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Grave Consequences for Economic Liberty: The Funeral Industry's Protectionist Occupational Licensing Scheme, the Circuit Split, and Why It Matters

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GRAVE CONSEQUENCES FOR ECONOMIC LIBERTY: THE FUNERAL INDUSTRY’S PROTECTIONIST OCCUPATIONAL LICENSING SCHEME, THE CIRCUIT SPLIT, AND WHY IT MATTERS

LANA HARFOUSH*

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ABSTRACT

This article examines a current circuit split regarding the constitutionality of restrictive occupational licensing schemes that exist only for protectionist purposes. The Sixth Circuit in *Craigmiles v. Giles* and the Tenth Circuit case *Powers v. Harris*, are cases that revolve around similar facts but reach opposite outcomes. The two cases profile state funeral industry licensing restrictions. In both cases, the plaintiffs were penalized for selling caskets without state-issued licenses.

Though licensing restrictions in the funeral industry affect most Americans as consumers, the scope of this circuit split reaches into nearly every industry. When businesses lobby governments to enact legislation, they establish large, often insurmountable barriers to competition. Drawing from scholarly work in this area, this article argues that protectionist licensing schemes produce numerous negative effects and infringe upon individuals’ right to earn an honest living. This article also looks to a new funeral case that has emerged, which will hopefully have a positive impact on the case law surrounding protectionist occupational licensing schemes.

“[W]hile baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments.” – Tenth Circuit Judge Tacha, *Powers v. Harris*¹

I. INTRODUCTION

How much training would you like someone to have before she sells you flowers? A few years of floral design school? Perhaps an apprenticeship with a master florist? Should she have passed a state exam on floral design? Would you *require* a training program by law? Do lousy bouquets actually create health and safety issues? Though this may seem like a silly question, more and more occupations require workers to have a state-granted license in order to perform their jobs. Though “in the 1950s . . . about one in twenty Americans needed the government’s blessing to do their job, today that number is more than one in three.”² Though sometimes licenses are created to ensure the health and safety of the general public,³ often they are only created to protect already established businesses from facing new competition. The requirements one must meet to obtain a license come in many forms: specialty degrees, several-year apprenticeships, and even *approval from one’s competitors* in order to enter the market.⁴ Though not always this prevalent in America, these protectionist occupational licensing schemes are now seen in many industries. In fact, these laws are so disputed that the debate over their legality has led to a circuit split.

This comment begins by unveiling a brief history of occupational licensing laws in the United States. It continues in Parts III and IV with an exploration and discussion of two factually similar cases from the funeral industry. These cases represent both sides of the circuit split. Part V analyzes how these cases, and others like it, affect economic liberty; more importantly, this comment explains

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

² *Why Can’t Chuck Get His Business Off the Ground*, INSTITUTE FOR JUSTICE (Oct. 02, 2011); see also Stephanie Simon, *A License to Shampoo: Jobs Needing State Approval Rise*, WALL ST. J. (Feb. 7, 2011), available at http://online.wsj.com/article/SB10001424052748703445904576118030935929752.html?mod=WSJ_hp_LEFTWhatsNewsCollection. Simon writes:

The most recent study, from 2008, found 23% of U.S. workers were required to obtain state licenses, up from just 5% in 1950, according to data from [an economist]. In the mid-1980s, about 800 professions were licensed in at least one state. Today, at least 1,100 are, according to the Council on Licensure, Enforcement and Regulation, a trade group for regulatory bodies. Among the professions licensed by one or more states: florists, interior designers, private detectives, hearing-aid fitters, conveyor-belt operators and retailers of frozen desserts.

Id.

³ Physicians are a common example of an occupational license created to promote the health and safety of the general population.

⁴ See *infra* note 96.

why it matters. Part VI looks at the rational basis test and the problems associated with it. This is the test courts currently use to scrutinize regulations that interfere with economic liberties. Part VII examines an even more recent funeral case now set for appellate review, demonstrating the timeliness of this important issue that will have a profound impact on the future of occupational licensing schemes generally. Part VII also considers what the role of these laws will be in the years to come. This comment concludes with Part VIII and the hope that an increasing number of courts and legislatures will disassemble licensing regulations created for protectionist purposes.

II. A BRIEF HISTORY OF OCCUPATIONAL LICENSING LAWS IN THE US

Economic liberty is “the right to pursue an honest living in a business or profession free from arbitrary government interference.”⁵ This right has been promoted and protected throughout early American history.⁶ The Founding Fathers believed economic liberty was a natural right and that “the individual’s right to go into business and keep the fruits of his labor” was “among the most important liberties.”⁷ Influential political economists, such as Adam Smith, argued that governments should allow businesses to compete fairly without subsidies and special favors because such economic environment was in the consumer’s

⁵ CLINT BOLICK, *DAVID’S HAMMER THE CASE FOR AN ACTIVIST JUDICIARY* 98 (Cato Institute 2007). Milton Friedman also described an “essential part of economic freedom” as the:

[F]reedom to use the resources we possess in accordance with our own values—freedom to enter any occupation, engage in any business enterprise, buy from and sell to anyone else, so long as we do so on a strictly voluntary basis and do not resort to force in order to coerce others. Today you are not free to offer your services as a lawyer, a physician, a dentist, a plumber, a barber, a mortician, or engage in a host of other occupations, without first getting a permit or license from a government official.

MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 66 (Harcourt 1979).

⁶ See TIMOTHY SANDEFUR, *THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW* 23–25 (Cato Institute 2010). Regarding occupational licensing schemes in English common law, guilds would “use[] their licensing power to create artificial scarcity” in order to protect their jobs and keep prices higher than a free market would allow. *Id.* at 23. But often, English courts and prominent members of Parliament would speak out in defense of the right to earn a living. See *id.* at 18–24. One argument by Lord Coke, claimed that licensing was unnecessary in a marketplace involving many occupations where legal redress and damages could be sought for injury. *Id.* at 23. Lord Coke further explained that the “possibility that a practitioner might do a bad job was not a good excuse for restricting economic freedom, raising costs to consumers, and depriving entrepreneurs of economic opportunity.” *Id.* English courts believed that the right to earn a living was one of “nationalistic concern for increasing the wealth of the realm.” *Id.* at 24. America’s Founders saw it “not as a matter of privilege or of public policy[,] but instead as a matter of natural freedom.” *Id.*

⁷ See *id.* The Founders’ emphasis on this right is seen in numerous founding documents. This includes the Declaration of Independence’s “life, liberty and the pursuit of happiness”—which was altered from John Locke’s “life, liberty, and estate” and interpreted by many Constitutional scholars as referring to the “individual’s right to pursue a trade and thereby improve his position in life.” *Id.* It also includes George Mason’s Virginia Declaration of Rights “declaring that ‘all men are by nature equally free and independent and have certain inherent rights,’ including ‘the enjoyment of life and liberty, with the means of *acquiring* and possessing property, and *pursuing and obtaining* happiness and safety.’” *Id.*

interest.⁸ Even charters granted by government authorities did not necessarily encompass the right to be free from competition with other businesses.⁹ At the time of the country's founding, "concern about the evils of state-granted monopolies was so prevalent . . . that four states—Massachusetts, North Carolina, New Hampshire, and New York— included prohibitions against monopolies in their proposed bills of rights when ratifying the Constitution" and "many states included such provisions in their own constitutions."¹⁰

Years later, the Fourteenth Amendment's Privileges or Immunities clause was created, which "was intended to protect, among other things, the traditional right to earn a living free from unreasonable interference."¹¹ This clause was largely in response to the occupational licensing laws enacted after the Civil War during Reconstruction; those licensing laws were meant to exclude freed slaves from earning a living and owning property.¹² The principle author of the Fourteenth Amendment's Privileges or Immunities clause, John Bingham, explained that the clause was meant to protect in part "the liberty . . . to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil."¹³

This active protection of economic liberties was greatly damaged at the turn of the century due to an influx of cheap labor from mass immigration to the United States; politicians began to enact legislation that "promote[d] the self-interested economic agenda of the politically powerful establishment at the expense of the politically disenfranchised, including Irish immigrants, European Jews, Catholics, Asians, African-Americans, and as increasing numbers of them began leaving the home and entering the workforce, women."¹⁴ Conceptually, the idea is simple: at

⁸ See *id.* at 25. Sandefur emphasizes one of Smith's most famous quotes on this topic: "[c]onsumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer." *Id.* In order to encourage wealth, governments needed to encourage competition and the quality products that resulted from a marketplace untainted by a crony capitalist society. *Id.*

⁹ See *id.* at 30 (quoting *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837)).

¹⁰ Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J. L. & LIBERTY 898, 901 (2005).

¹¹ See SANDEFUR, *supra* note 6, at 40.

¹² *Id.*

¹³ *Id.* at 41. Another representative at that time remarked:

[H]as no every person a right, to carry on his own occupation, to secure the fruits of his own industry, and appropriate them as best suits himself, as long as it is a legitimate exercise of this right and not vicious in itself, or against public policy, or morally wrong, or against the natural rights of others?

Id. More modernly, Clint Bolick explained that when it comes to the Fourteenth Amendment and the Privileges or Immunities clause, "any believer in original intent who devotes even the most cursory attention to the legislative history and to the problem Congress sought to correct will conclude that Congress unambiguously meant to protect economic liberty against excessive state regulation." BOLICK, *supra* note 5, at 100.

¹⁴ See Neily, *supra* note 10, at 901. Politicians would mask discriminatory legislation under the guise of protecting health and safety. *Id.* at 901–02. This was seen everywhere from, New York, where it was illegal to roll cigars in tenement houses (where immigrants lived), to many California cities, where "forbidding the operation of wooden laundries were supposedly enacted to reduce the risk of fire." *Id.* at 902. But actually, the effect "victimize[d] Chinese immigrants who, as it so happened,

that time businesses and workers worried that they would lose an advantage in the marketplace when new, cheaper labor arrived. Though “licensing laws, which limit[ed] economic opportunity, were originally allowed insofar as they protected the public health and safety,” unfortunately, “as economists predicted, [those laws] bec[a]me perverted into a tool for obstructing competition.”¹⁵

Courts at the turn of the century did not strike down every example of occupational licensing schemes but instead, “judges struggled mightily to balance the legitimate interests of government in serving genuine public purposes with the widespread and historically indisputable tendency of politicians to shamelessly sell their occupational licensing power to the highest-bidding special interests.”¹⁶ But amid the balancing tests, the Court never questioned the *existence* of the right to earn a living, and there has “never been any doubt at the Supreme Court about whether the Constitution protects the right of citizens to earn a living in the occupation of their choice.”¹⁷

Arguably the biggest blow to economic liberty was the *Slaughter-House Cases*,¹⁸ in which the Supreme Court’s five to four decision “effectively eliminated the [privileges or immunities] clause as a meaningful constitutional protection and ensured that, except where other constitutional provisions applied, states would have the power to create monopolies and violate the economic freedom of entrepreneurs without being limited by federal courts.”¹⁹ Many

tended to own wooden laundries while white-owned laundries were generally made of brick or stone.”
Id.

¹⁵ Timothy Sandefur, *Is Economic Exclusion A Legitimate State Interest? Four Recent Cases Test the Boundaries*, 14 WM. & MARY BILL RTS. J. 1023, 1028 (2006).

¹⁶ See Neily, *supra* note 10, at 902.

¹⁷ *Id.* at 904.

¹⁸ *Slaughter-House Cases*, 83 U.S. 36 (1873). As Timothy Sandefur describes this case:

[B]egan in 1869 when the owners of the Crescent City Livestock Landing and Slaughtering Company bribed the Louisiana legislature into passing a law that required all butchers in the New Orleans area to do their butchering at a single slaughterhouse—one owned, of course, by the Crescent City Company. That meant ruin for dozens if not hundreds of small, private butcher shops, which would now be required to slaughter their livestock at the Crescent City abattoir. Those butchers filed lawsuits, arguing that the new requirement deprived them of their common-law right to earn a living—a right that was among the ‘privileges or immunities’ of citizenship, which the state could not abridge. The state argued that the law was intended simply to protect the public health and safety, noting that many butcher shops were unsanitary affairs. Requiring that butchering be done at a single location would protect the public from the threat of disease. But this theory had one obvious flaw: if the law had been intended as a sanitary measure, why had it not regulated the conditions of those butcher shops? Instead, the law merely granted an exclusive economic privilege to a single private company.

SANDEFUR, *supra* note 6, at 41–42.

¹⁹ *Id.* at 41–43. This was an abhorrent decision to Justice Stephen J. Field who believed the:

[A]mendment was intended to incorporate, among other things, the common-law right to earn a living – what he called ‘the distinguish privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition.’

Id. at 43.

advocates of economic freedom argue that the Court “should have recognized that the rights guaranteed by the privileges or immunities clause protect all citizens against state governments.”²⁰ At least one scholar has described this case as the time when the Court “simply threw in the towel and declared the federal judiciary to be out of the business of subjecting economic regulations to any meaningful level of scrutiny.”²¹

Though the Commerce Clause and the Privileges or Immunities clause were meant to “protect citizens against interstate trade barriers,” since *Slaughter-House* the Fourteenth Amendment “is not sufficiently specific to curtail overly protectionist trade barriers within a state.”²² Later, Jim Crow era protectionist occupational laws were designed to keep African-Americans from earning an honest living. Sadly, those who sought to contest those laws as unconstitutional “were deprived by *Slaughter-House* of their strongest argument, freedom of contract.”²³ Today, some argue that economic liberty is not a fundamental civil right at all, but even the court in *Slaughter-House* agreed unanimously that it is.²⁴ There, the Court “did not disagree that [economic liberty] is a fundamental right,” but rather whether “that right was protected against abridgement by the states under the Fourteenth Amendment.”²⁵ Though *Slaughter-House* is infamous for damaging the right to earn a living, several other cases since then have been notably destructive to economic freedom as well.²⁶

²⁰ See CLINT BOLICK, *DEATH GRIP: LOOSENING THE LAW’S STRANGLEHOLD OVER ECONOMIC LIBERTY* 22 (Hoover Institution Press 2011) [hereinafter *DEATH GRIP*].

²¹ See Neily, *supra* note 10, at 903.

²² See BOLICK, *supra* note 5, at 109.

²³ *Id.* at 101. Instead, the plaintiffs were left to challenge the laws on equal protection grounds. *Id.* Some of those protectionist laws survive today or until relatively recently. *Id.* One example was the story of Ego Brown whose shoeshine business was shutdown in Washington D.C. because of an old law that “forbade ‘bootblacks’” from shining shoes on the street. *Id.* at 104. Fortunately, this was struck down as a “violation of the due process clause of the Fifth Amendment” and it even failed the rational basis test for not being “both conceivable and rational.” *Id.* at 105 (quoting *Brown v. Barry*, 710 F. Supp. 352, 355 (D.D.C. 1989)). Clark Neily points out another example of how restrictive state licensing schemes negatively affected blacks in America:

[S]o-called “emigrant agents,” who traveled around the South encouraging newly freed African-Americans to move west to work at understaffed cotton plantations in Mississippi and Texas, were subjected to exorbitant “registration fees” and occupational taxes—not to thwart the emigration of cheap labor, of course, but simply to ensure proper oversight and regulation of their activities. More blatant was the enactment of “Black Codes,” many of which contained ostensibly race-neutral provisions such as curfew laws that were, in application, clearly designed to prevent African-Americans from exercising their hard-won economic liberties.

Neily, *supra* note 10, at 902. See also *DEATH GRIP*, *supra* note 20, at 32–33.

²⁴ *Id.* at 43.

²⁵ *Id.* at 35.

²⁶ See *id.* at 9–11. One of these cases includes a 1955 case in which “the court sustained a statute prohibiting opticians from duplicating old or broken eyeglass lenses, or form fitting old lenses into new frames, without a prescription from a licensed optometrist.” *Id.* Another case that damaged liberty took place in 1976, in which the Supreme Court upheld a law that prohibited hot dog pushcarts in New Orleans—except for two carts that were “grandfathered” in. *Id.* In a 1993 case, the Supreme Court set forth “extreme deference to administrative discretion in a set of rules implementing the rational basis standard.” *Id.* This deference became an example of “judicial abdication” where courts would “blindingly defer to legislative decision-making.” *Id.* In all three cases, the court deferred to the legislature instead of enforcing workers’ economic rights. *Id.*

Since *Slaughter-House*, at best, governments have used their power to regulate when it was absolutely necessary to protect the health and safety of the general welfare; at worst, they have used their power to “insulate one business from competition by others.”²⁷ This is an attractive plan for many businesses that have a lot to gain from government protection. Protected companies may “invest a great deal of time and money in efforts to influence [government] power in their favor” because they profit by keeping other companies out of the marketplace—all without the “burden” of competing fairly with better quality or more cost efficient products.²⁸ Protected companies can effectively use the government to “illegaliz[e] their competition.”²⁹ Sometimes state regulatory boards even enact grandfather clauses which “exempt[] existing works from the testing requirements.”³⁰ This process hurts new and rising entrepreneurs, who simply want to start their businesses without unreasonable interference, and consumers, who want to buy quality goods at low prices.

III. *CRAIGMILES V. GILES*: PROTECTIONIST LICENSING REGULATIONS FAIL

The funeral industry often provides examples of such protected companies. In the 2002 *Craigmiles v. Giles* case, the Sixth Circuit decided the requirement that one must be a licensed funeral director simply to sell caskets was “designed only for the economic protection of funeral home operators” and “not even rationally related to a legitimate governmental purpose.”³¹

In *Craigmiles*, proprietors of two independent casket stores challenged a provision of the Tennessee Funeral Directors and Embalmers Act (FDEA) that “forbid[] anyone from selling caskets without being licensed by the state as a ‘funeral director.’”³² Rev. Nathaniel Craigmiles was one of those proprietors; he went into the business because he was “incensed over the exorbitant prices his congregants were forced to pay by funeral homes for caskets.”³³ The process by which those interested in the profession became funeral directors in Tennessee, required that they undergo “two years of education and training,” very little of which “pertain[ed] to casket design or selection.”³⁴ For this reason, the owners of the casket stores argued that the FDEA violated “both the Due Process and Equal Protection clauses of the Fourteenth Amendment.”³⁵

The history of the Tennessee FDEA began in 1951 when the funeral licensing legislation was originally enacted.³⁶ At that time, the definition of “funeral directing” was “limited to the arranging of funeral ceremonies, burial,

²⁷ See SANDEFUR, *supra* note 6, at 141.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Simon, *supra* note 2.

³¹ *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002).

³² *Id.* at 222.

³³ See BOLICK, *supra* note 5, at 106.

³⁴ See *Craigmiles*, 312 F.3d at 222.

³⁵ *Id.*

³⁶ *Id.*

cremation, and embalming” and did not include the sale of caskets.³⁷ This changed in 1972 when the definition was expanded by the Tennessee General Assembly to include the “making of arrangements to provide for funeral services and/or the selling of funeral merchandise, and/or the making of financial arrangements for the rendering of the services, and/or the sale of such merchandise.”³⁸

This change forced entrepreneurs, who were exclusively trying to sell caskets and funeral merchandise at competitive rates, to undergo rigorous and irrelevant training. The course schedule of the training required that applicants “complete[d] *either* one year of course work at an accredited mortuary school *and* then a one-year apprenticeship with a licensed funeral director or a two-year apprenticeship,” followed by taking and passing the state’s Funeral Arts Examination.³⁹ At the only school in Tennessee that offered the required coursework, Gupton College, students testified that “casket and urn issues constituted no more than five percent of the Gupton curriculum.”⁴⁰

The plaintiffs in this case operated stores that sold caskets, urns, grave markers, monuments, flower holders, and other similar merchandise items.⁴¹ Though the plaintiffs *did not* engage in “embalming or arranging of funeral services, cremations, or burials,” the Board of Funeral Directors and Embalmers issued a cease and desist order to prevent the plaintiffs from selling funeral merchandise including caskets.⁴² The Board said Craigmiles and the other plaintiffs in the case were violating the FDEA for operating without a licensed funeral director.⁴³ “Reverend Craigmiles sold the exact same caskets as the funeral homes”; the only difference was, he sold them “at a much lower price.”⁴⁴

Statutes regulating fundamental rights are subject to a heightened standard of review referred to as strict scrutiny, where “the regulation must serve a compelling state purpose and be narrowly tailored to achieving that purpose.”⁴⁵ Other rights are subject to rational basis review, where there is a “strong presumption of validity,” requiring only that “there is any reasonably conceivable state of facts that could provide a rational basis.”⁴⁶

The Sixth Circuit noted that “even foolish and misdirected provisions are generally valid if subject only to rational basis review.”⁴⁷ Moreover, those seeking

³⁷ *Id.*

³⁸ *Id.* “This specific action of requiring licensure . . . appears directed at protecting licensed funeral directors from retail price competition.” *Id.* at 227. Writing for the Sixth Circuit, Judge Boggs noted the obvious protectionist motives of the altered definition: “Tennessee’s justifications for the 1972 amendment come close to striking us with ‘the force of a five-week-old, unrefrigerated dead fish.’” *Id.* at 222. See TENN. CODE ANN. § 62-5-101(a)(3)(A)(ii) (2011).

³⁹ *Craigmiles*, 312 F.3d at 222.

⁴⁰ *Id.*

⁴¹ See *id.* at 223.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See BOLICK, *supra* note 5, at 108.

⁴⁵ See *Craigmiles*, 312 F.3d at 223.

⁴⁶ *Id.* at 224.

⁴⁷ *Id.* at 223–24.

to invalidate a statute using rational basis review are faced with the daunting task of “negativ[ing] every conceivable basis that might support it.”⁴⁸ In spite of the very low bar a regulation must pass to be upheld under the rational basis test, the court found the licensing requirement was only to protect already operating funeral homes from competition, which the Sixth Circuit believed was not a valid state interest. It cited cases proving that courts have “repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose.”⁴⁹ The Sixth Circuit explained that keeping unlicensed casket retailers out of the market resulted in higher prices for consumers because “funeral home operators sell caskets at prices substantially over total costs” and benefit from minimal competition.⁵⁰

Though the Board of Funeral Directors and Embalmers argued that the occupational license requirement was essential to promote health, safety, and consumer protection, the Sixth Circuit disagreed. The Board claimed that the license requirement “insure[d] that those who handle[d] dead bodies may dispose of them safely and prevent the spread of communicable diseases.”⁵¹ However, Craigmiles and his fellow plaintiffs neither handled dead bodies nor engaged in the embalming process; they were simply trying to earn a living by selling caskets and funeral merchandise to eager customers.⁵² In nearly every case, the plaintiffs simply “deliver[ed] the purchased casket to the funeral home.”⁵³ Though a leaking casket could pose health and safety risks by contaminating the groundwater with bacteria, caskets themselves are not regulated by Tennessee law.⁵⁴ In fact, Tennessee “does not require that any particular type of casket, or any casket at all, be used at burial.”⁵⁵ Caskets sold by licensed funeral directors were in no way “systematically more protective than those sold by independent casket retailers”; instead, they were simply “systematically more expensive.”⁵⁶

The Sixth Circuit explained how the market would lead to safer, better quality caskets than the protectionist regulation ever could. Generally speaking, more protective caskets were more expensive, but “nothing prevent[ed] licensed funeral directors from selling shoddy caskets at high prices.”⁵⁷ Increased competition would result in more affordable prices, bringing down even the price

⁴⁸ *Id.* at 224.

⁴⁹ *Id.*; see *City of Phila. v. New Jersey*, 437 U.S. 617, 624 (1978) (“Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.”).

⁵⁰ See *Craigmiles*, 312 F.3d at 224. The Sixth Circuit noted that the district court found that “funeral home operators generally mark up the price of caskets 250 to 600 percent [sic], whereas casket retailers sell caskets at much smaller margins.” *Id.*

⁵¹ *Id.* at 225.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* Judge Boggs notes, “[i]t is perfectly legal in Tennessee for loved-ones to provide a homemade casket, for friends to give (but not to sell) a casket for use in burial, or for a body to be buried in no container at all. This lack of regulation of body disposal is no different for those who have died from contagious diseases.” *Id.*

⁵⁶ *Id.* at 225–26.

⁵⁷ *Id.* at 226.

of the highest quality caskets, enabling more people to purchase them.⁵⁸ The court found that there was *no rational relation* between the licensing requirement and public safety or consumer protection.⁵⁹ Many of the misrepresentations and much of the fraud that the Board claimed it was trying to prevent via the licensing scheme were “generally applicable to retailers already, enforced by civil and criminal sanctions.”⁶⁰ Judge Boggs correctly explained, “the legislature could have directly required casket retailers to comply with [particular standards] without imposing the licensure requirements.”⁶¹

The Sixth Circuit found the Board’s protectionist licensing regulation “illegitimate” and a “significant barrier to competition in the casket market”; ultimately the regulation “harm[ed] consumers in their pocketbooks” and did not survive even under the overwhelmingly deferential standards of the rational basis test.⁶² Under this analysis, licensing schemes that only provide benefits to already existing businesses with political clout (and hurt consumers in the process) are not valid regulations. In essence, these regulations are state sanctioned cartels, which impose barriers to entry and keep prices artificially high. The Sixth Circuit’s decision is respectful of both entrepreneurs’ and consumers’ economic liberty. It acknowledges that repercussions for fraud and the promotion of consumer protection already exist outside of restrictive licensing schemes. But, unfortunately, this well-reasoned legal analysis has not been adopted nationwide.

IV. *POWERS V. HARRIS*, PROTECTIONIST LICENSING LAWS PREVAIL

Six days after *Craigmiles* was decided, an Oklahoma district court, having heard a factually similar case, arrived at a vastly different result, only to be affirmed by the Tenth Circuit two years later. That Oklahoma case was *Powers v. Harris*,⁶³ the leading case opposed to the Sixth Circuit’s opinion in *Craigmiles*. Thus, a circuit split was created that carries broad and dangerous implications for economic liberty.

Similar to the *Craigmiles* case, *Powers* involved a statute that sought to limit the sale of funeral-service merchandise,⁶⁴ including caskets. Anyone interested in

⁵⁸ *Id.*

⁵⁹ *Id.* Judge Boggs noted that, “[e]ven if casket selection has an effect on public health and safety, restricting the retailing of caskets to licensed funeral directors bears no rational relationship to managing that effect.” *Id.* The state also argued that during training, licensed funeral directors receive psychological training to help them better interact with grieving clientele, to which the court responded: “[S]urvivors must deal with a panoply of vendors in order to make funeral arrangements, from churches to food vendors for a wake, none of whom is required to have this psychological training. This justification is very weak, indeed.” *Id.* at 228.

⁶⁰ *Id.* at 226.

⁶¹ *Id.* at 228.

⁶² *Id.* Judge Boggs wrote, “we invalidate only the General Assembly’s naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers. This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review.” *Id.* at 229.

⁶³ *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004).

⁶⁴ In Oklahoma the definition of funeral service merchandise was expanded to “include[e], but not [be] limited to, the sale of burial supplies and equipment, but excluding the sale by a cemetery of lands or interests therein, services incidental thereto, markers, memorials, monuments, equipment, crypts,

selling these products is forced by statute to “be a licensed funeral director operating out of a funeral establishment.”⁶⁵ The Oklahoma statute detailing this requirement is called the Oklahoma Funeral Services Licensing Act (FSLA).⁶⁶ Curiously, the FSLA does not extend its licensing requirement to retailers who “sell other funeral-related merchandise (e.g., urns, grave markers, monuments, clothing, and flowers).”⁶⁷ Another difference between the Oklahoma and Tennessee statutes, was that in Oklahoma, the casket-selling regulation distinguished time of need sales from pre-paid sales; this permitted salespeople to sell caskets “pre-paid without a license so long as that person is acting as an agent of a licensed funeral director.”⁶⁸ The FSLA also only applied intrastate, meaning an unlicensed person could sell a casket out of state, but not within the state, if the casket was a time of need sale and not paid for in advance.⁶⁹

Like the Tennessee regulation, in order to obtain a funeral director’s license in Oklahoma, one had to go through rigorous, expensive, and time-consuming training.⁷⁰ Applicants for funeral director’s licenses were required to “complete both sixty credit hours of specified undergraduate training and a one-year apprenticeship.”⁷¹ During the apprenticeship applicants needed to “embalm twenty-five bodies.”⁷² In addition to these requirements, applicants also had to “pass both a subject-matter and an Oklahoma law exam.”⁷³ The district court noted in this case that “less than five percent of the education and training requirements necessary for licensure in Oklahoma pertain[ed] directly to any knowledge or skills necessary to sell caskets.”⁷⁴ Oddly, the Oklahoma State Board of Embalmers and Funeral Directors had deemed its excessive training regimen and state examination insufficient to sell a casket in-state at the time of someone’s death. Thus, the Oklahoma State Board required sellers of funeral merchandise to operate out of a funeral establishment. This means anyone hoping to sell caskets at the time of need must “have [had] a fixed physical location, a preparation room that meets the requirements for embalming bodies, a funeral-service merchandise-selection room with an inventory of not less than five caskets, and adequate areas for public viewing of human remains.”⁷⁵

Kim Powers and Dennis Bridges owned an online store called Memorial Concepts Online, Inc., through which they sold funeral merchandise. Their business “offered no other death- or funeral-related services, plays no role in the

niches or outer enclosures.” OKLA. STAT. ANN. tit. 59, § 396.2 (West 2010).

⁶⁵ *Powers*, 379 F.3d at 1211.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1212.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 1213–14. The district court commented on the inefficiency and absurd demand where funeral merchandise retailers were “required to spend years of their lives equipping themselves with knowledge and training which is not directly relevant to selling caskets.” *Id.* at 1214.

⁷⁵ *Id.* at 1212–13.

disposition of human remains, and is not licensed in Oklahoma as a funeral establishment.”⁷⁶ Neither Powers nor Bridges had the requisite license to sell caskets; plus, because they sold their merchandise online, the business lacked the “fixed physical location” mentioned above. But those two were not strangers to the funeral business. Powers actually had “many years of experience selling caskets on a pre-need basis as the agent of a licensed Oklahoma funeral director,” and Bridges was licensed in Tennessee for over twenty years; objectively, the two plaintiffs were *overqualified* to sell caskets, which at their basic level, are simply boxes.⁷⁷

The district court opined in its decision that this licensing scheme showed “intent to forego laissez faire treatment of those sales and services when provided in [Oklahoma].”⁷⁸ The plaintiffs in this case wanted to sell caskets in-state to consumers at the time of their loved ones’ deaths, but feared legal action if they were to provide that service. The plaintiffs brought a declaratory judgment action, asserting that the FSLA violated the Privileges or Immunities, Due Process, and Equal Protection clauses of the Fourteenth Amendment.⁷⁹

The Board argued that the licensing regulation was necessary to protect casket purchasers because of the great potential for emotional and psychological pain, making them “a particularly vulnerable group.”⁸⁰ Like the *Craigmiles* case, the level of scrutiny for this licensing regulation was the rational basis test. Even though the Board admitted that its licensing scheme did “not perfectly match its asserted consumer-protection goal,” the Board also argued that it was close enough to be upheld; unfortunately the Tenth Circuit agreed.⁸¹ The circuit court explained that it must “consider every plausible legitimate state interest that might support the FSLA”—even at the expense of the right to earn a living and economic freedom.⁸²

As in *Craigmiles*, the court spoke of the deferential nature of the rational basis test. Citing a 1938 Supreme Court case,⁸³ it argued that when legislative judgment is challenged on the basis of equal protection and the “issue is debatable, the decision of the legislature must be upheld if ‘any state of facts either known or which could reasonably be assumed affords support for it.’”⁸⁴ The Tenth Circuit opined that questioning the legislature’s regulations or suggesting alternative

⁷⁶ *Id.* at 1213.

⁷⁷ *Id.*

⁷⁸ *Id.* The district court also noted, “very little specialized knowledge is required to sell caskets. Most consumers select caskets based on price and style. Any information a generally educated person needs to know about caskets in order to sell them can be acquired on the job.” *Id.*

⁷⁹ *Id.* at 1214.

⁸⁰ *Id.* at 1215.

⁸¹ *Id.* at 1216. The Board claimed its regulation was “not ‘wholly irrelevant’ because ‘[e]very witness who testified on the subject agreed that consumers purchasing time-of-need caskets may be especially vulnerable to overreaching sales tactics because of grief and other emotions which arise as the result of the death of the person for whom the consumer is purchasing a casket.’” *Id.*

⁸² *Id.* at 1218.

⁸³ See *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938).

⁸⁴ *Powers*, 379 F.3d at 1216–17.

solutions were not permitted under a rational basis test analysis.⁸⁵ It looked to cases explaining that rational basis review upholds laws even though they “may not succeed in bringing about the result it seeks to accomplish” or because “no empirical evidence supports the assumptions underlying the legislative choice.”⁸⁶ The bar for upholding laws under this test was and still is incredibly low; in many circumstances the rational basis test requires that the party unlucky enough to challenge the regulation must “negative every conceivable basis which might support it.”⁸⁷

The Tenth Circuit explained that when scrutinizing regulations there is a strong presumption of validity. This presumption is so strong that it kills virtually all arguments of even illegitimate intended purposes, such as protectionism. This reasoning begs the question: why then, do courts not automatically dismiss every challenge to a regulatory scheme? The Tenth Circuit defended its decision by listing a parade of horrors that might occur if courts decided to intervene when legislatures behaved badly. It wanted to avoid “paralyz[ing] state governments . . . constantly asking them to ‘try again’” or “substitut[ing] [its] view of the public good or the general welfare for that chosen by the states” when the “definition of public good changes with the political winds.”⁸⁸ But the Tenth Circuit ignored the fact that established businesses lobby politicians to shut competition out; those fickle political winds the court alluded to will leave honest businesspeople— people trying to fairly provide goods and services to the public—out of luck. The right to earn a living is just that: a right. Like other rights, courts must protect it.⁸⁹

In spite of the Tenth Circuit’s reluctance to interfere with legislative intent, its opinion seemed focused on the “wide-ranging” externalities that its decision would have on policy: the circuit court worried that if they had overturned the statute, “every piece of legislation in six states aiming to protect or favor one industry or business over another in the hopes of luring jobs to that state would be in danger.”⁹⁰ In other words, the circuit court would be responsible for protecting the entrepreneur’s right to earn a living and harming blatant occupational protectionism not just in the case at hand, but in the several states that constitute the Tenth Circuit. The Tenth Circuit also opined that the plaintiffs “must turn to the Oklahoma electorate” to abolish such regulations; but when pre-existing businesses support politicians in order to construct large barriers to entry in their occupations, it is for the *courts*, not the electorate, to protect minority rights.⁹¹

⁸⁵ *Id.* at 1217.

⁸⁶ *Id.* See *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 50 (1966); see also *Vance v. Bradley*, 440 U.S. 93, 110–11 (1979).

⁸⁷ *Powers*, 379 F.3d at 1217 (quoting *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)).

⁸⁸ *Id.* at 1218.

⁸⁹ Amici in this case advocated for the plaintiffs and others like them, urging the Tenth Circuit to see that economic protectionism was not a legitimate state interest to be supported by licensing schemes or otherwise. Amicus curiae briefs were filed by: John Eastman, The Claremont Institute Center for Constitutional Jurisprudence, Orange, CA; Deborah J. La Fetra and Timothy Sandefur, Pacific Legal Foundation, Sacramento, CA in conjunction with Mark K. Moller, Cato Institute, Washington D.C. *Id.* at 1211.

⁹⁰ *Id.* at 1222.

⁹¹ *Id.*; see generally BOLICK, *supra* note 5.

V. HOW THESE CASES AFFECT ECONOMIC LIBERTY AND WHY IT MATTERS

The funeral industry affects all of us at some point or another. Funerals are commonly the third highest cost a family ever accrues—usually behind a family’s home and car.⁹² Nationally, between 22,000 and 23,000 funeral establishments make arrangements for “approximately two million people each year.”⁹³ In 2007, the average cost of a funeral was \$7,323; caskets often account for one-third to one-half of that cost.⁹⁴

Although licensing restrictions in the funeral industry affect most Americans as consumers, the scope of this circuit split reaches far beyond that, into nearly every existing industry. When businesses lobby governments to enact legislation, they establish large, often insurmountable barriers to competition. Unsurprisingly, many different kinds of businesses want to benefit from government favors—and legislatures are often happy to oblige. The benefits of licensing are “heavily concentrated in current practitioners and the liabilities are dispersed among potential new practitioners and consumers,” and those “currently licensed have a much stronger incentive to lobby for licensing restrictions than potential practitioners and consumers have to lobby against them.”⁹⁵

Several non-profit, public interest law firms and think tanks specialize in cases where the right to earn a living is threatened and advocate for entrepreneurs. The Pacific Legal Foundation (PLF) and the Institute for Justice (IJ) are two of those public interest law firms. Both firms have unearthed many industries where protectionist occupational licensing requirements are the norm.

For example, Missouri is one of many states that has enacted restrictions for people in the moving industry.⁹⁶ In one of PLF’s current cases, a man who has been operating his moving company in St. Louis, Missouri for over twenty years was notified that he needed a special license called a certificate of necessity to stay in business.⁹⁷ The statute at issue in that case states: “the Department of Transportation shall notify existing moving companies, and permit them to intervene in the application process and object to a new application on the basis that a new company is ‘inconsistent with the public convenience and necessity.’”⁹⁸ In other words, this man who has been in business for two decades, with an Angie’s List quality rating,⁹⁹ is forced by law to ask his competitors whether or not he is allowed to operate.¹⁰⁰ Naturally, several existing companies objected to his

⁹² Complaint at 4, *St. Joseph Abbey v. Castille*, 2010 U.S. Dist. Ct. Pleadings 2717 (E.D. La. Aug. 12, 2010) (No. 2:10-cv-02717).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Anthony B. Sanders, *Exhumation Through Burial: How Challenging Casket Regulations Helped Unearth Economic Substantive Due Process in *Craigiles v. Giles**, 88 MINN. L. REV. 668, 694 (2004).

⁹⁶ *Anticompetition laws collide with the Constitution: Munie v. Skouby*, PAC. LEGAL FOUND. <http://www.pacificlegal.org/page.aspx?pid=1224> (last visited Nov. 21, 2011).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ ABC QUALITY MOVERS, <http://www.abcqualitymovers.com> (last visited Feb. 20, 2011).

¹⁰⁰ *Anticompetition*, *supra* note 96.

application.¹⁰¹ These certificate of necessity laws are arguably worse than the occupational licensing restrictions at issue in the funeral cases, because “they exist for the explicit purpose of stifling competition and protecting established businesses against newcomers,” and do not even pretend to appeal to arguments of health and safety.¹⁰² PLF argues that the Missouri scheme was created “not to protect public health and safety but to protect established businesses against competition by [new] entrepreneurs” and, therefore, the statute “violates the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment.”¹⁰³

To put it another way, just imagine what would happen if a new fast food chain had to prove to McDonald’s and Burger King that another hamburger joint was *necessary* in a particular community; or if a new purse manufacturer had to ask Coach and Kate Spade for permission to make handbags. These businesses have an interest in making a profit and keeping their market shares if at all possible. If these schemes are constructed in a way that gives competitors the last word on newcomers entering a market, then those new businesses will rarely, if ever, be allowed to operate. It is just as easy as saying: no, new entrepreneur, your business isn’t necessary because we’re already here.

It is *consumers* who should decide what is necessary in the marketplace, not by lobbying the government for special favors, but instead by making choices with their individual purchasing power. Consumers are best situated to decide what products and services best suit them as individuals. Charles Wheelan, a lecturer of public policy and University of Chicago professor, sums it up well: “It’s fairly easy for you to tell whether you’ve gotten a bad haircut or not, and if quality turns out to be bad, it’s not a big social problem.”¹⁰⁴ The lasting impact of “bad” products is often miniscule, if present at all—it’s not something the legislature needs to control. Businesses and entrepreneurs are forced to take responsibility for bad products because inferior quality loses customers.

There is little evidence to support the assertion that licensing requirements ensure quality goods and services. In Alabama, which has the “strictest licensing requirements” for manicurists, it is mandatory that would-be manicurists complete “750 hours of schooling and a written and practical exam.”¹⁰⁵ According to the Alabama Board of Cosmetology, there is an average of “four public complaints a year” regarding Alabaman manicurists’ poor service.¹⁰⁶ Connecticut, on the other hand, takes a different approach and doesn’t require manicurists to have a license

¹⁰¹ *Id.*

¹⁰² Timothy Sandefur, *Government’s CON job*, PLF LIBERTY BLOG (June 27, 2011), <http://plf.typepad.com/plf/2011/06/governments-con-job.html>; see also Tim Sandefur, *CON Job: State “certificate of necessity” laws protect firms, not consumers*, REGULATION MAGAZINE, 42 (Summer 2011), <http://www.cato.org/pubs/regulation/regv34n2/regv34n2-1.pdf>.

¹⁰³ *Anticompetition*, *supra* note 96; see Timothy Sandefur, *Federal Court allows PLF’s lawsuit against Missouri mover cartel to proceed*, PLF LIBERTY BLOG (Mar. 8, 2011), <http://plf.typepad.com/plf/2011/03/federal-court-allows-plfs-lawsuit-against-missouri-mover-cartel-to-proceed.html>.

¹⁰⁴ Simon, *supra* note 2.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

at all.¹⁰⁷ Does this make a difference in number of annual complaints? Surely they must surge! To the chagrin of licensing boards, that is not the case. There is an average of only “six complaints a year to the state [of Connecticut] over the past five years” regarding manicurists there; of those six, four are usually about gift certificates that are not honored.¹⁰⁸ It is doubtful that Alabama includes a special “gift certificate course” in its mandatory curriculum.

Not moving or getting a manicure anytime soon? Imagine instead, that you want someone to fix a broken computer. In the state of Texas, computer repairmen must be licensed. This means they are “required to have a degree in criminal justice or perform a three-year apprenticeship under a licensed private investigator” simply to fix computers.¹⁰⁹ That is devastating news for computer savvy college students trying to earn a little cash. It is also frustrating news for consumers who want to hire technicians. This law increases costs to enter the profession, which increases costs for services and limits the number of technicians. How many people with the knowledge and skills to fix computers are going to spend three years learning how to become private investigators or earn degrees that have nothing to do with instructional computer repair? IJ has brought this case and it has yet to be decided.

Returning to this Comment’s opening question, how much training would you require someone to have in order to sell you flowers? Let’s say you were interested in buying flowers in Louisiana a couple of years ago. Only last year in 2010 was the Louisiana florists licensing scheme lifted by the legislature—thanks to negative press and the pressure of an upcoming IJ lawsuit.¹¹⁰ Before it was lifted, a test was administered that applicants needed to pass in order to sell floral arrangements. Each year the state would “*arbitrarily fail*[] numerous test takers” in order to control the number of florists within Louisiana—though the regulation was enacted under the guise of health and safety.¹¹¹ Today, there is still a required test but it is much more simple and would not lead to the arbitrary exclusion of florists trying to enter the market.

The lead attorney in the florist case, Tim Keller, remarked, “I can’t conceive of an occupation less in need of government regulation than floral arranging.”¹¹² IJ’s argument was similar to other legal arguments made against protectionist occupational licensing laws. Keller explained, “there is no reason to license florists because there is no risk to anyone from buying flower arrangements from unlicensed florists.”¹¹³ As in the Louisiana florist case, sometimes legislatures are persuaded to lift their protectionist bans because of public outcry.¹¹⁴

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *New Texas Law Limits Computer Repair To Licensed Private Investigators* Rife v. Tex. Private Sec. Bd., INST.FOR JUSTICE, <http://www.ij.org/economicliberty/2188> (last visited Nov. 21, 2011).

¹¹⁰ Shira Rawlinson & Tim Keller, *Institute for Justice Files New Legal Challenge Against Louisiana’s Florist Licensing Scheme*, INST. FOR JUSTICE (Mar. 4, 2010), <http://www.ij.org/about/3107>.

¹¹¹ *Id.* (emphasis added).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See also *Oregon Unfairly, and Unconstitutionally, Bars Entry to the Moving Business: Sweet v.*

As discussed throughout this comment, occupational licensing laws are often abused by legislatures in conjunction with pre-existing businesses to protect the market shares they already possess. When businesses can control who enters the market, they can reward themselves by keeping prices higher than the market would allow if others were allowed to compete. Morris Kleiner, a labor professor at the University of Minnesota, “looked at census data covering several occupations that are regulated in some states but not others, including librarians, nutritionists and respiratory therapists.”¹¹⁵ Kleiner found that “employment growth in those professions was about 20% greater, on average, in the unregulated states between 1990 and 2000.”¹¹⁶ He found in another study, that “licensed workers earn, on average, 15% more than their unlicensed counterparts in other states—a premium that may be reflected in their prices.”¹¹⁷ He also estimated that licensing laws added “at least \$116 billion a year to the cost of services” in the United States—which is “about 1% of total consumer spending.”¹¹⁸

In a February 2011 *Wall Street Journal* article, a short list was compiled of jobs that are subject to occupational licensing regulations in at least one or more states.¹¹⁹ The list was comprised of four major categories: Personal Care, Flora and Fauna, Product and Home Care, and Other.¹²⁰ Jobs listed included: wig specialists, shampoo specialists, naturopathic doctors, hearing aid dispensers, athletic trainers, nuisance control specialists, wildlife rehabilitators, dog handlers, land surveyors, appliance repair technicians, windshield installers, bedding supply dealers, computer repair technicians, handymen, locksmiths, automotive parts recyclers, private detectives, shorthand reporters, vending machine operators, student athlete agents, professional wrestlers, and tour guides.¹²¹ *The Wall Street Journal's* list is far from exhaustive. In the business climate of today, all industries are fair game to the legislatures and regulatory boards eager to impose licensing restrictions upon them.

VI. MORE ON THE RATIONAL BASIS TEST AND ECONOMIC LIBERTY

As for the rational basis test, and as the opinions in *Powers* and *Craigsmiles* make clear, there are many grounds for criticism with this notoriously low standard of review. Often, courts are reluctant to overstep their bounds and interfere with legislative intent; this was the primary reason that the Tenth Circuit in *Powers* upheld the protectionist licensing scheme before it.¹²² In these cases, courts often suggest that individuals who believe their economic rights are being violated by state occupational licensing schemes, should use the political process for

Kroger, PAC. LEGAL FOUND., <http://www.pacificlegal.org/page.aspx?pid=620> (last visited Nov. 21, 2011).

¹¹⁵ Simon, *supra* note 2.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Powers v. Harris*, 379 F.3d 1208, 1227 (10th Cir. 2004).

protection of their rights instead of the judicial system.¹²³ These courts fail to acknowledge in their opinions that “economic regulations are generally not enacted by legislatures at all but by administrative agencies not answerable to voters.”¹²⁴ If a given state regulatory board is trying to push budding start-up businesses out of the marketplace, and is also untouchable by both the judiciary and political process, that leaves very little in the way of redress for thousands of budding entrepreneurs throughout the country.

Some advocates of economic liberty and the right to earn an honest living do not inherently reject the rational basis test; rather, they call for an application where the state “articulates[s] a legitimate police-power justification, such as health or safety, and demonstrate[s] that the law actually is related in a rational way to that objective.”¹²⁵ If a law survived this application, it would be upheld. Thus, the right to earn a living would be slightly more secure because purely protectionist occupational licensing schemes would not be upheld.

Other advocates are less accepting of the test. One IJ lawyer described the test as a “sham” that is “shamelessly pro-Government” which he believes “perverts our system of justice” in application.¹²⁶ Clark Neily explained that when the Court established the test over 100 years ago, the Court created a “fictive standard of review that enables judges to speak as if the right of occupational freedom still exists, without actually having to act as though it does.”¹²⁷ Because the legislature never really has to provide the rationale for its proposed regulation, “facts tend to be relevant only insofar as they help support the challenged regulation” or government lawyers “simply make them up” to support the presumption of having a rational basis for the regulation.¹²⁸ Neily worries that this encourages witnesses to lie on the stand about the extensiveness of training required to perform a given occupation.¹²⁹ For example, in the *Powers* case, a government witness defending the casket regulation claimed under oath that sellers of caskets should know “how atomic particles interact with each other” and “how a virus reproduces itself.”¹³⁰ Additionally, the rational basis test requires judges to “assist the government in defending challenged regulations by dreaming up possible justifications of their own”—something that does not exist in American law outside of the rational basis

¹²³ See *supra* Parts III, IV.

¹²⁴ See SANDEFUR, *supra* note 6, at 140.

¹²⁵ See BOLICK, *supra* note 5.

¹²⁶ See Neily, *supra* note 10, at 898–900. Neily explains that:

Because the rational basis test is so shamelessly pro-government, to have even the slightest chance of prevailing, IJ must start with laws that are so outrageous, so palpably unjust, that it is impossible to take seriously any assertion that they might plausibly have been enacted to promote genuine public policy objectives.

Id.

¹²⁷ *Id.* at 900.

¹²⁸ *Id.* at 905. Neily quotes the Second Circuit’s decision in *Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001): “[T]he Government is under no obligation to produce evidence or empirical data to sustain the rationality of a statutory classification and can base its statutes on rational speculation.” *Id.*

¹²⁹ See *id.* at 907.

¹³⁰ See *id.* (quoting Deposition of Kenneth Curl, Ph.D., *Powers v. Harris*, No. CIV-01-445 (W.D. Okla. July 17, 2002)).

standard.¹³¹

Opponents of the rational basis standard note that judges' presumptive deference to enacted regulations, combined with their great contributions to the government's side of the argument, produce a variety of negative, unintended consequences. Some argue that judges witness real fraud and corruption within the political process and, because of the rational basis test, are expected to look the other way.¹³² This puts plaintiffs in very tough situations. Worse, when citizens want to assert their basic right to earn a living, under the rational basis test they are charged with the discouraging and virtually impossible task of "'negating' every conceivable justification that might be advanced in support of a law."¹³³ So not only are aggrieved plaintiffs worried about being unable to support their families by doing honest work, but they must also worry about tackling every rationale for a regulation; this is not just what is stated in the regulation, or what is stated in the legislative records, but also whatever the judge may think of while on the bench. This is an overwhelming, discouraging, and impossible task.

When it comes to combating the rational basis test, there is also the option of elevating the right to earn a living to its rightful status of other "fundamental" rights. This would subject regulations, which restrict the right to earn a living, to a higher level of scrutiny. If the right to earn a living is afforded review under intermediate or strict scrutiny, this would be unquestionably more protective of economic liberty (though admittedly that is a tall order for the time being). Unless something changes, there is no question that the "rational basis test problem" is a massive hurdle that must be overcome when dealing with cases involving protectionist occupational licensing regulations and economic liberty.

VII. A NEW FUNERAL CASE EMERGES AND WHAT THE FUTURE HOLDS

It is difficult to predict what the next stop on the road of protectionist licensing schemes will be. Some economic liberty advocates note with frustration that when "government destroys a person's livelihood or business, even for the most nefarious of purposes, courts typically will stand idly by."¹³⁴ But the court in

¹³¹ See Neily, *supra* note 10, at 908.

¹³² *Id.* at 909. Neily quotes the deposition of a key witness and defendant in the Louisiana Florist case, in which the defendant (a member of the legislature) admitted "his decision was based purely on an agreement he had made with licensed florists when he ran for office in 1980 that he would support whatever they wanted by way of licensing." Deposition of Bob Odom at 40, 56, *Meadows v. Odom*, No. CA 03-960-B-M2, 2004 WL 3576817 (M.D. La. July 9, 2004).

¹³³ See Neily, *supra* note 10, at 910. Neily continues by saying:

[H]aving to anticipate every single argument or justification that might ever be dreamed up--not only by their opponents, but by judges, law clerks, the media, passing strangers, Ouija boards, tic-tac-toe playing chickens, pretty much anyone or anything--in defense of the challenged law and create a fact record in the trial court so comprehensive and robust that it can prevail against literally any set of facts--real or imagined--and any argument that might ever be deployed against it.

Id.

¹³⁴ See BOLICK, *supra* note 5, at 98.

Craigmiles and others like it,¹³⁵ put forward opinions that seem promising for the future of economic liberty in the face of purely protectionist licensing laws. Though “[t]he Supreme Court has not struck down a law on economic substantive due process grounds since 1936,” the lower federal courts and state courts are increasingly “overturn[ing] decisions made by state and local governments on the grounds that they violate economic substantive due process.”¹³⁶

Recently, a new case has emerged and is receiving a lot of attention for addressing these questions (and once again in the funeral industry). The case was filed in 2010 by the IJ, on behalf of its client Saint Joseph Abbey of St. Benedict, Louisiana; a group of monks.¹³⁷ Those Benedictine monks have lived and worked in their Abbey for over one hundred years.¹³⁸ Originally, the monks had “farmed and harvested timber on their land,” but in the 1990s their advisors told them to find another way to support their Order.¹³⁹ The monks made caskets for decades for their small abbey community and eventually began using the caskets to provide income for their monastery as requests for their finely crafted products increased.¹⁴⁰ In 2007, the abbey “invested roughly \$100,000 in a woodshop to sell the simple caskets it had always made for its own monks.”¹⁴¹ Monks in other states such as Indiana, Iowa, Illinois, and Minnesota have similar workshops in which they make caskets to pay their respective monasteries’ bills.¹⁴² Unfortunately for the Louisianan monks, when a local Catholic newspaper publicized their casket-making business, the Louisiana State Board of Embalmers and Funeral Directors “slapped the abbey with a cease-and-desist order.”¹⁴³

Generally, the facts are reminiscent of *Craigmiles* and *Powers*, where a group of individuals are under attack for selling “funeral merchandise” without the appropriate state issued license. The Louisiana State Board of Embalmers and Funeral Directors, which is “dominated by industry members,” is enforcing a

¹³⁵ See *Merrifield v. Lockyer*, 547 F.3d 978, 992 (9th Cir. 2008), where Judge O’Scannlain of the Ninth Circuit ruled that a protectionist occupational licensing law in the pesticide industry was in violation of the equal protection clause. *Id.* This case involved a man who was required to have an occupational license to use non-pesticide controllers that targeted rodents and pigeons. *Id.* at 980. This regulation had been established by the California Structural Pest Control Board and because an exemption to the regulation was implemented under an incredibly weak rationale, it failed even the rational basis test. *Id.* at 991. The Ninth Circuit agreed with many aspects of the Sixth Circuit’s *Craigmiles* decision and struck down the law. *Id.* at 992.

¹³⁶ Sanders, *supra* note 95.

¹³⁷ *Free the Monks and Free Enterprise: Challenging Louisiana’s Casket Cartel*, INST. FOR JUSTICE. <http://www.ij.org/about/3457> (last viewed Feb. 20, 2011).

¹³⁸ *Id.*

¹³⁹ Complaint for Declaratory and Injunctive Relief at 5, *St. Joseph Abbey v. Castille*, No. 10-2717, 2011 WL 2973566 (E.D. La. July 21, 2011).

¹⁴⁰ *Free the Monks*, *supra* note 137.

¹⁴¹ Jennifer Levitz, *Coffins Made With Brotherly Love Have Undertakers Throwing Dirt*, WALL ST. J. (Aug. 25, 2010), <http://online.wsj.com/article/SB10001424052748703846604575448083489852328.html>.

¹⁴² *Id.* The monks in Iowa will even paint the Notre Dame logo onto the casket if the customer wishes. *Id.* Other monks across the country have helped pay the bills by starting a variety of small businesses that sell everything from dog biscuits to printer toner and peanut brittle. See also Complaint, *supra* note 139, at 6.

¹⁴³ Levitz, *supra* note 141.

regulation that could jail the monks for up to 180 days.¹⁴⁴ According to the initial subpoena that the monks received, “a party can be subject to fines between \$500 and \$2,500 for each casket illegally sold.”¹⁴⁵ What real harm do the monks’ handcrafted caskets cause? One funeral home director down the road from the abbey complained that the monks were, “cutting into [his] profit.”¹⁴⁶ This is a curious complaint considering that they only sold sixty caskets since 2007, in a state that has around 40,000 deaths annually.¹⁴⁷ However, this perceived economic harm seems to be enough for the State Board of Embalmers and Funeral Directors to try and stop the monks from providing their high-quality goods to consumers.

It is not uncommon for state regulatory boards to wedge themselves between aggrieved parties and the legislature that grants businesses special favors. The monks sought help from their local state legislature “who agreed in May 2008 to introduce a bill amending the law to permit casket sales by non-licensed funeral directors.”¹⁴⁸ The bill went to the House Commerce Committee and thereafter “funeral-industry lobbyist opposed the bill” and “several funeral directors showed up at the hearing to register their disapproval.”¹⁴⁹ In 2010, the state senate also failed to pass legislation exempting the monks from the law due to pressure from the funeral industry.¹⁵⁰

Because handcrafted caskets are covered by the state’s definition of funeral merchandise, this order of monks would have to “abandon their calling for one full year to apprentice at a licensed funeral home” and take an examination.¹⁵¹ The regulations require the “funeral-director exam to cover topics such as sociology, psychology, funeral directing, funeral-service law, Louisiana laws and regulations, and anything else the State Board deems relevant.”¹⁵² Unfortunately, what the State Board deems relevant is far from what common sense deems relevant. If one wants to handcraft and sell caskets, one’s knowledge of the great majority of the required curriculum is irrelevant. The regulation will also subject the monks to “substantial ongoing continuing education requirements” with which state-licensed funeral directors must comply.¹⁵³

Additionally, the monks would be forced to “convert their monastery into a ‘funeral establishment’ by, among other things, installing equipment for embalming human remains.”¹⁵⁴ Not only is the conversion of the workshop into a funeral establishment an expensive and time-consuming feat, it is also entirely useless because the monks never handle or embalm human remains. The monks

¹⁴⁴ *Id.*

¹⁴⁵ Complaint, *supra* note 139, at 7.

¹⁴⁶ Levitz, *supra* note 141.

¹⁴⁷ *Id.*

¹⁴⁸ See Complaint, *supra* note 139.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Levitz, *supra* note 141.

¹⁵² Complaint, *supra* 139, at 10 (quoting LA. ADMIN CODE tit. 46, § 503 (2011)).

¹⁵³ *Id.* (quoting LA. ADMIN CODE tit. 46, § 709 (2011)).

¹⁵⁴ *Free the Monks*, *supra* note 137.

simply attempt to pay their bills and support their abbey by building and selling wooden caskets to people who want to buy them. There is no coercion of any kind involved, just a product from which the monks derive income to support themselves—a product that some people choose to buy.

The regulation cannot be valid under the guise of health and safety, because caskets are not regulated in Louisiana—there is no law stating that dead bodies must be buried in caskets.¹⁵⁵ IJ’s complaint goes further by noting that a casket is not necessary just in Louisiana, but is “not required for burial in any state in the country.”¹⁵⁶ In fact, a person could simply be buried in the ground covered by a blanket or nothing at all.¹⁵⁷ Some environmental groups even *encourage* using cardboard or no caskets.¹⁵⁸ This occupational licensing law appears to be nothing more than a protectionist scheme so that already licensed funeral directors can keep “the lucrative funeral market to [themselves].”¹⁵⁹

Another interesting aspect of this case and others, is that Louisiana “does not require most sellers of other nonperishable goods to obtain specialized licenses,” such as for “clothing, computers, furniture, nonprescription medical supplies, or kitchen supplies.”¹⁶⁰ The state also does not require “other retailers to obtain licenses that are only tangentially related to the goods being sold, as it does for caskets.”¹⁶¹ To illustrate that point, IJ’s initial complaint on behalf of the monks, noted that Louisiana “does not require shoe salesmen to obtain podiatry licenses, or mattress salesmen to obtain chiropractic licenses.”¹⁶²

When Louisiana does require retail occupations to have a specialized state license, there must be a “direct relationship between the good being sold and both the training required for the license and concerns about public health and safety with the underlying product.”¹⁶³ IJ’s complaint references the fact that “retail pharmacies must have a licensed pharmacist to sell prescription medication.”¹⁶⁴ This is a clear and direct relationship between the service/product and the license required to provide that service, as well as a clear link to public health and safety. When it comes to the monks’ casket case and other protectionist occupational licensure cases (ie. cases that are just created to help businesses that already exist keep their market shares intact), most of those regulations lack a direct link to health, safety, and the industry that the regulation intends to influence.¹⁶⁵

But as IJ’s website warns, if businesses with government assistance are “willing to go after monks, then no one in America is safe from organized special

¹⁵⁵ *Id.*

¹⁵⁶ Complaint, *supra* note 139, at 3–4.

¹⁵⁷ *Id.* at 3.

¹⁵⁸ *Id.* at 4.

¹⁵⁹ *Free the Monks*, *supra* note 137.

¹⁶⁰ Complaint, *supra* note 139, at 11.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* (citing LA. REV. STAT. ANN. § 40:973 (2011)).

¹⁶⁵ See generally SANDEFUR, *supra* note 6, at 141–74.

interests and their allies in state legislatures.”¹⁶⁶ IJ and the monks have already publicized this case in attempts to inform the public about the licensing law and educate them about the basic right to earn a living.¹⁶⁷ Public opinion has played an important role for these public interest law firms in the past. As explained above, often these law firms can use public opinion to pressure legislatures to repeal anti-competitive legislation: it may help in this case. Some media sources have brought similar purely protectionist licensing restrictions to light.

On July 21, 2011 the Eastern District Court of Louisiana struck the Louisiana licensing scheme down for violating the Due Process and Equal Protection clauses of the Constitution.¹⁶⁸ The court stated clearly that there was “no rational basis for the State of Louisiana to require persons who seek to enter into the retailing of caskets to undergo the training and expense necessary to comply with [the licensing scheme’s] rules.”¹⁶⁹ The court also noted that “there is nothing in the licensing procedures that bestow[] any benefit to the public in the context of retail caskets,” and that “the sole reason for these laws is 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.”¹⁷⁰ The court followed the Sixth Circuit’s reasoning in *Craigmiles*, finding for the plaintiff monks, asserting that the defendants’ arguments were “hollow.”¹⁷¹ The court’s analysis explained that the licensing scheme promoted neither consumer protection nor public health and safety.¹⁷² The opinion noted that “the provisions simply protect a well-organized industry that seeks to maintain a strict hold on [that] business.”¹⁷³ This district court decision was great news for the monks and their business. However, their victory may be short-lived. The State of Louisiana Board of Embalmers and Funeral Directors (not interested in losing their protectionist advantages so quickly) have already filed an appeal.¹⁷⁴ This appeal will send the case to the Fifth Circuit Court of Appeals, which will hopefully affirm the district court’s decision.

A 2011 *Wall Street Journal* article noted that poor economic conditions have moved some legislators to think twice before passing some new licensing regulations; it stated that “the licensing push is meeting pockets of resistance, including a move by some legislators to require a more rigorous cost-benefit analysis before any new licensing laws are approved.”¹⁷⁵ The article also noted that some people were considering a variety of negative consequences of large

¹⁶⁶ *Free the Monks*, *supra* note 137.

¹⁶⁷ *Id.*

¹⁶⁸ *St. Joseph Abbey v. Castille*, No. 10-2717, 2011 WL 2973566, at *1 (E.D. La. July 21, 2011).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 3–6, 10.

¹⁷² *Id.* at 14–16.

¹⁷³ *Id.* at 10.

¹⁷⁴ Ramon Antonia Vargas, *Louisiana Challenges Judge’s Decision to Award Victory to Covington Monks Who Sued for Right to Sell Caskets*, NOLA.COM (Aug. 16, 2011), http://www.nola.com/crime/index.ssf/2011/08/louisiana_challenges_judges_de.html.

¹⁷⁵ Simon, *supra* note 2.

regulatory regimes that “spawn[] huge bureaucracies including rosters of inspectors,” and because of many requirements’ “pricey educations,” they “prohibit low-income workers from breaking in to entry-level trades.”¹⁷⁶ Some note that the high rate of occupational regulation in the service industry is particularly troubling because the service industry makes up “three-quarters of gross domestic product and most job growth in the U.S.,” and the potential number of jobs in that sector are being capped by occupational licensing laws aimed at helping pre-established businesses.¹⁷⁷

Beyond public opinion, and its effect on legislative bodies, is the judiciary. The more that circuit courts come down affirmatively on one side or the other, the more likely the Supreme Court will take notice of the growing nationwide split, hear a similar case, and set a national standard, which will explicitly prohibit protectionist occupational licensing schemes nationwide. Ideally, the Fifth Circuit will affirm the district court’s decision and, like the Ninth Circuit,¹⁷⁸ set another circuit court precedent supporting the Sixth Circuit’s *Craigmiles* decision.

Not everyone is so optimistic. Some argue that the Court is torn between the “Court’s rhetoric, which still refers—accurately—to occupational freedom as a constitutional right” and its 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.”¹⁷⁹ Others believe the victory for economic liberty in the *Craigmiles* case did not go far enough: though the opinion talked about protectionism as an illegitimate government interest, the opinion missed the opportunity to comment on the “irrationality of requiring occupational training that has nothing to do with one’s occupation.”¹⁸⁰ Critics of occupational licensing laws have not forgotten the ugly, discriminatory history that many of those laws share; some note that even today, the groups hit hardest by these laws are minority entrepreneurs and those who come from low a socio-economic status.¹⁸¹

One important fact worth conveying is that many prominent advocates of the right to earn a living do not expect or wish to abolish occupational licenses completely—for example, few people support less training and requirements for heart or brain surgeons.¹⁸² However, these specialized surgeons are generally clear-cut examples of regulation in the interest of health and safety. Unfortunately, many protectionist regulations are not clear-cut in this manner. An interior

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See *Merrifield v. Lockyer*, 547 F.3d 978, 992 (9th Cir. 2008).

¹⁷⁹ Neily, *supra* note 10, at 905.

¹⁸⁰ See Sanders, *supra* note 95, at 685–86.

¹⁸¹ *Id.* at 695.

¹⁸² Though some do argue that medical licensing “fails to protect consumers from incompetent physicians” and “by raising barriers to entry, makes health care more expensive and less accessible.” See Shirley Svorny, *Medical Licensing: An Obstacle to Affordable, Quality Care*, CATO INST. (Sept. 17, 2008) http://www.cato.org/pub_display.php?pub_id=9640. Additionally, “institutional oversight and a sophisticated network of private accrediting and certification organizations, all motivated by the need to protect reputations and avoid legal liability, offer whatever consumer protections exist today.” *Id.* Though even this study acknowledges the many political difficulties in doing away with medical licensing. *Id.*

decorator is not a heart surgeon; a hair braider, not a brain surgeon. Many of these occupations that are less intuitively linked with health and safety are the targets of regulations that stretch the law as far as possible to benefit the interests of only a few. Those occupational licensing laws are based upon a meritless “because I said so” justification. This helps a select few, but leaves many hardworking, honest entrepreneurs, who labor in harmless occupations, out in the cold. The circuit split that exists today provides some hope that *purely protectionist* occupational licenses will not stand.

VIII. CONCLUSION

Not even the savviest political theorist or legal historian can exactly define what will happen to protectionist licensing schemes on a national level. The future of anti-competitive licensing laws is yet to be determined. One thing is for certain: the multi-circuit split surrounding protectionist occupational licensing schemes in the funeral industry has grave consequences for entrepreneurs all across the country in a vast range of occupations. When already-established businesses join forces to keep new competitors out, they create excessive barriers to entry that destroy countless potential jobs. To name a few, these barriers to entry come in the form of expensive degrees, superfluous training, exorbitant fees, mandatory full-time apprenticeships, and even “convincing” one’s competitors that new business is necessary in their fields.

One of the greatest ironies is that many protectionist occupational licensing regulations are enacted for the “consumer’s interest and protection.” In reality, the effect of these licensing schemes is only to protect businesses that already exist. These laws keep prices artificially high and allow businesses to reduce product quality without suffering market consequences. Entrepreneurs and consumers alike can remain hopeful that the ultimate and eventual resolution of the funeral circuit split will overcome the problematic rational basis test and come down against protectionism—in favor of economic liberty.