Volume 59 | Issue 2 Article 4

4-1-2014

The Fifth Circuit Buries Intrastate Economic Protectionism in St. Joseph Abbey v. Castille

Antonios Roustopoulos

THE FIFTH CIRCUIT BURIES INTRASTATE ECONOMIC PROTECTIONISM IN *ST. JOSEPH ABBEY v. CASTILLE*

ANTONIOS ROUSTOPOULOS*

"[W]hile baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments."[1]

I. INTRODUCTION

For many, nothing embodies the American Dream more than the freedom to pursue economic opportunities of one's choosing.[2] In recent decades, state and local governments have imposed arbitrary and protectionist licensing requirements that threaten this version of the American Dream in many occupations.[3] Although states require the licensing of certain professionals—doctors, lawyers, and emergency responders—to protect citizens from physical harm or malpractice, the proliferation of protectionist licensing laws has increased tremendously over the last half-century.[4] One possible explanation for this increase is the rise of special

* J.D. Candidate, 2015, Villanova University School of Law. I would like to thank my colleagues on the *Villanova Law Review* for their diligent work and support. I would also like to thank Professor Lanctot for her helpful comments and insight. Lastly, I would like to thank my parents and grandparents—who came to the United States chasing the American Dream—for their continued love and support.

1. Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004).

2. *See* Timothy Sandefur, *Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries*, 14 WM. & MARY BILL RTS. J. 1023, 1023–24 (2006) (discussing economic opportunity as part of American Dream).

3. *See, e.g.*, Meadows v. Odom, 360 F. Supp. 2d 811 (M.D. La. 2005) (challenging Louisiana florist licensing law that required passage of subjective examination administered by incumbent florists and future competitors of licensee); Cornwell v. Cal. Bd. of Barbering & Cosmetology, 962 F. Supp. 1260 (S.D. Cal. 1997) (challenging California cosmetology licensing requirement for African hair braiders, which required completion of course in cosmetology school, completion of apprenticeship program, minimum of tenth grade education, and passage of state licensing examination); *see also* John Kramer, *Court Cases Ask: Is America Still the Land of Opportunity?*, INST. FOR JUST. (Mar. 15, 2005), http://www.ij.org/oklahoma-caskets-release-3-15-2005 (discussing proliferation of protectionist licensing requirements across America); Stephanie Simon, *A License to Shampoo: Jobs Needing State Approval Rise*, WALL ST. J. (Feb. 7, 2011), http://online.wsj.com/article/SB10001424052748703445904576118030935929752.html (discussing Texas licensing law requiring shampoo specialists to take "150 hours of classes, 100 of them on the 'theory and practice' of shampooing, before [sitting] for a licensing exam").

4. *See* Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. OF INDUS. REL. 676, 678 (providing statistics from Department of Labor and U.S. Census showing increase of licensure from five percent of American work-force in 1950s to twenty-nine percent by 2006); Simon,

interest groups that seek to stifle competition in their respective industries.[5]

Protectionist licensing legislation bars competitors from entering the market, raises prices, and ultimately harms consumers.[6] Three recent cases centering on the funeral industry have allowed courts to consider Fourteenth Amendment challenges to protectionist licensing laws that favor a few industry groups at the expense of consumers and potential competitors.[7] After analyzing the constitutionality of similar licensing

supra note 3 (discussing same and suggesting professions that rightfully require licensing). *See generally* Simon Rottenberg, *The Economics of Occupational Licensing*, *in* ASPECTS OF LABOR ECONOMICS 3, 3 (Univs.-Nat'l Bureau ed., 1962), *available at* http://www.nber.org/chapters/c0601.pdf (providing historical context for modern licensing system).

5. *See* Roger V. Abbott, *Is Economic Protectionism a Legitimate Governmental Interest Under Rational Basis Review?*, 62 CATH. U. L. REV. 475, 499–500 (2013) ("Where interest groups are able to obtain a competitive advantage by lobbying for special privileges, and where the costs created by those privileges are distributed broadly, the rationally ignorant voter is unlikely to even know about, let alone fight against, protectionist regulations."); *see also* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 139 (1962) (stating that legislatures pass many licensing laws on behalf of "producer groups" and noting absurdity of licenses for occupations such as "dealers in scrap tobacco," "tile layers[,] and potato growers"); *cf.* Merrifield v. Lockyer, 547 F.3d 978, 991 (9th Cir. 2008) (concluding that California pest control licensing scheme was designed to "favor economically certain constituents at the expense of others similarly situated"); Craigmiles v. Giles, 312 F.3d 220, 225 (6th Cir. 2002) ("[W]e invalidate only the . . . naked attempt to raise a fortress protecting the monopoly rents that [one industry participant] extract[s] from consumers.").

6. *See* St. Joseph Abbey v. Castille, 712 F.3d 215, 226 (5th Cir. 2013) ("[Granting one marketplace participant] an exclusive right of sale adds nothing to protect consumers and puts them at a greater risk of abuse including exploitative prices."). *But see Powers*, 379 F.3d at 1213 n.10 (noting debate in funeral industry over whether increased competition in casket sales market will decrease overall funeral costs when funeral homes can simply raise other fees to make up difference). Indeed, the funeral industry has been scrutinized by federal regulators because of the risk that funeral home owners may use deceptive practices when selling their services to grieving families. *See* Funeral Industry Practices, 47 Fed. Reg. 42,260, 42,260 (Sept. 24, 1982) (codified at 16 C.F.R. § 453) [hereinafter Funeral Rule] (noting that funeral is third largest expenditure for many consumers after house and car). Uncompetitive in-state markets for funeral services allowed funeral homes to take advantage of consumers by increasing prices and bundling services, forcing consumers to buy services they may not have wanted. *See id.* (listing practices by funeral providers that restrict "consumer's ability to make informed, independent choices"). Because state funeral licensing boards could not be trusted to change these practices due to their domination by funeral directors, the Federal Trade Commission promulgated a rule that prevented funeral homes from forcing consumers to buy bundled services and required them to provide an itemized price list for each service provided. *See id.* at 42,289 ("The effects of current industry practices on funeral consumers are sufficiently serious that action is warranted now.").

7. For a discussion of how protectionist laws in the funeral industry have been challenged under the Fourteenth Amendment, see *infra* notes 63–122 and accompanying text. The Fourteenth Amendment provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

laws, the Sixth and Tenth Circuits differed on whether protection of an intrastate industry may survive substantive due process and equal protection challenges.[8] In the midst of this split, the Fifth Circuit was faced with a similar challenge of a protectionist licensing law in the funeral industry.[9]

In this most recent case, *St. Joseph Abbey v. Castille*,[10] the Fifth Circuit held that a Louisiana law requiring casket retailers to obtain a funeral director's license was unconstitutional.[11] In doing so, the Fifth Circuit sided with the Sixth Circuit's decision in *Craigmiles v. Giles*,[12] where the court struck down a nearly identical statutory scheme and held that "privileg[ing] certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose."[13] In contrast, the Tenth Circuit upheld a similar Oklahoma law in *Powers v. Harris*,[14] dealing a blow to economic freedom by holding that mere intrastate economic protectionism is a legitimate state interest.[15]

This Note analyzes the development of economic substantive due process and equal protection under the Fourteenth Amendment and argues that the Fifth Circuit in *St. Joseph Abbey* correctly held that mere intrastate economic protectionism is not a legitimate state interest. Part II discusses the evolution of economic substantive due process and equal protection, and provides the standard of review that is applied to constitutional challenges.[16] Part III describes the current circuit split over intrastate economic protectionism and discusses how the Sixth and Tenth Circuits, purporting to apply the same standard of review, came to opposite conclusions.[17] Part IV provides an overview of the facts and reasoning of *St. Jo-*

---

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

8. *Compare St. Joseph Abbey*, 712 F.3d at 226–27 (finding Louisiana law requiring licensing of casket retailers to be in violation of Due Process and Equal Protection clauses), *and Craigmiles*, 312 F.3d at 229 (finding same of nearly identical Tennessee law), *with Powers*, 379 F.3d at 1225 ("We hold that intrastate economic protectionism . . . is a legitimate state interest and that the [challenged law] is rationally related to this legitimate end . . . .").

9. For a discussion of the circuit split over whether laws that protect an intrastate industry are constitutional, see *infra* notes 63–94 and accompanying text.

10. 712 F.3d 215 (5th Cir. 2013).

11. *See id.* at 226–27 (invalidating Louisiana licensing law).

12. 312 F.3d 220 (6th Cir. 2002).

13. *Id.* at 229.

14. 379 F.3d 1208 (10th Cir. 2004).

15. *See id.* at 1221 ("[F]avoring one intrastate industry over another is a legitimate state interest.").

16. For a discussion of the standard of review applied to challenges of protectionist state laws and an overview of economic substantive due process and equal protection, see *infra* notes 27–53.

17. For a discussion of the circuit split that preceded *St. Joseph Abbey*, see *infra* notes 63–94 and accompanying text.

seph Abbey.[18] Part V argues that the Fifth Circuit was justified in protecting Louisiana casket retailers from state regulation.[19] Part V also argues that protectionist laws should always fail rational basis review unless they reasonably further a cognizable public interest and that *St. Joseph Abbey* provided a workable framework for evaluating protectionist laws under a rational basis standard.[20] Part VI concludes by emphasizing that "transparently anticompetitive" laws do not serve a legitimate governmental purpose; they protect discreet interest groups at the expense of others and therefore cannot pass even the low threshold of rational basis review.[21]

II. THE LIFE, DEATH, AND REVIVAL OF ECONOMIC SUBSTANTIVE DUE PROCESS

Today, economic legislation that does not discriminate against suspect classes or restrict fundamental rights receives the lowest form of scrutiny when facing a constitutional challenge, but this was not always so.[22] In the early twentieth century, before the Supreme Court articulated a two-tiered constitutional review of Fourteenth Amendment claims, laws that restricted an individual's economic liberty drew relatively demanding scrutiny.[23] Since the Court's bifurcation of constitutional scrutiny, however, economic regulations have fallen squarely under the imprecise and sometimes contradictory rational basis review.[24] This section details the

18. For a further discussion of the facts and reasoning of the court in *St. Joseph Abbey*, see *infra* notes 98–122 and accompanying text.

19. For a critical analysis of why the Fifth Circuit came to the correct conclusion in *St. Joseph Abbey*, see *infra* notes 126–56 and accompanying text.

20. For a discussion of why *St. Joseph Abbey* provides an excellent framework for analyzing the constitutionality of state protectionist laws, see *infra* notes 157–71 and accompanying text.

21. *See* Anthony B. Sanders, *Exhumation Through Burial: How Challenging Casket Regulations Helped Unearth Economic Substantive Due Process in* Craigmiles v. Giles, 88 MINN. L. REV. 668, 669 (2004) (arguing against legitimacy of "transparently anticompetitive" state regulations); *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.").

22. For a discussion of the applicable standard of review for protectionist legislation, see *infra* notes 27–37 and accompanying text.

23. For a discussion of how protectionist laws were reviewed in the early twentieth century, see *infra* notes 38–53 and accompanying text.

24. *See* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (noting that economic regulations unequivocally receive rational basis review and defining standard); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 696 (4th ed. 2011) (observing that Supreme Court has applied rational basis inconsistently, varying "between complete deference and substantial rigor"); Scott H. Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clauses*, 50 S. CAL. L. REV. 689, 699–700 (1977) (illustrating ambiguity and confusing nature of rational basis review by way of example). The Court has appeared to give "teeth" to rational basis review on various occasions. *Compare* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 433, 448–50 (1985) (using rational basis review to invalidate city zoning law that prohibited operation of home for mentally handicapped), *and* Romer v. Evans, 517 U.S. 620, 632, 634–35 (1996) (invalidating state

evolution of the doctrine of economic substantive due process and the ever-changing standard of review under which it falls.[25] This section also summarizes the current state of economic substantive due process.[26]

A. *Preliminary Matters: Definitions and Standards of Review*

The Due Process Clauses of the Fifth and Fourteenth Amendments protect individuals from governmental deprivation of "life, liberty, or property, without the due process of law."[27] The Equal Protection Clause of the Fourteenth Amendment guarantees the "equal protection of the laws" to all people within a state's jurisdiction.[28] Although litigants commonly combine equal protection and substantive due process claims together when challenging state licensing laws, each clause protects "distinctly different interests."[29]

---

constitutional amendment prohibiting laws that protected homosexuals from discrimination under rational basis review), *with* Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 881–83 (1985) (declaring state law that sought to encourage growth of in-state insurance industry by taxing in-state insurance companies at lower rate than out of state companies unconstitutional under rational basis review), *and* Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 106–07 (2003) (finding higher state tax on slot machines at racetracks than on riverboats constitutional under rational basis review).

25. For a discussion of the evolution of the doctrine of economic substantive due process and the evolving standard of review under which it falls, see *infra* notes 27–62 and accompanying text.

26. For a discussion of the current state of economic substantive due process, see *infra* notes 54–62 and accompanying text.

27. *Compare* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."), *with id.* amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."); *see also* Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 267 (1987) (discussing substantive due process generally). The Due Process Clauses of the Fifth and Fourteenth Amendments differ only in that the Fifth Amendment applies to the federal government while the Fourteenth Amendment applies to the individual states. Further, substantive due process covers a vast body of law into which this Note will not endeavor. *See generally* William R. Musgrove, *Substantive Due Process: A History of Liberty in the Due Process Clause,* 2 U. ST. THOMAS J.L. & PUB. POL'Y 125 (2008) (discussing three main types of substantive due process claims: incorporation theory, economic substantive due process, and right of privacy).

28. *See* U.S. CONST. amend XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

29. *See* Powers v. Harris, 379 F.3d 1208, 1214–15 (10th Cir. 2004) (noting different interests that each claim represents). Substantive due process "provides heightened protection against governmental interference with certain fundamental rights and liberty interests." *Id.* at 1215 (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)). This protection applies "even when the challenged regulation affects all persons equally." *Id.* Equal protection on the other hand, only applies when a "state treats two groups, or individuals [who are otherwise similarly situated], differently." *Id.* Nevertheless, plaintiffs commonly assert both claims simultaneously and courts frequently do not distinguish between the two when reviewing a challenged law under rational basis review. *See, e.g.*, St. Joseph Abbey v. Castille, 712 F.3d 215, 223–27 (5th Cir. 2013) (holding simply that law bore no rational relation to legitimate government interest rather than addressing

Even though each clause protects different interests, laws challenged under either one will receive "strict scrutiny" or "rational basis" review.[30] Substantive due process claims alleging government interference with certain "fundamental rights," trigger strict scrutiny review, whereby the government bears the burden of proving that the regulation is "narrowly tailored" to advance a "compelling state interest."[31] Courts apply the same strict scrutiny analysis to equal protection claims when government regulation employs a "suspect classification," such as race or ethnicity.[32] Laws that do not infringe on fundamental rights or employ suspect classifications are reviewed under a much more deferential rational basis stan-

---

substantive due process and equal protection claims individually); *Powers*, 379 F.3d at 1215 ("[B]ecause a substantive due process analysis proceeds along the same lines as an equal protection analysis, our equal protection discussion sufficiently addresses both claims."). *But see* Casket Royale, Inc. v. Mississippi, 124 F. Supp. 2d 434, 437–41 (S.D. Miss. 2000) (analyzing substantive due process and equal protection claims separately while applying same rational basis standard to both); Cornwell v. Cal. Bd. of Barbering & Cosmetology, 962 F. Supp. 1260, 1271–78 (S.D. Cal. 1997) (applying same analysis).

30. *See* Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 73 (1989) (describing "tiered jurisprudence" for due process and equal protection claims).

31. *See* Roe v. Wade, 410 U.S. 113, 155–56 (1973) (articulating strict scrutiny standard for fundamental rights cases). In determining what rights are fundamental, the Supreme Court looks to the "'traditions and (collective) conscience of our people' to determine whether a principle is 'so rooted (there) as to be ranked as fundamental.'" Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). The Court has identified few fundamental rights outside of the Bill of Rights that merit the protection of the exacting strict scrutiny standard; all of these rights generally fall under the umbrella of privacy rights. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion) (recognizing "freedom of personal choice in matters of marriage and family life" as fundamental right protected by Due Process Clause of Fourteenth Amendment); *Roe*, 410 U.S. at 153 ("[The] right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); *Griswold*, 381 U.S. at 486 (declaring "right of association" as "right of privacy older than the Bill of Rights"); *cf.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) (recognizing right to refuse unwanted medical attention as liberty interest, not as fundamental right).

32. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."). A law that employs suspect classifications is not per se invalid; rather, the classification that was used must be necessary to meet a compelling goal and a less discriminatory avenue must not be available. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."). Moreover, it is very rare for a law to survive a strict scrutiny review. *See* Bice, *supra* note 24, at 694 (discussing strict scrutiny under equal protection clause).

dard.[33] Rational basis review simply requires that a law be "rationally related to a legitimate state interest."[34]

The Supreme Court has consistently held that laws that do not employ suspect classifications or limit fundamental rights may discriminate among groups as long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[35] Indeed, rational basis review gives great deference to legislatures and presumes the constitutionality of laws, a presumption that plaintiffs can overcome only by showing that the law is "unreasonable or arbitrary."[36] The Court applies this same standard to equal protection and substantive due process claims, employing largely the same language for both.[37]

---

33. *See* Abbott, *supra* note 5, at 482 (discussing levels of judicial scrutiny). The Supreme Court has also applied a flexible, "intermediate scrutiny" to "quasi-suspect" classifications based on gender and illegitimacy. *See id.* at 481–82 (summarizing intermediate scrutiny). This type of review is more stringent than rational basis but less stringent than strict scrutiny. *See id.* at 482 (describing intermediate scrutiny). Moreover, intermediate scrutiny presumes a law invalid and requires a showing that a classification is "substantially related to a significant government purpose." *See id.* (same).

34. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (addressing low threshold for upholding statute against equal protection challenge when court applies rational basis reveiw); *see also* CHEMERINSKY, *supra* note 24, at 694 (offering different articulations of rational basis standard).

35. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) (citing Sullivan v. Stroop, 496 U.S. 478, 485 (1990) (noting that statute does not violate equal protection under rational basis review if any conceivable state of facts can justify it); Bowen v. Gilliard, 483 U.S. 587, 600–01 (1987) (allowing imperfectly or roughly applied statute as long as "classification has some reasonable basis" (citation omitted) (internal quotation marks omitted)); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174 (1980) (same)). The Court has applied this rule to varying degrees of thoroughness creating some confusion over how far a court should go in conceiving a legitimate purpose for a government regulation. *Compare* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448–50 (1985) (striking down city ordinance requiring permits for "hospitals for the insane or feebleminded" *without* thinking of possible legitimate purposes), *with* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487 (1955) (stating that legislature "*might have* concluded" that regulation was necessary to protect consumers (emphasis added)).

36. *See* Nebbia v. New York, 291 U.S. 502, 530 (1934) (concluding that challenged law under rational basis review was not "unreasonable or arbitrary"); *accord* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) ("[T]he classification must be reasonable, not arbitrary."); *see also* CHEMERINSKY, *supra* note 24, at 695 (discussing requirement of unreasonableness or arbitrariness); Abbott, *supra* note 5, at 482 n.40 (same).

37. *Compare* Gen. Motors Corp. v. Romein, 503 U.S. 181, 191 (1992) (noting that "a legitimate legislative purpose furthered by rational means" suffices for substantive due process under rational basis (citing Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984))), *with* Pennell v. San Jose, 485 U.S. 1, 14 (1988)) (explaining that laws violate equal protection only if they are "so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational" (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979))); *see also* Chemerinsky, *supra* note 30, at 73 (addressing substantive due process and equal protection jurisprudence as one unit under rational basis review).

B. *Economic Substantive Due Process*

The doctrine of economic substantive due process posits that the Due Process Clause protects certain liberty and property interests, such as the freedom of contract and the right to enjoy property from unnecessary government intrusion.[38] Initially, the Supreme Court applied a fairly rigorous scrutiny to laws that restricted economic rights.[39] Economic substantive due process enjoyed a period of broad support in the early twentieth century, but was ultimately abandoned in the late 1930s and only exists in an attenuated form today.[40]

1. *The Height of Economic Substantive Due Process and Its Fall from Grace*

The height of economic substantive due process jurisprudence occurred during the "*Lochner* era" between 1897 and 1937.[41] In perhaps the most noteworthy case during that period, *Lochner v. New York*,[42] the Supreme Court rejected New York's "unreasonable, unnecessary, and arbitrary interference with the right of the individual . . . to enter into those

38. *See* BLACK'S LAW DICTIONARY 575 (9th ed. 2009) (defining doctrine of economic substantive due process); *see also* Phillips, *supra* note 27, at 269 (discussing history of economic substantive due process).

39. *See* Mugler v. Kansas, 123 U.S. 623, 661 (1887) (stating that courts must protect public from "palpable invasion of rights secured by the fundamental law").

40. *See* Phillips, *supra* note 27, at 269–70 (discussing rise and fall of economic substantive due process).

41. *See* Abbott, *supra* note 5, at 480 (discussing history of economic substantive due process). Scholars commonly cite to the seminal case of *Allgeyer v. Louisiana* as the beginning of this era. *See id.* (citing Allgeyer v. Louisiana, 165 U.S. 578 (1897)). In a unanimous decision, the Court in *Allgeyer* struck down a Louisiana law on freedom of contract grounds and explicitly recognized the freedom to "enter into all contracts which may be proper, necessary, and essential" to carry out a person's business. *Allgeyer*, 165 U.S. at 589. In doing so, the Supreme Court concluded that the Constitution protected the liberty of contract and limited the government's power to enact economic regulations. *See* BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 111 (1980) (discussing *Allgeyer*). The constitutional protection of an individual's freedom of contract died a slow death in the 1930s with its ultimate demise in *West Coast Hotel v. Parrish*, where the Court upheld a minimum wage law for women that was challenged as a restriction on the freedom of contract. *See* W. Coast Hotel v. Parrish, 300 U.S. 379, 398–400 (1937) (upholding minimum wage law). Scholars have observed that the Supreme Court's about-face was influenced by the view that the freedom of contract had devolved into a tool used by powerful parties with superior bargaining power to limit the liberty of people who needed government protection. *See* Phillips, *supra* note 27, at 281 (asserting that inequalities perpetuated by abuse of economic substantive due process led to its demise). Workers, women, and others with inferior bargaining power needed the government to intervene and prevent abuses of the freedom of contract. *See id.* (describing rationale for abandoning strict adherence to economic substantive due process); *see also West Coast Hotel*, 300 U.S. at 398–99 ("The Legislature was entitled to adopt measures to reduce . . . the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition.").

42. 198 U.S. 45 (1905), *overruled in part by* Ferguson v. Skrupa, 372 U.S. 726 (1962).

contracts . . . which may seem to him appropriate or necessary."[43] Accordingly, the Fourteenth Amendment limited a state's power of economic regulation to laws "relat[ing] to the safety, health, morals and general welfare of the public."[44] In determining whether a regulation violated the Constitution, the Court asked whether the legislature furthered an interest within its power to regulate.[45]

---

43. *Id.* at 56. In *Lochner*, the Supreme Court struck down a state law that prohibited bakery workers from working more than ten hours a day. *See id.* at 53 (invalidating state's labor law). The state argued that it enacted the law to preserve the health of bakers who worked in a potentially unhealthy environment. *See id.* at 57 (discussing state's proffered rationale). The Court rejected that reasoning, stating that a baker's job may be less healthy than some occupations, but was certainly more healthy than many and did not warrant unnecessary intrusion into workers' and employers' freedom of contract. *See id.* at 59 ("We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract . . . .").

44. *Id.* at 53. Even today, under rational basis review, restrictive government regulation must advance some legitimate purpose generally in the interest of some public good. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 305–06 (1976) (upholding city ordinance allowing only food cart vendors with greater than eight year tenure to operate in French Quarter and accepting preservation of touristic French Quarter as legitimate interest). The majority in *Lochner* strayed from its own standard by discounting the state's concerns for bakers' health. *See Lochner*, 198 U.S. at 57 (analyzing state's proffered rationale). In doing so, the Court prioritized the freedom of contract over public health concerns. *See id.* at 57 ("It is a question of which of two powers or rights shall prevail,—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract."). Even then, people were aware of the health concerns related to working long hours in bakeries. *See* People v. Lochner, 69 N.E. 373, 382 (N.Y. 1904) (Vann, J., concurring) (recognizing shortened life expectancy for bakers and confectioners who spent long hours breathing air filled with flour and sugar particles), *rev'd by Lochner*, 198 U.S 45 (1905), *overruled in part by* Ferguson v. Skrupa, 372 U.S. 726 (1963); *see also* Paul Kens, Lochner v. New York*: Tradition or Change in Constitutional Law?*, 1 N.Y.U. J.L. & LIBERTY 404, 407 (2005) (discussing bakers' exposure to flour dust and gas fumes, and tendency to contract "white lung" disease and tuberculosis). The reality of bakers' working conditions contradicted the Court's view of the occupation. *See Lochner*, 198 U.S. at 57 (discounting bakers' health concerns).

45. *See Lochner*, 198 U.S. at 57 (rejecting state's conclusion that reducing bakers' work hours benefited public health); *see also* Abbott, *supra* note 5, at 480 (discussing *Lochner* Court's method of evaluating legislation). Today, legislatures need not employ means that *directly* relate to the desired end, they need only "bear some rational relation to a legitimate interest," an exceedingly low and murky standard. *See* Craigmiles v. Giles, 312 F.3d 220, 223–24 (6th Cir. 2002) ("Even foolish and misdirected provisions are generally valid if subject only to rational basis review."). For that reason, courts and scholars have criticized the *Lochner* Court most heavily for its weighing of policy decisions and acting as a "superlegislature," deciding on its own whether a law directly advanced a public good. *See* Phillips, *supra* note 27, at 278 (noting criticism of *Lochner* Court); *Ferguson*, 372 U.S. at 729–30 (criticizing *Lochner* Court for making policy determinations). According to the Constitution, the legislature "decide[s] on the wisdom and utility of legislation" because of its accountability to the voting public; courts may only invalidate a law for patent unconstitutionality. *See Ferguson*, 372 U.S. at 729 ("[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."). Nevertheless, courts today generally make the same inquiry, asking

By the 1950s, the Court eliminated any vestige of *Lochner*-style scrutiny of restrictive economic regulations and presumed the constitutionality of such legislation unless it was "arbitrary or capricious."[46] One case in particular, *Williamson v. Lee Optical of Oklahoma, Inc.*,[47] articulated a standard at the opposite end of the spectrum from *Lochner*.[48] In *Williamson*, the Court considered an Oklahoma law that forbade anyone other than an optometrist or ophthalmologist from fitting lenses without a prescription.[49] The law effectively precluded opticians from fitting lenses without a prescription from an optometrist or ophthalmologist.[50] In upholding the law, the Court did not consider the legislature's *actual* arguments, but instead articulated justifications that the legislature *might have* offered.[51] The Court deferred to the legislature and concluded that a law need only have a conceivable rational relation to a legitimate government interest.[52] Although this standard affords great deference to legislatures and is lim-

---

whether the means employed by the legislature further a legitimate government interest, only with greater deference to the legislature. *See* Phillips, *supra* note 27, at 284–85 ("[M]ost of the more recent decisions have enunciated a lenient means-ends test." (citations omitted)).

46. *See* W. Coast Hotel v. Parrish, 300 U.S. 379, 399 (1937) (stating that Court need only decide whether enacted legislation was arbitrary or capricious); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–90 (1955) (affording great deference to legislature in determining necessity of legislation). Even before the 1950s the Court alluded to a fundamental dichotomy of rational basis review under the Fourteenth Amendment in *United States v. Carolene Products*. *See* United States v. Carolene Prods., 304 U.S. 144, 152 (1938) ("[L]egislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."). In a famous footnote, the Court turned away from the aggressive review of state economic regulation typical of the *Lochner* era while suggesting a more searching approach to facially discriminatory regulations. *See id.* at 152 n.4 (describing types of government restrictions that might warrant a more searching review). This footnote would later become the foundation for the development of strict scrutiny and rational basis review. *See* CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 665 (4th ed. 2013) (calling footnote 4 in *Carolene Products* "the Rosetta stone" for understanding justification for tiered level of judicial review).

47. 348 U.S. 483 (1955).

48. *See id.* at 487–88 ("[T]he law need not be in every respect logically consistent with its aims to be constitutional.").

49. *See id.* at 485–86 (describing Oklahoma law).

50. *See id.* at 486 (noting disadvantage to opticians).

51. *See id.* at 487–88, 490 (justifying statute by considering reasons that legislature "*might have* concluded" were necessary (emphasis added)).

52. *See id.* at 488 ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."); *see also* Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 108–09 (2003) ("Judicial review is 'at an end' once the court identifies a plausible basis on which the legislature may have relied." (citing United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980))).

ited only by "the Court's power of imagination," it still allows for the invalidation of economic legislation under rational basis review.[53]

2. *The Survival of Economic Substantive Due Process Today*

The Supreme Court has not invalidated a law on economic substantive due process grounds since 1936, in the twilight of the *Lochner* era.[54] Lower federal and state courts, however, have increasingly considered, and in some cases, have struck down protectionist economic legislation.[55] Yet, cases in which the courts have upheld protectionist laws against substantive due process and equal protection claims far outnumber successful challenges.[56] Nonetheless, many of the courts that have overturned economic legislation on constitutional grounds have explicitly stated that

---

53. *See* Abbott, *supra* note 5, at 483 (noting that rational basis gives latitude to judges); *see* Sanders, *supra* note 21, at 669 (discussing possibility of overturning economic legislation under rational basis review after *Williamson*).

54. *See* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 618 (1936) (invalidating minimum wage law for women on economic substantive due process grounds), *overruled in part by* Olsen v. Nebraska *ex rel.* W. Reference & Bond Ass'n, 313 U.S. 236, 244 (1941). Since 1936, however, the Court has found economic legislation in violation of the Equal Protection Clause even under the minimum scrutiny of rational basis review. *See, e.g.*, Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n, 488 U.S. 336, 343–46 (1989) (invalidating land taxation scheme under Equal Protection Clause for not being applied uniformly); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 882–83 (1985) (finding no legitimate state interest in imposing higher tax rate on insurance companies incorporated outside of particular state); Williams v. Vermont, 472 U.S. 12, 21–27 (1985) (holding that car-tax credit offered to state residents but denied to nonresidents did not relate to legitimate state interest). The Court's reluctance to revisit economic substantive due process since the *Lochner* era likely relates to the harsh criticism of the "activist Court" during that time period. *See* Phillips, *supra* note 27, at 278 (discussing criticism of *Lochner* Court).

55. *See* Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 SYRACUSE L. REV. 917, 926 (1999) ("[F]ederal and state courts have become increasingly prone to examine the substantive fairness of economic regulations . . . ."). Most of these cases are brought under Title 42, Section 1983 of the United States Code. *See, e.g.*, Craigmiles v. Giles, 312 F.3d 220, 220 (6th Cir. 2002) (noting that suit was filed under Section 1983). Section 1983 reads in relevant part:

> Every person who, under color of any statute . . . of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

42 U.S.C. § 1983 (2006). This statutory language parallels the language of the Fourteenth Amendment, resulting in its common use in constitutional challenges of state regulations. *Compare* 42 U.S.C. § 1983, *with* U.S. CONST. amend. XIV, § 1 (prohibiting states from abridging privileges and immunities of citizens, and proscribing deprivation of "life, liberty, or property, without due process of law").

56. *See* Phillips, *supra* note 55, at 926 (discussing disparity between successful and unsuccessful claims).

those laws failed rational basis review because they advanced illegitimate interests, such as the mere protection of a particular intrastate industry.[57]

For example, in *Santos v. City of Houston*,[58] the United States District Court for the Southern District of Texas considered substantive due process and equal protection challenges to a city ordinance that banned the use of jitneys.[59] The court observed that it has been "consistently held that the opportunity to pursue one's livelihood is a constitutionally protected liberty interest, which may not be arbitrarily denied."[60] The state defended its ban by claiming it was protecting public safety, but the court swiftly rejected that argument, pointing to the ordinance's stated purpose: protecting streetcars from competition.[61] Accordingly, the court invalidated Houston's ban on jitneys because it advanced an illegitimate interest and arbitrarily prevented individuals from pursuing an otherwise lawful livelihood.[62]

---

57. *See, e.g.*, Santos v. City of Houston, 852 F. Supp. 601, 608 (S.D. Tex. 1994) ("The purpose of the statute was economic protectionism in its most glaring form, and this goal was not legitimate."); *cf.* Wilkerson v. Johnson, 699 F.2d 325, 328–29 (6th Cir. 1983) (affirming district court ruling that city denied barber shop licensee due process to eliminate competition).

58. 852 F. Supp. 601 (S.D. Tex. 1994).

59. *See id.* at 603 (discussing factual background). Jitneys are small busses designed to carry passengers over a fixed route for a flat fee. *See id.* at 603 n.1 (defining "jitney"). The court noted that the city ordinance was the result of pressure from streetcar companies in the early 1900s. *See id.* (analyzing legislative history). When the city enacted the ordinance, its stated objective was "to protect streetcar companies from competition." *Id.*

60. *Id.* at 607 (citing Cowan v. Corley, 814 F.2d 223, 227 (5th Cir. 1987)). The court noted that statutes based purely on favoritism or economic protectionism cannot survive a constitutional challenge. *See id.* at 607–08 (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 470 (1981)) (discussing unconstitutionality of protectionist legislation). Finally, the court enunciated the standard of review applied to statutes that single out a particular class or that make "distinctions in the treatment of business entities engaged in the same business activity." *See id.* at 608 ("[A statute] must bear a reasonable relationship to the underlying purpose of the statute, *and that purpose must be legitimate*." (emphasis added) (citing City of New Orleans v. Dukes, 427 U.S. 297, 301–03 (1976))).

61. *See id.* at 608 ("[T]hese alleged [objectives] were far from the minds of city officials at the time of enactment . . . ."). The city argued that the ordinance preserved the flow of traffic and prevented accidents by keeping small transportation vehicles that made frequent stops off of the street. *See id.* (arguing that ordinance improved traffic flow). In rejecting the city's argument, the court delved into the ordinance's legislative history to find the illegitimate purpose of economic protectionism. *See id.* at 603, 608 (discussing ordinance's original purpose). Nevertheless, even if the court accepted the city's safety rationale, the ordinance bore no rational relation to it because the fifteen-passenger limit did not affect traffic safety. *See id.* at 608 ("The record further establishes that the 15 passenger limit has no substantial relationship to traffic safety."). Moreover, the court found that the city arbitrarily enforced the ordinance, banning jitneys but allowing the operation of other small transportation vehicles, such as airport and hotel courtesy vans. *See id.* (listing other similarly situated businesses permitted to operate).

62. *See id.* (granting plaintiff's summary judgment motion).

III. GRAVE DISAGREEMENT: WHETHER ECONOMIC PROTECTIONISM IS A VALID STATE INTEREST

The increased scrutiny that some courts have given protectionist laws has divided federal courts.[63] In two recent cases, the Sixth and Tenth Circuit Courts of Appeals considered the validity of a law favoring one intrastate industry over another, but arrived at opposite conclusions.[64] This section examines how two circuit courts, purporting to apply the same rational basis standard of review, came to dramatically different rulings.[65]

A. *The Sixth Circuit Rules That Intrastate Economic Protectionism Is Not a Legitimate State Interest*

In *Craigmiles v. Giles*, the Sixth Circuit Court of Appeals held that a Tennessee law requiring casket retailers to obtain a funeral director's license violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment because it bore no rational relation to the state's purported health or consumer protection justifications.[66] After finding no rational relation to a legitimate state interest, the court explained that the Tennessee licensing law was "very well tailored" to a "more obvious illegitimate purpose": protecting licensed funeral directors from competition in casket sales.[67] By protecting licensed funeral directors from com-

63. *Compare* Craigmiles v. Giles, 312 F.3d 220, 228 (6th Cir. 2002) (declaring protection of licensed funeral directors from competition within particular state illegitimate purpose), *with* Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004) (finding intrastate economic protectionism legitimate state interest).

64. *See Craigmiles*, 312 F.3d at 224 (applying rational basis review and finding law unconstitutional); *see also Powers*, 379 F.3d at 1215 (applying same standard of review and finding nearly identical law constitutional).

65. For a discussion of the divergent conclusions of the *Craigmiles* and *Powers* courts, see *infra* notes 66–94 and accompanying text.

66. *See Craigmiles*, 312 F.3d at 228–29 (invalidating state licensing law). The court also briefly addressed, and then dismissed, the plaintiffs' claim that the licensing law violated the Privileges and Immunities Clause of the Fourteenth Amendment. *See id.* at 229 (dismissing privileges and immunities claim). The Privileges and Immunities Clause states, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1. In dismissing the privileges and immunities claim, the court noted that the Supreme Court restricted the scope of the Privileges and Immunities Clause shortly after the ratification of the Fourteenth Amendment to "very limited rights of national citizenship." *See Craigmiles*, 312 F.3d at 229. Of particular relevance, the Supreme Court specifically held that the Privileges and Immunities Clause "did not protect an individual's right to pursue an economic livelihood against his own state." *Id.* Nevertheless, the court's dismissal of the privileges and immunities claim in *Craigmiles* was not fatal to the plaintiffs' case because the equal protection and due process claims supported the district court's findings. *See id.* ("Because the plaintiffs' Equal Protection and Due Process arguments are sufficient to support the district court's injunction, we do not reach [the Privileges and Immunities] argument.").

67. *See Craigmiles*, 312 F.3d at 228 (discussing scope of licensing law). Interestingly, Tennessee did not argue that economic protectionism was a legitimate state interest. *See id.* at 225–28 (arguing that licensing law promoted consumer protec-

petition, the law "harm[ed] consumers in their pocketbooks."[68] Moreover, the court explained that protecting funeral directors at the expense of consumers and potential competitors was not a legitimate state interest and therefore, the law could not satisfy the highly deferential rational basis review.[69]

When the Tennessee legislature originally enacted the licensing law in 1951, the statutory definition of funeral directing did not include the sale of caskets.[70] Twenty years later, the legislature amended the licensing law to include "*the selling of funeral merchandise*."[71] Under judicial review, Tennessee argued that the licensing requirement, in the context of selling funeral merchandise, was supported by public health and consumer protection justifications.[72] However, the Sixth Circuit disagreed, colorfully

---

tion not economic protectionism). The district court invalidated the Tennessee law finding that it "was designed only for the economic protection of funeral home operators" and invalidated it. *Id.* at 224. The Sixth Circuit likewise explained that Tennessee's justifications for the law were merely a pretext for stifling economic competition. *See id.* at 225 ("The weakness of Tennessee's proffered explanations indicates that the [licensing law] was nothing more than an attempt to prevent economic competition.").

68. *See id.* at 225 (discussing impact of law on consumers).

69. *See id.* at 229 ("This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review.").

70. *See id.* at 222 (recounting legislative history of Tennessee funeral director licensing law). The 1951 version of the law only contemplated "arranging of funeral ceremonies, burial, cremation, and embalming." *Id.* To become a licensed funeral director in Tennessee, a person—even someone who intended to sell just caskets—was required to complete one of two paths of study: (1) a two year apprenticeship under a licensed funeral director, followed by an examination; or (2) one year of course work at an accredited mortuary school, followed by a one year apprenticeship and an examination. *See id.* (describing requirements of Tennessee licensing law). The curriculum at the only accredited mortuary school in Tennessee consisted of "eight credit hours in embalming, three in 'restorative art,' and twenty-one in 'funeral service.'" *Id.* At trial, "students testified that casket and urn issues constituted no more than five percent" of the curriculum and evidence demonstrated that "[o]nly 37 of the 250 questions on the Tennessee Funeral Arts Exam concern[ed] funeral merchandising, including various casket options, FTC regulations regarding the sale of funeral merchandise, and merchandise display." *Id.* The same Tennessee law also established a seven-member Board of Funeral Directors and Embalmers, which consisted of six licensed funeral directors and one person from outside the funeral industry, to administer the law. Craigmiles v. Giles, 110 F. Supp. 2d 658, 660 (E.D. Tenn. 2000) (discussing board composition), *aff'd*, 312 F.3d 220 (6th Cir. 2002).

71. *Craigmiles*, 312 F.3d at 222 (citing TENN. CODE ANN. § 62-5-101(a)(3)(A)(ii) (2002)).

72. *See id.* at 225 (analyzing Tennessee's argument supporting its licensing law). Tennessee argued that its law ensured that casket retailers properly handled corpses, led to higher quality caskets, and minimized the spread of disease from corpses. *See id.* (addressing public health and safety arguments). Tennessee also argued that mandatory training would increase a casket retailer's ability to advise consumers on purchasing the right type of casket, better train retailers to accommodate grieving customers, and prevent fraud. *See id.* at 226–28 (describing consumer protection arguments). The court, however, rejected each of Tennessee's

stating that Tennessee's justifications for the amendment struck it "with 'the force of a five-week-old, unrefrigerated dead fish,' a level of pungence almost required to invalidate a statute under rational basis review."[73]

In its analysis, the Sixth Circuit relied on Supreme Court precedent that stood for two different, but related, propositions.[74] First, the Supreme Court has "repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose."[75] Second, the Court "has been suspicious of a legislature's circuitous path to legitimate ends when a direct path is available."[76] The precedent cited by the *Craigmiles* court, however, did not specifically address intrastate economic legislation.[77] The court relied heavily on one case in particular, *City of Cleburne v. Cleburne Living Center*,[78] in which the Supreme Court struck down a law discriminating against the mentally

---

justifications and stated that the licensing requirement "bears no rational relationship to increasing the quality of burial containers." *See id.* at 226.

73. *Id.* (citation omitted) (quoting United States v. Searan, 259 F.3d 434, 447 (6th Cir. 2001)). Ultimately, Tennessee's decision to apply its licensing law to casket retailers was fatal to the law's constitutionality. *See id.* at 227 (finding that legislation was suspicious). Reviewing the legislative history of the law, the court concluded that the "specific action of requiring licensure . . . appears [to be] directed at protecting licensed funeral directors from retail price competition." *Id.* The court noted that although rational basis review "does not require the best or most finely honed legislation," the law's legislative history, combined with the state's "weak" justifications, exposed the legislation's true intent: the protection of a discrete industry from competition. *See id.* at 225, 227 ("The weakness of Tennessee's proffered explanations indicates that the 1972 amendment adding the retail sale of funeral merchandise to the definition of funeral directing was nothing more than an attempt to prevent economic competition.").

74. For a discussion of the Supreme Court precedent on which the *Craigmiles* court relied, see *infra* notes 75–80 and accompanying text.

75. *Craigmiles*, 312 F.3d at 224. The Sixth Circuit relied upon Supreme Court precedent to reach this conclusion. *See, e.g.*, Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411 (1983); City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537–38 (1949).

76. *Craigmiles*, 312 F.3d at 227 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)).

77. *See* Powers v. Harris, 379 F.3d 1208, 1218–20 (10th Cir. 2004) (criticizing *Craigmiles* court for invoking Supreme Court precedent unrelated to issue of economic protectionism). *City of Philadelphia* addressed the Commerce Clause of the U.S. Constitution. *See City of Philadelphia*, 437 U.S. at 618 ("[W]hether [New Jersey law] violate[d] the Commerce Clause of the United State Constitution."). *H.P. Hood & Sons* concerned violations of the Dormant Commerce Clause. *See H.P. Hood & Sons*, 336 U.S. at 526 (addressing state regulation that sheltered local economy from national economy). *Energy Reserves Group* involved the Contracts Clause. *See Energy Reserves Grp.*, 459 U.S. at 403 ("[This case] presents a federal Contract Clause issue . . . ."). Finally, although *Cleburne* was an equal protection case, it did not concern an economic regulation. *See Cleburne*, 473 U.S. at 435 (concluding that city's denial of permit violated Equal Protection Clause).

78. 473 U.S. 432 (1985).

handicapped.[79] As this author will later argue, the Sixth Circuit reached the correct conclusion—that pure economic protectionism is not a legitimate state purpose—even though it was heavily criticized by the Tenth Circuit.[80]

B. *The Tenth Circuit Rejects* Craigmiles *and Holds That Intrastate Economic Protectionism Is a Legitimate State Interest*

In *Powers v. Harris*, the Tenth Circuit Court of Appeals upheld a similar Oklahoma law, which required casket retailers to obtain a license from the state Board of Embalmers and Funeral Directors.[81] The court briefly considered the state's proffered reason for the licensing requirement—consumer protection—before asserting that intrastate economic protectionism, on its own, is a legitimate state interest.[82] To reach this conclusion, the Tenth Circuit employed an extremely deferential form of rational basis review and directly addressed the Sixth Circuit's *Craigmiles* decision.[83]

---

79. *See id.* at 435 (holding that Cleburne was in violation of Equal Protection Clause).

80. *See Powers*, 379 F.3d at 1219 (accusing *Craigmiles* court of "selective quotation"); *see also* Marc. P. Florman, *The Harmless Pursuit of Happiness: Why "Rational Basis with Bite" Review Makes Sense for Challenges to Occupational Licenses*, 58 LOY. L. REV. 721, 765–66 (2012) (analyzing disagreement between *Powers* and *Craigmiles* courts). For a further discussion of the *Powers* court's criticism of the *Craigmiles* court's use of unrelated precedent, see *infra* notes 126–27 and accompanying text.

81. *See Powers*, 379 F.3d at 1221 (finding that Oklahoma's licensing law "constitutes a legitimate state interest"). Under the Oklahoma licensing law anyone "engaged in the sale of funeral-service merchandise" must be a licensed funeral director and operate "out of a funeral establishment." *Id.* at 1211 (discussing OKLA. STAT. tit. 59, § 396.2(2)(d), (3), (10) (2013)). "The [Oklahoma licensing law] effectively require[d] that both a funeral director's license and a funeral establishment license be obtained from the Board before a person or entity may lawfully sell caskets." Powers v. Harris, No. 01-445-F, 2002 WL 32026155, at *11 (W.D. Okla. Dec. 12, 2002), *aff'd*, 379 F.3d 1208 (10th Cir. 2004). The Oklahoma law was more taxing than the law in *Craigmiles* because it required a licensed establishment to operate out of a "fixed physical location" and maintain a "preparation room" that met high standards for embalming bodies. *Compare Powers*, 379 F.3d at 1212–13 ("[A] business must have a fixed physical location, a preparation room that meets the requirements for embalming bodies, . . . and adequate areas for public viewing of human remains."), *with Craigmiles*, 312 F.3d at 222–23 (articulating no embalming facilities requirement). Additionally, Oklahoma's licensing law required applicants to complete sixty credit hours of undergraduate training—only a fraction of courses related to casket sales—and a one-year apprenticeship in which an applicant was required to embalm at least twenty-five bodies. *See Powers*, 379 F.3d at 1212 (describing requirements of licensing law). Finally, an applicant had to pass two examinations before obtaining a license. *See Powers*, 379 F.3d at 1212 (noting examination requirement). *See* OKLA. ADMIN. CODE §§ 235:10-1-2, 10-3-2 (2013) (describing requirements under licensing statute).

82. *See Powers*, 379 F.3d at 1215–21 (discussing Oklahoma's justifications and issue of economic protectionism).

83. *See id.* at 1217–20 (discussing standard of review and addressing *Craigmiles* at length).

Although the Tenth Circuit applied the same rational basis test as the *Craigmiles* court, the Tenth Circuit emphasized that more deference should be given to the legislature.[84] The court explained that the Supreme Court has consistently held that great deference must be given to legislatures and that courts should seek out any "conceivable reasons for validating [a state law]."[85] Thus, the court had the freedom to not only consider the state's proffered consumer protection justification, but could also consider on its own whether intrastate economic protectionism could be a legitimate state interest.[86]

Of particular importance, the Tenth Circuit did not uphold Oklahomas's licensing requirement based on a rational relation to the state's consumer protection justification.[87] Instead, the court considered Supreme Court precedent that, in its view, suggested that states could simply favor one intrastate industry over another.[88] According to the *Powers* majority, the Supreme Court has "consistently held that protecting or favoring one particular intrastate industry, absent a federal constitutional or statutory violation, is a legitimate state interest."[89] As a result, the court articulated the view that mere intrastate economic protectionism is a valid state interest.[90] The *Powers* court went on to criticize the *Craigmiles* court

84. *See id.* at 1217–18 (addressing standard of review). The court went on to articulate three reasons why legislative deference is important. *See id.* at 1218 (explaining importance of deference to legislature) First, courts would "paralyze state governments" if they probed into each of their actions and continually struck down laws. *See id.* Second, because "the definition of the public good changes with the political winds," courts have no place substituting their view of what is "good" for the legislature's. *See id.* Third, matters of federalism require the federal courts to view and respect states as "separate sovereigns." *See id. But cf.* Abbott, *supra* note 5, at 498–501 (discussing tendency of state legislatures to be "captured" by special interests that seek economic regulation to curb or eliminate competition).

85. *Powers*, 379 F.3d at 1217 (quoting Starlight Sugar, Inc. v. Soto, 253 F.3d 127, 146 (1st Cir. 2001)).

86. *See id.* at 1218 (analyzing whether states may legitimately protect intrastate businesses).

87. *See id.* at 1216, 1225 (upholding Oklahoma's law under theory of legitimate interest in intrastate economic protectionism rather than in consumer protection).

88. *See id.* at 1218–22 (recognizing legitimate state interest in protecting intrastate industries).

89. *Id.* at 1220.

90. *See id.* at 1220–21 (discussing Supreme Court's history of finding legitimate state interest when laws favor particular intrastate industries); *see also* Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 110 (2003) (upholding Iowa statute taxing slot machine revenues on riverboats at lower rate than those at racetracks); Nordlinger v. Hahn, 505 U.S. 1, 18 (1992) (upholding California property taxation scheme favoring long-term property holders over new purchasers); City of New Orleans v. Dukes, 427 U.S. 297, 302 (1976) (per curiam) (rejecting Equal Protection Clause challenge to New Orleans ordinance that prohibited food cart vendors in French Quarter but exempted vendors with continuous operations for eight or more years); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955) (upholding Oklahoma statute prohibiting anyone other than optometrist or oph-

for applying a more stringent form of rational basis review when, in the Tenth Circuit's opinion, a rational basis review calls for more deference to legislatures than the *Craigmiles* court allowed.[91]

In a concurring opinion, however, Judge Tymkovich disagreed with the majority's conclusion that economic protectionism alone is a legitimate state interest.[92] Judge Tymkovich asserted that instead of arbitrarily supporting one economic actor over another, the Supreme Court has "insisted that the legislation advance some public good."[93] Nevertheless, the concurrence agreed that the Oklahoma licensing law, however imperfectly, purported to advance consumer protection interests and whether it truly did was a "battle [to] be fought in the Oklahoma legislature," not the judicial system.[94]

---

thalmologist from fitting lenses without prescription, requiring opticians to obtain prescriptions).

91. *See Powers*, 379 F.3d at 1223 (criticizing *Craigmiles* decision). The *Powers* court disagreed with the Sixth Circuit on three specific points. First, the *Powers* court believed that the *Craigmiles* court's analysis focused too "heavily on the . . . actual motives of the Tennessee legislature." *Id.* Second, the *Powers* court disagreed with the Sixth Circuit's conclusion that protecting intrastate industries from competition is not a legitimate state interest. *See id.* (disagreeing over whether protecting intrastate industries is a legitimate governmental interest). Third, the court found the Sixth Circuit's emphasis on the less deferential form of rational basis review found in *Cleburne* to be "misplaced." *See id.*

92. *See id.* at 1225 (Tymkovich, J., concurring) ("Where I part company with the majority is its unconstrained view of economic protectionism as a 'legitimate state interest.'").

93. *Id.* at 1226. The concurrence addressed each of the Supreme Court cases that the majority cited in support of its conclusion and pointed to some "public good" that the Court believed each respective legislature was advancing. *See id.* ("None of these cases overturned the principle that the Equal Protection Clause prohibits invidious state interests; to the contrary, they ratified the principle."). Judge Tymkovich explained that in *Williamson*, the Court accepted a consumer safety and health interest rationale "over a claim of pure economic parochialism." *Id.* The Court in *Fitzgerald* "invoked economic development and protect[ed] the reliance interests of river-boat owners." *Id.* In *Dukes* and *Nordlinger*, the Court invoked historical and neighborhood preservation, respectively. *See id.* (describing interests protected in *Dukes* and *Nordlinger*).

94. *Id.* at 1226–27. Although the concurrence upheld the licensing law, it suggested that the restrictions could hurt consumer interests in practice. *See id.* at 1227 ("Consumer interests appear to be harmed rather than protected . . . ."). The concurrence further stated, just as the *Craigmiles* court asserted, that general state consumer protection laws already addressed the state's impetus for requiring casket retailers to apply for licensure. *See id.* ("[G]eneral consumer protection laws appear to be a more than adequate vehicle to allow consumer redress of abusive marketing practices."). Nevertheless, in the interests of federalism and deference to the legislature the concurrence concluded that the law was constitutional. *See id.* (concluding that license law satisfies rational basis review).

IV. ECONOMIC LIBERTY: ALIVE AND KICKING IN THE FIFTH CIRCUIT AFTER *ST. JOSEPH ABBEY V. CASTILLE*

In *St. Joseph Abbey*, the Fifth Circuit unanimously held that economic protectionism alone is not a legitimate state interest.[95] The court explained that Louisiana's licensing law, which closely resembled the statutes in *Craigmiles* and *Powers*, was enacted for the sole purpose of protecting funeral directors from competition.[96] In striking down the law, the Fifth Circuit rejected *Powers* and joined the Sixth Circuit in defending economic liberty from arbitrary government interference.[97]

A. St. Joseph Abbey v. Castille*: The Facts*

For generations, the monks of St. Joseph Abbey made simple wooden caskets to bury their brothers.[98] After losing their main source of income to Hurricane Katrina, the monks recognized that they could generate new revenue by selling their simple caskets to the public.[99] Seizing this opportunity, the Abbey invested $200,000 and opened St. Joseph Woodworks.[100]

Shortly after the Abbey began selling its caskets, the Louisiana State Board of Embalmers and Funeral Directors (Board) ordered the Abbey to cease its casket selling operations, claiming that the business violated state

95. *See* St. Joseph Abbey v. Castille, 712 F.3d 215, 222 (5th Cir. 2013) ("[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose . . . .").

96. *See id.* at 226–27 ("The principle we protect from the hand of the State today protects [a] . . . vital core principle—the taking of wealth and handing it to others when it comes not as economic protectionism in service of the public good but as 'economic' protection of the rulemakers' pockets.").

97. *See id.* at 222 (declaring "mere economic protection of a particular industry" illegitimate government interest); Craigmiles v. Giles, 312 F.3d 220, 228–29 (6th Cir. 2002) (same).

98. *See St. Joseph Abbey*, 712 F.3d at 217 (providing history of monks at St. Joseph Abbey making caskets).

99. *See id.* (explaining monks' reasons for building and selling caskets). Before Hurricane Katrina, the Abbey harvested timber on its property for income. *See id.* (discussing history of St. Joseph Abbey). After the hurricane destroyed the Abbey's forested land, the monks were forced to find other sources of revenue. *See id.* (same). The monks noticed that public interest in their caskets increased after two bishops were buried in them in the 1990s. *See id.* (noting rise in consumer interest for caskets made by monks). Faced with financial distress and an apparent demand for their caskets, the monks decided to enter the casket retail business. *See id.* (describing St. Joseph Abbey's entry into casket market).

100. *See id.* (discussing St. Joseph Woodworks business startup and operations). The monks offered simple wooden caskets in two models, both priced significantly lower than caskets sold in funeral homes. *See id.* (comparing St. Joseph Abbey's casket prices to funeral home casket prices). The Abbey only constructed caskets and did not offer funeral services or prepare the deceased for burial. *See id.* (explaining that Abbey only constructed and sold caskets). The monks only participated in funeral services as pastors. *See id.* (noting monk's limited participation in funeral services).

law.[101] In Louisiana, only licensed funeral directors were permitted to sell caskets.[102] Over the next two years, the Abbey petitioned the Louisiana legislature to exclude the retail of caskets from its licensing statute.[103] Two bills to amend the law were drafted; although they faced no public opposition, the bills never made it out of committee.[104]

Finding no solace in the state legislature, the Abbey sued the Board in the United States District Court for the Eastern District of Louisiana.[105] The Abbey alleged that the Board denied the Abbey equal protection and due process under the Fourteenth Amendment by restricting intrastate casket sales to licensed funeral directors.[106] The district court ruled for the Abbey, finding the law to be protectionist and without a rational relation to a legitimate state interest.[107]

B. *The Fifth Circuit Finds No Legitimate Interest in Economic Protectionism*

On appeal, the Board argued that pure economic protection of a discrete industry is a valid state interest and, alternatively, that the law was rationally related to the state's interest in consumer protection and public health.[108] The Fifth Circuit first addressed the Board's novel argument

101. *See id.* at 219 (describing Board's actions against Abbey). The nine-member Board consisted of "four licensed funeral directors, four licensed embalmers, and just one representative not affiliated with the funeral industry." *Id.* According to the court, the Board's main purpose in regulating caskets consisted of restricting intrastate casket sales to funeral homes. *See id.* at 218 (stating Board's purpose in regulating caskets). Louisiana did not regulate the use of caskets in any other way. *See id.* at 217–18 ("[Louisiana] has no requirements for the construction or design of caskets; and does not require that caskets be sealed. Individuals may construct their own caskets . . . or purchase caskets from out-of-state suppliers via the internet. Indeed, no Louisiana law even requires a person to be buried in a casket.").

102. *See id.* at 218 (acknowledging Board's argument that only state-licensed funeral directors may sell caskets at state-licensed funeral homes). Louisiana's license law created several hurdles for retailers to jump over before selling their caskets. *See id.* (outlining Louisiana statute). The statute first required a hopeful casket retailer to become a licensed funeral home with a "layout parlor" for thirty people, a display room with no less than six caskets, an arrangement room, and embalming facilities. *See id.* (identifying building requirements for licensed funeral homes). Second, the funeral home was required to "employ a full-time funeral director." *Id.* A funeral director needed to pass thirty credit hours at an accredited college and complete an apprenticeship followed by an examination to become licensed. *See id.* (explaining that neither mandatory training nor examination related to caskets or burial practices).

103. *See id.* at 219 (discussing Abbey's efforts to influence legislature).

104. *See id.* (noting attempts to amend Louisiana's license law).

105. *See id.* at 220 (recounting procedural history of case).

106. *See id.* (discussing Abbey's claims).

107. *See id.* ("[T]he district court issued judgment for the Abbey . . . finding that this brand of economic protectionism is not a legitimate state interest and finding no rational relationship between the challenged law and Louisiana's interests in consumer protection, public health, and public safety.").

108. *See id.* at 221 (recognizing Board's alternative arguments). In arguing for a legitimate interest in the economic protection of an in-state industry, the

for unbridled power to protect a favored industry, and ultimately found that "neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose."[109] The court then turned to the Board's public health and consumer protection justifications, but found no rational relation between the licensing scheme and the Board's stated interests.[110] Accordingly, the Fifth Circuit affirmed the district court's ruling.[111]

In finding intrastate economic protectionism to be an illegitimate government interest, the Fifth Circuit analyzed the *Powers* court's position and the Supreme Court precedents that it used.[112] The Fifth Circuit criticized the *Powers* court for overstating the proposition for which the Supreme Court cases stood.[113] Rather than condoning pure economic protection of a specific industry, the precedents indicated that protectionism is a legitimate interest if it is incidental to furthering a legitimate public interest or the general welfare.[114] To bolster this view, the Fifth Circuit pointed to Judge Tymkovich's concurrence in *Powers*, which stated the same proposition.[115] Without some other legitimate purpose, Louisiana

---

Board pointed to the Tenth Circuit's decision in *Powers*. *See id.* at 221–22 (addressing Board's argument regarding validity of protecting discrete intrastate industry). In response, the Abbey pointed to the Sixth Circuit's decision in *Craigmiles*. *See id.* at 222 (noting opposite outcome in two circuits). The court explained that "*Craigmiles* and *Powers* rest on their different implicit answers to the question of whether the state legislation was supportable by rational basis." *Id.*

109. *See id.* at 222 (rejecting Board's argument). The Board argued "that pure economic protection of a discrete industry is an exercise of a valid state interest." *Id.* at 221.

110. *See id.* at 223–26 (finding no rational relation to consumer protection or public health interests).

111. *See id.* at 227 (affirming judgment of district court).

112. *See id.* at 221–23 (analyzing Board's economic protection argument by reviewing *Powers* decision).

113. *See id.* at 222 ("[N]one of the Supreme Court cases *Powers* cites stands for that proposition."). The *Powers* court believed that "the Supreme Court has consistently held that protecting or favoring one particular intrastate industry, absent a specific federal constitutional or statutory violation, is a legitimate state interest." *Id.* (quoting Powers v. Harris, 379 F.3d 1208, 1220 (10th Cir. 2004)). The Fifth Circuit emphasized that a legislature's efforts to protect an in-state industry must have a rational relation to some legitimate interest. *See id.* (noting public interest requirement for protection of in-state industries).

114. *See id.* ("[T]he cases [that the *Powers* court cites to] indicate that protecting or favoring a particular intrastate industry is not an *illegitimate* interest when protection of the industry can be linked to the advancement of the public interest or general welfare.").

115. *See Powers*, 379 F.3d at 1226 (Tymkovich, J., concurring) ("Rather than hold that a government may always favor one economic actor over another, the Court, if anything, insisted that the legislation advance some public good." (citing Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955))). For a further discussion of the *Powers* concurrence, see *supra* notes 92–94 and accompanying text.

could not favor a discreet industry merely for the sake of protecting it from competition.[116]

After finding no legitimate interest in pure economic protectionism, the court turned to the Board's consumer protection and public safety arguments.[117] The Board argued that the licensing statute protected consumers because it "restrict[ed] predatory sales practices by third-party sellers" and prevented the sale of faulty caskets.[118] The court thoroughly rejected this argument.[119] By pointing to the undisputed facts on the re-

116. *See St. Joseph Abbey*, 712 F.3d at 222 (finding no legitimate government interest in mere economic protectionism). The Fifth Circuit concluded its analysis of economic protectionism by stating that a "post hoc perceived rationale" could support the law if it related to a legitimate interest. *See id.* at 222–23 ("[E]conomic protection, that is favoritism, may well be supported by a post hoc perceived rationale . . . ."). Without a relation to some public interest or general welfare objective, protectionist statutes are merely a "naked transfer of wealth." *Id.* at 223. To illustrate this point the court described *Greater Houston Small Taxicab Co. Owners Ass'n v. City of Houston*, where a Houston city ordinance favored large cab companies over small ones. *See id.* ("Recently, we upheld against similar challenge a Houston taxi cab permitting scheme that disfavored small cab companies." (citing Greater Hous. Small Taxicab Co. Owners Ass'n v. City of Houston, 660 F.3d 235 (2012))). Although the record indicated that Houston was motivated by protectionism, the court noted that the law was upheld because it indisputably benefited consumers. *See id.* ("[T]here is no real dispute that promoting full-service taxi operations is a legitimate government purpose under the rational basis test." (quoting *Greater Hous. Small Taxicab Co.*, 660 F.3d at 240)). Unlike defendant Houston, the Board could not show that the Louisiana licensing statute was rationally related to a legitimate government interest regardless of its protectionist objective. *See id.* (noting necessity for actual relation to legitimate interest under rational basis review).

117. *See id.* at 223–27 (addressing consumer protection and public safety arguments).

118. *See id.* at 223 (describing Board's consumer protection argument).

119. *See id.* at 223–26 (analyzing consumer protection justification). The court explained that funeral directors' expertise was irrelevant to Louisiana's justification for making them the exclusive sellers of caskets because the state did not regulate the size, design, and price of caskets. *See id.* at 224 ("Given that Louisiana does not . . . [impose] requirements on any intrastate seller of caskets . . . regarding casket size, design, material, or price, whatever special expertise a funeral director may have in casket selection is irrelevant to it being the sole seller of caskets."). Additionally, the court found no evidence of significant fraud or deceptive sales practices by third-party casket retailers. *See id.* at 225 (addressing how FTC declined to apply Funeral Rule to third-party casket retailers due to insufficient evidence of consumer injury). On the contrary, the FTC acknowledged that funeral homes bundling their products presents a risk that the casket prices might become excessively marked up. *See id.* (discussing federal funeral home regulations). Additionally, Louisiana already regulated deceptive trade practices and unfair competition, thus, requiring licensure of casket retailers was irrelevant to protecting consumers. *See id.* at 225–26 ("In short, Louisiana's consumer protection regime reaches the sales practices of all intrastate sellers of caskets and can strike at any unfair practices . . . ."). Lastly, the court dismissed the Board's public health and safety argument and stated that of the "rationale . . . *eludes the realties* of Louisiana's regulation of caskets and burials." *Id.* at 226 (emphasis added). For example, "Louisiana does not even require a casket for burial, does not impose requirements for their construction or design, does not require a casket to be

cord, the court explained that the consumer protection and public safety justifications were "nonsensical explanations for regulation."[120] The Fifth Circuit could not even imagine a rational basis for restricting casket sales to licensed funeral directors.[121] Accordingly, the court invalidated the law as a protectionist measure and put an end to "the taking of wealth and handing it to others when it comes not as economic protectionism in service of the public good but as 'economic' protection of the rulemakers' pockets."[122]

V. PUTTING THE NAILS IN THE COFFIN FOR PROTECTIONIST LICENSING LAWS

The Fifth Circuit was correct in striking down Louisiana's licensing requirement for casket retailers.[123] In its analysis, the Fifth Circuit confined itself exclusively to cases that considered purely economic regulations, while the *Craigmiles* court relied heavily on *Cleburne*—a case involving discrimination of the mentally handicapped—and drew criticism from the *Powers* court.[124] As a result the Fifth Circuit has provided an exemplary framework for reviewing state occupational licensing laws.[125]

---

sealed before burial, and does not require funeral directors to have any special expertise in caskets . . . ." *Id.*

120. *See id.* at 226 ("The great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation.").

121. *See id.* at 227 ("The funeral directors have offered no rational basis for their challenged rule and, try as we are required to do, we can suppose none.").

122. *See id.* at 226–27 (invalidating Louisiana law).

123. *See id.* at 227 (affirming judgment of district court).

124. *Compare id.* at 221–23 (applying only cases involving economic regulations, such as *Williamson*, *Dukes*, and *Greater Hous. Small Taxicab Co.*), *with* Craigmiles v. Giles, 312 F.3d 220, 227 (6th Cir. 2002) (applying *Cleburne* in economic protection analysis); *see also* Powers v. Harris, 379 F.3d 1208, 1223 (10th Cir. 2004) (finding *Craigmiles's* emphasis on *Cleburne* misplaced); Florman, *supra* note 80, at 765 (noting Tenth Circuit's criticism of *Craigmiles*). *But see* Sanders, *supra* note 21, at 693 (praising *Craigmiles* for relying on *Cleburne*). The *Powers* court also criticized the *Craigmiles* court for relying on cases that addressed *inter*state economic protectionism instead of *intra*state economic protectionism. *See Powers*, 379 F.3d at 1219 (asserting that precedent relied on by *Craigmiles* court "is plainly directed at state regulation that shelters its economy from the larger national economy, i.e., violations of the 'dormant' Commerce Clause"). Although the Sixth Circuit reached the correct conclusion by invalidating a protectionist law that did not further a legitimate state interest, the *Powers* court appropriately pointed out *Craigmiles's* flaws. *See id.* at 1218–20 (criticizing Sixth Circuit's reasoning). However, *Powers* was not without its own flaws. *See* Jim Thompson, Powers v. Harris*: How the Tenth Circuit Buried Economic Liberties*, 82 DENV. U. L. REV. 585, 602 (2005) (criticizing *Powers* for misinterpreting precedent).

125. *Compare St. Joseph Abbey*, 712 F.3d at 222 ("[T]he cases indicate that protecting or favoring a particular intrastate industry is not an *illegitimate* interest when . . . linked to advancement of the public interest or general welfare."), *with Powers*, 379 F.3d at 1220 ("[T]he Supreme Court has consistently held that protecting or favoring one particular intrastate industry . . . is a legitimate state interest.").

A. *Arbitrary Occupational Licensing Laws Suppress Competition and Ultimately Hurt Consumers*

Requiring licensure in any profession raises barriers by making entry into that profession more costly.[126] Raised barriers consequently stifle competition within a given field and increase prices.[127] Whether intended or not, these conditions routinely coincide with licensing laws.[128] Therefore, legislatures should only consider restricting entry to professions that truly affect the health, safety, or general welfare of the public.[129]

---

126. *See* S. David Young, *Occupational Licensing*, LIBR. ECON. & LIBERTY (2002), http://www.econlib.org/library/Enc1/OccupationalLicensing.html ("The argument in favor of licensing always has been that it protects the public from incompetents, charlatans, and quacks. The main effect, however, is simply to restrict entry and reduce competition in the licensed occupation."). Although some economists bemoan the slightest occupational regulation, many others see the value of requiring capable professionals vetted by a regulator in certain industries. *Compare id.* (suggesting that occupational regulations have failed consumers), *with* Kleiner & Krueger, *supra* note 4, at 2 (discussing optimistic view of licensing, perceiving "a costless supply of unbiased, capable gatekeepers and enforcers"). Exactly which occupations deserve regulation, however, is a topic of much debate as legislatures have passed protectionist licensing laws in favor of certain "pet" industries. *See Powers*, 379 F.3d at 1221 ("[D]ishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments."); *see also* Sandefur, *supra* note 2, at 1035 ("Economic protectionism, in fact, is a constant occupation of legislatures . . . .").

127. *See* Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 16 (1976) ("Occupational licensing has typically brought higher status for the producer of services at the price of higher costs to the consumer . . . ."); *see also* Simon, *supra* note 3 (citing studies estimating additional $116 billion per year to cost of services due to occupational licensing). According to the "Cadillac effect," consumers in need of a licensed professional will either purchase the services of the best practitioners at a high price or purchase no services at all. *See* Young, *supra* note 126 (describing Cadillac effect). As a result, consumers pay a premium for a specific service or resort to do-it-yourself methods. *See id.* (discussing consumer behavior). Unsurprisingly, states with highly restrictive licensing laws in professions such as electricians and plumbers see more incidents of electrocutions and plumbing accidents because of consumers who forgo the artificially high rates for professionals and opt for do-it-yourself methods. *See id.* (recounting evidence of higher consumer injury in states with restrictive licensing laws).

128. *See* Young, *supra* note 126 ("Occupational regulation has limited consumer choice, raised consumer costs, increased practitioner income, limited practitioner mobility, and deprived the poor of adequate services . . . ."); *cf.* Morris M. Kleiner & Hwikwon Ham, *Regulating Occupation: Does Occupational Licensing Increase Earnings and Reduce Employment Growth?*, FED. TRADE COMM'N 1 (June 7, 2005), http://www.ftc.gov/be/seminardocs/050515kleiner.pdf ("The granting of licenses is generally placed with state licensing boards that usually consist of individuals in the occupation and they have an understandable incentive to restrict entry.").

129. *See* Simon, *supra* note 3 (noting certain professions such as electricians, tree trimmers, and tattoo artists should be monitored to protect people from harm); *see also Let a Thousand Florists Bloom: Uprooting Outrageous Licensing Laws in Louisiana*, INST. FOR JUST., http://www.ij.org/economic_liberty/la_florists/backgrounder.html (last visited Jan. 7, 2014) [hereinafter *Let a Thousand Florists Bloom*] ("[R]egulation of our livelihoods should be limited to only those restrictions that protect public health and welfare."). *But see* FRIEDMAN, *supra* note 5, at 139 (lamenting licensure of occupations such as tree surgeons); *see also* Young, *supra* note

In the funeral industry, for example, one can draw a clear distinction between the potential hazards of operating a funeral home and selling caskets.[130] No doubt, funeral directors that constantly come in contact with corpses can spread diseases if they do not properly handle them.[131] Casket retailers, on the other hand, face no such concerns because, put bluntly, the retailers simply sell a box to a consumer who then takes that box to a licensed funeral home to finish the job.[132] Arbitrarily requiring licenses of casket retailers under the guise of consumer protection and safety invariably hurts consumers by restricting competition and raising prices at a time when they are least likely to scrutinize the bill or shop around: when buying a casket for a loved one.[133]

126 (suggesting that licensure has no effect on quality of service provided). The Fifth Circuit made the same point by requiring an occupation to have some effect on general welfare for a state to properly require licensure. *See St. Joseph Abbey*, 712 F.3d at 222–23 (concluding that protectionist regulations can be justified through rational relation to some public interest). The court recognized the anticompetitive effects of licensing laws and found a balance, requiring some public benefit regardless of the legislature's intent. *See id.* at 223 (noting that even protectionist legislation can survive rational basis review if rationally related to legitimate governmental purpose). Moreover, the court unequivocally stated "that naked economic preferences are impermissible to the extent that they harm consumers." *Id.* (quoting Greater Hous. Small Taxicab Co. Owners Ass'n v. City of Houston, 660 F.3d 235, 240 (5th Cir. 2011)).

130. *See* Sanders, *supra* note 21, at 686–87 (outlining differences between casket retailers and licensed funeral directors who are "trained in protecting the public from the effects of dead bodies").

131. *See* TENN. CODE ANN. § 62-5-303 (2009), *invalidated by* Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002) (mandating that all who engage in embalming and funeral directing be licensed to "safeguard life and health and to prevent the spread of contagious diseases").

132. *See Craigmiles*, 312 F.3d at 225–26 ("There is no evidence in the record that licensed funeral directors were selling caskets that were systematically more protective than those sold by independent casket retailers."); *cf. Funeral*, COSTCO WHOLESALE, http://www.costco.com/funeral.html (last visited Jan. 13, 2014) (selling funeral merchandise, including caskets, over internet); *Funeral*, WALMART, http://www.walmart.com/cp/Funeral/1058564 (last visited Jan. 13, 2014) (same).

133. *See Craigmiles*, 312 F.3d at 224 (noting that funeral home operators mark up casket prices by 250 to 600%); Regulatory Review of the FTC Funeral Rule, 73 Fed. Reg. 13,740, 13,745 (Mar. 14, 2008) (codified at 16 C.F.R. § 453) ("Indeed, third-party retailers have a strong economic incentive to display their prices to the public at large because offering a lower price is the primary way they compete against funeral providers for sales of . . . caskets."). The Federal Trade Commission discussed the adverse consequences of licensing casket retailers in its amicus brief to the Fifth Circuit in *St. Joseph Abbey*. *See* Brief for Federal Trade Commission as Amicus Curiae Supporting Neither Party, St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013) (No. 11-30756) ("Recognizing that the best way to protect bereaved consumers from unfair trade practices is by promoting informed choice and reducing barriers to competition, the Commission consistently has opposed laws that prohibit persons other than licensed funeral directors from selling caskets or urns."). Although the FTC did not take a position on the plaintiff's constitutional claims, it vehemently opposed any law that restricted consumer choice and information, noting that doing so gave funeral directors an unfair buffer from competition. *See id.* at 13 ("The practical effect of [Louisiana's funeral director licensing law] is to limit a consumer's choice of funeral merchandise providers,

Unfortunately, arbitrary and protectionist licensing laws are not unique to the funeral industry.[134] States require licensure of practitioners in other occupations that do not actually affect the public's general welfare, such as African hair braiders, shampoo specialists, boxing promoters, interior designers, and florists.[135] Legislatures normally pass these laws intending to protect the public, but the laws routinely insulate entrenched businesses from competition with no public benefit.[136] Why, then, do

---

thereby insulating the funeral service industry in Louisiana from in-state competition."). The FTC argued that allowing casket vendors to sell their products without licensing requirements would lower prices by increasing the supply of caskets in the market and increasing competitive pressures on existing suppliers to lower their prices. *See id.* at 14 ("In short, independent casket retailers are likely to provide more choices at lower prices—precisely the type of pro-competitive benefit to consumers that the Funeral Rule seeks to promote.").

134. *See, e.g.*, Dick M. Carpenter II, *Blooming Nonsense: Experiment Reveals Louisiana's Florist Licensing Scheme as Pointless and Anti-competitive*, INST. FOR JUST. (Mar. 2010), http://www.ij.org/blooming-nonsense-experiment-reveals-louisianas-florist-licensing-scheme-as-pointless-and-anit-competitive (noting "complete dearth of evidence" for Louisiana florist licensing law's benefit to anyone other than incumbent licensed florists). For a further discussion of the negative effects of licensing laws, see *infra* note 136 and accompanying text.

135. *See* Valerie Bayham, *A Dream Deferred: Legal Barriers to African Hairbraiding Nationwide*, INST. FOR JUST., http://ij.org/a-dream-deferred (last visited Jan. 7, 2014) (commenting on licensing requirements for aspiring hair braiders enacted to protect cosmetology schools and licensed hair salons); Carpenter, *supra* note 134 (discussing same for florists in Louisiana); Simon, *supra* note 3 (referencing states that require licensure of shampoo specialists, interior designers, and boxing promoters).

136. *See* Gellhorn, *supra* note 127, at 14–15 (addressing "exclusionary intent and effect" of certain state licensing laws). In a particularly telling example, Louisiana requires that florists obtain a professional license. *See Let a Thousand Florists Bloom*, *supra* note 129 (exploring absurdity of florist licensing law). Prospective florists obtain licenses by passing a one-hour written examination and, until 2010, a three-hour performance examination, which tested subjective criteria such as the "harmony" and "unity" of flower arrangements. *See id.* (discussing license examination). A panel of the hopeful licensee's future competitors—licensed florists—judged the subjective examination. *See id.* Unsurprisingly, less than fifty percent of the test takers passed. *See id.* When the law was challenged in district court, the court held that it was rationally related to the government's interest in public welfare and safety because it helped prevent "exposed [thorns]," "broken wire[s]," and "flower[s] [with] some type of infection, like, dirt." *See* Meadows v. Odom, 360 F. Supp. 2d 811, 823–24 (M.D. La. 2005) (holding Louisiana florist licensing law constitutional under rational basis review), *vacated as moot*, No. 05-30450 (5th Cir. Aug. 1, 2006). Although the Eastern District of Louisiana upheld the law as a public welfare measure, the law was transparently anti-competitive and protectionist. *See* Leslie Turk, *Jindal Strikes Down Blooming Nonsense*, INDEP. MEDIA GRP. (July 12, 2010, 11:14 AM), http://www.theind.com/past-issues/6564-jindal-strikes-down-blooming-nonsense ("The law, by any measure, was an anti-competitive, anti-consumer scheme . . . ."). Ultimately, the Louisiana legislature abolished the subjective portion of the examination in 2010 but left the rest of the law intact, taking a small but significant step toward greater economic liberty. *See id.* (discussing developments in florist licensing law).

legislatures enact such protectionist legislation?[137]

B. *Incumbent Industry Professionals Seeking Licensure Wield Greater Powers of Persuasion with State Legislatures*

Although legislatures occasionally impose licensing requirements on industries, more often industry participants willingly seek licensing regulations.[138] This is always done "on the purported ground that licensure protects the uninformed public . . . but invariably with the consequence that members of the licensed groups become protected against competition from newcomers."[139] For example, industry groups seeking licensing regulations often include grandfather clauses in their proposals so that incumbent businesses may continue to operate unhindered while new entrants face burdensome hurdles.[140]

Long-standing industry groups are in a better position to influence legislatures and, because of their superior ability to organize and lobby, often dominate newcomers and consumers in the political process.[141]

---

137. For a discussion of the reasons why legislatures enact protectionist laws, see *infra* notes 138–48 and accompanying text.

138. *See* Gellhorn, *supra* note 127, at 11 (discussing willingness of industry participants to seek licensure); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 5 (1971) ("[E]very industry or occupation that has enough political power to utilize the state will seek to control entry."), *available at* http://www.rasmusen.org/zg601/readings/Stigler.1971.pdf.

139. Gellhorn, *supra* note 127, at 11 (addressing disparity between purpose and reality of occupational licensure); *see also supra* Part III (discussing cases that address funeral director licensing laws that insulate funeral directors from competition in funeral merchandise sales).

140. *See* Rottenberg, *supra* note 4, at 6 ("[I]n a single session of the New Jersey legislature practitioners asked that licensure be required for bait-fishing boats, beauty shops, chain stores, florists, insurance adjusters, photographers, and master painters, and that usually grandfather's clauses appeared in the draft proposals."); *cf. Pennsylvania Department of State Reminds Massage Therapists of Licensing Deadline*, PR NEWSWIRE (July 14, 2011), http://www.prnewswire.com/news-releases/pennsylvania-department-of-state-reminds-massage-therapists-of-licensing-deadline-125585403.html (reminding massage therapists to obtain licenses under grandfather clause within proper time frame).

141. *See* Gellhorn, *supra* note 127, at 12 (claiming that industry professionals who support new licensing laws "constitute a more effective political force than the citizens who, if aware of the matter at all, have no special interest which moves them to organize in opposition"). According to Nobel Prize-winning economist, Milton Friedman, the disproportionate power to organize arises because the interests of "producer groups" far outweigh the "casual" interests of consumers:

> [P]eople in the same trade, like barbers or physicians, all have an intense interest in the specific problems of this trade and are willing to devote considerable energy to doing something about them. On the other hand, those of us who use barbers at all, get barbered infrequently and spend only a minor fraction of our income in barber shops. Our interest is casual. Hardly any of us are willing to devote much time going to the legislature in order to testify against the iniquity of restricting the practice of barbering. . . . The public interest is widely dispersed. In consequence, in the absence of any general arrangements to offset the pressure of special interests, producer groups will invariably have a much

"Rationally ignorant" voters usually choose not to pay the costs associated with organizing and opposing protectionist legislation because the costs created by such laws are broadly distributed in the form of higher prices across a broad base of consumers who do not recognize the incremental effects.[142] Likewise, potential competitors are ill-suited to lobby against such legislation because of similar organizational problems.[143] Well-established industry participants, on the other hand, stand to gain much from increased prices and reduced competition.[144]

Given the perfect storm of powerful industry interests and voters' rational ignorance, the old rationale of correcting bad policies at the voting booth is ineffective.[145] While some state legislatures are vulnerable to special interests because they are simply at their mercy, others intentionally protect certain industries for political gain.[146] Voters affected by arbitrary licensing requirements cannot compete with an industry's lobbying efforts and self-interested politicians, whereas those who remain unaffected logi-

---

> stronger influence on legislative action and the powers that be than will the diverse, widely spread consumer interest.

FRIEDMAN, *supra* note 5, at 143.

142. *See* Abbott, *supra* note 5, at 500 (discussing rationally ignorant voter's role in protectionist legislation); *see also* BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES 3 (2007), *available at* http://www.cato.org/sites/cato.org/files/pubs/pdf/pa594.pdf (discussing rationally ignorant voters generally). Additionally, organizing a diffuse citizenry with vastly different desires proves prohibitively costly. *See* Stigler, *supra* note 138, at 10 (describing inefficiencies of "political decision processes"). To be effective, a large number of voters must make a decision simultaneously on a specific issue. *See id.* ("The condition of simultaneity imposes a major burden upon the political decision process."). Unfortunately, a majority of the voters remain uninterested in opposing licensing laws because a single law does not affect most voters. *See id.* at 11 ("The democratic decision process must involve 'all' the community, not simply those who are directly concerned with a decision.").

143. *See* Abbott, *supra* note 5, at 500 ("[P]otential competitors not yet in the market are poorly situated to lobby against [protectionist] legislation.").

144. *See id.* (noting competitive advantage gained by interest groups seeking "special privileges"); *see also* Rottenberg, *supra* note 4, at 13 (describing how incumbent businesses gain from licensing and giving examples).

145. *See* Powers v. Harris, 379 F.3d 1208, 1225 (10th Cir. 2004) ("Under our system of government, Plaintiffs 'must resort to the polls, not to the courts' for protection against [a law's] perceived abuses." (quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955))); *cf.* Ferguson v. Skrupa, 372 U.S. 726, 730–32 (1963) (holding that courts should not "sit as . . . super legislature[s]" and advocating for legislative solutions to bad policies).

146. *See* Sanders, *supra* note 21, at 694 ("In many fields of regulation, but particularly in occupational licensing, governments often impose requirements simply to protect entrenched economic interests."); *see also Powers*, 379 F.3d at 1221 ("[W]hile baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments."); Abbott, *supra* note 5, at 503 ("Empirical studies . . . have bolstered the contention that industries often shape the manner in which they are regulated to their own advantage.").

cally do not enter the fight.[147] Thus, as long as incumbent professionals can lobby their legislatures for protectionist legislation under the guise of public welfare, arbitrary licensing laws will continue to plague consumers and entrepreneurs alike.[148]

This cycle can end with greater judicial involvement.[149] A judge's position as a neutral arbiter allows legislation to be reviewed without the taint of special interests.[150] Yet, judges should proceed with caution to avoid being accused of invoking a *Lochner*-esque substitution of their preferences over the legislature.[151] Courts can avoid such criticism by employing rational basis review in a manner that takes a closer look at whether a licensing law's proffered justifications are *actually related* to legitimate interests.[152] Indeed, the Fifth Circuit provided an excellent blueprint for applying such review.[153]

C. *A Call to Reason: Invalidating Protectionist Licensing Laws Using the Rationale in* St. Joseph Abbey

The framework presented in *St. Joseph Abbey* properly disposes of a protectionist licensing law without changing the standard that courts have used since the end of the *Lochner* era.[154] First, the court stated that an

147. *See* Gellhorn, *supra* note 127, at 12 n.19 ("[M]en who are behind any interest always unite in organization, and the danger in every country is that these special interests will be the only things organized, and that the common interest will be unorganized against them." (quoting 2 WOODROW WILSON, PUBLIC PAPERS OF WOODROW WILSON 422 (Ray Baker & William Dodd eds., Harper Bros. 1925))).

148. *See* St. Joseph Abbey v. Castille, 712 F.3d 215, 226 (5th Cir. 2013) (deploring "the taking of wealth and handing it to others when it [does not come] as economic protectionism in service of the public good").

149. *See* Abbott, *supra* note 5, at 503 ("[C]omplete judicial abstention . . . is inappropriate due to the institutional weaknesses of the political process and the vulnerability of regulators to political capture."); *see also* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1696 (1984) (stating that judicial decision can constrain illegitimate government behavior by prohibiting "pure transfer of wealth").

150. *Cf.* Stigler, *supra* note 138, at 5–6 (examining multiple ways that special interests can use legislatures to achieve goals such as "entry control" or restriction of competition).

151. *See supra* notes 41–45 and accompanying text.

152. *See* Phillips, *supra* note 55, at 965 ("By [continuing to apply minimal scrutiny, judges] can blunt the standard criticisms of economic substantive due process . . . while preserving some ability to strike down government's more outrageous interferences with economic rights.").

153. For a further discussion of how the analysis in *St. Joseph Abbey* can be applied to future cases, see *infra* notes 154–71 and accompanying text.

154. *See* Abbott, *supra* note 5, at 502–05 (calling for heightened rational basis review for protectionist state laws); *see also* SIEGAN, *supra* note 41, at 324 (advocating for intermediate scrutiny where government bears burden of proving that "the legislation serves important governmental objectives," that "the restraint imposed . . . is substantially related to achievement of these objectives," and that "a similar result cannot be achieved by a less drastic means"); Florman, *supra* note 80, at 767 (stating same).

economic regulation must have a rational relation to some public purpose regardless of the legislature's intent.[155] Second, the court combated the extreme deference to state legislatures exemplified in *Powers* by stating that "[t]he great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation."[156]

In effect, the Fifth Circuit called for rational basis review of economic legislation coupled with *reasonable* legislative deference on a case-by-case basis.[157] This simple test examines whether a particular licensing law truly furthers the public welfare or arbitrarily shelters a special interest from free market competition, and does so within the traditional bounds of rational basis review.[158] Under this test, a court will still defer to the legislature's judgment as to how the law protects the public interest, but the court will not accept pretextual arguments that are controverted by facts on the record.[159] Ultimately, the *St. Joseph Abbey* test strikes the ideal balance between the extreme deference of the *Powers* court, where the state always wins, and the heightened scrutiny of *Craigmiles*, where the court employed something more than minimal scrutiny.[160]

---

155. *See* St. Joseph Abbey v. Castille, 712 F.3d 215, 222–23 (5th Cir. 2013) (stating that even protectionist legislation can be supported by legitimate government interest and that "without [such support] it is aptly described as a naked transfer of wealth").

156. *See id.* at 226.

157. *See id.* at 221–23 (examining individual cases and finding laws animated by legitimate state interest in some public interest).

158. *See id.* at 226–27 (stressing "great deference" to legislatures but insisting that "regulation not be irrational").

159. *See id.* at 224–26 (finding arguments advanced by state contradicted by facts on record); *cf.* Powers v. Harris, 379 F.3d 1208, 1227 (5th Cir. 2004) (Tymkovich, J., concurring) (noting that "[c]onsumer interests appear to be harmed rather than protected by" state licensing requirement). *Compare St. Joseph Abbey*, 712 F.3d at 223 (summarizing state's argument that Louisiana licensing law "restricts predatory sales practices" by casket retailers), *with id.* at 225 (finding "record 'bereft of evidence indicating significant consumer injury caused by third-party sellers'" (quoting Regulatory Review of the FTC Funeral Rule, 73 Fed. Reg. 13,740, 13,745 (Mar. 14, 2008) (codified at 16 C.F.R. § 453))).

160. *Compare* Craigmiles v. Giles, 312 F.3d 220, 227 (6th Cir. 2002) (using analysis ordinarily reserved for laws discriminating against historically unpopular groups), *with Powers*, 739 F.3d at 1221–22 (implying that courts owe legislatures deference in legislative decisions for fear of harming state industries). The deference owed to legislatures, however, must have some limit. *See* Lochner v. New York, 198 U.S. 45, 56 (1905) (noting necessity for limit to police power of states), *overruled in part by* Ferguson v. Skrupa, 372 U.S. 726 (1962). Otherwise legislatures would have "unbound power" to pass any law they deem necessary to advance whatever interest they like. *See id.* The *Lochner* Court stated this proposition persuasively:

> It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and

The type of review applied in *St. Joseph Abbey* does not rise to heightened scrutiny because it still searches for a legitimate interest to support a law rather than requiring a close fit between the means and the stated end.[161] Additionally, the court would not be allowed to substitute its policy preferences over those of the legislature.[162] Unlike *Lochner*, a court reviewing a licensing law under the *St. Joseph Abbey* standard does not inject its own theory of what is economically right into the analysis.[163] The standard articulated in *St. Joseph Abbey* simply ensures that legislators do not arbitrarily protect a particular industry from competition, which is an illegitimate interest.[164]

Those who advocate for heightened scrutiny point to cases like *Cleburne*, where the Supreme Court applied a stringent form of rational basis review to legislation challenged under the Equal Protection Clause.[165] Although the Court in *Cleburne* applied a heightened rational basis review, it did so to strike down "invidious discrimination" of "politically unpopular groups," not to address economic protectionism.[166] The *Powers* court correctly pointed out that the Supreme Court has not articulated the factors that justify heightened rational basis review, thus there is "no principled foundation for determining when more searching inquiry is to be invoked."[167] Accordingly, without a specific directive from the

> it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint.

Id.

161. *See St. Joseph Abbey*, 712 F.3d at 227 ("The funeral directors have offered no rational basis for their challenged rule and, try as we are required to do, we can suppose none."); *cf.* Florman, *supra* note 80, at 744–45 (defining and describing heightened rational basis scrutiny).

162. *See St. Joseph Abbey*, 712 F.3d at 227 ("We deploy no economic theory of social statics or draw upon a judicial vision of free enterprise.").

163. For a brief discussion of the analysis in *Lochner*, see *supra* notes 41–45 and accompanying text.

164. *See St. Joseph Abbey*, 712 F.3d at 222–23 (proclaiming that economic protectionism has no legitimate governmental purpose where it harms consumers without advancing some type of public interest).

165. *See* Sanders, *supra* note 21, at 693 (advocating application of heightened rational basis scrutiny to protectionist economic regulation).

166. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) (refusing to apply intermediate scrutiny to law discriminating against mentally handicapped but noting that such refusal "does not leave them entirely unprotected from invidious discrimination"); *see also* Romer v. Evans, 517 U.S. 620, 634–35 (1996) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (quoting Dep't of Agriculture v. Moreno, 413 U.S. 528, 534 (1973))).

167. Powers v. Harris, 379 F.3d 1208, 1224 (5th Cir. 2004) (quoting *Cleburne*, 473 U.S. at 460 (Marshall, J., concurring in part and dissenting in part)).

Supreme Court, lower courts should confine heightened rational basis scrutiny to laws discriminating against politically unpopular groups.[168]

In cases involving arbitrary and onerous economic regulation such as Louisiana's casket retailer licensing scheme, courts should apply the *St. Joseph Abbey* analysis.[169] By searching for a rational relation to a legitimate purpose while simultaneously considering the entire record, the Fifth Circuit viewed a complete picture of the Louisiana licensing law.[170] With that complete picture, the court concluded that not only was the legislation motivated by protectionism, but it also furthered no legitimate governmental purpose.[171]

VI. CONCLUSION

The Fifth Circuit correctly invalidated a protectionist state licensing law that disadvantaged consumers and entrepreneurs.[172] In doing so, the court rejected intrastate economic protectionism, branding it an illegitimate state interest.[173] The holding in *St. Joseph Abbey* reinforces the need for the Supreme Court to explicitly rule on whether mere intrastate economic protectionism is a legitimate state interest and explain how lower courts should review such legislation.[174]

The Court has reserved heightened rational basis scrutiny for cases involving discrimination of politically unpopular groups, and is therefore unlikely to apply heightened scrutiny to protectionist licensing laws.[175] However, the blind deference to state legislatures employed in *Powers* renders rational basis scrutiny a useless tool.[176] The *St. Joseph Abbey* frame-

168. *See id.* at 1224–25 (noting that Supreme Court has never applied "*Cleburne*-style" rational basis review to economic issues, but rather to "correct perceived inequities unique" to cases like *Cleburne*).

169. For a discussion of why courts should apply the *St. Joseph Abbey* test, see *supra* notes 138–53 and accompanying text.

170. *See* St. Joseph Abbey v. Castille, 712 F.3d 215, 223 (5th Cir. 2013) ("Mindful that a hypothetical rationale, even post hoc, cannot be fantasy, and that the State Board's chosen means must rationally relate to the state interests it articulates, we turn to the State Board's proffered rational bases for the challenged law. . . . [W]e will examine the State Board's rationale informed by the setting and history of the challenged rule.").

171. *See id.* at 226–27 (concluding that law "protect[s] the rulemakers' pockets" and bears no rational relation to legitimate interest).

172. For a further discussion of the court's reasoning in *St. Joseph Abbey*, see *supra* notes 112–22.

173. For a further discussion of the holding of *St. Joseph Abbey*, see *supra* notes 108–11.

174. For a further discussion of the split over whether intrastate economic protectionism is a legitimate state interest, see *supra* notes 63–94 and accompanying text.

175. For a discussion of why heightened rational basis review is unlikely to be extended to economic protectionist laws, see *supra* notes 165–68 and accompanying text.

176. For a critique of the holding in *Powers*, see *supra* note 156 and accompanying text.

work can thus provide valuable guidance for courts to evaluate and invalidate protectionist legislation within the bounds of rational basis scrutiny.[177]

177. For a further discussion of how the reasoning in *St. Joseph Abby* can serve as a model for other courts, see *supra* notes 154–60 and accompanying text.