

# OCCUPATIONAL LICENSING: THE PATH TO REFORM THROUGH FEDERAL COURTS AND STATE LEGISLATURES

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*Over the last several decades, we have seen an extraordinary increase in the scope and rigor of occupational licensing laws. In the 1950s, about five percent of the workforce required a license to do its job. By 2008, that number had risen to nearly thirty percent. About 1,100 occupations—including barbers, funeral directors, locksmiths, manicurists, tree trimmers, and fabric upholsterers—are licensed in at least one state. Licensing laws purport to benefit consumers by protecting them from incompetent or unreliable practitioners. However, the effect of licensing laws on consumer protection is negligible at best. Licensing laws often benefit only existing industry members—to the detriment of just about everyone else. Licensing raises consumer costs, limits consumer choice, contributes to income inequality, and reduces economic and geographic mobility.*

*In recent years, policy organizations and academics have driven efforts to deregulate occupational licensing. Their efforts are two-pronged. They use advocacy litigation to challenge egregious licensing laws on federal (and sometimes state) constitutional grounds. They also lobby for state*

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legislative reform, often facing fierce opposition from professional association lobbies.

*This Note explains that legislative change is the more effective tool for meaningful reform. Courts cannot effect sweeping change in this sphere; under existing doctrine, courts can at most strike only the most egregious licensing laws. Legislatures, by contrast, can effect reform that is both comprehensive and targeted. Legislatures can also address other aspects of deregulation, such as enhancing interstate license recognition.*

*Still, advocacy litigation is a powerful complementary weapon. Even unsuccessful lawsuits drive legislative change by pressuring states to enact reform. Such lawsuits also generate public awareness and support for reform by depicting sympathetic individuals disadvantaged by unreasonable licensing laws. Indeed, after years of litigation and lobbying efforts, legislative reform in statehouses has finally begun to take off. Advocacy groups should recognize the value of this dual strategy approach in their efforts to achieve further reform.*

## I. INTRODUCTION

Ndioba Niang owned a hair salon in Missouri.<sup>1</sup> She practiced African-style hair braiding, a traditional hair braiding technique she had learned growing up in Senegal.<sup>2</sup> Niang did not cut, color, or wash hair, and she did not use any chemicals or heat while braiding hair.<sup>3</sup> Unfortunately for her, the Missouri Board of Cosmetology and Barber Examiners (“Board”) had determined that African-style hair braiding was a form of cosmetology or barbering which, under state law, could only be practiced with a license.<sup>4</sup> If Niang continued to braid hair without a license, the Board could bring an enforcement action against her and shut her salon down.<sup>5</sup>

To braid hair legally, Niang would be required to train for 1,500 hours at a licensed cosmetology school or 1,000 hours at a barber school—at an average cost of over \$10,000.<sup>6</sup> Moreover, the training curriculums at the cosmetology and barber schools were completely unrelated to African-style hair braiding techniques.<sup>7</sup> Unable to afford the cost of a license, Niang sued the state for unconstitutionally infringing her right to earn a living. She ar-

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<sup>1</sup> Niang v. Carroll, No. 4:14 CV 1100 JMB, 2016 WL 5076170, at \*2 (E.D. Mo. Sept. 20, 2016), *aff’d*, 879 F.3d 870 (8th Cir. 2018).

<sup>2</sup> Plaintiffs’ Statement of Uncontroverted Material Facts at ¶10, Niang v. Carroll, No. 4:14-CV-1100, 2016 WL 5076170 (E.D. Mo. Sept. 20, 2016).

<sup>3</sup> Niang, 2016 WL 5076170, at \*3.

<sup>4</sup> *Id.* at \*4. See Mo. Ann. Stat. § 328.020 (West 2021); Mo. Ann. Stat. § 329.030 (West 2021).

<sup>5</sup> Niang, 2016 WL 5076170, at \*6. The Board had brought several enforcement actions against other salons providing African-style hair braiding. *Id.* The Board had not yet brought one against Niang, who sued for declaratory relief. *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at \*5.

gued that the onerous licensing requirements had no rational connection to the state's asserted interest in public health and safety.<sup>8</sup> However, the Eighth Circuit upheld the Board's determination that the licensing statutes applied to African-style hair braiders.<sup>9</sup> It held that although the fit between the licensing requirements and the state interest was "imperfect," the Missouri law was not unconstitutional.<sup>10</sup>

Although the court upheld the law, Niang's lawsuit—and other similar lawsuits<sup>11</sup>—raised public awareness of excessive licensing laws and generated support for legislative reform. Indeed, in 2018, Missouri repealed the cosmetology license requirement for hair braiders. In its place, the state created a standalone license for braiders, which requires them to pay a \$20 registration fee, watch a four to six hour training video, and submit to Board inspections.<sup>12</sup>

Niang is hardly alone. About thirty percent of the United States workforce is subject to occupational licensing laws.<sup>13</sup> Occupational licensing laws, also known as "right-to-practice" laws, make it illegal to practice a particular profession without a government license.<sup>14</sup> About 1,100 occupations were licensed in at least one state as of 2016.<sup>15</sup> As in the hair braiding case, occupational licensing requirements can be onerous. They often in-

<sup>8</sup> *Id.* at \*7.

<sup>9</sup> *Niang*, 879 F.3d at 875.

<sup>10</sup> *Id.* at 874.

<sup>11</sup> *See Brantley v. Kuntz*, 98 F. Supp. 3d 884 (W.D. Tex. 2015); *Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999).

<sup>12</sup> H.B. 1500, 99th Gen. Assemb., 2d Reg. Sess. (Mo. 2018). The push to eliminate licensing requirements for African-style hair braiders goes back to at least 2004, with a lawsuit filed by Melony Armstrong against Mississippi, which soon afterward eliminated its cosmetology license requirement for braiders. *See generally* DICK M. CARPENTER II & JOHN K. ROSS, INST. FOR JUST., *THE POWER OF ONE ENTREPRENEUR: MELONY ARMSTRONG, HAIRBRAIDER* (2009). Today, only five states require a cosmetology license for hair braiding, though some states have a special braiding license with fewer requirements. *See Braiding*, INST. FOR JUSTICE, <https://ij.org/issues/economic-liberty/braiding/> [<https://perma.cc/5BWQ-X7B9>]. In some ways, hair braiding has become the poster child for excessive licensing laws. *See, e.g.*, Matt Shafer, *Should Licensing Reformers Still Be Talking About African Hair Braiding?*, COUNCIL OF STATE GOV'TS (Aug. 12, 2019), <https://licensing.csg.org/should-licensing-reformers-still-be-talking-about-african-hair-braiding/> [<https://perma.cc/ZW4N-WC3K>] ("If you have been to a meeting on occupational licensing reform or researched the topic online for more than a few minutes, you will no doubt have seen African hair braiding brought up as a reason we should overhaul state occupational regulation.").

<sup>13</sup> MORRIS M. KLEINER, *GUILD-RIDDEN LABOR MARKETS: THE CURIOUS CASE OF OCCUPATIONAL LICENSING I* (2015) [hereinafter *GUILD-RIDDEN LABOR MARKETS*].

<sup>14</sup> *Id.* Occupational regulation generally takes three forms: registration, certification, and licensing. *See id.* at 62. Registration is the least restrictive and simply requires a person to file her name, address, qualifications, and sometimes a filing fee, with a government agency before practicing. *Id.* at 73. Certification allows a person to be certified by taking a government-administered exam. *Id.* A person can still practice without certification, but cannot hold herself out as a certified professional. *Id.* Thus, certification is also known as "right to title." *Id.* at 1.

<sup>15</sup> NAT'L CONF. OF STATE LEGISLATURES, *OCCUPATIONAL LICENSING: ASSESSING STATE POLICIES AND PRACTICES FINAL REPORT 14* (2020) [hereinafter *ASSESSING STATE POLICIES AND PRACTICES*].

clude education, examination, and work experience components, as well as personal qualifications such as residency, citizenship, and good moral character.<sup>16</sup> Individuals with criminal convictions are disqualified from obtaining many types of licenses.<sup>17</sup> And as in the braiding case, many occupational licensing requirements have, at best, a tenuous connection to public health and safety.<sup>18</sup> Even in occupations that the state might reasonably regulate, the excessiveness of the licensing requirements—for example, requiring months of training to become a hairstylist—are often unjustifiably disproportionate.

Proponents of occupational licensing laws, namely professional associations, maintain that such laws protect consumers from incompetent, unreliable, or irresponsible practitioners.<sup>19</sup> Detractors contend that licensing laws are protectionist in both nature and purpose. They argue that licensing serves only the interests of the profession's existing members by raising barriers to entry, thus increasing practitioners' wages.<sup>20</sup> More importantly, they argue, excessive licensing imposes costs on just about everyone else: licensing raises consumer costs, limits consumer choice, restricts job creation, contributes to income inequality, and reduces economic mobility.<sup>21</sup>

Indeed, many licensed occupations are low-skilled jobs, making licensing particularly burdensome for poor people who want to make a living but cannot afford the costs of entry.<sup>22</sup> Licensing thus puts otherwise accessible jobs out of reach for those who need them most. The burdens imposed by occupational licensing laws have evoked bipartisan concern, leading to across-the-aisle calls for policy reform.<sup>23</sup>

<sup>16</sup> See S. DAVID YOUNG, *THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA* 29 (1987); Michael J. Phillips, *Entry Restrictions in the Lochner Court*, 4 *GEO. MASON L. REV.* 405, 411 (1996).

<sup>17</sup> See THE WHITE HOUSE, *OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICY MAKERS* 36 (2015) (“[I]n many cases, a criminal conviction of any kind may be a bar to licensure . . . regardless of whether the conviction is relevant to the license sought, how recent it was, or whether there were any extenuating circumstances.”), [https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing\\_report\\_final\\_nonembargo.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf) [<https://perma.cc/U4GW-TKUR>] [hereinafter *WHITE HOUSE REPORT*].

<sup>18</sup> See *infra* Section II.A.

<sup>19</sup> See, e.g., Maury Gittleman & Morris M. Kleiner, *Wage Effects of Unionization and Occupational Licensing Coverage in the United States*, 69 *INDUS. & LAB. REL. REV.* 142, 145 (2015).

<sup>20</sup> See *GUILD-RIDDEN LABOR MARKETS*, *supra* note 13, at 3–4.

<sup>21</sup> *Id.* at 34; Phillips, *supra* note 16, at 411; *WHITE HOUSE REPORT*, *supra* note 17, at 7.

<sup>22</sup> *GUILD-RIDDEN LABOR MARKETS*, *supra* note 13, at 85 (“Licensing has also been cited as being a barrier for upward income mobility for individuals with low incomes or wealth.”); see also STEPHEN SLIVINSKI, *GOLDWATER INST., BOOTSTRAPS TANGLES IN RED TAPE: HOW OCCUPATIONAL LICENSING HINDERS LOW-INCOME ENTREPRENEURSHIP* (Feb. 10, 2015), [https://goldwaterinstitute.org/wp-content/uploads/cms\\_page\\_media/2015/4/15/OccLicensingKauffman.pdf](https://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2015/4/15/OccLicensingKauffman.pdf) [<https://perma.cc/45KV-WVPG>].

<sup>23</sup> See, e.g., *GUILD-RIDDEN LABOR MARKETS*, *supra* note 13, at 3 (“The political economy of occupational licensing has evolved so that both liberals and conservatives have come to oppose certain elements of it.”); DICK M. CARPENTER II, LISA KNEPPER, KYLE SWEETLAND & JENNIFER McDONALD, *INST. FOR JUST., LICENSE TO WORK* 10 (2d ed. 2017) (“Licensing reform is also now championed by public policy organizations left, right and center.”); Michelle

A network of policy organizations has in recent years attempted to achieve licensing reform. Reform efforts are mainly centered in state legislatures and in the federal courts (and to a lesser extent in state courts). Licensing laws are hard to change through either of these avenues. At state legislatures, attempts at deregulation trigger fierce opposition from professional associations and thus often fail.<sup>24</sup> And at the courthouse, current due process jurisprudence almost always directs judges to rubber stamp even clearly unreasonable licensing statutes.

This Note argues that statutory reform is ideal, but that lawsuits are also a valuable tool because they further statutory reform efforts. Even when unsuccessful, lawsuits catalyze statutory reform through settlement agreements and also by generating public support for reform. Lawsuits depict sympathetic individuals disadvantaged by unreasonable and excessive licensing laws, creating a moral tailwind of support for more sweeping reform. In a sense, lawsuits become political ads for legislative change. These two tactics are thus complementary and should be used together to achieve lasting reform.

Licensing reform, as the term is used in this Note, refers to licensing deregulation. Deregulation can take different forms. Licensing standards can be reduced and made less burdensome, or license requirements can be eliminated completely. Another type of reform is expanded interstate license recognition, in which states streamline the process for recognition of out-of-state licenses. Some reforms may be more appropriate for some occupations than for others. This Note does not argue for any one particular approach but simply recommends a path toward deregulation in general.

This Note proceeds as follows: Part II provides an overview of the structure of occupational licensing regimes and analyzes their costs and benefits, Part III examines the development of constitutional challenges to occupational licensing laws in federal and state courts and argues that courts have a limited role in effecting direct change, and Part IV discusses several kinds of licensing deregulation and how they interact with judicial challenges.

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Cottle, *The Onerous, Arbitrary, Unaccountable World of Occupational Licensing*, ATLANTIC (Aug. 13, 2017), <https://www.theatlantic.com/politics/archive/2017/08/trump-obama-occupational-licensing/536619/> [<https://perma.cc/3K7Y-Y34M>] (noting the “rare policy parallels” between the Trump and Obama administrations with respect to occupational licensing reforms); George Leef, *Right and Left Agree — Occupational Licensing Gets In The Way Of Upward Mobility*, FORBES (Dec. 27, 2017), <https://www.forbes.com/sites/georgeleef/2017/12/27/right-and-left-agree-occupational-licensing-gets-in-the-way-of-upward-mobility/?sh=3476581dcbc1> [<https://perma.cc/YW2G-6JG6>].

<sup>24</sup> See *infra* Section IV.A.

## II. AN OVERVIEW OF OCCUPATIONAL LICENSING LAWS

### A. *The Purpose(s) of Occupational Licensing*

Modern licensing began in the 1870s with the regulation of physicians and lawyers.<sup>25</sup> Licensing became more prevalent during the first few decades of the twentieth century, extending to a range of professions including nurses, engineers, embalmers, pharmacists, and barbers.<sup>26</sup> These first licensing laws were a response to the increasingly specialized and complex nature of technical professions such as medicine and engineering, and to the urbanization of society.<sup>27</sup> Licensing was required because customers could no longer assess on their own whether a professional was qualified. Minimum qualification standards enabled consumers to separate the doctors from the quacks.

Then, as now, occupational licensing was couched in terms of protecting the public from incompetent, unscrupulous, or unreliable practitioners.<sup>28</sup> Licensing laws, it was argued, protect consumers by ensuring that practitioners have the qualifications necessary to service consumers safely and reliably. Indeed, many occupational licensing statutes state that their legislative purpose is to protect consumers and ensure public safety.<sup>29</sup>

However, many licensing regimes today do not exhibit a robust connection to consumer protection or public health. In professions where the risk of injury resulting from incompetent or unscrupulous service is particularly

<sup>25</sup> See Marc T. Law & Sukkoo Kim, *Specialization and Regulation: The Rise of Professions and the Emergence of Occupational Licensing Regulation*, 65 J. ECON. HIS. 723, 731 (2005).

<sup>26</sup> See *id.*; Lawrence Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 CAL. L. REV. 487, 510 (1965).

<sup>27</sup> Law & Kim, *supra* note 25, at 726 (“At least for the Progressive Era, [the purpose of licensing regulations] seems to be more consistent with the asymmetric information hypothesis. . . . [A]s growth in scientific knowledge was accompanied by specialization and urbanization, individuals became less knowledgeable about the goods and services they purchased in the marketplace.”); see also Paul Starr, *Professionalization and Public Health: Historical Legacies, Continuing Dilemmas*, J. PUB. HEALTH MGMT. & PRAC. S26, S28 (2009); Hayne E. Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 J. POL. ECON. 1328, 1328 (1979) (finding that licensing can solve the problem of asymmetric information in markets, but that if standards are set by the profession, they are likely to be set too high).

<sup>28</sup> See Gittleman & Kleiner, *supra* note 19; YOUNG, *supra* note 16. Some licensing laws, such as those for workers in the construction industry, also may decrease the risk of workplace injuries. See also MORRIS M. KLEINER, STAGES OF OCCUPATIONAL REGULATION: ANALYSIS OF CASE STUDIES 127–29 (2013) [hereinafter STAGES OF OCCUPATIONAL REGULATION].

<sup>29</sup> See, e.g., La. Stat. Ann. § 37:562 (2001) (“The legislature hereby declares the purpose of this Chapter is to promote, preserve, and protect the public health, safety, and welfare by and through the effective control and regulation of the practice of cosmetology.”); N.J. Stat. Ann. § 45:7-33 (2020) (“In the interest of, and to better secure, the public health, safety and welfare and for the more efficient administration and supervision of sanitary codes and health regulations, the practice of mortuary science and the practice of embalming and funeral directing are hereby declared to be occupations charged with a high degree of public interest and subject to strict regulation and control.”).

high, like medicine and law, licensing regimes are relatively uncontroversial—although not without their critics.<sup>30</sup> But many licensed services do not pose a risk of significant injury at all, regardless of their quality. The licensing of barbers, shampooers, interior designers, florists, and funeral directors protects consumers from . . . what exactly? A bad haircut? A less-than-visually-pleasing flower bouquet? Even more, empirical studies across a broad range of professions—from dentists to Uber drivers—have found licensing to have a null or negative effect on service quality.<sup>31</sup> There simply is “little evidence that licensure improves the quality of services or protects consumers from harm.”<sup>32</sup>

The consumer protection rationale for occupational licensing is further undermined by the inconsistencies in licensing laws across states and across industries. Many licensed occupations are licensed in just a few states, and licensing requirements for the same occupations vary greatly across states.<sup>33</sup> For example, education requirements for cosmetologists range from 1,000–2,100 hours, with only a few states mandating continuing education requirements.<sup>34</sup> Tree trimmers in California must have four years of training to be licensed, while tree trimmers in forty-three states require no license at all.<sup>35</sup> Further, licensing burdens across industries are surprisingly disproport-

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<sup>30</sup> See STAGES OF OCCUPATIONAL REGULATION, *supra* note 28, at 4 (“If the perception of licensing is that it leads to a reduction in the most serious losses, such as the spread of disease or the lack of structural integrity of a building, then this form of regulation can have public backing and support. These are the potential benefits against which the costs—which are most often the subject of analysis—are measured.”). Even Milton Friedman, who famously criticized licensing for medicine, conceded that the case for licensing is stronger in the medical context than in other contexts. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 138 (2002). However, even in the healthcare field, licensing can have negative effects. As described *infra* Section II.C, studies have shown that regulation of dentistry, for example, causes higher prices which can lead some low-income consumers to forgo dental care completely.

<sup>31</sup> Chiara Farronato, Andrey Fradkin, Bradley Larsen & Erik Brynjolfsson, *Consumer Protection in an Online World: An Analysis of Occupational Licensing* 6 (Nat’l Bureau Econ. Rsch., Working Paper No. 26601, 2020), <https://ide.mit.edu/sites/default/files/publications/16700-w26601NBER.pdf> [<https://perma.cc/J7WD-BCBP>].

<sup>32</sup> SUZANNE HULTIN, NAT’L CONF. STATE LEGISLATURES, THE STATE OF OCCUPATIONAL LICENSING: RESEARCH, STATE POLICIES AND TRENDS 6 (2017) [hereinafter THE STATE OF OCCUPATIONAL LICENSING], <https://www.ncsl.org/research/labor-and-employment/report-the-state-of-occupational-licensing.aspx> [<https://perma.cc/2C9B-PATL>]; see also CAROLYN COX & SUSAN FOSTER, BUREAU OF ECON. FED. TRADE COMM’N, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION 21–27, 40 (1990), [https://www.ftc.gov/system/files/documents/reports/costs-benefits-occupational-regulation/cox\\_foster\\_-\\_occupational\\_licensing.pdf](https://www.ftc.gov/system/files/documents/reports/costs-benefits-occupational-regulation/cox_foster_-_occupational_licensing.pdf) [<https://perma.cc/99K9-JQQA>]; MORRIS M. KLEINER, HAMILTON PROJECT, REFORMING OCCUPATIONAL LICENSING POLICIES 13 (2015), [https://www.brookings.edu/wp-content/uploads/2016/06/thp\\_kleinerdiscpaper\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/thp_kleinerdiscpaper_final.pdf) [<https://perma.cc/9W4M-9WJF>] (“Overall, few studies have shown significant benefits of occupational regulation on the quality of service received by consumers or on the demand for the service. . . . On the other hand, several studies have found significant effects on the wages that licensed practitioners receive and on the prices that consumers face.”) [hereinafter REFORMING OCCUPATIONAL LICENSING].

<sup>33</sup> See CARPENTER II ET AL., *supra* note 23, at 24–25; see also GUILD-RIDDEN LABOR MARKETS, *supra* note 13, at 28; REFORMING OCCUPATIONAL LICENSING, *supra* note 32, at 11.

<sup>34</sup> ASSESSING STATE POLICIES AND PRACTICES, *supra* note 15, at 65.

<sup>35</sup> See CARPENTER II ET AL., *supra* note 23, at 195.

tionate to the risks posed by those industries.<sup>36</sup> For example, an EMT license requires thirty-four days of training on average; a cosmetology license requires 386 days.<sup>37</sup> If a license was truly necessary for consumer protection, one would expect to see greater consistency in the type of occupations licensed and in licensure requirements.

If most licensing regimes have no real connection to protecting consumers, why are they enacted? The answer is that licensing regimes are, at core, industry-created monopolies blessed by the state. Industries seek licensing so that they can extract so-called “monopoly rents” by having the state raise regulatory barriers to entry.<sup>38</sup> These barriers restrict the supply of services, thereby raising industry wages.<sup>39</sup> Indeed, “[t]he dominant view today is that the regulatory licensing process has been captured by industry to erect entry restrictions for its own benefit.”<sup>40</sup>

### B. *The Costs and Benefits of Occupational Licensing*

Professional associations maintain that they seek licensure for consumers’ sake. But both history and empirics tell another story. Professional associations seek licensure for their own benefit: by restricting new entrants and increasing competition, licensing increases profits within an industry by ten to eighteen percent or more.<sup>41</sup> And this benefit comes at the expense of both consumers and would-be practitioners.

First, licensing burdens consumers. Although licensing is supposed to benefit consumers, it imposes costs—and no corresponding benefits—on consumers. Licensing results in decreased and more expensive supply, with no meaningful increase in quality.<sup>42</sup> As one scholar has noted, “[t]he net effects [of licensing] can be regressive, as lower-income consumers . . . pay more to the regulated practitioners, some of whom are well compensated.”<sup>43</sup> Further, the higher prices caused by licensure can price out low-income consumers completely. Consumers who can afford these “monopoly prices” will receive the service, but those who cannot must “do it themselves or go without.”<sup>44</sup>

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<sup>36</sup> See *id.* at 24–25; see also GUILD-RIDDEN LABOR MARKETS, *supra* note 13, at 28.

<sup>37</sup> CARPENTER II ET AL., *supra* note 23, at 26.

<sup>38</sup> See STAGES OF OCCUPATIONAL REGULATION, *supra* note 28, at 3–4. The increase in earnings is not evenly disbursed across industries, however: practitioners in universally licensed occupations and in higher-income sectors, such as physicians and attorneys, see the highest gains from licensing. See REFORMING OCCUPATIONAL LICENSING, *supra* note 32, at 13.

<sup>39</sup> See STAGES OF OCCUPATIONAL REGULATION, *supra* note 28, at 6.

<sup>40</sup> Law & Kim, *supra* note 25, at 724.

<sup>41</sup> See STAGES OF OCCUPATIONAL REGULATION, *supra* note 28, at 6.

<sup>42</sup> See GUILD-RIDDEN LABOR MARKETS, *supra* note 13, at 34, 39–40, 81; see also *supra* notes 31–32 and corresponding text.

<sup>43</sup> See REFORMING OCCUPATIONAL LICENSING, *supra* note 32, at 16.

<sup>44</sup> See MORRIS M. KLEINER & EVGENY S. VOROTNIKOV, INST. FOR JUSTICE, AT WHAT CO\$T? STATE AND NATIONAL ESTIMATES OF THE ECONOMIC COSTS OF OCCUPATIONAL LICENSING 10 (Nov. 2018), [https://ij.org/wp-content/uploads/2018/11/Licensure\\_Report\\_WEB.pdf](https://ij.org/wp-content/uploads/2018/11/Licensure_Report_WEB.pdf)



Second, licensing imposes costs on the rest of the public. It contributes to income inequality by reducing upward mobility for low-income people who cannot afford the costs of licensing.<sup>45</sup> It reduces geographic mobility because licenses are often not transferrable across states.<sup>46</sup> Finally, licensing burdens ex-offenders—and even increases recidivism rates—because people with criminal convictions are often disqualified from receiving occupational licenses.<sup>47</sup> Thus, the costs of licensing fall on some of the most vulnerable members of society: immigrants, military spouses (who often must move across state lines), individuals with criminal convictions, and low-income people.<sup>48</sup> In total, studies suggest licensing costs the economy close to 2 million jobs each year, and almost \$200 billion annually in wasted resources.<sup>49</sup>

### C. *The Structure of Occupational Licensing Regimes*

Occupational licensing regimes are created, administered, and preserved by the licensed industry itself. Like medieval guilds, where practitioners “negotiate[d] with political elites for exclusive legal privileges that

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[<https://perma.cc/5GP4-2ACB>] (This is similar to the “Cadillac effect” which is based on “a hypothetical described by Milton Friedman in which it is illegal to sell any cars apart from luxury cars. In such a situation, many people would, by necessity, pay the cost of the Cadillac even though they would have been perfectly happy with . . . an economy car . . . . Many others, unable to afford a Cadillac, would be forced to go carless.”) [hereinafter AT WHAT CO\$T?]; see also THE STATE OF OCCUPATIONAL LICENSING RESEARCH, *supra* note 32, at 6 (noting that licensing “may lead to. . . increased public safety risks. . . [if] consumers forego necessary services because prices are too high or no one is available for hire”); COX & FOSTER, *supra* note 32, at 28–29 (“Even if the quality of professionals’ services increases as a result of . . . licensing, higher prices may cause consumers to switch to lower cost alternatives or choose to forgo services completely. Therefore, quality of service actually received by consumers may decrease . . . because some consumers become ‘do-it-yourselfers.’ For example, one study found that stricter mandatory entry requirements for electricians ‘are significantly associated with a rise in the rate of death from accidental electrocution.’”); *id.* at 35 (“Consumers may also ‘do without’ certain health care services [such as dental care] because of higher prices.”).

<sup>45</sup> See AT WHAT CO\$T?, *supra* note 44, at 19.

<sup>46</sup> See *id.* at 9–10; see also REFORMING OCCUPATIONAL LICENSING, *supra* note 32, at 13–14 (“Occupational licensing can act as a deterrent to geographical movements . . . because licensing is typically done at the state level, [so] the worker often must repeat many of the requirements and investments necessary to gain licensure in another state.”).

<sup>47</sup> See VITTORIO NASTASI & SAMUEL R. STALEY, THE JAMES MADISON INST., BRIDGING THE DIVIDE: LICENSING AND RECIDIVISM 2 (2019), [https://www.jamesmadison.org/wp-content/uploads/2019/04/PolicyBrief\\_LicensingRecidivism\\_v02.pdf](https://www.jamesmadison.org/wp-content/uploads/2019/04/PolicyBrief_LicensingRecidivism_v02.pdf) [<https://perma.cc/S75G-KBAJ>] (finding that “states that more stringently regulated entry into occupations most suited to lower- and middle-income occupations had higher re-arrest rates for former prisoners”); see also Annie Zhang, *Sanctioned Unemployment: The Impact of Occupational Licensing Restrictions on Ex-Offenders*, 57 WASH. U. J.L. & POL’Y 251 (2018); REBECCA VALLAS & SHARON DIETRICH, CTR. FOR AM. PROGRESS, ONE STRIKE AND YOU’RE OUT: HOW WE CAN ELIMINATE BARRIERS TO ECONOMIC SECURITY AND MOBILITY FOR PEOPLE WITH CRIMINAL RECORDS 36 (Dec. 2014), [https://cf.americanprogress.org/wp-content/uploads/2014/12/Vallas-CriminalRecordsReport.pdf?\\_ga=2.26329917.1643290444.1644080863-1798161917.1644080863](https://cf.americanprogress.org/wp-content/uploads/2014/12/Vallas-CriminalRecordsReport.pdf?_ga=2.26329917.1643290444.1644080863-1798161917.1644080863) [<https://perma.cc/5TSW-59NZ>].

<sup>48</sup> See WHITE HOUSE REPORT, *supra* note 17, at 4–5, 41.

<sup>49</sup> See AT WHAT CO\$T?, *supra* note 44, at 19.

allowed them to reap monopoly rents,”<sup>50</sup> licensing regimes are created and maintained by the licensed profession in response to competitive pressures.

The Progressive Era introduced the modern reincarnation of guilds: “friendly” licensing regimes.<sup>51</sup> In friendly licensing regimes, licensing statutes are sought by the industry, “drafted” by the industry, and administered by licensing boards composed of industry members.<sup>52</sup> For example, licensing for barbers and horseshoers was enacted at the turn of the twentieth century through the efforts of barbers’ and horseshoers’ unions who wanted to “eliminate ‘cutthroat’ competition.”<sup>53</sup> The barbers’ union in particular was trying to eliminate the competition produced by the “‘quickie’ barber school.”<sup>54</sup> These eight-week courses churned out new barbers who, the union argued, “were ‘unable to tell the difference between a filthy disease and a pimple.’”<sup>55</sup>

True to historical form, most occupational licensing laws today are enacted “at the behest of professional associations, not consumer advocacy or public interest groups.”<sup>56</sup> Licensing is rarely imposed on an unwilling industry.<sup>57</sup> Indeed, “professions’ degree of political influence is one of the most important factors in determining whether States regulate an occupation.”<sup>58</sup> For example, the American Society of Interior Designers (ASID) has for decades pushed state lawmakers to regulate the interior design industry.<sup>59</sup> ASID has drafted proposed legislation, lobbied state legislatures, and testified at committee hearings.<sup>60</sup> Its efforts have been instrumental in obtaining licensing laws in multiple states.<sup>61</sup>

Once an industry has succeeded in obtaining licensure, it retains control of the licensing regime through the state licensing board, which administers the statute. Licensing statutes generally require licensing boards to be com-

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<sup>50</sup> Sheilagh Ogilvie, *The Economics of Guilds*, 28 J. ECON. PERSPS. 169, 170 (2014); see also GUILD-RIDDEN LABOR MARKETS, *supra* note 13, at 4 (“These guilds offered an effective mechanism where guild members and politicians could collaborate in capturing a larger slice of the economic rents and redistributing it to themselves at the expense of the rest of the economy.”).

<sup>51</sup> See Friedman, *supra* note 26, at 497.

<sup>52</sup> See *id.* at 496–97.

<sup>53</sup> See *id.* at 498–99.

<sup>54</sup> *Id.* at 499.

<sup>55</sup> *Id.* Similarly, embalmers urged the creation of funeral director licensing statutes in an attempt to “professionaliz[e]” the industry and “protect an area of exclusive business competence”—i.e., to stymie competition from adjacent industries whose members also performed embalming services, such as doctors, clergymen, and undertakers. *Id.* at 501.

<sup>56</sup> See REFORMING OCCUPATIONAL LICENSING, *supra* note 32, at 7–8.

<sup>57</sup> *Id.*; see also Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 11 (1976).

<sup>58</sup> WHITE HOUSE REPORT, *supra* note 17, at 22.

<sup>59</sup> DICK M. CARPENTER II, INST. FOR JUST., DESIGNING CARTELS 9 (2007).

<sup>60</sup> *Id.* at 10.

<sup>61</sup> *Id.* at 9; see also STAGES OF OCCUPATIONAL REGULATION, *supra* note 28, at 215 (discussing massage therapist licensing efforts).

posed mainly of active members of the licensed profession.<sup>62</sup> For example, the cosmetology licensing statute at issue in *Niang v. Carroll* created an eleven-member board, nine members of which were required to be licensed cosmetologists, barbers, or owners of an accredited or licensed cosmetology school.<sup>63</sup> Of these nine, eight were also required to have been actively practicing for at least five years prior to their appointment.<sup>64</sup>

Moreover, licensing boards enjoy broad authority to administer licensing statutes. Boards often have the authority to establish requirements for licensure, administer licensing exams, accredit approved vocational schools, sanction practitioners who violate professional standards, prosecute unlicensed practitioners for unauthorized practice, set standards for the recognition of out-of-state licenses, and decide whether to enter into reciprocity agreements with their counterparts in other states.<sup>65</sup>

The licensing board structure thus creates a “regime of self-regulation.”<sup>66</sup> Professional self-regulation may seem reasonable because industry members have the knowledge to establish professional standards.<sup>67</sup> However, industry domination of licensing boards presents a clear conflict of interest.<sup>68</sup> Boards composed of existing practitioners are more likely to act to “insulate incumbents rather than to ensure public welfare.”<sup>69</sup> As explained earlier,

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<sup>62</sup> Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSPS. 189, 191 (2000); Aaron Edlin & Rebecca Shaw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PENN. L. REV. 1093, 1103–04, 1157–64 (2014) (summarizing their findings that on 90% of licensing boards in Florida and Tennessee, active license-holders constitute a majority of the board); see also *North Carolina Bd. of Dental Exam’rs v. FTC*, 574 U.S. 494 (2015) (holding a state regulatory board mostly composed of market participants is a “private actor” under federal antitrust laws and cannot claim immunity unless subject to active supervision by the state).

<sup>63</sup> Mo. Ann. Stat. § 329.015 (West 2021).

<sup>64</sup> *Id.*

<sup>65</sup> See ASSESSING STATE POLICIES AND PRACTICES, *supra* note 15, at 46, 49; see also, e.g., Fla. Stat. Ann. § 475.180 (West) (“[T]he commission in its discretion may enter into written agreements with similar licensing authorities of other states, territories, or jurisdictions of the United States or foreign national jurisdictions . . . . Whenever the commission determines that another jurisdiction does not offer nonresident licensure to Florida licensees substantially comparable to those afforded to licensees of that jurisdiction by this section, the commission shall require licensees of that jurisdiction who apply for nonresident licensure to meet education, experience, and examination requirements substantially comparable to those required by that jurisdiction with respect to Florida licensees.”).

<sup>66</sup> See Edlin & Shaw, *supra* note 62, at 1103–04; see also Rebecca Haw Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105 CAL. L. REV. 1567, 1574–76 (2017) (noting that professional dominance on licensing boards is even more pronounced than statutes suggest, since non-professional seats are more likely to be vacant, and sometimes non-professional seats are nonvoting).

<sup>67</sup> COX & FOSTER, *supra* note 32, at 36.

<sup>68</sup> *Id.* The existence of “grandfather clauses” exempting existing practitioners from new entry regulations suggests regulators may be motivated by interests other than consumer protection. *Id.* at 37; REFORMING OCCUPATIONAL LICENSING, *supra* note 32, at 8; Edlin & Shaw, *supra* note 62, at 1104; Roger V. Abbott, *Is Economic Protectionism a Legitimate Governmental Interest Under Rational Basis Review?*, 62 CATH. U. L. REV. 475, 499 (2013).

<sup>69</sup> See Edlin & Shaw, *supra* note 62, at 1104; see also Jarod M. Bona, *The Antitrust Implications of Licensed Occupations Choosing Their Own Exclusive Jurisdiction*, 5 U. ST. THOMAS

these two aims are quite often mutually exclusive: unnecessarily high entry barriers benefit incumbents by raising wages but impose costs on the public in the form of higher prices, loss of economic mobility, and reduced access to services. And because these entry barriers have no effect on service quality, they provide no benefit to consumers—nominally the purpose of the statute.<sup>70</sup> At best, they simply transfer value from the public to existing practitioners; more likely, they destroy social value by raising barriers to entry and thereby artificially raising prices.<sup>71</sup>

An analysis of how licensing boards actually administer statutes suggests that licensing boards indeed act to shield incumbents rather than to protect consumers. First, licensing boards manipulate entry restrictions in response to market conditions.<sup>72</sup> For example, boards raise minimum pass rates on licensing exams or limit the number of openings at vocational schools in order to restrict new entrants.<sup>73</sup> If licensing requirements were established solely with reference to consumer protection, they should be unaffected by market conditions. Second, licensing boards determine which occupations are included within the statutory definition of the regulated occupation.<sup>74</sup> Boards can thus define—and extend—the scope of their own regulatory sphere. Dentistry boards assert that teeth whitening is a form of dentistry that can only be provided by a licensed dentist,<sup>75</sup> veterinary boards

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J. L. & PUB. POL'Y 28, 45 (2011) (noting that individuals have strong incentives “to expand the reach of their occupation to the detriment of both consumers and other occupations”).

<sup>70</sup> See *supra* Section II.A.

<sup>71</sup> The monopolistic nature of the licensed industry destroys social value because as prices rise (inflated by the barriers to entry) quantity supplied falls and the deadweight loss grows. See Morris M. Kleiner, *Our Guild-Ridden Labor Market*, CATO INST.: CATO ONLINE F. (NOV. 18, 2014), <https://www.cato.org/cato-online-forum/our-guild-ridden-labor-market> [<https://perma.cc/7L4J-G9UW>]. Kleiner & Vorotnikov have estimated this deadweight loss to be over \$6 billion per year. See AT WHAT CO\$T?, *supra* note 44, at 7. They further note that the economic costs of licensing are much broader than just deadweight loss. They estimate that the cost to consumers of misallocated or wasted resources due to licensure—such as “inappropriate allocation of the human capital of people who cannot, because of licensing, work in the occupation for which they are best suited, the resources wasted fulfilling licensing requirements that do not raise quality, the resources lost to rent-seeking when occupational practitioners and their industry associations push for licensure, the resources wasted providing services of unnecessarily high quality,” and the costs of “featherbedding”—is around \$200 billion per year. *Id.* at 12–13.

<sup>72</sup> STAGES OF OCCUPATIONAL REGULATION, *supra* note 28, at 5; CARPENTER II, ET AL., *supra* note 23, at 31.

<sup>73</sup> STAGES OF OCCUPATIONAL REGULATION, *supra* note 28, at 5.

<sup>74</sup> CARPENTER II, ET AL., *supra* note 23, at 30–31.

<sup>75</sup> See, e.g., Jordan Matyas, *Teeth Whitening and the Law: The Battle Over an \$11 Billion Industry*, 1818 (Sept. 4, 2019), <https://www.1818advocacy.com/teeth-whitening-and-the-law-the-battle-over-an-11-billion-industry/> [<https://perma.cc/KUZ6-C2QS>] (“By one estimate, members of the American Academy of Cosmetic Dentistry bring in an average of \$25,000 annually from teeth whitening alone. Part of this revenue stems from the fact that dentists typically charge two to six times more for teeth whitening services than salons or kiosks. With so much potential revenue at stake, it is no wonder that dentists and dental boards have been lobbying hard to shut down freestanding teeth whitening businesses. Since the early 2000s, 14 states have changed their laws and imposed outright bans on anyone but licensed dentists, hygienists, and dental assistants performing teeth-whitening procedures.”).

decide that animal massage therapy can only be provided by licensed veterinarians,<sup>76</sup> cosmetology boards determine that an eyebrow threader is an esthetician under the board's purview,<sup>77</sup> and so forth. Some have dubbed this phenomenon "license creep."<sup>78</sup>

Of course, given how valuable licensing is to industry members, licensing reform is vigorously opposed by professional associations. Proposals for deregulation—such as delicensing occupations or even just reducing licensing requirements—are met with stubborn opposition from industry members.<sup>79</sup> Indeed, the political power wielded by professional associations and the structure of occupational licensing statutes suggests that occupational licensing exhibits all the symptoms of regulatory capture. Public Choice theorists have in fact argued that this capture makes legislative reform very difficult, if not impossible.<sup>80</sup> This has led some to believe that the path for reform wends through the courthouse.

### III. LEGAL CHALLENGES TO OCCUPATIONAL LICENSING LAWS

From the beginning, licensing laws were challenged in the courts—both state and federal. In federal courts, challengers mainly argue that licensing statutes that restrict a person from pursuing an otherwise lawful occupation violate the Due Process Clause of the U.S. Constitution.<sup>81</sup> In state courts,

<sup>76</sup> See, e.g., Patricia Cohen, *Moving to Arizona Soon? You Might Need a License*, N.Y. TIMES (June 17, 2016), <https://www.nytimes.com/2016/06/18/business/economy/job-licenses.html> [<https://perma.cc/E2ET-6B9M>].

<sup>77</sup> See, e.g., *Patel v. Tex. Dep't Regul.*, 469 S.W.3d 69, 73 (2015).

<sup>78</sup> CARPENTER II, ET AL., *supra* note 23, at 30.

<sup>79</sup> See, e.g., Robert J. Thornton & Edward J. Timmons, *The Delicensing of Occupations in the United States*, MONTHLY LAB. REV. (2015); see also, Danny Heitman, *Do You Have a License for That Bouquet?*, WALL ST. J. (Aug. 24, 2018), <https://www.wsj.com/articles/do-you-have-a-license-for-that-bouquet-1535147773> [<https://perma.cc/BRC7-SBBV>] (describing the Louisiana legislature's rejection of a proposed repeal of florist licensure requirements under pressure from the state's powerful florists lobby); Andy Chow, *Cosmetology Schools, Salons Square Off Over Battle to Change Licensing Standards*, WKSU (March 16, 2018), <https://www.wksu.org/government-politics/2018-03-16/cosmetology-schools-salons-square-off-over-battle-to-change-licensing-standards> [<https://perma.cc/BW4Z-H63P>] (describing Ohio cosmetologists' opposition to a bill lowering educational requirements for cosmetologists); Lydia DePillis, *In Taking on Cosmetologists – and Other Licensed Professions – the White House May Have Picked a Fight It Can't Win*, WASH. POST (Nov. 9, 2015), <https://www.washingtonpost.com/news/wnk/wp/2015/11/09/in-taking-on-cosmetologists-and-other-licensed-professions-the-white-house-may-have-picked-a-fight-it-cant-win/> [<https://perma.cc/5HPY-U6MD>] (discussing the cosmetology industry's resistance to occupational licensing deregulation).

<sup>80</sup> See generally Paul J. Larkin, Jr., *Public Choice Theory & Occupational Licensing*, 39 HARV. J.L. & PUB. POL'Y 209, 243 (2016).

<sup>81</sup> Challenges are often also brought under the Equal Protection Clause. Interestingly, the first law to be struck down under the Equal Protection Clause involved an occupational licensing ordinance that discriminated against Chinese-owned laundries. See *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886). In *Yick Wo v. Hopkins*, the Court struck down a San Francisco ordinance requiring all laundries to receive a permit because the city had used the standardless permit system to deny permits to Chinese-owned laundries. *Id.* As economic regulations, most occupational licensing laws are subject to rational basis review under the Equal Protection

plaintiffs argue that licensing statutes violate state constitutional provisions that are similar to or identical to the federal Due Process Clause.

### A. Federal Constitutional Challenges

#### 1. *The Lochner Court and Occupational Licensing*

The modern rise in occupational licensing at the turn of the twentieth century coincided with the *Lochner* era, a period characterized by a judicial willingness to overturn state economic regulations.<sup>82</sup> During this era, the Court used the Constitution's Due Process Clause to protect freedom of contract and economic liberty from interference by state regulation.<sup>83</sup>

Some of the new licensing laws were challenged in the *Lochner* court.<sup>84</sup> In fact, the era's eponymous case, *Lochner v. New York*, discussed several horseshoeing licensing laws recently held invalid by state courts and noted that "interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the increase."<sup>85</sup> The *Lochner* court took a balanced approach to its review of licensing laws: it struck down laws which did not clearly further the public interest but upheld those it deemed to protect public health, safety, or morals.<sup>86</sup>

Thus, in a series of cases during the period, the Court upheld licensing requirements for physicians,<sup>87</sup> dentists,<sup>88</sup> and real estate brokers,<sup>89</sup> and also upheld a law disqualifying convicted felons from practicing medicine.<sup>90</sup> In

Clause. This rational basis standard is functionally identical to that under the Due Process Clause. See *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 307 (1993); *Heller v. Doe*, 509 U.S. 312, 320 (1993). Indeed, many occupational licensing challenges are brought under both clauses, and both claims are often reviewed simultaneously. See, e.g., *Powers v. Harris*, 379 F.3d 1208, 1215 (10th Cir. 2004).

<sup>82</sup> See HOWARD GILMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 72–73 (1993).

<sup>83</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45, 53 (1905) ("The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution."); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (finding the 14th Amendment "embrace[s] the right of the citizen to . . . earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential . . .").

<sup>84</sup> See Friedman, *supra* note 26, at 511.

<sup>85</sup> *Lochner*, 198 U.S. at 63.

<sup>86</sup> This is not unique to the occupational licensing context. Despite its reputation, the *Lochner* court actually upheld many more regulatory initiatives than it struck down. See Larkin, *supra* note 80, at 254 ("Lochner was hardly the legislative kryptonite it has been made out to be. The Supreme Court of that era upheld more laws than it struck down.")

<sup>87</sup> See *Dent v. West Virginia*, 129 U.S. 114, 129 (1889); see also *Reetz v. Michigan*, 188 U.S. 505, 510 (1903) (upholding the creation of a state board of registration for physicians).

<sup>88</sup> See *Graves v. Minnesota*, 272 U.S. 425, 429 (1926); see also *Semler v. Or. State Bd. of Dental Exam'rs*, 294 U.S. 608, 611 (1935) (upholding advertising restrictions on dentists).

<sup>89</sup> *Bratton v. Chandler*, 260 U.S. 110, 114–15 (1922).

<sup>90</sup> See *Hawker v. New York*, 170 U.S. 189, 200 (1898). The Court also upheld an Interstate Commerce Clause challenge to a state law requiring a color-blindness and vision exam for in-state railroad employees. See *Nashville, Chattanooga & St. Louis Ry. Co. v. Alabama*, 128 U.S. 96, 99 (1888) (emphasizing that "it is a matter of the greatest importance to safe

upholding the physician licensing law, the Court noted that “[t]he power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud.”<sup>91</sup>

Still, the Court invalidated occupational regulations that lacked a “real and substantial relation” to the demands of the profession as they related to public welfare.<sup>92</sup> Thus, it invalidated a law requiring all freight conductors to have two years of brakeman experience,<sup>93</sup> and a law requiring all stockholders of a pharmacy corporation to be licensed pharmacists.<sup>94</sup> With the closing of the *Lochner* era, however, the Court retreated from even this limited oversight role—an approach that extends to this day.<sup>95</sup>

## 2. Rational Basis Review and Occupational Licensing

After the *Lochner* era, the Court developed the exceedingly deferential rational basis standard to review due process and equal protection challenges to economic regulations. Under the rational basis standard, economic regulations carry an almost insuperable presumption of constitutionality, with the burden on the party challenging the law “to negative every conceivable basis which might support it.”<sup>96</sup> A court is required to uphold the law if it can conceive of any rationale for the law, and the connection between the law and its asserted purpose need not be supported by any empirical evidence.<sup>97</sup>

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railroad transportation of persons and property that strict examination be made as to the existence of [colorblindness] in persons seeking employment on railroads”).

<sup>91</sup> *Dent*, 129 U.S. at 122.

<sup>92</sup> *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 111 (1928), *overruled by* N.D. State Bd. of Pharmacy v. Snyder’s Drug Stores, Inc., 414 U.S. 156 (1973).

<sup>93</sup> *See* *Smith v. Texas*, 233 U.S. 630, 642 (1914); *see also id.* at 638 (“[I]n the exercise of the police power, the state may prescribe tests and require a license from those who wish to engage in . . . a private calling affecting the public safety. The liberty of contract is, of course, not unlimited; but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent . . . None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position.”).

<sup>94</sup> *See Baldridge*, 278 U.S. at 111.

<sup>95</sup> *Lochner* was not merely abandoned—it was anathematized. It occupies a recognized place in the anticanon of constitutional law. *See* Jamal Green, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011). As one scholar noted, “*Lochner* . . . is still shorthand in constitutional law for the worst sins of subjective judicial activism.” Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888–1921*, 5 L. & HIST. REV. 249, 250 (1987). Even as scholars continue to debate the meaning of *Lochner*, judges deliver their opinions in its long shadow. *See, e.g.,* *Patel v. Tex. Dep’t of Licensing & Regul.*, 469 S.W.3d 69, 94 n.11 (Tex. 2015) (“The *Lochner* bogeyman is a mirage but a ready broadside aimed at those who apply rational basis rationally.”); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 623 (2012) (Ginsburg, J., concurring in part) (“THE CHIEF JUSTICE’s Commerce Clause opinion, and even more so the joint dissenters’ reasoning . . . bear a disquieting resemblance to those long-overruled decisions.”).

<sup>96</sup> *See* *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993).

<sup>97</sup> *Id.*

Thus, in *Kotch v. Board of River Port Pilot Commissioners*,<sup>98</sup> the Court upheld an apprenticeship requirement for river pilots that effectively closed the river piloting occupation to everyone other than relatives and friends of existing river pilots.<sup>99</sup> The Court deferred to the legislature's judgment, stating, "[w]e can only assume that the Louisiana legislature weighed the obvious possibility of evil against whatever useful function a closely knit pilotage system may serve."<sup>100</sup> In *Williamson v. Lee Optical*,<sup>101</sup> the Court upheld an Oklahoma statute forbidding opticians to fit or replace glasses lenses, or to provide new frames for existing prescription lenses, without a prescription from an ophthalmologist or optometrist.<sup>102</sup> Even if the law was not "in every respect logically consistent with its aims," the Court held, it was constitutional as long as "there was an evil at hand for correction," and "it might be thought that the particular legislative measure was a rational way to correct it."<sup>103</sup>

In *Ferguson v. Skrupa*,<sup>104</sup> the Court upheld another licensing law prohibiting the business of debt adjusting by non-lawyers.<sup>105</sup> In a particularly broad holding, in which the Court barely discussed the rationale of the state law, the Court emphasized that it would no longer use the "vague contours" of the Due Process Clause to strike down laws it thought unwise.<sup>106</sup> Instead, the Court maintained, "a state Legislature can do whatever it sees fit to do unless it is restrained by some express [constitutional] prohibition."<sup>107</sup>

*Ferguson's* expansive recognition of a state's police power and *Williamson's* insubstantial rational basis standard came together in a seminal case involving yet another occupational licensing law. *City of New Orleans v. Duke's*<sup>108</sup> involved an equal protection challenge to a law prohibiting food pushcart vendors from hawking their wares in the French Quarter of New Orleans.<sup>109</sup> The Court upheld the law, finding it to be a valid economic regulation that attempted to preserve "the distinctive character and charm" of the Quarter.<sup>110</sup> As long as the law was not "wholly arbitrary," it was not unconstitutional.<sup>111</sup>

<sup>98</sup> 330 U.S. 552 (1947).

<sup>99</sup> *Id.* at 563–64.

<sup>100</sup> *Id.* at 563.

<sup>101</sup> 348 U.S. 483 (1955).

<sup>102</sup> *Id.* at 484–87.

<sup>103</sup> *Id.* at 487–88.

<sup>104</sup> 372 U.S. 726 (1963).

<sup>105</sup> *Id.* at 732–33.

<sup>106</sup> *Id.* at 731 (quoting *Adkins v. Children's Hosp.*, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting)).

<sup>107</sup> *Id.* at 729 (quoting *Tyson & Brother v. Banton*, 273 U.S. 418, 445–46 (1927) (Holmes, J., dissenting)). The Court also found that allowing only lawyers to engage in debt adjusting did not violate the Equal Protection Clause. *Id.* at 732–33.

<sup>108</sup> 427 U.S. 297 (1976).

<sup>109</sup> *Id.* at 298.

<sup>110</sup> *Id.* at 305.

<sup>111</sup> *Id.* at 304–05.



*Dukes* was the last Supreme Court case involving occupational licensing laws, although occupational licensing has expanded drastically since *Dukes*. Later cases appear to have cemented the rational basis review's deferential posture with respect to economic regulations.<sup>112</sup> However, a circuit split over whether economic protectionism is a legitimate state interest has given hope to some that the courts will start taking a more active oversight role in reviewing excessive licensing laws.

### 3. *Circuit Split: A Path Forward?*

Circuit courts have generally upheld occupational licensing laws against due process and equal protection challenges.<sup>113</sup> However, the circuit courts have split on the question of whether economic protectionism is a legitimate state interest under rational basis review. In several of the "most important economic freedom cases decided after the New Deal," the Fifth, Sixth, and Ninth Circuits struck down occupational licensing laws after finding that the laws were motivated by economic protectionism, which they deemed to be a non-legitimate state interest.<sup>114</sup> The Second and Tenth Circuits disagreed, holding that economic favoritism is a legitimate state interest for the purposes of rational basis review.

In *Craigsmiles v. Giles*,<sup>115</sup> the Sixth Circuit invalidated a Tennessee law that required casket sellers to obtain a funeral director's license.<sup>116</sup> The law imposed a licensing requirement on anyone engaged in "funeral directing," and it defined "funeral directing" to include the sale of funeral merchandise.<sup>117</sup> Licensure required "either one year of course work at an accredited mortuary school *and* then a one-year apprenticeship . . . *or* a two-year apprenticeship" and all candidates were required to pass the Tennessee Funeral Arts Examination.<sup>118</sup> The plaintiffs were casket retailers who challenged the application of the licensure requirement to the sale of caskets under the Due Process and Equal Protection Clauses.<sup>119</sup>

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<sup>112</sup> See, e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992).

<sup>113</sup> See, e.g., *Niang v. Carroll*, 879 F.3d 870, 874–75 (8th Cir. 2018) (upholding a licensing board determination that African-style hair braiding is a form of cosmetology or barbering); *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 284 (2d Cir. 2015) (upholding a law that allowed only licensed dentists to provide teeth whitening services); *Powers v. Harris*, 379 F.3d 1208, 1225 (10th Cir. 2004) (upholding a funeral director licensing law as applied to casket retailers); *Sutker v. Ill. State Dental Soc'y*, 808 F.2d 632, 633–34 (7th Cir. 1986) (upholding a law that allowed only licensed dentists to fit dentures for patients against an Equal Protection Clause challenge); *Guardian Plans, Inc. v. Teague*, 870 F.2d 123, 126 (4th Cir. 1989) (upholding a requirement that funeral arrangers be licensed funeral professionals).

<sup>114</sup> *TIMOTHY B. SANDEFUR, THE RIGHT TO EARN A LIVING* 149 (2010).

<sup>115</sup> 312 F.3d 220 (6th Cir. 2002).

<sup>116</sup> *Id.* at 222.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* The plaintiffs also challenged the law under the Fourteenth Amendment's Privileges and Immunities Clause. However, the court found no need to "break new ground . . . to hold

The Sixth Circuit sided with the plaintiffs. It pointed out that the law was an obvious “attempt to prevent economic competition.”<sup>120</sup> Such economic protectionism, it asserted, “is not a legitimate governmental purpose.”<sup>121</sup> The court held that this “naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers” constituted a non-legitimate state interest, and was thus unconstitutional under rational basis review.<sup>122</sup>

The Ninth Circuit followed the Sixth Circuit’s approach in *Merrifield v. Lockyer*,<sup>123</sup> striking down a licensing law for exterminators as irrational because it applied only to the extermination of pigeons, rats, and mice but not other vertebrates.<sup>124</sup> The Fifth Circuit followed suit in *St. Joseph Abbey v. Castille*,<sup>125</sup> striking down another law restricting casket selling to licensed funeral directors.<sup>126</sup>

However, the Tenth Circuit in *Powers v. Harris*<sup>127</sup> rejected the Sixth Circuit’s reasoning in *Craigsmiles* and upheld (yet another) law that limited casket selling to licensed funeral directors.<sup>128</sup> The Tenth Circuit held that intrastate economic protectionism is a legitimate state interest and that a state has the power to favor one industry in its state at the expense of others.<sup>129</sup> To hold otherwise, the court maintained, “would be nothing more than substituting our view of the public good or the general welfare for that chosen by the states.”<sup>130</sup>

The Second Circuit agreed with *Powers* in 2015, in a case challenging a ruling by Connecticut’s State Dental Commission that allowed only licensed dentists to use certain teeth whitening methods.<sup>131</sup> The court expressly sided with the Tenth Circuit that economic protectionism is a legitimate state interest, concluding that “there are any number of constitutionally rational grounds for the Commission’s rule, and . . . one of them is the favoring of licensed dentists at the expense of unlicensed teeth whiteners.”<sup>132</sup>

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that the application of the [licensure requirement] to funeral merchandise retailers is unconstitutional under the Fourteenth Amendment.” *Id.* at 229.

<sup>120</sup> 312 F.3d 220, 225 (6th Cir. 2002).

<sup>121</sup> *Id.* at 224.

<sup>122</sup> *Id.* at 229.

<sup>123</sup> 547 F.3d 978 (9th Cir. 2008).

<sup>124</sup> *Id.* at 991.

<sup>125</sup> 712 F.3d 215 (5th Cir. 2013).

<sup>126</sup> *Id.* at 217.

<sup>127</sup> 379 F.3d 1208 (10th Cir. 2004).

<sup>128</sup> *Id.* at 1223.

<sup>129</sup> *Id.* at 1221–22.

<sup>130</sup> *Id.* at 1218.

<sup>131</sup> *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 286 (2d Cir. 2015).

<sup>132</sup> *Id.* at 288. The court pointed out that “even the law at issue in *Lochner*—the paradigm of disfavored judicial review of economic regulations—might well fail the sort of rational basis scrutiny advocated by *Sensational Smiles* and its amicus.” *Id.* at 287 (citing Rebecca L. Brown, *Constitutional Tragedies: The Dark Side of Judgment*, in *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* 139, 142 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (“[S]ubsequent analysts . . . have demonstrated that the law at issue in *Lochner*, despite its guise as a health regulation, was probably a rent-seeking, competition-reducing

This circuit split has raised hopes among some scholars that courts will start to exercise meaningful oversight over licensing laws. They argue that if the Supreme Court recognizes economic protectionism as a non-legitimate state interest, courts will then be able to use a more stringent rational basis standard to review licensing laws.<sup>133</sup>

However, even if the Supreme Court holds economic protectionism to be a non-legitimate state interest, the effect on licensing laws would be slight at best. The vast majority of licensing laws would survive heightened review, and only the most egregious would be struck down. Licensure for most occupations—for barbers, cosmetologists, and even locksmiths—would likely still be deemed to further a legitimate interest such as public safety. Further, courts will be reluctant to delve deeply into whether particular prerequisites for licensure—such as education and training requirements—are so burdensome that they are not rationally related to that interest.<sup>134</sup> Courts will recognize that institutional competency concerns dictate that courts should not wrangle over the finer points of a statutory structure.

Judge Tymkovich’s concurrence in *Powers v. Harris* demonstrates the likely effect of a Supreme Court holding that economic protectionism is a non-legitimate state interest. Judge Tymkovich disagreed with the Tenth Circuit’s majority holding that economic protectionism is a legitimate state interest, but concurred in the judgment because he found “the funeral licensing scheme here furthers, however imperfectly, an element of consumer protection . . . [and] was not enacted solely to protect funeral directors facing increased intrastate competition.”<sup>135</sup> He noted that although the “licensing scheme at issue here leaves much to be desired . . . [and] [c]onsumer interests appear to be harmed rather than protected by the limitation of choice and price encouraged by the licensing restrictions on intrastate casket sales[,] . . . the majority is surely right that the battle over this

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measure supported by labor unions and large bakeries for the purpose of driving small bakeries and their large immigrant workforce out of business.”). See also Larkin, *supra* note 80, at 250.

<sup>133</sup> Some commentators see this as a doctrinal path toward a broader protection of economic liberty. See David E. Bernstein, *The Due Process Right To Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 *YALE L.J. F.* 287 (2016) (“Recent precedent, however, suggests that courts are becoming more protective of what has traditionally been considered a subset of liberty of contract: the right to pursue an occupation.”); Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 *NYU J.L. & LIBERTY* 1055, 1058 (2014) (“One area in which the classical liberal constitution seems to be reasserting itself against the contemporary version of rational basis review is in the emerging circuit split over whether in-state economic protectionism is a legitimate state interest and hence a constitutional justification for economic regulation. . . . In this article we consider the implications of this position for reinvigoration of the classical liberal constitution.”); Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 *CORNELL L. REV.* 527, 576–78 (2015).

<sup>134</sup> Rational basis review has both a means and an ends component: a law must serve a legitimate purpose and be rationally related to that purpose. See Robert W. Bennett, “*Mere*” *Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 *CALIF. L. REV.* 1049, 1070 (1979).

<sup>135</sup> *Powers*, 379 F.3d at 1225–27 (Tymkovich, J., concurring).

issue must be fought in the Oklahoma legislature, the ultimate arbiter of state regulatory policy.”<sup>136</sup>

### B. State Constitutional Challenges

Licensing laws have also been challenged under state constitutional provisions.<sup>137</sup> During the *Lochner* era, for example, state courts “struck down legislative attempts to impose licensing in cases involving blacksmiths, undertakers, ticket agents, druggists, and plumbers.”<sup>138</sup> However, although state courts have greater doctrinal flexibility than federal courts (and no federalism concerns), they are still weak agents for reform.

First, state courts tend to interpret their own constitutions in “lockstep” with the federal Constitution.<sup>139</sup> Thus, most state courts are unlikely to recognize sweeping constitutional protection for the right to earn a living when the federal courts do not. There are some exceptions, however. In one well-known case, the Texas Supreme Court struck down a cosmetology license requirement for eyebrow threading (a form of hair removal) as violating the Texas Constitution’s Due Process Clause.<sup>140</sup> In his concurrence, Judge Willett amplified:

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<sup>136</sup> *Id.* at 1227; see also *Sensational Smiles*, 793 F.3d at 288–89 (Droney, J., concurring) (“I join the majority opinion in its conclusion that the Dental Commission’s declaratory ruling is rationally related to the state’s legitimate interest in protecting the public health. . . . I write separately to express my disagreement [with the majority position that pure economic protectionism is a legitimate state interest]. In my view, there must be at least some perceived public benefit for legislation or administrative rules to survive rational basis review under the Equal Protection and Due Process Clauses. . . . It may be that, as a practical matter, economic protectionism can be couched in terms of some sort of alternative, indisputably legitimate state interest. Indeed, the majority suggests as much when it observes that, in this case, the state may have concluded that protectionism ‘would subsidize lower costs for more essential dental services that only licensed dentists can provide.’ But it is quite different to say that protectionism for its own sake is sufficient to survive rational basis review, and I do not think the Supreme Court would endorse that approach.”) (citations omitted).

<sup>137</sup> See Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 389 (1988); see also Friedman, *supra* note 26, at 511 (noting that in the context of licensing, “state courts generated substantial case-law”).

<sup>138</sup> Hovenkamp, *supra* note 137, at 389.

<sup>139</sup> See Robert A. Schapiro, *Judicial Deference and Interpretive Coordinality in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 693 (1999) (noting the “tendency of state courts to interpret state constitutions as having the same meaning as the federal Constitution, a practice sometimes termed ‘lockstep interpretation’”); see also Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 419–28 (1998); Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 16 WM. & MARY L. REV. 1499, 1502 (2005) (noting that “circumstances where state courts decide to follow, rather than diverge from, federal constitutional doctrine . . . [constitute] the clear majority of cases”).

<sup>140</sup> See *Patel v. Tex. Dep’t of Licensing & Regul.*, 469 S.W.3d 69, 73 (Tex. 2015). More recently, the Pennsylvania Supreme Court invalidated under the state’s constitution a real estate broker license requirement for running a short-term vacation property management business. See *Ladd v. Real Est. Comm’n*, 230 A.3d 1096 (Pa. 2020). This has caused some scholars to hope that state constitutions will arise as new protectors of economic liberty. See, e.g., Gary M. Dreyer, *After Patel: State Constitutional Law & Twenty-First Century Defense of Economic Liberty*, 14 N.Y.U. J.L. & LIBERTY 800, 802–05 (2021) (“[A]dvocates of expanding constitu-

Today's case arises under the Texas Constitution, over which we have final interpretive authority, and nothing in its 60,000-plus words requires judges to turn a blind eye to transparent rent-seeking that bends government power to private gain . . . . Indeed, even if the Texas Due Course of Law Clause mirrored perfectly the federal Due Process Clause, that in no way binds Texas courts to cut-and-paste federal rational-basis jurisprudence that long post-dates enactment of our own constitutional provision, one more inclined to freedom.<sup>141</sup>

More importantly, however, state court-driven reform suffers from the same drawbacks as federal court-driven reform. Courts are reactive institutions: they can strike down individual instances of licensing but cannot drive comprehensive reform. Even courts that are willing to strike down egregious licensing laws have limited ability to do so. Thus, most occupational licensing laws—many of which have harmful net effects on society—would be out of judicial reach. So, the judiciary—both state and federal—is on its own a weak tool to check excessive licensing laws.

However, although state and federal courts are not likely to create meaningful change on their own, they are a useful method for generating public support for statutory reform. As described in the next section, successful legislative change often follows well-publicized lawsuits that put pressure on legislatures to deregulate licensing regimes.

#### IV. STATUTORY REFORM

The path for meaningful reform wends through state legislatures, with perhaps a detour through the courthouse. In fact, legislative reform has been slowly but steadily gaining momentum, despite stiff opposition from professional associations' lobbies. Although there is still a way to go, the early successes of reformers' litigation and lobbying efforts have shown that deregulation is certainly possible.

In particular, successful legislative reform often follows well-publicized lawsuits brought against licensing boards. Even when such lawsuits are unsuccessful, they raise public awareness and thereby generate support for deregulation. Mississippi, for example, recently eliminated licensing requirements for eyebrow threaders, eyelash technicians, and makeup artists.<sup>142</sup>

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tional protection for economic liberties should concentrate their efforts on exporting the *Patel-Ladd* standards to the other forty-eight states in the coming years, allowing these doctrines to better ripen before moving toward federalizing these standards.”); Dana Berliner, *Are States Protecting Economic Liberty?*, 43 HARV. J.L. & PUB. POL. 77, 77–79 (2020).

<sup>141</sup> *Patel*, 469 S.W.3d at 98 (Willett, J., concurring).

<sup>142</sup> See H.B. 1312, 2021 Leg., Reg. Sess. (Miss. 2021); see also Leah L. Willingham, *Mississippi Ends License Requirements for Some Beauty Jobs*, ASSOCIATED PRESS (Apr. 14, 2021), <https://apnews.com/article/mississippi-tate-reeves-2c6a13d5de4e73f2ccd3bd995ec069e1> [<https://perma.cc/FJ37-VU36>].

The legislation followed two lawsuits brought against the licensing board arguing that the licensing requirements were unconstitutional.<sup>143</sup> As part of the settlement agreement, the Mississippi State Board of Cosmetology agreed to repeal the esthetician license requirement for these “low-risk beauty services.”<sup>144</sup>

Similarly, as discussed at the beginning of this Note, Niang’s lawsuit against the Missouri Board of Cosmetology—although unsuccessful—led to legislative reform of the licensing requirements for African-style hair braiders.<sup>145</sup> In 2018, Missouri passed a law that created a standalone license for braiders, which requires them to pay a twenty dollar registration fee, watch a four to six hour training video, and submit to Board inspections.<sup>146</sup> Arkansas similarly repealed its cosmetology license requirement for hair braiders after it was sued in federal court.<sup>147</sup>

The analysis below outlines two main directions that legislative reform efforts have taken: (1) lessening licensing burdens by reducing or eliminating licensing requirements; and (2) expanding interstate license recognition.

### A. *Lessening Licensing Burdens*

Legislative reforms can directly lessen licensing burdens either by reducing the requirements for licensure (e.g., trimming the amount of training hours required for cosmetologists) or by eliminating a license entirely (e.g., allowing interior designers to practice without a license). Despite the arguable capture of state legislatures by professional associations who strictly oppose any deregulation, such reforms have been increasingly successful. Additionally, some states have implemented process-based reforms that can indirectly reduce licensing burdens by creating a review process for licensing requirements that mandates a cost-benefit analysis of existing or proposed licensing laws.

Legislative reforms that directly reduce licensing requirements have been mostly incremental but have steadily been gaining traction.<sup>148</sup> In 2021, Nebraska repealed registration requirements for locksmiths<sup>149</sup> and lowered education and training requirements for real estate appraisers.<sup>150</sup> The same

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<sup>143</sup> See *Bhattarai v. Fitch*, No. 3:19-CV-560-DPJ-FKB, 2020 WL 1821253 (S.D. Miss. Apr. 10, 2020) (order granting Motion to Dismiss); *Compl. at 2, Get Glam Beauty, LLC v. Stewart*, No. 3:20-CV-00580 (S.D. Miss. Aug. 31, 2020).

<sup>144</sup> Willingham, *supra* note 142.

<sup>145</sup> See *supra* Part I.

<sup>146</sup> See H.B. 1500, 99th Gen. Assemb., 2d Reg. Sess. (Mo. 2018).

<sup>147</sup> See Chris Burks, *The Right to Work: The Rise in Occupational Licensing Litigation Comes to Arkansas*, 51 ARK. L. REV. 22, 24 (2016).

<sup>148</sup> See Rich Ehisen, *Occupational Licensing Reform Gains Steam in Statehouses*, STATE NET CAPITOL J. (Feb. 5, 2021), <https://www.lexisnexis.com/en-us/products/state-net/news/2021/02/05/Occupational-Licensing-Reform-Gains-Steam-in-Statehouses.page> [https://perma.cc/78TK-3ZLD].

<sup>149</sup> See L.B. 169, 107th Leg., 1st Sess. (Neb. 2021).

<sup>150</sup> See L.B. 23, 107th Leg., 1st Sess. (Neb. 2021).

year, California reduced the licensing requirements for cosmetologists and barbers, including reducing required training hours from 1,600 and 1,500 hours, respectively, to 1,000 hours each.<sup>151</sup> And in 2020, Florida enacted an impressively comprehensive occupational licensing reform called The Occupational Freedom and Opportunity Act, which eliminated or reduced licensing requirements for over thirty occupations.<sup>152</sup> This success came after three years of failed legislation.<sup>153</sup>

Licensing reform is often difficult to achieve because of the political clout held by professional associations. Many reform efforts have been derailed by professional associations' opposition. For example, a Mississippi House Bill proposing to repeal licensing for art therapists, auctioneers, interior designers, funeral home directors, and wigologists died in committee after industry groups rallied to kill the bill.<sup>154</sup>

A (mostly) failed effort to remove licensing requirements for florists in Louisiana is particularly illustrative. Louisiana's florist license requirement, the only one of its kind in the country, required aspiring florists to pass a practical exam and a written exam in order to arrange and sell bouquets.<sup>155</sup> The practical exam—in which applicants were given four hours to create four bouquets which were judged by licensed florists—had less than a fifty percent pass rate.<sup>156</sup> After aspiring florists brought lawsuits arguing the li-

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<sup>151</sup> S.B. 803, 2021-2022 Reg. Sess. (Cal. 2021).

<sup>152</sup> H.B. 1193, 2020 Reg. Sess. (Fla. 2020); Eric Boehm, *Florida Just Passed the Most Sweeping Occupational Licensing Reform in History*, REASON.COM (July 1, 2020), <https://reason.com/2020/07/01/florida-just-passed-the-most-sweeping-occupational-licensing-reform-in-history/> [<https://perma.cc/CFD9-DM8V>]; Press Release, Governor Ron DeSantis Signs "The Occupational Freedom and Opportunity Act" to Remove Unnecessary Barriers to Employment (June 30, 2020), <https://www.flgov.com/2020/06/30/governor-ron-desantis-signs-the-occupational-freedom-and-opportunity-act-to-remove-unnecessary-barriers-to-employment/> [<https://perma.cc/Z5BP-KFL7>].

<sup>153</sup> See H.B. 7047, 2017 Reg. Sess. (Fla. 2017); H.B. 15, 2018 Reg. Sess. (Fla. 2018); see also S.B. 1640, 2019 Reg. Sess. (Fla. 2019) (attempting to repeal licensing for twenty-three occupations, but dying on calendar May 3, 2019).

<sup>154</sup> See *Mississippi Art Therapists Successfully Organized to Defeat Bill to Repeal Art Therapy and Other Licenses*, AM. ART THERAPY ASS'N (Mar. 11, 2021), <https://arttherapy.org/news-mississippi-bill-to-repeal-art-therapy-license-defeated/> [<https://perma.cc/ENZ8-TAYK>]; Steve Wilson, *Licensing Bill Stirs Controversy Among Groups*, NORTHSIDE SUN (Feb. 19, 2021), <https://www.northsidesun.com/most-recent/licensing-bill-stirs-controversy-among-groups#sthash.nvzu3ryd.dpbs> [<https://perma.cc/R3UR-5VCH>]; Slim Smith, *Local Massage Therapist Opposes Cuts to Training Hours*, DISPATCH (Feb. 11, 2021), <https://cdispatch.com/news/2021-02-11/local-massage-therapist-opposes-cuts-to-training-hours/> [<https://perma.cc/4TNK-RPWP>].

<sup>155</sup> Shoshana Weissman & C. Jarrett Dieterle, *Louisiana Is the Only State that Requires Occupational Licenses for Florists. It's Absurd.*, USA TODAY (Mar. 28, 2018), <https://www.usatoday.com/story/opinion/2018/03/28/louisiana-only-state-requires-occupational-licenses-florists-its-absurd-column/459619002/> [<https://perma.cc/FL9Q-F7X5>] ("The [exam] results were judged by a panel of licensed Louisiana florists, who all-but-certainly viewed the applicants as competitors that were best kept out of the floristry trade. The passage rates for the exam were below 50 percent; even longtime florists often failed it. One licensed florist in the state described the test as nothing more than a 'hazing process.'").

<sup>156</sup> *Id.*

cense was unconstitutional,<sup>157</sup> the state repealed the practical exam requirement, but preserved the written exam portion.<sup>158</sup> Subsequent attempts to completely eliminate the license requirement have failed in the face of the Louisiana florists lobby's remarkable influence. Its arguments in opposition to delicensing have ranged from consumer protection to promoting the status of the industry.<sup>159</sup>

In addition to direct deregulation, many states have implemented sunrise or sunset review processes for occupational licensing laws. Sunrise reviews for proposed legislation and sunset reviews for existing legislation "charge an independent agency with reviewing proposed and existing occupational regulations and give it a mandate to protect competition by favoring regulation only in cases of demonstrated harm and by selecting the least restrictive option to address that harm."<sup>160</sup>

Sunset and sunrise reviews mandate that the agency conduct a cost-benefit analysis to determine whether licensing laws are justified, and whether there are less restrictive alternatives, such as certification or registration, that would be more efficient.<sup>161</sup> Certification, for example, is an op-

<sup>157</sup> See, e.g., *Meadows v. Odom*, 360 F. Supp. 2d 811 (M.D. La. 2005), *vacated as moot*, 198 F. App'x 348, 351 (5th Cir. 2006); Chauvin v. Strain, No. 2:10-CV-00729 (E.D. La. 2010).

<sup>158</sup> H.B. 1407, 2010 Reg. Sess. (La. 2010).

<sup>159</sup> See Elizabeth E. Crisp, *Effort to End Florist Licensing in Louisiana Nipped in the Bud with Senate Panel's Rejection*, ADVOCATE, (May 1, 2018), [https://www.theadvocate.com/baton\\_rouge/news/politics/legislature/article\\_4058ed8e-4d59-11e8-aced-a3f61ef63b1c.html](https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_4058ed8e-4d59-11e8-aced-a3f61ef63b1c.html) [<https://perma.cc/8CK6-67R5>]; see also Danny D. Heitman, *Do You Have a License for that Bouquet?*, WALL ST. J., (Aug. 24, 2018), <https://www.wsj.com/articles/do-you-have-a-license-for-that-bouquet-1535147773> [<https://perma.cc/G9G2-QCFZ>] ("Louisiana's Republican Legislature bends to the will of the state's powerful florists lobby.").

<sup>160</sup> CARPENTER II, ET AL., *supra* note 23, at 38; ASSESSING STATE POLICIES AND PRACTICES, *supra* note 15, at 62 ("Sunrise reviews, which occur before legislation is enacted, and sunset reviews, which occur once legislation has been passed and implemented, can be powerful tools for policymakers to evaluate occupational licensing measures for continued relevancy. Both processes examine the existing or proposed costs and benefits of licensure, compare regulation with other states and provide policymakers with a data-driven analysis to assist them in decision-making."); WHITE HOUSE REPORT, *supra* note 17, at 48.

<sup>161</sup> See CARPENTER II, ET AL., *supra* note 23, at 32–33 (listing alternatives for licensure from least restrictive to most restrictive). Further, technological developments in the service industry which allow consumers and providers to exchange detailed information about each other—such as online reviews—undermine the need for occupational licensure. See, e.g., Farronato et al., *supra* note 31, at 33 ("[T]he increased availability of alternative signals of quality, such as online reviews, has probably reduced the level of regulatory scrutiny needed for service providers."); Eduardo E. Porter, *Job Licenses in Spotlight as Uber Rises*, N.Y. TIMES (Jan. 27, 2015), <https://www.nytimes.com/2015/01/28/business/economy/ubers-success-casts-doubt-on-many-job-licenses.html> [<https://perma.cc/BU66-E6FC>] ("What lesson should we draw from the success of Uber? . . . Just as limited taxi medallions can lead to a chronic undersupply of cabs at 4 p.m., the state licensing regulations for many occupations are creating bottlenecks across the economy, raising the prices of many goods and services and putting good jobs out of reach of too many Americans."); Daniel E. Rauch & David Schleicher, *Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy*, 76 OHIO ST. L.J. 901, 909–13 (2015) ("And as scholars like Lior Strahelivitz have found with respect to eBay auctions, digital reputation 'ratings' can form a functional substitute for personal trust, making more, and more credible, transactions possible - if a Lyft driver has 800 'five star' reviews, a rider may be willing [to] board her car even if she lacks classic indicia of



tional credential that does not restrict one's right to practice, but only reserves the "right to title" to those who have become certified.<sup>162</sup> Certification gives customers both the information and the choice over whether to pay extra for (supposedly) enhanced service, without blocking people out of the job market or pricing out low-income consumers.<sup>163</sup> However, the scope of sunset or sunrise reviews can vary significantly.<sup>164</sup> Moreover, the effectiveness of such reviews is questionable at best, and the more common sunset review processes rarely result in legislative reform.<sup>165</sup>

In sum, reforms that reduce licensing burdens have been gathering momentum in state legislatures over the last few years. Although successful reforms have mostly been small and hard-fought, they provide a blueprint—as well as encouragement—for more ambitious reform.

### B. *Expanding Interstate License Recognition*

In addition to reducing licensing requirements, policy organizations have also focused on other aspects of deregulation, and in particular on expanding interstate license recognition. Licensing requirements for a particular occupation can vary widely from state to state. And unlike, for example, drivers' licenses, professional licenses are not automatically recognized by other states. So an individual who moves to another state may be required to

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trustworthiness, like a business license.") (citing Lior Strahlevitz, *'How's My Driving?' for Everyone (and Everything)*, 81 N.Y.U. L. REV. 1661, 1713–14 (2006)); REFORMING OCCUPATIONAL LICENSING, *supra* note 32, at 7 ("The growth of information technology in recent years, especially mobile devices, has allowed consumers and service providers to connect with each other with increasingly detailed levels of information about each party, in ways that challenge the traditional role of occupational licensing.").

<sup>162</sup> See GUILD-RIDDEN LABOR MARKETS, *supra* note 13, at 1.

<sup>163</sup> See WHITE HOUSE REPORT, *supra* note 17, at 8 ("State certification requirements may restrict the use of a profession's title to those who have been certified, but allows anyone to perform the duties of the profession. In doing so, certification can provide consumers with additional information regarding providers' quality, without restricting consumer choice or limiting entry into the workforce."); REFORMING OCCUPATIONAL LICENSING, *supra* note 32, at 8 ("In contrast to occupational licensing, the process of certification permits any person to legally perform the relevant tasks, but the government—or sometimes a private, nonprofit agency—administers an examination and certifies those who have achieved the requisite level of skill and knowledge. . . . This process allows for competition for services, as anyone can legally perform the work, but it protects the right of the title for those in the occupation.").

<sup>164</sup> CARPENTER II, ET AL., *supra* note 23, at 38 n. 88 ("Thirteen states have a sunrise process to evaluate proposals for new occupational regulations. . . . More than 30 states have some form of sunset review, but their scope and procedures vary widely."); ASSESSING STATE POLICIES AND PRACTICES, *supra* note 15, at 63; WHITE HOUSE REPORT, *supra* note 17, at 48.

<sup>165</sup> See WHITE HOUSE REPORT, *supra* note 17, at 48 ("There is some evidence to suggest that sunrise reviews can be more successful at limiting the growth of licensing than sunset reviews are at removing unnecessary licensing. Thornton and Timmons (2015) discover only eight instances in the past 40 years of the successful 'de-licensing' of an occupation at the State level, and in four of these cases, attempts to relicense the occupations followed afterward. They find that State sunset committees usually recommend the continuation of the license, and that in the rare instances when they recommend that licensing laws be repealed, the State legislature usually ignores the recommendation.") (citing Thornton & Timmons, *supra* note 79).

go through the licensing process all over again. The cost involved necessarily chills geographic mobility.<sup>166</sup> It also hampers the flow of supply across state lines.<sup>167</sup> If there is a surplus of plumbers in one state and a shortage in another, the costs of transfer mean that supply may not flow to the state that needs it.

When states do recognize out-of-state licenses, they do so in either of two ways: endorsement or reciprocity. Licensure by endorsement occurs when a licensing board issues the out-of-state practitioner an in-state license based on her existing (out-of-state) qualifications without requiring her to take the new state's examinations.<sup>168</sup> The requirements for endorsement vary, and applications are approved at the discretion of the licensing board.<sup>169</sup> Licensure by reciprocity occurs when states (or state licensing boards) enter into mutual agreements to create a streamlined process for recognizing each other's occupational licenses. Some reciprocity agreements provide for the automatic mutual recognition of out-of-state licenses (much like drivers' licenses), while others require an approval process.<sup>170</sup>

In the last several years, legislation aimed at improving the portability of interstate licenses have been enacted in multiple states.<sup>171</sup> This includes

<sup>166</sup> See REFORMING OCCUPATIONAL LICENSING, *supra* note 32, at 20; ASSESSING STATE POLICIES AND PRACTICES, *supra* note 15, at 48; WHITE HOUSE REPORT, *supra* note 17, at 65–66.

<sup>167</sup> REFORMING OCCUPATIONAL LICENSING, *supra* note 32, at 20 (“Nationwide endorsement through policies that do not limit entry requirements could alleviate uneven geographic distribution of licensed practitioners and ease possible location-specific mismatches (for example, the dearth of certain health-care practitioners in rural states). . . . More generally, expanding endorsement could greatly assist the economy by reducing structural unemployment and allowing licensed workers to maximize their incomes and productivity.”); ASSESSING STATE POLICIES AND PRACTICES, *supra* note 15, at 48 (“Further, states have an interest in ensuring licensing standards do not unnecessarily conflict with interstate migration and broader workforce strategies that seek to address labor shortages.”).

<sup>168</sup> REFORMING OCCUPATIONAL LICENSING, *supra* note 32, at 20.

<sup>169</sup> For example, some licensing statutes provide for endorsement only when the home state requirements are “substantially equal” to (or more stringent than) the new state’s requirements. See, e.g., GA. COMP. R. & REGS. 240-11-.01 (2022) (“Any person licensed in another state desiring to apply for a license or instructor license in cosmetology, barber, barber II, hair design, esthetics, or nail care in the State of Georgia is required to make application using the form furnished by the Georgia State Board of Cosmetology and Barbers, to submit the required application processing fee(s) . . . . [S]uch application for endorsement . . . shall be accompanied by the following: (a) for applicants that can provide proof of passing both a written and practical national or state approved examination in English, and: (i) proof of attaining at least 17 years of age; (ii) a copy of a high school diploma, general educational development (GED) diploma, or a postsecondary education or college degree; (iii) be of good moral character; (iv) verification of a license issued by another state or territory that is currently active and in good standing at the appropriate level for the type of license being applied for . . . .”).

<sup>170</sup> For example, the Recognition of Emergency Medical Services Personnel Licensure Interstate Compact (“REPLICA”) operates under a mutual recognition model. By contrast, Florida recognizes real estate brokers’ licenses from nine states with which it holds mutual recognition agreements, but still requires brokers to take a forty question exam on Florida real estate law. See FLA. ADMIN. CODE ANN. r. 61J2-26.001 (2022).

<sup>171</sup> As of October 2021, Arizona, Idaho, Iowa, Kansas, Mississippi, Missouri, Montana, Pennsylvania, Utah, and Wyoming have enacted universal licensing laws; other states have

promoting interstate compacts (contracts between states that set up reciprocal licensing practices)<sup>172</sup> and enacting universal licensing laws. Universal licensing laws require licensing boards to issue a license to an applicant who has held an out-of-state license for at least one year as long as the other state required the person to meet some education, training, or experience standards.<sup>173</sup>

Expanding license portability may lower the regulatory burden for individuals who move across state lines. Yet such reforms seem limited in scope, since they do not directly reduce initial licensing requirements. Some may argue that improving licensure portability will eventually lead to reduced licensing burdens by driving a race to the bottom for licensing requirements. First, states with above average licensing standards would have to reduce their standards in order to expand license portability, because many forms of interstate license recognition demand comparable requirements among the recognizing states.<sup>174</sup> Second, if licenses are easily transferable, would-be practitioners can simply obtain licensure in the state with the most lenient requirements and then transfer it to the state in which they wish to practice. As one labor union leader said in opposition to a proposed universal licensing bill, “Why would any prospective licensed professional go to the trouble of completing highly regarded Connecticut training and apprenticeship programs, when they can get a license in another state with less effort and then come back to Connecticut and have reciprocal recognition?”<sup>175</sup>

The race to the bottom argument is overly optimistic, however. License portability reforms have been more successful than efforts to lessen or eliminate licensing requirements because such reforms invoke less opposition

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enacted weaker versions of these laws, or have applied the reforms only to military spouses. *Breaking Down Barriers to Work with Universal Recognition: Frequently Asked Questions*, GOLDWATER INST. (Oct. 2021), <https://goldwaterinstitute.org/universalrecognition/> [<https://perma.cc/39CP-YUXX>].

<sup>172</sup> Interstate compacts are a trending approach to improving licensure portability. For a recent analysis of interstate compacts, see generally COUNCIL OF STATE GOV'TS, OCCUPATIONAL LICENSURE: INTERSTATE COMPACTS IN ACTION (2020).

<sup>173</sup> Universal licensing laws are often based on the Goldwater Institute's model legislation, “Breaking Down Barriers to Work.” See GOLDWATER INST., BREAKING DOWN BARRIERS TO WORK (2020), <https://goldwaterinstitute.org/wp-content/uploads/2020/07/Break-Down-Barriers-to-Work.pdf> [<https://perma.cc/JY3E-QXUU>]. The model legislation also includes other pathways to licensure through recognition of work experience and private certification. If someone worked for at least three years in an occupation in another state where a license was not required, they are eligible for licensure in the new state. If someone worked for at least two years and held private certification, they are similarly eligible for licensure.

<sup>174</sup> See ASSESSING STATE POLICIES AND PRACTICES, *supra* note 15, at 49 (noting that if a state has particularly onerous licensure requirements, then “reducing licensure requirements to better align with the averages of other states can improve the portability of licenses”).

<sup>175</sup> *An Act Expanding Economic Opportunity in Occupations Licensed by the Department of Consumer Protection: Hearing on H.B. 6445 Before the Gen. Law Comm.*, 2021 Reg. Sess. (Conn. 2021) (testimony of Sal Luciano, Pres. Conn. AFL-CIO), <https://www.cga.ct.gov/2021/GLdata/Tmy/2021HB-06445-R000223-Luciano,%20Sal,%20President-Connecticut%20AFL-CIO-TMY.PDF> [<https://perma.cc/274G-99DN>] [hereinafter Testimony of Sal Luciano].

from professional associations.<sup>176</sup> While those industry members may tolerate increased interstate recognition, they are much less likely to tolerate any accompanying or follow-on changes to licensing standards. Thus, one cannot assume that expanded licensure recognition will organically lead to reduced licensing standards.

In short, efforts to enhance interstate license recognition are valuable, but they are still low-hanging fruit. The more important—and tough—policy battles are those that attempt to lessen initial licensing burdens themselves.

## V. CONCLUSION

Occupational licensing laws are certainly not all bad. We all take comfort in the prestigious degrees lining our doctors' and lawyers' walls. However, many licensing laws are much more problematic. It is unlikely that a diploma on your florist's wall would give you significant reassurance. Yet such licensing requirements exist, and they impose a heavy cost on those trying to earn a living. Those trying to halt or reverse the growth of occupational licensing laws attempt deregulation through challenging the constitutionality of truly excessive licensing laws and through lobbying for legislative change.

This Note explains that judicial review is a weak tool for reform because even under the best-doctrine scenario, judicial reform would only strike the most egregious instances of licensing. Legislative reform is the more effective tool for comprehensive and targeted reform. It also has the ability to address other aspects of deregulation, such as interstate license portability.

Judicial review is still a useful complementary weapon, however. Lawsuits put pressure on states and licensing boards to deregulate, and also generate broad public support for reform. The interplay between the courthouse and the legislature can be clearly seen in the development of licensing deregulation efforts: after decades of litigation and lobbying efforts, legislative change seems to have finally begun to take hold. Advocacy groups should take note, and continue to use these complementary tools in their efforts to achieve further reform.

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<sup>176</sup> REFORMING OCCUPATIONAL LICENSING, *supra* note 32, at 20 ("Furthermore, expanding endorsement and reciprocity is more often supported by members of a profession than is deregulation, and thus is likely to be met with less political opposition."); GUILD-RIDDEN LABOR MARKETS, *supra* note 13, at 35 (noting that endorsement "represents a potential policy reform since the proposal is often supported by a majority of the members of a profession relative to deregulation"). Of course, such reforms still evoke plenty of backlash from professional associations. When Governor Ned Lamont of Connecticut introduced a bill to ease licensure requirements for people moving into Connecticut, labor unions were "dismayed," arguing that the "bill lowers the bar for workers from out-of-state . . . [w]ithout knowing the quality of education, types of training, years of experience or other licensing requirements in other states." Testimony of Sal Luciano, *supra* note 175.