

## **Buried Online: State Laws That Limit E-Commerce in Caskets**

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### **Abstract**

Consumers seeking to purchase caskets online could benefit from the Supreme Court's 2005 decision that states cannot discriminate against interstate direct wine shipment. Federal courts have reached conflicting conclusions when asked whether state laws requiring casket sellers to be licensed funeral directors violate the U.S. Constitution's Due Process Clause. In *Powers v. Harris*, the 10th Circuit even offered an unprecedented ruling that economic protectionism is a legitimate state interest that can justify otherwise unconstitutional policies. In *Granholm v. Heald*, however, the Supreme Court declared that discriminatory barriers to interstate wine shipment must be justified by a legitimate state interest, and states must present real evidence that the discrimination is necessary to accomplish their policy objectives. The Court conducted a fact-intensive analysis which concluded the states had failed to make a persuasive case in favor of discrimination against out-of-state wine sellers. Examining the economic evidence, we find that state laws which impede electronic commerce in caskets would almost certainly fail a *Granholm* style factual analysis. This implies that such laws could be held unconstitutional under the Commerce Clause, if a plaintiff brought a challenge similar to the one in *Granholm*. Our analysis also suggests that the laws are vulnerable to an Equal Protection or Due Process challenge if courts consider whether evidence actually supports the state's defense.

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## Introduction

The Internet now affects the market for virtually every good and service imaginable, from cars and contact lenses to teaching and telemedicine. Perhaps not surprisingly, the Internet is also affecting the funeral market. Independent vendors often sell caskets online at much lower prices than funeral homes, which typically mark up their caskets by 300-400%. Many online vendors also offer a greater variety, such as individualized caskets with western or Victorian themes. One online vendor features caskets emblazoned with the phrase “Return to Sender.”

Some states, however, have adopted regulations that could limit online casket sales. In approximately ten states, state law permits retail casket sales only through a vendor who has a funeral director’s license or operates a physical funeral establishment. These requirements can impose high costs in both time and money. In South Carolina, for example, a licensee must complete an apprenticeship that lasts “a minimum of twenty-four months.” Proponents argue that such regulations protect consumers by preventing high-pressure sales tactics and ensuring proper burials, while critics counter that such regulations merely protect funeral homes from competition.

Partly because of their high costs and ambiguous benefits, these types of funeral regulations have come under legal attack. In three recent cases, federal courts struck regulations pursuant to the rational basis test after finding that they did not advance any legitimate state interests. A fourth court upheld similar regulations, despite finding no evidence that the regulations benefited casket buyers. In a remarkable opinion, the court concluded that economic protectionism for licensed funeral directors, by itself, qualified as a legitimate state interest.

A recent Supreme Court decision may further alter the analysis of state regulations that impede e-commerce in favor of local merchants. In *Granholm v. Heald*, the Court struck down discriminatory bans against interstate direct shipping of wine, including state laws that required an out-of-state supplier to maintain an in-state “physical presence” to do business on equal terms with in-state suppliers. In so holding, the Court recognized that pre-existing state regulations can impede the flow of e-commerce, and used empirical evidence to evaluate the regulations’ effect on consumers and state interests. The Court conducted a fact-intensive analysis which concluded the states had failed to make a persuasive case in favor of discrimination against out-of-state wine sellers. Although *Granholm* involved the negative Commerce Clause rather than the Equal Protection or Due Process Clause, the Court’s rationale ultimately may affect the analysis of regulations in the funeral industry and other markets affected by e-commerce, including automobiles, real estate, teaching, and medicine.

Examining the economic evidence, we find that state funeral regulations which impede electronic commerce in caskets would almost certainly fail a *Granholm*-style factual analysis. This implies that such regulations could be held unconstitutional under the Commerce Clause, if a plaintiff mounts a challenge similar to the one in *Granholm*. Our analysis also suggests that the laws are vulnerable to an Equal Protection or Due Process challenge if courts consider whether evidence actually supports the state’s defense.

Part I of this Article summarizes the recent cases involving state regulation of casket sales. Part II explains how *Granholm* could alter the analysis of these regulations, as well as state regulations involving e-commerce generally. Part III examines state casket regulations through the prism of a *Granholm* analysis, including a discussion of the casket market, the benefit of e-commerce for consumers, and the data regarding consumer welfare and consumer protection. Part IV concludes.

## I. Recent Funeral Cases

In four recent cases, courts addressed the constitutionality of state casket regulations.<sup>2</sup> In each case, state statutes and regulations limited casket sales to licensed funeral directors, but also erected significant obstacles to obtaining a license. Typically, the state required a casket vendor to obtain a “funeral director” and a “funeral establishment” license as a prerequisite to selling caskets. The plaintiffs—casket vendors and consumers—challenged the statutes on various constitutional grounds, such as the Commerce Clause and the Fourteenth Amendment’s Due Process Clause. They argued that the licensing requirements were not rationally related to any legitimate state interest, because the requirements had no rational relation to the business of selling caskets. The states countered that their laws advanced legitimate consumer protection goals, such as protecting grieving consumers from overreaching sales tactics and ensuring the safe disposal of human remains.

All four courts analyzed the regulations under the rational basis test. In three of the cases, out of Tennessee, Mississippi, and Georgia, the courts struck the statutes. These courts concluded that the licensing requirements advanced no legitimate state interest, and that in any event, the states had less restrictive means of achieving their goals. In the fourth case, out of Oklahoma, the court held that economic protectionism alone qualified as a legitimate state interest for constitutional purposes.

### A. Cases Striking Licensing Requirements

The leading case, *Craigmiles v. Giles*, involved the Tennessee Funeral Directors and Embalmers Act. The Act forbade anyone from selling caskets unless they obtained a state “funeral director” license. To obtain a license, an applicant had to complete either (1) one year of study at the only mortuary school accredited in Tennessee, plus a one-year apprenticeship with an existing funeral director, or (2) a two-year apprenticeship. After the two years, the applicant then had to pass a funeral arts test. Most of the applicant’s training, however, had little to do with selling caskets. Expert witnesses testified that no more than 5% of the mortuary school’s curriculum involved caskets and urns, and less than 15% of the questions on the funeral test dealt with caskets and

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<sup>2</sup> *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), *aff’d* 110 F. Supp. 2d 658 (E.D. Tenn. 2000); *Powers v. Harris*, 379 F.3d 1208 (10<sup>th</sup> Cir. 2004), cert. denied, 125 S. Ct. 1638 (2005); *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434 (S.D. Miss. 2000); *Peachtree Caskets Direct, Inc. v. State Bd. of Funeral Serv.*, No. Civ. 1:98-CV-3084-MHS, 1999 WL 33651794 (N.D. Ga. Feb. 9, 1999).

urns. Much of the remaining coursework dealt with extraneous issues such as embalming or “restorative art.”<sup>3</sup>

Nathaniel Craigmiles operated two independent casket stores that sold caskets, urns, flower holders, and other funeral merchandise. His stores did not embalm bodies or arrange funeral services. Based on the Tennessee Act, however, the Tennessee Funeral Board issued a cease and desist order to bar Craigmiles from selling caskets or other merchandise. Represented by the libertarian public interest group the Institute for Justice, Craigmiles and other plaintiffs sued on the ground that the statute, as applied to him, violated the Due Process, Equal Protection, and Privileges or Immunities Clauses of the 14<sup>th</sup> Amendment.

The Sixth Circuit analyzed the case using the rational basis test. Under that test, a regulation is constitutional if it bears some rational relation to a legitimate state interest. As the court explained, a statute enjoys a strong presumption of validity, and is valid “if there is any reasonably conceivable state of facts that could provide a rational basis.” To justify such a statute, the state need not provide “an exquisite evidentiary record” but only “rational speculation linking the regulation to a legitimate purpose, even unsupported by evidence or empirical data.” The court stated, however, that “Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose.”<sup>4</sup>

Turning to Tennessee’s Act, the court found that the law was “nothing more than an attempt to prevent economic competition.” In the first place, the court found that the statute did not promote public health and safety. The plaintiffs did not embalm or otherwise handle the bodies. The court stated that, in theory, low quality caskets could potentially threaten public health if they leaked, but the court noted that the Act imposed no safety standards on caskets; the Act did not require that consumers use any particular type of casket or, indeed, any casket at all. Moreover, the Act had the practical result of increasing casket prices, which likely led consumers to buy relatively less protective caskets. For similar reasons, the court also discounted the state’s consumer protection rationale. Addressing concerns about fraud, the court held that the Act’s licensing requirement was overbroad because general consumer protection laws already applied to retailers, and the state could always apply more stringent laws to retailers without requiring licensing. In any event, consumers would still have to consult a licensed funeral director for arranging services and handling the body.<sup>5</sup>

After disposing of the Act’s proffered rationales, the court concluded that Tennessee’s actions were simply “naked attempts to raise a fortress protecting the monopoly rents that funeral directors extract from consumers.” The court found that “[t]he licensure requirement imposes a significant barrier to competition in the casket market” by “protecting licensed funeral directors from competition on caskets.” As the court explained, “dedicating two years and thousands of dollars to the education and training required for licensure is undoubtedly a significant barrier to

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<sup>3</sup> Craigmiles, 312 F.3d at 322.

<sup>4</sup> *Id.* at 224-25.

<sup>5</sup> *Id.* at 224-25.

entering the Tennessee casket markets.” These entry barriers led to higher prices for consumers. As the court found, “funeral home operators generally mark up the price of caskets 250 to 600%, whereas casket retailers sell caskets at much smaller margins.”<sup>6</sup>

Courts used similar reasoning to invalidate funeral regulations in Georgia and Mississippi. In *Peachtree Caskets Direct, Inc. v. State Board of Funeral Service of Georgia*, a district court enjoined enforcement of Georgia’s licensing scheme because “neither the statute nor any rules of the [Board] contain standards for the design, construction, or sale of caskets or alternative containers.”<sup>7</sup> Similarly, in *Casket Royale, Inc. v. Mississippi*, the district court acknowledged that the state had a legitimate interest in the prompt disposition of human remains and consumer protection, but held that the state’s licensing scheme bore no rational relationship to those purposes. For example, Mississippi “failed to show that the licensing requirement in any way speeds the process of burial . . . [or] to provide any evidence that unlicensed dealers slow burial or cremation.”<sup>8</sup> In addition, although Mississippi had expressed concern about vendors soliciting dead bodies, its license requirement did not prevent licensees from soliciting casket sales. As a result, the court concluded that Mississippi’s law protected funeral homes at the expense of consumers: “As a result of this [licensing] requirement, consumers in Mississippi are offered fewer choices when it comes to selecting a casket. Consequently, there is less price competition among the sellers of caskets. Ultimately, the consumer is harmed by this regulation as one is forced to pay higher prices in a far less competitive environment.”<sup>9</sup>

In addition to these court cases, an opinion from the Texas Attorney General similarly concluded that, under Texas law, the state should allow vendors to sell caskets without a license. As the Attorney General explained, “while a casket indeed constitutes funeral merchandise, the simple sale of a casket, without more, is not an act of funeral directing and accordingly does not violate” Texas law.<sup>10</sup> The opinion noted that the “sale does not directly involve the disposition of a body,” and that “what distinguishes a funeral director is ‘the duty . . . to take charge of,’ and prepare for burial or other disposition, a dead human body.”<sup>11</sup>

## **B. Cases Upholding Licensing Requirements**

In contrast to these decisions, the Tenth Circuit recently held that licensing requirements do, in fact, further a legitimate state interest—economic protectionism. In *Powers v. Harris*,<sup>12</sup> the court considered Oklahoma’s Funeral Services Licensing Act, which required that anyone engaged in the sale of funeral merchandise, including caskets, have a funeral director’s license and operate

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<sup>6</sup> *Id.*

<sup>7</sup> 1999 WL 33651794, at \*1 (N.D. Ga. Feb. 9, 1999).

<sup>8</sup> 124 F.Supp.2d. 434, 438 (S.D. Miss. 2000).

<sup>9</sup> *Id.* at 440. See also Office of Mississippi AG, Opinion No. 2003-0588, 2003 WL 22970542 (applying Casket Royale to Mississippi regulations).

<sup>10</sup> Tex. Atty. Gen. Op. JC-0505 (2002) at 1.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> 379 F.3d 1208 (10<sup>th</sup> Cir. 2004), cert. denied, 125 S.Ct. 1638 (2005).

out of a licensed funeral establishment. To obtain a license, a candidate must, among other things, graduate from an accredited program of mortuary science, complete sixty college semester hours at an accredited institution of higher education, pass two exams, and complete a one-year apprenticeship in a funeral home, “during which the applicant must embalm 25 bodies.” Under the Act, a “funeral establishment” must have a fixed physical location, preparation room for embalming bodies, merchandise-selection room with at least five caskets, and adequate space for public viewing of human remains.<sup>13</sup> The Act extends to intrastate sales only. Out-of-state vendors can sell caskets directly to Oklahoma consumers, and Oklahoma vendors can sell caskets to out-of-state consumers.

The plaintiff, an online casket vender based in Oklahoma, charged that the Act bore no rational relation to Oklahoma’s proffered rationale of protecting consumers. Like the plaintiffs in *Craigmiles*, the plaintiffs pointed out that less than 5% of the education and training requirements related directly to selling caskets. Oklahoma, like Tennessee, countered that the regulations were not “wholly irrelevant” to the state’s interests because some funeral consumers may be vulnerable to overreaching sales tactics. Oklahoma also argued that the state deserved “leeway to approach a perceived problem incrementally.”<sup>14</sup>

Unlike *Craigmiles*, however, the *Powers* court ignored the question of whether the state’s statutes actually served the interests of consumers. Instead, the court stated that it was “obliged to consider every plausible legitimate state interest that might support the [Act]—not just the consumer-protection interest forwarded by the parties.”<sup>15</sup> Accordingly, the court proceeded directly to consider “whether protecting the intrastate funeral industry, absent a violation of a specific constitutional provision or a valid federal statute, constitutes a legitimate state interest.”<sup>16</sup>

In a decision that embodies the worst fears of Mancur Olson’s *The Rise and Decline of Nations*, the court held that the naked protectionism qualifies as a legitimate state interest. “[T]he Supreme Court has consistently held that protecting or favoring one particular intrastate industry, absent a specific federal constitutional or statutory violation, is a legitimate state interest.”<sup>17</sup> As the court explained, “dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments.”<sup>18</sup> Therefore, “in practical terms, we would paralyze state governments if we undertook a probing review of each of their actions.”<sup>19</sup> To strike Oklahoma’s protectionist scheme for funeral homes would have the effect of threatening licensing schemes for all professionals, including doctors, electricians, or plumbers.<sup>20</sup> Faced with the prospect of unlicensed accountants or even lawyers, the court upheld the Act’s

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<sup>13</sup> *Id.* at 1213.

<sup>14</sup> *Id.* at 1216 (citation omitted).

<sup>15</sup> *Id.* at 1217.

<sup>16</sup> *Id.* at 1218.

<sup>17</sup> *Id.* at 1220.

<sup>18</sup> *Id.* at 1221.

<sup>19</sup> *Id.* at 1218.

<sup>20</sup> *Id.* at 1222.

constitutionality because “[t]here can be no serious dispute that the [Act] is ‘very well tailored’ to protecting the intrastate funeral-home industry.”<sup>21</sup>

The court criticized *Craigmiles* for relying on cases involving interstate, not intrastate, commerce. “Our country’s constitutionally enshrined policy favoring a national marketplace is simply irrelevant as to whether a state may legitimately protect one intrastate industry as against another when the challenge to the statute is purely one of equal protection.”<sup>22</sup> The court also criticized *Craigmiles* for examining the motives of the state’s legislature, rather than considering every conceivable rationale for the state’s actions.

In a concurring opinion, Judge Tymkovich criticized the majority for adopting an “unconstrained view of economic protectionism as a ‘legitimate state interest.’”<sup>23</sup> According to him, the majority had created “an almost per se rule upholding intrastate protectionist legislation.” In Judge Tymkovich’s view, in contrast, courts should uphold a protectionist effect only where “the discriminatory legislation arguably advances either the general welfare or a public interest.”<sup>24</sup> Although conceding that “[c]onsumer interests appear to be harmed rather than protected by the limitation of choice and price encouraged by the licensing restrictions on intrastate casket sales,”<sup>25</sup> Judge Tymkovich nevertheless found that Oklahoma had demonstrated its legitimate interest in promoting the general welfare by bringing enforcement actions under the Act against funeral directors.

Aside from *Powers*, one other recent decision held that states have a legitimate, non -protectionist rationale in requiring a license to sell a casket. In South Carolina, a state administrative law judge enjoined a stand-alone casket store from selling caskets because the store did not have a license as a “funeral establishment.”<sup>26</sup> The administrative court held that the state had a “legitimate interest” in requiring licenses for casket vendors because a casket “directly impacts sanitation.”<sup>27</sup> Finally, in 1998, the Oklahoma Court of Civil Appeals upheld the state’s casket sales restriction based on health and sanitation concerns.<sup>28</sup>

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<sup>21</sup> *Id.* at 1223.

<sup>22</sup> *Id.* at 1220.

<sup>23</sup> *Id.* at 1225.

<sup>24</sup> *Id.* at 1225.

<sup>25</sup> *Id.* at 1227.

<sup>26</sup> *South Carolina Dep’t of Labor v. Workman*, No. 98-ALJ-11-0634-IJ, 1999 WL 459728, \*5 (S.C. Admin Law Div. May 20, 1999). South Carolina permits third parties to sell caskets “at-need” but not “pre-need.” The state requires third party sellers to hold a license to sell retail caskets, which is not the same as a funeral director’s license but involves some costly requirements. See S.C. Code Ann. 19 §§ 40-19-265 (discussing permit requirements for funeral homes); 32-7-10 et seq (discussing preneed funeral contracts).

<sup>27</sup> *Workman*, 1999 WL 459728, at \*8.

<sup>28</sup> *Stone Casket*, 976 P.2d 1074.

## II. Judicial Tests Assessing Regulatory Barriers

Based on the great weight of authority, states lack a rational basis in applying funeral director and funeral establishment licensing schemes to online casket sales. Other than *Powers*, the case law provides no support for the idea that intrastate protectionism, by itself, qualifies as a legitimate state interest. Moreover, a recent Supreme Court decision may lead courts to more closely scrutinize state licensing schemes that impair the flow of e-commerce, particularly where empirical evidence shows that the licensing scheme harms, rather than helps, consumer welfare.

### A. Protectionism and Rational Bases

In all four of the recent casket cases, plaintiffs primarily argued that the statutes violated the Equal Protection, Due Process, or Privileges or Immunities Clauses. The plaintiffs did not (seriously) allege that the statutes discriminated against out-of-state competitors in violation of the Commerce Clause, or that the statutes discriminated against, for example, a discrete and insular minority. In *Powers*, the plaintiffs had argued that Oklahoma’s statutes violated the Commerce Clause before the district court; the district court held that it lacked jurisdiction to adjudicate this claim because Oklahoma had never enforced its statutes against out-of-state vendors, and the plaintiffs did not appeal that ruling. Accordingly, all four cases analyzed the state statutes using the deferential rational basis test. Under that test, a regulation is constitutional “if there is any reasonably conceivable state of facts that could provide a rational basis.”<sup>29</sup> Courts do not require states to provide an “exquisite evidentiary record” to justify their legislative purposes, so long as the purposes are legitimate.

Aside from *Powers*, no court decision—and certainly no Supreme Court decision—has ever held that protectionism, by itself, qualifies as a legitimate state interest.<sup>30</sup> For example, the *Powers* majority cites *Williamson v. Lee Optical*<sup>31</sup> for the proposition that a state may legitimately try to free a profession “from all taints of commercialism.” The majority also cites two tax cases in which states taxed different types of property at different rates, and one case in which New Orleans created a grandfather exception for longtime vendors of pushcart foodstuffs. Although all of these cited decisions allowed governments to discriminate in favor of certain economic interests, none of them supports the majority’s sweeping proclamation.

As the *Powers* concurrence explained, in all of those cases “the discriminatory legislation arguably advances either the general welfare or a public interest.”<sup>32</sup> In *Williamson*, for example, the Supreme Court invoked consumer safety and health interests to uphold the state’s regulation of eye care. Likewise, in the other cases, the Court invariably upheld the legislation, at least in part, because the legislation promoted the public good. In both the pushcart and tax cases, the Court stressed the need to preserve legitimate reliance interests or promote general economic

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<sup>29</sup> Craigmiles at 224.

<sup>30</sup> See *Powers*, 379 F.3d at 1220-21; *id.* at 1225 (Tymkovich, concurring).

<sup>31</sup> 348 U.S. 483 (1955).

<sup>32</sup> *Id.* at 225.



prosperity.<sup>33</sup> As these decisions illustrate, the Constitution may let the government play favorites, but only if the government does so, at least in part, for the good of the game.<sup>34</sup>

## B. *Granholm*

Indeed, a 2005 Supreme Court decision, *Granholm v. Heald*, may lead courts to more closely scrutinize state regulation that impairs the flow of e-commerce in order to benefit local economic interests. In *Granholm*, the Court considered statutory schemes in New York and Michigan that allowed in-state vendors, but not out-of-state vendors, to ship wine directly to consumers. As the Court recognized, “[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine.”<sup>35</sup> The Court also recognized that the bans had the effect of protecting intrastate wineries and wholesalers from competition. Because the plaintiffs alleged that the statutes discriminated against interstate commerce, the Court analyzed the statutes under the rubric of the negative, or “dormant,” Commerce Clause. The Court ultimately held that the statutes violated the Commerce Clause by giving in-state vendors an advantage over out-of-state competitors, and that the Twenty-first Amendment, which repealed Prohibition, did not authorize the discriminatory treatment.

In analyzing the statutes under the Commerce Clause, the Court applied a different framework than that used to analyze purely intrastate statutes under the Equal Protection or Due Process Clauses. Instead of deferring to the state legislature and requiring only “rational speculation” to uphold the legislation, the Court demanded evidence. “Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods. The burden is on the State to show that the *discrimination* is demonstrably justified.”<sup>36</sup> The Court holds discriminatory statutes to a higher standard for several reasons. For example, from a public choice standpoint, more rigorous scrutiny makes sense because out-of-state residents may lack the ability to defend their interests in another state’s legislature.<sup>37</sup>

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<sup>33</sup> In *Fitzgerald v. Racing Ass’n of Central Iowa*, 539 U.S. 103, 123 S.Ct. 2156, 156 L.Ed.2d 97 (2003) invoked economic development and protecting the reliance interests of river-boat owners, in *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) invoked historical preservation and economic prosperity, and in *Nordlinger v. Hahn*, 505 U.S. 1, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) invoked neighborhood preservation, continuity, stability, and protecting the reliance interests of property owners.

<sup>34</sup> See generally *Powers v. Harris: How the Tenth Circuit Buried Economic Liberties*, 82 *Denver U. L. Rev.* 585 (2005).

<sup>35</sup> *Id.* at \*5 (quoting an FTC report).

<sup>36</sup> *Id.* at \*21 (citations and internal quotations omitted).

<sup>37</sup> The public choice point has been discussed most thoroughly in debate over the “state action” immunity from federal antitrust laws, where scholars have noted that extensive state action immunity could allow a state to impose costs on citizens of other states who are not represented in its legislature. See, e.g., Frank Easterbrook, *Antitrust and the Economics of Federalism*, 26 *J. L. & Econ.* 23 (1983); Robert P. Inman and Daniel J. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 *Tex. L. Rev.* 1203 (1997); Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 *Cal. L. Rev.* 227 (1987); Federal Trade Commission State Action Task Force, Report of the State Action Task Force, 35-40 (2003) available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

More importantly for the judiciary, a central purpose of the Constitution is to protect the free flow of goods among the states. “If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints.”<sup>38</sup> The Founders believed that “to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”<sup>39</sup> The Commerce Clause enshrines the Founders’ purpose by prohibiting protectionist state regulation. Although the Clause’s text grants affirmative power to Congress, “It has long been accepted that the Commerce Clause . . . directly limits the power of the States to discriminate against interstate commerce. This ‘negative’ aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”<sup>40</sup> In stressing this aspect of the Commerce Clause, James Madison wrote that it “grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves.”<sup>41</sup>

Although *Granholm* analyzed the wine statutes using a different, more rigorous test than that used to analyze the casket statutes, *Granholm*’s analysis ultimately may affect the way in which courts analyze any licensing scheme that impairs the flow of e-commerce.

First, and perhaps most importantly, *Granholm* recognized that e-commerce benefits consumers and that pre-existing state regulatory schemes can prevent new entrants from competing via the Internet. The Court noted, for example, that “[wholesaler consolidation] has led many small wineries to rely on direct shipping to reach new markets. Technological improvements, in particular the ability of wineries to sell wine over the Internet, have helped make direct shipments an attractive sales channel.”<sup>42</sup> The Court also recognized that a state ban on direct shipping “substantially limits the direct sale of wine to consumers, an otherwise emerging and significant business,” even though the “wine producers in the cases before us are small wineries that rely on direct consumer sales as an important part of their businesses.”<sup>43</sup> Indeed, without direct shipping, many smaller wineries would find distribution “economically infeasible.”<sup>44</sup>

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<sup>38</sup> *Gibbons v. Ogden*, 22 U.S. 1 (1824) (Johnson, J.). See also Agarwal and Zywicki, NYU J L & Liberty.

<sup>39</sup> *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

<sup>40</sup> *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988). Accord *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) (“One of the fundamental purposes of the Clause ‘was to insure . . . against discriminating State legislation.’”) (quoting *Welton v. Missouri*, 91 U.S. 275, 280 (1876)); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

<sup>41</sup> 3 M. Farrand, Records of the Federal Convention of 1787, vol. III, p. 478 (1911) (cited in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994)).

<sup>42</sup> *Granholm* at \*5.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* \*at 6, 9.

Having acknowledged the importance of e-commerce to both consumers and some producers, the Court may become more willing to force states to articulate plausible reasons for restricting e-commerce, even for regulations that ostensibly apply only to intrastate transactions. In particular, *Granholm* may serve as a template for the types of empirical evidence that courts will consider, and perhaps require, in the course of evaluating licensing schemes that affect e-commerce under the rational basis test.<sup>45</sup> For example, New York and Michigan had argued that interstate direct shipping allowed minors to buy wine online, and had provided some anecdotal evidence in support. In finding these assertions “unsupported,” the Court relied heavily on a study of the wine industry by the Federal Trade Commission. The FTC’s Wine Report canvassed over a dozen states that permitted interstate direct shipping and found that none of them had reported any problems with direct sales of wine to minors.<sup>46</sup> The Wine Report also relied on other surveys and basic economic principles to conclude that minors were more interested in beer and spirits, rather than wine, and that minors had far more direct means of obtaining alcohol than the Internet. In effect, the Wine Report undermined all of the states’ speculative, non-protectionist arguments against direct shipping. The Court’s complete embrace of the Wine Report and scepticism of the states’ arguments suggests that, in the future, the Court may be amenable to using such evidence to evaluate state laws under the more lenient rational basis test.

Moreover, *Granholm* also may increase the burden on states to justify treating in-state and out-of-state vendors differently. The Court found that, even if direct shipping increased underage drinking, the states could not justify banning interstate direct shipping while allowing intrastate direct shipping. As the Court noted, “minors are just as likely to order wine from in-state producers as from out-of-state ones.”<sup>47</sup> Arguably, this rationale also could apply on sales of online caskets. In *Powers*, Oklahoma banned intrastate unlicensed vendors from selling caskets directly to Oklahoma consumers, but never tried to prohibit out-of-state unlicensed vendors from selling caskets directly to Oklahoma consumers. The record contained no evidence of any problems with any sales from out-of-state vendors. Based on *Granholm*, a court could well find that the lack of a problem from out-of-state vendors thoroughly undermines the plausibility of a state’s need to limit intrastate sales, even under the rational basis test. In the Internet world, all commerce is, in a sense, interstate commerce.

In fact, courts could well decide that all e-commerce is “interstate commerce” for constitutional purposes. In the first place, some of the physical peculiarities of Internet casket sales often necessitate interstate commerce. Some Internet casket sellers develop networks of bricks-and-mortar funeral homes that handle deliveries. In any given transaction, the funeral home handling the delivery often may ship the casket to a local market far from its physical location—in many cases, far enough to cross state lines. One of Funeral Depot’s funeral home partners, for example, will deliver only outside of its local market.<sup>48</sup> In addition, the states typically do not

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<sup>45</sup> See *Granholm* at \*20.

<sup>46</sup> See *id.*; Wine Report.

<sup>47</sup> *Id.* at \*20.

<sup>48</sup> David E. Harrington, *Brick-and-Mortar Barriers to Internet Casket Sales: Are State Funeral Regulations Part of the Mortar?*, Paper presented at the Southern Economic Association (November 19, 2005) (manuscript on file with authors).

limit their statutes and regulations solely to intrastate sales. In *Powers*, the district court held that it lacked jurisdiction to evaluate the Commerce Clause claim because Oklahoma had not enforced its regulatory scheme against out-of-state vendors. In another case, however, perhaps a declaratory judgment suit, a court could find that the risk of such enforcement could “chill” interstate sales enough to raise a Commerce Clause issue.

Finally, *Granholm* may force states to consider less restrictive regulatory alternatives if the states attempt to limit e-commerce with onerous licensing schemes.<sup>49</sup> “[I]mprovements in technology have eased the burden of monitoring out-of-state wineries. Background checks can be done electronically. Financial records and sales data can be mailed, faxed, or submitted via e-mail.”<sup>50</sup> As the court explained in *Craigsmiles*, the existence of less restrictive, pro-competitive alternatives increases the burden on the state to justify more onerous rules.<sup>51</sup> This analysis ultimately could affect state regulation of a number of industries, such as automobiles (where most states prohibit manufacturers from selling new cars directly to consumers and instead require them to sell through a licensed car dealer), real estate (where many states require dealers to obtain a license), teaching, or telemedicine.<sup>52</sup>

### III. Casket Markets and Regulation

A *Granholm*-type analysis thoroughly undercuts the rationale for requiring casket vendors to obtain a funeral director’s license or open a physical funeral establishment. The empirical evidence shows that, as applied to online casket sales, such regulations merely raise prices and limit competition.

#### A. The Overall Casket Market

The funeral industry represents a prime target for further e-commerce litigation. Consumers spend approximately \$11 billion on cremations, funerals, and funeral-related expenses annually, to take care of the roughly 2.4 million Americans who die every year. They thus pay roughly \$4522 per death, making funerals one of the largest-ticket consumer purchases.<sup>53</sup> There are three major casket manufacturers: Batesville Casket, York Group, and Aurora Casket. Batesville Casket had \$510 million in sales in 2002, while both York Group and Aurora Casket have annual sales of approximately \$130 million.<sup>54</sup> The leading manufacturers sell their caskets to funeral homes, who in turn sell most of the caskets to consumers. Three large funeral home chains,

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<sup>49</sup> See *id.* at \*21.

<sup>50</sup> *Id.*

<sup>51</sup> *Craigsmiles* at \_\_\_\_.

<sup>52</sup> See FTC workshop.

<sup>53</sup> Judith Chevalier and Fiona Scott Morton, National Bureau of Economic Research, *State Casket Sales Restrictions: A Pointless Undertaking?* 1 (2006)..

<sup>54</sup> Hoover’s Company Profiles, Hillenbrand Indus., Inc. (Dec. 3, 2003); Matthews Int’l Names Jonathan H. Maurer President of York Casket, PR Newswire, Apr. 9, 2002.

Service Corp. International (SCI), the Alderwoods Group, and Stewart Enterprises, collectively own about one-fifth of the nation's 23,000 funeral homes and handle about one-fifth of the funerals.<sup>55</sup>

The large funeral home chains have not developed a substantial online presence, and nearly 70% of funeral homes nationwide have yet to establish a Web site.<sup>56</sup> Of those sites that do exist, "the vast majority of funeral home Web sites are little more than marketing tools."<sup>57</sup> Unlike in some other industries, the leading manufacturers do not sell and are not seeking to sell their products directly to consumers via the Internet, although at least one smaller manufacturer, Casket Royale, Inc. does ship caskets directly to consumers, as well as to retailers.<sup>58</sup> Rather, most online casket sales come from independent casket vendors or individual funeral homes that have an online presence.<sup>59</sup>

Online sales are a small,<sup>60</sup> but seemingly growing part of the casket market. Although there are no hard data,<sup>61</sup> as of 2001, online casket sales represented only about 1% of all casket sales.<sup>62</sup> In a 2004 survey of funeral homes, however, 56% of respondents identified Internet sellers as a significant source of competition for casket sales.<sup>63</sup> In California, independent vendors estimate that they now may have about 3% of the casket market in some cities,<sup>64</sup> and a funeral industry web developer reports that 10% of its clients sold funeral services online in 2003, up from 3% in 2001.<sup>65</sup> Similarly, "funeral industry executives and analysts say that consumers are increasingly interested in being able to shop online for their funeral needs."<sup>66</sup>

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<sup>55</sup> National Casket Retailers Assoc., News & Funeral Statistics (2003), at <http://www.casketstores.com/News.htm>.

<sup>56</sup> *Web Sites: 6 Tips to Launch or Upgrade Your Online Calling Card*, Funeral Service Insider, June 23, 2003, at 3.

<sup>57</sup> Eve Tahmincioglu, *The Online Way of Death*, Salon.com, Apr. 28, 2003.

<sup>58</sup> Casket Royale: Retail and Ordering Information, at <http://www.casketroyale.com/html/necustomers.html>. See also Mei Fong, *E-Business: The Web @ Work / Casket Royale*, Wall St. J., Aug. 27, 2001, at B4; Louis Jacobson, *Breakaway (A Special Report)*, Wall St. J., May 14, 2001, at R5.

<sup>59</sup> Fong, *supra* note \_\_, at B4.

<sup>60</sup> Harrington, Tr. 512.

<sup>61</sup> Tahmincioglu, *supra* note \_\_ (noting that "it's unclear how prevalent online funeral planning is," and that the "National Funeral Directors Association does not track how many of its 13,500 members have a Web presence").

<sup>62</sup> Jacobson, *supra* note \_\_, at R5 ("Independent vendors sell about 50,000 of the two million caskets sold annually").

<sup>63</sup> *FSI's Third Party Seller Survey*, Funeral Service Insider, April 19, 2004, at 3.

<sup>64</sup> Rob Kaiser, *Funeral Homes, Retailers Clash in Casket Market / Few Consumers Opting to Visit Outside Sources*, Chicago Tribune, Mar. 16, 2003, at 1.

<sup>65</sup> Tahmincioglu, *supra* note \_\_.

<sup>66</sup> Bob Tedeschi, *Some Web Merchants Fill a Void, and Make a Profit, by Selling Coffins and Other Funeral Supplies Online*, New York Times, Feb. 3, 2003, at C5. Besides the Internet, other changes are also affecting the funeral industry. In recent years, funeral directors and cemetarians have started to provide goods and services once exclusively provided by the other. In addition, "pre-need" purchases, or buying funeral goods and services in advance of a death, have become more popular; the AARP estimates that consumers have invested \$25 billion in pre-need funeral trusts and insurance plans. Cremation's popularity has also increased; about one-fourth of deaths now result in cremation. Funeral Service Insider, September 1, 2003, at 1 (noting that "the steadily rising cremation

## B. Casket Sale Regulations

State regulation of Internet casket sales varies widely. It appears that no state has enacted specific statutes or regulations for online sales. Instead, if the state regulates online sales, the state regulates online vendors by applying existing regulations designed for bricks-and-mortar, third-party vendors.<sup>67</sup> Iowa, for example, regulates pre-need casket sales from third-party vendors, and applies the same regulations to Internet sales.<sup>68</sup> Overall, only a handful of states have regulations that apply to online casket sales. According to a Government Accountability Office survey, only sixteen states regulate third-party sales of funeral goods, and only ten states regulate all third-party sales of funeral goods.<sup>69</sup> In most states, therefore, funeral regulations do not appear to limit Internet casket sales.<sup>70</sup>

### 1. Explicit licensing requirements

In the approximately ten states that regulate all third-party sales, statutes restrict the sale of caskets in the state exclusively to licensed funeral directors.<sup>71</sup> Typically, these states require a license for anyone engaged in funeral directing, and then define the practice of funeral directing to include the sale of funeral-related merchandise, including caskets. For example, Louisiana defines “funeral directing” as “the operation of a funeral home, or . . . any service whatsoever connected with the management of funerals, or . . . the purchase of caskets or other funeral

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rate tells the story of how American funeral service has changed”); Sylvester Brown Jr., *Poker Amid Ashes? Cremation May Yet Get the Upper Hand*, St. Louis Post Dispatch, Aug. 5, 2003, at B1; Robert Schoenberger, *Casket Industry Gets Creative as More Turn to Cremations*, The Courier-Journal, Oct. 31, 2003, at 1F; AARP, *The Policy Book: AARP Public Policies 2003 1* (2003).

<sup>67</sup> Sklar, Tr. 477; the workshop’s transcript is cited as “Tr.,” and is available at <http://www.ftc.gov/opp/e-commerce/anticompetitive/agenda.htm>.

<sup>68</sup> *Id.*

<sup>69</sup> GAO, *supra* note \_\_, at 13. Of the states that do not regulate all third-party sales, some exempt Internet sales, at-need sales, and sales in which the consumer takes possession of the goods within a fixed period of time.

Aside from licensing, a variety of other practices have been alleged to impair e-commerce. Many independent vendors complain that the major manufacturers refuse to supply them, for “fear [of] being blackballed by large funeral home companies.” Indeed, a class action lawsuit was recently filed against Hillenbrand on this very point. Manufacturers say that they prefer dealing with funeral homes and maintaining their existing relationships. Moreover, manufacturers may have legitimate concerns about online vendors free riding on the services of local funeral homes, such as if an online vendor told a prospective customer to examine the selection of caskets offered at a funeral home’s physical show room, and then buy the casket from the online vendor. As a result of the large manufacturers’ sales policies, some online vendors have developed relationships with independent funeral homes and casket distributors to obtain a supply of caskets, usually in exchange for fees or referrals.

<sup>71</sup> Clark Neily, Written Statement 1, at <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/neily.pdf>; Mark Krause, Written Statement 3, at <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/krause.pdf>. According to testimony, these states include Alabama, Delaware, Idaho, Louisiana, Maine, Oklahoma, South Carolina, Vermont, Virginia, and Minnesota. Anecdotal evidence, however, suggests that only four states—Oklahoma, Louisiana, Virginia, and South Carolina—have been enforcing these statutes. All of the workshop panelists’ written statements are available at <http://www.ftc.gov/opp/e-commerce/anticompetitive/agenda.htm>. See also *Funeral Service Insider*, January 19, 2004, at 5 (quoting Neily).

merchandise, and retail sale and display thereof . . . .”<sup>72</sup> Similarly, Delaware’s statute states that “no person shall engage in the practice of funeral services . . . unless such person has been duly licensed,” and then defines “funeral services” as “those services rendered for the . . . burial, entombment or cremation of human remains, including the sale of those goods and services usual to arranging and directing funeral services.”<sup>73</sup> On its face, therefore, Delaware’s statute appears to prohibit third-party casket sales.

State licensing requirements can significantly raise the cost of entering the casket market.<sup>74</sup> Oklahoma’s regulations require, among other things, that an individual graduate from an accredited program of mortuary science, complete sixty college semester hours at an accredited institution of higher education, pass two exams, and complete an embalmer or funeral director apprenticeship, “during which the applicant must embalm 25 bodies.”<sup>75</sup> Such requirements consume time and money. In South Carolina, a licensee must complete an apprenticeship that lasts “a minimum of twenty-four months.”<sup>76</sup> In Oklahoma, an applicant must complete at least 60 credit hours at an accredited college or university, graduate from an accredited program of mortuary science, and complete a one-year apprenticeship in a funeral home during which he or she must embalm at least twenty-five human bodies.<sup>77</sup> Other states require that a funeral director have training in embalming, a specialty that has little relation to the business of selling a casket.

In addition to requiring a funeral director’s license for selling a casket, some states also require that a casket seller operate out of a licensed “funeral establishment.” “Funeral establishments” must have particular features. Louisiana, for instance, prohibits anyone from engaging in the business of funeral directing “unless such business is conducted by a duly licensed funeral establishment.”<sup>78</sup> An “establishment,” in turn, must have “adequate parlors or chapel,” a “display room,” and an “embalming room,” among other features.<sup>79</sup> South Carolina requires that every funeral establishment have all of the aforementioned features, as well as “at least one motor hearse for transporting casketed remains.”<sup>80</sup>

Although some online vendors may also choose to operate bricks-and-mortar retail stores, an online vendor does not need any of these features to deliver a casket to a consumer. An Internet vendor need not maintain a chapel or display room because the consumer does not need to physically visit an online vendor at all. In addition, independent retailers never handle the body, and therefore do not need embalming facilities. Funeral establishment requirements, therefore, merely add to the costs of operating online. In *Powers*, the district court found that, when combined with the facility and equipment requirements, the funeral establishment license

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<sup>72</sup> La. Rev. Stat. Ann. § 37:831 (West 2004).

<sup>73</sup> Del. Code Ann. 24 § § 3101 (5)–(7), 3102, 3106 (a).

<sup>74</sup> Harrington, *supra* note \_\_\_, at 3.

<sup>75</sup> *Powers*, 2002 WL 32026155, at \*12; FTC Amicus Br., *supra* note \_\_\_, at 12-13.

<sup>76</sup> S.C. Code Ann. 19 § 40-19-230(B)(4) (Law Co-Op. 1976).

<sup>77</sup> *Powers* at \_\_\_.

<sup>78</sup> La. Rev. Stat. Ann. § 37:848(C) (West 2004).

<sup>79</sup> La. Admin. Code tit. 46, § 101(B).

<sup>80</sup> S.C. Code Ann. § 40-19-20(11)(d) (Law Co-Op. 1976).

requirement “effectively precludes the in-state sale of caskets using the Internet model in which transactions occur by computer or by telephone.”<sup>81</sup>

It is unclear how much these regulations limit competition in practice. Some evidence suggests that states are not enforcing these requirements against online vendors, or at least against out-of-state online vendors. Oklahoma’s funeral board does not regulate, investigate, or restrict the sale of caskets by persons or businesses located outside the state to consumers inside the state.<sup>82</sup> The National Funeral Directors Association (“NFDA”) testified in 2002 that it “has no knowledge of any state action against an out-of-state casket retailer offering to sell caskets via the Internet. Therefore, online casket retailers are currently able to freely sell caskets throughout the United States.”<sup>83</sup> Moreover, several online casket retailers have told the FTC staff that they ship to all fifty states.<sup>84</sup> Caskets are also sold on eBay.

On the other hand, the National Casket Retailers Association, citing a Louisiana case, disagrees that retailers are able to sell caskets freely in all states.<sup>85</sup> Moreover, according to a Maryland regulator, Washington state permits only licensed funeral service providers to sell pre-need caskets, which “sort of shuts out the Internet provider of caskets, pre-need or otherwise.”<sup>86</sup> Finally, in both Oklahoma and South Carolina, recent litigation suggests that some states are limiting the sales of third-party vendors. In *Powers v. Harris*, the district court found that the plaintiff-casket vendors “have a reasonable and genuine fear that if they were to sell caskets to Oklahoma consumers, they might be prosecuted . . . . For fear of prosecution, plaintiffs have foregone in-state casket sales.”<sup>87</sup>

In states that apply such licensing requirements to casket sales, the requirements likely deter some independent vendors from selling caskets.<sup>88</sup> Online vendors may be unwilling or unable to incur the costs of obtaining a license. Unlike traditional funeral homes, they may not recover the full financial costs of obtaining a license, because their business model involves only selling caskets, not providing services such as embalming.<sup>89</sup> As the Sixth Circuit noted, “dedicating two years and thousands of dollars to the education and training required for licensure is undoubtedly a significant barrier to entering the Tennessee casket market.”<sup>90</sup> Similarly, in *Powers*, the district court found that the state’s licensing requirements “effectively preclude” in-state online vendors

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<sup>81</sup> *Powers* 2002 WL 32026155, at \*5. Within the last few years, Georgia has denied the registration of a third-party seller of funeral goods. GAO, *supra* note \_\_, at 37.

<sup>82</sup> See Neily, Tr. 492.

<sup>83</sup> Neily, Tr. 462.

<sup>84</sup> Cite to websites.

<sup>85</sup> Brown, Tr. 494.

<sup>86</sup> Sklar, Tr. 478.

<sup>87</sup> *Powers* 2002 WL 32026155, at \*3.

<sup>88</sup> Krause, *supra* note \_\_, at 4.

<sup>89</sup> See Harrington, *supra* note \_\_, at 5.

<sup>90</sup> *Craigsmiles*, 312 F.3d at 224-25.



from obtaining a funeral director's license and, therefore, "from selling caskets to in-state purchasers."<sup>91</sup>

Finally, state licensing requirements could, in theory, prevent out-of-state online vendors from selling caskets to consumers within the state. In one case, Mississippi's State Board of Funeral Services sent a cease and desist order to Casket Royale, a New Hampshire manufacturer, because neither Casket Royale nor its Mississippi-based dealers had Mississippi licenses.<sup>92</sup> Accordingly, state regulations could threaten one of the Internet's primary benefits, the ability of online vendors to provide goods and services to consumers across the country.

## 2. Indirect effects of licensing

Even if states allow unlicensed, independent vendors to sell caskets, state funeral director licensing could still discourage independent casket sales by reducing competition in a "downstream" market, the funeral directors who put the bodies into the caskets. Stringent licensing requirements, particularly the funeral establishment and embalming regulations, raise the cost of becoming a funeral director. Increased costs translate into less entry of new funeral directors. Over time, this reduced entry may result in fewer funeral directors or more cartel behavior. Online sellers, therefore, may face greater challenges in recruiting bricks-and-mortar funeral home partners to deliver caskets. Alternately, funeral directors, protected by higher barriers to entry, may feel freer to disparage online sellers.<sup>93</sup>

These indirect effects may compound the impact of explicit requirements that all casket sellers have funeral director's licenses. Where casket sellers must have a license and that license is expensive to obtain, the licensing requirement might keep independent casket sellers out of the market altogether. On the other hand, where casket sellers must have a license but entry into the funeral directing market is easy, the licensing requirement may have little or no effect.<sup>94</sup> Many of the states that require casket sellers to have funeral director's licenses also impose costly licensing requirements on funeral directors, such as lengthy educational and/or apprenticeship requirements, and the mastery of irrelevant knowledge and skills, such as embalming bodies. Accordingly, it is difficult to disentangle the impact of the two types of regulation.<sup>95</sup>

A recent econometric study finds that embalming regulations impede online casket sales. Adjusting for population size and other demographics, an online seller's sales are lower than expected in states that require that all funeral service providers must be embalmers or all funeral homes must have an embalming preparation room. These regulations reduce the probability of online casket sales in a zip code by about 25%, although the reduction is smaller in states that

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<sup>91</sup> *Powers*, 2002 WL 32026155, at \*6 .

<sup>92</sup> *Casket Royale*, 124 F. Supp. 2d at 435.

<sup>93</sup> Harrington, *supra* note \_\_\_\_, at 11.

<sup>94</sup> Daniel Sutter, *State Funeral Regulations, Casket Retailers and the Casket Market* (June 2003) (working paper at 14, on file with the authors).

<sup>95</sup> Harrington, *supra* note \_\_\_\_, at 15.

allow only funeral directors to sell caskets. Since 13 of the 14 states that limit who can sell caskets also impose stringent embalming requirements, the most one can say is that the licensing requirement increases online casket sales in states that have high barriers to entry into funeral directing.<sup>96</sup> This may occur because higher entry barriers lead to higher casket prices at funeral homes, thus increasing demand for cheaper online caskets.

### **C. Applying the Tests to Funeral Regulation**

The empirical evidence undermines claims that licensing restrictions, as applied to online sales of caskets, serve a legitimate, non-protectionist state interest. Internet sales offer several benefits to consumers, including convenience and lower casket prices. The consumer protection concerns, in contrast, are largely illusory.

#### **1. Licensing, E-Commerce, and Consumer Welfare**

Regulations that hamper online casket sales could affect consumer welfare in several ways. They could affect casket prices, funeral prices, and the variety of caskets available to consumers. In addition, regulation could prevent consumers from enjoying the convenience of searching for caskets at all hours from the comfort of their homes.

##### **a. Casket Prices**

Funerals and caskets are expensive, and are becoming more so. A traditional funeral costs more than \$5,000. A casket, typically the most expensive component of a traditional funeral,<sup>97</sup> usually costs between \$2,000-3,000,<sup>98</sup> and some mahogany or metal caskets cost as much as \$10,000. Funeral costs have risen substantially over time. From 1981 to 2001, average funeral costs increased from \$2,086 to \$5,047, a 142% increase in nominal prices. During that same time period general consumer prices rose only 94.8%.<sup>99</sup>

##### **i. Economic Hypotheses**

For several reasons, online purchases might lead to lower casket prices for at least some consumers. The simplest reason is that online shopping allows consumers to conveniently compare many more sellers' prices, thus raising the odds that the online shopper will find a lower price than at a small number of local sellers.<sup>100</sup> E-commerce could also lead to generally

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<sup>96</sup> Harrington, *supra* note \_\_\_\_, at 14-15.

<sup>97</sup> See *Craigmiles*, 110 F. Supp. 2d at 664.

<sup>98</sup> See note 1.

<sup>99</sup> *Average Profit Slipped to 8.08% in 2001, FFDA Reports*, The American Funeral Director, June 2002; 2003 Economic Report to the President. See also Kaiser, *supra* note \_\_ (noting that from 1991 to 2000, the general inflation rate was 26.4%, whereas average funeral costs increased by 38.4%).

<sup>100</sup> A similar point has been made in the context of online wine sales. See Alan Wiseman and Jerry Ellig, *Market and Nonmarket Barriers to Internet Wine Sales: The Case of Virginia*, 6 Business and Politics (2004) at \_\_\_\_.

lower retail margins and prices online by reducing the cost of searching price and nonprice attributes. Online casket sellers might also charge lower prices than offline sellers if state funeral director licensing creates market power by erecting barriers to entry and lowering the costs of enforcing casket cartels.<sup>101</sup> Finally, an Internet casket retailer may simply have a fundamentally different business model that incurs less of the traditional retail costs, such as physical showrooms and sales staff. Each of these factors could lead to lower online prices.<sup>102</sup> If bricks-and-mortar casket sellers perceive online sales as a substantial competitive threat, they may respond with lower prices.

A growing body of empirical research finds that e-commerce often offers lower prices and sometimes reduces prices charged by bricks-and-mortar sellers as well. In auto retailing, for example, users pay lower prices by using a referral site (autobytel.com) that facilitates price competition among dealers.<sup>103</sup> Similarly, one study found that online book and compact disk (CD) prices were 9-16% lower than those in bricks-and-mortar stores, even after including shipping costs and sales taxes.<sup>104</sup> Another study found that wine consumers could find lower prices online (even including shipping costs) than in northern Virginia stores for a sample of popular wines retailing for more than \$20 per bottle.<sup>105</sup> By 2004, legalization of interstate direct-to-consumer wine shipping in Virginia had reduced the online vs. bricks-and-mortar price difference by 40%.<sup>106</sup> Contact lenses purchased online cost less on average than lenses purchased from bricks-and-mortar sellers, although warehouse clubs offer the lowest prices of all.<sup>107</sup> Finally, web sites that facilitate price comparisons for term life insurance policies have lowered premiums for policies sold offline by 8-15%.<sup>108</sup>

As a matter of economic theory, however, online sales need not lead to lower prices. The literature on e-commerce offers two hypotheses suggesting why online prices could be higher than offline prices: the value of consumers' time, and reduced search costs for quality attributes.

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<sup>101</sup> Harrington, *supra* note \_\_\_\_.

<sup>102</sup> See Michael D. Smith, Joseph Bailey, and Erik Brynjolfsson, *Understanding Digital Markets: Review and Assessment*, in E. Brynjolfsson and B. Kahin, eds., *Understanding the Digital Economy: Data, Tools, and Research* (2000); Debra J. Holt, *The Internet and Auto Sales: Benefits and Barriers*, 19 *Journal of Private Enterprise* 21 (2003); Daniel Sutter, *State Regulations and E-Commerce: The Case for Internet Casket Sales in Oklahoma*, 20 *Journal of Private Enterprise* 31 (2005).

<sup>103</sup> Fiona Scott Morton, Florian Zettelmeyer and Jorge Silva-Risso, *Internet Car Retailing*, 49 *J of Industrial Econ* 501 (2001); Florian Zettelmeyer, Fiona Scott Morton, and Jorge Silva-Risso, *Cowboys or Cowards? Why are Internet Car Prices Lower?*, National Bureau of Economic Research Working Paper No. 86 (2001).

<sup>104</sup> Erik Brynjolfsson and Michael Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, *Management Science* (2000).

<sup>105</sup> Wiseman and Ellig, *supra* note \_\_\_\_ at Tables 3b.

<sup>106</sup> Alan Wiseman and Jerry Ellig, *Legislative Action and Market Responses: Results of Virginia's a Natural Experiment with Direct Wine Shipment* (October 20, 2005). (Draft manuscript on file with authors.)

<sup>107</sup> James C. Cooper, *Prices and Price Dispersion in Online and Offline Markets for Contact Lenses* (2005). (Draft on file with authors.)

<sup>108</sup> Jeffrey R. Brown and Austan Goolsbee, "Does the Internet Make Markets More Competitive? Evidence from the Life Insurance Industry," 110 *J of Political Economy* 481 (2002).

If Internet casket sellers are not the lowest-cost suppliers, they may charge a higher price and survive because their customers find the convenience worth the extra cost.<sup>109</sup> Alternately, by reducing the cost of obtaining information on quality attributes, online sales could increase customers' ability to perceive quality differences between different types of caskets, and online sellers could charge higher prices that reflect these perceived differences.<sup>110</sup> In both instances, the higher online prices need not reduce consumer welfare, because consumers would pay the higher prices only if they perceived greater value.

Some empirical studies have found that online prices are higher than offline prices. Studies of online auto auctions, CDs, books, and software have found that prices are higher online.<sup>111</sup> Wines retailing for less than \$20 cost more online than in bricks-and-mortar stores, once shipping costs are included in the online price.<sup>112</sup> The book and CD studies, however, occurred relatively early in the history of e-commerce; more recent studies suggest online prices are lower. The wine result is explained by shipping costs, since wine is relatively heavy and expensive to ship. Although economic theory suggests that online prices could be higher or lower than offline prices, the bulk of the evidence suggests that they are often lower.

There is, finally, one circumstance in which lower online prices might actually lead offline prices to be higher than they would otherwise be. When retailers face consumers with different price elasticities of demand, they will charge different prices in equilibrium.<sup>113</sup> In states where online casket sales are legal, the market might actually be segmented into offline and online components. Funeral directors and other offline merchants, knowing that the majority of their consumers are less price sensitive than the typical online consumer, might be able to exploit this differential by raising prices. In this case, the net effect of online casket sales on average casket prices may be ambiguous.

This proposition has been less frequently tested in the e-commerce literature. Some studies find that online and offline sales channels are indeed in the same market. The probability that a consumer will purchase a computer online, for example, increases by more than 1% for every 1% increase in offline prices, suggesting that online prices may help keep offline prices lower

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<sup>109</sup> Smith, Bailey, and Brynjolfsson, *supra* note \_\_\_ at 109.

<sup>110</sup> John G. Lynch and Dan Ariely, Wine Online: Search Costs Affect Competition on Price, Quality, and Distribution, 19 *Marketing Science* 83 (2000).

<sup>111</sup> Joseph P. Bailey, *Electronic Commerce: Prices and Consumer Issues for Three Products: Books, Compact Disks, and Software*, Organization for Economic Cooperation and Development, OECD/GD(98)4 (1998); Bailey, Intermediation and Electronic Markets: Aggregation and Pricing in Internet Commerce, Ph.D. Thesis, Massachusetts Institute of Technology (1998); Ho Geun Lee, *Do Electronic Marketplaces Lower the Price of Goods?*, 41 *Communications of the ACM* (1997); Karen Clay, Ramayya Krishnan, Eric Wolf, and Danny Fernandes, "Retail Strategies on the Web: Price and Non-Price Competition in the Online Book Industry," 50 *J of Industrial Econ* 351 (2002);

<sup>112</sup> Wiseman and Ellig, *supra* note \_\_\_ at Table 3d.

<sup>113</sup> Steven C. Salop and Joseph E. Stiglitz, *Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion*, 44 *Review of Economic Studies* 493 (1977).

than they would otherwise be.<sup>114</sup> Similarly, legalization of direct wine shipping from out-of-state businesses to Virginia consumers tended to reduce the spread between online and offline prices.<sup>115</sup> No empirical studies find that online sales have increased offline prices.

## ii. Casket Prices

Anecdotal evidence suggests that online casket prices are often lower than bricks-and-mortar prices. Third-party casket sellers typically charge significantly lower prices than funeral homes for comparable caskets.<sup>116</sup> Some independent vendors undercut established funeral home prices by as much as 50%.<sup>117</sup> One court found that funeral homes mark up their casket prices from 250-400%, and sometimes as high as 600%, whereas online vendors mark up their caskets by substantially less.<sup>118</sup> In *Casket Royale*, the court concluded that, “as a result of this requirement, consumers in Mississippi are offered fewer choices when it comes to selecting a casket . . . . Ultimately, the consumer is harmed by this regulation as one is forced to pay higher prices in a far less competitive environment.”<sup>119</sup>

Similarly, surveys imply that online casket sales have helped reduce bricks-and-mortar prices. In a 2004 survey of funeral homes, 71% of those responding stated that they had reduced markups on caskets in response to third-party sellers.<sup>120</sup> In the same survey, 41% of respondents stated that their average casket markup exceeded 200%, whereas two years ago, 68% of them had markups higher than 200%.<sup>121</sup> In *Powers*, the court found that “as long as independent sellers stay in the market, casket sales from independent sources . . . place downward pressure on casket prices as a result of increased competition. This downward pressure may result, and in other states has at times resulted, in lower casket prices.”<sup>122</sup> Finally, according to one economist, “Enough people are now browsing for caskets [on the Internet] that an owner of a brick-and-mortar funeral home told me that more and more people are coming to his funeral home with pictures (and prices) of caskets they found on the Internet.” Even if customers feel that negotiating over prices is

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<sup>114</sup> Austan Goolsbee, “Competition in the Computer Industry: Online vs. Retail,” 46 J of Industrial Econ 487 (2001). Local sales tax rates also affect consumers’ propensity to purchase online. See Austan Goolsbee, “In a World Without Borders: The Impact of Taxes on Internet Commerce,” 115 Quarterly J of Econ 561 (2000).

<sup>115</sup> Wiseman and Ellig, *supra* note \_\_\_\_.

<sup>116</sup> See Report of Daniel Sutter, Ph.D. at 4, filed in *Powers v. Harris*, 2002 WL 32026155 (W.D. Okla. Dec. 12, 2002) (No. CIV-010445-F).

<sup>117</sup> Fong, *supra* note \_\_\_, at B4. In the same article, one online vendor commented that when consumers purchase a casket from an affiliated retailer, rather than buying direct, shipping adds an average of \$350 to the total cost. Many online vendors discount casket prices by much more than that amount.

<sup>118</sup> *Craigmiles*, 110 F. Supp. 2d at 664.

<sup>119</sup> *Casket Royale*, 124 F. Supp. 2d at 440.

<sup>120</sup> *FSI’s Third Party Seller Survey*, Funeral Service Insider, April 19, 2004, at 3.

<sup>121</sup> *Id.* The survey also found that 19% of respondents had urged other funeral homes to boycott casket suppliers who dealt with third-party sellers.

<sup>122</sup> *Powers* 2002 WL 32026155, at \*6. See also Kaiser, *supra* note \_\_\_, at 1 (reporting that some funeral homes, in response to pressure from independent vendors, have reduced markups on caskets from around 400% to 200%, although these funeral homes may have simultaneously increased prices for services).

disrespectful to the deceased, “funeral directors see the prices and understand that they need to respond to them.”<sup>123</sup>

Two recent economic studies have examined the effects of casket sales restrictions and the potential for Internet casket sales to offer consumers lower prices. Yale University economists Judith Chevalier and Fiona Scott Morton analyzed data from surveys of funeral directors’ Generalized Price Lists in six southern states. They found that a state requirement that casket sellers must have funeral director’s license increases the price funeral homes charge for a plain, cloth-covered wood casket by about \$261. The potential Internet savings, however, are even larger. Chevalier and Scott Morton’s regression analysis finds that funeral directors charge about \$1045 for a plain wood casket in restrictive states, but similar caskets are available on the Internet for about \$440. Even after accounting for the fact that funeral directors in non-restrictive states charge higher prices for their services, the consumer in a non-restrictive state could still save \$344 on the cost of a funeral by buying the casket online.<sup>124</sup> Funeral homes in restrictive states also charge about \$124 more for a cardboard box for cremation.<sup>125</sup>

Chevalier and Scott Morton also used 1997 Economic Census data from 49 states to test whether funeral directors’ receipts per death for funeral merchandise are higher in restrictive states. They found that in restrictive states, funeral directors had merchandise receipts per death that were \$175 higher than in non-restrictive states.<sup>126</sup>

Another study, conducted by an expert witness in the *Powers* case, compared an online vendor’s prices for 30 caskets with prices for the same caskets sold in 14 Oklahoma funeral homes. The funeral homes’ prices averaged 68% higher than those of the Internet retailer. Funeral home prices for the same casket varied significantly, with an average price spread of 52%.<sup>127</sup> Thus, a consumer who shopped several funeral homes could achieve significant savings, but a consumer who shopped on the Internet could achieve even larger savings.

More recent empirical research thus confirms the anecdotal evidence cited in court cases: consumers can save a significant amount of money on caskets by purchasing them on the Internet. Moreover, competition from third-party casket sellers appears to have forced funeral directors in non-restrictive states to lower their casket prices, although the funeral directors’ prices still appear to be far above the cost of a casket. Whether these price savings on caskets translate into lower overall funeral costs is less clear.

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<sup>123</sup> Harrington, *supra* note \_\_\_\_, at 7.

<sup>124</sup> Chevalier and Scott Morton, *supra* note \_\_\_\_, at 12-13.

<sup>125</sup> *Id.* at 14.

<sup>126</sup> *Id.* at 22. The statistical significance of this coefficient is 94 percent – 1 point shy of the traditional 95 percent confidence level that economists conventionally label “statistically significant.” The higher receipts per death for merchandise were balanced by lower receipts per death for services, discussed in section C.1.b. *infra*.

<sup>127</sup> Sutter (2005), *supra* note \_\_\_\_, at 34.

## b. Funeral Prices

Economic theory suggests that online casket sales may or may not lower overall funeral costs.<sup>128</sup> In response to competition from independent casket vendors, funeral directors may simply raise prices for their other goods and services to compensate for lower casket prices, particularly if they have market power based on factors besides their control of casket sales.<sup>129</sup> This is, of course, simply an application of the “one monopoly rent” theory associated with “Chicago school” antitrust analysis.<sup>130</sup>

On the other hand, third-party casket sales could help reduce overall funeral prices if the demand for caskets is less price elastic than the demand for other funeral goods and services. For example, if a funeral director could more easily persuade consumers to buy a more expensive casket than to spend additional money on a more elaborate service, then third party casket sales constrain the funeral director’s ability to price discriminate. Likewise, if consumers are less likely to perceive a high casket price as an excessive charge, then the funeral director has an incentive to take more of his profit through high casket prices.<sup>131</sup> This strategy is less likely to succeed if consumers have access to caskets sold by third parties who lack market power from regulatory barriers to entry.

One district court found both effects:

In some states where open price competition is occurring, the overall price of funerals appears to be going down or escalating at a decreased rate. In some cases, however, when competition increases, funeral homes have raised their prices for the other services they provide in order to compensate for profits lost due to lower casket prices.<sup>132</sup>

Similarly, at an FTC workshop on barriers to e-commerce, one panelist agreed that greater competition for casket sales likely would lower funeral costs somewhat: “increasing competition in casket markets will, however, probably reduce funeral expenditures, just not as much as some people think.”<sup>133</sup> According to that panelist, competitive casket markets will constrain how much funeral directors can raise other prices, in part because consumers might search for better deals. Once consumers learn that there are options to choose from among funeral arrangements, prices will have to change to match the discriminating customer.<sup>134</sup> Moreover, price competition would

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<sup>128</sup> *Powers*, 2002 WL 32026155, at \*6 (noting that lower casket prices “may or may not” result in lower costs for the entire funeral).

<sup>129</sup> Harrington, Tr. 473-74; *Powers*, 2002 WL 32026155, at \*6.

<sup>130</sup> See Chevalier and Scott Morton, *supra* note \_\_\_, at 3; Sutter, *supra* note \_\_\_, at 5.

<sup>131</sup> Sutter (2003), *supra* note \_\_\_ at 6.

<sup>132</sup> *Powers*, 2002 WL 32026155, at \*6.

<sup>133</sup> Harrington, Tr. 474.

<sup>134</sup> Sutter (2003), *supra* note \_\_\_, at 5 (“customers might have more difficulty estimating the cost of caskets than the cost of funeral services, making caskets the preferred component to mark up”).

increase due to the development of referral systems between online casket vendors and funeral homes.<sup>135</sup> Some web sites already offer this type of service.

Two econometric studies have examined the effect of casket sales restrictions on total funeral costs with conflicting results.

Daniel Sutter analyzed Economic Census data from 1997 to determine whether 13 states that required casket sellers to have funeral director's licenses had higher funeral costs. The study found that the restrictions' effect depended on the difficulty of obtaining a funeral director's license. Funeral homes' receipts per death were about \$450 (11%) higher in states that required a funeral director's license and imposed the most extensive training requirements.<sup>136</sup> Thus, the licensing requirement raises consumers' funeral costs when barriers to entry into funeral directing are high, but not when barriers to entry are low. Receipts per death for the entire death care industry (including cemeteries and crematories) were \$132-826 (3-16%) higher in the states than ban third-party casket sales and impose the most extensive training requirements on funeral directors. This finding suggests that funeral directors benefit at the expense of both consumers and other death care providers, such as cemeteries and crematories.<sup>137</sup> Casket sales restrictions also increase the number of funeral homes per capita and funeral home employees per death in states with the most stringent licensing requirements, which suggests that the restrictions tend to protect smaller, less efficient funeral homes.<sup>138</sup>

Chevalier and Scott Morton reached a different conclusion examining similar 1997 Economic Census data. They found that in restrictive states, funeral directors had higher receipts per death for merchandise, but this effect was roughly balanced by lower receipts per death for funeral directors' services. The authors conclude that, after the FTC's 1984 Funeral Rule made it easier for consumers to purchase funeral goods from third parties, "funeral directors moved rents out of funeral goods and into funeral services, except in states which adopt funeral good sales restrictions."<sup>139</sup> Employing 2002 Economic Census data, they found that funeral directors' total receipts per death were unaffected when several states removed their licensing requirement for casket sales in response to court challenges.<sup>140</sup>

The different findings in the Sutter and Chevalier/Scott Morton studies may be a result of different control variables and econometric specifications. Sutter controls for the severity of the states' barriers to entry into funeral directing, finding that the licensing requirement for casket sellers increases receipts per death only in states that impose the most extensive training requirement on funeral directors. Casket sales restrictions have a disproportionate impact in

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<sup>135</sup> David Harrington, Written Statement 6, at <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/harrington.pdf>.

<sup>136</sup> Sutter (2003), *supra* note \_\_\_\_, Table 5.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 16-17.

<sup>139</sup> Chevalier and Scott Morton, *supra* note \_\_\_\_, at 21-24.

<sup>140</sup> *Id.* at 23.



states with higher barriers to entry into funeral directing. In states with low barriers to entry, competition among licensed funeral directors may suffice to keep prices near costs—and entrepreneurs who really just want to sell caskets can easily obtain a funeral director’s license. Chevalier and Scott Morton do not control for the difficulty of obtaining a funeral director’s license, but they do control for the cremation rate and each state’s historic pattern of funeral spending. A definitive answer awaits future research. In the meantime, Sutter’s findings should give policymakers and courts reason to question state laws that require casket sellers to have funeral directors’ licenses.

### **c. Variety**

Aside from lower prices, online casket sales also offer consumers a greater variety of caskets. When consumer tastes are heterogeneous, increased variety makes consumers better off, “especially . . . when the additional customization or versioning can be produced at very low or zero marginal costs.”<sup>141</sup>

Consumers can purchase individualized caskets with non-standard interior linings, such as fur or leather, or particular themes, such as western or Victorian themes.<sup>142</sup> They also can purchase caskets with humorous themes; one casket is emblazoned with the words “Return to Sender.”<sup>143</sup> Consumers may not find such caskets through funeral homes, which may have only a certain number of samples available to show. Although it is difficult to quantify the benefits of product variety in this market, at least some consumers appear to highly value the ability to personalize their loved ones’ caskets. One consumer, for instance, spent several hundred dollars having his father’s casket painted with the colors of his father’s favorite university.<sup>144</sup> Other consumers may have religious reasons for wanting a certain style of casket. Accordingly, while the extent of competition’s effect on price is not clear, competition certainly increases consumer choice.

### **d. Other Effects**

The Internet offers consumers a variety of intangible benefits. Some consumers may prefer the privacy of shopping for a casket online.<sup>145</sup> Some consumers may feel less pressure from salespeople by shopping for a casket over the Internet.<sup>146</sup> Finally, as in many industries, consumers may prefer the convenience of shopping online. For both pre-need and at-need sales, consumers can search the Internet twenty-four hours a day from the convenience of their

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<sup>141</sup> Yannis Bakos, *The Emerging Landscape for Retail E-Commerce*, 15 J Econ Perspectives (2001) at 79.

<sup>142</sup> News Briefs, *Mortuary Management*, Mar. 2000, at 21-22.

<sup>143</sup> Harrington, *supra* note \_\_\_, at 8.

<sup>144</sup> Schoenberger, *supra* note \_\_\_, at 1F. See also Peter Kilborn, *Funerals With a Custom Fit Lighten Up a Solemn Rite*, NEW YORK TIMES, Feb. 11, 2004, at A14 (stating that “families are shunning the somber, one-size-fits all rituals and customs of traditional funerals”).

<sup>145</sup> Lisa Carlson, Written Statement 1, at <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/carlson.htm>.

<sup>146</sup> Harrington, Tr. 474; Sklar, Tr. 500-01.

homes.<sup>147</sup> Similarly, online sales could lower consumers’ “coordination costs” by allowing family members in different parts of the country to select a casket jointly.

In short, competition from independent, online casket sellers offers consumers significant benefits. Licensing regulations can impair this competition directly, by keeping independent casket sellers out of the market, or indirectly, by creating market conditions conducive to cartels or exclusionary behavior by bricks-and-mortar funeral directors. Thus, licensing can create significant costs for consumers.

## 2. Assessing the Consumer Protection Rationale

Although we have limited empirical information about the impact of state licensing on competition in the casket market, the impact on consumer protection is more certain. There is little or no evidence that these requirements benefit casket purchasers rather than the funeral directors.<sup>148</sup> For three reasons, state licensing of independent casket sellers is unlikely to benefit casket purchasers. First, many consumers are not as vulnerable or uninformed as the advocates of regulation assume.<sup>149</sup> Indeed, a consumer savvy enough to try and purchase a casket from someone other than his or her funeral director is likely to be relatively well-informed. Second, to the extent that some consumers are vulnerable or uninformed, more stringent state licensing likely compounds the problem. Stringent licensing raises barriers to entry, reduces competition, and makes it easier for funeral directors to employ aggressive sales practices.<sup>150</sup> Third, most licensing requirements have little relation to the business of selling caskets. Even if licensing funeral directors provides some consumer protection or public health benefits, licensing independent casket retailers provides no analogous benefits. Accordingly, the empirical evidence deeply undermines the argument that state licensing of casket retailers promotes a legitimate state interest.

### a. Sales Pressure

Some states and funeral homes argue that grieving consumers need protection from aggressive sales tactics. They contend that consumers may lack the ability to comparison shop or resist sales pressure. In *Powers* for instance, the district court found that “at least in some instances, Oklahoma funeral homes have employed sharp practices in their dealings with consumers purchasing caskets.”<sup>151</sup>

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<sup>147</sup> See Tahmincioglu, *supra* note \_\_.

<sup>148</sup> See Steven M. Simpson, *Judicial Abrogation and the Rise of Special Interests*, 6 Chap. L. Rev. 173, 179 (2003) (“Laws restricting casket sales to licensed funeral directors are a more recent phenomenon, but their benefit to funeral directors is clear. Casket sales are extremely lucrative for funeral directors”).

<sup>149</sup> Fred S. McChesney, *Consumer Ignorance and Consumer Protection Law: Empirical Evidence from the FTC Funeral Rule*, 7 J. L. & POL. 1 (1990).

<sup>150</sup> See, e.g., David Harrington and Kathy Krynski, *The Effect of State Funeral Regulations on Cremation Rates: Testing For Demand Inducement in Funeral Markets*, 45 J. L. & Econ. 205 (2002).

<sup>151</sup> *Powers* 2002 WL 32026155, at \*4. See also Sklar, Tr. 501 -02.

The best empirical evidence, however, suggests that many consumers can and do make rational funeral purchasing decisions.<sup>152</sup> Consumers often benefit from prior experience when making choices regarding funerals. For example, an FTC staff survey found that over 60% of respondents had been involved in at least one prior funeral arrangement.<sup>153</sup> Moreover, only 11% of respondents arranged funerals alone; many first-time consumers receive help from friends and relatives.<sup>154</sup> In addition, because the majority of deaths are not unexpected or sudden, consumers can gather information and arrange funerals deliberately and in advance.<sup>155</sup> Experience, reputation, and referrals are important ways that consumers gather information about individual funeral directors.<sup>156</sup> Funeral directors' trade associations even survey consumers to gauge their satisfaction with prices and relay consumer feedback to individual funeral homes.<sup>157</sup> Moreover, consumers purchase many goods and services at the time of a funeral from non-funeral directors, such as airline tickets and flowers, with no reported problems.<sup>158</sup>

One of the most significant tests of the “ignorant consumer” hypotheses lies in a comprehensive assessment of the effects of the FTC’s Funeral Rule. The Funeral Rule essentially requires that funeral directors disclose itemized price lists and provide a final statement of goods and services. The Rule also requires that funeral directors refrain from various types of misrepresentations, from requiring the purchase of certain goods and services as a condition for receiving other goods and services, and from embalming for a fee without prior approval.<sup>159</sup> The FTC enacted the rule to protect ignorant and hurried consumers from exploitation by aggressive and knowledgeable funeral directors. Yet by most measures, the rule led to little change in consumer shopping or purchasing behavior.<sup>160</sup> In fact, the rule appears to have increased consumer spending on funerals—a result difficult to square with the notion that, prior to the rule, funeral directors were selling consumers unwanted merchandise.<sup>161</sup> The rule generated no increase in consumer satisfaction, which surveys showed already exceeded 90% prior to the rule’s enactment.<sup>162</sup>

Finally, the fact that some licensed funeral homes may engage in aggressive sales tactics does not support licensing requirements for independent casket sellers. Arguments for regulation of

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<sup>152</sup> See . McChesney, *supra* note \_\_\_\_.

<sup>153</sup> Report on the Survey of Recent Funeral Arrangers, Federal Trade Commission III-5 (April 28, 1988). Similarly, a study released by the Batesville Casket Company observed that “[m]ore than 44% of Baby Boomers have made funeral arrangements for someone close to them. Interestingly, nearly one in seven Gen Xers (14%) have also been involved in funeral planning.” *New Consumer Research*, Mortuary Management, January 2002, at 32.

<sup>154</sup> *Id.* (noting that “only 11% of the respondents made all the funeral arrangements by themselves”).

<sup>155</sup> McChesney, *supra* note \_\_\_, at 8.

<sup>156</sup> McChesney, *supra* note \_\_\_, at 29.

<sup>157</sup> McChesney, *supra* note \_\_\_, at 15, 31-32, 43.

<sup>158</sup> Neily, Tr. 471.

<sup>159</sup> 16 C.F.R. Sec. 453.

<sup>160</sup> McChesney, *supra* note \_\_\_, at 43-48.

<sup>161</sup> McChesney, *supra* note \_\_\_, at 48-51.

<sup>162</sup> McChesney, *supra* note \_\_\_, at 52-57.

funeral directors assume that funeral purchasers are “ignorant, beleaguered, and dissatisfied.”<sup>163</sup> They must make unexpected and rapid decisions with little information about competitive alternatives. The funeral director, as a trained, informed professional, may manipulate the customer’s emotions to sell things that customers would not purchase when in a calmer state of mind, or may selectively disclose only the more expensive options, including caskets.

Whatever the merits of these arguments, they are basically irrelevant for independent casket sales, and especially irrelevant for online sales. Requiring independent retailers to have funeral directors’ licenses will protect few grief-stricken consumers. These consumers are the ones who are usually assumed to deal only with the funeral director who provides the funeral services and thus eschew comparison shopping at independent casket retailers.<sup>164</sup> Licensing requirements for independent casket retailers could, however, reduce the flow of useful information to consumers who do want to shop around. Independent casket sellers provide consumers with an additional set of competitive options and an alternative source of information. Online casket vendors allow consumers to search available models and compare prices without having to interact with sales staff at all. Regulations that increase barriers to independent casket sales tend to deprive consumers of this alternative information source and increase consumer vulnerability to manipulation.

In *Powers*, the Federal Trade Commission argued precisely this point in refuting a particularly novel consumer protection theory. Oklahoma argued that casket sellers must have funeral director’s licenses to ensure that casket purchasers are protected by the FTC’s Funeral Rule.<sup>165</sup> The Funeral Rule applies only to businesses that supply both funeral goods and funeral services, which is precisely what funeral directors do. Former FTC officials have questioned whether the rule was really justified by funeral market conditions.<sup>166</sup> Regardless of the merits of the rule, as the FTC itself pointed out in an amicus brief, requiring independent casket sellers to have funeral director’s licenses does not further the goals of the Funeral Rule:

The fundamental purpose of the Rule is to protect consumers by giving them full information in order to promote greater competition. In adopting the Rule, the Commission determined that, without adequate information, consumers could find themselves at the mercy of individual funeral directors, who, in turn, would be insulated from meaningful competition. The Rule sought to remedy that problem by helping to ensure that funeral directors faced genuine competition, to the ultimate benefit of consumers.

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<sup>163</sup> McChesney, *supra* note \_\_, at 20.

<sup>164</sup> Sutter (2005), *supra* note \_\_, at 29.

<sup>165</sup> *Powers v. Harris*, Defendants’ Motion to Dismiss Plaintiffs’ First Amended Complaint and Brief in Support at 19.

<sup>166</sup> See McChesney, *supra* note \_\_; Timothy J. Muris, *Rules Without Reason: The Case of the FTC*, 6 REGULATION 20, 25 (1982).

The purpose and effect of the challenged portion of the FSLA [Funeral Services Licensing Act] is precisely the opposite. Rather than promote competition, the FSLA prohibits it. Rather than protect consumers by exposing funeral directors to meaningful competition, the FSLA protects funeral directors from facing any competition from third-party casket sellers. Rather than promote consumer choice, the FSLA forces consumers to purchase caskets from funeral directors. Whatever ends the FSLA can be said to be advancing, it is not advancing the ends of the FTC's Funeral Rule.<sup>167</sup>

Indeed, it is likely that Oklahoma's licensing requirement would not even have subjected independent casket sellers to the Funeral Rule, since the rule explicitly applies only to "funeral providers" who furnish both "funeral goods and funeral services."<sup>168</sup> Even if the Funeral Rule produces consumer benefits, therefore, licensing casket sellers would not produce any benefits due to the Funeral Rule.

### **b. Grief Counseling**

Some states and funeral homes have expressed concerns about the mental health of consumers buying caskets online. They argue that funeral directors are trained to comfort people during a time of loss. Mirroring arguments in other industries, funeral homes contend that "a casket is not just a commodity like a shirt or a pair of shoes; it is a product for a special specific event at a very sensitive and specific time."<sup>169</sup> In addition, some grief counselors believe that consumers should visit funeral homes to ease the grieving process,<sup>170</sup> and others worry that online sales might "trivialize the gravity of death."<sup>171</sup> A Maryland regulator testified that the "difficulty with an Internet sale is that we may not have the opportunity for this give and take and personal exchange."<sup>172</sup>

Online sales, however, simply give consumers a choice of where to buy a casket. Even in states that allow online sales, most consumers continue to purchase caskets through funeral directors. Furthermore, consumers can receive psychological help from people other than licensed funeral directors; in the Tennessee case, one of the unlicensed funeral vendors was an ordained minister.<sup>173</sup> Finally, the Sixth Circuit noted two other problems with this argument:

[E]ven those who purchase from casket retailers will still need a licensed funeral director for arranging services and handling the body, at which time the survivors may still receive the benefit of the funeral director's psychological training.

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<sup>167</sup> FTC Amicus Brief at 2.

<sup>168</sup> 16 C.F.R. Sec. 453.1(j).

<sup>169</sup> Vandenbergh, Tr. 461.

<sup>170</sup> Tedeschi, *supra* note \_\_\_, at C5.

<sup>171</sup> Tahmincioglu, *supra* note \_\_\_.

<sup>172</sup> Sklar, Tr. 501.

<sup>173</sup> *Craigmiles*, 110 F. Supp. 2d at 659.

Moreover, survivors must deal with a panoply of vendors in order to make funeral arrangements, from churches to food vendors for a wake, none of whom is required to have this psychological training. This justification is very weak, indeed.<sup>174</sup>

### c. Health and Safety

Some states and funeral homes contend that licensing promotes health and safety, because proper disposal of human remains affects the environment and the public.<sup>175</sup>

The evidence, however, shows that caskets themselves do not protect consumers. “Caskets have not been shown to play a role in protecting public health, safety, or sanitation, nor have they been shown to aid in protection of the environment.”<sup>176</sup> In *Craigmiles*, the district court found that “the record contains no evidence that anyone has ever been harmed by a leaky casket.”<sup>177</sup> Many states do not require the use of a casket in a burial at all; in both Oklahoma and Tennessee, for example, consumers can provide their own casket, or none at all.<sup>178</sup> Similarly, Georgia sets no standards for the design or construction of caskets.<sup>179</sup> At the FTC workshop, no one presented evidence demonstrating a link between public health and caskets, or evidence that consumers suffered harm in states that did not require a license to sell a casket.

In any case, even if caskets did benefit the environment, a casket retailer would not need specialized training to sell them. “Selling a casket is not rocket science. You don’t need to be a funeral director, to be educated at a mortuary school to do these things.”<sup>180</sup> None of the federal courts that considered the issue found that selling a casket required specialized training. The court in the Oklahoma case, for example, concluded that “very little specialized knowledge is required to sell caskets.”<sup>181</sup> Currently, “none of the training received by licensed funeral directors regarding caskets has anything to do with public health or safety.”<sup>182</sup> Less than 5% of the education and training requirements for a license relate to selling a casket.<sup>183</sup>

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<sup>174</sup> *Craigmiles*, 312 F.3d at 228.

<sup>175</sup> *Id.* at 224-28 (discussing Tennessee’s arguments).

<sup>176</sup> *Powers* 2002 WL 32026155, at \*3. See also *The High Cost of Dying: Rising Prices and Consumer Deception in the Funeral Industry: Proposals for Reform* (NYC Dep’t of Consumer Affairs February 1999) at 20 (noting that “there is no such thing as a ‘protective’ casket”).

<sup>177</sup> *Craigmiles*, 110 F. Supp. 2d at 662.

<sup>178</sup> *Id.*

<sup>179</sup> *Peachtree*, 1999 WL 33651794, \*1.

<sup>180</sup> Krause, Tr. 499.

<sup>181</sup> *Powers* 2002 WL 32026155, at \*5. See also *Casket Royale*, 124 F. Supp. 2d at 438 (“surely no special skills are necessary for this duty”).

<sup>182</sup> *Craigmiles*, 110 F. Supp. 2d at 663.

<sup>183</sup> *Powers* 2002 WL 32026155, at \*5; *Craigmiles*, 312 F.3d at 222 (casket and urn issues constituted no more than 5% of mandatory curriculum for funeral directors).

In terms of logistics, independent casket retailers can provide caskets in a timely manner. Independent casket retailers face the same types of shipping and inventory issues as funerals. The fact that a casket comes from an independent seller “does not present any unique problems for funeral directors or for customers.”<sup>184</sup> In *Casket Royale*, the court found that “Defendants have failed to show that the licensing requirement in any way speeds the process of burial. More importantly, Defendants have failed to provide any evidence that unlicensed dealers slow burial or cremation.”<sup>185</sup>

Finally, there is no difference in quality between caskets sold by independent vendors and those sold by funeral directors.<sup>186</sup> For most caskets, the manufacturer, not the retailer, provides a warranty, which will seldom if ever address the protective qualities of the caskets.<sup>187</sup> A casket is a “glorified box” that “does not differ from any other product in the marketplace.”<sup>188</sup> In *Craigmiles*, the Sixth Circuit concluded that “there is no evidence in the record that licensed funeral directors were selling caskets that were systematically more protective than those sold by independent casket retailers. Indeed, the only difference between the caskets is that those sold by licensed funeral directors were systematically more expensive.”<sup>189</sup> Of course, if there was a difference in casket quality, a state could simply regulate the casket directly, with far fewer anticompetitive effects.

#### **d. Legal Remedies**

Some funeral homes and states maintain that consumers could suffer from fraud or other abuses if they buy caskets from independent sources. They suggest that injured consumers would have no legal remedy unless casket sales are limited to funeral directors subject to regulatory oversight.

Like any retailers, however, casket sellers are subject to the same general consumer protection laws as any other business, including state contract and consumer protection laws.<sup>190</sup> Many of these laws provide for private rights of action.<sup>191</sup> At the FTC’s workshop, for example, no one

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<sup>184</sup> *Powers* 2002 WL 32026155, at \*6.

<sup>185</sup> *Casket Royale*, 124 F.Supp.2d at 438.

<sup>186</sup> *Craigmiles*, 312 F.3d at 226.

<sup>187</sup> Joanne Kimberlin, *Monopolistic Funeral Homes Have the Law on Their Side, Critics Say*, *The Virginia Pilot*, Aug. 21, 2001; *Craigmiles*, 110 F. Supp. 2d at 664; Brown, Tr. 498. *See also Aurora Introduces New 25 Year Warranty for Metal Caskets*, *Mortuary Management*, April 2003, at 32 (the Aurora casket warranty states “There is no scientific or other evidence that any casket with a sealing device will preserve human remains.”); *Batesville Casket Updates Warranties*, *Mortuary Management*, January 2003, at 30 (“Batesville will no longer describe its gasket-equipped metal caskets as ‘protective’”).

<sup>188</sup> *Casket Royale*, 124 F. Supp. 2d at 438; *Craigmiles*, 110 F. Supp. 2d at 663.

<sup>189</sup> *Craigmiles*, 312 F.3d at 226. *See also Casket Royale*, 124 F. Supp. 2d at 438.

<sup>190</sup> *See Casket Royale*, 124 F. Supp. 2d at 440; *Craigmiles*, 110 F. Supp. 2d at 664; FTC Amicus Br., *supra* note \_\_\_, at 15.

<sup>191</sup> *Powers* 2 002 WL 32026155, at \*13.

presented evidence indicating that these laws do not provide sufficient remedies for consumers, or that jurisdictional concerns present any greater difficulties in this market than in any other.<sup>192</sup>

### 3. Less Restrictive Alternatives

To the extent that states seek to protect consumers, they may have less restrictive means than licensing of achieving their consumer protection goals. In the first place, states could best protect consumers by encouraging competition. As *Craigmiles* found, competition, not regulation, represents the best remedy for practices that raise consumer protection concerns: “perhaps the best antidote for the evil of funeral goods and services bundling by funeral homes is to have third-party competitors on individual items like caskets.”<sup>193</sup> Online sales allow consumers to comparison shop among a much larger number of casket providers. Through the Internet, consumers can avoid having to interact with salespeople in purchasing a casket altogether, and the empirical evidence indicates that online sales put competitive pressure on funeral homes. By easing licensing requirements, states would encourage competition and, therefore, increase consumer protection.

Greater competition also would improve the overall quality of caskets purchased by consumers. By lowering prices, competition would allow consumers to purchase better caskets. The Sixth Circuit explained the effect concisely:

In fact, restricting sales of caskets to licensed funeral directors would seem to have an adverse effect on the quality of caskets. The licensing requirement does not require consumers to choose more protective caskets or funeral directors to recommend them. Generally, however, the cost of more protective caskets is higher. If casket retailers were to increase competition on casket *prices* and bring those prices closer to marginal costs, then more protective caskets would become more affordable for consumers with limited funds and their use would likely increase.<sup>194</sup>

The FTC staff offered a similar analysis in the contact lens industry. Staff testimony before the Connecticut Board of Examiners for Opticians noted that higher prices for disposable contact lenses likely lead consumers to replace them less frequently than their doctors recommend.<sup>195</sup>

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<sup>192</sup> Moreover, the Federal Trade Commission has authority under Section 5 of the FTC Act to bring an enforcement action against a casket seller who makes false or misleading claims about the products or services it provides. 15 U.S.C. § 45. The Commission also has authority under its unfairness jurisdiction to stop marketing practices that cause or are likely to cause substantial consumer injury, which is not reasonably avoidable by consumers and is not outweighed by countervailing benefits to consumers or to competition. 15 U.S.C. § 45(n). *See also* Unfairness Policy Statement, *appended to International Harvester Co.*, 104 FTC 949, 1070 (1984). Many state attorneys general have similar authority.

<sup>193</sup> *Craigmiles*, 312 F.3d at 228.

<sup>194</sup> *Craigmiles*, 312 F.3d at 226.

<sup>195</sup> *See* FTC Staff Comment Before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002), at <http://www.ftc.gov/be/v020007.htm>.



In terms of regulation, states can tailor laws to address a specific consumer protection concern. For example, Mississippi justified its licensing regime as a way to prevent funeral directors from soliciting dead bodies,<sup>196</sup> but Mississippi could have simply applied its solicitation rule to all casket vendors. Likewise, if a state found, hypothetically, that the evidence demonstrated a concern about the quality of caskets, states could simply establish standards for casket usage and quality rather than limit the types of vendors who could sell caskets.<sup>197</sup>

Finally, if states choose to require a license to sell a casket, they can lower the cost of obtaining one, or require simple registration. For example, states need not require training in embalming, which has no relation to the business of selling a casket. Some states impose relatively simple requirements to obtaining a license. California requires only that a licensee pass a test, but does not impose specific educational or apprenticeship standards.<sup>198</sup> According to a Maryland regulator, Maryland's licensing system is "more of a registration. There's no training or education requirements, and the permit applications for businesses are rarely unmet . . . Our barrier is that they have to be in business and above 21 in age and not be on parole, and they're in. So, that doesn't keep too many people out."<sup>199</sup> Maryland also gives out-of-state internet vendors the option to voluntarily submit to the state's jurisdiction, which some vendors accept to instill confidence in potential customers.<sup>200</sup>

#### IV. Conclusion

Both the case law and the empirical evidence undermine the argument that state funeral licensing, as applied to online casket sales, furthers a legitimate state interest. *Powers* notwithstanding, naked protectionism is not a legitimate state interest. No other court has so held. Moreover, the empirical evidence shows that the regulations likely harm consumers by raising casket prices and restricting the variety of available caskets.

In light of *Granholm* and the casket cases, courts may increasingly scrutinize regulations that impair the flow of e-commerce, not only in caskets and wine, but in many other industries ranging from automobiles to real estate. The *Granholm* court extensively analyzed the effects of discriminatory regulation on interstate commerce, consumer welfare, and the underlying

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<sup>196</sup> *Casket Royale*, 124 F. Supp. 2d at 438.

<sup>197</sup> *Craigsmiles*, 312 F.3d at 226, 228 ("The legislature could develop similar standards for casket retailers, or even make Section 317 directly applicable to casket retailers also, without requiring the licensure that is the subject of complaint . . . The licensure requirement imposes a significant barrier to competition in the casket market. By protecting licensed funeral directors from competition on caskets, the FDEA harms consumers in their pocketbooks. If consumer protection were the aim of the 1972 amendment, the General Assembly had several direct means of achieving that end").

<sup>198</sup> Harrington and Krynski, *supra* note \_\_\_\_, at 205. See also GAO, *Funeral-Related Industries 22* (1999) (analyzing five states' approach to regulation).

<sup>199</sup> Sklar, Tr. 479, 503.

<sup>200</sup> *Id.* at 479-80.

consumer protection rationales. When state regulation clearly impedes e-commerce—even ostensibly intrastate commerce—courts may well find that the regulation also impedes interstate commerce. If so, they would then need to use empirical evidence to evaluate the state’s justifications.

The empirical evidence shows that licensing third party casket retailers increases casket prices, may increase overall funeral expenditures (when barrier to entry into funeral directing are high), and likely deprives consumers of the increased variety and convenience that online casket sales offer. In addition, there is little evidence that licensing is necessary to accomplish any legitimate public purpose. Many funeral purchasers are well-informed consumers who are unlikely to need the protections that licensing purports to offer. Licensing third-party casket sellers offers consumers little additional protection, since most of the consumers likely to shop from third party vendors are likely to be well-informed. Discouraging market entry by online casket sellers could actually reduce consumer protections by depriving consumers of useful information they can garner from online sellers. Online casket sales do not deprive consumers of access to grief counseling, since casket buyers must still deal with trained funeral directors and often other professionals, such as clergy, to obtain funeral services. Licensing of casket retailers does nothing to improve public health or safety. Finally, states can use less restrictive alternatives, such as registration, to accomplish the legitimate public purposes that licensing is purported to accomplish.

For these reasons, state funeral regulations which impede electronic commerce in caskets would almost certainly fail a *Granholm*-style factual analysis. This implies that such regulations could be held unconstitutional under the Commerce Clause. They would also likely fail a challenge under the Equal Protection or Due Process Clause if courts consider whether evidence actually supports the state’s defense. Accordingly, *Granholm* may ultimately drive the last nail into the coffin of casket sales licensing.