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One Test, Two Standards: The On-and-Off Role of "Plausibility" in Rational Basis Review

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Most of us have a drawer or a closet in our home where we put things that are not important enough to have their own place but are not quite worthless enough to throw away either. That is what the rational basis test is for the Supreme Court—a junk drawer for disfavored constitutional rights the Court has not explicitly repudiated, but that it prefers not to enforce in any meaningful way. Like any other junk receptacle, the rational basis test has become a real mess.

One way to begin cleaning up that mess—hopefully on the way to jettisoning rational basis review in favor of a test with some measure of substance and integrity—would be for the Supreme Court to make clear first that purported justifications for challenged regulations must be not only "conceivable" but truly plausible, and second, that in making that evaluation judges should favor reality over conjecture. Fortunately, there is ample support in the Court's precedents for the former and in common sense for the latter.

This essay proceeds in three parts. First, I will explain why I believe the rational basis test is more accurately described as a vehicle for judicial abdication of responsibility than a genuine test—particularly as applied to economic liberties. Second, I will show not only that some formulations of the rational basis test contain a "plausibility" element, but that it has been a decisive—though sometimes unacknowledged—factor in the Supreme Court's resolution of several high profile rational basis cases. Finally, I will use several cases litigated by the Institute for Justice to illustrate why judges should embrace a plausibility requirement in rational basis cases and why I believe this approach would be better for courts, citizens, and the Constitution.

I. RATIONAL BASIS REVIEW BECOMES A MECHANISM FOR ABANDONING DISFAVORED RIGHTS WITHOUT EXPLICITLY REPUDIATING THEM

As I have argued elsewhere,[1] the so-called "rational basis test" is really not a test at all, but rather a vehicle by which judges may read various rights out of the Constitution without admitting they have done so. For example, the Su-

* Senior Attorney, Institute for Justice; J.D. 1994, University of Texas School of Law; B.A. 1990 University of Texas. I would like to thank Chip Mellor and Clint Bolick, co-founders of the Institute for Justice, for giving me the opportunity to help defend people's fundamental right to earn an honest living in the occupation of their choice. I would also like to thank my colleagues at the Institute for Justice, whose commitment to liberty is a source of constant inspiration.

1. Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J. L. & Lib. (forthcoming).

preme Court has consistently recognized that there is a constitutional right of occupational freedom, i.e., a right to earn a living in the occupation of one's choice without undue government interference.[2] Until the mid-1930's, the Supreme Court treated that right as if it had genuine substance, just as it had already done and would continue to do with various other unenumerated rights, including the rights to vote,[3] travel,[4] marry,[5] have[6] and raise[7] children, and—much later—to enjoy a measure of sexual and reproductive privacy.[8]

With the advent of the New Deal, however, the Court came under increasing pressure from President Roosevelt and the Congress to stop interpreting the Constitution as if it imposed any significant limits on the government's power to micromanage the economic lives of citizens. Whether in response to President Roosevelt's court-packing threat or otherwise, in 1937 the Supreme Court

2. *See, e.g.*, Dent v. West Virginia, 129 U.S. 114, 121 (1889) ("[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition"); Truax v. Raich, 239 U.S. 33, 41 (1915) ("the right to work for a living in the common occupations of life is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure"); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (Fourteenth Amendment's conception of "liberty" includes the right "to engage in any of the common occupations of life"); New State Ice Co. v. Liebmann, 285 U.S. 262, 278 (1932) ("nothing is more clearly settled than that it is beyond the power of a state, under the guise of protecting the public, arbitrarily to interfere with private businesses or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them") (internal quotations and citations omitted); Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 238-39 (1957) ("[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment"); Greene v. McElroy, 360 U.S. 474, 492 (1959) ("[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment"); Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972) (recognizing the right "to engage in any of the common occupations of life" (citing *Meyer*, 262 U.S. at 399-400)); Examining Bd. of Eng'rs v. Otero, 426 U.S. 572, 604 (1976) (protection of the right to work for a living in a common occupation was the purpose of the Fourteenth Amendment (citing *Truax*, 239 U.S. at 41)); Lowe v. SEC, 472 U.S. 181, 228 (1985) (quoting *Dent* and *Schware*, for the proposition that citizens have a right to follow any lawful calling subject to licensing requirements that are rationally related to their fitness or capacity to practice the profession); Conn. v. Gabbert, 526 U.S. 286, 291-92 (1999) ("this Court has indicated that the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment, but a right which is nevertheless subject to reasonable government regulation").

3. *See* Reynolds v. Sims 377 U.S. 533, 560 (1964) (holding that while the Fifteenth and Nineteenth Amendments provide that the right to vote shall not be denied on account of race or sex, respectively, nothing in the Constitution explicitly prohibits the government from denying *all* citizens—or some subset of citizens not defined by race or sex—the right to vote).

4. *See* Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (citing The Passenger Cases, 7 How. 283, 492 (1849)).

5. *See* Loving v. Virginia, 388 U.S. 1 (1967).

6. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

7. *See* Meyer v. Nebraska, 262 U.S. 390 (1923).

8. *See* Lawrence v. Texas, 539 U.S. 558 (2003); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

blinked.[9] Within the space of a few years, the Court established two new principles of jurisprudence: first, that Congress would no longer be limited to exercising powers actually granted to it under the Constitution[10]; and second, that virtually any economic regulation would be approved so long as it did not discriminate against "discrete and insular" minorities or clearly violate any specific provision of the Constitution.[11]

In abandoning economic liberties and enumerated powers, the Court did not explicitly repudiate those doctrines, but nevertheless achieved that result through an act of rhetorical legerdemain. Thus, while still paying lip service to those doctrines, the Supreme Court began applying a version of the rational basis test so one-sided, so blatantly pro-government, that the Constitution would no longer present any serious obstacle to federal and state governments' regulation of the economic sphere.

Thus, under the rational basis test, regulations that interfere with certain disfavored constitutional rights will be upheld by the courts "if there is any reasonably conceivable state of facts that could provide a rational basis" for them.[12] The constitutionality of such regulations is to be presumed, and the government need not produce any evidence that the challenged regulation actually promotes any legitimate public policy objectives or that it was motivated by any desire to do so.[13] Indeed, the true purpose for the challenged law is irrelevant, as long as legislators could have been motivated by some hypothetically valid purpose.[14]

To understand how insubstantial the rational basis test is—at least when applied to economic liberties—note that the Supreme Court has not struck down a single occupational licensing regulation under that standard. Thus, despite abundant historical evidence and a rich theoretical literature showing that occupational regulations are particularly prone to abuse by rent-seeking special interests,[15] and notwithstanding a consistent pattern of violating myriad other constitutional rights, neither the federal nor any state government has, according to the U.S. Supreme Court, passed an improper occupational licensing regulation in over seventy years.

Oddly, modern liberals and conservatives vie with one another in applauding the Court's abandonment of economic liberties, and in heaping scorn on the so-called "Lochner era," during which the Court committed the unpardonable

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9. *See, e.g.*, Daniel A. Farber, *Who Killed Lochner? The Constitution and the New Deal*, 90 GEO. L.J. 985, 997 (2002) (book review) (providing chronology of events leading up to Supreme Court's proverbial "switch in time").

10. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 124 (1942).

11. *See* United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938); *see also* W. Coast Hotel v. Parrish, 300 U.S. 379, 400 (1937); Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

12. *E.g.*, FCC v. Beach Commc'ns, 508 U.S. 307, 313 (1993)

13. FCC v. Beach Commc'ns, 508 U.S. 307, 314-15 (1993).

14. *Id.*

15. *See, e.g.*, MICHAEL T. HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS 90-92 (1981).

sin of occasionally siding with individual citizens over self-aggrandizing politicians and the rent-seeking special interests that played them like so many fiddles.[16]

This is odd for liberals because they tend to advocate a wide variety of "personal" or privacy-based rights—including the right to abortion and sexual privacy—the textual and historical basis for which is vastly inferior to the case for economic liberty. Conservatives, meanwhile, typically like economic freedom in principle, but not as much as they hate *Roe v. Wade*. Thus, they tend to embrace some version of the "Where is it written in the Constitution?" canard (together with a helping of conveniently placed "inkblots"[17]) in the hopes of undermining the very foundation of unenumerated rights upon which *Roe* depends.

Thus unenumerated-rights-denying conservatives find themselves in the uncomfortable position of ignoring the Ninth Amendment[18] (so much for strict constructionism!) and espousing a view of the Constitution that offers no protection for citizens' ability to vote, travel, wed, have children, or engage in any other conduct not specifically mentioned in the document. Meanwhile, one can well imagine the outrage from the liberal establishment if the Supreme Court suddenly announced that, without overruling *Roe v. Wade*, it would henceforth "protect" the right to privacy using the same rational basis standard it now applies to economic liberties.

To recap, the Constitution protects both enumerated and unenumerated rights. The Supreme Court's creation of hierarchy in which some constitutional rights receive robust protection while others receive virtually none was an act of mere judicial will that had no legitimate basis in precedent, history, or text. The rational basis test, which the Court primarily applies to rights at the disfavored end of its constitutional spectrum, provides no meaningful protection for individual liberty and instead serves primarily as a vehicle for courts to abrogate constitutional rights whose existence they acknowledge but would prefer not to enforce.

A modest step in redeeming the rational basis test (on the way, hopefully, to replacing it with a more principled standard) would be for courts to require justifications for challenged regulations that are not merely conceivable but truly plausible. As explained below, there is support for this approach in existing Supreme Court precedent.

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16. *See, e.g.*, Liebman v. New State Ice Co., 285 U.S. 262, 279 (1932) (striking down Oklahoma law prohibiting the manufacture, sale, or distribution of ice without a license and noting that the aim of the law "is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it").

17. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 166 (1990).

18. "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

II. THE DIFFERENCE BETWEEN "CONCEIVABLE" AND "PLAUSIBLE" UNDER THE RATIONAL BASIS TEST: FANTASY VERSUS REALITY

The classic modern formulation of the rational basis was set forth in *FCC v. Beach Communications*.[19] Upholding provisions that exempted some cable television providers from regulation but not others, Justice Thomas explained that a law challenged under the rational basis test will be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis" for it.[20] The party challenging the law must "negative every conceivable basis which might support it,"[21] and, because the Court "never require[s] a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged [regulation] actually motivated the legislature."[22] Accordingly, the legislature's decision to enact the law "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."[23] As Justice Thomas noted with some understatement, "[t]his standard of review is a paradigm of judicial restraint."[24]

In his concurring opinion, Justice Stevens objected that Justice Thomas's formulation of the rational basis test "sweeps too broadly, for it is difficult to imagine a legislative classification that could not be supported by a 'reasonably conceivable state of facts.'"[25] Accordingly, "[j]udicial review under the 'conceivable set of facts' test is tantamount to no review at all."[26] While that obviously strikes Justice Stevens as problematic, as argued above, that is in fact *precisely the point* of the rational basis test.

Justice Stevens goes on in his concurrence to argue for a somewhat more robust version of the rational basis test that would ask whether the challenged law is "rationally related to a 'legitimate purpose that we may *reasonably presume* to have motivated an impartial legislature.'"[27] According to that view, it is not enough to require that a given law might hypothetically have been enacted for reasons that are not technically delusional, it must be reasonable to assume that the legislature was *actually* motivated by a desire to achieve some genuine public policy objective. While that might seem like a relatively minor distinction, if applied in a principled way it has the potential to transform rational basis review from an empty gesture into something resembling a genuine test.

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19. 508 U.S. 307 (1993) (quoting Madden v. Kentucky, 309 U.S. 83, 88 (1940)).
20. *Id.* at 313.
21. *Id.* at 315 (quoting Lenhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).
22. *Id.*
23. *Id.*
24. *Id.* at 314.
25. *Id.* at 323 n.3 (Stevens, J., concurring).
26. *Id.*
27. *Id.* (quoting U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 181 (1980) (Steven, J., concurring) (emphasis in original).

The majority opinion in *Beach Communications* contains language from which one could argue that Justice Stevens' more rigorous conception is the more appropriate—or at least an appropriate—way of applying rational basis review. Specifically, when the Court states that "[w]here there are 'plausible reasons' for Congress' action, 'our inquiry is at an end,'"[28] it appears by negative implication that any law for which there is no truly *plausible* explanation should fail the rational basis test.

Notably, the Court has used the word "plausible" in that context in at least five other cases: *United States Railroad Retirement Board v. Fritz*,[29] *Williams v. Vermont*,[30] *Nordlinger v. Hahn*,[31] *Heller v. Doe*,[32] and *Fitzgerald v. Racing Association of Central Iowa*.[33] This raises two distinct questions. First, does the Court's use of the word "plausible" actually mean anything, and if so, what?

As to the first question, the cases point in different directions. On the one hand, the Supreme Court has repeatedly upheld laws—particularly economic regulations—where the asserted public policy justification appears highly implausible. For example, in *Williamson v. Lee Optical*,[34] the Court upheld an Oklahoma law that prohibited opticians from fitting eyeglass frames to a customer's face, requiring this quotidian service to be performed by licensed eye doctors instead.[35] Similarly, in *Kotch v. Board of River Port Pilot Commissioners*,[36] the Court approved an apprenticeship requirement for Louisiana riverboat pilots that gave so much discretion to existing pilots that the field was effectively closed to all but their friends and relatives.[37] While the government lawyers defending those laws certainly offered "conceivable" public purposes for them, the idea that either of them were passed out of a genuine desire to benefit the public—as opposed to eye doctors and existing riverboat pilots, respectively—is distinctly *implausible*.

On the other hand, there is at least one group of cases in which the Supreme Court gave more than lip service to the notion of plausible (as opposed to

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28. *Id.* at 313-14 (quoting Fritz, 449 U.S. at 179 (majority opinion)).

29. 449 U.S. 166, 179 (1980) (upholding benefit program for railroad employees that awarded different pension benefits to railroad workers depending on whether they had a "current connection" with the railroad industry).

30. 472 U.S. 14, 26 (1985) (striking down a Vermont car tax that discriminated between state residents and nonresidents).

31. 505 U.S. 1, 11 (1992) (upholding California's differential property tax scheme embodied in the infamous "Proposition 13").

32. 509 U.S. 312, 324, 333 (1993) (upholding Kentucky regulations establishing different involuntary commitment procedures for mentally retarded and mentally ill persons).

33. 539 U.S. 103, 110 (2003) (upholding differential tax rates on slot machine proceeds from riverboats and race tracks).

34. 348 U.S. 483 (1955).

35. *Id.* at 485 n.1.

36. 330 U.S. 552 (1947).

37. *Id.* at 565 (Rutledge, J., dissenting) ("While the statutes applicable do not purport on their face to restrict the right to become a licensed pilot to members of the families of licensed pilots, the charge is that they have been so administered. And this charge not only is borne out by the record but is accepted by the Court as having been sustained.").

merely conceivable) legislative purpose, and actually invoked the concept as a means of explaining why it reached different results in similar cases. All three cases in the group involved the constitutionality under the Equal Protection Clause of differential tax rates being applied to similarly situated persons.

The first case was *Allegheny Pittsburgh Coal Co. v. Commission of Webster County*, in which several property owners challenged an assessment procedure that resulted in "gross disparities in the assessed value of generally comparable property."[38] The disparities arose from the county tax assessor's practice of tying the appraised value of the property to its last sale price—whether that sale occurred recently or long ago.[39] Not surprisingly, that method produced "dramatic differences" in the assessed value of similarly situated properties, with at least one plaintiff being taxed at 35 times the amount charged to owners of comparable properties.[40] A unanimous Supreme Court rejected the county's scheme on the grounds that it failed to meet the constitutional requirement of ensuring a "seasonable attainment of a rough equality in tax treatment of similarly situated property owners."[41] Notably, the Court offered no specific framework or analytical guide for determining the point at which inevitable disparities in property valuations cross the line from rational and legitimate to constitutionally forbidden "intentional systematic undervaluation."[42]

By contrast, several years later in *Nordlinger v. Hahn*,[43] the Supreme Court upheld California's infamous Proposition 13, which created tax disparities similar to those in *Allegheny Pittsburgh* by again valuing property at its most recent sale price instead of current market value.[44] This time, the Court upheld the scheme under the rational basis test, finding that California's decision to tax recently-acquired properties at a far higher rate (based on their acquisition value) than similarly situated properties that had not been recently sold satisfied the rational basis test. Specifically, the Court found that California's differential tax scheme was rationally related to the state's interest in promoting "local neighborhood preservation, continuity, and stability"[45] as well as protecting the "reliance interests" of longtime homeowners who, unlike prospective purchasers, could not simply decline to purchase the property if the tax burden became too much.[46] The Court distinguished *Allegheny Pittsburgh* based on "the ab-

38. 488 U.S. 336, 338 (1989).

39. *Id.* at 338-39.

40. *Id.* at 341.

41. *Id.* at 343.

42. Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350, 352 (1918), *quoted in Allegheny Pittsburgh*, 488 U.S. at 345.

43. 505 U.S. 1 (1992).

44. Proposition 13 was prompted by the extraordinary increase in property values in California during the late 1960's and 1970's. Essentially, existing homeowners sought to "lock in" the current value of their homes for property tax assessment purposes, while saddling new owners with the "acquisition value" of the property. This led to massive tax disparities between properties that were identically situated in every respect except for when they were last sold. *See generally id.* at 4-8.

45. *Id.* at 12.

46. *Id.* at 12-13.

sence of any indication in *Allegheny Pittsburgh* that the policies underlying an acquisition-value taxation scheme could conceivably have been the purpose for the Webster County tax assessor's unequal assessment scheme."[47]

As Justice Thomas pointed out in his concurrence, however, that distinction is dubious at best and is in some tension with the Court's rational basis precedents. According to Justice Thomas, the differential tax schemes in *Allegheny Pittsburgh* and *Nordlinger* "operate[] precisely the same way."[48] It therefore follows, he says, that the differential tax scheme in *Allegheny Pittsburgh* being "indistinguishable from California's" Proposition 13, should be constitutional for the same reasons accepted by the *Nordlinger* majority.[49] The only reason the Court reached a different result in *Allegheny Pittsburgh* was because "'the facts precluded any plausible inference that the reason for the unequal assessment was to achieve the benefits of an acquisition-value tax scheme.'"[50]

Justice Thomas is surely correct in his basic objection to the Court's distinction between *Allegheny Pittsburgh* and *Nordlinger*. If the Court is serious in its assertion that the true purpose for government action is irrelevant as long as the government's lawyers (or even the courts) can dream up a "conceivable" *post hoc* rationalization for the challenged regulation, then what possible difference does it make that in one case (*Allegheny Pittsburgh*) the differential tax valuation appears to have been more the result of bureaucratic inertia or sloth than any discernible policy objective, whereas in *Nordlinger* it was plainly the result of a deliberate plan with (supposedly) legitimate public purposes?

The notion that there is a distinction—and perhaps a critical distinction—between a law having merely a "conceivable" public purpose and a law having a truly "plausible" public purpose was recently reinforced in *Fitzgerald v. Racing Association of Central Iowa*.[51] *Fitzgerald* involved an equal protection challenge by a racetrack owners' association to an Iowa law that taxed the proceeds from slot machines at racetracks at a higher level than slot machines located on riverboats. Resolving that challenge required the Court to revisit *Allegheny Pittsburgh* and *Nordlinger* in order to explain why it rejected a differential tax scheme in the former case but upheld it in the latter.

Explaining the distinction, Justice Breyer twice quoted language from *Nordlinger* discussing the Court's requirement that there be "*plausible* public policy reason" in order for a law to meet the rational basis test.[52] He found several plausible reasons for Iowa's decision to tax riverboats at a lower rate than race

47. *Id.* at 15.

48. *Id.* at 18 (Thomas, J., concurring).

49. *Id.* at 23.

50. *Id.* at 25-26 (quoting *id.* at 15 (majority opinion)).

51. 539 U.S. 103 (2003).

52. *Id.* at 107 ("[T]he Equal Protection Clause is satisfied so long as there is a plausible public policy reason for the classification" (quoting *Nordlinger*, 505 U.S. at 11-12) (emphasis added)); *id.* at 108-9 ("judicial review is 'at an end' once the court identifies a plausible basis on which the legislature may have relied" (quoting *Nordlinger*, 505 U.S. at 17-18)); *id.* at 110 ("[t]he Court in *Nordlinger* added that 'Allegheny Pittsburgh was the rare case where the facts precluded any plausible inference that the

tracks, including encouraging the economic development of river communities, promoting riverboat history by giving them incentives to stay in the state, and protecting the reliance interests of riverboat operators in continuing to receive a flat 20% tax rate, instead of the graduated 20%-plus rate applied to racetrack owners.[53] Thus, because there was a "plausible policy reason" for the differential tax rate, because the legislature could "rationally" have considered the underlying facts to be true, and because the relationship of the tax scheme to the hypothetical goals was not "so attenuated as to render the [scheme] arbitrary or irrational," the scheme survived rational basis review.[54]

If consistently and seriously applied, a genuine "plausibility" element might well begin to undermine the rational basis test's entirely fictitious—but widely accepted—reputation as an objective standard of review that keeps judges from ruling on the basis of personal policy preferences as opposed to constitutional command. Unfortunately, as suggested above, the "plausibility element" is not consistently applied, and even when it has done so, the Court sometimes refuses to acknowledge it.

For example, in *Moreno v. Department of Agriculture*,[55] the Court considered the constitutionality of an amendment to the federal food stamp program designed to exclude "households" that included any people who were not related to one another. Although the Court found no rational basis for that exclusion, Justice Rehnquist pointed out in dissent that it was in fact a perfectly rational attempt to discourage fraud in the food stamp program by ensuring that eligible "households" existed "for some other purpose than to collect federal foodstamps."[56] Even Justice Douglas, who concurred in the result (but considered the issue one of free association, which receives a higher level of scrutiny than the equal protection rationale upon which the majority relied), acknowledged that "unrelated person" provision was rationally related to controlling fraud.[57]

Brushing aside this rather obvious connection, however, the majority focused on portions of the legislative history that it believed showed the amendment "was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."[58] The majority went on to criticize the government's anti-fraud argument as being based on factual assumptions that were "unsubstantiated" and also noted that the food stamp program already contained various other anti-fraud provisions which, said the majority, "necessarily cast[] considerable doubt upon the proposition that the 1971 amendment

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reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme'" (quoting *Nordlinger*, 505 U.S. at 16-17)).

53. *Id.* at 109.

54. *Id.* at 110 (quoting *Nordlinger*, 505 U.S. at 11-12).

55. 413 U.S. 528 (1973).

56. *Id.* at 546 (Rehnquist, J., dissenting).

57. *Id.* at 542-43 (Douglas, J., concurring in judgment).

58. *Id.* at 534.

could rationally have been intended to prevent those very same abuses."[59]

Note the word "intended" in the preceding quote. To anyone familiar with the rational basis test, it stands out like a sore thumb because the Supreme Court has repeatedly held the legislature's actual intent in passing the challenged law is irrelevant under the rational basis test.[60] Moreover, the fact that the food stamp program already had other anti-fraud provisions built into it says nothing about the rationality of additional fraud-prevention mechanisms. Thus, it appears the *Moreno* Court was concerned not with the *rationality* of the challenged provision excluding unrelated persons from the program, but the *plausibility* of the government's assertion that it represented a genuine desire to deter fraud rather than "a bare congressional desire to harm a politically unpopular group," namely, hippies.[61]

The Court likewise brushed aside a variety of conceivable public purposes in *City of Cleburne v. Cleburne Living Center*,[62] when it rejected a city's attempt to prevent a group home for mentally retarded adults from operating in a neighborhood where it permitted other types of group homes, such as fraternities and sororities, retirement homes, and boarding houses.[63] Thus, the Court dismissed the city's stated concerns about students at a nearby middle school harassing the residents of the home, as well as questions about legal responsibility for actions the mentally retarded residents might take and the fact that the property in question was located in a flood plain.[64] Summarizing its refusal to accept the city's explanations for withholding the permit, the Court explained that the "record does not clarify how" the characteristics of the mentally retarded adults rationally justify treating them differently than other groups that would have been permitted to operate a group home on the same site.[65] Accordingly, the decision to withhold the permit "appears to us to rest on an irrational prejudice against the mentally retarded."[66]

Normally, of course, there is no requirement in rational basis cases that the government actually support its assertions with record evidence, and it is irrelevant what *actually* motivated the government conduct so long as there could, hypothetically, have been a legitimate reason.[67] On the other hand, if one takes seriously the Court's occasional nods to a plausibility requirement, then the result in *City of Cleburne* looks perfectly reasonable. Clearly, the only *plausible* explanation for the city's conduct was prejudice against the mentally retarded; but it is equally clear that that is not the only *conceivable* purpose for

59. *Id.* at 536-37.
60. *E.g.*, FCC v. Beach Commc'ns, 508 U.S. 307, 315 (1993).
61. *Moreno*, 413 U.S. at 534.
62. 473 U.S. 432 (1985).
63. *Id.* at 447-48.
64. *Id.* at 449.
65. *Id.* at 450.
66. *Id.*
67. *See* FCC v. Beach Commc'ns, 508 U.S. 307, 315 (1993).

the city's action.

A decade later, in *Romer v. Evans*,[68] the Court again chose to ignore a variety of conceivable justifications when it struck down an amendment to the Colorado constitution that would have forbidden the state from enacting any special legal protections for homosexuals. Just as it did in *City of Cleburne*, the Court focused on what appeared to it to be the actual reason for the provision—animus towards gays—while disregarding the perfectly rational—though distinctly implausible—justifications offered by the state's attorneys. Thus, the Court rejected the challenged provision in *Romer* because it "seems inexplicable by anything but animus towards the class it affects."[69]

In all three cases—*Moreno*, *City of Cleburne*, and *Romer*—the Court's speculation about the true (invidious) purpose of the challenged provisions seems clearly correct, just as the Court's assertion that the government failed in each case to identify any "conceivable" public purposes for its conduct seems plainly incorrect. Instead of candidly admitting that it was applying a higher "plausibility" standard, however, the majority in each instance simply insisted, without any credibility, that it was applying standard rational basis analysis.

III. THE GOVERNMENT SHOULD HAVE PLAUSIBLE EXPLANATIONS FOR REGULATIONS THAT INTERFERE WITH PEOPLE'S LIBERTY

According to its most common formulation, the rational basis test requires judges to uphold challenged regulations "if there is any reasonably conceivable set of facts" that could support them.[70] But what exactly does "reasonably conceivable" mean in that context? Specifically, can there ever come a point where justifications offered by the government—though not technically irrational—become so absurd, so obviously fraudulent, that a judge need not accept them? The foregoing discussion suggests that while the answer may well be yes, the Supreme Court is deeply ambivalent about doing so. But the following illustrations vividly illustrate the need for such a standard.

The question whether there can be a point where the government's arguments in support of a challenged law, though not irrational, are too ridiculous for serious people to accept is no hypothetical. As a libertarian public interest firm dedicated to reviving economic liberties, including specifically the right to earn a living in the occupation of one's choice without undue government interference, the Institute for Justice is familiar with many such situations.

For example, in Alabama it is a crime for anyone but fully licensed interior designers to go into people's homes and advise them, for a fee, about what color to paint their living room, what kind of art to hang on their walls, or whether to go with shag or berber carpet.[71] Becoming a licensed interior designer requires

68. 517 U.S. 620 (1996).
69. *Id.* at 632.
70. *Beach Commc'ns*, 508 U.S. at 312.
71. ALA. CODE § 34-15B-8(c).

a combined six years of college plus apprenticeship and the applicant must also pass a national exam that is almost totally irrelevant to what many interior designers actually do.[72] According to its "legislative findings," one justification for the law is the fact that interior design is a "learned profession" and it is a matter of "public . . . concern" that members of that profession "receive the confidence of the public and that only qualified persons be permitted to practice interior design" within the state.[73]

Like interior designers in Alabama, not just anyone can arrange and sell flowers in Louisiana. That privilege is reserved for the lucky few who manage to pass the state's outdated and wildly subjective licensing exam that requires applicants to prepare four different floral arrangements that will be judged by their own future competitors.[74] Among other things, the state claims the law is a health and safety measure designed to protect people from the hazards of exposed floral picks, broken wires, and infected dirt.[75]

Meanwhile, in Oklahoma, Louisiana, Virginia, and a handful of other states, only fully licensed funeral directors may sell caskets to the public.[76] While this state-created cartel results in mark-ups of up to 600% above the wholesale cost,[77] and despite the funeral industry's notorious (and unfortunately well-earned) reputation for exploiting consumers, government lawyers have defended those schemes as consumer protection measures designed, in part, to protect grieving customers from being swindled.[78]

Finally, a number of states including California have interpreted their cosmetology laws to forbid traditional African hairbraiders from plying their trade without a cosmetology license even though they use no scissors, chemicals, or techniques that could injure their clients in any way.[79] Again, government lawyers have attempted to justify those regulations on a variety of implausible—but arguably not delusional—grounds such as public health and safety and ensuring professional competence.[80]

Each of the foregoing regulations presents judges with the same challenge: namely, deciding whether there can come a point where the government's

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72. ALA. CODE § 34-15B-6.

73. ALA. CODE § 34-15B-2.

74. LA. REV. STAT. ANN. § 3808(B)(1); Brief of Appellants at 4-15, Peters v. Odom, No. 05-30450 (5th Cir. July 1, 2005) (hereafter "Peters Brief"), http://www.ij.org/pdf_folder/economic_liberty/la_flowers/Appellants-Brief-la-florists.pdf. The historical pass rate on Louisiana's florist licensing exam is 36%, about half that of the Louisiana Bar Exam. *Id.* at 4.

75. *See* Meadows v. Odom, 360 F. Supp. 2d 811, 824 (M.D. La. 2005).

76. OKLA. STAT. tit. 59, §§ 396.2(2)(d), 396.2(10), 396.3(A) & 396.6(A); LA. REV. STAT. ANN. §§ 37:831(35)-(38), 37:848(C); VA. CODE ANN. §§ 54.1-2800, -2805.

77. Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002); Brief of Appellants at 58, Powers v. Harris, No. 03-6014 (10th Cir. May 23, 2003) (copy available from the Institute for Justice).

78. *E.g.*, Craigmiles, 312 F.3d at 225.

79. *See, e.g.*, Cornwell v. Hamilton, 80 F. Supp. 2d 1101 (S.D. Cal. 1999).

80. *Id.* at 1106 & nn.15-16 (identifying health and safety; regulating conduct of professions; ensuring that practitioners of hair care activities have adequate training in non-hair care aspects of cosmetology as well).

asserted justifications for a given regulation, though technically "conceivable," are nevertheless so obviously spurious that they cannot be accepted.

For example, no reasonable person would believe that Louisiana regulates florists out of a genuine legislative concern for the health and safety of florists and their customers. That premise is strongly supported by the fact that licensed florists are not actually required to supervise any of the work being done in their shops (it is customary in the industry to hire unlicensed "designers" to do much of the actual design work),[81] by the fact that no other state licenses florists the way Louisiana does,[82] and by the absence of safety-related material on the written and practical tests.[83] It is also supported by the fact that shortly after the regulation was challenged in court, the Louisiana House of Representatives voted 92-3 to get rid of it, an effort that was thwarted when the bill was killed in the Senate Agriculture Committee without ever receiving a floor vote.[84] Presented with such absurd arguments in support of such a blatantly protectionist law, one could certainly forgive a district court judge's inclination to give them no more weight than the Supreme Court did in *Moreno*, *Cleburne*, and *Romer*.

And consider the conundrum presented by the casket-selling and hairbraiding regulations described above. Obtaining a funeral directors license in Oklahoma takes at least two years of full-time college course work, a one-year apprenticeship in a funeral home (during which the applicant must embalm at least 25 human bodies), and passing scores on two different exams that cover all aspects of embalming, funeral directing, and related legal issues. Almost none of that training and testing—less than five percent—has anything remotely to do with selling caskets. According to two of the judges who upheld the scheme, however, that is enough to provide a rational basis for the state's decision to require people who only wish to sell caskets over the Internet to nevertheless master all of the knowledge and skills required of full blown funeral directors.[85]

The California hairbraiding case presents a similar dynamic. Although very little of the state-mandated cosmetology course had anything to do with braiding hair—and almost everything to do with skills and techniques that African hairbraiders do not use—there was at least some overlap of skill (about six percent, according to the district court).[86] Is that enough of an overlap to make up for the government's obviously protectionist motivation in enforcing the regulations against African hairbraiders? The district court in that case held that

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81. *See* Peters Brief, *supra* note 74, at 5-6.

82. *See id.* at 4.

83. *See id.* at 9-12.

84. *See id.* at 35-36.

85. Powers v. Harris, 379 F.3d 1208, 1225-27 (10th Cir. 2004) (Tymkovich, J., concurring). Notably, the two judges in the Tenth Circuit majority accepted, for the sake of argument, the plaintiffs' assertion that the only conceivable purpose for Oklahoma's casket sales regulation was economic protectionism for funeral directors, which it held to be a legitimate public purpose. In their words, "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." *Id.* at 1221.

86. *Cornwell*, 80 F. Supp. 2d at 1111.

it was not.[87]

Under circumstances like these, it is simply impossible to apply the rational basis test cogently. On the one hand, one can argue that since a minute portion of funeral director and cosmetologist training is relevant to casket retailers and hairbraiders the training has at least some connection to ensuring they are equipped to do their jobs properly and therefore bears a rational—albeit dubious—relationship to ensuring professional competency.[88] On the other hand, there must surely be a point where the size of the disparity between the amount of relevant versus irrelevant training becomes so great (forcing caskets retailers who will never touch a dead body to spend a year in a funeral home learning how to embalm them, for example, while barely teaching them anything about caskets), and the government's consumer protection arguments so preposterous, that it is no longer reasonable to believe that the challenged regulations have any *genuine* connection to advancing any truly public purpose.

If the rational basis test is to have any substance whatsoever, judges must candidly acknowledge that regulations can be technically "rational" (in the sense that they bear some non-delusional connection to a public purpose) but nevertheless utterly improper because their purpose to advance an illegitimate end is so manifest. Thus, no one truly believes—indeed, other than the bureaucrats who must enforce them, no serious person even contends—that Louisiana's florist regulations or Oklahoma's casket sales restrictions are genuinely intended to benefit the public. Indeed, all of the judges who voted to uphold Oklahoma's casket sales monopoly made clear in their opinions that they did not actually *believe* the law was designed to protect consumers or advance any other truly public purpose.[89]

It is difficult to believe the benefits of judicial deference can be so great as to outweigh the violence to individual liberty and the legislative disrespect for constitutional limits on power that cases like these engender. If the courts are prepared to give their imprimatur to such obvious abuses, how can we expect anything but more abuse? Perhaps that is why the Supreme Court occasionally—but usually not explicitly—rejects perfectly rational explanations for laws it finds sufficiently offensive, even while it purports to apply the rational basis test. It would do much for the honesty of the debate over unenumerated rights—not to mention the protection of civil liberties—if the Court would embrace the precept that some abuses of power are too rank to countenance, even if they are not technically insane.

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87. *Id.* at 1108.

88. *Powers*, 379 F.3d at 1225-27 (Tymkovich, J., concurring).

89. *Id.* at 1223 (majority opinion) ("There can be no serious dispute that the [casket sales restriction] is 'very well tailored' to protecting the intrastate funeral-home industry."); *id.* at 1227 (Tymkovich, J., concurring) ("Consumer interests appear to be harmed rather than protected by the limitation on choice and price encouraged by the licensing restrictions.").