RECENT CASES

RATIONAL BASIS REVIEW — SUBSTANTIVE DUE PROCESS — EIGHTH CIRCUIT UPHOLDS LICENSING REQUIREMENT FOR AFRICAN-STYLE HAIR BRAIDERS. — *Niang v. Carroll*, 879 F.3d 870 (8th Cir. 2018).

Federal courts articulating a rational basis for economic legislation are often like an ice cream package touting the health benefits of calcium — so long as they can identify 1 pro, they will disregard 100 cons. In the words of Justice Stevens, rational basis scrutiny "is tantamount to no review at all."[1] Recently, in *Niang v. Carroll*,[2] the Eighth Circuit applied rational basis review in upholding the constitutionality of Missouri laws that prohibit braiding hair for pay without a cosmetology license. Despite holding that the licensing scheme was rationally related to the State's interests in public health and consumer protection,[3] the panel expressed some uncertainty articulating what a rational relation demands: "If there's a requirement of some degree of fit, how much is required?"[4] and "where is this line that we need to draw?,"[5] the panel asked during oral argument. While such questions naturally eschew bright-line answers, the Supreme Court has already developed a quantitative-based scrutiny to guide "rational basis" review of litigants' economic substantive due process rights — in the context of assessing punitive damages.[6] Adopting a similar framework to review of occupational licensing laws could offer a more meaningful and uniform approach to defining the "rational" in rational basis review.

As a young girl in Senegal, Ndioba Niang learned African-style hair braiding (braiding) from her family and friends.[7] In 1998, Niang immigrated to St. Louis, Missouri,[8] and opened a salon where she exclusively braids hair.[9] She does not wash, cut, color, heat, or apply any chemicals to her clients' hair.[10] Yet because Missouri's Board of Cosmetology and Barbers decided braiding falls within the definition of cosmetology and

---

1 FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring); *see also* Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1485 (2008).

2 879 F.3d 870 (8th Cir. 2018).

3 *Id.* at 874 (quoting Gallagher v. City of Clayton, 699 F.3d 1013, 1019 (8th Cir. 2012)).

4 Oral Argument at 20:00, *Niang*, 879 F.3d 870 (No. 16-3968), media-oa.ca8.uscourts.gov/OAaudio/2017/9/163968.MP3 [https://perma.cc/X58H-6X5S].

5 *Id.* at 14:23.

6 *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–85 (1996).

7 Plaintiffs' Statement of Uncontroverted Material Facts ¶ 10, Niang v. Carroll, No. 4:14-CV-1100, 2016 WL 5076170 (E.D. Mo. Sept. 20, 2016) [hereinafter Statement of Facts].

8 *Id.* ¶ 15.

9 *Id.* ¶ 74.

10 *Niang*, 2016 WL 5076170, at *3.

barbering,[11] it is a criminal offense in Missouri to braid hair for pay without a cosmetology or barber's license.[12]

A cosmetology license requires an applicant to either work 3000 hours as an apprentice under a licensed cosmetologist, or pay thousands of dollars to complete 1500 hours of training at a licensed cosmetology school.[13] A barber's license similarly requires 2000 hours as an apprentice or 1000 hours at a licensed barber school.[14] These licensing regulations have been enforced against numerous braiding practitioners[15] by the eleven-member Board, nine of whom are barbers, cosmetologists, or licensing school owners.[16] Fearing an enforcement action, Niang completed part of the apprenticeship requirement but lost interest as the program did not offer instruction in braiding and her licensing supervisor had very limited knowledge of the skill.[17] As the sole owner of her business, Niang feared she would not be able to keep her business open if she were forced to spend thousands of hours learning skills she did not consider relevant to the braiding profession; nor could she afford to pay several thousand dollars to fulfill the state-mandated education.[18]

In 2014, the Institute for Justice, a nonprofit libertarian law firm,[19] filed a complaint in the U.S. District Court for the Eastern District of Missouri on behalf of Niang and fellow Missouri braider, Tameka Stigers.[20] Niang and Stigers requested declaratory relief stating that Missouri's licensing regime violated their Fourteenth Amendment rights to substantive due process as well as an injunction preventing any enforcement action against their businesses.[21]

Since the braiders' economic interests did not implicate a fundamental right, the court held, the licensing regime would be sustained as long as it "rationally related to a legitimate government interest."[22] And since

---

[11] *Id.* at *6.

[12] MO. REV. STAT. §§ 328.160, 329.250 (2016).

[13] *Id.* § 329.050(2)–(3) (providing a 1220-hour exception for students at public vocational technical schools); *see Niang*, 2016 WL 5076170, at *4–6.

[14] § 328.080(3); *see Niang*, 2016 WL 5076170, at *5.

[15] *Niang*, 2016 WL 5076170, at *9 (acknowledging "at least eighteen enforcement actions" in recent years).

[16] § 329.015(2). The other two members are ordinary public citizens. *Id.*

[17] Statement of Facts, *supra* note 7, ¶¶ 17–19.

[18] *Id.* ¶¶ 21–23.

[19] *See About Us*, INST. FOR JUST., ij.org/about-us [https://perma.cc/7MVH-GZGT].

[20] *Niang*, 2016 WL 5076170, at *3, *6.

[21] *Id.* at *7. After discovery, both sides moved for summary judgment. *Id.* Niang also brought a claim under the Equal Protection Clause, arguing the Clause "protect[s] not only similarly situated individuals from disparate treatment, but also differently situated individuals from similar treatment." *Id.* at *10. The District Court rejected this "invert[ed]" understanding of the Clause, however, and held that the Missouri licensing regime's failure to differentiate between braiders and cosmetologists did not form a viable Equal Protection claim. *Id.*; *see also id.* at *12.

[22] *Id.* at *13.

Niang had conceded the State's alleged "interests in promoting the public health and protecting consumers" were legitimate, the only task left for the court was to determine if the plaintiffs could prove the licensing regime was *not* "rationally related to" these goals.[23] Niang maintained that braiding does not interfere with the State's public health concerns since any possible connection between her occupation and the licensing requirements was so attenuated that the laws could not plausibly further the State's objectives.[24] She compared Missouri's licensing regulations to those in *Cornwell v. Hamilton*[25] and *Clayton v. Steinagel*,[26] in which California and Utah district courts struck down similar cosmetology licensing requirements as applied to braiding businesses.[27] Despite acknowledging the *Clayton* and *Cornwell* courts' "commonsense persuasive force," the district court disregarded those opinions since they had applied a "more stringent" form of rational basis review that "would not pass muster in the Eighth Circuit."[28]

The court was sympathetic to the fact that braiding "d[id] not fit comfortably within"[29] Missouri's licensing statutes, but it nevertheless held that "this marginal overlap"[30] was not unconstitutional under the Supreme Court's standard for rational basis review — established in the seminal case *Williamson v. Lee Optical of Oklahoma, Inc.*[31] — since there was "an evil at hand for correction" and the State's licensing scheme "was a rational way to correct it."[32] Accordingly, the court granted summary judgment for the Board.[33]

The Eighth Circuit succinctly affirmed the district court's ruling and endorsed its reasoning. Writing for the panel, Judge Benton stressed rational basis review's deferential standard, describing it as the "paradigm of judicial restraint."[34] Even if "erroneous,"[35] the Board's assertion that braiding could pose health risks such as "hair loss, inflammation, and scalp infection" sufficed,[36] the panel held, to provide "some

---

[23] *Id.* at *14.
[24] *See id.*
[25] 80 F. Supp. 2d 1101 (S.D. Cal. 1999).
[26] 885 F. Supp. 2d 1212 (D. Utah 2012).
[27] *See Niang*, 2016 WL 5076170, at *18.
[28] *Id.* at *19.
[29] *Id.*
[30] *Id.* at *18.
[31] 348 U.S. 483 (1955).
[32] *Niang*, 2016 WL 5076170, at *17 (quoting Merrifield v. Lockyer, 547 F.3d 978, 988 (9th Cir. 2008) (quoting *Lee Optical*, 348 U.S. at 488)).
[33] *Id.* at *19.
[34] *Niang*, 879 F.3d at 873 (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 (1993)). Judge Benton was joined by Judges Colloton and Kelly.
[35] *Id.* at 874 (quoting *Beach Commc'ns*, 508 U.S. at 320).
[36] *Id.* at 873.

footing in the realities of the subject addressed by the legislation."[37] Judge Benton rejected Niang's contention that an exception Missouri had enacted to permit braiding for pay at "public amusement" and "entertainment venue[s]" undermined the licensing regime's rationality[38] since the legislature was not required to "choose between attacking every aspect of a problem or not attacking the problem at all."[39] He also embraced two other potential government interests the district court had contrived on its own: "stimulating more education on African-style braiding and incentivizing braiders to offer more comprehensive hair care."[40] That these reasons were not offered by the State was not a problem, Judge Benton wrote, since the braiders' burden required they negate "every conceivable basis" for the regulation.[41]

Despite the Board's conceding that, at most, only 10% of the state-mandated education was relevant to the braiding profession, the Eighth Circuit held it was compelled to accept the "imperfect fit between means and ends"[42] since *Lee Optical* grants legislatures the freedom to exact "needless, wasteful requirement[s]" that are not "in every respect logically consistent with its aims."[43] At the core of its decision, the panel concluded, was the determination that a licensing scheme's pros and cons are to be balanced by the legislature and not the courts.[44]

Niang of course can be defended as a faithful application of *Lee Optical*'s judicial deference to economic legislation. This capitulation to virtually any interest the government writes in its briefs has permitted the explosion of occupational licensing in recent decades, resulting in overly burdensome regulations that disproportionately hurt minorities.[45] But *Lee Optical* is not the final word on economic substantive due process. In recent decades, the Court has adopted a more rigorous framework to assess arbitrary deprivations of property in the form of excessive jury awards. Adopting a similar approach to arbitrariness review of occupational licensing laws could provide a more rational "rational basis" scrutiny.

When *Lee Optical* was decided in the 1950s, around 5% of professionals needed a state-level license; today roughly a quarter of American workers must be licensed.[46] And licensing is not a particularly partisan

---

[37] *Id.* at 874 (quoting Heller v. Doe, 509 U.S. 312, 321 (1993)).

[38] MO. REV. STAT. § 316.265 (2016); *Niang*, 879 F.3d at 874.

[39] *Niang*, 879 F.3d at 874 (quoting United Hosp. v. Thompson, 383 F.3d 728, 733 (8th Cir. 2004)).

[40] *Id.* at 873.

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

[42] *Id.* at 874 (quoting *Heller*, 509 U.S. at 321).

[43] *Id.* (quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487 (1955)).

[44] *Id.* at 874–75.

[45] *See* Stuart Dorsey, *Occupational Licensing and Minorities*, 7 LAW & HUM. BEHAV. 171, 172 (1983).

[46] *See* DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, LICENSE TO WORK: A

issue.[47] Economic models estimate licensing laws may cost nearly three million jobs nationwide, raise expenses by over $200 billion each year, and decrease the availability of goods and services.[48] Licensing laws especially harm minorities, immigrants, former convicts, and low-income individuals for whom exams, paperwork, educational requirements, and licensing fees impose particularly steep barriers.[49] Further, because each licensing regime affects relatively few voters, those who are excluded from a profession often "lack the political power to combat an organized, licensed interest group."[50]

While *Lee Optical* may have effectively closed one path to "Scrutiny Land,"[51] there has been a "partial revival" of economic substantive due process in the Court's more recent scrutiny of punitive damages.[52] Worried about "the lack of consistency" and "objective external standards,"[53] the Court first suggested that excessive jury awards could violate the Due Process Clause in *Pacific Mutual Life Insurance Co. v. Haslip*.[54] It refused to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable"[55] award but concluded that the state's discretion in achieving its interests of deterrence and retribution is subject to "reasonable constraints."[56] In subsequent cases, the Court signaled it would look "for evidence providing at least a *rational basis* for the particular deprivation of property imposed by the State,"[57] and held that "plainly arbitrary and

---

NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING 6 (2d ed. 2017) [hereinafter LICENSE TO WORK], ij.org/report/license-work-2/ [https://perma.cc/L7E5-6D2L].

47 A 2015 White House study under the Obama Administration concluded, "There is evidence that licensing requirements raise the price of goods and services, restrict employment opportunities, and make it more difficult for workers to take their skills across State lines." DEP'T OF TREASURY OFFICE OF ECON. POLICY ET AL., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 3 (2015) [hereinafter 2015 REPORT], https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf [https://perma.cc/SH9C-R3UJ].

48 LICENSE TO WORK, *supra* note 46, at 9; *see also* 2015 REPORT, *supra* note 47, at 5.

49 *See* 2015 REPORT, *supra* note 47, at 4–5; LICENSE TO WORK, *supra* note 46, at 9; Dorsey, *supra* note 45, at 179 ("The evidence suggests that minorities, the poor, and the less-educated bear a disproportionate share of the costs of occupational licensing.").

50 Brief of Amici Curiae Cato Institute et al. at 20, *Niang*, 879 F.3d 870 (No. 16-3968) (citing Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 50 ("[S]cattered individuals who are denied access to an occupation by State-enforced barriers are about as impotent a minority as can be imagined.")).

51 Barnett, *supra* note 1, at 1485.

52 KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 505 (19th ed. 2016); *see also* Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 528–29 (2008).

53 Laura J. Hines & N. William Hines, *Constitutional Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma*, 66 HASTINGS L.J. 1257, 1260 (2015).

54 499 U.S. 1 (1991).

55 *Id.* at 18.

56 *Id.* at 20.

57 Honda Motor Co. v. Oberg, 512 U.S. 415, 429 (1994) (emphasis added).

oppressive" awards violate the Due Process Clause, which "imposes substantive limits 'beyond which penalties may not go.'"[58] The Court also repeated dicta suggesting that a compensatory-to-punitive-damages ratio of 1:4 "'may be close to the line' of constitutional permissibility."[59]

Then, in *BMW of North America, Inc. v. Gore*,[60] the Court overturned a jury award it described as so "breathtaking" it would "surely 'raise a suspicious judicial eyebrow.'"[61] Because the award was "grossly excessive" in relation to the state's interests, the Court held, "it enter[ed] the zone of arbitrariness that violates the Due Process Clause."[62] More importantly, *Gore* established a framework to guide the Court's arbitrariness review. After "identification of the state interests" to ensure they are "legitimate,"[63] the Court considers whether the penalty is reasonably related to those interests.[64] This inquiry, in turn, considers: 1) the "enormity" of the offense,[65] recognizing that "some wrongs are more blameworthy than others" and 2) the "reasonable relationship" or "ratio"[66] between the award and "the harm likely to result."[67] Post-*Gore*, the Court has maintained its refusal to establish any bright-line rule demarcating the "irrational and arbitrary deprivation of property"[68] but has continued to embrace the 1:4 ratio — adding that "few awards exceeding a single-digit ratio [i.e., 1:9] between punitive and compensatory damages, to a significant degree, will satisfy due process."[69]

Viewed together, this line of cases has fashioned a quantitative, quasi-proportionality rational basis scrutiny that actually has teeth.[70]

---

[58] TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 454 (1993) (plurality opinion) (first quoting Sw. Tel. & Tel. Co. v. Danaher, 238 U.S. 482, 491 (1915); then quoting Seaboard Air Line Ry. v. Seegers, 207 U.S. 73, 78 (1907)).

[59] *Id.* at 459 (quoting *Haslip*, 499 U.S. at 23).

[60] 517 U.S. 559 (1996).

[61] *Id.* at 583 (quoting *TXO*, 509 U.S. at 481 (O'Connor, J., dissenting)).

[62] *Id.* at 568 (citing *TXO*, 509 U.S. at 456 (plurality opinion)).

[63] *Id.*; *see, e.g.*, Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (holding state's desire to punish for harm to unknown third parties is not a legitimate interest).

[64] *Gore*, 517 U.S. at 575–81.

[65] *Id.* at 575 (quoting Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1852)). This inquiry, the Court observed, harks back to the "deeply rooted and frequently repeated" notion of whether the state's deprivation of property is proportionate to the conduct. *Id.* at 575 n.24 (quoting Solem v. Helm, 463 U.S. 277, 284 (1983)).

[66] *Gore*, 517 U.S. at 580.

[67] *Id.* at 581 (quoting *TXO*, 509 U.S. at 460). The Court also provided a third factor: the criminal and civil sanctions for comparable conduct. *Id.* at 583. However, the Court recognized, and practice has borne out, it is the first two inquiries that are, respectively, "the most important," *id.* at 575, and "most commonly cited indicium" in this framework, *id* at 580. *See also* Neil B. Stekloff, Note, *Raising Five Eyebrows: Substantive Due Process Review of Punitive Damages Awards After* BMW v. Gore, 29 CONN. L. REV. 1797, 1822–23 (1997).

[68] *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003).

[69] *Id.* at 425.

[70] *See* Levinson, *supra* note 52, at 529 ("[These cases] demonstrate that substantive due process may be used to challenge arbitrary deprivations of property — not just liberty . . . ."); Alice

While the framework has thus far only been applied to review of jury awards, it displays a willingness to take a meaningful look at whether the state has unconstitutionally impinged on an individual's economic liberty. For this right, which the Court has characterized as not fundamental,[71] *Gore*'s framework offers a uniform approach to challenging claims of arbitrary state action and suggests actual quantitative limits that are especially amenable to occupational licensing cases like *Niang*.

The first step in *Gore* — identifying a legitimate state interest — is effectively the sum total under the *Lee Optical* brand of arbitrariness review. This is not to say the first step is completely impotent. On the contrary, failure to conceive of a legitimate government end has proven dispositive in cases like *Romer v. Evans*[72] and *Lawrence v. Texas*,[73] in which the states' goals were simply not legitimate. Similarly, a majority of circuit courts do not recognize pure economic protectionism as a legitimate government interest.[74] Nevertheless, it is the second step — determining whether the means-to-end fit is rational — that courts have abandoned, creating opinions that are a "mere tautological recognition of the fact that Congress did what it intended to do."[75] It is here that *Gore*'s quantitative-proportionality approach offers to restore meaning to arbitrariness review.

Applying *Gore*'s framework in *Niang* would have allowed the court to engage more seriously and objectively with Ndioba Niang's due process rights. *Gore*'s first step, which is identical to that of *Lee Optical*, would be met here since she conceded that the state's interests in public health and consumer protection were legitimate.

The second step would entail a two-part inquiry into how well the licensing regulations "fit" the asserted interest. First, the court would consider the "enormity" of the potential harm and whether the response is "reasonable" in proportion to the importance of regulating certain conduct (the proportionality prong). The dangers in *Niang* ranged from potential hair loss and scalp infection to (much more likely) a bad hair day. While the State identified a non-negligible "evil," it is arguably not the type that would justify an upward departure from constitutional presumptions. Second, the court would measure the "ratio" between the licensing criteria that are relevant to achieving the state's interests and the "extra" requirements (the quantitative prong). In other words, courts

---

Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 298–99 (2005).

[71] *See* Barnett, *supra* note 1, at 1486–88.

[72] 517 U.S. 620, 635 (1996).

[73] 539 U.S. 558, 578 (2003).

[74] City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) ("Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected."); *see also* Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002) ("Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose."). *But see* Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004) (holding intrastate economic protectionism *is* a legitimate state interest).

[75] U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 180 (1980) (Stevens, J., concurring).

and counsel would assess what percent of the mandated training hours, licensing test questions, or fees are actually pertinent to the regulated profession. Accepting the Board's concession in *Niang* that only 7–10% of the mandated education was relevant to braiding produces a ratio between 1:10 and 1:14 as a measurement of the relationship between the licensing laws' provisions that are relevant to preventing the potential harm caused by unlicensed braiders and the additional requirements imposed on braiders. As in the punitive damages context, this ratio should be around 1:4 but may exceed 1:9 in cases where the State shows the harm it seeks to deter is substantial. Consistent with the Court's precedent, this is not a bright-line rule, but a presumptive bound above which the government would be forced to justify. Were the Board in *Niang* unable to meet this burden, the court might find the licensing laws sufficiently arbitrary so as to violate Niang's due process rights.

Admittedly, just as determining the reprehensibility of certain behavior necessitates a certain degree of judicial discretion, passing judgment on the potential for harm would entail line-drawing difficulties.[76] But this inquiry would simply help inform the court's determination of the range of appropriate multipliers and would be constrained by constitutional presumptions and precedent regarding the permissible ratio. For example, the *Niang* court could have looked to where other jurisdictions have drawn the line: In *Clayton*, the State admitted that "1400 to 1600 of the 2000 hours of the mandatory curriculum [were] irrelevant to African hairbraiding" (a 1:7 to 1:8 ratio).[77] Likewise, the *Cornwell* court found only 4% of California's curriculum relevant to braiding, but "[f]or purposes of summary judgment," assumed it was less than 10% (between a 1:25 to 1:10 ratio).[78] Further, unlike in other exercises of judicial discretion, the Court has held that *Gore*'s framework is to be reviewed de novo by appellate courts — providing further protection against gamesmanship of the relevant ratio.[79]

Gore's framework affords courts a more coherent approach to an area of law that is riddled with inconsistencies and various levels of "bite."[80] Instead of arguing in the abstract whether it is rational to allow Niang to braid hair at the local rodeo but not in her salon, counsel can objectively demonstrate what percent of Missouri's licensing conditions are relevant to her profession. Quantitative rational basis would thus

---

[76] As quantitative-based precedent develops, litigants can analogize to similar licensing laws in other states or compare how the states' interests are tailored in other occupations.

[77] Clayton v. Steinagel, 885 F. Supp. 2d 1212, 1215 (D. Utah 2012).

[78] Cornwell v. Hamilton, 80 F. Supp. 2d 1101, 1110 (S.D. Cal. 1999).

[79] Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 431 (2001). De novo review would, for example, help prevent courts from broadly or narrowly construing licensing laws' relevance to any given profession in order to reach a desired ratio.

[80] *See generally* Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070 (2015).

help alleviate the frustrating "judicial shrug"[81] evident in cases like *Niang* by compelling the government to engage in a substantive dialogue about the rationality of licensing laws.[82]

Additionally, quantitative presumptions of constitutionality could potentially cure some of the inconsistencies in how courts undertake review of licensing laws. In *Craigmiles v. Giles*,[83] the Sixth Circuit reviewed a Tennessee law that restricted anyone from selling caskets without a funeral director's license. In holding that the licensing scheme violated the casket sellers' due process, the Sixth Circuit observed less than 5% of the mandated curriculum concerned the specific profession of casket selling (a 1:20 ratio).[84] A similar case was later brought in the Tenth Circuit, challenging the constitutionality of Oklahoma's funeral director licensing laws.[85] In addition to the mandatory curriculum, again only 5% of which was relevant to selling caskets, Oklahoma mandated funeral directors embalm at least 25 bodies to be able to sell caskets.[86] The Tenth Circuit, however, disagreed with *Craigmiles* and upheld the licensing laws under *Lee Optical*.[87] More recently, a group of monks that sell hand-made caskets in Louisiana brought the same claim before the Fifth Circuit, which found that "[n]one of [the State's] mandatory training relate[d] to caskets" and sided with the *Craigmiles* court.[88] Quantitative presumptions of constitutionality thus offer a remedy to the current approach under which similar licensing laws violate the federal Constitution in Louisiana and Tennessee but are valid in Oklahoma.

That quantitative rational basis was developed to review jury, and not legislative, decisions is not a per se bar on its application to state licensing regimes. The extreme judicial deference toward occupational licensing laws is often rationalized out of fear of the "*Lochner* bogeyman."[89] But as Justice Stevens noted, "it is not correct to assume that the safeguards in the legislative process have no counterpart in the judicial process."[90] The process of impartial jury selection, their "collective deliberation," and the trial judge's review of the award entitle jury

---

[81] Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 112 (Tex. 2015) (Willett, J., concurring).

[82] Established constitutional baselines could also discourage state legislatures from enacting overly broad licensing regulations.

[83] 312 F.3d 220 (6th Cir. 2002).

[84] *Id.* at 222.

[85] Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004).

[86] *Id.* at 1212–14.

[87] *See id.* at 1225.

[88] St. Joseph Abbey v. Castille, 712 F.3d 215, 218 (5th Cir. 2013).

[89] Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 94 n.11 (Tex. 2015) (Willett, J., concurring) (referencing Lochner v. New York, 198 U.S. 45 (1905)).

[90] TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 456 (1993) (plurality opinion).

awards to a "strong presumption of validity."[91] Moreover, *Gore* itself cites to *Lochner*-era precedent recognizing that "disproportion[ate]" *statutory penalties* violate the Due Process Clause.[92] Although the Supreme Court has not explicitly extended its arbitrariness review of punitive damages to statutory civil penalties, a number of jurisdictions have already employed *Gore*'s quantitative rational basis review to strike down legislatively enacted penalties.[93]

Although *Niang*'s decision to "draw the line" safely within the strictures of *Lee Optical* profoundly affects the lives of Missouri braiders, its logic extends beyond hair braiding. In the modern "gig economy," *Niang* affords scant protection against overly burdensome licensing laws imposed on individuals working in disruptive technologies like Uber and Airbnb.[94] And the Eighth Circuit's insistence that the remedy lies in the legislature overlooks the reality that licensing "laws provide concentrated tangible benefits to organized groups with resources, while the costs . . . are diffused among the public as a whole."[95] As the Court does not seem inclined to resurrect *Lochner* from its anticanon status, a new conceptualization of rational basis is needed — one with objective and measureable constraints that avoids the "sins" of *Lochner*. The Court's foray into quantitative-based arbitrariness review provides more structured guidance to discerning the line between judicial restraint and judicial abdication.[96] *Gore*'s constitutional presumptions present opportunities for increased uniformity in rational basis scrutiny and center argument around tangible indicia of a regulation's "fit" for a given profession — assisting courts to determine when licensing laws enter "the zone of arbitrariness" the Due Process Clause forbids.

---

[91] *Id.* at 456–57.

[92] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996) (quoting St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 67 (1919)).

[93] *See, e.g.*, Parker v. Time Warner Entm't Co., 331 F.3d 13, 26 (2d Cir. 2003) (citing *Gore* and noting a disproportionate "statutory penalty may violate due process"); *In re* Napster, Inc. Copyright Litig., No. C 04-1671, 2005 WL 1287611, at *10 (N.D. Cal. June 1, 2005) (applying *Gore* and observing, "large awards of statutory damages can raise due process concerns"); *see also* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 124–26, 124–25 n.173 (2009) (noting a few courts have embraced *Gore* in the statutory penalty context).

[94] *See generally* Ilya Shapiro & David McDonald, *Regulation Uber Alles: How Governments Hurt Workers and Consumers in the New New Economy*, 2017 U. CHI. LEGAL F. 461 (2018).

[95] John Blevins, *License to Uber: Using Administrative Law to Fix Occupational Licensing*, 64 UCLA L. REV. 844, 869 (2017).

[96] *Cf.* Citizens United v. FEC, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring); Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 98–99 (Tex. 2015) (Willett, J., concurring).