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## Getting a Second Wind: Reviving Natural Rights Clauses as a Means to Challenge Unjustified Occupational Licensing Regulations

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**Getting A Second Wind:  
Reviving Natural Rights Clauses As A Means To  
Challenge Unjustified Occupational Licensing  
Regulations**

**Alexander C. Lemke\* & Alexander Macdonald\*\***

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*Abstract*

*Occupational licensing refers to a government-imposed regulation which requires an individual to obtain a license before engaging in a certain line of work. Over the last several decades, occupational licensing regulations have expanded rapidly. While some of these regulations can be justified as a form of consumer protection (as in the medical industry), many simply operate as*

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barriers to entry (as in the interior design industry). Furthermore, these regulations impose economic costs that fall disproportionately on those who are economically disadvantaged.

Fortunately, bipartisan state legislative efforts have begun to make some progress in rolling back these regulations. However, because legislative reform is often slow, the bearers of these burdensome regulations often seek redress through the court systems. In a recent case, *Ladd v. Real Estate Commission*,<sup>1</sup> the Pennsylvania Supreme Court ruled that certain licensing requirements violated the right to pursue one's chosen occupation—a right it said was protected by the state's natural rights clause enshrined in the Pennsylvania Constitution. We believe that Ladd's conclusion is correct in light of the historical understanding of these natural rights clauses. Importantly, Pennsylvania is one of thirty-three states to have such a clause in its state constitution. These natural rights clauses provide an easy anchor point by which to argue that unjustified occupational licensing unduly interferes with one's right to pursue a chosen occupation and, consequently, interferes with the rights guaranteed by the state constitution. Therefore, Ladd can serve as a powerful example of how to limit the breadth of occupational licensing through state court litigation in the majority of states.

## I. INTRODUCTION

The American Dream was perhaps first described by Alexis de Tocqueville in his book *Democracy in America* as “the charm of anticipated success,”<sup>2</sup> but it is probably best understood as defined by early twentieth century historian James Truslow Adams. He wrote in his book, *Epic of America*, “The American Dream, that dream of a land in which life should be better and richer and fuller for every man, with opportunity for each according to his ability or achievement.”<sup>3</sup> The American Dream can be seen as the promise that, no matter who you are, you will have the opportunity to succeed through hard work and be more prosperous than your parents, and their parents before them.

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1. *Ladd v. Real Estate Comm'n*, 230 A.3d 1096 (Pa. 2020).

2. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 550 (Henry Reeve trans. 2002).

3. JAMES TRUSLOW ADAMS, *THE EPIC OF AMERICA* 404 (1932).

Yet this promise is being broken more frequently. Intergenerational economic mobility—the percentage of children who earn more than their parents at the same age—has declined drastically since the 1940s when over 90% of children surpassed their parents’ earnings; now, for the first time, most children earn less than their parents did at the same age.<sup>4</sup> This coincides with other worrying signs that the American Dream may be dying or at least is quite ill. Income inequality has risen 39% since 1980.<sup>5</sup> Real wage growth—wage growth adjusted for inflation—has largely stagnated over the same period and has even declined for those in the lower part of the income distribution.<sup>6</sup> While there are many contributing causes to declining economic mobility in the United States, one that is significant—and is a low hanging fruit for substantial impact if eliminated—are the growing barriers of entry to employment imposed by occupational licensing.

The rapid expansion in unjustified occupational licensing requirements over the last sixty years directly contributes to the indicators which represent the fading American Dream. Using county-level data for the United States, the growth in licensing has been shown to be associated with increases in income inequality ranging from 3.9% to 15.4%, along with a 1.7% to 6.7% reduction in intergenerational economic mobility.<sup>7</sup> This is a contributing factor to the decrease in real wages for the poorest Americans and has posed massive economic costs which fall disproportionately on the poorest Americans.

Occupational licensing, much like what labor unions do for their members, often creates substantial increases in wages and benefits for license holders; however, unlike unions, which provide higher wages “by reallocating some of the profit” from

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4. Raj Chetty et al., *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, 356 *SCIENCE* 398, 398 (2017).

5. Juliana Menasce Horowitz et al., *Trends in Income and Wealth Inequality*, PEW RSCH. CTR. (Jan. 9, 2020), <https://www.pewsocialtrends.org/2020/01/09/trends-in-income-and-wealth-inequality/>.

6. *See generally* SARAH A. DONOVAN ET AL., CONG. RSCH. SERV., R45090, REAL WAGE TRENDS, 1979 TO 2018 1–2 (updated July 23, 2019).

7. Edward Timmons et al., *Too Much License? A Closer Look at Occupational Licensing and Economic Mobility*, ARCHBRIDGE INST. 1–2 (2018), <https://archbridgeinst.wpengine.com/wp-content/uploads/2018/04/Too-Much-License-1.pdf>.

business shareholders to workers through collective bargaining, “occupational licensing transfers income from consumers” to license holders in the form of higher prices.<sup>8</sup> This fact is supported by an abundance of economic literature showing that barriers to entry reduce employment in an occupation, leading to higher wages for licensed workers but also to lower wages on average for those denied access. The result is higher prices for consumers.<sup>9</sup> For instance, a study estimating the effects of licensing for cosmetology—a commonly licensed profession with no obvious consumer health rationale—found that it increased prices for consumers by 19% and reduced total beauty shop visits by 14%.<sup>10</sup>

For some professions, licensing not only increases prices for customers but can drastically reduce the availability of a whole class of services. A shocking example of this is the comparison of African style-hair braiding in the neighboring states of Louisiana and Mississippi. In Louisiana, hair braiders must complete 500 hours of training to earn a braiding license; in Mississippi, hair braiders only need to register with the state with no further fees or requirements.<sup>11</sup> Despite having a significantly larger black population, Louisiana had only thirty-two legal hair braiders in 2012, compared to around 1,200 in Mississippi.<sup>12</sup> Louisiana is not alone in regulating hair braiding. Sixteen states “require hair braiders to get a cosmetology license” despite not being cosmetologists, and fourteen states and the District of Columbia require specialized hair braider licenses, including training of up to 600 hours.<sup>13</sup> All this exists

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8. Morris M. Kleiner, *Reforming Occupational Licensing Policies*, BROOKINGS 6–7 (Mar. 2015), [https://www.brookings.edu/wp-content/uploads/2016/06/THP\\_KleinerDiscPaper\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/THP_KleinerDiscPaper_final.pdf).

9. See DEPT. OF TREASURY ET AL., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 4 (2015), [https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing\\_report\\_final\\_nonembargo.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf).

10. A. Frank Adams, III et al., *Occupational Licensing in a “Competitive” Labor Market: The Case of Cosmetology*, 23 J. LAB. RSCH. 261, 272–73 (2002).

11. Dick M. Carpenter II et al., *License to Work: A National Study of Burdens from Occupational Licensing*, INST. FOR JUST. 6, 9 (2d ed. 2017), [https://ij.org/wp-content/themes/ijorg/images/lw2/License\\_to\\_Work\\_2nd\\_Edition.pdf](https://ij.org/wp-content/themes/ijorg/images/lw2/License_to_Work_2nd_Edition.pdf).

12. *Id.*

13. Angela C. Erickson, *Barriers to Braiding: How Job-Killing Licensing Laws Tangle Natural Hair Care in Needless Red Tape*, INST. FOR JUST. 7 (July 2016), [https://ij.org/wp-content/uploads/2016/07/Barriers\\_To\\_Braiding-2.pdf](https://ij.org/wp-content/uploads/2016/07/Barriers_To_Braiding-2.pdf).

even though there is no apparent health or safety justification for licensing hair braiders. For example, over a seven-year period, there were zero complaints reported to most state licensing boards related to health or safety concerns over hair braiders; in fact, nearly all complaints were people reporting hair braiders operating without a license.<sup>14</sup>

These examples are not unique. Occupational licensing regulations burden hundreds of professions across the United States, driving some service providers out of business or underground and stymieing potential entrepreneurs before they get started. The economic impact of occupational licensing is devastating. Economists, using standard economic models, have shown that occupational licensing has resulted in “up to 2.85 million fewer jobs” in the United States and poses “annual costs to consumers of \$203 billion.”<sup>15</sup> As the breadth and depth of occupational licensing varies greatly by state, so too do the costs incurred. A 2018 study found that thirty-six states bore a heavy toll in jobs and economic losses due to licensing.<sup>16</sup> The total jobs lost due to licensing as a percentage of total workers in each state vary from 0.92% in South Carolina to 6.72% in Hawaii; annual economic costs of occupational licensing as a percentage of state GDP likewise vary, ranging from 0.71% of GDP in Texas to 7.16% of GDP in Hawaii.<sup>17</sup>

While occupational licensing exists for many high-income professions such as law, healthcare, education, and finance, it is low-income people and those who already have other barriers to employment that suffer from licensing the most.<sup>18</sup> A recent study shows that the effect of licensing an occupation reduces

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14. *See id.* at 2.

15. Kleiner, *supra* note 8, at 6.

16. Morris M. Kleiner & Evgeny S. Vortnikov, *At What Cost? State and National Estimates of the Economic Costs of Occupational Licensing*, INST. FOR JUST. 5 (Nov. 2018), [https://ij.org/wp-content/uploads/2018/11/Licensure\\_Report\\_WEB.pdf](https://ij.org/wp-content/uploads/2018/11/Licensure_Report_WEB.pdf).

17. *Regional Economic Accounts*, BUREAU ECON. ANALYSIS, <https://apps.bea.gov/regional/downloadzip.cfm> (last visited Mar. 23, 2021); *see* Kleiner & Vortnikov, *supra* note 16, at 18.

18. *See* Patrick A. McLaughlin et al., *The Effects of Occupational Licensure on Competition, Consumers, and the Workforce*, MERCATUS CTR. GEORGE MASON UNIV. 4 (Nov. 2017), [https://www.mercatus.org/system/files/mclaughlin\\_mitchell\\_and\\_philpot\\_-\\_mop\\_-\\_the\\_effects\\_of\\_occupational\\_licensure\\_comments\\_for\\_the\\_ftc\\_-\\_v1.pdf](https://www.mercatus.org/system/files/mclaughlin_mitchell_and_philpot_-_mop_-_the_effects_of_occupational_licensure_comments_for_the_ftc_-_v1.pdf).

the labor supply by an average of 17%–27%.<sup>19</sup> It is no surprise then that when low-income occupations become licensed, the number of jobs available in that occupation evaporates. Low-income people who turn to entrepreneurship fare no better.<sup>20</sup> This is made worse by the fact that occupational licensing makes it harder for people to move from one occupation to another when new opportunities arise, and because licensing is typically done at the state level, it also contributes to reduced interstate mobility even for people not seeking to change occupations.<sup>21</sup>

Many studies have shown the disparate impact of occupational licensing on ethnic and racial minorities.<sup>22</sup> An example of racial and class disparities heightened by occupational licensing are the licensing requirements for interior designers in three states (Florida, Louisiana, and Nevada) and District of Columbia, which are in place due to lobbying by the American Society of Interior Designers.<sup>23</sup> In addition to paying licensing fees between \$1,120–\$1,485, prospective interior designers are required to take an exam and have a bachelor's degree.<sup>24</sup> Black and Hispanic interior designers in the United States are around 20% less likely to hold a college degree compared to white interior designers, effectively excluding them from practicing their profession in those states.<sup>25</sup> Additionally, one of the most commonly licensed professions is that of a barber. All fifty states and the District of Columbia require barbers to get a license, and Nevada specifically requires up to four separate exams, and training and education

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19. Peter Q. Blair & Bobby W. Chung, *How Much of Barrier to Entry is Occupational Licensing?* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25262, 2019).

20. See Stephen Slivinski, *Bootstraps Tangled in Red Tape*, GOLDWATER INST. (Feb. 10, 2015), <https://goldwaterinstitute.org/article/bootstraps-tangled-in-red-tape/>.

21. See Mikkel Hermansen, *Occupational Licensing and Job Mobility in the United States* 41–43 (OECD Econ. Dep't, Working Paper No. 1585, 2019).

22. See generally Patrick A. McLaughlin et al., *Regulatory Reform in Florida: An Opportunity for Greater Competitiveness and Economic Efficiency* (Mercatus Ctr. George Mason Univ., Working Paper No. 14-09, 2014).

23. See generally David E. Harrington & Jaret Treber, *Designed to Exclude: How Interior Design Insiders Use Government Power to Exclude Minorities & Burden Consumers*, INST. FOR JUST. 8–9 (Feb. 2009), <https://ij.org/wp-content/uploads/2015/03/designed-to-exclude.pdf>.

24. *Id.*

25. *Id.*

requirements leading to anywhere between 54 to 900 estimated calendar days lost.<sup>26</sup> These regulations, mostly instituted in the early-mid twentieth century, have been shown to have reduced the probability of a black individual working as a legal barber by 17.3%.<sup>27</sup>

For populations with additional barriers to employment, such as the formerly incarcerated, young single mothers, and people with disabilities, the effects of occupational licensing are magnified. One example is veterans, who often gain numerous skills in the military which may not “translate” easily to the civilian economy.<sup>28</sup> Occupational licensing makes the transition from active duty even harder for veterans.<sup>29</sup> Military spouses suffer equally from occupational licensing, with constant moves across state lines complicating the lives of those who require a license for their occupation and discouraging others from entering such occupations in the first place.<sup>30</sup> As a result, at least in part, military spouses in the United States earn an estimated 30% less than their civilian counterparts.<sup>31</sup>

For the formerly incarcerated population, finding employment is always challenging due to stigma, lack of experience or education during prison time, and employment regulations, leading to 27% unemployment and high rates of recidivism.<sup>32</sup> Occupational licensing only makes things worse. In addition to the burden which occupational licensing places on all low-income workers, the National Inventory of the Collateral Consequences of Conviction identifies over 16,000 additional restrictions on state occupational licenses and certifications for

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26. Carpenter et al., *supra* note 11, at 148.

27. Marc T. Law & Mindy S. Marks, *Effects of Occupational Licensing Laws on Minorities: Evidence from the Progressive Era*, 52 J.L. & ECON. 351, 359 (2009).

28. Ryan D. Van Slyke & Nicholas J. Armstrong, *Communities Serve: A Systematic Review of Need Assessments on U.S. Veteran and Military-Connected Populations*, 46 ARMED FORCES & SOC'Y 564, 573 (2019).

29. See NAT'L CONF. OF STATE LEGIS., THE STATE OF OCCUPATIONAL LICENSING 4 (2017).

30. INST. FOR VETERANS & MIL. FAMS., MILITARY SPOUSE EMPLOYMENT REPORT 4 (2014).

31. *Id.* at 6.

32. Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html>.

formerly incarcerated people.<sup>33</sup> Licensing boards in seven states can disqualify applicants for any felony; in seventeen states they can deny licenses regardless of whether the applicant has been rehabilitated, and in thirty-three states they can deny licenses to applicants even for an arrest that did not lead to a criminal conviction.<sup>34</sup> The predictable result, as demonstrated by research, shows that in states with higher occupational licensing restrictions, the formerly incarcerated have an even harder time finding employment and reintegrating into the economy.<sup>35</sup>

These massive costs have mobilized bipartisan support for occupational licensing reform in recent years, which has led to some legal and policy reforms at the state level. However, the localized nature of licensing in the United States, and the organized power of special interest groups, have limited the political will for policy reform. Complementary to policy reform, litigation has shown some success over the years as a means of tackling unjustified occupational licensing regimes. In May 2020, the Pennsylvania Supreme Court, in *Ladd v. Real Estate Commission*,<sup>36</sup> protected the right to pursue a chosen occupation under Article I Section I of the Pennsylvania Constitution. This holding, we believe, opens a powerful new avenue for taking on occupational licensing regulations through litigation.

Article I Section I of the Pennsylvania Constitution provides that “[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”<sup>37</sup> This clause, known to some as a Lockean natural rights guarantee,<sup>38</sup> exists in either identical

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33. *Population Spotlight: Occupational Licensing*, NAT’L CONF. STATE LEGISLATURES (Sept. 5, 2017), <https://www.ncsl.org/research/labor-and-employment/population-spotlight-occupational-licensing.aspx>.

34. Nick Sibilla, *Barred from Working: A Nationwide Study of Occupational Licensing Barriers for Ex-Offenders*, INST. FOR JUSTICE 1 (Aug. 2020), <https://ij.org/wp-content/uploads/2020/08/Barred-from-Working-August-2020-Update.pdf>.

35. See Hermansen, *supra* note 21, at 3, 30.

36. *Ladd v. Real Est. Comm’n*, 230 A.3d 1096, 1108 (Pa. 2020).

37. PA. CONST. art. I, § 1.

38. See Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1299 (2015). While some use the phrase “Lockean natural rights guarantee,” we will, for simplicity reasons only,

or substantially similar form in thirty-three different state constitutions.<sup>39</sup> So, while *Ladd's* holding certainly has important implications for Pennsylvanians specifically, we believe this case provides an opportunity for those seeking to challenge occupational licensing regulations via litigation in other states as well.

As such, *Ladd's* holding could signal an important shift in the way economic regulations are litigated in the state court systems. Using state courts to litigate economic liberty is particularly important considering the advancement of economic liberty through the federal courts has been at a near standstill for many years, even while bipartisan political momentum for occupational licensing reform is growing.<sup>40</sup> As such, the state court systems are proving to be a more fertile fora for economic liberty litigation.<sup>41</sup> State constitutions can be interpreted by the state courts to protect economic liberty more rigorously than the U.S. Constitution because the state constitutions are not merely “little copies of the U.S. Constitution.”<sup>42</sup> They contain additional provisions that protect their citizens’ economic liberties more robustly.<sup>43</sup>

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use the term “natural rights clause” as this term refers to the same types of provisions. *See id.*

39. Other states include: Alabama (ALA. CONST. art. I, § 1), Alaska (ALASKA CONST. art. 1, § 1), Arkansas (ARK. CONST. art. 2, § 2), California (CAL. CONST. art. 1, § 1), Colorado (COLO. CONST. art. 2, § 3), Florida (FLA. CONST. art. 1, § 2), Georgia (GA. CONST. art. 1, § 1, ¶ I), Hawaii (HAW. CONST. art. 1, § 2), Idaho (IDAHO CONST. art. 1, § 1), Illinois (ILL. CONST. art. 1, § 1), Indiana (IND. CONST. art. 1, § 1), Iowa (IOWA CONST. art. 1, § 1), Kansas, (KAN. CONST. art. I, § 1), Maine (ME. CONST. art. 1, § 1), Massachusetts (MASS. CONST. Pt. 1, art. 1), Missouri (MO. CONST. art. 1, § 2), Montana (MONT. CONST. art. 2, § 3), Nebraska (NEB. CONST. art. I, § 1), Nevada (NEV. CONST. art. 1, § 1), New Hampshire (N.H. CONST. Pt. 1, art. 2), New Jersey (N.J. CONST. art. 1, ¶ 1), New Mexico (N.M. CONST. art. 2, § 4), North Carolina (N.C. CONST. art. I, § 1), North Dakota (N.D. CONST. art. 1, § 1), Ohio (OHIO CONST. art. 1, § 1), Oklahoma (OKLA. CONST. art. 2, § 2), Oregon (OR. CONST. art. I, § 1), South Dakota (S.D. CONST. art. 6, § 1), Utah (UTAH CONST. art. 1, § 1), Vermont (VT. CONST. Ch I, art. 1), Virginia (VA. CONST. art. 1, § 1), West Virginia (W. VA. CONST. art. 3, § 1), and Wisconsin (WIS. CONST. art. 1, § 1).

40. *See* Dawn Bauman, *The Climate for Licensing Community Association Managers: Sweeping Occupational Licensing Reform*, CMTY. ASSN’S INST. (Jun. 13, 2019), <https://advocacy.caionline.org/comm-mgr-licensing/>.

41. Dana Berliner, *Are States Protecting Economic Liberty?*, 43 HARV. J.L. & PUB. POL’Y 77, 78 (2020).

42. *Id.* at 77.

43. *Id.* at 78.

We believe that *Ladd* provides a useful example of a state court using a natural rights clause to protect economic liberty. As far as we can tell, the Pennsylvania Supreme Court is the *first* court to protect the right to pursue a chosen occupation as a natural right. Despite this, the court did not properly examine the historical basis for its own conclusion—that the right to pursue a chosen occupation is protected by the Pennsylvania Constitution as a natural right. So, while we agree with *Ladd*'s holding, the primary purpose of this article is to dive deeper into the historical basis for the court's decision. In doing so, we hope to demonstrate that *Ladd*'s holding is historically sound and, thus, can be an effective argument in state court forums when challenging occupational licensing regimes.

This article proceeds in three parts. In part II, we describe occupational licensing, its burdens, and the *Ladd* case itself. In part III, we defend *Ladd*'s holding, discuss its implications, and explore its historical underpinnings. Finally, in part IV, we discuss what *Ladd* can teach those who seek to challenge occupational licensing regulations through state court litigation.

## II. THE BURDENS OF OCCUPATIONAL LICENSING AND *LADD*

Sara Ladd, the litigant in the *Ladd* case, was the owner of two vacation properties in the Pocono Mountains.<sup>44</sup> She offered those properties as short-term rentals through Airbnb and other similar platforms but was reported to the Pennsylvania Real Estate Commission for “unlicensed practice of real-estate.”<sup>45</sup> According to Pennsylvania law, Ms. Ladd was required to get a real estate broker's license in order for her to operate her Airbnb properties. This entailed spending three years working for an established broker, passing two exams, and setting up a brick-and-mortar office in Pennsylvania.<sup>46</sup>

Pennsylvania is not the only state to have imposed such draconian measures on short-term rental owners. In total, forty states maintain laws that similarly subject Airbnb hosts and

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44. *Ladd v. Real Est. Comm'n*, 230 A.3d 1096, 1100 (Pa. 2020).

45. *Id.* at 1101.

46. *AirBnB Property Manager Files Constitutional Challenge to Pa. Real Estate Licensing Regime*, INST. FOR JUST., <https://ij.org/case/pennsylvania-property-management/> (last visited Mar. 23, 2021).

other short-term vacation rentals to traditional real estate brokers licenses.<sup>47</sup> At the city level, restrictions can be even more stringent. For example, the City of Denver requires a special short-term rental license for Airbnb hosts and takes a 10.75% tax on guests,<sup>48</sup> while Santa Monica, California, and New York City—with pressure from hotel lobbyists—instituted outright bans on landlords providing short-term rentals on Airbnb and other similar platforms (in New York, eventually a settlement with Airbnb was reached to allow it to continue operating after some concessions).<sup>49</sup> Yet, despite the obvious economic costs of these regulations, these regulatory schemes are entrenched in American municipal and state governments. We now briefly explain how that came to be.

#### A. Origins and Growth of Occupational Licensing

Since WWII, few regulatory regimes have grown in scope as quickly as occupational licensing.<sup>50</sup> In 1950, only 5% of the employed population was licensed, but now around 20% of employed Americans are licensed workers.<sup>51</sup> Research has shown that this growth does not come from workers moving from farm and factory jobs to traditionally licensed occupations, such as medicine and law, but rather is driven by new laws expanding licensing to previously unlicensed occupations, often without justifications due to health or safety concerns.<sup>52</sup> These barriers to entry most adversely affect those who experience additional barriers to employment, such as the formerly incarcerated, young single moms, and people with disabilities.<sup>53</sup>

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47. *Id.*

48. Matt Powers, *Denver Now Licensing Airbnb Services*, INST. FOR JUSTICE (July 7, 2016), <https://ij.org/denver-now-licensing-airbnb-services/>.

49. Tim Logan, *Santa Monica Comes Down Hard on Airbnb; Will Crackdown Spread?*, L.A. TIMES (May 13, 2015, 4:00 AM), <https://www.latimes.com/business/realestate/la-fi-santa-monica-council-oks-tough-rental-regs-20150512-story.html>; Kate Conger, *Airbnb Sues New York City*, TECHCRUNCH (Oct. 21, 2016, 5:31 PM), <https://techcrunch.com/2016/10/21/airbnb-sues-new-york-city/>; Erik Engquist, *Why Did Airbnb Give in to de Blasio?*, THEREALDEAL (June 15, 2020, 8:50 AM), <https://therealdeal.com/2020/06/15/why-did-airbnb-give-in-to-de-blasio/>.

50. Kleiner, *supra* note 8, at 2.

51. Kleiner & Vorotnikov, *supra* note 16, at 5.

52. DEPT. OF TREASURY ET AL., *supra* note 9, at 4.

53. McLaughlin et al., *supra* note 18, at 5–7.

Occupational licensing can have valid justifications, especially when focused on health and safety, but far too often licensing is used primarily as a tool for limiting competition by creating barriers to entry that create a privileged class who are usually the only ones to benefit. A review of the literature on occupational licensing in the United States indicates that licensing does *not* generally improve the quality of goods and services or public health and safety.<sup>54</sup>

Like many similar anti-competitive practices, occupational licensing is often driven by “rent-seeking” by entrenched interest groups—behavior aimed at shifting money to the group members at the expense of the entire economy. For many industries in the United States, occupational licensing is the result of lobbying by professional associations. Additionally, states frequently delegate their regulatory authority to licensing boards populated largely by practitioners—those with direct interest in tighter regulation of their profession.<sup>55</sup>

This is an age-old phenomenon that dates back as far as human commerce. Adam Smith in *Wealth of Nations* noted that “[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”<sup>56</sup> Laws against anti-competitive practices have their origins in Roman law which, as far back as 50 B.C. in the *lex Julia de Annona*, imposed heavy fines on traders who banded together to increase grain prices.<sup>57</sup> While laws against anti-competitive practices and monopolies have continued until modern times, anti-competitive practices and rent-seeking behavior continue to wreak economic havoc where interest groups have remained strongest, whether the guilds of Europe in the Middle Ages or the commercial lobbies and professional associations of today.<sup>58</sup>

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54. See McLaughlin et al., *supra* note 18, at 3–5.

55. Ryan Nunn, *The Future of Occupational Licensing Reform*, BROOKINGS (Jan. 30, 2017), <https://www.brookings.edu/opinions/the-future-of-occupational-licensing-reform/>.

56. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 105–06 (Harriman House ed., 4th ed. 2007).

57. Pierre A. Picarda, *A Brief Summary of the Law for the Prevention of Restrictive Practices in France*, 2 INT’L & COMP. L.Q. SUPP. PUB. 79, 79 (1961).

58. An interesting example of this are the studies on the economic effect of European guilds in the Middle Ages by Sheilagh Ogilvie, which find that

There are essentially two main mechanisms for tackling the immense burdens imposed by unjustified occupational licensing: legislative reform and legal challenges in court. While legislative reform is perhaps the best way to cut away unjustified occupational licensing requirements—and many states have taken steps to do just that<sup>59</sup>—we choose to focus on the latter: using litigation to successfully challenge and eliminate occupational licensing regulations.

## B. Attempted Legislative Reform of Occupational Licensing

The broad consensus on the harmful burdens of occupational licensing has led policy experts of every political stripe to call for the overhaul of occupational licensing regimes in the United States. This includes a broad array of think tanks from the center-left Brookings Institution,<sup>60</sup> the Progressive Center for American Progress,<sup>61</sup> and Progressive Policy

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“[g]uild rent-seeking imposed deadweight losses on the economy and generated no demonstrable positive externalities. Industry flourished where guilds decayed.” Sheilagh Ogilvie, *Rehabilitating the Guilds: A Reply*, 61 *ECON. HIST. REV.* 175, 175 (2008).

59. According to a database of occupational licensing legislation regarding 30 most highly licensed occupations kept by the National Conference of State Legislatures, the District of Columbia, Puerto Rico, and 10 states have adopted 34 pieces of legislation aimed at reducing the burden of occupational licensing for one or more professions in some way since 2017. These states include: Alabama, Alaska, Georgia, Idaho, Kansas, Louisiana, Massachusetts, Pennsylvania, Rhode Island, and Texas. Additionally, since 2016, nine state governors have signed executive orders temporarily or permanently removing licensing requirements or mandating a statewide review of occupational licensing regimes. These states include: Arizona, Delaware, Idaho, New Hampshire, New Mexico, North Carolina, Oklahoma, and Pennsylvania. *Occupational Licensing Legislation Database*, NAT'L CONF. STATE LEGISLATURES (June 19, 2020), <https://www.ncsl.org/research/labor-and-employment/occupational-licensing636476435.aspx>; Iris Hentze, *Occupational Licensing Executive Order Tracker*, NAT'L CONF. STATE LEGISLATURES, (Oct. 25, 2019), <https://www.ncsl.org/research/labor-and-employment/occupational-licensing-executive-order-tracker.aspx>.

60. See, e.g., Brad Hershbein et al., *Nearly 30 Percent of Workers in the U.S. Need a License to Perform Their Job: It Is Time to Examine Occupational Licensing Practices*, BROOKINGS (Jan. 27, 2015), <https://www.brookings.edu/blog/up-front/2015/01/27/nearly-30-percent-of-workers-in-the-u-s-need-a-license-to-perform-their-job-it-is-time-to-examine-occupational-licensing-practices/>.

61. See, e.g., *Removing Barriers to Economic Opportunity for Americans with Criminal Records Is Focus of New Multistate Initiative* by CAP, NELP, and CLS, CTR. AM. PROGRESS (Sept. 12, 2017),

Institute<sup>62</sup> on the left, and the libertarian Cato Institute<sup>63</sup> and conservative Heritage Foundation<sup>64</sup> on the right. In recent years, both the Obama Administration<sup>65</sup> and Trump Administration<sup>66</sup> have called on states to implement occupational licensing reforms.

Over the past five years, states from both sides of the political spectrum have begun to tackle occupational licensing, albeit in a piecemeal manner. In 2016, Iowa, Kentucky, and Nebraska removed licensing requirements for African-style hair braiders,<sup>67</sup> and Indiana joined them in 2017,<sup>68</sup> bringing the total number of states which have exempted hair braiders from licensing to 23.<sup>69</sup> Some other recent examples include Wisconsin ending licensing requirements for selling home baked goods in 2017,<sup>70</sup> and Tennessee delicensing shampoo providers and servicers in 2017; Tennessee also passed legislation to reduce barriers in obtaining occupational licenses by formerly incarcerated people in 2018.<sup>71</sup>

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<https://www.americanprogress.org/press/release/2017/09/12/437592/release-removing-barriers-economic-opportunity-americans-criminal-records-focus-new-multistate-initiative-cap-nelp-cl/>.

62. See, e.g., *Unleashing Innovation & Growth: A Progressive Alternative to Populism*, PROGRESSIVE POL'Y INST. (Mar. 2016), [https://www.progressivepolicy.org/wp-content/uploads/2016/03/2016\\_PPI\\_Unleashing-Innovation-and-Growth\\_A-Progressive-Alternative-to-Populism.pdf](https://www.progressivepolicy.org/wp-content/uploads/2016/03/2016_PPI_Unleashing-Innovation-and-Growth_A-Progressive-Alternative-to-Populism.pdf).

63. See, e.g., Angela C. Erickson, *The Tangled Mess of Occupational Licensing*, 40 CATO POL'Y REP. 5 (2018).

64. See, e.g., Salim Furth, *Understanding the Data on Occupational Licensing*, HERITAGE FOUND. (Sept. 28, 2016), <https://www.heritage.org/jobs-and-labor/report/understanding-the-data-occupational-licensing>.

65. See, e.g., DEP'T OF TREASURY ET AL., *supra* note 9.

66. See, e.g., The White House, *The President's Principles on Workforce Freedom and Mobility*, (Jan. 2020), <https://web.archive.org/web/20200314181634/https://www.whitehouse.gov/wp-content/uploads/2020/01/Presidents-Principles-on-Workforce-Freedom-and-Mobility.pdf>.

67. Furth, *supra* note 64, at 10.

68. *A look at Occupational Licensing Reform Across the United States*, ARK. CTR. FOR RSCH. IN ECONS. 53 (2018), [https://uca.edu/acre/files/2018/10/ACRE\\_occupational-licensing-state-reforms-WEB-FINAL.pdf](https://uca.edu/acre/files/2018/10/ACRE_occupational-licensing-state-reforms-WEB-FINAL.pdf).

69. Carpenter et al., *supra* note 11, at 35.

70. Jennifer McDonald, *Ready to Roll: Nine Lessons from Ending Wisconsin's Home-Baking Ban*, INST. FOR JUST. 3 (Nov. 2018), <https://ij.org/wp-content/uploads/2018/10/Wisconsin-Home-Bakers-FINAL.pdf>.

71. *A look at Occupational Licensing Reform Across the United States*,

Michigan provides a rare example of a comprehensive reform effort for occupational licensing across many professions, but after years of efforts, the state legislature was only able to agree on completely delicensing six of the twenty + occupations recommended for elimination after review: auctioneers, community planners, dieticians and nutritionists, immigration clerical assistants, ocularists, and proprietary school solicitors.<sup>72</sup> Recent 2019 legislation in Ohio provides another example of an attempt to tackle occupational licensing at a large scale. The law mandates that every state licensing board will expire every six years unless explicitly renewed by the legislature, along with periodic reviews of each board's staff, budget, and enforcement actions to determine whether it has "inhibited economic growth, reduced efficiency, or increased the cost of government."<sup>73</sup> Additionally, the law eliminates barriers for formerly incarcerated people to get licenses, who previously were barred from 25% of jobs in the state.<sup>74</sup> Also in 2019, Arizona passed significant legislation mandating universal license recognition, allowing all new state residents who already had an occupational license in another state to have their out-of-state license recognized in Arizona.<sup>75</sup>

However, legislation can be a slow and often ineffective approach to tackling occupational licensing burdens due to the local nature of the regulations and powerful special interests at the state and local levels. A review published by the Bureau of Labor Statistics in 2015 found that only seven occupations had been completely and permanently delicensed in the United States over the previous forty years: naturopaths in Virginia (1973), private investigators in Colorado (1977), watchmakers in Wisconsin (1979), morticians in Colorado (1981), watchmakers in Minnesota (1983), egg candlers in Colorado (1994), and

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*supra* note 68, at 25.

72. *Id.* at 5–10.

73. Liam Sigaud, *Momentum Builds for Occupational Licensing Reform in 2019*, AM. CONSUMER INST. CTR. CITIZEN RSCH. (Feb. 20, 2019), <https://www.theamericanconsumer.org/2019/02/momentum-builds-for-occupational-licensing-reform-in-2019/>.

74. *Id.*

75. Patrick Gleason, *Governors & Lawmakers Successfully Remove Barriers to Work in 2020*, FORBES (Sept. 30, 2020, 10:16 PM), <https://www.forbes.com/sites/patrickgleason/2020/09/30/governors-lawmakers-successfully-remove-barriers-to-work-in-2020/#75b3cc3942b5>.

interior designers in Alabama (2004).<sup>76</sup> An eighth case was Alabama, which for a while became the only state to delicense barbers (1983) before passing new licensing legislation again (2013 at the behest of the Alabama Board of Cosmetology).<sup>77</sup> While efforts have increased over the past five years, it seems likely that legislation on its own will be a slow, plodding path towards comprehensive occupational licensing reform. For this reason, litigation may often be a more attractive path towards tackling unjustified occupational licensing. Importantly, in *Ladd*, we find an exemplary case of using litigation to successfully challenge occupational licensing regimes.

### C. The Pennsylvania Supreme Court's Decision in *Ladd*

Sara Ladd sued the Pennsylvania Real Estate Commission seeking a declaratory judgment and a permanent injunction, alleging that Pennsylvania's broker requirements imposed "unlawful burdens on her right to pursue her chosen occupation."<sup>78</sup> Her suit made its way to the Pennsylvania Supreme Court, where the court agreed with her.<sup>79</sup> Importantly, the Pennsylvania Supreme Court began its analysis by citing the state constitution's natural rights clause, which provides that: "[a]ll men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."<sup>80</sup> This provision, the court said, protects "the right to pursue a chosen occupation."<sup>81</sup> Or, in other words, the "right to pursue a chosen occupation" is now protectable under the Pennsylvania Constitution's natural

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76. Robert J. Thornton & Edward J. Timmons, *The De-licensing of Occupations in the United States*, MONTHLY LAB. REV. 4–6 (May 2015), <https://www.bls.gov/opub/mlr/2015/article/pdf/the-de-licensing-of-occupations-in-the-united-states.pdf>.

77. *Id.* at 3; see Mike Cason, *Alabama Gears Up to License and Regulate Barbers Under New Law*, AL.COM (May 31, 2013, updated Mar. 6, 2019), [https://www.al.com/wire/2013/05/alabama\\_gears\\_up\\_to\\_license\\_an.html](https://www.al.com/wire/2013/05/alabama_gears_up_to_license_an.html).

78. *Ladd v. Real Estate Comm'n*, 230 A.3d 1096, 1101 (Pa. 2020).

79. *Id.* at 1098.

80. *Id.* at 1108 (quoting PA. CONST. art. I, § 1).

81. *Id.* (citing *Nixon v. Dep't of Pub. Welfare*, 839 A.2d 277, 288 (Pa. 2003); *Gambone v. Commonwealth*, 101 A.2d 634, 636–37 (Pa. 1954)).

rights clause.<sup>82</sup> That is a monumental holding.

The court, unfortunately, neither explained its conclusion thoroughly, nor delved into the historical basis for its conclusion. Instead, the court's analysis was based on the use of its own precedents: *Nixon v. Department of Public Welfare*<sup>83</sup> and *Gambone v. Commonwealth*.<sup>84</sup> However, neither of these cases adequately grapple with the gravity of declaring the right to pursue a chosen occupation as a protectable natural right.

In *Nixon*, the court only noted that Pennsylvania's natural rights clause "guarantees persons in this Commonwealth certain inalienable rights."<sup>85</sup> In *Gambone*, the court's natural rights analysis is similarly lacking—the impetus of the court's decision was that the state's police powers are restrained by the state and federal constitutions through the power of judicial review.<sup>86</sup> Nonetheless, despite the *Ladd* court's hurried analysis, we believe its conclusion is correct. As such, it provides a powerful argument to litigants seeking to reign in the ballooning occupational licensing schemes existing in the United States.

### III. IMPLICATIONS OF *LADD*

#### A. *Ladd*-type Litigation Offers the Most Immediate Way to Achieve Occupational Licensing Reform

The economic and social costs posed by expansive occupational licensing have been repeatedly highlighted by policymakers as well through litigation, as seen in *Ladd*. Yet occupational licensing remains at record levels and has become even more burdensome over the past decade.<sup>87</sup> Even with unusual bipartisan support and widespread efforts, why has occupational licensing reform been relatively slow and often minimal? An optimistic answer is time: the movement to reform occupational licensing has only gained widespread momentum over the past five years, and governments move slowly. The COVID-19 pandemic has been a catalyst for states to move more

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82. *Id.*

83. *Nixon*, 839 A.2d at 277.

84. *Gambone*, 101 A.2d at 634.

85. *Nixon*, 839 A.2d at 286.

86. *Gambone*, 101 A.2d at 636–37.

87. *See supra* notes 9–14 and accompanying text.

quickly to reduce licensing requirements for various medical occupations. Thirty states have made reforms, including suspended or reduced licensing requirements for medical occupations, expediting the licensing process or allowing temporary licenses for people who had not yet met all testing requirements, and allowing reciprocity for out-of-state licenses.<sup>88</sup>

The pessimistic answer is that the localized nature of licensing in the United States and the influence of special interest groups with state legislatures limit avenues and political will for reform, even where governors and other political leaders make it a centerpiece of their agendas. City-level licensing rules can further complicate the process, as in the case of Detroit, which requires licenses for sixty occupations, half of which are also licensed at the state level.<sup>89</sup> Thus, in Detroit, one needs to comply with both state and local licensing requirements if one wishes to practice one of those specific occupations.

Because attempted legislative reform regarding occupational licensing has largely failed in reducing these burdens, as discussed *supra* II.B, litigation following the model of *Ladd* is an attractive alternative for addressing similar questions. This type of litigation can occur at either the state or federal level. While litigation seeking to protect economic freedoms can be successful in a federal forum,<sup>90</sup> such success is

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88. Five states suspended or reduced licensing requirements for medical occupations (Alaska, Arizona, Maine, Vermont, Wisconsin), six states expedited the licensing process or sanctioned temporary licenses for people who had not yet met all testing requirements (Colorado, Connecticut, Georgia, Iowa, Massachusetts, and New Jersey), and twenty-one states permitted reciprocity for out-of-state licenses (California, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Mississippi, Nevada, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Washington, and West Virginia). Daniel Greenberg, *States Respond to Coronavirus with Occupational Licensing Reforms*, DEP'T LAB. (May 19, 2020), <https://blog.dol.gov/2020/05/19/states-respond-to-coronavirus-with-occupational-licensing-reforms>.

89. Jarrett Skorup, *This Isn't Working. How Michigan's Licensing Laws Hurt Workers and Consumers*, MACKINAC CTR. FOR PUB. POL'Y 14 (2017), <https://www.mackinac.org/archives/2017/s2017-02.pdf>.

90. *See* St. Joseph Abbey v. Castille, 712 F.3d 215, 217, 226–27 (5th Cir. 2013) (invalidating a law restricting the sale of funeral merchandise to state-licensed funeral directors in challenge by Benedictine monks wanting to sell handcrafted pine coffins); *Merrifield v. Lockyer*, 547 F.3d 978, 991–92 n.15 (9th Cir. 2008); *Craigmiles v. Giles*, 312 F.3d 220, 222, 229 (6th Cir. 2002) (invalidating state law banning sale of caskets by anyone other than funeral

not the norm. As explained below, there is little protection for economic liberties under current federal court jurisprudence, resulting in fewer ways to challenge occupational licensing requirements in that manner. Thus, we think it is best to use the state court systems to challenge unjustified occupational licensing regulations. However, limited economic liberty protections at the federal level was not always the case.

After the famous 1905 decision in *Lochner v. New York*, economic liberty received robust protection under the United States Constitution. In *Lochner*, New York State made it a misdemeanor to require or permit an employee working for a baker to work more than sixty hours in a one week.<sup>91</sup> One such employer, after being found in violation of the statute, challenged the constitutionality of the statute in federal court.<sup>92</sup> When the United States Supreme Court heard the case, it held that:

The statute necessarily interferes with the right of contract between the employer and employe[e]s, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.<sup>93</sup>

In other words, the Court held that the U.S. Constitution protects the right to contract. The right to contract is an important and is perhaps the most essential aspect of economic liberty.<sup>94</sup> While free market advocates could say that *Lochner* was a victory, it was a short-lived victory. In 1937, *Lochner* was

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directors on the basis that the law infringed on economic liberty); *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434, 436–37 (S.D. Miss. 2000); *Santos v. City of Houston*, 852 F. Supp. 601, 607–08 (S.D. Tex. 1994) (“[A] statute based on pure favoritism which creates a closed class will likely be declared unconstitutional.”).

91. *Lochner v. New York*, 198 U.S. 45, 52 (1905).

92. *Id.*

93. *Id.* at 53 (citing *Allgeyer v. Louisiana*, 165 U.S. 578 (1897)).

94. Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL’Y 5, 5 (2012).

overturned by *West Coast Hotel Co. v. Parrish*.<sup>95</sup> Since *West Coast Hotel*, so-called economic liberties are scantily protected under the United States Constitution. As the Court itself put it, “[w]hen economic legislation does not employ classifications subject to heightened scrutiny or impinge on fundamental rights, courts generally view constitutional challenges with the skepticism due respect for legislative choices demands.”<sup>96</sup> Moreover, the current federal test for economic regulations—the rational basis test<sup>97</sup>—has been characterized as “weak.”<sup>98</sup> As one law professor put it:

By allowing any plausible reason for the legislation to suffice, whether or not it was a true reason for the legislation, and by asking only whether lawmakers could have thought that it was reasonably related to the subject it purported to advance, the Court has essentially made the rational basis test the equivalent to no test at all.<sup>99</sup>

Another commentator put it: rational basis scrutiny is “minimal scrutiny in theory and virtually none in fact.”<sup>100</sup>

Additionally, *Lochner*’s restoration, for many reasons, will not likely come about. As it stands today, the treatment of *Lochner* is “almost uniformly hostile, but it differs sharply along ideological lines: conservatives decry the case for protecting unenumerated rights [under the Fourteenth Amendment], while liberals shun it for protecting the *wrong* unenumerated rights.”<sup>101</sup> Thus, it is unlikely that it will be revived, and we do

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95. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

96. *Levin v. Com. Energy*, 560 U.S. 413, 426 (2010).

97. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (holding that laws regulating businesses need to only survive rational basis review and that the Court need not contemplate all the reasons for the legislation).

98. Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 493 (2011).

99. *Id.*

100. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

101. Brandon R. Magner, Note, *Burying Lochner: Why Courts Should*

not advocate for its revival. *Lochner* is widely considered part of the constitutional anti-canon.<sup>102</sup> That is, it is part of “the set of cases whose central propositions all legitimate decisions must refute[.]”<sup>103</sup> In many legal circles, it keeps company with cases such as *Dred Scott v. Sandford*, *Plessy v. Ferguson*, and *Korematsu v. United States*.<sup>104</sup> While it is possible the United States Supreme Court will change course and protect economic liberty under the Fourteenth Amendment (thereby, effectively reinstating *Lochner*), it is very unlikely. However, regardless of the merits of such an argument, our point is merely this: because federal courts only minimally scrutinize economic regulations, they are not the best forum to challenge those regulations. Consequently, as one commentator stated, since the 1930s, the United States Supreme Court “essentially stopped paying serious attention to [economic liberty] matters.”<sup>105</sup>

Even though the Court has arguably neglected this area of the law, there has been a resurgence in scholarship arguing that the U.S. Constitution does, in fact, protect economic liberty.<sup>106</sup> At the forefront of this movement is Professor Randy Barnett, who suggests that the U.S. Constitution does protect economic liberty, not under the due process clause in the 14th Amendment, but under the privileges and immunities clause.<sup>107</sup> However, even Professor Barnett recognizes that the Supreme Court has “effectively gutted the [p]rivileges or [i]mmunities [c]lause[.]”<sup>108</sup> And he acknowledges economic regulations will “be upheld if the court c[an] conceive of any hypothetical reason why the legislature *might* have enacted the restriction.”<sup>109</sup>

Nonetheless, while the debate about whether the U.S. Constitution may protect economic liberty is undergoing a

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*Reject Coming Attempts to Revive Economic Due Process*, 106 KY. L.J. 463, 477 (2018).

102. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011).

103. *Id.*

104. *See id.* (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Korematsu v. United States*, 323 U.S. 214 (1944)).

105. TIMOTHY SANDEFUR, *THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW* 279 (2010).

106. *See* Barnett, *supra* note 94, at 5.

107. *Id.*

108. *Id.* at 11.

109. Randy E. Barnett, *Judicial Engagement Through the Lens of Lee Optical*, 19 GEO. MASON. L. REV. 845, 856 (2012).

renaissance, in practice, most restrictions to economic liberty are currently subject to little scrutiny in federal courts.<sup>110</sup> Therefore, those seeking to challenge occupational licensing regulations in court are better off (or at least not worse off) litigating in the state court systems. Even those who argue that the U.S. Constitution does protect economic liberty suggest that state courts are a good place to achieve occupational licensing reform. For example, as the litigation director for the Institute for Justice (an organization that focuses on occupational licensing reform) put it, “I do not agree at all with the conclusion that there is no federal constitutional protection for economic liberty, but there is a lot of opportunity for state constitutional litigation now.”<sup>111</sup> As such, *Ladd* represents a growing trend of state supreme courts that, unlike their federal court counterparts, are willing to recognize economic liberty and attempt to protect it. To be sure, *Ladd* is not the first example of a state supreme court providing more protections for economic liberty than the federal courts.<sup>112</sup> However, *Ladd* is the first modern case we are aware of to protect economic liberty as a natural right.

## B. The Importance of Natural Rights

The crux of *Ladd*'s holding is that the Pennsylvania Constitution's natural rights clause protects the “right to pursue a chosen occupation.”<sup>113</sup> This is a momentous holding because it means that in Pennsylvania, the right to pursue a chosen occupation is recognized to be a natural right as opposed to a

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110. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 483 (1955) (holding that laws regulating businesses need to only survive rational basis review and that the Court need not contemplate all the reasons for the legislation).

111. Berliner, *supra* note 41, at 77.

112. See *Ladd v. Real Est. Comm'n*, 230 A.3d 1096, 1096 (Pa. 2020); see also *Pizza di Joey, LLC v. Mayor of Baltimore*, 235 A.3d 873 (Md. 2020) (holding that an economic regulation did not violate due process, but that it was unconstitutionally vague); *Jackson v. Raffensperger*, 843 S.E.2d 576, 578 (Ga. 2020) (holding that certain occupational licensing requirements violated both Georgia's due process and equal protection guarantees); *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 91 (Tex. 2015) (holding that occupational licensing requirements violate TEX. CONST. art. I, § 19, the state's due process clause); *Alabama v. Lupo*, 984 So. 2d 395, 411 (Ala. 2007) (recognizing that economic liberties deserve protection).

113. *Ladd*, 230 A.3d at 1108.

civil or acquired right. The difference between the two classes of rights is significant because a natural right is one that is independent of the government.<sup>114</sup> Meanwhile, a civil right *requires* the existence of government in order to exercise it.<sup>115</sup> Philip Hamburger aptly explains the difference between the two:

[F]reedom of speech or of the press was a right that could be exercised in the absence of government and therefore was considered a natural right, whereas the right of a sheriff to retain his position, notwithstanding his political views, could only be had under government and therefore was distinguished as an acquired right.<sup>116</sup>

The founding generation had great reverence for natural rights. Indeed, they believed that the basic reason for forming a government was to protect these rights: “[T]o *secure these rights*, Governments are instituted among Men[.]”<sup>117</sup> Thus, the *protection* of these rights was at the forefront of their minds when the colonists broke away from England. Consequently, when a government infringes on these rights, “it is the Right of the People to alter or to abolish it, and to institute new Government[.]”<sup>118</sup> John Adams said, “[r]ights that cannot be repealed or restrained by human laws—[are] Rights[ ]derived from the great legislator of the universe.”<sup>119</sup> Moreover, as Alexander Hamilton put it, all civil liberty is “founded in” natural liberty.<sup>120</sup> As such, liberty cannot be wrested away from

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114. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 54 (rev. ed. 2014).

115. See Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *YALE L. REV.* 907, 908 (1993).

116. *Id.*

117. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

118. *Id.*

119. JOHN ADAMS, *A DISSERTATION ON THE CANON AND THE FEUDAL LAW* (1782), *reprinted in* 3 *THE WORKS OF JOHN ADAMS* 335 (Charles Francis Adams ed., 1851).

120. Alexander Hamilton, *The Farmer Refuted* (1775), *reprinted in* 1 *THE WORKS OF ALEXANDER HAMILTON* 53 (Henry Cabot Lodge ed., Fed. ed. 1850).

the people without “the most manifest violation of justice[.]”<sup>121</sup> The founding generation held this view because natural rights were understood to be *more* fundamental than civil rights and so they ought to be *more* fundamentally protected.

This respect for natural rights is not solely an American notion either. Sir William Blackstone, the great English jurist, remarked that the protection of natural rights was “the principal aim of society.”<sup>122</sup> Additionally, the idea that the government could not infringe on a natural right was not merely rhetoric saved for the Declaration of Independence, but rather a legal reality which early American judges sought to protect. For example, Supreme Court Justice Samuel Chase, in the 1798 case *Calder v. Bull*, summed up the Court’s early attitude towards legislation that violated these so-called natural rights:

There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power[.] An A[ct] of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.<sup>123</sup>

And Justice Iredell, concurring in *Calder*, said:

If the Legislature pursue the authority delegated to them, their acts are valid. [ ] If they transgress the boundaries of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust: but in the latter case, they violate *a fundamental law, which must be our guide*, whenever we are called upon as judges to determine the validity of a legislative act.<sup>124</sup>

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121. *Id.*

122. 1 WILLIAM BLACKSTONE, COMMENTARIES \*124.

123. *Calder v. Bull*, 3 U.S. 386, 388 (1798).

124. *Id.* at 399 (Iredell, J., concurring) (emphasis added).

To some extent, this line of thinking continues even today: “laws that violate these [natural] rights do not advance the general welfare or common good. Indeed, they harm it, and by so doing *undermine* the justification for claiming a duty of obedience[]” to those laws.<sup>125</sup>

Therefore, when *Ladd* recognized that the Pennsylvania Constitution protects the right to pursue a chosen occupation under its natural rights clause, it elevated that right to be as important as the right to free speech (as compared to merely treating it as a civil right, such as the right to use public facilities). To reach its conclusion, *Ladd* relied on the Pennsylvania Constitution’s natural rights clause.<sup>126</sup> And that language imitates the language found in the Declaration of Independence.<sup>127</sup> Pennsylvania’s clause states that “[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, *possessing and protecting property* and reputation, and of *pursuing their own happiness*.”<sup>128</sup> As *Ladd* noted, the question essentially is: does the ability to “possess property” and “pursue happiness” encompass the right to pursue a chosen occupation? While the court reasoned that they do,<sup>129</sup> it did not delve into the historical basis for its conclusion.<sup>130</sup> So, while we agree with *Ladd*’s conclusion, one of the chief purposes of this article is to dive deeper into the historical basis for its conclusion. In doing so, our goal is twofold: (1) provide additional support for *Ladd*’s conclusion; and (2) develop an argument for advocates seeking to reduce the burdens of occupational licensing regulations that may be used in the thirty-three other states which also claim to protect natural rights in through their state constitutions.

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125. BARNETT, *supra* note 114, at 85 (emphasis added).

126. PA. CONST. art. I, § 1.

127. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”).

128. PA. CONST. art. I, § 1 (emphasis added).

129. *Ladd v. Real Est. Comm’n*, 230 A.3d 1096, 1108 (Pa. 2020).

130. *Id.*

### C. Identifying a Natural Right

Our ultimate inquiry is whether Article I Section I, the natural rights clause, of the Pennsylvania Constitution protects an individual's natural right to pursue a chosen occupation. Determining whether something is a natural right can be a difficult task because "any such natural law principles may be more difficult to discern and consequently more controversial than the principles of engineering or architecture."<sup>131</sup> That is so because as Justice Iredell put it: "[t]he ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject[.]"<sup>132</sup>

Importantly, because natural rights deserve so much deference,<sup>133</sup> courts ought to take great care before they declare something a natural right lest they do so haphazardly and undercut otherwise legitimate legislative choices. For example, the Kansas Supreme Court recently declared that the Kansas Constitution's natural rights clause protects a natural right to end a pregnancy.<sup>134</sup> However, as argued in a forthcoming law review article, the court's analysis on the question was shoddy and incomplete.<sup>135</sup> And, when courts conduct an incomplete analysis, they risk creating more problems than they solve. Thus, before any court declares a right to be a natural right, it must exercise prudence. Therefore, we will (and urge courts to) heed to the advice Professor Barnett, relying on former Ohio Senator John Sherman, gave, stating that when courts need to identify the existence of a natural right, they should:

[L]ook first at the Constitution of the United States as the primary foundation of authority. If that does not define the right they will look for the unenumerated powers to the Declaration of American Independence, to every scrap of

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131. Randy E. Barnett, *A Law Professor's Guide to Natural Law and Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 655, 657 (1997).

132. *Calder v. Bull*, 3 U.S. 386, 399 (1798) (Iredell, J., concurring).

133. *See generally* Hermansen, *supra* note 21.

134. *Hodes v. Schmidt*, 440 P.3d 461 (Kan. 2019).

135. *See generally* Skylar Reese Croy & Alexander Lemke, *An Unnatural Reading of History: The Revisionist History of Abortion in Hodes v. Schmidt*, 32 U. FLA. J.L. & PUB. POL'Y (forthcoming 2021) (manuscript at 1) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3708558](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3708558)).

American history, to the history of England, to the common law of England, the decisions of Lords Mansfield and Holt, and so on back to the earliest recorded decisions of the common law. There they will find the fountain and reservoir of the rights of Americans as English citizens.<sup>136</sup>

Importantly, “judges should exercise caution and restraint before declaring a natural right—and they should do so only after an exhaustive search of the historical record.”<sup>137</sup> We will borrow a lesson from the Wisconsin Supreme Court, where two dissenting judges interpreted that state’s natural rights clause in another economic liberty case using historical sources:

[The] framers of our state constitution expressly incorporated language from the Declaration of Independence, including liberty among those inherent rights governments are instituted to protect. Therefore, we may ascertain the original public meaning of liberty by considering the documented perspective of our nation’s founders, in particular the principal author of the Declaration of Independence, Thomas Jefferson.<sup>138</sup>

Because the Pennsylvania Constitution also uses Thomas Jefferson’s words, we need to conduct a historical inquiry to understand what he meant by them when he wrote these words in the Declaration of Independence. We will further consider what Jefferson’s mentors and contemporaries thought on the matter and what early American courts and thinkers considered when they examined laws regulating economic activity.<sup>139</sup>

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136. BARNETT, *supra* note 114, at 67.

137. Croy & Lemke, *supra* note 135, at 42.

138. See Porter v. State, 913 N.W.2d 842, 855 (2018) (Bradley, J., dissenting).

139. We do not purport to engage in an *exhaustive* historical survey. That is beyond the scope of this paper, which is to examine the viability of Ladd’s claim that the right to pursue a chosen occupation is within the original understanding of what a natural right is. See generally Timothy Sandefur, *The Right to Earn a Living*, 6 CHAPMAN L. REV. 207 (2003) (giving a more robust historical analysis).

### 1. The Pre-Jefferson Understanding of Economic Liberty

Before delving into what Jefferson thought about the “right to pursue a chosen occupation,” it would be helpful to understand the thoughts of Jefferson’s mentors on the subject. It is well-known that American jurisprudence owes much to its English ancestor, and perhaps its two most important ancestors are Sir William Blackstone and Lord Edward Coke. It is said that Blackstone “almost singlehandedly shaped the course of American law.”<sup>140</sup> He had a “prime influence on the Declaration of Independence.”<sup>141</sup> As to Coke, “no writer in the intervening period approached Lord Coke in providing as complete and authoritative [an] overview of the common law.”<sup>142</sup> Specifically, Thomas Jefferson called Coke the “father” of legal science.<sup>143</sup>

Blackstone’s message could not be more clear: “At common law every man might use what trade he pleased . . . .”<sup>144</sup> Coke provides a bit more insight, and, as one scholar put it, he may “rightly be regarded as the founding father of what is now called ‘economic substantive due process.’”<sup>145</sup> In Coke’s day, “the right of the king to control the economy *was* limited at common law[.]”<sup>146</sup> That was so because “[t]he right to support oneself by a lawful calling was not only central to the health of the state, but to the lives of citizens.”<sup>147</sup> Therefore, Coke vigorously defended the free choice of occupation throughout his various opinions. This defense, however, was “not intended to protect the rich, but exactly the opposite: to defend the poor from legal restrictions on the freedom which gave them a chance to work their way out of poverty.”<sup>148</sup> For he said, “[n]o man ought to be put from his livelihood without answer.”<sup>149</sup>

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140. Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 731 (1976).

141. *Id.* at 731–32 (citation omitted).

142. Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought To Be*, 78 ST. JOHN’S L. REV. 725, 776–77 (2004).

143. L.K. Caldwell, *The Jurisprudence of Thomas Jefferson*, 18 IND. L.J. 193, 205 (1943) (citations omitted).

144. 1 WILLIAM BLACKSTONE, COMMENTARIES \*427.

145. Sandefur, *supra* note 139, at 208.

146. *Id.* at 210.

147. *Id.* (footnote omitted).

148. *Id.* at 215.

149. EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF

Importantly, Coke expressly condemned an early form of occupational licensing: mandatory apprenticeships.<sup>150</sup> In *Allen v. Tooley*, an upholsterer was sued for failing to fulfill his apprenticeship requirement before opening up his practice.<sup>151</sup> Coke, ruling in favor of the upholster, said that he had the right “to use any trade thereby to maintain himself and his family[.]”<sup>152</sup> After his time on the bench, Coke wrote vigorously against the imposition of restriction on engaging in trade: “if a graunt be made to any man, to have the sole making of cards, or the sole dealing with any other trade, that graunt is against the liberty and freedom of the subject[.]”<sup>153</sup>

## 2. Jefferson and Contemporaries

Jefferson put great stock in what Blackstone and Coke said.<sup>154</sup> As for Jefferson, he wrote: “everyone has a natural right to choose for his pursuit such one of them as he thinks most likely to furnish him subsistence.”<sup>155</sup> In another instance Jefferson said: “a wise and frugal Government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned.”<sup>156</sup> Jefferson’s statements should come to no surprise, as he was also influenced by the Cato Papers, which stated:

[T]he Right of every Man to pursue the natural, reasonable, and religious Dictates of his own Mind; to think what he will, and act as he thinks, provided not to the Prejudice of another; to spend his own Money himself, and lay out the Produce of

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ENGLAND \*47.

150. See *Allen v. Tooley* (1782) 80 Eng. Rep. 1055 (KB).

151. *Id.*

152. *Id.*

153. COKE, *supra* note 149, at \*47.

154. See Caldwell, *supra* note 143, at 206.

155. THOMAS JEFFERSON, THOUGHTS ON LOTTERIES (1826), reprinted in 17 THE WRITINGS OF THOMAS JEFFERSON 449 (Albert Ellery Bergh ed., Definitive ed. 1905).

156. THOMAS JEFFERSON, FIRST INAUGURAL ADDRESS (1801), reprinted in STEPHEN HOWARD BROWNE, JEFFERSON’S CALL FOR NATIONHOOD xv (2003).

his Labour his own Way; and to labour for his own Pleasure and Profit, and not for others who are idle, and would live and riot by pillaging and oppressing him, and those that are like him.<sup>157</sup>

Shortly before Jefferson authored the Declaration of Independence, fellow Virginian George Mason wrote that all men have certain inherent rights: “the enjoyment of life and liberty, with *the means of acquiring* and possessing property, and pursuing and obtaining happiness and safety.”<sup>158</sup> James Madison, one of Jefferson’s closest friends,<sup>159</sup> said that property is not secure

where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called. What must be the spirit of legislation where a manufacturer of linen cloth is forbidden to bury his own child in a linen shroud, in order to favour his neighbour who manufactures woolen cloth; where the manufacturer and wearer of woolen cloth are again forbidden the [e]conomical use of buttons of that material, in favor of the manufacturer of buttons of other materials!<sup>160</sup>

Therefore, “in light of Jefferson’s other influences, it is evident that Jefferson’s use of the phrase, ‘life, liberty, and the pursuit of happiness,’ was meant to assert this right of

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157. CATO, AN ENQUIRY IN THE NATURE AND EXTENT OF LIBERTY (Letter No. 62) (1721), *reprinted in* DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT 15 (2011). Importantly, Cato’s Letters were a “major influence” on Thomas Jefferson. *Porter v. State*, 913 N.W.2d 842, 856 (2018) (Bradley, J., dissenting).

158. Sandefur, *supra* note 139, at 220 (quoting ROBERT ALLEN RUTLAND, GEORGE MASON: RELUCTANT STATESMAN 111 (1961) (emphasis added)).

159. See generally Lee Wilkins, *Madison and Jefferson: The Making of a Friendship*, 12 INT’L SOC’Y POL. PSYCH. 593 (1992).

160. JAMES MADISON, PROPERTY (1792), *reprinted in* JAMES MADISON: WRITINGS 516 (Jack N. Rakove ed., 1999).

livelihood.”<sup>161</sup> Finally, another scholar said “that to Jefferson liberty as a natural right meant . . . freedom of occupation[.]”<sup>162</sup>

### 3. Post-Jefferson

Having considered what Jefferson’s predecessors and contemporaries thought about whether liberty includes the right to earn a living, we can now turn to early cases dealing with the topic. In 1795, in *VanHorne’s Lessee v. Dorrance*, Supreme Court Justice Patterson said: “No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry . . . [t]he preservation of property then is a primary object of the social compact, and, by the later Constitution of Pennsylvania, was made a fundamental law.”<sup>163</sup> In another case, *Sewall v. Jones*, the Massachusetts Supreme Court held that “[s]tatutes which impose restrictions upon trade or common occupations, or which levy an excise or tax upon them, must be construed strictly.”<sup>164</sup> That is to say, the court, in interpreting the statute, interpreted it in a way that less infringes on a party’s liberties.

The Massachusetts court was not the only court to apply an exacting review of economic regulations. In Alabama, an early court went so far as to say that a man could not be deprived of his right to pursue a lawful living without a full jury trial.<sup>165</sup> The list could go on. However, we defer to the work of Mr. Timothy Sandefur, who compiled a list of about sixty reported cases discussing the right to earn a living.<sup>166</sup> As Mr. Sandefur’s work suggests, *Lochner* did not announce any new, previously unknown principle of law.<sup>167</sup> It was simply a reaffirmation of the norm: the protection of economic rights. Mr. Sandefur argues that it was the 1937 *West Coast Hotel* decision that “was

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161. Sandefur, *supra* note 139, at 219–20.

162. Chester James Antieau, *Natural Rights and the Founding Fathers—The Virginians*, 17 WASH. & LEE L. REV. 43, 64 (1960) (citing Carl Becker, *What Is Still Living in the Political Philosophy of Thomas Jefferson?*, 48 AM. HIST. REV. 691, 695 (1943)).

163. *VanHorne’s Lessee v. Dorrance*, 2 U.S. 304, 310 (1795).

164. *Sewall v. Jones*, 26 Mass. (1 Pick) 412, 421 (Mass. 1830).

165. *In re Dorsey*, 7 Port. 293, 368 (Ala. 1838).

166. Sandefur, *supra* note 139, at 225, 263–66 (listing the cases from 1823–1873 defending the common law right to earn a living).

167. *Id.* at 208.

the new, ahistorical reading of the law.”<sup>168</sup> Thus, while *Lochner*’s conclusion was problematic for a variety of reasons, it needs to be understood that *West Coast Hotel*’s conclusion—that economic liberty deserved only minimal protection—was not a return to some ancient precedent from which *Lochner* wandered away from. Therefore, while we do not advocate the revival of *Lochner*, we must also point out that *West Coast Hotel* is also problematic in its own right.

#### D. Historical Limitations on the Exercise of a Natural Right

History supports *Ladd*’s conclusion that the Pennsylvania Constitution’s natural rights clause, as originally understood, protects the right to pursue a chosen occupation.<sup>169</sup> As such, it can provide a valuable litigation blueprint to opponents of occupational licensing. As previously mentioned, Pennsylvania is just one of thirty-three such states that contain a natural rights clause.<sup>170</sup> These natural rights clauses provide an easy anchor point by which to argue that occupational licensing interferes with one’s “right to pursue a chosen occupation” and, consequently, interferes with the rights guaranteed by the state constitution’s natural rights clause. However, it is equally important to understand that there are limits on the exercise of any natural right.

*Ladd* shifts the conversation from *whether the right exists to how much protection should the right be given*. We do not argue, and history does not support the position, that the right to pursue a chosen occupation is limitless. Historically, courts have allowed governments to impose regulations to protect consumer health and safety.<sup>171</sup> Even *Ladd* recognized that the “right to pursue a chosen occupation” is not absolute and can be limited to “preserve public health, safety, and welfare.”<sup>172</sup> However, limits on the exercise of a right do not negate the existence of the right.

Moreover, the limits recognized by the court in *Ladd*—public health, safety, and welfare—are in accord with the

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168. *Id.*

169. *See supra* notes 27–30.

170. *See supra* note 39.

171. *See Sandefur, supra* note 139, at 213.

172. *Ladd v. Real Estate Comm’n*, 230 A.3d 1096, 1108 (Pa. 2020).

traditional limiting principles on exercising any natural right. The founders generally agreed on this principle: “Being equally free, individuals did not have a right to infringe the equal rights of others, and, correctly understood, even self-preservation typically required individuals to cooperate—to avoid doing unto others what they would not have others do unto them.”<sup>173</sup> That is, a person can generally exercise his or her natural rights up until the point the exercise of that right harms others. In other words, “natural rights define a private domain within which persons may do as they please, provided their conduct does not encroach upon the *rightful* domain of others.”<sup>174</sup> We can see this limiting principle at work in a very straightforward example. For instance, bodily integrity is considered one of the “most cherished of rights.”<sup>175</sup> But even that right is limited, as certain persons can be involuntarily committed if they pose a danger to themselves or others.<sup>176</sup>

Therefore, not even the founding fathers or their predecessors argued for unbridled economic liberty. Blackstone once said: “This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, *unless by the law of nature*[.]”<sup>177</sup> That is to say, “[t]he natural law accepted by these men stood not only for the proposition that man is social by his nature, but also that his existence in society necessarily imposes limitations upon the enjoyment of his natural rights.”<sup>178</sup>

Accordingly, even state courts that protect economic freedom do not leave that freedom unbridled. Health and safety can often provide valid justification for limiting the exercise of these rights, with evidence, for licensing, but quality alone does not. So far, as we are able to discern, there are two predominant

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173. Hamburger, *supra* note 115, at 924 (footnote omitted).

174. BARNETT, *supra* note 114, at 58 (emphasis added).

175. Caitlin E. Borgmann, *The Constitutionality of Government-Imposed Bodily Intrusions*, 2014 U. ILL. L. REV. 1059, 1059 (2014).

176. See *Standards for Involuntary Commitment (Assisted Treatment) State-by-State (Source Treatment Advocacy Center)*, MENTAL ILLNESS POL’Y ORG., <https://mentalillnesspolicy.org/national-studies/state-standards-involuntary-treatment.html> (last visited June 5, 2021) (listing states containing the statutes for involuntary commitment for health or safety reasons).

177. BLACKSTONE, *supra* note 122, at \*125 (emphasis added).

178. Antieau, *supra* note 162, at 55.

standards state courts apply when reviewing economic regulations: “rational basis” and “heightened rational basis review.”<sup>179</sup> For example, *Ladd* subjects economic regulations to a “heightened rational basis review.”<sup>180</sup> However, other states subject it to less scrutiny. For example, in *Patel v. Texas Department of Licensing and Regulation*, commercial eyebrow threaders successfully challenged a Texas occupational licensing scheme that required them to complete 750 hours of training before obtaining their license.<sup>181</sup> The court concluded that the scheme deprived the challengers of the due process of law guaranteed by the Texas Constitution.<sup>182</sup> However, in reaching that conclusion, the Texas Supreme Court still adhered to the standard “rational basis” test, which put the onus on the challengers to show that the licensing scheme was “so oppressive” that it violated the Texas Constitution.<sup>183</sup>

At the end of the day, each state supreme court is more than capable of choosing the proper standard demanded by its constitution, and it is not our purpose to outline the pros and cons of each standard. Rather, our purpose is to highlight that *Ladd* recognizes a right to pursue a chosen occupation and protects that right. Additionally, no court, other than *Ladd*, to our knowledge, has gone so far as to protect the right to pursue a chosen occupation as a natural right.<sup>184</sup> However, if other courts do, they must confront the reality that natural rights arguably deserve more protection than mere civil rights.<sup>185</sup> Accordingly, advocates in those courts can make a compelling

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179. This standard goes by many other names as well: “rational basis with bite,” “rational basis with teeth,” and “rational basis with economic bite.” While the formulation of this test varies depending on the jurisdiction, its essential inquiry is: what is the “actual *rationality*” behind the law and it scrutinizes “the law’s actual *basis*.” See *Patel v. Tex. Dep’t of Licensing & Regul.*, 469 S.W.3d 69, 98 (Tex. 2015) (Willet, J., concurring).

180. *Ladd v. Real Est. Comm’n*, 230 A.3d 1096, 1110 (Pa. 2020).

181. *Patel v. Tex. Dep’t of Licensing & Regul.*, 469 S.W.3d 69, 91 (Tex. 2015).

182. *Id.* at 90.

183. *Id.*

184. In fact, the only other example we could find of a court reaching such a conclusion comes from the two dissenting justices in *Porter v. State*, who determined that Wisconsin’s natural rights clause guaranteed an inherent and fundamental right to economic liberty. *Porter v. State*, 913 N.W.2d 842, 859 (2018) (Bradley, J. & Kelly, J., dissenting).

185. See generally Hermansen, *supra* note 21.

argument that economic regulations—such as burdensome occupational licensing schemes—which interfere with the right to pursue a chosen occupation *ought to be viewed with more scrutiny*, either strict scrutiny<sup>186</sup> or the heightened rational basis test outlined in *Ladd*.<sup>187</sup> The latter test, as one law professor put it:

would require that the legislation at issue actually be reasonably related to its legislative purpose, and that the purpose be valid. Such a test would allow courts to better protect rights, while at the same time retain the benefits of tiered scrutiny as it currently exists. By allowing courts to inquire into the purpose behind the legislation and to look at the link between the ends and the means, courts will no longer have to try to find some way around the test in hard cases, and the doctrine will become more consistent and legitimate.<sup>188</sup>

Even if the right to choose one's occupation is a natural right, the government can impose regulations on that right where the health and safety of others may be at risk. For instance, licensing requirements may very well be more easily justified for medical professions. It is much harder to justify licensing requirements, however, for florists or interior designers. In response, many advocates for occupational licensing attempt to justify licensing requirements on the basis that licensing can improve the quality of goods and services delivered to customers. However, the health and safety justifications are different in kind from quality justifications. Each person has a right to not be harmed by another person, but people do not have a right to say, a high-quality florist. So, even setting aside the fact that ensuring the quality of goods and services is not a justified limitation on a natural right (unless the quality directly affects the health and safety of the consumer), recent research does not support the position that

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186. When a court reviews a law under the strict scrutiny standard the law (1) must further a compelling interest; and (2) be narrowly tailored to achieve that interest. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

187. *Ladd v. Real Est. Comm'n*, 230 A.3d 1096, 1110 (Pa. 2020).

188. *Jackson*, *supra* note 98, at 493.

licensing *even increases quality*—thereby, undermining this secondary justification for licensing. A report by the White House Council of Economic Advisors under the Obama Administration, along with Department of the Treasury and Department of Labor, found that licensing generally neither improves quality nor health and safety: “With the caveats that the literature focuses on specific examples and that quality is difficult to measure, most research does not find that licensing improves quality or public health and safety.”<sup>189</sup> A review of the nineteen empirical studies on the subject shows that 84% of studies show occupational licensing to have a neutral or negative effect on the quality of goods and services provided; the remaining three studies, which showed positive effects on quality, were specific to professions in the medical field or to the policy of reciprocal licensing between states.<sup>190</sup>

#### E. The Limitations of *Ladd*-type Litigation

While natural rights clauses may appear to provide an easy opportunity for litigants challenging occupational licensing, they are likely to run into a potential obstacle—a catch-22 situation. The “conservative” judges who are generally the most likely to be eager to restrict burdensome occupational licensing regulations, might be the most hesitant to find unenumerated natural rights in their own state constitutions. That is to say, by using a natural rights clause to protect unenumerated rights, these judges are likely cognizant of the risk opening up a Pandora’s box: the use of these clauses can evolve into mini-substantive due process fonts where “new” rights can be discovered whenever the bench decides to go looking for them. Justice Antonin Scalia said the way the federal court interprets substantive due process causes it to effectively operate as a “mere springboard[] for judicial lawmaking.”<sup>191</sup> As one law professor put it: “Many scholars have discussed natural law and natural rights, and often they have employed these ideas to claim the existence of unwritten constitutional rights or to claim

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189. DEPT. OF TREASURY ET AL., *supra* note 9, at 13.

190. See McLaughlin et al., *supra* note 18, at 29–31 tbl. 3.

191. Antonin Scalia, *Common-Law Courts in a Civil-Law System*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25 (2d. ed., 2018).

that constitutional rights should be expansively defined.”<sup>192</sup> In part for this reason, legislation has to date been the most obvious approach to reducing unjustified occupational licensing regulations.

While it remains to be seen how successful this method will be, *Ladd* does ultimately represent a new approach for litigation which may open the door for larger scale reforms.

#### IV. CONCLUSION

Arbitrary occupational licensing regulations have increased over the last sixty years due to a rapid expansion in requirements and anti-competitive rent-seeking behavior by professional associations and others. Sara Ladd, the litigant in the *Ladd* case, is not alone in having to face down a burdensome occupational licensing scheme. In 2009, Ash Patel moved from India to Texas to begin his own version of the American Dream: opening a small eyebrow threading salon.<sup>193</sup> However, Texas required him to obtain an expensive cosmetology license and training (that taught very little about eyebrow threading).<sup>194</sup> Mr. Patel shut down his business and went to court where, six litigation-filled years later, he eventually regained his right to operate his business.<sup>195</sup> Ms. Ladd and Mr. Patel are fortunate, and they are among the few that have won court cases of this kind. Yet, there remains hundreds of professions across the United States harnessed with unjustified barriers to entry, imposing massive economic costs that fall disproportionately on the shoulders of those least positioned to afford them.

However, progress is being made. Legislative reform, while slow to date due to the local nature of licensing laws, has received bipartisan support. But until such time as legislative reform is widespread, persons like Ms. Ladd and Mr. Patel will likely need to resort to legal challenges as the most direct route for tackling the immense burdens imposed by unjustified occupational licensing.

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192. Hamburger, *supra* note 115, at 907.

193. *Ash Patel*, INST. FOR JUST. (Dec. 8, 2009), <https://ij.org/client/ash-patel/>.

194. *Id.*

195. *See generally* *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 69 (Tex. 2015).

We believe *Ladd* provides a compelling example of successful state court litigation in this area. *Ladd* recognized a natural right to pursue a chosen occupation, therefore calling into question the legitimacy of restrictions to that right—namely, it calls into question the legitimacy of unjustified occupational licensing which restrict the exercise of that right. *Ladd's* holding is not some far-fetched decision with no basis in the law. The founding fathers clearly identified the freedom to choose one's occupation as an essential component of the right to pursue happiness, a position firmly founded on the English common law tradition as interpreted by Blackstone and Coke. Opinions of U.S. courts in the nineteenth century largely reinforced such an interpretation. *Ladd* simply recognizes that this right is protected by the natural rights clause of the Pennsylvania Constitution. This recognition is especially relevant for the thirty-three states with identical or substantially similar natural rights clauses in their respective constitutions whose courts may be inclined to follow *Ladd's* example. It remains to be seen what impact *Ladd* may have in Pennsylvania and if it will lead to a more systematic review of all occupational licensing in the state. If courts recognize the right to pursue a chosen occupation as a natural right, courts will be forced to confront the fact that natural rights, by their status as such, deserve a substantial amount of protection.<sup>196</sup> Thus, *Ladd* could potentially signal the beginning of a period of increased judicial scrutiny over occupational licensing regulations and compliment the positive bipartisan trend in state legislative reforms by systematically challenging those occupational licensing requirements which are anti-competitive and which lack proper justification.

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196. See Hermansen, *supra* note 21.