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# Of Butchers, Bakers, and Casket Makers: *St. Joseph Abbey v. Castille* and the Fifth Circuit’s Rejection of Pure Economic Protectionism as a Legitimate State Interest

## INTRODUCTION

Cutting timber, brewing beer, and making wine—the Benedictine monks strive to maintain a life of simplicity by engaging in various common trades to financially support their monastic communities.<sup>1</sup> Hurricane Katrina forced the monks of St. Joseph Abbey (Abbey) to find a new trade; the monks could no longer cut and sell timber since their supply was washed away by the storm.<sup>2</sup> As a result, turning to their century-old tradition of casket making, the Abbey’s monks began selling their handmade wooden caskets customarily used to bury their brethren.<sup>3</sup> For the monks, the art of casket making was the clear solution, allowing them to maintain a quiet lifestyle in furtherance of the order’s motto *ora et labora*—“prayer and work”,<sup>4</sup> however, in their quest to become more Christ-like, the monks became monastic-clad criminals. Unbeknownst to the Abbey, the monks were operating in contravention of Louisiana law, which requires that all intrastate casket sales to the public be

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1. See *Free the Monks and Free Enterprise: Challenging Louisiana’s Casket Cartel*, INST. FOR JUSTICE, <http://www.ij.org/louisiana-caskets-background-2>, archived at <http://perma.cc/NLP9-Z6PY> (last visited Oct. 5, 2014) (“Selling caskets helps the monks pay for food and healthcare, and helps them share their belief in the noble simplicity of life and death.”).

2. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 217 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 423 (2013).

3. *Id.* (“In years past, the Abbey’s timberland provided a source of income. After Hurricane Katrina destroyed its timber, the Abbey began looking for other revenue sources. For generations the Abbey has made simple wooden caskets to bury its monks. Public interest in the Abbey’s caskets increased after two bishops were buried in Abbey caskets in the 1990s. Seeing potential in this demand, the Abbey invested \$200,000 in ‘St. Joseph Woodworks,’ managed by Mark Coudrain, a deacon of the Church and an employee of the Abbey. The business plan was simple. St. Joseph Woodworks offered one product—caskets in two models, ‘monastic’ and ‘traditional,’ priced at \$1,500 and \$2,000 respectively, significantly lower than those offered by funeral homes.”).

4. *Free the Monks and Free Enterprise: Challenging Louisiana’s Casket Cartel*, *supra* note 1. As a Benedictine Monastery, the monks of St. Joseph Abbey follow the teachings of Saint Benedict of Nursia, a sixth-century Christian monk. *Id.* “This ancient tradition is encapsulated in the Benedictine motto ‘*ora et labora*’ (prayer and work). The monastic life at Saint Joseph Abbey is one of liturgical prayer, the singing of psalms, simple labor, education, and hospitality toward those seeking a contemplative respite from the world.” *Id.*

made by a state-licensed funeral director at a state-licensed funeral home.<sup>5</sup> The Louisiana Board of Embalmers and Funeral Directors (State Board), the entity responsible for enforcing the relevant statutes and regulations, caught wind of the rising enterprise and ordered the monks to shut down their casket-making business or face heavy fines, jail time, and an injunctive lawsuit.<sup>6</sup>

In *St. Joseph Abbey v. Castille*, the Abbey sought to enjoin the State Board from enforcing the casket regulations, contending that the Louisiana laws violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.<sup>7</sup> The United States District Court for the Eastern District of Louisiana found the casket regulations unconstitutional on equal protection and due process grounds.<sup>8</sup> On appeal, the Fifth Circuit affirmed the lower court's decision.<sup>9</sup> The Fifth Circuit held that mere economic protection of the funeral industry, absent a connection to the advancement of the public good or general welfare, is not a legitimate state interest.<sup>10</sup> Although the monks rejoiced in their Fifth Circuit victory, the State Board swiftly petitioned the United States Supreme Court to overturn the Fifth

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5. See LA REV. STAT. ANN. §§ 37:831(33), (39), § 848 (2011).

6. See *id.* § 37:848; *Castille*, 712 F.3d at 217–19.

7. *St. Joseph Abbey v. Castille*, 835 F. Supp. 2d 149 (E.D. La. 2011), *aff'd*, 712 F.3d 215 (5th Cir. 2013). The Fourteenth Amendment provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

8. See *Castille*, 835 F. Supp. 2d at 151 (holding it “unconstitutional to require those persons who intend solely to manufacture and sell caskets be subject to the licensing requirements for funeral directors and funeral establishments”). The district court found that this requirement was in contravention of the Due Process Clause and the Equal Protection Clause, because there was no rational basis for the state to “require persons who seek to enter into the retailing of caskets to undergo the training and expense necessary to comply with these rules.” *Id.* at 151. In addition, the court found that “there [was] nothing in the licensing procedures that bestows any benefit to the public in the context of the retail sale of caskets,” and “[t]he license [had] no bearing on the manufacturing and sale of caskets.” *Id.* at 151. The court believed the “sole reason for these laws [was] the economic protection of the funeral industry which reason the Court has previously found not to be a valid government interest standing alone to provide a constitutionally valid reason for these provisions.” *Id.*

9. *Castille*, 712 F.3d at 217.

10. *Id.* at 226–27.

Circuit's ruling.<sup>11</sup> However, the Supreme Court rejected the State Board's petition.<sup>12</sup>

By denying the State Board's writ of certiorari, the Supreme Court remained silent regarding the constitutionality of Louisiana's casket laws, and thus the decision holding the law unconstitutional became final. Nevertheless, the Supreme Court has a colorful history of reviewing economic legislation very similar to Louisiana's casket regulations.<sup>13</sup> Supreme Court jurisprudence has touched on the various mechanisms used to protect individuals' economic liberties, such as the freedom to pursue a livelihood.<sup>14</sup> In the nineteenth century, many Supreme Court justices considered such economic liberties to be natural rights.<sup>15</sup> Throughout the nineteenth century until the 1930s, also known as the "*Lochner* Era,"<sup>16</sup> the Court closely scrutinized economic laws and interpreted the Due Process Clause as protecting the freedom of contract.<sup>17</sup> Consequently, during that time the Supreme Court invalidated most economic

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11. Petition for Writ of Certiorari, *Castille v. St. Joseph Abbey*, 134 S. Ct. 423 (2013) (No. 13-91). Members of the State Board filed a petition for certiorari on July 17, 2013, requesting review of the Fifth Circuit's opinion. *Id.* The Board urged the Court to allow the writ, because there is a circuit split regarding whether pure economic protectionism is a legitimate governmental interest under the Equal Protection and Due Process Clauses. *Id.* at 35.

12. *Castille v. St. Joseph Abbey*, 134 S. Ct. 423 (2013).

13. See *infra* Part I.

14. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICES 622 (Vicki Been et al. eds., 4th ed. 2011) ("The Supreme Court's protection of economic liberties has varied enormously over time.").

15. *Id.* ("In the early nineteenth century, the Court invoked natural law principles to protect property rights."). Justice Chase "expressed the view that the government could neither violate the provisions of the Constitution nor infringe rights that are part of the natural law." *Id.* at 624. He stated, "there are certain vital principles in our free Republic governments, which will determine and overrule an apparent and flagrant abuse of legislative power . . . An ACT of the legislature . . . contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." *Id.* at 625.

16. The era was named after the famous case of *Lochner v. New York*, 198 U.S. 45 (1905) (finding that a law restricting the number of hours bakers could work was unconstitutional).

17. CHERMERINSKY, *supra* note 14, at 630. Throughout the "*Lochner* Era," the Supreme Court stated that:

[F]reedom of contract is a basic right protected as liberty and property rights under the due process clause of the Fourteenth Amendment . . . the Court [has] said that liberty includes the right 'to enter into all contracts which may be proper, necessary, and essential' to carrying out a trade or profession.

*Id.* The Court said that the state could limit the freedom of contract only to serve a valid police purpose, and it was the judiciary's responsibility to closely scrutinize such legislation to make sure it served a valid police purpose. *Id.* at 630-31.

legislation as illegitimate interferences with the freedom of contract.<sup>18</sup>

However, in the 1930s, the Court changed course and rejected the protection of freedom of contract as a liberty interest under the Due Process Clause.<sup>19</sup> The Court has not invalidated a single piece of economic legislation on due process or equal protection grounds since, opting for a more deferential, rational basis review of state laws.<sup>20</sup> Now, in order to satisfy the outermost limits of due process and equal protection, economic legislation must be supported by a legitimate governmental purpose, and the state's interest must be rationally related to the regulation.<sup>21</sup> Applying these minimal due process requirements, lower courts now often defer to the judgment of state legislatures as to the reasonableness of legislation.<sup>22</sup> Yet, the Due Process and Equal Protection Clauses maintain necessary safeguards for economic liberties.<sup>23</sup> Despite states' possible protectionist motivations, courts scrutinize economic laws to find some discernible connection to a legitimate state interest, such as protecting public health or safety.<sup>24</sup>

Prior to the Fifth Circuit's decision in *St. Joseph Abbey v. Castille*, the Tenth Circuit applied the rational basis standard of review and upheld a state regulatory scheme that was strikingly similar to the Louisiana regulations restricting the sale of caskets.<sup>25</sup>

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18. *Id.* at 632 (“[T]he Court followed the principles articulated in *Lochner*, finding many laws unconstitutional as interfering with freedom of contract. It is estimated that almost 200 state laws were declared unconstitutional as violating the due process clause of the Fourteenth Amendment.”).

19. *Id.* at 639–40.

20. *Id.* at 641. “The legal inquiry using the rational basis test is two-fold. The Court must determine (1) whether the regulation has a legitimate government purpose; and (2) whether there is a rational relationship between that purpose and the means chosen by the State to accomplish it.” *St. Joseph Abbey v. Castille*, 835 F. Supp. 2d 149, 156 (E.D. La. 2011).

21. *Castille*, 835 F. Supp. 2d at 156.

22. CHEMERINSKY, *supra* note 14, at 642. The Supreme Court stressed the need for judicial deference to legislative choices in an opinion upholding a state economic regulation. The Court found that it is for the legislatures, not the courts, to balance the advantages and disadvantages of the new requirement. *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

23. Although the Supreme Court has adopted a policy of great deference to state economic regulations, legislation must still meet the requirements of the rational review standard. *See supra* note 20.

24. CHEMERINSKY, *supra* note 14, at 641 (“The government’s purpose can be any goal not prohibited by the Constitution.”).

25. *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004) (holding that the Oklahoma Funeral Services Licensing Act did not violate the Due Process Clause or Equal Protection Clause of the Fourteenth Amendment). Like the Louisiana statutes, the Oklahoma Funeral Services Licensing Act requires that

The Tenth Circuit was satisfied with the state's sole interest in protecting the funeral industry.<sup>26</sup> As a result, a circuit split emerged with the Sixth Circuit, which previously invalidated a nearly identical casket regulation on equal protection and due process grounds.<sup>27</sup> Unlike the Tenth Circuit, the Sixth Circuit explicitly rejected economic protectionism as a legitimate rationale for funeral director licensure requirements.<sup>28</sup>

The Fifth Circuit's opinion in *St. Joseph Abbey v. Castille* comes at a seismic moment. In light of the circuit split, the Fifth Circuit's decision demonstrates that neither precedent nor constitutional principles protect pure economic protectionism as a legitimate state interest.<sup>29</sup> More importantly, however, the Fifth Circuit breathed life back into rational basis review, a test commonly misperceived as a "virtual rubber stamp" and "judicial abdication."<sup>30</sup> This Note proposes that courts should look to the Fifth Circuit as a revival of the rational basis standard of review in the due process and equal protection contexts rather than a rebirth of Lochnerian principles and judicial activism. Part I of this Note explains the constitutional principles underlying the Due Process and Equal Protection Clauses of the Fourteenth Amendment and traces the United States Supreme Court's jurisprudence in the context of economic legislation. Part II examines the circuit split between the Sixth and Tenth Circuits on the issue of whether pure economic protectionism is a legitimate government purpose. Part III then discusses the Fifth Circuit's decision in *St. Joseph Abbey v. Castille*. Part IV analyzes the reasoning of the opinion, and Part V considers the implications of the Fifth Circuit's ruling and its effects on future economic legislation, particularly in Louisiana.

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any person engaged in the sale of caskets be a licensed funeral director operating out of a funeral establishment. *Id.* at 1212.

26. *See id.* at 1222–23 (holding that "the FSLA need only be rationally related to the legitimate state interest of intrastate industry protection. There can be no serious dispute that the FSLA is 'very well tailored' to protecting the intrastate funeral-home industry").

27. *Craigsmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (holding that the Tennessee Funeral Directors and Embalmers Act's prohibition on sale of caskets by anyone not licensed as a funeral director violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

28. *Id.* at 224 ("Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose.").

29. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 217 (5th Cir.), *cert. denied*, 124 S. Ct. 423 (2013).

30. Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.*, 88 KY. L.J. 591, 607 (2000).

## I. JUDICIAL TREATMENT OF ECONOMIC LEGISLATION

The Due Process Clause of the Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>31</sup> The term “due process of law” originated in England to “secure the subject against the arbitrary action of the crown.”<sup>32</sup> The due process requirement has a similar effect on the legislatures, both federal and state, in the United States.<sup>33</sup> Initially, the Due Process Clause was interpreted merely as a procedural limitation, requiring states to provide fair procedures before depriving individuals of certain interests.<sup>34</sup> Eventually, however, the Due Process Clause developed a substantive component. The doctrine of substantive due process protects persons against arbitrary state laws that exceed the limits of the government’s authority.<sup>35</sup>

*A. The Birth of Substantive Due Process*

Shortly after the enactment of the Fourteenth Amendment, the Supreme Court rejected an attempt to use the Due Process Clause to protect economic liberties from governmental interference.<sup>36</sup> The *Slaughter-House Cases* involved a challenge to a Louisiana law that granted a private company a 25-year monopoly in the livestock landing and slaughterhouse business and required persons to pay a fixed fee for using the facilities to slaughter animals.<sup>37</sup> Several butchers attacked the constitutionality of the law as a violation of due process and a deprivation of their rights to pursue a livelihood.<sup>38</sup> The butchers’ argument formulated the doctrine now known as “substantive due process” and provided that the Due Process Clause protects certain fundamental rights from government limitations, including the right to choose a profession.<sup>39</sup> However, the majority rejected the butchers’ claims.<sup>40</sup>

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31. U.S. CONST. amend. XIV, §1.

32. *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 519 (1885).

33. Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 U. DAYTON L. REV. 313, 313 (1991) (“The touchstone of due process is protection of the individual against arbitrary action of government.” (quoting *Dent v. West Virginia*, 129 U.S. 114, 123 (1889))).

34. CHEMERINSKY, *supra* note 14, at 626.

35. Levinson, *supra* note 33, at 314 n.7.

36. *See Slaughter-House Cases*, 83 U.S. 36, 80–81 (1872).

37. *Id.* at 59–61.

38. *Id.* at 43.

39. CHEMERINSKY, *supra* note 14, at 626.

40. *Slaughter-House Cases*, 83 U.S. at 82.

Refusing to inject substance into the Due Process Clause, the Supreme Court declared:

[U]nder no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.<sup>41</sup>

Although the majority was adamant in its rejection of substantive due process doctrine, Justice Bradley countered it with a powerful dissent interpreting the Due Process Clause as a mechanism to prevent states from adopting arbitrary laws.<sup>42</sup> Justice Bradley interpreted the words “liberty” and “property” in the Due Process Clause as protecting the right to practice a trade, occupation, or profession.<sup>43</sup> He believed that a statute prohibiting citizens from pursuing a lawful employment deprived citizens of both liberty and property without due process of law.<sup>44</sup> Justice Bradley’s dissent espoused principles of natural law, a philosophy embraced by many of the Framers of the Constitution, and set the stage for a new era of jurisprudence where the Supreme Court would rigorously review the substance of state economic regulations.<sup>45</sup>

In *Munn v. Illinois*, the *Railroad Commission Cases*, and *Mugler v. Kansas*, the Supreme Court upheld various economic regulations yet maintained Bradley-like beliefs in natural rights.<sup>46</sup> Although the Court validated the constitutionality of the laws, the Court also recognized due process restraints on the government’s regulatory power.<sup>47</sup> In *Munn*, the Court upheld a state law that set maximum rates for grain-storage warehouses; however, the Court simultaneously suggested that a state regulation may be invalidated as a violation of due process “[i]f no state of circumstances could exist to justify such a statute.”<sup>48</sup> Thereafter, in the *Railroad Commission Cases*, the

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41. *Id.* at 81.

42. *See id.* at 122 (Bradley, J., dissenting) (arguing that “a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law”).

43. *Id.*

44. *Id.*

45. CHEMERINSKY, *supra* note 14, at 627.

46. *Id.* at 628–29.

47. *See id.* at 628.

48. *Munn v. Illinois*, 94 U.S. 113, 132–33 (1877) (“If no state of circumstances could exist to justify such a statute, then we may declare this one void, because it is in excess of the legislative power of the State. But if it could, we must presume it

Court sustained a state law regulating railroad rates but alluded to the potential fatality of such laws under the Due Process Clause, warning that the “power to regulate is not a power to destroy.”<sup>49</sup> Finally, in *Mugler v. Kansas*, the Court upheld a state ban on alcoholic beverages but indicated that legislation is valid only if it truly serves a valid state police purpose.<sup>50</sup> The Court said:

If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge, and thereby give effect to the Constitution.<sup>51</sup>

Justice Bradley’s dissent in the *Slaughter-House Cases*, and the Supreme Court’s majority opinions in *Munn v. Illinois*, the *Railroad Commission Cases*, and *Mugler v. Kansas*, articulated the Supreme Court’s evolving interpretation of the Due Process Clause as not only a bundle of procedural limitations, but also a limitation upon the substantive power of state legislatures to regulate various areas of economic life.<sup>52</sup> These cases set the stage for the “*Lochner* era,” a period known for the Supreme Court’s suspicions of state regulations and the inevitable fatality of most economic legislation.<sup>53</sup>

### B. The *Lochner* Era

*Lochner v. New York* ushered in a regime characterized by the widespread invalidation of state economic regulations on substantive

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did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.”).

49. *Railroad Commission Cases*, 116 U.S. 307, 331 (1886).

50. *See Mugler v. Kansas*, 123 U.S. 623 (1887). A Kansas law prohibited the manufacture or sale of intoxicating liquor. *Id.* at 657. Mugler was arrested for making and selling beer. The Court found that the Kansas prohibition did not infringe on Fourteenth Amendment rights, because it falls within the state’s police powers. *Id.* at 661–63.

51. *Id.* at 661.

52. *See* CHEMERINSKY, *supra* note 14, at 627–29.

53. Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 1 (1991) (“Legal scholars and historians have generally depicted the *Lochner* era as a deviant period during which the Supreme Court broke from the constitutionalism that the Marshall Court established and the New Deal Court restored. They maintain that the *Lochner* era Court, which struck down much legislation affecting industrial regulation, strayed from the American constitutional tradition by underconstruing the scope of congressional power and overprotecting private property.”).

due process grounds.<sup>54</sup> *Lochner* gave hope to the butchers whose challenges were rejected in the *Slaughter-House Cases* and defined a new formulation of due process analysis.<sup>55</sup> Accepting freedom of contract as a fundamental right, the Supreme Court carefully scrutinized laws to ensure that those laws were supported by valid governmental objectives and that the regulations sufficiently achieved those objectives.<sup>56</sup>

In *Lochner*, the Court struck down a New York law limiting the hours that a bakery employee could work as an undue interference with the bakers' liberty of contract, a fundamental right protected by the guarantees of the Due Process Clause.<sup>57</sup> The Supreme Court found that the government could only interfere with the freedom of contract to serve a valid police purpose, and it was the judiciary's responsibility to closely scrutinize such legislation to ensure that it did.<sup>58</sup> In examining the legislation, the Court asked whether the regulation was a "fair, reasonable and appropriate exercise of the police power of the State" or, rather, "an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty."<sup>59</sup> The Court demanded such scrutiny of economic legislation, recognizing that many laws purporting to protect the public health or welfare were nothing more than self-serving economic measures to protect private interests.<sup>60</sup> Rejecting the government's supposed goals of public health and safety, the Court refused to defer to the legislature's findings of fact.<sup>61</sup> Rather, the Court suspected that the state's sole motive was to regulate labor conditions.<sup>62</sup> Moreover, the Court determined that the goal of protecting bakers' health could be satisfied by less restrictive measures, such as inspecting premises and requiring that wash rooms be furnished.<sup>63</sup>

In contrast, Justice Harlan's dissent found the state law constitutional and criticized the majority for failing to defer to the

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54. *See id.* at 8, 14.

55. *See id.* at 92–93.

56. *Id.* at 16.

57. *Lochner v. New York*, 198 U.S. 45, 64 (1905).

58. *Id.* at 68.

59. *Id.* at 56.

60. *Id.* at 64 ("It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives.").

61. *See id.*

62. *See id.* at 62–63 ("In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman.").

63. *Id.* at 61.

legislature.<sup>64</sup> Deferring to the legislature's findings, Justice Harlan accepted the maximum-hour regulation as a reasonable means to protect the health of bakers who were frequently exposed to flour dust and intense heat.<sup>65</sup> In an equally vigorous dissent, Justice Holmes criticized the majority's judicial activism, warning that "a Constitution is not intended to embody a particular economic theory."<sup>66</sup> Justice Holmes concluded that "liberty" in terms of due process should be found only to have been violated when "a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."<sup>67</sup>

### C. *The Decline of Economic Substantive Due Process*

The reign of *Lochner* ended with the Court's decision in *West Coast Hotel Co. v. Parrish*, which flatly rejected freedom of contract as a fundamental right.<sup>68</sup> The Supreme Court instead found that the government could regulate to serve a legitimate purpose, and the judiciary would defer to the legislature's decision as long as it was reasonable.<sup>69</sup> With the death of the freedom-of-contract doctrine in this context, the Due Process Clause survives to preserve and protect economic liberties. In a post-*Lochner* decision, the Supreme Court articulated that the "liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment, but a right which is nevertheless subject to reasonable government regulation."<sup>70</sup> Thus, freedom of contract is no longer protected as a fundamental right; economic liberties are still rights protected under the "liberty" provision of the Due Process Clause, but they are

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64. *See id.* at 76 (Harlan, J., dissenting).

65. *Id.* at 69–70.

66. *Id.* at 75 (Holmes, J., dissenting).

67. *Id.* at 76.

68. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a state minimum wage law for women, finding a reasonable state interest in protecting the health of women and redressing women's inferior bargaining power).

What is this freedom [of contract]? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. . . . [R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

*Id.* at 391.

69. *See id.* at 393.

70. *Conn v. Gabbert*, 526 U.S. 286, 291–92 (1999).

subjected to a lesser degree of scrutiny than those that are fundamental.<sup>71</sup>

After the Supreme Court abandoned freedom of contract as a fundamental right, it swept away the remnants of *Lochner* in *United States v. Carolene Products Co.*<sup>72</sup> The Court in *Carolene Products* formulated a more deferential, less-stringent procedure for analyzing economic regulations, yet maintained a threshold requirement of rationality.<sup>73</sup> Emphasizing a need for deference to legislative choices, the Court applied a presumption of constitutionality and a minimum-rationality standard to legislation.<sup>74</sup> The Court firmly declared that economic regulations should be upheld as long as there was some rational basis, and “any state of facts either known or which could reasonably be assumed” would be considered in support thereof.<sup>75</sup>

In *Williamson v. Lee Optical Co.*, the Supreme Court upheld the rational basis framework set forth in *Carolene Products* but relaxed judicial scrutiny of economic legislation even further.<sup>76</sup> The Court upheld an Oklahoma statute that made it unlawful for any person not a licensed optometrist or ophthalmologist to fit eyeglass lenses into frames without a prescription from an ophthalmologist or optometrist.<sup>77</sup> Encouraging judicial deference to legislative findings, the Court concluded that “the Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.”<sup>78</sup> Applying the rational basis test, the Court hypothesized justifications that the legislature may have considered to support the regulation.<sup>79</sup> The Oklahoma law was more likely a

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71. *Id.*

72. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (sustaining a federal prohibition on the interstate shipment of “filled” milk as a constitutional exercise of the power to regulate interstate commerce).

[T]he existence of facts supporting the [statute prohibiting the shipment of filled milk in interstate commerce] is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

*Id.* at 152.

73. *Id.* at 147–48.

74. *Id.*

75. *Id.* at 154.

76. *See generally* *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

77. *See id.* at 485.

78. *Id.* at 487.

79. *Id.*

protectionist measure to maintain the business of optometrists and ophthalmologists rather than a desire to improve health; however, the Court found that the hypothetical justifications of public health satisfied the requirement of rationality.<sup>80</sup>

In response to an era marked by the Court's aggressive review of economic legislation, *Carolene Products* formulated a rational basis test for judicial review of economic legislation under the Due Process and Equal Protection Clauses.<sup>81</sup> The Supreme Court has since expressed numerous definitions and articulations of the rational basis requirement, giving rise to confusion surrounding its application in the context of economic legislation.<sup>82</sup>

## II. THE CIRCUIT SPLIT

Despite the challenged regulations' striking resemblance in both cases, the Sixth and Tenth Circuits reached opposite conclusions regarding the constitutionality of legislation granting the exclusive right to sell caskets to funeral directors.<sup>83</sup> The Sixth Circuit in *Craigsmiles v. Giles* refused to accept the mere assertion of a legitimate government interest and determined that the licensing requirement was "nothing more than an attempt to prevent

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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. Likewise, when it is necessary to duplicate a lens, a written prescription may or may not be necessary. But the legislature might have concluded that one was needed often enough to require one in every case. Or the legislature may have concluded that eye examinations were so critical, not only for correction of vision but also for 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.

*Id.*

80. *Id.* at 487–88 (explaining that a "law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it").

81. See *supra* text accompanying note 69.

82. See Neelum J. Wadhvani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 808 (2006) ("[O]ne of the largest problems with the [rational basis] test is the Court's inconsistency in applying it. . . . [T]here are actually two levels of rational basis review: good old-fashioned, deferential rational basis review and a more demanding, heightened version—one with 'teeth.'").

83. See *infra* notes 84–85.

economic competition.”<sup>84</sup> Dissimilarly, the Tenth Circuit in *Powers v. Harris* swiftly accepted pure economic protectionism of the funeral industry as a legitimate state interest and upheld the casket regulations.<sup>85</sup>

*A. The Sixth Circuit: Craigmiles v. Giles*

Applying the rational basis framework set forth in *Carolene Products*, the Sixth Circuit invalidated a regulation limiting the retail sale of caskets to licensed funeral directors on equal protection and due process grounds and explicitly rejected economic favoritism as a legitimate rationale for the state licensure requirements.<sup>86</sup> Under the rational basis standard of review, the key issue was whether the state had a rational basis for implementing the regulation.<sup>87</sup> The state claimed that the licensure requirement promoted public health and safety and consumer protection.<sup>88</sup>

Although public health and consumer protection are legitimate state interests, the court examined the evidence set forth in the record to evaluate the relationship between the law and the state’s purpose.<sup>89</sup> Analyzing the public safety objective, the court emphasized the following facts: the state did not require the use of caskets in burials; there were no special requirements regarding the construction of caskets sold by funeral directors to distinguish them from caskets sold elsewhere; and none of the training received by funeral directors regarding caskets had anything to do with public health or safety.<sup>90</sup> Turning to the consumer protection justification, the court found no evidence that consumers were treated any differently by funeral directors compared to other casket retailers.<sup>91</sup> Considering the fact that caskets are usually the most expensive purchase in a funeral arrangement, the court found that the regulations actually hurt the consumer by reducing price competition and therefore simultaneously increasing casket prices.<sup>92</sup>

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84. *Craigmiles v. Giles*, 312 F.3d 220, 225, 228 (6th Cir. 2002) (“Finding no rational relationship to any of the articulated purposes of the state, we are left with the more obvious illegitimate purpose to which licensure provision is very well tailored. The licensure requirement imposes a significant barrier to competition in the casket market.”).

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

86. *Craigmiles*, 312 F.3d at 224.

87. *Id.*

88. *Id.* at 225.

89. *See id.* at 224–26.

90. *See id.*

91. *See id.* at 225–26.

92. *See id.* at 226.

Considering the evidence directly contradicting the state's reasoning of public health and safety and consumer protection, the court was unable to find a rational relation between the regulatory scheme and any legitimate state interest.<sup>93</sup> The Sixth Circuit thus concluded that the attenuated rationalizations offered by the state came "close to striking us with 'the force of a five-week-old, unrefrigerated dead fish.'"<sup>94</sup> Any conceivable legitimate state objective was repudiated by the very facts of the case, which the court could not ignore even under the most forgiving standards of the rational basis standard of review.<sup>95</sup>

*B. The Tenth Circuit: Powers v. Harris*

Two years after the Sixth Circuit's decision in *Craigmiles v. Giles*, the Tenth Circuit's decision in *Powers v. Harris* created a circuit split.<sup>96</sup> Refusing to follow the Sixth Circuit's holding, the Tenth Circuit upheld Oklahoma's regulatory scheme restricting the retail sale of caskets to licensed funeral directors.<sup>97</sup> The court held that "absent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest."<sup>98</sup> Upon finding a rational relationship between the casket regulation and the funeral directors' interest in protecting the intrastate funeral home industry, the court ended its inquiry.<sup>99</sup> The court cited to Supreme Court precedent to justify its reliance on economic protectionism—the protection of a particular group or industry from competition—as a valid purpose under rational basis analysis.<sup>100</sup> In the concurring opinion, however, Judge Tymkovich rejected the majority's view that pure economic protectionism is a legitimate state interest.<sup>101</sup> Rather, Judge

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93. *See id.* at 225–29.

94. *Id.* at 225 (citation omitted).

95. *See id.* at 229 ("No sophisticated economic analysis is required to see the pretextual nature of the state's proffered explanations for the [regulation].").

96. *Powers v. Harris*, 379 F.3d 1208, 1211 (10th Cir. 2004).

97. *See id.* at 1211 ("The Oklahoma Funeral Services Licensing Act, ('FSLA'), and Board rules promulgated pursuant to the FSLA provide the regulatory scheme for the funeral industry in Oklahoma. Pursuant to the FSLA, any person engaged in the sale of funeral-service merchandise, including caskets, must be a licensed funeral director operating out of a funeral establishment." (citations omitted)).

98. *Id.* at 1221.

99. *See id.* at 1222.

100. *Id.* at 1220–21.

101. *See id.* at 1225–27 (Tymkovich, J., concurring) ("I write separately because I believe the majority overstates the application of 'intrastate economic

Tymkovich concurred in the holding because he found that the licensing scheme furthered a state interest in consumer protection.<sup>102</sup>

### III. THE FIFTH CIRCUIT CASE: *ST. JOSEPH ABBEY V. CASTILLE*

After the Tenth Circuit's decision in *Powers*, the Fifth Circuit had an opportunity to choose a side in the circuit split discussed above in *St. Joseph Abbey*.<sup>103</sup> *St. Joseph Abbey* involved a state casket regulation limiting the retail sales of caskets to state licensed funeral directors, which was strikingly similar to the regulatory schemes in *Craigmiles* and *Powers*.

#### *A. Factual and Procedural History*

In a search for an alternate source of revenue to support St. Joseph Abbey's monastic community in Louisiana, the Abbey's monks started "St. Joseph Woodworks," which sold the Abbey's traditional handmade caskets to the public at prices significantly lower than the prices of caskets sold by funeral homes.<sup>104</sup> The monks did not realize that their small-scale, casket-making business was operating in violation of a Louisiana law until the State Board demanded that the monks stop selling their caskets.<sup>105</sup> The law at issue, the Louisiana Embalming and Funeral Directors Act, is a series of statutes and regulations enforced by the State Board that limits the intrastate sales of caskets to the public to state-licensed funeral directors at state-licensed funeral homes.<sup>106</sup> The regulatory scheme has two major components.<sup>107</sup> First, a potential casket retailer must become a licensed funeral establishment.<sup>108</sup> The licensure requirement of a funeral establishment requires building a layout parlor for third parties, a display room for six caskets, an arrangement room, and embalming facilities.<sup>109</sup> Second, the funeral

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protectionism' as a legitimate state interest furthered by Oklahoma's funeral licensing scheme.").

102. *Id.* at 1226–27.

103. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 217 (5th Cir.), *cert. denied*, 124 S. Ct. 423 (2013).

104. *See supra* note 3.

105. *See Castille*, 712 F.3d at 217–18.

106. *See* LA. REV. STAT. ANN. §§ 37:831–37:854 (2011).

107. *Id.*

108. *Id.* §§ 37:831(37), (39), 842(D).

109. *Castille*, 712 F.3d at 218. *See also* LA. REV. STAT. ANN. § 37:842(D)(3) (2011).

establishment must employ a full-time funeral director.<sup>110</sup> In order to become a funeral director, an individual must have a high school diploma or GED, earn 30 credit hours at an accredited college, and pass a test administered by the International Conference of Funeral Examining Boards.<sup>111</sup>

St. Joseph Abbey sued members of the State Board, seeking “declaratory and injunctive relief against the enforcement of Louisiana’s Embalming and Funeral Directors Act . . . asserting that the statute denied them the right to make and retail caskets to the Louisiana public.”<sup>112</sup> The district court held that the Act’s rules and regulations granting the exclusive right to sell caskets to funeral directors were unconstitutional as a denial of equal protection and due process of law.<sup>113</sup> The State Board appealed the district court’s decision.<sup>114</sup>

### *B. Opinion of the Fifth Circuit*

On appeal, the Fifth Circuit ruled on the constitutionality of the Act and affirmed the lower district court decision invalidating the regulation.<sup>115</sup> First, the court expressly rejected the Tenth Circuit’s holding in *Powers v. Harris* that pure economic protectionism is a legitimate government purpose.<sup>116</sup> Second, the court reviewed and ultimately rejected Louisiana’s proffered justifications of public health and safety and consumer protectionism in light of the Act’s history and structure.<sup>117</sup> Finally, the court did not propose any hypothetical justifications and was unable to find a rational basis for the Act.<sup>118</sup>

#### *1. Pure Economic Protectionism Is Not a Legitimate Government Interest*

The Fifth Circuit expressly rejected the Tenth Circuit’s holding in *Powers v. Harris* that pure economic protectionism of a discrete

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110. LA. REV. STAT. ANN. § 37:842(D)(1) (2011).

111. *Castille*, 712 F.3d at 218. See LA. REV. STAT. ANN. § 37:842(A) (2011).

112. Original Brief of Appellants at 4, *St. Joseph Abbey v. Castille*, 835 F. Supp. 2d 149 (E.D. La. 2011) (No. 11-30756), *aff’d*, 712 F.3d 215 (5th Cir. 2013).

113. *Castille*, 835 F. Supp. at 160.

114. *Castille*, 712 F.3d at 217.

115. *Id.*

116. *Id.* at 222–23.

117. *Id.* at 224–26.

118. *Id.* at 223 (reasoning that “a hypothetical rationale, even post hoc, cannot be fantasy, and that the State Board’s chosen means must rationally relate to the state interests it articulates”).

industry is a legitimate state interest.<sup>119</sup> In support, the court referenced *Powers*' concurring opinion and the Sixth Circuit's holding in *Craigmiles v. Giles*.<sup>120</sup> In *Powers*' concurring opinion, Judge Tymkovich rejected pure economic protectionism as a valid governmental interest but was persuaded that the state had otherwise identified a sufficient public purpose.<sup>121</sup> The Fifth Circuit also highlighted the Sixth Circuit's similar rejection of pure economic protectionism as a rational basis for casket regulations.<sup>122</sup> Next, the court carefully examined *Powers*' majority opinion, which stated that "the Supreme Court has consistently held that protecting or favoring one particular intrastate industry, absent a specific federal constitutional or statutory violation, is a legitimate state interest."<sup>123</sup> The court rejected *Powers*' contentions as an erroneous application of Supreme Court precedent.<sup>124</sup> According to the Fifth Circuit, the correct observation of the Court's precedent is that economic protectionism "is not an *illegitimate* interest when protection of the industry can be linked to advancement of the public interest or general welfare."<sup>125</sup> The Fifth Circuit acknowledged cases where the state regulations at issue may have been partly motivated by economic protectionism; however, the court reasoned that in those cases the regulations advanced some public purpose connected to the state's protectionist motivations.<sup>126</sup>

## 2. No Rational Relationship Between the Means and the End

Second, the Fifth Circuit reviewed and rejected the state's rationalization of public health and safety and consumer protectionism in light of the Act's history and setting.<sup>127</sup> The court followed *Williamson*'s application of the rational basis test, which instructs courts to consider post hoc rationales to find a rational basis for a challenged law.<sup>128</sup> Recognizing the deference afforded

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119. *Id.* at 222–23.

120. *Id.* at 222.

121. *Powers v. Harris*, 379 F.3d 1208, 1225 (10th Cir. 2004) (Tymkovich, J., concurring).

122. *Castille*, 712 F.3d at 222.

123. *Id.* at 222 (quoting *Powers*, 379 F. 3d at 1220).

124. *Id.* at 222.

125. *Id.*

126. *Id.* at 223. The Fifth Circuit previously upheld a Houston taxicab scheme that disfavored small cab companies, finding that "even if Houston had been 'motivated in part by economic protectionism, there is no real dispute that promoting full-service taxi operations is a legitimate government purpose under the rational basis test.'" *Id.*

127. *See id.* at 223–26.

128. *Id.* at 223.

under *Williamson*, the court stressed that “a hypothetical rationale, even post hoc, cannot be fantasy, and that the State Board’s chosen means must rationally relate to the state interests it articulates.”<sup>129</sup> The court rejected the state’s consumer protection rationale, relying on two important facts: (1) “whatever special expertise a funeral director may have in casket selection is irrelevant to it being the sole seller of caskets”;<sup>130</sup> and (2) “Louisiana’s Unfair Trade Practices and Consumer Protection Law already polices inappropriate sales tactics by all sellers of caskets.”<sup>131</sup>

After examining the Act itself, the court highlighted the only limitation governing the sale of caskets: the exclusive grant of intrastate casket sales to funeral directors.<sup>132</sup> Just like the law in *Craigmiles v. Giles*, Louisiana law does not require a person to be buried in a casket; restrict intrastate casket purchases from out of state retailers; or enforce any requirements on intrastate casket retailers regarding casket size, design, material, or price.<sup>133</sup> The court also reviewed the state’s purported goal of consumer protection in connection with existing Louisiana law, specifically Louisiana’s Unfair Trade Practices and Consumer Protection law.<sup>134</sup> The court found that the law already adequately regulates unfair trade practices in casket sales, thereby protecting consumers against fraud and deception.<sup>135</sup> Because Louisiana law lacks any requirements regarding the construction and design of caskets, the special expertise of casket retailers, and the prerequisite imposing the use of caskets for burial, the Fifth Circuit similarly rejected the state’s proffered justification of consumer protection.<sup>136</sup>

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129. *Id.*

130. *Id.* at 224.

131. *Id.* at 225.

132. *Id.* at 223 (“No provision mandates licensure requirements for casket retailers or insists that a casket retailer employ someone trained in the business of funeral direction. Rather, the licensure requirements and other restrictions imposed on prospective casket retailers create funeral industry control over intrastate casket sales.”).

133. *Id.*

134. *Id.* at 225 (“Louisiana’s Unfair Trade Practices and Consumer Protection Law declares that ‘[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are . . . unlawful’ and empowers the state attorney general to make ‘rules and regulations’ to interpret the provisions of the Chapter.”).

135. *Id.* at 224.

136. *See id.* at 223–25.

### 3. No Conceivable Post Hoc Rationales

Third, the court did not propose any hypothetical justifications for the licensure requirements, because it could not ascertain any conceivable rational basis for the Act not articulated by the State Board.<sup>137</sup> The court indicated “although rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality.”<sup>138</sup> As a result, the court could not find a rational relationship between the Act and consumer protectionism or public health and safety, because the state’s plausible rationales were “betrayed by the undisputed facts” set forth by the Abbey.<sup>139</sup>

## IV. ANALYSIS OF THE DECISION

From the butchers and bakers, to the casket makers, the Fifth Circuit’s opinion in *St. Joseph Abbey v. Castille* is a constitutional landmark for a country that has struggled to find the proper balance between government regulations and economic liberties.<sup>140</sup> The Fifth Circuit’s holding influences the course of future economic legislation, particularly in Louisiana, and questions the validity of laws and regulations already in place.<sup>141</sup> The Fifth Circuit’s decision may face a crowd of critics fearing a return to *Lochner*-ism and the emergence of a “second order” rational basis review;<sup>142</sup> however, the court’s decision is consistent with Supreme Court precedent and the very constitutional principles that influenced the Framers of the Constitution. From the unforgiving scrutiny of *Lochner* to the utmost deference of *Williamson*, the Court has consistently required a minimum standard of rationality in determining the constitutionality of economic legislation.<sup>143</sup> The Supreme Court’s precedent equally

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137. *Id.* at 223.

138. *Id.*

139. *Id.*

140. *See supra* Part I.A–C.

141. *See Saint Joseph Abbey, et al. v. Castille, et al. Challenging Louisiana’s Casket Cartel*, INST. FOR JUSTICE, <http://www.ij.org/saint-joseph-abbey-et-al-v-castille-et-al>, archived at <http://perma.cc/R3ZY-43CV> (last visited Oct. 5, 2014) [hereinafter *Challenging Louisiana’s Casket Cartel*].

142. Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065 (2013). The “second order” rational basis test requires “a more searching inquiry” than is characteristic of the traditional rational basis test and “involves a more demanding inquiry into the means and ends of a challenged statute.” *Id.* at 1067, 1072.

143. *Castille*, 712 F.3d at 223.

reveals the Court's unwavering suspicion of protectionist laws and its concern for safeguarding economic liberties.<sup>144</sup> Amidst the Supreme Court's numerous formulations of rational basis review, the Fifth Circuit's opinion revitalizes the rationality standard by adding critical language to the framework established in *Carolene Products* and *Williamson*.<sup>145</sup> All courts should follow the Fifth Circuit's model analysis of due process and equal protection claims so that aspiring businesspersons can pursue an honest living free from arbitrary governmental interference.

*A. Return to Constitutional Principles and Precedent*

*1. The Fifth Circuit Held that Pure Economic Protectionism Is Not a Legitimate Governmental Interest*

The Fifth Circuit rejected the Tenth Circuit's proposition that pure economic protectionism of a particular industry is a legitimate state interest.<sup>146</sup> According to Supreme Court precedent, "protecting or favoring a particular intrastate industry is not an *illegitimate* interest when protection of the industry can be linked to advancement of the public interest or general welfare."<sup>147</sup> At the heart of the Due Process Clause and the Equal Protection Clause is a fear of the government's arbitrary interference with economic liberties.<sup>148</sup> As the Abbey's attorney observed:

[T]he very formulation of the rational basis test—a rational relationship with a *legitimate* government interest—precludes a government interest that is nothing more than private favoritism. To be "equally protected" by the laws necessarily means that the government will not arbitrarily extend special favors to one group to the detriment of another.<sup>149</sup>

The attorney's observation reflects Justice Field's pre-*Lochner* vision of due process: "The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen."<sup>150</sup>

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144. CHEMERINSKY, *supra* note 14.

145. *See supra* Part I.C.

146. *Castille*, 712 F.3d at 222–23.

147. *Id.* at 222.

148. *Id.* at 222, 227.

149. Brief of Respondents–Appellees at 19, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir.) (No. 11-30756), *cert denied*, 134 S. Ct. 423 (2013).

150. *Dent v. West Virginia*, 129 U.S. 114, 124 (1888) (upholding a state law which required physicians to hold a degree from a reputable medical college, pass an examination, or prove practice in West Virginia for the previous ten

Returning to the spirit of natural law philosophers like Justice Field, the Fifth Circuit's opinion demonstrates a concern for protecting economic liberties, not a return to the *Lochner* era.<sup>151</sup> The *Lochner* regime's aggressive review of economic legislation was a result of the fundamental right status given to the freedom of contract.<sup>152</sup> The Supreme Court abandoned such scrutiny of state regulations and the freedom-of-contract theory for a deferential analysis of legislative choices.<sup>153</sup> Nevertheless, the Court purposefully preserved measures to protect individuals from arbitrary governmental interference. The Fifth Circuit noted that none of the Supreme Court cases accepted the contention that protecting or favoring one particular intrastate industry, absent a specific federal constitutional or statutory violation, is a legitimate state interest.<sup>154</sup> The Supreme Court consistently reiterates notions that "[s]tates are accorded wide latitude in the regulation of their local economies," "the judiciary may not sit as a superlegislature,"<sup>155</sup> and "[s]tates 'have [the] power to legislate against what are found to be injurious practices in their internal commercial and business affairs.'"<sup>156</sup> However, the Supreme Court has similarly reiterated that the rational basis requirement is meant to protect individuals' economic liberty from arbitrary governmental interference and check the legislature within the confines of its Article III discretion.<sup>157</sup>

The Fifth Circuit emphasized that economic protectionism is not a legitimate state interest standing alone but may be validated by a post hoc perceived rationale.<sup>158</sup> In *Williamson*, "the coloration of wealth transfer to ophthalmologists and optometrists" was balanced by the post hoc rationale of public health.<sup>159</sup> Similarly, in *City of New Orleans v. Dukes*, the Supreme Court concluded that the state

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years). The Court noted that each citizen had a right to follow any lawful calling—subject to natural restraints such as age or sex—as well as state restrictions, as long as those state restrictions were reasonable. *Id.* at 121.

151. *Castille*, 712 F.3d at 227 ("Nor is the ghost of *Lochner* lurking about. We deploy no economic theory of social statics or draw upon a judicial vision of free enterprise.").

152. *See supra* Part I.C.

153. *See supra* Part I.C.

154. *Castille*, 712 F.3d at 223–24.

155. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

156. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (holding that a Kansas statute that outlawed a person from engaging in debt adjusting did not violate the Due Process Clause because it is up to the legislatures, not the courts, to decide the wisdom and utility of the legislation).

157. CHEMERINSKY, *supra* note 14, at 622.

158. *Castille*, 712 F.3d at 222–23.

159. *Id.* at 221 (describing the reasoning of the opinion in *Williamson*).

regulation was “a means to preserve the appearance and custom valued by the Quarter’s residents and attractive to tourists.”<sup>160</sup> In *Williamson* and *Dukes*, the challenged regulations effectively shielded a particular industry or group from economic competition; however, despite likely protectionist interests, the Supreme Court found that the state was furthering other legitimate state interests in both instances.<sup>161</sup>

Other circuits confirm that naked economic preferences are impermissible to the extent that they harm consumers.<sup>162</sup> The Ninth Circuit in *Merrifield v. Lockyer* emphasized that protectionism might be allowed if coupled with a legitimate state interest:

[T]here might be instances when economic protectionism might be related to a legitimate governmental interest and survive rational basis review.<sup>163</sup> However, 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.<sup>164</sup>

Because the *Merrifield* occupational licensing regulation was solely advancing the illegitimate interest of pure economic protectionism, the Ninth Circuit held that it was unconstitutional.<sup>165</sup>

With the rise and fall of economic substantive due process, there is a theme embraced by the natural law philosophers, the *Lochner* era’s judicial activists, and the *Williamson* deferentialists, and it survives today. At a minimum, the Court has consistently held economic legislation to a standard of rationality.<sup>166</sup> If pure economic protectionism were a legitimate governmental objective, the rational basis requirement would be depleted and the outer most limits of due process and equal protection diminished.<sup>167</sup> The

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160. *Dukes*, 427 U.S. at 304 (internal quotation marks omitted) (upholding a New Orleans ordinance banning all pushcart vendors in the French Quarter except those who had continuously operated there for eight or more years).

161. In other words, both regulations furthered some governmental purpose despite the states’ likely protectionist motivations for the laws. See *supra* notes 154–55 and accompanying text.

162. *Merrifield v. Lockyer*, 547 F.3d 978, 990 (9th Cir. 2008) (invalidating a state licensing scheme requiring all persons engaged in structural pest control to obtain licenses).

163. *Id.* at 991 n.15.

164. *Id.*

165. *Id.* at 989 (“[T]he singling out of a particular economic group, with no rational or logical reason for doing so, was strong evidence of an economic animus with no relation to public health, morals or safety.”).

166. See *supra* Part I.C.

167. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 217 (5th Cir.), *cert. denied*, 124 S. Ct. 423 (2013).

power to regulate would be limitless. The purpose of government power is to advance public interests.<sup>168</sup> The Fourteenth Amendment's equal protection and due process guarantees are constitutional checks on the legislature to ensure legitimate state objectives and prevent irrational governmental interference.<sup>169</sup> If public power can be used to protect purely private interests, the Fourteenth Amendment's limitations on states' powers are meaningless. As a result, the Fifth Circuit rejected both Louisiana's regulation and the Tenth Circuit's ruling that economic protectionism is a legitimate state interest.<sup>170</sup>

*2. The Fifth Circuit Found that No Rational Relationship Exists Between the Casket Regulations and Louisiana's Interest in Consumer Protection, Public Health, and Public Safety*

The Fifth Circuit found no rational relationship between the casket regulations and a legitimate governmental objective because there was none.<sup>171</sup> Under *Williamson*, state legislation will be upheld against constitutional attack as long as there is any reasonably conceivable state of facts that could provide a rational basis for the challenged law;<sup>172</sup> however, the Fifth Circuit opinion indicated that the court's "analysis does not proceed with abstraction for hypothesized ends and means do not include post hoc hypothesized facts."<sup>173</sup> The Fifth Circuit echoed *Carolene Products*, which declared that legislation is "not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."<sup>174</sup> The burden is on one complaining of a due process violation to establish that the legislature acted in an arbitrary and irrational way.<sup>175</sup>

Plaintiffs challenging state economic regulations appear to carry a heavy burden; however, the monks carried a relatively painless burden, because the evidence negated any logical support for the casket regulations.<sup>176</sup> The undisputed facts destroyed any

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168. CHEMERINSKY, *supra* note 14, at 625.

169. *Id.*

170. *Castille*, 712 F.3d at 227.

171. *Id.*

172. *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

173. *Castille*, 712 F.3d at 223.

174. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

175. *Turner v. Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

176. *Castille*, 712 F.3d at 223 ("[P]laintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality.").

rational relationship between Louisiana's law and a legitimate governmental interest: Louisiana consumers can purchase caskets from any retailer in the United States except non-licensed retailers in Louisiana.<sup>177</sup> In Louisiana, one can buy a casket online from an inexperienced, uneducated casket maker but cannot purchase a hand-crafted casket from the monks of St. Joseph Abbey due to supposed safety and health concerns.<sup>178</sup>

The Fifth Circuit searched for a rational relationship between Louisiana's statutory scheme and the state's goals of public health and safety and consumer protection.<sup>179</sup> Although the Louisiana law was presumed constitutional, the Abbey successfully met its burden and provided sufficient evidence to support the finding that the legislation was arbitrary and therefore unconstitutional.<sup>180</sup> *St. Joseph Abbey* is distinguishable from *Williamson*, where the plaintiffs failed to rebut every conceivable post hoc rationale of the regulation.<sup>181</sup> Although the state presented legitimate purposes for the casket regulations, the court properly found that the history of the Act and the absence of other state regulations governing the construction and design of caskets and out-of-state casket retailers diminished any rational connection between Louisiana's means and ends.<sup>182</sup> Consequently, the Fifth Circuit correctly concluded that there was not a rational basis for Louisiana's casket regulations.

### *B. Revitalization of Rationality*

Amidst the Supreme Court's numerous formulations of rational basis review, the Fifth Circuit opinion revitalizes the rationality standard by adding critical language to the framework established in *Carolene Products*.<sup>183</sup> In *Williamson*, the Supreme Court initiated misconceptions of the judicial deference once given to state economic legislation.<sup>184</sup> The Supreme Court in *Williamson* noted that "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment 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

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177. *Id.* at 223–24.

178. *Id.* at 217–18 (finding that Louisiana law does not restrict casket purchases in any way over the Internet or from other sources out of state).

179. *Id.* at 223–27.

180. *Id.* at 226–27.

181. *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

182. *Castille*, 712 F.3d at 227.

183. *See supra* note 69 and accompanying text.

184. *See Williamson*, 348 U.S. at 488.

of thought.”<sup>185</sup> The deferential approach in *Williamson* is commonly misconstrued to provide an automatic validation of legislation under rational basis review.<sup>186</sup> The Fifth Circuit follows the spirit of *Williamson* but makes a significant clarification: “The great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation.”<sup>187</sup> Using the phrases “judicial blindness” and “nonsensical explanations,” the Fifth Circuit implied that the rational basis test is much more than a judicial rubber stamp or mechanical test.<sup>188</sup>

Revitalizing the rationality standard of rational basis review, the Fifth Circuit’s decision is a model example of proper due process and equal protection analysis of state economic legislation. The predominant requirements of the rational basis test are two-fold, but the Fifth Circuit provided a more detailed framework.<sup>189</sup> First, courts must identify a legitimate governmental purpose.<sup>190</sup> Courts accept as legitimate all objectives within the state’s police power, including public health, public safety, and general welfare interests.<sup>191</sup> Considering legitimate governmental objectives for the law, courts may also consider post hoc rationales—meaning conceivable rationales the state could have provided.<sup>192</sup> Second, courts must evaluate the relationship between the state’s chosen means and the state’s articulated interests.<sup>193</sup> Courts must consider the context and history of the challenged legislation, because even a post hoc rationale cannot be “fantasy.”<sup>194</sup> Third, even if courts find a rational basis between the regulation and a legitimate state interest, they must look to the record to determine whether the rational basis is refuted by the evidence presented by the

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185. *Id.*

186. Saphire, *supra* note 30, at 605. One scholar noted that the “‘mere rationality’ requirement symbolized virtual judicial abdication.” *Id.* at 607 (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 19 (1972)).

187. *Castille*, 712 F.3d at 226.

188. *Id.*

189. *Id.* at 223–26.

190. *Id.* at 223.

191. *Id.*

192. *Id.* at 221.

193. *Id.*

194. *Id.*

plaintiffs.<sup>195</sup> Where every conceivable rationale is contradicted, courts must invalidate the challenged law.<sup>196</sup>

The Fifth Circuit's application of the rational basis standard reflects Justice Field's position in the pre-*Lochner* era.<sup>197</sup> Justice Field supported the right of every citizen to follow his calling but maintained the importance of licensure requirements to ensure the necessary qualifications of learning and skill for certain professions.<sup>198</sup> Justice Field exercised appropriate judicial restraint yet protected economic liberties, observing these rights as the "distinguishing feature of our republican institutions."<sup>199</sup> Moreover, he acknowledged the deference required for state judgment but, like the Fifth Circuit, did not stop there. Describing the constitutionality of licensing requirements, Justice Field stated:

If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.<sup>200</sup>

Justice Field and the Fifth Circuit demonstrated deference for the judgments of state legislatures and an understanding of the importance of occupational regulations; however, the Fifth Circuit opinion transformed Justice Field's nineteenth-century articulation into accessible language for the twenty-first century. The opinion injected meaning back into the vague reiterations of due process analysis that drain the rational basis test of its only requirement: a rational basis.<sup>201</sup>

Revitalizing the definitions previously formulated by courts, the Fifth Circuit emphasized the significance of the rational basis standard.<sup>202</sup> Louisiana's invalidated casket regulations reveal that states are not always rational and, more importantly, do not always win.<sup>203</sup> Plaintiffs prevail when they present evidence that

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195. *Id.* at 223.

196. *Id.* at 220.

197. *See* Slaughter-House Cases, 83 U.S. 36, 109–11 (1872).

198. *Id.*

199. *Dent v. West Virginia*, 129 U.S. 114, 121 (1889).

200. *Id.* at 122.

201. *Saphire*, *supra* note 30, at 605.

202. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 217 (5th Cir.), *cert. denied*, 124 S. Ct. 423 (2013).

203. Jeff Rows & Scott Bullock, *Divine Justice: IJ Case on Behalf of Monks Puts Lid on Louisiana Casket Monopoly*, INST. FOR JUSTICE (Oct. 2011),

deteriorates any logical connection between the challenged statutory scheme and any plausible legitimate rationale.<sup>204</sup> Although the Fifth Circuit's opinion is consistent with Supreme Court precedent and constitutional principles, it is a reminder to all courts of two basic ideals. First, the government does not prevail simply by offering a general justification of public health, safety, or welfare.<sup>205</sup> Instead, when the government articulates a legitimate interest, there must be a factually plausible, logical connection between a legitimate interest and the challenged law.<sup>206</sup> Second, plaintiffs can successfully negate plausible rationales for challenged legislation through an analysis of the statutory scheme and relevant evidence.<sup>207</sup>

## V. IMPLICATIONS OF THE DECISION

In the wake of *Powers v. Harris*, *St. Joseph v. Abbey* sends a warning to state legislatures: "The great deference due state economic regulation does not demand judicial blindness."<sup>208</sup> With a history of legislation regulating butchers, casket makers, and other professional industries, the Fifth Circuit's message resonates most in Louisiana.

### A. A Warning to State Legislatures

The Supreme Court has not invalidated a single piece of economic legislation on economic substantive due process grounds since the 1930s;<sup>209</sup> however, the Fifth Circuit's decision in *St. Joseph Abbey* is an indication that not all state regulations will satisfy even "the outer-most limits of due process and equal protection."<sup>210</sup> *St. Joseph Abbey* is an exceptional case where the reality of the facts eliminated any potential rational connection between the casket regulations and a legitimate state interest.<sup>211</sup> The

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<https://www.ij.org/divine-justice-ij-case-on-behalf-of-monks-puts-lid-on-louisiana-casket-monopoly-2>, archived at <https://perma.cc/F4EH-PVBM> (explaining the important precedential effect of the opinion in *St. Joseph Abbey* in Louisiana and beyond regarding the vitality of economic laws).

204. See *Castille*, 712 F.3d at 223.

205. *Id.* at 226.

206. *Id.* at 226–27.

207. *Id.* at 222.

208. *Id.* at 226.

209. See *supra* Part I.C.

210. *Castille*, 712 F.3d at 227.

211. Robert Barnes, *Louisiana Monks Go To Court To Sell Their Caskets*, WASH. POST (May 29, 2012), <http://www.washingtonpost.com/politics/louisian-a->

president of the Institute for Justice, the Abbey's representative, articulated three critical components to a successful suit: "outrageous facts," "evil villains," and "sympathetic clients."<sup>212</sup> Amidst the increasing number of licensure requirements for various professions, the Fifth Circuit's opinion is a critical reminder to state legislatures that the power to regulate is not limitless.<sup>213</sup> Because courts following the Fifth Circuit's opinion will not accept "fantasy" or "nonsensical explanations," state legislatures should rethink future economic regulations, particularly those protectionist measures disguised as rationalizations of consumer protection and public health.<sup>214</sup>

Louisiana's irrational licensure requirements and protectionist motivations for regulating casket sales mimic the reality of licensing schemes in many states. Current licensing statutes govern an endless list of trades.<sup>215</sup> Like Louisiana's casket regulations, most licensing statutes impose a series of requirements that must be satisfied before granting entry into the profession.<sup>216</sup> Masked as public safety or health measures, many licensing schemes are enacted to suppress competition.<sup>217</sup> Licensing boards are normally "composed of members of the regulated occupation, thereby endowing established producers with the discretion to exclude their own potential competitors."<sup>218</sup> Similarly, the Louisiana casket regulations imposed extensive requirements on casket retailers forcing them to become licensed funeral directors to sell caskets.<sup>219</sup> Moreover, the nine-member State Board, the entity responsible for

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monks-go-to-court-to-sell-their-caskets/2012/05/29/gJQA7VMK0U\_story.html?hpid=z1, archived at <http://perma.cc/L2EV-7C7R>.

212. *Id.*

213. *Id.*

214. *See Castille*, 712 F.3d at 223, 226.

215. *See Raynor*, *supra* note 142, at 1085. Licensing statutes currently govern various trades, including "taxidermists, elevator operators, auctioneers, florists, fortune tellers, interior designers, junkyard dealers, motion picture projectionists, hair braiders, upholsterers, ticket brokers, and turtle farmers."

215. *Id.*

216. *See Matt Davis*, Comment, *Licensing the Competition to Death: How Economic Protectionism Would Allow the Louisiana Board of Embalmers and Funeral Directors to Nail the Coffin Shut on the Monks of St. Joseph Abbey*, 39 S.U. L. REV. 199, 202 (2011).

217. *Id.*

218. *Raynor*, *supra* note 142, at 1086.

219. *Castille*, 712 F.3d at 218. ("A funeral director must have a high school diploma or GED, pass thirty credit hours at an accredited college, and complete a one-time apprenticeship.")

enforcing the regulations, has only one representative who is not affiliated with the funeral industry.<sup>220</sup>

Considering the relationship of Louisiana's casket regulations and licensing schemes more generally, the timing of the Fifth Circuit's decision is significant. The Fifth Circuit's ruling is only one of a handful of decisions since the New Deal to protect economic liberty.<sup>221</sup> As a result, the Fifth Circuit's decision sets critical precedent for future challenges of economic legislation.<sup>222</sup>

### *B. The Validity of Louisiana Licensure Requirements*

The Supreme Court rejected the State Board's petition for review, so the Fifth Circuit's ruling survives as vitally important precedent for the protection of economic liberty.<sup>223</sup> The opinion serves as a platform to challenge other irrational licensing schemes. Consequently, the decision will likely influence the construction of future economic legislation and will have an equally profound effect on current regulations in Louisiana.<sup>224</sup> The Fifth Circuit's decision strays from previous Louisiana jurisprudence on the constitutionality of professional licensure requirements.<sup>225</sup> Louisiana district courts have upheld many laws similar to Louisiana's casket regulations.<sup>226</sup> As a result of the Fifth Circuit's holding, the validity of Louisiana's economic laws which once passed constitutional muster may now be questioned.<sup>227</sup>

Louisiana is home to various licensure requirements governing a wide range of professions.<sup>228</sup> Like the casket regulations, these laws suffered constitutional attack. In *Meadows v. Odom*, Louisiana's florist licensing requirements were challenged.<sup>229</sup> The plaintiffs included would-be florists who were unable to pass the highly

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220. *Id.* at 219 ("By law, the nine-member State Board must consist of four licensed funeral directors, four licensed embalmers, and just one representative not affiliated with the funeral industry.").

221. *See supra* Part I.C.

222. *See Challenging Louisiana's Casket Cartel, supra* note 141.

223. *Castille v. St. Joseph Abbey*, 134 S. Ct. 423, 187 (2013) (denying the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit).

224. *See supra* note 223.

225. *Id.*

226. *Rowes & Bullock, supra* note 203.

227. *See Challenging Louisiana's Casket Cartel, supra* note 141.

228. *See Professional and Occupational Licenses*, LOUISIANA.GOV, <http://louisiana.gov/Services/POLicenses/>, archived at <http://perma.cc/EBU4-UAYT> (last visited Jan. 12, 2015) (listing all of the professional and occupational licenses in Louisiana).

229. *Meadows v. Odom*, 356 F. Supp. 2d 639, 640 (M.D. La. 2005).

subjective state-mandated exam graded by existing florists.<sup>230</sup> Following the Tenth Circuit's logic in *Powers*, the district court upheld the legislation and found that the floral licensing examination was rationally related to a legitimate government interest in regulating the profession.<sup>231</sup> First, the court found that the licensure qualifications had a rational connection with the applicants' "fitness or capacity to serve in that trade or profession."<sup>232</sup> Second, the court concluded that the floral examination was rationally related to the government interest of public welfare and safety.<sup>233</sup> The court was satisfied with the state's proffered justification to ensure florist arrangements were assembled properly in a manner least likely to cause harm to consumers.<sup>234</sup>

Despite the district court's decision in *Meadows*, the Louisiana State Legislature repealed some of the most arbitrary and subjective components of the licensing scheme;<sup>235</sup> however, the *Meadows* court would have likely ruled differently and eliminated the arbitrary florist licensing requirements if it had the insight of the Fifth Circuit's opinion in *St. Joseph Abbey*.<sup>236</sup> The florist and casket regulations are very similar in their lengthy examination requirements and hefty penalties.<sup>237</sup> Like the casket laws, the florist requirements appeared to be purely protectionist measures.<sup>238</sup> Furthermore, the relationship between the imposed qualifications and the public safety interests appear equally attenuated.<sup>239</sup> Applying the logic of the Fifth Circuit, the state's interest in protecting consumers from injuries would not be enough to satisfy even the deferential rational basis test.<sup>240</sup>

In addition to the florist licensure requirements, Louisiana has laws regulating various other occupations, such as hair braiding, teeth whitening, and food truck vendors.<sup>241</sup> Applying the Fifth Circuit's reasoning in *St. Joseph Abbey*, the validity of these

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230. *Id.* at 640.

231. *Id.* at 643–44.

232. *Meadows v. Odom*, 360 F. Supp. 2d 811, 823 (M.D. La. 2005) (quoting *Payne v. Fontenot*, 925 F. Supp. 414 (M.D. La. 1995)), *vacated as moot*, 198 F. App'x 348 (5th Cir. 2006).

233. *Id.* at 823–25.

234. *Id.*

235. *Meadows v. Odom*, INST. FOR JUSTICE, <http://www.ij.org/meadows>, archived at <http://perma.cc/JR4Z-KCH> (last visited Dec. 26, 2014).

236. *Id.*

237. *Id.*

238. *Meadows*, 360 F. Supp. 2d at 811.

239. *Id.*

240. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 226 (5th Cir. 2013).

241. *See generally* Davis, *supra* note 216.

licensing laws is questionable.<sup>242</sup> For example, Louisiana is one out of ten remaining states to have a specialized license for hair braiders.<sup>243</sup> Louisiana law requires 1,000 hours of training and education to become a licensed hair braider.<sup>244</sup> An artistic tradition passed down from generation to generation, hair braiding—much like making caskets and arranging flowers—is not an activity deserving of such burdensome regulations.<sup>245</sup> As a result, these demanding licensing requirements appear solely to protect the industry from competition, which standing alone is not enough under the Fifth Circuit’s reasoning.<sup>246</sup>

The Fifth Circuit opinion is especially important in Louisiana, where the very words of the Louisiana Constitution seem to have been forgotten. The Preamble of the 1974 Louisiana Constitution begins by stating: “We, the people of Louisiana, grateful to Almighty God for the civil, political, economic, and religious liberties we enjoy, and desiring to protect individual rights to life, liberty, and property.”<sup>247</sup> The preamble explicitly states that the people of Louisiana enjoy economic liberties.<sup>248</sup> Considering the very language of the Louisiana Constitution, it is challenging to reconcile the fact that the same state gave birth to some of the nation’s most arbitrary laws, which regulate butchers and casket makers. Nonetheless, the Louisiana Constitution supports the Fifth Circuit’s determination that pure economic protectionism is not a legitimate governmental interest;<sup>249</sup> accepting such a proposition would allow arbitrary interferences with individuals’ economic liberties, rights enjoyed by Louisiana’s citizens.<sup>250</sup>

### *C. A Final Victory for the Monks*

The Supreme Court’s decision to reject the State Board’s petition for review is a final victory for the monks of St. Joseph Abbey.<sup>251</sup> The denial leaves for another day the Supreme Court’s

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242. *Castille*, 712 F.3d at 226.

243. Valerie Bayham, *A Dream Deferred*, INST. FOR JUSTICE, <http://www.ij.org/legal-barriers-to-african-hairbraiding-nationwide-2>, archived at <http://perma.cc/25MN-G3WF> (last visited Dec. 26, 2014).

244. *Id.*

245. *Id.*

246. *Castille*, 712 F.3d at 226.

247. LA. CONST. pmbl.

248. *Id.*

249. *Id.*

250. *Id.*

251. Heather Nolan, *St. Joseph Abbey Monks Can Legally Sell Caskets After U.S. Supreme Court Rejects State Funeral Directors Request for Hearing*, THE TIMES PICAYUNE, [http://www.nola.com/crime/index.ssf/2013/10/st\\_joseph\\_abbey](http://www.nola.com/crime/index.ssf/2013/10/st_joseph_abbey)

answer to the question this Note explores: whether pure economic protectionism is a legitimate governmental interest.<sup>252</sup> Plainly, there is a conflict that must be resolved by the Supreme Court in the future, and the State Board's petition anticipates future challenges;<sup>253</sup> surely a similar crowd of Louisiana-born entrepreneurs will return to the Court's steps. Nevertheless, the Supreme Court's decision provides the much-needed relief for the monks who will be able to legally sell their handcrafted caskets free from the State Board's scrutiny.<sup>254</sup> In addition, the monks' success provides hope to other entrepreneurs burdened by protectionist licensing requirements.<sup>255</sup>

Although a victory for the monks, the circuit split remains.<sup>256</sup> Rejecting the State Board's petition, the Supreme Court simultaneously scrapped the opportunity to expressly reject the contention that pure economic protectionism is a legitimate state interest and establish the first instance since the 1930s where the Court invalidated economic legislation on due process and equal protection grounds.<sup>257</sup> Until the Supreme Court speaks on the issue, courts will struggle with whether to accept pure economic protection of an industry as a sufficient rational basis for economic regulation. Moreover, with the Tenth Circuit decision still intact, states are better equipped to eliminate the labor of disguising protectionist measures as legitimate public health and safety tools and pass laws for the sole benefit of protecting one group at the expense of another.<sup>258</sup> The Tenth Circuit's validation of pure economic protectionism since 2004 produced a dangerous loophole that allowed states to enact legislation that escapes the very purpose of rational basis review.<sup>259</sup> As states continue to pass groundless laws unsupported by any public interest, the Supreme Court will one day have to put the issue to rest once and for all.

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[monks\\_can\\_sell.html](http://perma.cc/FAC7-GEQQ), archived at <http://perma.cc/FAC7-GEQQ> (last visited Dec. 26, 2014).

252. *Id.*

253. *Id.*

254. Rows & Bullock, *supra* note 203.

255. *Id.*

256. *See supra* Part II (explaining the circuit split between the Sixth and Tenth Circuits).

257. *See supra* Part I.C (analyzing the decline in substantive due process).

258. Davis, *supra* note 216.

259. *Id.*

## CONCLUSION

The Supreme Court's decision to reject the State Board's request to overturn the ruling in *St. Joseph Abbey* is a final victory for the Benedictine monks and provides hope for the butchers, bakers, and casket makers alike in their quest to make an honest living. While the circuit split remains, the Fifth Circuit's decision in *St. Joseph Abbey* revives the protection of economic liberties and defends against southern capitalists who have haunted the economy since the *Slaughter-House Cases*.<sup>260</sup> The rejection of pure economic protectionism as a legitimate state interest is consistent with the Supreme Court's deeply rooted safeguards against arbitrary governmental interference.<sup>261</sup> Moreover, the decision is harmonious with constitutional principles and Supreme Court jurisprudence aimed to protect the rights of citizens to pursue a livelihood.<sup>262</sup> The lawsuit's attention did exactly what the State Board adamantly fought against and more.<sup>263</sup> Engulfed by the courtroom spotlight, the monks reclaimed their right to sell caskets in Louisiana and increased public demand for their handcrafted work.<sup>264</sup> Finally, the monks left their quiet lifestyle to fight for their calling, *ora et labora*—"prayer and work."<sup>265</sup>

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260. See *supra* Part I.A.

261. *Id.*

262. *Id.*

263. Nolan, *supra* note 251.

264. *Id.*

265. *Free the Monks and Free Enterprise: Challenging Louisiana's Casket Cartel*, INST. FOR JUSTICE, <http://www.ij.org/louisiana-caskets-background-2>, archived at <http://perma.cc/6XU4-5GB8> (last visited Oct. 5, 2013).

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