The Journal of Private Enterprise 34(2), 2019, 23–41

The Undertaker's Cut: Challenging the Rational Basis for Casket Licensure

Daniel J. Smith*
Middle Tennessee State University

Noah J. Trudeau
West Virginia University

Abstract
Even when occupational licensing restricts entry to a profession, raising prices without providing a worthwhile increase in consumer safety or quality, it can be upheld by US courts using the rational basis test. The rational basis test impels courts to seek out hypothetical justifications to support licensure. As some courts have found that even protectionism itself provides a rational basis for licensure, courts using the rational basis test often fail to overturn abuses of occupational licensing. We challenge the rational basis test by analyzing Oklahoma's Tenth Circuit Court's *Powers v. Harris* case, which upheld casket licensure under the rational basis test. We find no rational basis to support casket licensure when it comes to promoting public health or preventing fraud. In addition, we argue that, contrary to the decision, protectionism does not provide a rational basis for casket licensure.

JEL Codes: J44, K31
Keywords: casket licensure, occupational licensing, rational basis test, *Powers v. Harris*

I. Introduction

Occupational licensing is often justified on the grounds that consumers, lacking full information, will be exploited by informed industry practitioners (Akerlof 1970; Darby and Karni 1973; Dulleck and Kerschbamer 2006; Law and Kim 2005; Leland 1979; Shapiro 1986; Stigler 1971). Licensing requirements such as education and training, examinations, practical experience, and registration are thus adopted on the basis that they will protect consumers and advance public health. While occupational licensing in the United States was initially isolated to a few recognized professions, such as medicine

* The authors thank two anonymous referees for helpful comments.

and law, it was gradually extended to cover a growing portion of the workforce (Friedman and Kuznets 1954; Bryson and Kleiner 2010, p. 670; Habenstein and Lamers 1955, p. 446).

In practice, occupational licensing is often adopted at the request not of consumers and public health advocates, but of industry practitioners seeking to inflate industry wages by erecting costly barriers to entry—often with licensing requirements having no worthwhile influence on consumer safety or public health (Adams, Ekelund Jr., and Jackson 2003; Carroll and Gatson 1983; Carpenter II 2012; Gellhorn 1976; Gittleman and Kleiner 2015; Hogan 1983; Gross 1986; Kleiner 2000, 2006; Maurizi 1974; Powell and Vortotnikov 2012; Svorny 2004; Thornton and Timmons 2013; Timmons and Thornton 2010). There is even evidence suggesting that some licensing boards protect industry practitioners to the detriment of consumer safety and public health (Levine, Oshel, and Wolfe 2011; Svorny 2015; Wolfe 2000). Of particular concern is that the costs of occupational licensing may fall most heavily on minorities and low-income individuals (Dorsey 1983; Williams 2011).

Despite the preponderance of evidence finding that occupational licensing often harms consumers and restricts occupational opportunity, some US courts have upheld licensure laws using the rational basis test. The rational basis test was first used by the Supreme Court in 1877 in *Munn v. Illinois*,[1] but it became prominently used in the 1930s as a method to assess the due process and equal protection of the law when it comes to legislation dealing with economic rights (Kingsmill 2015, p. 936; Neily 2005; Raynor 2013).[2]

The rational basis test is a two-part test. First, courts must determine whether a piece of economic legislation has a legitimate purpose; then, they must determine whether there is a possible connection between the purpose and the legislation (Kingsmill 2015, p. 936). The test impels courts to hypothesize feasible justifications for occupational licensure. Whether plausible or not, the hypothesized justifications must then be negated to overturn the licensing law (Neily 2005, p. 912). The rational basis test, in essence, encourages courts, which are supposed to be impartial, to act as a defendant and seek out hypothetical justifications for legislation that *could* feasibly be construed as a legitimate function of government. In doing so, it transforms the role of a judge from making an impartial

[1] 94 U.S. 113.

[2] See *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) for the first use of the term "rational basis."

ruling on the merits of a case to being an advocate for defending legislative rules (Neily 2013, p. 53). Thus, the rational basis test often puts courts in the position of deferring to legislatures when it comes to occupational licensing.[3] This deference to legislatures is particularly concerning when a preponderance of evidence demonstrates that licensure often harms consumers and restricts economic opportunity without providing worthwhile benefits to consumers in terms of improved safety and quality. Thus, the rational basis test tends to undermine rights not considered fundamentally protected by the Constitution (Jackson 2011, p. 492; Neily 2005; Ward 2014).

We critique the rational basis test by examining the *Powers v. Harris* case, which upheld casket licensure in Oklahoma under the rational basis test.[4] The case originated when two national online casket sellers, Kim Powers and Dennis Bridges, were prevented from selling caskets in Oklahoma due to the state's funeral licensing laws, which required casket sellers to be licensed funeral directors. Powers and Bridges filed a federal case challenging the law since obtaining a funeral director license in Oklahoma would have required several years of undergraduate coursework, a year-long apprenticeship, and the passing of two exams. The rational basis arguments for casket licensure in the *Powers v. Harris* case fall into three broad categories:

- protecting public health
- protecting consumers from fraud
- industry protectionism as a legitimate function of government

This paper challenges the rational basis of casket licensure on all three grounds. A major problem with the rational basis test as it applies to occupational licensing, and specifically occupational licensing of the funeral industry, is that the Tenth Circuit Court, when reviewing *Powers v. Harris*, ruled that protectionism—government regulation that protects one firm or industry at the expense of other firms, industries, and consumers—was a legitimate function of government. While other courts have ruled that protectionism is not a legitimate function of government, the fact

[3] Deference to democratically elected legislatures could be considered welfare-enhancing if one subscribes to the belief that democratic processes are efficiency-enhancing (Wittman 1989). Following Caplan (2007) and Brennan (2016), we do not adhere to this view. In fact, the arguments presented in this paper provide an additional argument that legislatures can be captured by special interest groups and that judicial independence, which can protect against this outcome, could be a welfare-enhancing check on democracy.

[4] *Powers v. Harris* 379 F.3d 1208 (10th Cir. 2004).

that this case has not been reviewed by the Supreme Court means that courts have a large degree of leeway when it comes to the rational basis test (Florman 2012; Trafton 2014).[5] The standard adopted in *Powers v. Harris*, however, means that any amount of protectionism will suffice to uphold these laws, no matter how high the economic costs they may impose upon consumers and competitors in terms of decreased occupational choice and economic mobility.

While this paper provides a case study specific to casket licensure, our arguments can be applied to the literature on occupational licensing more generally. Beyond casket licensure, the rational basis test continues to be utilized by US courts to uphold occupational licensing laws even when there is an explicit recognition that licensure is being used to restrict entry to the profession—sometimes even without a worthwhile benefit being provided to consumers (Neily 2005). Thus, occupational licensing research that fails to address the rational basis test may fall short of policy impact and relevance. By providing a case study critiquing the application of the rational basis test to casket licensure, this paper may prove instructional for overcoming the rational basis test for other forms of licensure.[6]

Section 2 provides a brief history of funeral licensing in the United States. Section 3 details the current state of casket licensure in the United States and reviews recent court cases addressing casket licensure. In section 4, we critique as a case study the rational basis test using the Tenth Circuit Court's *Powers v. Harris* ruling, which upheld casket licensure under the rational basis test. Section 5 concludes.

II. Funeral Licensing in the United States

It wasn't until the emergence of large cities in the late nineteenth and early twentieth centuries in the United States that funeral homes emerged as a profitable business (Robertson 1959, p. 87; Cahill 1999, p. 108; Moller 1996, p. 82). Prior to this point, families provided

[5] The Sixth Circuit Court in *Craigmiles v. Giles* and the Fifth Circuit Court in *St. Joseph Abbey v. Castille*, for instance, maintained that protectionism was not a legitimate function of government.

[6] *North Carolina State Board of Dental Examiners v. Federal Trade Commission* 135 S. Ct. 1101 (2015) did remove the immunity clause that protected licensing boards from antitrust lawsuits, opening up one possible avenue for overcoming the rational basis test.

burial preparation and buried their deceased in a local or family graveyard. Licensing soon followed on the tails of the creation of city, state, and national funeral directors associations (Robertson 1959, p. 93; Cahill 1999, p. 108; Habenstein and Lamars 1955, p. 460). Habenstein and Lamars (1955, p. 458) speculate, "It is probable that in most of the major cities during the period 1865–1880 undertakers founded associations for the purposes of mutual protection, dispensing information and setting of preliminary standards for operation in their trade." The first step toward occupational licensing in the funeral industry came with the passage of simple regulations on the process of embalming and burial, which was gradually expanded to include occupational licensing requirements for embalmers, and finally for funeral directors (Habenstein and Lamars 1955, pp. 499–530). Virginia was the first state to officially set up licensing requirements for embalmers, with the majority of states following over the next few decades.

The original intention of funeral licensure, as expressed by policymakers and interpreted by the courts, was to protect and promote public health (Habenstein and Lamars 1955, p. 530). While funeral licensing was promoted as a means to protect consumers, it was advanced by industry practitioners seeking to protect themselves from the competition of traveling "cross road coffin peddlers" who cut into local embalmers' and funeral homes' profits, especially during the economic collapse of the Great Depression (Robertson 1959, pp. 91–92). In addition, Habenstein and Lamars (1955, p. 467) write,

> The need for protection from unfair, even though legal, competition within the occupation itself was quite evident. Protection was especially needed by funeral directors in Eastern and Midwestern states where nearly every merchant who sold furniture could include a line of caskets in his wares, and thus threaten the very existence of recognized establishments.

Complex barriers have been added to occupational licensing requirements over time, including education, internship, and exam requirements, despite the fact that, as Moller (1996, p. 84) notes, "there is little that is new and unique to the activities of the present-day American undertaker." Historically, the educational requirements between states have lacked uniformity. For instance, Habenstein and

Lamars (1955, p. 528) quote Dr. Robert McFater speaking at the 1947 National Funeral Directors meeting:

> State laws were passed prescribing complete college curricula for the courses in embalming and funeral directing, so many hours of this subject, so many hours of that, and with no flexibility allowed. Furthermore, the requirements of one state would generally vary markedly from the requirements in a neighboring state. These requirements were not determined by a conference between the colleges and the members of the profession, but usually were based on the ideas of just one or two persons, often individuals not too well-informed. For the past twenty-five years then, the colleges of embalming and mortuary science have been faced with the problem of meeting the requirements set up by state laws with no opportunity to change their curricula to meet the advances in funeral service. In fact, most state laws, as they refer to education in this field, are completely impracticable and impossible.

Occupational licensing in the funeral industry now often extends to coffin makers, casket sellers, funeral directors (or undertakers), and embalmers (Thornton and Timmons 2015). The funeral industry in the United States is highly regulated in terms of occupational licensure. Forty-nine states have occupational licensure laws related to the funeral industry. The exception is Colorado, which only requires that funeral directors and embalmers practice at a registered funeral home (GAO 2011). Occupational licensure requirements vary drastically among the states. Embalmer education requirements range from a twelve-month mortuary school to a bachelor's in mortuary science. Nebraska even goes so far as to specify particular classes that must be taken, including English, accounting, and psychology, to accumulate the sixty hours required for licensure. Educational requirements for funeral directors vary from a high school degree to an associate's degree.

Studies examining the effects of funeral industry licensure have found that funeral licensure tends to restrict competition (Harrington and Krynski 2002; Harfoush 2011; Pizzola and Tabarrok 2017). For instance, ready-to-embalm laws have been found to have an anticompetitive effect on the industry (Harrington 2007). In the first comprehensive estimate of the total effects of various types of

licensure requirements in the funeral industry, Ellig (2015) finds that higher training requirements, direct deposition licenses, and bans on the sale of cemetery merchandise such as caskets and other cemetery goods by cemeteries have the most anticompetitive effects.

III. Casket Licensure

Analyzing casket licensure independently is important for two reasons. First, while no state requires the use of caskets, casket costs comprise the single largest funeral expense of the $25 billion funeral industry (Sutter 2005; Embrey and Mellor 1999). As the largest funeral expense, it is a particular concern that casket licensure often leads to higher casket prices for grieving consumers (Sutter 2005, 2007; Harrington 2003). Second, as we will argue in section 4, casket selling is arguably the funeral occupation with the least need for licensure.

Eight US states maintain casket licensure laws: Delaware, Idaho, Maine, Minnesota, Oklahoma, South Carolina, Vermont, and Virginia. A few states—Alabama, Georgia, Louisiana, Mississippi, and Tennessee—recently repealed their laws. Alabama revised its law in 2016, under threat of a lawsuit (Berry 2016; Mork 2016). Georgia changed its laws after *Peachtree Caskets Direct v. State Board of Funeral Services* ruled against Georgia's law requiring casket sellers to be licensed.[7] Mississippi was forced to change its law in 2000 after the US District Court for the Southern District of Mississippi ruled that "there is no rational relationship between these interests ['to ensure the prompt disposition of human remains and the protection of consumers'] and such discrimination ['against unlicensed casket retailers']."[8]

Three states—Tennessee, Oklahoma, and Louisiana—have had challenges to their licensing laws taken to US Circuit Courts of Appeals. *Craigmiles v. Giles* (Tennessee) went to the Sixth Circuit Court,[9] *Powers v. Harris* (Oklahoma) went to the Tenth Circuit Court,[10] and *St. Joseph Abbey v. Castille* (Louisiana) went to the Fifth Circuit Court.[11]

---

[7] *Peachtree Caskets Direct, Inc. v. State Bd. of Funeral Service of Ga.*, No. Civ.1:98–CV–3084–MHS, 1999 WL 33651794 (N.D. Ga. 1999).

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

[9] *Craigmiles v. Giles* 312 F.3d 220 (6th Cir. 2002).

[10] *Powers v. Harris* 379 F.3d 1208 (10th Cir. 2004).

[11] *St. Joseph Abbey v. Castille* No. 11-30756 (5th Cir. Nov. 21, 2012).

In *Craigmiles v. Giles*, several plaintiffs, including Nathaniel Craigmiles, challenged the legality of Tennessee's occupational licensing laws as they pertained to the funeral industry in 2002. The Tennessee Funeral Directors and Embalmers Act required two years of education and training to receive a license to sell a casket in Tennessee, when little of the education and training directly addressed information relevant to building or selling caskets. The court overturned the law, ruling that there was no rational basis for licensing casket sellers except that it served as an improper barrier to competition in the industry.

Powers v. Harris, taken up by the Tenth Circuit Court in 2004, ruled that while "the record makes it clear that limitations on the free market of casket sales have outlived whatever usefulness they may have had," and that "consumer interests appear to be harmed rather than protected by the limitation of choice and price encouraged by the licensing restrictions on intrastate casket sales," Oklahoma's funeral industry licensing law "furthers, however imperfectly, an element of consumer protection" and "was not enacted solely to protect funeral directors facing increased intrastate competition." The court also wrote,[12]

> We also note, in passing, that while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments. While this case does not directly challenge the ability of states to provide business-specific economic incentives, adopting a rule against the legitimacy of intrastate economic protectionism and applying it in a principled manner would have wide-ranging consequences. Thus, besides the threat to all licensed professions . . . every piece of legislation in six states aiming to protect or favor one industry or business over another in the hopes of luring jobs to that state would be in danger. While the creation of such a libertarian paradise may be a worthy goal, Plaintiffs must turn to the Oklahoma electorate for its institution, not us.

[12] References and footnotes omitted from quote.

A Louisiana case, *St. Joseph Abby v. Castille*, was taken up by the Fifth Circuit Court in 2012, which ruled that casket licensure was irrational in that it provided only economic protectionism and that "the funeral directors have offered no rational basis for their challenged rule and, try as we are required to do, we can suppose none." Thus, they ruled that economic protectionism was not a legitimate, rational basis function of the state government (Kingsmill 2015, p. 934).

IV. Challenging the Rational Basis for Casket Seller Licensure

The rational basis arguments for casket licensure fall into three broad categories: (1) concerns for public health based on sanitary grounds, (2) concerns for protecting consumers from fraud, and (3) protectionism for the funeral industry. We challenge the rational basis of casket licensure by addressing the arguments that casket licensure protects the public as it pertains to the sanitary disposal of bodies and consumers in regards to preventing fraud. We also challenge the rational basis of protectionism as a legitimate purpose of government as it pertains to casket licensure.

A. Public Health

Concern for public health and sanitation is often advanced as a justification for casket licensure.[13] Caskets, if poorly constructed, could possibly lead to bacteria entering local ground water, especially if the body is not embalmed and/or is carrying a transmittable disease.

These concerns certainly represent claims that are important to evaluate. Yet, the evidence suggests that these concerns are often unfounded. Examining the threat of infectious disease from unburied dead bodies during a natural disaster, Morgan (2004, p. 310) finds, in a survey of the health literature, that "there is no evidence that, following a natural disaster, dead bodies pose a risk of epidemics."[14] It is important to note that these are results from studies following natural disasters, when dead bodies are more likely to remain exposed and unembalmed due to the stress on capacity of mortuaries and funeral homes, and, given that, have more frequent and prolonged exposure to air and water. In a World Health Organization report examining the public health concerns of cemeteries, Ucisik and Rushbrook (1998, p. 2) find that "no reports have been found in the

[13] See *Craigmiles v. Giles* 312 F.3d 220 (6th Cir. 2002); *Powers v. Harris* 379. F.3d 1208 (10th Cir. 2004); *St. Joseph Abbey v. Castille* No. 11-30756 (5th Cir. Nov. 21, 2012).
[14] See also Morgan et al. (2006) and de Ville (1999, 2004).

literature of epidemics or widespread disease outbreaks which were unequivocally the result of seepage from cemeteries."[15] Watson, Gayer, and Connolly (2007, p. 6) conclude,

> The sudden presence of large numbers of dead bodies in disaster-affected areas can heighten expectations of disease outbreaks, despite the fact that dead bodies do not pose a risk of outbreaks following natural disasters. Rather, the risk of outbreaks is associated with the size, health status and living conditions of the population displaced by the natural disaster. [footnotes omitted]

Most infectious diseases are unlikely to survive burial (Healing, Hoffman, and Young 1995; Watson, Gayer, and Connolly 2007). While risks remain for people immediately handling the bodies directly, including police officers, morticians, and embalmers, Demiryurek, Bayramoglu, and Ustacelebi (2002, p. 194) note that "there are inadequate data in the literature about the disinfectant efficiencies of fluids used for embalming," suggesting that even embalming itself lacks scientific support in disease mitigation. Furthermore, since embalmers themselves are the ones at the most risk for contracting an infectious disease from a deceased body, they already have a strong incentive to take proper safety precautions.

The concerns for the spread of infectious disease, however, can be used to make a case for the regulation of the embalming process.[16] It may also represent a case for certain regulations on cemetery location, such as regulating the distance a cemetery must be from a water source (Ucisik and Rushbrook 1998, pp. 9–10). It may even represent a regulatory case for the types of chemicals and materials allowed in the construction of a coffin.[17] They decidedly do not, however, represent a legitimate concern that warrants requiring a funeral director or an embalming license to sell a casket.

In fact, occupational licensing, in protecting the current funeral industry from competition, has often stood in the way of more natural and environmentally friendly burial methods (Harris 2008;

---

[15] Ucisik and Rushbrook (1998) admit, however, that "doubt and concern persist due to the paucity of sufficient and clear scientific data."

[16] Regulation, dictating the mandatory rules for the embalming process, can be more effective, and less economically harmful, then occupational licensing.

[17] Ucisik and Rushbrook (1998, p. 1) write, "Ideally, coffins should be made of materials that decompose rapidly and do not release persistent chemical by-products into the environment."

Carlson, Slocum, and Lisa 2011). For instance, the Alabama Board of Funeral Services recently brought suit against the Good Earth Burial Ground in Hazel Green for violating Alabama's occupational licensing laws by selling biodegradable caskets (Berry 2016). To help customers find truly environmentally friendly cemeteries, the Green Burial Council even set up a private certification system for cemeteries with accountability measures.

The fact that green burial, or natural burial, is legal in every state, and that no state has special legislation on the types of materials allowed or the construction style of coffins, combined with the fact that education requirements for becoming a funeral director or embalmer place little emphasis on coffins and public health concerns themselves (*Powers v. Harris* 379 F.3d 1208 10th Cir. 2004), strongly suggest that public health concerns do not justify casket licensure.

B. Fraud

Fraud is often the primary justification advanced for requiring casket sellers to be licensed funeral directors and/or embalmers. Casket fraud can possibly take several forms, including misleading claims about the structural integrity and quality of a casket or its appropriate price, taking advantage of the distress of loved ones to push expensive upgrades on consumers, or even selling a casket that has been previously used.

There is strong evidence, however, showing that occupational licensing requirements themselves often hurt consumers and inhibit market competition from protecting consumers by preventing fraud (Agarwal 2007; Agarwal and Ellig 2006; Carlson 2011; Chevalier and Morton 2008; Harrington 2003). More specific to the funeral industry, the evidence shows that occupational licensing inhibits competition in the casket market, giving licensed funeral homes more market power to increase prices (Sutter 2005, 2007). The very fact that the Tenth Circuit Court in *Powers v. Harris* upheld a law requiring the licensure of casket sellers on the basis that protectionism was its only legitimate government purpose undermines the argument that occupational licensure prevents fraud in the casket selling industry.[18] Rather, by providing legal legitimacy to the cartelization of casket selling and the prohibition of entry, the court potentially protects those committing the fraud.

[18] *Powers v. Harris* 379 F.3d 1208 (10th Cir. 2004).

One major fault with the justification for licensure to protect grieving consumers is that it fails to pass a basic logic test. As Sutter (2005, p. 5) states, "Grief-stricken consumers by definition do not comparison shop and thus few are likely to patronize casket retailers." If grief-stricken consumers are only buying from one source—the funeral directors—then an independent casket retailer would have no opportunity to take advantage of them. Thus, the licensure is null because the consumers are only buying from the funeral directors or are searching for the best prices in a competitive market, which would be hindered by licensure.

Market mechanisms can also emerge to protect consumers. These mechanisms range from private certifications (such as those used in Colorado), investigative journalism, the legal system, internet reviews, funeral prearrangement, private product certification or licensing, advertising, brand names, chain stores, warranties and guarantees, and seller reputation (Pizzola and Tabarrok 2017; Sher 1963; Smith 2015). For instance, many industries with asymmetric information problems, such as the used-car and car-sharing industries, find ways to assure consumers of quality and the absence of fraud without occupational licensing. Voluntary private certification offers perhaps one of the most effective mechanisms for professionals to assure quality to consumers without the economic burdens and anticompetitive effects of licensure. In the absence of occupational licensure, markets often emerge to provide assurance to consumers. For instance, while emergency medical technicians, paramedics, EMT drivers, nurse aides, and orthotists and prosthetists are licensed in many states, they have private certification in Mississippi, where they are not licensed (Smith 2018).

Licensed industries have supported the suppression of some of these market mechanisms that would have provided consumers with more protection against fraud (Smith 2015, p. 6). Furthermore, laws protecting consumers against fraud and misrepresentation already exist in every state. This means that consumers, even without casket licensure, already have legal recourse to pursue remedy against fraud or misrepresentation through laws already on the books forbidding fraud more generally. Market mechanisms have enabled grieving families to make arrangements with priests, florists, urn sellers, and tailors—often without the protection of licensure.

Rather than the mere possibilities of fraud and misrepresentation representing legitimate justifications for the licensure of casket sellers, concern for fraud represents a strong argument against occupational

licensure. Market competition to serve customers, combined with a legal system that has robust laws against fraud and misrepresentation, is the most powerful and reliable mechanism to protect consumers from fraud.

C. Protectionism as Rational Basis: Suggestions for Better Policy

While protectionism has been upheld under the rational basis test as a legitimate function of government and thus a sufficient reason for licensure, it can be argued that this general precedent should only apply if some other rational basis that advances public health or welfare can be found (Kingsmill 2015, p. 954). Even this stricter standard, however, would still fall short of protecting the public from anticompetitive occupational licensing rules since special interest groups, such as licensed occupations, habitually advocate for protectionism under the guise of public welfare arguments (Yandle 1983; Neily 2005, p. 900).

Another possible improvement to the rational basis test would be to require courts to judge occupational licensing only on the explicitly stated justifications under which it was adopted (Jackson 2011). That way, legislation that had no other public health or welfare benefits would only pass the rational basis test as protectionist if, in fact, legislators approved the law with the explicit—and publicly understood—premise that it was a protectionist piece of legislation. Occupational licensing, especially in industries with no other rational basis beyond protectionism, is rarely, if ever, enacted on the sole basis that it will protect an industry at the expense of consumers.

Cost-benefit analysis offers an additional avenue for limiting occupational licensure abuse (Adler and Posner 1999; Glaeser and Sunstein 2014; White House 2015, p. 5; Sunstein 2002). If courts rule that protectionism is, in fact, a legitimate function of government, and thereby a reason to uphold occupational licensing laws, then the courts should be required to commission a cost-benefit analysis to ensure that the benefits (to the licensed industry) outweigh the costs (to consumers and competitors) (Florman 2012; Trafton 2014). Thus, courts can rely on the impartiality of adding up the costs and benefits to determine whether a particular licensing regime is justified or not.[19]

[19] There are certainly epistemic limitations to the cost-benefit approach. More specifically, there are knowledge problems regarding what counts as a cost and a benefit and to what relevant actors (Buchanan 1999, 57; Stringham 2001). Given that economic costs and benefits range from being concentrated to dispersed, it is

The comparative institutional framework, with a proper concern for robust political economy (Leeson and Subrick 2006; Pennington 2011), offers an additional framework for limiting the abuses of occupational licensing under the rational basis test. From an economic perspective, policymakers and courts cannot simply find conceivable theoretical market failures, such as threats to public health from leaking caskets, and thereby justify economic legislation. Real market outcomes, including market institutions that emerge to solve the alleged problems and alternative regulation beyond licensure, must be compared to real political outcomes, taking into consideration both knowledge and incentive problems faced by government actors, as well as potential unintended consequences of the legislation (Buchanan 1999, pp. 45–59; Demsetz 1969; Pennington 2011).[20] The drastic difference in licensing requirements across the states when it comes to the funeral industry suggests that policymakers "often do not have the information to judge whether licensing requirements mandated by occupational licensing are intended to promote the public interest and protect consumers, or to restrict entry into the profession and benefit industry practitioners" (Smith 2015, p. 6).

A final avenue for reforming the rational basis test would be to require that it be conducted in the framework of rights guaranteed in the Constitution (Epstein 2014; Menashi and Ginsburg 2014). One way to interpret this framework would be through a veil of uncertainty (Buchanan 1977; Rawls 1971). Behind a conceptual veil of uncertainty, where people do not know if they will be consumers or producers of funeral services, funeral licensing would have to be justified by demonstrating positive spillover effects for producers and consumers. In other words, occupational restrictions and prohibitions could only be justified if they had measurable public-good benefits. Thus, private benefits, such as protectionism, would not be considered under the rational basis test. As James Buchanan (1977, pp. 16-17) writes, "Arbitrary restrictions or prohibitions on voluntary contractual agreements among persons and groups, in the absence of demonstrable spillover effects on third parties, cannot be parts of any plausible social contract." Thus, under this view,

---

often difficult to account for—and foresee—the potential beneficiaries and victims, let alone measure their subjective costs.

[20] Cathles, Harrington, and Krynski (2010) find at least one potential, and unobvious, adverse impact of licensing funeral directors: that they decrease the number of female funeral directors.

protectionism with no public welfare benefits would not pass a rational basis test.

V. Conclusion

Despite recognizing that occupational licensing laws can lend legal authority to the very abuses they are intended to prevent, occupational licensing has been upheld in some US courts under the rational basis test. The rational basis test undermines the impartiality of the court system by putting judges in the position of seeking feasible justifications for licensure. Among these feasible hypothetical justifications have been protectionism itself, as a proper and rational function of government.

We have critiqued the rational basis test using a case study of *Powers v. Harris*, which upheld casket licensure under the rational basis test. Casket licensure has a powerful anticompetitive effect on the industry, enabling practitioners to restrict entry and raise prices. Yet, casket licensure was upheld in *Powers v. Harris* on the grounds that public health, fraud protection, and protectionism of the industry provided a rational basis for licensure. We have argued, however, that the rational basis justification falls apart under scrutiny. Scant evidence supports the claim that there are health risks associated with dead bodies and natural burial. Grieving consumers may well be better off with market solutions to protect them against fraud—such as warranties, reputation, and civil lawsuits—rather than the legally enforced restriction of competition enabled by occupational licensure. Finally, strict protectionism, with no public welfare basis, does not represent a rational and proper function of government.

References

Adams, Frank A. III, Robert B. Ekelund Jr., and John D. Jackson. 2003. "Occupational Licensing of a Credence Good: The Regulation of Midwifery." *Southern Economic Journal*, 69(3): 659–75.

Adler, Matthew D., and Eric A. Posner. 1999. "Rethinking Cost-Benefit Analysis." *Yale Law Journal*, 109(2): 165–247.

Agarwal, Asheesh. 2007. "Protectionism as a Rational Basis? The Impact on E-Commerce in the Funeral Industry." *Journal of Law, Economics & Policy*, 3(2): 189–218.

Agarwal, Asheesh, and Jerry Ellig. 2006. "Buried Online: State Laws That Limit E-Commerce in Caskets." Mercatus Center.

Akerlof, George A. 1970. "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism." *Quarterly Journal of Economics*, 84(3): 488–500.

Berry, Lucy. 2016. "Alabama Cemetery Owner Can Now Sell Caskets, Funeral Supplies without a License," *AL.com*, May 5.

Brennan, Jason. 2016. *Against Democracy*. Princeton, NJ: Princeton University Press.

Bryson, Alex, and Morris M. Kleiner. 2010. "The Regulation of Occupations." *British Journal of Industrial Relations*, 48(4): 670–75.

Buchanan, James M. 1977. *Freedom in Constitutional Contract*. College Station, TX: Texas A&M University Press.

Buchanan, James M. 1999. *The Logical Foundations of Constitutional Liberty*. The Collected Works of James M. Buchanan, Volume 1. Indianapolis, IN: Liberty Fund.

Cahill, Spencer E. 1999. "The Boundaries of Professionalization: The Case of North American Funeral Direction." *Symbolic Interaction* 22(2): 105–19.

Caplan, Bryan. 2007. *The Myth of the Rational Voter: Why Democracies Choose Bad Policies*. Princeton, NJ: Princeton University Press.

Carlson, Slocum, and Lisa. 2011. *Final Rights: Reclaiming the American Way of Death*. Hinesburg, VT: Upper Access Inc.

Carpenter II, Dick M. 2012. "Testing the Utility of Licensing: Evidence from a Field Experiment on Occupational Regulation." *Journal of Applied Business and Economics*, 13(2): 28–41.

Carroll, Sidney L., and Robert J. Gatson. 1983. "Occupational Licensing and the Quality of Service." *Law and Human Behavior* 7(2/3): 139–46.

Cathles, Allison, David E. Harrington, and Kathy Krynski. 2010. "The Gender Gap in Funeral Directors: Burying Women with Ready-to-Embalm Laws?" *British Journal of Industrial Relations* 48(4): 688–705.

Chevalier, Judith, and Fiona M. Scott Morton. 2008. "State Casket Sales Restriction: A Pointless Undertaking?" *Journal of Law & Economics*, 51(1): 1–23.

Darby, Matthew R., and Edi Karni. 1973. "Free Competition and the Optimal Amount of Fraud." *Journal of Law and Economics*, 16(1): 67–88.

Demiryurek, Deniz, Alp Bayramoglu, and Semsettin Ustacelebi. 2002. "Infective Agents in Fixed Human Cadavers: A Brief Review and Suggested Guidelines." *The Anatomical Record*, 269: 194–97.

Demsetz, Harold. 1969. "Information and Efficiency: Another Viewpoint." *Journal of Law & Economics*, 12(1): 1–22.

de Ville de Goyet, Claude. 1999. "Stop Propagating Disaster Myths." *Prehospital and Disaster Medicine*, 14(4): 9–10

de Ville de Goyet, Claude. 2004. "Epidemics Caused by Dead Bodies: A Disaster Myth that Does Not Want to Die." *Pan American Journal of Public Health*, 15(5): 297–99.

Dorsey, Stuart. 1983. "Occupational Licensing and Minorities." *Law and Human Behavior*, 7(2–3): 171–81.

Dulleck, Uwe, and Rudolf Kerschbamer. 2006. "On Doctors, Mechanics, and Computer Specialists: The Economics of Credence Goods." *Journal of Economic Literature*, 44(1): 5–42.

Ellig, Jerry. 2015. "State Funeral Regulations: Inside the Black Box." *Journal of Regulatory Economics*, 48: 97–123.

Embrey, Gretchen, and William H. Mellor. 1999. "Tennessee Caskets." Institute for Justice.

Epstein, Richard A. 2014. *The Classical Liberal Constitution*. Cambridge, MA: Harvard University Press.

Florman, Marc P. 2012. "The Harmless Pursuit of Happiness: Why 'Rational Basis with Bite' Review Makes Sense for Challenges to Occupational Licenses." *Loyola Law Review*, 58(3): 721.

Friedman, Milton, and Simon Kuznets. 1954. *Income from Independent Professional Practice*. NBER.

Gellhorn, Walter. 1976. "The Abuse of Occupational Licensing." *University of Chicago Law Review*, 44(1): 6–27.

Gittleman, Mark A., and Morris M. Kleiner. 2015. "Analyzing the Labor Market Outcomes of Occupational Licensing." NBER Working Paper No. 20961.

Glaeser, Edward L., and Cass R. Sunstein. 2014. "Regulatory Review for the States." *National Affairs*, 20(3): 37–54.

Government Accountability Office (GAO). "Death Services: State Regulation of the Death Care Industry Varies and Officials Have Mixed Views on Need for Further Federal Involvement." GAO Report to Congressional Requesters. December.

Gross, Stanley J. 1986. "Professional Licensure and Quality: The Evidence." CATO Institute Policy Analysis No. 79.

Habenstein, Robert W., and William M. Lamers. 1955. *The History of American Funeral Directing*. Milwaukee, WI: Bulfin.

Harfoush, Lana. 2011. "Grave Consequences for Economic Liberty: The Funeral Industry's Protectionist Occupational Licensing Scheme, the Circuit Split, and Why It Matters." *Journal of Business, Entrepreneurship & the Law*, 5(1): 135–59.

Harrington, David E. 2003. "Breathing Life into the Funeral Market." *Regulation*, 26(1): 14–18.

Harrington, David E. 2007. "Markets: Preserving Funeral Markets with Ready-to-Embalm Laws." *Journal of Economic Perspectives*, 21(4): 201–16.

Harrington, David E., and Kathy J. Krynski. 2002. "The Effect of State Funeral Regulations on Cremation Rates: Testing for Demand Inducement in Funeral Markets." *Journal of Law & Economics*, 45(1) 199–225.

Harris, Mark. 2008. *Grave Matters: A Journey Through the Modern Funeral Industry to a Natural Way of Burial*. New York: Scribner.

Healing, T. D., P. N. Hoffman, and S. E. Young. 1995. "The Infection Hazards of Human Cadavers." *CDR Review*, 28(5): 61–68.

Hogan, Daniel B. 1983. "The Effectiveness of Licensing: History, Evidence, and Recommendations." *Law and Human Behavior*, 7(2/3): 117–38.

Jackson, Jeffrey D. 2011. "Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment." *University of Richmond Law Review*, 45(2): 491–548.

Kingsmill, Allison B. 2015. "Of Butchers, Bakers, and Casket Makers: *St. Joseph Abbey v. Castille* and the Fifth Circuit's Rejection of Pure Economic Protectionism as a Legitimate State Interest." *Louisiana Law Review*, 75(3): 933–65.

Kleiner, Morris M. 2000. "Occupational Licensing." *Journal of Economic Perspectives*, 14(4): 189–202.

Kleiner, Morris M. 2006. *Licensing Occupations: Ensuring Quality or Restricting Competition?* Kalamazoo, MI: W. E. Upjohn Institute for Employment Research.

Law, Marc T., and Sukko Kim. 2005. "Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation." *Journal of Economic History*, 65(3): 723–56.

Leeson, Peter T., and J. Robert Subrick. 2006. "Robust Political Economy." *Review of Austrian Economics*, 19: 107–11.

Leland, Hayne. 1979. "Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards." *Journal of Political Economy*, 87(6): 1328–46.

Levine, Alan, Robert Oshel, and Sidney Wolfe. 2011. "State Medical Boards Fail to Discipline Doctors with Hospital Actions Against Them." *Public Citizen*.

Maurizi, Alex. 1974. "Occupational Licensing and the Public Interest." *Journal of Political Economy*, 82(2): 399–413.

Menashi, Steven, and Douglas H. Ginsburg 2014. "Rational Basis with Economic Bite." *New York University Journal of Law and Liberty* 8(3): 1055-1104.

Moller, David W. 1996. *Confronting Death: Values, Institutions, and Human Morality*. New York: Oxford University Press.

Morgan, Oliver. 2004. "Infectious Disease Risks from Dead Bodies Following Natural Disasters." *Pan American Journal of Public Health*, 15(5): 307–12.

Morgan, Oliver W., Pongruk Sribanditmongkol, Clifford Perera, Yeddi Sulasmi, Dana Van Alphen, and Egbert Sondorp. 2006. "Mass Fatality Management Following the South Asian Tsunami Disaster: Case Studies in Thailand, Indonesia, and Sri Lanka." *PLoS Medicine*, 3(6): 809–15.

Mork, Kristiana. 2016. "Green Cemetery Owner Fights Law Restricting Casket Sales." *Daily Signal*, April 11.

Neily, Clark. 2005. "No Such Thing: Litigating under the Rational Basis Test." *NYU Journal of Law & Liberty*, 1(2): 897–913.

Neily, Clark. 2013. *Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government*. New York: Encounter Books.

Pennington, Mark. 2011. *Robust Political Economy*. Northampton, MA: Edward Elgar.

Pizzola, Brandon, and Alexander Tabarrok. 2017. "Occupational Licensing Causes a Wage Premium: Evidence from a Natural Experiment in Colorado's Funeral Services Industry." *International Review of Law and Economics*, 50: 50–59.

Powell, Benjamin, and Evengy S. Vortotnikov. 2012. "Real Estate Continuing Education: Rent Seeking or Improvement in Service Quality?" *Eastern Economic Journal*, 38(1): 57–73.

Rawls, John. 1971. *A Theory of Justice*. Cambridge, MA: Harvard University Press.

Raynor, Austin. 2013. "Economic Liberty and the Second-Order Rational Basis Test." *Virginia Law Review*, 99: 1065–1102.

Robertson, James I., Jr. 1959. "The Development of the Funeral Business in Georgia, 1900–1957." *Georgia Review*, 13(1): 86–96.

Shapiro, Carl. 1986. "Investment, Moral Hazard, and Occupational Licensing." *Review of Economic Studies*, 53(5): 843–62.

Sher, Byron D. 1963. "Funeral Prearrangement: Mitigating the Undertaker's Bargaining Advantage." *Stanford Law Review*, 15(3): 415–79.

Smith, Daniel J. 2015. "Reforming Occupational Licensing in Alabama." In *Improving Lives in Alabama: A Vision for Economic Freedom and Prosperity*, ed. Daniel Sutter, 143–56. Troy, AL: Manuel H. Johnson Center for Political Economy at Troy University.

Smith, Daniel J. 2018. "Occupational Licensing in Mississippi." In *Promoting Prosperity in Mississippi*, ed. Brandon Cline and Claudia Williamson, 119–31. Mississippi State, MS: Institute for Market Studies.

Stigler, George J. 1971. "The Theory of Economic Regulation." *Bell Journal of Economics*, 2(1): 3–21.

Stringham, Edward P. 2001. "Kaldor-Hicks Efficiency and the Problem of Central Planning." *The Quarterly Review of Austrian Economics* 4(2): 41-50.

Sunstein, Cass R. 2002. *The Cost-Benefit State: The Future of Regulatory Protection.* Chicago: American Bar Association.

Sutter, Daniel. 2005. "State Regulations and E-Commerce: The Case for Internet Casket Sales in Oklahoma." *Journal of Private Enterprise*, 20(2): 27–42.

Sutter, Daniel. 2007. "Casket Sales Restrictions and the Funeral Market." *Journal of Law, Economics and Policy*, 3(2): 219.

Svorny, Shirley V. 2004. "Licensing Doctors: Do Economists Agree?" *Econ Journal Watch*, 1(2): 279–305.

Svorny, Shirley V. 2015. "Asymmetric Information and Medical Licensure." *Cato Unbound.*

Thornton, Robert J., and Edward J. Timmons. 2013. "Licensing One of the World's Oldest Professions: Massage." *Journal of Law and Economics*, 56(2): 371–88.

Thornton, Robert J., and Edward J. Timmons. 2015. "The De-licensing of Occupations in the United States." Bureau of Labor Statistics *Monthly Labor Review*, May.

Timmons, Edward J., and Robert J. Thornton. 2010. "The Licensing of Barbers in the USA." *British Journal of Industrial Relations*, 48(4): 740–57.

Trafton, Elizabeth. 2014. "The Fifth Circuit Lays Economic Protectionism to Rest in St. Joseph Abbey." *Boston College Law Review*, 55(6).

Ucisik, Ahmet S., and Philip Rushbrook. 1998. "The Impact of Cemeteries on the Environment and Public Health: An Introductory Briefing." *World Health Organization.*

Ward, Andrew. 2014. "The Rational-Basis Test Violates Due Process." *New York University Journal of Law & Liberty*, 8(2): 713–41.

Watson, John T., Michelle Gayer, and Marie A. Connolly. 2007. "Epidemics after Natural Disasters." *Emerging Infectious Diseases*, 13(1): 1–5.

White House. 2015. "Occupational Licensing: A Framework for Policymakers." Report by the Department of Treasury Office of Economic Policy, the Council of Economic Advisers, and the Department of Labor.

Williams, Walter E. 2011. *Race & Economics.* Stanford, CA: Hoover Institute Press.

Wittman, Donald. 1989. "Why Democracies Produce Efficient Results." *Journal of Political Economy*, 97(6): 1395–1424.

Wolfe, Sidney M. 2000. "Survey of Doctor Disciplinary Information on State Medical Board Web Sites." *Health Letter*, 16(3): 1–3.

Yandle, Bruce. 1983. "Bootleggers and Baptists–The Education of a Regulatory Economist." *AEI Journal on Government and Society*, May/June: 12–16.