

Beating Rubber-Stamps into Gavel: A Fresh Look at Occupational Freedom

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The number of Americans who must obtain government permission to work in their chosen vocation has been steadily rising. A recent White House report observed that “[o]ccupational licensing has grown rapidly over the past few decades”¹ and has come to include many harmless vocations such as interior design, hair braiding, and even floristry.² Today, about one quarter of American workers must obtain a government-issued license to do their job, up from less than five percent in the 1950s.³

Experience shows that licensing is subject to abuse. For example, one of the Supreme Court’s first occupational-licensing cases, in 1873, involved an aspiring attorney named Myra Bradwell who was denied admission to the Illinois bar simply because she was a woman.⁴ One hundred thirty-five years later, Kim

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1. Office of Econ. Policy et al., *Occupational Licensing: A Framework for Policymakers*, U.S. DEP’T TREASURY 3 (July 2015) [hereinafter White House Report], http://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf [<http://perma.cc/MHQ2-WWUC>].
 2. See generally *Economic Liberty*, INST. FOR JUST. (2016), http://ij.org/pillar/economic-liberty/?post_type=case [<http://perma.cc/S58Y-85B6>] (listing cases litigated by the Institute for Justice, which include challenges to occupational licensing for interior designers, hair braiders, and florists).
 3. White House Report, *supra* note 1, at 6 (citing Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. S173 (2013)).
 4. *Bradwell v. Illinois*, 83 U.S. 130 (1873) (upholding the Illinois Supreme Court’s rejection of Bradwell’s application for admission to the bar solely on account of her gender).

Powers saw her dreams of running an online casket emporium dashed by an Oklahoma law that gives state-licensed funeral directors the exclusive right to sell caskets.⁵

The Tenth Circuit's decision upholding Oklahoma's casket-sales monopoly underscores the incoherence of modern occupational-licensing doctrine. The court explicitly approved naked favoritism as a valid basis for restricting a person's livelihood, and noted that "while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments."⁶ The Second Circuit recently embraced that proposition despite acknowledging conflict with the Fifth, Sixth, and Ninth Circuits.⁷

A jurisprudence that has drifted so far from the principles of fairness, regularity, and equality, such that rank favoritism may be a permissible basis for restricting a person's livelihood, seems both problematic and unsustainable. Nevertheless, many judges remain skeptical of occupational freedom, because of both its association with the notorious case *Lochner v. New York*⁸ and the broader concerns it raises about judicial activism. Thus, to avoid repeating the supposed mistakes of *Lochner*, most courts have refused to seriously scrutinize laws that restrict people's livelihoods, instead applying what often amounts to little more than a judicial rubber-stamp.

But several trends in constitutional scholarship and doctrine suggest that a transformation of that jurisprudence may be closer at hand than many would suppose. Dynamics pointing to more robust review for occupational freedom include:

1. The reappraisal by academics and judges of *Lochner v. New York* as a paradigmatic case of judicial overreach;
2. Increasing concerns about the legitimacy of the rational basis test;
3. A growing number of cases where the fundamental right to free speech meets the nonfundamental right to occupational freedom; and
4. The recent application of federal antitrust law to anticompetitive policies for which states have been accustomed to receiving a free pass in most constitutional settings.

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

6. *Id.* at 1221.

7. *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 286 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1160 (2016) (mem.). The Supreme Court has repeatedly declined to address the circuit split over the constitutionality of naked economic protectionism. *See id.*; *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 423 (2013) (mem.); *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005) (mem.).

8. 198 U.S. 45 (1905)

In reappraising *Lochner*, academics and judges alike are weakening the courts' knee-jerk reaction against meaningful scrutiny for occupational licensing. Likewise, increased skepticism toward the rational basis test, and the collision of occupational licensing with more highly scrutinized realms of speech regulation and antitrust, have created both opportunities and an inclination for judges to reconsider the traditional evaluation of occupational licensing.

I. THE "REHABILITATION" OF *LOCHNER V. NEW YORK*

There is no obvious reason why occupational freedom should be relegated to nonfundamental status and deprived of any serious judicial protection. Most Americans care deeply about the ability to put food on their families' tables. Indeed just one year before penning the Court's most deferential occupational-licensing decision, Justice William O. Douglas described "[t]he right to work" as "the most precious liberty that man possesses."⁹ But such is the power of *Lochner's* status as part of the American anti-canon—that is, a case whose result is considered anathema and which "embodies a set of propositions that all legitimate constitutional decisions must be prepared to refute"¹⁰—that it continues to serve as a one-word argument against robust judicial review for occupational freedom, more than a century later.

Improbable as it may seem now, occupational freedom was actually among the first unenumerated rights ever recognized by the Supreme Court. As the Court observed in upholding a conviction for the unlicensed practice of medicine in *Dent v. West Virginia*, "[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition."¹¹ The Court extolled the right of occupational freedom again in *Truax v. Raich*, explaining that "the right to work for a living . . . is of the very essence of the personal freedom and opportunity" that the Fourteenth Amendment was designed to secure.¹² And just between *Dent* and *Truax* is the Court's most famous occupational-regulation case of all time, *Lochner v. New York*.¹³

9. *Barsky v. Bd. of Regents of Univ. of N.Y.*, 347 U.S. 442, 472 (Douglas, J., dissenting).

10. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011) (listing *Lochner v. New York* as part of the "anticanon").

11. 129 U.S. 114, 121-22 (1889).

12. 239 U.S. 33, 41 (1915).

13. 198 U.S. 45 (1905).

Lochner involved a New York law that prohibited bakers from working more than ten hours a day or sixty hours in one week.¹⁴ The state defended that provision as a health measure designed to protect bakers from the hot, dusty conditions of their workplace. But the Supreme Court rejected that contention, noting that the “mere assertion” of a permissible legislative purpose “does not necessarily render the enactment valid.”¹⁵ Noting that legislative “interference . . . with the ordinary trades and occupations of the people seems to be on the increase,”¹⁶ the Court suggested an alternative explanation: “[M]any of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from some other motives.”¹⁷

As Professor David Bernstein documents in his meticulously researched book *Rehabilitating Lochner*,¹⁸ those “other motives”¹⁹ may well have been to protect factory bakeries from “the cheap labor of the green hand from foreign shores” – that is, immigrant bakers whose only hope of competing was to work longer hours.²⁰

Nevertheless, *Lochner* has served for decades as a one-word condemnation of judicial overreach. So powerful is the word that it can – and regularly does – serve as a substitute for actual legal reasoning.²¹ To take one example, Chief Justice Roberts’s dissenting opinion in the same-sex marriage case invokes *Lochner* sixteen times in an apparent effort to make full use of its talismanic qualities.²² But there are signs that this old-school approach to *Lochner* is losing force as academics and judges take a fresh look at the case itself instead of its surrounding mythology.

As Professors Thomas Colby and Peter Smith wrote last year in their article *The Return of Lochner*, not only academics but also judges have begun to recon-

14. *Id.* at 45 n.†.

15. *Id.* at 57.

16. *Id.* at 63.

17. *Id.* at 64.

18. DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011).

19. *Lochner*, 198 U.S. at 64.

20. BERNSTEIN, *supra* note 18, at 24 (quoting *Now for the Ten-Hour Day*, BAKER’S J., Apr. 20, 1895, at 1).

21. *Cf.* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 435 (1st ed. 1978) (noting that “‘Lochnerizing’ has become so much an epithet that the very use of the label may obscure attempts at understanding”).

22. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611–26 (2015) (Roberts, C.J., dissenting).

sider their traditional knee-jerk hostility to the decision.²³ Colby and Smith describe a number of recent court decisions in which courts have employed *Lochner*-like reasoning²⁴ and rhetoric²⁵ in defending a meaningful right to occupational freedom that merits judicial engagement.

More recently, Texas Supreme Court Justice Don Willett wrote a remarkable concurrence in an occupational-licensing case called *Patel v. Texas Department of Licensing and Regulation*²⁶ that involved eyebrow threading. In that opinion, which was joined by two other justices, Willett defended *Lochner* in a full-page footnote that framed the issue as whether judges should “blindly accept government’s health-and-safety rationale, or instead probe more deeply to ensure the aim is not suppressing competition to benefit entrenched interests.”²⁷

Blind acceptance of asserted—but unsubstantiated—justifications for government regulation is the *sine qua non* of the rational basis test that the Supreme Court applies to most occupational-licensing challenges. But, like the myth of *Lochner*, it is beginning to crumble under careful scrutiny.

II. THE RATIONAL BASIS TEST RECONSIDERED

Though it has never explicitly repudiated the right of occupational freedom, the Supreme Court has achieved virtually the same result by applying the extraordinarily forgiving version of the rational basis test articulated in *Williamson v. Lee Optical of Oklahoma, Inc.*²⁸ *Williamson* concerned a rather transparent effort by state-licensed optometrists and ophthalmologists to run lower-cost opticians out of the eyeglass business.²⁹ Though the Court stopped short

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23. Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527 (2015).
24. See *id.* at 576-78 (discussing *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), which struck down a Louisiana law giving state-licensed funeral directors the exclusive right to sell caskets intrastate while denying that “the ghost of *Lochner* [was] lurking about,” despite using “words that could have come straight from the *Lochner* era” in explaining the rationale for striking down the law under the Fourteenth Amendment (quoting *Castille*, 712 F.3d at 227)).
25. See *id.* at 574-76 (discussing *Hettinga v. United States*, 677 F.3d 471 (D.C. Cir. 2012), which upheld the dismissal of a challenge to a federal milk-marketing statute but included a withering concurrence by Judge Janice Rogers Brown, joined by then-Chief Judge David Sentelle, accusing the post-*Lochner* Supreme Court of “abdicat[ing] its constitutional duty to protect economic rights completely” (quoting *Hettinga*, 677 F.3d at 481 (Brown, J., concurring))).
26. 469 S.W.3d 69, 92 (Tex. 2015) (Willett, J., concurring).
27. *Id.* at 100 n.46.
28. 348 U.S. 483 (1955).
29. *Id.*

of embracing rank economic favoritism, it made clear to lower-court judges that they should be prepared to accept virtually any justification the government could offer with a straight face and advised litigants that “[f]or protection against *abuses* by legislatures the people must resort to the polls, not to the courts.”³⁰

But this aggressively government-favoring approach to constitutional adjudication presents significant problems. First, this approach imposes an almost “irrebuttable presumption” of constitutionality.³¹ Moreover, some circuits have held that judges must “resort to their own talents” and invent justifications beyond those offered by the government’s lawyers.³² Of course, a bedrock principle of procedural due process is that litigants are entitled to a decision maker who is free from both bias and the appearance of bias. A judge who actively assists one side in litigation violates that basic duty,³³ as does a judge who presides over a case in which he has been directed to help one party justify its own conduct—whether he actually does so or not.

Thus, it is unsurprising that a growing number of scholars have questioned not merely the legitimacy but also the constitutionality of the rational basis test. This trend was punctuated in February 2016 by an academic symposium at Georgetown titled “Is the Modern Rational Basis Test Unconstitutional?”³⁴ Particularly in its most deferential form, the modern rational basis test poses serious constitutional questions. As noted above, these questions include procedural due process concerns, particularly in jurisdictions where circuit precedent requires judges to actively assist the government in litigation by inventing justifications for challenged laws.³⁵ Inconsistent application of the rational basis test—sometimes with “teeth,”³⁶ but usually without—also raises equal pro-

30. *Id.* at 488 (emphasis added) (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)).

31. Randy E. Barnett, *Keynote Remarks: Judicial Engagement Through the Lens of Lee Optical*, 19 *GEO. MASON L. REV.* 845, 857 (2012).

32. *Burke Mountain Acad., Inc. v. United States*, 715 F.2d 779, 783 (2d Cir. 1983); see also *Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004) (explaining that “this Court is *obligated* to seek out other conceivable reasons for validating’ a state statute” besides those presented by the government (quoting *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 146 (1st Cir. 2001))).

33. *Knapp v. Kinsey*, 232 F.2d 458, 465 (6th Cir. 1956).

34. Articles from that symposium, which was co-sponsored by the Institute for Justice’s Center for Judicial Engagement and Georgetown’s Center for the Constitution, will be published in a forthcoming edition of *The Georgetown Journal of Law and Public Policy*.

35. See *supra* text accompanying note 30.

36. See, e.g., Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 *IND. L.J.* 779, 780 & n.11 (1987) (noting the apparent effort by Supreme Court to “put more ‘teeth’ in the rational basis test” in certain cases, to the point where the Court may in fact be applying intermediate scrutiny under the guise of rational basis review).

tection concerns, as courts pick and choose which rational basis litigants will receive genuine judicial review and which ones will not. But as scholars become more skeptical of the test, courts may become less inclined to treat it as the rubber-stamp it has become.

III. THE OCCUPATIONAL-SPEECH CONUNDRUM

In the information age, an increasing number of vocations involve nothing more than expressing ideas or transmitting information, rather than creating a physical product. For example, everything an interior designer does, from creating design drawings to recommending furniture and finishes, is speech—and frequently artistic speech. When states regulate a “speaking vocation” such as interior design, should courts apply some form of heightened scrutiny—as they typically do in free-speech cases—or the rational basis test typically applied to occupational licensing?

This conundrum presents a puzzle that courts have taken varying approaches to resolve. Some courts resort to a rhetorical sleight of hand. Thus, when the Eleventh Circuit upheld Florida’s interior design law, it characterized the drawings, advice, and suggestions of interior designers as “occupational conduct” to avoid First Amendment analysis.³⁷ The Ninth Circuit took the same approach in reviewing California’s regulation of a controversial psychological technique known as “sexual orientation change efforts.”³⁸ As Judge O’Scannlain explained in his dissent from denial of rehearing en banc, the question at issue was whether the “legislature [can] avoid First Amendment judicial scrutiny by defining disfavored talk as ‘conduct.’”³⁹ The majority’s answer was an unpersuasive “yes.” The Third Circuit expressly rejected this approach less than one year later in an opinion recognizing that psychotherapy involves speech not conduct, and therefore the First Amendment applies to laws regulating the practice of psychotherapy, including restrictions on sexual orientation change efforts.⁴⁰ A similar split has arisen between the Fifth Circuit and the D.C. Circuit over the licensing of tour guides, whose primary function is to convey information about points of interest and who are tested on their knowledge of the relevant (and sometimes irrelevant) subject matter.⁴¹

37. *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011).

38. *Pickup v. Brown*, 740 F.3d 1208, 1221-22 (9th Cir. 2014).

39. *Id.* at 1215 (O’Scannlain, J., dissenting).

40. *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014).

41. *Compare Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014) (rejecting the free-speech argument and upholding New Orleans’ licensing requirement for tour guides), *with Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014) (rejecting the Fifth Circuit’s

Applying the various forms of heightened scrutiny typically associated with free speech claims to cases involving occupational speech creates interesting and potentially fruitful doctrinal tensions. First, it helps dispel the notion that courts are incapable of identifying the government's true ends in occupational licensing cases or evaluating the constitutionality of those ends. Second, it underscores that simply requiring the government to provide an honest explanation for its regulatory actions is not tantamount to a blanket ban on regulation. On the contrary, there is a significant difference between telling policymakers they may not regulate at all and simply requiring them to exercise at least a modicum of care in how they go about it. Finally, there is a reason why judges do not glibly refer First Amendment litigants to the ballot box as a substitute for the meaningful judicial review to which they are entitled: experience shows that individuals have very little chance of correcting constitutional injustices through the political process. And that is true whether the injustice is expressive, economic, or some combination of the two.

IV. THE ANTITRUST CHICKENS COME HOME TO ROOST

Federal antitrust law, as interpreted by the Supreme Court, generally prohibits the “unreasonable” restraint of trade,⁴² and generally exempts state actors from liability.⁴³ Does that mean states may immunize blatantly anticompetitive conduct simply by appointing industry members to occupational licensing boards and cloaking them with the state's authority to dictate who may work in which vocation?

That was the question the Supreme Court recently confronted in *North Carolina State Board of Dental Examiners v. FTC*,⁴⁴ a case in which the FTC brought suit against members of North Carolina's Dental Board for ordering non-dentist teeth-whiteners to “cease all activity constituting the practice of dentistry.”⁴⁵ The Board invoked state-action immunity on the grounds that those responsible for adopting and enforcing the teeth-whitener policy were public officials.

The Supreme Court rejected that argument. Instead, the Court held that a regulatory board consisting primarily of industry members is only entitled to

holding and striking down Washington, D.C.'s licensing of tour guides on First Amendment grounds).

42. *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 723 (1988).

43. *Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

44. 135 S. Ct. 1101 (2015).

45. *Id.* at 1108 (internal quotation marks omitted).

state-action immunity when there is a “clearly articulated state policy to displace competition” and the board itself is “actively supervised” by the state.⁴⁶

As a result of that decision, federal courts must now determine the legitimacy of the occupational licensing policies in antitrust cases as well as in civil rights cases. Significantly, there is no antitrust doctrine that permits government defendants to make false factual assertions about the supposedly public-spirited nature of their competition-suppressing conduct, the way they are permitted to do in rational basis cases.⁴⁷ So far, there have been about a dozen challenges to state licensing boards in the wake of *North Carolina Dental*, including at least one asserting both antitrust and constitutional claims.⁴⁸ Among the issues in such cases will be whether courts will continue to credit under the rational basis test justifications proffered by the government that are not only demonstrably false, but potentially even sanctionable under the more stringent standards of federal antitrust law.

CONCLUSION

Under any formulation the Supreme Court has used to identify purportedly “fundamental” rights—“deeply rooted in this Nation’s history and traditions” or “implicit in the concept of ordered liberty”—the freedom to choose one’s own vocation subject only to truly reasonable government restrictions would seem to qualify. And yet the Supreme Court has held otherwise, neither deigning to confer fundamental status on what many consider to be the quintessentially American right nor applying an analytical framework that reliably ensures the reasonableness of government regulation. But the Court’s longstanding indifference to occupational freedom is coming under increased pressure from a variety of sources. Given the dubious jurisprudential foundation upon which the occupational licensing doctrine rests, its continued survival is by no means assured.

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46. *Id.* at 1109.

47. *See id.* (noting the FTC’s rejection of the dental board’s unsubstantiated public safety assertions in support of its teeth-whitening restrictions).

48. *See, e.g.,* Colindres v. Battle, No. 1:15-CV-2843 (N.D. Ga. filed June 6, 2016).

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Preferred Citation: Clark Neily, *Beating Rubber-Stamps into Gavel: A Fresh Look at Occupational Freedom*, 126 YALE L.J. F. 304 (2016), <http://www.yalelawjournal.org/forum/beating-rubber-stamps-into-gavels>.