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Regulating Death: Occupational Licensing and Efficiency in the Deathcare Industry

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REGULATING DEATH: OCCUPATIONAL LICENSING AND EFFICIENCY IN
THE DEATHCARE INDUSTRY

Gale B. Robinson, Jr *

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I. INTRODUCTION

Everyone dies; it is a fact of life. This means that the American funeral industry will reach everyone. How state boards regulate the industry affect the relationship we, as future consumers, will have with the industry. In 2015, the United States Supreme Court held that state boards and the regulations they implement are not always immune

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from antitrust review.¹ This decision necessarily calls for a reevaluation of the actions taken by state funeral boards, particularly because of how heavily-regulated the funeral industry is. Many consumers and commentators feel that the funeral industry takes advantage of consumers in their most vulnerable state,² and that regulations play a big role in that.³ As will be discussed below, state funeral boards implemented many of these regulations for the stated purpose of protecting consumers. Yet these regulations have served the industry, making it more expensive and less competitive. Whereas American consumers once demanded more stringent regulations on the funeral industry, the industry itself is now the one championing those same regulations to keep competition out and keep funeral prices high. With the annual revenue of the funeral industry reaching sixteen billion dollars in 2013,⁴ consumer interest in righting the wrongs of anti-competitive regulations in an industry of which we all will be consumers must become paramount.

One of the most consequential aspects of the Supreme Court's holding in *North Carolina State Board of Dental Examiners* affecting funeral boards pertains to states' occupational licensing schemes. The decision came in the midst of what has been an over-proliferation of licensing regulations in many industries. As of 2015, about thirty percent of Americans needed a license—which may include a degree or passing a test—to enter an industry workforce, when less than five percent of the workforce needed a license during the 1950s.⁵ Licensing regulations are not necessarily a thorn in the side of economic liberty, and they can often serve compelling interests in consumer welfare and

¹ N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1104 (2015).

² For a lighter take on the funeral industry's practices, see truTV, *Adam Ruins Everything—How Funerals Completely Rip Us Off*, YOUTUBE (Dec. 21, 2015), <https://www.youtube.com/watch?v=OGqbALhpUmM>.

³ See *infra* Section IV.A.

⁴ *Revenue of funeral homes (NAICS 81221) in the United States from 2008 to 2013 (in billion U.S. dollars)*, STATISTA (2017), <http://www.statista.com/statistics/296203/revenue-funeral-homes-in-the-us/>.

⁵ Edward Timmins & Anna Mills, *Short-Sighted Policy: Studying opticians shows occupational licensing doesn't help consumers*, USNEWS (Feb. 17, 2015), <http://www.usnews.com/opinion/economic-intelligence/2015/02/17/occupational-licensing-is-short-sighted-hurts-low-income-workers> (the authors' definition of occupational licensing laws includes requirements such as passing a specific test or obtaining a degree); Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUS. RELS. 676, 678 (2010); see e.g., InstituteForJustice, *Why Can't Chuck Get His Business Off the Ground*, YOUTUBE (Oct. 26, 2010), <https://www.youtube.com/watch?v=YQscE3Xed64>.

public health and safety. However, consumers must be cautious because licensing regulations do not translate per se to better quality goods or services for consumers. In the funeral industry specifically, there is scant evidence suggesting a correlation between the two.⁶ Consumers must be wary that regulatory boards and legislatures often abuse licensing regulations to protect market power rather than consumers. Such regulations are often used to bar entry into the market, keep consumer prices high, and prevent economically healthy competition between those already within the market. This problem has garnered the attention of many in recent years. The White House even issued a report that laid a framework for state regulatory boards to use in implementing occupational licenses.⁷

Occupational licensing is just one of many regulations negatively affecting consumers' relationship with the funeral industry. This Note advocates for reevaluation and deregulation of state funeral director licensing schemes and their requirements. These requirements have played a role in the significant increase in prices for goods and services in this sector—the traditional burial ranging from seven to fifteen thousand dollars.⁸ Specifically, this Note will address two aspects of funeral home occupational licensing: (1) the regulatory schemes that require an individual be both a funeral director and embalmer; and (2) the educational requirements that an individual must have to be a funeral director. Part II of this Note will include a brief history of licensing regulations in the American funeral industry, the justifications for the licensing regulations, the social reforms that led to the Federal Trade Commission's ("FTC") Funeral Rule, and state regulations that are restricting competition. Part III will explain occupational licensing, when regulatory boards are justified in implementing them, and the recent White House report that lays a framework for policymakers.

⁶ Lana Harfoush, *Grave Consequences for Economic Liberty: The Funeral Industry's Protectionist Occupational Licensing Scheme, the Circuit Split, and Why it Matters*, 5 J. BUS. ENTREPRENEURSHIP & L. 135, 149 (2011).

⁷ *Occupational Licensing: A Framework for Policymakers*, DEP'T OF TREASURY OFF. OF ECON. POL'Y, COUNCIL OF ECON. ADVISORS, AND DEP'T OF LAB. (July 2015) [hereinafter *White House Licensing Report*], https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

⁸ *Funeral Costs: How Much Does an Average Funeral Cost?*, PARTING: BLOG (Sept. 14, 2016), <http://www.parting.com/blog/funeral-costs-how-much-does-an-average-funeral-cost/> (estimating the range as between \$7,000-\$10,000, with an average of \$9,000); JAMES D. GWARTNEY ET AL., MICROECONOMICS: PRIVATE AND PUBLIC CHOICE 224 (12th ed. 2008) (estimating the average as between \$10,000-\$15,000)

Part IV will argue that some of the funeral industry's occupational licensing requirements are no longer justifiable, and will provide possible alternatives to existing licensing requirements. Part V will briefly explain how consumers can advocate for changes in their states, both by advocating to the boards themselves and by challenging the regulations through the court system. Part VI will offer concluding remarks to the Note.

II. HISTORY, OVERVIEW, AND THE RISE OF REGULATION

A. *The Early History of Funeral Regulations*

The funeral industry has been an established part of American culture since the late nineteenth-century. The industrial revolution, mass consumerism, and the increasing reliance on science and technology over religious faith were all a part of establishing the funeral home as an American institution.⁹ The social developments of the time, such as the medicalization of death,¹⁰ as well as certain institutional shifts such as changing considerations of practical home design,¹¹ also contributed to the funeral home replacing the family home as the place to lay a loved one to rest.

The most crucial factor in establishing the funeral home as an American institution, which also gave rise to the industry's first occupational licenses, was the modernization and growing acceptance of embalming techniques. Embalming first became a part of the country's consciousness during the Civil War when Abraham Lincoln instituted what were called "embalmer-surgeons," who embalmed Union soldiers so they could be returned to their families.¹² Given the nature of

⁹ GARY LADERMAN, *REST IN PEACE: A CULTURAL HISTORY OF DEATH AND THE FUNERAL HOME IN TWENTIETH-CENTURY AMERICA* 47 (2005).

¹⁰ *Id.* at 3 (explaining that the 3,800% increase in hospitals between 1873-1923 led to a new perspective on death, which was that death is the defeat of medical technologies).

¹¹ *Id.* at 5-6 (considerations of domestic space led middle and upper class families, especially in urban environments, to design their homes without a parlor, where home funerals historically took place).

¹² David Foos, *State Ready-to-Embalm Laws and the Modern Funeral Market: The Need for Change and Suggested Alternatives*, 2012 MICH. ST. L. REV. 1375, 1384 (2012). However, it was Abraham Lincoln's funeral that really brought America's attention to the embalming procedure, which was the critical turning point that propelled the funeral industry into the twentieth-century. See Gary Laderman, *Funeral Industry*, ENCYCLOPEDIA OF DEATH AND DYING [hereinafter *Funeral Industry*], <http://www.deathreference.com/En-Gh/Funeral-Industry.html> (last visited Nov. 14, 2011) ("Hundreds of thousands of people filed past the viewable body on display in

the “profession” at the time, however, those in the industry sought to implement occupational licenses¹³ so as to appear more prestigious and to protect their livelihoods from rivals.¹⁴ Virginia was the first state to enact legislation in 1884, with twenty-four states following its lead by 1900.¹⁵ These occupational licenses gave funeral homes a sense of professionalism and established them as the “primary mediators between the living and the dead from the moment of death to the final disposition.”¹⁶

While some of the motivation for these early licenses was to create a learned funeral “profession,” health and safety concerns surrounding the embalming procedure also drove the need for industry regulation. These health and safety concerns became a large justification for the licenses at the turn of the last century.¹⁷ First, embalming techniques were crude at the time,¹⁸ often involving homemade embalming fluid with arsenic as the principal chemical, and threatened

cities from Washington, D.C., to Springfield, Illinois, and newspaper reports provided the public with graphic details about embalmers, whose methods were central to preserving a sacred relic that ritualistically united Americans after the divisive and bloody war.”); Foos, *supra* note 12, at 1385 (estimating that 1.3 million Americans viewed the open casket on the twenty-day caravan from D.C. to Springfield); LADERMAN, *supra* note 9, at 6 (stating that it was Abraham Lincoln’s funeral that changed the general perception of embalming from fear of bodily mutilation and grisly surgery to a legitimate procedure).

¹³ “Occupational licensing is defined as a process where entry into an occupation requires the permission of the government, and the state requires some demonstration of a minimum degree of competency.” Morris Kleiner, *Occupational Licensing*, 14 J. ECON. PERSPECTIVES 189, 191 (2000).

¹⁴ Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 CAL. L. REV. 487, 501 (1965); The principle “rivals” to those wishing to implement these regulations were doctors and clergymen. *Id.*

¹⁵ ROBERT W. HABENSTEIN & WILLIAM M. LAMERS, *THE HISTORY OF AMERICAN FUNERAL DIRECTING* 457-501 (1955).

¹⁶ LADERMAN, *supra* note 9, at 8 (“[E]mbalming became the enduring signature of the nascent funeral industry, a practice at the center of the economic, cultural, and religious funereal universe taking shape.”); see Foos, *supra* note 12 (explaining that although embalming as a practice began as separate from the funeral service industry, the two began integrating between the Civil War and the turn of the century).

¹⁷ David E. Harrington & Kathy J. Krynski, *The Effect of State Funeral Regulations on Cremation Rates: Testing for Demand Inducement in Funeral Markets*, 45 J. LAW & ECON. 199, 203 (2002).

¹⁸ Foos, *supra* note 12, at 1386-87; ROBERT G. MAYER, *EMBALMING: HISTORY, THEORY, AND PRACTICE* 476 (4th ed. 2006) (techniques ranged from primitive cavity treatment to a more sophisticated arterial embalming).

the safety of those embalming.¹⁹ The second safety concern was the belief that cemeteries with un-embalmed bodies posed a health risk to nearby towns and water sources.²⁰ Both the safety of inexperienced embalmers and the belief that un-embalmed bodies were infectious served as historical justifications for early funeral regulations.

By the mid-twentieth-century, the traditional burial²¹ had become the standard practice for grieving families. Most, if not all, of the funeral process took place at and was handled by all-purpose funeral homes, which were becoming increasingly prevalent.²² This cultural shift in the handling of death was not without its detractors though.²³ However, a more startling problem that came to light in the mid-twentieth-century dealt with how the consumer's wallet was being affected by the shift, rather than their sensitivity to change.

The public was skeptical of the American funeral throughout the first half of the twentieth-century as many grew to see it as a scam.²⁴ Much of the early criticism focused on the capitalistic, competitive environment of the undertaking business.²⁵ The anti-funeral

¹⁹ MAYER, *supra* note 18.

²⁰ Harrington & Krynski, *supra* note 17, at 207 (proponents of regulating embalmers in the late nineteenth-century believed that dead bodies were infectious and could be disinfected through embalming).

²¹ "Traditional burials" are memorial services centered on the public display of an embalmed loved one at a funeral home. See *Traditional Burial*, CEMETERYDEPOT, <http://www.cemeterydepot.com/Traditional-Burial-information.php> (last visited Feb. 27, 2017).

²² Funeral directors would handle the multitude of detailed tasks that would have proven distressful for the family. LADERMAN, *supra* note 9, at 23.

²³ Some felt that with the advent of embalming, funerals became a form of "pagan body worship" and that it encouraged the denial of death. *Id.* at 22. Funeral directors often countered with a psychological argument that the embalmed body created a therapeutic "memory picture" that would afford loved ones closure in the grieving process. *Id.*

²⁴ *Funeral Industry*, *supra* note 12. Consumers began to see the cost of funerals as outrageous and felt that funeral homes were taking advantage of many low-income families at their most vulnerable time. *Id.* Also, many funeral directors participated in deceptive practices, such as adding non-itemized costs to the contract, enraged consumers, community leaders, academics, and politicians alike. *Id.* Public hearings were even held during this time to address these concerns. *Id.*

²⁵ QUINCY L DOWD, *FUNERAL MANAGEMENT AND COSTS: A WORLD-SURVEY OF BURIAL AND CREMATION* (1921) (criticizing the wasteful nature of funeral costs associated with flowers, vaults, cemetery plots, and even the church, and called the public to consider more simplistic alternatives such as cremation); JOHN C. GEBHART, *FUNERAL COSTS: WHAT THEY AVERAGE: ARE THEY TOO HIGH? CAN*

home rhetoric called for reform, increased regulation, and oversight, which reached the public in books, newspapers, magazines, and academic journals.²⁶ Despite this early concern, it was not until the early 1960s, by which time death care had become a billion-dollar industry,²⁷ that the call for reform would get its final push thanks to Jessica Mitford's scathing exposé.

Jessica Mitford first became interested in the unscrupulous practices of the funeral industry when her husband, a labor lawyer, noticed that when a union worker died, the death benefit would end up in the hands of the funeral director, and not the surviving spouse and children.²⁸ After publishing a successful article in *Frontier* on the subject of funeral trade magazines, a writer for the *Saturday Evening Post* talked Mitford into writing a book on the subject matter.²⁹ In 1963, Mitford published *The American Way of Death*. Through a comical and sensationalist lens, *The American Way of Death* challenged the mythology of death perpetuated by funeral directors. What really bothered Mitford were not the unethical members of the funeral industry, but rather the ethical ones.³⁰ In the wake of Mitford's book, the funeral industry was left fighting the public realization that the image of funeral directors as exploiters of grief was more than just a stereotype.³¹

THEY BE REDUCED 221 (1928) (characterizing competition within the funeral industry as a competition for "the possession of bodies," and that once the funeral director obtains possession of a body, she can "charge all that the traffic will bear").

²⁶ LADERMAN, *supra* note 9, at 59.

²⁷ *Id.* at 45.

²⁸ JESSICA MITFORD, *THE AMERICAN WAY OF DEATH REVISITED*, at xiii (1998).

²⁹ *Id.* at xiv-xv.

³⁰ LADERMAN, *supra* note 9, at 85 ("[S]he is really writing about a pervasive, industry-wide ethic she found to be depraved, duplicitous, and deceiving."). Mitford argued that the funeral industry invented the "need for grief therapy," and the supposed therapeutic value of viewing an embalmed body as a "memory picture." JESSICA MITFORD, *THE AMERICAN WAY OF DEATH* 17-18 (1963); see ELISABETH KÜBLER-ROSS, *ON DEATH AND DYING* (1969) (arguing that funeral practices of the time created unhealthy attitudes about mortality, and revealed an American denial of death). To Mitford, the only value of embalmed bodies was more profit for funeral homes. LADERMAN, *supra* note 9, at 109-10. Laderman addresses further how psychology as a discipline eventually took over grief, as well as the eventual role that psychology played in the education of funeral directors and morticians following *The American Way of Death*. *Id.* at 112-18.

³¹ See *Id.* at 88-100 (showing the stereotypes Americans held of funeral directors and morticians through various film and literary depictions, and explaining how, up until Mitford, funeral directors could play against the stereotype to their advantage).

The New York Times Bestseller became a pervasive part of the American consciousness and inspired a call to reform the industry with regulation of funeral home behavior.³²

B. *The FTC's Funeral Rule and State Regulatory Boards*

Due to growing criticism of the funeral industry, the FTC launched an investigation into the funeral industry in 1974.³³ According to the FTC, the investigation was not due to a large number of complaints,³⁴ but rather was based on more general concerns about a largely unregulated industry raised in the public arena.³⁵ After nearly ten years of investigating, the FTC voted to promulgate the Funeral Rule in 1982,³⁶ which took effect in January 1984.³⁷

The Funeral Rule contains four main substantive sections, covering areas of price disclosure, misrepresentations, required purchase of funeral goods and services, and services provided without prior approval.³⁸ The first section of the Rule, which became one of the most significant requirements on funeral homes, aimed to increase transparency by providing consumers the right to get an itemized general price list upon the customer inquiring into funeral arrangements.³⁹ The se-

³² LADERMAN, *supra* note 9, at 83-84.

³³ Harrington & Krynski, *supra* note 17, at 200 (stating that the FTC's investigation of the funeral market was the most extensive until then).

³⁴ LADERMAN, *supra* note 9, at 133 (citing the FTC Final Staff Report for 16 C.F.R. pt. 453) (stating that before and after Mitford's *The American Way of Death* there had not been a noticeable number of complaints). *But see* MARK HARRIS, GRAVE MATTERS: A JOURNEY THROUGH THE MODERN FUNERAL INDUSTRY TO A NATURAL WAY OF BURIAL 9 (2007) (stating that the FTC did consider complaints that some funeral directors had embalmed bodies without asking the family, some of who were orthodox Jews, whose faith opposes the embalming process).

³⁵ LADERMAN, *supra* note 9, at 133 (giving credit for the FTC's sudden vitality to the consumer protection movement in the 1960s led by Ralph Nader); *see also* James E. Moliterno, *Symposium: The Lawyer as Catalyst of Social Change*, 77 *FORDHAM L. REV.* 1559, 1583 (2009) (quoting Ralph Nader as suggesting that "ample evidence suggested that the FTC was extremely deferential to the corporations it was supposed to police").

³⁶ Fred S. McChesney, *Consumer Ignorance and Consumer Protection Law: Empirical Evidence from the FTC Funeral Rule*, 7 *J.L. & POL.* 1, 4 (1990).

³⁷ 16 C.F.R. § 453 (2015); Harrington & Krynski, *supra* note 17, at 200.

³⁸ McChesney, *supra* note 36.

³⁹ There are sixteen specified goods and services which must be on the general price list. 16 C.F.R. § 453.2(a) (2015) ("[I]t is an unfair or deceptive act or practice for a funeral provider to fail to furnish accurate price information disclosing the cost to the purchaser for each of the specific funeral goods and funeral services . . .

cond section prohibited funeral directors from affirmatively misrepresenting to consumers the state law requirements in six areas: (1) embalming; (2) caskets for direct cremation; (3) outer burial container; (4) legal and cemetery requirements; (5) preservative and protective value of goods and services in respect to decomposition; and (6) cash advance items.⁴⁰ The third substantive area of the Funeral Rule prevents funeral homes from conditioning desired goods and services on the purchase of unwanted goods and services.⁴¹ This includes tacking on a charge for an optional good or service in a non-declinable basic service fee.⁴² The last substantive section prevents funeral homes from embalming the deceased without the approval of the family, unless state law provides it can or there are extenuating circumstances, as laid out in subsection (a)(3) of the Funeral Rule.

The ultimate goal of the Funeral Rule's requirements was to increase the transparency in price, so as to both protect consumers and increase competition.⁴³ The FTC enforces the Funeral Rule by conducting undercover inspections to see if funeral homes are providing customers with itemized price lists, and are not acting in any way that violates the Funeral Rule.⁴⁴ Consumers can also file complaints with

"); see Keith Horton, Note, *Who's Watching the Cryptkeeper?: The Need for Regulation and Oversight in the Crematory Industry*, 11 ELDER L.J. 425 (2003) ("The Funeral Rule requires sellers of funeral goods and services to give itemized price lists to consumers who inquire about purchasing such goods or services and to disclose which fees are declinable."). The FTC does provide sample price lists for funeral homes to use to comply with the Funeral Rule. *Complying with The Funeral Rule*, FED. TRADE COMM'N 24-29 (Apr. 2015), <https://www.ftc.gov/system/files/documents/plain-language/pdf-0131-complying-with-funeral-rule.pdf>.

⁴⁰ 16 C.F.R. § 453.3 (2015).

⁴¹ 16 C.F.R. § 453.4 (2015).

⁴² *Complying with The Funeral Rule*, FED. TRADE COMM'N 20 (Apr. 2015), <https://www.ftc.gov/system/files/documents/plain-language/pdf-0131-complying-with-funeral-rule.pdf>.

⁴³ Foos, *supra* note 12, at 1379 ("The FTC sought to remedy . . . the continuously rising price of a funeral and the ability of unethical funeral directors to induce bereaved consumers into making more expensive purchases.").

⁴⁴ *Truth in Advertising, The FTC's Funeral Rule: Helping Consumers Make Informed Decisions During Difficult Times*, FED. TRADE COMM'N, <https://www.ftc.gov/news-events/media-resources/truth-advertising/funeral-rule> (last visited Nov. 18, 2015); see Press Release, *Undercover Inspections of Funeral Homes in Nine States and Washington, D.C. Press Funeral Homes to Comply with Consumer Protection Law*, FED. TRADE COMM'N (Mar. 16, 2010), <https://www.ftc.gov/news-events/press-releases/2010/03/undercover-inspections-funeral-homes-nine-states-washington-dc> (setting forth the penalty for serious violations as a three-year offender's program, with the alternative being a lawsuit potentially resulting in \$16,000 per violation).

the FTC against funeral homes for behavior that they find violative of the Funeral Rule.⁴⁵

The FTC's attempt at managing funeral director behavior with the Funeral Rule seemed like a victory for consumers at the time. However, the FTC failed to address the state funeral regulations that could impede the goals of the Funeral Rule.⁴⁶ This Note is not suggesting that the Funeral Rule or the federal government should have usurped the power from the states to regulate funeral homes across the country. Rather, this point simply illustrates what other commentators have expressed—that there is a gap between what the Funeral Rule *intended* to accomplish, and what state regulatory boards *are able to* accomplish through regulations.⁴⁷ It is this relationship that has led us into the modern funeral home landscape, in which state regulatory boards have implemented new regulations that protect industry interests over consumer interests, and where criticism of the funeral industry has resurfaced.

III. JUSTIFYING OCCUPATIONAL LICENSES AND THE WHITE HOUSE REPORT

A. *General Principles of Licensing Regulations*

A general maxim of free market economics is that regulations

⁴⁵ After receiving a complaint, the FTC then uploads them to the Consumer Sentinel Network, which is an investigative tool used by both civil and criminal law enforcement agencies. *Complying with The Funeral Rule*, *supra* note 42, at 23.

⁴⁶ FED. TRADE COMM'N, FUNERAL INDUSTRY PRACTICES: FINAL STAFF REPORT TO THE FEDERAL TRADE COMMISSION AND PROPOSED TRADE REGULATION RULE 207 (1978) (codified at 16 C.F.R. pt. 453) (stating that states were left “the task of correcting features of their regulations that impose unnecessary costs and restrict consumer choice”).

⁴⁷ See Daniel Sutter, *E-commerce Symposium – May 24, 2006: Casket Sales Restrictions and the Funeral Market*, 3 J.L. ECON. & POL'Y 219, 221-22 (2007); Foos, *supra* note 12; Judith A Chevalier, *State Casket Sales Restrictions: A pointless Undertaking?*, 51 J. LAW & ECON. 1 (2008); Fred S. McChesney, *supra* note 36. Studies in demand inducement show that the state regulations (which are pro-industry) trump the goals of the Funeral Rule (which was put into place to protect consumers). See *infra* Part II.B. All that Jessica Mitford wanted was more regulation to protect consumers, which arguably would help in theory, but the relationship between the two sources of regulations is the ones hurting consumers with continued high prices and demand inducement.

are only justified in the case of a market failure.⁴⁸ The essential premise of a free economy is that a competitive market will provide “the most effective means of promoting economic progress, economic justice and the general welfare.”⁴⁹ However, a free market economy does not always work.⁵⁰ It is when the economy creates market failures that regulations are justified.⁵¹ Problems arise when regulations are put in place absent a market failure, and regulations originally put into place to address perceived or actual problems prove unnecessary and unworkable in execution.⁵² A less intrinsic problem, though just as salient, involves who is implementing the regulations, and with whose interests in mind.⁵³ As previously stated, this has become one of the main criticisms of state funeral boards.⁵⁴

This general economic maxim proves true for regulation through occupational licenses. The existence of occupational licensing schemes, as well as critics of their proliferation, are not new.⁵⁵ Occupational licensing was an initial way for some organizations to gain

⁴⁸ Peter Hettich, *Mere Refinement of the State Action Doctrine Will Not Work*, 5 DEPAUL BUS. & COM. L.J. 105, 106 (2006); Bernard H. Siegan & John Kenneth Galbraith, *Industrial Regulation*, GOV., REGULATION, AND THE ECON. 1, 1 (Bernard H. Siegan ed., 1980) (“Economic regulation should remain or be imposed only when strong or compelling justification for it exists. Under this standard, a relatively small portion of regulatory controls would survive.”).

⁴⁹ JOEL B. DIRLAM & ALFRED E. KAHN, *FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY* 17 (1954) (addressing the notion that competition is not necessarily always more efficient, it does not change the fact that the drafters of the Sherman Act realized that punishing unfair anticompetitive tactics would allow consumers to order industries in a way that benefitted the general welfare).

⁵⁰ Siegan & Galbraith, *supra* note 48.

⁵¹ *Id.*

⁵² Hendrick Houthakker, *Economic Aspects of Deregulation*, in DEREGULATING AMERICAN INDUSTRY 1, 22 (Donald L. Martin & Warren F. Schwartz eds., 1977); see Siegan & Galbraith, *supra* note 48, at 8 (making the distinction between wise and unwise regulations, and how wise, calculated regulatory schemes can be beneficial to the public).

⁵³ Alan Stone, *Economic Regulation, the Free Market, and Public Ownership*, in ECONOMIC REGULATORY POLICIES 187, 188 (James E. Anderson ed., 1976) (“Even when they are competent, many regulators are more sympathetic to industries they are supposed to regulate than they are to their purported mission.”).

⁵⁴ See *supra* text accompanying notes 39-41.

⁵⁵ See Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976). Gellhorn delves into American history and explains how certain occupations became “learned” professions and how the proliferation of pseudo professions have reduced competition and economic mobility.

integrity in the late nineteenth-century.⁵⁶ The Supreme Court upheld the states' ability to license such occupations in *Dent v. West Virginia*.⁵⁷ The Court in *Dent* recognized that justifications of health, safety, and consumer welfare are legitimate reasons for implementing occupational licenses in some professions.⁵⁸ Although it has been more than a century since this case was decided, the Court's justifications are just as important in the present-day analysis of occupational licensing and whether the licenses, and the requirements to obtain them, are justified.⁵⁹

While occupational licenses grew throughout the 1900s, they have skyrocketed in the past few decades. More and more professions require licenses, with a recent study showing that nearly thirty percent of the workforce is required to obtain a license in order to work.⁶⁰ With this increase, the requirements that one must meet to obtain a license has garnered increased attention.⁶¹ Typically, these requirements come in the form of length of education, college degrees, apprenticeships, examinations, and hefty fees.⁶² Since those already in the industry benefit from keeping new entrants out, the industry incumbents will more than likely make "successive demands for making entry costs

⁵⁶ MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 18 (2006).

⁵⁷ 129 U.S. 114 (1889). The Court in *Dent* addressed the validity of a regulation that required those wanting to practice medicine to obtain a certificate from West Virginia's State Board of Health that they graduated from medical school, or prove to the Board that they are qualified to practice medicine. *Id.* at 124-25.

⁵⁸ *Id.* at 122-23 ("Due consideration, therefore, for the protection of society may well induce the State to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified."); Simon Rottenberg, *The Economics of Occupational Licensing*, in ASPECTS OF LABOR ECONOMICS 3, 4 (Universities-National Bureau Committee for Economic Research ed., 1962) ("From the earliest times, licensing statutes and ordinances have been adopted by legislatures on the alleged ground of defense of public health, safety, and morals.").

⁵⁹ The importance to this Note's present analysis of occupational licensing requirements will be explained in the subsequent discussion of the White House's report on the current state of occupational licensing.

⁶⁰ Kleiner & Krueger, *supra* note 5; see Timmins & Mills, *supra* note 5.

⁶¹ For some general examples, see John Hood, *Does Occupational Licensing Protect Consumers?*, THE FREEMAN (Nov. 1, 1992), <http://fee.org/freeman/does-occupational-licensing-protect-consumers/>. At one point, the time it took to become a master plumber in the state of Illinois was longer than it took to become a Fellow of American College of Surgeons. *Id.* The education requirements for cosmetologists can range to thousands of hours of training, when arguably they could be taught on the job. *Id.* As for application fees, the price to become a licensed optician can be as high \$850. Timmins & Mills, *supra* note 5.

⁶² Hood, *supra* note 61; Timmins & Mills, *supra* note 5.

higher.”⁶³

The growing concern over the proliferation of occupational licensing has led federal and state legislatures pushing back, with some being successful and others not.⁶⁴ Within the past year, the Supreme Court addressed an antitrust claim regarding a state regulatory board in North Carolina, which will likely have implications down the line for state board liability for anti-competitive behavior.⁶⁵ Further, The White House addressed the issue of occupational licensing in many industries,⁶⁶ and included nearly fifteen million dollars in its budget to investigate issues of occupational licensing across the country.⁶⁷

B. Consumer Welfare and the White House Report

The White House investigated occupational licensing schemes and issued a report in July 2015 on its findings.⁶⁸ One of the main reasons for this investigation stemmed from the fact that licenses restrict competition and harm consumer welfare. In its seventy-six page report on the state of occupational licensing, the White House described the growth in licensing over the past few decades, and the negative impact it can have on the economy and on specific groups of people.⁶⁹ Specif-

⁶³ Rottenberg, *supra* note 58, at 11.

⁶⁴ Then-Indiana Governor Mike Pence tried unsuccessfully to get over a dozen occupations deregulated in 2013. Jenni Bergal, *A License to Braid Hair? Critics Say State Licensing Rules Have Gone Too Far*, STATELINE (Jan. 30, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/1/30/a-license-to-braid-hair-critics-say-state-licensing-rules-have-gone-too-far>. The Michigan legislature successfully deregulated eight occupations in 2014, with representative Tim Kelly saying “you don’t need some silly regulation keeping someone from earning a living.” *Id.*

⁶⁵ N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101 (2015). The Court addressed the N.C. Dental Board’s attempt to prevent non-licensed dentists from offering teeth whitening. *Id.* at 1104. The Court ruled that when a state board consisted of a majority of industry participants, the board had to be properly supervised, which it was not, in order to claim state-action antitrust immunity. *Id.*

⁶⁶ *White House Licensing Report*, *supra* note 7.

⁶⁷ Timmins & Mills, *supra* note 5.

⁶⁸ *White House Licensing Report*, *supra* note 7.

⁶⁹ *Id.* at 28-39. Specifically, The White House discusses the impact on those with criminal records, veterans, military spouses, entrepreneurs, and low-wage workers. *Id.* For one example, if an industry requires higher education or expensive registration and exam fees, lower-income workers are more likely to not be able to enter the market. *Id.* at 12. This would essentially be shifting the resources to higher income individuals that can afford to jump through the hoops the regulatory board has set up. *Id.*

ically, the report mentions that creating barriers to entry restricts competition and drives up consumer prices.⁷⁰ The report goes further in explaining that occupational licensing requirements not only affect consumers, but also those barred entry and the industry itself.⁷¹

In an effort to help restore competition to industries and lower prices for consumers, the report lays out the considerations that need to be weighed when implementing licensing requirements. The White House report states that these considerations have not been properly favored, leading in part to the current over-proliferation of occupational licenses.⁷² Two pertinent considerations include ensuring that the license is closely targeted to public health and safety, and is not overly broad or burdensome; and a consideration of the costs and benefits of the license.⁷³ Part IV will further focus on these practices the report suggests.

This Note is not suggesting that The White House report in any way suggests or implies that the licensing of funeral directors should be completely deregulated. However, there is the interesting case of Colorado, which is the only state where there is no licensing scheme, and you only need work at a funeral home in order to be a funeral director.⁷⁴ What this Note does suggest is that The White House's recent report breaks down the occupational licensing analysis beyond a simple, binary acceptance-rejection system, and into a more comprehensive, tailored framework. This framework will, and *should*, give more focus to the requirements of such licenses, and the costs that variations in those requirements can have on consumers and those entering the market.

Moreover, proposed solutions may have a greater likelihood of effectuating change if we break the analysis down further than just a

⁷⁰ *Id.* at 12.

⁷¹ The wages of those not allowed entry into certain industries will go down since they will likely have to take lower-paying jobs. *Id.* By creating barriers to entry, the industry may even be hampering innovation in its own industry. *Id.*

⁷² *Id.* at 41.

⁷³ *Id.* at 42.

⁷⁴ *State Laws and Regulations*, CO. FUNERAL DIRECTORS ASS'N, <http://www.cofda.org/laws> (last visited Jan 1, 2015). The Colorado legislature decided that given the lack of consumer complaints, which has remained low even after licensing was deregulated, and the cumbersome regulatory system, the best course of action was to deregulate the licensing system. *Id.* Given that the justifications for licensing are health, safety, and consumer welfare, the system that Colorado has established seems to be working since: consumer complaints are low; more individuals can easily enter the market; and the State is no longer burdened to the regulatory system. That is not to suggest that a solution as seemingly extreme as Colorado's is the right one for all states.

mere discussion of whether they should exist or not in a particular industry.⁷⁵

IV. FUNERAL LICENSING AND THE (NOT-SO-JUSTIFIED) MODERN JUSTIFICATIONS

A. *Challenging the Regulations: A Shift in Opinion and Law*

Consumers have begun to notice the deleterious effects that funeral board regulations, enacted for the stated purpose of consumer protection, have had on them.⁷⁶ For example, the funeral board in Montana has received condemnation from consumers as proposed and enacted legislation has had the effect of insulating the funeral industry

⁷⁵ Some commentators do suggest that the existence of occupational licensing schemes for certain industries is unwarranted, and put solely in place to protect already existing business from future competition. Harfoush, *supra* note 6, at 136 (“Though sometimes licenses are created to ensure the health and safety of the general public, often they are created to protect already established businesses from facing new competition.”) (footnote omitted). What has really led many commentators to raise their eyebrows is that regulatory boards are placing stringent requirements on seemingly mundane jobs. Louisiana is the only state in the country that requires retail florists to have a license, for which you must pass a fifty-dollar exam issued by the Louisiana Horticulture Commission. Morris Kleiner, *Why License a Florist?*, N.Y. TIMES (May 28, 2014), http://www.nytimes.com/2014/05/29/opinion/why-license-a-florist.html?_r=0; see *Education Requirements*, LA. STATE FLORIST’S ASS’N, <http://www.lsfafloirists.com/education/floristryexamdates.html> (last visited Dec. 31, 2015). While all states require that manicurists obtain licenses, some go so far as to require that the applicant be proficient in English in order to obtain a license. Timothy Taylor, *Occupational Licensing and Its Discontents*, THE CONVERSABLE ECONOMIST (Aug. 5, 2015), <http://conversableeconomist.blogspot.com/2015/08/occupational-licensing-and-its.html>. It is illegal in Arkansas to braid hair without a cosmetology degree, which requires passing state exams and attending cosmetology school where they do not even teach hair braiding. Jenni Bergal, *A License to Braid Hair? Critics Say State Licensing Rules Have Gone Too Far*, STATELINE (Jan. 30, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/state-line/2015/1/30/a-license-to-braid-hair-critics-say-state-licensing-rules-have-gone-too-far>. The argument is that these jobs are unrelated to concerns of health, safety, and consumer welfare—the historical justifications for licensing arrangements. Timothy Sandefur, *Is Economic Exclusion A Legitimate State Interest? Four Recent Cases Test the Boundaries*, 14 WM. & MARY BILL RTS. J. 1023, 1028 (2006).

⁷⁶ Alain Sherter, *In death, a final chance to get gouged*, CBS NEWS, <http://www.cbsnews.com/news/in-death-a-final-chance-to-get-gouged/> (last updated Oct. 20, 2015) (stating that consumers are dissatisfied by how the prices for funerals are exorbitantly high and how inconsistent prices amongst the funeral homes in a confined area often frustrates the grieving process).

from competition, keeping funeral prices at high levels.⁷⁷

The court system has also doubted the justifications being brought forward for funeral home occupational licensing. Although the specific issues in some of the cases are beyond the scope of this Note, the arguments made and illuminated in the opinions all resonate the idea that funeral industry regulations often work against consumers in favor of industry interests. For example, in *Heffner v. Murphy*,⁷⁸ the Middle District of Pennsylvania heard a challenge to Pennsylvania's Funeral Directing Law, which restricted who could operate a funeral home.⁷⁹ The law narrowed the avenues with which out-of-state firms could enter the Pennsylvania marketplace, essentially insulating the local funeral homes from the threat of competition.⁸⁰ The plaintiffs argued at trial that the motivations behind the Funeral Directing Law were anti-competitive in nature because established funeral directors grew wary of the stark increase in competition over a period of years.⁸¹ The court eventually found the law to be unconstitutional under the Commerce Clause, and spent a portion of the opinion recognizing the plaintiffs' argument that the restrictions on entry into the funeral industry were anti-competitive and worked against consumer interests.

Two separate challenges to nearly identical statutes regarding

⁷⁷ *Montana Funeral Directors Try to Shut Down Competition*, FUNERAL CONS. ALLIANCE (Jan. 30, 2007), <https://www.funerals.org/newsandblogsmenu/blogdailydirge/96-montana-funeral-directors-try-to-shut-down-competition> (regarding proposed legislation, which never made it out of committee thanks to consumer opposition, that would have effectively given funeral homes a legal right to the custody of a deceased's remains since it would have made it illegal for families to take care of arrangements themselves at their homes); *Montana Running Amok . . . Again*, FUNERAL CONS. ALLIANCE, <https://www.funerals.org/legislative-watchblog/2802-montana2013> (last updated July 24, 2013) (regarding proposed legislation that would have made it illegal for crematory operators to do typically routine, mundane procedures, such as removing pacemakers, which would have arguably driven out competition from low-cost crematoriums); *Montana: The Divine Right of Undertakers II*, FUNERAL CONS. ALLIANCE (June 20, 2012), <https://www.funerals.org/newsandblogsmenu/blogdailydirge/2433-montanaspoja2012> (pointing the inconsistencies of the Montana Funeral Board's legal arguments for the validity of regulations with prior statements stating just the opposite). However, at least one commentator has suggested that consumers want more regulations in certain areas of the funeral industry due to a perceived lack of oversight. Horton, *supra* note 39, at 437-38 (pointing out the instances in how the very unregulated crematory business has led to accusations of theft, returning less remains than were actually removed, and harvesting body parts).

⁷⁸ 866 F. Supp. 2d 358 (M.D. Pa. 2012).

⁷⁹ *Id.* at 383.

⁸⁰ *Id.*

⁸¹ *Id.* at 371.

licensing regulations resulted in a split between the Tenth and the Sixth Circuit.⁸² In both cases, the circuit courts of appeal addressed funeral-licensing regulations that required one to be a licensed funeral director in order to sell caskets.⁸³ In the Sixth Circuit decision of *Craigmiles v. Giles*,⁸⁴ the court heard a challenge to a Tennessee law restricting casket sales by a local Reverend who was fed up with the expensive prices charged to members of his congregation, and began to make and sell cost-effective caskets.⁸⁵ The court subjected the Due Process and Equal Protection Clause claims to rational basis review, and found that the state could not justify even a legitimate interest in the regulation and held that the regulation was “designed only for the economic protection of funeral home operators.”⁸⁶ This decision recognized that licensing schemes that only provide a benefit to already existing and established industry businesses, and hurt consumers in their pocket-books, are invalid regulations.⁸⁷

Less than five years after the Sixth Circuit’s decision in *Craigmiles*, the Tenth Circuit came to the opposite conclusion in *Powers v. Harris*.⁸⁸ The Oklahoma regulation at issue in *Powers* was similar to the regulation at issue in *Craigmiles*⁸⁹ in that both required someone to be a licensed funeral director to sell caskets. The regulatory board argued that although the regulation was not perfect, it was crafted well enough to promote the state interest of protecting a vulnerable group,

⁸² These are not the only two courts to have weighed in on this. See *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434 (S.D. Miss. 2000). The FTC has also addressed similar regulations. In the *Matter of Missouri Board of Embalmers and Funeral Directors*, File No. 061-0026, <https://www.ftc.gov/sites/default/files/documents/cases/2008/06/080624msbefddo.pdf>.

⁸³ Harfoush, *supra* note 6, at 141-44.

⁸⁴ 312 F.3d 220, 224 (6th Cir. 2002).

⁸⁵ Harfoush, *supra* note 6, at 141.

⁸⁶ *Craigmiles v. Giles*, 312 F.3d 220, 200-29 (6th Cir. 2002). The State tried to argue the usual state interest of promoting health, safety, and consumer protection. *Id.* at 225. The court disagreed and noted that the only difference in a casket sold by a retailer and a casket sold by a funeral home was that the latter was often marked up 225-600%. *Id.* at 224.

⁸⁷ *Id.* at 229; Harfoush, *supra* note 6, at 144 (“In essence, these regulations are state sanctioned cartels, which impose barriers to entry and keep prices artificially high.”).

⁸⁸ *Powers v. Harris*, 379 F.3d 1208, 1209-27 (10th Cir. 2004).

⁸⁹ See OKLA. STAT. tit. 59. §396.2 (West 2010). The Oklahoma regulation only applied to those trying to sell caskets to the families that had experienced a death, and not pre-arranged funerals. *Powers*, 379 F.3d at 1211. Also, the Oklahoma statute only applied intrastate, allowing non-funeral directors to sell caskets out-of-state. *Id.*

and should therefore pass rational basis review. The Tenth Circuit agreed and reasoned that court intervention into every regulation that legislatures got wrong would paralyze state governments.⁹⁰ The Tenth Circuit's decision in *Powers* has received negative commentary, mainly fear that the decision incentivizes and allows industries other than the funeral industry to lobby government and create "insurmountable barriers to competition."⁹¹

Recently, legal scholars have also become interested in analyzing the relationship between the existence of regulations, what they require, and how effective or ineffective they are at promoting the interests of consumers.⁹² Economists David Harrington and Kathy Krynski conducted a polarizing study that looked at the relationship between multiple regulations⁹³ and possible demand inducement.⁹⁴ The empirical study found that in the states that require funeral directors to also be embalmers, cremation rates were reduced by roughly sixteen percent, and expenditures on funerals were 2.6% higher.⁹⁵ These results suggest that funeral directors in those states induce consumers to choose the more expensive option.⁹⁶ The study also frames its conclusions in the context of the relationship between regulatory boards and the goals of the Funeral Rule.⁹⁷

Harrington and Krynski's research influenced a study by David Foos, who took the analysis one step further and specifically made recommendations as to how states could create better regulatory schemes that would protect consumer interests.⁹⁸ The study specifically addressed regulations referred to as "Ready-to-Embalm" statutes, which require, in some variation, that all funeral homes have embalming facilities and that all funeral directors also be embalmers.⁹⁹ The study reached the same conclusions as Harrington and Krynski, that state

⁹⁰ *Id.* at 1218.

⁹¹ Harfoush, *supra* note 6, at 148. *But cf.*, Chevalier, *supra* note 47.

⁹² See Stephen W. Kopp & Elyria Kemp, *The Death Care Industry: A Review of Regulatory and Consumer Issues*, 41 J. CONS. AFFS. 150, 150-68 (2007).

⁹³ The regulations that the study used as variables included licensing schemes that require all funeral directors to be embalmers, prohibitions on operating mortuaries in cemeteries, and requirements that crematories be located in cemeteries. Harrington & Krynski, *supra* note 17, at 207-10.

⁹⁴ *Id.* at 200-01 (hypothesizing that in more regulated states, funeral directors will more likely push ground burials onto consumers as opposed to cremations).

⁹⁵ *Id.* at 217, 222.

⁹⁶ *Id.* at 222.

⁹⁷ *Id.*; see *supra* Part II.B.

⁹⁸ Foos, *supra* note 12.

⁹⁹ *Id.* at 1388.

regulations play an important role in determining the amount of demand inducement.¹⁰⁰ Foos concludes that the historical justifications for Ready-to-Embalm regulations are no longer viable considerations, and instead suggests the adoption of hybrid regulations that at the very least would only require a funeral home to have access to an embalming room.¹⁰¹ He also suggests that the twenty-seven states¹⁰² that require all funeral directors to be trained to embalm should bifurcate their licensing regulations and instead offer a choice of a dual licensing structure to those wanting to enter the industry.¹⁰³ Creating a dual licensing structure would benefit consumers because it would allow funeral homes and those working in them to more adequately offer and encourage options that the current industry landscape is trending toward.¹⁰⁴ This Note will address in the following section how the White House's framework applies to Foos' suggestion of a bifurcation of many state-licensing schemes.¹⁰⁵ However, current literature on occupational licensing, and the White House's recent report identifying a viable framework for licensing, reveal that the problem may cut deeper than what a dual licensing system can heal. By looking at the effects of occupational licensing in regulatory schemes, and the findings in the White House report, it is evident that the educational requirements of funeral licensing schemes need also be addressed.

B. Dual Licensing

One common type of restrictive type of occupational license in

¹⁰⁰ *Id.* at 1405; Harrington & Krynski, *supra* note 17, at 223.

¹⁰¹ Foos, *supra* note 12, at 1414. Foos also looks to other states that follow a form of a hybrid model, such as Indiana, which allows for owners of multiple funeral homes to only have an embalming room in one location. *Id.*

¹⁰² These states include: Arizona, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin. *Id.* at 1388 n.108, 111; *Licensing Boards and Requirements*, NAT'L FUNERAL DIRS. ASSOC., <http://nfda.org/licensing-boards-and-requirements.html> (last visited Dec. 28, 2015).

¹⁰³ Foos, *supra* note 12, at 1412-13.

¹⁰⁴ See *supra* Part IV.A. The current landscape being a trend toward alternatives to ground burials that excessive regulations encourage funeral directors to induce in their customers.

¹⁰⁵ Rather, Foos' argument against a single licensing system for both funeral directors and embalmers is further evidence of a stacked system of regulations that prevent the Funeral Rule from having its desired effect, and shows how state regulatory boards are protecting the interests of the funeral industry.

the funeral industry requires funeral directors to also be licensed embalmers. For instance, the District of Columbia does not separate the two jobs and requires funeral directors to be able to practice both funeral directing and embalming.¹⁰⁶ The D.C. Municipal Regulations do not address embalming at all, and only lays out the requirements for becoming a “Funeral Director,” which involves going to mortuary school and having to embalm twenty-five bodies to obtain a license.¹⁰⁷

The White House Report’s considerations for analysis suggest that states should bifurcate licenses such as D.C.’s and allow applicant the choice to be either or both. The first suggestion in the White House report is to make sure the substantive requirements of licensing are closely tied to public health and safety.¹⁰⁸ This weighs in favor of separating the licenses for funeral directors and embalmers. Historically, all funeral directors were embalmers and so it was necessary to license them as one, but the context of the industry has changed.¹⁰⁹ Arguably, the separation of funeral director and embalmer as professions, and the authority each has within the funeral business, has drastically decreased the threat to public health and safety for funeral directors. Take, for example, the Tennessee statute defining a funeral director.¹¹⁰ The responsibility that has the closest reach to public health and safety concerns would be the allowance to prepare dead bodies *other than embalming*.¹¹¹ The rest of the definition of a funeral director includes making arrangements with families, provisioning a site of disposition, and holding oneself out as a funeral director.¹¹² While preparing dead bodies other than embalming may raise a “mild” concern, to use language from the White House report,¹¹³ it is a large deviation to the health and safety concerns that historically justified the implementation of the licenses, which were principally addressing the embalming process.¹¹⁴ In fact, the World Health Organization has stated that it is an inaccurate conception that handling corpses poses health risks.¹¹⁵

¹⁰⁶ D.C. Mun. Regs. tit. 17, § 3002 (LexisNexis 2017).

¹⁰⁷ See *id.* at § 3099.1.

¹⁰⁸ *White House Licensing Report*, *supra* note 7, at 42.

¹⁰⁹ See *supra* Part IV.A.

¹¹⁰ TENN. CODE ANN. § 62-5-101(6) (West 2015).

¹¹¹ See *id.* § 62-5-101(6)(A)(1).

¹¹² See *id.* § 62-5-101(6)(A)(2)-(5).

¹¹³ *White House Licensing Report*, *supra* note 7, at 42.

¹¹⁴ See *supra* Part II.A; Foos, *supra* note 12, at 1387-88.

¹¹⁵ *Water Sanitation Health*, WORLD HEALTH ORG., http://www.who.int/water_sanitation_health/emergencies/qa/emergencies_qa8/en/ (last visited Mar. 10, 2016); see *Dead Bodies and Disease: the “Danger” that Doesn’t Exist*, FUNERAL CONS. ALLIANCE, <https://funerals.org/?consumers=dead-bodies-disease-danger-doesnt-exist> (last visited Mar. 18, 2016) (stating that the

Also, the modern trends of the twenty-first-century funeral industry illuminate the future role that funeral directors will play in the business. Most people no longer want to be embalmed and interred, and are now considering alternatives to ground burial.¹¹⁶ One of the biggest trends in the funeral industry has been toward cremation.¹¹⁷ In 1980, the cremation rate in America was 9.7%,¹¹⁸ while the rate in 2013 was 45.4%.¹¹⁹ There are many reasons why cremation has become such a popular alternative, including cost,¹²⁰ environmental awareness,¹²¹ changes in religious perspectives on cremation,¹²² and the decline of the nuclear family.¹²³ Also, cremations allow families flexibility in choosing exactly what type of service they want.¹²⁴ Another eco-friendly alternative receiving increasing interest is green burials, broadly defined as burials meant to have a small, if infinitesimal, ecological impact.¹²⁵ In 2015, 64% of adults over forty said they would

World Health Organization, the Center for Disease Control, and the Pan-American Health Organization have all published data supporting the proposition that dead bodies pose no health risk, even when unembalmed).

¹¹⁶ Horton, *supra* note 39, at Part IV.A.

¹¹⁷ Horton, *supra* note 39, at 429.

¹¹⁸ Karen Parker, *Cremation Trends: Are the Numbers of Cremations Increasing?*, NEPTUNE SOC'Y (May 4, 2013), <http://www.neptunesociety.com/about-cremation/cremation-trends>.

¹¹⁹ *Statistics*, NAT'L FUNERAL DIRS. ASSOC., <http://nfda.org/about-funeral-service/-trends-and-statistics.html#cremationburial> (last updated Jan. 11, 2017).

¹²⁰ Tyler Mathisen, *Cremation is the hottest trend in the funeral industry*, NBC NEWS (Jan. 22, 2013), <http://www.nbcnews.com/business/cremation-hottest-trend-funeral-industry-1B8068228> (cremations cost a third of what a burial costs); Horton, *supra* note 39, at 430.

¹²¹ *Earth-Friendly Cremations*, AGREENERFUNERAL.ORG, <http://agreenerfuneral.org/greener-funerals/earth-friendly-cremations/> (last visited Nov. 18, 2015) (explaining that cremations use far less resources than other forms of disposition, and future developments in more advanced filtration systems will reduce the amount of mercury that is emitted in the process).

¹²² Mathisen, *supra* note 120 (Until 1963 the Catholic Church outlawed cremation, but now bishops can even permit a funeral mass with the cremated remains present).

¹²³ Mathisen, *supra* note 120 (“As more Americans live far from hometowns and parents, and as family burial plots have waned in popularity and accessibility, millions have turned to cremation as a practical and cost-effective way to care for a loved one’s remains.”).

¹²⁴ Parker, *supra* note 118 (a family could choose a direct cremation with no service, a full service followed by cremation, or a service when they spread the ashes).

¹²⁵ Robert Schroeder, *Why More Americans are considering ‘green’ funerals*, MARKETWATCH.COM (Oct. 29, 2015), <http://www.marketwatch.com/story/why->

be interested in green funerals, as compared to 43% in 2010.¹²⁶ As interest in green alternatives to funerals has risen, the availability of green cemeteries has also risen over the past decade.¹²⁷ The funeral process can also be green by using locally grown flowers, organic food, and recycled paper products.¹²⁸ These growing alternatives, which will continue to grow as demand inducement decreases,¹²⁹ do not present the health and safety concerns that embalming does. As we continue through the twenty-first-century, regulatory boards will see an evolving profession in funeral directing that does not threaten health and safety the way it did one hundred or even fifty years ago. The regulatory boards would be stunting innovation and progression by not reevaluating the occupational licenses in place, and would essentially allow the regulation to become *more* harmful to consumers over time.

C. Educational Requirements

Another restrictive element in occupational licensing schemes is the educational requirements needed to obtain a license. The White House Report suggests that states should consider the requirement of particularized education for funeral directors, and how it relates to public health and safety. Although many states still have not adopted a

more-americans-are-considering-green-funerals-2015-10-29. Compared to the ecological impact of traditional burial and cremation, green burials are the most environmental friendly alternative. Shannon Palus, *How to Be Eco-Friendly When You're Dead*, THE ATLANTIC (Oct. 30, 2014), <http://www.theatlantic.com/technology/archive/2014/10/how-to-be-eco-friendly-when-youre-dead/382120/>. Traditional burials leave a million pounds of wood, concrete, and steel in the ground every year, while one cremation requires "about two SUV tanks worth of fuel." *Id.*

¹²⁶ FAMIC Study, *New Study Shows Americans Recognize the Role of Memorialization in Healthy Healing Following the Death of a Loved One*, FUNERAL AND MEMORIAL INFO. COUNCIL, <http://www.famic.org/index.php/famic-study> (last visited Nov. 18, 2015).

¹²⁷ *Green Cemeteries*, AGREENERFUNERAL.ORG, <http://www.agreenerfuneral.org/greener-cemeteries/> (last visited Feb. 5, 2017) (The number of green cemeteries in the U.S. has gone from a handful in the 1990s to 150 in 2014). The number of providers, including both cemeteries and funeral homes, that the Green Burial Council has certified is currently 340. *Find a Provider*, GREEN BURIAL COUNCIL, <http://greenburialcouncil.org/find-a-provider/> (last visited Feb. 5, 2017). This number pales in comparison to the 20,915 funeral homes operating in the U.S. in 2015. *General Funeral Service Facts*, NAT'L FUNERAL DIRS. ASSOC. (July 30, 2015), <http://nfda.org/about-funeral-service/-trends-and-statistics.html>.

¹²⁸ *Trends in Funeral Service*, NAT'L FUNERAL DIRS. ASSOC., <http://nfda.org/media-center/trends-in-funeral-service.html> (last visited Nov. 18, 2015).

¹²⁹ See *supra* notes and text accompanying notes 92-96.

dual licensing system,¹³⁰ some states that have require that funeral directors be educated at a school accredited by the American Board of Funeral Service Education. For example, Tennessee changed its licensing system in 2010 and required that one has to attend such a school in order to be a licensed funeral director.¹³¹ This is not necessarily damning to the regulatory scheme, however, in considering the relationship to health and safety, state boards should look to alternatives, including and especially direct regulatory establishments, including regular inspection of funeral homes.¹³² Funeral homes are already subject to independent inspections by state funeral boards and the Occupational Safety & Health Administration. Moreover, forty states currently have continuing education requirements,¹³³ which ensure that funeral directors know how to perform their jobs in line with public health and safety concerns. Furthermore, even though it may address consumer welfare more than public health and safety, funeral directors will still have to comply with the Funeral Rule and be subject to inspections from the FTC.¹³⁴ This argument is not to suggest that the current state of funeral home inspections is enough to warrant no required education, but is rather to illustrate that the industry is no stranger to inspection, and that there are multiple ways in which state regulatory boards can supplement stringent educational requirements with a system of inspection that would have the same effect on public health and safety.

State boards should also evaluate the requirement of particularized education, not just through the lens of public health and safety, but also market entry costs. Take for example the already-discussed requirement in Tennessee for individuals to attend a school accredited by the American Board of Funeral Service Education in order to be licensed.¹³⁵ The White House Report stated that such educational requirements can stand high in the way for lower-income individuals wanting to become funeral directors.¹³⁶ What is more telling of the Tennessee's law discriminatory effects on prospective entrants, however, is that there is only one accredited school in Tennessee, located

¹³⁰ See *supra* notes and text accompanying notes 105-13.

¹³¹ TENN. CODE ANN. § 62-5-305(b)(6) (West 2016).

¹³² *White House Licensing Report*, *supra* note 7, at 43.

¹³³ *Licensing Boards and Requirements*, *supra* note 101.

¹³⁴ See Section II.B. Such a type of deregulation would in theory allow for the Funeral Rule to actually do what it was intended to do, instead of be overshadowed by state regulations that do not have consumer interest in mind. See Harrington & Krynski, *supra* note 17; Foos, *supra* note 12.

¹³⁵ See *supra* notes and text accompanying notes 92-96.

¹³⁶ *White House Licensing Report*, *supra* note 7, at 12.

in Nashville.¹³⁷ Tennessee does have a Reciprocity Statute, which allows for those accredited out of state to practice in Tennessee.¹³⁸ However, the costs, both monetary and personal, a Tennessean not residing in Nashville would incur to relocate to Nashville or out-of-state seems unduly restrictive given the alternatives that are available.¹³⁹ By altering the requirement for particularized education and allowing those in Tennessee, and other similar states, alternative ways to acquire the statutorily mandated education, the implications of this bar to entry will be lowered. And given the lack of public health and safety concerns, it seems unjustifiable not to do so.

What about the other justification for occupational licensing, consumer welfare, that we have seen? Many funeral boards state upfront that the regulations they implement, including occupational licensing, are for consumer welfare. "Consumer welfare" evades a precise definition, simply because what threatens the consumer changes over time. At the turn of the nineteenth-century, when many industries, including the funeral industry, first obtained occupational licensing, the threat to consumers dealt with their lack of knowledge of what was happening in the industries.¹⁴⁰ Occupational licenses resulted in regulatory boards, which resulted in increased transparency for consumers.¹⁴¹ As times have changed, a lack of information in the funeral industry no longer seems to affect the meaning of "consumer welfare." Consumers nowadays seem to be more concerned with the high price of funerals.¹⁴² State legislatures should reevaluate if the funeral boards in their particular state should consist of a majority of industry professionals,¹⁴³ when the actions they are taking in the name of "consumer welfare" have the opposite effect.

¹³⁷ *ABFSE Directory of Programs-Tennessee*, ABFSE, <http://www.abfse.org/html/dir-tn.html> (last visited Jan. 31, 2016) (listing John A. Gupton College as the only school in Tennessee).

¹³⁸ TENN. CODE ANN. § 62-5-311 (West 2016).

¹³⁹ Other states use some alternatives to attendance at an ABFSE accredited school, such as: California, which only requires an associate's degree in any subject; Kansas, which requires sixty credit hours at a college, twenty of which are defined by the state board; Kentucky, which only requires a high school education, but also requires three years of apprenticeship. *Licensing Boards and Requirements*, *supra* note 102.

¹⁴⁰ MORRIS A. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 22 (2006).

¹⁴¹ *Id.*

¹⁴² *See supra* Section II.C.

¹⁴³ *See supra* notes and text accompanying notes 43-45.

V. AVENUES FOR CHANGE: CHALLENGING THE OCCUPATIONAL LICENSES

Consumers of the funeral industry bear the costs of the restrictive nature of occupational licensing schemes. It is therefore in consumers' hands to be the impetus for change in the industry. There are various methods in which consumers and affected parties can challenge these regulations legally. The regulations can be challenged constitutionally, such as the equal protection and due process challenges previously discussed.¹⁴⁴ However, plaintiffs would likely have an uphill battle in seeking dual-licensing schemes and relaxed educational requirements. Under a rational basis review, a regulatory board would only need to show a rational relationship between the regulation and a legitimate state interest in the regulation.¹⁴⁵ Successful challenges under rational basis review are rare, but it does remain a possible avenue into the courtroom. A worthier avenue may be to challenge the occupational licenses under antitrust theories, especially with a recent Supreme Court antitrust decision that revisited state regulatory board immunity.¹⁴⁶ Regardless of how successful these suits may be against funeral boards, the potential losing immunity creates the opportunity for affected parties to advocate for consumer-friendly changes that will allow the boards to may maintain their immunity.

A. A Lack of Antitrust Immunity: *North Carolina State Board of Dental Examiners v. FTC*

Parties affected by the anti-competitive occupational licensing may take their claims to court under antitrust theories. The Supreme Court recently decided *North Carolina State Board of Dental Examiners v. FTC*,¹⁴⁷ which broadened the potential liability under the Sherman Act¹⁴⁸ for state regulatory boards. The Court looked at the two-part *Midcal* test in determining whether the state regulatory board in question could invoke antitrust immunity.¹⁴⁹ In order to invoke im-

¹⁴⁴ See *supra* Section IV.A (certain occupational licenses being challenged under the Commerce Clause and the Equal Protection Clause).

¹⁴⁵ *District of Columbia v. Heller*, 554 U.S. 570, 687-88 (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

¹⁴⁶ *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1104 (2015).

¹⁴⁷ *Id.* at 1104; see discussion, *supra* note 65, and accompanying text.

¹⁴⁸ 15 U.S.C.A. §§ 1-7 (2012).

¹⁴⁹ *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1110.

munity, the board must satisfy two requirements: (1) that “the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy,” and (2) the implemented policy be supervised by the State.¹⁵⁰ The Court reasoned that there was practically no difference between a regulatory board made up of market participants and one made up of private trade associations, and thus immunity could not be based on “nomenclature alone.”¹⁵¹ In order to obtain immunity for regulatory boards made up of market participants, the State must adopt clear policies for stomping out anticompetitive regulations.¹⁵²

The Supreme Court’s decision creates more potential antitrust liability for all state regulatory boards that are made up of mostly market participants. The implication comes from the fact that the antitrust problems created by regulatory boards are structural, and not substantive.¹⁵³ Future courts will not apply *North Carolina* and determine immunity based on the substance of the implemented regulations, but will rather look at whether a state is adequately supervising the decisions of the boards.¹⁵⁴ As many industry regulatory boards, not just funeral boards, are made up of a majority of market participants,¹⁵⁵ future decisions may find that many state regulatory boards are not immune from antitrust liability.

The Supreme Court’s decision in *North Carolina* will allow affected parties to bring antitrust suits against funeral boards because most of the funeral boards across the country are made up of a majority of market participants.¹⁵⁶ However, it is unclear *how* courts will determine “active supervision” of the regulatory boards under *North Carolina* as it will depend on a case by case basis.¹⁵⁷ However, the current

¹⁵⁰ *Id.* (quoting *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)).

¹⁵¹ *Id.* at 1114.

¹⁵² *Id.*

¹⁵³ Jarod Bona, *My Analysis of the Supreme Court’s North Carolina State Board of Dental Examiners v. FTC Decision*, THE ANTITRUST ATT’Y BLOG (Mar. 14, 2015), <http://www.theantitrustattorney.com/2015/03/14/my-analysis-of-the-supreme-courts-north-carolina-state-board-of-dental-examiners-v-ftc-decision/>.

¹⁵⁴ *Id.*

¹⁵⁵ Aaron Edlin & Rebecca Haw, *Cartels By Another Name: Should Licensed Occupations Face Antitrust Scrutiny*, 162 U. PA. L. REV. 1093, 1096 (2014) (“[L]icensing boards are largely dominated by active members of their respective industries.”).

¹⁵⁶ *Who Enforces the Laws?* ALSIRAT.ORG, <http://www.alsirat.com/silence/consumers/enforcement.html> (last visited Nov. 11, 2015) (stating that only one state had a majority of consumers on the funeral regulatory board in 2001).

¹⁵⁷ *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1116-17 (2015).

makeup of most funeral boards, and the lack of oversight from non-market-participant supervisors or legislators, would potentially fail the second prong of the *Midcal* immunity test and open the door for anti-trust challenges to the occupational licensing schemes.¹⁵⁸

*B. Regaining Immunity under North Carolina:
Advocating to the Legislature*

In the wake of the Supreme Court's decision in *North Carolina*, state legislatures are in a position to implement new, clear policies to actively supervise the regulatory boards and satisfy the second prong of the *Midcal* requirements. One of the major issues in challenging state boards directly deals with the fact that state regulatory boards are the ones implementing the funeral regulations. State funeral boards, like many regulatory boards, are made up of industry professionals.¹⁵⁹ Take for example North Carolina, whose funeral board is made up nine people, six of whom are industry professionals and are recommended to the Governor for appointment by two different trade organizations.¹⁶⁰ It is this relationship between trade organizations and state regulatory boards that allow for industry-friendly, industry-protective regulations to be stacked up against consumer interests.¹⁶¹ Such regulations have recently garnered the attention of consumers, courts, and

¹⁵⁸ See *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 102-09 (Tex. 2015) (laying out the proliferation of occupational licensing and how *North Carolina* will be applied in various contexts); see also *FTC Staff guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*, FED. TRADE COMM'N (Oct. 14, 2015) [hereinafter *Staff Guidance*], https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf (laying out guiding factors that are relevant when evaluating whether active supervision exists over regulatory boards controlled by market participants).

¹⁵⁹ *Who Enforces the Laws?*, *supra* note 156.

¹⁶⁰ N.C. GEN. STAT. § 90-210.18A (West 2015); see Holly Stevens, *Why the Law Matters—What Every Funeral Consumer Needs to Know*, FUNERAL CONS. ALLIANCE (Jan. 22, 2009), <http://www.funerals.org/newsandblogsmenu/blog-dailydirge/462-northcarolinafuneralconsumerlaw>.

¹⁶¹ Another challenge in advocating to these boards is consumers' relatively unorganized nature as compared to the industry's interest groups. One element of this is that consumers of the funeral industry are not in sharp contrast with the industry interests. See Gellhorn, *supra* note 55, at 16. Though the general public may know that they will one day be consumers of the funeral industry, the negative effects of occupational licenses do not present such a large problem to warrant getting involved. The economist Walter Gellhorn points out the obvious that a well-knit special interest group will have more success at challenging state regulatory and legislatures than will an "amorphous public" whose members are dispersed. *Id.* Special

commentators.¹⁶² Because advocating to the market-participant-dominated state boards is somewhat futile for aggrieved parties, advocating to state legislatures to come into compliance with *North Carolina* and the second prong of the *Midcal* test seems to be the more realistic avenue.

There are a number of changes to the funeral regulatory boards that affected parties can advocate for state legislatures to adopt. First, state legislatures could restructure funeral boards and make the majority of the membership non-market participants. Second, a state could avoid all antitrust liability by making funeral boards that act only in an advisory capacity.¹⁶³ This would still allow funeral boards to oversee compliance with the regulations, and would also give the power of implementing regulations to the non-market-participant legislature. Third, the legislature could designate an executive agency to hold hearings and accept recommendations from parties other than those on the board to assess the substance of the regulation and its proposed justifications.¹⁶⁴ These types of changes to the structure of funeral boards would allow non-market participants to have a more powerful voice in occupational license regulations, and create a more competitive industry.

VI. CONCLUSION

The high prices for funerals reflect a system of regulations in favor of those wanting to keep the market all to themselves.¹⁶⁵ The occupational licensing schemes of the funeral industry are an important regulation to those in the industry because they constructively bar those willing to participate in the trade.¹⁶⁶ The solution seems simple in this case: loosen the regulations in the funeral industry as to allow more competition and benefit consumers. This is not to suggest that the world needs more funeral homes or directors, as evidenced in the preceding paragraph. But what the world needs, what the economy needs, and what consumers need, is more competition. This is easier said than done since those controlling the competition through regulations are the ones who benefit from a lack thereof—those already in

interest groups representing consumers of the funeral industry have become more prevalent, but until regulatory boards no longer consist of industry professionals, it is unlikely that these groups will have much success appealing directly to the boards.

¹⁶² See *supra* Section IV.A.

¹⁶³ *Staff Guidance*, *supra* note 158.

¹⁶⁴ *Id.*

¹⁶⁵ See *supra* Section III.

¹⁶⁶ See *supra* Sections IV and V.

the industry.¹⁶⁷ However, the White House framework illuminates the ways in which the occupational licenses of the funeral industry can be tailored by policymakers to create competition without stripping away all funeral licensing schemes.¹⁶⁸ This is still easier said than done, but there is hope in the cause. Given that the Supreme Court has opened an avenue to challenge these regulations through antitrust litigation, the cause seems to be alive and well. The only challenge is that it requires that the public become more vested in the funeral industry. Just as Jessica Mitford illustrated in her life's work, consumers *can* have an impact on how the funeral industry operates. And given that we will all be consumers of this industry one day, we should try to have an impact.

¹⁶⁷ JAMES D. GWARTNEY ET AL., MICROECONOMICS: PRIVATE AND PUBLIC CHOICE 224 (15th ed. 2008).

¹⁶⁸ See *supra* Section IV.