William & Mary Bill of Rights Journal

Volume *14 (2005-2006)*
Issue 3

Article 11

February 2006

Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries

Timothy Sandefur

IS ECONOMIC EXCLUSION A LEGITIMATE STATE INTEREST? FOUR RECENT CASES TEST THE BOUNDARIES

Timothy Sandefur*

INTRODUCTION

For most people, economic opportunity defines the American Dream.[1] For centuries, immigrants have struggled to reach the United States for a chance to find a better job or open a business to support themselves and their families. Within the United States, Americans have fought to lower barriers, such as racism and sexism, that stand in the way of economic opportunity. Yet many barriers remain. In particular, government regulation has often overwhelmed the right to earn an honest living. Although these regulations are promulgated in the name of public safety and welfare, they often bar the door of opportunity and protect, not the public, but the private interest of established firms seeking to prevent competition from entrepreneurs.[2] Unfortunately, while previous generations saw economic freedom as a vital

---

* Staff Attorney, Pacific Legal Foundation. J.D. 2002, Chapman University School of Law; B.A. 1998, Hillsdale College. Mr. Sandefur is the lead attorney in the Pacific Legal Foundation's Economic Liberty Project. In that capacity, he filed amicus curiae briefs in *Powers v. Harris*, *Sagana v. Tenorio*, and *Meadows v. Odom*. He also represents the plaintiffs in *Merrifield v. Lockyer*. Mr. Sandefur would like to dedicate this article to his dear friend, Scott Cueto. "[F]riendship is precious, not only in the shade but in the sunshine of life; & thanks to a benevolent arrangement of things, the greater part of life is sunshine." Letter from Thomas Jefferson to Maria Cosway (Oct. 12, 1786), *in* THOMAS JEFFERSON: WRITINGS 873 (Merrill Peterson ed., 1984).

[1] *See, e.g.*, Bae v. Peters, 950 F.2d 469, 471 (7th Cir. 1991); Mancuso v. Consol. Edison Co. of N.Y., Inc., 56 F. Supp. 2d 391, 393 (S.D.N.Y. 1999); Fifth Third Bank of W. Ohio v. United States, 56 Fed. Cl. 668, 674 (2003); Turner v. Turner, 809 A.2d 18, 24 (Md. Ct. Spec. App. 2002) (depicting the American Dream as working one's way from "rags to riches"); Nat'l Rejectors, Inc. v. Trieman, 409 S.W.2d 1, 26 (Mo. 1966) (describing the "American dream" as including owning one's own business).

[2] There is a rich and thorough scholarship on occupational licensing abuse. *See, e.g.*, DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 28–45 (2001); S. DAVID YOUNG, THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA (1987); David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89 (1994) [hereinafter Bernstein, *Licensing Laws*]; David Fellman, *A Case Study in Administrative Law — The Regulation of Barbers*, 26 WASH. U. L.Q. 213 (1941); Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976); J.A.C. Grant, *The Gild Returns to America, I*, 4 J. POL. 303 (1942); Alex Maurizi, *Occupational Licensing and the Public Interest*, 82 J. POL. ECON. 399

constitutional right,[3] since the 1930s, economic regulations, including occupational licensing laws, have greatly restricted this freedom. The regulations have been reviewed by courts under the rational basis test, a test so lenient that virtually no law can fail it.[4] Nevertheless, even under this deferential regime, courts have occasionally declared that the Constitution limits the degree to which states may erect barriers to entry into the job market.[5] For example, in *Schware v. Board of Bar Examiners*,[6] the Supreme Court held that the Due Process Clause requires occupational licensing laws to have some "rational connection with the applicant's fitness or capacity to practice" the profession.[7] This is consistent with the Supreme Court's repeated holding that the rational basis test, while very deferential, still requires laws to have some *public* justification, rather than being based on mere animus[8] or the desire to benefit a particular constituency.[9]

In four recent cases, federal courts have been confronted with the issue of whether regulations designed for no other purpose than to protect political insiders from fair economic competition meet the standards of the Fourteenth Amendment. Most notably, in *Powers v. Harris*,[10] the Tenth Circuit Court of Appeals upheld an occupational licensing requirement even while acknowledging that it was *solely intended* to protect established companies against competition — that is, even where the law had no *public* justification behind it.[11] "[I]ntrastate economic protectionism," the court declared, "constitutes a legitimate state interest."[12] This is the most

---

(1974); Thomas G. Moore, *The Purpose of Licensing*, 4 J.L. & ECON. 93 (1961); Jonathan Rose, *Occupational Licensing: A Framework for Analysis*, 1979 ARIZ. ST. L.J. 189; Lawrence Shepard, *Licensing Restrictions and the Cost of Dental Care*, 21 J.L. & ECON. 187 (1978); Kathleen Stolar, *Occupational Licensing: An Antitrust Analysis*, 41 MO. L. REV. 66 (1976); Note, *Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097 (1973); Mario Pagliero, What Is the Objective of Professional Licensing? Evidence from the US Market for Lawyers (Jan. 26, 2005) (unpublished working paper, University of Turin), *available at* http://ssrn.com/abstract=622761.

[3] *See generally* Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207 (2003).

[4] *See* Arceneaux v. Treen, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring) ("[Rational basis scrutiny] can hardly be termed scrutiny at all. Rather, it is a standard which invites us to cup our hands over our eyes and then imagine if there could be anything right with the statute.").

[5] *See, e.g.*, Lowe v. SEC, 472 U.S. 181, 228 (1985).

[6] 353 U.S. 232 (1957).

[7] *Id.* at 239.

[8] *See* Romer v. Evans, 517 U.S. 620, 632–33 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985).

[9] *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

[10] 379 F.3d 1208 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 1638 (2005).

[11] *Id.* at 1221.

[12] *Id.*

disastrous case for economic freedom in over seventy years.[13] Yet, despite a clear conflict between it and the decision of the Sixth Circuit Court of Appeals in a virtually identical case,[14] the Supreme Court recently declined to address the issue.[15] As a result, constitutional protection for economic opportunity remains in serious danger. That danger is further exemplified by *Sagana v. Tenorio*,[16] a recent Ninth Circuit decision affirming the explicitly discriminatory labor laws of the Northern Mariana Islands on the grounds that protecting some laborers against competition from others is a legitimate state interest under the Fourteenth Amendment. Two recent trial court decisions — *Merrifield v. Lockyer*[17] and *Meadows v. Odom*[18] — explore these themes further by evaluating the constitutionality of occupational licensing laws that lack any serious public-regarding justification.

In this article, I explain why mere economic protectionism is not a legitimate state interest, and why courts must revive the common sense limits on government's authority to grant pure political favors to economic interest groups. In doing so, I focus on these four recent cases. Part I briefly describes the history of occupational licensing. Part II gives a history and overview of the *Powers* case. In Part III, I discuss the principles that establish why economic protectionism violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Part IV puts these principles into concrete form by examining cases in which labor laws discriminating against immigrants have been held unconstitutional — and the *Sagana* case, which ignored such precedents. Part V concludes with the two district court decisions, *Meadows* and *Merrifield*, which suggest some important lessons for the future of economic liberty. Courts simply cannot avoid these lessons if the American Dream is to remain as it has long been understood.

I. OCCUPATIONAL LICENSING AS A PUBLIC HEALTH MEASURE

Occupational licensing has its roots in the medieval guild system, which required practitioners of various trades to serve as apprentices and to be approved by the guild before going into business.[19] It was only at the end of the nineteenth century, however, that government-enforced occupational licensing became a regular feature of American law.[20]

---

[13] *See* United States v. Carolene Prods. Co., 304 U.S. 144 (1938); W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

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

[15] *See* Powers v. Harris, 125 S. Ct. 1638 (2005) (denying certiorari).

[16] 384 F.3d 731 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 1313 (2005).

[17] 388 F. Supp. 2d 1051 (N.D. Cal. 2005).

[18] 360 F. Supp. 2d 811 (M.D. La. 2005).

[19] *See* YOUNG, *supra* note 2, at 9.

[20] *See* Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890–1910: A Legal and Social Study*, 53 CAL. L. REV. 487, 489 (1965); A. Scott McDaniel, Comment,

Licensing was seen as a reform measure, protecting the public from dangerous or incompetent practitioners. In *Dent v. West Virginia*,[21] the United States Supreme Court held that occupational licensing for doctors was a valid use of the state's authority to protect public health and safety. That decision was written by Justice Stephen Field, well known as the Court's leading defender of liberty of contract.[22] Yet Field held that the right to earn a living may be regulated to protect public health and safety. "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose," he wrote.[23] Under the Constitution, this right "cannot be arbitrarily taken from" any person, "[b]ut there is no arbitrary deprivation" when the state imposes "conditions . . . for the protection of society."[24] A state has the power "to provide for the general welfare of its people . . . [by] prescrib[ing] 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."[25] But if a licensing scheme did not reasonably relate to public health and safety, it would unconstitutionally "deprive one of his right to pursue a lawful vocation."[26]

In this decision, Field echoed his own majority opinion in *Cummings v. Missouri*,[27] in which the Court invalidated a law barring former Confederate soldiers from various occupations. Field held that the law was really just a disguised attempt to punish the former soldiers, contrary to the ex post facto clause.[28] Although the state claimed the law was merely a regulation to protect the public from dishonest and dishonorable practitioners,[29] Field rejected this as a sham: "The Constitution deals with substance, not shadows," he wrote.[30] The ban on ex post facto laws "was levelled at the thing, not the name. . . . If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."[31]

The Good, the Bad, and the Unqualified: The Public Interest and the Unregulated Practice of General Contracting in Oklahoma, 29 TULSA L.J. 799, 802 (1994) ("Between 1911 and 1915 alone, 110 statutes licensing 24 occupations were enacted.").

[21] 129 U.S. 114 (1889).

[22] *See, e.g.*, The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 109–10 (1873) (Field, J., dissenting) (contending that the right to earn a living "is the distinguishing privilege of citizens of the United States").

[23] *Dent*, 129 U.S. at 121.

[24] *Id.* at 121–22.

[25] *Id.* at 122.

[26] *Id.*

[27] 71 U.S. (4 Wall.) 277 (1866).

[28] *Id.* at 318–19.

[29] *Id.* at 294.

[30] *Id.* at 325.

[31] *Id. See also* Ho Ah Kow v. Nunan, 12 F. Cas. 252, 255 (Field, Circuit Justice, C.C.D. Cal. 1879) ("[W]e cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men.").

In the years following *Dent*, licensing schemes were affirmed in several cases involving the practice of medicine.[32] Spurred by these successes, reformers proposed licensing requirements for many other professions, often with beneficial results for public health and safety.[33] But there has always been a darker side to occupational licensing. Businesses which cannot reasonably be said to endanger the public health increasingly came under licensing requirements during the twentieth century, so that today even arborists,[34] shorthand reporters,[35] and landscape architects[36] must be licensed. It is difficult to imagine how some of these laws can be said to protect the public safety, even by the most strained interpretation. Although any regulation of any business might, through *some* chain of reasoning, be described as serving the public welfare, "[o]ne would . . . have to be more than a little naive to overlook the self-serving aspects of many of the goals" of such laws.[37] Contrary to their image as devices for protecting the public, licensing laws frequently do nothing more than "benefit[] the practitioners who are in the industry at the time the restrictions are imposed."[38]

Scholars of occupational licensing have noted that licensing has generally been "eagerly sought" by members of the professions, "always on the purported ground that licensure protects the uninformed public against incompetence or dishonesty, but invariably with the consequence that members of the licensed group become protected against competition from newcomers."[39] Some licensing laws are patently absurd from the perspective of public safety. For example, Walter Gellhorn noted that Georgia once required professional photographers to pass a syphilis test, and Indiana required boxers and wrestlers to take a loyalty oath.[40] Such requirements are "probably not motivated by anything so rational as a desire to discourage competition."[41]

Recognizing the abuse to which licensing can be turned, the California Supreme Court explained in 1918:

---

[32] *See, e.g.*, Watson v. Maryland, 218 U.S. 173, 176 (1910); Reetz v. Michigan, 188 U.S. 505, 506 (1903); Hawker v. New York, 170 U.S. 189, 194 (1898).

[33] *See* Hayne E. Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 J. POL. ECON. 1328, 1330 (1979); Edward P. Richards, *The Police Power and the Regulation of Medical Practice: A Historical Review and Guide for Medical Licensing Board Regulation of Physicians in ERISA-Qualified Managed Care Organizations*, 8 ANNALS HEALTH L. 201, 208–12 (1999).

[34] *See, e.g.*, LA. REV. STAT. ANN. § 3:3804 (2003).

[35] *See, e.g.*, CAL. BUS. & PROF. CODE § 8025.1 (West 1995).

[36] *See, e.g., id.* § 5615 (West 2003).

[37] Ira Horowitz, *The Economic Foundations of Self-Regulation in the Professions, in* REGULATING THE PROFESSIONS 3, 7 (Roger D. Blair & Stephen Rubin eds., 1980).

[38] Moore, *supra* note 2, at 95.

[39] Gellhorn, *supra* note 2, at 11.

[40] *Id.* at 14.

[41] *Id.*

> The exercise of the police power is available only for the purpose of promoting the general welfare, the interests of the public as distinguished from those of individuals or persons. It cannot be used to promote private gain or advantage, except so far as the same may also promote the public interest and welfare, and it is the latter, and not the former, effect which forms the basis of the power and warrants its exercise.[42]

Unfortunately, as with virtually all legislation, occupational licensing is subject to rent-seeking. This means that government power to regulate professions often falls into the hands of ambitious or politically adept groups who would try to use that power to enrich themselves at the expense of others.[43] As Gellhorn put it, "[A] well-knit special interest group is likely to prevail over an amorphous 'public' whose members are dispersed and, as individuals, are not in sharp conflict with the organized interest."[44] In other words, legislative power to grant economic benefits or impose economic burdens often becomes a prize in the political contest — a contest won, not by the most deserving, but by those who have the most to benefit from favorable legislation, and who therefore invest the most resources in the contest.[45]

The result, as we shall see, is that licensing laws, which limit economic opportunity, were originally allowed insofar as they protected the public health and safety — but have, as economists predicted, become perverted into a tool for obstructing competition. As Justice Stevens warned twenty years ago:

> The risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of both the development of the common law

---

[42] Binford v. Boyd, 174 P. 56, 58 (Cal. 1918).

[43] *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 286–87 (1965) ("[I]nterest-group activity . . . is a direct function of the 'profits' expected from the political process by functional groups.").

[44] Gellhorn, *supra* note 2, at 16.

[45] The "public choice" effect has been widely observed in occupational licensing. *See, e.g.*, Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation — Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1238–39 (2003) (describing this effect in attorney licensing); Horowitz, *supra* note 37, at 9–16 (analyzing data from several professions); Larry E. Ribstein, *Lawyers As Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 314 (2004).

> The politics of state licensing give reason to doubt that the social benefits of the system outweigh the costs. Winning interest groups typically are those who can most effectively organize to raise and spend political resources. . . . They will, therefore, be able to out-lobby larger but more fragmented groups of consumers and business clients.

Id.

> of restraint of trade and our antitrust jurisprudence.... [P]rivate parties have used licensing to advance their own interests in restraining competition at the expense of the public interest.[46]

While the possibility of protectionist abuse was generally seen as a necessary evil accepted for the greater good of consumer protection, in recent years, some courts have come to see protectionism as *itself* a legitimate purpose to be served by occupational licensing and other regulations.

II. BURYING ECONOMIC LIBERTY: THE CASKET CASES

A. Craigmiles v. Giles

Reverend Nathaniel Craigmiles was angry. Too often he saw his parishioners exploited by funeral directors taking advantage of grieving families by charging outrageous rates for coffins and other funeral merchandise. Unfortunately, some parts of the funeral industry have long employed these tactics; in 1882, for instance, the National Funeral Directors Association passed a resolution fixing prices for adult coffins at fifteen dollars,[47] a large sum in those days. That same year, Mark Twain noted the effect of funeral cartels on the consumer. "Why, just look at it," a funeral director tells Twain in *Life on The Mississippi*.[48] "A rich man won't have anything but your very best; and you can just pile it on, too — pile it on and sock it to him — he won't ever holler. And you take in a poor man, and if you work him right he'll bust himself on a single lay-out."[49] By the time Jessica Mitford published her *exposé* on the industry, *The American Way of Death*, in 1963, "the funeral men ha[d] constructed their own grotesque cloud-cuckoo-land where the trappings of Gracious Living are transformed, as in a nightmare, into the trappings of Gracious Dying."[50] An industrial machine was created in which grief and longing were met with unscrupulous sales tactics and monopoly power, all for the financial interest of an entrenched economic minority.[51]

---

[46] Hoover v. Ronwin, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting).

[47] *See* JESSICA MITFORD, THE AMERICAN WAY OF DEATH REVISITED 158 (Alfred A. Knopf, Inc. 1998) (1963).

[48] *Id.*

[49] MARK TWAIN, LIFE ON THE MISSISSIPPI (1883), *reprinted in* MARK TWAIN, MISSISSIPPI WRITINGS 217, 482 (Library of America 1982).

[50] MITFORD, *supra* note 47, at 14–15.

[51] The funeral industry has been a frequent scene of conflict between the free market and cartel practices. In *People v. Ringe*, 90 N.E. 451 (N.Y. 1910), and *Wyeth v. Thomas*, 86 N.E. 925 (Mass. 1909), courts struck down laws quite similar to the law at issue in *Craigmiles*, prohibiting anyone but licensed embalmers from officiating at funerals. In *Gholson v. Engle*, 138 N.E.2d 508 (Ill. 1956), the Illinois Supreme Court invalidated a law which prohibited

Reverend Craigmiles's solution was to open his own business selling caskets, urns, and other items at discount rates.[52] He and Tommy Wilson, a former funeral home employee, started the Craigmiles Wilson Casket Supply company in Chattanooga, Tennessee.[53] But after only four months in business, the Tennessee Funeral Board ordered them to close their business because they did not have funeral directors' licenses.[54]

Under Tennessee law, only a person with a state funeral director's license could operate a business engaged in "funeral directing,"[55] which was defined to include "the selling of funeral merchandise, and/or the making of financial arrangements for the rendering of the services, and/or the sale of such merchandise."[56] Violations of this law carried a penalty of thirty days in jail or a fine of fifty dollars or both.[57] Neither Craigmiles nor Wilson had a funeral director's license, and obtaining one is not an easy affair. Applicants for licenses must complete a course of study at a board-approved mortuary school and serve for a year as an employee of a licensed funeral director,[58] or serve a two-year apprenticeship and assist in at least twenty-

---

any person from directing a funeral without first procuring a license as an embalmer. The plaintiff did not embalm bodies, nor was embalming required under state law. The court found no

> public health considerations [to] justify the requirement that a funeral director be a licensed embalmer. The funeral director is concerned primarily with the amenities of the funeral service. Proper performance of his other functions . . . does not require a year of college, nine months at an embalming school and a year's service as an apprentice embalmer.

Id. at 512. In 1948, the Massachusetts Supreme Judicial Court declared that a proposal to forbid the operators of private cemeteries from selling headstones and monuments was an unconstitutional interference with economic opportunity. Opinion of the Justices, 79 N.E.2d 883 (Mass. 1948). Although the state could certainly regulate graveyards for the protection of public health, headstones were simply "personal property and are bought and sold like other personal property." *Id.* at 886. Headstones did not endanger the public health in any way; the law was "a regulation more of sellers of monuments than of cemeteries," *id.* at 887 — meaning, it was designed to prevent competition in the headstone market. Accordingly, the court held that this was simply an abuse of the state's regulatory authority to benefit private parties.

[52] *See* INST. FOR JUSTICE, THE RIGHT TO URN AN HONEST LIVING: CHALLENGING TENNESSEE'S CASKET MONOPOLY, http://www.ij.org/economic_liberty/tennessee_caskets/backgrounder.html (last visited June 3, 2005).

[53] *Id.*

[54] *Id.*

[55] TENN. CODE ANN. § 62-5-313 (2005).

[56] *Id.* § 62-5-101(3)(A)(ii).

[57] *See id.* § 62-5-103 (defining a violation as a Class C misdemeanor); *id.* § 40-35-111(3) (providing the authorized penalty for a Class C misdemeanor).

[58] *Id.* § 62-5-305(a)(6)(A).

five funerals.[59] Then the applicant must pass an examination[60] to prove that he or she "has a reasonable knowledge of sanitation and disinfection of premises, clothing, bedding, and other articles subject to contagion and infection, and has a reasonable knowledge of the sanitation and disinfection of bodies of diseased persons where death was caused by infectious diseases or communicable diseases."[61] Completing a course of study at a mortuary school, however, can be exceedingly expensive. At the time Reverend Craigmiles opened his business, there was only one board-approved mortuary school in Tennessee: Gupton College, where the funeral director's course costs between $10,000 and $12,000.[62] The course of study included such matters as embalming corpses[63] and other skills which Craigmiles would never use.

Contending that the licensing requirement had no connection to the public welfare, but served simply to protect a favored interest group against fair competition, Craigmiles filed a lawsuit challenging the licensing law under the Fourteenth Amendment.[64] He did not deal with dead bodies, he argued, and he did not have any involvement with a funeral beyond selling the coffin to the bereaved family.[65] Requiring him to undergo the training and expense of getting a funeral director's license deprived him of the liberty to earn a living in a lawful occupation, without any rational connection to protecting the public health, safety, and welfare.[66] The court agreed.[67] Although the state argued that licensure protected the public from dangerous and incompetent practitioners, the court found that the training and examination requirements had nothing to do with the business of selling caskets. Rather, "[t]he training and the exam questions regarding caskets relate only to product information and merchandising. These topics have no relationship to health and safety, but might be helpful to one who sells any product."[68] Nor did caskets themselves pose any sort of health or safety risk: "all caskets, like their contents, eventually decompose," and rarely pose any danger to the public by doing so.[69] Moreover, even "[i]n those rare instances where human remains (before burial) might present a public health concern, funeral directors do not rely on caskets to negate the threat. Instead, they rely on embalming, adjustments to the funeral arrangements, and other techniques such as the

---

[59] *Id.* § 62-3-305(a)(6)(B).
[60] *Id.* § 62-5-306(a).
[61] *Id.* § 62-5-306©.
[62] Craigmiles v. Giles, 110 F. Supp. 2d 658, 660 (E.D. Tenn. 2000).
[63] *Id.*
[64] *Id.* at 659.
[65] *Id.*
[66] *Id.* at 661.
[67] *Id.* at 662.
[68] *Id.* at 663.
[69] *Id.* at 662.

use of plastic encasements for the body."[70] Moreover, the state did not require the use of caskets in human burials at all.[71]

Requiring a license for people selling caskets, therefore, did not protect the public from such possible rare instances of environmental or health threats.[72] The court concluded that, even under the lenient rational basis test used in cases involving economic liberty, the law was unconstitutional:

> The key issue in this case is whether the funeral merchandise sales licensure requirement is a rational means of [protecting the health, safety and welfare of the public]. This Court holds that it is not. The requirement certainly has nothing to do with public health and safety. . . .
>
> . . . .
>
> . . . [T]he purpose of promoting public health and safety is not served by requiring two years of training to sell a box.[73]

The Court of Appeals affirmed.[74] Although the rational basis test allows the legislature to make "[e]ven foolish and misdirected" laws, the Constitution still requires that laws have some bearing on the public health, safety and welfare.[75] The licensing requirement, however, had no public justification; instead, "adding the retail sale of funeral merchandise to the definition of funeral directing was nothing more than an attempt to prevent economic competition."[76] Like the district court, the court of appeals noted that there was no evidence that a licensing requirement for casket sales was related in any way to protecting the public safety, and no such relationship could be imagined.[77] Instead, the legislative history revealed that the law was simply "directed at protecting licensed funeral directors from retail price competition."[78] Protecting licensees from fair competition, the court held, was not part of the government's power: "Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose."[79]

---

[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.* at 662–63.
[74] Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002).
[75] *Id.* at 223–24.
[76] *Id.* at 225.
[77] *Id.*
[78] *Id.* at 227.
[79] *Id.* at 224.

B. Powers v. Harris

Six days after the Sixth Circuit affirmance in *Craigmiles*, the District Court for the Western District of Oklahoma issued a directly contrary ruling in an almost identical case, *Powers v. Harris*.[80] That case involved an Internet casket retail company called Memorial Concepts Online, Inc., started by entrepreneurs Kim Powers and Dennis Bridges.[81] Like Tennessee, Oklahoma law defines any person selling funeral merchandise as a funeral director,[82] and requires such a person to obtain a funeral director's license.[83] Obtaining a license in Oklahoma is as much a burden as in Tennessee: an applicant is required to complete at least sixty hours of study in an accredited college, to graduate from an approved mortuary science program, and to serve a year as a registered apprentice.[84]

But unlike the *Craigmiles* court, the district court in *Powers* found that this requirement was constitutional. Under the rational basis test, a judge must seek "any reasonably conceivable purpose [that the challenged] laws might serve,"[85] rather than "evaluat[ing] the effectiveness of a legislative measure as well as its economic benefits and detriments."[86] After criticizing the *Craigmiles* decision, *Powers* went on to uphold the licensing scheme even though "this court is not persuaded that the provisions in question advance the cause of consumer protection. Maybe they do and maybe they don't."[87] But the concept of occupational licensing itself is a legitimate one, the court held,[88] and even in the absence of any evidence showing that the law could, or did, serve the public health, safety, and welfare, it was "readily conceivable that the licensing provisions challenged by the plaintiffs could have been thought by the legislature to promote the goal of consumer protection."[89]

The Tenth Circuit Court of Appeals affirmed the district court's decision in *Powers*.[90] After a long recitation of the degree of deference accorded the government under the rational basis test,[91] the court declared that it was

---

[80] No. CIV-01-445-F, 2002 WL 32026155 (W.D. Okla. Dec. 12, 2002).

[81] *Id.* at *2.

[82] OKLA. STAT. tit. 59, § 396.2(2)(d) (2000).

[83] *Id.* § 396.3(a).

[84] *Id.* § 396.3(b). Unlike Tennessee law, the Oklahoma law does not appear to allow any way around the apprenticeship requirement. *See supra* text accompanying notes 55–61.

[85] *Powers*, 2002 WL 32026155, at *14.

[86] *Id.* at *15.

[87] *Id.* at *18.

[88] *Id.* at *17 ("Consumer protection is a legitimate goal of Oklahoma public policy and licensure is one rational way in which the State may choose to serve that goal, despite the impact of that choice on other public policy interests such as increased competition in the marketplace.").

[89] *Id.* at *18.

[90] 379 F.3d 1208 (10th Cir. 2004).

[91] *Id.* at 1215–18.

> obliged to consider every plausible legitimate state interest that might support [the licensing requirement] — not just the consumer-protection interest forwarded by the parties. Hence, we consider whether protecting the intrastate funeral home industry, absent a violation of a specific constitutional provision or a valid federal statute, constitutes a legitimate state interest.[92]

Taking on the *Craigmiles* holding directly, the court declared that "absent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest."[93] It based this decision on three primary considerations. First, it noted that *Craigmiles* relied on three cases to support its finding that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose"[94] — *City of Philadelphia v. New Jersey*,[95] *H.P. Hood & Sons, Inc. v. Du Mond*,[96] and *Energy Reserves Group, Inc. v. Kansas Power & Light*[97] — none of which were Fourteenth Amendment cases. Accusing the *Craigmiles* court of "selective quotation,"[98] the Tenth Circuit noted that *Du Mond* and *Philadelphia* involved dormant commerce clause challenges to state laws, and *Energy Reserves Group* involved the contracts clause.[99] The dormant commerce clause has long been held to forbid states from discriminating against businesses from out of state, but protectionist legislation *within* states is a different matter.[100] Within state boundaries, laws are subject to the Fourteenth Amendment, and since the advent of rational basis review, the Supreme Court has frequently upheld laws designed solely to protect one industry over another within a state.[101] Second, to apply any more serious review of legislation would threaten the validity of the post-New Deal regime of rational basis scrutiny.[102] Third, "adopting a rule against the legitimacy of intrastate economic protectionism and applying it in a principled manner" would require invalidating countless laws that perform no public function, but merely protect

---

[92] *Id.* at 1218.

[93] *Id.* at 1221.

[94] Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002).

[95] 437 U.S. 617, 624 (1978).

[96] 336 U.S. 525, 537–38 (1949).

[97] 459 U.S. 400, 411 (1983).

[98] *Powers*, 379 F.3d at 1219.

[99] *Id.*

[100] *Id.* at 1220 ("Our country's constitutionally enshrined policy favoring a national marketplace is simply irrelevant as to whether a state may legitimately protect one intrastate industry as against another when the challenge to the statute is purely one of equal protection.").

[101] *See id.* at 1220–21 (citing Fitzgerald v. Racing Ass'n, 539 U.S. 103, 109 (2003), Nordlinger v. Hahn, 505 U.S. 1, 18 (1992), New Orleans v. Dukes, 427 U.S. 297, 298 (1976), and Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955)).

[102] *See id.* at 1216–17 (citing United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938)).

one interest group from another.[103] Economic protectionism, in fact, is a constant occupation of legislatures: "while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments."[104] Because legislatures pass such measures all the time, they must be constitutional. Thus, even though the licensing law bore no connection to public safety, the legislature's decision to prevent competition was legitimate, and the licensing law was upheld.

II. WHY PROTECTIONISM IS NOT A LEGITIMATE STATE INTEREST

Unfortunately, the *Powers* court's arguments focus too closely on the details and ignore the overriding constitutional imperative that laws must serve some *public* interest, rather than the private interests of specific, entrenched groups.[105] This rule is one of the longest-standing principles of constitutional law;[106] indeed, it is probably a defining trait of law itself.[107] Even in cases applying the rational basis test, the Supreme Court has held that some *public* justification for a law is still necessary.[108] But the Tenth Circuit's rule means that laws enacted solely for the *private* benefit of particular interest groups satisfies the rational basis test.

Such a holding is inconsistent with the principle of lawfulness: it would mean that might makes right — or at least, makes constitutional. Properly understood, the Constitution forbids government from using its coercive power to support politically successful groups simply because they are successful. But, understanding why requires us to reexamine ideas about constitutional government that have been out of fashion for over seventy years. In particular, it requires us to seriously address issues of political philosophy. Since the advent of modern notions of judicial deference

---

[103] *Id.* at 1222.

[104] *Id.* at 1221.

[105] *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 69 (1985); Sunstein, *supra* note 9.

[106] *See* Sunstein, *supra* note 9, at 1690.

[107] H.L.A. Hart, for example, contends that generality is one of the characteristics of law:

> [T]he *standard* form [of a law] . . . is general in two ways; it indicates a general type of conduct and applies to a general class of persons who are expected to see that it applies to them and to comply with it. Official individuated face-to-face directions here have a secondary place.

H.L.A. HART, THE CONCEPT OF LAW 21 (2d ed. 1994). Likewise, Friedrich Hayek argues that special laws narrowly treating particular groups differently undermines the concept of law because it makes law not generally applicable. F.A. HAYEK, THE CONSTITUTION OF LIBERTY 209 (1960). Special, unique rules for special, unique groups detracts from the uniformity that gives law its stability, predictability, and basic fairness. *See id.* This reasoning is consistent with the Supreme Court's conclusion in *Bolling v. Sharpe* that due process includes equal treatment as a rule of fundamental fairness. 347 U.S. 497, 499 (1954).

[108] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985).

in the 1930s, judges have been extremely reluctant to approach political philosophy. Modern phrases like "rationally related to a legitimate government interest" and "narrowly tailored to advance a compelling government interest" tend to cloak the need for political philosophy, but in the end, that need is inescapable. Just what *is* a legitimate government interest, and what differentiates it from a compelling government interest? The modern Supreme Court has candidly acknowledged that it does not know what a legitimate state interest is, let alone how to distinguish it from a compelling one.[109] So little guidance has been provided on the point, in fact, that Richard Epstein has called the legitimate state interest test a "bare conclusion, tantamount to asserting that the action is legitimate because it is lawful."[110] It would be only a mild overstatement to say that in most cases the Court is satisfied to hold that whatever goal government chooses to pursue is ipso facto legitimate. Still, there are some things which the Court has held are not legitimate interests. In particular, the Court has held many times that for the majority to single out an unpopular minority to bear unfair burdens, on the basis of mere prejudice, is not a legitimate state interest.[111] This principle is correct; what is lacking is the will to enforce it consistently. But such a will can only come from an understanding of the principles of American constitutionalism.[112]

A. Due Process: Which State Interests Are Legitimate and Why?

According to James Madison, writing in the social compact tradition of John Locke, government exists to protect the rights of individuals, that is, to protect the weak from the strong.[113] As did Locke, Madison begins by imagining what the world would be like if there were no government — the so-called "state of nature" — so as to discover what might lead people to create a government. In a state of nature, stronger people would be able to rob or enslave weak people; leading to a situation of constant physical warfare — what Thomas Hobbes described as the war of all against all.[114] While Hobbes concluded that there was no such thing as justice

---

[109] *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987) ("Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest.'").

[110] RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 109 (1985).

[111] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632–33 (1995).

[112] *Cf.* Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 CHAP. L. REV. 173, 202–03 (2003) ("If courts embrace economic protectionism as a legitimate state purpose, they will end up achieving precisely what the framers sought to avoid.").

[113] *See* THE FEDERALIST NO. 51, at 324–25 (James Madison) (Clinton Rossiter ed., 1961) (characterizing "a state of nature" as a state of "anarchy . . . where the weaker individual is not secured against the violence of the stronger," and that government is created to "protect all parties, the weaker as well as the more powerful" from each other).

[114] *See* THOMAS HOBBES, LEVIATHAN 100 (Michael Oakeshott ed., Collier Books 1962) (1651) ("[D]uring the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war, as is of every man, against every man.").

at all before government is created, and that the creation of the state is therefore also the creation of right and wrong,[115] Locke's followers believed that justice is antecedent to government, and even justifies it, since the purpose of government's existence is to protect justice from being subverted by the violence that goes on in the state of nature. Government exists only to protect people and their possessions from the initiation of force by those who wish to deprive them of their life, liberty, or property.[116] This not only explains the purpose of government, it also limits what government can do. It would be inconsistent if the government, created to protect the weak against the strong, were to become perverted into a tool by which the strong can continue their depredations upon the weak. To put it simply, government is created to protect people from bullies and is thus inherently forbidden from becoming a bully itself.[117] If it does become the bully, then it is engaged in a logical contradiction, much like a corrupt security guard at a bank who robs the bank where he works.

The problem is that in a democratic society, groups of people will compete for the opportunity to use government's authority for their own private benefit. Modern economists refer to this as the problem of public choice, but Madison called it the problem of faction.[118] This problem is especially acute because the people not only make the law, but also (indirectly) judge the *legitimacy* of those laws when they are called into question.[119] If the people become corrupted and pass a law taking all

---

[115] *See id.* at 101 ("Where there is no common power, there is no law: where no law, no injustice.").

[116] *See* JOHN LOCKE, *The Second Treatise of Government* § 94, *in* TWO TREATISES OF GOVERNMENT 373 (Peter Laslett rev. ed. 1963) (1698) ("Government has no other end but the preservation of Property.").

[117] *See, e.g.*, James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, *reprinted in* JAMES MADISON: WRITINGS 515 (Jack N. Rakove ed., 1999) ("Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.").

[118] THE FEDERALIST No. 10 (James Madison), *supra* note 113, at 78.

[119] *Id.* at 79–80.

> No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and . . . corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations . . . concerning the rights of large bodies of citizens? . . . Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or in other words, the most powerful faction must be expected to prevail.

Id.

property away from Jews,[120] such a law might be challenged in court. But since the people ultimately control the court system — by voting for presidents who choose federal judges — a powerful enough public delusion[121] might also prevent the courts from striking down such laws, even though these laws are contradictory to the fundamental justification for the state's existence.

What this means is that, in Lockean political philosophy, there is a difference between *law* and *force*. The distinction is found in the principle of *generality*. In Locke's words, the legislature's power "is *limited to the publick* [sic] good of the

---

[120] In the period leading up to World War II, Germany enacted a complicated variety of statutes pursuing the policy of "Aryanization," whereby property was confiscated from German Jews for the benefit of Aryans. *See generally* RICHARD Z. CHESNOFF, PACK OF THIEVES: HOW HITLER AND EUROPE PLUNDERED THE JEWS AND COMMITTED THE GREATEST THEFT IN HISTORY (1998); RICHARD PIPES, PROPERTY AND FREEDOM 220–25 (1999). Among such enactments were the Law Regarding the Confiscation of Assets in the Hands of Enemies of the People and the State (July 14, 1933) and the Order Eliminating Jews from German Economic Life (November 12, 1938). *See* CRT-II — Claims Resolution Tribunal, Selected Laws, Regulations, and Ordinances Used by the Nazi Regime to Confiscate Jewish Assets Abroad, http://www.crt-ii.org/_nazi_laws/ (last visited Aug. 2, 2005); *see also* Order Eliminating Jews from German Economic Life of 12 November 1938, *available at* http://www.ess.uwe.ac.uk/genocide/econord.htm (visited Aug. 2, 2005) (providing the text of the ordinance).

[121] According to the framers, the "will" of the community must be the aggregate, permanent, and reasoned will of the community and not merely the majority's tempororary unreasoned desires. *See, e.g.*, Letter from James Madison to James Monroe (Oct. 5, 1786), *in* THE COMPLETE MADISON: HIS BASIC WRITINGS, at 45 (Saul K. Padover ed., 1953) ("[T]he interest of the majority is the political standard of right and wrong [only if] . . . the word 'interest' [is] synonymous with 'ultimate happiness' . . . as [opposed to] referring to immediate augmentation of property and wealth."). As Alexander Hamilton famously put it,

> It is a just observation that the people commonly *intend* the PUBLIC GOOD. . . . But [the people's] good sense would despise the adulator who should pretend that they always *reason Right* about the *means* of promoting it. . . . [T]hey sometimes err . . . beset as they continually are by the wiles of parasites and sycophants, by the snares of the ambitious, the avaricious, the desperate, by the artifices of men who possess their confidence more than they deserve it, and of those who seek to possess rather than to deserve it. When occasions present themselves in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection. Instances might be cited in which a conduct of this kind has saved the people from very fatal consequences of their own mistakes, and has procured lasting monuments of their gratitude to the men who had courage and magnanimity enough to serve them at the peril of their displeasure.

THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 113, at 432.

Society."[122] A *law* differs from a mere act of *force* in that the former has a *public* justification. For example, the police officer arrests a person to protect the public from a wrongdoer. This would be "law." But an enactment which confiscates the property of Jewish citizens, simply because they are a disliked minority, would be an act of force, not justified by principles of public protection that legitimize the state in the first place. When government force is employed for private benefit rather than for a public reason, the people are not secure from arbitrary, unpredictable acts of coercion, which means that the government is failing to serve its purpose.

In modern times, the principle of generality was described as an essential component of law by Nobel laureate Friedrich Hayek.[123] For a rule to qualify as "law," Hayek contended, it must be an abstract regulation describing conduct under given circumstances — not a particular order compelling any particular person to do any particular thing.[124] Laws are "purpose-independent rules which govern the conduct of individuals towards each other, are intended to apply to an unknown number of further instances, and by defining a protected domain of each, enable an order of actions to form itself wherein the individuals can make feasible plans."[125] Thus *generality* is what distinguishes law from the mere "will of the ruler."[126] Law, in short, is the opposite of arbitrariness.[127]

It bears emphasizing that legislation does not qualify as law simply because it is approved by a legislative majority. James Wilson told the Pennsylvania Ratification Convention "that the power of the constitution [is] paramount to the power of the legislature, acting under that constitution. For it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual *mode*, notwithstanding that transgression."[128] *Legislation* is merely a statutory creation of a particular majority at a particular time; it is simply

---

[122] John Locke, *The Second Treatise of Government* § 135, *in* TWO TREATISES OF GOVERNMENT, *supra* note 116, at 403.

[123] *See, e.g.*, 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY 6 (1973); 3 *id.* (1979) at 101–02.

[124] *Id.* at 86–87.

[125] *Id.* at 85–86.

[126] *Id.* at 82.

[127] There is, unfortunately, good reason to believe that a generality requirement alone is not enough to ensure that the state does not fall prey to conflicts between interest groups. *See* ANTHONY DE JASAY, JUSTICE AND ITS SURROUNDINGS 170–85 (2002). Jasay contends that generality alone "cannot be sufficiently defined to allow us to tell rules that are general from rules that are not." *Id.* at 178. Without something more, a nation's constitution will gradually be driven by public choice pressures because "majorities choose legislation that maximizes their gains from politics, and they learn to choose a constitution that maximizes the scope for such legislation." *Id.* at 83.

[128] James Wilson, Speech in the Pennsylvania Ratifying Convention (Dec. 1, 1787), *in* 1 THE DEBATE ON THE CONSTITUTION 823 (Bernard Bailyn ed., 1993).

an assertion of political power,[129] which means a use of coercion by the state. But legislation might be corrupt — it might be an attempt by bullies to violate the rights of an unpopular minority — and, therefore, not *law*. This is the rationale behind what has come to be called "substantive due process."[130] Mere enactment, therefore, cannot be due process[131] because law is a qualitative concept, not merely a formal label. An enactment which lacks the characteristics of law, but still deprives a person of life or liberty or property for no public reason, is a mere act of force, regardless of the procedures used to enact it. The Due Process Clause was intended (among other things) to prevent special laws whereby unpopular minorities were subjected to unfair burdens simply due to their unpopularity — that is, it was written to require that deprivations of life, liberty, and property were engaged in for *legitimate public reasons*, rather than as a mechanism of bullying behavior.

None of these ideas were new in the so-called *Lochner* era. In an article called *The Security of Private Property*, published anonymously in the *American Law Magazine* in 1843, we find the following:

> It is certainly a principle, that the general powers of sovereignty are vested in the state governments . . . [which] are governments of general powers. . . . Yet what are the general powers of government in a civilized society? Is there no *lex legum*, independent of express constitutional restrictions? . . . [S]uppose the

---

[129] *See* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 113, at 467 (distinguishing between enactments of legislators and the permanent, overriding will of the people enunciated in the Constitution).

[130] The best early example of this view is Justice Chase's opinion in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). Chase explains that constitutions have a purpose and that legislation which blatantly contradicts this purpose is therefore unconstitutional even if such legislation is not prohibited by a constitution's express language. *Id.* at 383. "The *nature*, and *ends* of *legislative* power will limit the *exercise* of it." *Id.* Therefore legislation which attempts to "authorize *manifest injustice by positive law*; or to take away that security for *personal liberty*, or *private property*, for the protection whereof the government was established," and therefore is only "[a]n ACT of the Legislature (for I cannot call it a *law*)." *Id.*

[131] As Sunstein puts it,

> The [constitutional] prohibition of naked preferences, enforced as it is by the courts, stands as a repudiation of theories positing that the judicial role is only to police the processes of representation to ensure that all affected interest-groups may participate. It presupposes that courts will serve as critics of the pluralist vision, not as adherents striving only to "clear the channels" in preparation for the ensuing political struggle. In this respect, the prohibition of naked preferences reflects a distinctly substantive value and cannot easily be captured in procedural terms. Moreover, it reflects an attractive conception of politics, one that does not understand the political process as simply another sort of market.

Sunstein, *supra* note 9, at 1692–93 (citations omitted).

> legislature to pass a law arbitrarily depriving a citizen of life or liberty, without fault or crime on his part, must we look in the constitution for an express disaffirmance of such a power?[132]

An act by the majority which is motivated simply out of ire or simply from a desire to, in Madison's words, "despoil and enslave the minority of individuals,"[133] is an arbitrary act of force and not law. It therefore follows that to take property or liberty pursuant to such an act would be to deprive a person of property or liberty without due process of *law*.

Probably the clearest explanation of substantive due process occurs in the case of *Loan Ass'n v. Topeka*.[134] There, the Supreme Court held that the government violated the due process clause by spending tax dollars (taken from individuals without their consent) to invest in a private, for-profit railroad run by a small minority of individuals.[135] The reason for this holding was that the railroad owners were using the apparatus of the state to take other people's property for their own private profit — essentially the same as if they had walked down the street with guns, stolen money from people on the sidewalk, and invested it in their railroad. "There are limitations on such power which grow out of the essential nature of all free governments,"[136] the Court explained,

> which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B.
>
> Of all the powers conferred upon government that of taxation is most liable to abuse.
>
> . . . .
>
> . . . To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.[137]

---

[132] *The Security of Private Property*, 1 AM. L. MAG. 318, 334 (1843).

[133] Letter from James Madison to James Monroe, *supra* note 121, at 45.

[134] 87 U.S. (20 Wall.) 655 (1874).

[135] *Id.* at 661–62.

[136] *Id.* at 663.

[137] *Id.* at 663–64 (citation omitted).

Substantive due process, in short, is a rule requiring the legislature to engage in *law*, rather than mere enactment.[138] When the legislature is captured by a group which seeks to steal property from a minority, or otherwise infringe on a minority's liberty, simply on the basis of their political power, it is no longer making law and, therefore, violates the Due Process Clause.

This older "class legislation" rationale for substantive due process has been supplanted in recent decades by a "fundamental rights" rationale, which provides that the primary focus in substantive due process analysis is on the nature of the right at issue in a particular case. As the Court put it in *Planned Parenthood v. Casey*:[139] "[T]he Clause has been understood to contain a substantive component as well, one 'barring certain government actions regardless of the fairness of the procedures used to implement them.'"[140] This explanation is cruder than, but still related to, the now-ignored theory of *Loan Ass'n v. Topeka*.[141] Just as mere exertions of force without public justification are off limits to the government entirely, there are some aspects of personal behavior which are simply none of the government's business, and even if legislation affecting these aspects is passed in a manner that satisfies all the procedural requirements of the law, those enactments are simply beyond the bounds of any legitimate government.[142] Some rights are so valuable that interferences with them can never be imagined to serve a legitimate goal of government; hence legislation interfering with those rights are much more likely to be mere acts of force, rather than law.

Economic protectionism is a perversion of legal authority because it is a mere use of force for the benefit of a particular, private interest group. It limits the freedom of some members of society solely for the benefit of others, with no public justification.[143] Even after the end of the *Lochner* era, courts have struck down abusive licensing requirements in cases where the licensed profession could present no serious threat to the public safety, or where the licensing requirement was truly absurd.[144]

---

[138] In Hayek's words, substantive due process is a "basic clause . . . defin[ing] . . . law in this narrow sense of *nomos* which would enable a court to decide whether any particular resolution . . . possesse[s] the formal properties to make it law." 3 HAYEK, *supra* note 123, at 109.

[139] 505 U.S. 833 (1992).

[140] *Id.* at 846 (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

[141] It is cruder because it imposes a set of what Jasay calls "reference variables," which are supposed to indicate to a reviewing court when a law fails the generality requirement. *See* JASAY, *supra* note 127, at 184. But these reference variables are "not a firm but a shifting" foundation, "contingent on cultural change." *Id.* Over time, courts may come to declare that enactments once considered not general enough actually are general because they serve some normative predicate which has now come into general use.

[142] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567 (2003).

[143] *See further* 3 HAYEK, *supra* note 123, at 1–19 (explaining why special interest legislation is not "law").

[144] *See, e.g.*, Mercer v. Hemmings, 194 So. 2d 579, 583–84 (Fla. 1966) (invalidating a residency requirement for accountant licenses under rational basis test); Ohio Motor Vehicle

For instance, in 1945, the Supreme Court of Florida struck down an occupational licensing requirement for professional photographers.[145] Noting that occupational licensing laws, when taken to an extreme, "possess the essentials or elements of a monopoly," the court found that professional photography did not reasonably threaten the public safety.[146] In 1952, the Oklahoma Supreme Court invalidated the state's Watchmaking Act, which required any person practicing the trade of watchmaking to first serve a *four-year* apprenticeship for a licensee.[147] Watchmaking simply did not endanger the public, the court held. It was far more reasonable to see the law as "placing in the hands of those holding a license the power to limit the number of those allowed to engage in watchmaking in Oklahoma, and clearly tend[ing] toward creating a monopoly," and, therefore, an abuse of the state's regulatory power.[148]

Courts have never held that a regulation that simply benefits political insiders, for no reason other than that they are insiders, is permitted under the Due Process Clause.[149] In *Schware v. Board of Bar Examiners of New Mexico*,[150] the Supreme Court held that a man who had been a member of the Communist Party could not be denied the opportunity to take the bar exam for that reason. The Court held that his political views bore no connection to the legitimate requirement that a person must demonstrate his qualification to practice.[151] Any legal qualification for engaging in a trade

> must have a rational connection with the applicant's fitness or capacity to practice . . . . Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.[152]

Dealer's & Salesmen's Licensing Bd. v. Memphis Auto Sales, 142 N.E.2d 268, 274–75 (Ohio Ct. App. 1957) (striking down a licensing requirement for retail auto sales under rational basis test).

[145] Sullivan v. DeCerb, 23 So. 2d 571 (Fla. 1945); *accord* Bramley v. State, 2 S.E.2d 647 (Ga. 1939); State v. Ballance, 51 S.E.2d 731 (N.C. 1949).

[146] *DeCerb*, 23 So. 2d at 572.

[147] State *ex rel.* Whetsel v. Wood, 248 P.2d 612 (Okla. 1952).

[148] *Id.* at 614.

[149] In his remarkable article *The Gild Returns to America*, J.A.C. Grant candidly acknowledged that occupational licensing had led to a revival of the Medieval guild system — one which "makes use of government for its own purposes, which is a very different thing from subjecting itself to government," — and applauded the result. 4 J. POL. 303, 316 (1942).

[150] 353 U.S. 232 (1957).

[151] *Id.* at 238–39.

[152] *Id.* at 239 (citations omitted).

Occupational licensing could not be used for the sole purpose of excluding those who are unpopular; rather, such laws must promote the legitimate state interests of protecting the public safety by ensuring that practitioners are qualified.[153] Both as originally understood and under its modern rational basis interpretation, therefore, the Due Process Clause forbids government from enforcing barriers on disfavored groups simply because they are disfavored.

B. Equal Protection: Animosity Is Not a Legitimate State Interest

The "class legislation" understanding of substantive due process survives not only in some aspects of modern due process law, but in equal protection law as well. Under the Equal Protection Clause, government may divide people into groups and treat those groups differently if, among other things, its goal is sufficiently compelling. Any analysis of whether a legislative goal is compelling will involve a primary question of political philosophy: What is a legitimate, or compelling, government interest?

In several cases, the Supreme Court has held that the Equal Protection Clause does not allow government to enact laws based on mere animus toward a disfavored group. Such cases date back at least to *Yick Wo v. Hopkins*,[154] which struck down a San Francisco ordinance aimed at shutting San Francisco's Chinese-owned laundries on the grounds that "the equal protection of the laws is a pledge of the protection

---

[153] *See* Nebbia v. New York, 291 U.S. 502 (1934) (upholding a New York law prohibiting milk companies from charging less than a minimum amount, is probably the most extreme instance of deference to economic regulation challenged under the Due Process Clause). The Court held that this was constitutional because it was designed — however absurdly — to ensure a plentiful supply of milk in the city, a public-regarding rationale. *See id.* at 530. And the Court acknowledged that economic regulations would violate the Clause if they were "arbitrary or *discriminatory*." *Id.* at 536 (emphasis added). *See also id.* at 537 (defining due process limitation as "a reasonable relation to a proper legislative purpose . . . neither arbitrary *nor discriminatory*" (emphasis added)). The Court has never held that naked economic preference per se is a legitimate state interest. One exception to this would be the "market participant" doctrine in dormant commerce clause cases. *See, e.g.*, White v. Mass. Council of Const. Employers, Inc., 460 U.S. 204, 208 (1983). But in these cases, government is acting essentially as a private buyer in the marketplace would. The market participant doctrine simply treats states as buyers free to purchase what they wish. That choice does not curtail the economic opportunities of outsiders in the same way that state *regulation* does because in the latter case, the state is employing its coercive power. *See* Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel, 20 F.3d 1311, 1318 (4th Cir. 1994) ("[S]tate participation in the market, even participation that is frankly discriminatory in excluding foreign interests from receiving its benefits, does not establish barriers within the general market framework that impede interstate commerce, such activity falls outside the scope of the negative Commerce Clause.").

[154] 118 U.S. 356 (1886).

of equal laws."[155] In more recent cases, the Court has reiterated that legislative animus towards politically disfavored minorities is not a goal the government may pursue by creating categories of citizens. In *Department of Agriculture v. Moreno*,[156] the Court struck down a regulation aimed at preventing "hippie communes" from obtaining food stamps, because the regulation had no *public* justification but simply enforced hostility to a disfavored minority. A mere "desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest,"[157] the Court held. Also, in *City of Cleburne v. Cleburne Living Center, Inc.*,[158] the Court held that the city could not deny a zoning permit simply on the basis of animus toward the mentally retarded:

> [M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. . . . [T]he City may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[159]

In *Romer v. Evans*,[160] the Court again repeated that "animosity toward the class of persons affected" is not a legitimate state interest and does not justify the government treating some people differently than others.[161] This line of cases has set a bottom limit to the goals government may pursue. At the very least, it may not pass laws motivated by "animosity," a term which refers to an irrational hostility toward a person on the basis of irrelevant differences, or "'we-they' antagonism"[162] — what I have called "bullying" in this article. When government treats classes of persons differently, that choice must be based on some larger public benefit rationale.[163]

The same applies to cases involving economic discrimination. *Yick Wo*, for example, dealt with the right of Chinese immigrants to work in laundries, a prime

---

[155] *Id.* at 369.

[156] 413 U.S. 528 (1973).

[157] *Id.* at 534 (emphasis in original).

[158] 473 U.S. 432 (1985).

[159] *Id.* at 448 (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

[160] 517 U.S. 620 (1996).

[161] *Id.* at 634.

[162] Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 62–63 (1996).

[163] Unfortunately, as Sunstein notes, "we have seen enough to be able to say that hatred and fear can always be translated into public-regarding justifications." *Id.* at 62.

example of the exploitation of economic regulatory authority to exclude unpopular minorities.[164] There are many other sad examples of occupational licensing laws being used to exclude oppressed racial minorities from economic opportunity.[165] As Robert McCloskey pointed out, the rationale behind judicial solicitude for politically weak minorities[166] applies equally to economically excluded groups:

> Prejudice against Jehovah's Witnesses for their "queerness" makes repressive governmental action more probable, and precisely because of their queerness they are not likely to be numerous enough or influential enough in any given community so that their weight will be felt in the city council. To speak of their power to defend themselves through political action is to sacrifice their civil rights in the name of an amiable fiction. . . . Perhaps it is true that a prosperous corporation can effectively plead its case at the bar of legislative judgment by resort to publicity and direct lobbying. . . . But the scattered individuals who are denied access to an occupation by State-enforced barriers are about as impotent a minority as can be imagined. The would-be barmaids of Michigan or the would-be plumbers of Illinois have no more chance against the entrenched influence of the established bartenders and master plumbers than the Jehovah's Witnesses had against the prejudices of the Minersville School District.[167]

The Supreme Court appears to have recognized this fact in *Metropolitan Life Insurance Co. v. Ward*,[168] when it invalidated an Alabama law that imposed heavier

---

[164] *See generally* David E. Bernstein, Lochner, *Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999).

[165] *See* Bernstein, *Licensing Laws*, *supra* note 2.

[166] *See, e.g.*, Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 486 (1982).

> [G]overnmental action [which] seriously "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities" . . . implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Id. (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153, n.4 (1938), and San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)) (third alteration in original).

[167] Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 50. McCloskey is referring to *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), which was overruled in *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

[168] 470 U.S. 869 (1985).

taxes on out-of-state insurance companies than on in-state insurance companies. The tax was immune from dormant commerce clause challenge,[169] but the Court found that the tax violated the Equal Protection Clause. "In the equal protection context," wrote Justice Powell for the Court, "if the State's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose."[170] The purpose that the state provided as justifying the discriminatory tax was to protect domestic insurance companies against competition from out-of-state companies. The Court rejected this because

> then any discriminatory tax would be valid if the State could show it reasonably was intended to benefit domestic business. A discriminatory tax would stand or fall depending primarily on how a State framed its purpose — as benefiting one group or as harming another. This is a distinction without a difference . . . . [P]romotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose.[171]

It is especially important that the Court saw through the state's argument that it was not trying to harm outsiders, only to benefit insiders.[172] The Court spurned this "distinction without a difference," and in doing so, cited *Bacchus Imports Ltd. v. Dias*,[173] a dormant commerce clause case which rejected a similar argument advanced in defense of a state protectionist law. "Virtually every discriminatory statute," the Court noted in *Bacchus Imports*,

> can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party. . . . [I]t could

---

[169] *See id.* at 880 (citing 15 U.S.C. §§ 1011–15).

[170] *Id.* at 881.

[171] *Id.* at 882 (citation omitted).

[172] *See also* Delaware River Basin Comm'n v. Bucks County Water & Sewer Auth., 641 F.2d 1087, 1099–1100 (3d Cir. 1981).

> It is always possible to hypothesize that the purpose underlying a classification is the goal of treating one class differently from another. A statute's classifications will invariably be rationally related to a purpose so defined, since the "purpose" is, in effect, a restatement of the classification. . . . [This] would . . . render the rational basis standard no standard at all.

Id. (citation omitted).

[173] 468 U.S. 263 (1984).

> always be said that there was no intent to impose a burden on one party, but rather the intent was to confer a benefit on the other.[174]

Ward stands for the proposition that something more than a simple naked preference — some *public-regarding* justification — must support any government act granting economic benefits to some groups over others. As the Eighth Circuit Court of Appeals has put it: "[I]t is untenable to suggest that a state's decision to favor one group of recipients over another by itself qualifies as a legitimate state interest."[175]

Finally, as McCloskey suggested, it is often helpful to compare the judicial treatment of economic liberty to other kinds of liberty. It would hardly be maintained that a legislature's desire to promote, say, a particular religion, would be a legitimate state interest entitling it to forbid the free exercise of competing religions, or that the legislature's desire to advertise a particular message — which the legislature certainly may do[176] — would permit it to censor opposing messages.[177] Yet this is the principle adopted by the *Powers* court. The legislature's decision to grant protection to a politically favored group is legitimate, *regardless* of whether doing so has some public-regarding justification; the legislature's act legitimizes itself. By that principle, unfortunately, there is no possible limit to the range of "legitimate" government interests, and the notion of distinguishing them from illegitimate interests is a sham.

III. ECONOMIC EXCLUSION IN PRACTICE: THE SAGA OF *SAGANA*

Economic protectionism is nothing new to the Supreme Court. In several cases, the Court has held that merely protecting natives against competition from immigrants is not a legitimate state interest. Unfortunately, in the recent case of *Sagana v. Tenorio*,[178] the Ninth Circuit Court of Appeals disregarded these decisions and agreed with the Tenth Circuit's *Powers* rationale, that mere economic protection is a legitimate state interest. Although the case did not involve occupational licensing itself, *Sagana* gives us a better sense of why mere economic animus should not be considered a legitimate state interest for due process and equal protection purposes, in licensing as well as other areas of the law.

---

[174] *Id.* at 273.

[175] Ranschburg v. Toan, 709 F.2d 1207, 1211 (8th Cir. 1983).

[176] *See* Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377 (2001).

[177] *See, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991).

[178] 384 F.3d 731 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 1313 (2005).

A. Protecting the Wages of Natives Is Not a Legitimate State Interest

The tendency of legislatures to restrict employment opportunities to favored constituencies is a constant threat to the rights of aliens who are entitled to the equal protection of the law.[179] Hostility toward immigrants and immigration routinely has been predicated on competition for jobs. Among the most extreme examples is the California Constitutional Convention of 1878, called in large part to protect white European immigrants from competition from Chinese immigrants.[180] Delegates at the Convention came close to prohibiting the Chinese from owning property or working for any corporation. In striking down a similar law shortly thereafter, one federal judge expressed shock

> that such legislation as this could be directed against a race whose right freely to emigrate to this country, and reside here with all 'the privileges, immunities, and exemptions of the most favored nation,' has been recognized and guaranteed by a solemn treaty of the United States, which not only engages the honor of the national government, but is by the very terms of the constitution the supreme law of the land.[181]

Nevertheless, state discrimination against immigrant workers continued throughout the twentieth century. In *Truax v. Raich*,[182] the Supreme Court held that the Equal Protection Clause was violated by an Arizona law designed to protect the jobs of natives against Mexican immigrants. The law was "frankly . . . title[d] . . . '[a]n act to protect the citizens of the United States in their employment against non-citizens,'"[183] and it required that for any business employing more than five workers, at least eighty percent of the employees must be American citizens.[184] The law was an admittedly protectionist measure, the Court held, and the result was that "the

---

[179] *See* THOMAS SOWELL, THE ECONOMICS AND POLITICS OF RACE 204 (1983) ("[S]uppliers of labor . . . seek to restrict the numbers and categories of labor admitted."); Irene Scharf, *Tired of Your Masses: A History of and Judicial Responses to Early 20th Century Anti-Immigrant Legislation*, 21 U. HAW. L. REV. 131, 137 (1999) ("Not only did business leaders attack the newcomers, but so also did organized labor, jealous of competition for jobs from the immigrants."); *see also* IRIS CHANG, THE CHINESE IN AMERICA: A NARRATIVE HISTORY 38–156 (2003). Chang details California's nineteenth century legal discrimination which "ma[de] it difficult for the Chinese [immigrants] to find any work at all." *Id.* at 128.

[180] *See* Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday's Rationality Review Isn't Enough*, 24 N. ILL. U. L. REV. 457, 469–72 (2004).

[181] *In re* Parrott, 1 F. 481, 495–96 (C.C.D. Cal. 1880).

[182] 239 U.S. 33 (1915).

[183] *Id.* at 40.

[184] *Id.*

complainant is to be forced out of his employment as a cook in a restaurant, simply because he is an alien."[185] But the right to earn a living "is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure,"[186] and if this right "could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words."[187]

The state contended that the law was a public safety measure in that protecting the wages of native workers was a public service.[188] But the Court rejected this argument:

> It is no answer to say . . . that the act proceeds upon the assumption that "the employment of aliens unless restrained was a peril to the public welfare." The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor is necessarily involved. . . .
>
> . . . .
>
> . . . The restriction now sought to be sustained is such as to suggest no limit to the State's power of excluding aliens from employment . . . . The discrimination is against aliens as such in competition with citizens in the described range of enterprises and in our opinion it clearly falls under the condemnation of the fundamental law.[189]

Similarly, in *Takahashi v. Fish & Game Commission*,[190] the Court found a California law prohibiting Japanese citizens from obtaining licenses to fish off the state's coast to be unconstitutional.[191] The Court held that, although the federal government may regulate immigration, such a power does not permit a state to "adopt . . . the same classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living."[192] Again, the law was designed to protect natives against competition from outsiders — an interest which the Court did not consider legitimate. And in *Sugarman*

---

[185] *Id.* at 41.
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.* at 41–42, 43.
[190] 334 U.S. 410 (1948).
[191] *See id.* at 413, 422.
[192] *Id.* at 418–19.

v. Dougall,[193] the Court held that a New York law limiting civil service positions to citizens of the United States violated the Equal Protection Clause.[194] Aliens, wrote Justice Blackmun for the Court, are "entitled to the shelter of the Equal Protection Clause. This protection extends, specifically, in the words of Mr. Justice Hughes, to aliens who 'work for a living in the common occupations of the community.'"[195] The state argued that the citizenship restriction served a legitimate state interest in preserving the state's political identity,[196] but the Court noted that the "breadth and imprecision" of the restriction revealed that it did not serve this interest.[197] Rather, the law was a device for protecting residents from competing for civil service jobs — an interest the Court did not find legitimate.[198] Reflecting on this line of cases, the Supreme Court has noted that when it comes to economic discrimination against immigrants, "States have had the greatest difficulty in persuading this Court that their interests are substantial and constitutionally permissible."[199]

This is as it should be. One of the primary purposes of the Fourteenth Amendment was to secure the right of formerly disenfranchised persons — particularly former slaves — to "work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil."[200] It would be very strange for an amendment, intended to protect the new members of American society in their economic freedom, not to apply to immigrants as well.

B. Sagana v. Tenorio — *Protecting Residents Justifies Alienage Discrimination?*

The Commonwealth of the Northern Mariana Islands (CNMI) is subject to the Fourteenth Amendment the same as a state.[201] Yet, it enforces a law called the Nonresident Worker's Act (NWA),[202] which places heavy restrictions on the employment of lawfully admitted nonresident alien workers. Among other things, the law requires employers who wish to hire nonresidents to notify the CNMI Department

---

[193] 413 U.S. 634 (1973); *accord* Hampton v. Mow Sun Wong, 426 U.S. 88, 116–17 (1976) (holding that barring lawfully admitted resident aliens from employment violated Due Process Clause).

[194] *Sugarman*, 413 U.S. at 646.

[195] *Id.* at 641 (quoting Truax v. Reich, 239 U.S. 33, 41 (1915)).

[196] *Id.* at 642–43.

[197] *Id.* at 643.

[198] *See id.* at 644–45.

[199] Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 603 (1976).

[200] CONG. GLOBE, 42d Cong., 1st Sess. app. 86 (1871) (statement of Rep. Bingham). *See also* Sandefur, *supra* note 3, at 229.

[201] *See* Basiente v. Glickman, 242 F.3d 1137, 1143 (9th Cir. 2001).

[202] 3 N. MAR. I. CODE § 4411 (1983).

of Labor, which seeks resident workers to place in the position instead.[203] At least ten percent of an employer's work force must be made up of residents.[204] The Department of Labor preapproves all employment contracts for nonresident workers, and employers are required to post a bond covering three months of wages, medical coverage, and repatriation expenses.[205] Employers must pay nonresidents biweekly, in cash, and must pay special minimum wages.[206] The NWA forbids the hiring of nonresident workers for certain jobs entirely.[207]

Bonifacio Sagana was a nonresident worker who entered the CNMI in 1991 and worked as a security guard until 1994.[208] After running into trouble with immigration authorities in the CNMI, Sagana filed a civil rights lawsuit seeking a legal declaration as to whether he "ha[d] the right to freely market his labor in the common occupations of life to any prospective employer without restriction and on equal terms as any citizen for so long a period as [he was] lawfully admitted to the CNMI as a nonresident worker."[209] The question before the court was therefore very precise, and the court assumed for purposes of the case that Sagana had been legally admitted.[210]

The Ninth Circuit found that the NWA's restrictions on employment were not designed to protect the public against dangerous or wrongful business practices, but were instead designed to protect residents against competition from lawfully admitted nonresidents.[211] Nevertheless, the court held, such preferences served a legitimate state interest:

> The CNMI legislature has seen fit to create a temporary class of employees for the purpose of bolstering the CNMI economy, giving job preference to its residents, and protecting the wages and conditions of resident workers while enforcing a system to control and regulate its visiting laborers. These are reasonable, important purposes.[212]

---

[203] Sagana v. Tenorio, 384 F.3d 731 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 1313 (2005), at 734–35 (citing §§ 4431, 4432).

[204] *Id.* at 735 (citing § 4436(a)).

[205] *Id.* (citing §§ 4434(a)(1), 4435).

[206] *Id.* (citing §§ 4436(c), 4437(b)).

[207] *Id.* (citing §§ 4434(e)(1)–(2), (h), (I)).

[208] *Id.*

[209] *Id.* at 735–36.

[210] *See id.* at 736–40.

[211] *Id.* at 741.

[212] *Id.*

To support this conclusion, the court cited three cases, *Sure-Tan, Inc. v. NLRB*,[213] *INS v. National Center for Immigrants' Rights, Inc.*,[214] and the unreported case of *Kin v. Government of Northern Mariana Islands*.[215]

Although in *Sure-Tan* and *National Center for Immigrants' Rights* the Supreme Court concluded that "[a] primary purpose in restricting immigration is to preserve jobs for American workers,"[216] the Court was engaged only in a statutory interpretation of federal immigration laws, and did not discuss the constitutionality of this purpose at all. More importantly, the equal protection guarantee only applies to "person[s] within [the relevant] jurisdiction."[217] Immigration policies which limit the number of immigrants admitted for protectionist purposes are distinguishable from the treatment of immigrants once they have been lawfully admitted — which the *Sagana* court was bound to assume was the case.[218] Neither of these cases supports the conclusion that economically discriminatory federal immigration policies are constitutional, let alone that lawfully admitted non-resident aliens may be legally discriminated against to protect residents from economic competition. The latter contention is especially contrary to the weight of case law on the subject.

Kin provided even weaker support for the conclusion in *Sagana*. Written by the same judge who decided *Sagana* at the district court level, *Kin* was a district court decision which upheld the Mariana Islands' regulation of nonresident workers. The conclusory basis for the decision was that "[t]here is no bright line test to determine what is an important governmental interest.... The Court finds that controlling and regulating nonresident workers is an important governmental interest."[219]

Sagana's holding — that giving job preferences to residents, and "protecting the wages and conditions of resident workers... are reasonable, important purposes"[220] — conflicts directly with *Truax*, *Takahashi*, and other cases[221] holding that economic opportunity must be extended alike to all legally admitted aliens. While a sovereignty might be authorized to refuse admittance on the basis of economic protection, there is no constitutional basis for treating people differently after they have been legally admitted. And, following *Ward*[222] and *Bacchus Imports*,[223] it cannot be argued that

---

[213] 467 U.S. 883 (1984).

[214] 502 U.S. 183 (1991).

[215] Civ. A. No. 88-0022, 1989 WL 311391 (D. N. Mar. I. Jan. 27, 1989).

[216] *Nat'l Ctr. for Immigrants' Rights*, 502 U.S. at 194 (quoting *Sure-Tan*, 467 U.S. at 893).

[217] U.S. CONST. amend. XIV, § 1.

[218] Because the Equal Protection Clause does not explicitly apply to the federal government, the Supreme Court has held that it is bound by the principles of equal protection through the Fifth Amendment's Due Process Clause. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 215–18 (1995).

[219] *Kin*, 1989 WL 311391, at *2.

[220] Sagana v. Tenorio, 384 F.3d 731, 741 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 1313 (2005).

[221] *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973).

[222] MetroLife Ins. Co. v. Ward, 470 U.S. 869 (1985).

[223] Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

these preferences are simply attempts to subsidize beneficiaries rather than to harm outsiders, since this is a distinction without a difference. Unfortunately, as with *Powers*, the Supreme Court denied certiorari in *Sagana*.[224]

IV. THE FUTURE OF ECONOMIC PROTECTIONISM UNDER THE FOURTEENTH AMENDMENT: *MERRIFIELD* AND *ODOM*

If "[a]n intent to discriminate is not a legitimate state interest,"[225] then courts must pay much more serious attention to the question of whether economic exclusion, designed solely to keep up the wages of political insiders, constitutes a legitimate state interest.[226] If mere protectionism is a legitimate state interest, it is hard to see what could possibly, in principle, violate the Equal Protection Clause. Protectionism is simply a naked preference — a benefit granted to insiders because they are insiders, and a wall excluding outsiders simply because they are outsiders. While the government certainly has the authority to create laws which *incidentally* benefit private parties in the pursuit of general public benefits, not until *Powers* did a court hold that the legislature may grant monopoly preferences to preferred groups solely on the basis of their political power.

A. Occupational Licensing in the Public Perspective

Merrifield v. Lockyer[227] presents an excellent example of the pernicious consequences that can arise from the abuse of occupational licensing laws and the rational basis test used to analyze those laws. I have already noted that, although licensing is generally intended to accomplish a public benefit (by protecting consumers against dangerous practices and incompetent practitioners) such laws are often exploited by private businesses "to advance their own interests in restraining competition."[228] Unfortunately, the rational basis test frequently blinds courts to such abuse.

Like *Craigmiles*, *Merrifield* challenged the constitutionality of an occupational licensing scheme that had no sensible public justification at all, but which — the

---

[224] 125 S. Ct. 1313 (2005) (No. 04-774).

[225] Ranschburg v. Toan, 709 F.2d 1207, 1211 (8th Cir. 1983).

[226] For examples of some courts that have considered this issue seriously, see *Wal-Mart Stores, Inc. v. Rodriguez*, 238 F. Supp. 2d 395, 416 (D.P.R. 2002) ("Protectionism itself, or promoting in-state business by discriminating against out-of-state participants, is not a legitimate state interest."), *Tyson Foods, Inc. v. McReynolds*, 700 F. Supp. 906, 912 (M.D. Tenn. 1988) ("Insulating local operations of a nonresident corporation from interstate competition is not a legitimate state interest."), *Benson v. Zoning Bd. of Appeals*, 27 A.2d 389, 391 (Conn. 1942) (citing supporting cases), and *City of Guthrie v. Pike & Long*, 243 P.2d 697, 700–01 (Okla. 1952).

[227] 388 F. Supp. 2d 1051 (N.D. Cal. 2005).

[228] Hoover v. Ronwin, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting).

state's own expert witness admitted — was designed simply to protect the monopoly rates of licensees. The plaintiffs[229] are wildlife control workers; they trap or exclude vertebrate pests — such as pigeons, rats, skunks, or raccoons — from structures, and they install spikes or netting on building ledges to keep birds from roosting on them.[230] Alan Merrifield and the other plaintiffs do not use pesticides.[231] But, under California's Structural Pest Control Act, any professional engaged in vertebrate pest control in any structure must obtain a Branch 2 Structural Pest Control Operator's License.[232] This can be a significant burden because even to take the two-hundred-question licensing examination, an applicant must first show proof of having served two years in the employ of a licensee.[233] More disturbingly, the exam does not test an applicant's knowledge of non-pesticide techniques of pest control; instead, it is overwhelmingly devoted to a person's knowledge of the proper techniques of handling pesticides.[234] For example, although a person must take and pass this test before putting pigeon-deterring spikes on a building, the examination does not contain a single question about pigeons, or any other kind of bird, or about spikes.[235] Instead, the exam is overwhelmingly devoted to testing an applicant's knowledge of the proper ways of handling, using, and storing pesticides, and about invertebrate pests such as moths.[236]

Perhaps recognizing the silliness of requiring people who do not use pesticides to become experts on the use of pesticides, one state legislator sought to amend the law in 1995 to eliminate the licensing requirement for non-pesticide practitioners.[237] When this proposal became known, however, licensed pest control workers, seeking to maintain their control over the industry, opposed it. One organization in particular, the Pest Control Operators of California (PCOC) lobbied legislators and sent representatives to meetings hoping to dissuade the legislature from passing the bill. One of these lobbyists was PCOC's Eric Paulsen, who later testified as the state's expert witness. Paulsen explained his organization's opposition to the bill:

---

[229] *Merrifield* is currently on appeal.

[230] *See Merrifield*, 388 F. Supp. 2d at 1055.

[231] *See id.*

[232] CAL. BUS. & PROF. CODE §§ 8550(a), 8560(a) (West 1995).

[233] *Id.* § 8562(b). The law also allows an applicant to satisfy this requirement by submitting "[p]roof satisfactory to the board that the applicant has had . . . the equivalent of that experience." *Id.*

[234] *See* STRUCTURAL PEST CONTROL BOARD, CANDIDATE'S HANDBOOK FOR OPERATOR BRANCH 2, at 5–6, *available at* http://www.pestboard.ca.gov/education/oprbr2_handbook.pdf (last visited Jan. 16, 2006).

[235] *See* Declaration of Bill Gillespie at 4, *Merrifield*, 388 F. Supp. 2d 1051 (No. 04-0498-MMC) (on file with author); Declaration of Randall Blair at 5–6, *Merrifield*, 388 F. Supp. 2d 1051 (No. C-04-0498-MMC) (on file with author).

[236] *See* Declaration of Bill Gillespie, *supra* note 235, at 3–5; Declaration of Randall Blair, *supra* note 235, at 5–6.

[237] *See Merrifield*, 388 F. Supp. 2d at 1053–54.

> [O]ur position would be that — you know, at that time that anyone trapping these animals should be licensed. And then in the process of saying, Well, we need to find a compromise, which is what Assemblywoman Brown called this meeting, you know, and had her staff oversee, to find a compromise so that the licensing agencies and the industry that is currently licensed to do this activity and the currently unlicensed individuals could find a ground where — Well, what's going to be a reasonable rational way to divide this up so that these individuals can do what they want to do. Their primary purpose that they were pushing forward was the trapping of mostly vertebrate mammals, but they also talked about birds.
>
> I said, Well, you guys keep the pigeons. Will that keep you happy? So you will not oppose our bill. Keep rats, mice and pigeons. And we'll take these others.[238]

The result of this attempt to divide up the pest control industry was an alteration to the 1995 amendment which defined the term "vertebrate pests" as not including rats, mice, or pigeons.[239] Thus, under the current law, any person practicing structural pest control must obtain a license, with the exception of practitioners who do not use pesticides — but this exception does not apply when the work being done involves pigeons, rats, and/or mice.

In other words, if a professional installs a screen on a building to keep a *raccoon* out, she does not need a license; if the same person installs the *same* screen on the *same* building to keep a *rat* out, she does. Excluding pigeons requires a license; excluding seagulls does not. Meanwhile the test the person is required to take requires her to become familiar with the handling and storage of pesticides which she does not use — but does not contain a single question about pigeons that she *does* deal with.

Mr. Paulsen testified that the requirement that a person have a license for pigeon, rat, and mouse work, but not for seagull, squirrel, or raccoon work, was "an interesting quirk in the law."[240] Asked to explain what he meant by a "quirk," he testified that the law was "a political piece of legislation in order to make a particular constituency happy, but it harms the consumer because the consumer ends up with somebody coming in and doing what has traditionally been a behavior that requires a professional license."[241] The PCOC believed that all pest control work

---

[238] Deposition of Eric R. Paulsen at 115, *Merrifield*, 388 F. Supp. 2d 1051 (No. C-04-0498-MMC) (on file with author) [hereinafter *Paulsen Deposition*].

[239] CAL. BUS. & PROF. CODE § 8555(g) (West 1995).

[240] *Paulsen Deposition*, *supra* note 238, at 43.

[241] *Id.* at 45.

should require a license — a position with which the plaintiffs obviously disagreed. But both sides agreed that requiring a license for trapping or excluding pigeons, rats, and mice — but not for trapping or excluding any other kind of pest — made no sense:

> Q: Does it protect the public health and safety to require a person who does pigeon exclusion work without pesticides in structures to have a . . . license?
> Mr. Paulsen: Absolutely.
> Q: Does it protect the public health and safety not to require the same license for seagull exclusion work?
> Mr. Paulsen: No, it does not.
> Q: Would you call this irrational?
> Mr. Paulsen: Yes, I would.[242]

Finally, Paulsen concluded that "as it pertains to the specific rationale for separating them [*i.e.*, pigeons, rats, and mice from other animals] . . . from a public perspective, it might be irrational, and . . . from my perspective it would make more sense to leave it all under the Structural Pest Control Board."[243]

The phrase "from a public perspective it might be irrational" is a precise way to sum up the *Merrifield*, *Powers*, and *Sagana* cases. If mere protectionism is a legitimate state interest, as *Powers* held it to be, occupational licensing laws need not be rational from a public perspective. Simply dividing up the market would be a legitimate state interest in itself. But the principles of due process and equal protection require that laws must serve "'the protection of society,'"[244] rather than the protection of private beneficiaries.

The *Merrifield* plaintiffs alleged that requiring them to get a Branch 2 Structural Pest Control Operator's License deprived them of their right to earn a living without a rational connection to public health and safety.[245] In reply, the state contended that requiring the license for pigeon, rat, and mouse work, but not for work on other pests, was rational, because these are the most common and destructive vertebrate pests.[246] As to the fact that the test contains virtually no questions about these animals, the state argued that this was irrelevant because the test is required to ensure

---

[242] *Id.* at 46–47.

[243] *Id.* at 149.

[244] Lowe v. SEC, 472 U.S. 181, 228 (1985) (quoting Dent v. West Virginia, 129 U.S. 114, 121–22 (1889)).

[245] *See* First Amended Complaint for Declaratory and Injunctive Relief at 2, Merrifield v. Lockyer, 388 F. Supp. 2d 1051 (N.D. Cal. 2005) (No. C-04-0498-MMC) (on file with author).

[246] *See* Defendants' Motion for Summary Judgment at 5, *Merrifield*, 388 F. Supp. 2d 1051 (No. C-04-0498-MMC) (on file with author).

that people treating these pests are aware of the dangers of pesticides that might have been applied to the structure by other pest control technicians.[247] Yet this same knowledge is not required of persons who treat bats, seagulls, or other common structural pests.

The district court upheld the licensing requirement. Requiring a Branch 2 license for pigeon work but not for identical seagull work did not violate the Equal Protection Clause, the court held, because the legislature might have concluded "that rats, mice, and pigeons are overwhelmingly the most common vertebrate pests infesting structures and that . . . other vertebrate pests tend to be present inside structures rarely and incidentally."[248] Further, the legislature could have decided to "protect the interests of pest control consumers by requiring that pest control operators be knowledgeable about alternative methods of control, about the public health hazards posed by pests, and about ways of protecting themselves and the public from pesticides previously applied by others."[249] The court did not explain how this rationale could be consistent with the fact that this knowledge is *not* required of persons treating other kinds of pests.

The court also rejected the plaintiffs' due process argument — that the licensing exam does not test the knowledge that the plaintiffs use, and is overwhelmingly devoted to knowledge that the plaintiffs do not use. Distinguishing *Craigmiles* and similar cases, the court found that "purchasers of structural pest control services may be unaware of hazards arising from the past or current presence of pests, their parasites, or pesticides at the site in question,"[250] so that any person providing pest control services (with regard to pigeons, rats, and mice) should be tested on these subjects. Besides, "pest control operators' work . . . involves pest-ridden environments and thus brings structural pest control operators into direct contact with potential threats to public health."[251] It was therefore rational in the court's view to require them to study information about pesticides and invertebrate pests.

The court's rationalizations for the law are contradictory. If requiring practitioners to be knowledgeable about pesticides and invertebrate pests serves the public health, it is irrational for the state to require this knowledge only for the treatment of pigeons, rats, and mice, but not for any other kind of vertebrate pests. On the other hand, if pigeons, rats, and mice are singled out for special requirements because of their commonness or their destructiveness, it makes no sense for the examination to include no (or virtually no) questions about these pests.

The *Merrifield* decision shows the lengths to which courts are impelled to go under the rational basis test. The undisputed and unambiguous record established

---

[247] *Id.* at 6.

[248] *Merrifield*, 388 F. Supp. 2d at 1058.

[249] *Id.*

[250] *Id.* at 1060.

[251] *Id.* at 1061.

that the bizarre licensing scheme was simply designed to protect licensed practitioners against competition from outsiders. The state's expert witness testified to this fact, and testified that the licensing scheme positively harmed the public health, and was irrational. The court ignored this evidence, and allowed an acknowledged instance of economic protectionism to stand under a meager camouflage.

B. How Does an Incompetent Florist Threaten Public Health?

Alone among the states, Louisiana requires a professional license for florists.[252] Procuring such a license is a significant burden: applicants must pass a one-hour written examination and a four-hour performance examination, where they are tested on such subjective criteria as the "harmony" and "effectiveness" of their flower arrangements.[253] Obviously, the licensing regime makes it very difficult for would-be florists to obtain licenses; in the years since 2000, fewer than fifty percent of applicants have passed the examination.[254]

The notion that such a licensing scheme protects the public health and safety is simply ludicrous. Indeed, noting that there was no evidence "of any evil in connection with the sale of flowers and potted plants," the Michigan Supreme Court struck down a florist licensing law in 1939.[255] It concluded that the law "was not [designed] to protect the citizens of Detroit in their public health, safety, morals or general welfare, but was for the financial benefit of a few,"[256] by limiting the business to a favored few, without any public-regarding justification. But the federal district court in Louisiana was less attentive. In *Meadows v. Odom*,[257] the court upheld the constitutionality of the Louisiana florist licensing law. After an exhaustive review of the *Powers* decision,[258] the court concluded that the law served a legitimate public interest. Rejecting the plaintiffs' argument that "people handle millions of unlicensed floral arrangements around the world every year without being harmed,"[259] the court found that

> the evidence in the record does reveal and support Louisiana's concern for the safety and protection of the general public. For example, Ben Knight, the Retail Florist for the State of Louisiana, testified as follows:

---

[252] *See* INST. FOR JUSTICE, LET A THOUSAND FLORISTS BLOOM: UPROOTING OUTRAGEOUS LICENSING LAWS IN LOUISIANA, http://www.ij.org/economic_liberty/la_florists/ backgrounder.html (last visited Jan. 16, 2006).

[253] *Id.*

[254] *Id.*

[255] S.S. Kresge Co. v. Couzens, 287 N.W. 427, 430 (Mich. 1939).

[256] *Id.*

[257] 360 F. Supp. 2d 811 (M.D. La. 2005).

[258] *Id.* at 818–21.

[259] *Id.* at 824.

> I believe that the retail florist does protect people from injury, the public and their own people. We're very diligent about not having an exposed pick, not having a broken wire, not have a flower that has some type of infection, like, dirt that remained on it when it's inserted into something they're going to handle, and I think that because of this training, that prevents the public from having any injury.
>
> . . . The Court finds that the decision of the State of Louisiana to regulate the floral industry and to license those engaged in the industry by administering a floral licensing examination is rationally related to the state's desire that floral arrangements will be assembled properly in a manner least likely to cause injury to a consumer and will be prepared in a proper, cost-efficient manner. Thus, the Court finds that the examination is rationally related to the government interest of public welfare and safety.[260]

That is to say, the licensing scheme was a legitimate way of protecting the people of Louisiana from *scratching their fingers on the wires that florists use to hold their floral arrangements together.*

While this conclusion hardly passes the laugh test, *Meadows* is, in a sense, less deplorable than *Powers*. Where *Powers* found that protecting an interest group against economic competition is itself a legitimate state interest, *Meadows* at least clung to some alleged public-regarding rationale. What is troubling is how well it, like *Merrifield*, exemplifies the irrational lengths to which courts will sometimes go under the "rational" basis test. But even that test must have its limits. As the *Craigmiles* court colorfully put it, when a state's "justifications" for a licensing requirement "strik[e] us with 'the force of a five-week-old, unrefrigerated dead fish,'" those justifications have reached "a level of pungence almost required to invalidate a statute under rational basis review."[261] If the notion that scratched fingers are a danger to public health and safety does not strike us with the same pungence, then nothing will. Justice Stevens has repeatedly warned us that "[j]udicial review under the 'conceivable set of facts' test is tantamount to no review at all,"[262] because everything could be made

---

[260] *Id.*

[261] Craigmiles v. Giles, 312 F.3d 220, 225 (6th Cir. 2002) (quoting United States v. Searan, 259 F.3d 434, 447 (6th Cir. 2001), and United States v. Perry, 908 F.2d 56, 58 (6th Cir.1990)).

[262] FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring). *See also* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 180 (1980) (Stevens, J., concurring) ("[I]f any 'conceivable basis' for a discriminatory classification will repel a constitutional attack on the statute, judicial review will constitute a mere tantalogical recognition of the fact that Congress did what it intended to do."); Cornwell v. Hamilton, 80 F. Supp. 2d 1101, 1106 (S.D. Cal. 1999) (noting that under rational basis, "[t]here must be some congruity between the [legislative] means employed and the stated end or the [rational basis] test would be a

"rational" by some stretch of the imagination. The *Meadows* decision makes Justice Stevens's concerns startlingly real.

Meadows typifies everything wrong with occupational licensing law — a thin pretext of public benefit stretched over a blatant example of rent-seeking and anti-competitive practices. In 2004, when the Louisiana House of Representatives voted overwhelmingly in favor of a bill to eliminate the florist licensing requirement, the bill died in the state Senate's Agriculture Committee after intensive lobbying by licensed florists.[263] Even the State Commissioner of Agriculture lobbied against the bill, after interviewing several licensees — but not speaking to any unlicensed, would-be florists — because (as he later testified) "he had 'committed to the florists' when running for office that he would 'support [their] desires' of . . . [either] 'having or get[ting] rid of the [licensing] law.'"[264] The Louisiana florist law is a prime example of what the "public choice" school of economics calls "legislative capture" — the exploitation of government's public coercive powers for the benefit of private interest groups.

CONCLUSION

An earlier generation of lawyers saw law as something other than a mere use of coercion by the authorities. Law was defined as a general rule of conduct based on some public need. Limiting a citizen's liberty was not a self-justifying end in itself, but a way of accomplishing government's primary role in protecting the public health and safety. In *Dent*, the Supreme Court affirmed the constitutionality of occupational licensing, not because the state could interfere with liberty any time it chose, but because such deprivations served a legitimate public purpose: protecting the people from corrupt or incompetent workers. But because occupational licensing can be of immense economic value to licensed insiders — because it forbids competition — it becomes a prize in the political contest of interest groups.

While, in the past, courts took this problem seriously, the advent of the rational basis test has removed it from their view. At the birth of the rational basis theory, one attorney warned that "legislation which gives to a profession a pervasive or controlling voice in selecting those who control admission and standards goes a long way toward placing the government of a vital field in the hands of those having immediate interest and concern."[265] Things have only grown worse since then. Rather than confront the problem, however, the decisions in *Powers v. Harris* and *Sagana v. Tenorio* reinterpret this problem as a legitimate policy goal. The mischiefs of faction are now

---

nullity.").

[263] *See* Brief Amicus Curiae of Pac. Legal Found. in Support of Appellants at 7, Meadows v. Odom, No. 05-30450 (5th Cir. 2005) (on file with author).

[264] *Id.* (quoting Deposition of Defendant Bob Odom) (third and fourth alterations in Brief).

[265] Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 233 (1937).

seen not as mischiefs, but as permissible governmental purposes. And, as *Meadows* and *Merrifield* demonstrate, the rational basis test can neutralize any court's capacity to confront these mischiefs.

Perhaps in spite of itself, the *Powers* court explained the real reason behind its holding when it noted that "adopting a rule against the legitimacy of intrastate economic protectionism and applying it in a principled manner would have wide-ranging consequences."[266] That is true. But unconstitutional laws are not made constitutional simply because they are common.[267] It is sometimes the duty of the courts to make unpopular decisions and decisions with "wide-ranging consequences." Most of all, it is the job of the courts to apply rules "in a principled manner." Economic protectionism is not only the sort of animosity that the Supreme Court has repeatedly held violates the Constitution; it is also the sort of mere force that previous generations did not recognize as law at all.

---

[266] Powers v. Harris, 379 F.3d 1208, 1221–22 (10th Cir. 2004) (citation omitted).

[267] It is hard to imagine how desegregation could have occurred had the 1950s Supreme Court been convinced that barring segregation "in a principled manner" would be too difficult.