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## **An Easy Case Makes Bad Law: The Misapplication of Heightened Scrutiny in Maxwell's Pic-Pac, Inc. v. Dehner, 887 F. Supp. 2d 733 (W.D. Ky. 2012)**

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AN EASY CASE MAKES BAD LAW: THE MISAPPLICATION OF  
HEIGHTENED SCRUTINY IN *MAXWELL'S PIC-PAC, INC. V.*  
*DEHNER*, 887 F. SUPP. 2D 733 (W.D. KY. 2012)

Colin P. Pool\*

I. INTRODUCTION

Expressing displeasure or incredulity with “dumb laws” is a common pastime; there are, in fact, entire books devoted to the subject.<sup>1</sup> Restrictions on the sale of alcohol are particular targets for derision, either because of their apparent basis in a moral disapproval of alcohol or because of the inconvenience they create for consumers.<sup>2</sup> Just such a “dumb” restriction was at the center of a recent Western District of Kentucky decision. In striking down this restriction, the court followed other lower federal courts in determining that some laws are so bad that they run afoul of the U.S. Constitution. However, these purportedly innocuous decisions could have far-reaching implications.

On January 10, 2011, The Food With Wine Coalition (FWWC), a Kentucky nonprofit corporation, along with Maxwell’s Pic-Pac, Inc., a Kentucky corporation that owns and operates a grocery store in Louisville, Kentucky, filed a complaint against the state of Kentucky alleging that a provision of the state’s liquor control regulations violated the Equal Protection provisions of the United States and Kentucky Constitutions.<sup>3</sup> Specifically, the complaint alleged that Kentucky Revised Statute § 243.230(5), which prohibits grocery stores and gas stations from selling wine and liquor but potentially allows all other retailers to do so, creates a classification that lacks a rational relationship to a legitimate state interest.<sup>4</sup> Prior to filing suit, FWWC had lobbied the state legislature to allow grocery stores to sell wine.<sup>5</sup> The failure of these efforts led the plaintiffs to seek relief from the courts.<sup>6</sup>

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1. See, e.g., JEFF KOON, ANDY POWELL & WARD SCHUMAKER, *YOU MAY NOT TIE AN ALLIGATOR TO A FIRE HYDRANT: 101 REAL DUMB LAWS* (2002).

2. See, e.g., Editorial, *Repeal of Sunday Restriction on Alcohol Sales Is Overdue*, DANBURY NEWS-TIMES, May 2, 2012, <http://www.newstimes.com/default/article/Repeal-of-Sunday-restriction-on-alcohol-sales-is-3528534.php>.

3. Complaint at ¶¶5, 6, 19, *Maxwell’s Pic-Pac, Inc. v. Dehner*, 887 F. Supp. 2d 733 (W.D. Ky. 2012) (No. 3:11-CV-18-H).

4. *Id.* at ¶19.

5. Intervening Defendant’s Memorandum of Law in Support of Its Motion for Summary Judgment at 2, *Maxwell’s Pic-Pac, Inc. v. Dehner*, 887 F. Supp. 2d 733 (W.D. Ky. 2012) (No. 3:11CV-18-H).

6. *Id.* at 5.

Within a month, Liquor Outlet, L.L.C. d/b/a The Party Source, which operates a liquor store in Bellevue, Kentucky, had moved to intervene as a defendant in the dispute.<sup>7</sup> The Party Source believed that the state could not adequately represent its interest in the continuance of the Kentucky alcohol regulation scheme because the state had no economic interest to protect in the litigation.<sup>8</sup> After the motion to intervene was sustained, all parties moved for summary judgment, agreeing that no material facts were contested and that the dispute could be settled as a matter of law.<sup>9</sup>

On August 14, 2012, the Western District of Kentucky found in favor of the plaintiffs and struck down the statute.<sup>10</sup> While acknowledging that the type of judicial review required in cases challenging economic regulations accords tremendous deference to the legislature, it also asserted that such deference is not an abdication of judicial review.<sup>11</sup> In deciding the case in this manner, the court joined a growing trend among lower federal courts by applying a more exacting standard of judicial review to economic legislation than is typical in modern constitutional jurisprudence.<sup>12</sup> As such, the case raises age-old questions regarding the proper role of the judiciary in the protection of economic liberty.<sup>13</sup> The decision is particularly interesting because of its impending appeal to the Sixth Circuit, which has recently shown a willingness to strike down economic legislation on Equal Protection grounds.<sup>14</sup> Were the Sixth Circuit to affirm the decision of the trial court, it would exacerbate a circuit split on the question of economic Equal Protection, thus calling the future of Equal Protection jurisprudence into doubt.<sup>15</sup>

Part II of this Note will examine the Kentucky statute in question and the relevant constitutional issues. Part III will discuss the district court's decision in depth. Finally, Parts IV and V will discuss the jurisprudential questions the case raises and conclude that, while the

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7. Motion to Intervene, *Maxwell's Pic-Pac, Inc. v. Dehner*, 887 F. Supp. 2d 733 (W.D. Ky. 2012) (No. 3:11-CV-18-H).

8. *Id.* at ¶¶13, 22.

9. *Maxwell's Pic-Pac, Inc. v. Dehner*, 887 F. Supp. 2d 733, 739 (W.D. Ky. 2012).

10. *Id.* at 752.

11. *Id.* at 751.

12. *See infra* Part II.B.

13. *See, e.g.*, PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* (1998); DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011).

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

15. *See, e.g.*, Brianna J. Gorod, Note, *Does Lochner Live? The Disturbing Implications of Craigmiles v. Giles*, 21 *YALE L. & POL'Y REV.* 537 (2003); Lana Harfoush, Comment, *Grave Consequences for Economic Liberty: The Funeral Industry's Protectionist Occupational Licensing Scheme, the Circuit Split, and Why It Matters*, 5 *J. BUS. ENTREPRENEURSHIP & L.* 135 (2011).

trial court decided the case against the weight of Supreme Court precedent, there is a possible avenue under the Kentucky Constitution to properly strike the law.

## II. STATUTORY AND CONSTITUTIONAL BACKGROUND TO *MAXWELL'S*

### *A. The Kentucky Statute and its Accompanying Regulation*

The first iteration of Kentucky Revised Statute § 243.230, which controls eligibility for retail package licenses,<sup>16</sup> was enacted in 1938.<sup>17</sup> That statute, like the current one, specifically prohibited “grocery store[s] and] filling station[s]” from obtaining package licenses.<sup>18</sup> The reason for creating this classification is unknown. The distinction between grocery stores and other retailers is perhaps a remnant of the practice during Prohibition where drugstores were still allowed to sell alcohol by prescription for “medicinal purposes.”<sup>19</sup> The statute’s current language reads as follows:

No retail package or drink license for the sale of distilled spirits or wine shall be issued for any premises used as or in connection with the operation of any business in which a substantial part of the commercial transaction consists of selling at retail staple groceries or gasoline and lubricating oil.<sup>20</sup>

Kentucky regulations enacted in 1985 further clarify the terms “substantial part of the commercial transaction” (“ten percent or greater of the gross sales receipts as determined on a monthly basis”)<sup>21</sup> and “staple groceries” (“any food or food product intended for human consumption except alcoholic beverages, tobacco, soft drinks, candy, hot foods, and food products prepared for immediate consumption”).<sup>22</sup>

An effect of the statute and its accompanying regulation is that drugstores and convenience stores that do not sell gasoline are permitted to apply for a retail package license while grocery stores and gas stations

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16. Kentucky licenses wine and liquor sales through a single retail package license. *Maxwell's Pic-Pac, Inc. v. Dehner*, 887 F. Supp. 2d 733, 742 (W.D. Ky. 2012). Thus, the denial of a retail package license prevents a retailer from selling both wine and liquor. The types of retailers who can sell malt beverages are not restricted in the same manner. See KY. REV. STAT. ANN. § 243.280 (West 1998).

17. *Maxwell's*, 887 F. Supp. 2d at 740.

18. *Id.*

19. See *id.* at 741.

20. KY. REV. STAT. ANN. § 243.230(5).

21. 804 KY. ADMIN. REGS. 4:270 § 1 (1985).

22. *Id.* § 2.

are not.<sup>23</sup> The crux of the plaintiffs' complaint was that this classification system violated the Equal Protection Clause of the Fourteenth Amendment.<sup>24</sup>

### *B. The Equal Protection Clause of the Fourteenth Amendment*

Section One of the Fourteenth Amendment to the United States Constitution provides in part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>25</sup> This language "is essentially a direction that all persons similarly situated should be treated alike,"<sup>26</sup> the government may not classify persons based on impermissible or arbitrary criteria.<sup>27</sup> Since 1937, Supreme Court jurisprudence in this area has established a three-tiered system of judicial review.<sup>28</sup> The highest tier, known as "strict scrutiny," is used when a legislative classification distinguishes between persons on a suspect basis or infringes a person's ability to exercise a fundamental right.<sup>29</sup> The middle tier, "intermediate scrutiny," is used for classifications which distinguish between persons on a "quasi-suspect" basis.<sup>30</sup> The lowest tier, "rational basis review," is used for general economic and social welfare legislation which does not involve fundamental rights or suspect classes.<sup>31</sup>

During the so-called *Lochner* era (ca. 1900–1937),<sup>32</sup> the Supreme Court would often choose not to defer to the opinion of the other branches of government when ruling on economic regulations due to a

23. *Maxwell's*, 887 F. Supp. 2d at 738–39.

24. *Id.* at 743.

25. U.S. CONST. amend. XIV, § 1.

26. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

27. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.2(a) (5th ed. 2012), available at Westlaw 3 TREATISE ON CONST. L. § 18.2(a).

28. *Id.* § 18.3(a)(i).

29. *Id.* § 18.3(a)(iii). Suspect classes are those based on race and/or national origin. *Id.* "Fundamental rights" include freedom of association, the right to vote and participate in the electoral process, interstate travel, a right to fairness in procedure, and a right to privacy. *Id.* § 15.7.

30. See *Craig v. Boren*, 429 U.S. 190 (1976); *City of Cleburne*, 473 U.S. at 435. "Quasi-suspect" classes are those based on gender or legitimacy of birth. ROTUNDA & NOWAK, *supra* note 27, § 18.3(a)(iv).

31. ROTUNDA & NOWAK, *supra* note 27, § 18.3(a)(ii).

32. This period takes its name from the seminal case *Lochner v. New York*, 198 U.S. 45 (1905), where the Supreme Court held that liberty of contract was a fundamental right under a theory of substantive due process. The decision instituted an era of economic substantive due process, where exacting standards of judicial review were applied to economic legislation, that has proved to be one of the most criticized and controversial eras in Supreme Court jurisprudence. For detailed discussion of *Lochner* and its legacy see KENS, *supra* note 13.

belief that economic rights were “fundamental.”<sup>33</sup> Since 1937,<sup>34</sup> with the Court’s decision in *West Coast Hotel Co. v. Parrish*, the standard for rational basis review has been extremely deferential to the legislature: a classification’s validity is presumed, and it must only be rationally related to a legitimate state interest to be upheld.<sup>35</sup> Such regulations may be based on “rational speculation unsupported by evidence and empirical data” and will fail only if there is no “reasonably conceivable state of facts that could provide a rational basis for the classification.”<sup>36</sup> In addition, the challenging party must negate every conceivable basis which might support the statute.<sup>37</sup>

The classic example of the Court’s application of this standard to economic legislation is in *Williamson v. Lee Optical of Oklahoma*,<sup>38</sup> where an Oklahoma statute prevented opticians from fitting eyeglass lenses without a prescription from an ophthalmologist or optometrist.<sup>39</sup> The district court held that the law violated the Equal Protection Clause since it subjected opticians to the regulatory system but exempted sellers of ready-to-wear glasses.<sup>40</sup> The Supreme Court, however, overturned this decision, holding that, while the statute “may exact a needless, wasteful requirement,” it “need not be in every respect logically consistent with its aims to be constitutional. 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.”<sup>41</sup> The Court also held that in correcting such evils, the legislature may enact different remedies for different problems, and may take “one step at a time.”<sup>42</sup> In short, “[t]he prohibition of the Equal Protection Clause goes no further than the invidious discrimination”<sup>43</sup> and “for protection against abuses by legislatures the people must resort to the polls, not to

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33. See Gorod, *supra* note 15, at 539.

34. The end of the *Lochner* era coincided with the Court’s opposition to President Franklin Roosevelt’s New Deal legislation. Roosevelt responded with his “Court Packing Plan.” See WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL: 1932–1940, at 231–38 (1963). The conventional wisdom holds that the Court’s ideological shift away from stringent judicial review following Roosevelt’s proposal was a response calculated to preserve the Court’s integrity as a neutral arbiter of constitutional issues, though this reading of history is disputed. See, e.g., *id.*; BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998).

35. *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988).

36. *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313, 315 (1993).

37. *Id.* at 315.

38. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955).

39. *Id.* at 486.

40. *Id.* at 488.

41. *Id.* at 487–88.

42. *Id.* at 489.

43. *Id.*

the courts.”<sup>44</sup> The result is that classifications held to the rational basis test will almost always be upheld, making this type of review a “virtual rubber stamp.”<sup>45</sup>

However, the Court has not always deferred to the legislature when engaging in rational basis review.<sup>46</sup> In *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, the Court, ostensibly using rational basis review, invalidated the requirement that a home for the mentally disabled could be constructed only with a special use permit.<sup>47</sup> Justice Marshall noted in his concurrence that the standard the Court used in its decision was not the “traditional” rational basis test used in *Williamson*.<sup>48</sup> He explained that the Court’s close analysis of the evidentiary record to determine the legislation’s factual foundation, and its expression of disbelief in the necessity of the statute, constituted the use of a more powerful scrutiny even if the majority expressly denied it was doing so.<sup>49</sup> Marshall warned that such action by the Court created precedent which would encourage federal courts to “subject economic and commercial classifications to similar and searching ‘ordinary’ rational-basis review,” without “provid[ing a] principled foundation for determining when more searching inquiry is to be invoked.”<sup>50</sup>

This heightened form of rational basis review, sometimes called “rational basis with bite,” was later used by the Court in *Romer v. Evans* to strike down an amendment to the Colorado state constitution that disadvantaged homosexual and bisexual individuals,<sup>51</sup> and in *Lawrence v. Texas* to invalidate state laws which criminalized consensual sodomy.<sup>52</sup> These rational basis with bite decisions are characterized by a search for the actual purpose of the law, a careful evaluation of whether that purpose is permissible, and a review of the record for

44. *Id.* at 488 (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)).

45. Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 79 (1997).

46. Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 357 (1999). According to Farrell, there were 110 rational basis cases from 1971 through 1996, ten of which were successful for the plaintiffs.

47. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 435 (1985).

48. *Id.* at 458–59 (Marshall, J., concurring).

49. *Id.* at 457–60.

50. *Id.* at 460.

51. See *Romer v. Evans*, 517 U.S. 620 (1996).

52. See *Lawrence v. Texas*, 539 U.S. 558 (2003). The Court did not articulate what standard it was using to invalidate the law in *Lawrence*. It is presumed that the Court was applying so-called “rational basis with bite.” See Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2770 (2005). The Court also used a substantive due process theory rather than an equal protection theory to decide the case. However, Justice O’Connor’s concurrence used an equal protection theory, *Lawrence*, 539 U.S. at 579, and, regardless, the rational basis standard for substantive due process is identical to the standard used for equal protection.

factual evidence of a bona fide correlation between classification and purpose.<sup>53</sup> While scholars, commentators, and other federal judges have identified the use of this heightened form of rational basis review,<sup>54</sup> it is important to note that the Court has never acknowledged its existence in a majority opinion.<sup>55</sup>

While the modern Court has not used rational basis with bite to invalidate purely economic regulations,<sup>56</sup> several lower courts, in fulfillment of Justice Marshall's prophecy, have begun to apply this standard to such laws.<sup>57</sup> Perhaps the most notable example came in *Craigmiles v. Giles*,<sup>58</sup> a 2002 Sixth Circuit case involving a Tennessee statute that allowed only licensed funeral directors to sell caskets, urns, and other funeral merchandise.<sup>59</sup> As a result, retailers who sold such merchandise, but did not engage in embalming, cremation, or other funeral services, could not participate in the casket market,<sup>60</sup> giving licensed funeral directors a monopoly.<sup>61</sup> This was a particularly burdensome requirement because state law required two years of training to become a licensed funeral director.<sup>62</sup>

While noting that only a handful of statutes have been invalidated using rational basis review, the Sixth Circuit nevertheless invalidated the Tennessee statute on this ground.<sup>63</sup> It agreed with the district court's finding that the law did not promote public health or safety, and that the only practical difference between the plaintiffs' caskets and those sold by licensed funeral directors was that the latter's were "systematically

53. Farrell, *supra* note 46, at 359, 373.

54. See Smith, *supra* note 52, at 2770; *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring).

55. Powers v. Harris, 379 F.3d 1208, 1223–24 (10th Cir. 2004).

56. *Id.* at 1224. However, the Court invalidated an economic regulation using what appeared to be a heightened form of rational basis review in *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), a case involving an Alabama statute that taxed out-of-state insurance companies on gross premiums more heavily than Alabama-based insurers. The Court found this statute to fail rational basis equal protection analysis. This decision appears to be an outlier, since later in the same term, the Court unanimously found similar legislation to pass rational basis review. See *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159 (1985). See also *id.* at 179–80 (O'Connor, J., concurring); Gail Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 798–800 (1987). The Court has not applied rational basis with bite to any economic regulations since 1985. Perhaps it is significant that the *Metro. Life* decision predated the *Cleburne* decision by approximately three months.

57. See Anthony B. Sanders, Comment, *Exhumation Through Burial: How Challenging Casket Regulations Helped Unearth Economic Substantive Due Process in Craigmiles v. Giles*, 88 MINN. L. REV. 668, 678 (2004).

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

59. *Id.* at 222–23.

60. *Id.*

61. *Id.* at 229.

62. *Id.* at 222, 224.

63. *Id.* at 225.



more expensive.”<sup>64</sup> Finding that the law’s only purpose was to “privilege certain businessmen over others at the expense of consumers,” the court held the law lacked a legitimate purpose and therefore failed rational basis review.<sup>65</sup> The court took care to assert that its holding was “not a return to *Lochner*,” but also that “rational basis review, while deferential, is not toothless.”<sup>66</sup> Nevertheless, several commentators noted that the Sixth Circuit was clearly using a more exacting standard of review in *Craigmiles*, thus implying a step back towards the *Lochner* era.<sup>67</sup>

Through happenstance, a casket regulation would be the centerpiece of the next major case involving Equal Protection and economic legislation. In *Powers v. Harris*, involving an Oklahoma statute practically identical to that in *Craigmiles*, the Tenth Circuit disagreed with the Sixth Circuit’s ruling and found that intrastate economic protectionism was a legitimate state interest.<sup>68</sup> It also found that the Sixth Circuit’s focus on the legislature’s actual motives in enacting the statute was barred by traditional rational basis review and that its reliance on *Cleburne* as a model was unwarranted.<sup>69</sup> The court felt that even if *Cleburne* and *Romer* signaled the creation of a more exacting form of rational basis review, Supreme Court jurisprudence limited its use to classifications that merit such scrutiny, which the court felt did not include economic classifications.<sup>70</sup> Alternatively, the court reasoned, the so-called rational basis with bite of *Cleburne* and *Romer* may just be normal rational basis applied to situations where the only conceivable state interest was to harm a politically unpopular group.<sup>71</sup> In either case, the court declined to examine the Oklahoma statute under anything other than traditional rational basis review and upheld the law, finding that “intrastate economic protectionism, absent a violation of a specific federal statutory or constitutional provision, is a legitimate state interest and that the [Oklahoma statute was] rationally related to this legitimate end.”<sup>72</sup>

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64. *Id.* at 225–26.

65. *Id.* at 229.

66. *Id.*

67. *E.g.*, Gorod, *supra* note 15, at 541; Sanders, *supra* note 57, at 693.

68. *Powers v. Harris*, 379 F.3d 1208, 1218–19 (10th Cir. 2004). Interstate economic protectionism is usually invalidated under the Dormant Commerce Clause, *see* *Granholt v. Heald*, 544 U.S. 460 (2005), or when employment is involved, under the Article IV, § 2 Privileges and Immunities Clause, *see* *United Bldg. & Const. Trades Council of Camden Cnty. & Vicinity v. Mayor & Council of Camden*, 465 U.S. 208 (1984).

69. *Powers*, 379 F.3d at 1223.

70. *Id.* at 1224.

71. *Id.*

72. *Id.* at 1225.

The Supreme Court denied certiorari to *Powers*, declining to resolve a circuit split on the question of whether intrastate economic protectionism is a legitimate state interest.<sup>73</sup> Since then, other federal courts have addressed challenges to economic regulation on Equal Protection grounds. For example, in *Merrifield v. Lockyer*, the Ninth Circuit struck down a California pest control licensing regime that exempted those who controlled bats, raccoons, skunks, and squirrels without the use of pesticides, but specifically did not exempt those who controlled rats, mice, and pigeons without the use of pesticides.<sup>74</sup> The court found that, like in *Craigmiles*, the singling out of three types of pests from other vertebrates was an unacceptable form of economic protectionism.<sup>75</sup> The court also followed *Craigmiles* in asserting that its decision was not a return to *Lochner*, directly quoting the relevant language from the *Craigmiles* opinion.<sup>76</sup>

Another recent case, *St. Joseph Abbey v. Castille*, followed *Craigmiles* in striking down a Louisiana law that permitted only state-licensed funeral directors to sell caskets.<sup>77</sup> The Fifth Circuit found there was no rational relationship between the state's interests in consumer protection and public health and safety, and the limitation of casket sales to funeral directors.<sup>78</sup> It also found that the economic protectionism resulting from the statute was not a legitimate state interest because it was not "economic protectionism in service of the public good but . . . 'economic' protection of the rulemakers' pockets."<sup>79</sup> It also explicitly denied that the decision was a return to *Lochner*.<sup>80</sup> Also, in *Clayton v. Steinagel*, the District of Utah found that Utah's cosmetology licensing scheme failed rational basis review as applied to an African hair braider because the "facts demonstrate an insufficient rational relationship between public health and safety and the actual regulatory scheme."<sup>81</sup>

### C. The Equal Protection Provisions in the Kentucky State Constitution

While the *Maxwell's* plaintiffs' primary argument centered on the U.S. Constitution's Equal Protection Clause, they also argued that the

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73. *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004), cert. denied, 544 U.S. 920 (2005).

74. *Merrifield v. Lockyer*, 547 F.3d 978, 981–82, 991–92 (9th Cir. 2008).

75. *Id.* at 991.

76. *Id.* at 992.

77. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 217 (5th Cir. 2013).

78. *Id.* at 223–26.

79. *Id.* at 226–27.

80. *Id.* at 227.

81. *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1215 (D. Utah 2012).

legislation was barred by the equal protection provisions in the Kentucky Constitution.<sup>82</sup> The relevant language reads as follows:

All men are, by nature, free and equal, and have certain inherent and inalienable rights . . . . Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority. All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made<sup>83</sup> to any man or set of men, except in consideration of public services . . . .

Additionally, Sections 59 and 60 of the Kentucky Constitution include prohibitions on “special legislation.”<sup>84</sup> In this context, special legislation is “that which favors a special interest to the detriment of the rest of society.”<sup>85</sup>

The Kentucky Supreme Court has found that the combination of these provisions gives additional protection for individual rights against legislative interference, prompting the court “at times to apply a guarantee of individual rights in equal protection cases that is higher than the minimum guaranteed by the Federal Constitution.”<sup>86</sup> This higher standard requires a “reasonable basis” or a “substantial and justifiable reason” for discriminatory economic regulations.<sup>87</sup> The party claiming the validity of a challenged classification has the burden of proving a valid nexus between that “classification and the purpose for which the statute in question was drafted. There must be substantially more than merely a theoretical basis for a distinction. Rather, there must be a firm basis in reality.”<sup>88</sup> While it is unclear whether the “substantial and justifiable reason” standard applies in all cases,<sup>89</sup> the Kentucky Supreme Court has stated that its standard for evaluating economic legislation, “while deferential, is certainly not demure,”<sup>90</sup> and that a law that fails traditional rational basis review (as in *Williamson*) will also

82. Memorandum in Support of Plaintiffs’ Motion for Summary Judgment at 2, *Maxwell’s Pic-Pac, Inc. v. Dehner*, 887 F. Supp. 2d 733 (W.D. Ky. 2012) (No. 3:11-CV-18-H).

83. KY. CONST., §§ 1–3.

84. *Id.* §§ 59–60. Section 59 states: “The General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely: . . . In all other cases where a general law can be made applicable, no special law shall be enacted.” Section 60 states: “The General Assembly shall not indirectly enact any special . . . act by the repeal in part of a general act.”

85. *Yeoman v. Ky. Health Policy Bd.*, 983 S.W.2d 459, 468 (Ky. 1998).

86. *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408, 418 (Ky. 2005).

87. *Id.* at 418–19.

88. *Yeoman*, 983 S.W.2d at 468.

89. “Cases applying the heightened standard are limited to the particular facts of those cases.” *Elk Horn Coal Corp.*, 163 S.W.3d at 419.

90. *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455, 469 (Ky. 2011).

fail the heightened standard.<sup>91</sup> Examples of the Kentucky Supreme Court applying this heightened standard include striking down a worker's compensation statute that required different standards of proof to show different types of pneumoconiosis,<sup>92</sup> and striking down a statute that provided a special immunity from suit to architects, engineers, and builders.<sup>93</sup>

*D. Does Section Two of the Twenty-First Amendment Affect the Analytical Framework?*

While the question presented in *Maxwell's* is principally a matter of economic Equal Protection, the analysis is possibly complicated by the fact that the Kentucky statute in question regulates the sale of alcohol.<sup>94</sup> As such, it must also be analyzed under Section Two of the Twenty-First Amendment, which reads: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."<sup>95</sup> This language gives wide latitude to the states in how they choose to regulate the sale of liquor,<sup>96</sup> and because they are economic regulations, they will be held to the rational basis test unless they involve a suspect or quasi-suspect class or a fundamental right.<sup>97</sup> Thus, the power to regulate liquor sales is almost limitless.<sup>98</sup> However, as the Supreme Court noted in *Craig v. Boren*, the Twenty-First Amendment lacks sufficient strength "to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause."<sup>99</sup> Thus, while there may be a greater presumption in favor of validity for state liquor control measures because of the Twenty-First Amendment, arbitrary legislation in this area is still presumably vulnerable to attack under rational basis review.<sup>100</sup>

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91. *Elk Horn Coal Corp.*, 163 S.W.3d at 419.

92. *Vision Mining, Inc.*, 364 S.W.3d at 473-74.

93. *Tabler v. Wallace*, 704 S.W.2d 179 (Ky. 1985).

94. KY. REV. STAT. ANN. § 243.230(5) (West 1998).

95. U.S. CONST. amend. XXI, § 2.

96. *California v. LaRue*, 409 U.S. 109, 116 (1972).

97. Shelley Ross Saxer, *License to Sell: Constitutional Protection Against State or Local Government Regulation of Liquor Licensing*, 22 HASTINGS CONST. L.Q. 441, 484 (1995).

98. *Id.* at 489.

99. *Craig v. Boren*, 429 U.S. 190, 207 (1976).

100. *Parks v. Allen*, 426 F.2d 610, 613 (5th Cir. 1970).

III. THE WESTERN DISTRICT OF KENTUCKY'S DECISION IN *MAXWELL'S PIC-PAC, INC. v. DEHNER*

After dismissing several preliminary challenges to the plaintiffs' claim,<sup>101</sup> the court outlined rational basis as the appropriate standard of review, noting that "modern application of rational review upholds the long-established principal of judicial restraint and deference to legislative determinations . . . but also guards against government action that is arbitrary or lacks any legitimate purpose."<sup>102</sup> It surveyed numerous federal and state court decisions addressing liquor control schemes, finding that none were precisely on point, but that collectively they stood for the proposition that "when an alcohol control statute makes a classification based on how businesses sell alcohol, the statute will generally satisfy rational review. But classifications among potential alcohol vendors seemingly without a rational link to a conceivable legislative purpose are subject to meaningful judicial review."<sup>103</sup> It then began its rational basis analysis.

The court reiterated that the standard of review did not require the state to articulate a particular purpose or rationale for the statute, nor did it need to speculate on the legislature's motives.<sup>104</sup> Nevertheless, the state suggested six supposedly legitimate state interests to justify the statute:

- (1) stricter regulation of more potent alcoholic beverages;
- (2) curbing potential abuse by limiting access to the products;
- (3) keeping pricing among merchants competitive, but not so low as to promote excessive consumption;
- (4) limiting the potential for underage access;
- (5) limiting alcohol sales to premises where personal observation of the purchase occurs; and
- (6) balancing the availability of a controversial product between those who want to purchase it and those who seek to ban it.<sup>105</sup>

The court could not imagine any other possible interests, and in a footnote, pointed out that due to the binding precedent of *Craigmiles*, protecting businesses that currently possess a liquor license from competition could not be considered a legitimate state interest.<sup>106</sup>

The court then proceeded to address each of these proffered interests in turn. It rejected the idea that the statute served to limit the availability

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101. The Intervening Defendant challenged the plaintiffs' standing and also argued that their claim was barred by a statute of limitations. *Maxwell's Pic-Pac, Inc. v. Dehner*, 887 F. Supp. 2d 733, pt. II (W.D. Ky. 2012). Neither issue is of relevance to this Note, however, and will not be discussed.

102. *Maxwell's*, 887 F. Supp. 2d at 744–45.

103. *Id.* at 746.

104. *Id.* at 746–47.

105. *Id.* at 747.

106. *Id.* at 747 n.10.

of more potent alcoholic beverages because the state failed to demonstrate why it distinguished between a “grocery-selling drugstore like Walgreens . . . [and] a pharmaceutical-selling grocery store like Kroger,” and how that distinction rationally related to limiting higher proof alcohol sales.<sup>107</sup> The court then acknowledged that keeping pricing among merchants competitive, but not too low, was a legitimate interest, but also found this justification to be lacking because there was no rational relationship between “the degree to which a business sells non-grocery items more than it sells grocery items” and its impact on liquor and wine prices.<sup>108</sup>

The court then tackled the argument that the statute limited access to the products, and therefore curbed abuse and underage use.<sup>109</sup> It acknowledged that Kentucky was free to limit the number of liquor outlets so long as it did not do so in an arbitrary manner.<sup>110</sup> It found, however, that there was no rational relationship between the statute and this goal because

the Statute does not limit package sales of spirits and wine to stores whose primary business is the sale of those products. Instead, it allows package liquor licenses to stores whose primary business is anything other than groceries or gas . . . . Thus, the rational bases for limiting package liquor licenses to traditional package liquor stores are irrelevant here because the Statute does not make this classification.<sup>111</sup>

It also rejected the idea that the use of “self-checkout” machines by some grocery stores—which give these stores less direct observation of sales—justified the statute because drugstores are free under the statute to install such machines and continue selling liquor and wine.<sup>112</sup>

Finally, the court addressed the justification that grocery stores are community gathering centers where people with diametrically opposed viewpoints on the sale of intoxicating liquors intermingle.<sup>113</sup> According to the state, by allowing grocery stores to sell beer but not wine and liquor, the legislature was striking a balance between these two viewpoints and seeking to limit direct conflict between them.<sup>114</sup> The court found that while Kentucky was free to prohibit the sale of liquor in community gathering centers, it could not arbitrarily limit the

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107. *Id.* at 748.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 749.

112. *Id.*

113. *Id.* at 750.

114. *Id.*

prohibition to some centers but exclude others.<sup>115</sup> Such legislative line drawing must be necessary and have a rational basis.<sup>116</sup> The court concluded that this basis was lacking, and that the state simply “wanted to limit liquor sales generally and to maintain somewhat the status quo, and it did so by arbitrarily distinguishing grocers from all other retailers.”<sup>117</sup>

It concluded its rational basis review by reiterating that there appeared to be no stated reasons in the legislative history for drawing this distinction between types of retailers, and that as time has passed, the distinctions between grocery stores and drugstores have become increasingly insignificant, since most drugstores sell groceries and many grocery stores sell prescription drugs.<sup>118</sup> And even though the Supreme Court held in *Williamson* that legislatures “must be allowed leeway to approach a perceived problem incrementally,” the court did not believe that this was what the legislature was doing since “the 74-year-old statute has become more arbitrary over time.”<sup>119</sup> In short, the court found that

Kentucky ‘may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.’ Here, the attenuated or non-existent relationship between the Statute’s classification and any number of potential legislative goals leaves the Court with no other conclusion than that the Statute offends the Equal Protection Clause and, for that reason, must be struck down as unconstitutional.<sup>120</sup>

The court briefly addressed the question of whether the statute also violated the Kentucky Constitution. It found that since the statute failed traditional rational basis review, it also failed the potentially higher standard of review accorded by the Kentucky Constitution, and discussed the issue no further.<sup>121</sup> It offered no opinion on whether Kentucky’s higher standard of review was warranted.<sup>122</sup>

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115. *Id.*

116. *Id.*

117. *Id.* at 751.

118. *Id.*

119. *Id.*

120. *Id.* at 751–52 (citations omitted).

121. *Id.* at Part V.

122. *Id.* at 752.

IV. ANALYSIS: THE KENTUCKY CONSTITUTION IS PREFERABLE TO THE  
U.S. CONSTITUTION AS A MEANS TO INVALIDATE THE LIQUOR  
REGULATIONS

*Maxwell's Pic-Pac v. Dehner* is the latest in a continuing trend of federal court decisions that purportedly use rational basis review to strike down state economic legislation. Much of this litigation is the work of libertarian public policy organizations who argue that “arbitrary” regulations on economic activity infringe on a right to work inherent in the U.S. Constitution. This Part argues that the pattern of lower federal courts holding economic legislation to heightened scrutiny is not only in violation of controlling Supreme Court precedent but also an unwarranted encroachment on federalism and the separation of powers. It will also address *Maxwell's* pending appeal to the Sixth Circuit, and suggest that a more correct path to strike down the Kentucky liquor control regime lies in the Kentucky Constitution.

A. *Why the Trial Court's Decision is an Application of Rational Basis  
with Bite*

When analyzed under the controlling Supreme Court precedents for economic regulations, it is clear that the *Maxwell's* court used a heightened form of rational basis review. Traditional rational basis review does not require a nexus between the actual, legitimate purpose for a law and the classification it creates.<sup>123</sup> All that is required is a “reasonably conceivable state of facts that *could* provide a rational basis for the classification,”<sup>124</sup> which can be built on unsupported speculation, and the burden is on the challenging party to negate every possible justification for the law.<sup>125</sup>

But that is not what happened in *Maxwell's*. First, by throwing out the six proffered justifications for the statute one by one, and stopping the inquiry there, the court effectively placed a burden of justification on the government instead of a burden of negation on the challenging party. Second, in stating that “courts must always ensure that some rational link exists between a statute's classification and objective,” it also conflated the traditional rational basis test used for economic legislation with the heightened test used mainly for politically unpopular groups.<sup>126</sup> While it may be correct to say that classifications must have a *rational* link to their objective, it is clear from precedent that “[i]t is enough

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123. See *supra* Part II.B.

124. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (emphasis added).

125. *Id.* at 315.

126. *Maxwell's*, 887 F. Supp. 2d at 744.



that . . . it *might be thought* that the particular legislative measure was a rational way to correct” a problem.<sup>127</sup> As long as the legislature *reasonably believed* a rational link existed, the court is not obligated to establish the link through evidence.

For example, the *Maxwell's* court said that the proposed link between limiting access to alcoholic beverages and curbing alcohol abuse could not be “rational” because there was no rational reason for treating grocery stores and gas stations differently from other retailers.<sup>128</sup> This, however, ignores the precedent from *Williamson* that explicitly states that “reform may take one step at a time.”<sup>129</sup> The situation in *Maxwell's* is analogous to that in *Williamson* where sellers of ready-to-wear glasses were allowed to fit lenses without prescriptions but opticians were not, yet the law was allowed to stand for public health reasons.<sup>130</sup> The *Maxwell's* court addressed *Williamson* by saying that, because the law had been in place for seventy-four years, it did not believe the legislature was addressing the problem one step at a time.<sup>131</sup> However, there is nothing in *Williamson* which requires that each “step” be taken within a certain period of time, and it is simply enough that the legislature *could have reasonably believed* the classification would have the desired effect—the trial court even acknowledged as much.<sup>132</sup> When economic legislation is being challenged, the court's belief in the legislature's wisdom is not traditionally what is at issue. When reasonable people can disagree about the prudence of legislation, courts should defer to the legislature, as Justice Holmes stated in his famous *Lochner* dissent: “A reasonable man might think [a law to be] a proper measure on the score of health[, while m]en whom I certainly could not pronounce unreasonable would [uphold it]. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.”<sup>133</sup> Finally, the Equal Protection Clause has traditionally been applied only to strike down invidious discrimination<sup>134</sup>— “[d]iscrimination that is offensive or objectionable . . . because it

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127. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488 (1955) (emphasis added).

128. *Maxwell's*, 887 F. Supp. 2d at 749.

129. *Williamson*, 348 U.S. at 489.

130. *See id.*

131. *Maxwell's*, 887 F. Supp. 2d at 751.

132. “Nevertheless, the State claims that withholding liquor licenses from grocery stores and gas stations has some effect on each of the purposes it proffered. The truth of this assertion is *not for the Court to question*, so long as it was conceivable that the Kentucky legislature *could have believed it*.” *Id.* at 747 (emphasis added).

133. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

134. *Williamson*, 348 U.S. at 489 (1955) (“The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.”).

involves prejudice or stereotyping”<sup>135</sup>—and that is clearly not what was at issue in this case.

Because the application of heightened rational basis review to economic legislation is against the weight of precedent, the question becomes whether it is ever proper to apply this heightened standard to economic legislation, and if so, when? Before that issue is addressed, however, it is worth briefly discussing what it is about Fourteenth Amendment jurisprudence that has created the problematic system of distinctions between suspect classes and fundamental rights.

*B. The Origin of the Textual Basis for Applying Heightened Scrutiny to Economic Legislation*

The argument for extending exacting standards of judicial review to economic legislation has a basis in the text of the Constitution, but perhaps only through an accident of history. Section One of the Fourteenth Amendment addresses two groups: “citizens” and “persons.” Citizens are entitled to the privileges or immunities of United States citizenship, while all persons, including noncitizens, are entitled to due process of law and the equal protection of the laws.<sup>136</sup> While the plain language of the Amendment seems to indicate that the protection of substantive rights would fall into the Privileges or Immunities Clause, this is not how it has been interpreted. In the *Slaughterhouse Cases*,<sup>137</sup> the Supreme Court effectively gutted this Clause by holding that it “neither incorporated the Bill of Rights nor protected all rights of individual citizens.”<sup>138</sup> Instead, the Clause protects only rights of federal citizenship, which include “the right to petition Congress, the right to vote in federal elections, the right to interstate travel or commerce, the right to enter federal lands, [and] the rights of a citizen while in the custody of federal officers.”<sup>139</sup> This decision is universally acknowledged as an incorrect reading of the Clause, but since the Court is always reluctant to overturn its own decisions, it subsequently has had to look to other provisions of the Constitution to find protection for substantive rights, namely the Due Process and Equal Protection Clauses.<sup>140</sup>

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135. BLACK’S LAW DICTIONARY 535 (9th ed. 2009).

136. U.S. CONST. amend. XIV, § 1.

137. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

138. ROTUNDA & NOWAK, *supra* note 27, § 14.3(b).

139. *Id.*

140. See A. Christopher Bryant, *What McDonald Means for Unenumerated Rights*, 45 GA. L. REV. 1073, 1077–80 (2011); Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001) (“Virtually no serious modern scholar—left, right, and center—thinks that this is a plausible reading of the Amendment.”).

Though *Lochner's* use of substantive due process in the economic context was rejected, the Court revived the doctrine in the middle of the twentieth century as a tool to protect certain “fundamental rights.”<sup>141</sup> Many commentators and Justices have questioned the wisdom of “read[ing] a clause evidently about procedures to be a font for substantive rights,”<sup>142</sup> since doing so strips such rights of an explicit textual basis.<sup>143</sup> It would certainly make more sense to derive such rights from the Privileges or Immunities Clause, not only because of the apparent plain meaning of the Clause, but also because fundamental rights are more easily understood as rights reserved for individual citizens. By deriving them instead from the Due Process Clause and enforcing them through the Equal Protection Clause, the door is opened for the following argument: “that the three-tiered approach [to judicial review] is inherently *unequal* because differential treatment among different groups should not translate into discriminatory treatment of those groups by the Court.”<sup>144</sup> In other words, how can protection be equal if different classifications are held to different standards?<sup>145</sup> This distinction between persons and citizens becomes especially relevant to the *Maxwell's* case because the Supreme Court has held that corporations are persons but not citizens.<sup>146</sup> As a result, there is a strong textual argument for extending exacting standards of judicial review to all legislation, economic or otherwise.

### *C. The Argument in Favor of Applying Heightened Scrutiny to Economic Legislation*

It is the mission of organizations such as the Pacific Legal Foundation<sup>147</sup> and the Institute for Justice<sup>148</sup> to achieve the above

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141. See ROTUNDA & NOWAK, *supra* note 27, § 15.7.

142. Bryant, *supra* note 140, at 1079.

143. Adam Lamparello, *Taking the “Substance” Out of Substantive Due Process and Returning Lawmaking Power to the Federal and State Legislatures*, 63 S.C. L. REV. 285, 287–88 (2011).

144. *Id.* at 290 (emphasis added).

145. See Trimble v. Gordon, 430 U.S. 762, 779 (1977) (Rehnquist, J., dissenting) (“The Equal Protection Clause is itself a classic paradox, and makes sense only in the context of a recently fought Civil War. It creates a requirement of equal treatment to be applied to the process of legislation whose very purpose is to draw lines in such a way that different people are treated differently. The problem presented is one of sorting the legislative distinctions which are acceptable from those which involve invidiously unequal treatment.”).

146. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177 (1869). Additionally, the text of the Fourteenth Amendment itself precludes “citizenship” from corporations: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens.” U.S. CONST. amend. XIV, § 1. A corporation cannot be “born” or “naturalized,” and therefore cannot be a citizen.

147. PACIFIC LEGAL FOUNDATION, <http://www.pacificlegal.org> (last visited Aug. 27, 2013).

148. THE INSTITUTE FOR JUSTICE, <http://www.ij.org> (last visited Aug. 27, 2013).

described equality of judicial review as a bulwark against restrictions on economic liberty. These organizations engage in litigation and policy work with the intent of restoring economic liberty to its pre-New Deal status<sup>149</sup> and influencing judges to enforce “constitutional limits on government power.”<sup>150</sup> In practice, this would entail a return to the *Lochner* era, where practically all legislation would be subject to some form of heightened scrutiny. While an in-depth analysis of this viewpoint is outside the scope of this Note, a few points merit attention.

The foundation of this viewpoint is that the right to work is a “fundamental right” under the U.S. Constitution.<sup>151</sup> And indeed, the Court has acknowledged that, under the Privileges or Immunities Clause of Article IV, § 2, this right may not be infringed by *interstate* protectionist regulations.<sup>152</sup> The argument is that the Court should recognize these rights as a matter of substantive due process, or perhaps preferably, through a revival of the Fourteenth Amendment Privileges or Immunities Clause.<sup>153</sup> In either case, the end result would be the same: judges properly engaged in determining the government’s actual ends for all legislation and whether those ends are legitimate.<sup>154</sup>

Proponents of so-called “judicial engagement” argue that judges are “abdicated” their proper role in evaluating the constitutionality of legislation by hiding behind the rational basis test.<sup>155</sup> They point out that, in defending legislation under this test, “not only is the government invited to dream up entirely *post hoc* rationalizations for challenged legislation, it has no obligation to produce evidence in support of those rationalizations either.”<sup>156</sup> This could lead to absurd results:

[T]here are a small handful of states that prohibit self-service gas stations, ostensibly for health and safety reasons. . . . [I]f lower courts actually took the rational basis test at face value, it would matter not a whit if every legislator who voted for the self-service gas station ban came into court and swore on a stack of Bibles that he had only done so because he was paid off by the service station lobby. In other words, as long as the health and safety argument is “conceivable,” the fact that it is also

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149. James W. Ely, Jr., Book Review, 15 *THE INDEP. REV.* 612 (2011).

150. *Center for Judicial Engagement*, THE INSTITUTE FOR JUSTICE, <http://www.ij.org/cje> (last visited Aug. 27, 2013).

151. Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 *N.Y.U. J.L. & LIBERTY* 898, 902–03 (2005) [hereinafter Neily, *No Such Thing*].

152. For example, a state may not bar nonresidents from becoming attorneys. See *Supreme Court of N.H. v. Piper*, 470 U.S. 274 (1985).

153. Clark Neily, *Judicial Engagement Means No More Make-Believe Judging*, 19 *GEO. MASON L. REV.* 1053, 1062 (2012) [hereinafter Neily, *Judicial Engagement*].

154. *Id.* at 1056.

155. Neily, *No Such Thing*, *supra* note 151, at 903.

156. *Id.* at 900 (internal quotations omitted).

perfectly fraudulent has no bearing on the outcome of a legal challenge.<sup>157</sup>

In addition, the requirement that the challenging party negate every conceivable justification for a law is “technically impossible to meet because it is impossible to prove the non-existence of something as a matter of formal logic.”<sup>158</sup> Finally, they argue, the test is so flawed that the Supreme Court must “misappl[y]” it “in order to achieve preferred outcomes,” as was demonstrated in *Cleburne* and *Romer*.<sup>159</sup>

Certainly, these are strong arguments. It seems fairly obvious that traditional rational basis review creates a situation where “the deck is stacked so thoroughly against a litigant that the result of the case is effectively preordained.”<sup>160</sup> Frankly, this result was almost certainly the Court’s intention in formulating the rational basis test as it has. The Court likely wanted to remove itself from the business of reviewing every piece of legislation that came its way and in response created a test that was practically impossible for the government to fail. The proponents of “judicial engagement” argue that it is time for judges to cease the “abdication” of their proper role and demand legitimate reasons for government regulation.<sup>161</sup>

It is this word “abdication” that is of interest for the purposes of this Note. In his *Maxwell’s* opinion, Judge John G. Heyburn II twice states that “deference” to the legislature does not equal “abdication.”<sup>162</sup> His use of the word “abdication” in this context is curious, considering that Judge Heyburn, according to a Westlaw search, has never before used it in a decision.<sup>163</sup> One could draw the conclusion that Judge Heyburn is familiar with the call for “judicial engagement” and its underlying philosophy, and is choosing to “engage” by subjecting the Kentucky legislation to heightened scrutiny. Perhaps it is just a coincidence, but the use of such a loaded word in the context of rational basis review certainly begs the question.

Regardless of the motivation behind the decision, *Maxwell’s* joins

157. *Id.* at 908–09.

158. *Id.* at 909.

159. *Id.* at 910.

160. *Id.*

161. Neily, *Judicial Engagement*, *supra* note 153, at 1070.

162. *Maxwell’s Pic-Pac, Inc. v. Dehner*, 887 F. Supp. 2d 733, 744, 751 (W.D. Ky. 2012).

163. A WestlawNext search of Kentucky District Court opinions written by Judge John G. Heyburn II produced 1,923 results (Heyburn has only judged in the Western District of Kentucky). A search within those results for the string “abdicat!” produced two results. The result other than *Maxwell’s* is from *U.S. v. Ware*, 154 F. Supp. 2d 1016, 1025 (W.D. Ky. 2001). In that opinion, Heyburn was quoting language from *Illinois v. Gates*, 462 U.S. 213, 239 (1983). Heyburn, therefore, appears to have only deliberately chosen to use a form of “abdicat” in the *Maxwell’s* opinion. A Lexis search produced essentially the same results.

several others in the category of federal litigation seeking to strike down economic regulations under the rational basis test.<sup>164</sup> If these cases have anything in common, it is that they all seem to involve easy questions. Surely, can't reasonable people agree that Kentucky's liquor controls make no sense, or that African hair braiders should not be subject to hundreds of hours of unnecessary cosmetology training, or that casket retailers do not need training in mortuary science? Aren't such laws "uncommonly silly?"<sup>165</sup>

*D. Why Deference to the Legislature on Economic Matters is Good  
Jurisprudence for Federal Courts*

The problem, of course, is that sometimes easy cases can also make bad law.<sup>166</sup> By continuing the misapplication of the rational basis test begun in *Cleburne*, lower courts continue to muddle the standard and call into question when and how it is to be used. These decisions are motivated by *laissez-faire* principles, and are essentially about substituting the wisdom of the courts for the wisdom of the legislature.<sup>167</sup> Perhaps this results in better policy, but "the post-*Lochner* line of cases clearly repudiate judicial efforts to enshrine economic policies, even if ultimately wise, as constitutional rights."<sup>168</sup>

Despite the textual flaws in its formulation, the post-*Lochner* treatment of economic legislation is the correct policy. Equal protection may not really be equal, but neither does the First Amendment's "no law" language really mean *no* law. Governments cannot operate in absolutes, and placing the burden on state governments to justify every regulation they enact under the police power would be a huge encroachment on federalism. Since they are appointed to lifetime terms and not elected, Article III judges are politically unaccountable, and while this perhaps makes them ideal to combat invidious discrimination and infringements on fundamental rights, giving them the ability to substantively evaluate the legislature's wisdom in *every* case is a bridge too far. The counter is, of course, that the right to work, or practice a lawful trade, *is* a fundamental right that courts have only recently

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164. *See supra* Part II.B.

165. *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

166. The original adage, "hard cases make bad law," appears to derive from Baron Rolfe's opinion in *Winterbottom v. Wright*, (1842) 152 Eng. Rep. 402, 406, 10 M. & W. 109 (Ct. of Exchequer) (Rolfe, B.) ("Hard cases, it has been frequently observed, are apt to introduce bad law."). Rolfe was referring to cases that "tempt a judge to stretch or even disregard a principle of law at issue." BLACK'S LAW DICTIONARY 784 (9th ed. 2009). It goes without saying that the adage is applicable to *Maxwell's*.

167. Gorod, *supra* note 15, at 543.

168. *Id.*

decided to eschew. But the fact is that seventy-five years of Supreme Court jurisprudence explicitly rejects the idea of any economic right being fundamental, and the Court has given no indication that a return to *Lochner* is warranted or desirable.

Consider the consequences of such a return. Imagine that a state legislature, or perhaps even Congress, has chosen to institute a single-payer healthcare system, thus largely eliminating the need for private medical insurance. Could private insurers then challenge the law and demand it be subject to heightened scrutiny on the grounds that it infringes their “right to practice a lawful trade?” After all, these companies are persons, and theoretically entitled to the equal protection of the laws. One could counter that this hypothetical is in no way comparable to the situation in *Maxwell’s* or its brethren—“those cases are about silly laws that make no sense!” But this is the ultimate problem with applying heightened scrutiny to economic legislation: where do we draw the line, and who decides where it is drawn? Which is preferable: letting unelected federal judges make policy decisions or representative legislatures? There may be no clear philosophical answer, but the Constitution comes down heavily on the side of federalism and separation of powers, while it is silent on the matter of economic rights. Alexander Hamilton certainly did not imagine the judiciary to sit as a super-legislature when he wrote: “liberty . . . would have every thing to fear from [the judiciary’s] union with either of the other [branches of government]. . . . The complete independence of the courts of justice is peculiarly essential in a limited Constitution.”<sup>169</sup> Lower courts should therefore follow precedent and stop subjecting economic regulations to heightened judicial scrutiny: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate . . . [and] not prohibited . . . are constitutional.”<sup>170</sup>

However, the application of this proper deferential standard can still be flawed. Courts are not necessarily obligated to assume, as the *Powers* court did, that any proffered state objective, including economic protectionism, is legitimate just so that an economic regulation can be upheld. Certainly, as the concurring opinion in *Powers* noted, “[n]o case holds that the bare preference of one economic actor while furthering no greater public interest advances a ‘legitimate state interest.’ . . . [T]he record . . . support[s] a conclusion that the [regulation] here furthers, however imperfectly, an element of consumer protection.”<sup>171</sup> Because the scheme *was* conceivably related to a legitimate interest, the Tenth Circuit should have stopped the inquiry

169. THE FEDERALIST NO. 78 (Alexander Hamilton).

170. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819).

171. *Powers v. Harris*, 379 F.3d 1208, 1226 (10th Cir. 2004) (Tymkovich, J., concurring).

there and ignored the question of economic protectionism entirely, avoiding the circuit split simply by explaining that there was a conceivable basis for the regulation. Likewise, the Western District of Kentucky in *Maxwell's* should have recognized that the classification was flawed, but that the state's proffered bases for the regulation were within the bounds of reason, and ceased its Fourteenth Amendment inquiry.<sup>172</sup>

#### *E. What Will Happen on Appeal?*

The question remains: what will become of the *Maxwell's* decision at the Sixth Circuit? As explained throughout this Note, a proper application of rational basis review would certainly cause the decision to be overturned. However, the Sixth Circuit showed in *Craigmiles* that it was willing to apply heightened scrutiny to economic legislation, and circuit courts are ostensibly obligated to follow their own precedents. The question then is to what extent *Craigmiles* can be distinguished from *Maxwell's* and also to what extent the political leanings of the individual circuit judges will impact their decisions. It seems fair to assume that the latter question could be determinative, and therefore, that the fate of *Maxwell's* rests in large part on chance—in other words, which judges will be assigned to the case.<sup>173</sup> But these issues can be rendered irrelevant if the statute is instead evaluated under the Kentucky Constitution's equal protection provisions.

#### *F. Why the Kentucky Constitution May Allow the Classification to Be Struck Down*

The Kentucky Constitution allows for a higher standard of review than traditional rational basis review to be applied to legislative classifications.<sup>174</sup> This standard is indeed very similar to the rational basis with bite standard applied by the Supreme Court: there must be a substantial and justifiable reason for a classification and the party claiming validity must prove a valid nexus between classification and purpose. In fact, the trial court in *Maxwell's* applied such a standard: since Kentucky could not prove that the classification/purpose nexus existed, the statute was struck down.<sup>175</sup> It is interesting, then, that the trial court did not substantively address the question of the statute's

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172. "Where there are plausible reasons for Congress' action, our inquiry is at an end." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993).

173. This information is not publicly released until two weeks prior to the hearing.

174. *See supra* Part II.C.

175. *Maxwell's Pic-Pac, Inc. v. Dehner*, 887 F. Supp. 2d 733, 752 (W.D. Ky. 2012).



validity under the Kentucky Constitution, since it arguably had a greater license to apply heightened scrutiny under Kentucky law than under federal law.

A few questions remain, however. First, whether the classification at issue is “special legislation.” It is arguable that this law is one that “favors a special interest to the detriment of the rest of society.”<sup>176</sup> The intervening defendant acknowledged as much by stating that its motivation for intervention was protecting its economic interest in the continuance of the current liquor control scheme.<sup>177</sup> Arguing that the law is special legislation is problematic, however, since the original purpose for the law is unknown. It also does not appear to be necessary that the law qualify as special legislation for Kentucky’s heightened standard of review to apply.<sup>178</sup> Next, since the Kentucky Supreme Court has limited the heightened standard of review to the facts of particular cases, and has not delineated the controlling factors for its use, it is unclear whether this statute would qualify as a circumstance for the use of the standard. It does seem, however, that a sufficient amount of Kentucky Supreme Court precedent calls for “a substantial and justifiable reason apparent . . . from some . . . authoritative source” to allow “discriminatory legislation” to be upheld.<sup>179</sup> Finally, it must be determined if the legislation fits into the public services exception found in section three of the Kentucky Constitution (“no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services”).<sup>180</sup> In this context, public services appears to refer to hospitals, the military, social safety nets, etc., so this exception likely would not apply.<sup>181</sup>

In addition to requiring a “substantial and justifiable reason” for discriminatory legislation,<sup>182</sup> the Kentucky Supreme Court has stated that if “it is clear [a] statute has no reasonable relation to a proper legislative purpose and is arbitrary and discriminatory and without substantial basis,” then it is proper to strike it down.<sup>183</sup> The *Maxwell’s* court found the law fit this profile, so the state constitution may

176. *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 468 (Ky. 1998).

177. Motion to Intervene at ¶¶13, 22, *Maxwell’s Pic-Pac, Inc. v. Dehner*, 887 F. Supp. 2d 733 (W.D. Ky. 2012) (No. 3:11-CV-18-H).

178. *See, e.g., Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455 (Ky. 2011) (applying the “substantial and justifiable reason” standard without identifying the legislation at issue as “special legislation”).

179. *Tabler v. Wallace*, 704 S.W.2d 179, 186 (Ky. 1985).

180. KY. CONST., § 3.

181. *See, e.g., Ky. Bldg. Comm’n v. Effron*, 220 S.W.2d 836 (Ky. 1949); *Bowman v. Frost*, 158 S.W.2d 945 (Ky. 1942); *Bosworth v. Harp*, 157 S.W. 1084 (Ky. 1913).

182. *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408, 418–19 (Ky. 2005).

183. *Reeves v. Simons*, 160 S.W.2d 149, 151–52 (Ky. 1942).

therefore be a proper avenue to strike the statute down on appeal if the Sixth Circuit were to determine that the U.S. Constitution did not provide an avenue. The *Maxwell's* court missed an opportunity by not certifying the question of whether Kentucky state law bars this statute to the Kentucky Supreme Court, as, based on an analysis of precedent, there is a good chance that it would find the law unconstitutional. The Sixth Circuit should not make the same mistake: in the interest of federalism and the separation of powers, it should find the law acceptable under the Federal Constitution, and look to the Kentucky Supreme Court for guidance on the state constitutional issue.

#### V. CONCLUSION

Justice Marshall's *Cleburne* prophecy has proven true: lacking a foundation and a clear direction from the Court regarding its use, lower federal courts are applying heightened scrutiny to economic legislation and taking steps toward a return to the *Lochner* era. In striking down as unconstitutional the Kentucky liquor control regulation which explicitly prohibits grocery stores and gas stations from selling wine and liquor, the Western District of Kentucky joins these courts in incorrectly applying a heightened standard of judicial review inappropriate for economic legislation. And although the correct result on appeal is dictated by Supreme Court precedent, the statute's fate on appeal is unclear. The Sixth Circuit has applied rational basis with bite to economic legislation in the past and could potentially choose to do so again. Doing so would exacerbate a circuit split and further muddle the standards for when heightened scrutiny is appropriate. If the Sixth Circuit believes the statute should be struck down, it should instead look to the Kentucky Constitution, which gives greater leeway for the application of heightened standards of review to economic legislation.

Ultimately, it is not for politically unaccountable Article III judges to use the U.S. Constitution as a pretext to meddle in the affairs of legislatures, except for the limited circumstances where invidious discrimination or fundamental rights are involved. As Justice Thomas explained:

[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is *any* reasonably conceivable state of facts that *could* provide a rational basis for the classification.<sup>184</sup>

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184. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (emphasis added).

Lower federal courts need to get back to following this directive. It is not an “abdication” to defer to the legislature in these matters, because their proper role *is* deference. Legislatures may be imperfect, but at least we can “throw the rascals [or bastards, bums, etc.] out” if we are dissatisfied with their job.<sup>185</sup> Those who complain that it is too difficult to effect change via the legislature should perhaps concern themselves with the underlying reasons for legislative failings instead of pushing a *Lochnerian* agenda in federal court.

#### POST-SCRIPT

As this article was going to press in January 2014, the Sixth Circuit overruled the district court’s decision in *Maxwell’s Pic-Pac v. Dehner* and reinstated the Kentucky statute and regulations relating to package liquor licenses. In its brief opinion, the court cited to *F.C.C. v. Beach Communications, Inc.* and found Kentucky’s liquor laws were acceptable because “reasonably conceivable facts support the contention that grocery stores and gas stations pose a greater risk of exposing citizens to alcohol than do other retailers.”<sup>186</sup> The court noted that “Kentucky law occasionally subjects economic policies to stricter standards,” but did not consider whether this standard should be applied to the laws because “the [appellees] contend only that the statute lacks a rational basis.”<sup>187</sup>

Though this author agrees with the Sixth Circuit’s decision, it is disappointing that the question of the laws’ validity under the Kentucky Constitution was neither considered by the court nor argued by the parties. Full consideration of this question would have provided more finality to this litigation; it remains to be seen whether the Plaintiffs will now pursue their case in Kentucky state court.<sup>188</sup>

While this case came to the correct conclusion both for jurisprudential and public policy reasons, it is important to note that the other, similar cases discussed in this Note (e.g., *Clayton v. Steinagel*, *St. Joseph Abbey v. Castille*) have not been similarly overturned, and in fact, the Supreme Court denied certiorari in *St. Joseph Abbey v. Castille*.<sup>189</sup> For that reason, there is still the potential

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185. “The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.” *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

186. *Maxwell’s Pic-Pac v. Dehner*, Nos. 12–6056, 12–6057, 12–6182, 2014 WL 128129 at \*3, --- F.3d ---- (6th Cir., Jan. 15, 2014).

187. *Id.*

188. Defeat would be all but certain for the Plaintiffs at the Supreme Court.

189. *Castille v. St. Joseph Abbey*, 134 S. Ct. 423 (2013).

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for lower courts to improperly extend higher scrutiny to economic legislation, and this trend should be carefully monitored.