

## **BURIED ONLINE: STATE LAWS THAT LIMIT E-COMMERCE IN CASKETS**

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*Consumers seeking to purchase caskets online could benefit from the Supreme Court's 2005 decision that forbids states from discriminating 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 Tenth 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 and concluded that the states had failed to make a persuasive case in favor of discrimination against out-of-state wine sellers.*

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*Examining the economic evidence, we find that state laws that impede electronic commerce in caskets would almost certainly fail a Granholm-style factual analysis. This implies that such laws would be held unconstitutional under the Commerce Clause if a plaintiff brings a challenge similar to the one in Granholm. The laws are also vulnerable to an equal protection or due process challenge if courts consider whether evidence supports the state's defense.*

## Introduction

The Internet affects the market for virtually every good and service imaginable, from cars and contact lenses to teaching and telemedicine. Perhaps not surprisingly, the Internet also affects the funeral market. Independent vendors often sell caskets online at much lower prices than funeral homes, which typically mark up their caskets by 300% to 400%.<sup>1</sup> Many online vendors also offer a greater variety, such as individualized caskets with religious, college, or armed forces themes.<sup>2</sup> Major League Baseball recently signed a deal to license team logos to a casket and urn maker.<sup>3</sup> One online vendor features caskets emblazoned with the phrase "Return to Sender."<sup>4</sup>

Some states, however, have adopted regulations that could limit online casket sales. In ten states, state law permits retail casket sales only through a vendor who has a funeral director's license or who operates a physical funeral establishment.<sup>5</sup> 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."<sup>6</sup> Proponents argue that such regulations protect consumers by preventing high-pressure sales tactics and ensuring

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1. See *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 664 (E.D. Tenn. 2000).

2. Mem'l Concept Online, Caskets, <http://www.memorialconceptsonline.com/custom.asp> (last visited Oct. 24, 2006).

3. Patrick Walters, *Coffins to Bear Logos of Baseball Teams*, Yahoo! Finance, [http://biz.yahoo.com/ap/061018/baseball\\_funerals.html?.v=3](http://biz.yahoo.com/ap/061018/baseball_funerals.html?.v=3) (last visited Nov. 9, 2006).

4. David E. Harrington, *Are State Funeral Regulations Burying Online Casket Sales?* 8 (Oct. 9, 2002), <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/harrington.pdf>.

5. Clark Neily, Inst. for Justice Senior Attorney, Summary of Remarks Regarding Online Casket Retailers for the FTC's "Competition on the Internet" Workshop 1, 2 (Oct. 1, 2002), <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/neily.pdf>.

6. S.C. CODE ANN. § 40-19-230(B)(4) (Supp. XIV 2005).

proper burials, while critics counter that such regulations merely protect funeral homes from competition.<sup>7</sup>

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 the regulations did not advance any legitimate state interests.<sup>8</sup> A fourth court upheld similar regulations despite finding no evidence that the regulations benefited casket buyers.<sup>9</sup> In this remarkable opinion, the Tenth Circuit concluded that economic protectionism for licensed funeral directors, by itself, qualified as a legitimate state interest.<sup>10</sup>

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*,<sup>11</sup> 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.<sup>12</sup> In so holding, the Court recognized that preexisting state regulations can impede the flow of e-commerce and used empirical evidence to evaluate the regulations’ effect on consumers and state interests.<sup>13</sup> The Court conducted a fact-intensive analysis and concluded that the states had failed to make a persuasive case in favor of discrimination against out-of-state wine sellers.<sup>14</sup> Although *Granholm* involved the negative Commerce Clause rather than the Equal Protection Clause or the Due Process Clause, the Court’s rationale ultimately may affect the analysis of regulations in the funeral industry and other markets influenced by e-commerce, including automobiles, real estate, teaching, and medicine.

Examining the economic evidence, this article finds that state funeral regulations that impede electronic commerce in caskets would

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7. Powers v. Harris, 379 F.3d 1208, 1215–16 (10th Cir. 2004).

8. *Craigsmiles v. Giles*, 110 F. Supp. 2d 658, 667 (E.D. Tenn. 2000); *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434, 441 (S.D. Miss. 2000); *Peachtree Caskets Direct, Inc. v. State Bd. of Funeral Serv. of Ga.*, No. Civ. 1:98-CV-3084-MHS, 1999 WL 33651794, at \*2 (N.D. Ga. Feb. 9, 1999).

9. *Powers*, 379 F.3d at 1225.

10. *Id.* at 1221.

11. 544 U.S. 460 (2005).

12. *Id.* at 474–76, 493.

13. *Id.* at 466–67.

14. *Id.* at 492–93.

fail a *Granholm*-style factual analysis. This conclusion implies that such regulations would be held unconstitutional under the Commerce Clause if a plaintiff mounts a challenge similar to the one in *Granholm*. Moreover, it 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.

## I. Recent Funeral Cases

Four recent cases addressed the constitutionality of state casket regulations.<sup>15</sup> Each case involved challenges to state statutes and regulations that limited casket sales to licensed funeral directors and erected significant obstacles to obtaining a license.<sup>16</sup> The statutes required a casket vendor to obtain a "funeral director" license and a "funeral establishment" license as prerequisites to selling caskets.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> The states countered that their laws advanced legitimate consumer protection goals such as protect-

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15. *Powers*, 379 F.3d 1208; *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), *aff'g* 110 F. Supp. 2d 658 (E.D. Tenn. 2000); *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434 (S.D. Miss. 2000); *Peachtree Caskets Direct, Inc. v. State Bd. of Funeral Serv. of Ga.*, No. Civ. 1:98-CV-3084-MHS, 1999 WL 33651794 (N.D. Ga. Feb. 9, 1999).

16. *Powers*, 379 F.3d at 1211–12; *Craigmiles*, 312 F.3d at 222; *Casket Royale*, 124 F. Supp. 2d at 436; *Peachtree*, 1999 WL 33651794, at \*1.

17. *Powers*, 379 F.3d at 1211; *Craigmiles*, 312 F.3d at 222; *Casket Royale*, 124 F. Supp. 2d at 436; *Peachtree*, 1999 WL 33651794, at \*1.

18. *Powers*, 379 F.3d at 1214–15; *Craigmiles*, 312 F.3d at 223; *Casket Royale*, 124 F. Supp. 2d at 437; *Peachtree*, 1999 WL 33651794, at \*1.

19. *Powers*, 379 F.3d at 1216–17; *Craigmiles*, 312 F.3d at 226; *Casket Royale*, 124 F. Supp. 2d at 437; *Peachtree*, 1999 WL 33651794, at \*1.

ing grieving consumers from overreaching sales tactics and ensuring the safe disposal of human remains.<sup>20</sup>

All four courts analyzed the regulations using the rational basis test, under which a regulation is constitutional if it bears some rational relation to a legitimate state interest.<sup>21</sup> In three of the cases, the courts struck the Tennessee, Mississippi, and Georgia statutes.<sup>22</sup> 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.<sup>23</sup> In the fourth case, involving an Oklahoma statute, the court held that economic protectionism alone qualified as a legitimate state interest for constitutional purposes.<sup>24</sup>

#### A. Cases Striking Licensing Requirements

The leading case, *Craigmiles v. Giles*,<sup>25</sup> involved the Tennessee Funeral Directors and Embalmers Act.<sup>26</sup> The Act forbade anyone from selling caskets without first obtaining a state “funeral director” license.<sup>27</sup> To obtain this 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.<sup>28</sup> After the two years, the applicant then had to pass a funeral arts test.<sup>29</sup> Most of the applicant’s training, however, had little to do with selling caskets.<sup>30</sup> 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 concerned caskets and urns.<sup>31</sup> Much of the remaining coursework covered extraneous issues such as embalming or “restorative art.”<sup>32</sup>

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20. *Powers*, 379 F.3d at 1216; *Craigmiles*, 312 F.3d at 225; *Casket Royale*, 124 F. Supp. 2d at 438–40.

21. *Powers*, 379 F.3d at 1214–23; *Craigmiles*, 312 F.3d at 222–29; *Casket Royale*, 124 F. Supp. 2d at 437–41; *Peachtree*, 1999 WL 33651794, at \*1.

22. *Craigmiles*, 312 F.3d at 229; *Casket Royale*, 124 F. Supp. 2d at 441; *Peachtree*, 1999 WL 33651794, at \*2.

23. *Craigmiles*, 312 F.3d at 228; *Casket Royale*, 124 F. Supp. 2d at 441; *Peachtree*, 1999 WL 33651794, at \*1.

24. *Powers*, 379 F.3d at 1225.

25. 312 F.3d at 220.

26. *Id.* at 222.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

Plaintiff Nathaniel Craigmiles operated two independent casket stores that sold caskets, urns, flower holders, and other funeral merchandise.<sup>33</sup> His stores did not embalm bodies or arrange funeral services.<sup>34</sup> Based on the Tennessee Act, the Tennessee Funeral Board issued a cease and desist order to bar Craigmiles from selling caskets or other funeral merchandise.<sup>35</sup> Represented by the Institute for Justice, a libertarian public interest group, 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 Fourteenth Amendment.<sup>36</sup>

The Sixth Circuit analyzed the case using the rational basis test.<sup>37</sup> As the court explained, a statute enjoys a strong presumption of validity, and it is valid “if there is any reasonably conceivable state of facts that could provide a rational basis.”<sup>38</sup> 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.”<sup>39</sup> The court stated, however, that “[c]ourts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose.”<sup>40</sup>

Turning to Tennessee’s Act, the court found that the law was “nothing more than an attempt to prevent economic competition.”<sup>41</sup> In the first place, the court found that the statute did not promote public health and safety.<sup>42</sup> The plaintiffs did not embalm or otherwise handle the bodies.<sup>43</sup> The court stated that, in theory, low-quality caskets could potentially threaten public health if they leaked, but the Act imposed no safety standards on caskets, nor did it require consumers to use any particular type of casket or, indeed, any casket at all.<sup>44</sup> Moreover, the Act had the practical result of increasing casket prices,

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33. *Id.* at 223.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 224.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 225.

42. *Id.* at 226.

43. *Id.* at 225.

44. *Id.*

which likely led consumers to buy relatively less protective caskets.<sup>45</sup> For similar reasons, the court also discounted the state's consumer protection rationale.<sup>46</sup> Addressing concerns about consumer fraud, the court held the Act's licensing requirement to be overbroad because general consumer protection laws already applied to retailers, and the state could apply more stringent laws to retailers without requiring licensing.<sup>47</sup> In any event, consumers would still have to consult a licensed funeral director for arranging services and handling the body.<sup>48</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."<sup>49</sup> 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."<sup>50</sup> 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 entering the Tennessee casket markets."<sup>51</sup> These entry barriers led to higher prices for consumers because "funeral home operators generally mark up the price of caskets 250% to 600%, whereas casket retailers sell caskets at much smaller margins."<sup>52</sup>

Courts used similar reasoning to invalidate funeral regulations in Georgia and Mississippi.<sup>53</sup> In *Peachtree Caskets Direct, Inc. v. State Board of Funeral Service of Georgia*,<sup>54</sup> 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>55</sup> Similarly, in *Casket Royale, Inc. v. Mississippi*,<sup>56</sup> the district court acknowledged that the

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45. *Id.* at 225–26.

46. *Id.* at 226.

47. *Id.* at 226–27.

48. *Id.* at 224–25.

49. *Id.* at 229.

50. *Id.* at 228.

51. *Id.* at 224–25.

52. *Id.* at 224.

53. *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434 (S.D. Miss. 2000); *Peachtree Caskets Direct, Inc. v. State Bd. of Funeral Serv. of Ga.*, No. Civ. 1:98-CV-3084-MHS, 1999 WL 33651794 (N.D. Ga. Feb. 9, 1999).

54. *Peachtree*, 1999 WL 33651794.

55. *Id.* at \*1.

56. *Casket Royale*, 124 F. Supp. 2d at 439.

state had a legitimate interest in the prompt disposition of human remains and consumer protection, but it held that the state's licensing scheme bore no rational relationship to those purposes.<sup>57</sup> 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>58</sup> Moreover, although Mississippi had expressed concern about vendors soliciting dead bodies, its license requirement did not prevent licensees from soliciting casket sales,<sup>59</sup> and 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>60</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.<sup>61</sup> 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>62</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>63</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.<sup>64</sup> In *Powers v. Harris*,<sup>65</sup> the court considered

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57. *Id.* at 438.

58. *Id.*

59. *Id.* at 439.

60. *Id.* at 440; *see also* Pre-Need Cemetery and Funeral Registration Act, Miss. Att'y Gen., Op. No. 2003-0588, 2003 WL 22970542 (applying *Casket Royale, Inc. v. Mississippi* to Mississippi regulations).

61. Tex. Att'y Gen., Op. No. JC-0505, at 3 (May 15, 2002).

62. *Id.* at 1.

63. *Id.* at 3.

64. *Powers v. Harris*, 379 F.3d 1208, 1218–19 (10th Cir. 2004).

65. 379 F.3d 1208.



Oklahoma's Funeral Services Licensing Act, which required anyone engaged in the sale of funeral merchandise, including caskets, to have a funeral director's license and operate out of a licensed funeral establishment.<sup>66</sup> 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 twenty-five bodies.<sup>67</sup> Under the Act, a "funeral establishment" must have a fixed physical location, a preparation room for embalming bodies, a merchandise-selection room with at least five caskets, and adequate space for public viewing of human remains.<sup>68</sup> The Act extends only to intra-state sales and does not apply to out-of-state vendors who sell caskets directly to Oklahoma consumers or to Oklahoma vendors who sell caskets to out-of-state consumers.<sup>69</sup>

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.<sup>70</sup> Like the plaintiffs in *Craigmiles*, this Oklahoma vendor pointed out that less than 5% of the education and training requirements related directly to selling caskets.<sup>71</sup> 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.<sup>72</sup> Oklahoma also argued that the state deserved "leeway to approach a perceived problem incrementally."<sup>73</sup>

Unlike *Craigmiles*, however, the *Powers* court ignored the question of whether the state's statutes actually served the interests of consumers.<sup>74</sup> Instead, the court stated that it was "obliged to consider every plausible legitimate state interest that might support the [Act]—

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66. *Id.* at 1211.

67. *Powers v. Harris*, No. CIV-01-445-F, 2002 WL 32026155, at \*12 (W.D. Okla. Dec. 12, 2002); Brief for FTC et al. as Amicus Curiae Supporting Respondent, *Powers v. Harris*, No. CIV-01-445-F (W.D. Okla. Dec. 12, 2002), 2002 WL 32026155, at \*9 [hereinafter FTC Amicus Brief].

68. *Powers*, 379 F.3d at 1212–13.

69. *Id.* at 1212.

70. *Id.* at 1215.

71. *Id.* at 1215–16.

72. *Id.* at 1216.

73. *Id.* (citation omitted).

74. *Id.* at 1218.

not just the consumer-protection interest forwarded by the parties.”<sup>75</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>76</sup>

In a decision that embodies the worst fears of Mancur Olson’s *The Rise and Decline of Nations*,<sup>77</sup> the court held that naked protectionism qualifies as a legitimate state interest.<sup>78</sup> “[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>79</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>80</sup> Therefore, “in practical terms, we would paralyze state governments if we undertook a probing review of each of their actions.”<sup>81</sup> To strike Oklahoma’s protectionist scheme for funeral homes, the court reasoned, would have the effect of threatening licensing schemes for all professionals, including doctors, electricians, or plumbers.<sup>82</sup> Faced with the prospect of unlicensed accountants or even lawyers, the court upheld the Act’s constitutionality because “[t]here can be no serious dispute that the [Act] is ‘very well tailored’ to protecting the intrastate funeral-home industry.”<sup>83</sup>

The court criticized *Craigsmiles* for relying on cases involving interstate commerce rather than intrastate commerce.<sup>84</sup> “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>85</sup> The court also criticized

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75. *Id.*

76. *Id.*

77. MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* (1982) (explaining why well-organized, concentrated interest groups, rather than the broader public interest, often determine policy outcomes).

78. *Powers*, 379 F.3d at 1221.

79. *Id.* at 1220 (citing *Fitzgerald v. Racing Assoc. of Cent. Iowa*, 539 U.S. 103, 109 (2003)).

80. *Id.* at 1221.

81. *Id.* at 1218.

82. *Id.* at 1222.

83. *Id.* at 1223.

84. *Id.* at 1219.

85. *Id.* at 1220.

*Craigsmiles* for examining the motives of the state's legislature, rather than considering every conceivable rationale for the state's actions.<sup>86</sup>

In a concurring opinion, Judge Timothy M. Tymkovich criticized the majority for adopting an "unconstrained view of economic protectionism as a 'legitimate state interest.'"<sup>87</sup> His concurrence criticized the majority for creating "an almost per se rule upholding intrastate protectionist legislation."<sup>88</sup> In Judge Tymkovich's view, courts should uphold a protectionist effect only where "the discriminatory legislation arguably advances either the general welfare or a public interest."<sup>89</sup> While 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>90</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.<sup>91</sup>

Aside from *Powers*, one other recent decision held that states have a legitimate 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>92</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>93</sup> Finally, in 1998, the Oklahoma Court of Civil Appeals upheld the state's casket sales restriction, also based on health and sanitation concerns.<sup>94</sup>

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86. *Id.* at 1219–20.

87. *Id.* at 1225.

88. *Id.* at 1226.

89. *Id.* at 1225.

90. *Id.* at 1227.

91. *Id.* at 1226–27.

92. S.C. Dep't of Labor v. Workman, No. 98-ALJ-11-0634-IJ, 1999 WL 459728, at \*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. §§ 40-19-30, -230, -270 (1991) (discussing permit requirements for funeral homes); §§ 32-7-10 to -130 (discussing pre-need funeral contracts).

93. *Workman*, 1999 WL 459728, at \*8.

94. *State ex rel. State Bd. of Embalmers v. Stone Casket Co.*, 976 P.2d 1074, 1076 (Okla. Civ. App. 1999).

## 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, the recent Supreme Court case of *Granholm v. Heald* 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.<sup>95</sup> 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 argued before the district court that Oklahoma's statutes violated the Commerce Clause.<sup>96</sup> However, 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 this ruling.<sup>97</sup> 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>98</sup> Courts do not require states to provide an "exquisite evidentiary record" to justify their legislative purposes, so long as the purposes are legitimate.<sup>99</sup>

Aside from *Powers*, no court decision—and certainly no Supreme Court decision—has ever held that protectionism, by itself, qualifies

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95. *Powers*, 379 F.3d at 1214; *Craigsmiles v. Giles*, 312 F.3d 220, 223 (6th Cir. 2002); *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434, 436 (S.D. Miss. 2000); *Peachtree Casket Direct, Inc. v. State Bd. of Funeral Serv. of Ga.*, No. Civ. 1:98-CV-3084-MHS, 1999 WL 33651794, at \*1 (N.D. Ga. Feb. 9, 1999).

96. *Powers*, 379 F.3d at 1214 n.11.

97. *Id.*

98. *Craigsmiles*, 312 F.3d at 224 (quoting *Walker v. Bain*, 257 F.3d 660, 668 (6th Cir. 2001)).

99. *Id.*

as a legitimate state interest.<sup>100</sup> For example, the *Powers* majority cites *Williamson v. Lee Optical of Oklahoma*<sup>101</sup> for the proposition that a state may legitimately try to free a profession “from all taints of commercialism.”<sup>102</sup> 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.<sup>103</sup> Although all of these cited decisions allowed governments to discriminate in favor of certain economic interests, none of them supports the *Powers* 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>104</sup> In *Williamson*, for example, the Supreme Court invoked consumer safety and health interests to uphold the state’s regulation of eye care.<sup>105</sup> Likewise, in the other cases, the Court invariably upheld the challenged legislation, at least in part, because the legislation promoted the public good.<sup>106</sup> In both the pushcart and tax cases, the Court stressed the need to preserve legitimate reliance interests or to promote general economic prosperity.<sup>107</sup> As these decisions illustrate, the Constitution may let the government play favorites, but only if the government does so for the good of the game.<sup>108</sup>

## B. *Granholm v. Heald*

The 2005 Supreme Court decision in *Granholm v. Heald* may lead courts to more closely scrutinize state regulation that impairs the flow of e-commerce 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

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100. *Powers*, 379 F.3d at 1220–21; see also *id.* at 1225 (Tymkovich, J., concurring).

101. 348 U.S. 483 (1955).

102. *Powers*, 379 F.3d at 1221 (quoting *Williamson*, 348 U.S. at 491).

103. *Id.* at 1220–21.

104. *Id.* at 1225 (Tymkovich, J., concurring).

105. *Williamson*, 348 U.S. at 486–91.

106. *Powers*, 379 F.3d at 1225 (Tymkovich, J., concurring).

107. *Fitzgerald v. Racing Ass’n of Central Iowa*, 539 U.S. 103 (2003), invoked economic development and protecting the reliance interests of riverboat owners; *Nordlinger v. Hahn*, 505 U.S. 1 (1992), invoked neighborhood preservation, continuity, stability, and protecting the reliance interests of property owners; and *New Orleans v. Dukes*, 427 U.S. 297 (1976), invoked historical preservation and economic prosperity.

108. See generally Jim Thompson, *Powers v. Harris: How the Tenth Circuit Buried Economic Liberties*, 82 DENV. U. L. REV. 585 (2005).

directly to consumers.<sup>109</sup> As the Court recognized, “[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine.”<sup>110</sup> The Court also recognized that the bans had the effect of protecting intrastate wineries and wholesalers from competition.<sup>111</sup> 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.<sup>112</sup> The Court ultimately held that the statutes violated the Commerce Clause by giving in-state vendors an advantage over out-of-state competitors, and the Twenty-first Amendment, which repealed Prohibition, did not authorize the discriminatory treatment.<sup>113</sup>

In analyzing the statutes under the Commerce Clause, the Court applied a different framework than it uses to analyze purely intrastate statutes under the Equal Protection Clause or the Due Process Clause. Instead of deferring to the state legislature and requiring only “rational speculation” to uphold the legislation, the Court demanded evidence.<sup>114</sup> “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>115</sup> The Court holds discriminatory statutes to a higher standard for several reasons. For example, from a public choice standpoint, rigorous scrutiny makes sense because out-of-state residents may lack the ability to defend their interests in another state’s legislature.<sup>116</sup>

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109. *Granholm v. Heald*, 544 U.S. 460, 465–66 (2005).

110. *Id.* at 468.

111. *Id.* at 474–76.

112. *Id.* at 472.

113. *Id.* at 492–93.

114. *Id.* at 490.

115. *Id.* at 492 (citations and internal quotations omitted).

116. The public choice point has been discussed most thoroughly in the debate over “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 H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23 (1983); Robert P. Inman & 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); TODD J. ZYWICKI ET AL., FTC 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>117</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>118</sup> The Commerce Clause enshrines the Founders’ purpose by prohibiting protectionist state regulation. Although the clause’s text grants affirmative power to Congress, “[i]t 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>119</sup> Emphasizing 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>120</sup>

Although *Granholm* analyzed the wine statutes using a different, more rigorous test than would be appropriate 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 preexisting state regulatory schemes can prevent new entrants from competing via the Internet.<sup>121</sup>

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117. *Gibbons v. Ogden*, 22 U.S. 1, 231 (1824) (Johnson, J., concurring); see also Todd Zywicki & Asheesh Agarwal, *Wine, Commerce, and the Constitution*, 1 N.Y.U. J.L. & LIBERTY 609 (2005), available at <http://www.nyuill.org/articles/Lochner/I.1%20-%2013%20-%20Zywicki.pdf>.

118. *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979).

119. *New Energy Co. v. Limbach*, 486 U.S. 269, 273–74 (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).

120. Letter from James Madison to J.C. Cabell (Feb. 13, 1829), in *RECORDS OF THE FEDERAL CONVENTION* 478 (M. Farrand ed., 1911), quoted in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994).

121. *Granholm v. Heald*, 544 U.S. 460, 467 (2005).

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>122</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>123</sup> Indeed, without direct shipping, many smaller wineries would find distribution “economically infeasible.”<sup>124</sup>

Having acknowledged the importance of e-commerce to both consumers and 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>125</sup> For example, New York and Michigan argued that interstate direct shipping allowed minors to buy wine online and provided some anecdotal evidence as support.<sup>126</sup> In finding these assertions “unsupported,” the Court relied heavily on a study of the wine industry by the Federal Trade Commission (FTC).<sup>127</sup> The FTC’s *Wine Report* canvassed more than 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>128</sup> The *Wine Report* also relied on other surveys and basic economic principles to conclude that minors were more interested in beer and spirits than in wine, and that minors had far more direct means of obtaining alcohol than the Internet.<sup>129</sup> In effect, the *Wine Report* undermined all of the states’ speculative, nonprotectionist arguments against direct shipping. The Court’s complete embrace of the *Wine Report* and skepti-

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122. *Id.*

123. *Id.* at 467–68.

124. *Id.* at 468.

125. *See id.* at 493.

126. *Id.* at 489–90.

127. *Id.* at 490.

128. *See id.*; FTC, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE (2003), available at <http://www.ftc.gov/os/2003/07/winereport2.pdf>.

129. *Granholm*, 544 U.S. at 490.



cism of the states' arguments suggest 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* may increase the burden on states to justify treating in-state and out-of-state vendors differently. Even if direct shipping increased underage drinking, the Court found that the states could not justify banning interstate direct shipping while allowing intrastate direct shipping because "minors are just as likely to order wine from in-state producers as from out-of-state ones."<sup>130</sup> Arguably, this rationale could also apply to 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.<sup>131</sup> 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 caused by 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.

Indeed, courts could well decide that all e-commerce is interstate commerce for constitutional purposes. In the first place, 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.<sup>132</sup> In any given transaction under such an arrangement, the funeral home handling the delivery may ship the casket to a local market far from its physical location—in many cases, far enough to cross state lines.<sup>133</sup> One of Funeral Depot's funeral home partners, for example, delivers only outside of its local market.<sup>134</sup> In addition, the states typically do not 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.<sup>135</sup> In a future case, however,

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130. *Id.*

131. *Powers v. Harris*, 379 F.3d 1208, 1211 (10th Cir. 2004).

132. David E. Harrington, *Brick-and-Mortar Barriers to Internet Casket Sales* 3 (Nov. 19, 2005) (unpublished manuscript, on file with The Elder Law Journal).

133. *Id.* at 5.

134. *Id.* at 12.

135. *Powers*, 379 F.3d at 1214.

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. “[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>136</sup> As the court explained in *Craigmiles*, the existence of these less restrictive, procompetitive alternatives increases the burden on states to justify more onerous rules.<sup>137</sup> This analysis ultimately could also affect state regulation of a number of other 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>138</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. This section examines the empirical evidence and reveals that such regulations of online casket sales merely raise prices and limit competition.

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136. *Granholm v. Heald*, 544 U.S. 460, 491 (2005).

137. See *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 663 (E.D. Tenn. 2000).

138. Russell Capper, CEO & President, eRealty, Inc., Remarks at the FTC Workshop to Explore Possible Anticompetitive Efforts to Restrict Competition on the Internet: Panel on Real Estate/Mortgages/Financial Services 790–91 (Oct. 10, 2002), <http://www.ftc.gov/opp/ecommerce/anticompetitive/021010antitrans.pdf>; Sue Collins, Chief Educ. Officer, Apex Learning, Remarks at the FTC Workshop to Explore Possible Anticompetitive Efforts to Restrict Competition on the Internet: Panel on Cyber-Charter Schools 255–60 (Oct. 8, 2002), <http://www.ftc.gov/opp/ecommerce/anticompetitive/021008antitrans.pdf>; Mark Cooper, Research Dir., Consumer Fed’n of Am., Remarks at the FTC Workshop to Explore Possible Anticompetitive Efforts to Restrict Competition on the Internet: Panel on Automobiles 431 (Oct. 9, 2002), <http://www.ftc.gov/opp/ecommerce/anticompetitive/021009antitrans.pdf>; Robert Waters, Outside Counsel, Ctr. for Telemedicine Law, Remarks at the FTC Workshop to Explore Possible Anticompetitive Efforts to Restrict Competition on the Internet: Panel on Telemedicine and Online Pharmaceutical Sales 616–24 (Oct. 9, 2002), <http://www.ftc.gov/opp/ecommerce/anticompetitive/021009antitrans.pdf>.

### A. The Overall Casket Market

The funeral industry represents a prime target for further e-commerce litigation. Consumers spend approximately \$11 billion annually on cremations, funerals, and funeral-related expenses for the roughly 2.4 million Americans who die every year.<sup>139</sup> At an average price of roughly \$4522 per death, funerals are one of the largest-ticket consumer purchases.<sup>140</sup> There are three major casket manufacturers: Batesville Casket, York Group, and Aurora Casket.<sup>141</sup> Batesville Casket reported \$510 million in sales in 2002, and the annual sales for both York Group and Aurora Casket are approximately \$130 million.<sup>142</sup> The leading manufacturers sell their caskets to funeral homes, who in turn sell most of the caskets to consumers.<sup>143</sup> Three large funeral home chains—Service Corporation International (SCI), the Alderwoods Group, and Stewart Enterprises—collectively own about one-fifth of all the nation's 23,000 funeral homes and handle about one-fifth of all funerals.<sup>144</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>145</sup> Of the funeral home Web sites that do exist, “the vast majority . . . are little more than marketing tools.”<sup>146</sup> Unlike in some other industries, the leading casket manufacturers do not sell and are not seeking to sell their products directly to consumers via the Internet.<sup>147</sup> However, at least one smaller manufacturer, Casket Royale, Inc., ships caskets directly to consumers and retail-

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139. Judith Chevalier & Fiona Scott Morton, *State Casket Sales Restrictions: A Pointless Undertaking?* (Nat'l Bureau of Econ. Research, Working Paper No. 12012, 2006), available at <http://papers.nber.org/papers/w12012>.

140. *Id.*

141. Press Release, PR Newswire, Matthews Int'l Names Jonathan H. Maurer President of York Casket (Apr. 9, 2002).

142. *Id.*

143. Chevalier & Morton, *supra* note 139.

144. Nat'l Casket Retailers Assoc., *How Big Is the Funeral Service Industry and Sales to the Public?*, <http://www.casketstores.com/News.htm> (last visited Nov. 8, 2006).

145. Julia Scirrotto, *Web Sites: 6 Tips to Launch or Upgrade Your Online Calling Card*, FUNERAL SERVICE INSIDER, June 23, 2003, at 3.

146. Eve Tahmincioglu, *The Online Way of Death*, Apr. 28, 2003, SALON.COM, at 2, [http://dir.salon.com/story/tech/feature/2003/04/28/online\\_funerals/](http://dir.salon.com/story/tech/feature/2003/04/28/online_funerals/).

147. See Harrington, *supra* note 132, at 3–4 (noting that it is mostly third-party distributors that sell caskets online).

ers.<sup>148</sup> Most online casket sales come from independent casket vendors or individual funeral homes that have an online presence.<sup>149</sup>

Online sales are a small but seemingly growing part of the casket market.<sup>150</sup> Although there are no hard data,<sup>151</sup> as of 2001, online casket sales represented only about 1% of all casket sales.<sup>152</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>153</sup> In California, independent vendors estimate that they have about 3% of the casket market in some cities,<sup>154</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>155</sup> Similarly, “[f]uneral industry executives and analysts say that consumers are increasingly interested in being able to shop online for their funeral needs.”<sup>156</sup>

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148. Casket Royale, Casket Ordering Information, <http://www.casketroyale.com/html/necustomers.html> (last visited Nov. 8, 2006); 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.

149. Fong, *supra* note 148.

150. See Harrington, *supra* note 132, at 7.

151. Tahmincioğlu, *supra* note 146 (noting that it is “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”).

152. Jacobson, *supra* note 148 (“Independent vendors sell about 50,000 of the two million caskets sold annually.”).

153. *FSI's Third-Party Seller Survey: Here's How Funeral Homes Are Faring as Competition Increases*, FUNERAL SERVICE INSIDER, Apr. 19, 2004, at 3 [hereinafter *FSI's Third-Party Seller Survey*].

154. Rob Kaiser, *Funeral Homes, Retailers Clash in Casket Market; Few Consumers Opting to Visit Outside Sources*, CHI. TRIB., Mar. 16, 2003, at C1.

155. Tahmincioğlu, *supra* note 146.

156. Bob Tedeschi, *Some Web Merchants Fill a Void, and Make a Profit, by Selling Coffins and Other Funeral Supplies Online*, N.Y. TIMES, Feb. 3, 2003, at C5. Besides the Internet, other changes are also affecting the funeral industry. In recent years, funeral directors and ceterians 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. Doug Hernan, *Letter from the Publisher*, FUNERAL SERVICE INSIDER, Sept. 1, 2003, at 1 (noting that “the steadily rising cremation 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*, COURIER-J. (Louisville, Ky.), Oct. 31, 2003, at 1F.

## B. Casket Sales Regulations

State regulation of Internet casket sales varies widely. It appears that no state has enacted statutes or regulations specifically for online casket sales. Instead, states that regulate online vendors do so by applying existing regulations designed for bricks-and-mortar, third-party vendors.<sup>157</sup> For example, Iowa regulates pre-need casket sales from third-party vendors and applies the same regulations to Internet sales.<sup>158</sup> Overall, only a handful of states have regulations that apply to online casket sales. According to a 2003 General Accounting Office (GAO) survey, only sixteen states regulate third-party sales of funeral goods and only ten states regulate all third-party sales of funeral goods.<sup>159</sup> In most states, therefore, funeral regulations do not appear to limit Internet casket sales.<sup>160</sup>

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157. Steve Sklar, Dir., Md. Office of Cemetery Oversight, Remarks at the FTC Workshop to Explore Possible Anticompetitive Efforts to Restrict Competition on the Internet: Panel on Online Casket Sales 477 (Oct. 9, 2002), <http://www.ftc.gov/opp/ecommerce/anticompetitive/021009antitrans.pdf>.

158. *Id.* Literally, a pre-need purchase of funeral services or goods (such as a casket) means a purchase prior to the intended user's death. Pre-need sales most often involve advance-purchase contracts for funeral goods or services that are not provided until death, but a pre-need sale could also involve delivery of merchandise, such as a casket, prior to death.

159. U.S. GEN. ACCOUNTING OFFICE, DEATH CARE INDUSTRY: REGULATION VARIES ACROSS STATES AND BY INDUSTRY SEGMENT 13 (2003), available at <http://www.gao.gov/new.items/d03757.pdf> [hereinafter GAO, DEATH CARE INDUSTRY]. Some of the states that do not regulate all third-party sales exempt Internet sales, at-need sales, and sales in which the consumer takes possession of the goods within a fixed period of time. *Id.* at 13 n.14.

160. 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." Kaiser, *supra* note 154. Indeed, a class action lawsuit was recently filed against Hillenbrand on this very point. *Class Action Challenges Casket Prices*, CONSUMER AFFAIRS.COM, May 5, 2005, [http://www.consumeraffairs.com/news04/2005/casket\\_class\\_action.html](http://www.consumeraffairs.com/news04/2005/casket_class_action.html). Manufacturers say that they prefer dealing with funeral homes and maintaining their existing relationships. Kaiser, *supra* note 154. Moreover, manufacturers may have legitimate concerns about online vendors free riding on the services of local funeral homes, for example, by instructing a prospective customer to examine the selection of caskets offered at a funeral home's physical show room, and then to buy the casket from the online vendor. Clark Neily, Inst. for Justice Senior Attorney, Remarks at the FTC Workshop to Explore Possible Anticompetitive Efforts to Restrict Competition on the Internet: Panel on Online Casket Sales 475 (Oct. 9, 2002), <http://www.ftc.gov/opp/ecommerce/anticompetitive/021009antitrans.pdf>. 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. See Edward Wong, *A New View: Modern Technology Is Changing the Face of the Funeral Industry*, CHI. TRIB., Nov. 10, 2000, at C1.

### 1. EXPLICIT LICENSING REQUIREMENTS

In the ten states that regulate all third-party sales, statutes restrict the in-state sale of caskets exclusively to licensed funeral directors.<sup>161</sup> These states typically require a license for anyone engaged in funeral directing, a practice which, according to its statutory definition, includes the sale of caskets and other funeral-related merchandise.<sup>162</sup> 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 merchandise, and retail sale and display thereof.”<sup>163</sup> Similarly, Delaware’s statute provides 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>164</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>165</sup> Obtaining a license consumes time and money, especially in a state like Oklahoma that has extensive licensing requirements.<sup>166</sup> In South Carolina, a licensee must complete an apprenticeship that lasts a minimum of twenty-four months.<sup>167</sup> Other states require funeral directors to have training in embalming,<sup>168</sup> a specialty that has little relation to the business of selling caskets.

In addition to requiring a funeral director’s license for selling caskets, some states also require that a casket seller operate out of a

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161. Robert M. Fells, Int’l Cemetery & Funeral Assoc., Preliminary Comments Regarding the FTC Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet: Panel on Online Casket Sales 1 (Sept. 27, 2002), <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/krause.pdf>; Neily, *supra* note 5, at 1. According to testimony, these states include Alabama, Delaware, Idaho, Louisiana, Maine, Oklahoma, South Carolina, Vermont, Virginia, and Minnesota. Fells, *supra*, at 3 n.3. 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/ecommerce/anticompetitive/agenda.htm>.

162. See Neily, *supra* note 5, at 2.

163. LA. REV. STAT. ANN. § 37:831 (2006).

164. DEL. CODE ANN. tit. 24, §§ 3101(7), 3106(a) (2005).

165. See Harrington, *supra* note 132, at 2.

166. See *supra* note 67 and accompanying text.

167. S.C. CODE ANN. § 40-19-230(B)(4) (Supp. XIV 2005).

168. See, e.g., DEL. CODE ANN. tit. 24, § 3107.

licensed “funeral establishment.”<sup>169</sup> 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>170</sup> A funeral establishment, in turn, must have “adequate parlors or chapel,” a “display room,” and an “embalming room,” among other features.<sup>171</sup> South Carolina requires every funeral establishment to have all of the aforementioned features, as well as “at least one motor hearse for transporting casketed remains.”<sup>172</sup>

Although some online vendors may choose to also operate bricks-and-mortar retail stores, an online vendor does not need any of the features of a “funeral establishment” 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. In addition, independent online retailers never handle the body, and thus do not need embalming facilities. Funeral establishment requirements, therefore, merely add to the costs of operating online. In *Powers*, the district court found that the funeral establishment license requirement, when combined with the facility and equipment requirements, “effectively precludes the in-state sale of caskets using the Internet model in which transactions occur by computer or by telephone.”<sup>173</sup>

It is unclear how much these regulations limit competition in practice. Some evidence suggests that states are not enforcing the requirements against online vendors, or at least not against out-of-state online vendors.<sup>174</sup> 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>175</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 retail-

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169. See, e.g., *id.* § 3117.

170. LA. REV. STAT. ANN. § 37:848(C) (2006).

171. LA. ADMIN. CODE tit. 46, § 101(B) (2004).

172. S.C. CODE ANN. § 40-19-20(11)(d) (Supp. XIV 2005).

173. *Powers v. Harris*, No. CIV-01-445-F, 2002 WL 32026155, at \*12 (W.D. Okla. Dec. 12, 2002). Within the last few years, Georgia has denied the registration of a third-party seller of funeral goods. GAO, DEATH CARE INDUSTRY, *supra* note 159, at 37.

174. Neily, *supra* note 160, at 462.

175. *Id.* at 492.

ers are currently able to freely sell caskets throughout the United States.<sup>176</sup> Moreover, several online casket retailers will ship to all fifty states.<sup>177</sup> Caskets are also sold on eBay.<sup>178</sup>

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>179</sup> According to a Maryland regulator, the State of Washington 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>180</sup> In both Oklahoma and South Carolina, recent litigation suggests that some states are limiting the sales of third-party vendors.<sup>181</sup> 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>182</sup>

Licensing requirements for casket sales are likely to deter entry into the market by some independent online vendors,<sup>183</sup> many of whom may be unwilling or unable to incur the costs of obtaining a license. Unlike traditional funeral homes, online vendors may not recover the full financial costs of obtaining a license because their business model involves only selling caskets, not providing funeral services such as embalming.<sup>184</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

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176. *Id.* at 462.

177. *See, e.g.*, Casket Discounters, <http://www.casketdiscounters.com> (last visited Sept. 24, 2006) (noting that the company will ship to any destination within the United States); Funeral Depot, <http://funeraldepot.com/deliverynetwork.htm> (last visited Sept. 24, 2006) (advertising their “National Delivery Network”); *see also* Nat’l Casket Retailers Assoc., Casket Store National Directory, <http://www.casketstores.com/Directory.htm> (last visited Sept. 24, 2006) (listing casket retailers and their territories).

178. A September 18, 2006, search of [www.ebay.com](http://www.ebay.com) returned a number of auctions for caskets.

179. Betty Brown, Vice Chair of the Nat’l Casket Retailers Assoc., Remarks at the FTC Workshop to Explore Possible Anticompetitive Efforts to Restrict Competition on the Internet: Panel on Online Casket Sales 494 (Oct. 9, 2002), <http://www.ftc.gov/opp/e-commerce/anticompetitive/021009antitrans.pdf>.

180. Sklar, *supra* note 157, at 478.

181. *Powers v. Harris*, No. CIV-01-445-F, 2002 WL 32026155 (W.D. Okla. Dec. 12, 2002); *S.C. Dep’t of Labor v. Workman*, No. 98-ALJ-11-0634-IJ, 1999 WL 459728 (S.C. Admin. Law Div. May 20, 1999).

182. *Powers*, 2002 WL 32026155, at \*3.

183. Fells, *supra* note 161, at 4.

184. *See Harrington, supra* note 132, at 5.



the Tennessee casket market.”<sup>185</sup> Similarly, the district court in *Powers* found that the state’s licensing requirements “effectively preclude” in-state online vendors from obtaining a funeral director’s license and, therefore, “from selling caskets to in-state purchasers.”<sup>186</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>187</sup> The *Casket Royale* case illustrates how 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 the “downstream” market, namely the funeral directors who put the bodies into the caskets. Stringent licensing requirements, particularly the funeral establishment and embalming regulations, raise the costs of becoming a funeral director, and increased costs translate into the entry of fewer new funeral directors into the industry. Over time, this trend may result in fewer funeral directors or increased cartel behavior among funeral directors. 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 free to disparage online sellers.<sup>188</sup>

These indirect effects of downstream funeral directors may compound the more direct effects of explicitly requiring all casket sellers to have funeral director’s licenses. When casket sellers must have a license that is expensive to obtain, the licensing requirement might keep independent casket sellers out of the market altogether. On the other hand, when casket sellers must have a license but entry into the funeral directing market is easy, the licensing requirement may have

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185. *Craigsmiles v. Giles*, 312 F.3d 220, 224–25 (6th Cir. 2002).

186. *Powers*, 2002 WL 32026155, at \*6.

187. *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434, 436 (S.D. Miss. 2000).

188. *Harrington*, *supra* note 132, at 11.

little or no effect.<sup>189</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 apprenticeship requirements, and the mastery of irrelevant knowledge and skills, such as embalming corpses. Accordingly, it is difficult to disentangle the effects of the two types of regulation.<sup>190</sup>

A recent econometric study finds that embalming regulations impede online casket sales.<sup>191</sup> Adjusting for population size and other demographics, an online seller's sales are lower than expected in states that require all funeral service providers to be embalmers or all funeral homes to have an embalming preparation room.<sup>192</sup> The study found that zip codes with these regulations had a 25% lower chance of having online casket sales than zip codes without such regulations, although the reduction is smaller in states that allow only funeral directors to sell caskets.<sup>193</sup> Because thirteen of the fourteen states that limit who can sell caskets also impose stringent embalming requirements, the only definitive statement to arise out of this research is that the licensing requirement increases online casket sales in states that have high barriers to entry into funeral directing.<sup>194</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 casket sales, 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

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189. Daniel Sutter, *Casket Sales Restrictions and the Funeral Market* 16 (May 18, 2006) (working paper, available at [http://www.mercatus.org/repository/docLib/20060518\\_Dan\\_Sutter\\_Caskets\\_May\\_2006\\_FWPTW.pdf](http://www.mercatus.org/repository/docLib/20060518_Dan_Sutter_Caskets_May_2006_FWPTW.pdf)).

190. Harrington, *supra* note 132, at 15.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

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. A traditional funeral costs more than \$5000.<sup>195</sup> A casket is typically the most expensive component of a traditional funeral,<sup>196</sup> usually costing between \$2000 and \$3000,<sup>197</sup> while some mahogany or metal caskets cost as much as \$10,000.<sup>198</sup> Funeral costs have also risen substantially over time. From 1991 to 2000, average funeral costs increased by 38% to \$5180, not including the cost of a vault or a cemetery plot and tombstone.<sup>199</sup> By comparison, general consumer prices rose only 26.4% during that same time period.<sup>200</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>201</sup> E-commerce could also lead to generally lower retail margins and prices by reducing the cost of searching price and non-price attributes. Moreover, online casket sellers might 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>202</sup> Finally, an Internet casket retailer may

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195. FTC, FUNERALS: A CONSUMER GUIDE 1, available at <http://www.ftc.gov/bcp/online/pubs/services/funeral.pdf> (last visited Sept. 18, 2006) [hereinafter CONSUMER GUIDE].

196. *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 664 (E.D. Tenn. 2000); *id.*

197. Barbara R. Rowe, *Preplanning a Funeral*, FIN. FITNESS FACT SHEET (Oct. 2001), available at <http://extension.usu.edu/files/fampubs/FF09.pdf>.

198. CONSUMER GUIDE, *supra* note 195, at 13.

199. Rob Kaiser, *Funeral Homes, Retailers Clash in Casket Market; Few Consumers Opting to Visit Outside Sources*, CHI. TRIB., Mar. 16, 2003, at 1 (noting that during the same period, overall inflation was only 26.4%).

200. See COUNCIL OF ECON. ADVISORS, 2003 ECONOMIC REPORT OF THE PRESIDENT (2003), available at [http://www.gpoaccess.gov/usbudget/fy04/pdf/2003\\_erp.pdf](http://www.gpoaccess.gov/usbudget/fy04/pdf/2003_erp.pdf); Kaiser, *supra* note 154 (noting that from 1991 to 2000, the general inflation rate was 26.4%, whereas average funeral costs increased by 38.4%).

201. A similar point has been made in the context of online wine sales. See Alan Wiseman & Jerry Ellig, *Market and Nonmarket Barriers to Internet Wine Sales: The Case of Virginia*, 6 BUS. & POL. 1, 10 (2004).

202. Harrington, *supra* note 132, at 8–9.

simply have a fundamentally different business model that incurs fewer of the traditional retail costs, such as physical showrooms and sales staff.<sup>203</sup> Each of these factors could lead to lower online prices. 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 also reduces the prices charged by bricks-and-mortar sellers.<sup>204</sup> In auto retailing, for example, users pay lower prices by using the referral site autobytel.com, which facilitates price competition among dealers.<sup>205</sup> Similarly, one study found that online book and compact disc (CD) prices were 9% to 16% lower than those in bricks-and-mortar stores, even after including shipping costs and sales taxes.<sup>206</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>207</sup> By 2004, legalization of interstate direct-to-consumer wine shipping in Virginia had reduced the difference between online and bricks-and-mortar prices by 40%.<sup>208</sup> On average, contact lenses purchased online cost less than lenses purchased from bricks-and-mortar sellers.<sup>209</sup> Finally, Web sites that facilitate price comparisons for term life insurance policies have lowered premiums for policies sold offline by 8% to 15%.<sup>210</sup>

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203. See, e.g., Michael D. Smith et al., *Understanding Digital Markets: Review and Assessment*, in UNDERSTANDING THE DIGITAL ECONOMY: DATA, TOOLS, AND RESEARCH 99 (Erik Brynjolfsson & Brian Kahin eds., 2000); Debra J. Holt, *The Internet and Auto Sales: Benefits and Barriers*, 19 J. PRIVATE ENTERPRISE 21, 31–33 (2003); Daniel Sutter, *State Regulations and E-Commerce: The Case for Internet Casket Sales in Oklahoma*, 20 J. PRIVATE ENTERPRISE 25, 31 (2005).

204. See Smith et al., *supra* note 203, at 100–02.

205. Fiona Scott Morton et al., *Internet Car Retailing*, 49 J. INDUS. ECON. 501, 501 (2001); Florian Zettelmeyer et al., *Cowboys or Cowards? Why Are Internet Car Prices Lower?* (Nat'l Bureau of Econ. Research, Working Paper No. 86, 2001) (on file with The Elder Law Journal).

206. Erik Brynjolfsson & Michael Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 46 MGMT. SCI. 563 (2000).

207. Wiseman & Ellig, *supra* note 201, at 26 tbl.3b.

208. Alan Wiseman & Jerry Ellig, *Legislative Action and Market Responses: Results of Virginia's Natural Experiment with Direct Wine Shipment* (Oct. 20, 2005) (unpublished manuscript, on file with The Elder Law Journal).

209. James C. Cooper, *Public Versus Private Restraints on the Online Distribution of Contact Lenses* 10 (May 18, 2006) (unpublished manuscript, on file with The Elder Law Journal). However, warehouse clubs offer the lowest prices of all. *Id.*

210. Jeffrey R. Brown & Austan Goolsbee, *Does the Internet Make Markets More Competitive? Evidence from the Life Insurance Industry*, 110 J. POL. ECON. 481, 483 (2002).

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. 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>211</sup> Alternatively, 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>212</sup> In both instances, the higher online prices need not reduce consumer welfare because consumers pay the higher prices only if they perceive greater value.

Empirical studies have found that online prices for some products are higher than offline prices.<sup>213</sup> Specifically, studies of online auto auctions, CDs, books, and software have found that prices are higher online.<sup>214</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>215</sup> The book and CD studies, however, occurred relatively early in the history of e-commerce; more recent studies suggest online prices are lower than offline prices.<sup>216</sup> The wine result is explained by shipping costs, for 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 online prices are often lower.

There is one circumstance in which lower online prices might actually cause offline prices to be higher than they would otherwise be.

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211. Smith et al., *supra* note 203, at 109.

212. See John G. Lynch & Dan Ariely, *Wine Online: Search Costs Affect Competition on Price, Quality, and Distribution*, 19 *MARKETING SCI.* 83, 100 (2000).

213. Karen Clay et al., *Retail Strategies on the Web: Price and Non-price Competition in the Online Book Industry*, 50 *J. INDUS. ECON.* 351 (2002); Ho Geun Lee, *Do Electronic Marketplaces Lower the Price of Goods?*, 41 *COMM. ASS'N FOR COMPUTING MACHINERY* 73 (1998); Joseph P. Bailey, *Electronic Commerce: Prices and Consumer Issues for Three Products: Books, Compact Discs, and Software* 1 (1998) (working paper, on file with The Elder Law Journal).

214. Clay et al., *supra* note 213, at 353; Lee, *supra* note 213, at 73; Bailey, *supra* note 213, at 3.

215. Wiseman & Ellig, *supra* note 201, at 28 tbl.3d.

216. Austan Goolsbee, *Competition in the Computer Industry: Online vs. Retail*, 46 *J. INDUS. ECON.* 487, 487 (2001).

When retailers face consumers with different price elasticities of demand, they will charge different prices in equilibrium.<sup>217</sup> In states where online casket sales are legal, the market might 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 than they would otherwise be.<sup>218</sup> Similarly, legalization of direct wine shipping from out-of-state businesses to Virginia consumers tended to reduce the difference between online and offline prices.<sup>219</sup> No empirical studies have found that online sales have increased offline prices.

ii. *Online and Offline 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>220</sup> Some independent vendors undercut established funeral home prices by as much as 50%.<sup>221</sup> One court found that funeral homes mark up their casket

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217. Steven C. Salop & Joseph E. Stiglitz, *Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion*, 44 REV. ECON. STUDS. 493 (1977). "Price elasticity of demand" measures the responsiveness of consumers to price changes. If the price elasticity of demand is large, a relatively small price change leads to a large change in the quantity purchased. If the price elasticity of demand is small, a given price change will produce only a small change in the quantity purchased. If a retailer can separate low-elasticity consumers from high-elasticity consumers and prevent the high-elasticity consumers from reselling the product to the low-elasticity consumers, the retailer can maximize its profits by charging the low-elasticity consumers a higher price.

218. Goolsbee, *supra* note 216. 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 Q.J. ECON. 561, 565-66 (2000).

219. Wiseman & Ellig, *supra* note 208, at 18.

220. See Report of Daniel Sutter, Ph.D. at 4, *Powers v. Harris*, No. CIV-01-445-F, 2002 WL 32026155 (W.D. Okla. Dec. 12, 2002).

221. Fong, *supra* note 148. In the same article, one online vendor commented that when consumers purchase a casket from an affiliated retailer rather than buy-

prices by 250% to 400%, and sometimes by as much as 600%, whereas online vendor mark-ups are substantially less.<sup>222</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>223</sup>

Similarly, there is evidence 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 mark-ups on caskets in response to third-party sellers.<sup>224</sup> In the same survey, 27% of respondents stated that their average casket mark-up was 150% or higher, whereas two years ago, 49% of them had mark-ups of 150% or higher.<sup>225</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>226</sup> Finally, according to one economist, “[e]nough 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.”<sup>227</sup> Even if customers feel that negotiating over prices is disrespectful to the deceased, “funeral directors see the prices and understand that they need to respond to them.”<sup>228</sup>

Yale University economists Judith Chevalier and Fiona Scott Morton examined the effects of casket sales restrictions by analyzing data from surveys of funeral directors’ generalized price lists in six

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ing direct, shipping adds an average of \$350 to the total cost. *Id.* Many online vendors discount casket prices by much more than that amount.

222. *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 664 (E.D. Tenn. 2000).

223. *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434, 440 (S.D. Miss. 2000).

224. *FSI’s Third-Party Seller Survey*, *supra* note 153.

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

226. *Powers v. Harris*, No. CIV-01-445-F, 2002 WL 32026155, at \*6 (W.D. Okla. Dec. 12, 2002); *see also Kaiser*, *supra* note 154 (reporting that some funeral homes, in response to pressure from independent vendors, have reduced mark-ups on caskets from around 400% to 200%, although these funeral homes may have simultaneously increased prices for services).

227. *Harrington*, *supra* note 132, at 7.

228. *Id.*

southern states.<sup>229</sup> They found that in states requiring casket sellers to have funeral director's licenses, the price that funeral homes charge for a plain, cloth-covered wood casket was about \$261 higher than in states without such requirements.<sup>230</sup> The potential Internet savings, however, are even larger. Chevalier and Scott Morton's regression analysis found 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.<sup>231</sup> Even after accounting for the fact that funeral directors in nonrestrictive states charge higher prices for their services, the consumer in a nonrestrictive state can still save \$344 on the cost of a funeral by purchasing a casket online.<sup>232</sup> In addition, funeral homes in restrictive states charge about \$124 more for a cardboard box for cremation.<sup>233</sup> Chevalier and Scott Morton also used 1997 Economic Census data from forty-nine states to find that in restrictive states, funeral directors had merchandise receipts per death that were \$175 higher than in nonrestrictive states.<sup>234</sup>

Another study, conducted by an expert witness in the *Powers* case, compared an online vendor's prices for thirty caskets with prices for the same caskets sold in fourteen Oklahoma funeral homes.<sup>235</sup> The funeral homes' prices were an average of 68% higher than those of the Internet retailer.<sup>236</sup> Funeral home prices for the same casket varied significantly, with an average price differential of 52%.<sup>237</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.

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 nonrestrictive states to lower their casket prices, al-

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229. Chevalier & Morton, *supra* note 139.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* The statistical significance of this coefficient is 94%—one point shy of the traditional 95% confidence level that economists conventionally label “statistically significant.” *See id.* The higher receipts per death for merchandise were balanced by lower receipts per death for services. *See discussion infra* Part III.C.1.b.

235. Sutter, *supra* note 203, at 34.

236. *Id.*

237. *Id.*



though the funeral directors' prices still appear to be far higher. Whether these price savings on caskets translate into lower overall funeral costs is less clear.

*b. Overall Funeral Prices* Economic theory suggests that online casket sales may or may not lower overall funeral costs.<sup>238</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>239</sup> This is an application of the "one monopoly rent" theory associated with "Chicago school" antitrust analysis.<sup>240</sup> Because other licensing regulations impede entry into funeral directing, funeral directors may be able to collect rents even if there are no legal barriers to entry into casket retailing.<sup>241</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>242</sup> This strategy is less likely to succeed if consumers have access to caskets sold by third parties who lack market power as a result of regulatory barriers to entry.

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238. Powers v. Harris, No. CIV-01-0445-F, 2002 WL 32026155, at \*6 (W.D. Okla. Dec. 12, 2002) (noting that lower casket prices "may or may not" result in lower costs for the entire funeral).

239. *Id.*; David E. Harrington, Himmelright Professor of Econ., Kenyon Coll., Remarks at the FTC Workshop to Explore Possible Anticompetitive Efforts to Restrict Competition on the Internet: Panel on Online Casket Sales 473-74 (Oct. 9, 2002), <http://www.ftc.gov/opp/ecommerce/anticompetitive/021009antitrans.pdf>.

240. See Chevalier & Morton, *supra* note 139, at 3; Sutter, *supra* note 189, at 5. The "one monopoly rent" theory posits that, when products (or services) are used in fixed proportions, a firm with market power over one product or service cannot extract any additional monopoly profit by gaining market power in the sale of the second product or service. For a classic statement, see ROBERT BORK, THE ANTITRUST PARADOX 140-43 (1978).

241. See Chevalier & Morton, *supra* note 139, at 5.

242. Sutter, *supra* note 189, at 5-6.

The district court in *Powers* 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>243</sup>

Similarly, at an FTC workshop on barriers to e-commerce, one panelist agreed that greater competition for casket sales is likely to lower funeral costs<sup>244</sup> and constrain how much funeral directors can raise other prices, in part because consumers might search for better deals.<sup>245</sup> Once consumers learn that they have options among funeral arrangements, prices will have to change to match the discriminating customer.<sup>246</sup> Moreover, price competition is likely to increase due to the development of referral systems between online casket vendors and funeral homes.<sup>247</sup> Some Web sites already offer this type of service.<sup>248</sup>

Three 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 thirteen states that required casket sellers to have funeral director's licenses had higher funeral costs.<sup>249</sup> The study found that the restrictions' effect depended on the difficulty of obtaining a funeral director's license.<sup>250</sup> 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>251</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.<sup>252</sup> Receipts per death for the entire death-care industry, including cemeteries and crematories, were \$132 to \$826 (3% to 16%)

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243. *Powers*, 2002 WL 32026155, at \*6.

244. Harrington, *supra* note 239, at 474. "[I]ncreasing competition in casket markets will, however, probably reduce funeral expenditures, just not as much as some people think." *Id.*

245. *Id.*

246. Sutter, *supra* note 189, at 5-6 ("[C]ustomers might have more difficulty estimating the cost of caskets than the cost of funeral services, making caskets the preferred component to mark up.").

247. Harrington, *supra* note 4, at 6.

248. *Id.*

249. Sutter, *supra* note 189, at 1-2.

250. *Id.* at 13.

251. *Id.* at 10-11 tbl.5.

252. *Id.* at 11.

higher in the states that ban third-party casket sales and impose the most extensive training requirements on funeral directors.<sup>253</sup> This finding suggests that funeral directors benefit at the expense of both consumers and other death-care providers, such as cemeteries and crematories.<sup>254</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, suggesting that the restrictions tend to protect smaller, less efficient funeral homes.<sup>255</sup>

Chevalier and Scott Morton examined similar 1997 Economic Census data but reached a different conclusion.<sup>256</sup> 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.<sup>257</sup> The authors concluded that after the FTC's 1984 Funeral Rule<sup>258</sup> 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>259</sup> Employing 2002 Economic Census data, they found no effect on funeral directors' total receipts per death when several states removed their licensing requirements for casket sales in response to court challenges.<sup>260</sup>

Finally, a study by Sutter using state-level data from both 1997 and 2002 found that casket licensing laws have little effect on funeral homes' or the death-care industry's receipts per death.<sup>261</sup> Using Metropolitan Statistical Area-level data, he found that the funeral industry's receipts per death fell much more rapidly in the three states where the courts invalidated laws requiring casket sellers to have a funeral director's license than in the states that continued to enforce these laws.<sup>262</sup> The different findings in these 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

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253. *Id.* at 13–16.

254. *Id.* at 10.

255. *Id.* at 16–17.

256. Chevalier & Morton, *supra* note 139.

257. *Id.*

258. *See infra* notes 291–96 and accompanying text.

259. Chevalier & Morton, *supra* note 139.

260. *Id.*

261. Sutter, *supra* note 189, at 18.

262. *Id.* at tbl.8.

receipts per death only in states that impose the most extensive training requirements on funeral directors.<sup>263</sup> Casket sales restrictions have a disproportionate effect in states with higher barriers to entry into funeral directing.<sup>264</sup> In states with low barriers to entry, competition among licensed funeral directors may suffice to keep prices near costs—and entrepreneurs who 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.<sup>265</sup> The cremation rate, in turn, may be influenced by funeral regulation.<sup>266</sup> 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 than they would otherwise have. Because 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>267</sup>

Consumers can purchase individualized caskets with nonstandard interior linings, such as fur or leather, or particular themes, such as western or Victorian themes.<sup>268</sup> Customized casket models available online include "Lonestar" (decorated with the Texas flag, Alamo, and longhorn steer), "Fairway to Heaven" (golf fairway), a firefighter motif,<sup>269</sup> multiple religious themes (Holy Cross, Rosary, Mormon Temple, Last Supper, Our Lady of Guadeloupe, etc.),<sup>270</sup> and U.S. military (Army, Navy, Air Force, Marines, Coast Guard).<sup>271</sup> Consumers also can purchase caskets with humorous themes; one casket is em-

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263. *Id.* at 13.

264. *Id.* at 16.

265. Chevalier & Morton, *supra* note 139.

266. Sutter, *supra* note 189, at 20.

267. Yannis Bakos, *The Emerging Landscape for Retail E-Commerce*, 15 J. ECON. PERSP. 79, 79 (2001).

268. News Briefs, *Options Are the Object*, MORTUARY MGMT., Mar. 2000, at 21.

269. Memorial Concepts Online, Caskets, <http://www.memorialconceptsonline.com/catalog.asp?catid=9> (last visited Oct. 24, 2006).

270. *Id.*

271. *Id.*

blazoned with the words “Return to Sender.”<sup>272</sup> However, consumers may not find such caskets through funeral homes, many of which have only a certain number of samples available to show.<sup>273</sup> 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>274</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 clearly increases consumer choice.

*d. Other Effects* The Internet offers consumers shopping for caskets a variety of intangible benefits. Some consumers may prefer the privacy of shopping for a casket online.<sup>275</sup> Others may want to avoid the pressure from salespeople.<sup>276</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 homes.<sup>277</sup> Similarly, online sales can 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.

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272. Harrington, *supra* note 4, at 8.

273. *Id.* at 6.

274. Schoenberger, *supra* note 156; see also Peter Kilborn, *Funerals with a Custom Fit Lighten Up a Solemn Rite*, N.Y. TIMES, Feb. 11, 2004, at A14 (stating that “families are shunning the somber, one-size-fits all rituals and customs of traditional funerals”).

275. Lisa Carlson, Executive Director, Funeral Consumers Alliance, Written Statement for the FTC Workshop to Explore Possible Anticompetitive Efforts to Restrict Competition on the Internet: Panel on Online Casket Sales 1 (Oct. 8, 2002), <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/carlson.htm>.

276. Harrington, *supra* note 239, at 474; Sklar, *supra* note 157, at 500–01.

277. See Tahmincioglu, *supra* note 146.

## 2. ASSESSING THE CONSUMER PROTECTION RATIONALE

Although there is only limited empirical information about the effect of state licensing requirements on competition in the casket market, the effect on consumer protection is more certain. There is little or no evidence that these requirements benefit casket purchasers rather than funeral directors.<sup>278</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>279</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>280</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.<sup>281</sup> They contend that some consumers lack the ability to comparison shop or to resist sales pressure.<sup>282</sup> 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>283</sup>

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278. 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.”).

279. Fred S. McChesney, *Consumer Ignorance and Consumer Protection Law: Empirical Evidence from the FTC Funeral Rule*, 7 J.L. & POL. 1, 24 (1990).

280. See, e.g., David E. Harrington & Kathy J. Krynski, *The Effect of State Funeral Regulations on Cremation Rates: Testing for Demand Inducement in Funeral Markets*, 45 J.L. & ECON. 205 (2002).

281. McChesney, *supra* note 279, at 16.

282. *Id.*

283. *Powers v. Harris*, No. CIV-01-0445-F, 2002 WL 32026155, at \*4 (W.D. Okla. Dec. 12, 2002); see also Sklar, *supra* note 157, at 501–02.

The best empirical evidence, however, suggests that many consumers can and do make rational funeral purchasing decisions.<sup>284</sup> Consumers often benefit from prior experience when making choices regarding funerals. For example, an FTC staff survey found that more than 60% of respondents had been involved in at least one prior funeral arrangement.<sup>285</sup> Moreover, only 11% of respondents arranged funerals alone; many first-time consumers receive help from friends and relatives.<sup>286</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>287</sup> Experience, reputation, and referrals are important ways that consumers gather information about individual funeral directors.<sup>288</sup> Funeral director trade associations even survey consumers to gauge their satisfaction with prices and relay consumer feedback to individual funeral homes.<sup>289</sup> Moreover, at the time of a funeral, consumers purchase many goods and services, such as airline tickets and flowers, from sources other than funeral directors with no reported problems.<sup>290</sup>

One of the most significant tests of the “ignorant consumer” hypothesis lies in a comprehensive assessment of the effects of the FTC’s Funeral Rule. The Funeral Rule essentially requires funeral directors to disclose itemized price lists and provide a final statement of goods and services.<sup>291</sup> The rule also prohibits funeral directors from engaging in 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>292</sup> The FTC enacted the rule to protect ignorant and harried consumers from exploitation by aggressive and knowledgeable fu-

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284. See McChesney, *supra* note 279.

285. MARKET FACTS, INC., REPORT ON THE SURVEY OF RECENT FUNERAL ARRANGERS III-5 (1988). Similarly, a study released by the Batesville Casket Company observed that “[m]ore than 44 percent of Baby Boomers have made funeral arrangements for someone close to them. Interestingly, nearly one in seven Gen Xers (14 percent) have also been involved in funeral planning.” *New Consumer Research*, MORTUARY MGMT., Jan. 2002, at 32.

286. MARKET FACTS, INC., *supra* note 285 (noting that “only 11 percent of the respondents made all the funeral arrangements by themselves”).

287. McChesney, *supra* note 279, at 11.

288. *Id.* at 12.

289. *Id.* at 15, 31–32.

290. Neily, *supra* note 160, at 471.

291. 16 C.F.R. § 453.2 (2006).

292. *Id.* §§ 453.4–5.

neral directors.<sup>293</sup> Yet by most measures, the rule had little effect on consumer shopping or purchasing behavior.<sup>294</sup> In fact, the rule appears to have increased consumer spending on funerals—a strange result considering that prior to the rule, funeral directors were selling consumers unwanted merchandise.<sup>295</sup> The rule also generated no increase in consumer satisfaction, which surveys showed to have already exceeded 90% prior to the rule's enactment.<sup>296</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 regulating funeral directors assume that funeral purchasers are “ignorant, beleaguered, and dissatisfied”<sup>297</sup> and that they must make unexpected and rapid decisions with little information about competitive alternatives. Thus, a funeral director, as a trained professional, may manipulate the customer's emotions to sell things that the customer would not otherwise purchase in a calmer state of mind, or a funeral director may selectively disclose only the more expensive options among caskets or other products.

Whatever the merits of these arguments, they are irrelevant for independent casket sales and especially irrelevant for online casket sales. Requiring independent retailers to have funeral directors' licenses will not protect grief-stricken consumers, who presumably deal only with the funeral director who provides the funeral services and thus eschew comparison shopping at independent casket retailers.<sup>298</sup> Licensing requirements for independent casket retailers could, however, reduce the flow of useful information to consumers who want to shop around. Independent casket sellers provide 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.

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293. McChesney, *supra* note 279, at 6–9.

294. *Id.* at 43–48.

295. *Id.* at 48–51.

296. *Id.* at 52–57.

297. *Id.* at 20.

298. Sutter, *supra* note 189, at 2–4.



In *Powers*, the FTC 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>299</sup> The Funeral Rule applies only to businesses that supply both funeral goods and funeral services—precisely what funeral directors do.<sup>300</sup> Former FTC officials have questioned whether the Funeral Rule was justified by funeral market conditions.<sup>301</sup> Regardless of the merits of the rule, as the FTC itself pointed out in an amicus brief in *Powers*, 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.

The purpose and effect of the challenged portion of [Oklahoma's] 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>302</sup>

Indeed, it is likely that Oklahoma's licensing requirement would not even have subjected independent casket sellers to the Funeral Rule, because the rule explicitly applies only to "funeral providers" who furnish both "funeral goods and funeral services."<sup>303</sup> Even if the Funeral Rule produces consumer benefits, therefore, these benefits would not arise out of licensing casket sellers.

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299. Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint and Brief in Support at 19, *Powers v. Harris*, 2002 WL 32026155 (W.D. Okla. Dec. 12, 2002) (No. CIV-01-0445-F).

300. McChesney, *supra* note 279, at 3.

301. See *id.* at 72; Timothy J. Muris, *Rules Without Reason: The Case of the FTC*, 6 REGULATION 20, 25 (1982).

302. FTC Amicus Brief, *supra* note 67, at \*2.

303. 16 C.F.R. § 453.1(i) (2006).

*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.<sup>304</sup> 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>305</sup> In addition, some grief counselors believe that consumers should visit funeral homes to ease the grieving process,<sup>306</sup> and others worry that online sales might “trivialize the gravity of death.”<sup>307</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 personal exchange.”<sup>308</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.<sup>309</sup> 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>310</sup> The Sixth Circuit discussed the problems with the grief-counseling 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. 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>311</sup>

*c. Health and Safety* Some states and funeral homes contend that licensing casket sales promotes health and safety because proper disposal of human remains affects the environment and the public.<sup>312</sup>

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304. Tedeschi, *supra* note 156.

305. Robert Vandenbergh, President, Nat’l Funeral Directors Ass’n, Remarks at the FTC Workshop to Explore Possible Anticompetitive Efforts to Restrict Competition on the Internet: Panel on Online Casket Sales 461 (Oct. 9, 2002), <http://www.ftc.gov/opp/ecommerce/anticompetitive/021009antitrans.pdf>.

306. Tedeschi, *supra* note 156.

307. Tahmincioglu, *supra* note 146.

308. Sklar, *supra* note 157, at 501.

309. See Jacobsen, *supra* note 148.

310. *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 659 (E.D. Tenn. 2000).

311. *Craigmiles v. Giles*, 312 F.3d 220, 228 (6th Cir. 2002).

312. *Id.* at 224–28 (discussing Tennessee’s arguments).

The evidence, however, shows that caskets themselves do not protect consumers. According to the *Powers* court, “[c]askets 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>313</sup> In *Craigmiles*, the district court found that “the record contains no evidence that anyone has ever been harmed by a leaky casket.”<sup>314</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>315</sup> Similarly, Georgia sets no standards for the design or construction of caskets.<sup>316</sup> At the FTC workshop, no one presented evidence demonstrating a link between public health and caskets, or that consumers suffered harm in states that did not require a license to sell a casket.<sup>317</sup>

In any case, even if caskets do benefit the environment, a casket retailer does not need specialized training to sell them. “[S]elling 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>318</sup> None of the federal courts that considered the issue found that selling a casket required specialized training.<sup>319</sup> The court in *Powers*, for example, concluded that “very little specialized knowledge is required to sell caskets,”<sup>320</sup> and the *Craigmiles* court found that “none of the training received by licensed funeral directors regarding caskets has anything to do with public health or safety.”<sup>321</sup> Less than 5% of the education and training requirements for a license relate to selling a casket.<sup>322</sup>

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313. *Powers v. Harris*, No. CIV-01-0445-F, 2002 WL 32026155, at \*3 (W.D. Okla. Dec. 12, 2002).

314. *Craigmiles*, 110 F. Supp. 2d at 662.

315. *Id.*; *Powers*, 2002 WL 32026155, at \*7.

316. *Peachtree Caskets Direct, Inc. v. State Bd. of Funeral Serv. of Ga.*, No. Civ. 1:98-CV-3084-MHS, 1999 WL 33651794, at \*1 (N.D. Ga. Feb. 9, 1999).

317. See generally Remarks at the FTC Workshop to Explore Possible Anticompetitive Efforts to Restrict Competition on the Internet: Panel on Online Casket Sales (Oct. 9, 2002), <http://www.ftc.gov/opp/e-commerce/anticompetitive/021009antitrans.pdf> [hereinafter FTC Workshop].

318. Fells, *supra* note 161, at 499.

319. *Powers*, 2002 WL 32026155; *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434 (S.D. Miss. 2000); *Craigmiles*, 110 F. Supp. 2d 658; *Peachtree*, 1999 WL 33651794.

320. *Powers*, 2002 WL 32026155, at \*5; see also *Casket Royale*, 124 F. Supp. 2d at 438 (“[S]urely no special skills are necessary for this duty.”).

321. *Craigmiles*, 110 F. Supp. 2d at 663.

322. *Craigmiles v. Giles*, 312 F.3d 220, 222 (6th Cir. 2002) (explaining that casket and urn issues constituted no more than 5% of the mandatory curriculum for funeral directors); *Powers*, 2002 WL 32026155, at \*5.

In terms of logistics, independent casket retailers can provide caskets in a timely manner; they 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>323</sup> In *Casket Royale*, the court found that “[d]efendants have failed to show that the licensing requirement in any way speeds the process of burial. More importantly, [d]efendants have failed to provide any evidence that unlicensed dealers slow burial or cremation.”<sup>324</sup>

Finally, there is no difference in quality between caskets sold by independent vendors and those sold by funeral directors.<sup>325</sup> For most caskets, the manufacturer, not the retailer, provides a warranty, which seldom if ever addresses the protective qualities of the caskets.<sup>326</sup> The courts in *Casket Royal* and *Craigsmiles* called a casket a “glorified box” that “does not differ from any other product in the marketplace.”<sup>327</sup> In *Craigsmiles*, the Sixth Circuit found “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>328</sup> Even 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 might suffer from fraud or other abuses if they buy caskets from independent sources.<sup>329</sup> They also suggest that injured consum-

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323. *Powers*, 2002 WL 32026155, at \*6.

324. *Casket Royale*, 124 F. Supp. 2d at 438.

325. *Craigsmiles*, 312 F.3d at 225–26.

326. *Craigsmiles*, 110 F. Supp. 2d at 664; Joanne Kimberlin, *Monopolistic Funeral Homes Have the Law on Their Side, Critics Say*, VA. PILOT, Aug. 21, 2001, at A1; Brown, *supra* note 179, at 498; *see also Aurora Introduces New 25 Year Warranty for Metal Caskets*, MORTUARY MGMT., Apr. 2003, at 32 (quoting the Aurora casket warranty as providing that “[t]here is no scientific or other evidence that any casket with a sealing device will . . . preserve human remains”); *Batesville Casket Updates Warranties*, MORTUARY MGMT., Jan. 2003, at 30 (“Batesville will no longer describe its gasket-equipped metal caskets as ‘protective.’”).

327. *Casket Royale*, 124 F. Supp. 2d at 438; *Craigsmiles*, 110 F. Supp. 2d at 663.

328. *Craigsmiles*, 312 F.3d at 225–26; *see also Casket Royale*, 124 F. Supp. 2d at 438.

329. *See, e.g.,* Brief of Appellee at 10, *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2003); Kimberlin, *supra* note 326, at 3.

ers would have no legal remedy unless casket sales are limited to funeral directors subject to regulatory oversight.<sup>330</sup>

Casket sellers, however, are subject to the same consumer protection laws as any other retailer.<sup>331</sup> Many of these laws provide for private rights of action.<sup>332</sup> At the FTC's workshop, for example, no one 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>333</sup>

### 3. LESS RESTRICTIVE ALTERNATIVES

To the extent that states seek to protect consumers, they may have less restrictive means than licensing for achieving their consumer protection goals. In the first place, the best way for states to protect consumers is 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>334</sup> Online sales allow consumers to comparison shop among a much larger number of casket providers. Through the Internet, casket consumers can avoid interaction with salespeople 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 this effect concisely:

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330. See *Casket Royale*, 124 F. Supp. 2d at 439.

331. See *id.* at 440; *Craigmiles*, 110 F. Supp. 2d at 664; FTC Amicus Brief, *supra* note 67, at \*15.

332. *Powers v. Harris*, No. CIV-01-445-F, 2002 WL 32026155, at \*13.

333. See generally FTC Workshop, *supra* note 317. 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 (2006). 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. *Id.* § 45(n).

334. *Craigmiles v. Giles*, 312 F.3d 220, 228 (6th Cir. 2002).

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>335</sup>

In 2002, the FTC had offered a similar analysis of the contact lens industry.<sup>336</sup> FTC staff testimony before the Connecticut Board of Examiners for Opticians noted that higher prices for disposable contact lenses probably lead consumers to replace them less frequently than their doctors recommend.<sup>337</sup>

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>338</sup> but Mississippi could have simply applied its solicitation rule to all casket vendors. Likewise, if a state finds evidence demonstrating a concern about the quality of caskets, it can simply establish standards for casket usage and quality rather than limit the types of vendors permitted to sell caskets.<sup>339</sup>

Finally, if states choose to require a license to sell caskets, they can lower the cost of obtaining one or require simple registration. For example, states need not require training in embalming because it has no relation to the business of selling caskets. Some states impose relatively simple requirements for obtaining a license. California requires only that a licensee pass a test, without imposing specific educational

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335. *Id.* at 226.

336. See OFFICE OF POLICY PLANNING, FTC, COMMENTS BEFORE THE STATE OF CONN., DEP'T OF PUB. HEALTH, BD. OF EXAM'RS FOR OPTICIANS (2002), available at <http://www.ftc.gov/be/v02007.htm>.

337. See *id.*

338. *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434, 439 (S.D. Miss. 2000).

339. *Craigsmiles*, 312 F.3d at 226–28 (“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.”).

or apprenticeship standards.<sup>340</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>341</sup> Maryland also gives out-of-state Internet vendors the option to voluntarily submit to the state's jurisdiction, which some vendors accept in order to instill confidence in potential customers.<sup>342</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 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.

Research shows that licensing third-party casket retailers increases casket prices, may increase overall funeral expenditures (when barriers to entry into funeral directing are high), and probably deprives consumers of the increased variety and convenience that online casket sales offer. In addition, there is little empirical evidence that licensing is necessary to accomplish any legitimate public purpose.

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340. Harrington & Krynski, *supra* note 280, at 205; *see also* U.S. GEN. ACCOUNTING OFFICE, FUNERAL-RELATED INDUSTRIES 22 (1999) (analyzing five states' approach to regulation).

341. Sklar, *supra* note 157, at 503.

342. *Id.* at 479–80.

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 because most consumers who are likely to shop with third-party vendors are also likely to be well-informed. Discouraging market entry of online casket sellers could even reduce consumer protections by depriving consumers of useful online information. Because casket buyers must still deal with trained funeral directors and often other professionals such as clergy to obtain funeral services, online casket sales do not deprive consumers of access to grief counseling. Moreover, 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 that impede electronic commerce in caskets would almost certainly fail a *Granholm*-style factual analysis and be held unconstitutional under the Commerce Clause. They are also likely to fail a challenge under the Equal Protection Clause or the Due Process Clause if courts consider whether evidence supports the state's defense. Accordingly, *Granholm* may ultimately drive the last nail into the coffin of casket sales licensing.