INTERMEDIATE SCRUTINY AS A SOLUTION TO ECONOMIC PROTECTIONISM IN OCCUPATIONAL LICENSING

INTRODUCTION

For example, hair braiding is a low- to moderate-income occupation that requires a cosmetology license in most states.[10] 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.[11] The required training is unnecessary because it almost never teaches hair braiding.[12] Instead, braiders must learn practices they never intend to use, such as giving manicures and bleaching hair.[13] For example, Missouri forces hair braiders to spend $16,000 and 1500 hours to get a cosmetology license.[14] 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.[15] Zero hours are devoted to teaching African hair braiding, and only four percent of the coursework covers sterilization, sanitation, and scalp diseases.[16] In Missouri and other states, it is easier to become a licensed emergency medical technician (EMT) than a licensed cosmetologist.[17]

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.[18] Second, the necessary skills, rather than requiring extensive formal education, are passed from generation to generation.[19] Cosmetology licenses also have a disproportionate effect on African Americans and African immigrants because they are more likely to become hair braiders.[20]

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.

industry.[21] 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.[22] Though dental boards and associations argue that expanded licensing promotes public health and safety, the risks of teeth whitening are minimal.[23] 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.[24] These businesses simply provide places for customers to apply these products to their own teeth.[25] A study examining complaints filed with state agencies found that of the ninety-seven complaints provided, only four reported consumer harm.[26] The rest came not from consumers, but from state boards, dental associations, dentists, and hygienists alleging the unlicensed practice of dentistry.[27] 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."[28] 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.[29] 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.[30] At least thirty states have attempted to shut down teeth whitening businesses.[31] 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.*

teeth whitening services.[32] At least twenty-five state dental boards have ordered teeth whitening businesses to shut down.[33]

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[34] and racial

meet onerous licensure requirements.[39] These requirements pose additional hurdles for ethnic minorities and immigrants because licensing exams are usually only offered in English.[40] 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.[41] By targeting low-income vocations, licensing laws eliminate potential ways to make a living for those who already have few options.[42]

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.[43] Licensing laws may sometimes be good for those who value quality.[44] 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.[45]

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.[46] 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.[47] While the average EMT license requires a month of training, the average cosmetology license requires a year of training.[48] Interior designers face the greatest licensure burdens—greater than those faced by midwives, school bus drivers, crane operators, pharmacy technicians, EMTs, and security guards.[49]

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.[50] By collecting and summarizing various studies, University of Minnesota Professor Morris Kleiner found very little evidence of enhanced quality in licensed occupations.[51] 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.[52] Another study found a significant negative correlation between requiring teachers to be licensed and teacher quality.[53] Perhaps the time and money required to obtain the requisite qualifications made teaching less attractive to individuals who would have made good teachers.[54] 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.[55] A study examining occupational licensing of opticians found that licensing laws increased consumer costs and optician salaries but created no observable change in quality.[56] While occupational licensing often fails to ensure safety and quality, it almost always harms consumers and entrepreneurs for the sake of entrenching special interests.[57]

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.[58] 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.[59] 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. Pena, 515

constitutional right or targets a suspect classification, such as race.[60] Under current Supreme Court law, strict scrutiny is not applied to alleged violations of economic freedom.[61] 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.[62] Laws that implicate unenumerated rights and rights that the Supreme Court has not declared fundamental receive rational basis review.[63] Rational basis review almost always results in the challenged law being upheld.[64] 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.[65] Intermediate scrutiny applies when a law targets a quasi-suspect classification, such as gender.[66] Under current Supreme Court precedent, laws that allegedly violate one's economic freedom are subject to rational basis review.[67]

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.[68] 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.[69] 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.[70] 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] TJ7dy21 U.Sdy21 Ac1.1Js60w-9.18 T

providing affordable teeth cleaning services, laws licensing tour guides, and laws requiring eyebrow threaders to get a cosmetology license.[92]

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.[93] These lawsuits alleged the same constitutional violations as suffered in *St. Joseph Abbey*, *Craigmiles*, and *Powers*: violations of equal protection and substantive due process.[94] In response, the Arkansas legislature passed a law allowing hair braiders to work without obtaining a cosmetology license.[95] Similarly, the Washington Department of Licensing responded by pursuing a new administrative rule exempting hair braiders.[96] The third case, *Niang v. Carroll*, is still pending in the United States District Court for the Eastern District of Missouri.[97] 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.[98] Licensure

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.[103] Services like Handybook and TaskRabbit use a platform similar to Uber's to provide household repairs and maintenance.[104] 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.[105]

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.[106] *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.[107] 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.[108] 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.[109] 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.[110] 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/ta

can participate in its market, and on what terms, the need for supervision is manifest."[111] 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.[112] 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.[113] 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 define.6(na)5.5(l)] TJ0.003(al)4.9(y)4.3(s)2(in(e)-0..9(ons)8o5la)5.2(i)-0.73(e)-0.5(

actually pose such a problem.[115] 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.[116] Likewise, preventing casket sellers from taking advantage of grieving customers is not an important government interest because, as the

D. Effects of Applying Intermediate Scrutiny

not required to get any medical degree to massage humans.[139] 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