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Exhumation Through Burial: How Challenging Casket Regulations Helped Unearth Economic Substantive Due Process in Craigmiles V. Giles

Anthony B. Sanders

Comment

Exhumation Through Burial: How Challenging Casket Regulations Helped Unearth Economic Substantive Due Process in *Craigmiles v. Giles*

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The report of my death was an exaggeration.
—Mark Twain[1]

For most people, caskets have very little to do with their lives. Only in death do they encounter them. For Reverend Nathaniel Craigmiles, however, caskets are intimately connected with his life, or rather, with his livelihood.[2] He and a fellow minister run a casket supply store in Chattanooga, Tennessee.[3] Soon after first opening the business, the state ordered them to cease and desist operations because neither, as Tennessee law required,[4] was a licensed funeral director.[5] The order put the businessmen in a dire financial situation and denied them the opportunity to work in their chosen occupation. Said Reverend Craigmiles at that time, "We are almost on the verge of bankruptcy."[6]

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1. Note to London correspondent of the New York Journal (June 1, 1897), *in* JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 562 (17th ed. 2002).

2. Walter Williams, *On the Side of the Little Guy?*, DESERET NEWS, Oct. 18, 2000, at A17.

3. *Id.*

4. TENN. CODE ANN. § 62-5-303(b) (2002).

5. Craigmiles v. Giles, 110 F. Supp. 2d 658, 660 (E.D. Tenn. 2000), *aff'd*, 312 F.3d 220 (6th Cir. 2002).

6. *Casket Retailers File Suit to Sell in Tennessee*, THE COM. APPEAL (Memphis), Sept. 18, 1999, at B3.

Economic ruin is no longer in the Reverend's future, however, because of the doctrine of economic substantive due process.[7] Craigmiles sued the state, claiming that it had violated his right to earn a living as protected by the Fourteenth Amendment's Due Process Clause.[8] On December 6, 2002, the Sixth Circuit Court of Appeals agreed and unanimously struck down the licensing law.[9] Even though the state was only required to provide a rational basis for its licensing law, the court ruled that it failed to meet that standard.[10] The Sixth Circuit's ruling is the first time since the New Deal that a federal appeals court has found an occupational licensing law to violate a person's right to earn a living.[11]

This Comment argues that the Sixth Circuit was correct in protecting that right and that other courts should follow its lead. Part I analyzes the Supreme Court's recent treatment of economic substantive due process, as well as its treatment of equal protection rational basis review. Part II outlines how lower courts have recently begun giving greater consideration to economic substantive due process claims. Part III analyzes *Craigmiles* itself, focusing on the court's discussion of legitimate governmental interests and its application of the Supreme Court's rational basis jurisprudence. Part IV argues that the Sixth Circuit was justified in protecting Tennessee casket retailers from state regulation. The regulations involved are so onerous and transparently anticompetitive that they serve no legitimate governmental purpose.[12] Rather, they protect established businesses from competition, a purpose that fails even

7. Craigmiles v. Giles, 312 F.3d 220, 223 (6th Cir. 2002) (stating that after the district court granted an injunction against the state funeral board, the plaintiffs were able to resume business operations).

8. *Id.* The Fourteenth Amendment provides, in pertinent part: "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.

9. *Craigmiles*, 312 F.3d at 222.

10. *Id.* at 228.

11. *See* Press Release, John Kramer & Lisa Knepper, Institute for Justice, Sixth Circuit Decision Puts Another Nail in Coffin of State-Imposed Casket Monopolies (Dec. 6, 2002), *at* http://www.ij.org/cases/index.html (calling *Craigmiles* "the first federal appeals court victory for economic liberty since it was gutted by the New Deal").

12. *See infra* notes 148–78 and accompanying text.

the allowances of rational basis protection.[13] The *Craigmiles* court recognized that to fail rational basis review, a law almost always must not only lack a rational relationship to a legitimate governmental interest, but also must intentionally further an illegitimate governmental interest.[14] In doing so, it correctly relied on the Supreme Court's rational basis doctrine in the equal protection context.[15] The *Craigmiles* court failed, however, to fully pursue its analysis of the relevancy of Tennessee's licensing regulations, missing a stronger argument for the regulations' unconstitutionality.[16] Even so, the court's opinion signals that federal courts will become more active in protecting the economic liberties of upstart entrepreneurs from the protectionist hand of occupational licensing.

I. THE SUPREME COURT AND ECONOMIC SUBSTANTIVE DUE PROCESS

The doctrine of economic substantive due process contends that some economic laws and regulations violate individual rights that are protected through the due process clauses of the Fifth and Fourteenth Amendments.[17] The laws and regulations are not unconstitutional because they were improperly administered or enacted, but because they infringe on substantive individual liberties.[18] Modern economic substantive due process jurisprudence abruptly began in the 1930s.[19] In 1934, the Supreme Court started to reverse its previous active protection of economic liberties in *Nebbia v. New York*.[20] There the Court upheld a milk-pricing law on the grounds that economic legislation need only be rationally related to a legitimate governmental interest.[21] The Court cemented the new standard into law in 1937 with *West Coast Hotel Co. v. Parrish*.[22] Previously during the *Lochner* era,[23] the Court had at times overturned economic

13. *See infra* notes 138–39 and accompanying text.

14. *See infra* notes 173–93 and accompanying text.

15. *See infra* Part I.B.

16. *See infra* Part IV.A.

17. *See* Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 270 (1987).

18. *Id.* at 271.

19. *Id.* at 281.

20. 291 U.S. 502 (1934).

21. *Id.* at 537.

22. 300 U.S. 379, 391 (1937) (holding that a minimum wage law for women did not violate due process).

23. The era takes its name from the famous case of *Lochner v. New York*.

legislation when it felt Congress (through the Fifth Amendment) or state legislatures (through the Fourteenth) had exceeded the limits of their legitimate regulatory powers.[24] The Court often reviewed economic legislation through a means-ends analysis, inquiring into whether the legislation furthered an interest properly within the government's police power, or whether the means used to further the interest would actually do so directly.[25] If a regulation did not sufficiently or appropriately further a governmental interest, it was an unconstitutional violation of economic liberty.[26] Post-1937 jurisprudence has pursued essentially the same process of inquiry, but with much greater deference to the legislature.[27]

A. MODERN RATIONAL BASIS JURISPRUDENCE

Some of the most revealing remarks on the Court's post-1937 view of economic regulation and due process appeared in *Williamson v. Lee Optical of Oklahoma, Inc.*, decided in 1955.[28] There, the Court considered an Oklahoma law that forbade anyone other than an optometrist or ophthalmologist from fitting lenses without a prescription.[29] Admitting that the law might have nothing to do with health and safety, the Court stated that it could be a "needless, wasteful requirement in many cases."[30] Nevertheless, it opined that there might have been legitimate reasons for the Oklahoma legislature to pass the law, and proceeded to engage in a means-ends analysis of

198 U.S. 45 (1905) (finding that a law restricting the number of hours bakers could work per week to sixty was unconstitutional), *overruled in part by* Day Brite Lighting Inc. v. Missouri, 342 U.S. 421, 423 (1952).

24. *See, e.g.*, Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 609–15 (1936) (minimum wage law for women), *overruled in part by* Olsen v. Nebraska *ex rel.* W. Reference & Bond Ass'n, 313 U.S. 236, 244–47 (1941); Adkins v. Children's Hosp., 261 U.S. 525, 554 (1923) (minimum wage law for women), *overruled by W. Coast Hotel*, 300 U.S. at 400; Coppage v. Kansas, 236 U.S. 1, 26 (1915) (bar on employers forbidding union membership), *overruled in part by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941).

25. *See* Phillips, *supra* note 17, at 280.

26. *See id.* at n.88.

27. *See id.* at 284–85 (noting that the post-1937 Court has pursued traditional means-ends analysis in economic substantive due process cases, but with much greater leniency).

28. 348 U.S. 483, 487–91 (1955).

29. *Id.* at 485–86 ("In practical effect, [the law] means that no optician can fit old glasses into new frames or supply a lens . . . without a prescription.").

30. *Id.* at 487.

those reasons.[31] One possible reason behind the law was that some patients' needs were so delicate that even if an optician must only refit an old lens, the optician should be forced to read a prescription.[32] Another potential reason was that the legislature might have wished to encourage eye examinations.[33]

Although written in the form of a means-ends analysis, the Court's arguments were not couched as positions that the Oklahoma legislature *actually* took.[34] The Court spent no time considering the real reasons for the law and cited no legislative history.[35] The justifications addressed were reasons the legislature *might have* taken into consideration.[36] Under this standard, a law requires no more than a conceivable and rational justification to be constitutional.[37]

The Court now holds to a distinction between "certain fundamental rights and liberty interests"[38] and other less protected values, such as economic liberties.[39] In the course of developing substantive due process review for lesser values, the Court could have taken two different approaches. It could have followed the method suggested in *Ferguson v. Skrupa* and refused to consider economic legislation as subject to substantive due process analysis.[40] Instead, the Court has followed the method

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31. *See id.* at 487–88.

32. *See id.* at 487 ("[I]n some cases the directions contained in the prescription are essential, if the glasses are to be fitted so as to correct the particular defects of vision.").

33. *Id.*

34. *Id.* at 487–88.

35. *See id.* at 484–91.

36. *See, e.g., id.* at 487 ("The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation . . . . [and] the legislature might have concluded that [a prescription] . . . was needed often enough to require one in every case.").

37. *See id.* at 488 ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."); *cf.* Fitzgerald v. Racing Ass'n of Cent. Iowa, 123 S. Ct. 2156, 2160 (2003) (stating that "judicial review is 'at an end' once the court identifies a plausible basis on which the legislature may have relied" (citing United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980))).

38. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citing as examples the right to marry and the right to have children, among others).

39. *See id.* at 728–35 (inquiring whether the right to terminate one's own life is a protected liberty interest, and rejecting that claim); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting a bifurcation of the protections of the Fourteenth Amendment into those where the legislature is given deference and those which call for greater judicial scrutiny).

40. *See* Ferguson v. Skrupa, 372 U.S. 726, 732 (1963) (refusing to allow for

articulated in *Williamson*,[41] leaving open the possibility of overturning economic legislation through rational basis review.[42] Through this limited standard, the doctrine of economic substantive due process, at least nominally, lives on.[43]

The modern Court has recognized the need for a rational basis justification of economic legislation on a number of occasions.[44] In *General Motors Corp. v. Romein*, Justice O'Connor succinctly stated the appropriate test when reviewing a retroactive workers' compensation law: Economic legislation must correspond to "a legitimate legislative purpose" and must be "furthered by rational means."[45] In applying this test, the Court still adheres to a means-ends analysis of economic regulations, inquiring whether an economic regulation could conceivably further a legitimate governmental interest.[46] It will not summarily dismiss an economic substantive due process claim, concluding that a piece of regulation is irrational but then ruling it nonetheless constitutional.[47] Instead, the Court generally takes

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the possibility of overturning economic legislation through the Due Process Clause).

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

42. *See id.* (stating the need for legislation to be a "rational way to correct" "an evil at hand"); *see also* Gen. Motors Corp. v. Romein, 503 U.S. 181, 191 (1992) (providing an explicit rational basis test); Pennell v. City of San Jose, 485 U.S. 1, 11 (1988) (remarking that price controls resting on an arbitrary basis are unconstitutional under rational basis review); Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 476–77 (1985) (subjecting federal railroad legislation to a rational basis requirement).

43. Admittedly, the Court has cited *Ferguson* favorably on a number of occasions. *See, e.g.*, Exxon Corp. v. Governor of Md., 437 U.S. 117, 124 (1978). Despite the occasional affirmation that the Supreme Court does not "sit as a 'superlegislature to weigh the wisdom of legislation,'" *id.* (quoting *Ferguson*, 372 U.S. at 731), however, the Court still refuses to abandon the possibility of economic substantive due process review. For skepticism on whether *Williamson* allowed for any effective due process challenges, see G. Sidney Buchanan, *A Very Rational Court*, 30 HOUS. L. REV., 1509, 1520–21 (1993) (stating that "the Court moved to a position approaching total abdication" of protecting economic liberties).

44. *See supra* note 42.

45. *Romein*, 503 U.S. at 191 (citing Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984)).

46. *See, e.g., Nat'l R.R. Passenger Corp.*, 470 U.S. at 477–78 (discussing the conceivably rational basis of national railway legislation).

47. *See* Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397, 400 (1993) ("[D]espite the occasional judicial protestations of abstinence from the review of our government's economic programs, a total judicial abstinence would not have been appropriate and has, in fact, never been the rule."). The Court did implicitly allow for irrational governmental interests in *Ferguson*, 372 U.S. at 732, but, again, that case was

time to argue that regulations challenged under economic substantive due process actually are rational.[48]

B. EQUAL PROTECTION PARALLELS

The continuing existence of economic substantive due process has paralleled equal protection jurisprudence. The Supreme Court has held that in the absence of suspect categories or fundamental rights, legislation can treat groups differently as long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[49] The standard of rational basis review for equal protection and for substantive due process is the same.[50] The Court uses virtually identical language to describe each test. For instance, in the due process context, the Court has stated that laws violate substantive due process if they are "arbitrary, discriminatory, or demonstrably irrelevant,"[51] "arbitrary [or] irrational,"[52] or do not advance a "legitimate legislative purpose furthered by rational means."[53]

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an exception to the predominant rule. *See supra* note 43 and accompanying text.

48. *See, e.g.*, *Romein*, 503 U.S. at 191 (stating that the retroactive pension legislation at issue was a rational way to balance pension payments in the face of an unexpected state supreme court decision); *Nat'l R.R. Passenger Corp.*, 470 U.S. at 477–78 (arguing that the alteration of railroad contracts, which shifted costs to the railroads, was rational because the railroads received the benefit of improved labor relations); N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 166–67 (1973) (quoting Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 114–15 (1928) (Holmes, J., dissenting), which argued that it was sensible to require a majority of pharmacy stock to be owned by licensed pharmacists because "[t]he selling of drugs and poisons calls for knowledge in a high degree").

One arguable exception is *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978), where Justice Blackmun summarily deferred to the wisdom of the legislature. *Id.* at 124–25. In doing so, however, he referred to literature arguing for the divestiture legislation in question. *Id.* at 124 n.13 (citing Comment, *Gasoline Marketing Practices and "Meeting Competition" Under the Robinson-Patman Act*, 37 MD. L. REV. 323, 329 n.44 (1977)).

49. FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).

50. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.4 (3d ed. 1999) ("Regardless of whether a court is employing substantive due process or equal protection analysis, it should use the same standards of review."); Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 73 (1989) (lumping the two rational basis tests together for cases not involving fundamental rights or suspect classifications).

51. Pennell v. City of San Jose, 485 U.S. 1, 11 (1988).

52. *Nat'l R.R. Passenger Corp.*, 470 U.S. at 477.

53. *Romein*, 503 U.S. at 191 (citing Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984)).

Similarly, it has said that laws violate equal protection if they are "so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational"[54] or do not advance a "legitimate legislative purpose furthered by rational means."[55] Furthermore, in *Pennell*, Chief Justice Rehnquist implied that the test for each is the same.[56]

The Supreme Court sometimes finds that laws violate equal protection even when subjected to the deferential test of rational basis scrutiny.[57] In *City of Cleburne v. Cleburne Living Center, Inc.*, for example, the Court found that a zoning regulation violated equal protection even though the group in question, the mentally retarded, was not a suspect class.[58] There, a city ordinance denied zoning permits to group homes for the retarded while approving permits to various other developments.[59] The Court examined each reason the city put forward

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54. *Pennell*, 485 U.S. at 14 (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).

55. *Romein*, 503 U.S. at 191 (citing *Pension Benefit Guar. Corp.*, 467 U.S. at 730).

56. *See Pennell*, 485 U.S. at 14 (stating the Court could "hardly conclude" that the rent control ordinance under consideration violated equal protection once the Court had determined that it did not violate due process).

57. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631–36 (1996) (invalidating a state constitutional provision precluding any statutory state action to protect homosexuals from discrimination); Quinn v. Millsap, 491 U.S. 95, 106–09 (1989) (finding no rational basis for permitting only landowners to sit on planning board); Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 343–46 (1989) (holding that a land taxation scheme violated equal protection because it was not applied uniformly); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448–50 (1985) (invalidating a zoning ordinance that denied equal protection to the mentally retarded); Williams v. Vermont, 472 U.S. 14, 21–27 (1985) (holding that a car-tax credit given to state residents but denied to nonresidents promoted no legitimate state purpose); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 881–83 (1985) (holding that there was no legitimate state purpose behind a higher tax on insurance companies incorporated out of state); Zobel v. Williams, 457 U.S. 55, 60–62 (1982) (declaring that retrospective dividend distribution to Alaska residents was not rationally related to encouraging state residency); United States Dept. of Agric. v. Moreno, 413 U.S. 528, 533–38 (1973) (rejecting the exclusion of non-family households from the federal food stamp program); James v. Strange, 407 U.S. 128, 140–42 (1972) (rejecting the denial of debtor protections to indigent defendants).

58. *See Cleburne*, 473 U.S. at 442–50; *see also* Bd. of Tr. v. Garrett, 531 U.S. 356, 366 (2001) (clarifying that in *Cleburne* the Court held that the mentally retarded are not a "quasi-suspect" class, and that the ordinance at issue was subjected to "only the minimum 'rational-basis' review applicable to general social and economic legislation").

59. *Cleburne*, 473 U.S. at 436–37.

for denying a permit.[60] Through a means-ends analysis, it looked into what other types of businesses the ordinance in question affected and what possible harm the group home might pose to the public.[61] For example, the city argued that it should not grant the permit for the group home because it would be located across the street from a junior high school.[62] The Court responded by noting that "about 30 mentally retarded students" already attended the school, and that the group home would therefore not change the existing interaction between the children and the mentally retarded.[63] The Court concluded that the legitimate governmental purposes advanced by the city were not rationally related to the zoning ordinance and that the real purpose behind it, animus toward a specific group, was illegitimate.[64] Similarly, in *Romer v. Evans*, where the Court invalidated an amendment to the Colorado constitution, it concluded that the actual purpose behind the amendment was animus toward homosexuals.[65]

Many commentators contend that when the Court has invalidated legislation under the name of rational basis scrutiny, it has actually used some form of heightened scrutiny and illegitimately labeled its approach "rational basis."[66] A majority of justices, critics argue, do not have the courage to recognize groups such as homosexuals or the mentally retarded as "suspect classes," but feel they should protect them even without

60. *Id.* at 447–50.

61. *See id.*

62. *Id.* at 449.

63. *Id.*

64. *Id.* at 450. *But see id.* at 456 (Marshall, J., concurring in the judgment in part and dissenting in part) (arguing that the ordinance in question would be valid under traditional rational basis review, and that the Court in fact applied heightened scrutiny).

65. Romer v. Evans, 517 U.S. 620, 635 (1996); *see also* Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 ALASKA L. REV. 209, 250 (1998) ("*Moreno*, *Cleburne*, and *Romer* weave a consistent thread. In each case, the Court had some reason to suspect that the government was acting out of improper motives.").

66. *See, e.g.*, *Cleburne*, 473 U.S. at 456 (Marshall, J., concurring in the judgment in part and dissenting in part); Michael Stokes Paulsen, *Medium Rare Scrutiny*, 15 CONST. COMMENT. 397, 399 (1998) ("*Romer*-type scrutiny is probably better labeled 'rare to medium rare,' or—if we're really being honest — 'medium-*well*-to-well-done-but-call-it-rare-to-medium-rare-because-that's-hipper-and-I-don't-want-to-admit-what-I'm-really-doing' scrutiny."); Mark Strasser, *Equal Protection at the Crossroads: On* Baker, *Common Benefits, and Facial Neutrality*, 42 ARIZ. L. REV. 935, 940 (2000) (claiming that the *Cleburne* Court "lacked candor" in saying it applied rational basis scrutiny).

doing so.[67] Therefore, the Court has created something called "rational basis with bite" in these "quasi-suspect" cases.[68] If *Cleburne* and *Romer* were the only teeth-laden equal protection cases, this criticism might be correct. The sheer number of these cases, however, and the varied interests at stake in them,[69] suggest that the Court is actually doing what it says: confronting laws that are so outlandish and attenuated from legitimate governmental interests that they fail rational basis scrutiny. There is no thread between the cases suggesting sinister motives.[70] Some involve what might be called "discrete and insular minorities,"[71] but others involve more mundane issues such as taxation. Admittedly, some tax cases deal with the difference between in-state and out-of-state residents[72] (perhaps another "quasi-suspect" class), but some merely involve otherwise similar persons being taxed at differing rates.[73] Neither do votes of individual justices in these cases provide an explanation, as some are decided unanimously.[74] With no available alternative explaining the existence of these opinions, the best insight to draw is that the rational basis test does indeed exist as a "test" and that some laws actually are "irrational" and properly fail that test.

This insight leads the present analysis to a comforting conclusion. Because of the sustained interest in rational basis invalidation, and because the rational basis test is the same for equal protection and for substantive due process, the Court's equal protection precedents offer hope for plaintiffs seeking to

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67. *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 308 (1997) (arguing that means scrutiny has perhaps served as a "guise for assessing ends").

68. *See* Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 793–96 (1987) ("Since the Court did not analyze the [*Cleburne*] ordinance in the same manner that the dissent did, it must have employed a more exacting form of scrutiny than the rational basis test.").

69. *See supra* note 57.

70. Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 411–15 (1999) (rejecting four possible purposes behind the Court's invalidation of laws using rational basis scrutiny: (1) helping quasi-suspect classes, (2) thwarting governmental interests, (3) advancing political agendas, and (4) creating a new organizing principle for rational basis review).

71. United States v. Carolene Prods., Co., 304 U.S. 144, 152 n.4 (1938).

72. *See, e.g.*, Williams v. Vermont, 472 U.S. 14, 21–27 (1985).

73. Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 343–46 (1989).

74. *See id.*; *see also* Quinn v. Millsap, 491 U.S. 95, 95 (1989).

protect their economic liberties through the Due Process Clause and its rational basis test.

II. ECONOMIC SUBSTANTIVE DUE PROCESS IS ALIVE AND WELL AND LIVING IN THE LOWER COURTS

The Supreme Court has not struck down a law on economic substantive due process grounds since 1936.[75] This has not been the case, however, in the lower federal courts.[76] Although still by far the exception, courts have increasingly found it in their power to overturn decisions made by state and local governments on the grounds that they violate economic substantive due process.[77] In addition to federal courts, state judges have also begun to recognize the power of economic substantive due process.[78] From land use to the zoning of pay phones, state and federal courts have found some government decisions so transparently unrelated to a legitimate governmental interest that they are unconstitutional.[79] Many of these decisions center on executive actions, where a governmental official violates a party's economic liberties, such as in denying a building permit.[80] Some decisions, however, actually involve a court throw-

75. *See* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 618 (1936) (finding a minimum wage law for women unconstitutional), *overruled in part by* Olsen v. Nebraska *ex rel.* W. Reference & Bond Ass'n, 313 U.S. 236, 244 (1941).

76. *See* Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 SYRACUSE L. REV. 917, 926 (1999).

77. *Id.* at 918–19.

78. *See, e.g.*, Fair Cadillac-Oldsmobile Isuzu P'ship v. Bailey, 640 A.2d 101, 107 (Conn. 1994) (invalidating a mandatory Sunday closing law on state constitutional economic substantive due process grounds); Treants Enters. v. Onslow County, 350 S.E.2d 365, 370 (N.C. Ct. App. 1986) ("[T]he challenged [licensing] ordinance must fail even the minimal rationality test applicable to regulations that involve no fundamental rights."), *aff'd*, 360 S.E.2d 783, 786 (N.C. 1987).

79. *See, e.g.*, Catanzaro v. Weiden, 140 F.3d 91, 95 (2d Cir. 1998), *vacated on reh'g by* 188 F.3d 56, 64 (2d Cir. 1999); Indep. Coin Payphone Ass'n, Inc. v. City of Chicago, 863 F. Supp. 744, 752 (N.D. Ill. 1994).

80. *See, e.g.*, Cruz v. Town of Cicero, 275 F.3d 579, 589 (7th Cir. 2001) (upholding a jury verdict where the town's failure to furnish certificates of compliance to condominium owners was not "rationally related to a legitimate government interest"); Simi Inv. Co. v. Harris County, 236 F.3d 240, 249–54 (5th Cir. 2000) (holding that there was no rational basis for the county to deny a property owner access to a city street); Christopher Lake Dev. Co. v. St. Louis County, 35 F.3d 1269, 1274 (8th Cir. 1994) (remanding for consideration of a claim that singling out one property holder to pay for a drainage system was not rationally related to a legitimate governmental purpose); Brady v. Town of Colchester, 863 F.2d 205, 215–16 (2d Cir. 1988) (reversing the dis-

ing out the will of a legislature in favor of the economic liberties of the individual.[81] One example is *Santos v. City of Houston*, where city voters banned the use of buses that carry fewer than fifteen passengers ("jitneys").[82] The district court found the ordinance unconstitutional, citing the allowance of many other types of commercial passenger vehicles, including taxicabs, minivans used as taxis, airport buses, and limousines.[83] The court found no legitimate reason to exclude jitneys while allowing other vehicles.[84] What the court found especially compelling was the admitted real reason for the ordinance—protection of the now long defunct streetcar industry.[85] With no conceivable legitimate purpose, and with an illegitimate purpose thrust in its face, the court permanently enjoined the ordinance's enforcement.[86] Given the number of decisions such as *Santos*, it is hard to argue that invalidation of legislation under the rational basis test is per se illegitimate judicial action. Instead, the enforcement of economic substantive due process is a rare, yet continuously occurring and appropriate judicial method.

Some recent lower court decisions favoring economic substantive due process involve occupational licensing.[87] For example, in *Cornwell v. California Board of Barbering & Cosmetology*, a federal district court denied a motion to dismiss,

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missal of property owner's claim that the town's revocation of a building permit had no rational basis); Scott v. Greenville County, 716 F.2d 1409, 1421 (4th Cir. 1983) (finding the denial of a building permit to be motivated "by manifest arbitrariness and unfairness"); Browning-Ferris Indus. of S. Atl., Inc. v. Wake County, 905 F. Supp. 312, 321 (E.D.N.C. 1995) (holding that a county's decision to deny access to a sewer line violated substantive due process).

81. *See, e.g.*, Brookpark Entm't, Inc. v. Taft, 951 F.2d 710, 717 (6th Cir. 1991) (declaring unconstitutional a law allowing voters to revoke a liquor license); Cornwell v. Cal. Bd. of Barbering & Cosmetology, 962 F. Supp. 1260, 1273 (S.D. Cal. 1997) (finding no rational basis for requiring African hair stylists to obtain a cosmetology license); Santos v. City of Houston, 852 F. Supp. 601, 608 (S.D. Tex. 1994) (finding that an "anti-jitney" ordinance restricting the availability of small vehicle transportation violated substantive due process and equal protection).

82. *Santos*, 852 F. Supp. at 603.

83. *Id.* at 608.

84. *Id.*

85. *Id.* ("The jitney business was a sacrificial lamb in a deal struck between City Council and the Houston Electric Company . . . .").

86. *Id.* at 609.

87. *See, e.g.*, Casket Royale, Inc. v. Mississippi, 124 F. Supp. 2d 434, 440 (S.D. Miss. 2000) (striking down a casket licensing regulation); *see also* Brown v. Barry, 710 F. Supp. 352, 355 (D.D.C. 1989) (invalidating a shoe-shining licensing scheme on equal protection grounds).

holding that the plaintiff's challenge to a cosmetology licensing requirement, as it was applied to African hair stylists, had "adequately alleged" a constitutional violation.[88] The state mandated that hair stylists obtain a cosmetology license, which required 1600 hours of training.[89] The court determined that only four percent of those hours related to the practicing of hair styling and that the other ninety-six percent were irrelevant to the trade.[90] Because the licensing requirements were overwhelmingly irrelevant to the occupation, the court found that the licensing regime violated substantive due process.[91] Other occupational licensing cases have involved the regulation of casket sales.[92] Currently, ten states limit the selling of caskets to licensed funeral directors.[93] It was such a licensing law at issue in *Craigmiles v. Giles*.[94]

III. *CRAIGMILES v. GILES*: ECONOMIC LIBERTY AT THE APPELLATE LEVEL

The Sixth Circuit's opinion in *Craigmiles* concerned the Tennessee Funeral Directors and Embalmers Act (FDEA).[95] The FDEA mandates that those engaged in "funeral directing" be licensed funeral directors.[96] Under a 1972 amendment to the FDEA, the Tennessee legislature expanded the definition of "[f]uneral directing" to include "the selling of funeral merchandise."[97] To become a licensed funeral director, a person must complete either (1) a year at an accredited mortuary school and an additional one-year apprenticeship with a licensed funeral

88. Cornwell v. Cal. Bd. of Barbering & Cosmetology, 962 F. Supp. 1260, 1273, 1278 (S.D. Cal. 1997).

89. *Id.*

90. *Id.* (sixty-five hours out of 1600).

91. *Id.*

92. *See, e.g.*, *Casket Royale*, 124 F. Supp. 2d at 436. *But see* Powers v. Harris, No. CIV-01-445-F, 2002 WL 32026155, at *17–18 (W.D. Okla. Dec. 12, 2002) (finding a casket licensing law valid under the rational basis test), *appeal docketed*, No. 03-6014 (10th Cir. May 23, 2003).

93. Press Release, Inst. for Justice, April Court Arguments Seek to Restore America as "Land of Opportunity"; Gov't Limits Sale of Everything from Wine to Caskets (Apr. 12, 2002), *at* http://releases.usnewswire.com/GetRelease.asp?id=118-04122002.

94. Craigmiles v. Giles, 312 F.3d 220, 222 (6th Cir. 2002).

95. TENN. CODE ANN. § 62-5-101 (2002).

96. *Id.* § 62-5-303(b) ("It is unlawful for any person to engage in, or offer to engage in, either funeral directing, embalming or operation of a funeral establishment unless such person or business has been duly licensed.").

97. *Id.* § 62-5-101(6)(A)(ii); *Craigmiles*, 312 F.3d at 222.

director, or (2) a two-year apprenticeship.[98] After the two years of training, a candidate must pass the Tennessee Funeral Arts Exam.[99] Although required for the sale of funeral merchandise, only thirty-seven of the 250 questions on the exam and less than five percent of the curriculum at the only accredited school pertain to the selling of such merchandise.[100]

Reverend Craigmiles and the other plaintiffs operate independent casket stores but are not licensed funeral directors.[101] They sell various items, including caskets and urns.[102] Because the sale of caskets and urns ("funeral merchandise") is included in Tennessee's definition of "funeral directing," the state told the plaintiffs to cease and desist their operations.[103] The plaintiffs then filed a lawsuit under 42 U.S.C. § 1983 claiming that the FDEA violated their rights guaranteed under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[104]

The Sixth Circuit's opinion did not distinguish between the due process and equal protection claims.[105] Instead, the court applied the same rational basis standard to both, addressing them together.[106] It began by recognizing that the rational basis standard is usually easily met.[107] Its only requirement, according to Judge Boggs, is "that the regulation bear some rational

98. *Craigmiles*, 312 F.3d at 222. Only one school, Gupton College, is approved by the Funeral Board. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 222–23; *see supra* notes 3–5 and accompanying text.

102. *Craigmiles*, 312 F.3d at 223.

103. *Id.*

104. *Id.* The plaintiffs also claimed the state violated their rights guaranteed under the Privileges or Immunities Clause of the Fourteenth Amendment. *Id.* The court did not reach the merits of this claim. *Id.* at 229. For more on the Privileges or Immunities Clause and efforts to overturn the infamous *Slaughter-House Cases*, 83 U.S. 36 (1873), see Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 47 (1998).

105. *See Craigmiles*, 312 F.3d at 223–24.

106. *See id.* In other recent challenges to occupational licensing, courts have analyzed the economic substantive due process and equal protection claims separately, even while applying the same rational basis standard to both. *See* Casket Royale, Inc. v. Mississippi, 124 F. Supp. 2d 434, 437–41 (S.D. Miss. 2000); Cornwell v. Cal. Bd. of Barbering & Cosmetology, 962 F. Supp. 1260, 1271–78 (S.D. Cal. 1997).

107. *Craigmiles*, 312 F.3d at 223–24 (noting that "[e]ven foolish and misdirected provisions are generally valid").

relation to a legitimate state interest."[108] Furthermore, not only is the burden on the plaintiff to "negative every conceivable basis that might support" the regulation,[109] but it is "constitutionally irrelevant [what] reasoning in fact underlay the legislative decision."[110] Thus, the court found that the state needed a legitimate state interest that was rationally related to the regulation, but that the interest did not need to be the actual reason the legislature had in passing the regulation.[111]

The state forwarded two justifications for the regulation: (1) public health and safety, and (2) consumer protection.[112] The court found neither rationally related to the licensing requirement.[113] In the case of public health and safety, the state proffered that it had an interest in the quality of caskets sold because if caskets leak, "visitors to funeral services and perhaps even ground water could be exposed to bacteria emanating from the corpse."[114] In response to this claim, the court stated that there are no requirements under Tennessee law that caskets meet any standards.[115] Loved ones can bury bodies in homemade caskets and need not use a casket at all.[116] The court also commented that the casket regulation, if anything, made caskets less safe by driving up their cost.[117] More market competition, in the form of more casket sellers, would improve health and safety, the court said, because the cost of safer caskets would come down.[118] Because of these facts, the court concluded that the law was so attenuated from the interest of public

108. *Id.* at 223 (citing Romer v. Evans, 517 U.S. 620, 632 (1996)).

109. *Id.* at 224 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

110. *Id.* (quoting United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) (citation and quotation omitted)).

111. *See also* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955) ("[I]t *might* be thought that the particular legislative measure was a rational way to correct [a problem]." (emphasis added)).

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

113. *Id.* at 228–29 ("None of the justifications offered by the state satisfies the slight review required by rational basis review under the Due Process and Equal Protection [C]lauses of the Fourteenth Amendment.").

114. *Id.* at 225.

115. *Id.* (pointing out that the state does not regulate the quality of caskets themselves).

116. *Id.*

117. *Id.* at 226 (noting that given the lack of competition, "nothing prevents licensed funeral directors from selling shoddy caskets at high prices").

118. *Id.* ("If casket retailers were to increase competition on casket *prices* and bring those prices closer to marginal costs, then more protective caskets would become more affordable for consumers . . . .").

health and safety that the two were not rationally related.[119]

The state argued that its second legitimate governmental interest, consumer protection, was furthered by holding casket sellers to the demands of the FDEA, thus "preventing them from making fraudulent misrepresentations, making solicitations after death or when death is imminent, or selling a previously used casket."[120] The court found this argument unconvincing. It noted that nonlicensed casket sellers would be held to some of these demands without the casket regulations through other civil and criminal consumer protection laws.[121] The state also argued licensure under the FDEA provided for application of the Federal Trade Commission (FTC) "funeral rule" to all casket sellers.[122] The funeral rule mandates that funeral service providers itemize goods and services provided to consumers.[123] As a result, when a funeral home bills a customer it must list what it charges, such as an embalming and a casket, separately. Responding to the state's FTC justification, the court noted that casket retailers only sell caskets, so there was no need to worry they would bundle charges.[124]

The heart of the court's opinion focused on the state's consumer protection justification.[125] The court recognized that the FDEA's overinclusiveness might be justified on the grounds of legislative efficiency.[126] Rational basis requirements, it said, do

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119. *Id.* (stating that even if casket selection had an effect on public health and safety, it was not due to a rational relationship between public health and safety and the FDEA).

120. *Id.* (citing TENN. CODE ANN. § 62-5-317(a)(2) (2002)).

121. *Id.* ("[I]t is not as if casket retailers would be free to 'engage in misrepresentation or fraud' if not covered by the FDEA.").

122. *Id.* at 227. The funeral rule requires, *inter alia*, that funeral providers give customers itemized price lists for funeral services. *See* Funeral Industry Practices, 16 C.F.R. § 453.2 (2003).

123. *See* 16 C.F.R. § 453.2(b)(5). The court thought the rule did not apply to casket retailers, *Craigmiles*, 312 F.3d at 227, but in this it was mistaken. The definition of "funeral provider" includes anyone who sells "funeral goods." 16 C.F.R. § 453.1(i).

124. *Craigmiles*, 312 F.3d at 228. Interestingly, in recent litigation challenging the constitutionality of a similar Oklahoma law, the FTC submitted an amicus brief on behalf of the plaintiffs. *See* Memorandum of Law of Amicus Curiae The Federal Trade Commission at 14–18, Powers v. Harris, No. CIV-01-445-F, 2002 WL 32026155 (W.D. Okla. Dec. 12, 2002), *appeal docketed*, No. 03-6014 (10th Cir. May 23, 2003).

125. *See Craigmiles*, 312 F.3d at 226–27.

126. *Id.* (noting that "[t]he state could have passed a more nuanced piece of legislation" but acknowledging that it was perhaps more efficient to demand all casket sellers be licensed funeral directors).

not force a legislature into adopting the most narrowly tailored piece of legislation.[127] Perhaps the legislature did not want to take the time to exclude non-funeral-home casket sellers from the licensing regime, and therefore applied the FDEA to all sellers of caskets.[128] Despite this argument, the court stated that the specificity of the 1972 amendment to the FDEA suggests that the Tennessee legislature deliberately, and solely, meant to protect existing funeral directors from competition.[129] The amendment specifically expanded the FDEA's licensing requirements to cover funeral merchandisers.[130] The circuitry of this legislative behavior, said the court, raised a red flag.[131]

Further discussing rational basis review, the Sixth Circuit found that *City of Cleburne v. Cleburne Living Center, Inc.*[132] applied to the legislature's circuitous behavior.[133] The Supreme Court had found that the city had other "better-tailored"[134] alternatives to address the purported interest of overcrowding without barring the mentally retarded.[135] The Tennessee legislation could similarly have addressed the interest of consumer protection without imposing a prohibitive cost (in this case two years of training) upon the affected parties.[136]

After dispensing with the two legitimate governmental interests advanced by the state, the court identified what it believed the actual governmental interest to be: protecting funeral directors from competition.[137] Just as segregation of the mentally retarded was the aim of the ordinance in *Cleburne*, the 1972 amendment to the FDEA was "very well tailored" to quashing competition.[138] This aim, said the court, in and of it-

127. *Id.* at 227 (recognizing that there is no need for "the best or most finely honed legislation to be passed").

128. *Id.*

129. *Id.* ("This specific action of requiring licensure . . . appears directed at protecting licensed funeral directors from retail price competition.").

130. *Id.*

131. *Id.* (finding that the pointed nature of the 1972 amendment made the legislation "suspicious").

132. 473 U.S. 432, 439 (1985).

133. *Craigmiles*, 312 F.3d at 227.

134. *Id.*

135. *Cleburne*, 473 U.S. at 450 (stating that the city's interest in preventing overcrowding "fail[s] to explain" why the ordinance had so little effect on that interest); *see also supra* notes 57–64 and accompanying text.

136. *Craigmiles*, 312 F.3d at 227.

137. *Id.* at 228 ("The licensure requirement imposes a significant barrier to competition in the casket market.").

138. *Id.* ("Finding no rational relationship to any of the articulated pur-

self, was not a legitimate governmental interest.[139] Therefore, because it found no legitimate governmental interest rationally related to the FDEA's licensing requirement, and that an illegitimate governmental interest was the real motivator, the court held that the licensing requirement violated the Fourteenth Amendment's Due Process and Equal Protection Clauses.[140]

IV. A NEW METHOD OF PROTECTING ECONOMIC LIBERTY

The Sixth Circuit was correct in striking down the FDEA licensing requirement for funeral merchandise.[141] It was also correct in applying *Cleburne*.[142] Since rational basis review under equal protection and economic substantive due process is virtually identical,[143] the Supreme Court's equal protection rational basis jurisprudence is particularly suited to both the equal protection and economic substantive due process claims of *Craigmiles*, as well as other cases involving economic liberty.[144] With the victory for economic liberty in *Craigmiles*, the road is now open for further challenges to occupational licensing, thus furthering the dreams of disenfranchised entrepreneurs by slicing out irrational regulatory burdens that stand in their way.

The *Craigmiles* court did not, however, properly address the most troubling aspect of the Tennessee licensing requirement: its irrelevance to the practice of selling caskets. It missed an opportunity to demonstrate how absurd the FDEA's requirements truly are. A better analysis would have drawn upon cases such as *Cornwell* and emphasized the irrationality of re-

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poses of the state, we are left with the more obvious illegitimate purpose to which [the] licensure provision is very well tailored.").

139. *Id.* at 224 (stating that "[c]ourts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose").

140. *Id.* at 228–29. The court did not address the two other obvious combinations of these points: a legitimate governmental interest coupled with an illegitimate governmental interest, and the absence of a legitimate or illegitimate governmental interest. *See id.* For a discussion of these alternatives, see *infra* note 199.

141. This thesis has also been adopted by the *Wall Street Journal*. *See* Editorial, *Nails in the Coffin*, WALL ST. J., Jan. 3, 2003, at A10 (praising the Sixth Circuit's ruling and labeling the Tennessee law "absurd").

142. *See infra* notes 193–201 and accompanying text.

143. *See supra* notes 50–56 and accompanying text.

144. *See infra* notes 200–01 and accompanying text.

quiring occupational training that has nothing to do with one's occupation. The opinion did properly focus, however, on the distinction between legitimate and illegitimate governmental interests. This distinction is important, and the court should be commended for the recognition of how it applies to rational basis review. The *Craigmiles* court understood that it is usually insufficient to invalidate a law under rational basis review by merely arguing that the law is not rationally related to a legitimate governmental interest. In theory this is all that is required, but most successful examples of rational basis invalidation, such as *Cleburne* and *Romer v. Evans*,[145] suggest an additional step is extremely helpful: showing that the *actual* governmental interest served by the law is illegitimate. In *Cleburne* and *Romer*, the illegitimate interest was animus toward a group.[146] In *Craigmiles*, it was sheer economic protectionism.[147] This Comment will illustrate how the *Craigmiles* court could have better emphasized the FDEA's irrationality and how, nevertheless, its opinion can further the efforts of entrepreneurs outside of the casket retail market.

A. RATIONAL VERSUS IRRATIONAL RELATIONSHIPS

1. The Interest of Public Health and Safety

The *Craigmiles* court was quite blunt in addressing the reasons Tennessee offered for its licensing regime: "Tennessee's justifications for the 1972 amendment come close to striking us with 'the force of a five-week-old, unrefrigerated dead fish.'"[148] The following thought experiment illustrates this point with regard to the purported health and safety justification. The problem at issue—the dead body—is never seen by the casket

145. 517 U.S. 620, 635 (1996); *see supra* note 57 (listing cases where statutes failed rational basis review).

146. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985); *Romer*, 517 U.S. at 635.

147. Craigmiles v. Giles, 312 F.3d 220, 228–29 (6th Cir. 2002).

148. *Id.* at 225 (quoting United States v. Searan, 259 F.3d 434, 447 (6th Cir. 2001) (citations omitted)). The weakness of the public health and safety defense was apparent in similar litigation against the State of Oklahoma. The State raised the interest at the start of litigation, but dropped it after its witnesses at trial toughly discredited it. Opening Brief of Appellants at 28–29, Powers v. Harris, No. 03-6014 (10th Cir. May 23, 2003). Instead, the state wholly focused on the interest of consumer protection. *See* Powers v. Harris, No. CIV-01-445-F, 2002 WL 32026155, at *1 (W.D. Okla. Dec. 12, 2002).

retailer.[149] A customer purchases the casket and it is then delivered to a funeral home.[150] At the funeral home the body is treated and placed in the casket.[151] The funeral home is staffed by licensed funeral directors trained in protecting the public from the effects of dead bodies.[152] If an "unsafe casket" were shipped to the funeral home, the trained and licensed funeral directors would realize it posed a threat to public health. Furthermore, the concern that untrained casket retailers would ship "unsafe caskets" is largely illusory.[153] Perhaps most importantly, Tennessee does not regulate the quality of caskets or even require their use.[154] Casket retailers and funeral homes sell the same makes of caskets and buy them from the same distributors.[155] Testimony was taken at trial in *Craigmiles* that a leaky casket could pose a threat to public health,[156] but in practice that threat is nonexistent. In the words of the district court, "The record contains no evidence that anyone has ever been harmed by a leaky casket."[157] Caskets are not even meant to protect health and safety.[158] The very concept of an "unsafe casket" is a hollow one.

With this in mind, the licensing requirements of the FDEA do not further the legitimate governmental interest of public health and safety. That is, they do not further the interest *rationally*. A legislator might come to the opposite conclusion if she did not, for example, consider how caskets actually work

149. *Craigmiles*, 312 F.3d at 223.

150. *Id.*

151. *See id.* at 225.

152. *See* TENN. CODE ANN. § 62-5-201 (2002) (mandating that those who engage in the treatment of bodies be licensed funeral directors).

153. *See Craigmiles*, 312 F.3d at 225–26 (finding "no evidence in the record that licensed funeral directors were selling caskets that were systematically more protective than those sold by independent casket retailers").

154. Craigmiles v. Giles, 110 F. Supp. 2d 658, 662 (E.D. Tenn. 2000) ("Customers can choose any casket they desire, snug or airy, despite the views of the funeral director and regardless of the cause of the deceased's death."), *aff'd*, 312 F.3d 220 (6th Cir. 2002).

155. *See id.* at 663 (noting that caskets do not differ between those sold independently and those sold by funeral directors).

156. *Craigmiles*, 312 F.3d at 225 ("[F]uneral directors testified that such leakage was of particular concern when the decedent died from a communicable disease, or when the body was not embalmed.").

157. *Craigmiles*, 110 F. Supp. 2d at 662.

158. *See id.* ("In those rare instances where human remains (before burial) might present a public health concern, funeral directors do not rely on caskets to negate the threat. Instead, they rely on embalming, adjustments to the funeral arrangements, and other techniques . . . .").

(that is, that they are pieces of wood placed in a hole in the ground). If she ignored these pieces of evidence, she might conclude that a two-year licensing regime designed for funeral directors should be applied to casket retailers. In doing so, however, she would be thinking irrationally. The licensing requirement would then be *irrationally* related to the interest of public health and safety. Thinking irrationally does not, of course, satisfy rational basis review.[159] Therefore, even though someone might think the licensing requirement was rationally related to the interest of public health and safety, it would, in fact, not be. This analysis may appear overly pedantic, but because of the rational basis test being what it is, such appeals to the blatantly obvious become necessary.

2. The Interest of Consumer Protection

The other purported legitimate governmental interest, consumer protection, is slightly more complicated.[160] Although some mandates of the FDEA parallel general consumer protection laws that apply to all businesses, other mandates, such as selling a previously used casket, do not directly apply to unlicensed casket retailers.[161] The Sixth Circuit stated that the legislature could easily rectify this inadequacy by applying the legislation to retailers, but, as it also correctly pointed out, under rational basis review, legislation does not need to be narrowly tailored.[162] The Tennessee Funeral Board has the power to reprimand funeral directors who violate the FDEA. Therefore, Tennessee believed it had a valid argument that unlicensed casket retailers would thwart this protective instrument.[163]

The district court pointed out that in its entire history the Funeral Board had never reprimanded a funeral director in connection with the sale of funeral merchandise.[164] Nonetheless, the Funeral Board's disciplinary power appears in the abstract to be a rational way for the Tennessee legislature to protect the

159. *See* Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 476–77 (1985) (stating that legislation violates economic substantive due process if it is "irrational").

160. *See Craigmiles*, 312 F.3d at 226–28.

161. *See id.* at 226 (admitting that some requirements of the FDEA do not otherwise apply to unlicensed casket retailers).

162. *See id.* at 227.

163. *See* TENN. CODE ANN. § 62-5-317 (2003) (giving the Board the ability to suspend or terminate funeral director licenses).

164. Craigmiles v. Giles, 110 F. Supp. 2d 658, 664 (E.D. Tenn. 2000), *aff'd*, 312 F.3d 220 (6th Cir. 2002).

consumer. If the FDEA required only a week of consumer training or some other mild licensing requirement in order to sell funeral merchandise, the requirement might be eminently reasonable. Instead, the legislature imposed a two-year training requirement, featuring a curriculum largely irrelevant to casket retailing.[165]

It is upon this point, the specifics of the training requirement, that the court should have relied to a much greater degree. It should have contrasted the FDEA with the regulations at issue in *Williamson*. There, the Supreme Court addressed the rational basis for requiring a prescription to fit lenses.[166] The arguments proffered for the law's rational basis were that some customers had such specific needs that a universal prescription requirement would be beneficial, and that the public should be encouraged to get repeated eye examinations.[167] These arguments may appear specious, but they do, at least conceivably, further the legitimate governmental interest of public health.

The regulations involved in *Craigmiles* are of a different order. The FDEA requires retailers who sell caskets and urns to spend two years learning about the entire funeral directing business.[168] If prospective casket sellers take the option requiring a year of school, they must pay between $10,000 and $12,000 in tuition and expenses while spending no more than five percent of their time learning about issues pertinent to selling caskets and urns.[169] Once finished with their training they must pass a test where only thirty-seven questions out of 250 pertain to selling caskets and urns.[170] Thus, businesspeople who want to sell caskets and urns and who want nothing to do with arranging funerals or embalming bodies must endure two years of study largely consisting of funeral preparation and embalming. The FDEA effectively bars the practice of independent casket selling, as anyone with years of funeral directing experience and $10,000 in educational investments would, presumably, rather go into the business for which they had just

165. *See supra* notes 98–100 and accompanying text.

166. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487 (1955); *supra* notes 28–37 and accompanying text.

167. *Williamson*, 348 U.S. at 487.

168. Craigmiles v. Giles, 312 F.3d 220, 222 (6th Cir. 2002).

169. *See id.; Craigmiles*, 110 F. Supp. 2d at 660 (stating that those figures apply to the "more popular" sixteen-month option).

170. *Craigmiles*, 312 F.3d at 222.

trained. In *Williamson*, opticians could still fit lenses; they just needed their clients to obtain a prescription.[171] This requirement may have been an unjust imposition on opticians, but at least it still allowed the opticians to go about their business. The FDEA requirements, on the other hand, eviscerate the non-funeral-director casket retail market. This evisceration may appear a very small loss to the totality of entrepreneurs and the people they employ, but when coupled with the many other occupations heavily encumbered by licensing laws, the sabotage of human potential grows to much greater proportions.[172]

Since only five percent of Tennessee's training time concerns the sale of caskets,[173] ninety-five percent of that time is irrelevant to the occupation casket retailers wish to pursue. A similar situation presented itself in *Cornwell v. California Board of Barbering & Cosmetology*.[174] There, the court found that a cosmetology licensing requirement, as it applied to African hair styling, violated economic substantive due process because only four percent of the required training hours pertained to hair styling.[175] In addition, those hours did not specifically pertain to hair styling, and could have been as justifiably required of any occupation, because they would have been just as useful.[176] Taken together, that the training hours (1) were irrelevant to the sought-after occupation and (2) comprised the overwhelming majority of the licensing requirements, suggested that the state was placing irrational demands on prospective hair stylists.[177] The *Craigmiles* court should have applied the same reasoning to Tennessee's regime, and should have stated that requiring prospective workers to go through a training regime in which ninety-five percent of the training is irrelevant to their occupation is so extreme that it is irrational. This is not to say that there is a mathematical formula with a bright line dividing a "rational" percentage from an "irrational"

171. *Williamson*, 348 U.S. at 486 ("The effect of [the statute] is to forbid the optician from fitting or duplicating lenses without a prescription . . . .").

172. *See infra* notes 203–16 and accompanying text.

173. *Craigmiles*, 312 F.3d at 222.

174. 962 F. Supp. 1260, 1273 (S.D. Cal. 1997); *see supra* notes 88–91 and accompanying text.

175. *Cornwell*, 962 F. Supp. at 1273.

176. *Id.* (remarking that it would be just as appropriate, and just as irrational, to send "food preparers" to cosmetology school as it would be to send hair stylists).

177. *See id.*

percentage. Regulations do reach a point, however, where they are so attenuated from furthering their purported purposes that legislators could not think them rationally related to those purposes.[178]

This failure of the *Craigmiles* court to emphasize the irrelevance of the licensing standards pertains to criticism of *Craigmiles* in *Powers v. Harris*.[179] In that case, decided six days after the Sixth Circuit decided *Craigmiles*,[180] Oklahoma casket retailers challenged a law very similar to Tennessee's.[181] The district judge critiqued *Craigmiles*, stating that the Sixth Circuit used policy arguments in striking down the licensing restrictions.[182] Policy arguments are not allowed under the rational basis test, argued the court, so the Sixth Circuit went beyond its authority in weighing the pros and cons of licensing versus increased competition in the casket market.[183] The critical analytical flaw in the *Powers* opinion, however, is that the Supreme Court does exactly that—evaluates policy arguments—when it subjects legislation to the rational basis test.[184] It is just that the policy argument must demonstrate that the legislation is irrational. Without the method of *Cornwell*, the *Craigmiles* court left itself open to this criticism. If it had pursued the irrelevancy question further, courts such as the one deciding *Powers* would see the irrationality of the legislation much more starkly. As it is, *Craigmiles* has a certain air of the *Lochner* Court, with policy justifications not quite unmasking the irrationality of the FDEA.[185] Of course, the *Powers* court

178. *See* Fitzgerald v. Racing Ass'n of Cent. Iowa, 123 S. Ct. 2156, 2160 (2003) (stating that a court must provide a "*plausible* basis on which the legislature may have relied" to uphold challenged legislation (emphasis added)).

179. Powers v. Harris, No. CIV-01-445-F, 2002 WL 32026155 (W.D. Okla. Dec. 12, 2002).

180. *Id.* at *14.

181. *Id.*

182. *Id.* at *15.

183. *Id.* (stating that the *Craigmiles* court "engages in balancing of the various public policies which it finds to be either served or not served by the Tennessee law").

184. *See supra* note 46 and accompanying text (noting that even under modern economic substantive due process jurisprudence the Supreme Court uses means-ends analysis).

185. *See, e.g.*, Craigmiles v. Giles, 312 F.3d 220, 228 (6th Cir. 2002) (arguing that the legislature might have better confronted "bundling" by funeral homes by allowing casket retailers to not be licensed). If the *Craigmiles* court had left out its policy arguments and just stuck to the irrationality of the licensing law, the *Powers* court might have looked more kindly upon it. However, the policy arguments illuminate the absurdities of the legislation by

could simply believe that economic legislation cannot fail the rational basis test, period. This holding would follow *Ferguson v. Skrupa*,[186] however, and not *Williamson*.[187] As seen earlier, the *Ferguson* approach has not been the prevailing standard in the courts.[188]

Even though the *Craigmiles* court failed to properly apply an irrelevancy criterion, the strong specter of an illegitimate governmental interest remained.[189] The 1972 FDEA amendment illustrates that the Tennessee legislature acted solely to prevent competition in the casket market.[190] Therefore, the amendment was supported by an illegitimate governmental interest.[191] With no legitimate governmental interests supporting it in the first place, precedent calls for striking down the law.[192]

B. How Equal Protection Rational Basis Can Further Economic Liberty

As just alluded to, the demands of rational basis review are not impossible to overcome, but they are extraordinarily high.[193] If a court finds all proffered arguments not rationally related to a legitimate governmental interest, the possibility remains that there might be others yet unconsidered. As said above, however, what can tip the scales is plain evidence that an illegitimate interest is at work.[194] Some might argue, of course, that plain evidence was at hand in economic substantive due process cases like *Williamson*, demonstrating that the law in question clearly was protectionist.[195] Indeed, the evidence was rather plain in *Williamson*, but the proffered arguments con-

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pointing out, for example, how other options existed for the legislature to address the evil of bundling casket prices with other funeral costs.

186. *See* Ferguson v. Skrupa, 372 U.S. 726, 731 (1963).

187. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–91 (1955).

188. *See supra* notes 40–43 and accompanying text; *supra* Part II.

189. *See supra* notes 144–47 and accompanying text (discussing heightened suspicion once illegitimate governmental interests arise).

190. *See supra* notes 138–39 and accompanying text.

191. *See supra* note 139 and accompanying text.

192. *See infra* notes 194–201 and accompanying text.

193. *See supra* notes 108–11 and accompanying text (explaining how all possible rational basis arguments must first be defeated).

194. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 635 (1996) (arguing that the harm stemming from the bar against antidiscrimination laws "outrun[s] and belie[s] any legitimate justifications that may be claimed for it").

195. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487 (1955) (admitting that the law may generally be "needless" and "wasteful").

necting the law in question with legitimate governmental interests satisfied rational basis review.[196] In contrast, equal protection cases like *Cleburne*, *Romer*, and *Moreno*[197] contained evidence of illegitimate interests coupled with the absence of a legitimate interest.[198] This two-step process provides a method of overcoming the demands of rational basis review.[199]

There is little reason why courts should not extend this method to *Craigmiles* and to other economic substantive due process challenges to occupational licensing. The *Craigmiles* court applied *Cleburne* to equal protection and due process because it found rational basis review to be the same under both.[200] To argue that *Cleburne* and similar equal protection cases apply only to equal protection and not to substantive due process implies that the levels of rational basis review are different. They are not, as seen earlier, and so a cross application is acceptable.[201] Courts are therefore free to learn from the example of *Craigmiles* and protect entrepreneurs from the excesses of occupational licensing.

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196. *See supra* notes 166–67, 171 and accompanying text.

197. United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (overturning a denial of food stamp benefits); *see also supra* note 57.

198. For example, in *Moreno* the Court found no legitimate interest in denying food stamp benefits to households composed of unrelated people. 413 U.S. at 538. The government argued such households led to more abuse of the program. *Id.* at 534. The Court responded by stating this argument was based on "wholly unsubstantiated assumptions" contrary to the evidence. *Id.* Instead, the Court found that the illegitimate interest of discouraging "'hippies'" and "'hippie communes'" prompted the denial of benefits. *Id.* at 537 (quotation omitted). Thus, the Court found a lack of a legitimate interest and the presence of an illegitimate interest.

199. Two other combinations of interests—a law justified by both a legitimate governmental interest and an illegitimate governmental interest, or a law justified by neither a legitimate nor illegitimate governmental interest—probably meet rational basis requirements. The first scenario is the situation present in *Williamson*, and therefore meets rational basis. *See Williamson*, 348 U.S. at 487. The second scenario leaves a judge wondering whether a rational argument exists of which she has not thought. This is not to say a statute will necessarily survive the second scenario. The second scenario arguably existed in *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 343–46 (1989), where the Court struck down a taxation scheme even though it identified no legitimate interest and did not speculate on an illegitimate interest.

200. *See* Craigmiles v. Giles, 312 F.3d 220, 223–25, 227 (6th Cir. 2002).

201. *See supra* notes 56–57 and accompanying text.

C. WHY ECONOMIC SUBSTANTIVE DUE PROCESS IS GOOD POLICY

Whatever the state of the law may be, an outstanding issue remains: whether economic substantive due process itself is a wise policy. Perhaps if the Supreme Court is faced with a law that actually fails the due process rational basis test it should stamp out the doctrine entirely, giving even irrational legislation a pass.[202] There are reasons, however, that it would want to refrain from doing so and keep the doctrine alive. Take an entrepreneur like Reverend Nathaniel Craigmiles. He wants to sell caskets and does so at lower prices than funeral homes.[203] There are no indications that his lack of formal training negatively affects the public.[204] Removing the licensing barrier from a business like his helps his customers and his local economy by spurring innovation and competition.[205] The same is true for other kinds of economic barriers, but especially true for other forms of occupational licensing.[206]

In many fields of regulation, but particularly in occupational licensing, governments often impose requirements simply to protect entrenched economic interests.[207] These regulations hamper the creation of jobs and wealth.[208] Reform of anticompetitive licensing requirements through the legislative process is exceedingly hard to accomplish.[209] Despite the detrimental effects of occupational licensing upon consumers and

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202. The Court did this in *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963). Since then, however, it has repeatedly stated the need for a rational relationship to a legitimate governmental interest. *See supra* notes 40–48 and accompanying text.

203. Craigmiles v. Giles, 110 F. Supp. 2d 658, 664 (E.D. Tenn. 2000) (stating that funeral homes mark up prices between 250% and 600%, while Reverend Craigmiles adds a flat $350 and a co-plaintiff applies a 100% increase), *aff'd*, 312 F.3d 220 (6th Cir. 2002).

204. *See supra* Part IV.A.

205. *See* S. DAVID YOUNG, THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA 71–73 (1987) (detailing how licensing laws tend to stifle innovation by encouraging anticompetitive practices).

206. *See id.* at 1 ("Occupational regulation has served to limit consumer choice, raise consumer costs, increase practitioner income, limit practitioner mobility, deprive the poor of adequate services, and restrict job opportunities for minorities . . . .").

207. *Id.* at 24–25.

208. *See* MARY J. RUWART, HEALING OUR WORLD: THE OTHER PIECE OF THE PUZZLE 45–46 (1993) (describing how daycare requirements prevent poor mothers from opening daycares while also raising the price of the service they hope to provide).

209. YOUNG, *supra* note 205, at 27–28.

the poor and arguably upon quality, licensing reform is a painstaking process that yields few results.[210] Because the benefits of licensing are heavily concentrated in current practitioners and the liabilities are dispersed among potential new practitioners and consumers, those currently licensed have a much stronger incentive to lobby for licensing restrictions than potential practitioners and consumers have to lobby against them.[211] Because of this, legislatures rarely deregulate licensing regimes.[212] At the same time, various sectors of society, especially minorities[213] and the poor,[214] cannot realize their full potential because of licensing requirements such as those in the FDEA. With embedded regulatory schemes before them, they must resort to the courts and to economic substantive due process in order to protect their right to earn a living.

This is not to say that courts should shred licensing statutes at will. Some occupational licensing is unquestionably rationally related to protecting the public. Few people would want unlicensed heart surgeons or nuclear engineers. When it comes to licensing exceedingly less dangerous occupations such as ushers and hair stylists, however, the benefits to the public become much more suspect.[215] Using economic substantive due process to open up restricted markets such as mass transit could provide, and has provided, increased economic opportunity and consumer choice.[216]

Even if workers and consumers would benefit from increased use of the doctrine, some worry that such an increase would signal a move back to the activism of the *Lochner* era.[217] Rational basis deference, it is argued, may be hard to hold onto if courts begin to throw out more and more economic regula-

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210. *See* Morris M. Kleiner, *Occupational Licensing*, J. ECON. PERSP., Fall 2000, at 194.

211. *See* YOUNG, *supra* note 205, at 26–27.

212. *See* Kleiner, *supra* note 210, at 194.

213. *See* David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89, 90–91 (1994) (noting how licensing laws restricted blacks from working in the post–Civil War South).

214. RUWART, *supra* note 208, at 43–44.

215. *See* Doug Bandow, *Killing Enterprise in New York*, CATO INST. DAILY COMMENT., Apr. 16, 1997, *at* http://www.cato.org/dailys/4-16-97.html.

216. *See* Santos v. City of Houston, 852 F. Supp. 601, 608 (S.D. Tex. 1994) (finding an "anti-jitney" ordinance restricting the availability of small vehicle transportation violated economic substantive due process and equal protection).

217. *See supra* notes 23–27 and accompanying text.

tions.[218] On the other hand, some argue a "regression" to *Lochner*-era jurisprudence would be a good idea, breaking down seemingly rational yet unwise and counterproductive regulations.[219] The merits of such a move are best left to another study.[220] Fears that a more active use of rational basis review would open up haphazard denials of legislative power, however, are likely unfounded. The Supreme Court has repeatedly reserved a narrow area within which legislation violates economic substantive due process.[221] To expand that area would require elevating economic liberties to the status of "fundamental liberties," which are currently granted strict scrutiny.[222] This would require more than a slippery slope toward an activist rational basis jurisprudence. It would demand a seismic shift in precedent not seen since 1938.[223] Such a scenario is extremely unlikely given the modern Court's aversion to interfering with the power of the legislature.[224] Working within the rational basis test to further economic liberty, on the other hand, is a method the Court still allows for and has indirectly strengthened through its equal protection rulings.[225]

CONCLUSION

In *Craigmiles v. Giles*, the Sixth Circuit Court of Appeals ruled Tennessee's Funeral Directors and Embalmers Act vio-

218. *See 6th Circuit Buries Protectionist Statute in Tennessee Case*, TECH. L.J., Dec. 6, 2002 (claiming that the Sixth Circuit sidestepped the rational basis test and instead applied heightened scrutiny), *at* http://www.techlawjournal.com/topstories/2002/20021206.asp.

219. *See* BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 318–22 (1980); Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363, 1382–83 (1990).

220. *See, e.g.*, SIEGAN, *supra* note 219, at 318–22 (arguing strongly in favor of higher-level scrutiny for economic liberties); Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, *in* 1962 SUP. CT. REV. 34, 62 (1962) (urging courts to refrain from using the doctrine); Phillips, *supra* note 76, at 965 (counseling for limited use).

221. *See supra* notes 44–48 and accompanying text.

222. Washington v. Glucksberg, 521 U.S. 702, 722 (1997) (stating that if an interest is not "fundamental," it only receives rational basis review).

223. *See* United States v. Carolene Prods., Co., 304 U.S. 144, 152 n.4 (1938) (bifurcating the protections of the Fourteenth Amendment into those where the legislature is given deference, and those which call for higher judicial scrutiny).

224. *See supra* Part I.A (explaining the lenient method of the modern Court's review of economic regulation).

225. *See supra* notes 57–65 and accompanying text.

lated the Fourteenth Amendment's Due Process and Equal Protection Clauses. Even though the court applied rational basis review, it invalidated the law by holding that it furthered no legitimate governmental interest and instead furthered the illegitimate interest of economic protectionism. *Craigmiles* is the latest in a line of lower court decisions recognizing the continued viability of economic substantive due process. More significantly, it is the first circuit court decision invalidating an occupational licensing law by using the doctrine since the New Deal. It is a wake-up call to all sides that economic substantive due process is not dead, and that, as Mark Twain might say, the rumors of its demise have been greatly exaggerated.

The court correctly found the Supreme Court's equal protection rational basis precedent controlling. Courts should repeat this application in challenges to other economic regulations, especially those restricting the right to earn a living. Judicial intervention into economic affairs may conjure up fears of a return of the *Lochner* era, but limited use of economic substantive due process under rational basis review will extend needed protection against egregious violations of economic liberties. It will also result in greater opportunities for entrepreneurs who otherwise cannot pursue the occupation of their calling.