EXHUMING THE PRIVILEGES OR IMMUNITIES CLAUSE TO BURY RATIONAL-BASIS REVIEW

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IV. PROPOSAL TO OVERRULE SLAUGHTER-HOUSE AND EXHUME THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT TO MEANINGFULLY SAFEGUARD ECONOMIC

1. DISCLOSURE: The author was a summer legal clerk for the Institute for Justice (IJ) in 2014. IJ’s research, litigation, and attorneys are referenced significantly in this Comment.
"[F]reedom of contract is, nevertheless, the general rule and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."

Justice George Sutherland

I. INTRODUCTION

Sandy Meadows had little education and no money when her husband died. She had never needed to support herself, so at the time of her husband's death Sandy tried to find a job using the only skill she had: arranging flowers. In Sandy's home state of Louisiana, however, those hoping to make a living selling floral arrangements to the public first had to become licensed florists.

Unfortunately, as evidenced by the five attempts Sandy made at passing the licensing exam, becoming a licensed florist was no easy task. What could be so difficult about passing an exam to become a florist? Aside from a written test, the exam required aspiring florists to make four different floral arrangements in four hours and then a group of currently licensed and working florists would judge the arrangements and decide whether they were good enough to be sold to the people of Louisiana. Sadly, Sandy was never able to get the blessing of the board of florists to gain licensure and compete with them, so the grocery store that employed Sandy was forced to fire her.

4. Id.
5. Id. Louisiana is the only state that requires florists to be licensed. Id.
6. Id.
7. NEILY, supra note 3, at 1. The Legislature amended the florist license requirements in 2010 to remove the portion requiring four arrangements to be made. Victory for Louisiana Florists: Licensing Scheme Pruned Back After Florists File Civil Rights Lawsuit, INST. FOR JUST. (July 12, 2010), http://www.ij.org/victory-for-louisiana-florists.
8. NEILY, supra note 3, at 1.
Unable to legally utilize the only professional skill she possessed, Sandy died in 2004 impoverished and alone.9

Highlighting the barrier that Sandy and other aspiring florists faced, the passage rate on the florist exam was a meager 36% at the time Sandy pursued her license.10 Compare the florist exam passage rate with the passage rate of the Louisiana bar exam for aspiring attorneys over the same period: 61.5%.11 Do the people of Louisiana need so much protection from (subjectively) poorly designed flower arrangements, that the test to become a licensed florist is twice as difficult as the bar exam is to become a licensed attorney? While people within the respective industries administer and grade both exams, it is important to note that the four-arrangement requirement for aspiring florists was graded on a solely subjective basis, whereas bar examiners grade essay questions on an objective basis. It should come as no surprise then that florist graders were able to fail a higher percentage of exam takers, resulting in significantly less competition for the already licensed florists.

Perhaps there are some unknown dangers associated with floral arrangements, of which most people are not aware, that justify a demanding, subjective licensing exam. It is certainly conceivable that licensing florists could prevent the exposure of floral picks, broken floral wire, or infected dirt.12 Yet when questioned about evidence of these dangers, the chief enforcement officer of the Louisiana Horticulture Commission could not identify a single instance of one of these injuries occurring in any of the other forty-nine states that do not license florists.13 Nor was there evidence of any actual occurrence of injury in Louisiana.14

Maybe the high standards for florist licensure create a higher quality floral industry in Louisiana, giving the state's florists a competitive advantage over other states. However, there is no evidence that this is the case.15 In fact, a recent study

9. NEILY, supra note 3, at 1.
10. Id. at 59.
11. Id.
12. Id.
13. Id.
15. Cf. id. (showing that although the court ultimately held that the goal of
asked florists from Texas and Louisiana to judge floral arrangements from both states; the judges were unable to distinguish between arrangements made by Texas and Louisiana florists.16

What the evidence actually shows is that Sandy was not a bad or dangerous florist. She was a victim of anti-competitive behavior on the part of the Louisiana floral industry trying to limit competition by creating overly difficult and subjective criteria as a barrier to entry for aspiring florists. Louisiana Agriculture Commissioner, Bob Odom, confirms this fact. Odom admitted that he made promises to the Louisiana State Florists' Association (the primary trade association lobbying the government on behalf of florists) that he would assist the association in making whatever licensing requirements they wanted.17 Keeping true to his promises, Mr. Odom stopped an attempt to deregulate the florist industry that had sailed through the Louisiana House of Representatives by a 92–3 vote.18

Sandy simply wished to enjoy her economic liberty by working in an honest profession of her choosing. Unfortunately, when Sandy filed a lawsuit against the State of Louisiana, the federal court for the Middle District of Louisiana upheld these restrictive licensing requirements "as an appropriate effort on the legislature's part to enhance the reputation of Louisiana's floral industry and protect consumers from the physical dangers of unlicensed floristry," despite evidence to the contrary.19 This Comment first analyzes why Sandy was not able to enjoy her economic liberty, then it explains why the legislature and courts did not protect her ability and right to do so, and finally it recommends ways for courts to protect this vital right in the future.

The pages that follow argue that the modern, New Deal-era substantive due process framework for analyzing court-recognized fundamental rights is constitutionally illegitimate and industry protectionism does not invalidate a regulation, the defendants did not provide tangible evidence that Louisiana gained any competitive advantage as a result of its licensing requirements).

16. NEILY, supra note 3, at 59.
17. Id. at 60.
18. Id.
19. Id. at 59; see also Meadows v. Odom, 360 F. Supp. 2d 811, 823-25 (M.D. La. 2005), vacated as moot, 198 F. App'x 348 (5th Cir. 2006).
functionally inadequate. Thus, to properly protect the fundamental right to economic liberty, the United States Supreme Court should abandon this framework and employ the Privileges or Immunities Clause of the Fourteenth Amendment in its place.

Part II provides an overview of the Supreme Court’s treatment of economic liberty. Part III illustrates the inadequacy of the substantive due process framework, examines the difficulties occupational licensing regulations cause for entrepreneurs, and illustrates through public choice theory why courts should not rely on legislatures to ease the difficulties experienced by entrepreneurs. Finally, Part IV proposes that the Court should overrule the *Slaughter-House Cases* and resulting rise of rational-basis review and exhume the Privileges or Immunities Clause. Further, this Comment directly urges the Court to recognize economic liberty as a constitutional fundamental right.

II. THE UNEASY HISTORY OF ECONOMIC LIBERTY IN THE COURTS

This Part provides a historical overview of the United States Supreme Court’s treatment of economic liberty that will help explain why the federal district court for the Middle District of Louisiana ruled the way it did in Sandy’s case.20 First, this Part focuses on the historical meaning of the Privileges or Immunities Clause and the enactment history of the Fourteenth Amendment. Second, this Part analyzes the seminal *Slaughter-House Cases* and the effects of its holding on the Privileges or Immunities Clause. Third, this Part provides an overview of the *Lochner* era following the *Slaughter-House Cases*. Fourth, this Part considers the current jurisprudential treatment of the Privileges or Immunities Clause. Finally, this Part provides an overview of the application of rational-basis review that has developed in the Court following the *Lochner* era and the practical implications of this doctrine in the absence of the Privileges or Immunities Clause.

A. ENACTMENT OF THE FOURTEENTH AMENDMENT AND THE PRIVILEGES OR IMMUNITIES CLAUSE

The concept behind the Privileges or Immunities Clause of the Fourteenth Amendment began taking shape in American law as far back as 1606.21 As the colonies in America grew and developed, colonists included privileges-or-immunities-type language in many of the colonies’ charter documents.22 In the build-up to the American Revolution, the phrase, “privileges or immunities,” was most clearly understood to mean “fundamental rights and liberties specifically enjoyed by English citizens and, more broadly, by all persons.”23

Following the Revolution, the Articles of Confederation included a version of the Privileges or Immunities Clause: “the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States.”24 Colonists understood the primary purpose of the clause in the Articles of Confederation was to allow for the free movement of people between the states.25

Article IV of the United States Constitution also includes a Privileges and Immunities Clause: “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”26 Thus, American law has, from its earliest days, consistently included a privileges or immunities clause to

22. Id. at 523. The 1606 Charter of Virginia included the language that “all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies . . . shall HAVE and enjoy all Liberties, Franchises, and Immunities.” Id. The 1629 Charter of the Massachusetts Bay Colony guaranteed “liberties and immunities of free and natural subjects.” Id. at 523 n.2. The 1663 Charter of the Rhode Island and Providence Plantations guaranteed “liberties and immunities of free and natural subjects.” Id. The 1732 Charter of Georgia guaranteed “liberties, franchises and immunities of free denizens and natural born subjects.” Id. Lastly, the Massachusetts Resolves of 1765 stated “this inherent Right, together with all other essential Rights, Liberties, Privileges and Immunities of the People of Great Britain have been fully confirmed to them by Magna Charta.” Id. at 523 n.3.
24. ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1.
protect those rights. However, there is significant debate as to which rights, or “privileges or immunities,” this clause protects.

The clearest explanation of the meaning of the constitutional clause’s definition of privileges and immunities is found in Corfield v. Coryell. In Corfield, Justice Washington defined privileges and immunities as “more tedious than difficult to enumerate” but stated that they may be “comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety.” In essence, privileges and immunities are not unlimited, but are confined to those rights “which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states.

Following the Civil War, the Civil Rights Act of 1866 became a precursor to the Fourteenth Amendment and the Privileges or Immunities Clause included within it. In response to legislatures in southern states not respecting the rights of newly freed slaves, Congress passed the Civil Rights Act to protect and empower the freedoms granted to former slaves through the Emancipation Proclamation and the Thirteenth Amendment. During debates over the Civil Rights Act, members of Congress frequently invoked Corfield. The Act’s sponsor, Senator Trumbull, reciting Corfield, stated that the Civil Rights Act would protect the “fundamental rights belonging to every man as a free man, and which under the Constitution as it now exists we have a right to protect every man in.” Expressly among these fundamental rights that lawmakers designed the Act to protect are the economic rights to make and enforce contracts.

27. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).
28. Id. at 551.
29. Id. at 551-52.
30. Id. at 551.
34. Id. (quoting Cong. Globe, 39th Cong., 1st Sess. 476 (1866)).
35. Reinstein, supra note 32, at 383 n.128.
Notably, upon the enactment of the Civil Rights Act by Congress, President Johnson vetoed the legislation.\textsuperscript{36} However, Congress overrode Johnson’s veto by a two-thirds majority vote and the Act became law on April 9, 1866.\textsuperscript{37} Due in part to Johnson’s veto, and also as a result of many of the Act’s supporters’ belief that the law did not provide enough protections for former slaves, Congress quickly began to consider a fourteenth constitutional amendment.\textsuperscript{38} This amendment would place the protections of the Civil Rights Act “beyond doubt,” because without a constitutional amendment the statute could be repealed by a simple legislative majority in the future.\textsuperscript{39}

Importantly, this fear of repeal was well founded. With the freeing of the slaves, the Three-Fifths Compromise was no longer applicable.\textsuperscript{40} This meant that southern states who opposed the Civil Rights Act would soon enjoy a significant increase in counted populations because former slaves would now be counted as whole persons for purposes of determining population regardless of whether they were actually allowed to vote.\textsuperscript{41} In turn, this would allow southern states to meaningfully increase their number of members in the House of Representatives, making it possible to repeal the Civil Rights Act.\textsuperscript{42}

Just as in the debates over the Civil Rights Act, in the conversations concerning which rights to protect and how to protect them, supporters of the Fourteenth Amendment relied extensively upon Justice Washington’s framing of privileges and immunities in \textit{Corfield}.\textsuperscript{43} One senator even recited portions of the \textit{Corfield} opinion on the Senate floor during debates over the Amendment.\textsuperscript{44} Another Senator, John Sherman, explained that in determining what rights were to be protected, courts would “look first at the Constitution . . . [then to] the unenumerated

\begin{itemize}
\item \textsuperscript{36} Reinstein, \textit{supra} note 32, at 386.
\item \textsuperscript{37} \textit{Id.}
\item \textsuperscript{38} \textit{Id.} at 384-86.
\item \textsuperscript{39} Saenz v. Roe, 526 U.S. 489, 526 n.6 (1999) (Thomas, J., dissenting); Reinstein, \textit{supra} note 32, at 386.
\item \textsuperscript{40} Joseph R. Stromberg, \textit{A Plain Folk Perspective on Reconstruction, State-Building, Ideology, and Economic Spoils}, J. LIBERTARIAN STUD., Spring 2002, at 103, 111.
\item \textsuperscript{41} See \textit{id.}
\item \textsuperscript{42} See \textit{id.}
\item \textsuperscript{43} Blackman & Shapiro, \textit{supra} note 25, at 9-10.
\item \textsuperscript{44} \textit{Id.}
\end{itemize}
powers [sic] to the Declaration of American Independence, to every scrap of American history, [and] to the history of England." In effect, legislators were nationalizing Corfield. Accepting this framing of rights, no Republican in the House of Representatives or Senate opposed the wording of Section One of the resulting Amendment. The full text of Section One of the Fourteenth Amendment is as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

Several members of Congress noted that this language "constitutionalized the Civil Rights Act." Illustrating the importance of the Amendment, then Speaker of the House Schuyler Colfax boasted that the Amendment was "going to be the gem of the Constitution . . . because it is the Declaration of Independence placed immutably and forever in the Constitution." John Bingham offered perhaps the clearest explanation of the Amendment when he declared that the Privileges or Immunities Clause would "protect by national law" the "inborn rights of every person" against "the unconstitutional acts of any State."

To John Bingham, these rights "included the right to work in an honest calling and contribute by your toil in some sort to yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil." For the next few years at least, the Privileges or Immunities Clause of the Fourteenth Amendment would be viewed as a highly protective mechanism
for limiting state encroachments on individuals' rights, economic rights included. Then, the Supreme Court became involved.

B. THE SLAUGHTER-HOUSE CASES

In 1872, four years after the ratification of the Fourteenth Amendment, the United States Supreme Court interpreted the Privileges or Immunities Clause of Section One of the Amendment for the first time when it decided a series of cases now known as the Slaughter-House Cases.⁵³ The Clause has never been the same.

Slaughter-House involved a Louisiana statute that monopolized all animal slaughtering operations in the New Orleans metropolitan area into one company, the Crescent City Live-Stock Landing and Slaughter-House Company.⁵⁴ The statute required all existing slaughterhouses to close and all butchers in the area to conduct their butchering at the Crescent City Live-Stock Landing and Slaughter-House Company for a fee in an effort to "protect the health of the city of New Orleans."⁵⁵

Butchers in the New Orleans area who did not desire to close their own shops and carry on their business at the state-created monopoly sued, primarily claiming that the statute violated the Privileges or Immunities Clause of the Fourteenth Amendment.⁵⁶ The Court held that the Louisiana statute did not violate the Privileges or Immunities Clause because the Court determined that the Fourteenth Amendment only implicated privileges or immunities of national but not state citizenship, and since the Louisiana statute implicated economic legislation, a state matter, the amendment did not apply.⁵⁷

In so holding, the Court placed great emphasis on the wording of the clause that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."⁵⁸ The Court's opinion rested on the clause's inclusion of only privileges or immunities of citizens of the United States to the exclusion of privileges or immunities of citizens of

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⁵⁵. Id. at 59-60.
⁵⁶. Id. at 57, 66.
⁵⁷. Id. at 78-81.
⁵⁸. Id. at 74.
the states.\textsuperscript{59} The reason for the Court's distinction was the preceding sentence in the amendment that made "[a]ll persons born or naturalized in the United States . . . citizens of the United States and of the State wherein they reside."\textsuperscript{60} Thus, the Court reasoned that since the first clause of the amendment created two distinct types of citizenship, federal and state, then it made sense that if Congress intended the Privileges or Immunities Clause to apply to the states, the clause would have specified as such.\textsuperscript{61}

This distinction is a significant one. Here, the Court confined "privileges or immunities" of citizens of the United States primarily to the right to petition the government, access seaports, and demand protection of life, liberty, and property while on the high seas or abroad.\textsuperscript{62} This distinction left the remainder of privileges and immunities to be defined, and potentially restricted, by the states.\textsuperscript{63}

The majority's decision is ironic, if not inexplicable, considering the enactment history of the Fourteenth Amendment. Justice Field, in his dissent, noted that under the majority's theory, the entire clause in the Amendment becomes "a vain and idle enactment, which accomplishe[s] nothing."\textsuperscript{64} According to Justice Field, holding that the Fourteenth Amendment protects only the privileges and immunities of citizens of the United States is ironic because Congress wrote the Amendment with a focus on protecting newly freed slaves from state laws and the Black Codes that sought to deny emancipated slaves their newly gained freedoms.\textsuperscript{65} The Court itself recognized as much in its discussion of the ratification of the Fifteenth Amendment when it noted, "[t]he laws were administered by the white man alone."\textsuperscript{66} The contradiction between the Court's interpretation of the Privileges or Immunities Clause and the Fourteenth Amendment's history leads one to wonder if the majority was

\textsuperscript{59} McDonald v. City of Chicago, 561 U.S. 742, 808 (2010) (Thomas, J., concurring).
\textsuperscript{60} The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73-74 (1873).
\textsuperscript{61} \textit{Id.}
\textsuperscript{62} \textit{Id.} at 79.
\textsuperscript{63} \textit{Id.} at 78-79.
\textsuperscript{64} The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 96 (1873) (Field, J., dissenting).
\textsuperscript{65} See \textit{id.} at 96-97.
\textsuperscript{66} \textit{Id.} at 71 (majority opinion).
perhaps motivated by other concerns. 67

Today, Slaughter-House is still in effect, resulting in the effective relegation of the Privileges or Immunities Clause to the dustbins of constitutional history. 68 However, constitutional scholars are now resoundingly opposed to the Court's holding. 69 Opposition was apparent from the beginning, though. Aside from the Court's view being out of step with the history and purpose of the Fourteenth Amendment, the dissenters also viewed the Louisiana statute as pretextual. The dissent disagreed with Louisiana's claim that the challenged statute's intended purpose was the protection of the health and safety of New Orleans residents 70 and signaled its willingness to scrutinize the state's claims that limiting the economic liberty of New Orleans butchers was necessary. 71

67. See Michael Kent Curtis, Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment, 38 B.C. L. REV. 1, 96 (1996) (suggesting that members of the Court were hostile to racial equality); see also SANDEFUR, supra note 45, at 64-66 (pointing out that Jeremiah Black, the attorney for Louisiana in Slaughter-House, intentionally sought to undo Reconstruction and the Fourteenth Amendment with his arguments in the case. Black embraced a states' rights theory that viewed the rights protected by the Privileges or Immunities Clause as rights protected by a citizen of a state. However, the true embrace of states' rights at play in the case is found in the rhetorical question by the Court: "Was it the purpose of the fourteenth amendment to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government?" The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 77 (1873). Somehow, the Court answered that question in the negative. This view is precisely what the authors of the Fourteenth Amendment sought to eliminate due to the states' continuous violation of freed slaves' individual rights.).

68. This is an important point to note. Due to Slaughter-House's effective nullification of the Privileges or Immunities Clause of the Fourteenth Amendment, as will be discussed infra, the Clause practically has a "clean slate" unmarred by Court precedent. Therefore, should the Court decide in a future case to overrule Slaughter-House, it will be analyzing the history and application of the Privileges or Immunities Clause for essentially the first time since the enactment of the Fourteenth Amendment. SANDEFUR, supra note 45, at 69; see also McDonald v. City of Chicago, 561 U.S. 742, 859-60 (2010) (Stevens, J., dissenting).


70. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 111-12 (1873) (Bradley, J., dissenting).

71. See id. at 109 (Field, J., dissenting).
C. THE LOCHNER ERA

In the following decades, the Court began to adopt the views contained in the *Slaughter-House* dissent with respect to determining whether the freedom to contract is a protected liberty under the Fourteenth Amendment.\(^{72}\) However, because *Slaughter-House* effectively rendered the Privileges or Immunities Clause impotent, courts instead looked to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to determine the constitutionality of state restrictions on individual rights.\(^{73}\) Famously, this approach developed into the analysis employed by Justice Peckham in *Lochner v. New York*.\(^{74}\)

In *Lochner*, New York claimed that it passed a statute limiting the number of hours that bakers could work on a daily and weekly basis out of concern for the health of bakers and to better ensure clean products.\(^{75}\) Justice Peckham, however, noted that while proponents of many statutes interfering with individuals' ability to work in normal trades and occupations claim to have the public welfare at their core, such statutes are, in reality, enacted for other motives.\(^{76}\) According to Justice Peckham, when analyzing the true aim of such a statute, the Court should look "beyond the mere letter of the law,"\(^{77}\) and determine the actual effect of the statute, rather than just the proclaimed effect.\(^{78}\) In other words, in contrast to judicial activism or judicial restraint, the proper role for judges should be judicial engagement. Judicial engagement is a simple phrase that means "consistent, conscientious judging in all cases."\(^{79}\)

Taking this approach, the *Lochner* Court held the New York statute to be a violation of bakers' right to contract because the statute was not enacted for valid health concerns, but only as a means to regulate hours worked.\(^{80}\) Therefore, the prevailing view of the Court was that "[t]he general right to make a contract in

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\(^{72}\) See Curtis, supra note 67, at 91.

\(^{73}\) See Allgeyer v. Louisiana, 165 U.S. 578, 579-80 (1897).

\(^{74}\) 198 U.S. 45 (1905).


\(^{76}\) Id. at 62-64.

\(^{77}\) Id. at 64 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

\(^{78}\) Id.

\(^{79}\) NEILY, supra note 3, at 3.

\(^{80}\) *Lochner*, 198 U.S. at 62-64.
relation to [an individual's] business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution."81 Thus, employing the Due Process Clause of the Fourteenth Amendment, the Court invalidated the statute.82

At the time, Court observers did not see this as a radical decision.83 Protecting the individual's freedom to contract was viewed simply as the application of principles found in the Declaration of Independence and the Constitution and repeatedly discussed in the debates over the Civil Rights Act of 1866 and the Fourteenth Amendment.84 However, Justice Oliver Wendell Holmes dissented, stating that the Court was imposing a laissez faire view of economic policy on the country, a view, according to Justice Holmes, embraced by neither the Constitution nor the majority of the people.85 Justice Holmes would have upheld the New York statute because in his view, "the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless . . . the statute . . . would infringe fundamental principles."86 In other words, to Justice Holmes, the will of the majority takes precedence over individual rights unless those rights are considered fundamental. This view starkly contrasts with the Lochner majority, which did not actually embrace any economic theory, but presumed that people are "free unless the government has sufficient reason to limit their freedom."87 Under this view, legislative majority alone cannot be a sufficient reason to limit freedom.

Following Lochner, the Court in Adair v. United States applied a similar analysis to the Due Process Clause of the Fifth Amendment, and invalidated a Congressional statute that made it a criminal offense for employers to condition employment on employees agreeing not to join labor unions.88 The Adair Court

82. Id. at 53, 57, 64. As discussed supra, and as will be thoroughly analyzed infra, because of Slaughter-House's effective constraint of the Privileges or Immunities Clause, the Court now analyzes state restrictions on individuals' fundamental rights using the Due Process and Equal Protection Clauses of the Fourteenth Amendment.
83. SANDEFUR, supra note 45, at 131.
84. Id.
85. Lochner, 198 U.S. at 75 (Holmes, J., dissenting).
86. Id. at 76.
87. Id. at 56 (majority opinion); accord SANDEFUR, supra note 45, at 132.
made it clear that, because the employee was free to choose whether to accept or reject the terms of the agreement, Congress making the employment contract illegal was inappropriate.

Similarly, the Court struck down a Kansas statute that made it illegal for employers to require employees to agree not to join employee unions. In Coppage v. Kansas, the Court placed great emphasis on the freedom of the employee to choose to either work for the employer without being a member of the union or remain a union member and seek employment elsewhere. Thus, because the Kansas statute infringed on this freedom, the Court held the statute to be violative of the freedom to contract under the Due Process Clause of the Fourteenth Amendment.

After Coppage, the Lochner line of cases culminated with Railroad Retirement Board v. Alton Railroad Co. In Alton, the Court invalidated the Railroad Retirement Act under the Due Process Clause of the Fifth Amendment. The statute compelled railroad companies to provide their employees with retirement pension plans. The Court held this requirement invalid because it was an "arbitrary imposition of liability to pay again for services long since rendered and fully compensated" that "impose[d] by sheer fiat noncontractual incidents upon the relation of employer and employee."

Following the Great Depression and the rise of New Deal-era Progressive political policies, the dissenting view of Justice Holmes in Lochner began to take hold in the Court. In 1937, the Court decided West Coast Hotel Co. v. Parrish. In Parrish, the Court upheld a Washington statute that created a minimum wage for women. The Court declined to simply accept the

90. Id. at 176.
91. See Coppage v. Kansas, 236 U.S. 1, 26 (1915).
92. Id. at 21.
93. Id. at 26.
95. Id. at 354-55.
96. Id. at 344-46.
98. SANDEFUR, supra note 45, at 132-36.
100. Id. at 386, 400.
existence of a freedom to contract, instead only recognizing the right of liberty and of the freedom from deprivation of liberty unless given proper due process of law.¹⁰¹ Most distinguishable from the *Lochner* line was the *Parrish* Court's pronouncement that the liberty contemplated under the Due Process Clause is the liberty that requires protection from threats to the "health, safety, morals and welfare of the people."¹⁰² Further, the Court defined due process of law as "regulation which is reasonable in relation to its subject and is adopted in the interests of the community."¹⁰³

After *Parrish*, the Court expressly discarded the due process analysis applied by the *Lochner* line of decisions in *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*¹⁰⁴ There, the Court described the previous view of due process as a "strait jacket" on legislatures that attempted to "suppress business and industrial conditions which they regard as offensive to the public welfare."¹⁰⁵ In other words, the *Lincoln* Court viewed the presumption in favor of protecting individual rights to be too burdensome to legislative majorities wishing to regulate the marketplace. The final death knell for the *Lochner* era came in 1955, when the Court announced that "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws."¹⁰⁶

Abandoning the *Lochner* majority's view of due process as protecting individual rights, the Court in 1934 created rational-basis review in the case of *Nebbia v. New York*.¹⁰⁷ Under rational-basis review, courts would no longer presume that people are free from government restrictions absent sufficient reasons to restrict their freedom.¹⁰⁸ Instead, courts would now simply defer to the legislature in most cases and assume that elected officials and the bureaucracy are better suited to determine if a restriction on freedom is necessary for the public good.¹⁰⁹ This was a profound and drastic shift in the relationship between the

¹⁰². *Id*.
¹⁰³. *Id*.
¹⁰⁴. 335 U.S. 525 (1949).
¹⁰⁵. *Id.* at 536-37.
¹⁰⁸. SANDEFUR, supra note 45, at 132.
¹⁰⁹. *Id*. 
individual rights of the people and their government.

Four years later the Court moderated its deference to lawmakers and set the scene for the modern application of the Due Process Clause in the case of *United States v. Carolene Products Co.* First, the Court continued the precedential shift begun in *Nebbia*, and declared:

[R]egulatory 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.

However, in Footnote Four, the Court famously noted that there may be cases in which legislation restricting other, non-commercial kinds of individual rights may warrant a "more searching judicial inquiry." According to the Court, government restrictions impacting rights potentially worthy of greater review may include those "directed at particular religious, or national, or racial minorities," "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." The Court did not answer questions as to how much additional scrutiny should be applied in these situations or why some rights warrant greater constitutional protections than others. Nor did the Court explain how the tranching of rights, and the attendant exclusion of some rights, including "ordinary commercial transactions," was in line with the Ninth

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110. 304 U.S. 144 (1938).
111. *Id.* at 152.
112. *Id.* at 152 n.4.
113. *Id.* (citations omitted).
114. The current answer to these questions is found in *Washington v. Glucksberg*, 521 U.S. 702 (1997). In holding that the Due Process Clause does not protect the right to physician-assisted suicide, *Glucksberg* set out the modern test for determining whether a restriction on an individual right is to be given more judicial scrutiny than rational-basis review. *Id.* at 720-21, 732-35. The two-part test looks to determine whether the right is so fundamental as to be deeply rooted in our nation's history and traditions. *Id.* at 720-21. If so, the Court subjects restriction of that right to greater scrutiny than rational-basis review so long as the right is carefully described. *Id.* at 721; see also Blackman & Shapiro, *supra* note 25, at 74-75.
Amendment's protection of unenumerated rights. What the New Deal-era Court did make known, albeit subtly, was that protecting the political process was now of greater importance than protecting individual freedom.

D. PRIVILEGES OR IMMUNITIES CLAUSE REVIVED?

In the years following Slaughter-House, because of the rise of substantive due process and rational-basis review, scant mention was made of the Privileges or Immunities Clause in the decisions of the courts. Therefore, it was quite a surprise when Saenz v. Roe, decided in 1999, re-injected the Privileges or Immunities Clause into the Court's consciousness. Unfortunately, this re-injection was quite limited, applying only to the right to travel. Saenz dealt with the right of individuals newly arrived in one state to enjoy the privileges and immunities enjoyed by all other citizens of that state without restrictions based on time of residency. The Saenz Court noted that even though the majority and dissent in Slaughter-House differed widely on the larger interpretation of the Privilege or Immunities Clause, all members of the Court found common ground in recognizing that the clause protected the right to travel.

Though Saenz involved a right considered to be a right of national citizenship, Professor Erwin Chemerinsky noted: "for essentially the first time in American history ... [the] Court used the Privileges or Immunities Clause to invalidate a state law,' so it is at least possible that the tiny pebble of Saenz could portend a sea change.

115. The text of the Ninth Amendment is: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. This Amendment was vitally important to James Madison, Alexander Hamilton, and other Founding Fathers and drafters included it to guarantee that others would not view the Bill of Rights as a list of the only individual rights protected by the Constitution. At its core, the Amendment was intended to guarantee individual liberty. Simply by the Amendment's text, stating that individual rights are not capable of being exhaustively listed out means that government restrictions on those rights must be justified since individual freedom is the general rule. SANDEFUR, supra note 45, at 10. With this in mind, the Court in Carolene Products ignored the text of the Ninth Amendment by creating tiers of rights that are deserving of protection from government interference to the exclusion of others. See id. at 10, 128-29; see also Randy E. Barnett, The Ninth Amendment: It Means What it Says, 85 TEx. L. REV. 1, 14 (2006).

116. SANDEFUR, supra note 45, at 132-33.


118. Id.

119. Id. at 502, 505.

120. Id. at 503.
in how the Court henceforth may view the long-dormant Privileges or Immunities Clause."121

However, the more interesting treatment of the Privileges or Immunities Clause in Saenz can be found in the dissenting opinion of Justice Thomas:122

I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case. Before invoking the Clause, however, we should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence. The majority’s failure to consider these important questions raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the “predilections of those who happen at the time to be Members of this Court.”123

Unfortunately, Justice Thomas did not believe that Saenz was an appropriate case in which to revisit the Privileges or Immunities Clause.124 However, McDonald v. City of Chicago presented that opportunity to the Court eleven years later.125

In McDonald, Justice Thomas, in a concurring opinion, accepted his own invitation in Saenz to revisit the Privileges or Immunities Clause when he announced he would incorporate the Second Amendment individual right to keep and bear arms against the states via the Privileges or Immunities Clause of the Fourteenth Amendment.126 After an exhaustive review of the history of the Clause, Justice Thomas concluded that “the Clause establishes a minimum baseline of federal rights,” but since the issue at hand only implicated the right to keep and bear arms,

121. Blackman & Shapiro, supra note 25, at 12.
123. Id. (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977)).
124. Id. at 527.
126. Id. at 805-06 (Thomas, J., concurring).
Justice Thomas declined to apply it any further. However, Justice Thomas went on to state his disagreement with the holding of *Slaughter-House* that created two distinct types of rights. Instead, Justice Thomas considered the rights protected by the Clause, state and federal, to overlap, but declined to analyze the dissenting view in *Slaughter-House* that the Privileges or Immunities Clause protects unenumerated rights, including economic liberty. Nevertheless, Justice Thomas clearly noted that he was not concerned that a return by the Court to the original meaning of the Privileges or Immunities Clause would be hazardous but instead believed it would produce questions "more worthy of [the] Court's attention . . . than the substantive due process questions the Court has for years created on its own, with neither textual nor historical support."

Thus, it appears that Justice Thomas is prepared to analyze the applicability of the Privileges or Immunities Clause in appropriate future cases implicating other individual rights. It also seems quite clear that Justice Thomas is willing to overrule *Slaughter-House*, if necessary, to fully revive the Clause.

Therefore, it should now be clear that only since the 1930s has the Court shifted from a judicial presumption of freedom to contract to the presumption in favor of government restrictions on individual rights implied by rational-basis review. This shift was made possible by *Slaughter-House*’s nullification of the Fourteenth Amendment’s Privileges or Immunities Clause and the subsequent rise of the modern view of substantive due process in *Nebbia v. New York* and *United States v. Carolene Products*. With that in mind, the following section details the modern application of rational-basis review and its practical effect on litigation.

E. RATIONAL-BASIS REVIEW APPLIED

Because of *Slaughter-House* and the defining precedential shift of *Nebbia* and *Carolene Products*, today, economic liberty is essentially unprotected by the courts. This is primarily due to

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128. *Id.* at 851-53.
129. *Id.* at 853-54.
130. *Id.* at 855.
courts giving statutes motivated by economic policy a "strong presumption of validity."\textsuperscript{132} When petitioners challenge such statutes, courts apply rational-basis review via the Due Process Clause of the Fifth or Fourteenth Amendments.\textsuperscript{133} Rational-basis review is the least stringent level of constitutional review.\textsuperscript{134} This results in the failure of most challenges to statutes that courts analyze under rational-basis review.\textsuperscript{135} Courts generally uphold statutes analyzed under rational-basis review so long as they bear some rational relation to any legitimate state interest, such as the health, welfare, and safety of the public.\textsuperscript{136} Therefore, it is very difficult for the challengers of a statute to show that the law does not bear some rational relation to a legitimate government interest.

In other words, as long as there is any "reasonably conceivable state of facts that could provide a rational basis" for the statute, courts will uphold it.\textsuperscript{137} This means that even if a law is "needless [or] wasteful," it may be upheld.\textsuperscript{138} Under this standard of review, even if the legislature has not articulated a rational basis for the law before its passage or during litigation,\textsuperscript{139} the statute will be upheld if the courts themselves can come up with any rational basis for that statute.\textsuperscript{137} The party challenging a statute under rational-basis review must negate "every conceivable basis that might support it."\textsuperscript{141} Yet how does one prove a negative or defeat any possible notion that the human mind or courts can dream up?

While proving a negative may technically be possible, the fact that the Court has established this standard is absurd.\textsuperscript{142} In fact, courts have even recognized the "herculean burden" of this standard.\textsuperscript{143} In \textit{United States v. Wilgus}, the United States Court

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135. See infra note 145.
139. Id. at 487-88.
140. Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 146 (1st Cir. 2001).
142. NEILY, supra note 3, at 52.
143. See United States v. Wilgus, 638 F.3d 1274, 1289 (10th Cir. 2011) (citing Hamilton v. Schriro, 74 F.3d 1545, 1556 (8th Cir. 1996)).
\end{flushright}
of Appeals for the Tenth Circuit noted that "[i]n the abstract, such a thing can never be proven conclusively; the ingenuity of the human mind, especially if freed from the practical constraints of policymaking and politics, is infinite."\footnote{144. United States v. Wilgus, 638 F.3d 1274, 1289 (10th Cir. 2011).}

With this understanding of courts' application of rational-basis review to laws concerning economic liberty, it is easy to see why Sandy was unsuccessful in her challenge to Louisiana's florist-licensing requirements. Based on modern precedent, it truly is a surprise when courts strike down statutes burdening economic liberty, such as occupational licensing requirements.\footnote{145. "Only a handful of provisions have been invalidated for failing rational basis review." Craigmiles v. Giles, 312 F.3d 220, 225 (6th Cir. 2002) (invalidating a Tennessee law prohibiting the sale of caskets by anyone except licensed funeral directors). The Sixth Circuit in Craigmiles cited several other cases that invalidated provisions for failure to meet rational basis review. \textit{Id.}; see also Romer v. Evans, 517 U.S. 620, 635-36 (1996) (invalidating a Colorado constitutional amendment that prohibited any government actions to protect homosexuals from discrimination); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (invalidating a zoning ordinance that excluded homes for mentally disabled people from being constructed without a special permit); Peoples Rights Org., Inc. v. City of Columbus, 152 F.3d 522, 539 (6th Cir. 1998) (invalidating a city ordinance requiring firearm registration on the basis of a previously invalidated ordinance). Other, more general evidence shows that between 1954 and 2002, the United States Supreme Court struck down only 0.67\% of all laws enacted by Congress, 0.5\% of federal administrative regulations, and 0.05\% of state laws. NEILY, \textit{supra} note 3, at 125.}

When that happens, the enacting legislature must have strikingly overstepped its bounds. The prime example of such an overstep is when a state or local government engages in pure economic protectionism while burdening interstate commerce.\footnote{146. See \textit{City of Philadelphia v. New Jersey}, 437 U.S. 617, 624 (1978).} Courts define economic protectionism as "protecting a discrete interest group from economic competition."\footnote{147. Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002) (citing \textit{City of Philadelphia}, 437 U.S. at 624).} When a statute's purpose is simple economic protectionism, the Court has found those statutes to be practically per se invalid under the dormant commerce clause.\footnote{148. \textit{City of Philadelphia}, 437 U.S. at 624. While the focus of this Comment is not the dormant commerce clause or the commerce clause, \textit{City of Philadelphia} is still helpful in establishing general precedent for judicial hostility to economic protectionism.}

Nevertheless, in \textit{Williamson v. Lee Optical of Oklahoma} the Supreme Court was willing to overlook economic protectionism and still find a rational basis on which to uphold an Oklahoma
statute that regulated opticians.\textsuperscript{149} In \textit{Williamson}, the challenged statute only allowed licensed ophthalmologists or optometrists "to fit lenses to a face or to duplicate or replace into frames lenses or other optical appliances."\textsuperscript{150} The effect of the statute meant that opticians could not repair or replace lenses without a valid prescription even if the optician was exactly duplicating the previous lens due to a scratch or break.\textsuperscript{151} The statute even prevented opticians from putting existing lenses into new frames unless the customer produced a prescription from a licensed optometrist or ophthalmologist.\textsuperscript{152}

Practically, the statute required individuals who needed or wanted new glasses or needed their current glasses repaired to first visit (\textit{and pay}) a licensed optometrist or ophthalmologist. The Oklahoma law required this instead of allowing a customer simply to bring their current pair of glasses to an optician who was qualified to determine the strength of the needed lens. In addition, the law prevented opticians from measuring the current glasses and then duplicating the lenses, an extremely easy and affordable process, or even more simply, putting the customer's current lenses in new frames.

However, the Supreme Court upheld the statute under rational-basis review, stating that even if the law, "may exact a needless, wasteful requirement in many cases . . . it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement."\textsuperscript{153} Even though the Court recognized that in a majority of situations, prescriptions are unnecessary,\textsuperscript{154} it went on to articulate three reasons the Oklahoma legislature "might have" or "may have" thought it was necessary to enact this burdensome statute.\textsuperscript{155}

\begin{itemize}
  \item \textsuperscript{150} \textit{Id.} at 485. "An optometrist examines eyes for refractive error, recognizes (but does not treat) diseases of the eye, and fills prescriptions for eyeglasses." \textit{Id.} at 486. "An ophthalmologist is a duly licensed physician who specializes in the care of eyes." \textit{Id.}
  \item \textsuperscript{151} \textit{Williamson}, 348 U.S. at 486. An optician "is an artisan qualified to grind lenses, fill prescriptions, and fit frames." \textit{Id.}
  \item \textsuperscript{152} \textit{Id.}
  \item \textsuperscript{153} \textit{Id.} at 487.
  \item \textsuperscript{154} \textit{Williamson}, 348 U.S. at 487.
  \item \textsuperscript{155} \textit{Id.} These possible reasons included: (1) "the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses"; or (2) "that [a prescription] was needed often enough to require one in every case"; or (3) "that eye examinations were so critical, not only for correction of
Therefore, *Williamson* clearly illustrates the reality of rational-basis review. When the Court is presented with and recognizes that the evidence for the purpose of a statute burdening economic liberty is "needless" and "wasteful" and often by implication economically protectionist, the Court will embark on a journey to imagine other, more legitimate reasons that the legislature could have possibly enacted the statute. The Court will do this regardless of whether the legislature actually considered those reasons when enacting the statute. Whether this approach by the Court is an endorsement of economic protectionism or a head-in-the-sand refusal to seriously engage with the facts of the statute's purpose is certainly debatable, but it is clear that this approach by the Court does not provide any meaningful degree of judicial review of legislation.

With this in mind, the vast gulf between today's treatment of economic liberty and that of pre-New Deal treatment becomes immediately apparent. The shift can be traced to the holding that smothered the Privileges or Immunities Clause in *Slaughter-House* in 1872, and came to full fruition in the 1930s with the creation of rational-basis review in *Nebbia* and *Carolene Products*. As a result, the proud history of the Fourteenth Amendment as protecting individual rights is shrouded by a political view at odds with the amendment's origins. The Court has changed its focus from protecting individual rights to championing the political process. Even more troubling, while the Court champions the political process, it simultaneously turns a blind-eye to the realities of the political process and claims to put the interests of the community ahead of the individual while it actually puts organized political interests ahead of individuals and the community.

For a clear example of what happens to people in the real world because of this shift in the law, look no further than Sandy and her doomed fight against Louisiana florist regulators. The following Part illustrates and analyzes specifically why this shift in the Court is bad for individual entrepreneurs and their customers and provides little meaningful recourse for those

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157. *Id.* at 487-88.
actually attempting to reform the law through the democratic process.

III. CHALLENGES FACED BY ENTREPRENEURS TO PROTECT ECONOMIC LIBERTY

This section describes the regulatory and legislative barriers to entry that entrepreneurs face when starting businesses and the real world impact those barriers have on individuals and the economy. In addition, this section highlights the difficulty of petitioning the government to modify those regulations in the absence of meaningful oversight by the courts. First, this section discusses *St. Joseph Abbey v. Castille*, a recent case in the United States Court of Appeals for the Fifth Circuit that challenged Louisiana's requirement that casket sellers be fully licensed funeral directors.¹⁵⁸ Second, this section analyzes the overall burdens of occupational licensing requirements and their often-questionable connection to public health, safety, and welfare. Finally, this section delves into public choice theory to show that the usual judicial deference afforded in the legislative process is misguided and inadequately protects individuals' economic rights.

A. *ST. JOSEPH ABBEY V. CASTILLE: THE CASE OF THE CASKET-BUILDING MONKS*

Sandy is not the only one who wanted to engage in an honest profession of her choosing to support herself. In *St. Joseph Abbey v. Castille*, a group of Benedictine Catholic monks from Louisiana began constructing simple wooden caskets and selling them to the public to generate revenue for the ongoing support of their monastery.¹⁵⁹ When the popularity of the caskets grew, the Louisiana State Board of Embalmers and Funeral Directors issued a cease and desist order to the monastery under the authority of Louisiana statutes that only allowed state-licensed funeral directors to sell caskets.¹⁶⁰ The monks were not licensed funeral directors.¹⁶¹

¹⁵⁹. *Id.* at 217.
¹⁶¹. The burdensome requirements for becoming a licensed funeral director is discussed fully below. See infra Part III.B.
Initially, the monks attempted to change the law by lobbying the Louisiana Legislature. After several failed attempts, the monks filed a lawsuit in federal court. The monks argued that the licensing requirements violated the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment. As expected, the trial court analyzed the Louisiana statute under rational-basis review but surprisingly held that the statute implicated no rational government interest; thus, according to the court, it violated the Due Process Clause. The trial court held that the licensing requirements did not survive rational-basis review because the requirements were "hollow." When conscientiously considered, the requirements were hollow because Louisianans can purchase caskets online, the state does not actually require caskets for burial, and the state does not even require licensed funeral directors to have any special training in dealing with caskets. Additionally, because of the holding of Slaughter-House, the monks chose not to pursue their privileges or immunities claim. However, they preserved that claim for a potential appeal by the state.

Louisiana did appeal, and on appeal, the Fifth Circuit affirmed the trial court's decision, holding that there was no rational basis for requiring that individuals must be licensed as

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164. Complaint for Declaratory and Injunctive Relief at 2, St. Joseph Abbey v. Castille, 835 F. Supp. 2d 149 (E.D. La. 2011) (No. 10-2717). As a reminder, the relevant portion of the Fourteenth Amendment reads: "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.
166. Id.
167. Id.
168. Id. at 152 n.2. The monks argued and conceded this point, preserving this claim in the event that the case was eventually taken up by the Supreme Court. If so, this would allow a direct petition to the Court for a reversal of Slaughter-House and revival of the Privileges or Immunities Clause, as done in McDonald v. City of Chicago.
funeral directors before being allowed to sell caskets. The court, rather than protecting the public, the statute was actually "economic protection of the rulemakers' pockets." The court determined that Louisiana's claims of a public health and safety rationale for the restriction "elides the realities." Reiterating the findings of the trial court as to the hollowness of the license requirements, the Fifth Circuit also noted that the state does not have any design or construction requirements for caskets or even require caskets to be sealed before burial. Therefore, in the Fifth Circuit, economic protectionism of the funeral industry is not considered a legitimate state interest under rational-basis review.

Although the case was a win for the casket-building monks in Louisiana, the Fifth Circuit decision furthers an already existing circuit split on this issue. Further, Louisiana went on to appeal the case to the United States Supreme Court, but the Court denied the petition of certiorari. That means that entrepreneurs across the United States will not enjoy sufficient protection from overreaching occupational licensing regulations as a result of this case. Further analysis of the split allows for a fuller appreciation of the implication of the denial of certiorari by the Supreme Court and the expansion of the circuit split.

Contrast the success of the St. Joseph Abbey monks in the Fifth Circuit with the Tenth Circuit's decision in a similar case in Powers v. Harris. In Powers, an Oklahoma statute required any individual or organization located in Oklahoma that wished to sell a casket in Oklahoma to be a licensed funeral director and operate out of a licensed funeral home. Hopeful, non-licensed casket sellers challenged the statute on Fourteenth Amendment
Due Process, Equal Protection, and Privileges or Immunities grounds. The Tenth Circuit upheld the statute, finding intra-state economic protectionism to be a legitimate state interest. With a quip that should make all supporters of economic liberty shudder, the court stated that "while 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." Thus, the Tenth Circuit directed the challengers to lobby the Oklahoma legislature for modifications to the statute.

However, the court highlighted the hollowness of its own mandate when it recognized that efforts to accomplish changes to the statute had failed multiple times over the three previous years. Yet the court still maintained the legislature, not the courtroom, was the appropriate venue for statutory change. Therefore, Powers exemplified two problems not addressed by the monks' victory in St. Joseph Abbey.

First, Powers further illustrated the overall inadequacy of rational-basis review when the court openly acknowledged that economic protectionism was occurring, yet determined that rational-basis review was no obstacle to this action by the legislature. This was especially true as the court acknowledged the unlikelihood of change occurring in the legislature, leaving challengers to the statute without recourse. Second, Powers showed why a similar case must be accepted by the Supreme Court to overrule economic protectionism-endorsing or head-in-the-sand decisions like Williamson v. Lee Optical of Oklahoma. Without Supreme Court review, circuits that liberally apply rational-basis review, like the Tenth Circuit in Powers, will not be affected.

Perhaps there is a reasonable explanation that economic liberty rights are different and warrant less protection than other rights. Yet how is that rationale constitutional or logical? As discussed previously, the Ninth Amendment forecloses the

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178. Powers v. Harris, 379 F.3d 1208, 1211 (10th Cir. 2004).
179. Id. at 1222.
180. Id. at 1221.
181. Id. at 1222.
182. Id. at 1225.
183. Powers, 379 F.3d at 1225.
Logical explanations are also unconvincing, and as will be fully discussed below, the most likely rationale explaining courts' willingness to allow as inequitable an application as rational-basis review is the doctrine of stare decisis and the disapproval of judicial activism in favor of judicial restraint.

The Sixth Circuit has also recently addressed the issue of state restrictions on casket sellers. In *Craigmiles v. Giles*, the court struck down a Tennessee statute that required casket sellers to be licensed funeral directors. "Finding no rational relationship to any of the articulated purposes of the state," Judge Boggs, writing for the court, held the statute harmed consumers by creating artificially higher casket prices, and was resultantly illegitimate. The court recognized that the true aim of the statute was not health and safety concerns or consumer protection, but the aim was instead a "measure to privilege certain businessmen over others," and this measure "cannot survive even rational-basis review."

Even though the Fifth and Sixth Circuits struck down statutes restricting economic liberty under rational-basis review, both courts were careful to note that their respective holdings were not reviving the ghost of the *Lochner* era nor imposing the court's view of proper economic theory on the litigation. Therefore, even when courts strike down statutes restricting economic liberty that cannot survive rational-basis review, they are wary of potential claims of judicial activism and criticism for endorsing free-market ideology. The effect, then, of these decisions and judicial disclaimers is that economically burdensome regulations on entrepreneurs are not presumptively unconstitutional. States need only create them in such a way that the statutes maintain some plausible relation to a non-economically protectionist aim. This means that the holdings in

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185. See supra note 115.
186. See generally NEILY, supra note 3.
188. Id. at 228.
189. Id. at 229.
191. St. Joseph Abbey v. Castille, 712 F.3d 215, 227 (5th Cir. 2013); Craigmiles, 312 F.3d at 229.
192. See James E. Lobsenz, Bakke, Lochner, and Law School: The Nobility Clause Versus a Republican Form of Medicine, 32 ME. L. REV. 1, 3 (1980).
St. Joseph Abbey and Craigmiles, while positive developments for proponents of economic liberty, set a relatively low threshold for occupational licensing requirements to pass constitutional muster.

Had the Supreme Court taken up the appeal in St. Joseph Abbey v. Castille, however, the Court would have had the opportunity to address the two-to-one circuit split that has developed on the issue of state restrictions on casket makers and provide guidance for the entire country on whether the Court will protect economic liberty in the future.193 Instead, entrepreneurs must wait for some future case to raise issues of economic liberty. This may seem trivial because the monks of St. Joseph Abbey won their challenge. However, as the following subsections show, the burdens that the current state of the law imposes on would-be entrepreneurs dwarf this momentary, limited victory.

B. BURDENS OF OCCUPATIONAL LICENSING

The experience of the monks at St. Joseph Abbey with occupational licensing is not isolated to casket making or to Louisiana. Localities, states, and the federal government engage in widespread occupational licensing.194 Generally, these requirements take the form of statutes that require individuals in certain professions to be licensed before starting work.195 “Licensed” simply refers to an individual who has complied with the occupational license requirements for their respective profession. Typically, proponents introduce these requirements in legislatures as a means to protect the public and address health and safety concerns that arise within a regulated

193. See St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013); Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002); Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004).


195. See generally Morris M. Kleiner & Alan B. Krueger, The Prevalence and Effects of Occupational Licensing, 48 BRIT. J. INDUS. REL. 676 (2010). Occupational regulation can take the form of licensure, registration, and certification. Registration simply involves an individual filing her name, address, and qualifications with a government agency and then paying a fee before practicing her profession. Certification involves a government agency or other, private organization conducting exams to certify one’s competence in a given profession. This Comment focuses on the most stringent form of occupational regulation: government licensure.
profession.\textsuperscript{196}

In 2012, the Institute for Justice (IJ) conducted a study of 102 low and moderate-income occupations subject to licensure throughout all fifty states and the District of Columbia.\textsuperscript{197} The study found that licensing takes on numerous forms and usually includes a combination of fees, education or training, exams, minimum years of schooling completed, and minimum age.\textsuperscript{198} Notably, the study concluded, and this subsection illustrates, that requirements are often arbitrary and irrationally related to their alleged underlying health and safety goals.\textsuperscript{199} Further, this subsection does not focus on, or challenge, traditional, highly regulated industries like medicine, accounting, and law. Instead, this subsection focuses on the occupations similar to those in the IJ study: occupations practiced significantly by middle to low-income individuals at an early point in their careers.

A simple, noncontroversial example of the type of licensed occupations considered in this subsection is that of school bus drivers. Before being allowed to drive a school bus in Louisiana, drivers must, among other things, possess a commercial driver's license (CDL) with a passenger and school bus endorsement, pass a driving record check, and complete a training course with classroom instruction and bus training.\textsuperscript{200} Therefore, at a minimum, these requirements intend that bus drivers have passed tests that exhibit their ability to safely operate school buses, keeping children and other drivers out of harm's way.

Nevertheless, the number of individuals subject to licensure has increased significantly over the past century from less than 5\% of the workforce in 1950 to about 30\% in 2010.\textsuperscript{201} These percentages mean that in the 1950s, on average, 3.1 million workers were subject to licensure, but by 2010, that figure grew to 46.2 million workers requiring the government's permission

\textsuperscript{196} SUMMERS, supra note 194, at 3.
\textsuperscript{198} Id. at 7.
\textsuperscript{199} Id.
\textsuperscript{200} LA. ADMIN. CODE tit. 28, pt. CXIII, § 303 (2014).
\textsuperscript{201} Kleiner & Krueger, supra note 195, at 678-79.
before being allowed to earn a living. This increase is generally explained by the shift in the U.S. economy from one based primarily on manufacturing to one now based primarily on services. Accompanying this shift was the movement of workers from union-dominated professions to those lacking union representation. This change led members of growing service industry professions to begin implementing governing sets of standards. However, instead of pursuing a system of trade association-based certification, professionals lobbied various legislatures to implement licensing statutes.

There are other explanations for the large increase in licensed occupations. At times, lawmakers, at the urging of their electors, seek to prevent public exposure to (real, exaggerated, or even imagined) unsafe workers or work methods. Other times, lawmakers may be responding to scams or deceptive business practices by adding additional licensing requirements where existing fraud and tort statutes would suffice. Last, and the main focus of this subsection, is the prevalence of industries self-regulating by enacting barriers to enter their own professions.

Defenders of occupational licensing often repeat claims that licensing is necessary to protect the public health, safety, and welfare from unscrupulous or incompetent individuals. Yet thorough research into the 102 licensed occupations analyzed in the IJ study tells a different story. Only seven of the 102 occupations require a license in all fifty states and the District of


204. Id.

205. Id.

206. Id.

207. SUMMERS, supra note 194, at 3-4.

208. Id. at 4.

209. Id.

An additional eight occupations require a license in forty to fifty states. Five of the occupations only require licensure in one state. On average, when considering the 102 studied occupations, only twenty-two states license all 102 of them, leaving citizens of the other twenty-eight states and the District of Columbia without government regulation of all those occupations.

This data calls into question the claims by proponents that public health and safety motivate these licensing requirements. For example, as noted above in Sandy's case, it is doubtful that conditions are appreciably different in Louisiana from the other forty-nine states to an extent warranting protection from florists solely for Louisiana residents. Instead, the stated reasons for needing protection of the public could not be supported by actual evidence. Thus, there are no actual physical risks to the public that florists uniquely present. Therefore, the requirements must exist for some other reason.

Certainly, it is possible that licensure of a particular profession being limited to one or very few states could be a result of concentration of that industry to that small area. However, when considering the sixteen of the 102 studied occupations that require licensure in four or fewer states, this is simply not the case. These occupations can be and are practiced throughout

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211. CARPENTER ET AL., supra note 197, at 9. These occupations include: pest control applicator, emergency medical technician (EMT), school bus driver, bus driver (city/transit), vegetation pesticide handler, truck driver, and cosmetologist. Id.

212. Id. Those occupations include: skin care specialist, manicurist, barber, preschool teacher, earth driller, athletic trainer, fisher, and HVAC contractor (general/commercial). Id. at 10 tbl.1.

213. CARPENTER ET AL., supra note 197, at 9. Those occupations are: pipelayer non-contractor, conveyor operator, florist, fire sprinkler system tester, and forest worker. Id.

214. Id.

215. NEILY, supra note 3, at 59.

216. C.f. Meadows v. Odom, 360 F. Supp. 2d 811, 824 (M.D. La. 2005), vacated as moot, 198 F. App'x 348 (5th Cir. 2006) (accepting Louisiana's expert's opinion testimony that the license requirements prevent injury to the public despite not offering evidence of actual injuries that have occurred or been prevented as sufficient to show Louisiana regulated florists out of concern for public safety); NEILY, supra note 3, at 59.

217. These occupations are: psychiatric technician, interior designer, cross-connection survey inspector, court clerk, home entertainment installer, dietetic technician, electrical helper, nursery worker, log scaler, psychiatric aide, still
the United States.

The wide disparity in the number of occupations requiring licensure from state to state, and the amount of burdens that the requirements for licensure place on such occupations, likely reflects the lobbying efforts of particular interest groups more than it reflects actual consumer needs. In other words, if, for example, an auctioneer truly presented some health or safety risk to the public, one would expect all fifty states to license the profession as opposed to only thirty-three states throughout the country.\(^{218}\) In addition, one would expect the specific licensing requirements to be somewhat related to each other from state to state, but that is generally not the case.

For example, while Tennessee requires a $650 licensing fee of its auctioneers, Hawaii requires only a $15 fee, and where Tennessee requires 756 days of training, twenty-eight of the thirty-three states that license auctioneers require between zero and forty-five days of training.\(^{219}\) Therefore, the most likely explanation for the large disparity in fee and training requirements is lobbying efforts by affected industry participants in each individual state.\(^{220}\) Clearly, Tennessee auctioneers have been significantly more successful than their colleagues in other states in convincing lawmakers to raise the barriers for entry to their profession. Now, for new auctioneers to be able to compete with existing auctioneers in Tennessee, they must first pay a hefty fee and then spend over two years in training just to be able to earn a living and compete.

Another problem with the reality of occupational licensing is that most state boards that create and enforce occupational licensing requirements are primarily made up of practitioners within that industry. The industry regulates itself supposedly for the benefit of the public, but the motivations are all too easily expandable into other goals. For example, in 1977, a study determined that 16% of all insurance-covered dental work in

machine setter, pipelayer non-contractor, conveyor operator, florist, fire sprinkler system tester, and forest worker. CARPENTER ET AL., supra note 197, at 11.

218. See id. at 140.

219. Id.

220. The phenomenon of tradesmen conspiring to raise their wages by limiting the availability of members of their trade through arbitrary restrictions was presciently observed by famous economist Adam Smith. See generally ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (J.R. McCulloch ed., Edinburgh 4th ed. 1850) (1776); see also CARPENTER ET AL., supra note 197, at 29.
California required corrective treatment. However, the state board that regulated the California dental industry concluded that only eight dentists were deserving of correction. This example reflects the incentive of industries that regulate themselves to avoid negative publicity associated with disciplining those in the industry, all while simultaneously limiting those who may enter the profession by claiming the limiting regulations exist to protect the public.

With the burdensome realities of occupational licensing in mind, consider again the plight of the monks at St. Joseph Abbey. The contested Louisiana statute required the monks to become licensed funeral directors before they could legally sell caskets to the public or risk 180 days in jail and a fine of up to $2500. The statute also required licensed funeral directors to only sell caskets at state-licensed funeral homes.

Yet, the requirements for becoming a licensed funeral director in Louisiana are unnecessarily cumbersome because prospective funeral directors must acquire a high school diploma or GED, fulfill thirty credit hours (typically spanning at least one year) at an accredited college, complete a one-year, full-time apprenticeship, and pass an exam. Nonetheless, as the trial court noted, none of the required thirty credit hours involved grief counseling, funeral directing, or caskets. Nor was the apprenticeship required to cover grief counseling or knowledge about caskets, and the exam did not test on Louisiana law or burial practices.

Assuming the monks had managed to become licensed funeral directors, they also would have been forced to develop the monastery into a licensed funeral parlor, which would have required signage, a parlor for thirty people, a display room large enough for six caskets, an arrangement room, and an embalming facility to handle the sanitation and preparation of human

221. Summers, supra note 194, at 11-12.
222. Id. at 12.
223. See id. at 11.
225. Id.
226. Id.
227. Id.
228. Id.
corpses. According to Louisiana lawmakers, these costly and time-consuming requirements were necessary before someone could sell a simple, wooden box.

Interestingly, despite the rigorous statutory requirements for selling caskets in Louisiana, there is no state law banning the purchase and subsequent importation of a casket from an out-of-state, non-licensed vendor into Louisiana. Nor is there a requirement that a casket or any other container must actually be used for burying human remains. Neither must caskets meet any legal design or construction specifications, nor is there a ban on constructing and using one's own casket. The trial court in St. Joseph Abbey also pointed out that Louisiana was the only state in the country that still enforced laws restricting who may sell caskets to the public.

While it is true that the monks of St. Joseph Abbey successfully convinced the courts to strike down Louisiana's burdensome requirements on would-be casket sellers, the monks never challenged, nor did the court address, the licensing requirements on funeral directors as written. The monks only challenged the requirements to become a funeral director as applied to them as retail casket sellers. Therefore, anyone hoping to become a funeral director in Louisiana still must fulfill those requirements. Further, before the monks' challenge, the origins of the restriction of casket sales can be traced back to as early as 1932 when the Louisiana Board of Embalming and Funeral Directing was established. Hence, the success of the monks should not overshadow the burden that Louisiana's laws placed on its citizens throughout that time.

Another factor that weighs heavily against the liberal implementation of occupational licensing schemes is the disproportionate effect these schemes have on minorities and

230. Id. at 155.
231. Id.
232. Id.
233. Id. In spite of Powers v. Harris, it is unclear whether Oklahoma is still restricting casket sales.
individuals with less education and lower incomes than the national average. These disproportionate effects are felt primarily in two ways. First, occupational licensing tends to eliminate lower-priced, lower-quality services and products in favor of higher-priced, higher-quality services and products. Second, licensing leads to decreased choices of what profession people may enter.

The tendency of occupational licensing to eliminate lower-priced, lower-quality services and products in favor of higher-priced, higher-quality services and products may, on the surface, sound like a positive result. However, this arbitrary elimination is a negative outcome when enough information is available in the marketplace for individuals of varying income and education levels to knowingly and intelligently choose what they purchase. In 2014, the ability of individuals to acquire enough information to intelligently decide whether to buy a high-priced, high-quality product, or instead choose a (subjectively) suitable, lower-priced, lower-quality alternative is not only possible, but simple in many instances. Services like yelp.com and Angie's List, and publications like Consumer Reports provide valuable information on services and products in the marketplace for free or minimal cost. In addition, tried and true methods such as word of mouth, local news investigatory reports, and more recently, social media websites like Facebook and Twitter allow for information about the quality and performance of goods or services to be shared rapidly and easily by consumers.

The arbitrary elimination of subjectively disfavored products and services is also a negative outcome because the elimination of low-priced options due to occupational licensing requirements disproportionately harms individuals with lower incomes. Licensing laws limit competition in the marketplace, resulting in higher-priced goods and services that not all low-income consumers can afford. In addition, these restrictions fail to take into account the public's voluntary choice of products.

237. Id. at 173.
238. Id.
239. See id.
241. See Dorsey, supra note 236, at 173.
For example, consider a case in Arkansas where a dentist must sue to perform low-cost teeth cleanings.\textsuperscript{242} Dr. Burris is a licensed dentist and orthodontist in Arkansas.\textsuperscript{243} Due to the success of his orthodontics practice, he decided to start a program offering low-cost teeth cleanings to people in Arkansas who cannot afford to pay the typical price charged by other dentists for cleanings.\textsuperscript{244} However, shortly after Dr. Burris began his teeth-cleaning program, the Arkansas State Board of Dental Examiners informed him he was violating Arkansas law and that he must stop cleaning teeth or risk losing his license.\textsuperscript{245} Even though no customers had complained and Dr. Burris had never had any problems before the state board in the past, other dentists in Arkansas contacted the board to stop Dr. Burris from charging less for teeth cleanings.\textsuperscript{246}

The problem in Arkansas is that state law prohibits dental specialists, like orthodontists, from practicing outside of their area of specialty.\textsuperscript{247} This prohibition exists in spite of the fact that dental specialists are licensed dentists who have completed dental school just like general practitioner dentists who do teeth cleanings, plus an additional three-year residency in their area of specialty.\textsuperscript{248} In other words, because Dr. Burris gained additional expertise in dentistry, he is now prohibited from engaging in basic dentistry regardless of the fact that he is qualified to do so.

As a result, members of the Arkansas general public who lack dental insurance and cannot afford to pay the typical price for teeth cleanings must do without even though there are qualified dentists willing to perform the service affordably. This means that despite the total lack of evidence of risks to the public, the state board, at the behest of general dentists, arbitrarily increases the cost of teeth cleanings and prevents

\begin{itemize}
\item \textsuperscript{243} Id.
\item \textsuperscript{244} Access Denied, supra note 242. Dr. Burris charged about one-half to one-third what other dentists typically charge people who lack dental insurance.
\item \textsuperscript{245} Id.
\item \textsuperscript{246} Id.
\item \textsuperscript{247} Id.; see also ARK. CODE ANN. § 17-82-305(g)(2) (2010).
\item \textsuperscript{248} Access Denied, supra note 242.
\end{itemize}
some people from being able to afford them. The Arkansas state board has not even attempted to claim to have public health and safety in mind. Instead, it seems that the state board’s problem with Dr. Burris is that he has dared to engage in an activity that current law prohibits regardless of the law’s total lack of a rational connection to protecting the public.

The second and more profound way that occupational licensing disproportionately affects minorities and individuals with less education and lower incomes than the national average is in the decreased choice of professions that results from these requirements. This arbitrary limitation occurs in multiple ways. First, the most basic licensing requirements are the various fees to enter a profession that requires an occupational license to practice. By definition, those with low incomes are at a disadvantage in relation to their higher-earning fellow citizens and will be less likely to be able to afford the license fee than those with greater resources; and thus, fewer individuals with low incomes will be able to afford to enter the profession.

The second limitation to occupational choice arises with educational requirements to enter a field. As noted above in the examination of Louisiana’s requirements for licensed funeral directors, an applicant must have received a high school diploma or GED, and completed thirty hours of college credit. These types of requirements disproportionally limit the ability of minorities to enter professions for reasons that do not necessarily relate to their ability to perform well in the profession. Further, occupational licensing requirements that include written tests also significantly limit those with less education because studies show that a large percentage of those who fail written test components do not have high school diplomas.

The third limitation of occupational licensing is on the future earnings of those who cannot become licensed because of a lack of financial resources. Possessing fewer resources makes it more difficult to pay required licensing fees and school tuition to

249. See Access Denied, supra note 242.
250. Dorsey, supra note 236, at 173.
251. CARPENTER ET AL., supra note 197, at 7.
252. See Dorsey, supra note 236, at 174-75 (suggesting minorities are 30% less likely to pass licensing requirements in two studied states).
253. See id. at 174 (suggesting that of the applicants in two studied states who did not graduate high school, between 43-64% failed written tests).
achieve required education levels. Fewer resources also makes it more difficult to participate in professional training programs. In addition, not being able to afford to acquire education makes it more difficult to pass written tests required for many licenses.

The 102 occupations studied by IJ are considered to be particularly well-suited for those who are just entering or re-entering the labor force.254 As a result, the Bureau of Labor Statistics has recognized these professions as earning less income than the national average.255 This means that not only do occupational licensing requirements more severely affect those with fewer resources and education, but the requirements themselves limit access to entry-level type positions that pay lower than average wages.256

Thus, a perverse artificial ceiling results that prevents low-skilled, low-resourced workers, who are disproportionately minorities, from acquiring jobs with the potential for advancement and higher future wages.257 In other words, occupational licensing prevents those who need entry-level positions the most from acquiring them due to the exact reasons why they need that entry-level position in the first place: lack of resources and education that would allow them to bypass those low-paying, entry-level jobs.

Remember again, Sandy, the aspiring florist in Louisiana. When her husband died, she needed to go to work to support herself, but the only professional skill she possessed was making floral arrangements.258 However, due to not being able to pass the highly subjective florist test, Sandy was unable to generate income and died impoverished.259 A person with greater education, more financial means, or family resources may have had a better chance of finding different work or of learning another employable skill. However, should the ability to enter a safe, honest profession to simply make a living be dependent on one's good fortune to have been able to acquire an education or access to money? Is it too much to expect that individuals who have not been so fortunate should not be required to persuade a

254. CARPENTER ET AL., supra note 197, at 6-7.
255. Id. at 7.
256. Id.
257. See Dorsey, supra note 236, at 176.
258. NEILY, supra note 3, at 1.
259. Id.
group of potential competitors that their floral arrangements are of sufficient quality as to warrant their blessing to sell them to willing customers?

With the national unemployment rate at 5.6%, and the labor force participation rate dropping to only 62.7%, it is bad public policy to artificially limit the ability of individuals to find meaningful employment. Yet occupational licensing embraces this policy. In fact, statistics show that occupational licensing decreases job growth rates by 20% on average. Further, estimates suggest that occupational licensing creates an annual $34.8 to $41.7 billion drag on the economy due to decreased competition, resulting in higher prices and less innovation.

Due to the high social and economic costs discussed above, this Comment urges courts to reconsider the post-New Deal due process analysis of economic regulation. With the extreme deference given to legislatures by courts through rational-basis review, entrepreneurs desiring to make a living are given little, if any, recourse in the face of burdensome occupational licensing requirements. At a minimum, in light of the realities of occupational licensing, this Comment asks the Court to give laws restricting the ability to make a living a real, conscientious level of review just as it regularly does in cases weighing restrictions on other individual rights. The following subsection describes in detail why judicial deference to the legislative process, a result of the lack of real, conscientious review, does not provide meaningful protection to entrepreneurs seeking to challenge occupational licensing requirements.

C. PUBLIC CHOICE THEORY EXPLAINS WHY RELIANCE ON THE "POLITICAL PROCESS" IS FUTILE

As thoroughly discussed above, courts routinely defer to the legislature in the constitutional structure of checks and balances. Courts also assume that the citizenry is adequately

261. Id. at 2.
262. SUMMERS, supra note 194, at 36.
263. Id.
264. See Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1955) ("For protection against abuses by legislatures the people must resort to the polls, not to the courts." (quoting Munn v. Illinois, 94 U.S. 113, 134 (1876))); Powers v. Harris, 379 F.3d 1208,
protected merely because of its ability to vote out its representatives in favor of more preferable candidates and to exert pressure on its representatives to change the law. But is this assumption realistic? One prominent theory of political economics, known as public choice theory suggests that this assumption is flawed.265

Public choice theory emerged at the end of World War II in an effort to explain the economics and realities of politics, or as James Buchanan called it, “politics without romance.”266 The purpose of public choice theory is to analyze behaviors of individuals in various roles in the government process, from the voter, to the elected official, to the bureaucrat, allowing a better understanding of the complex interactions between those involved in creating public policy.267 Public choice theory presumes that self-interest primarily motivates political decisions, just as economic choices are also primarily driven by self-interest.268 Further, while public choice theory is not inherently negative, it is, as will be shown below, essentially inevitable. Thus, applying public choice theory to an analysis of occupational licensing allows a more realistic analysis of the motivations behind these requirements and a more accurate understanding of their purpose. In particular, this theory shows the danger of highly deferential levels of judicial review like rational basis, which embrace legislative solutions; yet legislative fixes are actually precluded by the existence of public choice.

George Mason Law School Professor Todd Zywicki sets out ten “axioms” of public choice theory, seven of which will be discussed here: (1) collective action; (2) rent-seeking is ubiquitous; (3) institutions matter; (4) methodological individualism; (5)

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267. Id. at 48.

people are people; (6) politicians are people too; and (7) free rider/forced rider. These axioms help to explain the real motivation behind occupational licensing and why the reasons typically provided by proponents for licensing are largely inaccurate at best and insincere at worst. Additionally, when one fully understands these axioms, it becomes clear that the current judicial deference to the political process is an inadequate protection for individuals’ economic rights; therefore, courts should be more proactive in examining stated rationales and effects of legislation implicating economic rights.

1. COLLECTIVE ACTION

Professor Zywicki’s axiom of collective action is illustrated by discussing the political activity known as pork-barrel spending. Collective action generally means that organized groups have an incentive to act where unorganized groups of the public at-large lack that incentive. This can, and frequently does, result in a “tyranny of the minority.” Organized groups who have great incentive to seek favorable outcomes for their desired policies constantly lobby legislative bodies. These groups are effective because it is easier to organize a group with shared, specifically limited interests than it is to organize masses of individual voters, it costs less to organize such groups, and it is easier to articulate and present the specific goals of a group than it is to grasp the will of a mass of individual voters. In addition, the lobbied legislators are heavily motivated to respond to these groups because they have greater assurance that the group will reward the legislators with support in the form of votes, campaign contributions, and other campaign support.

Contrast this with the public at-large. The mass of voters in any one town, state, or district is costly to organize, and difficult, if not impossible, to narrow down one set of issues or candidate on which they can all agree. Therefore, organized groups are better able to control the legislative agenda in their favor. This results in policies being enacted that would never survive on their own if

270. Shughart, supra note 268.
271. Id.
272. Id.
273. Id.
all affected parties had to vote for them separately because legislators are able to trade their votes for other legislators' "pork" programs in return for votes for their own "pork" programs lobbied for by those legislators' constituents. Therefore, this axiom is yet another example of the danger of the courts leaving plaintiffs to contend with organized interest groups in the legislative process instead of embracing judicial engagement to fully examine the purpose and motivation behind legislation.

The experience of the St. Joseph Abbey monks, whose efforts at statutory reform through the Louisiana legislature were extinguished, also illustrates the collective action axiom. As soon as the monks' proposed bill came up for hearing in its assigned legislative committee, an organized interest group, the Louisiana Funeral Directors Association, made sure that it had a mass of representatives present to provide sufficient testimony to put a halt to the bill. While the monks' plight may also highlight their naiveté, it also highlights the perverse results that collective action can create.

Hypothetically, it is plausible to conclude that if the monks' bill had been presented to the people of Louisiana for popular vote, then the monks would have been more successful even without resources to conduct an advertising campaign highlighting the merits of their bill. Logically, who, other than licensed funeral directors and those economically dependent on them, could oppose a small group of monks making and selling quality, lower-priced caskets? However, in states where lawmakers create occupational licensing requirements, the common sense of the general public does not play a direct role. Therefore, courts should be judicially engaged to examine what is truly going on with legislation to fully protect the economic rights of individuals like the St. Joseph Abbey monks.

2. RENT-SEEKING IS UBIQUITOUS

Rent-seeking is defined as the diversion of real resources to

274. Shughart, supra note 268.
276. This hypothetical does not suggest a constitutional amendment, but simply imagines voters of Louisiana making a simple "yes" or "no" vote as to whether groups like the monks should require licensure to sell caskets.
lobbying and similar efforts and away from productive use.\textsuperscript{277} Not only is rent-seeking not productive to society and the economy as a whole, but it is unfortunately also inevitable. Simply put, if benefits can be derived from the government, someone will invest to receive them.\textsuperscript{278} In other words, when an individual or a group can receive the benefit of reduced competition by the government statutorily making it more difficult for others to compete with them, then that individual or group will spend resources organizing and lobbying the legislature to receive that benefit instead of investing those resources into their business by hiring more employees, giving their current employees raises, or lowering prices for consumers. This is what happened in Louisiana when the monks tried to change the law to allow them to sell lower-priced caskets. Funeral directors lobbied en masse to keep their statutory monopoly on casket sales, and the legislature complied.

3. INSTITUTIONS MATTER

"Institutional problems demand institutional solutions."\textsuperscript{279} Institutions are "[t]he humanly devised constraints that structure human interaction."\textsuperscript{280} Understanding this axiom allows one to see how the near total judicial deference to the political process through rational-basis review collides with the constitutional structure of the United States. The institutions of courts and constitutions are highly important tools because they manage incentives.\textsuperscript{281} Courts are institutions because decisions handed down by courts have the ability to legally affect all parties in that jurisdiction. Constitutions are institutions in the sense that creating or amending a constitution is a top-down change in law that has the potential to completely alter the institution governed by that constitution. Therefore, the institution itself must be changed, not merely the actors within that institution. Placing the focus on the institutions that create and manage the political and legislative system may reduce special interest group lobbying efforts. Absent a focus on these institutions, law reformers are

\textsuperscript{277} Zywicki, supra note 269; see also Maxwell L. Stearns & Todd J. Zywicki, Public Choice Concepts and Applications in Law 60 (2009).

\textsuperscript{278} Zywicki, supra note 269; see also Stearns & Zywicki, supra note 277, at 66-67.

\textsuperscript{279} Shughart, supra note 268.

\textsuperscript{280} Stearns & Zywicki, supra note 277, at 11 (quoting Douglass C. North, Economic Performance Through Time, 84 Am. Econ. Rev. 359, 360 (1994)).

\textsuperscript{281} Zywicki, supra note 269; see also Stearns & Zywicki, supra note 277, at 11.
dependent, for better or worse, on engagement from individuals by way of voting, petition signing, letter writing, or phone-call campaigns of the many legislatures. Anyone who has attempted reforming a law through this process understands the high degree of difficulty in successfully accomplishing significant reform, especially in states that lack direct ballot initiatives.\textsuperscript{282}

However, when working with institutions, these legal reform efforts are more efficient. Creating or amending constitutions allows societies to accomplish complete legal creation and reform all at once. Bringing lawsuits in the court system allows a single plaintiff or defendant, in an appropriate case, to change a law for all parties within that jurisdiction without having to engage in the political, legislative process. Thus, the idea that real reform can somehow be accomplished by simply voting in new representatives is quaint.

Currently, one of the most effective modes of accomplishing legal reform is through lawsuits such as \textit{St. Joseph Abbey v. Castille}.\textsuperscript{283} Aside from the obvious result of the case being that any entrepreneur may now sell caskets in Louisiana whether they are a licensed funeral director or not,\textsuperscript{284} the case also illustrates how this axiom can become supercharged for legal reformers when combined with an appropriately engaged judiciary.

"Judicial engagement" is a concept that essentially "means deciding cases on the basis of actual facts, without bent or bias in favor of government."\textsuperscript{285} In other words, judicial engagement simply means "real judging in all constitutional cases" and creates "a level playing field for people seeking to vindicate their

\textsuperscript{282} Twenty-four states and the District of Columbia allow citizens to engage in ballot initiatives. A ballot initiative is a statute or constitutional amendment that is presented to voters directly on a ballot for approval or rejection. Thus, the state legislature is circumvented. Each state has its own procedural requirements to have an initiative placed on the ballot. These typically involve a petition process of collecting a certain amount of signatures in support of the initiative being placed on a ballot. If the initiative passes, it becomes law. This process is generally known as "direct democracy." See Anna Skiba-Crafts, Note, \textit{Conditions on Taking the Initiative: The First Amendment Implications of Subject Matter Restrictions on Ballot Initiatives}, 107 MICH. L. REV. 1305, 1308-09 (2009).

\textsuperscript{283} 712 F.3d 215 (5th Cir. 2013).

\textsuperscript{284} \textit{Id.} at 226-27.

This is not the same thing as judicial "activism."

Judicial activism is understood as occurring when a judge appears to have decided a case not based on the law or evidence before them but instead has decided the case based on the judge's own personal policy preference. While judicial activism under this definition probably occurs from time to time, the more popular usage of judicial activism as an accusation against judges who strike down laws is out of touch with the real meaning of the term. When people accuse judges of being activist, they generally seem to be saying three things: (1) the decision the judge made was not just incorrect but indisputably incorrect; (2) personal policy preferences motivated the judge's decision; and (3) the decision is part of a larger scheme among certain judges to promote their ideology. Put another way, most usage of the phrase judicial activism is really just a disguise for saying the person disagrees with the judge's decision.

In contrast, "judicial engagement" is what all people should expect from a judge who is properly fulfilling his or her role. What would a judge who is engaged do? First, the judge would determine what the government is really doing when it passes a particular law. Second, the judge would make the government prove that the law is really needed to accomplish the law's stated purpose. Third, the judge would not help the government justify its law or regulation, and fourth, the judge would put the burden of proof on the government to provide a valid constitutional reason for enacting a law or regulation.

With this framework, it seems that when people call for judges to practice "judicial restraint," what they actually mean, whether they realize it or not, is that they want the judiciary to abdicate its constitutional role of checking and balancing the other two branches of government. This cannot be what the authors of the Constitution meant when they declared that the

286. NEILY, supra note 3, at 2.
287. Id. at 119.
288. Id. at 118-19.
289. Id. at 137-39.
290. NEILY, supra note 3, at 139-41.
291. Id. at 141-42.
292. Id. at 142-43.
293. Id. at 126-27.
power to judge laws under the Constitution resides in the courts, not the legislative or executive branches.\textsuperscript{294}

Therefore, the axiom that institutions matter is especially apt when the institution of the courts is properly engaged in its constitutional or institutional role of judging laws and regulations that restrict individual, economic rights. The case of the St. Joseph Abbey monks clearly illustrates this. In that case, the Fifth Circuit first determined the government was really just engaging in economic protectionism.\textsuperscript{295} Next, the court made the government prove that the challenged statute was really enacted for public health, safety, or both concerns, as the government claimed.\textsuperscript{296} Then, the court played a neutral role in weighing the government's rationales for the challenged statute.\textsuperscript{297} Finally, the court properly placed the burden of showing a valid constitutional reason for the statute on the government.\textsuperscript{298}

In \textit{St. Joseph Abbey}, the government was unable to satisfy the demands of actual judicial review, and the court stuck down the statute arbitrarily limiting those who could sell caskets in Louisiana as unconstitutional.\textsuperscript{299} However, the court clearly noted that in a different case, if the government was able to adequately prove that a statute met judicial review, then the Fifth Circuit could uphold that statute as constitutional.\textsuperscript{300} This is why institutions matter and why the governmental process needs the institutions of courts to address institutional problems within the legislative and executive branches. Further, this is also why the United States Supreme Court must take up a case like \textit{St. Joseph Abbey}. While the Fifth Circuit, and the Sixth Circuit in \textit{Craigmiles}, showed a willingness to be engaged in actually reviewing statutes,\textsuperscript{301} other circuits like the Tenth in \textit{Powers} have not.\textsuperscript{302} Hence, to have consistent review of laws restricting individuals' economic rights, the Court must address this split.

\textsuperscript{294} U.S. CONST. art. III, § 2.
\textsuperscript{296} \textit{Id.} at 223-27.
\textsuperscript{297} \textit{See id.} at 223.
\textsuperscript{298} \textit{Id.} at 227.
\textsuperscript{299} \textit{Id.} at 226-27.
\textsuperscript{300} \textit{St. Joseph Abbey}, 712 F.3d at 227.
\textsuperscript{301} \textit{See Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002).}
\textsuperscript{302} \textit{See Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004).}
4. METHODOLOGICAL INDIVIDUALISM

Professor Zywicki's fourth axiom of methodological individualism purports that an individual's incentive to avoid small costs is low compared to the potential benefit. In other words, an individual is unlikely to take action to avoid an increase in the cost of a good or service if the cost increase is small. For example, imagine that a customer's home internet service provider has announced a $5 per month service fee increase. The customer has a choice of doing nothing and paying the increase, cancelling the service and doing without internet service at home, or shopping around to find a comparable service for the current fee or a lower fee. Some customers will consider the fee increase high enough to act and either cancel their service or switch to a lower priced service. However, others will consider the effort to contact the service provider to cancel the service and subsequently lose home internet as a higher cost than an extra $5 per month. In addition, other customers will view the time and effort required to shop around, compare services, and if a cheaper option is found, cancel their current service and sign up with another provider to be more costly than the additional $5 per month to simply leave things as is and do nothing.

Consider another example, only in the occupational licensing context: as part of an amendment to an occupational licensing scheme of barbers, a state decides to increase the annual license fee from the current $100 fee to $200. Individual barbers have a choice of either absorbing the increased fee or passing it on to their customers. For the purposes of this hypothetical, assume that the barber passes the fee on to his customers and that a typical barber sees eight customers a day, five days a week, fifty weeks a year, and charges $25 for each haircut. (For simplicity, ignore all other costs and fees.). This hypothetical would net the barber $50,000 a year before the license fee increase. To account for the fee increase, the barber will raise his fee for a haircut. However, when spread over 2000 haircuts a year at $25 each, the fee for each cut would only increase $0.05.

The numbers illustrate the point. Few barbers, if any, would challenge the change in the law that increases the fee by $100 if they know they can easily pass the added cost on to their

303. Zywicki, supra note 269; see also STEARNS & ZYWICKI, supra note 277, at 13-14.
customers. In addition, saving $100 certainly would not be worth missing much time at work or exerting much effort to change the law. Further, few customers would likely challenge the fee increase when the cost to the customer is merely a nickel more per haircut. Therefore, without some other mechanism, within the above example there is simply no motivation for any party to stop the state from acting absent some drastic increase in the fee year after year.

While the above example of the barbers is essentially just an example of incremental inflation without a major economic impact, it is plausible to see how a license fee change could have a large impact if the increase was large enough. Further, as mentioned above in subsection B, when one adds the economic impact of all occupational licensing together, estimates suggest that an annual $34.8 to $41.7 billion drag on the economy results.304 Therefore, all these fees significantly add up. Nevertheless, this axiom most closely illustrates the danger of a licensing board simply taking advantage of methodological individualism to implement a larger fee increase spread out over enough years so as not to raise sufficient ire among the licensed professionals or their customers.

Applying this axiom to the case of the St. Joseph Abbey monks is also illuminating. The statute at issue in St. Joseph Abbey v. Castille required all caskets sales in Louisiana to be done by a licensed funeral director.305 Since this statute created a monopoly on the sale of caskets in Louisiana in favor of licensed funeral directors, the funeral directors had no incentive to change this statute. The incentive for change was also minimal from the point of view of consumers. For most families, funerals are a rare occurrence. The typical family, then, makes decisions on funeral arrangements, including caskets, quickly and under emotional distress.306 While the methodological individualism axiom is not implicated under this example in the more traditional method of license fees of the profession being passed on to consumers, the axiom is implicated via the ability of licensed funeral directors to charge higher fees for caskets due to their prior statutory monopoly. Therefore, since most people only concern themselves

304. SUMMERS, supra note 194, at 36.
with the cost of a casket when a loved one dies, there is little incentive for a large segment of the public to challenge a statute that artificially increases the cost of a good that they will rarely buy.\textsuperscript{307} Thus, the danger mentioned above of incremental price increases is absolutely present in the funeral and casket industry.\textsuperscript{308}

5. PEOPLE ARE PEOPLE

It should come as no surprise that generally, people act in their own self-interest.\textsuperscript{309} Famed economist, Adam Smith furthered this notion in 1759 by describing rational self-interest as the "invisible hand."\textsuperscript{310} The concept is clearly described with the famous quote, "[i]t is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest."\textsuperscript{311} More directly, when businesspeople act in their own self-interest, they have every motivation to try to limit their competition. Some businesspeople seek to maximize their self-interest by lobbying the state to enact barriers to entry for new competitors. Behold, occupational licensing.

The axiom of people being people is also found in the case of the St. Joseph Abbey monks. When the monks at St. Joseph Abbey decided to start selling caskets to the public, they advertised via an article in The Clarion Herald, the official

\textsuperscript{307} "Preneed" funeral planning is becoming more popular in recent years. Preneed planning involves individuals arranging their own funerals and, in many instances, arranging payment before their death. An AARP survey from 1998 found that 32% of Americans over the age of fifty had prepaid some or all of their funeral expenses. PreNeed (Pre-Paid) Funeral and Burial Plans, NAT'L CARE PLAN. COUNCIL (Sept. 24, 2009), https://www.longtermcarelink.net/article-2009-9-24.htm.

\textsuperscript{308} An average casket costs around $2,000, but can cost as much as $10,000. Funeral Cost and Pricing Checklist, U.S. FED. TRADE COMMISSION (July 2012), http://www.consumer.ftc.gov/articles/0301-funeral-costs-and-pricing-checklist. The average cost of an adult funeral has risen from $708 in 1960 to $7,045 in 2012. About Funeral Service: Trends and Statistics, NAT'L FUNERAL DIRECTORS ASS'N, http://nfda.org/about-funeral-service/-trends-and-statistics.html (last updated Apr. 12, 2013). It is also interesting to note that the rate of cremation has risen from 3.56% in 1960 to 43.2% in 2012. See id.

\textsuperscript{309} This is not to suggest that this is the only motivation behind human behavior. This Comment merely highlights the influence that self-interest plays as a primary motivational factor of human behavior.


\textsuperscript{311} SMITH, supra note 220, at 7.
newspaper of the Archdiocese of New Orleans. Unfortunately for the monks, someone with the Louisiana State Board of Embalmers and Funeral Directors saw the article and began efforts to enforce the Louisiana statute, barring anyone other than licensed funeral directors from selling caskets. When the monks attempted to reform the statute to exempt themselves and other charitable organizations, the Louisiana Funeral Directors Association, a trade organization that represents licensed funeral directors’ interests in Louisiana, successfully lobbied the state legislature to vote down the reforms. This is a clear example of people being people and looking out for their economic self-interest by lobbying the state legislature to limit competition. Yet, when organized groups of industry insiders use their lobbying efforts to effectively keep unorganized individuals or inexperienced groups of monks from joining their profession, this results in limited options for people looking to make a living and significant costs to the economy as a whole. Therefore, while it is true that self-interested lobbying generally occurs with most legislation across the country, it becomes especially dangerous when targeted at limiting employment opportunities and increasing barriers to enter other professions.

6. POLITICIANS ARE PEOPLE TOO

According to Professor Zywicki, politicians have the same limited information as everyone else and do not magically change their ability to acquire and analyze information once they take office. It also should not come as a surprise that politicians also act in their own self-interest because generally, politicians seek to get re-elected. Accordingly, politicians respond to constituent and interest group concerns because being responsive increases the probability of re-election. This is especially true when powerful individuals or groups possessing a large amount of resources that may affect an upcoming election lobby politicians. It is in a politician’s self-interest to be responsive to the efforts, wishes, and information put forth by those powerful groups rather than to the efforts of a single individual who lacks resources individually to influence an election.

312. Free the Monks, supra note 275.
313. Id.
314. Id.
315. Zywicki, supra note 269.
Applying this axiom to the monks at St. Joseph Abbey, Louisiana politicians were simply acting like politicians, who are people, too. When the monks managed to have their local state representative introduce a bill into the Louisiana House of Representatives to allow them to sell their caskets, instead of siding with competition and a small band of monks, the members of the Commerce Committee of the Louisiana state House voted in favor of the influential Louisiana Funeral Directors Association that sent several members to the hearing to oppose the bill.\footnote{Free the Monks, supra note 275.} Therefore, even though a group of sympathetic monks was able to convince their local representative to take up their cause, when faced with the larger task of convincing a full legislative committee to ignore the lobbying efforts of the funeral directors, they were unsuccessful.

In addition, recall Sandy’s case against the Louisiana floral industry. The Louisiana State Florists’ Association successfully managed to lobby Agriculture Commissioner, Bob Odom.\footnote{Neily, supra note 3, at 60.} This resulted in Mr. Odom stopping an attempt by the Louisiana House of Representatives to deregulate the florist industry that had resounding support in the legislature.\footnote{Id.} Therefore, even in some cases where people have the ability to succeed in the legislature, that is not always enough. This is precisely why judicial deference through rational-basis review is so dangerous to individuals trying to earn a living. When courts do not conscientiously look at what is really going on with laws restricting economic rights, people become practically powerless to counter the lobbying efforts of highly organized and influential groups like the Louisiana floral industry and funeral directors.

7. **FREE RIDERS AND FORCED RIDERS**

a. **Free riders**

In economics, “free riders” are those who consume goods without paying for them.\footnote{See Tyler Cowen, Public Goods, CONCISE ENCYCLOPEDIA ECON., LIBR. ECON. \& LIBERTY, http://www.econlib.org/library/Enc1/PublicGoodsandExternalities.html (last visited Dec. 28, 2014).} The classic example of free riding is a fireworks show.\footnote{Id.} Everyone within eyesight of a fireworks show...
can watch and enjoy the show regardless of whether they paid the producers of the show for the privilege. Even if the show’s producers attempted to charge a fee for the show, it would be impossible to prevent those within viewing range from seeing the show regardless of whether they paid for it.

Goods and services that tend to generate free riders are known as public goods. National defense, lighthouses, and public roads are traditional examples of public goods. Governments frequently provide these public goods because of the belief that voluntary action will not occur to create the project since everyone could simply sit back and wait for others to expend time and resources to create the project, yet still enjoy the finished project once it is complete. However, this belief is not without its critics. Others posit that worthwhile projects are still carried out by voluntary actors in spite of the possibility for free riders.

Applying the concept of free riders to occupational licensing, evidence shows that government schemes are unnecessary to protect the public health, safety, and welfare. Sufficient voluntary alternatives exist to achieve the goals that proponents of occupational licensing desire. For example, the Automotive Service Excellence (ASE) certification is a program that approximately 330,000 auto mechanics have completed in the United States. The ASE is a program that auto mechanics voluntary participate in to exhibit to their customers their expertise and qualifications for quality auto mechanic work, which can result in a competitive advantage for the certified mechanic. Customers benefit from this program because the ASE is an easily recognizable certification that shows the mechanic has successfully completed a rigorous test of the

321. Cowen, supra note 319.
322. See id.
323. See id.
325. See id. at 324-25.
326. Id. at 324.
327. See Carpenter et al., supra note 197, at 30, 33.
329. Id.
mechanic's knowledge and experience. Further, the certification requires re-testing every five years to insure competence of mechanics.

The ASE certification for auto mechanics is only one example of how specific industries police themselves to provide protection for customers and provide an ability to highlight the difference in skill level between practitioners of the trade without requiring government involvement. Industries that adopt their own programs to insure quality and consumer protections show the industry's ability to account for free riders on its own. The free riders in these industries, those who choose not to gain certification, still must contend with their lack of certification when the consumer is aware of certification programs and these individuals' lack of credentials.

However, this still provides the customer with the choice of hiring the uncertified individual or seeking out another person with certification. This is a proper result of a functioning market because there are multiple motivations behind a consumer's choice to hire the uncertified person or find one who is certified: price, convenience, prior relationship, reputation despite lack of certification, etc. Even if an individual consumer lacks the ability or resources to analyze this process on her own, there are also nongovernmental resources available to assist her (such as the Better Business Bureau and Angie's List). Therefore, at a minimum, where individual industries have taken the initiative to self-police and provide consumer protections by way of voluntary certification, government occupational licensing schemes are unnecessary to prevent a free rider problem.

b. Forced riders

The concept of "forced riders" is best explained when considering political, pork-barrel spending. When legislatures

330. See About ASE, supra note 328. Mechanics wear ASE insignia and can use the ASE logo on their websites and in their customer waiting rooms. CARPENTER ET AL., supra note 197, at 33. Further, the ASE website contains easily usable links to find a certified shop and the ability for customers to file complaints and report abuse of ASE logos and claims of certification. NAT'L INST. FOR AUTOMOTIVE SERVICE EXCELLENCE, https://www.ase.com (last visited Dec. 28, 2014).

331. About ASE, supra note 328.


333. Cowen, supra note 319.
enact a particular spending program, opponents of that specific program have no real-time mechanism to avoid having their tax dollars pay for it. In other words, absent a checklist on yearly tax return forms that allows a taxpayer to choose what programs his tax dollars are to be spent on, citizens are forced to pay for all programs that officials enact whether they like it or not.

The concept of forced riders also applies within the context of occupational licensing. Whether a member of a licensed occupation supports the particular licensure scheme of that profession or not, the member must comply or be unable to practice that occupation. The only other options are to attempt to change the law through the legislature or file suit in court. Since the monks of St. Joseph Abbey had already failed in the legislature, if they also failed in their lawsuit challenging the Louisiana requirement to become a licensed funeral director before they could legally sell caskets, then they would have become forced riders and been required to comply with the burdensome licensing requirements or find some other way to support their monastery.

Therefore, with the axioms of public choice theory in mind, the troubles experienced by the monks at St. Joseph Abbey and by entrepreneurs across the United States become even clearer. In St. Joseph Abbey, upon being notified of their violation of the law by the Louisiana State Board of Embalmers and Funeral Directors (a board made up of four licensed funeral directors, four licensed embalmers, and one independent individual), the monks petitioned to the state legislature to have themselves and other non-profit charitable groups exempted from the statute. The monks presented two amendment drafts, but the drafts were never passed out of their respective committees for debate and vote by the legislature. The monks' failures in the legislature are likely related to the formal complaint filed by the Legislative Committee Chairman of the Louisiana Funeral Directors Association, who also owned several licensed funeral homes, after a court ordered the monks to cease and desist.

334. Cowen, supra note 319.  
336. St. Joseph Abbey v. Castille, 712 F.3d 215, 219 (5th Cir. 2013); Benedictine Monks, supra note 162.  
338. Id.
To be clear, public choice theory in itself is not inherently a bad thing. Understanding the mechanisms at play in the political, legislative process is extremely valuable for groups that are legitimately attempting to reform the law for the benefit of society. However, it is just as important that courts proactively consider these mechanisms instead of blindly deferring to legislatures.339 Maybe then, courts will be less willing to so easily turn plaintiffs away from the judicial system and require them to descend into the lair of the legislature. If courts become more engaged in truly judging cases before them and analyze the true motivation behind challenged statutes, something judges do in most all other cases before them, economic rights will be more sufficiently protected and governments will be kept honest in only enacting statutes when the true aim legitimately is for the public health, safety, and welfare.

IV. PROPOSAL TO OVERRULE SLAUGHTER-HOUSE AND EXHUME THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT TO MEANINGFULLY SAFEGUARD ECONOMIC LIBERTY

As demonstrated above, restrictions on individuals’ ability and right to earn a living are quite burdensome. In addition, it should also be clear that many of these restrictions are arbitrary and do not truly exist to protect the public health, welfare, and safety. Furthermore, courts’ use of rational-basis review since the 1930s gives entrepreneurs little chance for success in challenging occupational licensing restrictions in the courts. Finally, public choice theory explains that entrepreneurs also have little chance for success in convincing lawmakers to make licensing requirements less burdensome. Therefore, this Comment proposes three solutions: (1) The United States Supreme Court must overrule Slaughter-House and reinstate the Privileges or Immunities Clause of the Fourteenth Amendment as an effective safeguard of individual rights; (2) After reviving the Privileges or Immunities Clause, the Court should interpret and apply it by looking to the original meaning of the Clause as understood at the time of ratification of the Fourteenth Amendment; and (3), At a minimum, the Court should abandon rational-basis review as set out in Nebbia v. New York340 and

One of the longest-standing tenants of constitutional interpretation is that “[i]t cannot be presumed that any clause in the [C]onstitution is intended to be without effect.” However, this is precisely what the Court did with the Privileges or Immunities Clause in Slaughter-House. With modern scholars overwhelmingly in agreement that Slaughter-House was wrongly decided, it makes no sense to continue upholding the decision. In addition, since not only scholars but also at least one United States Supreme Court Justice appear ready to overrule Slaughter-House in the appropriate case, it is imperative that challengers to occupational licensing restrictions include Fourteenth Amendment Privileges or Immunities claims in every challenge they make. With over 1,000 occupations subject to licensing restrictions, this approach should eventually lead to the Court finally taking up a case that gives Justice Thomas and constitutional scholars the opportunity to convince the rest of the Court to overrule Slaughter-House.

Maintaining the precedent of Slaughter-House on the basis of stare decisis alone is misguided because Slaughter-House was decided so recently after the passage of the Fourteenth Amendment that the decision prevented the courts from developing a robust interpretation of the Privileges or Immunities Clause. Instead, it appears that the Court is ignoring the errors of the Slaughter-House Court because issues that could be addressed under the Privileges or Immunities Clause are now addressed under the Due Process clause. Justice Scalia reflected the hollowness of this rationale when he said “[d]espite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights ‘because it is both long established and narrowly limited.’” This statement by Justice

341. 304 U.S. 144 (1938).
343. Id. at 855; Blackman & Shapiro, supra note 25, at 10-11; see also Saenz v. Roe, 526 U.S. 489, 522 n.1 (1999) (Thomas, J., dissenting).
344. Saenz, 526 U.S. at 527-28 (Thomas, J., dissenting).
345. SUMMERS, supra note 194, at 3.
346. SANDEFUR, supra note 45, at 69.
347. Id.
Scalia is not a very confidence-inspiring endorsement of substantive due process.

Yet Justice Scalia is not alone in his discomfort. Justice Thomas said "[t]his Court's substantive due process framework fails to account for both the text of the Fourteenth Amendment and the history that led to its adoption, filling that gap with a jurisprudence devoid of a guiding principle." Therefore, this Comment implores the Court to give up the charade of not overruling *Slaughter-House* merely because it is old and because a separate doctrine, substantive due process, has evolved to serve many of the same purposes. Furthermore, "[t]here can be no better reason for overruling a wrong decision than the fact that it is wrong."

Second, upon overruling *Slaughter-House* and reviving the Privileges or Immunities Clause of the Fourteenth Amendment, the Court should interpret and apply the Clause by looking to the original meaning of the Clause as understood at the time of ratification of the Fourteenth Amendment. As quoted above, in his *Saenz* dissent, Justice Thomas noted the potential dangers of the use of the Privileges or Immunities Clause as a "convenient tool for inventing new rights."

Justice Thomas' concern is not ill-founded. Reviving the Privileges or Immunities Clause and the "clean slate" that accompanies its application to individual rights could conceivably allow individuals to challenge the Court to recognize countless rights that the Court has never recognized as rights that are fundamental to the history of the United States. Among these possible rights could be the positive right to redistribution of income from one group to another. Constitutional scholars like Erwin Chemerinsky embrace this view of the Privileges or Immunities Clause. However, to combat this over-expansive

(quotings Albright v. Oliver, 510 U.S. 266, 275 (1994) (Scalia, J., concurring)).

349. Id. at 812 (Thomas, J., concurring).
350. SANDEBURG, supra note 45, at 99.
352. See generally Blackman & Shapiro, supra note 25.
353. SANDEBURG, supra note 45, at 99.
354. Blackman & Shapiro, supra note 25, at 31-41.
356. Id.
notion of constitutionally protected rights, the Court should construe the Clause by considering what the Clause meant to the drafters of the Fourteenth Amendment.

Fortunately, the intentions and interpretations of the drafters of the Amendment are highly suggestive. Further, the Court is already conducting such an inquiry when it analyzes rights under the Due Process Clause. The modern analysis employed by the Court in determining whether a right is constitutionally protected is set out in Washington v. Glucksberg. Glucksberg created a two-part test to determine whether a right is so fundamental as to be deeply rooted in our nation's history and traditions. If so, the Court will subject restrictions of that right to greater scrutiny than rational-basis review so long as the right is carefully described.

However, what the Court fails to do in applying the Glucksberg test is recognize economic liberty as a fundamental right that is deeply rooted in United States traditions and history. This is strange. Textually, this test provides for constitutional protection of both enumerated and unenumerated rights. As discussed previously, the Ninth Amendment also provides protection for unenumerated rights. Since economic liberty is not a clearly enumerated right in the Constitution, for it not to receive protection by the Court, it must not be deeply rooted in American history.

Yet that interpretation of history is not accurate. The incorporation of Corfield into the debates over the drafting of the Fourteenth Amendment and the Civil Rights Act of 1866 suggests that economic liberty was considered a fundamental right not only in post-Civil War America but also in colonial America and in England before that. Therefore, reviving the Privileges or

357. See supra Part II.
358. Blackman & Shapiro, supra note 25, at 65-75.
360. Id. at 720-21.
362. See Blackman & Shapiro, supra note 25, at 66-67.
363. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.
364. The argument as to whether economic liberty is an enumerated right is beyond the scope of this Comment.
365. See SANDEFUR, supra note 355, at 290-93.
366. See supra Part II.A.
Immunities Clause allows the Court to fully recognize and protect rights, enumerated and unenumerated, in line with other constitutional provisions with a textual clarity that is absent from the Due Process Clause. In addition, economic liberty is a right that would and should receive protection under the Privileges or Immunities Clause as being recognized as a right deeply rooted in this country's history and traditions. Thus, this revival of the Clause would provide entrepreneurs who are burdened by occupational licensing requirements a greater means of protection in the courts because rational-basis review embedded within the Due Process Clause would not apply under Privileges or Immunities claims.

Finally, while the third proposal of this Comment may seem extreme and unrealistic, it is the goal of this Comment, through Part II, to show that the shift in the Court around the New Deal is actually the extreme change in American law. In addition, Part III of this Comment goes to great lengths to illustrate the repercussions of post-New Deal constitutional theory on ordinary individuals and the economy as a whole. Therefore, urging the Court to overrule Nebbia v. New York and United States v. Carolene Products and the resultant rise of rational-basis review and novel tiering of individual rights would merely correct the straying of the Court away from the sound principles that protected individual economic rights for most of American history.

The Constitution still means what it originally meant and the history it was built on remains the same. Progressive political theories of the New Deal cannot change that. As Clark Neily expresses in his description of judicial engagement, and as seen in the Lochner era of jurisprudence, American judges used to, and some still do, actually judge the cases before them. Casket sellers in the Fifth and Sixth Circuits can now enjoy their right to earn a living because the judges in their cases were willing to conscientiously examine the evidence before them to determine what was really going on in the legislature and subject the legislative results to constitutional scrutiny. Even though those cases were upheld under rational-basis review, critics were quick to note that meaningful judicial scrutiny of government rationales for legislation has no place in actual rational-basis

367. See Blackman & Shapiro, supra note 25, at 66-67.
368. See supra Part II.C.
Those same critics denied casket-sellers in the Tenth Circuit their right to earn a living expressly because rational-basis review allowed the right to be denied. Therefore, a test such as rational-basis review that can be applied so unevenly and unpredictably, and at its core advantages government restrictions over individual liberty, has no place in the Constitution imagined or ratified in 1787.

V. BENEDICTION

It may be too late for Sandy to make floral arrangements in Louisiana, but it is not too late for entrepreneurs across the United States to enjoy their right to earn a living. If the Court was simply to return to the original understanding of individual economic rights and apply that understanding with a focus on protecting liberty from unnecessary government interference now and in the future, individuals would rest assured that they remain free to engage in an honest living of their choice. Without significant action from the Court, though, individuals in over 1,000 occupations nationwide will continue having to ask for permission from the government and those in the industry they wish to compete with before they are able to go to work. This state of affairs should be unacceptable in a free society. If the United States is to prosper and again enjoy its competitive position in the world, the people must demand and the Court once again recognize the right to economic liberty.

Caleb R. Trotter

370. Id.