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# THE PROPER ROLE OF JUDICIAL OPPORTUNISM IN CONSTITUTIONAL RIGHTS SCRUTINY

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## ABSTRACT

*To one degree or another, judges in constitutional rights cases may exploit their available range of discretion in a narrowly political, ideologically rigid, or partisan way. But there are also important contexts in which a court's ample discretion under tiered scrutiny and related tests can be turned toward some more nearly consensual or reasonably well-established basic public good. These opportunities to judicially promote the public good remain available even in our age of political polarization, hostility, fragmentation, and distrust.*

*Where such important opportunities exist, and where it is otherwise constitutionally permissible and generally prudent to do so, courts should feel free to exploit the inevitable discretion they have in selecting among, and then in applying, levels of constitutional scrutiny and related tests. As contentious as constitutional rights adjudication may often be, there is ample low-hanging fruit to be judicially harvested in the form of protecting constitutional interests along with promoting basic common goods. Constitutional rights adjudication in such cases should thus be open to what may be called legitimately opportunistic judicial scrutiny.*

*This article illustrates and develops these themes. For simplicity and clarity, the focus is on the crucial context of the constitutional and other costs imposed upon often powerless persons who wish to safely and responsibly pursue an ordinary trade or occupation, but are burdened by some protectionist licensing or related legislative barrier. This merely illustrative focus, however, should not detract from the broader applicability of legitimate judicial opportunism in a variety of individual constitutional rights contexts.*


## INTRODUCTION

Often, the courts resolve constitutional rights cases by applying some selected level of judicial scrutiny, or some related test.[1] The extent to which any of these tests actually constrain judicial discretion is, at best, unclear. Justice Thomas, for example, has declared that "the label the Court affixes to its level of scrutiny . . . is increasingly a meaningless formalism. As the Court applies whatever standard it likes to any given case, nothing but empty words

[1] *See, e.g.,* Erwin Chemerinsky, Constitutional Law 687 (Rachel E. Barkow et al., eds., 6th ed. 2019); Alex Chemerinsky, Tears of Scrutiny, 57 TULSA L. REV. 341, 343-44 (2022).

separate our constitutional decisions from judicial fiat."[2] There remains much room for judicial discretion even after some particular level of constitutional scrutiny or related test has been settled upon.[3]

To one degree or another, judges in constitutional rights cases may exploit the available range of discretion in a narrowly political, ideologically rigid, or partisan way.[4] But there are also important contexts in which a court's ample discretion under tiered scrutiny and related tests can be turned toward nearly consensual and reasonably well-established public good. These opportunities to judicially promote the public good remain available even in our age of political polarization, hostility, fragmentation, and distrust.[5]

Where such important opportunities exist, and where it is otherwise constitutionally permissible and generally prudent to do so, courts should feel free to exploit the inevitable discretion they have in selecting among, and then in applying, levels of constitutional scrutiny and related tests. As contentious as constitutional rights adjudication may often be, there is ample low-hanging fruit to be judicially harvested in the form of protecting constitutional interests along with promoting basic common goods. Constitutional rights adjudication in such cases should thus be open to what we might call legitimately opportunistic judicial scrutiny.[6]

Below, the article illustrates and develops these themes. For simplicity and clarity, the focus is on the crucial context of the constitutional and other costs imposed upon often powerless persons, who wish to safely and responsibly

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[2] Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 638 (2016) (Thomas, J., dissenting). For background and perspective on the range of constitutional right test options, *see* Justin Collings & Stephanie Hall Barclay, *Taking Justification Seriously: Proportionality, Strict Scrutiny, and the Substance of Religious Liberty*, 63 B.C. L. Rev. 453, 467 n.78 (2022).; Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3127 (2015). Justice Thomas's position specifically is discussed in Paul Baumgardner & Brian Miller, *On Commonsense Inferences and Radical Indeterminacies*. *See* Paul Baumgardner & Brian Miller, *On Commonsense Inferences and Radical Indeterminacies: The Murky Future of Abortion Law After Whole Woman's Health*, 67 SYRACUSE L. REV. 679, 699 (2017).

[3] *See*, classically, the discussion of minimum scrutiny by Justice Thurgood Marshall in City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 456 (1985) (Marshall, J., concurring in part and dissenting in part), and more broadly, *see infra* Part IV.

[4] For background, *see* R. George Wright*, On the Authority of the Supreme Court* 8-9 (July 9, 2022) (unpublished manuscript) (on file with SSRN), https://ssrn.com/abstract=4158621.

[5] For background, *see* KEVIN VALLIER, MUST POLITICS BE WAR? RESTORING OUR TRUST IN THE OPEN SOCIETY 1 (2019). ("American political life often looks like a brute contest for dominion where the victors drag the country in their direction without concern or respect for the losers"); KEVIN VALLIER, TRUST IN A POLARIZED AGE 1-2 (2021). ("distrust is giving way to darker impulses like hatred"); *see also* EZRA KLEIN, WHY WE'RE POLARIZED 1 (2020); YASCHA MOUNK, THE GREAT EXPERIMENT:WHY DIVERSE DEMOCRACIES FALL APART AND HOW THEY CAN ENDURE 27 (2022)

[6] Admittedly, the word 'opportunism' is often thought to connote the unprincipled, if not cynical, pursuit of advantage in the moment. *See Opportunism*, OXFORD ENGLISH DICTIONARY (3d ed. 2004). But the term may also be used in a more neutral, if not a "wholesome sense." *See Opportunism*, OXFORD ENGLISH DICTIONARY 1.a (3d ed. 2004).

pursue some ordinary trade or occupation but are burdened by some protectionist licensing or related legislative barrier. This merely illustrative focus, however, should not detract from the broader applicability of legitimate judicial opportunism in a variety of individual constitutional rights contexts.

## I. MISSED OPPORTUNITIES, UNNECESSARY COSTS, AND SHEER HYPOCRISIES: THE CASE LAW OF BASIC OCCUPATIONAL OPPORTUNITY

### *A. Upholding Inappropriate Barriers to Occupational Entry*

There is great potential for opportunistic but entirely responsible judicial scrutiny in many kinds of constitutional right cases. Consider in particular, for ease of illustration, the legal challenges to state-imposed burdens on the opportunity of persons to safely and responsibly pursue some gainful trade or occupation. Legal barriers to entry into a trade in this obviously vital area are typically upheld against constitutional rights challenges.[7] But there has also been some judicial resistance to this pattern.[8] A look at some of the cases suggests the potential for legitimate opportunistic judicial scrutiny in such constitutional rights cases to promote relatively uncontroversial understandings of the basic common good.

Consider first the recent Sixth Circuit case of *Tiwari v. Friedlander*.[9] This case involved a form of official business licensing requirement known as a certificate of need.[10] Requiring a prospective business to demonstrate, in advance, a sufficient local "public need"[11] for its goods or services is purportedly thought to serve consumer interests.[12] In particular, requiring that a

[7] *See, e.g.*, Tiwari v. Friedlander, 26 F.4th 355, 360 (6th Cir. 2022); Birchansky v. Clabaugh, 955 F.3d 751, 757 (8th Cir. 2020); Niang v. Carroll, 879 F.3d 870, 875 (8th Cir. 2018), *vacated sub nom.*Niang v. Tomblinson, 139 S. Ct. 319 (U.S. 2018) (mem.); Colon Health Ctrs. of Am., LLC v. Hazel, 813 F.3d 145, 160 (4th Cir. 2015); Sensational Smiles, LLC v. Mullen, 793 F.3d 281 (2d Cir. 2015); Colon Health Ctrs. of Am., LLC v. Hazel, 733 F.3d 535 (4th Cir. 2013); Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004); Truesdell v. Friedlander, 2022 WL 1394545 (E.D. Ky. May 3, 2022); Newell-Davis v. Phillips, 2022 WL 843602 (E.D. La. March 22, 2022); Pizza di Joey, LLC v. Mayor, 470 Md. 308, 235 A.3d 873 (Md. Ct. App. 2020).

[8] *See, e.g.*, St. Joseph Abbey v. Castille, 712 F.3d 215, 227 (5th Cir. 2013); Craigmiles v. Giles, 312 F.3d 220, 229 (6th Cir. 2002) (distinguished in Yeager Asphalt, Inc. v. Charter Township, 2022 WL 1157879 (6th Cir. April 19, 2022)); Brantley v. Kuntz, 98 F. Supp. 3d 884, 894 (W.D. Tex. 2015); Ladd v. Real Estate Comm'n, 659 Pa. 165, 194, 230 A.3d 1096, 1113 (2020); Patel v. Tex. Dep't of Licensing, 58 Tex. Sup. Ct. J. 1298, 469 S.W.3d 69, 90-91 (2015).

[9] *Tiwari*, 26 F.4th at 355.

[10] *Id.* at 358.

[11] *Id.*

[12] *Id.* at 359.

prospective new business demonstrate in advance some specified sufficient demand for its services is thought to "'prevent overinvestment in and maldistribution of health care facilities.'"[13] Having been denied the required certificate of need,[14] Tiwari brought suit alleging, under the Fourteenth Amendment, a substantive due process denial of the right to seek out a living,[15] a denial of the equal protection of the laws,[16] and a violation of the Privileges or Immunities Clause.[17] The Sixth Circuit rejected these claims.[18]

The *Tiwari* court conceded that "certificate-of-need laws have fallen out of favor in the last few decades."[19] Still, sixteen states continue to impose certificate of need requirements on would-be entrants into the home health care industry.[20] Thus, for the home health care industry, a constitutional inquiry into the presence or absence of a history and tradition of regulation is mixed, and largely indeterminate.[21]

The certificate of need inquiry is multi-factorial,[22] including an official inquiry into the presumed "economic feasibility" and the presumed "quality of services" to be provided.[23] The primary inquiry, though, is into the officially (if fallibly) forecasted local need for, and accessibility of, the proposed business.[24] The inquiry also involves examining the consistency of the proposed business with the official State Health Plan.[25]

Tiwari's application for a certificate of need expressed a desire to provide

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[13] *Id.* at 358 (quoting Colon Health Ctrs. of Am., LLC V. Hazel, 813 F.3d 145, 153 (4th Cir. 2016)).

[14] *Id.*

[15] *Id.*

[16] *Id.* at 370.

[17] *Id.* Tiwari chose to concede that a Fourteenth Amendment Privileges or Immunities Clause claim was effectively barred by the notorious Slaughter-House Cases, 83 U.S. 36 (1872).

[18] Tiwari, 26 F.4th at 358.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 365. For broad theoretical background, *see* Marc O. DeGirolami, *Traditionalism Rising* 14 (Aug. 31, 2022) (unpublished manuscript) (on file with the University of San Diego Journal of Contemporary Legal Issues), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4205351; *see also* R. George Wright, *On the Logic of History and Tradition in Constitutional Rights Cases* 2 (Aug. 2, 2022) (unpublished manuscript) (on file with SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4179725.For the current Court's emphasis on the decisive role of history and tradition, *see* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (U.S. 2022); New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (U.S. 2022); Kennedy v. Bremerton, 142 S. Ct. 2407, 2048 (U.S. 2022); City of Austin v. Reagan Nat'l Advert., 142 S. Ct. 1464 (U.S. 2022).

[22] *Tiwari*, 26 F.4th at 359.

[23] *Id.*

[24] *Id.*

[25] *See id.* The official State Health Plan in this context requires new entrants to establish that at least 250 patients need the service, presumably at some assumed level of gravity, frequency, priority, and non-substitutability, while an already established business would have to show the need of only 125 patients. *See id.*

home health care not only for the residents of Louisville in general, but in particular for area residents whose native language is Napali.[26] The underlying, and obviously reasonable, belief was that some prospective consumers of home health care would prefer home health care workers who speak their own native language and understand their culture.[27] Tiwari's application was nevertheless administratively denied.[28]

Tiwari's federal suit did not claim any fundamental constitutional rights violation that might trigger strict scrutiny review.[29] The Sixth Circuit treated Tiwari's claim as merely economic in character, and as addressing a state's economic regulation,[30] despite the regulation's impairment of Tiwari's "liberty to work in a given area,"[31] or "to engage in a chosen occupation."[32] On this basis, the Sixth Circuit chose to apply a form of minimum scrutiny, or rational basis review, to Tiwari's equal protection and substantive due process claims.[33]

As the court understood this minimum scrutiny review, Tiwari was required to prove that there was "'no rational connection between the enactment and a legitimate government interest.'"[34] That is, if "some 'plausible' reason exists for the law -- any plausible reason, even one that did not inspire the enacting legislators -- the law must stand, no matter how unfair, unjust, or unwise the judges may see it as citizens."[35] Where the enacting legislature did apparently have some legitimate purpose, the legislature's mere "'rational speculation unsupported by evidence or empirical data' suffices."[36] Indeed, such a law may survive this form of minimum scrutiny even if it is "incorrigibly foolish."[37] The only limit is that a law that is premised only "on utterly

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[26] *See Tiwari,* 26 F.4th at 359. The Nepali language is spoken not only in Nepal, but in parts of India, Bhutan, Brunei, and Myanmar. *Nepali Language*, BRITANNICA, www.britannica.com/topic/Nepali-language (last visited Feb. 21, 2023).

[27] *Tiwari,* 26 F.4th at 359.

[28] *See id.*

[29] *See id.* at 360-61.

[30] *Id.*

[31] *Id.* at 361.

[32] *Id.* at 360. *See also infra* notes 52-54 and accompanying text. For a critique of the distinction between economic rights and liberty, personal autonomy, or lifestyle rights, *see infra* note 102.

[33] *Tiwari,* 26 F.4th at 361.

[34] *Id.* (quoting Am. Express Travel Related Servs. Co. v. Kentucky, 641 F.3d 685, 689 (6th Cir. 2011)).

[35] *Id.* (quoting Heller v. Doe, 509 U.S. 312, 320, 324, 330, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)).

[36] *Id.* (quoting FCC v. Beach Commc'ns., Inc., 508 U.S. 307, 315 (1993)).

[37] *Id. See also* N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 209 (2008) (Stevens, J., concurring) ("[t]he Constitution does not prohibit state legislatures from enacting stupid laws").

illogical grounds or fantasy premises will not be upheld."[38]

Underlying the remarkable deference of this variety of minimum scrutiny is the dubious "essential premise"[39] that "even improvident decisions will eventually be rectified by the democratic process."[40] The judicial assumption that 'improvident'[41] certificate of need requirements, licensing requirements, barriers to occupational entry, and wasteful rent-seeking behavior in general are likely to be corrected by the democratic process is at best only weakly grounded.[42]

The court recognized that, on occasion, occupational licensing laws have been struck down under minimum scrutiny when the courts have held that the laws in question serve "only protectionist goals and otherwise lack a rational basis for the lines they draw or the burdens they impose."[43] The problem is that the distinction between laws that provide mere protectionist rewards to established insiders, and laws that have some merely conceivable public benefit, beyond pure protectionism is impossible to draw in practice.[44] Any significant protectionist regulation can be imagined to somehow advance one or more legitimate, if not especially significant, public purposes.[45] The purely protectionist category is, under deferential judicial scrutiny, virtually a null set.

Applying its deferential form of minimum scrutiny, the *Tiwari* court awarded the relevant law a low, but passing, grade.[46] Perhaps the public interest in the form of certain economies of scale might thereby be served.[47] Perhaps greater customer volume for an established business builds useful

[38] *See Tiwari*, 26 F.4th at 361. Curiously, the court in *Tiwari* was willing to classify the state's cost justifications in the undocumented children's education case of *Plyler v. Doe* as thus utterly illogical, or based merely on sheer fantasy. *See id.* at 362 (citing Plyler v. Doe, 457 U.S. 202, 228-30 (1982)).

[39] *Tiwari*, 26 F.4th at 361, 365 (stating that "absent some reason to infer antipathy, 'flawed laws will eventually be rectified by the democratic process'") (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).

[40] *Id.*

[41] *Id.* at 361 (quoting *Vance*, 440 U.S. at 97)

[42] *See infra* notes 88-89, 141 and accompanying text.

[43] *Tiwari,* 26 F.4th at 363, 367–68 (citing Craigmiles v. Giles, 312 F.3d. 220, 224–29 (6th Cir. 2002)) (noting, among other things, that "[a] law that serves protectionist ends and nothing else…does not satisfy rational basis review"); *see also* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1705 (Nov. 1984) (noting how this issue was treated in Welton v. Missouri, 91 U.S. 275, 281–83 (1876)).

[44] *See infra* notes 46-49.

[45] *See id.*

[46] *Tiwari*, 26 F.4th at 363.

[47] *Id.* at 364 (stating that "[o]ne could plausibly think that, by tailoring services to need in a given market, current providers could use the larger market share and increased patient volume that come with the entry restriction to operate more efficiently and to ensure a wide range of services in areas with smaller populations.").

knowledge for that business rapidly.[48] Perhaps lack of new competitors reduces the problem of lack of consumer knowledge of the few available health care providers, their practices, and their costs.[49] At least one of these suppositions, regardless of whether they are supported by evidence, is not absurd.[50] Indeed, at a much broader level, something like stability, or predictability, in consumer markets could be considered, in itself, a comforting thing.[51]

The *Tiwari* court admitted that the broad distinction between mere economic rights, including occupational choice rights, evoking only minimum scrutiny and personal liberty rights evoking some higher level of scrutiny, is questionable.[52] But the Sixth Circuit concluded that a reassessment of the hierarchy of liberty rights and mere property rights,[53] and any strengthening or recalibration of minimum scrutiny, must be reserved to the Supreme Court.[54]

*Tiwari* is merely illustrative of the predominant line of cases addressing constitutional challenges to questionable legal barriers to occupational entry.[55] Recently, for example, the Eighth Circuit in *Birchansky v. Clabaugh*[56] rejected a claim denying that a certificate of need for an outpatient surgery facility that might compete with full service hospitals violated any relevant constitutional rights.[57] The plaintiffs' Fourteenth Amendment Privileges or Immunities Clause claim was deemed barred by the *Slaughter-House* cases.[58] And the plaintiffs' substantive due process and equal protection claims again evoked only a deferential form of minimum scrutiny.[59]

The *Birchansky* court, like the court in *Tiwari*, began with broad generic minimum scrutiny language. The court declared that "[w]e will uphold a state law that does not draw a suspect classification or restrict a fundamental right

[48] *See id.*

[49] *See id.*

[50] *See supra* notes 33–36.

[51] *See* Nick Robinson, *The Multiple Justifications of Occupational Licensing*, 93 WASH L. REV. 1903, 1907 (2018) (referring to "(1) fostering communities of knowledge and competence; (2) developing relationships of trust; and (3) buffering producers from the market").

[52] *See Tiwari,* 26 F.4th at 368–69 (citing the critique of this distinction in Dennis v. United States, 341 U.S. 494, 526–27 (1951) (Frankfurter, J., concurring), and noting the controversial residential home eminent domain case of Kelo v. City of New London, 545 U.S. 469, 487–90 (2005)).

[53] *Id.* at 369.

[54] *Id.*

[55] *See*, for further illustration, *Tiwari,*26 F.4th at 360; *Birchansky,* 955 F.3d at 757; *Niang,* 879 F.3d at 875; *Niang,* 139 S. Ct. 319; *Hazel,* 813 F.3d at 160; *Sensational Smiles, LLC,* 793 F.3d 281; Hazel, 733 F.3d 535; *Powers,* 379 F.3d 1208; *Truesdell,* 2022 WL 1394545; *Newell-Davis,* 2022 WL 843602; *Pizza di Joey, LLC*, 235 A.3d 873.

[56] Birchansky v. Clabaugh, 955 F.3d 751 (8th Cir. 2020).

[57] *Id.* at 756–59.

[58] *Id.* at 755–56.

[59] *Id.* at 757-758.

against an equal protection or substantive due process challenge if it is rationally related to a legitimate state interest."[60] Crucially, the *Birchansky* court then adopted a remarkably deferential, if entirely familiar, version of minimum scrutiny.[61]

Under that interpretation, "[t]he law's rational relation to a state interest need only be conceivable and supporting empirical evidence is unnecessary."[62] In particular, the court need not "consider the legislature's stated purpose as long as the law could rationally further some legitimate government purpose."[63] Of note is the *Birchansky* court's understanding of the relationship between incumbent group protectionism and the conceivable promotion of some legitimate public interest. The *Birchansky* court treated as settled the Eighth Circuit rule that "insulating existing entities from new competition in order to promote quality services and protect infrastructural investment can survive rational basis review."[64]

On this basis, one might be tempted to conclude that the Eighth Circuit believes that successful rent seeking, in the form of a secured monopoly or some other form of incumbent protectionism, amounts to a sufficient promotion of a legitimate public interest. This conclusion, however, perhaps underemphasizes or overlooks the court's qualification that the protectionist legislation must "promote quality services and promote infrastructural investment."[65] At least at a conceptual level, the *Birchansky* court holds open the possibility that protectionist legislation, whether in the form of certificate of need requirements or not, might not promote quality services or sensible investments in the public interest. Indeed, this possibility may, in practice, be all too real if not widely predominant.[66] Protectionism and the public interest are indeed typically more at odds than mutually compatible.[67]

The problem, though, is that a deferential version of minimum scrutiny effectively dismisses the possibility, if not the likelihood, that protectionist legislation may not promote, and may indeed substantially undermine, any

[60] *Id.* at 757 (citing FCC v. Beach Commc'ns., Inc., 508 U.S. 307, 313 (1993)).

[61] *See id.* (citing FCC v. Beach Commc'ns., Inc., 508 U.S. 307, 313 (1993) (explaining that the court will only require rational basis review).

[62] *Id.* (citing FCC v. Beach Commc'ns., Inc., 508 U.S. 307, 315 (1993)).

[63] *Id.* (citing Kansas City Taxi Cab Drivers Ass'n, LLC v. City of Kansas City, 742 F.3d 807, 809 (8th Cir. 2013)).

[64] *Id.* (citing Kansas City Taxi Cab Drivers Ass'n, LLC v. City of Kansas City, 742 F.3d 807, 809 (8th Cir. 2013)); *see also* Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 286 (2nd Cir. 2015) (stating that "even if . . . the Commission was in fact motivated by rent-seeking, the rational reasons . . . in support of the regulation would be enough to uphold it.").

[65] *Birchansky,* 955 F.3d at 757.

[66] *See infra* Part III.

[67] *See id.*

meaningful public interest. Insulating insiders from competition[68] may, at least conceivably,[69] allow favored insiders a greater opportunity to lead more healthful lives, focus more energy on promoting the public interest in other ways, reduce their trips to their lenders, share any monopoly profits with the less fortunate, stabilize relationships with suppliers and customers, or reduce the search costs that potential customers might otherwise have to incur.[70] Any established but now failed business involves incurring costs. Sheer institutional stability in our rapidly evolving and complex culture might also be judged in the public interest.

However, each of these and other claims might conceivably be true of virtually state-enforced monopolist or protected insider groups. If so, then every such protectionist law conceivably promotes some legitimate public interest. Any purported distinction between mere protectionism and a restriction that at least conceivably promotes some legitimate public interest thus evaporates. Under familiar deferential versions of minimum scrutiny, the class of protectionist laws that do not conceivably promote any public interest is empty.[71]

Crucially, if any protectionist legislation inevitably satisfies familiar forms of deferential minimum scrutiny, we should then wonder about rethinking the judicial scrutiny levels and related tests and how they are applied. What we have referred to as constitutional opportunism clearly offers certain advantages. The overall judicial goal should not be to uniformly impose some single test on all licensing restrictions, or to fret unduly as to choices among tests, but to be appropriately sensitive, and constructively responsive, to context.

Thus, in the first place, conceivable but clearly nonexistent public benefits are plainly not as valuable as actually realized public benefits.[72] Second, not all actually realized public benefits are equally valuable, at a constitutional level or otherwise.[73] Actual but trivial public benefits are not constitutionally

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[68] *See supra* note 64 and accompanying text.

[69] *See supra* note 62.

[70] *See* Birchansky, 955 F.3d at 757 (stating that Iowa could plausibly permit a limited amount of competition through the capital expenditure exemption consistent with its purpose of maintaining full-service hospital viability. Limited competition conceivably advances the very areas appellants are concerned with: reduced patient costs, innovative procedures, and better service. It is rational for Iowa to have intended the capital expenditure exemption to strike a balance between protecting full-service hospitals and allowing limited competition to promote continual improvement in hospital services. The financial and geographic limitations are consistent with this reasoning.).

[71] *See id.* at 758.

[72] *See* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 670 (1981) (argues that laws related to safety and public interest have a strong presumption of validity).

[73] *See* Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 288 (2d Cir. 2015) (exhibiting, through a review of its case law, the Supreme Court's preference toward actualized public benefits).

equivalent to much more substantial public benefits.[74] Third, actual public benefits may, for constitutional purposes, be either well-distributed to the most appropriate recipients, or not.[75] Distinctively burdening disadvantaged groups, in particular, should be strongly disfavored. Finally, and most broadly, even a substantial public benefit may come at either a low or a high cost in constitutional values, including costs in terms of freedom, community, and equality.[76] A constitutional jurisprudence that adaptively incorporates all of these considerations, along with the value of sensible occupational entry rules, is of distinct value.

The costs of unnecessary licensing barriers in terms of freedom, community, and especially basic equality were on display in the Eighth Circuit case of *Niang v. Carroll*.[77] In *Niang*, the State of Missouri required those who wish to become African-style hair braiders to complete a costly 1,000 hour barbering training course, or a 1,500 hour training course for persons interested in hairdressing or general cosmetology,[78] with little of the course material being relevant to African hair-braiding techniques.[79] In this instance, Missouri raised a merely conceivable[80] health and safety justification for its requirements.[81] The trial court in *Niang* also took it upon itself to raise the possibility of "stimulating more education on African-style hair braiding and incentivizing braiders to offer more comprehensive hair care."[82] The lack of any adversarial or evidentiary testing of the justifications advanced, *sua sponte*, is, again, irrelevant under deferential versions of minimum scrutiny.[83]

Worse, it is sometimes held that the burden on the party challenging such a regulation is a technically nondischargeable one, under which the

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[74] *See* Robert M. Ahlander, *Undressing Naked Economic Protectionism, Rational Basis Review, and Fourteenth Amendment Equal Protection*, 2017 BYU L. REV. 167, 187 (2017).

[75] *See id.*

[76] *See id.*

[77] *See* Niang v. Carroll, 879 F.3d 870, 872-74 (8th Cir.), *vacated as moot*, 139 S. Ct. 319 (2018).

[78] *See id.* at 872-73.

[79] *See id.* at 873.

[80] *See id.* at 873-74.

[81] *See id.*

[82] *Id.* at 873. In a sense, then, the state thereby seeks to discourage persons who want to become African hair braiders from becoming African hair braiding specialists. It is admittedly conceivable, if not plausible, that African-style hair braiding is the most lucrative element of, and effectively subsidizes, the broad range of services performed by some barbers or cosmetologists. But evidence here is, again, irrelevant. *See id.* For an expression of concern over irresponsible or exploitive incursions into only the most profitable aspects of established full-services businesses, *see* Pizza di Joey, 235 A.3d at 880 ("[S]timulating more education on African-style hair braiding and incentivizing braiders to offer more comprehensive hair care.").

[83] *See Niang v. Carroll Eighth Circuit Upholds Licensing Requirement for African-Style Hair Braiders*, 131 HARV. L. REV. 2453 (2018) ("[S]timulating more education on African-style hair braiding and incentivizing braiders to offer more comprehensive hair care.") .

challenger must "negat[e] every conceivable basis which might support it."[84] But an interested insider can always conceive of a greater number of possible justifications for any protectionist rule favoring an established group than any plaintiff can actually negate. This is particularly so when, on the basis of a now-closed record, a trial or appellate court raises a possible justification of a regulation for the first time.[85]

A number of the cases thus seem to imagine that the constitutional law of equal protection, substantive due process, and privileges or immunities permits little judicial response to any harms of occupational protectionism.[86] There is even an occasional sense of sheer fatalism, as in the judicial observation that "while baseball may be the national pastime of the citizenry, dishing out special benefits to certain in-state industries remains the favored pastime of state and local governments."[87]

This entire line of cases is non-opportunistic in the face of arguable violations of the constitutional rights of persons, and especially of outsiders, various minorities, and politically powerless individuals and groups. Failure to embrace the possibilities of legitimate opportunism in applying judicial scrutiny ensures that many substantial constitutional injuries of this sort will go unredressed. Such cases often instruct injured plaintiffs to instead, and likely quite futilely, petition the relevant state legislature for relief.[88]

Admittedly, the Supreme Court itself has occasionally followed such a dubious path in addressing claims of constitutional rights violations. Even in the context of an explicitly racial equal protection challenge to a criminal sentence of death, the Court declared that the defendant's equal protection arguments "are best presented to the legislative bodies."[89] Consigning the victims of state-legislated protectionism in our context to petitioning that very state legislature for relief, however, will typically be futile.

Importantly, not all constitutional rights claims against protectionist

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[84] *See Sensational Smiles, LLC*, 793 F.3d at 284 (quoting Heller v. Doe, 509 U.S. 312, 320 (1993)); *see also* Newell-Davis v. Phillips, 592 F.Supp.3d 532, 546 (E.D. La. 2022).

[85] *See supra* note 82 and accompanying text.

[86] Gerald S. Kerska, *Economic Protectionism and Occupational Licensing Reform*, 101 MINN. L. REV. 1703, 1714 (2017).

[87] *See Powers*, 379 F.3d at 1221.

[88] *See* Hazel, 813 F.3d at 158 (stating that the appellants' arguments might be more persuasive if made before the Virginia General Assembly and not in front of unelected federal judges); *see Powers*, 379 F.3d at 1225 (arguing that balancing the advantages and disadvantages of FLSA's regulatory requirements is a job for the legislature and not the courts); *see also Truesdell*, 2022 WL 1394545, at *5 ("...weighing of costs and benefits in the face of competing costs is eminently a legislative task, not a judicial one.").

[89] McCleskey v. Kemp, 481 U.S. 279, 319 (1987) (consigning McCleskey's racial equal protection claim to the Georgia state legislature).

regimes require any delicate balancing of roughly equal harms and benefits, including harms to the broader public interest.[90] No subtle balancing of comparable advantages and disadvantages may be required.[91] In some cases, the burden on the challengers' livelihood and constitutional rights will be clear and substantial; the inequality in economic, social, and other sorts of influence will be dramatic; the substantial harm to prospective minority customers will be obvious; and the unnecessary public harms of the regulatory regime will be significant.[92] Of course, not all cases will meet this template in all respects. But when such cases do arise, what we have called judicial opportunism regarding constitutional rights claims is especially appropriate. In such cases, we should sensibly and opportunistically take advantage of the inevitable indeterminacies of the constitutional tests. The rights of the claimants, and the otherwise unlikely promoted common good, can be promoted under any of several alternative test formulations.[93]

### *B. Striking Down Constitutionally Inappropriate Barriers to Occupational Entry*

The courts have, fortunately, not been uniformly insensitive to constitutional rights claims against protectionist barriers to entering a useful trade or occupation.[94] Consider, for example, the challenge to a Texas cosmetology training and licensing regulation scheme in *Patel v. Texas Department of Licensing and Regulation*.[95] This suit was brought by commercial eyebrow threaders and salon owners alleging that the cosmetology training requirements were largely irrelevant to any health and safety concerns associated with eyebrow threading.[96] The requirements were said to be unduly burdensome in terms of the number of hours required[97] and the income foregone thereby.[98] The court held that cosmetology training requirements, under these circumstances, violated the Texas State Constitution.[99]

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[90] *Contra Niang*, 879 F.3d at 873-74.

[91] *See id.*

[92] For an arguable such example, *see Tiwari*, 26 F.4th at 360-361.

[93] *See* Kerska, *supra* note 86, at 1720.

[94] *See, e.g.*, *Castille*, 712 F.3d at 227; *Craigmiles,* 312 F.3d at 228-29; *Ladd,* 230 A.3d at 1116; *Patel,* 469 S.W.3d at 91; *Brantley,* 98 F. Supp. 3d at 894.

[95] *Patel,* 469 S.W.3d at 74.

[96] *Id.* at 89-90.

[97] *Id.* at 88.

[98] *Id.* at 90.

[99] *Id.* at 91. As a further example of a somewhat less deferential level of constitutional scrutiny under state constitutional law, *see Ladd,* 230 A.3d at 1108.

The most notable opinion in *Patel* is Justice Don Willett's concurrence.[100] Justice Willett began by impeaching the value distinction separating personal liberties from mere economic liberties.[101] Justice Willett declared that "[s]elf-ownership, the right to put your mind and body to productive enterprise, is not a mere luxury to be enjoyed at the sufferance of governmental grace, but is indispensable to human dignity and prosperity."[102] This sentiment then translated into a distinctive approach to the levels of constitutional scrutiny, in that Justice Willett declared that "[t]he rational-basis bar may be low, but it is not subterranean,"[103] and that "[t]he State would have us wield a rubber stamp rather than a gavel."[104] The proper test to be applied in *Patel* according to Justice Willet was "rational basis with bite, demanding actual rationality, scrutinizing the law's actual basis, and applying an actual test."[105] Justice Willett found "transparent rent-seeking that bends government power to private gain, thus robbing people of their innate right--antecedent to government--to earn an honest living."[106]

Of course, it could hardly be claimed that this particular regulation, or indeed all occupational licensing requirements combined, entirely deprived anyone of all of their right to earn any honest living.[107] For most persons who could qualify as eyebrow threaders, some unregulated alternative means of gainful employment would likely still be available. And equally clearly, some occupational entry requirements are readily justifiable.[108] However, it is undeniable that for all of us, some career choices are more appropriate, more lucrative, or more fulfilling and self-perfective than others.[109]

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[100] *Patel*, 469 S.W.3d at 92 (Tex. 2015) (Willett, J., concurring, with Lehrmann & Devine, JJ.); *see also* David E. Bernstein, The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?, YALE L.J. F. 287, 300 (Dec. 5, 2016) ("… liberal Justices might re-conceptualize licensing laws as concerning personal autonomy rather than economic rights. The right to pursue an occupation is not a mere economic interest …. Rather the choice of occupations reflects and affects personal capacities, values, style of life, social status, and general life prospects in innumerable ways, and is a vital form of self-expression.") (internal quotation omitted).

[101] *Patel,* 469 S.W.3d at 92.

[102] *Id.*

[103] *Id.* at 95 (Willett, J., concurring, with Lehrmann & Devine, JJ.).

[104] *Id.*

[105] *Id.* at 98 (emphasis in the original).

[106] *Id.*

[107] *See generally id.*

[108] *See, e.g.,* U.S. CONST., art. II, cl. 5 (the presidential minimum age requirement imposed by the U.S. Constitution).

[109] In the extreme case, Alexander Borodin was a genuinely outstanding chemist and educator, although now best known as a composer. *See* T. Vik*, Alexander Borodin: Physician, Chemist, Scientist, Teacher, and Composer*, NCBI (Dec. 10, 1998), www.pubmed.ncbi.nlm.nih.gov/9914755. Being legally barred from a particular career path might conceivably have impaired Borodin's self-realization, despite the availability of his remaining viable alternative career paths.

The idea of legitimate self-realization through occupational choice was, in *Patel*, partly a matter of basic social and economic inequalities.[110] Protectionist barriers to entry inescapably have income and wealth redistributive effects.[111] Preventing qualified persons from entering the trade of eyebrow threading disproportionately affects persons "of modest means."[112] Any actual benefits of the rules burdening potential eyebrow threaders would likely be modest at best, especially in comparison to the severity of the burdens imposed.[113] Finally, the distributional effects of the protectionist rule were clearly inegalitarian in bearing, disproportionately affecting those seeking a realistic escape from poverty.[114]

Perhaps the leading case striking down occupational protectionist legislation, though, is the earlier casket sale case of *Craigmiles v. Giles*.[115] *Craigmiles* manages to uphold the challenger's rights claims by invoking a supposedly highly deferential review, but as then fortified by occasionally invoking as well somewhat less deferential forms of minimum scrutiny review. *Craigmiles* involved a requirement that anyone who wishes to sell caskets, urns, or other funeral-related items must undergo "two years of education and training."[116] The court deferentially granted this restriction "a strong presumption of validity."[117] The proper and deferential test, more specifically, was said to be whether there is "any reasonably conceivable state of facts that could provide a rational basis"[118] for the regulation. Whether there is a significant difference between a "reasonably conceivable"[119] basis and a merely "conceivable"[120] basis was left unexplored.

The *Craigmiles* court then cited authority to the effect that "protecting a discrete interest group from economic competition is not a legitimate

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[110] *See id.*

[111] *See infra* Part III.

[112] *Patel*, 469 S.W.3d at 108-09 (referring to "lower income, would-be entrepreneurs").

[113] *Id.* at 107.

[114] *See id.* at 109. *See also* Brantley, 98 F. Supp. 3d at 891 (pursuant to a substantive due process claim, "Plaintiffs have successfully refuted every purported rational basis . . . articulated by Defendants, and the Court can discern no other rational bases for the [regulations] in light of the facts at hand") (arguably applying an elevated level of minimum scrutiny without explicitly so specifying).

[115] *Craigmiles,* 312 F.3d 220; *see also* Castille, 712 F.3d at, 227 ("[t]he funeral directors have offered no rational basis for their challenged rule and, try as we are required to do, we can suppose none.").

[116] *Craigmiles*, 312 F.3d at 222.

[117] *Id.* at 224.

[118] *Id.* (quoting Walker v. Bain, 257 F.3d 660, 667 (6th Cir. 2001)). The court declared as well that the challenger "must negative every conceivable basis that might support it." *Id.* at 224 (quotation omitted).

[119] *Craigmiles,* 312 F.3d at 224.

[120] *See, e.g., Birchansky,* 955 F.3d at 757.

governmental purpose."[121] The problem, though, is that as demonstrated, an occupational protectionist statute of any importance will inevitably be accompanied by some at least conceivable public benefit, however modest in size.[122] Typical entry barriers to any trade should thus pass deferential forms of minimum scrutiny. Yet, the court in *Craigmiles*, on the purported basis of a highly deferential form of minimum scrutiny,[123] concluded that "Tennessee's justifications for the 1972 amendment [to the regulations] come close to striking us 'with the force of a five-week-old, unrefrigerated dead fish.'"[124] The court thus looked to the purposes that actually, and not merely conceivably,[125] "animated"[126] the legislature. Rational basis review, ultimately, while deferential,[127] "is not toothless."[128]

In the end, the *Craigmiles* opinion reflects a very understandable and as yet unresolved conflict. On the one hand, many courts feel bound by precedent and authority to apply only minimum scrutiny, and indeed only a deferential version thereof, to the occupational protectionism cases.[129] But on the other hand, courts may feel a judicial responsibility to uphold the right of fully capable low-income persons in particular to safely and responsibly pursue a useful trade to which they feel called,[130] particularly when the public benefits of the occupational entry restriction are extremely narrow, modest, or obscure.[131] Thus arises our call for a legitimate opportunistic use of the discretion courts inevitably have in choosing among, and then in creatively applying, any selected level of judicial scrutiny or related test.[132]

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[121] *Craigmiles,* 312 F.3d 220, 224 (citing the Dormant Commerce Clause narrow tailoring case of City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

[122] See *supra* notes 46-49 and accompanying text.

[123] See *supra* note 118 and accompanying text.

[124] *Craigmiles,* 312 F.3d at 225 (quoting United States v. Searan, 259 F.3d 434, 447 (6th Cir. 2001).

[125] *But see id.* at 224 (the court "must negative every conceivable basis that might support" the regulation).

[126] *Id.* at 229.

[127] *Id.*

[128] *Id.* For a recent case distinguishing *Craigmiles*, *see* Yeager Asphalt, Inc. v. Charter Twp. of Saginaw, 2022 WL 1157879, at *4-5 (6th Cir. Apr. 19, 2022).

[129] *See, e.g., Tiwari,* 26 F.4th at 368-69.

[130] *E.g.,* Craigmiles v. Giles, 312 F.3d at 222.

[131] *Id.* at 225 (6th Cir. 2002); Paul J. Larkin, Jr., *Public Choice and Occupational Licensing*, 39 HARV. J.L. & PUB. POL'Y 209, 221 (2016) (emphasis in the original).

[132] *See, e.g.*, Hellerstedt, 579 U.S. at 638 (Thomas, J., dissenting); Collings & Barclay, *supra* note 2, at 467 n.78; Jackson, *supra* note 2, at 3127; Baumgardner & Miller, *supra* note 2, at 698; Cleburne Living Center, 473 U.S. at 456-57 (Marshall, J., concurring in part and dissenting in part).

## II. THE PUBLIC, COMMUNITARIAN, AND CONSTITUTIONAL RIGHTS COSTS OF OCCUPATIONAL RENT SEEKING

In almost any sense of the term, wealth can be created, transferred, or destroyed.[133] What is referred to as rent seeking behavior[134] focuses on the transfer and destruction of wealth.[135] Rent seeking behavior involves a socially costly, but generally legal, process of successfully or unsuccessfully redistributing wealth or opportunity from some person or group to the rent seeking person or group.[136] The process of rent seeking is nonconsensual with respect to the losers, and is neither productive, nor even a zero-sum transfer.[137] Crucially, the "process of . . . rent-seeking uses real resources (measured by opportunity costs) that could otherwise be used for productive purposes."[138]

More specifically, the process of rent seeking-oriented lobbying "diverts resources away from positive-sum activities into zero- and even negative-sum efforts to capture transfers, resulting in social costs."[139] Rent seeking may also be indirect, as when large incumbent groups lobby for regulations that are indeed generally burdensome, but most especially so to their small-scale competitors and would-be occupational entrants.[140] Occupational incumbents enjoy some of the fruits of rent seeking, while typically devoting a portion of those proceeds to induce politicians not to weaken or remove the protectionist legislation in question.[141]

Importantly, rent seeking overall, in the occupational protectionist context

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[133] *See, e.g.,* Todd Zywicki, *Rent-Seeking, Crony Capitalism, and the Crony Constitution*, 23 SUP. CT. ECON. REV. 77, 80 (2015), https://www.journals.uchicago.edu/doi/epdf/10.1086/686473.

[134] The term itself is apparently owed to Anne O. Kruger. *See* Anne O. Kruger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291, 291 (1974) (defining the term "rent-seeking").

[135] *See id.*

[136] Zywicki, *supra* note 133. This is not at all to suggest that the fruits of rent seeking remain entirely with the rent seeker, as distinct from the relevant lobbyists, employees, and politicians.

[137] *Id.*

[138] *Id. See also* Kevin M. Murphy et al., *Why Is Rent-Seeking So Costly to Growth?*, 83 AEA PAPERS & PROC. 409, 409 (1993) (rent seeking as impairing innovation even more than growth).

[139] Robert D. Tollison, *The Economic Theory of Rent Seeking,* 152 PUB. CHOICE 73, 74 (2012); *See also* Tzirel Klein, *Occupational Licensing: The Path to Reform Through Federal Courts and State Legislatures*, 59 HARV. J. ON LEGIS. 427, 430 (2022) ("excessive licensing . . . raises consumer costs, limits consumer choice, restricts job creation, contributes to income inequality, and reduces economic mobility"). Timothy Sandefur, *State "Competitor's Veto" Laws and the Right to Earn a Living: Some Paths to Federal Reform*, 38 HARV. J. L. & PUB. POL'Y 1009, 1010 (2014) (certificate of need laws have the effect of "restricting the supply of services, raising prices for consumers, and . . . depriving would-be entrepreneurs of their constitutional right to earn a living without unreasonable government interference").

[140] Zywicki, *supra* note 133, at 89.

[141] *See id.*; Tollison, *supra* note 139, at 78.

and elsewhere, need not remain, and has not remained, at a constant level.[142] It has been said that "the percentage of jobs subject to occupational licensing expanded from 10 percent in 1970 to 30 percent in 2008."[143] Perversely, increased rent seeking may then actually incentivize further rent-seeking if the returns to actual productive activity fall faster than the returns to rent seeking.[144] If established firms find it more profitable to seek rents than to provide additional valued goods and services to customers, there will be market pressures to reallocate their resources into socially wasteful further rent-seeking, at the expense of genuinely productive activity.[145]

More broadly, in the words of the economist Mancur Olson, "when special-interest groups become more important and distributional issues accordingly more important, political life tends to be more divisive."[146] Increasingly significant distributional issues then naturally become, for the outsiders, equal protection issues.[147] Occupational licensing in particular "reduces opportunities for employment, limits the ability of new entrants to create small businesses, and restricts upward mobility for lower-income individuals."[148]

Such licensing requirements thus expand "the gap between rich and poor by squelching employment opportunities for people at the lower end of the socioeconomic scale . . ."[149] In our current context, "even as employment prospects for the less skilled have dwindled generally because of automation and globalization, the spread of licensing has further aggravated the situation."[150] Occupational licensing protectionism thus generates crucial

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[142] *See* Mark J. Perry, *Rent-Seeking: A Significant Cost of Protectionism that Doesn't Show Up in the Standard Economic Analysis of Tariffs*, AEIDEAS (Aug. 7, 2017), https://www.aei.org/carpe-diem/rent-seeking-a-significant-cost-of-protectionism-that-doesnt-show-up-in-the-standard-economic-analysis-of-tariffs/.

[143] ROBERT J. GORDON, THE RISE AND FALL OF AMERICAN GROWTH 649 (2016), https://muse.jhu.edu/book/64702.

[144] Murphy et al., *supra* note 138.

[145] Zywicki, *supra* note 133, at 79.

[146] MANCUR OLSON, THE RISE AND DECLINE OF NATIONS 47 (1982), http://ebookcentral.proquest.com/lib/richmond/detail.action?docID=3420903.

[147] *Id.*

[148] GORDON, *supra* note 143. For further possible systematic harms, *see* CLIFFORD WINSTON, GOVERNMENT FAILURE VERSUS MARKET FAILURE 40 (2006), https://www.jstor.org/stable/10.7864/j.ctt6wpfk5.

[149] BRINK LINDSEY & STEVEN M. TELES, THE CAPTURED ECONOMY 97 (2017).

[150] *Id.; See also* David E. Bernstein, *The Due Process Right to Pursue Lawful Occupation: A Brighter Future Ahead?*, 126 YALE L.J. F. 287, 298 (2016); John O. McGinnis, *Reforming Constitutional Review of State Economic Legislation*, 14 GEO. J. OF L. & PUB. POL'Y 517, 517 (2016) ("[t]hese cases likely reflect a growing concern that many occupational licensing regimes have become a barrier to social and economic inclusion."); Austin Raynor, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065, 1094 (2013).

inequalities, of substance and of opportunity, along predictable lines.[151] The obvious adverse impact is often concentrated on immigrant and minority populations.[152]

The predictable effects of such entry barriers on low-income, immigrant, and minority populations include not only legally enforced inequality, but a denial of full participation in the broader community.[153] Occupational protectionism is, in this sense, a repudiation of community and solidarity, and of jointly pursuing even the most basic common good.[154] In the words of the outstanding economist-theologian Mary L. Hirschfeld, "all people have a right to participate in the economic life of the society."[155] The crucial point of collective economic activity is the promotion of the common good, as distinct from that of insiders, or the good of the already advantaged.[156]

In this context, impairment of the basic common good involves imposing fundamental legal inequalities largely on vulnerable groups.[157] Rejection of basic community and of the common good are here inseparable from the construction of legal barriers and legal inequalities among classes and groups.[158] Poverty is one thing; poverty that is then worsened by community exclusion is another.[159] Any meaningful community, and the basic overall common good, require inclusion rather than exclusion.[160] Thus insiders, no less than the rest of us, are "required in reason to promote the common good."[161] More

[151] Edward Rodrigue and Richard V. Reeves, *Four Ways Occupational Licensing Damages Social Mobility, Brookings* (Feb. 24, 2016) https://www.brookings.edu/blog/social-mobility-memos/2016/02/24/four-ways-occupational-licensing-damages-social-mobility/.

[152] *See, e.g.*, *Tiwari,* 26 F.4th at 360; *Birchansky,* 955 F.3d at 757; *Niang,* 879 F.3d at 875, *vacated sub nom*. *Niang,* 139 S. Ct. at 319; *Hazel,* 813 F.3d at 160; *Sensational Smiles, LLC,* 793 F.3d 281 (2d Cir. 2015); Colon Health Centers of America LLC v. Hazel, 733 F.3d at 535; *Powers*, 379 F.3d at 1208; *Truesdell,* 2022 WL 1394545; *Newell-Davis,* 2022 WL 843602; *Pizza di Joey, LLC*, 470 Md. at 235; *Castille,* 712 F.3d 215; *Craigmiles*, 312 F.3d 220 (distinguished in Yeager Asphalt, Inc. v. Charter Township, 2022 WL 1157879 (6th Cir. April 19, 2022)); *Brantley,* 98 F. Supp. 3d 884; *Ladd,* 659 Pa. 165, 230 A.3d 1096; *Patel,* 469 S.W.3d at 90-91; *Niang v. Carroll Eighth Circuit Upholds Licensing Requirement for African-Style Hair Braiders*, *supra* note 83, at 2456; *Public Choice and Occupational Licensing*, *supra* note 131, at 239.

[153] *See* Matthew D. Mitchell, *Policy Spotlight: Occupational Licensing and the Poor and Disadvantaged*, MERCATUS CTR. (2017), https://www.mercatus.org/research/policy-briefs/policy-spotlight-occupational-licensing-and-poor-and-disadvantaged.

[154] *See* Mark Flatten, *Protection Racket: Occupational Licensing Laws and the Right to Earn a Living*, GOLDWATER INST. (Dec. 6, 2016), https://www.goldwaterinstitute.org/protection-racket-occupational-licensing-laws-and/.

[155] MARY L. HIRSCHFELD, AQUINAS AND THE MARKET: TOWARD A HUMANE ECONOMY 14 (2018).

[156] *See id.*

[157] *See id.*

[158] *See id.* at 186, 211.

[159] *Id.* at 211.

[160] *Id.*

[161] MARK C. MURPHY, NATURAL LAW IN JURISPRUDENCE AND POLITICS 85 (Cambridge Univ. Press, 2009), https://doi.org/10.1017/CBO9780511663772.

specifically, "[t]he common good . . . embodies a community structure that enables all members to lead flourishing lives by participating in the basic goods."[162] Both the broad common good and any meaningful understanding of equal protection require the opportunity for everyone, regardless of class status, to flourish in the most important respects, including useful work.[163]

It is possible to argue that perversely, occupational entry barriers do indeed in a sense promote a feeling of community and of trust.[164] This certainly seems plausible enough if the sense of community and trust is limited to within the insider group, and perhaps merely internal to any disadvantaged outsider group as well. But mere internal community and trust, confined to an exploiting or privileged group or entirely separately to their outsider victims, is of limited if not entirely dubious value. Inescapably, such narrowly limited, inherently divisive community and trust is based upon the denial of equal protection, and of basic economic opportunities, to an out-group, to whom broad and meaningful political community cannot possibly thereby extend. For constitutional purposes, community that spreads across, rather than merely within, class and other group lines is most significant.[165]

Someone might indeed conceivably wish to express solidaristic concern merely for privileged insiders by protecting them from a fairly operating market.[166] But this would again occur at the cost of uncompensated losses in basic opportunities for those who are typically already worse off.[167] This outcome is the opposite of any meaningful sense of equal protection of the laws, of broad political community, and the values of reasonably open occupational opportunity and basic self-realization.

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[162] *See* JONATHAN CROWE, THE COMMON GOOD. IN NATURAL LAW AND THE NATURE OF LAW 87-90 (2019).

[163] *See* JOHN FINNIS, NATURAL LAW & NATURAL RIGHTS 458-60, (Paul Craig ed., 2nd ed. 2011).

[164] *See* Nick Robinson, *The Multiple Justifications of Occupational Licensing*, 93 WASH. L. REV. 1903, 1907 (2018).

[165] As well, at this point in our national experience, rebuilding justified trust relationships across group lines, rather than merely among members of a successful insider group, is of practical importance. *See, e.g.,* FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 10-11 (1995); VALLIER, *supra* note 5.

[166] *See* Robinson, *supra* note 164, at 1907.

[167] LINDSEY & TELES, *supra* note 149, at 97-98; Bernstein, *supra* note 150; McGinnis, *supra* note 150, at 525 ("many occupational licensing regimes have become a barrier to social and economic inclusion"); Raynor, *supra* note 150, at 1093-94.

## III. THE LEGITIMATE AND PRUDENT SCOPE OF JUDICIAL CONSTITUTIONAL RIGHTS SCRUTINY

A remarkably broad range of empirical evidence[168] thus recognizes the stark conflicts between occupational protectionism, however it is rationalized, and the crucial constitutional values of equal protection and the chance to pursue meaningful employment.[169] Thinking of occupational protectionism as a problem best suited for resolution by the very legislature that is largely the source of the problem is misconceived.[170] The legislatures typically benefit by enacting, maintaining, or threatening to remove such protectionist provisions.[171]

If the more constitutionally objectionable statutes are to be abolished, the court must typically take the initiative. Crucially, the greater the willingness of the courts to strike down the most indefensible such protectionist statutes, the lower the value of protectionist legislation to those who might seek such legislation.[172] The benefits of occupational protectionism to seekers of such legislation, to the established firms, to lobbyists, and to legislators would have to be discounted by the then increased chance of judicial invalidation of protectionist statutes.[173] With the reduced expected value of such arrangements, the greater the appeal of devoting more resources to genuinely productive activities, including product or service improvement.[174] With reduced appeal of seeking or maintaining protectionist legislation would come a reduced incidence of the associated constitutional rights violations.[175]

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[168] *See supra* Part III.

[169] Whether the courts choose to label such a right as some sort of privilege or immunity of citizens, or as a substantive due process right, or else as an unenumerated Ninth Amendment right, is a question on which we are herein neutral. For a sense of the state of Fourteenth Amendment Privileges or Immunities jurisprudence after the *Slaughter-House* Cases, 83 U.S. (16 Wall) 36 (1872); *see* the opinions in McDonald v. City of Chicago, 561 U.S. 742 (2010); Saenz v. Roe, 526 U.S. 489, 521, 522 n.1 (1999) (Thomas, J., dissenting); *see also* Rebecca Haw Allensworth, *The (Limited) Constitutional Right to Compete in an Occupation*, 60 WM. & MARY L. REV. 1111 (2019). In our context, consider Truax v. Raich, 239 U.S. 33, 41 (1915) ("[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [equal protection clause of the Fourteenth] Amendment to secure"). More broadly, *see generally* Randy E. Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause*, 43 HARV. J. L. & PUB. POL'Y 1 (2020) (discussing the history of the Privileges or Immunities Clause).

[170] *See supra* notes 88-89, 139-141 and accompanying text.

[171] *See supra* notes 139-141.

[172] *See generally* Raynor, *supra* note 150, at 1088 (describing the potential ramifications of strict-licensing protectionist statutes and the likelihood that the judicial system will be willing to scrutinize such statutes).

[173] *See generally id.*

[174] *See supra* notes 138-139 and accompanying text.

[175] *See* Elizabeth Trafton, *The Fifth Circuit Lays Economic Protectionism to Rest in St. Joseph Abbey*, 55 B.C. L. REV. E. SUPP. 141, 150 (2014).

How should this constitutionally healthy prospect be judicially encouraged? The courts, in addressing the relevant cases, often adopt some level of constitutional scrutiny.[176] Tiered judicial scrutiny frameworks and related tests, particularly in cases of equal protection and related rights claims, are well-established in the law.[177] This arrangement persists despite the observation by Justice John Paul Stevens that "[t]here is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases."[178]

At its simplest, tiered constitutional scrutiny is binary, and thus confined to a single higher and a single lower level of judicial scrutiny, however complicated the elements of each level may be.[179] As the equal protection cases accrued, it became commonplace to recognize not merely two, but three supposedly distinct levels of constitutional scrutiny.[180] Thus, it has been said that "government action must submit to three levels of scrutiny: strict, intermediate, and rational basis."[181] The aims of the government action at issue are then "categorized as compelling, important, or merely legitimate."[182] Correspondingly, the relation between the government interest and the scope of the private interests thereby affected may in all three levels be more or less close.[183]

The three levels of scrutiny may, however, be "combined, recombined, and modified."[184] As a result, the rigor—or the degree of supposedly strict

[176] Of course, the courts may for a time decline to specify a level of scrutiny if the legislation at issue is said to fail even a relatively lenient scrutiny test. *See, e.g.,* Sorrell v. IMS Health Inc., 564 U.S. 552, 571 (2011) (declining to choose among possible judicial scrutiny standards where "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied"). And there is some judicial sympathy, though perhaps still within an overarching framework of scrutiny levels, for both sliding scale and some proportionalist balancing approaches. *See, e.g.*, Cleburne Living Center, 473 U.S. at 455-460 (Marshall, J., concurring in the judgment in part and dissenting in part) (preferring a sliding scale equal protection approach over the Court's exceptionally aggressive, second-guessing form of supposedly minimum scrutiny); U.S. v. Alvarez, 567 U.S. 709, 730-32 (2012) (Breyer, J., concurring in the judgment) (opting for a proportionalist balancing approach to the content-based speech restriction at issue).

[177] *See, e.g.,* Stephen E. Gottlieb, *Tears for Tiers on the Rehnquist Court*, 4 U. PA. CONST. L.J. 350, 350 (2002).

[178] Craig v. Boren, 429 U.S. 190, 211-212 (1976) (Stevens J., concurring).

[179] For exposition and critique of the familiar distinction between content-based and content-neutral restrictions of speech, *see* R. George Wright*, Content-Neutral and Content-Based Regulations of Speech: A Distinction That Is No Longer Worth the Fuss*, 67 FLA. L. REV. 2081 (2016).

[180] *See, e.g.,* Charles Fried, *Types*, 14 CONST. COMMENT. 55, 55 (1997).

[181] *Id.*

[182] *Id.*

[183] *See id.*

[184] *See id. See also* Philip J. Closius, *Lochner's Revenge: Tiered Scrutiny and the Acceptance of Judicial Subjectivity*, 90 U. CIN. L. REV. 779, 782-83 (2022).

scrutiny in particular—then becomes contested.[185] As we have seen *supra*,[186] the minimum scrutiny level "wavers between its typical deference to governmental decision-making and the occasional insistence on meaningful review, without a unifying theory for meshing the two seemingly distinct approaches."[187]

The lack of any satisfactory theory at this point is clear, but the underlying jurisprudential problem has in the meantime continued to balloon.[188] Thus, "the Supreme Court has indisputably indicated that there are four levels of scrutiny: rational basis, intermediate scrutiny, strict scrutiny, and a new tier, 'exacting scrutiny.'"[189] The fourth, 'exacting' scrutiny tier turns out to itself then come in stronger and weaker versions.[190]

Given the ongoing proliferation of these levels of judicial scrutiny and the nearly continuous range of weaker and stronger versions thereof, we are now up to at least eight levels of scrutiny.[191] Even if we set aside the rise of exacting scrutiny and its variants, the recently identifiable levels of constitutional scrutiny continue to increase.[192] Thus, one analyst has identified rational basis review;[193] a "higher level of legitimate government interest review;"[194] "heightened reasonableness balancing;"[195] "intermediate review;"[196] "heightened intermediate review;"[197] "loose strict scrutiny;"[198] and a presumably more garden-variety "strict scrutiny."[199] To this increasingly complex conceptual apparatus, we may add the further complications of associated shifting burdens and degrees of proof.[200]

At this point, any real power of these scrutiny tiers to constrain—or even meaningfully steer—adjudicative outcomes is far exceeded by the expanding

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185 *See* Fried, *supra* note 180. *See also* Closius, *supra* note 184.

186 *See e.g.,* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 482 (2004).

187 *See e.g., id.*

188 *See supra* Parts II. A. & II. B.

189 Alex Chemerinsky, Tears of Scrutiny, 57 TULSA L. REV. 341, 342-43 (2022).

190 *Id.*

191 *See* R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207, 231-32 (2016).

192 *See supra* notes 190-191 and accompanying text.

193 *See* Wright, *supra* note 191, at 214-15.

194 R. Randall Kelso, Justifying the Supreme Court's Standards of Review, 52 ST. MARY'S L.J. 973, 977 (2021).

195 *Id.*

196 *Id.* at 977-78.

197 *Id.* at 978.

198 *Id.* at 979.

199 *Id.* at 978.

200 *Id.* at 978-79.

opportunities to exercise discretion in adjudicating constitutional cases.[201] Within limits, the vague, if not interpenetrating, tiers of judicial scrutiny inevitably evoke subjectivity and increasing methodological arbitrariness, if not judicial manipulation.[202] To the extent that this remarkable degree of subjectivity, arbitrariness, and manipulability is either recognized, or else not recognized, by the general public, the legitimacy of that adjudication becomes increasingly questionable.[203]

More broadly, any tiered, and indeed any sliding-scale, proportionalist, balancing-oriented, or even history and tradition-oriented approach[204] to equal protection and related claims permits substantial unconstrained judicial discretion.[205] This available range of judicial discretion is realistically inevitable.[206] The point of legitimate judicial opportunism in constitutional rights scrutiny is to take appropriate advantage of this inevitable judicial discretion for the sake, not merely of the just resolution of constitutional right claims, but of promoting more or less widely recognizable basic public goods and interests.

## CONCLUSION

Overall, the point is not to endorse herein, or for courts to adopt, any particular level of judicial scrutiny in the occupational protectionism cases—or anywhere elsewhere across the broad range of constitutional right cases. More than one level of scrutiny, or interpretation thereof, will be judicially defensible in any given case. Fixing on some supposedly proper single level of judicial scrutiny, or interpretation thereof, is unnecessary and indeed fanciful. Judicial manipulability, subjectivity, and the sheer unenforceability of trying to impose from above any specific level of scrutiny on a court are inescapable. No specific level of scrutiny or any related judicial test exists that is less subject to manipulation than the others and that can be fittingly applied more or less uncontroversially to the run of cases. Constitutional claims vary

[201] *Id.* at 979-80.

[202] *Cf.* Gottlieb, *supra* note 177, at 351 ("[a]ll aspects of the tiers of scrutiny need to be specified precisely, or the tiers lose their meaning and cease to be effective in distinguishing actions consistent with the guarantee of equal protection from those that violate it"). The problem is that the proliferating tiers cannot be specified with any precision, nor distinguished from neighboring tiers, nor prevented from fissioning into more and less demanding sub-versions, in practice if not also formally.

[203] *See* R. George Wright, *What If All the Levels of Constitutional Scrutiny Were Abandoned?*, 45 MEM. L. REV. 165, 171-72 (2014).

[204] For a sense of the inevitably substantial judicial discretion even in history and tradition-oriented constitutional adjudication, *see, e.g.,* DeGirolami, *supra* note 21, at 30; Wright, *supra* note 21, at 34-35.

[205] Wright, *supra* note 21, at 20.

[206] *Id.* at 8-10.

widely in their impact on the public good and in merit. One size, in the context of any particular kind of constitutional right claim, certainly does not fit all, nor can there be any realistically imposable single best level of scrutiny in any particular case.

Instead, judges should take explicit, forthright, and responsible advantage of the inevitable discretion—the play in the joints—that any level of judicial or similar test scrutiny invariably affords. Opportunistic constitutional scrutiny should be sensitive to case and context. There is no sense in treating would-be brain surgeons, nuclear reactor technicians, or emergency medical technicians, as one would treat, say, would-be funeral urn suppliers, interior decorators, or floral arrangers. Courts should take appropriate account of the most relevant public interest-related considerations. There is, thus, no need to apply some particular more or less heightened degree of scrutiny to all occupational licensing cases, among other kinds of constitutional right cases. The goal should be, instead, to use whatever test a court chooses in such a way as to opportunistically promote ascertainable constitutional rights, basic interests, and the reasonably recognizable basic common good, especially where legislatures are unlikely to do so.

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