1 DRONEY, *Circuit Judge*, concurring in part and concurring in the judgment:

2 I join the majority opinion in its conclusion that the Dental Commission's
3 declaratory ruling is rationally related to the state's legitimate interest in
4 protecting the public health. Because this is sufficient to resolve the appeal, I
5 would not reach the question of whether pure economic protectionism is a
6 legitimate state interest for purposes of rational basis review. The majority
7 having chosen to address that issue, I write separately to express my
8 disagreement.

9 In my view, there must be at least some perceived public benefit for
10 legislation or administrative rules to survive rational basis review under the
11 Equal Protection and Due Process Clauses. As the majority acknowledges, only
12 the Tenth Circuit has adopted the view that pure economic protectionism is a
13 legitimate state interest. *See Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004).
14 Two of the circuits that reached the opposite conclusion expressly rejected the
15 Tenth Circuit's approach. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 222-23 (5th
16 Cir. 2013); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008).

17 I agree with the Fifth Circuit's reasoning in *St. Joseph Abbey*, particularly
18 insofar as it disputes the Tenth Circuit's reliance in *Powers* on the very Supreme

1 Court cases that the majority cites in support of its holding here. *See St. Joseph*
2 *Abbey*, 712 F.3d at 222 ("[N]one of the Supreme Court cases *Powers* cites stands
3 for that proposition [that intrastate economic protectionism is a legitimate state
4 interest]. Rather, the cases indicate that protecting or favoring a particular
5 intrastate industry is not an *illegitimate* interest when protection of the industry
6 can be linked to advancement of the public interest or general welfare."
7 (emphasis in original)); *see also Powers*, 379 F.3d at 1226 (Tymkovich, J.,
8 concurring) ("Contrary to the majority . . ., whenever courts have upheld
9 legislation that might otherwise appear protectionist . . ., courts have always
10 found that they could also rationally advance a *non-protectionist* public good."
11 (emphasis in original)).

12 A review of the Supreme Court decisions confirms the Fifth Circuit's
13 conclusion that some perceived public benefit was recognized by the Court in
14 upholding state and local legislation. In *Williamson v. Lee Optical of Oklahoma,*
15 *Inc.*, 348 U.S. 483 (1955), the Supreme Court reviewed an Oklahoma statute that,
16 *inter alia*, forbade opticians from replacing eyeglass lenses without a prescription
17 from an optometrist or ophthalmologist, even when an optician could easily and
18 safely have done the work. *See id.* at 485-87. In concluding that the legislation

1 passed rational basis review, the Court recognized that the requirement of a
2 prescription could advance the public interest in an eye examination by a doctor
3 before the lens replacement. *See id.* at 487-88.

4 In *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (per curiam), the Court
5 reviewed a New Orleans ordinance that prohibited food venders from operating
6 pushcarts in the French Quarter. *See id.* at 298. A grandfather clause exempted
7 existing vendors from the ban if they had been operating continuously in the
8 French Quarter for at least eight years. *See id.* The Supreme Court held that the
9 exemption survived rational basis review, observing that New Orleans may have
10 concluded that "newer businesses were less likely to have built up substantial
11 reliance interests in continued operation" and that the grandfathered vendors
12 may have "themselves become part of the distinctive character and charm" of the
13 French Quarter. *Id.* at 305.

14 The two more recent decisions cited by the majority upheld differential
15 rates of state taxation. *Nordlinger v. Hahn*, 505 U.S. 1 (1992), considered a
16 California property tax regime that tied the assessment of property values to the
17 value of the property at the time it was acquired, as opposed to its current value.
18 *See id.* at 5. This approach benefitted long-term property owners over newer

1 owners. *See id.* at 6. However, the Court identified the state's "legitimate interest
2 in local neighborhood preservation, continuity, and stability" and the "reliance
3 interests" of existing property owners as rational bases for the law. *Id.* at 12-13.

4 In *Fitzgerald v. Racing Association of Central Iowa*, 539 U.S. 103 (2003), the
5 Court reviewed an Iowa law that imposed higher taxes on racetrack slot machine
6 revenues than it imposed on riverboat slot machine revenues. *See id.* at 105.
7 Again finding the differential tax treatment rational, the Court suggested that the
8 state legislature "may have wanted to encourage the economic development of
9 river communities or to promote riverboat history." *Id.* at 109. And it again
10 emphasized "reliance interests," observing that the law preserved the historical
11 tax rate for riverboats, whereas racetracks had not previously been permitted to
12 operate slot machines at all. *Id.* at 105, 109.

13 It may be that, as a practical matter, economic protectionism can be
14 couched in terms of some sort of alternative, indisputably legitimate state
15 interest. Indeed, the majority suggests as much when it observes that, in this
16 case, the state may have concluded that protectionism "would subsidize lower
17 costs for more essential dental services that only licensed dentists can provide."
18 Maj. Op., *ante*, at 12. But it is quite different to say that protectionism *for its own*

1 *sake* is sufficient to survive rational basis review, and I do not think the Supreme
2 Court would endorse that approach. *Accord Merrifield*, 547 F.3d at 991 n.15 ("We
3 do not disagree that there might be instances when economic protectionism
4 might be related to a legitimate governmental interest and survive rational basis
5 review. However, economic protectionism for its own sake, regardless of its
6 relation to the common good, cannot be said to be in furtherance of a legitimate
7 governmental interest.").

8 Nor do I believe that rejecting pure economic protectionism as a legitimate
9 state interest requires us to resurrect *Lochner*. *Accord St. Joseph Abbey*, 712 F.3d at
10 227 ("We deploy no economic theory of social statics or draw upon a judicial
11 vision of free enterprise. . . . We insist only that Louisiana's regulation not be
12 irrational—the outer-most limits of due process and equal protection—as Justice
13 Harlan put it, the inquiry is whether '[the] measure bears a rational relation to a
14 constitutionally permissible objective.' Answering that question is well within
15 Article III's confines of judicial review." (second alteration in original) (footnote
16 omitted)); *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) ("We are not
17 imposing our view of a well-functioning market on the people of Tennessee.
18 Instead, we invalidate only the General Assembly's naked attempt to raise a

1 fortress protecting the monopoly rents that funeral directors extract from
2 consumers. This measure to privilege certain businessmen over others at the
3 expense of consumers is not animated by a legitimate governmental purpose and
4 cannot survive even rational basis review."); *see also* Cass R. Sunstein, *Naked*
5 *Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1692 (1984) ("The
6 minimum requirement that government decisions be something other than a raw
7 exercise of political power has been embodied in constitutional doctrine under
8 the due process clause before, during, and after the *Lochner* era.").

9 The majority, by contrast, essentially renders rational basis review a nullity
10 in the context of economic regulation. *See Powers*, 379 F.3d at 1226 (Tymkovich,
11 J., concurring) ("The end result of the majority's reasoning is an almost per se
12 rule upholding intrastate protectionist legislation."); *cf. Ranschburg v. Toan*, 709
13 F.2d 1207, 1211 (8th Cir. 1983) ("Although states may have great discretion in the
14 area of social welfare, they do not have unbridled discretion. They must still
15 explain why they chose to favor one group of recipients over another. Thus, it is
16 untenable to suggest that a state's decision to favor one group of recipients over
17 another by itself qualifies as a legitimate state interest. An intent to discriminate
18 is not a legitimate state interest."). If even the deferential limits on state action

1 fall away simply because the regulation in question is economic, then it seems
2 that we are not applying any review, but only disingenuously repeating a
3 shibboleth. *Cf. Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012) ("[W]hile
4 rational basis review is indulgent and respectful, it is not meant to be 'toothless.'"
5 (citation omitted)), *aff'd*, 133 S. Ct. 2675 (2013).

6 I acknowledge that the deference afforded by courts to legislative
7 enactments is significantly greater in the context of economic regulation than it is
8 "in matters of personal liberty." *St. Joseph Abbey*, 712 F.3d at 221 (citing *United*
9 *States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)); *see also* Allison B.
10 Kingsmill, Note, *Of Butchers, Bakers, and Casket Makers:* St. Joseph Abbey v.
11 Castille *and the Fifth Circuit's Rejection of Pure Economic Protectionism as a*
12 *Legitimate State Interest*, 75 La. L. Rev. 933, 936 (2015) ("The [Supreme] Court has
13 not invalidated a single piece of economic legislation on due process or equal
14 protection grounds since [the 1930s], opting for a more deferential, rational basis
15 review of state laws."). But this difference in degree does not compel the
16 conclusion that our deference in the economic sphere must be absolute. Nor will
17 an insistence on some legitimate, non-protectionist state interest result in
18 sweeping judicial entanglement in the legislative process.

1 For this reason, I am not troubled by the majority's surmise that "even the
2 law at issue in *Lochner*—the paradigm of disfavored judicial review of economic
3 regulations—might well fail the sort of rational basis scrutiny advocated by
4 Sensational Smiles." Maj. Op., *ante*, at 13-14. First, I doubt that this would
5 actually be the case; even if, as a matter of historical fact, the *Lochner* law was
6 *intended* to be a protectionist measure, such intent is not dispositive of the
7 rational basis inquiry. *See id.* at 10-11. And, in the highly unlikely event that the
8 evidence showed that the law was entirely untethered to any conceivable
9 legitimate state purpose (including protection of the public health), I do not see
10 why the law should survive. *Lochner* is "the paradigm of disfavored judicial
11 review of economic regulations" because it imposed exacting limits on state
12 action, in stark contrast to the deferential standard applied under modern
13 rational basis review. *See Lochner v. New York*, 198 U.S. 45, 59 (1905) ("There must
14 be more than the mere fact of the possible existence of some small amount of
15 unhealthiness to warrant legislative interference with liberty."). Our aversion to
16 *Lochner*'s flawed approach is well founded, but we should not respond to that
17 aversion by abandoning the minimum requirements of due process and equal
18 protection.

1 In short, no matter how broadly we are to define the class of legitimate
2 state interests, I cannot conclude that protectionism for its own sake is among
3 them.