 23. Although the litigants identify the separate and distinct test, it should be noted that Justice Doggett might have coined the term *Texas rational basis test* in his dissenting opinion in the 1994 case, *HL Farm Corp. v. Self*. *HL Farm Corp. v. Self*, 877 S.W.2d 288, 294 (Tex. 1994) (Doggett, J., dissenting) (citing *Whitworth v. Bynum*, 699 S.W.2d 194 (Tex. 1985)). The Texas Supreme Court recognized that there was a separate and distinct Texas version of the rational basis test in *Whitworth v. Bynum* when it adopted the “Texas version of the rational basis test” utilized in *Sullivan v. University Interscholastic League* to analyze an equal protection claim brought under the Texas Constitution. See *Whitworth*, 699 S.W.2d at 197; see, e.g., *Sullivan v. Univ. Interscholastic League*, 616 S.W.2d 170 (Tex. 1981) (applying the purpose and effect style analysis to a claim that student classifications of high school athletes violates the equal protection guarantees of the Fourteenth Amendment).

119. *HL Farm Corp.*, 877 S.W.2d at 293.

120. *Sullivan*, 616 S.W.2d at 172. The Texas Supreme Court held that due to the public school membership of the UIL, and its association with the Division of Continuing Education of The University of Texas, the UIL’s conduct constituted state action. *Id.*

121. *Id.* Although the claim was brought under the Fourteenth Amendment of the United States Constitution and not the Texas Constitution, the case is still instructive because subsequent Texas courts have looked to *Sullivan* when adopting a test to analyze claims brought under the Texas Constitution. See *HL Farm Corp.*, 877 S.W.2d at 293.

122. *Sullivan*, 616 S.W.2d at 172.

their families.¹²³ Essentially, the overbroad and over-inclusive transfer rule included the innocent athletes with the recruited athletes who violated other specific UIL rules.¹²⁴ Considering the harsh impact on innocent student athletes, and not accepting at face value the UIL's stated interest, the Court ultimately held the transfer rule violated the Equal Protection Clause.¹²⁵

In an earlier case, the Austin Court of Appeals had the opportunity to review the constitutionality of a filled milk statute in *Martin v. Wholesome Dairy, Inc.*, and upheld the statute.¹²⁶ The court of appeals, however, opted to utilize a heightened level of scrutiny that provided at least some level of review over and above the United States Supreme Court's rubber-stamp of the Filled Milk Act of 1923 in *Carolene*.¹²⁷ The court began its analysis by presuming the constitutional validity of the statute and affirming that the regulation was within the state's police powers.¹²⁸ After a lengthy review of the evidence and testimony submitted by the parties to the litigation, the court concluded that experts did not agree on the beneficial, or deleterious, health impact of filled milk.¹²⁹ The review of the evidentiary record allowed the court to also conclude that the legislature had a reasonable basis for exercising discretion in the regulation of filled milk.¹³⁰ Because the statute only regulated products that imitated a genuine dairy product, the scope of the statute was logically related to its intended purpose to protect the health of Texans.¹³¹ The effect of the statute essentially required the Farmer's Daughter High Protein Drink to not advertise as a milk product, like margarine or coffee cream, so that it could be sold in Texas.¹³² Not all Texas courts review the evidentiary record or look at a statute's intended purpose versus actual effect when evaluating cases under the rational basis test; instead, some courts provide a type of no-scrutiny standard of review.

3. Adopting a No-Scrutiny Standard of Review

In *Massachusetts Indemnity & Life Insurance Co. v. Texas State Board of Insurance*, Massachusetts Indemnity & Life Insurance alleged that the separate classifications of insurance professionals, under three separate statutory provisions, violated the Equal Protection and Due Process Clauses

123. *Id.* at 173.

124. *Id.*

125. *See id.*

126. *Martin v. Wholesome Dairy, Inc.*, 437 S.W.2d 586, 601-02 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.).

127. *Id.*

128. *Id.* at 590-91.

129. *Id.* at 587-601.

130. *Id.* at 600.

131. *See id.* at 601.

132. *See id.*

under both the state and federal constitutions.¹³³ The court began its analysis by presuming that the legislature intended that the statute conform to constitutional requirements.¹³⁴ It then responded to the attack in each instance by inventing presumptions that assumed the intent of the legislature was to craft legislation that was rationally related to the legislature's stated objectives.¹³⁵ Moreover, the court acknowledged that even if "the appearance of legitimate economic ends is really a cloak for a legislative body's irrational prejudice toward the disadvantaged class," the requirement for deference to the legislature prevents a finding of unconstitutionality.¹³⁶

In addition to the presumption of constitutionality that legislative acts receive, courts often ignore evidence controverting an act's rationality.¹³⁷ In *Lens Express, Inc. v. Ewald*, the Austin Court of Appeals considered whether the trial court inappropriately granted the State summary judgment after Lens Express raised substantive due process claims under the Texas Constitution.¹³⁸ Before Lens Express filed suit, the Texas Optometry Board pursued the ophthalmic device company for violating provisions of the Texas Optometry Act.¹³⁹ According to the Act, optometrists did not have to release the prescriptions of individuals looking to utilize the services of companies like Lens Express, which would presumably force consumers to purchase contact lenses from an optometrist.¹⁴⁰ Lens Express erred when it provided contact lenses to consumers anyway, even without securing an actual, physical copy of their prescription.¹⁴¹ At trial, the State came up with the required conceivable reason why an optometrist would justifiably refuse to provide a prescription, but Lens Express presented an expert witness to refute the State's claims.¹⁴² Although the trial court ultimately

133. *Mass. Indem. & Life Ins. Co. v. Tex. State Bd. of Ins.*, 685 S.W.2d 104, 108–09 (Tex. App.—Austin 1985, no writ).

134. *Id.* at 109.

135. *See id.* at 111–14. In determining that the limitation on the number of temporary licenses per calendar year was constitutional, the court presumed that the legislature intended to balance the public interest in using licenses as training devices against the need for some companies to issue more than 250 licenses per year. *See id.* at 111. In determining that the statute prevented temporary licensees from selling or soliciting insurance policies to existing policyholders, the court presumed that the legislature intended to protect consumers from agents not yet fully trained. *See id.* at 112.

136. *See id.* at 116 n.4.

137. *See Lens Exp., Inc. v. Ewald*, 907 S.W.2d 64, 70 (Tex. App.—Austin 1995, no writ) ("It was therefore unnecessary for the trial court to consider further factual evidence, and summary judgment was appropriate.").

138. *Id.* at 68.

139. *Id.* at 67.

140. *Id.* The scenario presented in *Lens Express* provides an analogue to other cases, laws, and regulations, where parties argue that the purpose of the acts in question relate more to protecting special interests, like those of licensed optometrists, over the health and safety of consumers. *See generally* Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 CHAP. L. REV. 173 (2003) (discussing the genesis between economic regulation and interest group politics).

141. *Lens Exp.*, 907 S.W.2d at 67.

142. *Id.* at 69. The State asserted that if patients received their own prescriptions, and presumably

granted the State summary judgment, the court of appeals first held that the trial court unnecessarily considered factual evidence because the expert's affidavit did not overcome the presumption of validity afforded to the legislative act by the rational basis test.¹⁴³ Just to be clear, and without providing any additional reasoning to support the assertion, the court held that even if a more rigorous standard of review would have been appropriate, the Act was reasonable enough to meet that standard as well.¹⁴⁴

4. Keeping Ambiguity Alive: *Trinity and Garcia*

With a three-way split in authority, it only follows that Texas courts would look to the Supreme Court of Texas for some clarity. In fact, two cases in the mid-1990s reached the Court and gave it the opportunity to settle the issue once and for all. Unfortunately for Texas courts, and Texas consumers, the Court opted instead to pass on the opportunity in each instance. Lower courts now utilize the indecision to choose whichever test they prefer.¹⁴⁵

In *Trinity River Authority v. URS Consultants, Inc.*, the Supreme Court of Texas considered whether a statute of repose that bars claims against architects violated the Texas Constitution's Equal Protection and Due Course of Law Clauses.¹⁴⁶ The Court acknowledged that "Texas courts have not been consistent in articulating a standard of review under the due course clause," however, the statute survives a constitutional challenge under any "cognizable" test.¹⁴⁷ The subsequent substantive due process analysis seemed to track a heightened standard of review, much like the real and substantial test.¹⁴⁸ First, the Court considered the legislature's purpose in establishing a statute of repose, which included protecting defendants against stale claims.¹⁴⁹ Next, the court balanced potential effects of allowing stale claims, including the neglect and abuse of third parties and fading memories of those involved, against the state's purpose.¹⁵⁰

ordered contact lenses from companies like Lens Express, they might stay in their contact lenses for too long and suffer permanent eye damage. *Id.* The appellate court rejected the Lens Express expert, stating that the expert's affidavit only claimed the Act lacked a legitimate state interest. *Id.*

143. *See id.* at 70.

144. *See id.* ("[T]he challenged provisions are reasonable enough to pass the more rigorous standard followed by some Texas courts.").

145. *See, e.g.,* *Zaragoza v. Chemetron Invs., Inc.*, 122 S.W.3d 341, 346 (Tex. App.—Fort Worth 2003, no pet.) (using *Trinity* as the basis for applying rational basis review); *Lens Exp.*, 907 S.W.2d at 70 (acknowledging the indecision in *Garcia* as the reason the court of appeals will continue to follow its own precedent regarding rational basis review).

146. *See Trinity River Auth. v. URS Consultants, Inc.-Tex.*, 889 S.W.2d 259, 260 (Tex. 1994).

147. *See id.* at 263.

148. *See* discussion *supra* Part III.C.1.

149. *Trinity*, 889 S.W.2d at 264.

150. *See id.* (citing *McCulloch v. Fox & Jacobs, Inc.*, 696 S.W.2d 918, 924 (Tex. App.—Dallas 1985, writ ref'd n.r.e.)).

Ultimately, the Court held that the statute did not violate the Texas Constitution on substantive due process grounds.¹⁵¹

Interestingly, Trinity's equal protection claim did not receive the same level of scrutiny and instead the repose statute survived no-scrutiny rational basis review.¹⁵² The Court acknowledged that the guarantee provided under the Texas Constitution mirrored the federal multi-tiered analysis.¹⁵³ Since Trinity did not allege, nor did the court find, that the statute violated the rights of a suspect class or a fundamental right, the statute, almost automatically, rationally related to a legitimate state purpose.¹⁵⁴ Borrowing reasoning from other jurisdictions, the Court found that architects, whose expertise typically leads to project design and supervision, do not get subjected to the quality control standards found in factories, like suppliers or manufacturers.¹⁵⁵ Additionally, architects and engineers lose the opportunity to control against injury and discover defects over time.¹⁵⁶ Typical of the no-scrutiny level of review, the holding of the statute's constitutionality did not examine whether the Texas Legislature that enacted the statute had either purpose in mind upon creation of the non-suspect classifications.¹⁵⁷

The following year, the Supreme Court of Texas had yet another opportunity to clarify the appropriate standard of review in *Texas Workers' Compensation Commission v. Garcia*, but chose again to pass on the issue.¹⁵⁸ The Court detailed how some courts have applied federal rational basis review, while it, at times, had attempted to articulate its own, more rigorous standard.¹⁵⁹ The plaintiffs alleged that the use of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (the Guide) to measure impairment violated their substantive due process rights.¹⁶⁰ Despite clarifying that relying on evidence in the record was not necessary for a determination of constitutionality, the Court considered prior testimony that the Guide was an adequate basis to measure impairment.¹⁶¹ Consequently, the Texas Workers' Compensation Act was "sufficiently rational and reasonable" to withstand any articulable form of review.¹⁶²

151. *Id.*

152. *See id.* at 264–65.

153. *Id.* at 264.

154. *See id.*

155. *See id.* at 265.

156. *See id.*

157. *See id.* at 264–65.

158. *See Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 525 (Tex. 1995).

159. *See id.*; *see also* Petitioners' Brief, *supra* note 107, at 17 (discussing the Court's unwillingness to resolve the standard for substantive due process).

160. *See Garcia*, 893 S.W.2d at 525.

161. *See id.* at 525–26.

162. *Id.* at 525.

In their brief on the merits in *Patel v. Texas Department of Licensing & Regulation*, the eyebrow threaders noted that the Supreme Court of Texas opted to avoid choosing a standard of review even after the San Antonio Court of Appeals, in the underlying matter, rejected the federal rational basis test and adopted a test modeled after different lines of Texas case law.¹⁶³ Applying primarily the framework from *State v. Richards*, the court adopted a three-part test that provided for a heightened standard of review:

- (1) The object of the law must be within the scope of the legislature's police power; (2) the means used must be appropriate and reasonably necessary to accomplish that object; and (3) the law must not operate in an arbitrary or unjust manner, or be unduly harsh in proportion to the end sought.¹⁶⁴

Additionally, the court identified reasonableness as the essential component to the second and third prongs.¹⁶⁵ Essentially, the San Antonio Court of Appeals provided the Supreme Court of Texas not just the opportunity to resolve the standard of review, but a framework to do so as well.¹⁶⁶

IV. A NEW HOPE: *PATEL V. TEXAS DEPARTMENT OF LICENSING AND REGULATION*

In 2009, business owners and practitioners sought relief from statutes and regulations that required a cosmetology license to practice eyebrow threading, eventually making their way before the Supreme Court of Texas in *Patel v. Texas Department of Licensing and Regulation*.¹⁶⁷ Eyebrow threading is a South Asian technique used by practitioners to remove facial hair with only a single strand of cotton thread.¹⁶⁸ Although sometimes practiced by traditional cosmetologists, the technique itself differs from most traditional services because it does not require the use of chemicals, dyes, or sharp objects.¹⁶⁹ For proper sanitation, threaders use only the single strand of thread.¹⁷⁰ Arguably, the technique is safer than traditional

163. Petitioners' Brief on the Merits, *supra* note 107, at 16.

164. *Tex. Workers' Comp. Comm'n v. Garcia*, 862 S.W.2d 61, 75 (Tex. App.—San Antonio 1993), *rev'd*, 893 S.W.2d 504 (Tex. 1995); *see* *Wylie v. Hays*, 263 S.W. 563, 565 (Tex. 1924) (citing *Thompson v. Calvert*, 489 S.W.2d 95, 99 (Tex. 1972); *City of Houston v. Johnny Frank's Auto Parts Co.*, 480 S.W.2d 774, 779 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.); *Humble Oil & Ref. Co. v. City of Georgetown*, 428 S.W.2d 405, 413 (Tex. Civ. App.—Austin 1968, no writ); and *City of Coleman v. Rhone*, 222 S.W.2d 646, 649 (Tex. Civ. App.—Eastland 1949, writ ref'd).

165. *Garcia*, 862 S.W.2d at 75 (citing *State v. Richards*, 301 S.W.2d 597, 602 (Tex. 1957); *Humble Oil*, 428 S.W.2d at 413; and *Rhone*, 222 S.W.2d at 649).

166. *Id.*

167. *See Patel v. Tex. Dep't of Licensing & Regulation*, 464 S.W.3d 369, 371–72 (Tex. App.—Austin 2012), *rev'd*, 469 S.W.3d 69 (2015).

168. *See id.* at 372; Petitioners' Brief on the Merits, *supra* note 107, at 2.

169. *See* Petitioners' Brief on the Merits, *supra* note 107, at 4.

170. *See id.*

Western techniques of eyebrow hair removal such as eyebrow waxing.¹⁷¹ Despite the low-risk nature of eyebrow threading, however, the Texas Department of Licensing and Regulation (TDLR) alleged that the technique “raise[d] significant public health concerns.”¹⁷² The TDLR’s concerns stemmed from the idea that improper sanitation practices by threaders, like potentially reusing the cotton thread, could contribute to the spread of infection and disease.¹⁷³

Attempting to curb the potential dangers to basic sanitation, the TDLR now requires future threaders to secure a cosmetology license.¹⁷⁴ Acquiring the license, however, is no easy task. The TDLR requires individuals who practice eyebrow threading to complete 750 or 1,500 hours of training.¹⁷⁵ The lengthy training costs between \$7,000 and \$22,000.¹⁷⁶ This contrasts with the licensure requirements for an emergency medical technician, which requires only 142 hours of training.¹⁷⁷ Yet with all of the training, cosmetology schools do not even require teaching the eyebrow threading technique to graduate.¹⁷⁸ Moreover, after completing the required training, the TDLR requires future threaders to pass state-approved licensing exams.¹⁷⁹ Much like the schools themselves, the exams do not include any material related to the eyebrow threading technique.¹⁸⁰ So despite the low-risk nature of the procedure, the lack of training and testing of the technique, and the required hours and costs necessary to acquire state-approval, the Austin Court of Appeals determined that the licensing regulations did not violate the eyebrow threaders’ economic rights.¹⁸¹

171. *Id.*

172. State’s Brief on the Merits at 2, *Patel*, 469 S.W.3d 69 (No. 12-0657), 2013 WL 5235071. The State also alleged that the practice could potentially spread a host of bacterial and viral infections including warts and ringworm. *Id.*

173. *See id.* at 2–3; *see also* Anita Hamilton, *Does Eyebrow Threading Carry Health Risks?*, TIME (Aug. 2, 2011), <http://healthland.time.com/2011/08/02/does-eyebrow-threading-carry-health-risks/> (detailing allegations by the TDLR’s public information officer that eyebrow threading is unsafe due to poor sanitation).

174. *See* 16 TEX. ADMIN. CODE § 83.120 (Westlaw through 2015) (Tex. Dep’t of Licensing & Regulation, Cosmetology Administrative Rules); Petitioners’ Brief, *supra* note 107, at 7.

175. *See* 16 TEX. ADMIN. CODE § 83.120; Petitioners’ Brief, *supra* note 107, at 7. The requirement for 1,500 hours is to secure a cosmetology license, while the 750-hour requirement is for an esthetician license, which falls under the cosmetology classification. *See* 16 TEX. ADMIN. CODE § 83.120.

176. *See* Petitioners’ Brief on the Merits, *supra* note 107, at 7.

177. CARPENTER II ET AL., *supra* note 18 (comparing the 33 days of training required for an Emergency Medical Technician to the 350 days required for a cosmetologist).

178. *See* Petitioners’ Brief on the Merits, *supra* note 107, at 8.

179. *See id.*

180. *See id.* at 9–10.

181. *Patel v. Tex. Dep’t of Licensing & Regulation*, 464 S.W.3d 369, 386 (Tex. App.—Austin 2012), *rev’d*, 469 S.W.3d 69 (2015).

V. THREADING THE NEEDLE: AN EVALUATION OF *PATEL*'S POSSIBLE
OUTCOMES

The Supreme Court of Texas is set to resolve whether economic liberty deserves heightened scrutiny.¹⁸² The outcome is not certain, however, and the Court could avoid choosing a standard altogether (as it did in *Trinity* and *Garcia*).¹⁸³ Conversely, the Court could simply fail to implement any meaningful level of review and adopt the federal rational basis test.¹⁸⁴ On the other hand, the facts of the case and the nature of the TDLR's justification for regulating eyebrow threading suggest that the only just result will move the Court to apply a heightened level of review.¹⁸⁵ Should the Court look to prior Texas cases to develop a heightened standard, the Court will likely adopt either the Texas rational basis test, or the more stringent real and substantial test and the eyebrow threaders will prevail.¹⁸⁶

A. *The Automatic Loss*

Interestingly, the eyebrow threaders in *Patel* conceded in their brief that they would not prevail under the federal rational basis test.¹⁸⁷ In fact, they contended that “neither could anyone else.”¹⁸⁸ A critic could argue that, understandable as it may be to concede that the deference afforded the TDLR under the federal rational basis test creates a wall that no plaintiff can climb over, the Court may have been persuaded otherwise.¹⁸⁹ Of course, in *Trinity*, the statute of repose survived all tiers of review.¹⁹⁰ Similarly, the Workers' Compensation Act, at issue in *Garcia*, survived as well.¹⁹¹ These results, along with the Court's hesitancy to choose a test in either case, likely shaped the threaders' strategy.¹⁹² Ultimately, the threaders avoided giving the Court an “out” with their concession, and they essentially demanded that the Court apply a heightened standard of review and find the TDLR's regulations unconstitutional.¹⁹³

The TDLR, on the other hand, followed a common theme in federal rational basis test cases and simply asserted in its brief that the eyebrow

182. See *supra* Part IV.

183. See *supra* Part III.C.4.

184. See *infra* Part V.A.

185. See *infra* Part V.B–C.

186. See *infra* Part V.B–C.

187. Petitioners' Brief on the Merits, *supra* note 107, at 61.

188. *Id.*

189. See *supra* Part III.C.4.

190. See *supra* Part III.C.4.

191. See *supra* Part III.C.4.

192. See *supra* Part III.C.4.

193. See Petitioners' Brief on the Merits, *supra* note 107, at 61–64.

threading regulation rationally related to public health, which constitutes a legitimate state interest.¹⁹⁴ The TDLR did not support this contention by presenting evidence that the purpose of the regulations, requiring numerous hours of training unrelated to health and safety, specifically related to public health.¹⁹⁵ Presumably, and unsurprisingly, the agency argued that precedent supported that the Government's stated justification was enough.¹⁹⁶ Following the familiar rational basis playbook, and despite potential evidence to the contrary, the TDLR preferred the Court close its eyes and simply trust the regulators.¹⁹⁷

At oral argument, the threaders did address the TDLR's claims head-on.¹⁹⁸ The threaders argued the obvious: 40 hours of sanitization instruction in the 750 total hours required for a cosmetology license does not constitute regulation rationally related to public health.¹⁹⁹ Moreover, cosmetology schools do not teach eyebrow threading, and the state-mandated tests do not test it either.²⁰⁰ So the only way to justify more than the forty hours dedicated to sanitation as a path to licensure requires upholding an arbitrary and unconstitutional barrier to the threaders' right to earn a living.²⁰¹ To avoid this result, and should the federal test apply, the threaders argued that the Supreme Court of Texas should adopt the version applied in federal courts that analyzed similar hair-braiding regulations ultimately held irrational.²⁰²

Unfortunately for the threaders, adopting the federal rational basis test requires the Justices to advocate on behalf of the regulatory board, which would result in a victory for the TDLR.²⁰³ As the United States Supreme Court held in *Williamson*, the state only needs to spot an evil and attempt to correct it.²⁰⁴ The Supreme Court of Texas could determine that the legislature believed a mass epidemic of ingrown eyebrow hair could force eyebrow threaders to utilize alternative techniques, including those taught in cosmetology schools and tested on state exams.²⁰⁵ Therefore, the additional training would protect the health of the public, and suddenly the

194. See State's Response Brief on the Merits at 20, *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015) (No. 12-0657), 2013 WL 5965387.

195. See *id.*

196. See *id.* at 19–20 (citing *City of San Antonio v. TPLP Office Park Props.*, 218 S.W.3d 60, 65–66 (Tex. 2007)).

197. See *id.*

198. Oral Argument at 7:15, *Patel*, 469 S.W.3d 69 (No. 12-0657), <http://texassupremecourt.mediasite.com/mediasite/Play/0d0a44670cf64dce82e6250c6c1dea1d1d>.

199. *Id.* at 6:14–7:30.

200. See Petitioners' Brief on the Merits, *supra* note 107, at 8–10.

201. Oral Argument, *supra* note 198, at 5:14.

202. *Id.* at 7:15.

203. See NEILY III, *supra* note 65, at 53.

204. See *supra* text accompanying note 74.

205. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–90 (1955) (allowing the Court to invent legitimate state interests not presented, or argued, by the state).

licensing scheme conveniently finds a rational relationship to a legitimate state interest.²⁰⁶ When make-belief constitutes judicial review, it does not take trained lawyers, or law students, to understand that the deference afforded to the legislature is tantamount to judicial abdication.²⁰⁷

B. Applying the Texas Approach

The Supreme Court of Texas could choose instead to put the “review” back into judicial review, while affording deference to the legislature, and adopt the Texas rational basis test requiring an inquiry into the purpose and effect of the TDLR’s licensing scheme.²⁰⁸ As Justice Doggett explained, the Texas rational basis test requires the Court to go beyond the government’s stated intent and review evidence to support the legislature’s aims.²⁰⁹ The threaders’ central argument under this slightly heightened level of review asks the Court to recognize that, at a minimum, “rationality means that regulations must be designed to accomplish, not undermine, their objectives.”²¹⁰ The threaders argue that the TDLR fails this standard for two reasons: (1) the TDLR does not limit the licensing scheme solely to sanitation, and (2) consumers may actually be duped into believing that licensed cosmetologists—who are likely to be untrained in eyebrow threading—have the necessary skills to perform the practice.²¹¹ The second reason is not overly persuasive, because a consumer would quickly discover—presumably in the shop chair—that the cosmetologist hired either could, or could not, practice the art of eyebrow threading.²¹² The first argument is more persuasive and touches on each of the prongs of the test.²¹³

If the TDLR’s purpose in requiring licensure necessarily flows from ensuring the public is protected from unsanitary practices, then why does the TDLR set a minimum of seventy-five training hours for makeup and only forty for “sanitation, safety, and first aid”?²¹⁴ Perhaps more

206. *Id.*

207. *Id.*; see also NEILY III, *supra* note 65, at 3, 61–63 (arguing that deference to legislatures constitutes judicial abdication, and discussing the Court’s deference to the state in *Williamson v. Lee Optical* after inventing support “out of thin air”).

208. See *supra* note 118 and accompanying text.

209. See *supra* text accompanying note 119.

210. See Petitioners’ Brief on the Merits, *supra* note 107, at 53.

211. See *id.*

212. See discussion *supra* notes 168–70, and accompanying text.

213. See Petitioners’ Brief on the Merits, *supra* note 107, at 53.

214. 16 TEX. ADMIN. CODE § 83.120 (Westlaw through 2015) (Tex. Dep’t of Licensing & Regulation, Cosmetology Administrative Rules). Arguably, a more relevant question may be why an eyebrow threader would even require training in makeup. See FRIEDMAN, *supra* note 78, at 141 (arguing that when a subset of individuals can choose who may pursue an occupation, several “irrelevant” factors will be considered). Generously accepting that all currently prescribed training hours are necessary to ensure public health and safety, an esthetician curriculum whittled down to include those hours necessary for “sanitation, safety, and first aid” (40); “superfluous hair removal” (25); “[o]rientation,

importantly, how does 3% to 6% of the required licensure curricula constitute an appropriate foundation for training programs dedicated almost entirely to other subjects?²¹⁵ The answer to these questions is simple, highlighting why the threaders should prevail under this form of heightened review: the TDLR's stated purpose cannot be seriously reconciled with the actual effect of the cosmetology regulation.²¹⁶ The more logical explanation for the regulation's purpose is protecting licensed cosmetologists from unlicensed competitors.²¹⁷ Arguably, asserting this stated purpose would reflect a more believable representation of the TDLR's motivations.²¹⁸ As we have seen, however, the assertion of economic protectionism as a legitimate state interest would likely cause the regulation to fail a federal court challenge under the Fifth Circuit precedent set forth in *St. Joseph Abbey v. Castille*.²¹⁹

A Patel victory is the only logical result should the Supreme Court of Texas adopt the Texas rational basis test. The Court would begin its analysis by affording deference to the TDLR and accepting the agency's stated purpose for the licensing regulation as it did in *Sullivan* and *Martin*.²²⁰ As highlighted in *Martin*, the Court would limit its review to the evidentiary record to determine if the TDLR's regulation rationally relates to public health and safety.²²¹ Next, the Court would apply the heart of the test and review the regulation's stated purpose weighed against its actual effect.²²² In *Sullivan*, the Court found that the overbroad and over-inclusive student classifications did not rationally relate to discouraging student-athlete recruitment. Here, under similar reasoning, the Court would likely determine that 710 or 1,460 hours of training, unrelated to sanitation, does not rationally relate to the required curricula to public health and safety.

rules and laws" (50); and "care of client" (50); would cut the required hours to secure an esthetician license by more than 75%. See 16 TEX. ADMIN. CODE § 83.120.

215. See 16 TEX. ADMIN. CODE § 83.120. This number is derived from the Esthetician Curriculum and then doubled to account for the 1,500 hour Cosmetology Curriculum. *Id.* This may be too generous, as the Cosmetology Curriculum does not actually list any required hours for sanitation, safety, or first aid. See *id.* Additionally, Patel's brief noted, "At oral argument in the court of appeals, TDLR conceded that, by its own reckoning, at least 57% of the 750-hour program is altogether irrelevant to threading." See Petitioners' Brief on the Merits, *supra* note 107, at 12 n.8.

216. See Petitioners' Brief on the Merits, *supra* note 107, at 55–56.

217. See generally KLEINER, *supra* note 27 (discussing occupational licensing as a method utilized by industries to protect the employment and wages of industry insiders).

218. See *id.*

219. See *supra* Part III.B.

220. See *supra* notes 120–32 and accompanying text.

221. See *supra* notes 129–30 and accompanying text.

222. See *supra* note 118 and accompanying text.

C. Finding the Real and Substantial Connection

The analysis under the real and substantial test tracks similarly to the Texas rational basis test. Should the threaders achieve victory under the less rigorous Texas rational basis test, logically the TDLR's licensing scheme would fail to sidestep an even higher standard of review. Under the real and substantial test, a court must complete an evidence-based review of the purpose and effect of a challenged regulation.²²³ Additionally, the court must determine that the purpose and the effect of the regulation constitute a real and substantial connection versus a simple inquiry into whether some rational relationship exists.²²⁴

As in *Satterfield v. Crown Cork & Seal Co.*, in which a lack of legislative findings supporting the real and substantial connection to limiting asbestos claims weighed against the effect of retroactively barring litigants' efforts at recovery, the test applied to *Patel* would strike a similar imbalance and result in a *Patel* victory.²²⁵ Clearly, a training curriculum that spends only a minimal amount of time focusing on the stated objectives prescribed by the regulation confirms that the licensing scheme at issue in *Patel* does not have a real and substantial connection to those objectives.²²⁶ Additionally, the barrier to employment suffered by potential eyebrow threaders, as a result of the hundreds of required hours and thousands of needless dollars for training, could only be seen as too harsh a result, even if the Court determined that some sort of connection between licensure and public health and safety does exist.²²⁷

Aside from showing that a clear victory under the real and substantial test is probable, the threaders further argued that the time is *now* for the Court to adopt the heightened standard of review.²²⁸ Specifically, the eyebrow threaders claimed that the test strikes "the right balance between individual liberty and government power."²²⁹ Additionally, the test better demonstrates individual liberty and entrepreneurship, which is part of Texas tradition.²³⁰ Finally, by adopting the heightened level of review, Texas would join several other states that have already adopted the real and substantial test.²³¹ Simultaneously appealing to the famously independent nature of Texas tradition, while pointing to the twenty other states that have applied the real and substantial test, is laudable. The more persuasive argument, however, highlights the pragmatic balance that produces winners

223. See *supra* note 107 and accompanying text.

224. See Petitioners' Brief on the Merits, *supra* note 107, at 35.

225. See *supra* notes 113–15 and accompanying text.

226. See Petitioners' Brief on the Merits, *supra* note 107, at 46–49.

227. See *id.* at 49–51.

228. *Id.* at 63.

229. *Id.* at 30.

230. See *id.* at 35.

231. *Id.* at 40.

and losers on each side while achieving the legitimacy that only flows from meaningful judicial review.

The threaders explained that results like those in *Satterfield* and *Humble Oil & Refining Co. v. City of Georgetown* show that applying the real and substantial test provides opportunities for plaintiffs to successfully challenge unconstitutional statutes and regulations.²³² In *Humble Oil*, the Austin Court of Appeals found that requiring large fuel trucks to transfer fuel into smaller trucks before entering Georgetown actually increased the chances of accidents or fires, effectively severing a real and substantial connection between the health and safety purpose of the regulation with its unintended effect.²³³ This contrasts with *City of Houston v. Johnny Frank's Auto Parts Co.* and *City of Coleman v. Rhone*, in which city governments prevailed over plaintiffs even under a heightened level of scrutiny.²³⁴ In *Johnny Frank's*, the Fourteenth Court of Appeals in Houston balanced the city's evidence, showing that wrecked vehicles create a risk of fire and serious injury, against the burdens imposed on tow companies required to build walls around wrecked cars drained of flammable fluids.²³⁵ In *Rhone*, the Eastland Court of Appeals reviewed the evidentiary record and upheld parking restrictions related to a new fire lane after confirming that parked cars were obstructing fire trucks attempting to respond to emergencies.²³⁶ In all of these cases, the courts took into consideration the purpose and effect of the challenged laws, weighed evidentiary records, and provided heightened scrutiny, yet laws clearly constructed to protect public health and safety, versus those arbitrarily designed to create economic barriers, survived.²³⁷ The eyebrow threaders in *Patel* convincingly argued that even when applying the highest level of review, legitimate laws actually based on protecting the public's health and safety can coexist with the individual Texan's right to earn a living.

VI. RESTORING ECONOMIC LIBERTY WHILE PROTECTING PUBLIC HEALTH AND SAFETY

*"A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines."*²³⁸

232. *See id.* at 35.

233. *See id.* at 33 (citing *Humble Oil & Ref. Co. v. City of Georgetown*, 428 S.W.2d 405, 407–14 (Tex. Civ. App.—Austin 1968, no writ)).

234. *See id.* at 35.

235. *See id.* at 33–34 (citing *City of Houston v. Johnny Frank's Auto Parts Co.*, 480 S.W.2d 774, 775–79 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.)).

236. *See id.* at 34 (citing *City of Coleman v. Rhone*, 222 S.W.2d 646, 648–51 (Tex. Civ. App.—Eastland 1949, writ ref'd)).

237. *See id.* at 35.

238. *Ralph Waldo Emerson Quotes*, BRAINYQUOTE, <http://www.brainyquote.com/quotes/quotes/r/ralphwaldo136909.html> (last visited Nov. 18, 2015).

Whatever the merits associated by many with occupational licensing as an economic regulation, when entrepreneurs, using single strands of cotton thread as their tools, find their way before the highest court in Texas to assert their constitutional right to earn a living, the time has come to reconsider licensing as a viable public policy. At the very least, the standard that courts use to evaluate the state's encroachment on economic rights should reflect meaningful judicial review. A better solution would combine both options.²³⁹ When deciding *Patel v. Texas Department of Licensing & Regulation*, the Supreme Court of Texas should reject the federal rational basis test and adopt a heightened level of judicial review. The review should require the state to produce evidence supporting the real and substantial connection between the purpose and effect of economic regulation that prohibits, prevents, or otherwise impedes Texans from securing employment in the field they choose. Additionally, the Texas Legislature, and the state's corresponding regulatory agencies, should consider adopting certification as an alternative to licensure for many occupations. Accomplishing these objectives would remove the unconstitutional barriers to wealth and employment created by occupational licensure while preserving Texans' health and safety.

A. *Deferring to Economic Liberty*

Essential to securing Texans' economic liberty, the Supreme Court of Texas should avoid the temptation to forgo choosing a uniform standard of review when deciding *Patel*.²⁴⁰ Texas should take the lead by adopting the real and substantial test as other states facing court challenges consider adopting a similar standard.²⁴¹ Additionally, Texas would join the Fifth Circuit by adopting a test that requires the meaningful judicial review applied in *St. Joseph Abbey v. Castille*.²⁴² Finally, adopting the real and substantial test would better protect the average Texan's rights by producing more equitable judicial decisions while achieving a stronger balance between preserving economic liberty and protecting public health and safety.²⁴³

1. *Leading By Example*

Texans are not alone in challenging licensing regimes. In late 2014, the United States Supreme Court heard oral arguments in *North Carolina*

239. See *infra* Part VI.A–B.

240. See *supra* Part III.C.4.

241. See *infra* Part VI.A.1.

242. See *infra* Part VI.A.2.

243. See *infra* Part VI.A.3.

State Board of Dental Examiners v. FTC, in which a dental licensing board prevented non-licensed dentists from performing simple teeth-whitening procedures.²⁴⁴ In Arkansas, Missouri, and Washington, African hair braiders recently challenged arbitrary licensing regulations.²⁴⁵ Similar to the TDLR in *Patel*, the state boards are enforcing training curricula that require hundreds of hours of instruction in areas unrelated to hair braiding. Meanwhile, animal massage therapists are challenging the Arizona veterinary board's requirement that therapists attend veterinary school, even though their human massage therapist counterparts are not required to obtain medical licenses to treat humans.²⁴⁶

The common thread underlying the recent surge in occupational licensing challenges is runaway regulatory agencies using legislative deference afforded by the rational basis test to expand their reach into the daily lives of average citizens.²⁴⁷ Only through meaningful judicial review, aimed at investigating the substantial connection between the purpose and effect of challenged regulations, can hair braiders, animal massagers, and eyebrow threaders preserve their liberty.²⁴⁸ Additionally, removing unlimited legislative deference will dismantle the commercial interests collaborating with governments that create unconstitutional barriers to employment, limit growth, and corrupt local politics.²⁴⁹ Moreover, as Texas leads by example and adopts the real and substantial test, lending weight to challenges outside its borders, the Supreme Court of Texas will move the state in line with the Fifth Circuit following *St. Joseph Abbey v. Castille*.

2. Where the Wind Blows

Following the Fifth Circuit's rejection of the no-scrutiny rational basis test in *St. Joseph Abbey*, little time passed before the decision impacted Texas's regulatory regime.²⁵⁰ Early in 2015, a federal district court in

244. George F. Will, Opinion, *Supreme Court Has a Chance to Bring Liberty to Teeth Whitening*, WASH. POST (Oct. 10, 2014), http://www.washingtonpost.com/opinions/george-will-supreme-court-has-a-chance-to-promote-cleaner-competition/2014/10/10/13a3a2c0-4fd8-11e4-babe-e91da079cb8a_story.html.

245. *Arkansas Hair Braiding*, INST. FOR JUST., <http://ij.org/case/arkansas-hair-braiding/> (last visited Nov. 18, 2015); *Missouri Hair Braiding*, INST. FOR JUST., <http://ij.org/case/missouri-hair-braiding/> (last visited Nov. 18, 2015); *Washington Hair Braiding*, INST. FOR JUST., <http://ij.org/case/washington-african-hair-braiding/> (last visited Nov. 18, 2015).

246. *Arizona Animal Massage*, INST. FOR JUST., <http://ij.org/arizona-animal-massage-backgrounder> (last visited Nov. 18, 2015).

247. See, e.g., *id.*

248. See NEILY III, *supra* note 65.

249. See Will, *supra* note 244.

250. See generally *Brantley v. Kuntz*, No. A-13-CA-872-SS, 2015 WL 75244, at *8 (W.D. Tex. Jan. 5, 2015) (holding that the test outlined in *St. Joseph Abbey* controlled the decision to overturn TDLR's hair braiding regulations).

Austin found the TDLR's barber college regulations violated hair braider Isis Brantley's substantive due process rights under the United States Constitution.²⁵¹ The TDLR required Brantley to acquire 2,250 hours in barber school instruction, pass four exams, and pay thousands of dollars creating a barber college just to teach a thirty-five hour hair-braiding course.²⁵² The court noted that the TDLR, nearly mirroring its argument against the threaders in *Patel*, was devoted to "the familiar proposition that judicial deference to legislative decision making is at its apex during rational basis review."²⁵³ Although the TDLR made every effort to discredit the decision in *St. Joseph Abbey* and urged the court follow *Lee Optical* instead, Judge Sparks held that the Fifth Circuit's application of heightened rational basis review controlled.²⁵⁴ Although not quite searching for a real and substantial connection to the TDLR's stated objectives, the court completed an evidence-based review and found that several individual regulatory requirements did not rationally relate to a legitimate state interest.²⁵⁵

Following Brantley's victory, the TDLR announced that the agency would not appeal the decision.²⁵⁶ The TDLR's Executive Director, Bill Kuntz, promised that the agency would "work with [its] legislative oversight committees on proposals to remove unnecessary regulatory burdens for Texas businesses and entrepreneurs."²⁵⁷ Eyebrow threaders await the final decision in *Patel* and likely wonder if the same forgiving oversight will be applied to their occupation.²⁵⁸ In a supplemental filing to the Supreme Court of Texas informing the Court of the decision in *Brantley*, the eyebrow threaders asserted that adopting a standard below the Fifth Circuit would be "a hollow act" because "[t]he state constitution is, after all, the 'ceiling' for Texans' individual liberty over and above the 'floor' set by federal law."²⁵⁹ Applying the real and substantial test in *Patel* would almost guarantee the identical outcome from *Brantley*, and the resulting consistency between Texas courts and the Fifth Circuit would

251. See Nick Sibilla, *How Hair Braiding Explains What's Gone Wrong With America's Economy*, FORBES (Jan. 29, 2015, 3:47 PM), <http://www.forbes.com/sites/instituteforjustice/2015/01/29/hair-braiding-and-occupational-licensing/>.

252. *Texas Hairbraiding Instruction*, supra note 45.

253. *Brantley*, 2015 WL 75244, at *4.

254. *Id.* at *5.

255. *Id.* at *5–8.

256. *Barbering*, TDLR, <http://www.tdlr.texas.gov/barbers/barbers.htm#braidruling> (last visited Nov. 18, 2015).

257. *Id.*

258. *Cf.* discussion supra notes 256–57 and accompanying text (highlighting TDLR's acquiescence toward hair braiders upon losing federal court challenge).

259. Additional Citations Received at 2, *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015) (No. 12-0657).

assure that Texans could vindicate their economic rights in both state and federal courts.²⁶⁰

3. Occam's Razor

A reasoned observer may analyze the facts in *Patel* and conclude that bad facts make bad law. If the Court correctly applies the federal rational basis test, it will conclude that no reasonable set of facts support a victory for the TDLR.²⁶¹ Yet, this analysis only serves to highlight the precise reason why the rational basis test fails as an adequate standard.²⁶² Twice, underlying courts were presented with the same evidence showing the TDLR's arbitrary regulations forced eyebrow threaders to spend hundreds of hours and thousands of dollars learning a vocation they never intended to practice.²⁶³ Each time, the courts cloaked judicial abdication in the form of blind deference to a regulatory board focused on protecting the interests of the threaders' competitors, not the public they were appointed to serve.²⁶⁴

Sometimes, the simplest solution actually is the best answer: the Supreme Court of Texas should immediately adopt the real and substantial test.²⁶⁵ As the eyebrow threaders convincingly argued, the heightened level of review affords economic liberty the greatest level of protection, while simultaneously allowing reasonable economic regulation that does not place arbitrary boundaries on Texans' right to work.²⁶⁶ The meaningful review required by the test fosters legitimate outcomes and increases the likelihood that future decisions will carry just and equitable precedential value.²⁶⁷ Moreover, the heightened standard would have the effect of necessitating a reevaluation of other onerous licensing regimes and encourage the legislature to adopt less burdensome economic regulations, such as certification.²⁶⁸

B. Certifying Liberty

Certification as an alternative to licensing provides the public with the information necessary to make safe and wise consumer choices, while at the same time eliminating the entry barriers into a profession that licensing

260. See *supra* notes 225–27 and accompanying text.

261. But see *Patel v. Tex. Dep't of Licensing & Regulation*, 464 S.W.3d 369, 386 (Tex. App.—Austin 2012) (holding under the facts in *Patel* that the TDLR's licensing survived rational basis review), *rev'd*, 469 S.W.3d 69 (2015).

262. See *supra* Part V.A.

263. See *Patel*, 464 S.W.3d at 387.

264. See *id.*

265. See *supra* Part V.C.

266. See Petitioners' Brief on the Merits, *supra* note 107, at 33–35.

267. See *id.*

268. See *infra* Part VI.B.

imposes.²⁶⁹ Certification allows consumers that are otherwise moved by “loss aversion” relative to potential gains the ability to forgo licensure as a means to avoid negative outcomes.²⁷⁰ Professor Morris Kleiner posits that this “weaker” form of regulation allows the consumer to have confidence that a service provider will have a minimum level of training and education to perform the task they were hired for.²⁷¹ Additionally, consumers would have the choice between practitioners who have gained the skills to call themselves “certified”—who also likely charge a premium rate—and other, less skilled—and cheaper—uncertified practitioners.²⁷² Already the second largest form of economic regulation in the United States, certification grants “occupational right-to-title” to those who meet predetermined standards either by legislative bodies, regulatory agencies, or through private organizations.²⁷³ This differs from licensing when a state agency grants a “right-to-practice,” preventing those without the license from engaging in the profession.²⁷⁴

1. *Barrier to Entry Removed*

With the basis for substantive due process claims in occupational licensing cases essentially boiling down to the plaintiffs asserting that the federal and state constitutions protect a right to earn an honest living, certification arguably strikes an acceptable balance between individual economic liberty and the state’s interest in protecting the health and safety of its citizens.²⁷⁵ With the barrier to *entering* a profession removed, many

269. See KLEINER, *supra* note 27, at 152.

270. See *id.* Professor Kleiner identifies “loss aversion” as consumer preference for the status quo or the reduction of risk related to a highly negative outcome. *Id.* at 142 (citing Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decisions Under Risk*, 47 *ECONOMETRICA* 2, 263–91 (1979)).

271. See *id.* at 152.

272. See *id.* at 153.

273. See *id.* at 18, 152. Although not quite the reach of occupational licensing, more than 200 occupations are certified by at least one state agency. See *id.* at 152 (citing Pamela L. Brinegar & Kara L. Schmitt, *State Occupational and Professional Licensure*, in *THE BOOK OF THE STATES* 567–80 (1992–1993)); LISE SMITH-PETERS ET AL., *THE DIRECTORY OF PROFESSIONAL AND OCCUPATIONAL REGULATION IN THE UNITED STATES AND CANADA* (1994); see also Morris M. Kleiner & Kyoung Wun Park, *Life, Limbs, and Licensing: Occupational Regulation, Wages, and Workplace Safety of Electricians, 1992–2007*, BUREAU LAB. STAT.: MONTHLY LAB. REV. (Jan. 2014), <http://www.bls.gov/mlr/2014/article/life-limbs-and-licensing-1.htm> (discussing the administration of a certification system by either governmental or private, nonprofit entities).

274. See KLEINER, *supra* note 27, at 18; Kleiner & Park, *supra* note 273.

275. See Petitioners’ Brief on the Merits, *supra* note 107, at 18 n.9. The Institute for Justice, a libertarian public interest law firm that brings many of these substantive due process challenges, argues, “[A]rbitrary licensing, permitting and other requirements . . . stand between entrepreneur of modest means and their ability to climb the economic ladder. The mission of IJ’s economic liberty practice is to remove these barriers by persuading state and federal judges to take entrepreneurs’ constitutional rights seriously.” *Economic Liberty*, INST. FOR JUST., <http://ij.org/cases/economicliberty> (last visited Nov. 18, 2015).

of the current constitutional issues related to occupational licensing necessarily vanish.²⁷⁶ Additionally, practitioners would avoid potential, and seemingly arbitrary, occupational redefinitions by licensing boards that cause entire occupations to suddenly require licensure to remain legal.²⁷⁷

In the case of eyebrow threading, a cosmetology certification versus licensing scheme would allow the practitioners in *Patel* to begin practicing their craft while acquiring the education and skills necessary to gain certification.²⁷⁸ The threaders could even avoid certification altogether by doing a simple cost–benefit analysis.²⁷⁹ This actually would put the onus on the threading consumer, not the practitioner, to determine if the proffered service requires additional training.²⁸⁰ The consumer, after all, will choose to use only certified cosmetologists if they perceive additional value in the training they would receive.²⁸¹ The reduced cost of uncertified threaders, however, may be more attractive to many consumers, allowing threaders to continue to earn a living while forgoing certification.²⁸² Most importantly, a certification-based regulatory scheme removes the ultimate decision to obtain certification in a chosen profession from the financially motivated licensing boards and the courts, and places it into the trained hands of the practitioners and the customers they serve.

Additional barrier-removal benefits are readily apparent. With certification, low-income individuals, who are the least able to afford upfront the costs of licensure, would see the most immediate benefit.²⁸³ Minorities would be better protected from state agencies and regulatory boards that all too often utilize licensing as a means to enshrine discrimination in economic regulation.²⁸⁴ Additionally, a regulatory system

276. See *supra* Part IV. Some constitutional issues could remain, should the Supreme Court of Texas not adopt a heightened level of review, because regulatory bodies could still use certification to protect the higher wages of favored groups. See KLEINER, *supra* note 27, at 75–84 (analyzing the correlation between economic regulation of occupations, in this case licensing, and an increase in the wages for those occupations).

277. See Petitioners’ Brief on the Merits, *supra* note 107, at 5 (discussing the TDLR’s sudden 2008 change that caused eyebrow threading to fall within the practice of cosmetology).

278. See KLEINER, *supra* note 27, at 8 (discussing how anyone that is not certified can do specific tasks, but can only become “certified” once meeting specific requirements).

279. See, e.g., *Certifications*, AAPL: AM. LANDMEN, <http://www.landman.org/education/certification> (last visited Nov. 18, 2015) (explaining that landmen who choose one of three separate certifications enhance their credibility in addition to “increas[ing] earning potential”).

280. See KLEINER, *supra* note 27, at 156.

281. See *id.*

282. Cf. KLEINER, *supra* note 36, at 4 (discussing how those consumers that seek “low-quality” services are hampered by licensing regulations because prices remain higher than what the consumers normally choose to pay, which also results in limited services). The low-cost attraction would apply mostly to low-income consumers who are harmed the most by licensing regulation. See *id.*

283. See Carrie Sheffield, *How Cutting Red Tape Helps Low-Income Families*, FORBES (Feb. 2, 2015, 8:43 PM), <http://www.forbes.com/sites/carriesheffield/2015/02/02/can-cutting-red-tape-generate-200b-for-low-income-families/>.

284. See Marc T. Law & Mindy S. Marks, *Effects of Occupational Licensing Laws on Minorities: Evidence from the Progressive Era*, 52 J.L. & ECON. 351, 352 (2009); SANDEFUR, *supra* note 44, at

based on certification would foster migration into Texas as licensing also inhibits the free flow of workers intrastate due to varying reciprocity issues.²⁸⁵ The economic benefit to Texas in allowing more job opportunities for low-skilled or less-educated workers and entrepreneurs takes the form of a lower unemployment rate and potentially a reduction in overall income inequality.²⁸⁶

2. *Change at the Expense of the Poor?*

One might assume that taking away the purported consumer protection that licensing is assumed to provide would most negatively impact lower income consumers.²⁸⁷ Hiring a licensed individual, we are told, provides the least knowledgeable consumer an assurance that the practitioner has acquired the appropriate skills and completed a commensurate level of training.²⁸⁸ Moving to certification would mean that certain consumers, likely those with lesser means, would hire uncertified practitioners and the results could be disastrous.²⁸⁹ A legitimate policy issue queries to what extent the government should protect individual consumers from making bad decisions.²⁹⁰ More importantly, would certification actually produce these ominous results?

Professor Kleiner suggests that for most licensed occupations, converting to a system of certification could improve overall outcomes for all, including the poor.²⁹¹ To the extent that licensing does produce better overall quality, the benefactors appear to be well-off individuals that hire licensed practitioners providing services covered by insurance policies.²⁹²

146–48.

285. See KLEINER, *supra* note 27, at 90–91 (describing the “continuum” of state policies related to reciprocal agreements for occupational licensing); Stephanie Simon, *A License to Shampoo: Jobs Needing State Approval Rise*, WALL ST. J. (Feb. 7, 2011, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748703445904576118030935929752> (“It’s tough for workers to move around the country, for example, when each state has a different list of jobs that require licenses—and a different set of standards to pass.”). If a cosmetologist moves to Texas and seeks a reciprocal license, they must, in addition to abiding by the myriad administrative tasks and paying the applicable fees, show that the license program from his or her home state meets the equivalent standard as the Texas licensing program. See 16 TEX. ADMIN. CODE § 83.28 (Westlaw through 2015). If the standard is not met, to gain licensure the applicant must pass all written and practical state exams. *Id.* By way of comparison, estheticians in New Mexico and Oklahoma must only complete 600 hours of training, leaving them 150 hours short of the 750 required in Texas. N.M. CODE R. § 16.34.5.12 (LexisNexis, Westlaw through 2015); *Licensing & Fee Information*, OKLA. ST. BOARD COSMETOLOGY & BARBERING, http://www.ok.gov/cosmo/Licensing_&_Fee_Information/#EstheticianFacialistLicenseRequirements (last visited Nov. 18, 2015).

286. See *infra* Part VI.B.2.

287. *But see* KLEINER, *supra* note 31, at 22.

288. See KLEINER, *supra* note 27, at 1.

289. See *id.*

290. *Id.* at 154.

291. See KLEINER, *supra* note 31, at 22.

292. See KLEINER, *supra* note 27, at 50 (citing Carl Shapiro, *Investment, Moral Hazard and*

In almost every other area studied, however, research does not support that licensing significantly improves quality.²⁹³ To the low-income consumer, the lack of access to a service often leads to the greatest chance for receiving reduced quality.²⁹⁴ Priced out of being able to hire licensed practitioners, some consumers are forced to do the work themselves or to hire someone who works “under the table” without a license.²⁹⁵ The competition created by a certification scheme would result in lower costs across the board because the pool of practitioners would increase, and those obtaining certification would have to compete with the uncertified.²⁹⁶ Weighed against the potential for some decrease in quality by moving to certification, the increased access to services relative to the decrease in cost should prevail as the more equitable policy choice.²⁹⁷

As we have seen, securing a cosmetology license involves a time-consuming and costly process.²⁹⁸ Yet, if an individual wants to practice the relatively innocuous craft of eyebrow threading, they are forced to go through the licensing process even if they already have the skills necessary to safely and effectively practice.²⁹⁹ Due to situations like these across the country, and the estimated \$203 billion cost associated with occupational licensure to the United States economy, the political winds are shifting, and alternatives, such as certification, are being considered.³⁰⁰ Congressman Paul Ryan, the Wisconsin representative and former vice-presidential candidate, recently called for nationwide occupational licensing reform.³⁰¹ State legislatures in Minnesota, Utah, Michigan, and Florida have recently introduced or considered licensing reform legislation.³⁰² Additionally, the governor of Iowa recently vetoed a bill that

Occupational Licensing, 53 REV. ECON. STUD. 5, 843–62 (1986)). Dentists, on the other hand, have been shown to buck this trend, and research suggests that the licensing of dentists does not produce better quality service but does result in increased costs to consumers. *See id.*

293. *See id.* at 12–13 (compiling multiple studies, including construction contractors, florists, and teachers, among others, and confirming that “few studies have shown significant benefits of occupational regulation on the quality of service received by consumers” and that licensing “may not improve consumer protection”). Professor Kleiner dubs this the “reverse Robin Hood effect” because higher income individuals seeking high-quality services gain from licensing at the expense of lower income individuals forced to seek out low-quality services. *See KLEINER, supra* note 36, at 4.

294. *See KLEINER, supra* note 27, at 8.

295. *See id.* at 43 (highlighting a story about a man who completed his own root canal surgery because he could not afford dental services).

296. *See KLEINER, supra* note 31, at 8.

297. *See id.* at 22. To the extent that perception of quality trumps reality, then policymakers can look to recent studies that show that with nearly every requirement to obtain licensure or certification (high school diploma, passing an exam, continuing education, among others), certification is only slightly less demanding. *Id.* at 8.

298. *See supra* Part IV.

299. *See supra* Part IV.

300. Sheffield, *supra* note 283.

301. *Id.*

302. *See KLEINER, supra* note 31, at 21.

would have licensed four occupations in health-related fields.³⁰³ The governor was not prepared to require higher-than-necessary levels of education that would bar future workers with the necessary skills from entering the occupations.³⁰⁴ The governor preferred certification as a more cost-effective alternative for regulation.³⁰⁵ In Texas, the second most populous state, with the thirteenth highest gross domestic product in the world, the time to consider adopting certification as an alternative to most forms of licensing is now.³⁰⁶ The implementation of certification as a viable alternative to licensing would not only protect the economic liberty of Texans but also benefit the Texas economy as a whole.

VII. CONCLUSION

As it turns out, Teddy Threader's outlook may be bright. Even as it seems that licensing boards consume more occupations each year, recent court victories and alternatives to licensure provide a hopeful perspective.³⁰⁷ As more Texans realize that financial independence should not have to come from a government permission slip, more challenges to arbitrary licensing regimes will follow.³⁰⁸ Yet, Texans must be able to rely on a judiciary that affords meaningful review to statutes and regulations that infringe upon their economic rights.³⁰⁹

After *Carolene* and *Lee Optical*, the federal rational basis test ceased to function as a mechanism capable of protecting economic rights.³¹⁰ In *Patel v. Texas Department of Licensing and Regulation*, the Supreme Court of Texas can reject the federal rational basis test and adopt a heightened level of judicial review like the Fifth Circuit in *St. Joseph Abbey*.³¹¹ The Court can then resolve the existing circuit split by adopting the real and substantial test, requiring a real and substantial connection between a challenged law's stated purpose and its actual effect.³¹²

Regardless of the decision in *Patel*, the legislature could reevaluate occupational licensing as the preferred form of economic regulation in Texas.³¹³ As an alternative, certification allows Texans entry into

303. *Id.*

304. *See id.*

305. *See id.*

306. Elena Holodny, *11 Staggering Facts About the Texas Economy*, BUS. INSIDER (Nov. 2, 2014, 8:50 AM), <http://www.businessinsider.com/facts-about-the-texas-economy-2014-11>; *see* Jacob Pramuk, *Florida Surpasses NY as 3rd Most Populous State*, CNBC (Dec. 23, 2014, 12:38 PM), <http://www.cnbc.com/id/102292115#>.

307. *See supra* Part VI.

308. *See supra* Part II.

309. *See supra* Part V.

310. *See supra* Part III.A.

311. *See supra* Part III.B.

312. *See supra* Part VI.A.

313. *See supra* Part VI.B.

occupations previously barred due to onerous and arbitrary training requirements coupled with thousands of dollars in school tuition and fees.³¹⁴ Additionally, the lower costs of goods and services stemming from greater job opportunities and increased competition provide previously unaffordable access to potentially higher quality services.³¹⁵ Ultimately, greater judicial review and less burdensome economic regulation protect every Texan's economic liberty while refocusing legislative bodies and regulatory agencies on legitimate means of protecting the public's health and safety.

314. *See supra* Part VI.B.1.

315. *See supra* Part VI.B.2.