

2016

## Intermediate Scrutiny as a Solution to Economic Protectionism in Occupational Licensing

Will Clark  
wclark4@slu.edu

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>



Part of the [Law Commons](#)

---

### Recommended Citation

Will Clark, *Intermediate Scrutiny as a Solution to Economic Protectionism in Occupational Licensing*, 60 St. Louis U. L.J. (2016).

Available at: <https://scholarship.law.slu.edu/lj/vol60/iss2/7>

This Comment is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

## INTERMEDIATE SCRUTINY AS A SOLUTION TO ECONOMIC PROTECTIONISM IN OCCUPATIONAL LICENSING

### INTRODUCTION

There has been an explosion in the growth of occupational licensing laws in the last few decades.<sup>1</sup> In the early 1950s, less than five percent of the United States workforce had an occupation requiring a state license.<sup>2</sup> By the late 1980s, that number had grown to eighteen percent.<sup>3</sup> In 2006, twenty-nine percent of the workforce needed a government license to work.<sup>4</sup> Though occupational licensing affects a larger portion of the workforce than labor unions or the minimum wage, it does not receive nearly as much attention.<sup>5</sup> Occupational licensing laws are usually enacted in the name of consumer protection.<sup>6</sup> However, they often impose barriers to entry, stifling competition and favoring those who are already established in the industry.<sup>7</sup> Occupational licensing laws increase the cost of doing business, making it more difficult for people to enter the market.<sup>8</sup> There is broad agreement that these laws reduce consumer welfare by making products and services more expensive, and giving consumers fewer choices.<sup>9</sup>

---

1. Joseph Sanderson, Note, *Don't Bury the Competition: The Growth of Occupational Licensing and a Toolbox for Reform*, 31 YALE J. ON REG. 455, 458 (2014).

2. Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. S173, S175 (2013).

3. *Id.*

4. Sanderson, *supra* note 1, at 458.

5. Kleiner & Krueger, *supra* note 2, at S176. In 2008, about twelve percent of workers were union members. *Id.* That year, there were 129,377,000 wage and salary workers, and 2,226,000 workers with wages at or below the minimum wage. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CHARACTERISTICS OF MINIMUM WAGE WORKERS: 2008 (Mar. 11, 2009), [http://www.bls.gov/opub/reports/cps/minimumwageworkers\\_2008.pdf](http://www.bls.gov/opub/reports/cps/minimumwageworkers_2008.pdf) [<http://perma.cc/2XLL-D6PW>]. Therefore, approximately 1.7% of workers had wages at or below the minimum wage. *See id.*

6. Sanderson, *supra* note 1, at 456.

7. *See* Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 953 (1985).

8. *See* Lana Harfoush, *Grave Consequences for Economic Liberty: The Funeral Industry's Protectionist Occupational Licensing Scheme, the Circuit Split, and Why It Matters*, 5 J. BUS. ENTREPRENEURSHIP & L. 135, 159 (2011).

9. Sanderson, *supra* note 1, at 455.

For example, hair braiding is a low- to moderate-income occupation that requires a cosmetology license in most states.<sup>10</sup> Though braiders do not cut hair, or use chemicals, dyes, or coloring agents, braiders in many states must pay thousands of dollars and endure hundreds of hours of coursework in order to avoid criminal prosecution.<sup>11</sup> The required training is unnecessary because it almost never teaches hair braiding.<sup>12</sup> Instead, braiders must learn practices they never intend to use, such as giving manicures and bleaching hair.<sup>13</sup> For example, Missouri forces hair braiders to spend \$16,000 and 1500 hours to get a cosmetology license.<sup>14</sup> One hundred and ten hours are dedicated to manicuring, arm massages, and hand massages, and 260 hours are dedicated to cutting, coloring, and bleaching hair, all of which are services hair braiders do not offer.<sup>15</sup> Zero hours are devoted to teaching African hair braiding, and only four percent of the coursework covers sterilization, sanitation, and scalp diseases.<sup>16</sup> In Missouri and other states, it is easier to become a licensed emergency medical technician (EMT) than a licensed cosmetologist.<sup>17</sup>

Cosmetology license laws harm those with limited resources for two reasons. First, those with limited resources are more likely to become hair braiders because little financial capital is required to start a braiding business.<sup>18</sup> Second, the necessary skills, rather than requiring extensive formal education, are passed from generation to generation.<sup>19</sup> Cosmetology licenses also have a disproportionate effect on African Americans and African immigrants because they are more likely to become hair braiders.<sup>20</sup>

Another service subject to onerous licensure burdens is teeth whitening. Since Crest Whitestrips were introduced in 2001, skyrocketing demand for products like gum and toothpaste, and for services offered by dentists, salons, spas, and mall kiosks, has turned teeth whitening into an eleven billion dollar

---

10. PAUL AVELAR & NICK SIBILLA, UNTANGLING REGULATIONS: NATURAL HAIR BRAIDERS FIGHT AGAINST IRRATIONAL LICENSING 8 (July 2014).

11. *Id.* at 3.

12. *Id.*

13. *Id.*

14. Complaint for Declaratory and Injunctive Relief at 13, *Niang v. Carroll*, 4:14-cv-01100 (E.D. Mo. June 16, 2014), ECF No. 1.

15. MO. REV. STAT. § 329.040(4) (2000).

16. *Id.*

17. Greg Reed, *Untangle African-Style Braiders from Missouri's Irrational Cosmetology Laws*, ST. LOUIS POST-DISPATCH, June 24, 2014, at A17.

18. Valerie Bayham, *A Dream Deferred: Legal Barriers to African Hairbraiding Nationwide*, INST. FOR JUST., <http://www.ij.org/report/a-dream-deferred/> [<http://perma.cc/SPWY-CKUX>] (last visited Sept. 21, 2015).

19. *Id.*

20. *See id.*

industry.<sup>21</sup> As the industry grew, state dental boards and dental associations lobbied for laws enabling dentists and hygienists to capture a larger share of the market by banning anyone else from offering teeth whitening services.<sup>22</sup> Though dental boards and associations argue that expanded licensing promotes public health and safety, the risks of teeth whitening are minimal.<sup>23</sup> Entrepreneurs in spas, salons, and kiosks provide the same over-the-counter products that anyone, even a minor, can buy at a store and apply at home without supervision, instruction, or a prescription.<sup>24</sup> These businesses simply provide places for customers to apply these products to their own teeth.<sup>25</sup> A study examining complaints filed with state agencies found that of the ninety-seven complaints provided, only four reported consumer harm.<sup>26</sup> The rest came not from consumers, but from state boards, dental associations, dentists, and hygienists alleging the unlicensed practice of dentistry.<sup>27</sup> The four consumer complaints only reported “reversible side-effects typical of teeth whitening wherever it is done, such as temporary gum irritation and tooth sensitivity.”<sup>28</sup> With such minimal risks, the more likely purpose of these laws is to protect dentists from honest competition. Eighty percent of dentists offer teeth whitening, and typically charge two to six times more for teeth whitening than salons and kiosks.<sup>29</sup> Laws putting lower-cost competitors out of business enable dentists to capture a greater share of the market and maintain high prices.

These examples may seem extreme, but they are surprisingly common. Thirty-nine states and the District of Columbia require individuals to obtain a cosmetology license to braid hair.<sup>30</sup> At least thirty states have attempted to shut down teeth whitening businesses.<sup>31</sup> Fourteen have changed their laws to exclude all but licensed dentists, hygienists, or dental assistants from offering

---

21. ANGELA C. ERICKSON, WHITE OUT: HOW DENTAL INDUSTRY INSIDERS THWART COMPETITION FROM TEETH-WHITENING ENTREPRENEURS 2 (Apr. 2013).

22. *Id.* at 1.

23. *Id.* at 24.

24. *See id.* at 1.

25. *Id.* at 4.

26. ERICKSON, *supra* note 21, at 4.

27. *Id.*

28. *Id.* at 25.

29. *Id.* at 1–2. Dentists charge between \$600 and \$1200 per procedure. *See id.* at 25. In 2006, dentists performed an average of seventy procedures a year for average annual revenues of \$350 to \$25,000 per procedure. *Id.* at 2. Teeth whitening services at salons and spas are as low as \$109, \$139, or \$150. *Id.* at 2, 25.

30. AVELAR & SIBILLA, *supra* note 10, at 3.

31. Angela C. Erickson & Paul Sherman, *Teeth-Whitening Rules Take a Bite Out of Business*, WALL ST. J. (Apr. 29, 2013), <http://www.wsj.com/articles/SB10001424127887324482504578451262629236322> [<http://perma.cc/FU24-8SKJ>].

teeth whitening services.<sup>32</sup> At least twenty-five state dental boards have ordered teeth whitening businesses to shut down.<sup>33</sup>

In the post-*Lochner* era, federal courts give state and local governments a high level of freedom to regulate economic conduct through means such as occupational licensing laws. However, as the number of occupations requiring a license has significantly increased recently, many of these governments have faced lawsuits in federal court, alleging violations of due process and equal protection. The federal courts that have ruled on these issues are split. Each of them has used a slightly different analysis with varying levels of scrutiny, each coming to different results.

In Part I, this Comment will examine the increasing prevalence of licensing laws and the effect these laws have on society. Part II will evaluate the possible standards of review that can be applied to challenges of licensing laws. In Part III, this Comment will outline how the Fifth, Sixth, and Tenth Circuits have approached three cases with nearly identical facts in different ways. Finally, Part IV will explain why an intermediate scrutiny standard of review should be categorically applied to occupational licensing laws.

#### I. OCCUPATIONAL LICENSING PROBLEMS

There are a number of problems created by occupational licensing laws. First of all, the burdens imposed by occupational licensing laws are particularly onerous for economically disadvantaged groups<sup>34</sup> and racial minorities.<sup>35</sup> Licensing laws restrict social mobility by increasing operating costs for those who can least afford to pay them.<sup>36</sup> Licensing laws often target low- and moderate-income vocations that require little formal training, such as hair styling, pest control, and exercise instruction.<sup>37</sup> If no license is required, these vocations provide a relatively quick path for individuals to work their way out of poverty.<sup>38</sup> Licensing regulations harm low-income workers who have the skills to compete but lack the formal training or financial resources to

---

32. ERICKSON, *supra* note 21, at 2.

33. *Id.*

34. Sanderson, *supra* note 1, at 460.

35. Stuart Dorsey, *Occupational Licensing and Minorities*, 7 L. & HUM. BEHAV. 171, 172 (1983); David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89, 90 (1994).

36. James C. Cooper & William E. Kovacic, *U.S. Convergence With International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 B.U. L. REV. 1555, 1566–67 (2010).

37. *Id.* at 1567; DICK M. CARPENTER II ET AL., LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING 10 tbl.1 (May 2012).

38. Cooper & Kovacic, *supra* note 36, at 1567.

meet onerous licensure requirements.<sup>39</sup> These requirements pose additional hurdles for ethnic minorities and immigrants because licensing exams are usually only offered in English.<sup>40</sup> Licensing laws also give a great deal of discretion to independent boards that have historically abused their powers by keeping minorities, immigrants, and women out of the industries they regulate.<sup>41</sup> By targeting low-income vocations, licensing laws eliminate potential ways to make a living for those who already have few options.<sup>42</sup>

Licensing laws also disproportionately harm low-income consumers. The higher prices that licensing laws create are an inconvenience to many, but to the poor they can mean the difference between being able to access a service or not.<sup>43</sup> Licensing laws may sometimes be good for those who value quality.<sup>44</sup> However, licensing laws harm those who prefer the option to choose a lower quality for a lower price, especially when the alternative is not having access to a service at all.<sup>45</sup>

Licensing lower-income occupations does not promote public safety. Occupational licensing laws often target occupations that have little risk of harm, such as interior designer, shampooer, florist, funeral attendant, barber, travel guide, and tour guide.<sup>46</sup> The burden of obtaining a license is often not proportional to the potential risks of the occupation. A study comparing the licensure requirements for 102 low- and moderate-income occupations found that sixty-six occupations had greater average licensure burdens than EMTs, including landscape workers and manicurists.<sup>47</sup> While the average EMT license requires a month of training, the average cosmetology license requires a year of training.<sup>48</sup> Interior designers face the greatest licensure burdens—greater than those faced by midwives, school bus drivers, crane operators, pharmacy technicians, EMTs, and security guards.<sup>49</sup> Though many occupational licensing laws have little to do with protecting the public, they do protect those who already have a license from honest competition.

---

39. Roger V. Abbott, *Is Economic Protectionism a Legitimate Governmental Interest Under Rational Basis Review?*, 62 CATH. U. L. REV. 475, 501 (2013).

40. *Id.*

41. *Id.*

42. Cooper & Kovacic, *supra* note 36, at 1567.

43. *Id.* at 1566.

44. See Ginevra Bruzzone, *Deregulation of Structurally Competitive Services: Economic Analysis and Competition Advocacy*, in THE ANTICOMPETITIVE IMPACT OF REGULATION 5, 10 (Giuliano Amato & Laraine L. Laudati eds., 2001).

45. *See id.*

46. CARPENTER ET AL., *supra* note 37, at 10–11, 31.

47. *Id.* at 26, 29.

48. *Id.* at 29.

49. *Id.* at 12–13.

Though the principal justification for occupational licensing is quality control, empirical studies generally find that tougher licensing laws have little to no effect on increased quality, and that they may even negatively impact quality.<sup>50</sup> By collecting and summarizing various studies, University of Minnesota Professor Morris Kleiner found very little evidence of enhanced quality in licensed occupations.<sup>51</sup> One study found that restrictive dental licensing laws were not correlated with improved dental health, maybe because the laws made it more expensive to visit a dentist or because the tougher licensing standards were irrelevant to standards of dental care.<sup>52</sup> Another study found a significant negative correlation between requiring teachers to be licensed and teacher quality.<sup>53</sup> Perhaps the time and money required to obtain the requisite qualifications made teaching less attractive to individuals who would have made good teachers.<sup>54</sup> Another study found no difference in fraud among TV repairers in New Orleans and Washington, D.C., though New Orleans required a license to repair TVs.<sup>55</sup> A study examining occupational licensing of opticians found that licensing laws increased consumer costs and optician salaries but created no observable change in quality.<sup>56</sup> While occupational licensing often fails to ensure safety and quality, it almost always harms consumers and entrepreneurs for the sake of entrenching special interests.<sup>57</sup>

## II. STANDARDS OF REVIEW

With some variation, there are three basic standards of review that federal courts can apply when examining constitutional challenges to state laws: strict scrutiny, intermediate scrutiny, and rational basis review.<sup>58</sup> To survive strict scrutiny, a law must be narrowly tailored to address a compelling governmental interest and be the least restrictive means of achieving that interest.<sup>59</sup> Strict scrutiny is only used if the law infringes a fundamental

---

50. *Id.* at 6, 29–30; MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 52–56 (2006).

51. KLEINER, *supra* note 50, at 52–56.

52. CARPENTER ET AL., *supra* note 37, at 9, 50–51.

53. Dale Ballou & Michael Podgursky, *Teacher Recruitment and Retention in Public and Private Schools*, 17 J. POL'Y ANALYSIS & MGMT. 393, 412, 414–15 (1998).

54. *See id.*

55. KLEINER, *supra* note 50, at 55.

56. Edward J. Timmons & Anna Mills, *Bringing the Effects of Occupational Licensing Into Focus: Optician Licensing in the United States* 18 (Feb. 2015) (unpublished manuscript) (on file with the George Mason University Mercatus Center).

57. *See* Rose-Ackerman, *supra* note 7, at 953.

58. Abbott, *supra* note 39, at 481–82.

59. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *Bernal v. Fainter*, 467 U.S. 216, 219 (1984).

constitutional right or targets a suspect classification, such as race.<sup>60</sup> Under current Supreme Court law, strict scrutiny is not applied to alleged violations of economic freedom.<sup>61</sup> Rational basis review is on the other end of the spectrum. To be found constitutional under rational basis review, a statute only needs to be reasonably related to a legitimate state interest.<sup>62</sup> Laws that implicate unenumerated rights and rights that the Supreme Court has not declared fundamental receive rational basis review.<sup>63</sup> Rational basis review almost always results in the challenged law being upheld.<sup>64</sup> Intermediate scrutiny falls somewhere between strict scrutiny and rational basis review. Intermediate scrutiny requires a law to be *substantially* related to an *important* government interest.<sup>65</sup> Intermediate scrutiny applies when a law targets a quasi-suspect classification, such as gender.<sup>66</sup> Under current Supreme Court precedent, laws that allegedly violate one's economic freedom are subject to rational basis review.<sup>67</sup>

### III. CASKET LICENSING LAWS: A CIRCUIT SPLIT

In 2002, the Sixth Circuit in *Craigmiles v. Giles* struck down a Tennessee law that made it illegal to sell a casket without a funeral director license.<sup>68</sup> One of the plaintiffs, Craigmiles, was a pastor who was threatened with criminal prosecution for selling caskets for a fraction of what funeral establishments charged.<sup>69</sup> Though he did not handle dead bodies, Craigmiles would have had to embalm twenty-five dead bodies and get years of training costing thousands of dollars in order to get a funeral director license.<sup>70</sup> The state argued that the requirements were necessary to safeguard public health and protect vulnerable

---

60. *Adarand*, 515 U.S. at 227; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973).

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

62. *Id.*

63. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

64. Jeffrey D. Jackson, *Be Careful What You Wish For: Why McDonald v. City of Chicago's Rejection of the Privileges or Immunities Clause May Not Be Such a Bad Thing for Rights*, 115 PENN ST. L. REV. 561, 593 (2011).

65. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

66. *Id.*; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–41 (1985).

67. *Cleburne*, 473 U.S. at 456, 460.

68. *Craigmiles v. Giles*, 312 F.3d 220, 222, 229 (6th Cir. 2002).

69. *The Right to Urn an Honest Living: Challenging Tennessee's Casket Monopoly*, INST. FOR JUST., <http://www.ij.org/tennessee-caskets-background> [<http://perma.cc/F7R5-ECV6>] (last visited Sept. 27, 2015).

70. *IJ Breaks up Tennessee Casket Cartel; Scores First Federal Appellate Victory for Economic Liberty Since New Deal*, INST. FOR JUST., <http://www.clinic.ij.org/craigmiles-v-giles> [<http://perma.cc/GPG5-2U98>] (last visited Sept. 27, 2015).



consumers.<sup>71</sup> The court found that the law existed only to protect established funeral directors, an illegitimate government interest.<sup>72</sup>

In 2004, the Tenth Circuit decided *Powers v. Harris*, a case with facts almost identical to those in *Craigmiles*.<sup>73</sup> The court did not consider whether Oklahoma's casket selling law was rationally related to consumer protection (the state's proffered reason for the law).<sup>74</sup> Instead, the court considered whether economic protectionism was a legitimate state interest, asserting that the Supreme Court allows courts to seek out any conceivable reason for validating a state law.<sup>75</sup> Purporting to apply rational basis review, the *Powers* court found that, absent a violation of an express constitutional prohibition or the Dormant Commerce Clause, intrastate economic protectionism is a legitimate state interest.<sup>76</sup> To support this, the court cited Supreme Court cases that, in its view, suggested that states could favor one intrastate industry for another.<sup>77</sup> The court relied on a quote from *Williamson v. Lee Optical of Oklahoma*, which stated that "free[ing a] profession, to as great an extent as possible, from all taints of commercialism" is a legitimate state goal.<sup>78</sup> Because Oklahoma's law was rationally related to protecting established funeral directors, the court held that it survived rational basis review and was constitutional.<sup>79</sup> The *Powers* court criticized the Sixth Circuit for applying a more stringent form of rational basis review by focusing on the legislature's motives and the legislative history behind the law challenged in *Craigmiles*.<sup>80</sup>

In 2013, the Fifth Circuit decided *St. Joseph Abbey v. Castille*, a case with facts almost identical to those in *Powers* and *Craigmiles*.<sup>81</sup> Benedictine monks tried to sell handmade caskets to raise money for their monastery, but the monks were threatened with criminal prosecution.<sup>82</sup> The court found that mere economic protectionism is not a legitimate state interest under rational basis review and, because the licensing law furthered no other interest, it was

---

71. *Craigmiles*, 312 F.3d at 225.

72. *Id.* at 227, 229.

73. Timothy Sandefur, *Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries*, 14 WM. & MARY BILL RTS. J. 1023, 1024–25 (2006).

74. *See Powers v. Harris*, 379 F.3d 1208, 1218 (10th Cir. 2004).

75. *Id.* at 1218–19.

76. *Id.* at 1222–23.

77. *Id.* at 1221.

78. *Id.* (citing *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 491 (1955)).

79. *Powers*, 379 F.3d at 1222–24.

80. *Id.* at 1223.

81. Abbott, *supra* note 39, at 491.

82. *St. Joseph Abbey v. Castille*, 835 F. Supp. 2d 149, 153–54 (E.D. La. 2011), *aff'd*, 712 F.3d 215 (5th Cir. 2013). Under Louisiana law, those who sell caskets without a funeral director license face fines of up to \$2500 and 180 days imprisonment per casket. *Id.*

unconstitutional.<sup>83</sup> The court began its analysis by rejecting the argument that mere economic protection of an industry is a legitimate government purpose.<sup>84</sup> It criticized the *Powers* court's characterization of the Supreme Court cases it used.<sup>85</sup> Those cases did not condone pure economic protectionism; they indicated that protectionism is a legitimate interest *if it is related to furthering the general welfare or a legitimate public interest*.<sup>86</sup> The court rejected the argument that the licensing law was rationally related to restricting predatory sales practices and preventing the sale of faulty caskets.<sup>87</sup> The court recognized that rational basis review is highly deferential, but it stated that this deference neither requires judicial blindness to the history of a challenged law or the context surrounding its adoption nor does it require courts to accept "nonsensical explanations" for a law.<sup>88</sup> Because the state's explanations were nonsensical, and the court could not conceive of any other rational basis for the law, the court held that the law was unconstitutional.<sup>89</sup>

#### IV. INTERMEDIATE SCRUTINY AS A SOLUTION TO OCCUPATIONAL LICENSING PROBLEMS

##### A. *Why the Supreme Court Should Address Occupational Licensing*

Though *St. Joseph Abbey* provided a perfect opportunity for the Supreme Court to address the circuit split over this issue, it declined to hear the appeal.<sup>90</sup> However, it will likely have another opportunity to address the issues raised by these three cases because the organization that brought these lawsuits, the Institute for Justice, shows no signs of stopping. It currently has twenty-three "economic liberty" cases pending, most of which challenge occupational licensing laws that require individuals to spend excessive amounts of time and money to obtain licenses that are irrelevant to the services they provide.<sup>91</sup> These include laws requiring a dental license to whiten teeth, laws requiring a cosmetology license to teach makeup artistry, laws requiring animal massage therapists to get a veterinarian license, laws banning orthodontists from

---

83. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 226–27 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 423 (2013).

84. *Id.* at 222.

85. *Id.* at 221–23.

86. *Id.* at 222.

87. *Id.* at 223.

88. *St. Joseph Abbey*, 712 F.3d at 226.

89. *Id.* at 226–27.

90. *Castille v. St. Joseph Abbey*, 134 S. Ct. 423 (2013).

91. *Economic Liberty: Cases in the News*, INST. FOR JUST., <http://www.ij.org/cases/economicliberty> [<http://perma.cc/8WNE-7S5Q>] (last visited Oct. 14, 2015).

providing affordable teeth cleaning services, laws licensing tour guides, and laws requiring eyebrow threaders to get a cosmetology license.<sup>92</sup>

The Institute for Justice may soon give the Supreme Court another chance to consider occupational licensing. In June of 2014, the Institute for Justice filed three federal lawsuits challenging the application of cosmetology licenses to hair braiders.<sup>93</sup> These lawsuits alleged the same constitutional violations as suffered in *St. Joseph Abbey, Craigmiles*, and *Powers*: violations of equal protection and substantive due process.<sup>94</sup> In response, the Arkansas legislature passed a law allowing hair braiders to work without obtaining a cosmetology license.<sup>95</sup> Similarly, the Washington Department of Licensing responded by pursuing a new administrative rule exempting hair braiders.<sup>96</sup> The third case, *Niang v. Carroll*, is still pending in the United States District Court for the Eastern District of Missouri.<sup>97</sup> There is a good chance that this case, or one of the Institute's other twenty-two cases, will deepen the circuit split and be appealed to the Supreme Court.

The success of ridesharing services like Uber has increased public awareness of how occupational licensing harms consumers.<sup>98</sup> Licensure burdens on taxi drivers and caps on the number of licenses awarded limit the number of taxis on the road so that the demand for taxis exceeds the supply.<sup>99</sup> This reduced supply "reduces the incentives for taxi owners to innovate and care about consumers."<sup>100</sup> Operating outside of such licensing regimes, Uber has thrived while providing wages on par with or exceeding those of licensed taxi drivers.<sup>101</sup> The convenience and popularity of Uber have confirmed suspicions that licensed taxis are inefficient and have called all occupational licensing regimes into question.<sup>102</sup> Because so many occupational licensing

---

92. *See id.*

93. Reed, *supra* note 17, at A17.

94. *See id.*

95. "Natural Hair Braiding Protection Act" Now Law in Arkansas, INST. FOR JUST. (Mar. 19, 2015), <http://www.ij.org/arkansas-hair-braiding-release-3-19-2015> [<http://perma.cc/2Y6B-5W5U>].

96. Scott Shackford, *Another Win Against Hair-Braiding Licensing in Washington State*, REASON (Nov. 17, 2014), <http://reason.com/blog/2014/11/17/another-win-against-hair-braiding-licens> [<http://perma.cc/Y5LC-AY3D>].

97. Complaint at 1, *Niang v. Carroll*, No. 4:14-cv-01100 (E.D. Mo. June 16, 2014), ECF No. 1.

98. Eduardo Porter, *Job Licenses in Spotlight as Uber Rises*, N.Y. TIMES, Jan. 28, 2015, at B1.

99. Peter Van Doren, *Uber Provides Case Against Occupational Licensing*, CATO INST. (Jan. 28, 2015), <http://www.cato.org/blog/uber-provides-case-against-occupational-licensing> [<http://perma.cc/L263-KT6U>].

100. *Id.*

101. *Id.*

102. *See* Porter, *supra* note 98, at B1.

laws have the same anti-competitive effects as those for taxi drivers, the success of Uber has created an opportunity for consumers to question the efficacy of occupational licensing.<sup>103</sup> Services like Handybook and TaskRabbit use a platform similar to Uber's to provide household repairs and maintenance.<sup>104</sup> These services also call licensing regimes into question because many of the low- to moderate-income occupations that require a license in the United States are construction trades, such as house painting, landscaping, carpentry, and door repair.<sup>105</sup>

On February 25, 2015, the Supreme Court decided *North Carolina Board of Dental Examiners v. Federal Trade Commission*, a case challenging the application of a dental licensing law to teeth whiteners.<sup>106</sup> *St. Joseph Abbey, Powers*, and *Craigmiles* were civil rights suits alleging violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *North Carolina Board of Dental Examiners*, however, is a Federal Trade Commission (FTC) action against the North Carolina Board of Dental Examiners for violating federal antitrust law by sending cease and desist letters to teeth whiteners.<sup>107</sup> The North Carolina Board of Dental Examiners argued that, because it was a board created by the state legislature, it was a state actor and thus immune from antitrust laws.<sup>108</sup> The FTC argued that the board is a private actor for the purposes of federal antitrust law because the board members are market participants who are elected by other market participants.<sup>109</sup> In a six-to-three majority, the Court held that, because the Board was made up of market participants with no active supervision by the state, it was a private actor not immune from antitrust laws.<sup>110</sup> Though this decision may not directly affect civil rights suits challenging occupational licensing on due process and equal protection grounds, it signals a willingness to challenge occupational licensing. In explaining why the need for supervision is so important, the court noted the dangers of regulatory capture, stating, "When a State empowers a group of active market participants to decide who

---

103. *Id.*

104. Steven Bertoni, *Handybook Wants to Be the Uber for Your Household Chores*, FORBES (Mar. 26, 2014), <http://www.forbes.com/sites/stevenbertoni/2014/03/26/handybook-wants-to-be-the-uber-for-your-household-chores/> [<http://perma.cc/TS75-QRTD>]; Casey Newton, *TaskRabbit Is Blowing up Its Business Model and Becoming the Uber for Everything*, THE VERGE (June 17, 2014), <http://www.theverge.com/2014/6/17/5816254/taskrabbit-blows-up-its-auction-house-to-of-fer-services-on-demand> [<http://perma.cc/JJ3V-NPMJ>].

105. CARPENTER ET AL., *supra* note 37, at 8, 10–11.

106. Adam Liptak, *Regulatory Case in North Carolina Appears to Trouble Supreme Court*, N.Y. TIMES, Oct. 15, 2014, at A24.

107. N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1108–09 (2015).

108. *Id.* at 1110.

109. *See id.* at 1109.

110. *Id.* at 1114.

can participate in its market, and on what terms, the need for supervision is manifest.”<sup>111</sup> Describing the dangers of regulatory capture as obvious suggests that the Supreme Court is sensitive to the problems of economic protectionism in occupational licensing, just as the *St. Joseph Abbey* and *Craigmiles* courts were.

*B. How the Supreme Court Should Address Occupational Licensing*

In order to prevent the negative consequences of overly burdensome licensing laws without damaging states’ abilities to regulate economic harms, federal courts should categorically use intermediate scrutiny to examine the constitutionality of occupational licensing laws. Applying intermediate scrutiny when analyzing the constitutionality of a licensing law would prevent the proliferation of different variations of rational basis review. Courts hearing these occupational licensing cases purport to be applying rational basis review but come to different results using different analyses. Though the *Craigmiles* court claimed to apply rational basis review, its analysis was slightly more rigorous than that in *Powers*. It required a tighter fit between the law’s means and ends, scrutinized the legislature’s intent, and gave a narrower definition of what is a legitimate government purpose.<sup>112</sup> Similarly, the *St. Joseph Abbey* court considered the history and actual motives behind legislation when determining if a proffered interest was legitimate or just a pretext. This type of heightened scrutiny is often referred to as “second-order” rational basis review.<sup>113</sup> As courts continue to hear cases of obvious economic protectionism, they, like the *St. Joseph Abbey* and *Craigmiles* courts, will be compelled to invalidate unfair laws. In order to do so, they will likely utilize second-order rational basis review while calling it traditional rational basis review, just as the *St. Joseph Abbey* and *Craigmiles* courts did. While second-order rational basis review is poorly defined, there is plenty of case law interpreting intermediate scrutiny.

Under intermediate scrutiny, a law will be invalidated if it is not *substantially* related to an *important* government interest.<sup>114</sup> Under this level of scrutiny, courts will not be able to uphold protectionist laws that are only supported by weak or minor interests. Requiring an important government interest would invalidate pretexts like those the states gave in *Craigmiles*, *Powers*, and *St. Joseph Abbey*. Preventing the spread of disease from faulty coffins may be a legitimate government interest. However, it is not an important government interest because there is no evidence that faulty caskets

---

111. *Id.*

112. Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065, 1074 (2013).

113. *Id.*

114. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

actually pose such a problem.<sup>115</sup> Further, bans on unlicensed casket sales are not substantially related to this interest because they are not as effective as other less burdensome methods, such as requiring diseased bodies to be embalmed or buried in body bags.<sup>116</sup> Likewise, preventing casket sellers from taking advantage of grieving customers is not an important government interest because, as the *St. Joseph Abbey* court noted, the FTC found that there was no evidence of significant consumer injury caused by sellers of funeral goods.<sup>117</sup> Even if the *Powers* court found that preventing deceptive tactics was an important government interest, it would still have to strike the licensing law because it is not substantially related to that interest. Casket sellers are subject to the same consumer protection laws as any other business, and the legislature could develop standards for casket retailers without requiring an irrelevant license.<sup>118</sup> Therefore, even if the state offers an important interest, such as preventing the spread of disease from improper handling of dead bodies, it still could not use this interest to justify a regulation on casket sellers who do not handle dead bodies.

### C. Arguments Against Applying Intermediate Scrutiny

Some have argued that the Supreme Court should declare that economic protectionism is not a legitimate government interest but continue to apply the rational basis test.<sup>119</sup> If the Supreme Court were to simply declare that economic protectionism is not a legitimate state interest, the problem of onerous licensing laws would not be solved. Under rational basis review, the government could proffer interests that are simply pretexts for a truly protectionist law. Even if a state's proffered interests were laughable, courts could still assert that they should not invalidate a law under rational basis review simply because it does not address a serious problem.<sup>120</sup> Instead of

---

115. *Craigsmiles v. Giles*, 110 F. Supp. 2d 658, 662–63 (E.D. Tenn. 2000), *aff'd*, 312 F.3d 220 (6th Cir. 2002) (finding no evidence of public safety risk from faulty caskets). Caskets do not protect the environment, public health, or safety. See Affidavit of Lisa Carlson at 5, *Craigsmiles*, 110 F. Supp. 2d 658 (E.D. Tenn. 2000) (No. 1:99-cv-00304). There are no public health or environmental problems in parts of the world where people are buried without caskets or where gravesites are repeatedly reused. *Id.* No state requires a container for burial, and disposition of other mammals is unregulated. *Id.* In the case of rare infectious diseases, health officials recommend body bags, not any particular casket. *Id.*

116. See *Craigsmiles*, 312 F.3d at 226; Affidavit of Charles L. Crawford at 16–17, *Craigsmiles*, 110 F. Supp. 2d 658 (E.D. Tenn. 2000) (No. 1:99-cv-00304).

117. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 219 (5th Cir. 2013); Regulatory Review of the Trade Regulation Rule on Funeral Industry Practices, 73 Fed. Reg. 13,740, 13,745 (Mar. 14, 2008).

118. *St. Joseph Abbey*, 712 F.3d at 225; *Craigsmiles*, 312 F.3d at 226.

119. See Elizabeth Trafton, Comment, *The Fifth Circuit Lays Economic Protectionism to Rest in St. Joseph Abbey*, 55 B.C. L. REV. 141, 152 (2014).

120. See *Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004).

considering the validity of the state's consumer protection interest, the *Powers* court came to its conclusion based on the premise that protectionism is a legitimate state interest.<sup>121</sup> However, its analysis and interpretation of Supreme Court precedent suggest that it would have upheld the law even without that premise. The majority opinion stresses that rational basis review only requires a loose fit between the means and ends of a law, and that a court cannot second-guess the legislature's wisdom.<sup>122</sup> It also emphasizes that courts are obligated to seek out conceivable reasons for a statute and criticizes the *Craigmiles* court's inquiry into the actual motive for Tennessee's licensing law.<sup>123</sup> This suggests that the *Powers* court would have upheld the law based on the same weak consumer protection interests that *St. Joseph Abbey* and *Craigmiles* rejected.

Some have suggested that the second-order rational basis test should be applied when analyzing the constitutionality of occupational licensing laws.<sup>124</sup> However, applying the second-order rational basis test would not solve the problems posed by licensing laws either. Because the second-order rational basis test is poorly defined, it may not be as rigorously applied in some courts. Even if the *Powers* court had inquired into the history and motive surrounding Oklahoma's casket licensing law, the court could have also required the plaintiff to prove that the legislature's sole intent was protectionism. This would still be second-order rational basis review but would differ from *Craigmiles* and *St. Joseph Abbey*, where the courts allowed the plaintiffs to prevail by simply contradicting the states' rationales. Also, applying the second-order rational basis test would not have prevented the *Powers* court from finding economic protectionism to be a legitimate government interest. Though the second-order rational basis test typically requires a stronger government interest,<sup>125</sup> courts could still decide that economic protectionism is important enough that it still fits within this slightly narrower definition of legitimate government interest.

One may argue that applying intermediate scrutiny to occupational licensing would put all licenses in danger—including those for doctors and lawyers. Applying intermediate scrutiny, while preventing economic protectionism, would not prevent legitimate occupational regulation that serves the public good. Intermediate scrutiny will not be a hard standard to meet if a regulation has a real purpose besides protectionism. In fact, a law that is motivated by protectionism can still be upheld as long as it is related to a more important interest as well. Licensing laws for doctors would have no problem

---

121. *Id.* at 1218, 1222.

122. *Id.* at 1217.

123. *Id.* at 1217, 1223.

124. Raynor, *supra* note 112, at 1101–02.

125. *Id.* at 1074.

meeting this standard. Protecting individuals from physical harm is an important government interest because of the high risk inherent in the medical profession. Improper medical services can result in serious injury or death. Likewise, occupational licensing for lawyers would easily survive intermediate scrutiny. Protecting consumers from legal malpractice is an important government interest because, for the client, the stakes can be extremely high. Improper legal services can result in the loss of property, freedom, or even life. The important interests behind licensing doctors and lawyers will easily satisfy intermediate scrutiny as long as the required training remains relevant to practicing law and medicine. The only laws threatened would be those solely motivated by protectionism because, if they actually protect consumers, the government should have no problem demonstrating that they are “substantially related” to protecting consumers. Further, since the rule would only apply to occupational licensing laws, its effect would be limited.

A common theme in current Supreme Court case law is deference to the legislature, exemplified by the rational basis test. Proponents of legislative deference believe that the ability of individuals to vote and to lobby their representatives is a sufficient check against bad laws. However, when dealing with occupational licensing problems, legislative deference is not appropriate. Established industry groups are in a better position to lobby legislatures, so they dominate competitors and consumers in the political process.<sup>126</sup> Consumers do not spend time or money opposing protectionist laws because the negative effects of those laws are widely dispersed among consumers in the form of higher prices, creating collective action problems.<sup>127</sup> With harms so widely dispersed, the potential benefit to be gained from lobbying representatives is outweighed by the cost of doing so. Add to that the small probability that an individual consumer will actually change the law, consumers have little incentive to try to influence the legislature. Competitors face the same collective action problems that consumers face. Not yet established in the industry, potential competitors are likely to lack the resources that established professionals have to lobby legislatures. Though the harms of occupational licensing are widely dispersed among consumers and competitors, the benefits are highly concentrated among current practitioners.<sup>128</sup> This gives current practitioners a strong incentive to lobby for licensing laws that will make it harder for newcomers to compete.

---

126. Miles O. Indest, *Walking Dead: The Fifth Circuit Resurrects Rational Basis Review*, 88 TUL. L. REV. 993, 1004–05 (2014); Antonios Roustopoulos, *The Fifth Circuit Buries Intrastate Economic Protectionism in St. Joseph Abbey v. Castille*, 59 VILL. L. REV. 341, 367–68 (2014).

127. Roustopoulos, *supra* note 126, at 367–68.

128. Abbott, *supra* note 39, at 503.



*D. Effects of Applying Intermediate Scrutiny*

Applying intermediate scrutiny to occupational licensing laws would not only help casket sellers. States require licenses for countless other occupations that do not affect the general welfare of the public, such as yoga instructors,<sup>129</sup> hair braiders, shampoo specialists, boxing promoters, interior designers, and florists.<sup>130</sup> Protectionist licensing laws are not rare. All fifty states and the District of Columbia license pest control applicators and cosmetologists.<sup>131</sup> Fifty states license skin care specialists, manicurists, and barbers.<sup>132</sup> Forty-six states license athletic trainers, forty-one license fishers, thirty-nine license massage therapists, thirty-six license makeup artists, thirty-five license door repairers, thirty-three license auctioneers, twenty-six license taxidermists, twenty-one license travel guides, twenty license animal trainers, sixteen license sign language interpreters, nine license funeral attendants, eight license travel agents, five license shampooers, and four license interior designers.<sup>133</sup> The expansive ways these laws are crafted allow them to affect even more occupations. For example, thirty-nine states and the District of Columbia require individuals to obtain a cosmetology or similar license to braid hair.<sup>134</sup> At least thirty states have attempted to require teeth whiteners to get a dental license.<sup>135</sup> States have required that practitioners of non-pesticide-based pest control undergo training that is irrelevant to their line of work.<sup>136</sup> Several states<sup>137</sup> require horse teeth floaters (individuals who file down horses' teeth—a painless and low-risk exercise) to attend four years of veterinary college that does not teach horse teeth floating.<sup>138</sup> Some states require animal massage therapists to spend hundreds of thousands of dollars on four years of veterinary school that does not teach animal massage, even though massage therapists are

---

129. Julie Turkewitz, *Colorado Yogis Balk at State Regulation of Teacher Training*, N.Y. TIMES, Mar. 2, 2015, at A14.

130. See Roustopoulos, *supra* note 126, at 366.

131. CARPENTER ET AL., *supra* note 37, at 10–11.

132. *Id.*

133. *Id.*

134. AVELAR & SIBILLA, *supra* note 10, at 3.

135. Erickson & Sherman, *supra* note 31.

136. *Merrifield v. Lockyer*, 547 F.3d 978, 982–83 (9th Cir. 2008).

137. See *State Summary Report: Authority of Veterinary Technicians and Other Non-Veterinarians to Perform Dental Procedures*, AM. VETERINARY MED. ASS'N, <http://www.avma.org/advocacy/stateandlocal/pages/sr-dental-procedures.aspx> [<http://perma.cc/44RK-SQ27>] (last updated Oct. 2014).

138. *Challenging Barriers to Economic Opportunity: Challenging Minnesota's Occupational Licensing of Horse Teeth Floaters*, INST. FOR JUST., <http://www.ij.org/minnesota-horse-teeth-floating-background> [<http://perma.cc/3TEV-YB4U>] (last visited Oct. 8, 2015).

not required to get any medical degree to massage humans.<sup>139</sup> Applying intermediate scrutiny would ensure that states do not license occupations like interior design that do not need to be licensed, and it would ensure that individuals are not required to obtain professional licenses that are not related to their work.

Applying intermediate scrutiny would help eliminate the licensing laws that harm consumers and economically disadvantaged groups, and would place a check on special interests. Though states have been given extreme deference in the post-*Lochner* era, courts examining protectionist licensing laws have expressed their disapproval of using rational basis review as a rubber-stamp. To prevent the proliferation of different types of poorly defined rational basis review, the Supreme Court should provide an easy-to-apply standard that allows courts to address unfair licensing laws. Rational basis review lacks teeth, and its application to occupational licensing has had negative effects on consumers, entrepreneurs, and the poor. The right to earn a living is one of the most important rights an individual has because it has dramatic effects on every aspect of his or her life. This inalienable right to pursue happiness is enshrined in the Declaration of Independence. Thomas Jefferson wrote that “the first principle of association” was “the *guarantee* to every one of a free exercise of his industry, and the fruits acquired by it,”<sup>140</sup> and that “every one has a natural right to choose for his pursuit such one of them as he thinks most likely to furnish him subsistence.”<sup>141</sup> The opportunity to prosper and succeed, which allows social mobility, is the basis of the American Dream. By applying intermediate scrutiny to occupational licensing laws, the Court can begin to recognize the importance of the right to earn a living and the judiciary’s role in protecting that right.

#### CONCLUSION

The Supreme Court should address occupational licensing laws and the circuit split that they have created. In doing so, it should recognize the futility of the rational basis test and acknowledge the importance of economic freedom by categorically applying the well-defined intermediate scrutiny test to occupational licensing laws. This would provide relief in cases of particularly unfair economic protectionism but would not prevent legislatures from solving important social ills as they see fit. This limited relief would still have a

---

139. See *Challenging Irrational Barriers to Economic Opportunity: Freeing Arizona Animal Massage Entrepreneurs from the Veterinary Cartel*, INST. FOR JUST., <http://ij.org/arizona-animal-massage-backgrounder> [<http://perma.cc/8MPD-8HQX>] (last visited Oct. 8, 2015).

140. Letter from Thomas Jefferson to Joseph Milligan, April 6, 1816, in 14 THE WRITINGS OF THOMAS JEFFERSON 456, 466 (Albert Ellery Bergh ed., 1905).

141. Thoughts on Lotteries, February, 1826, in 17 THE WRITINGS OF THOMAS JEFFERSON 448, 449 (Albert Ellery Bergh ed., 1905).

positive effect on economically disadvantaged consumers and would-be competitors.

WILL CLARK\*

---

\* J.D. Candidate, 2016, Saint Louis University School of Law.