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Unearthing the Public Interest: Recognizing Intrastate Economic Protectionism as a Legitimate State Interest

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UNEARTHING THE PUBLIC INTEREST: RECOGNIZING INTRASTATE ECONOMIC PROTECTIONISM AS A LEGITIMATE STATE INTEREST

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In Oklahoma, a person must complete sixty-credit hours of undergraduate training and embalm twenty-five bodies before being legally licensed to sell caskets in the state. In Louisiana, in order to sell caskets, one must operate a fully licensed funeral establishment, defined as a place dedicated to preparing bodies for burial. In recent years, these states and others have faced legal challenges to casket sale restrictions by individuals who wish to sell caskets directly to the public, yet who are unable to do so as they are not licensed funeral directors. Courts have grappled with whether these state regulations, which in effect restrict sales of caskets to funeral home operators, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

This Note explores the constitutionality of state licensing schemes that limit casket sales to registered funeral directors. It begins by exploring the constitutional framework of economic substantive due process and equal protection jurisprudence. Next, this Note briefly addresses pluralist theory and interest group theory before turning to a brief overview of the FTC's Funeral Rule. This Note then presents the current split between the Tenth and Sixth Circuits regarding whether economic protectionism of an in-state industry constitutes a legitimate state interest. Ultimately, this Note argues that while the U.S. Supreme Court has never explicitly articulated that intrastate economic protectionism is a legitimate state interest—instead requiring regulations to be tethered to a public purpose as constrained by the contours of the state's traditional police powers—the Court has implicitly accepted such a goal as legitimate due to the deferential nature of the Court's review of state economic regulations. This Note thus argues that the Supreme Court should make explicit its implicit endorsement that economic protectionism is a legitimate state interest precisely because economic protectionism may, in the state's own legislative wisdom, plausibly serve the public interest.

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INTRODUCTION

> For protection against abuses by legislatures the people must resort to the polls, not to the courts.[1]
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> As a creature of politics, the definition of the public good changes with the political winds. There simply is no constitutional or Platonic form against which we can (or could) judge the wisdom of economic regulation.[2]

In Oklahoma, a person must complete sixty-credit hours of undergraduate training and embalm twenty-five bodies before being legally licensed to sell caskets in the state.[3] One also must have a preparation room capable of embalming bodies and "a funeral-service merchandise-selection room with an inventory of not less than five caskets, and adequate areas for public viewing of human remains."[4]

1. Williamson v. Lee Optical, 348 U.S. 483, 488 (1955) (quoting Munn v. Illinois, 94 U.S. 113, 134 (1876)) (internal quotation marks omitted).
2. Powers v. Harris, 379 F.3d 1208, 1218 (10th Cir. 2004).
3. *See* The Oklahoma Funeral Services Licensing Act, OKLA. STAT. tit. 59, § 395.1 (2011); Powers v. Harris, 379 F.3d 1208, 1212 (10th Cir. 2004); OKLA. ADMIN. CODE § 235:10-1-2, 10-3-1 (2010).
4. *Powers*, 379 F.3d at 1213.

In Tennessee prior to 2010,[5] to be licensed to sell a casket in the state, one was required either to complete one year of course work at an accredited mortuary school and a one-year apprenticeship with a licensed funeral director, or to do a full two-year apprenticeship.[6] The required coursework at the only mortuary school in Tennessee included "eight credit hours in embalming, three in 'restorative art,' and twenty-one in 'funeral service.'"[7] In addition, one was required to pass the Tennessee Funeral Arts Examination.[8]

In Louisiana, in order to sell caskets, one must be licensed as a funeral establishment, which is defined as "any place or premises duly licensed by the board and devoted to or used in the care and preparation for burial of the body of a deceased person."[9]

These three states are among those whose courts have recently grappled with whether these state regulations, which in effect restrict the sales of caskets to funeral home operators, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment by treating funeral directors differently from other would-be casket sellers and by irrationally infringing on the individual liberty to engage in a trade.[10]

In Part I, this Note explores the constitutional framework of economic substantive due process and equal protection jurisprudence, then briefly addresses pluralist theory and interest group theory before turning to a brief overview of the Federal Trade Commission's (FTC) Funeral Rule. Then, in Part II this Note lays out the current circuit split over whether economic protectionism of an in-state industry constitutes a legitimate state interest. In Part III, this Note argues that while the U.S. Supreme Court has never explicitly articulated that intrastate economic protectionism is a legitimate state interest, instead requiring regulations be tethered to some traditionally circumscribed public purpose, the Court has implicitly accepted such a goal as legitimate due to its deferential review of state economic regulations. This Note thus argues that the Supreme Court should expand its conception of state police powers to acknowledge that economic protectionism plausibly serves a public purpose, and make explicit its implicit endorsement that economic protectionism is a legitimate state interest.

I. THE DUE PROCESS AND EQUAL PROTECTION CLAUSES: A HISTORICAL AND LEGAL BACKGROUND

Part I begins by detailing the development of the Supreme Court's economic substantive due process and equal protection jurisprudence under rational basis review and discusses the diverging conceptions of the limits,

5. The statute was amended in 2010 following the Sixth Circuit's decision in *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).

6. *Id.* at 222 (quoting TENN. CODE. ANN. § 62-5-101(a)(3)(A)(ii) (1997)).

7. *Id.*

8. *Id.*

9. LA. REV. STAT. 37:831(37) (West 2012).

10. *See infra* Part II.

if any, on the states' police powers. Next, it analyzes pluralist theory and interest group theory, concluding with an overview of the funeral industry and the FTC Funeral Rule.

A. Constitutional Framework: The U.S. Federal System

In the U.S. federal system, the U.S. Constitution grants the federal government limited, enumerated powers.[11] For example, the Constitution explicitly grants Congress the power to raise taxes, coin money, and regulate interstate commerce.[12] Congress has the power to pass laws and regulate using legislation that is "necessary and proper" to achieve these and other enumerated ends explicitly listed in the Constitution.[13] Since Article I of the Constitution begins by declaring that "[a]ll legislative Powers herein granted shall be vested in a Congress,"[14] by negative inference, all legislative powers not expressly granted to Congress in the Constitution remain the sole domain of the states through operation of the Tenth Amendment.[15]

Of particular relevance to this Note, the Constitution itself has only a few references to property rights, all expressed in general terms such as "property," or "contract."[16] Besides the Contracts Clause found in Article I, which provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts,"[17] most economic liberties specifically referenced in the text reside in the Bill of Rights and subsequent amendments.[18] The Due Process Clauses of the Fifth and Fourteenth Amendments specifically refer to property rights, with the Fifth Amendment providing that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[19]

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11. *See* ERWIN CHEMERINKSY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 3 (3d ed. 2006).

12. U.S. CONST. art. I, § 8.

13. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411–13 (1819).

14. U.S. CONST. art. I, § 1.

15. *See infra* notes 23–33 and accompanying text. The Tenth Amendment provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Whether and to what extent the Tenth Amendment "reserves a zone of authority exclusively to the states" has been much debated. CHEMERINKSY, *supra* note 11, at 3.

16. *See* U.S. CONST. art. I, § 10 ("Contracts"); U.S. CONST. amend. V ("[P]roperty"); U.S. CONST. amend. XIV, § 1 (same).

17. U.S. CONST. art. I, § 10. Early on in its jurisprudence, the Court read the Contracts Clause narrowly, limiting its protection considerably. *See* CHEMERINKSY, *supra* note 11, at 629 (describing how the Contracts Clause applies only if local or state law interferes with existing contracts, and thus does not apply to infringement by the federal government or to future contract terms); James W. Ely, Jr., *The Protection of Contractual Rights: A Tale of Two Constitutional Provisions*, 1 N.Y.U. J. L. & LIBERTY 370, 377–83 (2005) (detailing the shift that occurred between 1875 and 1905 from using the Contracts Clause to using the Due Process Clause to strike down state laws).

18. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 735 (6th ed. 2009).

19. U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV, § 1 (differing from the Fifth Amendment, in that it provides that "No *State* shall . . . deprive any person of life, liberty, or property, without due process of law" (emphasis added)).

However, most critical to this Note, the Court has at times protected other economic liberties not found in the constitutional text.[20] These unenumerated economic liberties protect more specific rights, including "freedom of contract, freedom to pursue a livelihood, and freedom to practice a trade or profession."[21] To find constitutional guarantees for these rights, the Court first relied on natural law conceptions of the "fundamental laws of every free government,"[22] the inherent limitations of state police powers, and later used the term "liberty" in the Due Process Clause to protect substantive, as opposed to merely procedural, rights from erosion by the states.[23] The next subsections will address these approaches, and the extremely divergent outcomes[24] that have resulted throughout U.S. history.

1. State Police Powers: Undefined Powers, Unclear Limits

In contrast to the federal government's limited authority, the states, through their police powers, have extremely broad authority. The term "police power" appears nowhere in the constitutional text,[25] and "[g]enerations of judges and scholars have suggested that . . . state police power is undefinable."[26] Through these broad powers the states can regulate for the health, safety, and general welfare of their citizens.[27] However, the limits, if any, on the police powers are difficult to delineate.[28]

The classical liberal tradition in which the Constitution is grounded[29] places limits on the states' power to regulate using their police powers.[30] Stemming from Lockean social contract theory, states and local

20. *See infra* Part I.A.1–2, I.B.1–2.

21. CHEMERINKSY, *supra* note 11, at 606. Also, more recently, some scholars have championed recognizing a fundamental right to earn a living. *See generally* TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW (2010) (advocating for "the right to earn a living" to be a protected fundamental right).

22. Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 52 (1815).

23. U.S. CONST. amend. XIV, § 1; *see* CHEMERINKSY, *supra* note 11, at 606–07; *see also infra* Part I.B.

24. *See* CHEMERINSKY, *supra* note 11, at 606 ("The Supreme Court's protection of economic liberties has varied enormously over time.").

25. *See* RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 9 (2006).

26. 2 JOHN W. BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 136 (1893) ("The police power . . . is the 'dark continent' of our jurisprudence. It is the convenient repository of everything for which our juristic classifications can find no other place."); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA 13, 255 (1996) ("We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless . . . ." (quoting Berman v. Parker, 348 U.S. 26, 32 (1954)) (internal quotation marks omitted)); *see also* Walter Wheeler Cook, *What is the Police Power?*, 7 COLUM. L. REV. 322, 322 (1907) ("No phrase is more frequently used and at the same time less understood than the [police powers].").

27. *See infra* Part I.A.1; *see also* NOVAK, *supra* note 26, at 13 (noting that the constitutional basis for police power is the Tenth Amendment).

28. *See* NOVAK, *supra* note 26, at 13.

29. *See* EPSTEIN, *supra* note 25, at 16 ("[T]he Constitution is unambiguously in the classical liberal camp.").

30. *Cf.* EPSTEIN, *supra* note 25, at 16.

governments,[31] using their police powers, can only regulate for the general health, welfare, and safety of their citizens, since only these situations constitute "collective action" problems in which state regulation is necessary to combat "market failure[s]."[32] The assumption under this conception is that free market competition will satisfactorily allocate private resources, and that government regulation is legitimate only when the competitive market cannot be trusted.[33] Under this conception,[34] individual property rights could be regulated when "necessary for the *public good*."[35]

In addition to "common pool" problems of the allocation of scarce resources, the classical liberal tradition also justifies government intervention as necessary to combat the market failure incident to natural monopolies.[36] Thus, common carriers and utilities were deemed proper targets of governmental regulation since they were "affected with the public interest" as natural monopolies.[37]

Nevertheless, in *Munn v. Illinois*,[38] the Court blurred the line between permissible and impermissible regulation by purporting to find an Illinois statute setting the maximum price of grain elevators (which did not constitute a monopoly) analogous to common carriers and thus a legitimate target of state regulation.[39] It is unclear, however, what supported the Court's conclusion that grain elevators were distinguishable from other ordinary businesses, such as tailors and shoemakers, whom the state did not have the power to regulate using its police powers.[40]

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31. *See* NOVAK, *supra* note 26, at 13 (noting that the term "state police power" is misleading because, among other reasons, it historically was local, as opposed to state, power).

32. *See* EPSTEIN, *supra* note 25, at 16–17. The classical liberal tradition is juxtaposed against the pure libertarian position, which finds any forced exchange for the common good illegitimate. *Id.* at 16.

33. *See id.* at 17 ("Thus, government may restrict the acquisition . . . of forms of wildlife and natural resources that are subject to premature dissipation through the standard common-pool problem . . . .").

34. The U.S. adopted this conception of the police powers from England, where sovereign power was constrained by the conception of a "body politic" grounded in social contract theory. Munn v. Illinois, 94 U.S. 113, 124–25 (1876) ("[T]he police powers . . . are nothing more or less than the powers of government inherent in every sovereignty. . . ." (quoting The License Cases, 46 U.S. (5 How.) 504, 583 (1847)) (internal quotation marks omitted)).

35. *Id.* at 125 (emphasis added); *see also* RICHARD J. PIERCE, JR. & ERNEST GELLHORN, REGULATED INDUSTRIES 79 (4th ed. 1999).

36. *See* EPSTEIN, *supra* note 25, at 17; PIERCE & GELLHORN, *supra* note 35, at 78–80.

37. *See* PIERCE & GELLHORN, *supra* note 35, at 81–82. *But see* New State Ice Co. v. Liebmann, 285 U.S. 262, 302–03 (1932) (Brandeis, J., dissenting) ("The notion of a distinct category of business 'affected with a public interest,' . . . rests upon historical error . . . . In my opinion, the true principle is that the State's power extends to every regulation of any business reasonably required and appropriate for the public protection.").

38. 94 U.S. 113 (1876).

39. *See* PIERCE & GELLHORN, *supra* note 35, at 78–79.

40. *See id.* at 80. At the time that the states were prevented from passing such regulations, the federal government was also unable to regulate, as its Commerce Clause powers were read narrowly. *See* Daniel A. Farber, *Who Killed* Lochner*?* 90 GEO. L.J. 985, 989 (2002) (reviewing G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000),

2. Unenumerated Rights Protected by Natural Law Principles

In the early nineteenth century, in an effort to protect those economic rights not explicitly provided for in the constitutional text, the Court utilized natural law principles to safeguard certain economic liberties deemed natural at common law.[41] These natural rights precluded legislatures from interfering with people's rights to possess and own property, creating a sphere of constitutional protection for rights not specifically found in the Constitution.[42] In *Calder v. Bull*,[43] for example, the Court displayed a willingness to adopt natural law principles as a legitimate means to render decisions: "An ACT of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."[44] Justice Chase's concurrence in *Calder*, however, revealed a distaste for natural law principles[45] that was ultimately adopted by the Court as it shifted away from using natural law principles as a legitimate means of adjudication.[46] Although the Court's explicit reliance on natural law evaporated, this shift did not cause the Court to enforce only those economic rights enumerated in the Constitution; rather, these natural law principles migrated to the doctrine of substantive due process.[47]

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which explains that Congress the lacked power under the Commerce Clause to regulate a nationwide sugar manufacturing monopoly in *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895)).

41. *See, e.g.*, Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 52 (1815); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810); Calder v. Bull, 3 U.S. (3 Dall.) 386, 387–88 (1798). *See generally* CHEMERINKSY, *supra* note 11, at 608–09.

42. CHEMERINKSY, *supra* note 11, at 608–09; Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 715–16 (1975) ("[I]t came to be accepted that the judiciary had the power to enforce the commands of the written Constitution when these conflicted with ordinary law, it was also widely assumed that judges would enforce as constitutional restraints the unwritten natural rights as well.").

43. 3 U.S. (3 Dall.) 386.

44. *Id.* at 388 (emphasis omitted). There is some evidence that the Founding Fathers intended to imbue in the constitutional framework unenumerated liberties using a theory of natural law. *Cf.* Susan P. Stuart, *Fun with Dick and Jane and* Lawrence*: A Primer on Education Privacy As Constitutional Liberty*, 88 MARQ. L. REV. 563, 577–78 (2004) (discussing how Alexander Hamilton envisioned that "'liberty' filled the bill by encompassing all the fundamental rights of Englishmen").

45. *See Calder*, 3 U.S. at 399 (Chase, J., concurring) ("[T]he Court cannot pronounce [the law] to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and purest men have differed upon the subject . . . .").

46. *See* Hon. Diarmuid F. O'Scannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513, 1514 (2011) (noting the trend against using natural law reasoning in contemporary legal society).

47. *See* Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140, 165 (1949) ("Substantive due process['s] . . . true source is . . . to be found in . . . concepts of natural law which have had strong influence upon the legal thinking of this country. These concepts, historically separate from the English concept of due process, have by judicial fiat been grafted upon the venerable phrase [of substantive due process]."); O'Scannlain, *supra* note 46, at 1515 ("*Lochner*, and similar cases of that age, were seen as instances of 'natural law

B. The Evolution of Economic Substantive Due Process

Originally, the rights guaranteed to the people through the Bill of Rights were held to apply only to actions by the federal government and not actions taken by state or local actors.[48] The logic of this holding was that a removed federal government should not encroach on those liberties already governed separately under state and local law.[49]

Over time, the Court developed the incorporation doctrine to remedy this gap.[50] The Fourteenth Amendment, one of the three Reconstruction Amendments, was ratified on July 9, 1868,[51] and was specifically directed at abuses by state legislatures.[52] The Amendment aimed to shift the balance of power between the federal and state governments.[53] Specifically, the incorporation doctrine utilized the Fourteenth Amendment's Due Process Clause to make the Bill of Rights applicable against the states.[54] It accomplished this by interpreting the term "liberty" found in the Fourteenth Amendment to include, at a minimum, some of the rights protected by the first eight amendments of the Bill of Rights.[55]

State economic regulations are analyzed under the theory of substantive due process, which, like the incorporation doctrine, derives from the Fourteenth Amendment's Due Process Clause.[56] Unlike the incorporation doctrine, however, substantive due process reads into the Fourteenth Amendment's Due Process Clause not just the explicitly *enumerated*

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reasoning.' Thus, criticism of 'the *Lochner* era' became bound up with criticism of the natural law.").

48. *See* Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 250–51 (1833).

49. *See id.* at 249–50.

50. *See* Dale E. Ho, *Dodging a Bullet:* McDonald v. City of Chicago *and the Limits of Progressive Originalism*, 19 WM. & MARY BILL RTS. J. 369, 379 (2010); Richard J. Hunter, Jr. & Hector R. Lozada, *A Nomination of a Supreme Court Justice: The Incorporation Doctrine Revisited*, 35 OKLA. CITY U. L. REV. 365, 384–85 (2010). The Court turned to the incorporation doctrine after its decision in the *Slaughter-House Cases*, which essentially removed the Fourteenth Amendment Privileges or Immunities Clause from providing federal protection of individual liberties against state action. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74–75 (1872).

51. *See* William R. Musgrove, Note, *Substantive Due Process: A History of Liberty in the Due Process Clause*, 2 U. ST. THOMAS J.L. & PUB. POL'Y 125, 125 (2008). The first section of the amendment granted citizenship to all freed slaves, *see id.*, thus overturning *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

52. The Fourteenth Amendment explicitly aims at state action: "No *State* shall . . . ." U.S. CONST. amend XIV, § 1 (emphasis added).

53. *See* David Krinsky, *A Plan Revised: How The Congressional Power To Abrogate State Sovereign Immunity Has Expanded Since The Eleventh Amendment*, 93 GEO. L.J. 2067, 2082 (2005). Likewise, the Thirteenth and Fifteenth Amendments had similar goals. *Id.*

54. *See* Ho, *supra* note 50, at 379.

55. *See* U.S. CONST. amend. XIV, § 1. Select provisions of the Bill of Rights proceeded to be incorporated on a piecemeal basis, encompassing a victory for Justice Frankfurter's preferred methodology over Justice Black's favored "total" incorporation approach. *See generally* STONE ET AL., *supra* note 18, at 731–33 (discussing the Black-Frankfurter incorporation debate).

56. *See* U.S. CONST. amend XIV, § 1; Musgrove, *supra* note 51, at 125–26; *see also infra* Part I.B.

liberties found in the Bill of Rights,[57] but also *unenumerated* individual liberties—liberties that are not specifically found in the constitutional text.[58]

The Court gradually[59] turned to the term "liberty" in the Due Process Clause to safeguard unenumerated economic liberties against government intrusion.[60] Defining what constitutes "liberty" within the meaning of the Due Process Clause has sparked intense debate for much of U.S. constitutional history.[61] Some scholars have argued that the Framers of the Constitution were chiefly concerned with protecting individual economic rights when they drafted the Constitution.[62] Regardless of the Framers' actual intent, by the mid-nineteenth century, the Court found freedom of contract to be "a basic right under the liberty and property provisions of the due process clause."[63]

1. The *Lochner v. New York* Decision

While the Court hinted at protecting unenumerated rights using the Fourteenth Amendment's Due Process Clause before its famous decision[64]

57. The incorporation doctrine has also been used to incorporate unenumerated rights. *See* STONE ET AL., *supra* note 18, at 733. In fact, the incorporation doctrine can be conceptualized as a form of substantive due process, since it protects substantive fundamental rights from state action, albeit enumerated rights. *See* Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 842 (2003) ("The most commonplace form of fundamental rights analysis—so commonplace that it is often treated as though it were not substantive due process at all—is the incorporation of the Bill of Rights provisions against the states.").

58. *See* Jed Storey Crumbo, Case Note, *Constitutional Law—Right to Privacy—Government Contract Employees' Right to Informational Privacy*, 79 TENN. L. REV. 417, 422–23 (2012).

59. *See* Morrison, *supra* note 47, at 165 (noting that substantive due process began developing in the late nineteenth century).

60. *See infra* Part I.B.

61. *See* Stuart, *supra* note 44, at 576–78 (noting the large number of competing theories regarding the Framers' conception of "liberty" and arguing that "the historical smorgasbord of choices was somewhat overwhelming, and no particular tradition of liberty is discernible") (footnote omitted).

62. *See generally* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913) (arguing that the impetus behind drafting the Constitution was a desire to protect individual private property and wealth). *But cf.* CHEMERINKSY, *supra* note 11, at 606 (describing how subsequent historians challenged Beard's analysis and conclusions, but arguing that ultimately there is little doubt that the Framers were motivated in part by an impulse to protect economic rights).

63. CHEMERINKSY, *supra* note 11, at 606; *see, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525, 545 (1923) ("That the right to contract about one's affairs is a part of the liberty of the individual protected by [the Due Process] [C]lause, is settled by the decisions of this Court and is no longer open to question." (citing, inter alia, N.Y. Life Ins. Co. v. Dodge, 246 U.S. 357, 373–74 (1918))); Coppage v. Kansas, 236 U.S. 1, 16 (1915) (voiding act prohibiting yellow dog contracts because the act "intended to deprive employers of a part of their liberty of contract, to the corresponding advantage of the employed"); Muller v. Oregon, 208 U.S. 412, 421 (1908); Adair v. United States, 208 U.S. 161, 180 (1908), *overruled in part by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941)).

64. *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897); Mugler v. Kansas, 123 U.S. 623 (1887); Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 (1884).

in *Lochner v. New York*,[65] it was not until *Lochner* that the Court formally recognized the novel doctrine of substantive due process.[66]

In *Lochner*, the Supreme Court famously invalidated a New York statute that regulated the maximum hours of bakers.[67] The statute limited the amount of hours a baker could work to ten hours a day and sixty hours a week, with certain exceptions.[68] Justice Peckham, writing for the majority, concluded that "[t]he statute necessarily interferes with the right of contract between the employer and employes,"[69] and thus struck down the law as infringing on the substantive right of liberty of contract.[70]

Although the text of the Constitution does not explicitly protect the "right to contract," the Court used the term "liberty" in the Due Process Clause of the Fourteenth Amendment to protect such a right, reasoning that the clause protects not just procedural safeguards,[71] but also substantive rights.[72] This allowed the Court to strike down the maximum hours legislation as unconstitutionally violating the Due Process Clause, since it interfered with the right to contract.[73] The effect of the substantive due process doctrine was to insulate certain rights—in *Lochner*, the right to contract—from the reach of governmental regulation.[74]

Justice Peckham's majority opinion in *Lochner* and Justice Holmes's dissent disagreed over what ends states can legitimately seek to serve through the use of the police power and the amount of deference the federal judiciary should accord state legislative actions.[75] While Peckham defined the police power as "relat[ing] to the safety, health, morals[,] and general welfare of the public,"[76] Holmes's dissent seemed to reject such a civil republican conception of the general welfare in favor of a pluralist

65. 198 U.S. 45 (1905), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

66. *See id.*

67. *See id.* at 64.

68. *See id.* at 46 n.1.

69. *Id.* at 53.

70. *See id.* at 64–65.

71. *Procedural* due process rights previously were the only components of due process protected from government infringement. *See* CHEMERINSKY, *supra* note 11, at 545. Procedural due process involves the right to the legal and legislative mechanisms that ensure fair process. *See id.* By contrast, the *substantive* component of the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

72. *See Lochner*, 198 U.S. at 62. Substantive due process has been called a "contradiction in terms—sort of like 'green pastel redness'" because due process originally was synonymous with procedural processes. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980).

73. *Lochner*, 198 U.S. at 53.

74. *See* STONE ET AL., *supra* note 18, at 736.

75. *Lochner*, 198 U.S. at 53; *id.* at 75 (Holmes, J., dissenting).

76. *Id.* at 53 (majority opinion).

approach, whereby states can regulate based on the will of those who manage to wrestle legislative power.[77]

While conceding that the state has the authority, using its police powers, to regulate for the health and safety of the general public, the Court in *Lochner* embarked on a searching investigation of the intent behind the legislation, revealing extraordinary skepticism about the state's proffered rationale.[78] In reaching its conclusion, the Court rejected the state's proffered health and safety rationale,[79] believing instead that the legislation was, in fact, "passed from other motives."[80] The Court interpreted these motives as intending to interfere with the ability of employers to freely contract with their employees in the free market,[81] reflecting the redistributive aims of the legislature.[82] The majority thus read the New York statute as aimed at the redistribution of property, something the Court implicitly rejected in favor of its laissez-faire economic theory.[83] Because of the Court's belief that the legislature aimed to take away the employer's ability to contract with its employees, the Court found the regulation violated the liberty of contract as read into the Due Process Clause.[84]

Justice Holmes dissented from the *Lochner* majority, rejecting what he saw as the majority substituting its own economic theory for that of the New York state legislature.[85] Holmes wrote that his personal preferred economic theory had nothing to do with whether a state legislature has the power to "embody their opinions in law,"[86] conveying his belief that it is not a judge's place to determine whether the will of a democratic majority must conform to a particular economic theory and what that theory must be.

According to Professor Sunstein, Justice Holmes's dissent in *Lochner* "comes close to modern interest-group pluralism, which treats the political process as an unprincipled struggle among self-interested groups for scarce

77. *See* Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 879 (1987) (noting that Holmes's dissent in *Lochner* is a rejection of the principal of neutrality which demands that state legislatures pass laws of neutral application for the general welfare).

78. *See Lochner*, 198 U.S. at 58–65.

79. *Id.* at 58 ("There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health . . . ."). However, as Justice Harlan's dissent makes clear, the degree to which working as a baker was detrimental to health was far from clear, with multiple sources citing it as an extremely hazardous occupation due to inhaling large amounts of flour dust. *Id.* at 69–71 (Harlan, J., dissenting). Furthermore, Harlan argued that regardless of the danger, "[w]hether or not this be wise legislation it is not the province of the court to inquire," as "[the Court is] not to presume that the State of New York has acted in bad faith." *Id.* at 69, 73 (Harlan, J., dissenting).

80. *Id.* at 64 (majority opinion).

81. *Id.*

82. *See* Sunstein, *supra* note 77, at 878 n.28 (stating that during the *Lochner* era redistributive ends were not considered sufficiently public to justify government regulation).

83. *Id*. at 75 (Holmes, J., dissenting) ("[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.").

84. *See id.* at 64 (majority opinion).

85. *See id.* at 75 (Holmes, J., dissenting) (stating famously that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics").

86. *Id.*

social resources."[87] Thus Holmes's and Peckham's arguments in *Lochner* reveal diverging opinions on an issue that remains debated today: whether it is legitimate for a government to act solely to advance the interests of a politically powerful group,[88] or whether state legislation must contain an aspect of neutrality, thereby benefiting the general public at large.[89]

2. Business Entry Cases Following *Lochner*

Following its decision in *Lochner*, the Supreme Court declared it unconstitutional for states to pass legislation restricting access to a particular business.[90] In *New State Ice Co. v. Liebmann*,[91] the Court invalidated an Oklahoma law that required a license to sell ice.[92] The state only granted licenses upon establishing that existing ice suppliers could not adequately meet supply.[93] The Court stated that "a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business . . . cannot be upheld."[94] Justice Brandeis issued a famous dissent, accusing the majority of judicial overreaching and argued that states should be left as "laborator[ies]" able to "try novel social and economic experiments without risk to the rest of the country."[95]

Similarly, in *Louis K. Liggett Co. v. Baldridge*,[96] the Court struck down a law requiring that all owners of pharmacies, including corporate stockholders, be licensed pharmacists.[97] Finding that "mere stock ownership in a corporation, owning and operating a drug store, can have no

87. Sunstein, *supra* note 77, at 879. Sunstein further argues that "Holmes' opinion treats the political process as a kind of civil war, in which the powerful succeed; if courts interfere, they will be bottling up forces that will express themselves elsewhere in other and more destructive forms." *Id.*

88. *See, e.g.*, STONE ET AL., *supra* note 18, at 748 ("The due process clause cannot logically prohibit legislatures from passing laws merely because powerful groups want and press for them. Such an approach would ultimately prove counterproductive, for, if the courts prevent powerful groups from having their way in the legislative process, the political pressures will be bottled up and eventually emerge in even more destructive forms elsewhere."); Richard A. Posner, *The* Defunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 27 (arguing that most "public policies are better explained as the outcome of a pure power struggle—clothed in a rhetoric of public interest that is a mere figleaf—among narrow interest or pressure groups").

89. See *infra* Part I.D.1. for a discussion of interest group theory.

90. *See* CHEMERINSKY, *supra* note 11, at 619–20.

91. 285 U.S. 262 (1932).

92. *See id.* at 278–80.

93. *See id.* at 271–72.

94. *Id.* at 278 ("[I]t is beyond the power of a state, 'under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'" (alteration in original) (quoting Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 513 (1924))).

95. *New State Ice*, 285 U.S. at 311 (Brandeis, J., dissenting) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory . . . .").

96. 278 U.S. 105 (1928).

97. *Id.* at 108–09.

real or substantial relation to the public health,"[98] the Court held that the law "deals in terms only with *ownership*. [The law] plainly forbids the exercise of an ordinary property right and, on its face, denies what the Constitution guarantees."[99]

3. The New Deal, *West Coast Hotel Co. v. Parrish*, and the Demise of *Lochner*

Due to the economic and social upheaval during the Great Depression, by the mid-1930s, the Court was under "enormous pressures . . . to abandon the laissez-faire philosophy of the *Lochner* era," as many viewed government economic regulation as essential to economic recovery.[100] In response to the political climate, the Court began to overrule its previous decisions,[101] and embraced a more expansive view of regulatory power, both under the Due Process Clause and the Commerce Clause.[102]

Constitutional scholar Cass Sunstein suggests that by the time the Court reversed *Lochner* in *West Coast Hotel Co. v. Parrish*,[103] the Court had changed its conception of what Sunstein identifies as the "baseline," seeing the judicially enforced common law doctrines relating to the current distribution of property as just as much government action as state legislative enactments of hours and wages legislation.[104] The argument goes that the Court saw the common law status quo as interfering with an individual's ability to contract just as much as state legislation.[105] The Court began viewing the baseline differently, believing it not to constitute illegitimate redistribution of property to pass laws that entitled everyone to fair wages and working conditions.[106] Thus, the legislation would serve that public end by reining in abusive practices of employers, who were unfairly benefitting from the common law status quo.[107] The *West Coast Hotel* decision rang the death knell for economic substantive due

98. *Id.* at 113.

99. *Id.*

100. CHEMERINKSY, *supra* note 11, at 621; LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 446–47 (1978) ("[I]t was the economic realities of the Depression that graphically undermined *Lochner*'s premises. . . . The legal 'freedom' of contract and property came increasingly to be seen as an illusion . . . . Positive government intervention came to be more widely accepted as essential to economic survival . . . .").

101. *See infra* notes 103–09 and accompanying text. For a discussion of the factors that contributed to the famous "switch in time that saved nine," see generally Farber, *supra* note 40, at 987–95, and Mark Tushnet, *The New Deal Constitutional Revolution: Law, Politics, or What?* 66 U. CHI. L. REV. 1061, 1063 (1999) (reviewing BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT (1998)).

102. *See* Farber, *supra* note 40, at 985.

103. 300 U.S. 379 (1937).

104. *See* Sunstein, *supra* note 77, at 874–75.

105. *See id.* at 874.

106. *See id.*

107. *See id.* at 881 ("[D]epartures from [common law] baselines were no longer impermissibly partisan.").

process;[108] afterward, the Court was exceedingly deferential to legislative enactments.[109]

There has been much disagreement in the academic literature about what was wrong with the Court's decision in *Lochner*.[110] In fact, some scholars argue that the *Lochner* Court was correct in "protecting freedom of contract as a basic aspect of liberty and in carefully scrutinizing laws regulating the economy."[111] However, *West Coast Hotel* did not change the majority's position in *Lochner* that in order to be a legitimate exertion of the state's police powers, the legislation must serve some neutral purpose[112] directed at aiding the general welfare.[113] The Court justified permitting the law at issue, which regulated the wages of working women, on the ground that without equalizing the bargaining field between employers and employees through legislation, poor working conditions might negatively impact the health and morals of women.[114] Thus, the underlying purpose of the law aimed toward a public end.

In *Williamson v. Lee Optical*,[115] the Court took an even more deferential stance toward legislative economic enactments, finding an Oklahoma statute that prohibited an optician to fit or copy lenses without a prescription from an optometrist or an ophthalmologist to be constitutional.[116] The Court, reversing the district court,[117] reached its

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108. *See, e.g.*, Donald E. Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551, 557 n.37 (1986).

109. *See* CHEMERINSKY, *supra* note 11, at 624–25.

110. *See, e.g.*, TRIBE, *supra* note 100, at 564 (arguing that while the Due Process Clause contains substantive protection for fundamental rights, "liberty of contract" was not one such right, and thus *Lochner*'s error "lay not in judicial intervention to protect 'liberty' but in a misguided understanding of what liberty actually required in the industrial age"); *see also* STONE ET AL., *supra* note 18, at 744–47; *cf.* Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 440 (1926) (arguing that the First Congress intended to import the English common law meaning of the word "liberty"—namely the "right to have one's person free from physical restraint"—into the Fifth Amendment Due Process Clause, and thus the clause does not protect substantive rights such as the right to contract).

111. CHEMERINKSY, *supra* note 11, at 621; *see, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 128–29 (1985). *See generally* BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (2d ed. 2006).

112. The term "neutrality" is used by Sunstein to describe laws enacted to benefit the public generally, as opposed to laws that benefit particular partisan interest groups' goals, which he calls "naked preferences." *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1690 (1984); Sunstein, *supra* note 77, at 878.

113. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) ("The Constitution does not speak of freedom of contract. It speaks of . . . liberty without due process of law. . . . [T]he liberty safeguarded is liberty in a social organization which requires the protection of laws against the evils which menace the health, safety, morals and welfare of the people.").

114. *See id.* at 394 ("[Women's] physical well being 'becomes an object of public interest and care in order to preserve the strength and vigor of the race.'" (quoting Muller v. Oregon, 208 U.S. 412 (1908))).

115. 348 U.S. 483 (1955).

116. *See id.* at 486–91.

117. The district court had concluded that the regulation was irrational, since a new prescription was unnecessary when someone simply broke their glasses and needed a

decision by contemplating a set of hypothetical legitimate purposes that might have motivated the law in question.[118]

However, the Court did not require the state to even argue these reasons to justify the law; rather, the Court supplied them itself.[119] The Court made its deferential stance toward economic regulation clear when it stated that "[t]he day is gone when this Court uses the Due Process Clause . . . to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[120]

Similarly, the Court in *Ferguson v. Skrupa*[121] declared constitutional a Kansas law that restricted debt adjusting to lawyers.[122] The Court noted that "[t]here was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy,"[123] but concluded that the doctrine "has long since been discarded."[124] Justice Black, writing for the majority, emphasized that "[u]nder the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation."[125] Thus the Court went even further than in *Lee Optical*, seemingly finding the law constitutional without any real inquiry into the means/end fit between the purpose and structure of the regulation.[126]

Professor Chemerinsky has stated that the Kansas law was clearly an anticompetitive law aimed at protecting lawyers from competition in debt adjusting, in effect granting them a monopoly, and thus that "*Ferguson* shows that no longer did the Court interpret the due process clause to protect a right to practice a trade or profession or even freedom of contract."[127]

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replacement. *See id.* at 485–86. For a discussion of the district court's opinion, see generally Randy E. Barnett, *Keynote Remarks: Judicial Engagement Through the Lens of* Lee Optical, 19 GEO. MASON L. REV. 845 (2012).

118. *See Lee Optical*, 348 U.S. at 487 ("The legislature *might* have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses. . . . Or the legislature *may* have concluded that eye examinations were so critical, not only for correction of vision but also for the detection of latent ailments or diseases, that every change in frames and every duplication of a lens *should be* accompanied by a prescription from a medical expert." (emphasis added)).

119. *See id.*

120. *Id.* at 488. *But see* CHEMERINSKY, *supra* note 11, at 626 (noting that "[i]n all likelihood, the Oklahoma law [in *Lee Optical*] was adopted to protect business for optometrists and ophthalmologists and was not motivated by a desire to improve health").

121. 372 U.S. 726 (1963).

122. *Id.* at 732–33.

123. *Id.* at 729.

124. *Id.* at 730.

125. *Id.* at 729.

126. *See* STONE ET AL., *supra* note 18, at 758. This deferential standard stems from the application of rational basis review to economic legislation. *See infra* Part I.C.

127. CHEMERINSKY, *supra* note 11, at 627.

C. Current Equal Protection and Economic Substantive Due Process Analysis: The Tripartite Framework and Resulting Deference to Economic Legislation

The Equal Protection Clause, while often analyzed concurrently with the Due Process Clause, derives from a separate theoretical underpinning, and consequently requires separate discussion.[128] This section first briefly discusses the history of the enactment of the Fourteenth Amendment and how the tripartite system of review is used to analyze legislation under the Equal Protection Clause. This section then goes on to discuss the current rational basis standard as applied to economic regulations under the Due Process and Equal Protection Clauses.

1. Overview of the History and Purpose of the Equal Protection Clause and Its Application to Economic Regulations

The Fourteenth Amendment's Equal Protection Clause states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[129] The motivation behind the Fourteenth Amendment's Equal Protection Clause was "largely to protect the rights of the newly freed slaves" after the Civil War.[130] Yet the Equal Protection Clause does more than just protect against racially drawn classifications that discriminate by treating people unequally based on racial characteristics.[131] All legislative action involves classifying along some basis, resulting in unequal treatment.[132] However, not all laws that classify individuals into different groups violate the Constitution.[133] Otherwise, virtually all laws would be deemed unconstitutional violations of the Equal Protection Clause.[134] Thus, the challenge in equal protection jurisprudence is to determine which government classifications result in an unconstitutional deprivation of equal protection and which government classifications are permissible exercises of legislative authority.[135]

Today, courts rarely invalidate state economic legislation under the rubric of equal protection or economic substantive due process analysis.[136] Unlike

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128. *See* Powers v. Harris, 379 F.3d 1208, 1215 (10th Cir. 2004).

129. U.S. CONST. amend. XIV, § 1.

130. CHEMERINSKY, *supra* note 11, at 13.

131. *See id.* at 672.

132. For example, property owners are treated differently than nonproperty owners in paying property taxes, and children are treated differently than adults vis-à-vis voting rights. None of these classifications have been deemed violations of the Equal Protection Clause, even though they treat people differently as a result of the classification.

133. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (describing that the Equal Protection Clause "essentially [is] a direction that all persons *similarly situated* should be treated alike" (emphasis added)).

134. *See id.* at 439–40.

135. *See infra* Part I.C.2–3.

136. *See* STONE ET AL., *supra* note 18, at 758 ("[T]he Court has not invalidated an economic regulation on substantive due process grounds since 1937."). *But see infra* note 169 and accompanying text.

the realm of "implied fundamental rights," where the Court has engaged in a more searching review using substantive due process analysis,[137] the Court has been said to have abdicated its role of judicial review in the realm of economic regulations.[138] Viewing this phenomenon as problematic, Professor Siegan favored elevating judicial review, arguing that the current deferential treatment of economic liberties violates separation of powers principals by closing off economic regulations entirely from meaningful review by the courts.[139]

The Court, in its famous footnote four in *United States v. Carolene Products Co.*,[140] established that legislative classifications that regulate social and economic relationships will be viewed by courts with deference, with courts only applying searching judicial review when regulations infringe on a fundamental right or discriminate against "discrete and insular minorities."[141] The logic behind this formulation is that it allows the more democratically elected branches of government to make decisions without fear of the unelected judiciary second-guessing it, unless judicial scrutiny is warranted for some reason.[142]

According to Professor Ackerman, *Carolene Products* "brilliantly endeavored to turn the Old Court's recent defeat into a judicial victory."[143] Since the era of judges imposing their own economic agenda had ended with *West Coast Hotel*, the Court, in an effort to rebuild their legitimacy, adopted the *Carolene Products* framework that largely deferred to the will of elected majorities.[144] This solved what Professor Bickel identified as the countermajoritarian dilemma.[145] To Bickel, "judicial review is a deviant

137. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (finding a fundamental right to engage in private consensual homosexual activity); Roe v. Wade, 410 U.S. 113 (1973) (finding that the fundamental right to privacy includes a woman's decision to terminate her pregnancy prior to viability); Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923) (finding a fundamental right of parents to "establish a home and bring up children" and "to control the education of their own").

138. *See, e.g.*, Barnett, *supra* note 117, at 860 ("The modern rational basis approach adopted by the Warren Court in *Lee Optical* represents a judicial abdication of its function to police the Constitution's limits on legislative power."); Brandon S. Swider, *Judicial Activism v. Judicial Abdication: A Plea for a Return to the* Lochner *Era Substantive Due Process Methodology*, 84 CHI.-KENT L. REV. 315, 326–27 (2009).

139. *See generally* Bernard H. Siegan, *Separation of Powers and Economic Liberties*, 70 NOTRE DAME L. REV. 415 (1995).

140. 304 U.S. 144, 152, 152–53 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

141. *Id.* at 152–53 n.4. The Court has subsequently characterized certain "liberty interests" as requiring elevated review. *See* Lucy E. Hill, Note, *Seeking Liberty's Refuge: Analyzing Legislative Purpose Under* Casey*'s Undue Burden Standard*, 81 FORDHAM L. REV. 365, 370–73 (2012).

142. *See* CHEMERINSKY, *supra* note 11, at 678–79.

143. Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 714 (1985).

144. *See id.* at 715.

145. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 18 (1962).

institution in the American democracy,"[146] as it allows a few unelected judges to undo the laws passed by a democratically elected legislature.[147]

2. Rational Basis Review: What Constitutes a Legitimate Government Purpose?

Rational basis review is the lowest level of judicial review.[148] Under the rational basis standard, a state must proffer a legitimate state interest, and the means employed through regulation to meet that interest must be rationally related.[149] Legislation enjoys a presumption of validity, and the burden lies with the plaintiff to show that the law "does not rest upon any reasonable basis, but is essentially arbitrary."[150] This can be done in two ways: (1) by showing that the law does not further a legitimate state purpose; or (2) by showing that the law could not rationally serve the legitimate state purpose.[151]

The Court has made clear that the ends sought under traditional state police powers constitute legitimate state interests and are thus proper ends of government regulation.[152] However, these are not the only goals or "ends" that states may legitimately regulate to advance.[153] Rather, "[v]irtually any goal that is not forbidden by the Constitution will be deemed sufficient to meet the rational basis test."[154]

Nevertheless, the Court has found several illegitimate ends, including classifications which deprive individuals of their constitutional rights, for example their First Amendment rights, or laws which violate the Dormant Commerce Clause by preferring in-state actors over out-of-state actors.[155]

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146. *Id.*

147. *Id.*; *see also* Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1290–92 (2004).

148. *See* CHEMERINSKY, *supra* note 11, at 672–73.

149. *See id.* at 672.

150. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78–79 (1911); *see also* McGowan v. Maryland, 366 U.S. 420, 425–26 (1961) ("State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").

151. *See* CHEMERINSKY, *supra* note 11, at 678.

152. *See* CHEMERINSKY, *supra* note 11, at 680–81 (citing Ry. Express Agency v. New York, 336 U.S. 106 (1949) (public safety); Williamson v. Lee Optical, 348 U.S. 483 (1955) (public health); McGowan v. Maryland, 366 U.S. 420 (1961) (public morals)). *But see* Romer v. Evans, 517 U.S. 620 (1996) (finding a moral justification insufficient as Colorado's Amendment 2 aimed at the illegitimate purpose of singling out an unpopular group and denying that group fair access to the political process).

153. *See* CHEMERINSKY, *supra* note 11, at 681 ("Public safety, public health, and public morals are legitimate government purposes, but they are not the only ones.").

154. *See id.* at 681 (citing Berman v. Parker, 348 U.S. 26, 32 (1954) ("Public safety, public health, morality, peace and quiet, law and order, these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.")).

155. *See id.* at 682.

Furthermore, in *Romer v. Evans*,[156] the Court struck down a law while purporting to be engaged in rational basis review.[157] The Court in *Romer* cited *Department of Agriculture v. Moreno*[158] for the proposition that "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[159]

The plaintiffs bear the burden of proving that the state's interest is not legitimate.[160] This is a high burden since, as the Court emphasized in *FCC v. Beach Communications, Inc.*, the actual purpose behind the statute is "entirely irrelevant" and any "conceiv[able] reason for the challenged distinction" will be enough to uphold the legislation.[161] Furthermore, this distinction does not need to rest on any empirical evidence, but can be proved based on "rational speculation."[162] This leaves plaintiffs challenging a law with the "burden 'to negat[e] every conceivable basis which might support it,'"[163] which some scholars have decried as an impossible task.[164]

3. Rational Basis Review: What Constitutes a Reasonable Relationship?

Whether the law is rationally related to the legitimate end is "the most relaxed and tolerant form of judicial scrutiny."[165] The only limitation is that the law cannot be "clearly wrong, a display of arbitrary power, not an exercise of judgment."[166] This means that rational basis allows both underinclusive and overinclusive laws.[167]

This loose fit between ends and means has been criticized by commentators who view courts' acceptance of such a loose connection to amount to judicial abdication. Steven M. Simpson, a senior attorney at the Institute for Justice, has argued that:

> [a]t a sufficient level of generality, any statutory scheme can be said to serve a state purpose. But reciting a tautology is not the same thing as examining whether a particular legislative choice is within the bounds of

156. 517 U.S. 620 (1996).
157. *See id.* This type of heightened review has been deemed rational basis review "with bite." *See* CHEMERINSKY, *supra* note 11, at 680.
158. 413 U.S. 528 (1973).
159. *Romer*, 517 U.S. at 634–35 (emphasis omitted) (quoting *Moreno*, 413 U.S. at 534).
160. *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).
161. *Id.*
162. *Id.*
163. *Id.* (citation omitted).
164. *See, e.g.*, Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday's Rationality Review Isn't Enough*, 24 N. ILL. U. L. REV. 457, 500–01 (2004).
165. Dallas v. Stanglin, 490 U.S. 19, 26 (1989).
166. Mathews v. De Castro, 429 U.S. 181, 185 (1976) (quoting Helvering v. Davis, 301 U.S. 619, 640 (1937)).
167. *See* CHEMERINSKY, *supra* note 11, at 686 (explaining that underinclusive laws are often indicators that the law is either being used to harm a particular group, or to help a politically powerful group).

> its constitutional authority. It is little more than a rationalization for government action dressed up as judicial review.[168]

Regardless of the scholarly criticism, instances of the Court finding laws irrational are few and far between.[169] Part II of this Note discusses the diverging treatment of the question of what constitutes unconstitutional "arbitrary" power.

D. Pluralist Theory, Interest Group Theory, and the FTC's Funeral Rule

This section briefly explains pluralist theory and interest group theory. This explanation is necessary for a full discussion of the regulations that limit casket sales to funeral home directors, due to the arguments that the casket sales restrictions are illegitimate as they are wholly the product of powerful interest group pressures. However this discussion will necessarily be limited, as it is outside the scope of this Note to provide a complete survey of these theories. This section concludes with a brief overview of the funeral industry and a discussion of the FTC's Funeral Rule.

1. Interest Group Pluralism and Public Choice Theory

Pluralist theory views interest group participation as an essential element of the proper functioning of a democracy.[170] As far back as de Tocqueville's writings on the importance of "factions," interest group pluralism has been embraced as necessary in a democracy.[171] Pluralists embrace self-interested special interest groups' participation in government and view regulation of interest groups as a threat to proper democratic process by distorting the marketplace for private political activity.[172] Pluralists believe that interest group participation should be left unregulated, embracing an "invisible hand" approach, which posits that the best results ensue when interest groups advocate freely.[173]

In contrast with the pluralists' optimistic view of interest group participation,[174] public choice theorists take a more sinister view of public

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168. Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 CHAP. L. REV. 173, 191 (2003).

169. *See* CHEMERINSKY, *supra* note 11, at 687–89 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)); Sunstein, *supra* note 112, at 1698. *But see* Brief for Petitioners-Appellees at 26–27 & nn.13–14, St. Joseph Abbey v. Castille, No. 11-30756 (5th Cir. Dec. 12, 2011) (collecting cases where laws have been struck down under rational basis review).

170. *See* Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the* Noerr-Pennington *Doctrine*, 41 HASTINGS L.J. 905, 937–42 (1990).

171. *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 29 (1985); *see also* William N. Eskridge, Jr., *A Pluralist Theory of the Equal Protection Clause*, 11 U. PA. J. CONST. L. 1239, 1239 (2009) (arguing that the Constitution is grounded in the normative theory of pluralism).

172. *See* Minda, *supra* note 170, at 939 & n.113 (citing Sunstein, *supra* note 171, at 33).

173. *See id.* at 938–39 (citing Sunstein, *supra* note 171, at 34).

174. *See id.* at 937 (noting the "optimistic[]" conception of politics that pluralism provided in the 1960s).

interest groups.[175] Borrowing tools from economics and applying them to lawmaking, public choice theory's tenants of interest group theory and rent seeking reject the presumption that legislatures act to serve the general public.[176] Interest group theory posits that small, organized groups gain disproportionate[177] power in government, resulting in regulations that do not advance the public interest, but rather extract "monopoly rents" from interest groups for the right to operate a monopoly that harms the public, often through higher prices.[178] Small, extremely interested groups gain disproportionate benefits compared to the large majorities with diffusely held interests, due to lowered transaction costs, such as lower costs in policing free riding and receiving larger benefits if successful.[179] Interest group theory thus explains why regulations often do not mirror the interests of majorities.[180]

Using interest group theory as a tool, some scholars have advocated elevating judicial review of economic regulations that are products of interest group lobbying.[181] This reflects the notion that the political process is broken due to the presence of interest groups, and that judges must interfere to ensure that laws are passed to advance the public interest.[182]

This urge to ratchet up judicial scrutiny is not without critics, however.[183] For example, Professor Elhauge argues that, absent some normative evaluation of the outcomes of special interest legislation, interest group theory cannot show that the political process is defective.[184] This is because, "[w]hether courts will find any given level of [interest group] influence excessive depends upon the normative baseline they use."[185] Put differently, without attaching a baseline level of what the "appropriate" amount of influence a particular group should yield, it is impossible to determine whether the outcome is "inappropriate" or not.[186] As Elhauge points out, a baseline of efficiency is often implicitly adopted, but using interest group theory to attain the realization that a particular regulation is

175. *Id.* at 945.

176. *See* Ezra B. Hood, Comment, *Interpreting in the Public Interest: How Macey's Canon Can Restore Economic Liberty*, 19 GEO. MASON U. C.R. L.J. 441, 450 (2009).

177. *But see* Einer R. Elhauge, *Does Interest Group Theory Justify More Instrusive Judicial Review?*, 101 YALE L.J. 31, 49–60 (1991) (arguing that finding a particular group's influence disproportionate requires adopting some normative baseline for determining what that group's proportionate influence should be); *see also infra* notes 184–87 and accompanying text.

178. *See* Elhauge, *supra* note 177, at 32; Hood, *supra* note 176, at 453–54, 461.

179. *See* Elhauge, *supra* note 177, at 36–37; Hood, *supra*, note 176, at 450.

180. *See* Elhauge, *supra* note 177, at 32.

181. *See id.* at 32–33 (citing Erwin Chemerinsky, Frank Easterbrook, Richard Epstein, William Eskridge, Jonathan Macey, Jerry Mashaw, Gary Minda, William Page, Martin Shapiro, Bernard Siegan, Cass Sunstein, and John Wiley as proponents of a less deferential form of judicial review).

182. *See id.*

183. *See generally id.*

184. *See id.* at 48–61.

185. *Id.* at 60.

186. *See id.* at 60–63.

inefficient adds nothing additional to the analysis that a mere evaluation of the efficiency of the regulation could not illustrate.[187]

2. Overview of the Funeral Industry and the FTC's Funeral Rule

To illustrate the effects of the restrictive casket-sales regulations at issue in this Note, this subsection embarks on a brief discussion of the high costs of a funeral and the FTC's efforts to keep those costs low through its Funeral Rule.

Other than buying a house or a car, arranging a funeral is the most expensive purchase for many Americans.[188] A traditional funeral in the United States, including a casket and vault, costs about $6,000, not including extras such as flowers and limousines that can add thousands more to the bottom line, sometimes with the total escalating to $10,000.[189] The average casket, usually constructed of metal, wood, fiberboard, fiberglass, or plastic, costs around $2,000, while some mahogany, bronze, or copper caskets can cost up to $10,000.[190] With over two million funerals a year nationwide,[191] funeral preparation is a multibillion dollar industry.[192]

In the 1980s, the FTC promulgated regulations for consumer protection against unfair and deceptive practices in the funeral industry.[193] Known as the Funeral Rule, the FTC regulations require price lists to be distributed to consumers in an effort to create transparency in pricing and to prevent abusive "bundling" of products and services within the industry.[194] The Funeral Rule contemplates casket sales by nonfuneral provider[195] third-party sellers.[196] In 1994, the FTC amended the Funeral Rule to expressly disallow the charging of casket handling fees when consumers opted to

187. *See id.* at 54–55. Elhauge uses this same analysis to conclude that using antitrust capture theory to justify more searching judicial review is similarly flawed. *See id.* at 46–47.

188. *See* FTC Funeral Rule, 47 Fed. Reg. 42,260, 42,260 (Sept. 24, 1982) (codified as amended at 16 C.F.R. pt. 453). *See generally*, Asheesh Agarwal & Jerry Ellig, *Buried Online: State Laws That Limit E-commerce in Caskets*, 14 ELDER L.J. 283 (2006) (detailing the funeral industry as it existed in 2006).

189. *See Funerals: A Consumer Guide*, FTC (June 2000), http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro19.shtm.

190. *See id.*

191. *See id.*; *see also Deaths and Morality*, CENTER FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/fastats/deaths.htm (last updated Nov. 16, 2012) (stating that there were 2,437,163 deaths in 2009).

192. *Statistics*, NAT'L FUNERAL DIRECTORS ASS'N, http://www.nfda.org/media-center/statisticsreports.html (last visited Nov. 16, 2011) (stating that funeral arranging and cremation was a $11.95 billion dollar industry in 2007).

193. *See* 16 C.F.R. § 453.1–.9 (2012).

194. *See* FTC Funeral Rule, 47 Fed. Reg. 46,260, 42,269, 42,281 (Sept. 24, 1982) (codified as amended at 16 C.F.R. pt. 453).

195. The Funeral Rule defines "funeral provider" as "any person, partnership or corporation that sells or offers to sell funeral goods *and* funeral services to the public." 16 C.F.R. § 453.1(i) (emphasis added).

196. *See* Brief for the FTC As Amicus Curiae Supporting Neither Party at 6–7 & n.9, St. Joseph Abbey v. Castille, No. 11-30756 (5th Cir. Dec. 16, 2011) (citing 16 C.F.R. § 453.2(b)(D)(1)).

purchase caskets from third-party sellers.[197] By eliminating such fees, the FTC aimed to foster a more competitive environment whereby consumers would not be deterred from purchasing caskets through independent third-party retailers by the imposition of excessive handling fees.[198] Acknowledging that third-party sellers pose a substantially lesser threat to competition, in 2008, the FTC declined to extend the coverage of the Funeral Rule to third-party casket and urn sellers, concluding that the lack of abuses by such sellers rendered the imposition of the rule unnecessary.[199]

II. THE CURRENT CIRCUIT SPLIT OVER CASKET-SALE RESTRICTIONS: IS ECONOMIC PROTECTIONISM A LEGITIMATE STATE INTEREST?

Part I discussed the history of substantive due process and equal protection jurisprudence and showed how under rational basis review, most economic regulations are upheld. Part II examines the casket sales restriction cases that bring to the forefront the current circuit split over whether intrastate economic protectionism is a legitimate state interest. Part II.A discusses the arguments employed by courts that have upheld the constitutionality of the funeral home regulations by finding them rationally related to legitimate state interests other than pure intrastate economic protectionism. Part II.B discusses the Sixth Circuit's opinion in *Craigmiles v. Giles*,[200] which held that intrastate economic protectionism is not a legitimate state interest, before turning to the Fifth Circuit's recent treatment of the issue in *St. Joseph Abbey v. Castille*.[201] Part II.C analyzes the arguments presented by the Tenth Circuit in *Powers v. Harris*,[202] which led to its conclusion that intrastate economic protectionism constitutes a legitimate state interest.[203]

197. *See* 1994 FTC Funeral Rule Amendment, 59 Fed. Reg. 1592 (Jan. 11, 1994) (amending 16 C.F.R. pt. 453). Both the originally promulgated Funeral Rule and the subsequent amendments withstood legal challenge on various grounds by funeral operators. *See* Pa. Funeral Dirs. Ass'n v. FTC, 41 F.3d 81 (3d Cir. 1994); Harry & Bryant Co. v. FTC, 726 F.2d 993 (4th Cir. 1984).

198. *See* 1994 FTC Funeral Rule Amendment, 59 Fed. Reg. at 1593. *But see* Judith A. Chevalier & Fiona M. Scott Morton, *State Casket Sales Restrictions: A Pointless Undertaking?*, 51 J.L. & ECON. 1, 1 (2008) (producing a study suggesting a "one-monopoly-rent" hypothesis to explain funeral goods and services, whereby when competition emerges among casket sellers, the cost of other funeral services rises, leaving no economic savings for consumers).

199. *See* 2008 FTC Funeral Rule Amendment, 73 Fed. Reg. 13,740, 13,742 (Mar. 14, 2008) (amending 16 C.F.R. pt. 453) (finding "insufficient evidence that . . . third-party sellers of funeral goods are engaged in widespread unfair or deceptive acts or practices").

200. 312 F.3d 220 (6th Cir. 2002).

201. No. 11-30756, 2012 WL 5207465 (5th Cir. Oct. 23, 2012).

202. 379 F.3d 1208 (10th Cir. 2004), *cert denied*, 554 U.S. 920 (2005).

203. This Note centers on the casket-sales regulations to examine the issue of whether economic protectionism of an intrastate industry is a legitimate state interest. While courts have discussed this issue in other regulatory contexts, most notably the Ninth Circuit in *Merrifield v. Lockyer*, 547 F.3d 978, 992 n.15 (9th Cir. 2008) (concluding that "economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest"), discussion of such cases is outside the scope of this Note.

A. Legitimate State Interests Other Than Intrastate Economic Protectionism Employed To Uphold the Constitutionality of the Casket-Sales Regulations

Before embarking on an analysis of the arguments concerning the primary question addressed in this Note, namely, whether legislating with the purpose of protecting an in-state industry from competition represents a legitimate exercise of the states' police powers, it is important to discuss the arguments employed by courts that have upheld the regulations without reaching this central question. These decisions relied on finding the regulations rationally related to other legitimate state interests besides intrastate economic protectionism, therefore supporting the conclusion of constitutionality, such as the state's interest in protecting the health and safety of its citizens and the state's interest in consumer protection.[204] While all of the cases addressed in this Note concede that consumer protection and promoting health and safety are legitimate state interests,[205] the following courts relied on those state interests to uphold the laws. In contrast, the courts discussed in Part II.B and II.C of this Note relied on the state interest in economic protectionism to either uphold or strike down the regulations.[206]

Some courts have used the states' general interest in regulating the health, safety, and welfare of its citizens to uphold the constitutionality of the funeral merchandise regulations, by finding the regulations rationally related to that end. In *Guardian Plans Inc. v. Teague*,[207] for example, the Fourth Circuit upheld a Virginia funeral-licensing scheme as constitutionally promoting the legitimate state interest of public health and safety.[208]

The Virginia regulation at issue limited the making of funeral arrangements, including selling supplies, to those licensed by the state in the funeral service profession.[209] The plaintiffs challenged the Virginia

204. *See, e.g.*, Guardian Plans Inc. v. Teague, 870 F.2d 123 (4th Cir. 1989) (public health and safety); N.C. Bd. of Mortuary Sci. v. Crown Mem'l Park, L.L.C., 590 S.E.2d 467, 471 (N.C. Ct. App. 2004) (finding that "seeking to protect pre-need consumer funds for funeral merchandise is a legitimate interest" and that the North Carolina pre-need casket sales regulation rationally related to that interest); State Bd. of Embalmers & Funeral Dirs. v. Stone Casket Co., 976 P.2d 1074, 1076 (Okla. Civ. App. 1998) (same).

205. *See, e.g.*, Craigmiles v. Giles, 110 F. Supp. 2d 658, 662 (E.D. Tenn. 2000) (noting that both protecting the funeral consumer and protecting the health, safety, and welfare of the public "are clearly legitimate governmental interests").

206. *See infra* Part II.B–C.

207. 870 F.2d 123 (4th Cir. 1989).

208. *Id.* at 126–27.

209. *See id.* at 125 ("[Practice of Funeral Services] shall also mean the engagement of making arrangements for funeral service, selling funeral supplies to the public or making financial arrangements for the rendering of such services or the sale of such supplies." (emphasis omitted) (citing VA. CODE ANN. 54-260.67(2))). The statute today reads:

> "Practice of funeral services" means engaging in the care and disposition of the human dead, the preparation of the human dead for the funeral service, burial or cremation, the making of arrangements for the funeral service or for the financing

regulation as unconstitutional on vagueness, due process, and equal protection grounds.[210] In its equal protection and due process analysis, the *Teague* court did not reach the question of whether economic protectionism can be a legitimate state interest. Rather, the appellants conceded that the Virginia legislature's interest in protecting the health, safety, and welfare of its citizens by regulating the funeral home industry is "well recognized."[211] Thus, the Court found that the legislature could have "rationally determined that keeping the arrangement of funerals in the hands of licensed funeral professionals would benefit the public by ensuring competence in funeral arrangement."[212]

The appellants had argued that it is "ludicrous to require a salesperson, who does nothing more than make preneed arrangements, to have the same credentials as a full-fledged funeral director."[213] The appellants had further argued that proof of the irrationality of the regulation was imbued in the fact that although the regulation was designed to protect consumers, it was in fact anti-consumer by "restricting consumer choice in this traditionally anti-competitive market."[214] The Fourth Circuit rejected appellants' arguments, classifying them as mere disagreement with the legislature's "judgment in refusing to establish different licensure requirements for persons who do nothing more than arrange funerals,"[215] which the Supreme Court has rejected with regard to other professions.[216] The Fourth Circuit concluded that "[o]ur inquiry ends here. The wisdom of [the licensure requirements] is simply irrelevant."[217] Thus, the Fourth Circuit deferred to the state's judgment regarding the best means to achieve its interest in public health and safety. Moreover, the court did not embark on a searching review of those means, instead finding the arguably loose "fit" between the ends and means of the regulation sufficient to pass constitutional muster.[218]

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of the funeral service and the selling or making of financial arrangements for the sale of funeral supplies to the public.

VA. CODE ANN. § 54.1-2800 (2011).

210. *See Teague*, 870 F.2d at 125.

211. *Id.* at 126.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *See id.* *Teague* cites *Lee Optical* as "uph[olding] requirement that only a licensed optometrist or ophthalmologist may refit old lenses into new frames"; *England v. Louisiana State Board of Medical Examiners*, 246 F. Supp. 993 (E.D. La. 1965), *aff'd*, 384 U.S. 885 (1966), as "uph[olding] requirement that chiropractors must have a full medical license"; and *Sutker v. Illinois State Dental Society*, 808 F.2d 632 (7th Cir. 1986), as "uph[olding] requirement that only licensed dentists could fit dentures." *See Teague*, 870 F.2d at 126.

217. *Teague*, 870 F.2d at 126.

218. *But see* Brief for Petitioners-Appellees at 34–35 & n.21, St. Joseph Abbey v. Castille, No. 11-30756 (5th Cir. Dec. 12, 2011) (distinguishing *Teague* as involving funeral arranging on a pre-need basis, and including complex financial transactions such as holding money in trust).

Similarly, in *State Board of Embalmers & Funeral Directors v. Stone Casket Co.*,[219] an Oklahoma Court of Civil Appeals reversed a due process and equal protection challenge to Oklahoma's funeral licensing scheme by finding the regulation rationally related to the legitimate state interest of regulating health and safety.[220] The court in *Stone Casket* reached this conclusion by finding that Oklahoma had a legitimate interest in regulating funeral services, since funeral services are related to the preparation and disposal of human remains, and "[s]uch laws protect the public health and safety of the citizens of Oklahoma."[221] The court also found that "[c]askets are directly involved in the burial of human remains,"[222] thus also promoting the health and safety of the citizens of the state. The court upheld the requirement that casket sellers be licensed by the state, reasoning that "[a] casket is a part of the funeral service business and cannot be separated as an independent item."[223] The court found that the state had the legitimate power to protect the health and safety of its citizens and further found the funeral regulations to be rationally related to that end by promoting sanitation.[224] Notably, the court focused on the state's power to regulate the funeral industry generally, and then accorded the state deference to their means of doing so, and thus endorsed limiting casket sales to those licensed by the state.[225]

B. Courts Finding That Pure Economic Protectionism Is Not a Legitimate State Interest

This section centers on the Sixth Circuit's decision in *Craigmiles*, which struck down Tennessee's regulation limiting the sales of caskets to funeral directors under the Due Process and Equal Protection Clauses. This section also discusses the Fifth Circuit's recent treatment of these similar regulations in *St. Joseph Abbey*.

1. Sixth Circuit: *Craigmiles v. Giles*

Craigmiles involved a due process and equal protection challenge[226] to the Tennessee Funeral Directors and Embalmers Act (FDEA). The FDEA

219. 976 P.2d 1074 (Okla. Civ. App. 1998).

220. *See id.* at 1076. This case involved a challenge in state court to the same regulations (OKLA. STAT. tit. 59, § 396.1. (2011)) later adjudicated in federal court in *Powers*. *See supra* Part II.C.

221. *Stone Casket*, 976 P.2d at 1076.

222. *Id.*

223. *Id.*

224. *See id.*

225. *See id.* ("[W]e hold that the manufacture and sale of caskets is part and parcel of the funeral service business, and regulating that business and licensing qualified persons engaged therein is a proper exercise of the police power of the State . . . .").

226. The plaintiffs also argued that the statute violated the Fourteenth Amendment Privileges or Immunities Clause. *See Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002). Unlike the district court, which rejected the argument, the Tenth Circuit failed to reach the issue, simply noting that the clause has been largely dormant since the *Slaughter-House Cases*. *See* Powers v. Harris, 379 F.3d 1208, 1214 (10th Cir. 2004). *But see* Saenz v. Roe,

was originally passed in 1951, but was amended in 1972 by the Tennessee General Assembly to include the retailing of funeral merchandise in the definition of "funeral directing."[227] The statute required[228] those engaged in funeral directing to either complete one year of course work at an accredited mortuary school and a one-year apprenticeship with a licensed funeral director, or to do a full two-year apprenticeship.[229] The required coursework at the only mortuary school in Tennessee included "eight credit hours in embalming, three in 'restorative art,' and twenty-one in 'funeral service.'"[230] In addition, one was required to pass the Tennessee Funeral Arts Examination.[231]

The plaintiffs were engaged in the business of selling caskets and other funeral merchandise through two independent retail stores located in Tennessee.[232] The Board of Funeral Directors and Embalmers issued a cease and desist letter, demanding that the plaintiffs stop selling caskets and other funeral merchandise.[233] The Board declared that the plaintiffs were engaged in "funeral directing" by selling such merchandise and argued that since the plaintiffs were not licensed funeral directors, they had violated the FDEA.[234] Both stores subsequently ceased operations.[235]

The plaintiffs sued in the Eastern District of Tennessee, seeking an injunction against the enforcement of the FDEA against those businesses only selling funeral merchandise.[236] The court held that the FDEA, as applied to the plaintiffs' businesses, violated equal protection and due process.[237] After enjoining the enforcement of the FDEA as applied to the plaintiffs, the plaintiffs resumed the operation of their businesses.[238]

The Sixth Circuit affirmed the decision, applying rational basis to review the constitutionality of the FDEA under the Due Process and Equal Protection Clauses, as the parties had conceded that this was the correct

526 U.S. 489, 501–04 (1999) (using the Privileges or Immunities Clause to protect the right of citizens to travel across state lines); *id.* at 527–28 (Thomas, J., dissenting) (indicating a willingness to reexamine the Privileges or Immunities Clause in a future case through the lens of original intent).

227. *See Craigmiles*, 312 F.3d at 222 (citing TENN. CODE. ANN. § 62-5-101(6)(A)(ii) which stated that "funeral directing" consisted of the "[m]aking of arrangements to provide for funeral services, the selling of funeral merchandise, the making of financial arrangements for the rendering of the services, [and/or] the sale of such merchandise.").

228. The statute was amended in 2010 following the Sixth Circuit's disposition of this case.

229. *See id.* (quoting TENN. CODE. ANN. § 62-5-101(a)(3)(A)(ii) (1997)).

230. *See id.*

231. *See id.*

232. *Id.* at 222–23.

233. *Id.* at 223.

234. *Id.*

235. *Id.*

236. *Id.*

237. *See* Craigmiles v. Giles, 110 F. Supp. 2d 658, 667 (E.D. Tenn. 2000).

238. *See Craigmiles*, 312 F.3d at 223.

level of review for an economic regulation.[239] The court noted that, regardless of the strong presumption under the rational basis standard that the law was legitimate, the district court had found that the regulation was not rationally related to a governmental purpose, as the district court believed that the law "was designed only for the economic protection of funeral home operators."[240] Citing the classic Dormant Commerce Clause decision of *City of Philadelphia v. New Jersey*[241] for the proposition that "[c]ourts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose,"[242] the court rejected out of hand the argument that economic protectionism can be a legitimate state interest.[243]

The State did not offer pure economic protectionism of the funeral directors as the objective of its law; rather, the court read between the lines, concluding that the state's proffered justifications were so weak[244] that the law must have been motivated by an attempt to isolate the funeral home industry from competition:[245] "we are left with the . . . obvious illegitimate purpose to which the licensure provision is very well tailored."[246] The court felt that "Tennessee's justifications for the 1972 amendment [came] close to striking us 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."[247] The court noted that while "[o]nly a handful of provisions have been invalidated for failing rational basis review. . . . [t]his case should be among [that] handful."[248] Thus the court inquired into the real motivation behind the regulation, and, finding it motivated by protecting special interests, equated such motivation with the motivation discovered by the Court in *Romer* and *City of Cleburne v. Cleburne Living Center*[249]: that of "a bare . . . desire to harm a politically unpopular group."[250]

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239. *Id.* at 224 ("While feared by many, morticians and casket retailers have not achieved the protected status that requires a higher level of scrutiny under our Equal Protection jurisprudence. Although the licensing requirement has disrupted the plaintiffs' businesses, the regulations do not affect any right now considered fundamental and thus requiring more significant justification.").

240. *Id.*

241. 437 U.S. 617 (1978).

242. *Craigmiles*, 312 F.3d at 224 (citing H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949), and Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400 (1983)).

243. *See id.* at 224–25.

244. See *infra* notes 251–63 and accompanying text for a discussion of the state's proffered purposes.

245. *Craigmiles*, 312 F.3d at 225.

246. *Id.* at 228.

247. *Id.* at 225 (quoting United States v. Searan, 259 F.3d 434, 447 (6th Cir. 2001)) (citations omitted).

248. *Id.* at 225.

249. 473 U.S. 432, 439 (1985).

250. Romer v. Evans, 517 U.S. 620, 634 (1996) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted); *see also Craigmiles*, 312 F.3d at 225.

The court proceeded to analyze whether the FDEA bore a rational relationship to any legitimate government purpose other than protecting the funeral director's economic interests.[251] The State proffered two governmental interests as the purpose of the law: (1) promoting health and safety and (2) consumer protection.[252] The court examined both justifications and found the regulation not rationally related to either end.[253]

With respect to the health and safety rationale, the court conceded that the quality of a casket has the potential to impact public health in that leaky caskets could potentially cause substances to contaminate ground water and harm the public.[254] However, the court rejected this rationale after finding that the state does not regulate the particular types of permissible casket designs, and in fact does not require that a casket be used at all.[255] The Sixth Circuit noted that "[t]he district court determined that there was no evidence of any public safety risk from a leaky casket, or mere 'box' for human remains."[256] Thus, the court concluded that any regulation restricting casket sales to funeral home operators was not rationally related to protecting the public welfare.[257] In fact, the court suggested that the regulations restricting casket sales might actually decrease public health and safety, since restricting competition in the casket market generally drives up prices, making the more protective caskets potentially unaffordable and leading to consumer purchases of lesser quality caskets.[258]

The State also argued that the regulation was needed in order to protect consumers, since the FDEA regulates the conduct of funeral directors by "preventing them from making fraudulent misrepresentations, making solicitations after death or when death is imminent, or selling a previously used casket."[259] The state argued that if casket sellers are not licensed funeral directors, then the state cannot prevent them from engaging in these types of behaviors.[260] The court rejected this argument, stating that the Act

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251. *Craigmiles*, 312 F.3d at 225.

252. *Id.*

253. *See id.* at 226.

254. *See id.* at 225. In *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434 (S.D. Miss. 2000), the State argued along similar lines that the Mississippi funeral licensing scheme promoted the prompt disposition of human remains. The court ultimately rejected this argument. *Id.* at 438.

255. *See Craigmiles*, 312 F.3d at 225; *see also Casket Royale*, 124 F. Supp. 2d at 439 (rejecting a consumer protection argument where "the Mississippi legislature has not seen fit to prescribe guidelines for the quality of caskets").

256. *Craigmiles*, 312 F.3d at 226 (citing Craigmiles v. Giles, 100 F. Supp. 2d 658, 662–63 (E.D. Tenn. 2000)). Thus the *Craigmiles* court diverged from the courts cited in Part II.A *supra*, which found similar regulations to be rationally related to the promotion of public health and safety.

257. *See Craigmiles*, 312 F.3d at 226.

258. *See id.*; *see also Casket Royale*, 124 F. Supp. 2d at 440 ("As a result of [the restriction of casket sales], consumers in Mississippi are offered fewer choices when it comes to selecting a casket . . . one is forced to pay higher prices in a far less competitive environment.").

259. *Craigmiles*, 312 F.3d at 226 (citing TENN. CODE. ANN. § 62-5-317(a)(2)).

260. *Id.*

already applies generally to casket retailers and, even if it did not, the State could easily pass or amend legislation making the regulations apply to casket retailers as well.[261] The court also rejected the similar argument that the licensing was required in order to ensure compliance with the FTC Funeral Rule, noting that the Funeral Rule is already generally applicable to casket retailers[262] and, furthermore, independent casket retailers generally have the effect of stimulating competition and promoting transparency of pricing—central policies that the FTC Funeral Rule was designed to promote.[263]

Departing from the usual level of deference prescribed for rational basis review, the court infused its discussion of consumer protection with an analysis of something that is usually reserved for a higher level of scrutiny—whether there are less restrictive alternatives to achieve the same legislative result.[264] The court wrote that "[i]f consumer protection were the aim of the 1972 Amendment, the General Assembly had several direct means of achieving that end."[265] In doing so, the court diverged in its conception of the degree to which the statute can only incidentally relate to the legitimate end.[266] Seeing the "pretextual" nature of the legislature's proffered justifications, the court preemptively defended a foreseeable argument of "Lochnering": "We are not imposing our view of a well-functioning market on the people of Tennessee. Instead, we invalidate only the General Assembly's naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers."[267] Thus the court found the law not aimed at a legitimate end, and therefore unable to withstand its more searching variant of rational basis review.[268]

2. Fifth Circuit: *St. Joseph Abbey v. Castille*

Very recently in *St. Joseph Abbey*, the Fifth Circuit confronted due process and equal protection challenges to restrictive casket-sales regulations.[269] Preceding the Fifth Circuit's ruling, the Eastern District of Louisiana permanently enjoined Louisiana from enforcing its Embalming and Funeral Directors Act.[270] Unlike *Powers*, where the court sua sponte

261. *Id.*

262. *See id.* at 227 (noting that the FTC Funeral Rule already applies to "any person, partnership, or corporation that sells or offers to sell *funeral goods* or funeral service to the public." (emphasis added) (quoting C.F.R. § 453.1(i))).

263. *See id. See generally* FTC Funeral Rule, 47 Fed. Reg. 42,260 (Sept. 24, 1982) (codified as amended at 16 C.F.R. pt. 453) (detailing the purpose of the FTC Funeral Rule).

264. *Craigmiles*, 312 F.3d at 228.

265. *Id.*

266. *But cf.* Guardian Plans Inc. v. Teague, 870 F.2d 123, 126 (1989) (quoting Williamson v. Lee Optical, 348 U.S. 483 (1955)).

267. *Craigmiles*, 312 F.3d at 229.

268. *Id.*

269. St. Joseph Abbey v. Castille, No. 11-30756, 2012 WL 5207465 (5th Cir. Oct. 23, 2012).

270. *See* St. Joseph Abbey v. Castille, 835 F. Supp. 2d 149, 160–61 (E.D. La. 2011); *see also* LA. REV. STAT. ANN. § 37:831 (West 2012). Prior to the filing of this lawsuit, there

tackled the argument that economic protectionism could constitute a legitimate state interest, in *St. Joseph Abbey*, the State advanced both consumer protection and economic protectionism as potential legitimate state interests.[271] In addressing the question of whether economic protectionism can constitute a legitimate state interest, the court tracked the arguments advanced by the *Craigmiles* court, as well as the *Powers* concurrence, and rejected those arguments.[272]

The Fifth Circuit, however, punted[273] on the constitutional questions by citing the doctrine of constitutional avoidance to defer ruling and instead certified an issue of state law to the Louisiana Supreme Court.[274] The question posed to the supreme court was whether the Louisiana State Board of Embalmers and Funeral Directors had statutory authority under state law to regulate the selling of caskets by those unrelated to the funeral industry.[275]

Despite the fact that the constitutional questions were not reached, the decision delved substantively into the constitutional arguments.[276] Such an approach indicates that if the Louisiana Supreme Court finds statutory support for the Board's ability to regulate the use of caskets by those not otherwise connected to the funeral industry, the Fifth Circuit will likely strike down the regulations on constitutional grounds.[277]

This is evidenced in the Fifth Circuit's language of "doubt"[278]: the court "doubt[ed]"[279] that the Louisiana regulations were rationally related to either consumer protection[280] or health and safety[281] justifications. As to

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were two legislative attempts, in 2008 and 2010, to exempt the plaintiff monks from the casket sale restrictions, both of which were defeated by funeral directors and industry lobbyists. *See* Ramon Antonio Vargas, *Monks Sue To Build, Sell Caskets*, HOUS. CHRON. (Aug. 19, 2010), http://www.chron.com/life/houston-belief/article/Monks-sue-to-build-sell-caskets-1709363.php.

271. *See St. Joseph Abbey*, 835 F. Supp. 2d at 151–52.

272. *See* St. Joseph Abbey v. Castille, No. 10-2717, 2011 WL 1361425 (E.D. La. Apr. 8, 2011) (denying motion to dismiss). For a similar case, see *Peachtree Caskets Direct, Inc. v. State Board of Funeral Service of Georgia*, No. Civ.1:98-CV-3084, 1999 WL 33651794, at *1 (N.D. Ga. Feb. 9, 1999).

273. Debra Cassens Weiss, *5th Circuit Appears To Favor Monks Challenging Casket Restrictions, But Punts Issue to La. Supremes*, ABA J. (Oct. 23, 2012, 5:30 AM), http://www.abajournal.com/news/article/5th_circuit_certifies_casket_sale_question_to_louisiana_supreme_court/.

274. *St. Joseph Abbey*, 2011 WL 1361425, at *9.

275. *Id.* at *11.

276. For this reason, Judge Haynes issued a concurrence, believing it unnecessary to discuss the constitutional issues beyond "not[ing] that there are substantial federal constitutional questions presented." *Id.* (Haynes, J., concurring).

277. *Id.* at *3 ("After examining the record, we have doubts about the constitutionality of the State Board's regulation of intrastate casket sales."); *see* Sam Favate, *Fifth Circuit: Louisiana Rule on Casket Sales "Must Not Be Irrational,"* WALL ST. J.L. BLOG (Oct. 24, 2012, 12:33 PM), http://blogs.wsj.com/law/2012/10/24/fifth-circuit-louisiana-rule-on-casket-sales-must-not-be-irrational/ (noting the Fifth Circuit "criticized the regulation").

278. *St. Joseph Abbey*, 2011 WL 1361425, at *3.

279. *Id.* at *6, *8.

280. *Id.* at *5–7.

281. *Id.* at *7–8.

the health and safety justification, the court noted how the State does not require the use of a particular type of casket, that caskets be sealed, or even the use of a casket at all at burial, thus negating the argument that the regulation is rationally related to aiding public health.[282]

Most notably for purposes of this Note, the Fifth Circuit sided with the *Craigmiles* court on the issue of economic favoritism, writing in dicta that "neither precedent nor broader principles suggest that mere economic protection of a pet industry is a legitimate governmental purpose."[283] However, the court noted that "economic protection, that is favoritism, . . . [if] supported by a post hoc perceived rationale"[284] may be upheld, but without such a rationale, "it is aptly described as a naked transfer of wealth."[285] The court reasoned that "naked economic preferences are impermissible to the extent that they harm consumers,"[286] indicating that the regulations at issue impermissibly harmed consumers through higher prices. [287]

C. The Tenth Circuit in Powers v. Harris*: Economic Protectionism Is a Legitimate State Interest*

The plaintiffs in *Powers*—individuals who wished to sell caskets online in the state of Oklahoma without obtaining a license[288]—sued members of the Oklahoma State Board of Embalmers and Funeral Directors, seeking declaratory relief.[289] After losing in the Western District of Oklahoma, the plaintiffs appealed to the Tenth Circuit, arguing that the Oklahoma licensing law violated the Privileges or Immunities, Equal Protection, and Due Process Clauses of the Fourteenth Amendment.[290] The Tenth Circuit affirmed the district court.[291]

The Oklahoma Funeral Services Licensing Act (FSLA) requires that any individual selling funeral-service merchandise, including caskets,[292] must

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282. *Id.*
283. *Id.* at *4.
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.* at *1.
288. The plaintiffs operated an internet company that sold caskets within the state through an in-state server and did not have a physical store. *See Powers v.* Harris, 379 F.3d 1208, 1213 n.9 (10th Cir. 2004). The parties and the court assumed that the server's location in the state was sufficient to render it the internet company's place of business, and thus subject to Oklahoma state regulation. *See id.*
289. *Id.* at 1211.
290. *Id.* At the district court level, the plaintiffs also argued that the Oklahoma Funeral Services Licensing Act (FSLA) violated the Dormant Commerce Clause. *See id.* at 1214 n.11. The Tenth Circuit confirmed that given the district court's findings of fact, the doctrine was inapplicable, and furthermore, that the claim was waived as plaintiffs did not assert it on appeal. *See id.* For an argument that the funeral regulations are unconstitutional under the Commerce Clause, see Agarwal & Ellig, *supra* note 188.
291. *See Powers*, 379 F.3d at 1211.
292. *See id.* at 1212 n.1 (explaining that funeral-service merchandise, as defined by the FSLA, includes "the sale of burial supplies and equipment, but excluding the sale by a

be a licensed funeral director[293] operating out of a funeral establishment.[294] Thus, in order to sell caskets in the state, the FSLA "effectively requires 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."[295] Notably, Oklahoma does not apply the licensing scheme to those who sell other funeral related merchandise, such as "urns, grave markers, monuments, clothing and flowers."[296] In addition, the licensing requirements only apply to time-of-need sales, leaving unlicensed individuals free to sell pre-paid[297] or pre-death caskets as long as they are acting as an agent of a licensed funeral director.[298] Lastly, the Board only enforces the law with respect to intrastate casket sales.[299] Plaintiffs wished to sell in-state, time-of-need caskets in Oklahoma over the internet, but had not done so out of fear that the Board would prosecute them for violating the Board rules.[300]

Plaintiffs argued that the FSLA violates both equal protection and substantive due process. In addressing the plaintiffs' challenge, the court noted that the proper level of review was rational basis review because the case concerned "a state economic regulation that does not affect a fundamental right and categorizes people on the basis of a non-suspect classification."[301] The court further decided that the plaintiff's claim was "most properly presented as an equal protection claim" since the plaintiffs cited mostly equal protection cases—even when making substantive due process arguments—and the Supreme Court itself has most often analyzed regulatory challenges under the Equal Protection Clause.[302]

The Board argued, and the plaintiffs and court agreed, that protecting casket purchasers—a vulnerable group—constitutes a legitimate state interest.[303] Since consumer protection was accepted as a legitimate end of state regulation, the parties urged the court to inquire whether the licensing

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cemetery of lands or interests therein, services incidental thereto, markers, memorials, monuments . . . ." (citing OKLA. STAT. tit. 59, § 396.2(10))).

293. *See id.* at 1211 n.2 ("The FSLA defines a funeral director as 'a person who: sells funeral service merchandise to the public . . . .'" (quoting OKLA. STAT. tit. 59, § 396.2(2)(d))).

294. *See id.* at 1211.

295. *Id.* at 1212 n.4 (citing Powers v. Harris, No. CIV-01-445-F, 2002 WL 32026155, at *11 (W.D. Okla. Dec. 12, 2002)).

296. *Id.* at 1212.

297. The Oklahoma Insurance Code and Insurance Commissioner regulate sales of caskets on a pre-paid basis. *See id.* at 1212 n.6 (citing OKLA. STAT. tit. 36, § 6121).

298. *Id.* at 1212 & n.5.

299. *Id.* at 1212 ("[A]n unlicensed Oklahoman may sell a time-of-need casket to a customer outside of Oklahoma . . . and an unlicensed salesperson who is not located in Oklahoma may sell a time-of-need casket to a customer in Oklahoma.").

300. *Id.* at 1213.

301. *Id.* at 1215.

302. *Id.*

303. *Id.*

scheme was rationally related to that end.[304] The Board admitted that its licensure requirements were not perfectly aligned with its goal of consumer protection but argued that they met the required "fit" under rational basis review.[305] Importantly, the Board noted that the licensing scheme was not "wholly irrelevant"[306] since all the witnesses who testified agreed that those purchasing time-of-need caskets were a particularly vulnerable group due to the grief that arises from death and, as a result, were susceptible to aggressive sales tactics.[307]

However, rather than address the question presented by the parties—whether the FSLA was rationally related to the legitimate interest of consumer protection—the court, sua sponte, after concluding that it was obligated[308] to examine every possible legitimate interest including those not advanced by the parties, decided to consider whether "protecting the intrastate funeral home industry, absent a violation of a specific constitutional provision or a valid federal statute, constitutes a legitimate state interest."[309] The court then proceeded to analyze whether economic protectionism can be a legitimate state interest, noting that if it is, the licensing arrangement was undoubtedly well-tailored to that end, thus easily passing rational basis review.[310]

Addressing the arguments advanced by *Craigmiles*, the court pointed out that all of the cases relied on were those addressing *inter*state, as opposed to *intra*state commerce, and thus inapposite.[311] For example, the *Powers* court criticized *Craigmiles*'s reliance on the Supreme Court's *City of Philadelphia v. New Jersey*[312] decision, since that case involved a New Jersey law that prohibited importing waste that originated outside of the state.[313]

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304. *Id.* The urge to protect grieving family members surrounding funerals also finds fruition in tort law, where during the late nineteenth century an exception to the general rule against recovery for pure emotional harm existed that permitted family members to recover for their emotional distress occurring during or in conjunction with funeral preparations. *See* JOHN C. P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 721–22 (2d ed. 2008) (citing Mentzer v. W. Union Tel. Co., 62 N.W. 1 (Iowa 1895)); *see also* Gregory C. Keating, *Is Negligent Infliction of Emotional Distress a Freestanding Tort?*, 44 WAKE FOREST L. REV. 1131, 1159 n.78 (2009).

305. *See Powers*, 379 F.3d at 1216 (citing Heller v. Doe, 509 U.S. 312, 324 (1993)).

306. *See* Heller v. Doe, 509 U.S. 312, 324 (1993) ("A statutory classification fails rational-basis review only when it 'rests on grounds *wholly irrelevant* to the achievement of the State's objective.'" (emphasis added) (quoting Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 71 (1978))).

307. *See Powers*, 379 F.3d at 1216 (citing Powers v. Harris, No. CIV-01-445-F, 2002 WL 32026155, at *5 (W.D. Okla. Dec. 12, 2002)).

308. *See id.* at 1217 (citing Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 146 (1st Cir. 2001)).

309. *Id.* at 1218.

310. *See id.* (citing Craigmiles v. Giles, 312 F.3d 220, 228 (6th Cir. 2002)).

311. *See id.* at 1219–21.

312. 437 U.S. 617 (1978).

313. *See Powers*, 379 F.3d at 1219.

As *Powers* explained, the distinction between *intra*state and *inter*state commerce is relevant, since the policies behind—as well as the textual hook of—the Dormant Commerce Clause cases do not apply to intrastate commerce analyzed under the Equal Protection or Due Processes Clauses.[314] The state-promulgated economic protectionist regulation the Dormant Commerce Clause forbids is that which protects a state from competition in the larger national economy.[315] As the Tenth Circuit pointed out, "[o]ur country's constitutionally enshrined policy favoring a national marketplace is simply irrelevant as to whether a state may legitimately protect one intrastate industry as against another when the challenge to the statute is purely one of equal protection."[316] Thus, the Tenth Circuit reasoned that only by engaging in "selective quotation"[317] from interstate commerce cases could the *Craigmiles* court have concluded that the Supreme Court had weighed in on the issue.

The *Powers* court ultimately found that "intra-state economic protectionism, absent a violation of a specific federal statutory or constitutional provision, is a legitimate state interest"[318] and, therefore, it undoubtedly passes rational basis review.[319] To reach this conclusion, the court focused its analysis on the Supreme Court's decisions in *Fitzgerald v. Racing Association of Central Iowa*,[320] *New Orleans v. Dukes*,[321] and *Lee Optical*.[322]

Fitzgerald involved an equal protection challenge by racetrack gambling institutions to the preferential tax rates afforded riverboat gambling and racetrack gambling casinos.[323] The Supreme Court upheld the tax scheme, finding "help[ing] the riverboat industry" to be a legitimate state goal.[324] In *Dukes*, the Supreme Court upheld a New Orleans ordinance that prohibited the selling of foodstuffs from pushcarts in the French Quarter, yet allowed those who had been selling food out of such carts for at least eight years to continue operating, thus reducing the number of pushcart operators to two.[325] As the *Powers* court discussed,[326] the Supreme Court rejected the plaintiff's argument that the New Orleans ordinance violated the Equal

314. *See id.* at 1220.
315. *See id.* at 1219.
316. *See id.* at 1220.
317. *See id.* at 1219.
318. *Id.* at 1222. The *Powers* court believed such a conclusion reflected Supreme Court precedent. *See id.* at 1220 ("[T]he 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.").
319. *Id.* at 1219–23 ("There can be no serious dispute that the FSLA is 'very well tailored' to protecting the intrastate funeral-home industry." (quoting Craigmiles v. Giles, 312 F.3d 220, 228 (6th Cir. 2002))).
320. 539 U.S. 103 (2003).
321. 427 U.S. 297 (1967).
322. *See infra* notes 115–20 and accompanying text.
323. *See Fitzgerald*, 539 U.S. 103 (2003).
324. *Id.* at 110.
325. *See Dukes*, 427 U.S. at 305.
326. Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004).

Protection Clause by creating "a protected monopoly for the favored class member[s],"[327] reasoning that the ordinance might have been implemented to stimulate tourism in the French Quarter.[328] Thus, it was legitimate for the city to eliminate vendors in the heart of the French Quarter, as failing to do so might have reduced tourism and thus harm the city's economy.[329]

The *Powers* court then took a direct jab at the *Craigmiles* court, noting that *Craigmiles* focused on the "actual motives of the Tennessee Legislature," into which the Supreme Court has foreclosed inquiry.[330] The court further attacked the *Craigmiles* court for equating the funeral-industry licensing scheme to the schemes at issue in the decisions that analyzed statutes under the rational-basis plus standard, such as *Romer*.[331] The majority opinion concluded by noting that a bill to amend the FLSA to favor unlicensed casket retailers has been introduced three times, but never made it past the committee stage.[332]

Judge Tymkovich's concurrence in *Powers* argued that the legislative scheme met the rational basis test and agreed with the majority that some courts have upheld regulations that favor some economic interest over others, but parted company with the majority in its belief that the cases relied upon by the majority "rest on a fundamental foundation: the discriminatory legislation arguably advances either the general welfare or a public interest."[333] The concurrence argued that the Supreme Court has always required a public interest be served when a regulation appears to advance one group's interest over another's.[334] Thus, the concurrence rejected what it perceived as the majority's per se approval of intrastate protectionist legislation.[335]

III. UNEARTHING THE PUBLIC INTEREST AND RECOGNIZING ECONOMIC PROTECTIONISM OF AN IN-STATE INDUSTRY AS A LEGITIMATE STATE INTEREST

This Part asserts that the court in *Powers* was correct in holding that naked intrastate economic protectionism, absent a federal statutory or constitutional violation, should be recognized as a legitimate state interest.

Part III first argues that the actual purpose behind the casket licensing schemes is most likely to protect the funeral services industry from

327. *Dukes*, 427 U.S. at 300 (citation omitted).
328. *See id.* at 304–05.
329. *See id.*
330. *Powers*, 379 F.3d at 1223 (citing FCC v. Beach Commc'ns, Inc., 508 U.S. 307 (1993)).
331. *See id.* at 1224–25.
332. *See id.* at 1225 ("While these failures may lead Plaintiffs to believe that the legislature is ignoring their voices of reason, the Constitution simply does not guarantee political success.").
333. *Id.* (Tymkovich, J., concurring).
334. *See id.* at 1225–26 (noting, for example, that in *Fitzgerald* the Court couched its protection of river-boat operators as an effort to preserve economic prosperity).
335. *See id.* at 1226.

competition, but that the *Craigmiles* court incorrectly ratcheted up judicial review by aligning itself with *Romer* and *Cleburne* and looking into the actual purpose and motivation behind the legislation. Similarly, this Part argues that the *Craigmiles* court erred when it cited Commerce Clause cases in a conclusory manner to support its assertion that the Supreme Court has held that economic protectionism is not a legitimate state interest.

This part next contends that the Tenth Circuit in *Powers* did not follow Supreme Court precedent since it made *explicit* the Supreme Court's *implicit* acceptance of economic protectionism as a legitimate state interest. However, this part continues to argue that *Powers* reached the correct outcome in upholding the licensing requirement because rational basis review requires a very high level of deference to legislative enactments.

Ultimately, this part argues that the Supreme Court, if it decides to hear this issue, should recognize pure economic protectionism of an in-state industry as a legitimate state interest, precisely because economic protectionism itself may promote the public good. By relying on *Dukes* and *Fitzgerald*, the *Powers* decision implicitly makes this argument, determining that states may rationally believe that protecting a particular industry from competition benefits the general population of the state. Lastly, this part addresses arguments against recognizing in-state economic protectionism as a legitimate state interest.

A. The Purpose of the State Funeral Regulations Is Likely To Benefit Special Interests

This section argues that the state casket-sales regulations likely reflect the actual product of interest group rent seeking. The next section shows however, why such a conclusion is irrelevant under current rational basis review, and thus the *Craigmiles* court was incorrect in striking down the regulations.

The true purpose of the regulations is likely protectionism of the funeral services industry, because they do not actually advance any of the other purported state interests. For example, they do not further the interest of preventing groundwater leakage because in Louisiana and Tennessee, there are no regulations that mandate the specifications of a casket.[336] Rather, a purchaser in Tennessee or Louisiana is free to choose any casket to use at burial.[337] In fact, in Louisiana no regulation mandates the use of a casket at all for burial.[338] It is not illegal for a body to be buried directly in the ground.[339] If the actual motivation behind these regulations concerned groundwater leakage, these states could pass laws requiring the use of caskets at burial, and require stringent casket specifications.[340] Thus, due to the lack of regulations detailing which type of caskets must be used, the

336. *See supra* notes 254–57, 281–82 and accompanying text.
337. *See supra* notes 255, 282 and accompanying text.
338. *See supra* note 282 and accompanying text.
339. *See supra* note 282 and accompanying text.
340. *See supra* notes 256–58 and accompanying text.

states are likely not actually trying to regulate in order to protect their citizens from groundwater contamination.[341]

They also do not further other legitimate state interests because as the current regulations stand, a citizen of Oklahoma is free to purchase a casket from anyone—be it a monk, a non–funeral director retailer, or even Walmart's website—as long as that person does not operate out of their home state.[342] If the state was actually concerned about the quality of caskets sold or wanted its casket-sales people to have sufficient grief-counseling training, the regulations would reflect these concerns.[343] If these states actually believed that people selling funeral merchandise should be trained in grief counseling, such training could be mandated for all funeral operators—something that it is not currently required. The regulations therefore do not further that purported state interest.

Similarly, the argument that the state seeks to protect consumers by restricting casket sales to funeral directors because the FTC's Funeral Rule only applies to funeral directors and not third-party retailers, is also not likely the actual motivation behind the regulations.[344] The FTC contends that the Louisiana regulations frustrate the purposes of the Funeral Rule.[345] The purpose of the Funeral Rule is to increase transparency in pricing and to foster competition in the industry.[346] The FTC has found that third-party casket retailers do not pose harm to competition, but rather improve competition by expanding consumer choice.[347] Furthermore, the evidence suggests that third-party retailers are not prone to abuses such as bundling, since announcing their (usually lower) prices helps them compete in the industry.[348] Third-party retailers are not unconstrained from abusive practices, since the FTC can bring an enforcement action under section 5 of the FTC Act for false or misleading statements or unfair marketing, and traditional unfair competition and tort and contract remedies remain available.[349] Thus, as stressed by the FTC, the third-party casket sellers do not actually pose a threat to consumer protection.

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341. *See supra* notes 256–58 and accompanying text.

342. *See supra* note 299 and accompanying text.

343. *See supra* notes 303–07 and accompanying text.

344. *See supra* notes 262–63 and accompanying text; *see also* Brief for the FTC As Amicus Curiae Supporting Neither Party at 14, St. Joseph Abbey v. Castille, No. 11-30756 (5th Cir. Dec. 16, 2011) ("[T]here is no merit to the argument . . . that, because the Funeral Rule does not itself cover independent casket retailers, only licensed funeral directors should be able to sell caskets.").

345. *See* Brief for the FTC As Amicus Curiae Supporting Neither Party at 15–16, *St. Joseph Abbey*, No. 11-30756.

346. *See supra* notes 193–94 and accompanying text.

347. *See supra* notes 198–99 and accompanying text.

348. *See supra* note 199 and accompanying text.

349. *See* Brief for the FTC As Amicus Curiae Supporting Neither Party at 15, *St. Joseph Abbey*, No. 11-30756.

B. Craigmiles*: Incorrect in Engaging in More Searching Review and Relying on Dormant Commerce Clause Cases*

The Sixth[350] and Tenth[351] Circuits and the Eastern District of Louisiana[352] agree that the purpose behind the casket-sales restriction was pure economic protectionism.[353] However, the courts differed about whether this was a legitimate state interest. Unlike the court in *Teague*, which concluded that the Virginia licensing scheme furthered the public purpose of ensuring competency in funeral arrangement,[354] the Sixth Circuit and the Eastern District of Louisiana recognized that the purpose the respective state licensing schemes effectuated was protecting the in-state funeral services industry, which they found illegitimate.[355]

However, looking to the actual purpose behind legislative enactments has no place in rational basis review.[356] Rather, rational basis review only requires *hypothetical* or *theoretical* justifications for a law and does not require that the law *actually* be passed for that purpose.[357] The following subsection explains why *Craigmiles* and *St. Joseph Abbey* erred by ignoring such hypothetical rationales and utilizing heightened rational basis "with bite."[358]

This Part argues that courts should not rely on interstate commerce cases or rational basis "with bite" cases when analyzing economic regulations under the Equal Protection or the Due Process Clauses. Part III.B.1 asserts that the Court's decisions in *Romer* and *Cleburne* do not support applying a more searching form of rational basis review to economic licensing regulations. Part III.B.2 argues that interstate commerce cases are inapposite and dubious precedent for intrastate commerce causes.

1. *Romer* and *Cleburne* Are Not Applicable for Casket Licensing

The Sixth Circuit in *Craigmiles* improperly applied a more searching standard than traditional rational basis by citing the *Romer* and *Cleburne* decisions.[359] The Sixth Circuit followed such an approach by acknowledging that in order for a statute to be invalidated under rational basis review, it must reek of "the force of a five-week-old, unrefrigerated

350. *See supra* notes 244–46 and accompanying text.
351. *See supra* note 318 and accompanying text.
352. *See supra* note 272 and accompanying text.
353. *Cf. supra* note 270 (describing lobbying efforts by the funeral industry).
354. *See supra* note 212 and accompanying text.
355. *See supra* Part II.B–C.
356. *See supra* note 161 and accompanying text.
357. *See supra* note 118 and accompanying text.
358. *See supra* note 157 and accompanying text.
359. *See supra* notes 247–50 and accompanying text; *see also* Briana J. Gorod, Case Note, *Does* Lochner *Live?: The Disturbing Implications of* Craigmiles v. Giles, 21 YALE L. & POL'Y REV. 537 (2003) (discussing *Craigmiles*' inappropriate reliance on *Cleburne*'s heightened standard of review).

dead fish."[360] The Sixth Circuit cited the Supreme Court's decisions in *Romer* and *Cleburne* as examples of statutes that have risen to that level of "pungence."[361] However, the Sixth Circuit erred in holding the Tennessee regulation subject to this same level of scrutiny.

The *Romer* and *Cleburne* decisions, while purportedly using rational basis review, involved a more searching level of review than typically applied.[362] This was because the Court perceived the laws to be motivated at least in part by discrimination, and aimed at a "bare . . . desire to harm a politically unpopular group" and thus looked into the actual reason behind the law.[363] In contrast, the casket licensing restrictions are not motivated by animus or discrimination against a politically unpopular group.[364] Rather, they are economic regulations, which like all licensing schemes harm those that do not have the time, money, or ability to gain the requisite credentials to be eligible for a license.[365] This group cannot be deemed a historically politically unpopular group to the extent of homosexuals or the mentally ill. This is a far cry from the type of "pungence" required to invalidate a law using rational basis review. Thus, the Sixth Circuit in *Craigmiles* was incorrect in elevating its standard of review and inquiring into the actual motivation behind the legislation as the Supreme Court did in *Cleburne* and *Romer*.

2. Mistaking the *Intra*state for the *Inter*state

In addition to unjustifiably using rational basis "with bite" cases for support, the Sixth Circuit in *Craigmiles* improperly relied on cases having to do with *inter*state, as opposed to *intra*state, commerce in reaching its conclusion that intrastate economic protectionism is not a legitimate state interest.[366]

The policy behind preventing interstate economic protectionism is to prevent barriers to the development and maintenance of a national marketplace.[367] Furthermore, the textual hook for interstate economic protectionism's unconstitutionality derives from the enumerated right of the

360. *See* Craigmiles v. Giles, 312 F.3d 220, 225 (6th Cir. 2002) (citations omitted) (quoting United States v. Searan, 259 F.3d 434, 447 (6th Cir. 2001)); *see also supra* note 247 and accompanying text.

361. *See supra* notes 247–50 and accompanying text.

362. *See supra* notes 156–59, 246–50 and accompanying text.

363. *See supra* note 159 and accompanying text.

364. *See supra* Part II.

365. If a monopoly results, such regulations may also potentially hurt consumers through higher prices. *Cf. supra* notes 197–99 and accompanying text. *But see supra* note 198 and accompanying text (discussing how the "one-monopoly-rent" hypothesis suggests that consumers are not harmed by state casket-sale restrictions). In any event, the presence of potentially harmed consumers does not turn an economic licensing scheme into a discriminatory scheme aimed to harm a politically unpopular group.

366. *See supra* notes 241–43 and accompanying text.

367. *See supra* note 315 and accompanying text.

federal government over interstate commerce.[368] Thus, the Supreme Court precedent on interstate economic protectionism does not support a finding that intrastate economic protectionism of a wholly in-state industry is a legitimate state interest under the Due Process or Equal Protection Clauses.[369]

C. Powers*: Correct in Upholding the Licensing Scheme*

While *Powers* was correct in upholding the licensing scheme, it made a jurisprudential error by making explicit what courts applying rational basis review often implicitly do, which is to uphold purely protectionist regulations. Stated differently, the court in *Powers* erred in not paying lip service to a more general conception of the health and safety rationale of the traditional police powers, even though the outcome of the case was correctly decided. What the *Powers* court should have done to align itself with explicit Supreme Court precedent was follow the courts' approaches in *Teague* and *Stone Casket*.

1. Supreme Court Precedent: Requirement That Regulations Be Passed for Public Purposes

The Tenth Circuit in *Powers* diverged from explicit Supreme Court precedent by holding that the state had a legitimate interest in aiming to benefit the funeral services industry by awarding it a regulatory monopoly in casket sales.[370] Supreme Court precedent reveals that even in *West Coast Hotel*[371] and the deferential cases following it, such as *Lee Optical*, the Court has tethered its decisions to finding that the state could have rationally concluded that it was using its traditional police powers to advance the public health, safety, or some other neutral goal[372] for the general public.[373]

As the concurrence in *Powers* argued, the majority in *Powers* departed from the traditional application of equal protection and due process analysis under rational basis review, where the legitimate state interest discussion focuses on whether the state is aiming to serve the general public and not arbitrarily awarding benefits or harming individuals.[374]

368. *See* U.S. CONST. art. 1, § 8, cl. 3; *see also supra* notes 314–15 and accompanying text.
369. *See supra* notes 314–17 and accompanying text.
370. *See supra* Part II.C.
371. *See supra* notes 112–14 and accompanying text.
372. *See supra* note 77 and accompanying text.
373. *See supra* notes 115–20 and accompanying text.
374. *See supra* notes 333–35 and accompanying text.

2. Rational Basis's Deferential Approach Suggests That the *Powers* Court Was Correct in Upholding the Regulation

There is a rift between what the Supreme Court says it does (which is require some traditional public purpose for regulations to be legitimate), and what it actually does, which is uphold patently protectionist regulations.[375] For example, in *Lee Optical*, the law was most likely a protectionist law aimed at protecting business for optometrists and ophthalmologists, and yet the Court upheld the law, finding it a legitimate exercise of police power, and thus not a violation of the Due Process Clause.[376]

This rift occurs due to the very deferential standard judges apply when reviewing such legislation. Under traditional rational basis review, the actual motivation behind the law is irrelevant, as any conceivable—even hypothetical—set of facts will support a finding of constitutionality.[377] Thus, under traditional rational basis review, the restrictive casket-sale regulations should have been upheld. It is certainly conceivable that the legislatures believed that restricting casket sales to funeral directors protected against leaky caskets, regardless of the fact that if this was their chief concern, they could have passed a more narrowly tailored law. The legislature could also have rationally concluded that mandating casket sales through funeral directors would encourage more people to buy a casket, and thus lower ground contamination.

It is also conceivable that the state legislators took a different view than the FTC and deemed that by not being covered by the Funeral Rule against deceptive practices, third-party retailers could harm consumers by selling cheap, but low quality caskets that might cause emotional harm to consumers.[378] Thus, the State may have a legitimate interest in protecting grieving families from the emotional distress incidental to purchasing a

375. *See supra* note 120 and accompanying text (noting that *Lee Optical* in all likelihood involved a protectionist law); *see also* Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 898, 905 (2005) ("[T]here is a yawning chasm between the Court's rhetoric, which still refers—accurately—to occupational freedom as a constitutional right, and the Court's holdings, which no longer provide any meaningful protection for that right and instead permit legislators to trample and abuse the right with near total impunity." (emphasis omitted)).

376. *See supra* note 120 and accompanying text.

377. *See supra* note 118 and accompanying text.

378. It is not inconceivable that a poor quality casket could result in severe emotional harm to grieving relatives. *See* Baynes v. George E. Mason Funeral Home, Inc., No. 3:09-CV-153, 2011 WL 2181469, at *3 (W.D. Pa. 2011) ("[The] funeral director . . . called . . . with some tragic news, and told him that the casket containing Trey's remains had 'failed.' . . . [resulting in a] sight that was an affront to the most fundamental dignity of human nature; the casket was deteriorating, corroding, rusting, and leaking a blue fluid. The casket also emitted a horrendous odor. [The plaintiff] learned that the bronze casket he had purchased was in fact made of steel."); Hirst v. Elgin Metal Casket Co., 438 F. Supp. 906, 908 (D. Mont. 1977) (finding that mental anguish reasonably resulted when a deceased family member's leak-proof casket leaked).

shoddy casket.[379] Since the practice of requiring only a hypothetical justification is extremely deferential to states, the Tenth Circuit in *Powers* was correct in upholding the casket-sales restriction.

D. Unearthing the Public Interest: Why Economic Protectionism Should Be Deemed a Legitimate State Interest

Current substantive due process and equal protection review of licensing restrictions remains extremely deferential to a state's purported justification for using its police power.[380] This deference reflects the federal judiciary's unwillingness to second-guess the legislative will of democratically elected state legislatures.[381] However, while courts have shown great deference to states' purported justifications for laws, they still require the law's purported purpose to fit into the liberal police power paradigm.[382] Thus, in order for a law to be legitimate, it must at least pay lip service to the advancement of the traditional conception of the health, safety, or general welfare of the public.[383] Instead of keeping up this inequitable charade,[384] courts should explicitly broaden their conception of the police powers. Therefore, courts should redefine their understanding of the police powers in light of post–New Deal jurisprudence and acknowledge economic protectionism as a legitimate state interest.

1. Post–New Deal Conception of the Public-Private Divide Supports Economic Protectionism As a Legitimate State Interest

In the post–New Deal era, the Court's conception of the public-private divide has shifted.[385] While previously very suspicious of legislative impulses to regulate in spheres traditionally deemed private, such as an employer's contract terms with its employees, the Court in *West Coast Hotel* signaled a shift in its conception of the baseline, viewing employer-employee relations as sufficiently public to justify legislative intervention.[386]

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379. *Cf. supra* note 303 and accompanying text.

380. *See supra* Part I.B.3, I.C.2–3.

381. *See supra* notes 142–47 and accompanying text.

382. *See supra* Part I.A.1, I.C.2.

383. *Cf.* Timothy Sandefur, *Is Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries*, 14 WM. & MARY BILL RTS. J. 1023, 1036–39 (2006) (using Lockean and Madisonian conceptions of government power to determine which statutes are legitimate).

384. The inequality stems from the fact that it creates a two-tiered system of rational basis review, one which endorses those protectionist laws which can be tethered, however disingenuously, to a public purpose, while condemning those laws that lack the fortune of being convincingly tied to a public purpose.

385. *See* Part I.B.3.

386. *See* Part I.B.3. A similar impulse can be identified long before the New Deal in *Munn*, which viewed activities "affected with the public interest" to include those not typically deemed sufficiently public, such as natural monopolies or common pools problems, to justify the exertion of the police powers. *See supra* notes 37–40 and accompanying text.

Throughout most of constitutional history, what constitutes a legitimate state interest has been conceived of by drawing on the classical liberal tradition that the Constitution is grounded in.[387] In determining what constitutes a legitimate state interest, courts have largely interpreted the police powers in terms of the classical liberal tradition, where, under a Lockean understanding, state legislative power was only valid if it aimed to solve a collective action problem or to regulate a natural monopoly.[388]

However, in the post–New Deal world, automatic resort to using the political philosophy of the founding to determine the contours of the police power raises the same sort of countermajoritarian difficulties that caused the Court to abandon *Lochner*-era laissez-faire constitutionalism back in 1937.[389] Rather, in the modern era, courts should defer to legislative majorities' conception of the political philosophy they wish to apply when measuring which state interests are legitimate. This solves the countermajoritarian dilemma and echoes the strands of populist thought found in Holmes's dissent in *Lochner*.[390]

This approach would allow states to regulate to effectuate broader public ends than conceived of under classic police powers. For example, economic protectionism of an in-state industry should be viewed as sufficiently general to justify legislating toward that end. As evidenced in *Dukes* and *Fitzgerald*, a state may have a perfectly valid public reason for protecting an in-state industry, even one that maintains an in-state monopoly.[391] Protecting the river boat gambling industry or the food-cart sellers was legitimate, because protecting those in-state industries from competition could conceivably help the general population of the state through either higher tax revenues or through more tourism to the state.[392]

Thus the Supreme Court should make explicit its implicit recognition that aiming to protect or assist an in-state industry is a legitimate state interest[393]

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387. *Cf.* Sandefur, *supra* note 164, at 497 ("A law may accomplish any purpose within the boundaries of 'legitimate state interests.' Those boundaries can only be set by political philosophy."). Sandefur argues that, in determining what political philosophy to apply, courts should turn to the American founding as their guide, which Sandefur believes abhors "naked preferences." *Id.* (internal quotation marks omitted).

388. *See supra* Part I.A.1.

389. *See supra* Part I.B.3.

390. *See supra* Part I.B.1.b.

391. *See supra* notes 320–29 and accompanying text.

392. *See supra* notes 328–29 and accompanying text.

393. For scholars who disagree with this conclusion, see Asheesh Agarwal, *Protectionism As a Rational Basis? The Impact on E-commerce in the Funeral Industry*, 3 J.L. ECON. & POL'Y 189, 217 (2007); Timothy Sandefur, *The Right To Earn a Living*, 6 CHAP. L. REV. 207 (2003); Simpson, *supra* note 168, at 202–03; Jim Thompson, Powers v. Harris*: How the Tenth Circuit Buried Economic Liberties*, 82 DENV. U. L. REV. 585, 600 (2005); Lana Harfoush, Comment, *Grave Consequences for Economic Liberty: The Funeral Industry's Protectionist Occupational Licensing Scheme, the Circuit Split, and Why It Matters*, 5 J. BUS. ENTREPRENEURSHIP & L. 135, 159 (2001); Hood, *supra* note 176, at 465–75 (arguing for increased judicial review for economic regulations by using Macey's cannon of statutory construction); Anthony B. Sanders, Comment, *Exhumation Through Burial: How*

precisely because it has the potential to affect the general welfare of the state.

2. Counterarguments Do Not Persuasively Alter This Conclusion

Finding pure economic protectionism as a legitimate state interest may result in the establishment and maintenance of certain in-state monopolies and drive up the prices for consumers.[394] However, Supreme Court precedent has stated that courts should not impose a particular economic theory on the states.[395] Requiring states to outlaw regulations that through taxation or occupational licensing schemes award benefits to certain in-state classes, would invalidate a wide range of legislation and pose a slippery slope problem, as the *Powers* court noted.[396] Making it unconstitutional for a state to protect a particular industry through regulation goes against the federalism and judicial-activism concerns underpinning the Court's economic substantive due process jurisprudence since the demise of *Lochner*.[397]

Applying interest group theory fails to persuasively alter the conclusion that pure economic protection of an in-state industry should be a legitimate state interest.[398] Federalism concerns would attach to finding intrastate economic protectionism unconstitutional, as such a finding would impose a normative baseline of efficiency on the states that favor redistribution of monopoly profits to the consumer over the producer.[399] Rather, such a baseline should be determined by the states. On basic federalism terms, the federal government's imposition of its economic theory through the Due Process Clause on the states is unconstitutional. Rather, these sorts of concerns are more appropriately addressed by antitrust or unfair competition laws.

Another argument against finding in-state economic protectionism a legitimate state interest is that if the handing out of benefits to certain in-state actors at the expense of others constitutes a legitimate interest under current Supreme Court jurisprudence, then the first step of rational basis

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Challenging Casket Regulations Helped Unearth Economic Substantive Due Process in Craigmiles v. Giles, 88 MINN. L. REV. 668, 692–94 (2005).

394. *See, e.g.*, Thompson, *supra* note 393, at 600.

395. *See supra* Part I.B.3.

396. *See* Powers v. Harris, 379 F.3d 1208, 1222 (10th Cir. 2004) (noting the "wide-ranging" consequences prohibiting intrastate protectionism would have, and suggesting that "every piece of legislation . . . aiming to protect or favor one industry or business over another in the hopes of luring jobs to th[e] state would be in danger.").

397. *See supra* note 142 and accompanying text.

398. *See supra* Part I.D.1.

399. *See supra* notes 183–87 and accompanying text. Federal antitrust law takes a consumer-centric view, condemning wealth transfers from consumers to producers with sufficient market power, even when at the expense of efficiency. *See generally*, Robert H. Lande, *Wealth Transfers As the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

review is wholly unnecessary.[400] Rather, courts would simply ask whether the law was rationally related to protecting that interest and, as the court in *Powers* noted, the casket sales restrictions are very well tailored to the end of protecting funeral establishments from competition.[401] Thus, the argument goes that such a finding would in effect write federal review of economic regulations out of the Constitution, causing separation of powers concerns.[402]

However, this conclusion overblows the effect of such a finding. While such a construction would allow economic protectionist legislation to stand, it would not completely end federal review of state economic regulations. For example, if a regulation cannot even be tethered to economic protectionism, but is instead clearly just a legislative favor to a particular corporation or individual, such a law would not be legitimate.

Lastly, recognizing economic protectionism as a legitimate state interest may in fact restrict entry to some entrepreneurs and, in such regard, impact their ability to practice the trade or profession of their choosing.[403] However, courts should not resort to *Lochne*r-era substantive due process, or engage in searching review of economic legislation under the Equal Protection Clause in order to protect the "right to earn a living."[404] The countermajoritarian reasons behind the retreat from *Lochner* remain in effect today. While extremely sympathetic arguments can be made in favor of recognizing such a fundamental right, the ills posed by not recognizing such a right could be better addressed through other legal doctrines, constitutional or otherwise.[405] Ultimately, states should be allowed to experiment with their preferred economic theory,[406] and the federal government should not unduly infringe on the states' police powers through the Due Process or Equal Protection Clauses.

400. *See* Thompson, *supra* note 393, at 601 (2005) ("Could a majority now pass a law enjoining a certain individual or group from participating in a business for any reason at all?").

401. *See supra* note 310 and accompanying text.

402. *See supra* note 139 and accompanying text; *cf.* Sunstein, *supra* note 77, at 878 (arguing that "[i]f there is no class of impermissible ends, means-ends scrutiny is incoherent").

403. *See supra* note 21 and accompanying text.

404. *See* Sandefur, *supra* note 164, at 496–503 (advocating for courts to elevate judicial review under the Equal Protection Clause to protect the right to earn a living by avoiding speculative rationales for the legislation and requiring a more searching review of the fit between means and ends).

405. *See, e.g.*, *id.* at 466–67 (noting that monopolies have been used "as a weapon against racial minorities or other politically unpopular groups"). If the main concern surrounds cutting off access to racial and ethnic minorities, these sorts of ills might be better addressed through a revitalization of the treatment of disparate impact under the Equal Protection Clause. However, full examination of these issues is outside the scope of this Note.

406. *See supra* note 95 and accompanying text.

CONCLUSION

The courts of appeals are currently split on whether a state can legitimately proscribe the selling of caskets by all in-state actors except those licensed as funeral directors. The central debate surrounding these economic licensing cases is whether economic protectionism of an in-state industry can be a legitimate state interest. Supreme Court precedent reveals that in order to exercise their police power legitimately, states must tether their regulations to a public purpose. However, because of the amount of deference states are afforded under current economic substantive due process and equal protection, protectionist legislation can still be legitimately passed as long as some—albeit theoretical or hypothetical—benefit could arguably be linked to the public generally. Thus even laws with the sole purpose and effect of awarding purely private benefits to an in-state industry can be legitimately enacted. In response, courts should not require a link to a traditional police power of health, safety, or general welfare, and instead find that pure economic protectionism of an in-state industry is a legitimate state interest precisely because the state may conclude that such a regulation plausibly serves the general public.