Protecting Economic Liberty in the Federal Courts: Theory, Precedent, Practice

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Other Views:

- Amy Coney Barrett, *Originalism and Stare Decisis*, 92 Notre Dame L. Rev. 1921 (2017), *available at* https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4734&context=ndlr.
- Roderick Hills, *Is the Federal Judicial Cure for Protectionism Worse Than the Disease?*, 43 Harv. J.L. & Pub. Pol'y 13 (2020), *available at* https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2020/01/Hills-FINAL.pdf.
- Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955), *available at* https://supreme.justia.com/cases/federal/us/348/483/.
- Tiwari v. Friedlander, No. 3:19-CV-884, 2021 WL 1407953 (W.D. Ky. Apr. 14, 2021), *available* at https://casetext.com/case/tiwari-v-friendlander.

The 14th Amendment meaningfully protects economic liberty. While this protection was originally housed in the Privileges or Immunities Clause, current Supreme Court doctrines of substantive due process and equal protection of the laws can provide substitute protection for this liberty.

Today, Supreme Court precedent subjects economic liberty claims to rational basis review. While the original law of the 14th Amendment would provide economic liberty more protection, judges can still provide modest protection for this right by applying meaningful rational basis review, rather than simply deferring to governments' claims about their interests and the means used to achieve them. *St. Joseph Abbey v. Castille*, a case decided by the Fifth Circuit Court of Appeals, is a model of harmonizing this original law with Supreme Court precedent. Other federal courts considering economic liberty challenges should follow suit.

This article (1) explains how the 14th Amendment protects economic liberty, (2) describes how federal courts employing the rational basis test can protect economic liberty even though they are bound by nonoriginalist precedent, and (3) gives three case illustrations of how this method of judicial review under the 14th Amendment can be applied to protect economic liberty today.

I. The Original Law of the 14th Amendment Protects Economic Liberty

The original law of the 14th Amendment protects economic liberty.[1] Economic liberty—which encompasses the right to earn an honest living—is "the right to acquire, use, and possess private property and the right to enter into private contracts of one's choosing."[2] James Madison called this right an individual's "free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called."[3] And in the words of John Bingham, it was the liberty "to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellow-men, and to be secure in the enjoyment of the fruits of your toil."[4] This

1 This article employs a theory of originalism called original-law originalism. This theory holds that our law is the original law, the founders' law, as it has been lawfully changed. It seeks to ascertain the original legal rule enacted by a particular clause of the Constitution at the time of enactment. Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 Harv. L. Rev. (forthcoming 2022) (manuscript at 46) ("On an original-law approach . . . the key standard for interpreting [a clause] is that it enacts whatever rule of law it enacted at the Founding.").

2 Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 Harv. J.L. & Pub. Pol'y 5, 5 (2012).

3 James Madison, *Property*, National Gazette (March 29, 1792), *in* James Madison's Writings 516 (Jack N. Rakove ed., 1999).

4 Cong. Globe, 42nd Cong., 1st Sess., Appendix 81–86 (Mar. 31, 1871) (speech of John Bingham), *in* 2 The Reconstruction Amendments:

right, also called free labor at the framing of the Reconstruction Amendments, was central to the Second Founders' constitutional vision, and its protection was guaranteed by the 13th and 14th Amendments.[5]

The Privileges or Immunities Clause is the 14th Amendment's primary vehicle for protecting economic liberty. That clause states: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[6] The Privileges or Immunities Clause incorporates by reference a body of rights for federal protection. This body of rights is "a species of general law" recognized in state constitutions, the federal Constitution, and the common law.[7] Senator Jacob Howard recognized that this constellation of rights "cannot be fully defined in their entire extent and precise nature" but identified two textual hooks for identifying some of these rights: the federal Bill of Rights and the rights protected by Article IV, Section 2's Privileges and Immunities Clause.[8] In his concluding remarks presenting the 14th Amendment to the Senate, he stated, "Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution . . . ."[9] The Privileges or Immunities Clause incorporated a preexisting body of rights, and the 14th Amendment provided an express textual ground for protection by federal courts (Section 1) and Congress (Section 5).[10] This would provide the protection for civil rights that the Second Founders argued was always part of the constitutional design, while leaving the structure of federalism intact.

At minimum, the privileges or immunities protected by the 14th Amendment include (1) the rights recognized in the federal Bill of Rights, (2) the rights recognized by each state since the Founding, often in their state constitutions, and (3) the rights protected by Article IV's Privileges and Immunities Clause.[11]

Among the privileges or immunities protected by the clause is the right to earn an honest living. First, the right to ply one's trade was long recognized at common law and inherited by the American states.[12] Second, *Corfield v. Coryell*, the leading case defining the privileges and immunities of citizens under Article IV, included economic liberty among Americans' privileges or immunities. Justice Bushrod Washington wrote,

> the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . . . The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . . to take, hold and dispose of property, either real or personal . . . may be mentioned as some of the particular privileges and immunities of citizens . . . .[13]

This reading of the clause is confirmed by antislavery constitutionalism and free-labor ideology, two of the leading strands of thought that animated the Second Founders. For instance, by the time of the 14th Amendment's framing, many antislavery constitutionalists had begun reading Article IV's Privileges and Immunities Clause as a guarantor of rights within states.[14] By contrast, the dominant position to that point had viewed that clause as simply an interstate antidiscrimination provision. The antislavery view that the federal Constitution must protect basic rights within the states ultimately prevailed through the Second Founders' enactment of the Privileges or Immunities Clause.[15]

But this clause was swiftly gutted by the Supreme Court in the *Slaughter-House Cases*. In 1873, a group of butchers challenged a Louisiana state law that closed all slaughterhouses

The Essential Documents 629 (Kurt Lash ed., 2021).

5 James W. Ely, Jr., "*To Pursue Any Lawful Trade or Avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. Penn. J. Const. L., 917, 932 (2006); *see also* Eric Foner, Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War ix (2d ed. 1995) ("[T]he Republican party before the Civil War was united by a commitment to a 'free labor ideology,' grounded in the precepts that free labor was economically and socially superior to slave labor and that the distinctive quality of Northern society was the opportunity it offered wage earners to rise to property-owning independence."); *see also* Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution xx (2019) ("So profound were these changes that the amendments should be seen not simply as an alteration of an existing structure but as a 'second founding,' a 'constitutional revolution,' in the words of Republican leader Carl Schurz, that created a fundamentally new document with a new definition of both the status of blacks and the rights of all Americans.").

6 U.S. Const. amend. XIV, § 1.

7 Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. Ill. L. Rev. 1433, 1435 (2020) ("The rights mentioned in state declarations and in the federal constitution were often conceptualized as a species of general law, not as a form of enacted law that one would expect to vary from jurisdiction to jurisdiction. State courts could—and often did—refer to the federal constitution and other state constitutions as evidence of the rights that operated against their governments.").

8 Cong. Globe, 39th Cong., 1st Sess., 2764–67 (May 23, 1866) (speech of Jacob Howard), *in* 2 The Reconstruction Amendments: The Essential Documents 187 (Kurt Lash ed., 2021).

9 *Id.* at 188.

10 Campbell, *supra* note 7, at 1435 ("[T]he central controversy in the late nineteenth century was [not which rights were protected but] the extent to which the Fourteenth Amendment added a new way of enforcing these rights.").

11 David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 Hastings Const. L. Q. 213, 223 (2015); *see also* McDonald v. City of Chicago, 561 U.S. 742, 813 (2010) (Thomas, J., concurring) ("At the time of Reconstruction, the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.' The two words, standing alone or paired together, were used interchangeably with the words 'rights,' 'liberties,' and 'freedoms,' and had been since the time of Blackstone.").

12 Timothy Sandefur, The Right to Earn a Living: Economic Freedom and the Law 18–29 (2010); Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 983, 989–1009 (2013).

13 Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823).

14 Randy E. Barnett & Evan D. Bernick, *The Difference Narrows: A Reply to Kurt Lash*, 95 Notre Dame L. Rev. 679, 688–90 (2019).

15 The original understanding of the clause is best expressed in Senator Jacob Howard's speech introducing the 14th Amendment to the Senate. Randy E. Barnett & Evan Bernick, *The Privileges or Immunities Clause Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 Notre Dame L. Rev. 499, 499–503 (2019); *see also* Barnett & Bernick, *supra* note 13, at 690–92.

in New Orleans and required all slaughtering to be done in one slaughterhouse.[16] The butchers challenged this as an unconstitutional, monopolistic restriction on their economic liberty under the 13th and 14th Amendments.[17] In the Court's first case interpreting these amendments, it adopted a narrow reading of the Privileges or Immunities Clause. The Court's key move was to create a distinction between the privileges or immunities of state citizenship and those of national citizenship, holding that state-citizenship rights were unprotected by the clause.[18] The Court placed economic liberty in the state-citizenship box, outside the 14th Amendment's protection.

The Court was sharply divided over the case. The leading dissents from Justices Stephen Field and Joseph Bradley recognized the broader nature of the 13th and 14th Amendments, particularly their protection of economic liberty. Justice Field wrote, "[t]he privileges and immunities designated are those *which of right belong to the citizens of all free governments*. Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons."[19] And Justice Bradley wrote, "any law which establishes a sheer monopoly, depriving a large class of citizens of the privilege of pursuing a lawful employment, does abridge the privileges of those citizens."[20] But these dissents went unheeded. Instead, *Slaughter-House* laid the foundation of a constricted 14th Amendment jurisprudence, which would ultimately lead to the rise of Jim Crow—an era epitomized by *Plessy v. Ferguson*.[21] Although *Plessy* was largely overruled by *Brown v. Board of Education* and its progeny,[22] *Slaughter-House* still stands.[23]

In the aftermath of the *Slaughter-House Cases*, economic liberty is woefully underprotected by the federal courts. Yet today, similar protections for basic rights like the right to earn an honest living and against discrimination with respect to that right are imperfectly channeled through the Due Process and Equal Protection Clauses.[24] Thus, federal courts can achieve part of the original protections for economic liberty intended under the Privileges or Immunities Clause through substantive due process and equal protection (until the Supreme Court is willing to overturn the *Slaughter-House Cases*). Under both doctrines, the right to earn a living is protected to a degree, but because these doctrines subject this right to rational basis review, it is often given less than a passing glance, even though the original law and modern precedent both require it receive more protection.[25]

II. A More Meaningful—and More Originalist—Rational Basis Test

Today, economic liberty receives minimal protection under the rational basis test. The rational basis test is the lowest tier of protection for constitutional rights. It is a means-ends test "having two parts—is there a legitimate government interest, and is the law at issue rationally related to that interest?"[26] Although the current version of the test is inconsistent with originalism, even under modern rational basis review, economic liberty can, and should, receive more protection than it often does.

Since the Founding, federal courts have engaged in means-ends review to assess the constitutionality of statutes. Chief Justice John Marshall famously phrased it: "Let the end [of a statute] be legitimate, let it be within the scope of the constitution, and

16 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 59–61 (1872).

17 *Id.* at 66–68.

18 *Id.* at 74 ("Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State . . . it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by [the Privileges or Immunities Clause].").

19 *Id.* at 97 (Field, J., dissenting).

20 *Id.* at 122 (Bradley, J., dissenting).

21 *See* Bradwell v. Illinois, 83 U.S. 130 (1872) (depriving woman of equal rights); United States v. Cruikshank, 92 U.S. 542 (1875) (denying African Americans protection of the First and Second Amendments); Civil Rights Cases, 109 U.S. 3 (1883) (invalidating the Civil Rights Act of 1875); Plessy v. Ferguson, 163 U.S. 537 (1896) (enforcing the doctrine of separate but equal).

22 Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).

23 *McDonald*, 561 U.S. at 758 ("We therefore decline to disturb the *Slaughter-House* holding.").

24 *See* Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997) ("The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. . . . The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests."); *see also id.* at 728 (requiring, at minimum, that a regulation infringing liberty "be rationally related to legitimate government interests"). *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."); *see also* Sunday Lake Iron Co. v. Wakefield Township, 247 U.S. 350, 352 (1918) ("The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.").

25 A disagreement on reading protections for fundamental rights under due process or privileges or immunities has made it to the U.S. Supreme Court for rights enumerated in the Bill of Rights. Justice Thomas holds that the Privileges or Immunities Clause and that clause alone protects rights. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1421 (2020) (Thomas, J., concurring) ("I also would make clear that [the Sixth Amendment] right applies against the States through the Privileges or Immunities Clause of the Fourteenth Amendment, not the Due Process Clause."). Justice Gorsuch agrees with Justice Thomas as an original matter. *See* Timbs v. Indiana, 139 S. Ct. 682, 691 (2019) (Gorsuch, J., concurring) ("As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause."). But he holds that protecting rights under the 14th Amendment, whether under due process or privileges or immunities, is appropriate, so long as the right was originally understood to be within the Amendment's sweep. *Ramos*, 140 S. Ct. at 1397 ("This Court has long explained that the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice' and incorporated against the States under the Fourteenth Amendment."). It remains to be seen what these Justices would do if protecting the unenumerated right to economic liberty—which was intended to be protected by the original law of the 14th Amendment—came before the Supreme Court.

26 Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 Geo. J.L. & Pub. Pol'y 373, 376 (2016).

all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[27] This method of judicial review was also used in early America to determine whether a state law was a valid exercise of the police power or a violation of the Commerce or Contract Clause.[28]

During the 19th century, courts enforcing the 14th Amendment also reviewed laws in this manner—by assessing whether a state law was a valid exercise of the police power or an unconstitutional abridgment of a right protected by the 14th Amendment. This form of means-ends review was triggered when a litigant argued a law unconstitutionally abridged his right to earn an honest living or unlawfully discriminated against his exercise of that right. Justice John Marshall Harlan applied this form of judicial review under the 14th Amendment, for example in *Mugler v. Kansas*, but also in his dissent in *Lochner v. New York*. In *Mugler*, Justice Harlan stated that if

> a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.[29]

Judges Steven Menashi and Douglas Ginsburg have identified "a formal continuity between *Mugler* and modern rational basis review."[30] They argue the notorious deference associated with modern rational basis review "results more from the application of the standard than from the standard itself."[31] This method of judicial review is also distinguishable from the majority opinion in *Lochner v. New York* because *Lochner* applied a "presumption in favor of liberty of contract."[32] By contrast, the method of judicial review employed by Justice Harlan applied a rebuttable presumption of constitutionality to the challenged statute. But, if a litigant could prove an infringement of economic liberty without a valid police powers defense, the presumption was overcome, and the statute was declared unconstitutional. This method is directly connected to modern rational basis review and should serve as a guide for courts today.

The rational basis test requires that a law burdening an individual's right be "rationally related to a legitimate state interest" to be constitutional.[33] A law is unconstitutional under this test when (1) the logical connection between its means and ends are too attenuated[34] to be rational, or (2) when the end itself is illegitimate.[35] Economic protectionism is an example of an illegitimate state interest (at least in many circuits).[36] And for state laws regulating entry into a profession, the Supreme Court has stated any such regulation must be rationally related, not merely to a legitimate state interest, but more specifically to "the applicant's fitness or capacity to practice" the profession itself.[37]

Still, the rational basis test builds a high wall of deference shielding statutes from constitutional challenge—a wall difficult to scale but not impossible. The test presumes a statute constitutional and upholds it even in "the absence of any factual foundation" for the statute's validity.[38] The deference afforded to the government under rational basis review reached its zenith in *Williamson v. Lee Optical*, where the Court stated that "the law need not be in every respect logically consistent with its aims to be constitutional. It

27 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421–22 (1819); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173, 176 (1803) (assessing the meaning of a statue, the jurisdiction it grants, and determining that grant violated the Constitution—thus the means were unlawful even if issuing mandamus was a proper end).

28 Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. Chi. L. Rev. 815, 837–47 (2020); *see also* Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 193 (2004) ("In the early years of the Republic, federal courts actively scrutinized state enactments to ensure they did not violate these expressed prohibitions, especially the Contracts Clause.").

29 Mugler v. Kansas, 123 U.S. 623, 661 (1887); *accord* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2463–64 (2019).

30 Steven Menashi & Douglas Ginsburg, *Rational Basis with Economic Bite*, 8 N.Y.U. J.L. & Liberty 1055, 1065 (2014).

31 *Id.*

32 *Id.* at 1064–65.

33 *E.g., City of Cleburne*, 473 U.S. at 440.

34 *See* Quinn v. Millsap, 491 U.S. 95, 108 (1989) (ability to grasp politics not logically connected to land ownership); *City of Cleburne*, 473 U.S. at 449–50 (home being too big not logical basis for permit denial when identical homes routinely granted permits); Williams v. Vermont, 472 U.S. 14, 24–25 (1985) (encouraging Vermont residents to make in-state car purchases not logical basis for tax on car that Vermont resident bought out-of-state before becoming Vermont resident); Zobel v. Williams, 457 U.S. 55, 61–62 (1982) (refusing to fund new Alaska residents not rationally related to encouraging people to move to Alaska); Chappelle v. Greater Baton Rouge Airport Dist., 431 U.S. 159 (1977) (per curiam) (ability to grasp politics not logically connected to land ownership); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (stimulating the agricultural economy not logically connected to whether people in a household are related); Mayer v. City of Chicago, 404 U.S. 189, 196 (1971) (if inability to pay is no basis to deny transcript to felony defendant, then inability to pay no logical basis for denying transcript to misdemeanor defendant); Turner v. Fouche, 396 U.S. 346, 363–64 (1970) (no rational interest underlying property ownership requirement for political office).

35 *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (no legitimate interest in criminalizing consensual adult homosexual acts); Romer v. Evans, 517 U.S. 620, 634–35 (1996) (no legitimate interest in anti-gay animus); Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612, 623 (1985) (no legitimate interest in dividing bona fide state residents into different classes); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 880 (1985) (no legitimate interest in discriminating against out-of-state companies); *City of Cleburne*, 473 U.S. at 448 (no legitimate interest in animus against the mentally disabled); *Zobel*, 457 U.S. at 64 (no legitimate interest in creating permanent classes of bona fide residents); *Moreno*, 413 U.S. at 534 (no legitimate interest in antihippie animus); *id.* at 535 & n.7 (traditional morality rationale constitutionally dubious).

36 Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002) (economic protectionism is not a legitimate state interest); Merrifield v. Lockyer, 547 F.3d 978, 991 n.15 (9th Cir. 2008) (same); St. Joseph Abbey v. Castille, 712 F.3d 215, 222 (5th Cir. 2013) (same); *but see* Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004) (economic protectionism is a legitimate state interest); Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 286 (2d Cir. 2015) (same).

37 Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 239 (1957); *see also* Dittman v. California, 191 F.3d 1020, 1030–31 (9th Cir. 1991).

38 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397 (1937).

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."[39] Given this heavy presumption, and because courts "never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."[40] Therefore, "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," the courts will uphold it.[41] And "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'"[42] And yet, in spite of these grand statements of judicial deference, many challengers have prevailed on rational basis claims, demonstrating its deference is not bulletproof.[43]

Take for example *St. Joseph Abbey v. Castille*, a case out of the Fifth Circuit which provides a blueprint for how courts, though bound by rational basis precedent, can still protect economic liberty in a manner more consistent with the original law of the 14th Amendment. There, the Fifth Circuit successfully reconciled originalism with precedent—taking the Supreme Court's admonitions about judicial restraint seriously, while still performing meaningful means-ends judicial review. As a result, the court declared unconstitutional certain protectionist Louisiana regulations that granted "funeral homes an exclusive right to sell caskets."[44]

The monks of St. Joseph Abbey make and sell simple wooden caskets.[45] But Louisiana law forbade the monks the rewards of their simple labors. It required intrastate casket retail sales be made only by a state-licensed funeral director at a state-licensed funeral home.[46] Of course, the monks had no licenses and were not funeral directors nor a funeral home. And even if licensed, just to sell their caskets to consumers at retail, the monks would have to equip the Abbey with "a layout parlor for thirty people, a display room for six caskets, an arrangement room, and embalming facilities."[47] The monks would also need to acquire funeral director licenses with apprenticeship and examination requirements. Just to sell a box. But "[n]one of this mandatory training relate[d] to caskets or grief counseling," and "[t]he exam [did] not test Louisiana law or burial practices."[48] "In sum," wrote the court, "the State Board's sole regulation of caskets [was] to restrict their intrastate sales to funeral homes. There [were] no other strictures over their quality or use."[49]

The monks sued, invoking the rational basis test to argue these restrictions violated the 14th Amendment.[50] The monks argued Louisiana's regulation deprived them of their right to earn a living with no rational relation to a legitimate state interest. It was naked economic protectionism. The funeral board responded that (1) economic protectionism was a legitimate state interest, and (2) applying the licensing regulations to the monks advanced Louisiana's interests in consumer protection, public health, and public safety.[51]

The court first rejected economic protectionism as a legitimate state interest. It determined that "neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose." Even *Lee Optical* determined that while protectionism might be supported "by a post hoc perceived rationale," without such a justification, a regulation "is aptly described as a naked transfer of wealth."[52]

The court then assessed Louisiana's police powers justifications. Although the government bore no burden, the monks could "negate a seemingly plausible basis for the law by adducing evidence of irrationality."[53] And while *Lee Optical* requires that the court's means-ends analysis consider post hoc hypothetical justifications, those justifications "cannot be fantasy," and the analysis does "not include post hoc hypothesized facts."[54]

The first justification, consumer protection, was rejected on the facts. Louisiana argued that the regulation protected consumers from predatory sales practices by third-party sellers peddling subpar caskets. That was "a perfectly rational statement of hypothesized footings" for the law, wrote the court, but it was "betrayed by the undisputed facts."[55] Because Louisiana law did not require persons to be buried in a casket, restrict out-of-state casket sales, or impose requirements on casket sellers "regarding casket size, design, material, or price," any "special expertise" funeral directors might have in casket selection was "irrelevant" to their exclusive privilege to sell caskets.[56] Moreover, the court found no evidence of deceptive practices by third-party sellers; instead, it was funeral homes that had more "incentive" to use "deceptive sales tactics."[57] But even assuming a risk of deceptive sales practices by third-party sellers, the court still found "a disconnect between restricting casket sales to funeral homes and

39 Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487–88 (1955).

40 FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

41 *Id.* at 313.

42 *Id.* at 315.

43 *See supra* notes 34–36.

44 *St. Joseph Abbey*, 712 F.3d at 217.

45 *Id.*

46 *Id.* at 218.

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.* at 220.

51 *Id.*

52 *Id.* at 222–23.

53 *Id.* at 223.

54 *Id.*

55 *Id.*

56 *Id.* at 224.

57 *Id.* at 225.

preventing consumer fraud and abuse."[58] Louisiana law already policed "inappropriate sales tactics by all sellers of caskets," making the licensing restriction redundant. Moreover, the grant to funeral directors of an exclusive right to sell caskets premised on protecting consumers from supposed abuses by third-party casket sellers could not be "square[d] with FTC findings or rulemaking [that rested] on the conclusion that third-party sellers do not engage in consumer abuse."[59] As a result, rather than promoting consumer protection, Louisiana's licensing law placed consumers "at a greater risk of abuse including exploitative prices."[60]

The second justification, public health and safety, was likewise incapable of justifying Louisiana's funeral-licensing laws. The court explained that the absence of any health or safety requirements in the licensing law made it impossible to justify on those grounds:

> That Louisiana does not even require a casket for burial, does not impose requirements for their construction or design, does not require a casket to be sealed before burial, and does not require funeral directors to have any special expertise in caskets leads us to conclude that no rational relationship exists between public health and safety and limiting intrastate sales of caskets to funeral establishments.[61]

The inquiry conducted by the court that took real-world facts into account in assessing the validity of each police powers justification is a key feature of its harmonizing the original law of the 14th Amendment with rational basis review. The court's review ensures a statute is a genuine police regulation rather than a law abridging the right to earn a living without justification. And it ensures that economic liberty is protected by assessing the validity of a police powers defense on the basis of the law's application to real-world facts.

The court cast its decision protecting the monks' economic liberty in anti-class legislation language.[62] The court announced that "[t]he principle we protect from the hand of the State today protects an equally vital core principle—the taking of wealth and handing it to others when it comes not as economic protectionism in service of the public good but as 'economic' protection of the rulemakers' pockets" is unconstitutional.[63] The court recognized the "great deference due state economic regulation," and consistent with Justice Harlan-style judicial review rejected the notion that it was engaging in *Lochner*ism.[64] It simply analyzed whether a challenged "measure bears a rational relation to a constitutionally permissible objective," patrolling "the outer-most limits of due process and equal protection" to determine that Louisiana's funeral-licensing law failed even the rational basis test.[65]

Although written in the language of modern rational basis review, the analysis in *St. Joseph Abbey* maps onto the original law of the 14th Amendment. The monks alleged violations of their rights to due process and equal protection that were unsupported by a legitimate state interest—an infringement of their right to earn an honest living and an arbitrary discrimination against their right without a valid police powers justification. Once they stated a claim for a constitutional violation, the government asserted its police powers defense: health, safety, and consumer protection. Then the monks produced evidence and arguments for why those asserted justifications could not possibly support the law. Exercising the judicial power—judgment[66]—the court determined Louisiana's asserted police powers justifications could not in reality, or even hypothetically, support the law. Without a police powers justification, the law was an unconstitutional abridgment of the monks' right to earn an honest living.

Even a noted skeptic of constitutional protections for economic liberty under the federal Constitution, Justice Amy Coney Barrett, has recognized the validity of *St. Joseph Abbey*. In *Countering the Majoritarian Difficulty*, then-Professor Barrett wrote that "modern courts have occasionally stretched even the existing rationality test too far. For example, it is indeed difficult to see the connection between safe casket-making and a funeral home director's license."[67] She opined: "A rational basis test ought not mean that courts are obliged to accept explanations that beggar all belief."[68] *St. Joseph Abbey* demonstrates the original law of the 14th Amendment, adapted and applied by federal courts under modern rational basis precedent, can provide at least a necessary minimum check on government laws that abridge the right to earn an honest living.

III. Three Areas Where Meaningful Rational Basis Review Can Protect Economic Liberty

Today, federal courts continue to face constitutional challenges to statutes infringing the right to earn an honest living. This section will address how federal courts can and should apply the above framework of judicial review to economic liberty suits in three areas: (1) state funeral-licensing statutes, (2) occupational licensing restrictions on ex-criminals' ability to pursue a profession, and (3) certificate-of-need laws. This section provides an example of an active case in each area and discusses how courts can apply the rational basis test as articulated in *St. Joseph Abbey* to review challenges to economic restrictions in these areas and others.

A. Protecting Your Rites

Home funerals are an American tradition and are legal in all fifty states. Until well into the 20th century, American

58 *Id.*

59 *Id.* at 225–26.

60 *Id.* at 226.

61 *Id.*

62 Calabresi & Leibowitz, *supra* note 12, at 1023–1042.

63 *St. Joseph Abbey*, 712 F.3d at 226–27.

64 *Id.*

65 *Id.*; *see also* Ginsburg & Menashi, *supra* note 30, 1064–65.

66 The Federalist No. 78 (Alexander Hamilton) (explaining that the judiciary has "neither FORCE nor WILL, but merely judgment").

67 Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 Const. Comment. 61, 71 (2017).

68 *Id.*

funerals occurred primarily in private homes, with parlors built to fit coffins.[69] Home funerals involve family and friends holding a funeral in a private home to honor their deceased loved one. Usually family members wash and dress the remains, which lie in honor in a home for visitation.

Akhila Murphy and Donna Peizer are end-of-life doulas who assist families conducting lawful home funerals. They perform these services for their shoestring nonprofit, Full Circle of Living and Dying. For years, they have safely provided these services in and around Grass Valley, California. For example, Murphy assisted a member of her community, Pamela Yazell, hold a home funeral for her husband, Bob. They decorated their parlor with Bob's favorite sports team, golf clubs, and memorabilia from his life. His family washed and dressed him in his favorite golf shirt; his granddaughters put on his favorite socks. Murphy and Peizer provide these services to families who wish to hire them because they believe their care eases the pain of loss, affirms the reality of death, and promotes healthier grieving.[70]

But the California Cemetery and Funeral Bureau ordered Murphy and Peizer to cease and desist providing their services. Because Murphy and Peizer are not licensed funeral directors, and Full Circle is not a licensed funeral establishment, the Bureau contends they are forbidden from assisting families perform home funerals. Obtaining these licenses requires not only examinations and inspections, but also building a physical facility equipped to store bodies or embalm.[71]

Refusing to be subjected to licensure, Murphy and Peizer sued, alleging an unconstitutional violation of their right to earn a living as end-of-life doulas. They argue these restrictions violate their 14th Amendment rights under the Supreme Court's and Ninth Circuit's substantive due process jurisprudence.[72]

First, Murphy's and Peizer's right to earn a living as end-of-life doulas is infringed with no police powers justification. Requiring Murphy and Peizer to build a funeral establishment equipped to embalm just to assist families with home funerals is arbitrary and oppressive; Murphy and Peizer do not embalm, store bodies, or even take possession of any bodies, and it would be incredibly costly to build a funeral home they would never use. Thus, the rules requiring these entrepreneurs to have funeral director licenses, a funeral establishment license, and a physical establishment to practice a safe and lawful occupation irrationally violates their 14th Amendment rights.

Second, Murphy and Peizer are being treated like funeral directors and Full Circle like a funeral establishment, even though they are neither, which is an irrational restriction on their economic liberty. This violates due process.[73] When California law treats an end-of-life doula assisting families with simple and legal home funerals *inside* private homes the same as a funeral director operating a funeral home to embalm bodies and manage funerals *outside* of private homes, the Bureau is treating two different things the same. That is an arbitrary and irrational restriction that violates the 14th Amendment.

The Bureau argues that its regulations advance health, safety, and consumer protection because the California legislature has chosen to impose licensure on any third parties supervising and overseeing the final disposition of human remains.

But Murphy and Peizer argue California's funeral licensing statutes cannot survive even rational basis scrutiny as applied to them. Home funerals are legal in all 50 states, and the services Murphy and Peizer provide are all services a family can provide for itself. They argue that nothing is made more harmful by the mere presence and assistance of a doula at a lawful, family-run home funeral. Not only that, these services are all safe and involve ordinary activities like dressing and washing a person, then laying them on a bed in a bedroom or living room for family and friends to pay their respects. Murphy and Peizer do not embalm, and they follow all California health and safety regulations for how long a body can be kept by the family before being buried.[74] As a result, Murphy and Peizer assert that these burdensome licensure requirements achieve no valid health and safety purpose, denying them their right to earn an honest living without justification.

Murphy and Peizer are not alone in challenging state funeral-licensing laws. Other federal courts have determined laws like these violate the 14th Amendment because they lack any police powers justification[75] and are often motivated more by economic protectionism than real health and safety concerns.[76] That happened in *St. Joseph Abbey* as discussed above, and also in *Craigmiles v. Giles*. In *Craigmiles*, the Tennessee state funeral board ordered Pastor Nathaniel Craigmiles to stop selling funeral goods, including caskets, and they padlocked his store.[77] He had started selling caskets when he was assisting his wife bury her mother, and he learned about the exorbitant markups that funeral directors place on caskets.[78] The resistance he received from the funeral board only emboldened him, so he sued. The federal district

69 William Mellor & Dick M. Carpenter II, Bottleneckers: Gaming the Government for Power and Private Profit 22 (2016).

70 The facts of the case are drawn from the complaint in *Full Circle of Living & Dying v. Sanchez*, No. 2:20-CV-01306-KJM-KJN, *available at* https://ij.org/wp-content/uploads/2020/06/Doc.-01-Complaint.pdf. The plaintiffs also bring two First Amendment claims, one for pure speech, providing individualized advice, and another for commercial speech, advertising their services.

71 Cal. Bus. & Prof. Code §§ 7616, 7617.

72 *See, e.g., Merrifield*, 547 F.3d at 986 (explaining that when plaintiffs are "*different* from other groups" but are "treated the *same*," it "is an unconstitutional barrier on [protected] liberty under the Due Process Clause"); *see also id.* at 991 n.15 ("We conclude that mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review.").

73 *Id.* at 986.

74 Cal. Health & Safety Code §§ 7100, 7102, 7103(a) (California law requires the person with legal rights to the deceased's body to legally inter the body within a reasonable time).

75 Peachtree Caskets Direct, Inc. v. State Bd. of Funeral Serv., No. CIV.1:98-CV-3084-MHS, 1999 WL 33651794 (N.D. Ga. Feb. 9, 1999); Casket Royale, Inc. v. Mississippi, 124 F. Supp. 2d 434, 436 (S.D. Miss. 2000); *but see Powers*, 379 F.3d 1208 (upholding Oklahoma's funeral-licensing regulations under the rational basis test).

76 Mellor & Carpenter, *supra* note 69, at 22–23 (explaining the protectionist origins of funeral-licensing laws).

77 *Id.* at 28–29.

78 *Id.* at 27–28.

court ruled unconstitutional Tennessee's restrictions requiring Pastor Craigmiles to obtain a funeral director license to sell funeral supplies because "there is no reason to require someone who sells what is essentially a box [a casket] to undergo the time and expense of training and testing that has nothing to do with the State's asserted goals of consumer protection and health and safety."[79]

And the Sixth Circuit affirmed. In an opinion written by Judge Danny Boggs, the court wrote

> [Today] we invalidate only the General Assembly's naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers. This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review.[80]

In sum, federal courts have repeatedly noted the lack of any legitimate state interest in enforcing funeral-licensing laws against casket sellers. Rather than genuinely protect health and safety, these laws often result in unconstitutional abridgements of the right to earn an honest living. Murphy and Peizer argue that these same licensing laws have no legitimate interest as applied to their work assisting in home funerals at Full Circle either.

B. More Than Your Worst Mistake

We want ex-offenders who have served their time to turn from a life of crime to earning an honest living, not least because it is a leading way to prevent them from re-offending. But occupational licensing laws pose a serious barrier to this rehabilitation. These laws present a general barrier to individuals trying to enter the workforce, whether in an innovative profession like an end-of-life doula or in a traditional one like African hair braiding.[81] But these laws have an especially detrimental impact on ex-offenders trying to earn an honest living.

For instance, California categorically bans two-time felons from becoming full-time firefighters by preventing them from obtaining Emergency Medical Technician (EMT) certification.[82] California trains and uses prisoners to fight wildfires through their Conservation Camp Program, and then, after they have served their sentences, it bars those same people from becoming full-time firefighters because of their criminal histories. It does this even though the state already has express authorization to deny EMT certification to applicants with offenses "substantially related" to the sought-after certification.[83]

Dario Gurrola and Fernando Herrera are two Californians whose rights to earn an honest living as firefighters are abridged by California's categorical ban. As young men, they were each convicted of two felonies. They served their time, and while in jail they also fought fires in California's camp program. But due to California's two-felony ban, they—like many other former inmates—can never practice the profession for which the prison system trained them.[84]

Today, Gurrola is a seasonal firefighter living in Northern California. But in 2003, at age 22, he was convicted for carrying a concealed dagger (a kitchen knife in his jacket pocket). Two years later, he was convicted for assault (a drunken fight with a security guard)—his second felony. As his twenties were ending, he repented and turned his life around. He reconnected with his father, a sheriff, and he joined a church. He dedicated himself to becoming a firefighter—a first responder like his dad. He spent years as a volunteer seasonal firefighter, working as a medical transport, and taking certification classes. Yet even with years of training and documentation of rehabilitation in hand, Gurrola's two felonies prohibit him from acquiring the EMT certification required to achieve his dream job of becoming a full-time firefighter.

Herrera has a similar story. Today he is a supervisor at the California Conservation Corps. But at 14 and 15 years old, he was convicted of assault with a deadly weapon and witness tampering. Two years later, watching his mother cry during a visit, he decided to turn his life around. He has been productively employed since his release and has taken an EMT training course to obtain his certification and become a firefighter. But, like Gurrola, his two juvenile felony convictions prevent him from doing so.

Gurrola and Herrera have challenged California's categorical ban as violating their right to earn an honest living under the Due Process and Equal Protection Clauses of the 14th Amendment.[85] First, they argue, the ban has no rational relation to any health-and-safety police powers justification because California already has the authority to deny individuals certification based on relevant crimes (say, arson). As a result, only individuals convicted of *irrelevant* crimes are affected by the categorical ban. Moreover, California trains inmates to be firefighters while in prison and then denies them the ability to become full-time firefighters once they get out of prison. But if Gurrola and Herrera can fight fires for the state as inmates and as part-time employees, then there is no justification for denying them the opportunity to earn a living fighting fires full time.

Second, they argue that the ban arbitrarily discriminates between two-time ex-felons with irrelevant convictions and persons without any felony convictions. Because the categorical ban does not consider the relevance of a person's convictions to practicing the occupation of a firefighter, it arbitrarily discriminates between felons with two irrelevant conviction, who are not allowed to pursue employment as full-time firefighters, and persons without a felony conviction, who are allowed to pursue the same profession. An irrelevant conviction is the same

79 Craigmiles v. Giles, 110 F. Supp. 2d 658, 665 (E.D. Tenn. 2000).

80 *Craigmiles*, 312 F.3d at 229.

81 *See, e.g.,* Cornwell v. Hamilton, 80 F. Supp. 2d 1101, 1106 (S.D. Cal. 1999) (invalidating California cosmetology regulations as applied to African hair-braiders).

82 Cal. Code Regs. tit. 22, § 100214.3(c)(3). California also bans any person with a single felony from obtaining EMT certification for ten years after release from incarceration for the offense. *Id.* § 100214.3(c)(6).

83 Cal. Health & Safety Code § 1798.200(c)(6), -(8), -(12)(C).

84 The facts of this case are drawn from the complaint in *Gurrola v. Duncan*, No. 2:20-cv-01238-JAM-DMC, *available at* https://ij.org/wp-content/uploads/2020/06/CA_EMT_Complaint-file-stamped.pdf.

85 *See id.* Gurrola and Herrera also argue the categorical ban violates their rights to earn an honest living under the 14th Amendment's Privileges or Immunities Clause directly, but they recognize that argument is foreclosed by the *Slaughter-House Cases* and can only be corrected by the U.S. Supreme Court.

as no conviction for purposes of becoming a full-time firefighter. Thus, California's ban arbitrarily discriminates between these two classes of people.[86]

But the federal district court dismissed Gurrola and Herrera's claims. The court believed "the very act of committing a felony more than once, regardless of the underlying offense, can be relevant" to a person's qualification for EMT certification.[87] That is because the legislature could rationally conclude "individuals with multiple or recent felony convictions are more likely to harm persons than those without" convictions.[88] Given that EMTs provide "basic life support and medical care to vulnerable persons," the court found a rational connection between the ban on two-time felons and a legitimate government interest in public safety.[89] The court acknowledged this connection between the ban and its legitimate ends was "tenuous" but not enough to violate the 14th Amendment.[90]

Gurrola and Herrera appealed. They counter that because in their current part-time firefighting positions they render the same life support and medical care to vulnerable persons that full-time firefighters do, the two-time felony ban does not protect anyone, but only denies them their ability to earn a full-time living helping Californians in need. The ban is simply irrelevant to preventing the harms is purports to curb. If it were categorically dangerous for Gurrola and Herrera to provide life-saving services due to their past convictions, regardless of the relevance of those convictions to EMT certification, then they would not be allowed to provide EMT services as inmates and provide them now as part-time firefighters.

In addition, the ban ignores the facts of individual cases. For instance, the ban ignores age at the time the crimes were committed, even though the law recognizes diminished capacity for youths.[91] And it ignores time since commission of the offenses, disregarding the fact that older convictions are less predictive of recidivism because recidivism decreases with age.[92] As a result, the ban ignores the fact that individuals who committed two irrelevant felonies many years ago, like Gurrola and Herrera, present no unique risk to the public.[93] It also ignores rehabilitation itself, which is a central "ideal" of the criminal justice system,[94] giving a two-time felon no chance of ever becoming a full-time firefighter.[95] Without case-by-case analysis, there is simply no way for judges to review the rational relationship between sweeping bans for convictions and occupational fitness.

Moreover, California does not have a flat ban for many of its most regulated, and often dangerous, professions. For instance, there is no categorical ban for past felons seeking to become doctors, lawyers, and engineers. Even if it is true that EMT-certified workers deal with vulnerable people that California has an interest in protecting, why would that rationale not place a two-time felony ban on doctors and lawyers?[96]

What is more, Gurrola and Herrera's claims are not outliers. Numerous federal courts have ruled unconstitutional categorical bans on former felons' rights to earn a living.[97] For example, in *Barletta v. Rilling*, Michael Barletta challenged a Connecticut law that forbid him from obtaining a license to trade in precious metals because he had previously been convicted of a felony.[98] The Connecticut District Court held this law violated the rational basis test because it lacked any rational connection to the state's goal of preventing fraud in the sale of precious metals. The court stated, "[a] proxy that serves its purpose only by happenstance is arbitrary and fails rational basis review."[99] So too, does California's two-time felony ban on EMT certification fail rational basis review.

C. CONned Out of Your Livelihood

A Certificate of Need (CON) is a government-mandated permission slip to start or expand a business—an expensive admission ticket to the economy.[100] In states that require medical businesses to obtain a CON to operate, the business must prove to the government that its services are "needed" before it can open. In these states, incumbent businesses often claim to have fully satisfied any need to protect themselves from competition. And

86 *See* Cal. Health & Safety Code § 1798.200(c)(6) (permitting the agency to deny applicants with convictions "substantially related to the qualifications, functions, and duties of" emergency personnel). Cases like *St. Joseph Abbey* and *Craigmiles* have recognized that the means-ends fit of a law to its stated police powers justification is strained beyond constitutionality when another law already addresses the claimed state interest. *See St. Joseph Abbey*, 712 F.3d at 225–26; *Craigmiles*, 312 F.3d at 226.

87 Gurrola v. Duncan, No. 2:20-CV-01238-JAM-DMC, 2021 WL 492437, at *7 (E.D. Cal. Feb. 10, 2021).

88 *Id.* at *8.

89 *Id.*

90 *Id.* at *7 ("Because these regulations are rationally related to the government's legitimate interest in ensuring public safety, even if tenuous, it does not violate the Equal Protection Clause.").

91 *See* Miller v. Alabama, 567 U.S. 460, 471 (2012).

92 Secretary of Revenue v. John's Vending Corp., 309 A.2d 358, 362 (Pa. 1973) ("To forever foreclose a permissible means of gainful employment because of an improvident act in the distant past completely loses sight of any concept of forgiveness for prior errant behavior and adds yet another stumbling block along the difficult road of rehabilitation.").

93 Appellant's Opening Br. at 39, *Gurrola v. Duncan*; No. 21-15414 (9th Cir. May 11, 2021) *see also* Complaint, *supra* note 84, at ¶ 160.

94 Graham v. Florida, 560 U.S. 48, 71, 73–74 (2010) (describing rehabilitation as not merely one "of the goals" of the criminal justice system but its "ideal").

95 Fields v. Dep't of Early Learning, 434 P.3d 999, 1005 (Wash. 2019) ("Because Fields's sole disqualifying conviction occurred long ago under circumstances that no longer exist, it is highly likely that her permanent disqualification is erroneously arbitrary.").

96 Cal Bus. & Prof. Code §§ 2236, 2236.1 (doctors); *id.* §§ 6101, 6102 (lawyers).

97 *See, e.g., Fields*, 434 P.3d 999; Chunn v. State ex rel. Miss. Dep't of Ins., 156 So. 3d 884 (Miss. 2015); Furst v. N.Y.C. Transit Auth., 631 F. Supp. 1331 (E.D.N.Y. 1986); Smith v. Fussenich, 440 F. Supp. 1077 (D. Conn. 1977).

98 Barletta v. Rilling, 973 F. Supp. 2d 132, 135 (D. Conn. 2013).

99 *Id.* at 137.

100 *See generally* Jaimie Cavanaugh et al., *Conning the Competition: A Nationwide Survey of Certificate of Need Laws*, Institute for Justice (Aug. 2020), *available at* https://ij.org/wp-content/uploads/2020/08/Conning-the-Competition-WEB-08.11.2020.pdf.

if a new business can't satisfy the government's need projection, it cannot open. Medical providers that have a CON form a class that can compete; those providers without a CON, a class that cannot compete. As a result, CON laws unconstitutionally discriminate between healthcare providers and infringe their rights to earn a living under the 14th Amendment.

Dipendra Tiwari and Kishor Sapkota are Nepali-speaking American immigrants prohibited from opening a home healthcare business by Kentucky's CON law. Both work in the healthcare industry and want to serve Nepali-speaking people in their community who cannot find home health aides who speak their native language. So, Tiwari and Sapkota set out to open a home health agency—Grace Home Care—to serve their community's needs. But when they applied for a CON, an incumbent home health provider, Baptist Healthcare, used the CON application process to oppose their application. In the face of opposition from an incumbent, Kentucky determined there was no "need" for a new home health agency in Louisville, and Grace was denied a CON.[101]

To obtain a CON in Kentucky, the state must determine there is a "need" for a new home health agency's services. If the government projects that a county does not have such a need, then a new company cannot open. As a result, the government chooses who can and cannot enter the healthcare market, insulating incumbents and raising a barrier for newcomers that abridges their economic liberty. Kentucky argues that its CON law is cost-efficient, increases patient access to care, and increases quality of care. But Tiwari and Sapkota argue the CON law does not achieve these ends and instead is motivated solely by economic protectionism of healthcare incumbents.

They argue that Kentucky's CON law violates their right to earn a living under both the Due Process and Equal Protection Clauses.[102] First, Kentucky's CON law restricts Grace Home Care's economic liberty without any police powers justification: It raises costs, decreases access to care, and decreases quality of care, without any health or safety benefit to the public. Second, due to certain statutory exceptions, the CON law discriminates between similarly situated healthcare providers, depriving Grace and other companies of their right to earn an honest living.

Although two federal circuit courts have upheld CON laws (the Fourth and Eighth Circuits),[103] a recent opinion, on a motion to dismiss, by Judge Justin Walker demonstrates how litigants challenging CON laws under the 14th Amendment can prevail. First, the police powers defense relied on by the Fourth and Eighth Circuits is not present in the home healthcare context.[104] Home health agencies don't cost much to start, so "the government doesn't need to guarantee a home health company a monopoly in order to incentivize someone to make the capital investment for it."[105] Second, the state CON laws reviewed by the Fourth and Eighth Circuits allowed "patients [to] travel to another county, or even another state, for innovative care from entrepreneurs providing the medical procedures at issue."[106] By contrast, home healthcare patients cannot travel outside their county for care because home health care is provided inside the patient's home. Without these defenses, Judge Walker determined that Kentucky's CON law increases costs, limits access to care, and decreases quality, only to protect "rent-seeking incumbents." And that form of protectionism is not a legitimate state interest.[107] Thus, Judge Walker held that if the record facts demonstrate these detrimental impacts without any police powers defense, then Kentucky's CON law, and other states' similar CON laws, cannot pass muster under the 14th Amendment.

But at the summary judgment stage, the district court ruled against Grace Home Care. After discarding a wealth of empirical evidence as irrelevant to the CON law's rationality, the court held that the Kentucky legislature could rationally have believed the CON law improved cost-efficiency, increased quality of care, and increased access to care. First, the Court discarded a plethora of evidence based on the mistaken belief that it could not review "evidence that the law did not subsequently work or even that it is counterproductive" because that is not evidence of whether the "legislature rationally could have believed that the CON laws would promote its objective."[108] Without this evidence, the court believed CON laws funnel more patients to home health agencies, giving them more money to afford higher quality goods and services.[109] It held CON laws protect stability because allowing unguarded competition could create disruptions and fluctuations in the market that disrupt care.[110] And it determined CON laws prevent for-profit home health agencies from opening in rural areas and poaching lucrative patients, which would destabilize existing agencies and potentially leave low-income patients without stable access to care.[111]

As an initial matter, the district court should not have refused to consider the overwhelming and uncontradicted

101 The facts of the case are drawn from the complaint in *Tiwari v. Meier*, No. 3:19-CV-884, *available at* https://ij.org/wp-content/uploads/2019/12/ECF-1-Complaint-FILE-STAMPED-12.03.19-IJ109774xA6322.pdf.

102 Tiwari and Sapkota also bring a claim under the Privileges or Immunities Clause, but due to the *Slaughter-House Cases*, that argument is foreclosed unless the U.S. Supreme Court revisits the case.

103 Colon Health Centers of Am., LLC v. Hazel, 733 F.3d 535, 541 (4th Cir. 2013); Birchansky v. Clabaugh, 955 F.3d 751, 754 (8th Cir. 2020).

104 Tiwari v. Friedlander, No. 3:19-CV-884, 2020 WL 4745772, at *13 (W.D. Ky. Aug. 14, 2020).

105 *Id.* at *13–14.

106 *Id.* at *13.

107 *Id.* at *14.

108 Tiwari v. Friedlander, No. 3:19-CV-884, 2021 WL 1407953, at *6 (W.D. Ky. Apr. 14, 2021) (cleaned up).

109 *Id.* at *8 ("Defendants and KHA posit that one example of cost-efficiency resulting from the CON laws is the ability to buy supplies and equipment in bulk at reduced prices due to the increased patient volume funneled to the HHAs.").

110 *Id.* at *9 ("It is entirely plausible for the General Assembly to have believed that leaving HHAs to the fluctuations of the market could lead to disruptions in care when HHAs close or downsize due to expensive quality standards, insufficient profits, or any other similar reason.").

111 *Id.*

evidence that these purported rational bases for the CON law are fictitious. Unrebutted evidence is one of the most common ways that litigants prevail under the rational basis test. The Fifth Circuit in *St. Joseph Abbey* relied on evidence,[112] and so have numerous other federal courts in assessing a law's rationality.[113] Certainly evidence that a law does not in reality accomplish its goal necessarily makes it more probable that a rational legislature could not have believed that the law would accomplish its intended goal.[114] Indeed, at the motion to dismiss stage, Judge Walker relied on this evidence, concluding that "four decades of academic and government studies say[ ] Certificate of Need laws accomplish nothing more than protecting monopolies held by incumbent companies,"[115] and that therefore there is no rational basis for Kentucky's CON law.

Moreover, this evidence merely confirms the common-sense intuition that reducing competition imposes higher costs on patients, reduces patient access to care, and decreases patients' quality of care.[116] By contrast, more home health agencies entering the market increases the supply of services, thereby reducing costs and increasing access.[117] And with lowered costs and increased access, consumers are freer to choose services based on quality, driving up the quality of care to meet consumer demand.[118] Nevertheless, the argument that CON laws improve quality is predicated on the false idea that patients should be prevented from moving to different, better home health agencies because patients making that choice would somehow decrease quality of care. It is simply not rational to believe that is true.

Other courts have made similar findings when invalidating CON laws. For instance, the Supreme Court of North Carolina has held that a CON law for hospitals was irrational.[119] Judge Danny Reeves held Kentucky's CON law for moving companies was irrational.[120] The First and Fourth Circuits have held that CON laws disadvantaging out-of-state companies violated the Dormant Commerce Clause.[121] Given the weight of evidence about CON laws' systemic failure to do anything other than protect incumbent providers, it is simply not rational to believe that Kentucky's CON law decreases cost, improves quality, or increases access. Instead, Kentucky's CON law is motivated solely by economic protectionism and is therefore unconstitutional.

IV. Conclusion

The U.S. Supreme Court should restore the original law of the 14th Amendment by overruling the *Slaughter-House Cases*. The 14th Amendment protects the privilege or immunity of citizens to pursue a lawful calling, and judges are empowered to protect that right. But until the Supreme Court overturns the *Slaughter-House Cases*, Americans must turn to the Due Process and Equal Protection Clauses to protect their economic liberty. Federal courts charged with applying rational basis review to these challenges can do so in a more originalist way, respecting both the original law of the 14th Amendment and Supreme Court precedent. This method for protecting economic liberty in the federal courts can and should become the norm among judges seeking to reconcile originalism with precedent.

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

113 United States v. Carolene Prod. Co., 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) ("parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational"); *see also, e.g.*, Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. Dep't of Health, 64 F. Supp. 3d 1235, 1247–54 (S.D. Ind. 2014) (empirical research contradicted safety justification for medical requirements); Pedersen v. OPM, 881 F. Supp. 2d 294, 342–43 (D. Conn. 2012) (government research refuted hypothesis that benefit denials would preserve funds); Burstyn v. City of Miami Beach, 663 F. Supp. 528, 534 (S.D. Fla. 1987) (expert testimony contradicted hypothesis that zoning would protect tourism).

114 Fed. R. Evid. 401(a) ("Evidence is relevant if[] it has any tendency to make a fact more or less probable than it would be without the evidence.").

115 *Tiwari*, 2020 WL 4745772, at *2.

116 Appellant's Opening Br. at 57, *Tiwari v. Friendlander*, No. 21-5495 (9th Cir. Aug. 12, 2021) ("CON laws have failed to produce cost savings, higher quality healthcare, or greater access to care, whether in underserved communities or in underserved areas.").

117 Medigen of Kentucky, Inc. v. Pub. Serv. Comm'n of W. Va., 985 F.2d 164, 167 (4th Cir. 1993) ("[R]estricting market entry does nothing to insure that services are provided at reasonable prices. Without rate regulation, higher rather than lower prices will more likely result from limiting competition. [The state's] goal of providing universal service at reasonable rates may well be a legitimate state purpose, but restricting market entry does not serve that purpose.").

118 *Craigmiles*, 312 F.3d at 226–29 (holding a law irrational in part because of basic economic arguments).

119 In re Certificate of Need for Aston Park Hosp., Inc., 193 S.E.2d 729, 736 (N.C. 1973) ("The Constitution of this State does not . . . permit the Legislature to grant to the Medical Care Commission authority to exclude Aston Park from this field of service in order to protect existing hospitals from competition otherwise legitimate.").

120 Bruner v. Zawacki, 997 F. Supp. 2d 691, 700 (E.D. Ky. 2014) ("To the extent that the protest and hearing procedure prevents excess entry into the moving business, it does so solely by protecting existing moving companies—regardless of their quality of service—against potential competition.").

121 Walgreen Co. v. Rullan, 405 F.3d 50 (1st Cir. 2005); *Medigen*, 985 F.2d 164.