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THE FIFTH CIRCUIT LAYS ECONOMIC PROTECTIONISM TO REST IN *ST. JOSEPH ABBEY*

Abstract: On March 20, 2013, the U.S. Court of Appeals for the Fifth Circuit in *St. Joseph Abbey v. Castille* held that the economic protection of a discrete interest group does not constitute a legitimate state interest under rational basis review. In so holding, the court split from the Tenth Circuit, which held the opposite almost a decade earlier. This Comment argues that courts should follow the Fifth Circuit’s decision and deem economic protectionism an illegitimate state interest. Recognizing economic protectionism as a legitimate state interest, as the Tenth Circuit did, is inconsistent with U.S. Supreme Court precedent.

INTRODUCTION

A Louisiana occupational licensure requirement obligated the Benedictine Monks of St. Joseph Abbey to become funeral directors in order to sell their homemade wooden caskets.¹ Occupational licensing schemes, akin to the one employed in Louisiana, have been utilized in American law since the end of the 19th century.² Traditionally, their purpose is rooted in protecting the public from frauds or inexperienced persons.³

Nevertheless, according to the U.S. District Court for the Eastern District of Louisiana and the U.S. Court of Appeals for the Fifth Circuit, the sole purpose of the licensure requirement faced by St. Joseph Abbey was economic protection of the funeral industry.⁴ In determining the validity of such state licensing schemes, the U.S. Supreme Court has explicitly noted that any li-

¹ *St. Joseph Abbey v. Castille*, 712 F.3d 215, 218 (5th Cir.), *cert. denied*, 134 S. Ct. 423 (2013). See generally LA. REV. STAT. ANN. §§ 37:831, :848 (2013), *invalidated by* *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222–23 (5th Cir. 2013).

² See Timothy Sandefur, *Economic Exclusion a Legitimate State Interest? Four Recent Cases Test the Boundaries*, 14 WM. & MARY BILL RTS. J. 1023, 1025 (2006).

³ See *id.* at 1026.

⁴ *St. Joseph Abbey*, 712 F.3d at 220; *St. Joseph Abbey v. Castille*, 835 F. Supp. 2d 149, 160 (E.D. La. 2011), *aff’d*, 712 F.3d 215 (finding that the licensing law served no public interest but simply protected “a well organized industry that seeks to maintain a strict hold” on the funeral business). Economic protectionism is often discussed in terms of the dormant commerce clause, which forbids the protection of intrastate commerce at the expense of interstate commerce. See Justin M. Nesbit, Note, *Commerce Clause Implications of Massachusetts’ Attempt to Limit the Importation of “Dirty” Power in the Looming Competitive Retail Market for Electricity Generation*, 38 B.C. L. REV. 811, 833–35 (1997). Nevertheless, the dormant commerce clause did not pertain to the situation in *St. Joseph Abbey* because the licensing law applied only to intrastate sales. Cf. LA. REV. STAT. ANN. §§ 37:831, :848.

censing scheme not reasonably related to a legitimate state interest violates the Fourteenth Amendment.⁵ Whether the pure economic protection of a discrete interest group, such as the funeral industry, constitutes a legitimate state interest has recently come to the forefront of constitutional law.⁶ The U.S. Court of Appeals for the Sixth Circuit deemed such protectionism illegitimate, but the U.S. Court of Appeals for the Tenth Circuit came out on the opposite side.⁷ More recently, in 2013 the U.S. Court of Appeals for the Fifth Circuit tackled the issue in *St. Joseph Abbey v. Castille*.⁸ The court joined the Sixth Circuit, holding that economic protectionism does not constitute a legitimate state interest.⁹ In so ruling, the court rejected the Tenth Circuit's interpretation of Supreme Court precedent.¹⁰

This Comment argues that economic protectionism, by itself, is not a legitimate state interest.¹¹ Part I of this Comment describes the procedural background of *St. Joseph Abbey* and examines the licensing law that required Louisiana casket retailers to be licensed funeral directors.¹² Part II discusses how other federal appeals courts have dealt with the issue of pure economic protectionism and identifies where the Fifth Circuit's holding falls on that spectrum.¹³ Finally, Part III argues that, as recognized by the Fifth Circuit, economic protectionism does not constitute a legitimate state interest.¹⁴

⁵ *Dent v. West Virginia*, 129 U.S. 114, 122 (1889). *See generally* U.S. CONST. amend. XIV, § 1 (providing that “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of laws”). A statute is “reasonably related” to a legitimate state interest when it is plausible that a particular legislative measure is a rational way to achieve a legitimate state interest. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955). Some examples of legitimate state interests are public health, safety, morality, peace and quiet, and law and order—but these examples are simply illustrative; any goal not forbidden by the Constitution can constitute a legitimate governmental interest. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 698 (Vicki Been et al. eds., 4th ed. 2011); *see* *Berman v. Parker*, 348 U.S. 26, 32 (1954). In 1889, in *Dent v. West Virginia*, the U.S. Supreme Court held that licensing requirements for doctors are a valid use of West Virginia's police power. 129 U.S. at 123. The Court acknowledged the right of every person to pursue any lawful calling, but also recognized that states have the power to impose conditions on this right for the protection of society. *Id.* at 121–22.

⁶ *See, e.g., St. Joseph Abbey*, 712 F.3d at 221–22; *Powers v. Harris*, 379 F.3d 1208, 1218 (10th Cir. 2004) (holding that the economic protection of a discrete interest group constitutes a legitimate state interest); *Craigsmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (holding that the economic protection of a discrete interest group does not constitute a legitimate state interest).

⁷ *See Powers*, 379 F.3d at 1223; *Craigsmiles*, 312 F.3d at 224.

⁸ *See* 712 F.3d at 221–22.

⁹ *See id.* at 222; *Craigsmiles*, 312 F.3d at 224.

¹⁰ *See St. Joseph Abbey*, 712 F.3d at 222.

¹¹ *See infra* notes 74–93 and accompanying text.

¹² *See infra* notes 15–39 and accompanying text.

¹³ *See infra* notes 40–73 and accompanying text.

¹⁴ *See infra* notes 74–93 and accompanying text.

I. THE FUNERAL LICENSING LAWS OF LOUISIANA AND ST. JOSEPH ABBEY'S CHALLENGE TO THEIR CONSTITUTIONALITY

St. Joseph Abbey faced substantial regulatory burdens when it attempted to enter the casket industry in 2007.¹⁵ After generations of constructing simple wooden caskets to bury their members, the Abbey decided to invest in their pastime as a possible source of income.¹⁶ Before entering the market, the Abbey did not face regulatory burdens, as laws relating to caskets in general are scarce in Louisiana.¹⁷ For example, no Louisiana law pertains to the design, use, or construction of caskets.¹⁸ Despite the absence of these specifications, Louisiana law nevertheless restricts the sale of caskets.¹⁹ Title 37, sections 831 and 848 of the Louisiana Revised Statutes provide that only a state-licensed funeral director working at a state-licensed funeral home may sell caskets within Louisiana.²⁰ As a result, in an official complaint in January 2007, the Louisiana State Board of Embalmers and Funeral Directors ordered the monastery to stop selling their caskets.²¹ The Board argued that the Abbey had violated the state law reserving intrastate casket sales for only state-licensed funeral directors.²²

¹⁵ See LA. REV. STAT. ANN. §§ 37:831, :848 (2013), *invalidated by* St. Joseph Abbey v. Castille, 712 F.3d 215, 222–23 (5th Cir. 2013); *St. Joseph Abbey*, 712 F.3d at 219. The monastery's entrance into the funeral market was limited to the retailing of caskets. *St. Joseph Abbey*, 835 F. Supp. 2d at 154. The Abbey did not compete with the funeral industry in any other way, as it did not arrange funerals, participate in funerals (except in a pastoral sense), or prepare bodies for burial. *Id.*

¹⁶ *St. Joseph Abbey*, 712 F.3d at 217. Hurricane Katrina decimated the Abbey's primary source of revenue, timber. *Id.* With this loss of revenue, the monastery decided to invest in the casket pastime to generate income. *Id.* Thereafter, public interest in the caskets grew as a result of two bishops being buried in their product. *Id.* The Abbey offered caskets in two models, priced at \$1,500 and \$2,000—significantly lower than those offered by funeral homes. *Id.*

¹⁷ See *id.* at 217–18.

¹⁸ See *id.*; see also LA. REV. STAT. ANN. §§ 37:831–:885 (2013) (delineating general provisions for the funeral industry with no restrictions on caskets other than their sale). For example, caskets need not be sealed. *St. Joseph Abbey*, 712 F.3d at 217–18. In addition, individuals may even construct their own caskets or purchase them from out of state via the Internet. *Id.* Furthermore, no law even requires a person to be buried in a casket. *Id.*

¹⁹ See LA. REV. STAT. ANN. §§ 37:831, :848.

²⁰ See *id.*

²¹ *St. Joseph Abbey*, 712 F.3d at 219. The Louisiana State Board of Embalmers and Funeral Directors is the licensing and regulatory group charged with enforcing the laws pertaining to the funeral industry in Louisiana. LA. REV. STAT. ANN. § 37:832. The Board is empowered through Louisiana state statutory law and consists of nine members. *Id.* Four must be licensed funeral directors, four must be licensed funeral embalmers, and one must not be affiliated with the funeral industry. *Id.*

²² *St. Joseph Abbey*, 712 F.3d at 218. See generally LA. REV. STAT. ANN. §§ 37:831, :848. The penalty for each unlicensed casket sale is up to a \$2,500 fine or 180 days in jail. LA. REV. STAT. ANN. § 37:850. In 2008 and 2010, the Abbey petitioned the legislature to allow non-profit charitable groups to sell caskets without being a licensed funeral home. *St. Joseph Abbey*, 712 F.3d at 219. Two bills to amend the law were drafted, but the bills never made it out of the committee. *Id.*

Becoming a licensed funeral home with a licensed funeral director is not a simple task.²³ To become a licensed funeral home, an establishment must meet a host of building requirements and must hire a full-time funeral director.²⁴ Additionally, to become a licensed funeral director, a person must meet many training requirements.²⁵ Although none of the building or director requirements relate to the construction or sale of caskets, the Abbey would need to fulfill all of these requirements to sell their caskets.²⁶

The Abbey challenged the licensure requirement in the Eastern District Court of Louisiana.²⁷ It sought declaratory relief against the Board's enforcement of the statute, arguing that the licensure requirement violated the Equal Protection and Due Process Clauses of the Constitution.²⁸

²³ See *St. Joseph Abbey*, 712 F.3d at 219 ([T]he Abbey's plan for casket sales faced significant regulatory burdens."). Cf. LA. REV. STAT. ANN. § 37:842(A), (D) (2013) (imposing a variety of requirements for licensure).

²⁴ See LA. REV. STAT. ANN. § 37:842(D). A funeral home must have a layout parlor for thirty people, display room for six caskets, an arrangement room, and an embalming facility. LA. ADMIN. CODE tit. 46, § 1107 (2013); *St. Joseph Abbey*, 217 F.3d at 218.

²⁵ See LA. REV. STAT. ANN. § 37:842(A). The requirements to become a licensed funeral director include obtaining a high school diploma or GED, completing thirty credit hours at an accredited college, participating in a one-year apprenticeship, and passing the funeral boards. *Id.*

²⁶ See *St. Joseph Abbey*, 712 F.3d at 218. The funeral industry has a history of exploiting consumers. See *Funeral Industry Practices*, 47 Fed. Reg. 42,260, 42,260–61 (Sept. 24, 1982). In the past, funeral homes would bundle their products, causing consumers to buy products that they neither wanted nor needed. *Id.* The individual prices of goods and services were not only unavailable to consumers, but this unavailability was part of the funeral industry's tradition not to reveal such information. See *id.* at 42,270. Additionally, funeral establishments charged high "casket-handling" fees to those who bought from third party retailers. *Funeral Industry Practices*, 59 Fed. Reg. 1,592, 1,593 (Jan. 11, 1994). To curb these practices, the Federal Trade Commission began regulating the funeral industry in the 1980s through the promulgation of the Funeral Rule. See *Trade Regulation Rule, Funeral Industry Practices*, 47 Fed. Reg. at 42,260. The regulations allow consumers to buy only the funeral arrangements they want, receive price information on the telephone and an itemized price list when visiting a home, receive a written statement after deciding on items and before paying, provide the funeral home with a casket or urn bought elsewhere with no additional handling fees, and make funeral arrangements without embalming. 16 C.F.R. §§ 453.2, .4 (2013). As a result of the FTC's regulation, Louisiana consumers could buy caskets from third-party retailers in forty-nine states and worldwide with no discouragement or fees from funeral homes. See *id.* Louisiana residents, however, could not buy from third-party retailers residing in their own state because of Louisiana's licensing requirement. See LA. REV. STAT. ANN. §§ 37:831, :848 (2013).

²⁷ *St. Joseph Abbey*, 835 F. Supp. 2d at 151.

²⁸ *Id.* at 151–152. See generally U.S. CONST. amend. XIV, § 1. The Equal Protection Clause requires that states treat similarly situated people similarly. *E.g.*, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985). The substantive prong of the Due Process Clause prohibits governments from infringing on fundamental liberties. *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The Abbey argued that the law violated the Due Process Clause because it interfered with its fundamental right to pursue a desired occupation. *St. Joseph Abbey*, 835 F. Supp. 2d at 152. Further, the Abbey argued that, because funeral directors do not have any special casket training, the law arbitrarily treated its members differently from these directors and thus violated the Equal Protection Clause. *Id.*

Generally, to survive a due process or equal protection challenge, a law must be rationally related to a legitimate state interest.²⁹ This type of judicial scrutiny is known as “rational basis” review.³⁰ Under rational basis review, a statute is subjected to a strong presumption of validity such that the law will be upheld if any reasonably conceivable state of facts could support the law being related to a legitimate state interest.³¹ A state interest is legitimate, for example, if it advances a “police” purpose, such as protecting the safety, health, welfare, or morals of the community.³²

The Board—the defendants in *St. Joseph Abbey*—maintained that the economic protection of a particular industry is a legitimate state interest in itself, and responded to the suit by filing a motion to dismiss.³³ The Board argued that because the protection of the funeral industry constitutes a sufficient government purpose, the licensing requirement was related to a legitimate state interest and thus passed rational basis review.³⁴ The district court rejected this argument, finding that economic protection of a discrete interest group, alone, does not provide a per se rational basis to pass constitutional muster.³⁵ After

²⁹ *Washington*, 521 U.S. at 728 (holding this in a due process context); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding this in an equal protection context).

³⁰ *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938); CHEMERINSKY, *supra* note 5, at 688. The Supreme Court has established a three-part inquiry to determine what type of judicial scrutiny a law or regulation receives under the Equal Protection Clause. CHEMERINSKY, *supra* note 5, at 687–88. A statute that regulates fundamental rights or distinguishes between people on the basis of suspect characteristics is subjected to “strict scrutiny,” less suspect classifications are subjected to intermediate scrutiny, and all others receive “rational basis review.” *Id.* In the case of due process review, where no fundamental right is implicated, the rational basis test is used. *Washington*, 521 U.S. at 728. Because the plaintiffs in *St. Joseph Abbey* did not satisfy the more stringent categories of equal protection review, nor did they allege infringement of a fundamental right, their claims were given rational basis review under both the Equal Protection and Due Process Clauses. *See* 712 F.3d at 220–221.

³¹ *Powers*, 379 F.3d at 1216–17; CHEMERINSKY, *supra* note 5, at 688. Rational basis review is very deferential to legislatures. *See Williamson*, 348 U.S. at 488. The Supreme Court noted that for a law to pass rational basis review, it is enough that there is an “evil at hand for correction” and it is plausible that a particular legislative measure was a rational way to correct it. *Id.* A court cannot strike down a law under the Fourteenth Amendment because it is “unwise, improvident, or out of harmony with a particular school of thought.” *Id.* Furthermore, the burden is on the respondents to negate every conceivable rational basis for the law. *Powers*, 379 F.3d at 1217.

³² CHEMERINSKY, *supra* note 5, at 697. Again, these examples of legitimate state interests are illustrative; recall that any goal not forbidden by the Constitution can constitute a legitimate governmental interest. *Id.* at 697–98; *see Berman*, 348 U.S. at 32. The Supreme Court has declined, however, to define a legitimate state interest. *See Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 834 (1987) (“Our cases have not elaborated on the standards for determining what constitutes a ‘legitimate state interest.’”); *see also Zobel v. Williams*, 457 U.S. 55, 65 (1982) (holding, without defining “legitimate state interest,” that favoring established residents over new residents is not a legitimate purpose).

³³ *St. Joseph Abbey*, 835 F. Supp. 2d at 152–53.

³⁴ *Id.*

³⁵ *Id.* at 153, 156–59.

determining that no other interest justified the statute, the court deemed the licensure requirement unconstitutional.³⁶

The Board appealed to the Fifth Circuit on both issues—whether economic protection is a legitimate state interest and whether other legitimate state interests were served by the licensing requirement.³⁷ In *St. Joseph Abbey*, the Fifth Circuit agreed with the district court on both issues.³⁸ It held that the licensure requirement served no other purpose than to protect the funeral industry and that such protectionism does not constitute a legitimate governmental interest.³⁹

II. THE LEGAL LANDSCAPE: PURE ECONOMIC PROTECTION OF A DISCRETE INTEREST GROUP

This Part discusses how the U.S. Courts of Appeals for the Fifth, Sixth, and Tenth Circuits have addressed the issue of economic protectionism.⁴⁰ Section A examines the circuit split between the Sixth and Tenth Circuits and identifies where the Fifth Circuit's holding in *St. Joseph Abbey v. Castille* fell on that spectrum.⁴¹ Next, Section B describes the Fifth and Tenth Circuits' differing interpretations of the U.S. Supreme Court precedent that both federal appeals courts used to support their holdings.⁴²

A. *The Circuit Split: The Tenth Circuit Stands Alone*

The question of whether protecting the funeral industry from competition is a valid governmental purpose is not a novel question.⁴³ In addition to the Fifth Circuit, both the Sixth and Tenth Circuits have addressed this issue.⁴⁴ The

³⁶ *Id.* at 160. The district court found that Louisiana's lack of laws pertaining to caskets (other than their sale) demonstrated that no health interest was served by the licensure requirement. *See id.* at 158–59. Additionally, the court found the funeral industry's exploitation of consumers too troublesome to believe the law was rationally related to consumer protection. *Id.* at 157–58. Ultimately, the district court found the licensing requirement to be just another tactic the funeral industry used to avoid competition and to exploit consumers. *See id.* at 160.

³⁷ *St. Joseph Abbey*, 712 F.3d at 220.

³⁸ *Id.* at 227. On July 17th, 2013, the defendants filed a petition for writ of certiorari to the Supreme Court. Petition for Writ of Certiorari, *Castille v. St. Joseph Abbey*, 712 F.3d 215 (2013) (No. 13-91), 2013 WL 6407546 (July 17, 2013). The Supreme Court denied certiorari. *Castille v. St. Joseph Abbey*, 134 S. Ct. 423 (2013).

³⁹ *St. Joseph Abbey*, 712 F.3d at 227.

⁴⁰ *See infra* note 43–73 and accompanying text.

⁴¹ *See infra* note 43–54 and accompanying text.

⁴² *See infra* note 55–73 and accompanying text.

⁴³ *See Powers v. Harris*, 379 F.3d 1208, 1218 (10th Cir. 2004); *Craigsmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002); *Sandfeur*, *supra* note 2, 1029–34 (discussing the conflicting Sixth and Tenth Circuit conclusions regarding whether economic protectionism is a legitimate state interest).

⁴⁴ *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 227 (5th Cir.), *cert. denied*, 134 S. Ct. 423 (2013); *Powers*, 379 F.3d at 1218; *Craigsmiles*, 312 F.3d at 224.

Fifth and Sixth Circuits, however, have diverged from the Tenth Circuit, which held that such protectionism is a valid governmental interest.⁴⁵

In 2002, in *Craigmiles v. Giles*, the Sixth Circuit examined a scenario almost identical to the facts of *St. Joseph Abbey*.⁴⁶ In its analysis, the court quickly addressed the issue of economic protectionism.⁴⁷ It promptly discarded the issue, maintaining that the Supreme Court has repeatedly recognized that economic protectionism is not a legitimate state interest.⁴⁸

In 2004, in *Powers v. Harris*, the Tenth Circuit also addressed whether the pure economic protection of the funeral industry constitutes a legitimate state interest.⁴⁹ Unlike the decision in *Craigmiles*, the *Powers* court upheld the licensing scheme.⁵⁰ The Tenth Circuit reasoned that, absent a federal constitutional or statutory violation, favoring one particular intrastate industry is a legitimate state interest.⁵¹

With these two federal appeals courts split on the interpretation of Supreme Court precedent, the Fifth Circuit was poised to endorse one of these views when *St. Joseph Abbey* was appealed.⁵² Joining the Sixth Circuit, the court held that neither Supreme Court precedent nor policy principles⁵³ suggest

⁴⁵ Compare *St. Joseph Abbey*, 712 F.3d at 227 (holding that mere economic protectionism is not a valid government interest), and *Craigmiles*, 312 F.3d at 224 (same), with *Powers*, 379 F.3d at 1221 (concluding that economic protectionism is a legitimate state interest).

⁴⁶ Compare *St. Joseph Abbey*, 712 F.3d at 215–218, with *Craigmiles*, 312 F.3d at 222–23. The plaintiffs in the case challenged a Tennessee licensure requirement that forbade anyone from selling caskets without being licensed by the state as a funeral director. *Craigmiles*, 312 F.3d at 223. The plaintiffs brought equal protection, due process, and privileges and immunities challenges. *Id.* The district court found that the licensure requirement violated the plaintiff's due process and equal protection rights, but rejected the plaintiff's Privileges and Immunities Clause argument. *Id.*

⁴⁷ See *Craigmiles*, 312 F.3d at 224.

⁴⁸ See *id.* The Sixth Circuit cited cases decided under the Dormant Commerce Clause and Contract Clause to support its holding. See *id.*; *Powers*, 379 F.3d at 1219. The Tenth Circuit took issue with this use of precedent, stating that Commerce and Contracts Clause jurisprudence cannot be used to support an equal protection argument. *Powers*, 379 F.3d at 1219–20. The Tenth Circuit explained that the holdings in these cases reflect the “constitutionally enshrined policy of favoring a national marketplace,” and that such policy considerations are immaterial when dealing with intrastate commerce. *Id.* at 1220.

⁴⁹ See 379 F.3d at 1218.

⁵⁰ See *id.* at 1222; *Craigmiles*, 312 F.3d at 224.

⁵¹ See *Powers*, 379 F.3d at 1222. In support of this reasoning, the Tenth Circuit explained that several Supreme Court cases have reached this conclusion. See *id.* (citing *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103 (2003); *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955)).

⁵² See *St. Joseph Abbey*, 712 F.3d at 222–23.

⁵³ See *id.* at 222. Nevertheless, the court did not fully endorse the Sixth Circuit's reasoning, as it ignored the Supreme Court precedent cited by the Sixth Circuit. Compare *id.* at 221 (citing Equal Protection Clause cases to support its holding), with *Craigmiles*, 312 F.3d at 224 (citing Commerce and Contracts Clause cases to support its holding).

that economic protectionism is a legitimate state purpose. In so ruling, the court rejected the Tenth Circuit's interpretation of Supreme Court precedent.⁵⁴

B. *The Fifth and Tenth Circuits' Interpretations: Same Cases, Different Conclusions*

Both the Fifth and Tenth Circuits examined Supreme Court equal protection cases, including the Court's 2003 decision *Fitzgerald v. Racing Association of Central Iowa*, its 1976 decision *City of New Orleans v. Dukes*, and its 1955 decision *Williamson v. Lee Optical of Oklahoma, Inc.*⁵⁵ The federal appeals courts, however, reached different conclusions regarding the meaning of these cases.⁵⁶ The Tenth Circuit held that the cases stood for the proposition that economic protectionism, by itself, is a legitimate governmental interest.⁵⁷ In contrast, the Fifth Circuit interpreted the cases as indicating that economic protectionism is generally not a legitimate state interest.⁵⁸ According to the Fifth Circuit, such protectionism can only be constitutional when the protectionist legislation can be linked to the advancement of the public interest or general welfare.⁵⁹

In coming to these differing conclusions, the Fifth and Tenth Circuits relied on cases where the Supreme Court upheld legislation that benefited one economic interest group at the expense of another.⁶⁰ For example, in *Fitzgerald*, the Court upheld a differential tax rate that favored riverboat slot machines over racetrack slot machines in Iowa.⁶¹ The *Fitzgerald* Court fully acknowledged that the taxing scheme was designed to help the riverboat industry, but held that this fact did not render the law unconstitutional.⁶² The Court emphasized that the protectionist legislation could be related to other state interests,

⁵⁴ See *St. Joseph Abbey*, 712 F.3d at 222.

⁵⁵ See *id.* at 221–22; *Powers*, 379 F.3d at 1219–23. See generally *Fitzgerald*, 539 U.S. at 109 (holding that a differential tax rate did not violate equal protection); *Dukes*, 427 U.S. at 304–05 (holding that a law limiting who can sell food in the French Quarter did not violate equal protection); *Williamson*, 348 U.S. at 486 (holding that a law limiting who can fit lenses or other optical appliances did not violate equal protection). Notably, although it was not cited by the Fifth Circuit, the 1982 Supreme Court case *Zobel v. Williams* struck down a protectionist law that favored established residents over new residents because the law was not related to a public value. See 457 U.S. 55, 65 (1982).

⁵⁶ See *St. Joseph Abbey*, 712 F.3d at 222; *Powers*, 379 F.3d at 1220–21.

⁵⁷ 379 F.3d at 1221.

⁵⁸ 712 F.3d at 222.

⁵⁹ *Id.*

⁶⁰ *Id.* at 221–223; *Powers*, 379 F.3d at 1220–1221; see *Fitzgerald*, 539 U.S. at 109; *Dukes*, 427 U.S. at 304–05 (1976); *Williamson*, 348 U.S. at 486 (1955).

⁶¹ 539 U.S. at 109. Iowa law set the tax rate of racetrack slot machines at thirty-six percent, whereas the riverboat tax was only twenty percent. *Id.* In contrast to the U.S. Supreme Court, the Iowa Supreme Court ruled that the differential tax rate violated the Equal Protection Clause. *Id.* at 106; see *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 648 N.W. 2d 555, 562 (Iowa Sup. Ct. 2002), *rev'd*, 539 U.S. 103 (2003).

⁶² See *Fitzgerald*, 539 U.S. at 109.

such as encouraging the development of riverboat communities or promoting riverboat history.⁶³

The two federal appeals courts reached wildly different conclusions regarding the meaning of the Supreme Court's analysis in *Fitzgerald*.⁶⁴ The Tenth Circuit understood the Court's conclusion as an endorsement of economic protectionism as a legitimate state interest.⁶⁵ The Fifth Circuit disagreed with this interpretation, pointing to the court's emphasis on the other state interests promoted by the law.⁶⁶ Because the *Fitzgerald* Court discussed other state interests, the Fifth Circuit reasoned that the taxing scheme only passed rational basis review because it promoted public values.⁶⁷ This perception led the court to conclude that protectionism, by itself, is not a legitimate interest.⁶⁸

Similarly, the federal appeals courts' interpretations of *Williamson* and *Dukes* diverged along the same lines as the *Fitzgerald* interpretations.⁶⁹ In both cases, the Supreme Court indicated that the protectionist effect of the specific laws did not render them unconstitutional.⁷⁰ Additionally, in both cases, the Court discussed other state interests served by the laws.⁷¹ Using the same reasoning as it did in its interpretation of *Fitzgerald*, the Tenth Circuit explained that, because the Court deemed the protectionist laws constitutional under rational basis review, *Williamson* and *Dukes* legitimized economic protectionism as a governmental interest.⁷² In contrast, the Fifth Circuit explained that these cases illustrate that protectionism is not a legitimate state interest on its own,

⁶³ *Id.*

⁶⁴ Compare *St. Joseph Abbey*, 712 F.3d at 222 (understanding the Court's discussion of public values tied to the challenged law to be a requirement that laws must be linked to a public good), with *Powers*, 379 F.3d at 1220 (understanding the Court's approval of the protectionist law to be an endorsement of economic protectionism as a legitimate state interest).

⁶⁵ See *Powers*, 379 F.3d at 1220. The *Powers* court explained that the U.S. Supreme Court's 2003 holding in *Fitzgerald* indicated that the goal of helping riverboat gambling was a rational basis for the differential taxing scheme. See *id.* See generally *Fitzgerald*, 539 U.S. at 109 (upholding a tax scheme that benefited riverboats over racetracks).

⁶⁶ See *St. Joseph Abbey*, 712 F.3d at 222. See generally *Fitzgerald*, 539 U.S. at 109 (considering what public value the differential tax scheme could be promoting).

⁶⁷ See *St. Joseph Abbey*, 712 F.3d at 222.

⁶⁸ See *id.*

⁶⁹ Compare *id.* (highlighting the importance of the Court's search for public values served by the laws), with *Powers*, 379 F.3d 1221 (highlighting the importance of the Court upholding laws that favor one economic group over another).

⁷⁰ See *Williamson*, 384 U.S. at 483, 488 (upholding a law that benefited ophthalmologists over opticians); *Dukes*, 427 U.S. at 300, 305 (upholding a law that benefited two push-cart food vendors over the rest of the class).

⁷¹ See *Williamson*, 384 U.S. at 487 (explaining the many ways that the law could protect the health of the public); *Dukes*, 427 U.S. at 304, 305 (explaining that the law was related to maintaining the historic character of the French Quarter).

⁷² See *Powers*, 379 F.3d at 1221.

but must instead be linked to a public interest to survive rational basis review.⁷³

III. THE FIFTH CIRCUIT GOT IT RIGHT: SUPREME COURT PRECEDENT AND POLICY CONSIDERATIONS SUPPORT ITS HOLDING

The Fifth Circuit's conclusion that economic protectionism is not a legitimate state interest is consistent with U.S. Supreme Court precedent regarding economic protectionism and the Equal Protection Clause.⁷⁴ The Supreme Court's analysis of protectionist legislation illustrates that, to be constitutional, the law must be linked to a public interest.⁷⁵ Economic protectionism, by itself, advances no public interests and is thus insufficient to meet the Court's criteria for constitutionality under rational basis review.⁷⁶ Thus, on these grounds, courts should strike down solely protectionist legislation.⁷⁷

The Fifth Circuit's *St. Joseph Abbey* holding that mere economic protectionism is an *illegitimate* state interest is consistent with Supreme Court precedent.⁷⁸ In its rational basis review jurisprudence, the Supreme Court has searched for public values served by laws.⁷⁹ This step, which the Tenth Circuit overlooked in its 2004 *Powers v. Harris* decision, is of vital importance because it is only after the Court has found a related public value that it has upheld protectionist laws.⁸⁰ Requiring that protectionist laws relate to public val-

⁷³ *St. Joseph Abbey*, 712 F.3d at 222.

⁷⁴ See *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 109 (2003) (holding that a differential tax rate resulting in economic protectionism was valid because of certain additional state interests advanced by the statute); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir.), *cert. denied*, 134 S. Ct. 423 (2013); Sandefur, *supra* note 2, at 1054 (arguing that if economic protectionism constitutes a legitimate state interest, virtually no law could violate the Equal Protection Clause); Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1697 (1984) (arguing that the public value requirement in rational basis review protects the public from tyrannical factions).

⁷⁵ See *Fitzgerald*, 539 U.S. at 109; *City of New Orleans v. Dukes*, 427 U.S. 297, 304–05 (1976); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 486 (1955).

⁷⁶ See *Zobel v. Williams*, 457 U.S. 55, 65 (1982) (striking down a protectionist law that favored established residents over new residents because the law was not related to a public value).

⁷⁷ See *infra* notes 91–93 and accompanying text.

⁷⁸ See *infra* notes 79–93 and accompanying text.

⁷⁹ Sunstein, *supra* note 74, at 1713 (explaining that the Supreme Court has made clear through its rational basis review jurisprudence that laws must serve a public value to be upheld); see *Zobel*, 457 U.S. at 65 (invalidating a law that did not relate to a public benefit); see also *Fitzgerald*, 539 U.S. at 109 (highlighting the public benefit of the protectionist law); *Williamson*, 348 U.S. at 487 (same); *Dukes*, 427 U.S. at 304, 305 (same).

⁸⁰ See *Powers v. Harris*, 379 F.3d 1208, 1225 (10th Cir. 2004) (Tymkovich, J., concurring) (“The majority is correct that courts have upheld regulatory schemes that favor some economic interests over others . . . [.] [b]ut all of the cases rest on a fundamental foundation: the discriminatory legislation arguably advances either the general welfare or a public interest.”); Sandefur, *supra* note 2, at 1035 (“This rule is one of the longest-standing principles of constitutional law; indeed, it is probably a defining trait of law itself.”); Sunstein, *supra* note 74, at 1713 (“Although the rationality test is highly deferential, its function is to ensure that classifications rest on something other than a naked prefer-

ues to pass rational basis review, as the Fifth Circuit did, recognizes the importance of this step.⁸¹

In its search to find a rational basis for protectionist laws, the Supreme Court has implicitly recognized that mere economic protectionism is not a legitimate state interest.⁸² In each case, the Court's first step has been to recognize that the challenged law favors a particular industry, but the Court's second step consistently moves beyond this recognition to identify an independent legitimate state interest related to the protectionist law.⁸³ This second step would be superfluous if the Court recognized that favoring one industry over another is itself a legitimate state interest.⁸⁴

In particular, a close look at the Court's analysis in its 2003 decision *Fitzgerald v. Racing Association of Central Iowa* illustrates that mere economic protectionism is not a legitimate interest.⁸⁵ The *Fitzgerald* Court acknowledged that the differential tax rates at issue were protectionist in nature, but it went on to link the rates to three state interests that promoted public values.⁸⁶ Had the Court recognized protectionism as a legitimate state interest, its analysis should have halted after it recognized that the tax rates were designed to protect riverboats, as rational basis review would have been satisfied.⁸⁷ Instead, the Court surveyed potential public interests served by the differential tax rates, which demonstrates that the Court did not recognize protectionism as a legitimate state interest.⁸⁸ Similarly, in the Court's 1976 decision *City of New*

ence for one person or group over another."); see also, e.g., *Fitzgerald*, 539 U.S. at 109; *Williamson*, 384 U.S. at 487; *Dukes*, 427 U.S. at 304, 305.

⁸¹ See *St. Joseph Abbey*, 712 F.3d at 222.

⁸² *Id.*; Sunstein, *supra* note 74, at 1713; Jim Thompson, Comment, Powers v. Harris: *How the Tenth Circuit Buried Economic Liberties*, 82 DENV. U. L. REV. 585, 602–03 (2005); see *Fitzgerald*, 539 U.S. at 109 (upholding a differential tax scheme after determining that the law was related to a public value); *Dukes*, 427 U.S. at 304–305 (upholding a protectionist law after tying it to a public value); *Williamson*, 384 U.S. at 486–87 (upholding a protectionist law because it had a public value rationale).

⁸³ See *Fitzgerald*, 539 U.S. at 109; *Dukes*, 427 U.S. at 300, 305; *Williamson*, 384 U.S. at 486–87.

⁸⁴ Cf. *Fitzgerald*, 539 U.S. at 109; *Dukes*, 427 U.S. at 300, 305; *Williamson*, 384 U.S. at 486–87. See generally *Zobel*, 457 U.S. at 65 (striking down a protectionist law that was not related to a public value and favored established residents over new residents). If protectionism satisfied rational basis review then the *Zobel* Court would not have struck down the law for favoring established residents over new residents. See *id.* at 65.

⁸⁵ See 539 U.S. at 109.

⁸⁶ See *id.* (tying the law to the economic development of riverboat communities, promoting riverboat history, keeping the riverboat industry in the state, and protecting riverboats' reliance interest on a twenty percent tax rate).

⁸⁷ See Sunstein, *supra* note 74, at 1713 (explaining that the Supreme Court's rational basis review jurisprudence has made it clear that the government must invoke some public value served by a challenged law); Thompson, *supra* note 84, at 602–03 (arguing that the *Fitzgerald* Court did not consider economic protectionism to be a legitimate state interest because the Court continued its search for such an interest until it tied the law to a public value).

⁸⁸ See *Fitzgerald*, 539 U.S. at 109; *Powers*, 379 F.3d at 1225–26 (Tymkovich, J., concurring).

Orleans v. Dukes and 1955 decision *Williamson v. Lee Optical of Oklahoma*, the Court only upheld the protectionist laws after finding a public interest served by the laws.⁸⁹ The Fifth Circuit's conclusion in *St. Joseph Abbey* that protectionist laws must be related to a public value is thus consistent with the Supreme Court's analysis of protectionist legislation.⁹⁰

Accordingly, Supreme Court precedent demands that courts strike down protectionist laws that further no public interests.⁹¹ The Fifth Circuit in *St. Joseph Abbey* recognized this mandate and correctly rejected economic protectionism as a legitimate state interest.⁹² Such laws do not fulfill the Supreme Court's criteria for constitutionality under rational basis review.⁹³

CONCLUSION

Courts should follow the Fifth Circuit's decision in *St. Joseph Abbey v. Castille* and reject economic protectionism as a legitimate state interest because an accurate reading of U.S. Supreme Court precedent supports the Fifth Circuit's holding. In several rational basis review cases, the Court upheld the protectionist laws at issue only after finding an independent public value served by the laws. Had the Court recognized protectionism as a legitimate state interest, its analysis should have ended after it recognized that the laws at issue were protectionist, as rational basis review would have been satisfied. Instead, the Court looked beyond the protectionism and demanded that the laws have a public value justification to survive rational basis review, demonstrating that economic protectionism, by itself, is an illegitimate state interest. Thus, to be consistent with Supreme Court precedent, courts should reject economic protectionism as a legitimate state interest.

ELIZABETH TRAFTON

⁸⁹ See *Dukes*, 427 U.S. at 304–05 (determining that the city's classification rationally furthered the public purpose of preserving the appearance of the French Quarter); *Williamson*, 384 U.S. at 487 (concluding that public health concerns were sufficient to justify the regulation).

⁹⁰ See *St. Joseph Abbey*, 712 F.3d at 222; *Fitzgerald*, 539 U.S. at 109; *Dukes*, 427 U.S. at 300, 305; *Williamson*, 384 U.S. at 486–87.

⁹¹ See *Fitzgerald*, 539 U.S. at 109 *Fitzgerald*, 539 U.S. at 109 (upholding a differential tax scheme after determining that the law was related to a public value); *Dukes*, 427 U.S. at 304–05 (upholding a protectionist law after tying it to a public value); *Williamson*, 384 U.S. at 486–87 (upholding a protectionist law because it had a public value rationale).

⁹² See *St. Joseph Abbey*, 712 F.3d at 222.

⁹³ See *Fitzgerald*, 539 U.S. at 109 (demonstrating that rational basis review requires that laws relate to public values not private interests); Sandefur, *supra* note 2, at 1054 (concluding that the Equal Protection clause would be meaningless if economic protectionism constituted a legitimate governmental interest); Sunstein, *supra* note 74, at 1690, 1697 (arguing that the requirement that laws have a public value justification is consistent with the view that the role of government is to promote public values not implement private interests).

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