

Licensing Laws: A Historical Example of the Use Of Government Regulatory Power Against African-Americans

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Among the many controversies aroused by Professor Richard Epstein's book, *Forbidden Grounds*, is a dispute over his assertion that the economic subjugation of black Americans between Reconstruction and the modern civil rights era was a result of a combination of Jim Crow laws, actual or threatened private violence, and laws that gave monopoly power to private actors who discriminated against blacks, rather than irrational private discrimination and social custom in a free marketplace.¹ Epstein argues that blacks would have been far better off economically under a laissez-faire system of free labor markets and equal protection of the law.² Critics, however, have taken him to task for not providing sufficient historical evidence to support his position.³

Of course a historical counterfactual cannot be proven, so we cannot be certain how blacks would have fared in a marketplace free from governmental discrimination and private violence. The legacy of government policy, though, has surely been underestimated as a factor in the plight of black Americans. For example, as shall be

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1. *E.g.*, RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 91-129 (1992).

2. *Id.*

3. *E.g.*, Gregory S. Crespi, *Market Magic: Can the Invisible Hand Strangle Bigotry?*, 72 B.U. L. REV. 991, 1010 (1992) (book review); John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1594 (1992) (book review); J. Hoult Verkerke, *Free to Search*, 105 HARV. L. REV. 2080, 2089-94 (1992) (book review).

demonstrated below, white interest groups used occupational licensing laws to stifle black economic progress. While generally not Jim Crow laws per se, the laws were used both in the South and the North to prevent blacks from competing with established white skilled workers.

I. LICENSING LAWS, PEOPLE OF COLOR, AND THE COURTS

The first thing that should be noted about licensing laws is that even if their supporters had the best of intentions, and had no hostility to blacks, the laws would have hurt blacks nonetheless. Because unions did not admit blacks into their apprenticeship training programs and because southern public schools provided blacks with very little vocational training as compared to whites,⁴ skilled black workers generally had little formal training in their professions and therefore often could not satisfy certain licensing requirements despite their practical experience. Moreover, because of discrimination, blacks usually had little formal education, making the typical licensing exam comprised of written sections an insurmountable hurdle to many blacks. Therefore, even purely public-spirited licensing laws, if such things actually existed, necessarily harmed blacks.

The pursuit of the public interest, however, was seldom the sole motivation behind the passage of licensing statutes. States and municipalities frequently passed licensing laws at the behest of the organized members of the licensed profession in order to grant them a state-sponsored monopoly at the expense of those who could not get the license. Even in cases of "hostile" licensing, when the licensing process was originated to regulate an industry in the public interest, generally the licensed group quickly gained control of the licensing process and used it to benefit its members by limiting the number of new entrants, thus assuring those already in the field of higher incomes.⁵

Organized groups of workers controlled the licensing process through their unions or professional societies. Those groups usually excluded blacks, and they used the licensing statutes to prevent blacks from gaining licenses in professions in which they were once numerous — particularly, though far from exclusively, in the South — and to prevent blacks from getting a toehold in other fields.⁶

4. HERBERT R. NORTHRUP, *ORGANIZED LABOR AND THE NEGRO* 38 (1944).

5. See Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 CAL. L. REV. 487, 496-97 n.41 (1965).

6. Richard B. Freeman, *The Effect of Occupational Licensing on Black Occupational Attainment*, in *OCCUPATIONAL LICENSING AND REGULATION* (Simon Rottenberg ed., 1980); Herbert Hill, *Black Labor and Affirmative Action: An Historical Perspective*, in *THE QUESTION OF DISCRIMINATION* 190, 213 (William Darity, Jr. & Steven Shulman eds., 1989) [hereinafter *Affirmative Action*]; cf. LORENZO GREENE & CARTER G.

Occasionally, states or municipalities passed laws explicitly restricting blacks from a profession. A Maryland statute, for example, restricted admission to the bar to white males.⁷ Far more often, however, organized white workers used facially neutral laws that had a plausible public health or welfare justification to keep blacks out of a field.

Indeed, facially neutral licensing laws have a history of being used against racial minorities. *Yick Wo v. Hopkins*,⁸ one of the first Fourteenth Amendment equal protection and substantive due process cases to reach the Supreme Court, involved a San Francisco ordinance that made it unlawful to run a laundry business without having first obtained a license from the City Board of Supervisors. As the case wound its way through the courts, the government asserted that the ordinance was a prophylactic measure against a potentially disastrous fire. The city, however, obviously designed the law to eliminate Chinese laundries that were usually housed in wooden buildings. The Board of Supervisors also administered the law unevenly; whites who owned wooden laundries were able to acquire the necessary operating licenses, while the government prosecuted Chinese laundry owners.⁹ The Supreme Court struck down the law, noting that it violated economic liberty and arguing: "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand . . . the denial of equal justice is still within the prohibition of the Constitution."¹⁰

Despite its potential power, courts rarely relied upon *Yick Wo* in licensing cases. Instead, an 1888 case, *Dent v. West Virginia*,¹¹ in

WOODSON, *THE NEGRO WAGE EARNER* 192 (1969) (blacks in Memphis had trouble passing plumbers license test as early as 1902).

7. The Maryland Supreme Court upheld the law on the strength of *The Slaughter House Cases*, 83 U.S. 36 (1873). *In re Taylor*, 38 Md. 28 (1877); see David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers*, 44 MD. L. REV. 939, 943 (1985). The law was invalidated a few years later in an unreported decision. *Id.* at 1038-39.

8. 118 U.S. 356 (1886).

9. The white owners of steam laundries who competed with the Chinese hand laundries provided the motivating force behind the laundry law. See *In re Wo Lee*, 26 F. 471, 474 (C.C.D. Cal.), *aff'd sub nom. Yick Wo*, 118 U.S. 356 (1886). An analogous situation occurred in Georgia in the 1920s, when white owners of steam laundries persuaded the City of Atlanta to pass an ordinance requiring black washwomen to obtain a certificate that their premises were disease free. The black community understood the ordinance to have discriminatory origins. Edward A. Gaston, *A History of the Negro Wage Earner In Georgia* 292-93 (1957) (unpublished Ph.D. dissertation, Emory University).

10. GASTON, *supra* note 9, at 373-74.

11. 129 U.S. 114 (1888).

which the Court upheld the licensing of physicians on public health grounds, became the most important licensing precedent. The Supreme Court had subsequent opportunities to rule on the question of the licensing of physicians, and invariably sustained the licensing laws.¹² On the strength of those cases, lower courts universally accepted the general proposition that licensing statutes were constitutional.¹³

Nonetheless, it was not inevitable that the *Dent* holding would establish the rule governing licensing challenges. In 1897, the Supreme Court explicitly embraced liberty of contract in *Allgeyer v. Louisiana*, emphasizing the right of a person “to earn his living by any lawful calling.”¹⁴ The most famous liberty of contract case, *Lochner v. New York*,¹⁵ also gave hope to anti-licensing forces. Not only did the decision generally stand for liberty of contract, but the majority in *Lochner* also specifically referred to the dangers of occupational licensing. Justice Peckham, writing for the Court, warned that “interference on the part of the legislatures of the several states with the ordinary trades and occupations seems to be on the increase.”¹⁶ Peckham approvingly cited decisions in which state courts invalidated licensing regulations on the trade of shoeing horses.¹⁷

Yet *Lochner*, like *Yick Wo* and *Allgeyer* before it, had little impact on most state court licensing decisions. As long as the government was able to cite a plausible public health purpose for a licensing statute, it was almost always upheld. This judicial deference allowed racially exclusionary white unions and professional organizations to monopolize certain professions.¹⁸ The rest of this Article will explore three examples of occupations from which blacks were restricted through the application of facially-neutral licensing laws — medicine, plumbing, and barbering.

12. *Watson v. Maryland*, 218 U.S. 173 (1910); *Reetz v. Michigan*, 188 U.S. 505 (1903); *Hawker v. New York*, 170 U.S. 189 (1898); see also *Douglas v. Noble*, 261 U.S. 165 (1923) (upholding licensing of dentists).

13. RICHARD REAVES, THE LAW OF PROFESSIONAL LICENSING AND CERTIFICATION 1 (1984); Friedman, *supra* note 5, at 511. *Dent* was cited as late as 1964 in *Smith v. State of California*, 336 F.2d 530 (9th Cir. 1964), in a case upholding the licensing of engineers. The court relied on *Dent*, noting that while *Dent* applied to medicine, “[t]he principles stated in the *Dent* case have been widely applied by all of the states in a great variety of professions and businesses.” *Id.* at 534.

14. 165 U.S. 578, 589 (1897).

15. 198 U.S. 45 (1905).

16. *Id.* at 60.

17. *Lochner*, 198 U.S. at 63, citing *Bessette v. People*, 193 Ill. 334, 62 N.E. 215 (1901); *People v. Beattie*, 96 A.D. 383, 89 N.Y.S. 193 (1904); *In re Aubry*, 36 Wash. 308, 78 P. 900 (1904).

18. License fees were also used against striking black workers at least one time. W. HARRIS, THE HARDER WE RUN: BLACK WORKERS SINCE THE CIVIL WAR 37 (1982) (introduction of a \$25 license fee requirement broke the strike of Atlanta laundresses in 1881).

A. *Physician Licensing Laws*

The physician licensing laws are a clear example of laws initially passed for a public purpose that wound up hurting blacks unintentionally. The impact of the growth of licensing laws on the number of black physicians was not severe, at first. For example, despite the spread of licensing laws, between 1900 and 1910 the percentage of black physicians in the United States rose from 1.3% to 2%.¹⁹

In 1910, Abraham Flexner published his famous study of medical education in the U.S., known as the Flexner Report. Flexner's study showed that many American medical schools provided severely inadequate education and many doctors were, therefore, incompetent to practice medicine. In response, some states put medical licensure directly in the hands of the American Medical Association (AMA).²⁰ Other states required that potential doctors be graduates of a medical school rated "A" or "B" by the AMA.²¹

Once the AMA took control of the licensing procedure, state physician licensing laws began to have marked effects on the number of black doctors. Most important, they forced five of the seven existing black medical schools — those that educated most black doctors — to close.²² These schools received "C" or lower ratings from the AMA despite desperate attempts by their administrators to raise their standards.²³

With the black community in dire need of physicians, one would have imagined that public-spirited licensing officials would have temporarily bent standards to allow the black schools to catch up. Alternatively, they could have pressured the other medical schools to admit black students. The AMA, though, was concerned mainly

19. Reuben A. Kessel, *The A.M.A. and the Supply of Physicians*, 35 LAW & CONTEMP. PROBS. 267, 270 (1970).

20. FRANCIS DELANCY, *THE LICENSING OF PROFESSIONS IN WEST VIRGINIA* 111-12 & n.76 (1938).

21. HERBERT WALL, *OCCUPATIONAL RESTRICTIONS: A STUDY OF THE LAWS OF EIGHTEEN SELECTED STATES, COVERING THE REQUIREMENTS FOR ENTERING OCCUPATIONS THEREIN* 30 (1929).

22. Kessel, *supra* note 19, at 270. As late as the 1940s approximately 80% of black doctors were receiving their education at the two black medical schools, Howard and Meharry. GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 32, 419 (1943). For a history of how the Flexner Report led to the closure of certain medical schools for blacks, see Todd L. Savitt, *The Education of Black Physicians at Shaw University, 1882-1918*, in *BLACK AMERICANS IN NORTH CAROLINA AND THE SOUTH* 160, 181-85 (Jeffrey J. Crow & Flora J. Hatley eds., 1984). Savitt's article also provides statistics showing the negative effect that state licensing laws had on black medical schools and students. *Id.* at 182-83.

23. Savitt, *supra* note 22.

with the interests of its members, who were, by strict rule, all white.²⁴ Not surprisingly, after 1910 the percentage of black doctors, which had been rising, leveled off.²⁵ The discriminatory effects of facially-neutral physician licensing statutes helped create a shortage of medical personnel to serve the black community that continues to this day.

B. Plumber Licensing Laws

Valid public health rationales for states and municipalities to regulate plumbers existed. Defective and improperly installed plumbing fixtures were responsible for dysentery epidemics in Chicago in 1933 and in Kansas in 1942.²⁶ But licensing statutes allegedly promulgated for public health reasons are susceptible to being used primarily as barriers to entry.²⁷ Yet, for the most part, courts refused to examine the motives behind the statutes or how they were implemented. As a practical matter, courts allowed the interests of black plumbers to suffer without any gain to the public health.

Licensing statutes for plumbers generally delegated the power to license individuals as plumbers to a licensing board composed of members appointed by the mayor and/or city council. Not surprisingly, local plumbers' unions, representing the politically best-organized plumbers, were able to exert a great deal of influence over who was chosen to serve on the board of examiners. The Plumbers' and Steamfitters' Union, affiliated with the American Federation of Labor (AFL), excluded blacks nationally throughout the *Lochner* era.²⁸ Through their influence on boards of examiners, the unions were often able to deny licenses to their black competitors.²⁹

24. DELANCY, *supra* note 20, at 111-15; see generally JAMES G. BURROW, ORGANIZED MEDICINE IN THE PROGRESSIVE ERA: THE MOVE TOWARD MONOPOLY (1977).

25. MYRDAL, *supra* note 22, at 319 Table 3; Kessel, *supra* note 19, at 270. Discrimination in medicine due to licensing was also extremely harmful to Jews. See Reuben Kessel, *Price Discrimination in Medicine*, 1 J.L. & ECON. 20, 47 n.82 (1958); see also Thomas Moore, *The Purpose of Licensing*, 4 J.L. & ECON. 93 (1961) (citizenship requirements were added to licensing laws to keep out Jewish immigrants).

26. Note, *Restriction of Freedom of Entry into the Building Trades*, 38 IOWA L. REV. 556, 557 (1953).

27. Cf. WALTER GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENT RESTRAINTS 114-15 (1968); Friedman, *supra* note 5, at 497 n.41.

28. PHILIP FONER, HISTORY OF THE LABOR MOVEMENT OF THE UNITED STATES: THE POLICIES AND PRACTICES OF THE AMERICAN FEDERATION OF LABOR, 1900-1909 240 (1964) (exclusion of plumbers around turn of the century); DEP'T OF RESEARCH AND INVESTIGATIONS, NAT'L URBAN LEAGUE, NEGRO MEMBERSHIP IN AMERICAN LABOR UNIONS 38 (1930); STERLING SPERO & ABRAM HARRIS, THE BLACK WORKER 58 (1931) (blacks excluded from plumbers' union by tacit agreement); Charles S. Johnson, *Negro Workers and the Unions*, THE SURVEY, Apr. 15, 1928, at 113 (as of 1928, out of 35,000 members of Plumbers' and Steam Fitters' Union none were black, despite 3,600 Negro workers in the trade as of 1928).

29. As Spero and Harris noted in their 1931 study of black workers: "It is generally understood that Negroes are not admitted to the Plumbers' and Steamfitters' Union.

Despite liberty-of-contract arguments made by unlicensed plumbers, state courts almost uniformly upheld the power of the state to license plumbers on public health grounds and rarely looked closely at how licensing was being administered. The judges of the day, infused with Progressive optimism about the benevolence of government and the value of institutionalized expertise, seem to have had little or no awareness of the misuses to which licensing laws could so easily be put. In 1898, for example, the Wisconsin Supreme Court upheld a plumbers licensing law, noting that it did not “anticipate that any examining board would go further than the act requires, and insist upon more than this practical knowledge acquired in the school of experience.”³⁰ The Wisconsin court apparently believed that the licensing authorities’ only interest would be to protect the public health from incompetent plumbers.

Yet by the time the Wisconsin Supreme Court decided *Winkler*, a case had been published in which a party alleged that a licensing board was using discriminatory criteria in making its decisions. In an 1895 New York State case, *People ex rel. Nechamcus v. Warden*,³¹ Peter Nechamcus, a master plumber, complained that he was unable to get a plumber’s license because of his religion and his Russian nationality.³² His brief gave examples of other applicants who had been refused certificates because of their “race and religion” and because they did not belong “to an association of master plumbers.”³³ In other words, Nechamcus argued that the licensing board discriminated against Jews, immigrants, and those who did not belong to a union. He argued that the law was unconstitutional because it created a monopoly and was applied discriminatorily.

One of the plans for disqualifying them is the license law. It requires that every person wishing to practice the plumbing trade pass an examination given under municipal authority.” SPERO & HARRIS, *supra* note 28, at 59; see also RAYFORD LOGAN, THE BETRAYAL OF THE NEGRO 155 (1965); NORTHRUP, *supra* note 4, at 223-24.

Examining boards would require a union apprenticeship before a potential licensee could even qualify to take the licensing examination. Because blacks were banned from union apprenticeship programs, they could not even qualify to take the test. Herman D. Bloch, *Craft Unions and the Negro in Historical Perspective*, 43 J. NEGRO HIST. 10, 23 (1958). Other tactics favored by unions in preventing blacks from getting licenses were requiring a high school diploma and/or requiring a highly subjective personal interview before one could take the exam. WALTER E. WILLIAMS, THE STATE AGAINST BLACKS 94-95 (1982). If those tactics did not work, the examining boards were not above doctoring test scores. *Id.*

30. *State ex rel. Winkler v. Benzenberg*, 101 Wis. 172, 177, 76 N.W. 345, 346 (1898).

31. 144 N.Y. 529, 39 N.E. 686 (1895).

32. *Id.* at 534, 39 N.E. at 687.

33. *Id.*

The court rejected Nechamcus' argument that the law created a monopoly,³⁴ and added — despite *Yick Wo* — that it would not strike down licensing laws even if they were applied in a discriminatory manner:

Nor is the constitutionality of an act to be determined by the manner in which its provisions may be carried out by those upon whom devolves the duty of acting as examiners. If they act unfairly or oppressively, as alleged by the relator in his petition, that is conduct which may call for a remedy against the persons who compose the board; but it does not furnish ground for assailing the validity of the statute.³⁵

The *Nechamcus* decision led to the exclusion of blacks from plumbing in New York City through union control of licensing,³⁶ and became an important precedent upholding exclusionary licensing in other states.

Throughout the late 1890s and early 1900s, state courts continued to uphold the licensing of plumbers on public health grounds.³⁷ In one of the most important and widely cited licensing cases, the Ohio Supreme Court upheld the general authority of the state to license plumbers.³⁸ The court, rejecting a challenge based on *Yick Wo*, cited *Dent* and *Nechamcus* as precedents.³⁹

In the aftermath of this decision, Ohio plumbers' licensing laws, though outwardly passed in order to improve sanitary standards, actually gave control of the field to the racially exclusive plumbers' union.⁴⁰ The union promptly used the laws to exclude their competition, including black plumbers.⁴¹ As a result, by 1910 only five blacks were licensed as plumbers in the entire city of Cleveland, despite the fact that blacks had once been prominent in the skilled trades there.⁴²

None of the plumbers cases discussed above involved black plumbers directly. Nevertheless, the reluctance of the courts to carefully review the substance and application of licensing laws encouraged racist plumbers' unions to boldly push for licensing laws specifically in order to keep blacks out of the profession. A Virginia plumber wrote the following letter, published in the *Plumbers' Journal*, discussing his union's lobbying for a state licensing law that would serve to exclude blacks:

[T]he Negro is a factor in this section, and I believe the enclosed Virginia

34. *Id.* at 539, 39 N.E. at 689.

35. *Id.*

36. HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM* 22 (1977).

37. *See, e.g., Singer v. Maryland*, 72 Md. 464, 19 A. 1044 (Md. App., 1890).

38. *State v. Gardner*, 58 Ohio St. 599, 51 N.E. 136 (1898).

39. *Id.* at 609, 51 N.E. at 138.

40. DAVID A. GERBER, *BLACK OHIO AND THE COLOR LINE, 1860-1915* 303 (1976).

41. *Id.*

42. *Id.*; Hill, *supra* note 6, at 214.

state plumbing law will entirely eliminate him and the impostor from following our craft and I would suggest to the different locals that if they would devote a little time and money they would be able to secure just as good if not a better law in their own state.⁴³

Despite the discriminatory intent, the bill made no mention of race whatsoever. Rather, the bill provided, among other things, that members from the local plumbers' union should be included on the board of examiners that passes upon the competency of applicants. It was patterned after a similar Kansas statute which was typical of the plumbers' license laws found in twenty-four states and Puerto Rico as of 1924.⁴⁴

As the years passed, the courts continued to ignore the abuse of plumbers' licensing laws. Blacks made significant inroads into the plumbing trade in Philadelphia and Chicago until licensing laws were used to exclude them.⁴⁵ After such laws were passed, however, blacks could no longer obtain plumbing licenses.⁴⁶ Yet the courts proceeded to uphold the laws.⁴⁷

A few state courts did, however, recognize the danger of allowing licensing boards to control entry into the plumbing profession. The Arkansas Supreme Court, in striking down its state's law, declared its suspicion that the law would be misused: "The constitutionality of the act must be tested, not by what the board has actually done, but by the power it actually has. The presumption that public servants will do their duty cannot be indulged in determining whether the act violates the Constitution."⁴⁸

These occasional decisions, though, did not stem the overall tide of licensing laws being upheld by state courts. The results of judicial

43. Letter from C. H. Perry to the Plumbers' J., 16 (Feb. 1905), *quoted in* SPERO & HARRIS, *supra* note 28, at 478; *see also* PLUMBERS, GAS AND STEAM FITTERS OFFICIAL JOURNAL, Jan. 1905, at 10, *quoted in* SPERO & HARRIS, *supra* note 28, at 481: "There are about ten Negro skate plumbers working around here [Danville, Va.] doing quite a lot of jobbing and repairing, but owing to the fact of not having an examining board it is impossible to stop them, hence the anxiety of the men here to organize."

44. SPERO & HARRIS, *supra* note 28, at 59.

45. *Id.* at 160 Table X.

46. HILL, *supra* note 36, at 22; NATIONAL INTERRACIAL CONGRESS, TOWARD INTERRACIAL COOPERATION 123 (1926); SPERO & HARRIS, *supra* note 28, at 479-80.

47. Douglas v. People *ex rel.* Ruddy, 225 Ill. 536, 80 N.E. 341 (1907); Rock v. City of Philadelphia, 127 Pa. Super. 143, 191 A. 669 (Super. Ct. 1937), *aff'd*, 328 Pa. 382, 196 A. 59 (1938).

48. *Replogle v. City of Little Rock*, 166 Ark. 617, 628, 267 S.W. 353, 356 (1924); *see also* *Dewell v. Quarles*, 180 Ga. 864, 181 S.E. 159 (1935). Note the contrast between *Replogle* and *Nechamcus*. In the former case, the court held that the mere potential for abuse was enough to render a law invalid. In *Nechamcus*, however, the court held that even evidence of abuse is not sufficient to invalidate a law.

acquiescence to the licensing system, combined with other factors benefiting the plumbers' union, particularly inspection laws,⁴⁹ discriminatory government funding of vocational training,⁵⁰ and local government's inability or unwillingness to curb union violence against black competitors,⁵¹ were disastrous for blacks.⁵²

The exact effect of licensing laws on black plumbers is difficult to quantify because most surveys of black occupational status underestimate the effect of licensing by relying on self-reported census occupational data. Such data are skewed because many black plumbers — including Justice Clarence Thomas' grandfather⁵³ — have traditionally been forced to work in the underground economy without licenses, or to pay whites to “officially” do the plumbing work actually done by blacks.⁵⁴

We do know that the efforts of the plumbers' unions to keep blacks from getting licenses were extraordinarily successful. To take a few examples, a 1953 state investigation disclosed that out of 3,200 licensed plumbers in Maryland, only two were black.⁵⁵ The first black passed a plumbers' licensing exam in Colorado in 1950 — and only after pressure from civil rights authorities.⁵⁶ Only one black plumber was licensed in Charlotte, North Carolina in 1968.⁵⁷ As late as 1972, only one black plumber was licensed in all of Montgomery

49. White inspectors, recruited from the plumbers' union, refused to approve work done by blacks. NORTHROP, *supra* note 4, at 24. Such laws were routinely upheld once licensing itself was upheld. *See, e.g.,* City of New Castle v. Withers, 291 Pa. 216, 139 A. 860 (1927).

50. ROBERT C. WEAVER, NEGRO LABOR: A NATIONAL PROBLEM 42-43 (1947); *see also* RAY MARSHALL, *The Negro in Southern Unions, in THE NEGRO AND THE AMERICAN LABOR MOVEMENT* 128, 135 (Julius Jacobson ed., 1968).

51. To take just one example, the Urban League reported the case of a black plumber who unsuccessfully tried to join the Journeyman Plumbers' Union for several years. His work was bombed several times. NAT'L URBAN LEAGUE, *supra* note 28, at 134.

52. *See* FLORENCE PETERSON, AMERICAN LABOR UNIONS 88-89 (1945); MARSHALL, *supra* note 50, at 145 (municipal licensing laws, along with apprenticeship restrictions, severely limited black opportunity in plumbing field).

53. PACIFIC INSTITUTE FOR PUBLIC POLICY, *Clarence Thomas Interviewed by Bill Kaufman, in FREE MINDS & FREE MARKETS* 142 (Robert W. Poole, Jr., & Virginia I. Postrel eds., 1993) (quoting an interview with Clarence Thomas in Washington, D.C. in 1987).

54. The white plumbers did not interfere with black plumbers if they only worked in black neighborhoods or did dirty work that union plumbers did not want. BENJAMIN SHIMBERG ET AL, OCCUPATIONAL LICENSING: PRACTICES AND POLICIES 116 (1973); MARSHALL, *supra* note 50, at 145.

55. SHIMBERG ET AL, *supra* note 54, at 116. Licensing of plumbers was upheld in Maryland in *Singer v. Maryland State*, 72 Md. 464, 19 A. 1044 (1890).

56. Plumbers' licensing laws in Colorado were upheld in *Evans v. City of Denver*, 79 Colo. 533, 247 P. 173 (1926) (upholding conviction of helpers and apprentices for acting as journeymen without a license).

57. Zachary Dyckman, *An Analysis of Negro Employment in the Building Trades* 73 (1971) (unpublished Ph.D. dissertation, Yale University, available at Yale University Sterling Memorial Library).

County, Alabama, and he was only able to get his license after a ferocious struggle with the local plumbers' union.⁵⁸ By the early 1970s, very few black plumbers were licensed in the United States.⁵⁹

C. Barber Licensing Laws

In the late 19th century, southern blacks had a near monopoly on the barber profession.⁶⁰ Many northern blacks worked as barbers as well. Overall, in 1890 20.5% of the barbers and hairdressers in the United States were black.⁶¹ However, because of an increase in immigrant barbers, as well as other factors, many whites started to patronize only white barbers.⁶² By 1910, only about 11% of American barbers, beauticians, and manicurists were black.⁶³ Encouraged by this decline, white barbers soon aspired to use the legal system to totally limit black barbers to black customers.

White barbers were sometimes less than subtle in their attempts to monopolize white customers. In 1926, the Atlanta City Council passed an ordinance requiring barbers to only serve members of their own race.⁶⁴ Unlike many facially neutral laws that served intentionally or unintentionally to advantage white workers at the expense of blacks, this law caused an uproar among both blacks and sympathetic whites.⁶⁵ The City modified the ordinance to prohibit black barbers from serving white women or children under fourteen years old and to require them to close their shops at seven every night.⁶⁶ The Chamber of Commerce, however, fearful of bad publicity for the city and of further restrictions on black workers which might hurt its members, provided lawyers to fight the law in the courts.⁶⁷ A group of independent black barbers, and white barbers who employed blacks, challenged the law.⁶⁸ The result was that in 1927 the

58. SHIMBERG ET AL, *supra* note 54, at 112-13.

59. HERBERT R. NORTHRUP, *ORGANIZED LABOR AND THE NEGRO* xb (1971).

60. HILL, *supra* note 36, at 15; GASTON, *supra* note 9, at 270.

61. WILLIAM SCOTT, *THE JOURNEYMAN BARBERS' INTERNATIONAL UNION OF AMERICA*, 44 n.27 (1936) (citing *ELEVENTH CENSUS OF THE UNITED STATES* 354-55 (1890)).

62. See, e.g., RICHARD WRIGHT, *THE NEGRO IN PENNSYLVANIA: A STUDY IN ECONOMIC HISTORY* 75-76 (1911) (black barbers lost most of their white customers, but retained their black customers).

63. Culled from 1910 census data. *TWELFTH CENSUS OF THE UNITED STATES* (1910).

64. GASTON, *supra* note 9, at 293.

65. *Id.* at 293-94.

66. *Id.* at 294.

67. *Id.* at 293-95.

68. *Id.* at 294.

Georgia Supreme Court struck it down as a violation of equal protection, property rights, and substantive due process.⁶⁹

Usually, though, laws that served to restrict black barbers were facially neutral and seemed to have nothing to do with race at all. *The Norfolk (Va.) Journal and Guide*, a black weekly, complained that such a law, however, had as certainly been designed "to effectively limit the opportunity of colored persons to follow the trades if it had been openly drafted to accomplish that purpose."⁷⁰ The bill that the *Journal and Guide* opposed mandated that licenses would only be issued to those who had served as registered apprentices for eighteen months and had passed an examination given by the Board of Examiners. One could only become a registered apprentice if one graduated from a school of barbering approved by the Board. Schools of barbering would be prohibited from accepting applicants having less than an eighth grade or equivalent education.⁷¹

These facially neutral regulations were, in fact, discriminatory, the paper editorialized. First of all, the newspaper noted that no existing barbers' school would admit blacks, and it predicted that the board would simply refuse to license any new school that did. Moreover, "prejudice or politics involved with organized labor's voting strength might easily operate through the board to destroy the usefulness of Negro barbering schools and, of course, cut off the source of apprentices."⁷² Also, according to the editors, many blacks in the state could not meet the eighth grade educational requirements and, even if they could, many could not afford to spend six months at a barbering college.⁷³ "The proposed barbers' licensing law is a real menace to the economic opportunity of colored people," the *Journal and Guide* warned. "The social consciousness and responsibility of the State must be aroused against this pernicious measure, masquerading as a public health effort, but obviously an organized labor union project drawn in the special interest of white organized labor."⁷⁴

69. *Chaires v. Atlanta*, 164 Ga. 755, 139 S.E. 559 (1927). Several years earlier, a Michigan court had struck down a law banning aliens from becoming licensed barbers. *Templar v. Board of Barbers*, 131 Mich. 254, 90 N.W. 1058 (1902). States of Idaho, Iowa, and Wisconsin later made citizenship a requirement for licensing. IDAHO CODE § 53-606 (1931); IOWA CODE § 2585-613 (1931); WIS. STAT. § 158.08 (1931).

70. *The Proposed Barbers Licensing Law*, NORFOLK J. & GUIDE, Aug. 3, 1929 (editorial page). The editors note that the discriminatory aspects of this law "are basically similar to the provisions employed by organized labor to bar members of the colored race from many skilled trades." *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* The Journeyman Barber's Union did not generally admit blacks. NAT'L URBAN LEAGUE, *supra* note 28, at 155. The union's official policy, however, was that it did admit blacks. SCOTT, *supra* note 61, at 43-44. Some local chapters of the union, particularly in the North, apparently did admit blacks, while many did not. Discrimination by the Barbers' union apparently increased between the turn of the century, when

The proposed Virginia law was supported by the Virginia Federation of Labor and other trade unions, and was vigorously opposed by the Virginia Commission on Interracial Relations.⁷⁵ Opponents of the bill argued that the proposed board of three white barbers could sooner or later eliminate all black barbers on one pretext or other.⁷⁶ As one commentator noted, if under licensing a certain black barber shop is taking too much business from its white rivals, "a question or two [from a board of white barbers] to the operator concerning sebaceous glands and the problem is quickly solved."⁷⁷ Ben Taylor, a black barber, testified that his colleagues would "whiten the mountains with their bones" and "dye old Virginia with their blood" rather than submit to be licensed by a State board of barber examiners.⁷⁸

While the proposed Virginia law went down to defeat,⁷⁹ by 1941 every state except Virginia and New York had barbers' licensing laws. In those two states, however, local government stepped in to fill the gap.⁸⁰ The laws often had many of the elements objected to by the *Journal and Guide*. Indeed, while it seemed obvious to the *Journal and Guide* that the Virginia bill was purposely aimed to restrict black barbers, it was actually typical of license laws lobbied for by unions and passed by many states, including those with few, if any, black barbers.⁸¹ Unions successfully designed the laws to prevent the licensure of the poorest and least-educated barbers and potential barbers,⁸² a greatly disproportionate percentage of whom were black, and union-dominated licensing boards undoubtedly applied facially neutral licensing standards in a discriminatory fashion, as predicted by the *Journal and Guide*.

Blacks were not mute in the face of this threat to their livelihood. In Ohio, the barbers' union tried to pass licensing legislation that

the union's nondiscriminatory policy was set, and the 1930s. SCOTT, *supra* note 61. In 1903, 1000 members of the Journeymen Barbers' Union were black, but by 1928 only 239 were black. SPERO & HARRIS, *supra* note 28, at 76 Table I.

75. Virginius Dabney, *Negro Barbers in the South*, THE NATION, July 16, 1930, at 64.

76. *Id.* at 65.

77. *Id.*

78. *Id.*

79. *Id.*

80. David Fellman, *A Case Study in Administrative Law — The Regulation of Barbers*, 26 WASH. U. L.Q. 213, 214-15 n.1 (1941).

81. See SCOTT, *supra* note 61, at 80-84.

82. *Id.* at 87.

blacks believed would effectively drive them out of the trade, although the law was probably not designed for that purpose. Black barbers and non-union white barbers successfully opposed such bills in 1902, 1904, 1910, and 1913, but a licensing law finally passed in 1915 after some issues of contention were compromised.⁸³ Black barbers in West Virginia, meanwhile, managed to convince the state government to protect their interests through a statutory requirement that one member of the four man examination board be black.⁸⁴

While black barbers and their allies had some success in blocking licensing in the state legislatures, they often failed. Opponents of licensing then turned to the courts, but only rarely managed to persuade judges that licensing laws violated their right to occupational liberty. Beginning in about 1900, cases almost uniformly upheld licensing of barbers.⁸⁵ Even the Washington State Supreme Court, which declared licensing of plumbers to be unconstitutional the year before, upheld it for barbers, over a vigorous dissent by Justice Rudkin, who demonstrated how little the provisions of the law related to public health.⁸⁶

Minnesota had passed the first barbers' licensing law in 1897 and other states quickly followed suit.⁸⁷ As with plumbers, the major effect of licensing of barbers was not necessarily to keep blacks out of the field, but to prevent their licensure. Ironically, the unionized barbers' racism protected blacks to some extent from the effects of licensing laws. If union members discovered an unlicensed black barber who continued to serve white customers, the union would complain to the authorities. White union barbers, though, had no interest in serving black customers. Legal authorities, therefore, did not harass unlicensed black barbers as long as they restricted their trade to black neighborhoods.

Barbers' licensing laws continue to have a negative effect on blacks. As late as the early 1980s researchers reported that unlicensed black barbers and beauticians commonly practiced their trade in the inner city because of difficulty in getting licensed,⁸⁸ thereby saving their careers, but sacrificing their level of income.⁸⁹

83. GERBER, *supra* note 40, at 335-36 & n.44.

84. W. VA. CODE § 1409(41) (1936).

85. FRIEDMAN, *supra* note 5, at 518; see Annotation, *Constitutionality of Statute Regulating Barbers*, 20 A.L.R. 1111; Annotation, *Validity of Statute or Ordinance Regulating Barbers*, 98 A.L.R. 1088; see Fellman, *supra* note 80.

86. *State v. Walker*, 48 Wash. 8, 92 P. 775, 778 (1907).

87. SCOTT, *supra* note 61, at 79.

88. Stuart Dorsey, *Occupational Licensing and Minorities*, 7 L. & HUMAN BEHAV. 171, 177, 179 (1983).

89. *Id.* at 177.

Interestingly, the reasons blacks have trouble getting barbers' licenses today are remarkably similar to some of the problems the *Journal and Guide* foresaw from the proposed Virginia law: blacks often cannot afford trade school tuition (where students are taught how to pass the exams) and have generally inferior educational opportunity.⁹⁰

One relatively recent study of cosmetology licensing found that while the failure rates of blacks and whites on the practical part of the examination were about even, blacks failed the written portion of the examination at a much higher rate than whites. Qualified black beauticians were unable to get licensed because they could not answer questions that were only tangentially related to their jobs.⁹¹ Besides those who failed the test, one must consider the many others who are discouraged from taking it because they do not believe they can pass. The situation surely was far worse in the days when the tests were often intentionally used to exclude blacks.

CONCLUSION

The licensing laws discussed above are merely the tip of the iceberg. Not only have other licensing laws also served to exclude blacks from the skilled trades, but a variety of other economic regulations have contributed to the economic plight of blacks. For example, as I have argued elsewhere,⁹² Depression era labor legislation contributed greatly to the rise of the black underclass. Further research would undoubtedly uncover other examples.

Too many legal scholars and historians ignore this sorry history of government intervention into the labor market when focusing on civil rights issues, because they focus solely on private discriminatory behavior instead. Regardless of what one thinks of Professor Epstein's overall thesis, it should be recognized that he has done the legal community a great service by reminding it that the source of some of the economic disparity between whites and blacks is past government provision of de jure monopoly power to white dominated interest groups. While that is obviously only part of the story, the example of

90. *Id.* at 173.

91. Stuart Dorsey, *The Occupational Licensing Queue*, 15 J. HUMAN RESOURCES 424 (1980).

92. David E. Bernstein, *The Davis-Bacon Act: Vestige of Jim Crow*, 13 NAT'L BLACK L.J. (forthcoming 1994); David E. Bernstein, *Roots of the Underclass: The Decline of Laissez-faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85 (1993).

the history of licensing legislation shows that it is an important part, and one that should not be lightly dismissed by Epstein's critics.