Denver Law Review

Volume 82
Issue 3 *Tenth Circuit Surveys*

Article 7

January 2005

Powers v. Harris: How the Tenth Circuit Buried Economic Liberties

Jim Thompson

Powers v. Harris: How the Tenth Circuit Buried Economic Liberties

POWERS V. HARRIS: HOW THE TENTH CIRCUIT BURIED ECONOMIC LIBERTIES

> A democracy is nothing more than mob rule, where fifty-one percent of the people may take away the rights of the other forty-nine.
>
> - *Thomas Jefferson*[1]

I. INTRODUCTION

Thomas Jefferson recognized this inherent problem with our democratic system: A democratic government unchecked does not prevent a legislature from enacting naked preferences.[2] A naked preference is an evil that can by defined as "the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want."[3] Interest group politics have posed a problem since the time of our founding fathers.[4] In fact, the problem of "faction" greatly concerned James Madison and was one of the reasons the Constitution was enacted.[5]

Fortunately, the Constitution now provides individuals with some protection of their liberties against the whims of state government majorities. The Fourteenth Amendment prevents state legislatures from encroaching on certain individual liberties.[6] The relevant text of the amendment provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[7]

However, these clauses have little effect in modern constitutional law, especially when applied to economic liberties, and "have been spun

---

1. *Available at* http://www.wisdomquotes.com/cat_democracy.html (last visited Mar. 31, 2005).
2. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984).
3. *Id.*
4. Steven Simpson, *Judicial Abdication and the Rise of Special Interest*, 6 CHAP. L. REV. 173, 173 (2003).
5. *Id.*
6. U.S. CONST. amend. XIV.
7. *Id.*

into a quagmire of convoluted jurisprudence so entangled that some jurists have suggested their elimination."[8]

In *Powers v. Harris*,[9] the U.S Tenth Circuit Court of Appeals further limited the protection offered by the Fourteenth Amendment.[10] The Court broke with past precedent in deciding that state governments could permissibly enact legislation for the sole purpose of intrastate economic protectionism.[11] In doing so, they also split with a U.S. Sixth Circuit Court of Appeals decision involving an almost identical fact pattern in *Craigmiles v. Giles*.[12] This dangerous holding has drastic implications for economic liberties because it gives state governments the virtually unchecked authority to meddle in the economic affairs of their citizenry. This comment will argue that *Powers* was decided incorrectly, while *Craigmiles* was decided correctly. The court in *Powers* wrongly declared naked economic protectionism to be a legitimate government end. The Tenth Circuit should have held such economic protectionism, by itself, to be an illegitimate government purpose. Then, it should have correctly applied the rational basis test as the *Craigmiles* Court did to determine that the Oklahoma legislation restricting the sale of caskets was not rationally related to any other legitimate government purpose.

Part II of this comment will discuss the legal principles underlying economic liberty jurisprudence and the current state of the law. Part III of this comment will describe the facts of *Powers* and the decision reached by the 10th Circuit. Part IV will describe the facts of *Craigmiles* and the decision reached by the 6th Circuit for purposes of comparison. Part V analyzes the unfortunate holding of the 10th Circuit in *Powers* and discusses how the Supreme Court can handle the case more appropriately.

II. THE CURRENT STATE OF ECONOMIC LIBERTIES

The plaintiffs in *Powers*, operators of an online retail casket business, challenged an Oklahoma law requiring that most intrastate casket sales be made only by licensed funeral directors.[13] The plaintiffs argued that the law violated the Privileges or Immunities, Due Process, and Equal Protection clauses of the Fourteenth Amendment.[14] The current jurisprudential state of each clause will be discussed in turn.

---

8. Jessica E. Hacker, *The Return to Lochnerism? The Revival of Economic Liberties from David to Goliath*, 52 DEPAUL L. REV. 675, 675 (2002).

9. 379 F.3d 1208 (10th Cir. 2004).

10. *See generally* Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (approving of the casket monopoly by declaring naked economic protectionism to be a legitimate state interest). However, the Supreme Court has never declared that governments can permissibly grant monopolies without an underlying public purpose.

11. *Id.* at 1225.

12. 312 F.3d 220 (6th Cir. 2002).

13. *Powers*, 379 F.3d at 1211.

14. *Id.* at 1214; U.S CONST. amend. XIV.

The vague Privileges or Immunities clause has been difficult to interpret since its inception.[15] However, the *Slaughter House Cases*[16] greatly restricted whatever substantive meaning the clause was meant to have.[17] In the *Slaughter House Cases*, the U.S. Supreme Court upheld a Louisiana law giving slaughter houses a 25 year monopoly.[18] In doing so, the majority "virtually eradicated the clause by determining that it was not a tool to protect state citizens from their own state actions."[19] However, in the recent *Saenz v. Roe*[20] decision, the Court relied on the Privileges or Immunities clause to invalidate a durational residency requirement for California welfare benefits.[21] Thus, the Court "restored the possibility of practical weight to the Privileges or Immunities clause for the first time in 130 years."[22] Even Justice Thomas in his dissenting opinion expressed a willingness to reexamine the meaning of the clause and apply it along with or instead of an Equal Protection or substantive Due Process analysis in certain cases.[23] However, lower courts have not used this clause to review the constitutionality of state economic regulations.[24]

With the demise of the Privileges or Immunities clause, plaintiffs have sought to protect their economic rights through the substantive element of the Due Process clause.[25] The degree of protection against state limitations of economic liberties has varied widely throughout our nation's history.[26] In the infamous 1905 case *Lochner v. New York*,[27] the Supreme Court found a state law limiting the number of hours that bakers could work per week unconstitutional.[28] The Court found "liberty to contract" to be a fundamental right and applied a strict scrutiny standard of review, holding that the law violated substantive Due Process.[29] In the years following *Lochner*, the Court invalidated hundreds of state laws.[30] This era could be seen as the high-water mark for Fourteenth Amendment substantive Due Process protection of economic liberties.[31]

---

15. *See* Hacker, *supra* note 8, at 680.
16. 86 U.S. 36 (1872).
17. *See id.*
18. *See id.*
19. Hacker, *supra* note 8, at 681.
20. Saenz v. Roe, 526 U.S. 489 (1999).
21. *See id.*
22. Hacker, *supra* note 8, at 676.
23. *Saenz*, 526 U.S. at 528 (Thomas, J., dissenting).
24. *See Powers*, 379 F.3d. at 1214; *see also* Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002).
25. Hacker, *supra* note 8, at 677.
26. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 486–513 (15th ed. 2004).
27. 198 U.S. 45 (1905).
28. *Lochner*, 198 U.S. at 45–46, 64–65.
29. *Id.* at 53–54.
30. Hacker, *supra* note 8, at 685.
31. *See* SULLIVAN & GUNTHER, *supra* note 26.

However, in the wake of the Great Depression, the Court reversed its position in *Nebbia v. New York*.[32] In this case, the Court upheld a New York law fixing milk prices, reasoning that the prices were fixed in the interest of the public.[33] This case broke with *Lochner* in the standard of review used in evaluating state economic regulations.[34] Instead of reviewing the economic regulations with strict scrutiny, the Court applied a rational basis test—a test that is highly deferential to the state legislature.[35] The *Nebbia* Court describes this standard as follows: "If laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are [satisfied]."[36] This abandonment of stare decisis had the effect of the Court upholding many state economic regulations with little to no consideration.[37] Although this rational basis test is highly deferential, the Supreme Court has occasionally used the standard to strike down state laws.[38] Thus, the rational basis test still has "some bite,"[39] and the standard of review is not "toothless," as recognized by numerous courts, including the Tenth Circuit in *Martin v. Bergland*.[40]

Certain cases outline how the test is supposed to be used. "When a statute regulates certain 'fundamental rights' (e.g. voting or abortion) or distinguishes between people on the basis of certain "suspect characteristics (e.g. race or national origin), the statute is subject to 'strict scrutiny.'"[41] Under *Romer v. Evans*,[42] the Court "will uphold a law that neither burdens a fundamental right nor targets a suspect class so long as the legislative classification bears a rational relation to some independent and legitimate legislative end."[43] When applying the test, legislation is strongly presumed to be valid and will be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis."[44] A plaintiff who wants to strike down a piece of state legislation using the rational basis test has the burden to "negative every conceivable basis that might support it."[45] However, the courts insist on knowing the rela-

32. 291 U.S. 502 (1934).
33. Nebbia v. New York, 291 U.S. 502, 502 (1934).
34. *Nebbia*, 291 U.S. at 502.
35. *Id.*
36. *Id.*
37. Hacker, *supra* note 8, at 687.
38. Simpson, *supra* note 4, at 189.
39. *Id.*
40. 639 F.2d 647, 650 (10th Cir. 1981) (rejecting assertion that "no amount of evidence" could overcome the strong presumption of validity afforded to state legislation under rational basis review).
41. Craigmiles v. Giles, 312 F.3d 220, 223 (6th Cir. 2002).
42. 517 U.S. 620 (1996).
43. *Romer*, 517 U.S. at 621.
44. *Craigmiles*, 312 F.3d at 224 (quoting Walker v. Bain, 257 F.3d 660, 668 (6th Cir. 2001)).
45. *Id.* (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973)).

tion between the means and end sought to be attained by a piece of legislation.[46]

Equal Protection jurisprudence closely parallels that of substantive due process.[47] In fact, the *Craigmiles* Court used the same analysis to find the legislation unconstitutional under both clauses.[48] Generally, it is well settled that the rational basis test is the applicable standard of review for both substantive Due Process and Equal Protection claims.[49] However, the Equal Protection clause protects a different aspect of personal liberties than that which is protected by the substantive aspect of the Due Process clause. While the Due Process clause is concerned with violations of rights that affect persons equally, the Equal Protection clause prevents state governments from enacting legislation that arbitrarily treats similar groups differently or arbitrarily treats different groups the same.[50] In fact, the Supreme Court has held that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . . ."[51] If such state legislation is to be constitutional, there must be some "plausible connection between the distinction and a legitimate public purpose."[52] The Court in *Powers* decided to address the plaintiffs' claims in an Equal Protection discussion, but recognized that the "substantive due process analysis proceeds along the same lines as an equal protection analysis . . . ."[53]

III. *POWERS V. HARRIS*

A. Facts

Under Oklahoma law, the funeral industry is regulated by the Oklahoma Funeral Services Licensing Act ("FSLA") and the Board it created.[54] The FSLA stipulates that any person engaged in selling caskets must be a licensed funeral director operating out of a funeral establishment.[55] This restriction is not applied to people engaged in selling other funeral-related merchandise, including urns.[56] This strict regulation is only applied to "time-of-need" casket sales (when the person for whom

46. *See Romer*, 517 U.S. at 632.

47. Anthony B. Sanders, *Exhumation Through Burial: How Challenging Casket Regulations Helped Unearth Economic Substantive Due Process in* Craigmiles v. Giles, 88 MINN. L. REV. 668, 674 (2002).

48. *See generally Craigmiles*, 312 F.3d at 223–30 (describing the standard of review to be the same under both clauses and evaluating the claims under both clauses simultaneously).

49. Sanders, *supra* note 47, at 674.

50. *See* Opening Brief for Appellant at 59, Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (No. 03-6014).

51. Jenness v. Fortson, 403 U.S. 431, 442 (1971).

52. Sunstein, *supra* note 2, at 1690; *see also* Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103 (2003).

53. *Powers*, 379 F.3d at 1215.

54. OKLA. STAT. tit. 59 § 395.1-396.28 (2004).

55. *Id.*

56. Powers v. Harris, 379 F.3d 1208, 1212 (10th Cir. 2004).

the casket is for is already dead).[57] A license is not necessary to sell "pre-need" caskets, but the salesperson must be acting as the agent of a fully licensed funeral director.[58] In fact, plaintiff Kim Powers engaged in the "pre-need" sale of thousands of caskets as the agent of various funeral homes.[59] Also, the licensing requirement only applied to the *intrastate* sale of caskets.[60] Thus, no license is required for an Oklahoman to sell a casket to a customer outside of the state, nor is a license required for an out-of-state salesman to sell a casket to customer located in Oklahoma. If the law were to apply to interstate casket sales, it almost certainly would be held unconstitutional under the dormant commerce clause.[61]

Becoming a licensed funeral director in Oklahoma is not an easy task. "According to the Board's rules, an applicant for a funeral director's license must complete both sixty credit hours of specified undergraduate training and a one-year apprenticeship during which the applicant must embalm twenty-five bodies."[62] Also, applicants are required to pass two exams, one dealing with Oklahoma law.[63] Additionally, to gain a license, a business must meet certain specific requirements, including, "a fixed physical location, a preparation room that meets the requirements for embalming bodies, a funeral-service merchandise-selection room with an inventory of not less than five caskets, and adequate areas for public viewing of human remains."[64] Essentially, to sell caskets in Oklahoma a person has to jump through numerous hoops entirely unrelated to the sale of caskets. In fact, the district court found that "very little specialized knowledge is required to sell caskets."[65]

The plaintiffs, Kim Powers and Dennis Bridges, desired to sell "time-of-need" caskets intrastate in Oklahoma over the internet.[66] They are not licensed under the FSLA and "have no desire to obtain the appropriate Oklahoma licenses because they view their requirements as irrelevant to the operation of an intrastate, Internet, retail, casket business."[67] In order to lawfully engage in their chosen business, the Plaintiffs would have to "spend years of their lives equipping themselves with knowledge

57. *Powers*, 379 F.3d at 1212.
58. *Id.*
59. Opening Brief for Appellant at 11, Powers v. Harris 379 F.3d 1208 (10th Cir. 2004) (No. 03-6014).
60. *Powers*, 379 F.3d at 1212 (emphasis added).
61. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (reasoning that for dormant commerce clause review, "where simple economic protectionism is effected by a state legislation, a virtually *per se* rule of invalidity has been erected"). Incidentally, the *Craigmiles* Court applies this same reasoning to their substantive due process/equal protection analysis. Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002).
62. *Powers*, 379 F.3d at 1212.
63. *Id.*
64. *Id.* at 1212-13.
65. *Id.* at 1213.
66. *Id.*
67. *Id.*

and training which is not directly relevant to selling caskets."[68] The Plaintiffs do not provide any funeral services or offer any other funeral-related products.[69] However, they have refrained from making these kinds of sales because they "have a reasonable and genuine fear that if they were to sell caskets to Oklahoma consumers, they might be prosecuted for violation of the FSLA and Board rules."[70] The Plaintiffs brought suit in federal district court "asserting that the FSLA violates the Privileges and Immunities, Due Process, and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution."[71]

B. Decision

The *Powers* Court quickly dealt with the Privileges or Immunities clause claim by relying on the *Slaughter-House Cases*, reasoning that it was not its place to overrule them.[72] The court then turned to evaluate the merits of the equal protection claim. The court correctly identified the "rational basis test" as the proper tool for its analysis.[73] The rational basis test, as applied in the equal protection context, essentially has two elements: a law's disparate treatment of two similar groups, or similar treatment of different groups, must serve a legitimate government purpose; and any such distinction must be *rationally related* (albeit minimally) to that legitimate government purpose.[74] The defendant Board argued that the interest served by the FSLA was consumer protection because casket purchasers were a "particularly vulnerable group."[75] The defendant Board initially also proffered the argument that the licensure requirement advanced public health, but abandoned this argument before trial.[76]

The *Powers* Court then discussed whether the FSLA was rationally related to serving the government interest of consumer protection.[77] The Plaintiffs presented strong evidence that the FSLA's licensing scheme was not rationally related to furthering the legitimate government interest of consumer protection.[78] The Board did not even argue that the provi-

68. *Id.* at 1214.
69. *Id.* at 1213.
70. *Id.*
71. *Id.* at 1214.
72. *Id.*
73. *Id.* at 1215.
74. *Id.*
75. *Id.*
76. Opening Brief for Appellant at 4-5, Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (No. 03-6014).
77. *Powers*, 379 F.3d at 1215.
78. *Id.* ("Less than five per cent of the education and training requirements necessary for licensure in Oklahoma pertain directly to any knowledge or skills necessary to sell caskets."); *see also* Opening Brief for Appellant at 36-37, Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (No. 03-6014) (arguing that a casket is not a "complex piece of equipment," and that "everything one needs to know about purchasing a casket can be conveyed in just a few minutes;" also pointing out that plaintiff Kim Powers successfully sold caskets on a pre-need basis to grieving individuals (for

sions of the FSLA were relevant to consumer protection; rather, it merely suggested that they were not "wholly irrelevant."[79]

Because of the radical reasoning of the majority, whether the licensing scheme was rationally related to the goal of consumer protection effectively became a moot point. The court decided that the state interest being sought by the FSLA could actually be "protecting the intrastate funeral home industry."[80] Ironically, this is exactly what the plaintiffs had attempted to demonstrate.[81] The court then declared that intrastate economic protectionism, even in the absence of any public value, constituted a legitimate state purpose.[82] Because the licensure requirement was rationally related to protecting funeral directors by giving them a virtual monopoly on casket sales, the legislation was deemed valid.[83] Thus, the court allowed Oklahoma to treat casket retailers differently than retailers of other similar products (as well as treating the very different professions of casket salesmen and funeral directors exactly the same) because the legislation was in furtherance of a legitimate public purpose and rationally related to that purpose.[84] The court then discussed the differences between their reasoning and that of the Sixth Circuit case *Craigmiles v. Giles*.[85]

IV. *CRAIGMILES V. GILES*[86]

A. Facts

Craigmiles v. Giles is a U.S. Sixth Circuit Court of Appeals case with a virtually identical fact pattern to that of *Powers*. Similar to Oklahoma's law at issue in *Powers*, the Tennessee Funeral Directors and Embalmers Act ("FDEA") forbade persons from selling caskets unless they were a licensed funeral director.[87] Also similar to Oklahoma's law, becoming a licensed funeral director required a two year time commitment.[88] An applicant could "complete either one year of course work at an accredited mortuary school and then a one-year apprenticeship with a licensed funeral director or a two-year apprenticeship."[89] After this period of time, the applicant is required to pass the Tennessee Funeral Arts Examination.[90] The district court found that "no more than five percent"

---

many of whom the death of a loved one was imminent) for years without any mortuary education or grief psychology training).

79. *Id.* at 1216.
80. *Id.* at 1218.
81. *Id.*
82. *Id.* at 1222.
83. *Id.*
84. *Id.*
85. *Id.* at 1223–24.
86. 312 F.3d 220 (6th Cir. 2002).
87. *Craigmiles*, 312 F.3d at 222.
88. *Id.*
89. *Id.*
90. *Id.*

of the curriculum at the only accredited funeral director school related to the sale of caskets.[91]

The plaintiffs operated independent casket stores in Chattanooga and Knoxville. Although the stores did sell other funeral merchandise, they "engage[d] in no embalming or arranging of funeral services, cremations, or burials."[92] Both of the plaintiffs' stores only engaged in "time-of-need" sales, "after the death of the intended occupant."[93] The Tennessee Board of Funeral Directors and Embalmers ("FDEA") then issued a cease and desist order, which banned the plaintiffs from continuing their business of selling caskets because they were not licensed funeral directors.[94] When the plaintiffs brought suit, the district court found that the FDEA, as it applied to the plaintiffs' businesses, violated their rights under both the Equal Protection and substantive Due Process clause.[95] However, the court rejected the plaintiffs' argument that the law also was invalid under the Privileges or Immunities clause.[96]

B. Decision

The initial reasoning of the Sixth Circuit in examining the states' appeal mirrors that of the Tenth Circuit in *Powers*. However, the court considered the constitutionality of the law under both the Equal Protection and Due Process clauses simultaneously.[97] The court here also correctly identified the rational basis test as the proper standard of review, "requiring only that the regulation bear some rational relation to a legitimate state interest."[98] The court then went on to discuss the wide deference given to state legislatures under such a test. "Even foolish and misdirected provisions are generally valid if subject only to rational basis review."[99] The court made it clear that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose."[100] This is the essential difference in the reasoning between *Powers* and *Craigmiles*. Once the court decided that protecting the economic interests of licensed funeral directors was not a legitimate government purpose, the Court looked to see whether the FDEA was rationally related to any other legitimate government purpose.[101] Unlike, the defendants in *Powers*, Tennessee proffered two explanations for the legitimate

91. *Id.*
92. *Id.* at 223.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* (quoting Romer v. Evans, 517 U.S. 620, 632 (1996)).
99. *Id.* at 223–24.
100. *Id.* at 224.
101. *Id.* at 225.

government interest being served, claiming the licensure requirement advanced both consumer protection and public health and safety.[102]

The Sixth Circuit was not persuaded by either of these explanations. While recognizing that the quality of a casket could potentially affect public health, the court reasoned that the law "does not require that any particular type of casket, or any casket at all, be used at burial."[103] Also, there was no evidence that caskets sold by licensed funeral directors were any more protective than those sold by unlicensed casket salesman: The only difference was that caskets sold by licensed funeral directors were "systematically more expensive."[104] Thus, the licensing requirement may actually reduce the quality of caskets being used because of the artificially high prices it creates.[105] The court of appeals, like the district court, was not convinced that poor quality caskets posed any health risk whatsoever, but reasoned, "even if casket selection has an effect on public health and safety, restricting the retailing of caskets to licensed funeral directors bears no rational relationship to managing that effect."[106]

The Court next analyzed whether the licensing requirement was rationally related to the legitimate government purpose of consumer protection. Tennessee argued that because the FDEA regulates the conduct of funeral directors, consumers are protected from salesman "making fraudulent misrepresentations, making solicitations after death or when death is imminent, or selling a previously used casket."[107] The court countered this argument in several ways. First, the court reasoned that civil and criminal sanctions are available to govern the conduct of casket salesmen even without the FDEA.[108] The court also reasoned that the "legislature could develop similar standards for casket retailers, or even make Section 317 [of the FDEA (which prevents funeral directors from making fraudulent representations)] directly applicable to casket retailers, without requiring the licensure that is the subject of complaint."[109] The court recognized that the legislature "could . . . have addressed the interest of consumer protection without imposing a prohibitive cost" in the form of two years of unnecessary training.[110]

The state also argued that "the course of study required for licensure trains directors in the best ways to treat individuals who have suffered profound loss."[111] The court rejected this argument, reasoning that indi-

102. *Id.*
103. *Id.*
104. *Id.* at 226.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. Sanders, *supra* note 47, at 684; *Craigmiles*, 312 F.3d at 227–28.
111. *Craigmiles*, 312 F.3d at 288.

viduals purchasing a casket from an independent retailer will still require the services of a licensed funeral director and many other vendors are dealt with by survivors, none of whom are required to have such training.[112]

After finding "no rational relationship to any of the articulated purposes of the state," the Court explicitly examined "the more obvious illegitimate purpose to which licensure provision is very well tailored."[113] The Courts finds this purpose to be imposing a "significant barrier to competition in the casket market."[114] Finally, the Court recognized that "invalidation of economic regulation under the Fourteenth Amendment has been rare in the modern era," but emphasized that its' decision was "not a return to *Lochner*, by which this court would elevate its economic theory over that of legislative bodies."[115] Because the law failed to meet the even minimal requirements of the rational basis test, Justice Boggs and the Sixth Circuit found Tennessee's licensing requirement to sell time-of-need caskets intrastate to be unconstitutional as violating both the plaintiffs' equal protection and substantive due process rights under the Fourteenth Amendment.[116]

V. ANALYSIS

In *Powers*, the Tenth Circuit upheld an Oklahoma law limiting the sale of caskets to licensed funeral directors despite plaintiffs' challenges that the law violated their rights under the Privileges or Immunities and Equal Protection clauses, and the substantive element of the Due Process clause.[117] By doing so, the Tenth Circuit failed to protect the economic liberties of its citizens.

First, this comment will briefly examine the wisdom of using a highly deferential standard of review when protecting individuals' economic rights under the Equal Protection and Due Process clauses. Second, this comment will discuss whether the court could have invalidated the Oklahoma law by relying on the Privileges or Immunities clause, which was intended to protect an individual's right to earn an honest living, and has been recently revived by the Supreme Court. Third, this comment primarily argues that the Tenth Circuit wrongly found naked economic protectionism to be a legitimate government interest for the purpose of rational basis review. This dangerous and radical holding could have drastic implications for the future of economic liberty and is not supported by past precedent. Fourth, this comment argues that the Tenth Circuit also failed to consider the arbitrary nature of the licensure

112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 229.
116. *Id.* at 228–29.
117. Powers v. Harris, 379 F.3d 1208, 1211 (10th Cir. 2004).

requirement. After determining that protecting the intrastate funeral industry is not a legitimate government interest, the Tenth Circuit should have invalidated the state law using the highly deferential rational basis test. Finally, this comment discusses the likely future of *Powers v. Harris*.

A. Do Economic Rights Deserve Greater Protection?

Although the framers intended the courts to be a significant check on legislative power, they have largely been absent in the arena of economic rights for much of this century.[118] The Court now distinguishes between "certain fundamental rights and liberty interests" and economic liberties, the latter of which are less protected.[119] Why should this be the case? Are economic rights, specifically, the right to earn an honest living free from government interference, less important to citizens of this country than other rights? In fact, "there is little justification for eliminating the use of substantive due process for challenges to economic regulations while retaining its use in areas concerning personal liberties."[120]

Modern constitutional jurisprudence makes it extremely difficult for a court to overturn an economic regulation because of the highly deferential rational basis test.[121] This gives the state legislatures much leeway to control the economic affairs of their citizens. Thus, state regulatory powers are at an all time high.[122] Not surprisingly, interest groups now have great influence in legislation.[123] Individuals and corporations "often must pit their economic survival against state regulations seeking to limit or prohibit their rights."[124] Thus, it may be time to reexamine the importance of economic liberties and the role of the courts in protecting them.[125] After all, "a large and active government requires an active judiciary to counter its excesses."[126]

What would be so wrong with the courts taking a cautious step towards returning to the reasoning of *Lochner* and elevating the status of economic rights? Even three of the four dissenting justices in *Lochner* "accepted that a liberty to contract could be found in the Fourteenth Amendment."[127] The only real debate in Lochner was the amount of

118. Simpson, *supra* note 4, at 177.
119. Sanders, *supra* note 47, at 672 (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).
120. Hacker, *supra* note 8, at 735.
121. Simpson, *supra* note 4, at 177.
122. *See id.* at 176.
123. *Id.* at 176-77.
124. Hacker, *supra* note 8, at 675.
125. *See* Simpson, *supra* note 4, at 177.
126. *Id.*
127. Hacker, *supra* note 8, at 685.

deference given to the state legislatures.[128] This "liberty to contract" which the Court relied on was only removed in the face of a national crisis, the Great Depression.[129] Now that this country is in a period of general economic stability, maybe the time is ripe for the Supreme Court to reevaluate the importance and historical significance of economic rights and the protection offered to them by the Fourteenth Amendment. After *Nebbia*, the Court "moved from the extreme of near per se invalidation of economic regulation to the opposite extreme of near per se validation."[130] This overzealous elimination of economic substantive due process should be reexamined.[131]

Such consideration would be consistent with the recent elevation of the right of privacy, illustrated in the Court's decision in *Roe v. Wade*.[132] In this case the Supreme Court effectively invalidated anti-abortion laws by finding privacy to be a fundamental right protected by the substantive due process clause of the Fourteenth Amendment.[133] If privacy can be characterized as a fundamental right, then could not the right to earn an honest living also be characterized as fundamental? Affording economic rights such a status would allow courts to apply a stricter standard of review when confronted with restrictions like the licensure requirement in *Powers*, making their decision to invalidate such needless laws even easier. However, this comment argues that such an expanded judicial role in evaluating economic regulations is not necessary to invalidate the law upheld by the Tenth Circuit in *Powers*.

B. Does the Privileges or Immunities Clause Provide Protection for the Plaintiffs?

Could the Tenth Circuit have relied on the Privileges or Immunities clause to invalidate the Oklahoma licensure requirement? The court correctly noted that "it is [the Supreme] Court's prerogative alone to overrule one of its precedents."[134] It is not the place of the Tenth Circuit to essentially overrule *The Slaughterhouse Cases*.[135] Even the *Craigmiles* Court thought it would be beyond its authority to "breathe new life into the Privileges or Immunities Clause."[136] However, the history of the Fourteenth Amendment, accompanied with the Supreme Court's recent

128. *See generally* Lochner v. New York, 198 U.S. 45 (1905). The dissent in *Lochner* accepted that a liberty to contract could be found in the Constitution. However, the dissent would have upheld the law, which restricted the number of hours bakers could work per day, because it had a "real and substantial" relation to the protection of health." *Id.* at 69. The use of the word "substantial" implies an intermediate standard of review, more exacting than the current minimum rationality standard.

129. *See* Hacker, *supra* note 8, at 685.

130. *Id.* at 730.

131. *Id.*

132. *See* Roe v. Wade, 410 U.S. 113, 152-54 (1973).

133. *Roe*, 410 U.S. at 164–65.

134. *Powers*, 379 F.3d at 1214 (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)).

135. *See id.*

136. *Id.* at 698 (quoting Craigmiles v. Giles, 312 F.3d 220, 228 (6th Cir. 2002)).

decision in *Saenz v. Roe*, merits discussion of whether the clause does in fact provide protection for the plaintiffs in *Powers*.

The Privileges or Immunities clause of the Fourteenth Amendment was modeled after the Article IV Privileges and Immunities clause.[137] The difference between the two clauses is that while the Privileges and Immunities clause protects residents of one state against the action of another state government, the Privileges or Immunities clause was enacted to protect U.S. citizens against state action, including action taken by their own state government.[138] The plaintiffs claim that "[t]he Privileges or Immunities Clause clearly protects Americans against their home state's legislative power when that state's power is exercised in a manner that abridges a privilege or immunity of *national citizenship*."[139] Furthermore, since the Article IV provision undisputedly provides protection for the right to earn an honest living, it can be assumed that the Fourteenth Amendment also protects such a right.[140] At least one of the framers of the clause included within its' scope "the liberty . . . to work in an honest calling and contribute by your toil in some sort to yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil."[141] Because the right to earn an honest living stems from U.S. citizenship and not state citizenship, the Privileges or Immunities clause should afford protection to economic liberties.[142]

The Supreme Court recently showed an interest in reviving the Privileges or Immunities Clause as it applies to citizens' economic rights.[143] *Saenz* signified an important step in reviving the Privileges or Immunities clause.[144] The Court held that "the Privileges or Immunities Clause protected citizens' rights to be treated like other state citizens in the state to which they move, the Court relied on the unenumerated right to travel."[145] Even in his dissent, Justice Thomas expressed an openness to reexamine the meaning of the clause in an appropriate case, using it either in addition to or instead of an equal protection or due process analysis.[146] At the very least, the Supreme Court's decision in *Saenz*, combined with historical background, raises the question of whether economic liberties are protected by the Privileges or Immunities clause

137. Opening Brief for Appellant at 63, Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (No. 03-6014).
138. *Id.* at 64 n.18.
139. *Id.* at 64.
140. *Id.* at 63-64.
141. *Id.* at 64 (quoting CONG. GLOBE, 42nd Cong., 1st Sess. 86 (1871) (statement of Rep. Bingham)).
142. *Id.* at 65.
143. *See generally* Saenz v. Roe, 526 U.S. 489 (1999) (invalidating a durational residency requirement for welfare benefits by relying on the Privileges and Immunities Clause).
144. *See* Hacker, *supra* note 8, at 693–94.
145. *Id.* at 695.
146. *Id.* at 696.

and whether that protection would include a more exacting standard of review than the rational basis test.[147]

The plaintiffs' argument that the Privileges or Immunities clause protects their right to earn an honest living may not square with existing Supreme Court precedent.[148] However, the plaintiffs are correct in the assertion that the Privileges or Immunities clause should protect this right. After all, in our capitalist society, what could be more important to an individual than the right to engage in honest trade to support oneself and one's family? Surely the vast majority of Americans would agree that the freedom to choose a lawful occupation is fundamental to their happiness and survival. Moreover, a more expansive reading of the Privileges or Immunities clause would be beneficial from a legal standpoint because it would relieve courts' excessive reliance on the Equal Protection and substantive Due Process clauses to support economic and individual rights.[149] When reviewing this or a similar case, the Supreme Court should consider expanding the scope of the protection offered by the clause.

C. *Naked Economic Protectionism is NOT a Legitimate Government Interest*

The *Powers* decision split from the Sixth Circuit decision in *Craigmiles* and wrongly upheld an irrational state law that served no legitimate government purpose. By doing so, the court not only failed to protect the economic liberties of Oklahoma citizens, but also blatantly misstated the law. In order to invalidate the Oklahoma licensing scheme, which the Court itself recognizes as a "needless, wasteful requirement,"[150] the Tenth Circuit would not have to take what could be interpreted as extreme measures in reviving the Privileges and Immunities clause or elevating the status of economic rights. Invalidating the Oklahoma law as either violating Fourteenth Amendment substantive due process or equal protection would not be tantamount to a return to *Lochner*. All the Tenth Circuit had to do to strike down the law was adequately apply the current "minimum rationality" standard of review to the given fact situation.

State legislation "is generally upheld under an economic due process analysis if it furthers a permissible police power end."[151] Protecting the "general welfare" is a permissible police power end.[152] What constitutes general welfare? One thing is clear: Purely private interest legisla-

147. Reply Brief for Appellant at 22–23, Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (No. 03-6014).
148. Slaughter House Cases, 86 U.S. 36 (1872).
149. Hacker, *supra* note 8, at 713.
150. *Powers*, 379 F.3d at 1225.
151. Hacker, *supra* note 8, at 733.
152. *Id.*

tion does not protect the general welfare.[153] This type of legislation treats one group of people differently from another group because of a "raw exercise of political power."[154] Such exercises of power are prohibited by our constitution.[155] "Economic redistributions that do not increase community welfare, help a disadvantaged group or those harmed by "natural or market forces," or promote public health or safety are generally impermissible."[156]

No Supreme Court case supports the proposition that naked economic protectionism, without even the guise of furthering the general welfare of the state, is a legitimate government interest.[157] Not only has virtually every court confronted with a similar licensing requirement for casket salespersons invalidated the law,[158] none of them have even entertained the idea that protecting the interests of funeral directors, by itself, constituted a legitimate government interest.[159] The defendants themselves did not even argue such a justification for the law, and instead concocted the far-fetched consumer protection rationale.[160] The plaintiffs also lacked the foresight (albeit understandably) to demonstrate in their arguments why pure economic protectionism is not a legitimate government purpose.[161]

In fact, even the concurring opinion in *Powers* recognized that "all of the cases rest on a fundamental foundation: The discriminatory legislation arguably advances either the general welfare or a public interest."[162] Thus, the *Powers* Court actually engaged in radical judicial reasoning in concluding that the Oklahoma legislature could benefit funeral directors by giving them a virtual monopoly on the sale of caskets without any public interest being served. And let there be no doubt that the funeral directors did benefit from their effective monopoly, at the expense of consumers. Funeral directors in Oklahoma routinely marked up casket prices 300-600%.[163] Even the defendants' own expert witness testified that he had never seen a markup of greater than 300% outside of

153. *See id.* at 734.
154. Sunstein, *supra* note 2, at 1693.
155. *Id.* at 1697.
156. Hacker, *supra* note 8, at 734.
157. *See Powers*, 379 F.3d at 1225 (Tymkovich, J., concurring).
158. Opening brief for Appellant at 26, Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (No. 03-6014).
159. *See* Craigmiles v. Giles, 110 F. Supp. 2d 658 (E.D. Tenn. 2000), *aff'd*, 312 F.3d 220 (6th Cir. 2002); Casket Royale, Inc. v. Mississippi, 124 F. Supp. 2d 434 (S.D. Miss. 2000).
160. *See generally Powers*, 379 F.3d 1208. The defendants did not proffer the argument that the protection of funeral directors, by itself, could be a legitimate state interest. The 10th Circuit devised this rationale on its own.
161. Opening brief for Appellant at 26, Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (No. 03-6014).
162. *Powers*, 379 F.3d at 1225.
163. Opening brief for Appellant at 14, Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (No. 03-6014).

Oklahoma.[164] The complete deference to the legislature embodied in the *Powers* holding puts a stamp of approval on all intrastate private interest legislation, and allows state governments to openly do favors for special interests and friends. This effectively removes all meaning from the term "legitimate." Could a majority now pass a law enjoining a certain individual or group from participating in a business for any reason at all? Could the legislature now give an individual or group a monopoly for any reason at all? This is what the *Powers* majority is apparently authorizing.

The *Powers* reasoning blatantly conflicts with the ideas of the framers of the Constitution. "That Madison included economic liberty within the rights of individuals is clear from his views on how governments often abuse rights."[165] To Madison, a prime example of an unjust government exists "where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations."[166] The Oklahoma law at issue in *Powers* is exactly the type of arbitrary restriction Madison was referring to. Fortunately for proponents of economic liberties, courts need not look all the way back to the Federalist Papers to invalidate such legislation.

Case law precedent directly conflicts with the *Powers* holding. The Sixth Circuit recognized this in *Craigmiles* and declared that "protecting a discrete interest group from economic competition is not a legitimate government purpose."[167] In fact, this proposition was so obvious to the *Craigmiles* Court that they spent little time defending it.[168] To support the proposition, the court cites *City of Philadelphia v. New Jersey*,[169] *H.P. Hood & Sons, Inc. v. Du Mond*,[170] and *Energy Reserves Group, Inc. v. Kansas Power*.[171] The *Powers* Court rejected these cases as applicable precedents because they dealt with state regulations of *interstate* commerce and not *intrastate* commerce.[172] Because the licensing scheme in *Powers* did not apply to casket sales across state borders (interstate, i.e. someone in Oklahoma buying a casket from or selling a casket to someone outside of Oklahoma), it was acceptable.[173] What the Court failed to recognize was that these cases give no indication that the definition of a

164. *Id.*
165. Simpson, *supra* note 4, at 181.
166. *Id.*
167. *Craigmiles*, 312 F.3d at 224.
168. *See id.*
169. 437 U.S. 617 (1978) (finding a New Jersey law banning waste from entering the state to be protectionist and unconstitutional).
170. 336 U.S. 525 (1949) (finding the application of a New York licensing statute for milk processing receiving facilities to be protectionist and unconstitutional).
171. 459 U.S. 400 (1983) (finding that the Kansas Natural Gas Protection Act, which permitted increases in gas prices under contractual escalator clauses was constitutional because regulation of the natural gas industry was directed at protecting consumers and the Act was rationally related to that goal).
172. *Powers*, 379 F.3d at 1218.
173. *See id.*

"legitimate state purpose" should be different under a "dormant" commerce clause analysis than under an equal protection/substantive due process analysis.[174] The *City of Philadelphia* Court simply stated: "Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected."[175] Also, at least some constitutional scholars find that the tests involved in a dormant commerce clause analysis should be virtually the same as the test in an equal protection analysis.[176]

Moreover, as a practical matter, what sense does it make to allow a state to treat its own citizens worse than citizens of other states? Should protection offered by the *dormant* commerce clause be greater than the protection *clearly articulated* in the Fourteenth Amendment? The law in *Powers* effectively gives Oklahoma residents seeking to sell caskets to other Oklahoma residents two options: Either become a licensed funeral by complying with all the licensure requirements, or simply move their place of business just across the Oklahoma border where they could lawfully sell caskets *interstate* in Oklahoma. This "loophole" illustrates the arbitrariness of the law's distinctions.

Although they are not wholly irrelevant, it is entirely unnecessary to use "dormant commerce clause" cases to determine what constitutes a legitimate state purpose for equal protection and substantive due process claims. They may not invalidate state laws, but every substantive due process and equal protection case identifies some sort of general welfare state interest beyond mere economic protectionism.[177]

The *Powers* Court misinterpreted some of these cases when relying on *Williamson v. Lee Optical of Oklahoma*,[178] *Fitzgerald v. Racing Association of Central Iowa*,[179] and *City of New Orleans v. Dukes*.[180] Not only can these cases be differentiated on their facts, but none of them stand for the proposition that the court raises: That naked economic protectionism is a legitimate state purpose.

First of all, in *Fitzgerald*, the Court seems to hint that when tax levels are at issue, an even more deferential standard of review is applied than the usual rational basis standard.[181] The Court also did not phrase

174. *E.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); H.P Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949); Energy Reserves Group, Inc. v. Kansas Power, 459 U.S. 400 (1983).

175. *City of Philadelphia*, 437 U.S. at 624.

176. Sunstein, *supra* note 2, at 1689–90.

177. *See generally Williamson*, 348 U.S. 483 (reasoning the law advanced public health); *see generally Fitzgerald*, 539 U.S. 103 (reasoning the law could have been enacted to encourage riverboat communities); *see generally Dukes*, 427 U.S. 297 (reasoning the law could have been enacted to protect the appearance and custom valued by city residents).

178. 348 U.S. 483 (1955).

179. 539 U.S. 103 (2003).

180. 427 U.S. 297 (1976).

181. Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 107 (2003).

the issue as whether the legislature could favor one gambling industry over another without justification. The Court reasoned that "the legislators may have wanted to encourage the economic development of river communities or to promote riverboat history, say, by providing incentives for riverboats to remain in the State, rather than relocate to other States."[182] The Court also speculated that the legislation might be protecting the "reliance interests of riverboat operators."[183] These rationales show that the Court is searching for a legitimate policy purpose beyond arbitrary economic protectionism. Encouraging economic development and promoting riverboat history certainly relate to the general welfare of the state.

In *Williamson*, the Plaintiffs challenged a law making it "unlawful for any person not a licensed optometrist or ophthalmologist to fit lenses to a face or to duplicate or replace into frames lenses or other optical appliances, except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist."[184] The Court upheld the legislation against a Fourteenth Amendment constitutional challenge.[185] However, implicit in the Court's reasoning was that the restriction was rationally related to the legitimate state interest of public health:[186]

> An eyeglass frame, considered in isolation, is only a piece of merchandise. But an eyeglass frame is not used in isolation . . . it is used with lenses; and lenses, pertaining as they do to the human eye, enter the field of health. Therefore, the legislature might conclude that to regulate one effectively it would have to regulate the other.[187]

Thus, the Supreme Court requires that some public value be invoked in order to legitimize a piece of state legislation.[188] Judge Tymkovich recognized this in his *Powers* concurrence, stating, "[r]ather than hold that a government may always favor one economic actor over another, the Court, if anything, insisted that the legislation advance some public good."[189]

Dukes involved legislation banning street vendors from selling foodstuffs out of pushcarts in a certain area of New Orleans unless they had been operating there for a specified period of time.[190] The Court found that the legislation rationally furthered the legitimate state interest of preserving "the appearance and custom valued by the Quarter's resi-

182. *Id.* at 109.
183. *Id.*
184. Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S 483, 485 (1955).
185. *Williamson*, 348 U.S. at 490.
186. *See id.*
187. *Id.*
188. Sunstein, *supra* note 2, 1713.
189. *Powers*, 379 F.3d at 1225 (Tymkovich, J., concurring).
190. *Dukes*, 427 U.S. at 297.

dents and attractive to tourists."[191] The Court did not hold that legislation could simply favor long-term vendors over short term vendors without an overriding public purpose.[192] On the contrary, the Court described invalid legislation to be "the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment."[193] What could the Court possibly be referring to in this statement, if not a licensing requirement that could plausibly advance no other state interest than the mere economic protection of funeral directors?

The Court went on to defend the difference in treatment as a gradual approach to limiting street vendors and reasoned that the city could have reasonably been concerned about the reliance interest of the older vendors.[194] Again, this reasoning used by the Court here does not lend support to the *Powers* holding that "intra-state economic protectionism . . . is a legitimate government interest."[195] Of course, the argument could be made that upholding the licensing requirements in Oklahoma would further the reliance interests of funeral directors who have always enjoyed a monopoly on casket sales. However, none of the cases discussed lend any credibility to the assertion that a piece of legislation can be justified on a reliance interest alone.[196] Moreover, there is no gradual opening of the intrastate casket market over time, nor is there evidence that funeral directors in Oklahoma enjoyed a monopoly on the sale of caskets prior to 1989.[197] Also, neither the defendant Board nor the Tenth Circuit relied on such reasoning.

Even the concurring opinion in *Powers* agrees that economic protectionism alone, without any other legitimate government interest, is not a legitimate state interest.[198] After examining *Williamson*, *Dukes*, and *Fitzgerald*, Judge Tymkovich reasoned "the majority, in contrast to these precedents, effectively imports a standard that could even credit legislative classifications that advance no general state interest."[199] If economic protectionism is a legitimate state interest, then what justification would not be considered legitimate? There must be some principled purpose behind a government action that (at least in theory) relates to the overall good of the society.

---

191. *Id.* at 304.
192. *See id.*
193. *Id.* at 303–04.
194. *Id.* at 304–05.
195. *Powers*, 379 F.3d at 1222.
196. *See generally Williamson*, 348 U.S. 483 (reasoning the law advanced public health); *see generally Fitzgerald*, 539 U.S. 103 (reasoning the law could have been enacted to encourage riverboat communities); *see generally Dukes*, 427 U.S. 297 (reasoning the law could have been enacted to protect the appearance and custom valued by city residents).
197. Opening Brief for Appellant, Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (No. 03-6014).
198. *Powers*, 379 F.3d at 1226 (Tymkovich, J., concurring).
199. *Id.*

Requiring a legitimate state interest that somehow relates to a public value or benefit is not only consistent with past precedent—it also makes sense. Requiring a public value ends to justify legislation protects against the power of factions that worried Thomas Jefferson.[200] Requiring something more than a naked economic preference to validate a piece of legislation helps to ensure that state government action truly promotes the public welfare, and prevents interest groups from exercising raw political power.[201] "Moreover, it reflects the notion that the role of government is not to implement or trade off preexisting private interests, but to select public values."[202] A return to *Lochner* is entirely unnecessary to support such a proposition. In fact, "the minimum requirement that government decisions be something other than a raw exercise of political power has been embodied in constitutional doctrine under the due process clause before, during, and after the *Lochner* era."[203]

With the ability to pass purely protectionist legislation, state governments would have virtually unlimited power to regulate every aspect of their economy. Imagine a society where every profession was required to be licensed by the government. Political savvy and high-powered connections would determine a person's livelihood. One's quality craftsmanship or skill would be entirely irrelevant to their success in business. Prices on all goods would be inflated, and a black market would inevitably open, pushing honest businessmen underground. Although this sounds extreme, such a controlling state government would be perfectly constitutional under the majority's holding.

The *Powers* Court also failed to apply the reasoning of *Cleburne v. Cleburne Living Center* as the *Craigmiles* Court did.[204] The Court seems to inconsistently reject the notion that *Cleburne* uses anything but a typical rational basis standard of review while recognizing *Cleburne* as some sort of anomaly.[205] In its discussion of *Cleburne*, the majority gives its only indication of what would constitute an illegitimate government interest, namely, a "bare desire to harm a politically unpopular minority."[206] The Court's reasoning implies that even if the legislation was designed to harm non-licensed casket salespeople, it is valid because it furthers the legitimate government interest of benefiting funeral directors. After all, casket salespeople are not a politically unpopular minority. The *Powers* Court seems to be saying that state governments can do whatever they want as long as their objective is not tantamount to obvi-

200. Sunstein, *supra* note 2, at 1697.
201. *Id.* at 1689.
202. *Id.* at 1697.
203. *Id.*
204. *Powers*, 379 F.3d at 1224 (rejecting *Cleburne* for reasons that are not quite clear in the opinion).
205. *Id.*
206. *Id.*

ous and invidious racism.[207] This seems like a rather lenient place to draw the line on permissible state action.

It is important to note that the *Powers* majority is completely unsatisfied with Oklahoma's regulatory scheme.[208] In fact, the court was not able to validate the law using traditional rational basis analysis (i.e. examining whether the law is rationally related to a legitimate purpose relating to the public good).[209] Instead, the Tenth Circuit had to embrace the troubling and highly suspect economic protection rationale, which was not even put forth by the defendants.[210] In doing so, the court impermissibly broadened the definition of what constitutes a legitimate government purpose, and deviated from any sort of traditional rational basis review of state economic regulations.

How the Tenth Circuit would have ruled had it considered only the consumer protection rationale is uncertain. However, if it had been persuaded by the defendant's arguments, there would be no need to declare economic protectionism a legitimate state interest. While it is possible that the court wanted to use this case to establish a precedent under which economic protectionism is an acceptable state interest, it is more likely that the majority wished to defer to the Oklahoma legislature, but simply could not bring itself to conclude that the licensure requirement was rationally related to consumer protection. Thus, the court had to find another way to validate the law.

Such judicial restraint in the face of legislation that the court knows to be wrong is dangerous. According to Richard Epstein, "when [courts] use transparent arguments to justify dubious legislation, they cannot raise the level of debate. When courts . . . hold that the state has the right to say X, when they know X is wrong, they fritter away their own political authority on an indefensible cause."[211]

After examining the plaintiffs' arguments, the court should have found the Oklahoma law to be unconstitutional under a traditional rational basis review because it is not rationally related to consumer protection. Although the court may have been obligated to seek out other possible justifications for the law,[212] economic protectionism is *not* a legitimate justification.

D. The Arbitrary Nature of the Oklahoma Licensing Scheme

One area of analysis that neither the *Powers* Court nor the *Craigmiles* Court focused on was the arbitrary nature of a regulating scheme

207. *See id.*
208. *Powers*, 379 F.3d at 1225.
209. *Id.*
210. *Id.* at 1218-22.
211. Simpson, *supra* note 4, at 190.
212. *Powers*, 379 F.3d at 1218.

that requires years of study completely unrelated to one's chosen profession. The *Craigmiles* Court "missed an opportunity to demonstrate how absurd the FDEA's requirements truly are."[213] Even the majority opinion in *Nebbia* recognized that "[p]rice control, *like any other form of regulation,* is unconstitutional only if *arbitrary, discriminatory, or demonstrably irrelevant* to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."[214] This "any other form of regulation" would presumably include industry licensure requirements.[215]

The Oklahoma law at issue violates the Equal Protection clause by both arbitrarily treating similar groups differently and arbitrarily treating quite different groups exactly the same.[216] First of all, the law arbitrarily treats casket salespeople differently than people selling other merchandise, "such as hardware, books and computers," because Oklahoma law does not force people seeking to sell these types of merchandise to spend years of their lives learning knowledge that is useless to their chosen trade.[217] Moreover, Oklahoma does not require a license to sell even other funeral merchandise, such as urns or flowers.

The Oklahoma law also arbitrarily (and unconstitutionally) treats two very different professions as if they were the same.[218] A funeral director's role is fundamentally different from that of a casket salesperson. A casket salesperson does not need the extensive training required of a licensed funeral director.[219] However, the Oklahoma law at issue here "treats two distinct occupations—funeral directing and casket retailing—as if they were the same . . . ."[220]

The *Fitzgerald* Court, quoting *Allied Stores of Ohio, Inc. v. Bowers*, reasoned that "the Equal Protection Clause requires States, when enacting tax laws, to 'proceed upon a rational basis' and not to 'resort to a classification that is palpably arbitrary.'"[221] If Equal Protection provides that tax laws cannot be arbitrary, then should it also not provide for licensing measures to also not be arbitrary? What other arbitrary method could the state of Oklahoma employ to regulate the sale of caskets? Could the legislature vote to simply find a random homeless man on the street and give him a monopoly on casket sales? This would "conceiva-

213. Sanders, *supra* note 47, at 685.
214. Nebbia v. New York, 291 U.S. 502, 539 (1934) (emphasis added).
215. *Nebbia*, 291 U.S. at 539.
216. Opening Brief of Appellants at 59, Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (No. 03-6014).
217. *Id.* at 60.
218. *Id.* at 61.
219. *See Craigmiles*, 312 F.3d at 220.
220. Opening Brief of Appellants at 61, Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (No. 03-6014).
221. *Fitzgerald*, 539 U.S. at 107 (quoting Allied Stories of Ohio, Inc. v. Bowers, 358 U.S. 522, 527 (1959)).

bly" serve the government interest of regulating casket sales because there would only be one person to oversee. Moreover, it would certainly advance the "legitimate" government interest in protecting the homeless man's monopoly.[222]

When applying the rational basis test to intrastate economic regulations, the defendant Board in *Powers* claims that any conceivable government interest would be sufficient to validate the challenged legislation.[223] The Board was essentially arguing that if the Oklahoma licensing scheme could conceivably do something good (i.e., further consumer protection), then it should be valid under the rational basis test.[224]

In contrast, *Fitzgerald* stands for the proposition that "[t]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification." Under *Fitzgerald*, there must be a "plausible inference" that a certain piece of legislation was actually enacted to advance "some legitimate government interest."[225] The appropriate question is not whether the licensing requirement could advance consumer protection in some hypothetical fact situation, but whether it is plausible to believe that the legislature passed the law to advance consumer protection.[226] If the court is looking for just any conceivable policy reason, then there will hardly be any law that will not pass the rational basis test. Even the most arbitrary of classifications could conceivably relate to some public good. For example, under the district court's assumptions, a legislature could decide to require a person to be a licensed funeral director to sell not only caskets, but also "shoes, hamburgers, washing machines, computers, or any other type of merchandise—because, of course, the increased regulatory oversight of those transactions" could conceivably further the legitimate state interest of consumer protection.[227] Of course, "[i]t is axiomatic that increased government regulation of a particular transaction can provide greater protection for consumers."[228] This mere fact does not prevent a licensure requirement from being unreasonable or arbitrary.

What if the state of Oklahoma decided to require that casket salespeople be not only licensed funeral directors, but also licensed physicians, because some knowledge of anatomy would be helpful in their

222. *See generally Powers*, 379 F.3d at 1208 (reasoning that granting one *group* a monopoly, for the sole benefit of that group, is legitimate. Extending this reasoning, granting one person a monopoly would also be legitimate.).

223. *See id.*

224. Reply Brief of Appellants at 2, Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (No. 03-6014).

225. Reply Brief of Appellants at 2–3, Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (No. 03-6014) (quoting Fitzgerald v. Racing Ass'n of Central Iowa, 123 S. Ct. 2156, 2160 (2003)).

226. *See id.* at 2–3 & n.2 (pointing out that the actual motivations of the legislature are entirely irrelevant under a rational basis review).

227. *Id.* at 7.

228. *Id.*

trade?[229] Could the legislature further force people seeking to sell caskets to become licensed pilots or licensed architects?[230] There must be a point where the relationship between the knowledge actually required of casket salespeople and the requirements of the Oklahoma licensing scheme "[rise] to the level of arbitrary and unreasonable."[231] A proper examination of the facts reveals that the licensing scheme in this case, which requires casket salespeople to spend years of their lives learning information wholly irrelevant to their chosen profession, reaches this threshold.

E. The Likely Fate of Powers v. Harris

Now that the plaintiffs have filed a *writ of certiorari* with the United States Supreme Court to appeal the Tenth Circuit's decision in *Powers*, the Supreme Court will have an opportunity to decide this important issue and resolve the split between the Tenth and Sixth Circuits. This survey suggests that the Court should evaluate Oklahoma's licensing scheme with a stricter standard of review than minimum rationality by either (1) applying the Privileges or Immunities clause or (2) elevating the status of the right to earn an honest living that it might receive greater judicial scrutiny. However, even if the Court analyzes this case using traditional rational basis review, it should first use the opportunity presented in *Powers* to announce that economic protectionism is not a legitimate state purpose. This will prevent future courts from making the mistake of the Tenth Circuit, and confusing deferential review with the complete absence of review.

Thereafter, the Supreme Court can either accept the consumer protection rationale, or invalidate the law. This survey anticipates that the Supreme Court would likely choose between the reasoning of the district court in *Powers* and the reasoning of the *Craigmiles* court. Because the plaintiffs presented incredibly strong evidence that the licensure requirement could not have conceivably been passed to protect consumers,[232] this survey argues the Court should determine that the legislation is not rationally related to consumer protection.

---

229. Opening Brief of Appellants at 47, Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (No. 03-6014).

230. *Id.*

231. *Id.*

232. The plaintiffs argue that if the licensing requirement truly was enacted to advance consumer protection, then the legislation is plagued with inconsistencies. The plaintiffs/appellants used an interesting analogy in their Opening Brief:

> Imagine [if] the State said that one possible justification for its casket licensing requirements was the problem of spontaneously-combusting caskets. Presumably it would arouse at least some suspicion if, in addition to providing that only licensed funeral directors may sell caskets, the legislature also decreed that caskets be stored only in wooden buildings. True, that provision wouldn't *necessarily* mean the legislature's avowed concern about flaming caskets was specious, but it would certainly tend to cast doubt on it. And eventually, if enough provisions like that were piled one on top of another, a review-

The Court must recognize that invalidating this law would not symbolize a return to or even a step in the direction of *Lochner* (even though that might not be such a bad thing). It is true that legislation is rarely invalidated under the rational basis test.[233] However, the rational basis test is still a *test*, and it is possible for some pieces of legislation to fail. The fact that the defendants initially proffered a public health argument and later dropped it shows that some rationales simply will not hold.[234] If the Court were to accept the consumer protection rationale, the test would effectively lose all meaning, leaving lower courts powerless to strike down even the most absurd and arbitrary economic regulations.

Even the concurring judge in *Powers* admits that he "can imagine a different set of facts where the legislative classification is so lopsided in favor of personal interests at the expense of the public good, or so far removed from plausibly advancing a public interest that a rationale of 'protectionism' would fail."[235] Although the concurring opinion deserves credit for not completely eliminating equal protection of economic liberties, it is difficult to imagine legislation further "removed from plausibly advancing a public interest" [236] than the licensing requirements for casket salespeople in Oklahoma.

In summary, the *Powers* Court failed to protect the economic liberties of its citizens by engaging in radical judicial reasoning. A strong argument can be made that economic rights deserve more protection than they are presently afforded by substantive due process jurisprudence. Another strong argument can be made that the Privileges or Immunities clause should provide at least some protection for economic liberties against state interference. However, the Tenth Circuit needed only to rely on the highly deferential rational-basis test to invalidate Oklahoma's

---

ing court might well conclude that the State's flaming-casket rationale was simply too riddled with inconsistencies to take seriously.

Opening Brief of Appellants at 53–54, Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (No. 03-6014).

Consider the following inconsistencies in the licensing requirement, assuming it was enacted to protect consumers. The licensing requirement only applies to "time-of-need" casket sales. However, there is evidence that "pre-need" customers, for whom the death of a loved one is imminent, are often grieving as well, and thus are just as vulnerable as "time-of-need" customers. The licensing requirement is applied only to casket sales, and not the sale of other funeral-related goods, including urns, which are also receptacles for human remains. The licensing requirement is directly inconsistent the position of the Federal Trade Commission, which "has enacted specific rules to ensure that consumers are not forced to buy caskets from funeral homes." *Id.* The regulation directly injures consumers through the outrageous markup in price funeral directors apply to caskets. Finally, the provision that the law only apply to intrastate casket sales effectively undoes any protection that consumers might have under the law. Out-of-state casket salespeople do not have to be licensed in any way and do not have to go through any training. These inconsistencies make it clear that the legislature could not have plausibly enacted the licensure requirements to advance the legitimate public interest of consumer protection. *See id.* at 54–57.

233. *Powers*, 379 F.3d at 1218.

234. *Id.*

235. *Id.* at 1226 (Tymkovich, J., concurring).

236. *Id.*

licensing requirement. Unfortunately, they declared naked economic protectionism, by itself, to be a legitimate state interest. This holding is not supported by past precedent, historical insight, or common sense. The Tenth Circuit should have found that protecting the economic interests of funeral directors was not by itself a legitimate state purpose. Then, like the court in *Craigmiles*, the *Powers* Court should have adequately applied the rational basis test to strike down the legislation.

VI. CONCLUSION

In recent times, economic liberties have been almost completely ignored by the courts. However, economic liberties may still find some minimal protections under the Equal Protection and substantive Due Process clauses of the Fourteenth Amendment. Unfortunately, this protection comes in the form of the highly deferential rational basis test. This test requires that a piece of legislation be rationally related to a legitimate government interest. The court in *Powers v. Harris* wrongly concluded that economic protectionism is a legitimate government interest. The enactment of naked preferences by state legislatures is absolutely prohibited by both the Equal Protection and the substantive Due Process clauses.[237] Moreover, allowing states to pass legislation based solely on the raw exercise of political power conflicts with the views of the founding fathers that legislatures should not be used for factional takeovers.[238] The Sixth Circuit decided a virtually identical case much more appropriately in *Craigmiles v. Giles*. The *Craigmiles* Court correctly identified legislation unmistakably benefiting only a private interest as serving an illegitimate government interest, and further found that the wholly arbitrary licensing requirements were not rationally related to the legitimate government interest of consumer protection. Hopefully, the Supreme Court will agree with *Craigmiles* and refuse to place the last nail in the coffin of economic liberties. The Supreme Court should overrule *Powers v. Harris* and hold that purely protectionist legislation does not further a legitimate government interest, and arbitrary licensing requirements—such as those in Oklahoma governing licensing of casket salespeople discussed here—are not rationally related to consumer protection or any other legitimate government interest.

*Jim Thompson**

237. Sunstein, *supra* note 2, at 1689.

238. Simpson, *supra* note 4, at 173.

* J.D./M.B.A. Candidate, 2007, University of Denver Sturm College of Law. The author would to thank Clark Neily and the Institute for Justice.