From:	Conrad, Donald
To:	Rodriguez, Lisa
Subject:	FW: CLE Materials for upcoming CLE: Working In a Discrimination and Harrassment Free Workplace, Tuesday, Novembr 3, 2015
Date:	Friday, October 30, 2015 3:29:06 PM
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Pls print

From: AGO-ContinuingLegalEducation
Sent: Friday, October 30, 2015 3:23 PM
To: Case, Brenda
Subject: CLE Materials for upcoming CLE: Working In a Discrimination and Harrassment Free Workplace, Tuesday, Novembr 3, 2015

Attached you find the PowerPoint materials for Tuesday's CLE presentation.

Thank you,

Brenda Case
Office Administrator
Assistant CLE Coordinator

Office of the Arizona Attorney General Mark Brnovich
Information Services Section
Desk: (602) 542-7973
Fax: (602) 542-8078
brenda.case@azag.gov

Working In a Discrimination and Harrassment Free Workplace

November 3, 2015

Presented by

Dennis D. Carpenter, Jr.

Chief Counsel, Employment Law Section

Arizona Attorney General's Office*

*Views expressed are not official opinions of the Arizona Attorney General

Course Goal

- The Goal of this course is provide employees with information about what constitutes illegal conduct so that employees know what is not acceptable and can work in an environment that is free of unlawful discrimination, harassment and retaliation.
- This course focuses on understanding *unlawful* conduct.
- The Attorney General's Office expects high ethical standards from all employees which includes respectful and professional conduct with each other and the public in general.

OBJECTIVES

Upon completion of this course you should be able to:

- Define unlawful discrimination, harassment and retaliation
- Understand situations that may or may not be unlawful
- Understand your responsibilities and rights as an employee
- Be familiar with office policies and procedures that apply

PROFESSIONALISM

- What does that word mean to you?
- It's more than Competence
  - It's also about:
    - Commitment
    - Communication
    - Demeanor
    - Image

IMPORTANCE

- Work should be a "safe" place
- Our environment should be one where everyone is valued, regardless of their background
- Productivity is enhanced when drama is reduced
- The Court's liability is protected

CORE values

- Being sensitive to your colleagues involves looking at and understanding your basic beliefs:
  - Do I think I am superior to any other group of people?
  - Do I believe that certain individuals, due to their race, religion, age, etc. are inherently less competent than I am?
  - Am I fearful or nervous around people who are different than I am?

Common Problems

- Stereotyping
- Failure to get to know the person as an individual
- Fear of finding out new information and not knowing how to deal with it
- Lack of respect
- Failure to value differences
- Myopic world view

SOLUTION

- Respect and treat everyone the way you want to be respected in the workplace

- Respect and treat everyone the way you would want your spouse/child/parent to be respected in the workplace

RISK

- Over 97,000 charges of discrimination were filed with the EEOC in 2013. That number is up from 81,000 in 1997
- Approximately 2,800 of those claims were filed in Arizona
- 40% of those claims also alleged retaliation on the part of their employer
- $39 million awarded to claimants
- State of Arizona employees (including court employees) filed 138 EEOC charges in FY14-15. That is up from 90 EEOC charges filed in FY13-14.

Relevant* Federal and State Laws

Defining "Unlawful" Conduct

Federal

- Equal Pay Act of 1963 (EPA)
- **U.S. Civil Rights act of 1964 – Title VII**
- Age Discrimination in Employment Act of 1967 (ADEA)
- Pregnancy Discrimination Act of 1978 (PDA)
- The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)
- Americans with Disabilities Act of 1990 (ADA)/ ADA Amendments Act of 2008
- Genetic Information Nondiscrimination Act of 2008 (GINA)

State

- Arizona Civil Rights Act
- Arizona's Whistleblower Protection

* This is not a comprehensive list of all employment laws.

What is "unlawful employment discrimination?"

- Unlawful employment discrimination means that the employee, or an applicant, is treated unfavorably *because* of that person's membership in a "protected class."

- Employment decisions that are based on a "protected class" interfere with equal employment opportunities.

What are "protected classes?"

- National origin
- Age
- Disability
- Military status
- Genetic information
- Race
- Color
- Sex/Gender
- Pregnancy
- Religion

Title VII – Definition of unlawful discrimination

Title VII generally requires that:

- employers do not discriminate against an individual on the basis of race, color, sex, national origin, or religion
- with respect to hiring, discharge, compensation, promotion, classification, training, apprenticeship, referral for employment, or other terms, conditions, and privileges of employment
- It short, employees should be provided equal opportunities that are not based on protected class status
- How? By making every employment decision based on a legitimate business purpose related to the employer's mission.

What is "unlawful harassment?"

There are two types of Harassment

- Economic
- Environmental

Economic Harassment - $$$

- Involves Supervisor – Abuse of Power
- Involves a tangible employment action
  - Economic harassment involves an employment action that results in a monetary loss or gain for an employee or it can result in significant changes in workload or work assignment
- Involves threats and/or promises
  - A person is threatened of a job detriment or a promise of a job benefit . Agreement result in a positive employment action. Refusal results in a job detriment.

Environmental Harassment

- Conduct of a sexual nature or conduct directed at a protected category
- Unwelcome
- Offensive to the receiver *and* a "Reasonable Person"
- Severe (one time incident) OR Pervasive (keeps happening over and over

Types of Conduct

- Physical
- Verbal
- Visual

Examples of Conduct
Physical, Verbal, Visual

- Sexual activity
- Blocking
- Hugging
- Massaging
- Assault
- Be sensitive to a person's individual space

Examples of Conduct
Physical, **Verbal**, Visual

- Telling offensive jokes, stories, epithets about a protected category/ stereotypes
- Swearing; using words with sexual connotations
- Repeatedly asking for a date after rejections/making unwanted sexual advances
- Asking intrusive questions personal life (dating, race, religion… etc)
- Expressing opinions about others' religion
- Talking about one's sex life
- Grunts and moans

Examples of Conduct
Physical, Verbal, **Visual**

- Offensive posters, cartoons, pictures
- Offensive text messages or emails
- Leering, staring, winking
- Looking a person up and down
- Offensive gestures with hand or body movements

There is no magical line to determine what is or is not unlawful harassment.

Totality of the Circumstances

- What is happening at the time?
- What is the nature of the contact?
- Is conduct offensive to him/her?
- Is the conduct offensive to a reasonable person? Is this reasonable behavior?
- Is this "severe?"
- Is this repeated behavior?
- Bottom line: Be professional and respectful.

Consider the totality of the circumstances – Scenario #1

John and Jane are co-workers and over the past year they have become friends. When they would see each other Jane began to give John hugs and say how nice it was to see him. They both would talk about their lives and they got along well.

On one particular day, Jane did not show up for work. John got Jane's phone number from the emergency contact phone roster and called Jane to see if she was okay. Jane thought it was nice of him to think of her and thanked John, telling him that it was sweet of him to check on her.

Over the next several weeks while at work, Jane noticed John seemed to always end up in the same areas of the office as her...more than usual.

One morning , when Jane came into work , she saw John and gave him a hug. As she did so, John whispered in her ear that he loved her and gave Jane a kiss on the lips.

Consider the totality of the circumstances – Scenario #2

- Susan asks her supervisor, Steve, for a day off. Steve points out that Sam is standing outside the office at a copy machine. He tells Susan if she will walk by Steve and goose him in the rear end, he will give her the day off.
- Susan walks past Sam in the hallway, and pinches him.
- Steve watches this, from his office and begins to laugh out loud. He yells over to Sam, "hey Sam, was it good for you?"

Consider the totality of the circumstances – Scenario #3

- Joe and Joan are co-workers. They have been working together for over a year. They do not socialize outside of work.
- One day, Joe came to work but seemed somewhat unhappy. Joan asked Joe what was wrong. Joe then began telling Joan about another female co-worker, with whom he had a special relationship with, but she broke it off.
- Joan asked Joe what kind of special relationship. Joe explained that they were never a couple, but they had a sexual relationship, which he goes on to describe in detail.
- Joe then asked Joan if she would like to be his new special friend.

Consider the totality of the circumstances – Scenario #4

- On May 5th, three employees, Martinez, Smith and Williams were waiting for a staff meeting to begin. Smith and Martinez are friends and hang out with each other outside of work.
- Williams makes a comment to Martinez stating, "Hey Martinez, what are you doing here? Isn't this your day?" Martinez replies, "What do you mean...my day'" Williams replies, "You know, Cinco de Mayo. Shouldn't you be at home eating tacos."
- All three laugh it off as a joke; however Williams notices that Martinez seemed somewhat caught off guard by the comment. Willliams pats Martinez on the back and states, "Hey, I'm sorry, I was just kidding."
- After the meeting, Smith reports what took place to their supervisor. The supervisor talks to Martinez about what happened. Martinez said that he and Williams were friends and that they joke around like that all the time, and that the comment Williams made did not offend him in any way. However, towards the end of the meeting he says, "besides, Williams could tell I was a little bothered by the comment and apologized."

Pop Quiz

- A person has to say "stop" for the behavior to be unwelcome.
  - True
  - False
- A male employee can ask a female employee out without committing sexual harassment
  - True
  - False
- People who fail to immediately bring a complaint of harassment waive any right to complain.
  - True
  - False
- A white male cannot be discriminated against because he is not in a protected category.
  - True
  - False
- It is o.k. to exchange sexually explicit emails at work with those you know will not be offended.
  - True
  - False

What is "unlawful retaliation?"

- Protected Activity
- Adverse action
- Connection between the two

What are "protected activities?"

- Notifying supervisor about workplace discrimination or harassment
- Filing a charge of discrimination or complaint either internally or externally
- Cooperating in a workplace investigation (internal or external)
- The concept of protected activity is broader than just in the areas of discrimination and harassment. It include other workplace issues such as reporting safety concerns and illegal activity.

What are "Adverse Actions?"

The law forbids unlawful retaliation when it comes to any aspect of employment including:

- Hiring
- Firing
- Discipline
- Compensation
- Job assignments
- Transfers
- Promotions/Demotions
- Layoffs
- Training
- Benefits
- Other terms or conditions of employment

Connection

Unlawful retaliation occurs where there is an adverse action taken against an employee specifically because the employee engaged in protected activity.

Consider whether or not there is unlawful retaliation – Scenario #5

- Susan asks her supervisor, Steve, for a day off. Steve tells Susan that she is "hot" and if she goes out with him, he'll give her the day off.
- Susan is very offended and upset. She goes into to the bathroom crying.
- Emily, a supervisor from another department , sees Susan in the bathroom. Emily asks Susan what is wrong. Susan told her what happened and explains that Steve is always saying things like that to her. Susan says she just tries to ignore it but it really bothers her.
- Emily tells Susan she should report it to Human Resources. Susan says she is worried that if she complains, Steve will just get worse or he will fire her! Emily promises not to say anything.
- Another co-worker, Jill, overhears the conversation in the bathroom and tells Steve that afternoon.
- The next day, Steve fires Susan and Emily.

Consider whether or not unlawful discrimination or harassment exists in Scenario #5

- What are the possible issues in the scenario?
- What are the responsibilities of the employees in the scenario?
- Is this unlawful discrimination, harassment, or retaliation? Why or why not?

Employee Rights and Responsibilities

- You have the right to work in an environment free from unlawful discrimination, harassment and retaliation.

Employee Rights and Responsibilities

- What do you do if you think discrimination or harassment is occurring?
- *Report it!*
- It is every employee's responsibility to report unlawful discrimination, harassment, or retaliation.
- Any employee can report.
- You can report to a supervisor, upper management, or human resources.

MARK BRNOVICH
Attorney General

OFFICE OF THE ARIZONA ATTORNEY GENERAL
Operations Division

LESLIE WELCH
Director of Operations

NON-DISCRIMINATION POLICY

The Arizona Attorney General's Office (AGO) is committed to a work environment in which all individuals are treated with respect and dignity. Each individual has the right to work in a professional atmosphere that promotes equal employment opportunity and prohibits discriminatory practices, including harassment. Therefore, the Arizona Attorney General's Office commits itself to the attached Non-Discrimination policy.

- The Arizona Attorney General's Office has developed this policy to ensure that all its employees can work in an environment free from harassment, discrimination and retaliation.
- The Arizona Attorney General's Office will make every reasonable effort to ensure that all concerned are familiar with this policy and aware that any complaint or violation of such policies will be investigated and resolved appropriately.
- The Arizona Attorney General's Office will post our Equal Opportunity Policy Statement. This policy is available on the AGO Employee Intranet: https://sharepoint.azag.gov/default.aspx; in the display windows located in front of the Human Resources Section in the Law Building (1275 W. Washington, Phoenix, AZ 85007), in the first floor of the Capitol Center (15 S. 15th Avenue, Phoenix, AZ 85007) and in the third floor of the Tucson 400 W. Congress Building (400 W. Congress, Suite 315, Tucson, AZ 85701); and on the Arizona Attorney General's website: www.azag.gov.
- All employment announcements shall include the phrase:

"Arizona State Government is an EOE/ADA Reasonable Accommodation Employer"

As the Director of the Arizona Attorney General's Office, I am committed to the principles of Equal Employment Opportunity. To ensure the dissemination and implementation of the Equal Opportunity Policy throughout all levels of the Department, Leslie Welch shall serve as the Equal Opportunity Administrator for the Arizona Attorney General's Office. Leslie Welch may be contacted at (602) 542-8056 or Leslie.Welch@azag.gov.

Mark Brnovich, Attorney General

13 Feb 15
Date

Any employee who has any questions or concerns about this policy should talk with, the AGO Human Resources Section, at humanresources@azag.gov, 602-542-8055 or the Governor's Office of Equal Opportunity, http://az.gov.gov.az.gov/eoo/index.asp, 602 542-3711.

AGO Policy HR-12

Complaints – Allegations of Unlawful Discrimination or Harassment

POP QUIZ

An employee can let the supervisor know “off the record" that harassment that is occurring.

- True
- False

- The person who is experiencing harassment is the only one who can complain about it.
- True
- False

THANK YOU!

The End

From: Conrad, Donald
To: Rodriguez, Lisa
Subject: FW: CLE Presentation - Working In a Discrimination and Harassment Free Workplace
Date: Wednesday, October 21, 2015 2:32:38 PM
Attachments: image002.png

Enroll me and schedule

From: Neumann, Valerie
Sent: Wednesday, October 21, 2015 12:16 PM
To: DL-Everyone-Statewide AGO
Subject: CLE Presentation - Working In a Discrimination and Harassment Free Workplace

All AGO employees are invited to attend a CLE Presentation:

"Working In a Discrimination and Harassment Free Workplace"
Presented by Dennis Carpenter - Employment Law Section Chief Counsel

Tuesday, November 3, 2015, 2:00 – 3:30 pm
Capital Center Basement Conference Room
15 S. 15th Ave., Phoenix, AZ 85007

Every employee deserves to work in an environment free of discrimination, harassment and retaliation. But at what point does a working environment become an unlawful one? Come and learn the employment laws that govern workplace discrimination and harassment and hear examples and anecdotes of when the line is crossed in the workplace and employee conduct becomes unlawful.

Seating is limited – this presentation will be available to the first 115 employees to RSVP.

This CLE is limited to Employees of the Attorney General's Office and may qualify for up to 1.5 hours of Ethics Credit.

Written materials for this program will be available electronically prior to the date of the program. Paper copies of CLE materials will no longer be provided.

In Phoenix to Register:
Please send an email to: AGO-continuinglegaleducation@azag.gov
Phone: 602-542-7973

***Tucson Main office may attend via video conference
***A separate notice will be sent to satellite offices on how to stream the CLE

In Tucson to Register:
Please send an email to: Jessica.Rivera@azag.gov
Phone: 520-628-6504

Any questions, or if you have a disability, please call Brenda at (602) 542-7973 and let her know how to accommodate your needs.

Valerie Neumann
Executive Assistant to Chief Deputy Michael Bailey
Office of the Arizona Attorney General
1275 W. Washington St.
Phoenix, AZ 85007
602-542-8017 Office
valerie.neumann@azag.gov

From:	Conrad, Donald
To:	Rodriguez, Lisa
Subject:	FW: CLE: Economic Liberty for Public Lawyers: Reconciling constitutional liberties with our duty to defend Monday, November 2, 2015, 3:00 p.m. – 4:00 p.m.
Date:	Friday, October 30, 2015 9:05:37 AM
Attachments:	110215_CLE_Announcement_Clark_Neily.doc 4_Neily_BookReview.pdf Powers v Harris.pdf St Joseph Abbey v Castille.pdf

Pls print

From: AGO-ContinuingLegalEducation
Sent: Friday, October 30, 2015 8:46 AM
To: Case, Brenda
Cc: Rivera, Jessica
Subject: CLE: Economic Liberty for Public Lawyers: Reconciling constitutional liberties with our duty to defend Monday, November 2, 2015, 3:00 p.m. – 4:00 p.m.

Attached you will find the materials for the presentation: Economic Liberty for Public Lawyers: Reconciling constitutional liberties with our duty to defend

Thank you,

Brenda Case
Office Administrator
Assistant CLE Coordinator

Office of the Arizona Attorney General Mark Brnovich
Information Services Section
Desk: (602) 542-7973
Fax: (602) 542-8078
brenda.case@azag.gov

CLE Presented by the Attorney General's Office

Economic Liberty for Public Lawyers:
Reconciling constitutional liberties with our duty to defend

Monday, November 2, 2015, 3:00 p.m. – 4:00 p.m.
Capital Center Basement Conference Room
15 S. 15th Ave., Phoenix, AZ 85007

****Also available in the Tucson office via video conference***

This CLE is limited to Employees of the Attorney General's Office

Why you should attend

Do laws that embody "naked economic protectionism" violate the equal protection clause? Should a protectionist legislative purpose alter or impact this office's duty to defend state laws and regulatory regimes? Should it?

Mr. Neily, a veteran national litigator on behalf of individuals seeking to vindicate their economic liberties will consider these issues and discuss his experiences.

Presenter

Clark Neily, Senior Attorney and Director
Institute for Justice Center for Judicial Engagement
www.ij.org/cneily

Written materials for this program will be available electronically at https://www.azag.gov/cle prior to the date of the program. Paper copies of CLE materials will no longer be provided.

In Phoenix to Register:

Please send an email to:
Email: AGO-continuinglegaleducation@azag.gov
Phone: 602-542-7973

***In Tucson: To Register**:

Please send an email to:
Email: Jessica.Rivera@azag.gov
Phone: 520-628-6504

Questions? Call Brenda Case

If you have a disability, please call Brenda at (602) 542-7973 and let her know how to accommodate your needs.

AGAINST ARBITRARY GOVERNMENT AND THE AMORAL CONSTITUTION

BY CLARK M. NEILY III*

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V. CONSERVATIVE PROGRESSIVISM: DENYING AND DISPARAGING UNENUMERATED RIGHTS 95
VI. THE MORAL CONSTITUTION 99

* Senior Attorney, Institute for Justice and Director of the Institute's Center for Judicial Engagement. J.D. 1994, University of Texas School of Law; B.A. 1990, University of Texas. I would like to thank the clients of the Institute for Justice for their conviction, their courage, and the honor of representing them in court.

I. INTRODUCTION

The most important debate in constitutional law today is within the conservative-libertarian movement over the proper role of courts in mediating personal freedom and government power. At one end of the spectrum are those who support robust judicial review and the protection of rights not specifically enumerated in the text of the Constitution; at the other are those who favor judicial restraint and deference to majoritarian politics. This tension parallels an even more fundamental debate about the relationship of the individual and the state. Simply put, does the state exist to serve the interests of individuals or do individuals exist to serve the interests of the state?

The Founders had a clear answer to that question, which they expressed "to a candid world" in the Declaration of Independence.[1] "We hold these truths to be self-evident," they begin: not debatable, not relative, not purely a matter of subjective preference or social mores, but *self-evident*—that is, objectively true in all settings, for all people, for all time.[2] And what are these objective, self-evident truths? That individuals have certain natural rights to which they are all equally entitled, and that the purpose of government is to secure those rights. It did not give them to us, and it cannot (legitimately) take them away.

The reason America has the longest-running constitution in the world is because the Founders got it right. Government exists to protect individual liberty. It does not exist to enable some people—be they monarchs or majorities—to arbitrarily impose their will on others. Accordingly, while government may regulate the exercise of individual rights, it may only do so for good reason. How do we know what constitutes good reason? That is the question Tim Sandefur tackles with keen insight and characteristic verve in *The Conscience of the Constitution: The Declaration of Independence and the Right to Liberty.*

Sandefur begins with a metaphor borrowed from Abraham Lincoln about a shepherd driving a wolf away from a sheep's throat, an act "for which the sheep thanks the shepherd as a liberator while the wolf denounces him . . . as the destroyer of

1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
2. *Id.*

liberty."[3] It is clear, Lincoln quips, that "the sheep and the wolf are not agreed upon a definition of the word liberty."[4] Neither are we agreed upon the definition of liberty today or the proper role of our constitutional shepherd, the judiciary, in protecting it. The result has been a haphazard jurisprudence of liberty filled with glaring inconsistencies, disingenuous rationalizations, and an assortment of morally indefensible holdings by the Supreme Court.

Sandefur's thesis is simple, but he must prune back a thicket of bad reasoning and errant precedent to make space for it. In a nutshell, his argument is this: to develop an operational grasp of the Constitution, one must understand and accept the moral framework in which it is situated. The best explication of that moral framework is the Declaration of Independence, which Sandefur calls the "conscience" of the Constitution.[5] Above all else, the Declaration stands for the primacy of liberty over any form of political power, including democracy.[6]

Various groups have challenged this ordering of values during our nation's history, particularly the pro-slavery movement and political Progressives. The latter finally upended the Founders' hierarchy during the New Deal by persuading the Supreme Court to replace it with their own government-centric vision of the Constitution.[7] Unfortunately, modern conservatives like Robert Bork have helped cement that inversion by embracing—indeed, exalting—the progressive jurisprudence of judicial restraint and the presumption of constitutionality.

The Conscience of the Constitution reminds us that for the Framers, limited government was not merely a goal, but a moral imperative. Any attempt to interpret and apply the Constitution without appreciating that fact is bound to fail. And fail we have. We failed countless men and women held to bondage on American soil for centuries before the Civil War; we failed their

3. TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY 1 (2014) [hereinafter SANDEFUR] (quoting Abraham Lincoln, Address at Sanitary Fair, Baltimore, Maryland (Apr. 18, 1864) *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859–1865, 589, 589–90 (Don E. Fehrenbacher ed., 1989).

4. *Id.*

5. *Id.* at 2.

6. *Id.*

7. *See, e.g.*, RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006); Randy E. Barnett, *The Wages of Crying Judicial Restraint*, 36 HARV. J.L & PUB. POL'Y 925 (2013).

sons and daughters by abandoning the promise of freedom embodied in the Reconstruction Amendments; we failed generations of women by excluding them from the polity and from much of civil society; and we fail our fellow citizens every time we permit government to restrict their freedom without sufficient justification.

In short, we have treated the Constitution as if it were an amoral document, one that was made, as Justice Holmes famously claimed, "for people of fundamentally differing views."[8] That would have shocked the authors of our founding documents, who believed they were expressing universal truths, not merely their personal opinions. But Holmes's view has gained ascendancy, particularly among modern conservatives who pride themselves—often mistakenly, as we shall see—on being "strict constructionists." As Sandefur laments, this moral relativism means "[t]he Constitution's real promise thus remains imperfectly redeemed."[9] Amen.

II. IN THE BEGINNING

Like siblings sent off to live with different parents after a divorce, the Declaration of Independence and the Constitution have grown apart over the years, becoming increasingly unfamiliar to one another and sometimes awkward in each other's presence. No doubt that would have appalled members of the Founding generation, who endured great hardships to provide themselves a blank slate upon which to write their plan for "a new nation, conceived in Liberty."[10] The Declaration of Independence and the Constitution *together* comprise our nation's founding documents.[11] The Declaration provides the moral framework for understanding the Constitution and a compass to help guide us when applying it to situations the Framers could never have foreseen.[12]

8. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

9. SANDEFUR, *supra* note 3, at 160.

10. Abraham Lincoln, Address at Gettysburg, Pennsylvania (Nov. 19, 1863), *in* ABRAHAM LINCOLN, *supra* note 3, at 536, 536.

11. SANDEFUR, *supra* note 3. *See generally* Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN. ST. L. REV. 413 (2006) (surveying debate regarding the Declaration's place in constitutional law).

12. *See* Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J.L. & PUB. POL'Y 489, 507–08 (2004) [hereinafter *Liberal Originalism*] (describing the Declaration and Constitution as "a political system with worldwide ramifications").

Some find this talk of "frameworks" and "compasses" gauzy and undisciplined. But they are wrong. America has the shortest constitution of any major country. That helps make it more accessible, but the price of brevity is detail. For example, government may not take a person's life, liberty, or property without due process of law,[13] but we are not told just what process is "due" in any given setting. Judges hold their offices during "good Behaviour"[14] and the Fourth Amendment prohibits searches that are "unreasonable,"[15] but again, the Constitution provides no definition or elaboration of those terms.

Even where the Constitution appears to speak with greater precision—stating that Congress "shall make no law" respecting an "establishment" of religion or "abridging" the freedom of speech[16]—difficult line-drawing questions inevitably arise, such as whether states may display religious monuments[17] and whether burning an American flag should be considered protected speech or punishable conduct.[18] The answers to those questions cannot be derived from the plain text of the Constitution. Indeed, as Professor Kermit Roosevelt—whose excellent book on judicial activism Sandefur discusses and critiques at some length—correctly notes, "the words of the Constitution alone seldom decide difficult cases."[19] Instead, you must have what Cato Institute scholar Roger Pilon likes to call "a theory of the matter."[20]

Sandefur's theory of the matter is that the Declaration of Independence provides the key to understanding the Constitution and that any attempt to divorce the two inevitably

13. U.S. CONST. amend. XIV, § 1.
14. U.S. CONST. art. III, § 1.
15. U.S. CONST. amend. IV.
16. U.S. CONST. amend. I.
17. Sometimes yes, sometimes no. *Compare* Van Orden v. Perry, 545 U.S. 677 (2005) (holding that display of monument inscribed with the Ten Commandments on grounds of state capitol did not violate Establishment Clause), *with* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844 (2005) (holding that display of Ten Commandments in county courthouses violated Establishment Clause).
18. Speech. Texas v. Johnson, 491 U.S. 397 (1989).
19. KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS 38 (2006).
20. Roger Pilon, *Facial v. As-Applied Challenges: Does It Matter*, CATO SUP. CT. REV., 2008–2009, at vii, ix, *available at* http://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2009/9/foreword-pilon_0.pdf [perma.cc/V8BZ-JV7H].

leads to error and injustice.[21] The Declaration's essential point, he says, was to make clear which understanding of liberty prevails on American soil: the sheep's liberty to live free of wolfish violence and coercion, or the wolf's "liberty" to do as it will with the sheep.[22] "The wolf is wrong to imagine that he has a fundamental right to rule others, or that the sheep's rights are simply whatever the wolf decides to allow."[23] The Declaration of Independence makes clear that "America's constitutional order is premised on the opposite principle: on the basic right of each person to be free."[24] Importantly, this freedom is not limited to a mere handful of discrete rights. As Sandefur explains, the Founders understood that "[l]iberty does not come in discrete quanta; it is a general absence of interference. It is, in Jefferson's words, 'unobstructed action according to our will, within the limits drawn around us by the equal rights of others.'"[25]

But "freedom," "liberty," and even "rights" are notoriously malleable terms whose meanings have been made obscure by two centuries of constitutional dialogue and debate. A more precise way of conceptualizing the issue—one that neatly frames not only those two centuries of debate here in America, but the centuries-long debate among political philosophers throughout the world—is whether there is a right to be free from the *arbitrary* exercise of government power.

As Sandefur explains, "[a]n arbitrary act is one that does not accord with a rational explanatory principle: one that has no connection to a legitimate purpose or goal. It may lack reasons to explain it, or be supported by illegitimate reasons."[26] These two distinct meanings of the word "arbitrary" encompass a crucial point in the context of judicial review, because it is the second connotation that captures most unconstitutional government action, not the first.

For example, when the state of Florida requires an occupational license to perform interior design work, it is not because the legislature set out to regulate architects, got confused about who does what, and accidentally imposed

21. SANDEFUR, *supra* note 3, at 3–4.
22. *Id.* at 2.
23. *Id.*
24. *Id.*
25. *Id.* at 9 (quoting Letter from Thomas Jefferson to Isaac H. Tiffany (Apr. 4, 1819), *in* THOMAS JEFFERSON: POLITICAL WRITINGS 224, 224 (Joyce Appleby & Terence Ball eds., 1999)).
26. *Id.* at 73.

licensing on interior designers instead of architects. That would be arbitrary in the first sense of the word: a mistake with no reason to explain it. Instead, when the Florida legislature imposed licensing on interior designers it did so consciously, deliberately, and for a manifestly illegitimate reason: namely, economic protectionism for industry insiders, including particularly members of the politically influential American Society of Interior Designers (ASID).[27]

If the definition of arbitrary government power is the naked assertion of authority to restrict another's freedom, then state-sanctioned chattel slavery is its ultimate manifestation. Thus, it is not surprising that the first sustained challenge to the Declaration's recognition of "inalienable rights" came from the pro-slavery movement.[28] Sandefur recounts how "[a]ttacks on the principles of the Declaration began at an early point in American history" with defenders of slavery calling them "'self-evident lie[s].'"[29] Because it is impossible to reconcile human bondage with the proposition that "all men are created equal" and are equally endowed with the right to "Life, Liberty, and the pursuit of Happiness,"[30] pro-slavery advocates fought to sever the link between the Declaration of Independence and the Constitution.[31]

Of particular concern to defenders of slavery was the proposition that the Due Process Clause—which Sandefur correctly reminds us actually refers to due process of *law*[32]—"prohibits all arbitrary government action, including unjustified restrictions of individual liberty."[33] Thus interpreted, the Due Process Clause would have provided a powerful weapon with

27. *See, e.g.*, DICK M. CARPENTER II, DESIGNING CARTELS: HOW INDUSTRY INSIDERS CUT OUT COMPETITION (Inst. for Justice ed. 2007), *available at* www.ij.org/images/pdf_folder/economic_liberty/Interior-Design-Study.pdf [perma.cc/ZZP9-MA3A] (explaining and documenting ASID's strategy for enacting protectionist interior design licensing requirements); *see also Florida Interior Design*, INST. FOR JUSTICE, www.ij.org/locke-v-shore [perma.cc/44H4-HEDP] (last visited Nov. 30, 2014) (documenting a partially successful challenge to Florida's interior design law).

28. SANDEFUR, *supra* note 3, at 22.

29. *Id.* (quoting CONG. GLOBE, 33rd Cong., 1st Sess., app. 214 (1854) (Sen. Petit)).

30. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

31. *See Liberal Originalism*, *supra* note 12, at 498–507 (2004).

32. SANDEFUR, *supra* note 3, at 71. As Sandefur explains, not everything that government purports to do—even pursuant to a law enacted through valid legislative procedures—is necessarily "law." *Id.* at 78. Instead, "the ingredients of [true] law include generality, regularity, fairness, rationality, and public orientation." *Id.* at 79. A "law" that lacks these ingredients is not truly a law at all. *Id.*

33. SANDEFUR, *supra* note 3, at 71.

which to attack federal legislation, including the Fugitive Slave Law, designed to help perpetuate the peculiar institution.[34] But the requirement to provide due process—whether procedural, substantive, or both—did not apply to the states and therefore threatened neither to eradicate the institution of slavery itself nor enshrine, at the level of government where it was most urgently needed, a constitutional prohibition against the arbitrary exercise of government power. Those would be the jobs of the Thirteenth and Fourteenth Amendments, respectively.

III. FROM RECONSTRUCTION TO *LOCHNER*

Ratified in 1865, the Thirteenth Amendment ended legal slavery in America.[35] But many in the South were determined to keep newly free blacks, or "Freedmen," in a state of constructive servitude, and they responded with a web of regulations that came to be known as the "Black Codes."[36] These laws prohibited everything from Freedmen owning guns for self-defense, to leaving their master's property in search of better economic opportunities without permission, to restricting their ability to enter into contracts.[37]

The Black Codes represented a frontal assault on the very notion of personal sovereignty, and they infuriated Republicans in Congress, who pledged to eliminate them and stamp out slave culture once and for all.[38] Their initial response was to enact a series of federal laws, including the Civil Rights Act of 1866, which provided that all persons born in the United States have the same right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."[39] After doubts were

34. *Id.* at 42–43.

35. U.S. CONST. amend. XIII.

36. SANDEFUR, *supra* note 3, at 100–01; *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 162 (1998) (noting southern governments' attempts to "resurrect[] de facto slavery through the infamous Black Codes").

37. W.E.B. DU BOIS, BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880, 167–78 (Harcourt, Brace and Co., 1st ed. 1935), *available at* http://archive.org/stream/blackreconstruc00dubo#page/172/mode/2up [perma.cc/R498-GTVL].

38. *See* CONG. GLOBE, 39th Cong., 1st Sess., 1151 (1866) (Rep. Thayer).

39. Civil Rights Act of 1866, ch. 31, 14 Stat. 27; *see also* Freedmen's Bureau Act, ch. 200, 14 Stat. 173, 176–77 (1866) (protecting right to bear arms).

raised about the constitutionality of those laws, Congress proposed the Fourteenth Amendment to empower the federal government, including particularly the federal courts, to protect the basic civil rights of all Americans.[40]

The Supreme Court, however, had other plans, and it rendered the Fourteenth Amendment practically meaningless in the aptly named *Slaughter-House Cases*.[41] As Sandefur recounts, *Slaughter-House* involved a challenge to a Louisiana law requiring butchers to slaughter cattle at a single, privately owned facility.[42] This state-sanctioned monopoly "put hundreds of small-scale butchers out of business,"[43] who then sued the state, arguing that the Louisiana law deprived them of their right to earn a living in violation of the Fourteenth Amendment's proscription against any state law that shall abridge "the Privileges or Immunities of citizens of the United States."[44]

In a 5–4 opinion that misquoted relevant text,[45] twisted precedent, and flatly ignored the abuses the Fourteenth Amendment was plainly designed to correct, the Supreme Court held that the Privileges or Immunities Clause prevents the states from infringing only a small handful of rights that "owe their existence to the Federal government," such as the right of "free access to [America's] seaports" and to "demand the care and protection of the Federal government . . . when on the high seas."[46] This was a preposterous reading of the Privileges or Immunities Clause, and Sandefur provides a fresh and sophisticated critique of the majority opinion.[47] Inevitably, "[t]he *Slaughter-House* Court's withdrawal of the protections promised by the Fourteenth Amendment was a calamity for civil rights, and along with similar rulings it prepared the way for what historian

40. STAFF OF S. COMM. ON THE JUDICIARY, 99TH CONG., AMENDMENTS TO THE CONSTITUTION: A BRIEF LEGISLATIVE HISTORY 30–32 (Comm. Print 1985), *available at* www.senate.gov/artandhistory/history/resources/pdf/SPrt99-87.pdf [perma.cc/QPT9-BWTC].

41. 83 U.S. 36 (1872).

42. SANDEFUR, *supra* note 3, at 65.

43. *Id.*

44. U.S. CONST. amend. XIV, § 1; *Slaughter-House Cases*, 83 U.S. at 74.

45. *See, e.g.*, Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House Cases, 70 CHI.-KENT L. REV. 627, 646–48 (1994) (identifying and discussing Justice Miller's misquotations of constitutional text in *Slaughter-House*).

46. *Id.* at 79.

47. SANDEFUR, *supra* note 3, at 63–68.

Douglas Blackmon calls a 'torrent of repression' and the practical reestablishment of slavery."[48]

But a truth as profound as the one expressed in the Declaration of Independence—that all human beings have a natural right to be free from arbitrary government oppression—is not so easily extinguished. Disagreements soon arose among lower courts about whether the Constitution really allows government to restrict people's freedom for no good reason.

That question was presented with particular clarity in a trio of cases involving the humble non-dairy spread we call margarine. Invented in the latter half of the nineteenth century, oleomargarine, as it was then known, quickly drew the ire of the dairy industry, which used its political muscle to suppress competition.[49] Laws enacted at the behest of Big Dairy included mandatory disclosures, prohibitions against coloring oleomargarine yellow to make it look more like butter, and outright prohibitions against the shipment or sale of margarine.[50]

Professor Noga Morag-Levine recounts that between 1882 and 1887, the high courts of three states—Missouri, New York, and Pennsylvania—handed down decisions in cases challenging the constitutionality of oleomargarine bans.[51] She explains that the defendants in all three cases "offered to present expert testimony regarding the wholesomeness of the product they sold."[52] All three trial courts *excluded* that testimony as irrelevant, a decision with which only the New York Court of Appeals ultimately disagreed.[53] Based on evidence presented by the would-be seller, it appeared "quite clear" to the New York Court of Appeals that the true object of the law was not to prevent fraud or protect the public, but rather "to drive [oleomargarine] from the market."[54] Somewhat surprisingly (at least by modern standards), the government's lawyer did not dissemble on this point. Instead,

48. SANDEFUR, *supra* note 3, at 68 (quoting DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME 93 (2008)).

49. Adam Young, *The War on Margarine*, THE FREEMAN, June 2002, http://fee.org/the_freeman/detail/the-war-on-margarine [perma.cc/6E5P-2CGP].

50. *Id.*

51. Noga Morag-Levine, *Facts, Formalism, and the Brandeis Brief: The Origins of a Myth*, 2013 U. Ill. L. Rev. 59, 72 (2013).

52. *Id.* at 72–73.

53. *Id.* at 73.

54. People v. Marx, 2 N.E. 29, 32 (N.Y. 1885).

> The learned counsel for the [state] frankly [met] this view and claim[ed] . . . that even if it were certain that the sole object of the enactment was to protect the dairy industry in this state against the substitution of a cheaper article made from cheaper materials, this would not be beyond the power of the legislature.[55]

Here in one passage is the great unresolved tension in American constitutional law, and the essence of Sandefur's book: May government restrict one person's freedom simply to promote the selfish interests of another, and is it any of the judiciary's business? The Supreme Court's treatment of that issue over the years has been a jurisprudential game of pin the tail on the donkey, with judges stumbling around in blindfolds to avoid confronting the true object of government regulation and only occasionally peeking out to see what the government is really up to. We call this the rational-basis test, and it made an early appearance (though not by name) in—surprise!—a margarine case.

Powell v. Pennsylvania[56] involved a prosecution for selling margarine in violation of state law.[57] In an opinion by Justice Harlan, the Court began by recognizing that the Fourteenth Amendment protects "the privilege of pursuing an ordinary calling or trade" and that the law in question would violate that right unless it had a "real or substantial relation" to a legitimate government interest, such as protecting public health or preventing fraud.[58] At trial, the defendant sought to prove that the margarine he sold was "a wholesome and nutritious article of food," but the trial court deemed that evidence irrelevant and excluded it.[59] The Supreme Court affirmed.[60] Applying "[e]very possible presumption" in favor of the validity of the statute, the Court held that whether margarine presents any *actual* health risk is a "question[] of fact and of public policy which belong[s] to the legislative department to determine."[61] In other words, truth doesn't matter; the mere assertion of a legitimate government interest will suffice.

55. *Id.* at 32–33.
56. 127 U.S. 678 (1888).
57. *Id.* at 679.
58. *Id.* at 684.
59. *Id.* at 682.
60. *Id.* at 687.
61. *Id.* at 684–85.

Of course, courts do not usually accept assertions of fact that are false or unsubstantiated, so it is hardly surprising that the *Powell* Court's indifference to reality would not be the last word on the subject. The most famous rejoinder came seventeen years later in *Lochner v. New York*,[62] where the Court split over the constitutionality of a law limiting the number of hours bakers could work in any one day or week.[63] As Sandefur explains, the 5–4 majority "found no reason to believe the maximum-hours rule actually protected the public or the bakery workers."[64] Because the law restricted the bakers' freedom "without advancing any public goal,"[65] the law was an arbitrary—and therefore unconstitutional—exercise of government power.[66]

Though the case is reviled by most conservatives and nearly all liberals, Sandefur correctly asserts that "*Lochner* was a textbook application of the classical liberal principles embodied in the Declaration of Independence and the Constitution."[67] Distilled to its essence, *Lochner* stands for two propositions: First, the government must have a public-spirited reason for restricting people's freedom. Second, courts should not accept uncritically the government's naked assertions to that effect. Unfortunately, that commitment to defending the principle of non-arbitrariness would soon be replaced by the Progressive vision of the rubber-stamp judiciary championed in Justice Holmes's *Lochner* dissent.[68]

IV. THE PROGRESSIVE INVERSION

The Founders were classical liberals for whom individual freedom was the ultimate political value. For them, the point of government was to create a society where people could pursue their own goals and interests so long as they respected the equal right of others to do the same.[69]

The Progressive vision of government is very different. Progressives believe the role of government is to improve the

62. 198 U.S. 45 (1905).
63. *Id.* at 52–53.
64. SANDEFUR, *supra* note 3, at 131.
65. *Id.*
66. *Lochner*, 198 U.S. at 64.
67. SANDEFUR, *supra* note 3, at 131.
68. *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).
69. ROGER PILON, *The Purpose and Limits of Government*, CATO'S LETTER NO. 13, 1999, at 9, *available at* www.cato.org/sites/cato.org/files/pubs/pdf/cl-13.pdf [perma.cc/TYK4-D63C].

human condition by ensuring particular outcomes, especially in the distribution of resources and opportunities. Because those resources and opportunities belong where the government thinks they ought to belong—and not simply wherever they happen to end up as a result of individual decisions and actions—Progressives have little patience for individual rights. As recounted by Professor David Bernstein, Woodrow Wilson "dismissed talk of 'the inalienable rights of the individual' as 'nonsense.'"[70] "'The object of constitutional government,' according to Wilson, was not to protect liberty, but 'to bring the active, planning will of each part of the government into accord with the prevailing popular thought and need.'"[71]

As Sandefur notes, "Progressive politicians presided over a dramatic expansion of government programs—everything from minimum-wage legislation to laws banning alcohol and segregating people by race—aimed at transforming people's very nature."[72] Courts often resisted those efforts when they impinged on individual liberty by employing robust concepts of due process, property rights, and freedom of contract. In *Buchanan v. Warley*,[73] for example, the Supreme Court struck down a residential segregation ordinance in Louisville, Kentucky, not on equal-protection grounds, but on the grounds that it violated due process "by depriving the plaintiffs of liberty and property without a valid police power justification."[74] Similarly, laws prohibiting parents from sending their children to private schools or teaching them in any language other than English were struck down not only as a violation of parents' freedom to "direct the upbringing and education" of their children,[75] but also as an unjustified interference with the occupational freedom of teachers[76] and the private schools' property rights.[77]

Unfortunately, the justices were not always consistent in their protection of individual liberty from the Progressives' utopian social policies, failing, for example, to prevent one of the most immoral programs in the history of America: eugenic

70. DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 92 (2011).
71. *Id.*
72. SANDEFUR, *supra* note 3, at 127.
73. 245 U.S. 60 (1917).
74. BERNSTEIN, *supra* note 70, at 81; *see also Buchanan*, 245 U.S. at 82.
75. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925).
76. Meyer v. Nebraska, 262 U.S. 390, 400–01 (1923).
77. *Pierce*, 268 U.S. at 535–36.

sterilization.[78] As Professor Bernstein notes, "[c]oercive eugenics was a quintessentially Progressive movement in that it reflected ideological commitments to anti-individualism, efficiency, scientific expertise, and technocracy."[79] And when that policy reached the Supreme Court, in the tragic and appalling case of *Buck v. Bell*,[80] it was that champion of judicial deference to democratic will, Justice Oliver Wendell Holmes, Jr., who wrote the opinion upholding Virginia's compulsory sterilization law and condemning Carrie Buck—and thousands of other young men and women—to a childless future.[81] As Holmes callously quipped in his breezy, page-and-a-half opinion, "Three generations of imbeciles are enough."[82]

According to Sandefur, this indifference to human dignity and the importance of self-determination is neither surprising nor anomalous.[83] On the contrary, "[i]n a Progressive world of process and moral agnosticism, judicial review exists not primarily to protect substantive rights, or to promote pre-political ideas of justice, but to sustain the machinery of collective decisionmaking."[84] As a pithy expression of this moral agnosticism, Sandefur offers a famous Holmes quote in which he tells a friend, "If my fellow citizens want to go to Hell . . . I will help them. It's my job."[85] But in fact, that is not quite right. What Holmes really means is, "If some of my fellow citizens want to send *other fellow citizens*—like Carrie Buck—to Hell, I will help them." Let there be no mistake: when Holmes and his fellow Progressives talk about self-government, they are not talking about the individual right to make bad decisions about one's own life. They are talking about a so-called "collective right" possessed by majorities to make bad decisions about other

78. *See generally* Buck v. Bell, 274 U.S. 200 (1927).

79. BERNSTEIN, *supra* note 70, at 96.

80. 274 U.S. 200 (1927).

81. *Id.* at 205–08. Carrie Buck was an unwed teenage mother, which was part of the state's reason for sterilizing her. *Id.* at 205. Holmes describes Buck's daughter Vivian as an "illegitimate and feeble-minded child." *Id.* Contrary to Holmes's description, Vivian was not feeble-minded. Roberta M. Berry, *From Involuntary Sterilization to Genetic Enhancement: The Unsettled Legacy of* Buck v. Bell, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 401, 419–20 (1998). And it appears she was conceived not in an act of promiscuity, as the state claimed, but rape. *Id.* at 413.

82. *Buck*, 274 U.S. at 207.

83. *See* SANDEFUR, *supra* note 3, at 25–26.

84. *Id.* at 128.

85. *Id.* at 127 (quoting Letter from Oliver Wendell Holmes Jr. to Harold Laski (Mar. 4, 1920), *in* 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1925, 248, 249 (Mark DeWolfe Howe ed., 1953)).

people's lives and enforce those sometimes horrifyingly immoral decisions through the coercive power of law. They are talking about the wolf's liberty to have his way with the sheep.

Sandefur refers to this as the "Progressive inversion of constitutional priorities."[86] Together, the Declaration of Independence and the Constitution establish a system in which "[l]iberty is the goal at which democracy aims, not the other way around."[87] Progressives, by contrast, "see the Constitution as concerned primarily with fostering democracy and enabling the majority to create its preferred society through legislation."[88] It may come as a surprise, then, to discover who has taken up the banner of this morally agnostic, government-friendly jurisprudence: modern conservatives.

V. CONSERVATIVE PROGRESSIVISM: DENYING AND DISPARAGING UNENUMERATED RIGHTS

Perhaps no issue more profoundly divides the libertarian and conservative wings of the limited-government movement than the status of "unenumerated" rights and the doctrine of substantive due process that the Supreme Court (occasionally) uses to protect them. Sandefur's thoughtful discussion of those points represents a tremendous contribution to one of the most interesting and important debates in American constitutional law.

The Constitution spells out approximately two dozen specific individual rights—mostly in the Bill of Rights, but some in the body of the Constitution as well, such as Article I's command that no state shall pass any "Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts."[89] But do we have other rights besides those specifically set forth in the Constitution, and if so, is it appropriate for courts to enforce these "unenumerated" rights? That debate is nearly as old as the Constitution itself, as Sandefur explains in summarizing the competing opinions of Justices Samuel Chase and James Iredell in the 1798 case *Calder v. Bull*.[90]

86. *Id.* at 154.
87. *Id.* at 2.
88. *Id.* at 121.
89. U.S. CONST. art. 1, § 10, cl. 1.
90. 3 U.S. 386 (3 Dall.) (1798).

Though they agreed on the holding of the case—that the Ex Post Facto Clause did not apply to a Connecticut law granting a new hearing to the losing party in a probate case—they clashed over whether "the Constitution imposes certain inherent restrictions on legislatures" beyond those expressly set forth in the text.[91] Chase believed the answer must be yes because legislatures are necessarily limited in the "objects" they can pursue.[92] Thus, the legitimate ends of legislative power "will limit the exercise of it."[93] So what are the legitimate ends of legislative power, or what we today call the police power? They include protecting people and property from violence, securing liberty, and otherwise promoting the general welfare.[94] Illegitimate ends of government—policies the government simply may not pursue because it has no legitimate authority to do so—include taking property from one person and giving it to another, punishing citizens for innocent acts, and allowing individuals to judge their own cases.[95] As Chase explains, it is simply not reasonable to suppose that anyone would entrust a legislature with such powers, "and, therefore, it cannot be presumed that they have done it."[96]

Justice Iredell disagreed. He argued that unless a given law contravenes some specific constitutional provision, courts "cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice."[97] This certainly sounds reasonable at first blush, and indeed many conservatives embrace Iredell's position as a laudable expression of judicial modesty. In practice, however, the idea that courts should only strike down laws that violate specific constitutional provisions produces results "that are often embarrassing, and sometimes horrifying."[98]

Tragically, one can illustrate that observation with any number of historical examples, but consider just one: was *Buck v. Bell* correctly decided? Was there really no legitimate constitutional objection to the forced sterilization of some 60,000 young people, most of them impoverished, uneducated, and politically

91. SANDEFUR, *supra* note 3, at 88; *Calder*, 3 U.S. at 387.
92. *Calder*, 3 U.S. at 388.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 399 (Iredell, J., concurring).
98. SANDEFUR, *supra* note 3, at 153.

disenfranchised? Was their only recourse to the ballot box?[99] It is difficult to find anyone who will say yes, at least in public, to any of those questions. But that is the practical consequence of Justice Iredell's position, of which perhaps the most influential modern exponent was Judge Robert Bork.[100]

Bork's writings, particularly his book *The Tempting of America,* profoundly influenced an entire generation of conservative scholars, judges, and policymakers. As Sandefur recounts, the "temptation" to which Bork is referring is that of "judges to implement their political preferences as constitutional law and thus intrude on the power of the majority."[101] Bork believes (along with Justices Iredell and Holmes) that "in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities."[102] Indeed, the only "areas of life" where majorities are *not* entitled to rule are those explicitly carved out by the Bill of Rights or some other unambiguous constitutional provision.[103]

But there are a host of problems with that Manichean perspective. First and foremost, "the Ninth Amendment declares that this is the wrong way to read the Constitution: it says that the fact that some rights are specified must *not* be interpreted to deny the existence or importance of other rights."[104] Second, it ignores the text of the Fourteenth Amendment, particularly the requirement that no state "shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[105] Bork, like most conservatives, prides himself on being a faithful textualist; yet, like most conservatives, he has no theory about how to interpret the Privileges or Immunities Clause. Instead, he famously likened it to an "ink blot," arguing, mistakenly, that the clause "has been a mystery since its

99. While the Supreme Court has never officially overruled *Buck v. Bell,* most commentators would likely agree that the decision was effectively overruled by *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942), when the Court struck down an Oklahoma law mandating sterilization of certain recidivist criminals.

100. *See generally* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 264–65 (1990).

101. SANDEFUR, *supra* note 3, at 128.

102. BORK, *supra* note 100, at 139.

103. *See* SANDEFUR, *supra* note 3, at 128.

104. *Id.* The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

105. U.S. CONST. amend. XIV, § 1, cl. 2.

adoption."[106] He makes the same false claim about the Ninth Amendment later in the book, asserting risibly, that, "[t]here is almost no history that would indicate what the [N]inth [A]mendment was intended to accomplish."[107] In reality, "Madison, Hamilton, and others wrote at length about what the amendment was intended to accomplish, making clear that it was designed to ensure that nobody would think the Bill of Rights lists all individual rights."[108]

Bork also rejects the use of substantive due process to protect unenumerated rights, claiming there is no "'intellectual structure'" to support that approach.[109] But again he is wrong, and Sandefur devotes two full chapters to demonstrating the doctrine's ample historical pedigree—which dates back to the "law of the land" provision in Magna Carta[110]—and refuting its many detractors, the volume of whose critiques far exceeds their depth.[111] Of course, it would rarely be necessary to invoke the concept of substantive due process if the Privileges or Immunities Clause of the Fourteenth Amendment and the doctrine of enumerated federal powers embodied in the Tenth Amendment were given their proper constitutional significance. Properly interpreted and applied, those two provisions alone would suffice to protect people from a vast range of illegitimate state and federal action, respectively.

And then there is the inability to answer the question about *Buck v. Bell.* Was it rightly decided? Silence. What about the Court's decision to strike down Oregon's requirement that all children attend public schools in *Pierce v. Society of Sisters* and its conclusion that parents have a right—nowhere mentioned in the text of the Constitution—to guide the upbringing of their own children?[112] Was that an example of the justices imposing their own personal policy preferences on a legislature that had determined, contrary to the Court's holding, that in fact the child *is* "the mere creature of the State"?[113] More silence.

106. BORK, *supra* note 100, at 166.
107. *Id.* at 183.
108. SANDEFUR, *supra* note 3, at 129.
109. *Id.* at 95 (quoting ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 55 (2003)).
110. *Id.* at 72.
111. *Id.* at 95–120.
112. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).
113. *Id.* at 535.

Judge Bork had no good answer to these and myriad other questions because "despite his reputation for moralistic conservatism, [he] was actually a relativist: the majority has virtually unlimited freedom to adopt its (entirely subjective) moral preferences as law, and to impose those preferences on others"—including Carrie Buck.[114] It won't do. These are difficult issues, not easy ones as Bork and company try to pretend. You won't get the right answers to hard questions by "ink blotting" inconvenient constitutional provisions, nor can the Constitution be properly understood outside the moral and political framework set forth in the Declaration of Independence.

VI. THE MORAL CONSTITUTION

After showing why the Constitution and the Declaration of Independence must be read together, Sandefur wisely avoids any sweeping prescriptions or promises that all will be easy and well if we simply follow that precept. The truth is there will always be hard questions in constitutional law, and any theory that purports to eliminate them is certain to be wrong. But there are better and worse ways of coming at those questions, and Sandefur offers three suggestions and a trenchant closing observation.

First, we must "eliminate the double standard by which some rights are given meaningful judicial protection while other, equally important rights are treated like poor relations and accorded practically meaningless rational-basis scrutiny."[115] Second, "courts should reexamine the Progressive inversion of constitutional priorities" and recognize that while democracy "is a valuable part of the constitutional structure, limits on freedom must be justified by some genuine public purpose and must be no greater than necessary to accomplish that goal."[116] Finally, "a jurisprudence rooted in this nation's substantive commitment to liberty must have a healthy respect for the natural-rights

114. SANDEFUR, *supra* note 3, at 129.

115. *Id.* at 154 (citation omitted) (internal quotation marks omitted); *see also* CLARK M. NEILY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT 33–63 (2013) (describing court-created dichotomy between "meaningful" and "meaningless" rights and critiquing rational basis test).

116. SANDEFUR, *supra* note 3, at 154.

philosophy on which the Constitution was based."[117] Contrary to the perception of Progressive constitutional relativists on the left and the right, "Americans in general share, and rightly share, a belief in the basic truth of the principles enunciated in the Declaration of Independence."[118]

Sandefur concludes with this astute critique of the moral relativism that has guided constitutional doctrine for nearly a century: "A society in which some people claim the right to control the lives of others experiences not harmony, cooperation, and freedom, but bitterness, hostility, and strife."[119] Looking around today, can anyone in good conscience say otherwise?

117. *Id.*
118. *Id.* at 154–55.
119. *Id.* at 159.

379 F.3d 1208
United States Court of Appeals,
Tenth Circuit.

Kim POWERS; Dennis Bridges; Memorial Concepts Online, Inc., Plaintiffs–Appellants,
v.
Joe HARRIS, in his official capacity as President of the Oklahoma State Board of Embalmers and Funeral Directors; Stephen Huston, Charles Brown, Terry Clark, Chris Craddock, Keith Stumpff, and Scott Smith, each in their official capacity as a Member of the Oklahoma State Board of Embalmers and Funeral Directors, Defendants–Appellees.
The Claremont Institute Center for Constitutional Jurisprudence; Pacific Legal Foundation, Amici Curiae.

No. 03–6014. | Aug. 23, 2004.

Synopsis

Background: Casket seller and its owners, which sought to sell caskets via Internet without obtaining licenses required by Oklahoma law, brought declaratory judgment action challenging constitutionality of Oklahoma Funeral Services Licensing Act. Following bench trial, the United States District Court for the Western District of Oklahoma, Stephen P. Friot, J., 2002 WL 32026155, ruled in favor of state licensing authority. Sellers appealed.

Holdings: The Court of Appeals, Tacha, Chief Judge, held that:

[1] Act did not violate Fourteenth Amendment's Privileges and Immunities Clause, and

[2] Act did not violate substantive due process or equal protection.

Affirmed.

Tymkovich, Circuit Judge, filed a separate concurring opinion.

Attorneys and Law Firms

*1211 Clark M. Neily, III, Institute for Justice, Washington, DC (William H. Mellor, Institute for Justice, Washington, DC, and Andrew W. Lester, Lester, Loving & Davies, PC, Edmond, OK, with him on the briefs), appearing for Plaintiffs–Appellants.

Stefan K. Doughty, Assistant Attorney General, Oklahoma City, OK, appearing for Defendants–Appellees.

John C. Eastman, The Claremont Institute Center for Constitutional Jurisprudence, Orange, CA, filed an amicus curiae brief.

Deborah J. La Fetra and Timothy Sandefur, Pacific Legal Foundation, Sacramento, CA, filed an amicus curiae brief.

Before TACHA, Chief Circuit Judge, McKAY, and TYMKOVICH, Circuit Judges.

Opinion

TACHA, Chief Circuit Judge.

Hornbook constitutional law provides that if Oklahoma wants to limit the sale of caskets to licensed funeral directors, the Equal Protection Clause does not forbid it. *See Fitzgerald v. Racing Assoc. of Cent. Iowa,* 539 U.S. 103, 109, 123 S.Ct. 2156, 156 L.Ed.2d 97 (2003) (holding that the Equal Protection Clause does not prohibit Iowa's differential tax rate favoring the intrastate racetrack over the intrastate riverboat gambling industry); *Ferguson v. Skrupa,* 372 U.S. 726, 732–33, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963) ("If the State of Kansas wants to limit debt adjusting to lawyers, the Equal Protection Clause does not forbid it."). Plaintiff–Appellants Kim Powers, Dennis Bridges, and Memorial Concepts Online, Inc. (collectively "Plaintiffs"), who wish to sell caskets over the Internet without obtaining the licenses required by Oklahoma law, challenge the soundness of this venerable rule. Seeking declaratory relief, Plaintiffs sued Defendant–Appellees, who are members of the Oklahoma State Board of Embalmers and Funeral Directors ("the Board"), the relevant licensing authority. After a full bench trial, the District Court ruled for the Board. On appeal, Plaintiffs contend that Oklahoma's licensing scheme violates the Privileges and Immunities, Due Process, and Equal Protection clauses of the Fourteenth Amendment to the

Federal Constitution. We take jurisdiction pursuant to 28 U.S.C. § 1291 and AFFIRM.

I. BACKGROUND

The Oklahoma Funeral Services Licensing Act, Okla. Stat. tit. 59, § 395.1 *et seq.* ("FSLA"), and Board rules promulgated pursuant to the FSLA provide the regulatory scheme for the funeral industry in Oklahoma. Pursuant to the FSLA, any person engaged in the sale of funeral-service merchandise, [1] including caskets, must be a licensed funeral director [2] operating out of a funeral establishment. [3] *Id.* at § 396.3a; *see also id.* at § 396.6(A) ***1212** (prohibiting sale of funeral merchandise without a license). [4]

Oklahoma does not, however, apply this licensing requirement to those who sell other funeral-related merchandise (e.g., urns, grave markers, monuments, clothing, and flowers). Furthermore, because the Board distinguishes between time-of-need and pre-need sales, [5] this licensing requirement does not apply to all casket sales. [6] Specifically, although a person must be fully licensed to make time-of-need sales, [7] a salesperson may lawfully sell caskets pre-paid without a license so long as that person is acting as an agent of a licensed funeral director.

Finally, while the Board may issue orders to enforce the FSLA, *see id.* at § 396.2a, the FSLA limits its enforcement to intrastate casket sales only, Dist. Ct. Op. at 3 (finding of fact). As such, an unlicensed Oklahoman may sell a time-of-need casket to a customer outside of Oklahoma—indeed, Plaintiffs have sold caskets to consumers located outside of Oklahoma—and an unlicensed salesperson who is not located in Oklahoma may sell a time-of-need casket to a customer in Oklahoma. The requirement that a salesperson possess both a funeral director's license and operate out of a licensed funeral establishment applies, therefore, only to the intrastate sale of time-of-need caskets in Oklahoma.

Obtaining these licenses is no small feat. According to the Board's rules, an applicant for a funeral director's license must complete both sixty credit hours of specified undergraduate training [8] and a one-year apprenticeship during which the applicant must embalm twenty-five bodies. An applicant also must pass both a subject-matter and an Oklahoma law exam. *See generally* Okla. Admin. Code §§ 235:10–1–2, 10–3–1. Furthermore, to be licensed as a funeral establishment in Oklahoma, a business must have a fixed physical location, a preparation room that ***1213** meets the requirements for embalming bodies, a funeral-service merchandise-selection room with an inventory of not less than five caskets, and adequate areas for public viewing of human remains. *See generally id.* at §§ 235:10–1–2, 10–3–2. In reflecting on these legislative and administrative regulations, the District Court concluded that "they evince an intent to forego laissez faire treatment of those sales and services when provided in this State. Limiting the sale of caskets to sellers licensed by the Board is, undeniably, a major component of that statutory scheme." Dist. Ct. Op. at 13.

Memorial Concepts Online, Inc. is an Oklahoma corporation created, operated, and owned by Ms. Powers and Mr. Bridges to sell funeral merchandise over the Internet. [9] It offers no other death- or funeral-related services, plays no role in the disposition of human remains, and is not licensed in Oklahoma as a funeral establishment. Although Ms. Powers, who lives in Ponca City, Oklahoma, has many years of experience selling caskets on a pre-need basis as the agent of a licensed Oklahoma funeral director, she is not licensed by the Board as either a funeral director or as an embalmer. Likewise, although Mr. Bridges has been a licensed funeral director in Tennessee for over twenty years, he is not licensed in Oklahoma. As a part of their current enterprise, Plaintiffs wish to sell in-state, time-of-need caskets to Oklahomans over the Internet. [10] They have foregone these sales because they "have a reasonable and genuine fear that if they were to sell caskets to Oklahoma consumers, they might be prosecuted for violation of the FSLA and Board rules." Dist. Ct. Op. at 3.

Importantly, Plaintiffs have no desire to obtain the appropriate Oklahoma licenses because they view their requirements as irrelevant to the operation of an intrastate, Internet, retail, casket business. On this point, the District Court specifically found that

> very little specialized knowledge is required to sell caskets. Most consumers select caskets based on price and style. Any information a generally educated person needs to know about caskets in order to sell them can be acquired on the job. Less than five per cent of the ***1214** education and training requirements necessary for licensure in Oklahoma

> pertain directly to any knowledge or skills necessary to sell caskets. As a result of the substantial misfit between the education and training required for licensure and the education and training required to sell caskets in Oklahoma, people who only wish to sell caskets, if they wish to make in-state sales, are required to spend years of their lives equipping themselves with knowledge and training which is not directly relevant to selling caskets. Dist. Ct. Op. at 5.

[1] Thus, Plaintiffs brought this declaratory judgment action, asserting that the FSLA violates the Privileges and Immunities, Due Process, and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. [11] After a thorough bench trial, the District Court, in its well-reasoned order and memorandum, found for the Board on all counts. Plaintiffs filed a timely notice of appeal.

II. STANDARD OF REVIEW

[2] "We review challenges to the constitutionality of a statute de novo." *United States v. Plotts,* 347 F.3d 873, 877 (10th Cir.2003) (quotations omitted). We review the District Court's factual findings for clear error. Fed.R.Civ.P. 52(a).

III. PRIVILEGES AND IMMUNITIES CLAUSE

[3] [4] Plaintiffs contend that the FSLA violates the Privileges and Immunities Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States[.]"). Citing *Saenz v. Roe,* 526 U.S. 489, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999), they contend that "the right to earn an honest living ... [is found] in the Privileges and Immunities Clause." Aplt. Brief at 62. Despite Plaintiffs' protestations, *Saenz* does not mark a sea change in long-standing constitutional jurisprudence. As such, we agree with the District Court's disposition of this claim: "There is no merit to this ground for challenge. Revival of the Privileges and Immunities Clause may be an interesting and useful topic for scholarly debate but this memorandum is not the place for that discussion." Dist. Ct. Op. at 8 (citations omitted). To the extent that Plaintiffs argue that we should overrule the *Slaughter–House Cases,* 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1872), it is enough to remind Plaintiffs that "it is [the Supreme] Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan,* 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); *but see Saenz,* 526 U.S. at 521, 119 S.Ct. 1518 (Thomas, J., dissenting) (urging the Court to reconsider its privileges-and-immunities jurisprudence).

IV. DUE PROCESS AND EQUAL PROTECTION CLAUSES

[5] Plaintiffs next contend that the FSLA violates two rights under the Fourteenth Amendment. First, they claim, as a matter of substantive due process, that the FSLA violates "the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose [.]" *Dent v. West Virginia,* 129 U.S. 114, 121, 9 S.Ct. 231, 32 L.Ed. 623 (1889) (upholding West Virginia's physician licensing scheme against a substantive due ***1215** process challenge). Second, they contend, as a matter of equal protection, that the FSLA is unconstitutional because the Board is "arbitrarily treating similarly-situated people differently, and ... arbitrarily treating differently-situated people the same." Aplt. Brief at 24. As a state economic regulation that does not affect a fundamental right and categorizes people on the basis of a non-suspect classification, we determine whether the FSLA passes constitutional muster, both as a matter of substantive due process and equal protection, by applying rational-basis review. *See Fitzgerald,* 539 U.S. at 107, 123 S.Ct. 2156 (equal protection); *General Motors Corp. v. Romein,* 503 U.S. 181, 191, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992) (substantive due process).

A. *Equal Protection Versus Substantive Due Process*

[6] [7] [8] [9] Because their substantive analyses converge, often the differences between equal protection and substantive due process are not fully appreciated. The Equal Protection and Due Process clauses protect distinctly different interests. On the one hand, the "substantive component" of the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests," *Washington v. Glucksberg,* 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), even when the challenged regulation affects all persons equally. In contrast, "the essence of the equal protection requirement is that the

state treat all those similarly situated similarly," *Bartell v. Aurora Pub. Schs.*, 263 F.3d 1143, 1149 (10th Cir.2001) (quotations omitted), with its "central purpose [being] the prevention of official conduct discriminating on the basis of race [or other suspect classifications,]" *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). As such, equal protection only applies when the state treats two groups, or individuals, differently.

Here, Plaintiffs have cast their challenge to the FSLA as both a substantive due process and an equal protection claim. Although Plaintiffs forward both contentions, their challenge is most properly presented as an equal protection claim, as evidenced by the fact that they almost exclusively cite to equal protection cases (even to support their substantive due process argument) and that the Court itself has most often analyzed regulatory challenges under the equal protection rubric. In any event, because a substantive due process analysis proceeds along the same lines as an equal protection analysis, our equal protection discussion sufficiently addresses both claims.

B. *Parties' Arguments*

[10] **[11]** To satisfy the rational basis test, "the [FSLA] need only be rationally related to a legitimate government purpose." *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir.2002). The Board argues that protecting casket purchasers, a particularly vulnerable group, constitutes a legitimate state interest. Plaintiffs concede this point, and we agree as well. *See Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189–90, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) (finding consumer protection a legitimate federal governmental interest in a First Amendment challenge). Thus, as framed by the parties, the relevant question is whether the FSLA's licensure scheme is rationally related to the state's proffered consumer protection interest.

Plaintiffs contend that it is not. They argue that the regulatory scheme is irrational because "[l]ess than five per cent of the education and training requirements necessary for licensure in Oklahoma pertain directly to any knowledge or skills *1216 necessary to sell caskets[.]" Dist. Ct. Op. at 5; *see also Cornwell v. Hamilton*, 80 F.Supp.2d 1101, 1111 (S.D.Cal.1999) (holding California's cosmetology licensing requirements in violation of the Fourteenth Amendment's Due Process and Equal Protection clauses because "just over six percent of the curriculum is relevant .... [to] a would-be African hair braider"). Indeed, Plaintiffs claim that "every single federal court ... that has considered casket sales restrictions like Oklahoma's has found they lack any rational basis."[12] Aplt. Brief at 23.

The Board concedes that its licensure requirements do not perfectly match its asserted consumer-protection goal. Instead, they contest the degree of fit needed to pass rational-basis review. In the Board's view, "[a] statutory classification fails rational-basis review only when it rests on grounds *wholly* irrelevant to the achievement of the State's objective." *Heller v. Doe by Doe*, 509 U.S. 312, 324, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (quotations omitted) (emphasis added). The Board further contends that:

> [t]hese restraints on judicial review have added force where the legislature must necessarily engage in a process of line-drawing. Defining the class of persons subject to a regulatory requirement ... inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.... This necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315–16, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) (internal citations and quotations omitted).

The Board urges that its licensing protocol is not "wholly irrelevant" because "[e]very witness who testified on the subject agreed that consumers purchasing time-of-need caskets may be especially vulnerable to overreaching sales tactics because of grief and other emotions which arise as the result of the death of the person for whom the consumer is purchasing a casket." Dist. Ct. Op. at 5. The Board further notes that "[e]ven [Plaintiffs'] own expert, Lisa Carlson, admitted that Oklahoma's FSLA functions to protect consumers and that removing those provisions would effectively reduce consumer protection for people buying caskets in ... Oklahoma." Aple. Brief at 22.

C. *Equal Protection and Judicial Review of Economic Legislation*

[12] In *United States v. Carolene Products Co.*, 304 U.S. 144, 154, 58 S.Ct. 778, 82 L.Ed. 1234 (1938), the Court held, pursuant to rational basis review, that when legislative judgment is called into question on equal protection grounds and the issue is debatable, the decision of the *1217 legislature must be upheld if "any state of facts either known or which could reasonably be assumed affords support for it." Second-guessing by a court is not allowed. *Id.; see also Beach Communications,* 508 U.S. at 313, 113 S.Ct. 2096 ("[E]qual protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."); *New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (per curiam) ("The judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines....").

[13] [14] Further, rational-basis review does not give courts the option to speculate as to whether some other scheme could have better regulated the evils in question. *Mourning v. Family Publ'n Serv., Inc.,* 411 U.S. 356, 378, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973). In fact, we will not strike down a law as irrational simply because it may not succeed in bringing about the result it seeks to accomplish, *Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 50, 86 S.Ct. 1254, 16 L.Ed.2d 336 (1966), *abrogated on other grounds by Healy v. Beer Inst., Inc.,* 491 U.S. 324, 342, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989), or because the statute's classifications lack razor-sharp precision, *Dandridge v. Williams,* 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). Nor can we overturn a statute on the basis that no empirical evidence supports the assumptions underlying the legislative choice. *Vance v. Bradley,* 440 U.S. 93, 110–11, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979).

[15] [16] [17] Finally, "because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Communications,* 508 U.S. at 315, 113 S.Ct. 2096 (citations and quotations omitted). "[T]hose attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it[.]' " *Id.* (quoting *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973)); *see also McDonald v. Board of Election Comm'rs,* 394 U.S. 802, 809, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969) ("Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them."). As such, we are not bound by the parties' arguments as to what legitimate state interests the statute seeks to further. In fact, "this Court is *obligated* to seek out other conceivable reasons for validating [a state statute.]" *Starlight Sugar, Inc. v. Soto,* 253 F.3d 137, 146 (1st Cir.2001) (emphasis added). Indeed, that the purpose the court relies on to uphold a state statute "was not the reason provided by [the state] is irrelevant to an equal protection inquiry." *Id.* (citing *Beach Communications,* 508 U.S. at 315, 113 S.Ct. 2096). [13]

*1218 These admonitions are more than legal catch phrases dutifully recited each time we confront an equal protection challenge to state regulation—they make sense. First, in practical terms, we would paralyze state governments if we undertook a probing review of each of their actions, constantly asking them to "try again." Second, even if we assumed such an exalted role, it would be nothing more than substituting our view of the public good or the general welfare for that chosen by the states. As a creature of politics, the definition of the public good changes with the political winds. There simply is no constitutional or Platonic form against which we can (or could) judge the wisdom of economic regulation. Third, these admonitions ring especially true when we are reviewing the regulatory actions of states, who, in our federal system, merit great respect as separate sovereigns. *See generally Geier v. American Honda Motor, Inc.,* 529 U.S. 861, 894, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000).

Thus, we are obliged to consider every plausible legitimate state interest that might support the FSLA—not just the consumer-protection interest forwarded by the parties. Hence, we consider whether protecting the intrastate funeral home industry, absent a violation of a specific constitutional provision or a valid federal statute, constitutes a legitimate state interest. If it does, there can be little doubt that the FSLA's regulatory scheme is rationally related to that goal. *See Craigmiles v. Giles,* 312 F.3d 220, 228 (6th Cir.2002) (stating that Tennessee's version of the FSLA is "very well tailored" to "protecting licensed funeral directors from competition on caskets").

D. ***Intrastate Economic Protectionism***

Implicit in Plaintiffs' argument is the contention that intrastate economic protectionism, even without violating a specific constitutional provision or a valid federal statute, is an illegitimate state interest. *See* Aplt. Brief at 53 n.8. Indeed, Plaintiffs describe Oklahoma's licensure scheme as "a classic piece of special interest legislation designed to extract monopoly rents from consumers' pockets and funnel them into the coffers of a small but politically influential group of business people—namely, Oklahoma funeral directors." *Id.* at 26. Amici are not so coy. In their view, Oklahoma's licensure scheme "is simply ... protectionist legislation[,]" Brief of Amicus Curiae Claremont Institute at 26, and "[u]nder the Constitution, ... economic protectionism is not a legitimate state interest[,]" Brief of Amicus Curiae Pacific Legal Foundation at 2.

By our count, only three courts have held, in the absence of a violation of a specific constitutional provision or a valid federal statute, that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Craigmiles,* 312 F.3d at 224; [14] *see also Cornwell,* 80 F.Supp.2d at 1117 (implying, without citation, that establishing a cartel for cosmetology services is not a legitimate state interest); *Santos v. City of Houston,* 852 F.Supp. 601, 608 (S.D.Tex.1994) (holding that "economic protectionism in its most glaring form ... [is] not legitimate."). [15] Because the four Supreme Court cases collectively cited by *Craigmiles* ***1219** and *Santos* do not stand for the proposition that intrastate economic protectionism, absent a violation of a specific constitutional provision or federal statute, is an illegitimate state interest, we cannot agree.

In fact, it is only by selective quotation that such a reading of these Supreme Court cases appears plausible. For example, in *H.P. Hood & Sons, Inc., v. DuMond,* 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1949), the Court considered whether "the State of New York [had the power] to deny additional facilities to acquire and ship milk in *interstate* commerce where the grounds of denial are that such limitation upon *interstate* business will protect and advance local economic interests." *Id.* at 526, 69 S.Ct. 657 (emphasis added). The Court struck the legislation. The *Craigmiles* court cites to the following passage from *H.P. Hood & Sons,* which is clearly limited to the regulation of *interstate* commerce, to support its conclusion that *intrastate* economic protectionism is an illegitimate state interest:

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 527, 55 S.Ct. 497, 79 L.Ed. 1032, 'What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.' In so speaking it but followed the principle that the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition. In *Buck v. Kuykendall,* 267 U.S. 307, 45 S.Ct. 324, 69 L.Ed. 623, the Court struck down a state act because, in the language of Mr. Justice Brandeis, 'Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition.' The same argument here advanced, that limitation of competition would itself contribute to safety and conservation, and therefore indirectly serve an end permissible to the state, was there declared 'not sound.' It is no better here. This Court has not only recognized this disability of the state to isolate its own economy as a basis for striking down parochial legislative policies designed to do so, but it has recognized the incapacity of the state to protect its own inhabitants from competition as a reason for sustaining particular exercises of the commerce power of Congress to reach matters in which states were so disabled. *H.P. Hood & Sons,* 336 U.S. at 537–38, 69 S.Ct. 657 (citations omitted).

When read in context, *H.P. Hood & Sons* 's admonition is plainly directed at state regulation that shelters its economy from the larger national economy, i.e., violations of the "dormant" Commerce Clause.

[18] The other cases relied upon in *Craigmiles* and *Santos* are similarly distinguishable. *See Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983) (addressing a Contracts Clause-specific issue); *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 471, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981) (addressing the "dormant" Commerce Clause); *City of Philadelphia v. New Jersey,* 437 U.S. 617, 618, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978) (addressing whether "[a] New Jersey law prohibit[ing] the importation of most solid or liquid waste which originated or was collected outside the territorial limits of the State .... violates the Commerce Clause of the United States Constitution."). As such, these passages

do not support the contention espoused in *Craigmiles* and *Santos* that intrastate economic ***1220** protectionism, absent a violation of a specific federal statutory or constitutional provision, represents an illegitimate state interest. Our country's constitutionally enshrined policy favoring a national marketplace is simply irrelevant as to whether a state may legitimately protect one intrastate industry as against another when the challenge to the statute is purely one of equal protection. *See Metropolitan Life Ins. Co. v. W.G. Ward,* 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985) (noting that the Commerce Clause and the Equal Protection Clause "perform different functions in the analysis of the permissible scope of a state's power—one protects interstate commerce, and the other protects persons from unconstitutional discrimination by states").

In contrast, the Supreme Court has consistently held that protecting or favoring one particular intrastate industry, absent a specific federal constitutional or statutory violation, is a legitimate state interest. *See Fitzgerald,* 539 U.S. at 109, 123 S.Ct. 2156 (holding that the hypothetical goal of fostering intrastate riverboat gambling provided a rational basis to support legislation taxing riverboat slot machine revenues at a more favorable rate than those from racetrack slot machines); *Ferguson,* 372 U.S. at 730–31, 83 S.Ct. 1028 ("It is now settled that States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.") (quotations omitted); *Dukes,* 427 U.S. at 304 n. 5, 96 S.Ct. 2513 ("[T]hese principles ... govern only when no constitutional provision other than the Equal Protection Clause itself is apposite. Very different principles govern even economic regulation when constitutional provisions such as the Commerce Clause are implicated, or when local regulation is challenged under the Supremacy Clause as inconsistent with relevant federal laws or treaties.").

The Court's application of this principle is found in numerous state subsidization and licensing equal protection cases. For example, in *Fitzgerald,* the Court held that an Iowa statute taxing slot machine revenues on riverboats at 20 %, while taxing those at racetracks at 36 %, did not violate the Equal Protection Clause because, even though they harmed the racetracks, "the different tax rates" may have furthered the state's legitimate interest in "help[ing] the riverboat industry." 539 U.S. at 110, 123 S.Ct. 2156. More specifically, the *Fitzgerald* Court held:

> Once one realizes that not every provision in a law must share a single objective, one has no difficulty finding the necessary rational support for the 20 percent/36 percent [tax] differential here at issue. That difference, harmful to the racetracks, is helpful to the riverboats, which, as respondents concede, were also facing financial peril. These two characterizations are but opposite sides of the same coin. Each reflects a rational way for a legislator to view the matter. *Id.* at 109, 123 S.Ct. 2156 (citations omitted).

Indeed, even Plaintiffs concede that "the [*Fitzgerald*] Court found [helping the riverboat industry] to be [a] legitimate governmental objective [.]" Aplt. Reply Brief at 6.

In *Nordlinger v. Hahn,* 505 U.S. 1, 18, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992), the Court held that California's property taxation scheme, which favored long-time property holders over new purchasers, did not violate the Equal Protection Clause. In discussing the many possible reasons for the taxation scheme, the Court held that "[t]he State ... legitimately can decide to ... [favor] established, 'mom-and-pop' businesses ... [over] newer chain operations." *Id.* at 12, 112 S.Ct. 2326.

***1221** In *Dukes,* the Court rejected an Equal Protection Clause challenge to a New Orleans ordinance that prohibited selling foodstuffs from pushcarts in the French Quarter, even though it exempted area vendors who had continuously operated that business for eight or more years. 427 U.S. at 298, 96 S.Ct. 2513. This ordinance had the effect of allowing only two vendors to continue operation in the French Quarter. *Id.* at 300, 96 S.Ct. 2513. Although the court of appeals struck the legislation as furthering an illegitimate state purpose because the ordinance created "a protected monopoly for the favored class member[,]" *id.* (quotations omitted), the Court rejected this reasoning, *id.* at 303, 96 S.Ct. 2513. Instead, it found that the ordinance furthered a legitimate state purpose, because the presence of "vendors in the [French Quarter], the heart of the city's tourist industry, might ... have a deleterious effect on the economy of the city." *Id.* at 304–05, 96 S.Ct. 2513. As the Court noted, "[t]he legitimacy of that objective [, i.e., benefitting the tourist industry,] is obvious." *Id.* at 304, 96 S.Ct. 2513.

Finally, in the watershed Equal Protection Clause case of *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955), the Court held that a state may set as a legitimate goal "free[ing a] profession, to as great an extent as possible, from all taints of commercialism." 348 U.S. at 491, 75 S.Ct. 461. Indeed, *Williamson* so closely mirrors the facts of this case that, but for the Siren's song that has recently induced other courts to strike state economic legislation similar to the FSLA, merely a citation to *Williamson* would have sufficed to dispose of this case. [16]

[19] Similarly, the Tenth Circuit has held that state legislation granting special benefits to an intrastate industry, absent a specific federal constitutional or statutory violation, does not run afoul of the Equal Protection Clause. For example, in *Schafer v. Aspen Skiing Corp.,* 742 F.2d 580, 583 (10th Cir.1984), an injured party pursued an equal protection challenge to Colorado's special three-year statute of limitations that applied only to suits against the ski industry. In rejecting the challenge, we noted that "[t]he ski industry makes a substantial contribution, directly or indirectly, to the Colorado economy" and that the "state has a legitimate interest in its well-being and economic viability." *Id.* at 584. Although the plaintiff in *Schafer* was an injured consumer and not a competitor, the underlying principle holds true: favoring one intrastate industry over another is a legitimate state interest. In short, given the overwhelming supporting authority, and the dearth of credible arguments to the contrary, we hold that, absent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest.

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. [17] While this case does not directly challenge the ability of states ***1222** 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. *See Vieth v. Jubelirer,* 541 U.S. 267, 124 S.Ct. 1769, 1776–77, 158 L.Ed.2d 546 (2004) ("[J]udicial action must be governed by standard, by rule. Laws promulgated by [legislatures] can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions."). Thus, besides the threat to all licensed professions such as doctors, teachers, accountants, plumbers, electricians, and lawyers, *see, e.g.,* Oklahoma Statutes, title 59 (listing over fifty 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.

E. *Oklahoma's Regulatory Scheme*

[20] Because we find that intra-state economic protectionism, absent a violation of a specific federal statutory or constitutional provision, is a legitimate state interest, we have little difficulty determining that the FSLA satisfies rational-basis review. As discussed above, *see supra* note 11, the Board enforces the FSLA in such a manner as to avoid any conflict with the "dormant" Commerce Clause. Moreover, we find no other federal statutory or constitutional provision that the FSLA violates. In particular, we note that, despite the FTC's protestations before the trial court that the FSLA does not "advanc[e] the ends of the FTC's Funeral Rule," [18] the FSLA does not transgress any of the Rule's express provisions. *See* 16 C.F.R. §§ 431.1–453.9. Hence, the FSLA need only be rationally related to the legitimate ***1223** state interest of intrastate industry protection. There can be no serious dispute that the FSLA is "very well tailored" to protecting the intrastate funeral-home industry. *Craigmiles,* 312 F.3d at 228. As such, "our inquiry is at an end." *United States R.R. Retirement Bd. v. Fritz,* 449 U.S. 166, 179, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980).

F. *Craigmiles v. Giles*

In so holding, we part company with the Sixth Circuit's *Craigmiles* decision, which struck a nearly identical Tennessee statute as violating the Equal Protection Clause and substantive due process. Our disagreement can be reduced to three points. [19] First, as noted by the District Court, *Craigmiles* 's analysis focused heavily on the court's perception of the actual motives of the Tennessee legislature. *Craigmiles,* 312 F.3d at 227 ("The state could argue that the Act as a whole ... actually provides some legitimate protection for consumers from casket retailers. The history of the legislation, however, reveals a different story...."). The Supreme Court has foreclosed such an inquiry. *Beach Communications,* 508 U.S. at 315, 113 S.Ct. 2096 ("[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.").

Second, the *Craigmiles* court held that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Craigmiles,* 312 F.3d at 224. As discussed above, we find this conclusion unsupportable. *See Fitzgerald,* 539 U.S. at 109–110, 123 S.Ct. 2156 (holding, after the decision in *Craigmiles,* that the objective of favoring one intrastate industry over another provides a rational basis to support legislation). Third, in focusing on the actual motivation of the state legislature and the state's proffered justifications for the law, the *Craigmiles* court relied heavily on *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). We find this emphasis misplaced.

A few additional words are in order regarding our last point of disagreement. In essence, Plaintiffs in this case "ask this court to engage in what they assert to be an exacting rational-basis standard set forth by the Supreme Court in *Cleburne* [.]" *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence,* 927 F.2d 1111, 1119 n. 6 (10th Cir.1991). Pursuant to their reading of *Cleburne,*[20] "a court would be shrinking from its most basic duty if it abstained from *both* an analysis of the legislation's *articulated* objective *and* the method that the legislature employed to achieve that objective." *Brown v. Barry,* 710 F.Supp. 352, 355 (D.D.C.1989); *see also Craigmiles,* 312 F.3d at 227. This reading of *Cleburne,* however, constitutes a marked departure from "traditional" rational-basis review's prohibition on looking at the legislature's actual motives, *see Beach Communications,* 508 U.S. at 315, 113 S.Ct. 2096, and our obligation to forward every conceivable legitimate state interest on behalf of the challenged statute, *see, e.g., Starlight Sugar,* 253 F.3d at 146.

Despite the hue and cry from all sides,[21] no majority of the Court has stated that ***1224** the rational-basis review found in *Cleburne* and *Romer v. Evans,* 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), differs from the traditional variety applied above. *But see Lawrence v. Texas,* 539 U.S. 558, 580, 123 S.Ct. 2472, 2485, 156 L.Ed.2d 508 (2003) (O'Connor, J., concurring in part) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."). Perhaps, as Justice O'Connor suggests, *Cleburne* and *Romer* represent the embryonic stages of a new category of equal protection review. *See Cleburne,* 473 U.S. at 458, 105 S.Ct. 3249 (Marshall, J., concurring in part and dissenting in part) (labeling *Cleburne* 's rational-basis review " 'second-order' rational-basis review"). But "[e]ven if we were to read *Cleburne* to require that laws discriminating against historically unpopular groups meet an exacting rational-basis standard," which we do not, "we do not believe the class in which [Plaintiffs] assert they are a member merits such scrutiny." *Jacobs, Visconsi & Jacobs, Co.,* 927 F.2d at 1119 n. 6.

On the other hand, *Romer* and *Cleburne* may not signal the birth of a new category of equal protection review. Perhaps, after considering all other conceivable purposes, the *Romer* and *Cleburne* Courts found that "a bare ... desire to harm a politically unpopular group," *Department of Agriculture v. Moreno,* 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973), constituted the only conceivable state interest in those cases, *see Clajon Production Corp. v. Petera,* 70 F.3d 1566, 1581 n. 24 (10th Cir.1995) (forwarding this interpretation of *Cleburne*). Under this reading, *Cleburne* would also not apply here because we have conceived of a legitimate state interest other than a "bare desire to harm" non-licensed, time-of-need, retail, casket salespersons.

Finally, perhaps *Cleburne* and *Romer* are merely exceptions to traditional rational basis review fashioned by the Court to correct perceived inequities unique to those cases. If so, the Court has "fail[ed] to articulate [when this exception applies, thus] provid[ing] no principled foundation for determining when more searching inquiry is to be invoked." *Cleburne,* 473 U.S. at 460, 105 S.Ct. 3249 (Marshall, J., concurring in part and dissenting in part). Regardless, the Court itself has never applied *Cleburne*-style rational-basis review to economic issues. *See, e.g., Fitzgerald,* 123 S.Ct. at 2159–60; *Beach Communications,* 508 U.S. at 315, 113 S.Ct. 2096; *Nordlinger,* 505 U.S. at 11–13, 112 S.Ct. 2326. Following the Court's lead, neither will we. Thus, we need not decide how *Cleburne* alters, if at all, traditional rational-basis review because, even under a modified ***1225** rational basis test, the outcome here would be unchanged.

V. CONCLUSION

We do not doubt that the FSLA "may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the [FSLA's] requirement[s]." *Williamson,* 348 U.S. at 487, 75 S.Ct. 461. Under our system of government, Plaintiffs " 'must resort to the polls, not to the courts' " for protection against the FSLA's perceived abuses.

Id. at 488, 75 S.Ct. 461 (quoting *Munn v. Illinois,* 94 U.S. 113, 134, 24 L.Ed. 77 (1876)).

As Winston Churchill eloquently stated: "[D]emocracy is the worst form of government except for all those other forms that have been tried." Winston Churchill, Speech at the House of Commons (Nov. 11, 1947). Perhaps the facts here prove this maxim. A bill to amend the FSLA to favor persons in the Plaintiffs' situation has been introduced in the Oklahoma House three times, only to languish in committee. *See* H.R. 1460 (Okla.2003); H.R. 1057 (Okla.2001); H.R. 1083 (Okla.1999). While these failures may lead Plaintiffs to believe that the legislature is ignoring their voices of reason, the Constitution simply does not guarantee political success.

Because we hold that intrastate economic protectionism, absent a violation of a specific federal statutory or constitutional provision, is a legitimate state interest and that the FSLA is rationally related to this legitimate end, we AFFIRM.

TYMKOVICH, J., concurring.

I join the majority opinion except for Parts IV D and E, and concur in the judgment. I write separately because I believe the majority overstates the application of "intrastate economic protectionism" as a legitimate state interest furthered by Oklahoma's funeral licensing scheme.

The majority opinion usefully sets forth an overview of the rational basis test. Under the traditional test, judicial review is limited to determining whether the challenged state classification is rationally related to a legitimate state interest. As the majority explains, and I agree, courts should not (1) second-guess the "wisdom, fairness, or logic" of legislative choices; (2) insist on "razor-sharp" legislative classifications; or (3) inquire into legislative motivations. I also agree that the burden rests with the challenger to a legislative classification "to negative every conceivable basis" supporting the law. Courts should credit "every plausible legitimate state interest" as a part of their judicial review under this deferential standard.

Where I part company with the majority is its unconstrained view of economic protectionism as a "legitimate state interest." The majority is correct that courts have upheld regulatory schemes that favor some economic interests over others. Many state classifications subsidize or promote particular industries or discrete economic actors. And it is significant here that Oklahoma's licensing scheme only covered intrastate sales of caskets. But all of the cases rest on a fundamental foundation: the discriminatory legislation arguably advances either the general welfare or a public interest.

The Supreme Court has consistently grounded the "legitimacy" of state interests in terms of a public interest. The Court has searched, and rooted out, even in the rational basis context, "invidious" state interests in evaluating legislative classifications. Thus, for example, in the paradigmatic case of *Williamson v. Lee Optical, Inc.,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955), the Supreme Court invoked consumer safety and health interests ***1226** over a claim of pure economic parochialism. Rather than hold that a government may always favor one economic actor over another, the Court, if anything, insisted that the legislation advance some public good. *Id.* at 487–88, 75 S.Ct. 461 ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.... The prohibition of the Equal Protection Clause goes no further than [ ] invidious discrimination."). Similarly, the Court in *Fitzgerald v. Racing Ass'n of Central Iowa,* 539 U.S. 103, 123 S.Ct. 2156, 156 L.Ed.2d 97 (2003) invoked economic development and protecting the reliance interests of river-boat owners, in *City of New Orleans v. Dukes,* 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) invoked historical preservation and economic prosperity, and in *Nordlinger v. Hahn,* 505 U.S. 1, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) invoked neighborhood preservation, continuity, stability, and protecting the reliance interests of property owners. None of these cases overturned the principle that the Equal Protection Clause prohibits invidious state interests; to the contrary, they ratified the principle.

While relying on these time-tested authorities, the majority goes well beyond them to confer legitimacy to a broad concept not argued by the Board—unvarnished economic protectionism. Contrary to the majority, however, whenever courts have upheld legislation that might otherwise appear protectionist, as shown above, courts have always found that they could also rationally advance a *non-protectionist* public good. The majority, in contrast to these precedents, effectively imports a standard that could even credit legislative classifications that advance no general state interest.

The end result of the majority's reasoning is an almost per se rule upholding intrastate protectionist legislation. I, for one, can imagine a different set of facts where the legislative classification is so lopsided in favor of personal interests at the expense of the public good, or so far removed from plausibly advancing a public interest that a rationale of "protectionism" would fail. Even those cases such as *Fitzgerald* that give some weight to economic protectionism, are careful to find a mix of state interests that advance the general welfare. No case holds that the bare preference of one economic actor while furthering no greater public interest advances a "legitimate state interest." [1]

We need not go so far in this case for two reasons. First of all, the record below and the district court's findings of fact support a conclusion that the funeral licensing scheme here furthers, however imperfectly, an element of consumer protection. The district court found that the Board had in fact brought enforcement actions under the Act to combat consumer abuse by funeral directors. The licensing scheme thus provides a legal club to attack sharp practices by a major segment of casket retailers. Secondly, the history of the licensing scheme here shows that it predates the FCC's deregulation of third- ***1227** party casket sales or internet competition, and, at least in the first instance, was not enacted solely to protect funeral directors facing increased intrastate competition. I would therefore conclude that the district court did not err in crediting the consumer protection rationale advanced by the Board.

The licensing scheme at issue here leaves much to be desired. The record makes it clear that limitations on the free market of casket sales have outlived whatever usefulness they may have had. 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 general consumer protection laws appear to be a more than adequate vehicle to allow consumer redress of abusive marketing practices. But the majority is surely right that the battle over this issue must be fought in the Oklahoma legislature, the ultimate arbiter of state regulatory policy.

I therefore conclude that the legislative scheme here meets the rational basis test and join in the judgment of the majority.

All Citations

379 F.3d 1208

Footnotes

1 The FSLA defines funeral-service merchandise as "those products ... normally provided by funeral establishments and required to be listed on the General Price List of the Federal Trade Commission, ... including, but not limited to, the sale of burial supplies and equipment, but excluding the sale by a cemetery of lands or interests therein, services incidental thereto, markers, memorials, monuments, equipment, crypts, niches or outer enclosures...." Okla. Stat. tit. 59, § 396.2(10).

2 The FSLA defines a funeral director as "a person who: sells funeral service merchandise to the public...." Okla. Stat. tit. 59, § 396.2(2)(d).

3 A funeral establishment is defined as "a place of business used ... in the profession of ... funeral directing...." Okla. Stat. tit. 59, § 396.2(3).

4 As the District Court noted:

> By including all products normally provided by funeral establishments and required to be listed on the General Price List of the FTC (a list which includes caskets) within the definition of 'funeral service merchandise,' and by including anyone who sells such 'funeral service merchandise' within the definition of 'funeral director,' and by including the place of business of anyone who participates in 'funeral directing' within the definition of a 'funeral establishment,' the FSLA effectively requires that both a funeral director's license and a funeral establishment license be obtained from the Board before a person or entity may lawfully sell caskets. *Powers v. Harris,* CIV–01–445–F, 2002 WL 32026155 at 11 (W.D.Okla. Dec.12, 2002) [hereinafter Dist. Ct. Op.]

5 Time-of-need sales are those that are neither pre-death nor pre-paid (i.e., purchased and paid for at the time of the sale with delivery of the casket to occur at a future date). Pre-need sales, conversely, are those sales that are either pre-death or pre-paid.

6 The Oklahoma Insurance Code and the Insurance Commissioner regulate the sale of caskets on a pre-paid basis. *See generally* Okla. Stat. tit. 36, § 6121 *et seq.;* Okla. Admin. Code § 365: 25–9–1 *et seq.* As such, the Board requires funeral directors who make funeral arrangements on a pre-need basis to comply with the Insurance Code and with the Insurance Commissioner's regulations. *Id.* at § 235:10--7--2(6). The pre-paid sale of non-casket cemetery merchandise is governed by the Oklahoma Cemetery Merchandise Trust Act and by the State Banking Commissioner. Okla. Stat. tit. 8, § 301 *et seq.*

7 The FSLA and Board rules also require that a person be a licensed funeral director operating out of a funeral establishment to sell pre-death, but not pre-paid, caskets.

8 The required mortuary science curriculum includes: embalming, restorative art, microbiology, pathology, chemistry, arranging funerals, psychology, grief management, funeral merchandise, and the funeral and burial practices of various religions.

9 Because this is an Internet company, it maintains no physical storefront presence in the State of Oklahoma. Only the server is located there. The parties have assumed, as do we for purposes of this appeal, that the server's location constitutes the Internet company's place of business. Hence, we need not address the imponderables of "where" an Internet company is located for purposes of state regulation.

10 Plaintiffs contend that they could offer a valuable service to Oklahoma customers because, whereas "caskets commonly represent upwards of 25 per cent (and [in] some cases more) of the total cost of funeral-related goods and services," Dist. Ct. Op. at 3, they can sell these products at a substantial discount. We note that there is significant debate regarding whether increased competition in the casket-sales market will decrease overall funeral costs. Although the FTC prohibits funeral directors from charging a direct "casket-handling fee" to recoup revenue lost from the sale of the casket, *see* 16 C.F.R. § 453.4(b)(1)(ii), many funeral directors simply raise the overall price of non-declinable fees for all customers—thus increasing everyone's overall funeral costs. *See, e.g., Pennsylvania Funeral Dir. Assoc., Inc. v. FTC,* 41 F.3d 81, 84–85 (3d Cir.1994) (noting that, although some hope exists that increased competition in the casket market will eventually lower overall funeral prices, it will assuredly cause "many funeral service providers ... [to] raise the amount of their non-declinable professional service fees in order to ensure that they recoup overhead costs."); Dist. Ct. Op. at 6 ("In some cases, however, when competition increases, funeral homes have raised their prices for the other services they provide in order to compensate for profits lost due to lower casket prices.").

11 At trial, Plaintiffs also contended that the FSLA violated the "dormant" Commerce Clause. Given the District Court's factual findings, *see supra* at 4–5, this doctrine is inapplicable. Moreover, Plaintiffs do not reassert this claim on appeal. As such, it is waived. *See State Farm Fire & Cas. Co. v. Mhoon,* 31 F.3d 979, 984 n. 7 (10th Cir.1994).

12 Plaintiffs cite the following cases: *Craigmiles v. Giles,* 312 F.3d 220 (6th Cir.2002) (holding Tennessee's casket selling licensure requirements, which are nearly identical to Oklahoma's, in violation of the Fourteenth Amendment's Due Process and Equal Protection clauses); *Craigmiles v. Giles,* 110 F.Supp.2d 658 (E.D.Tenn.2000) (same); *Casket Royale, Inc. v. Mississippi,* 124 F.Supp.2d 434 (S.D.Miss.2000) (same in relation to Mississippi's casket statute). Plaintiffs' statement pushes the bounds of credulity, however, given *Guardian Plans, Inc. v. Teague,* 870 F.2d 123 (4th Cir.1989). In *Teague,* upon which the Board relies heavily, the Fourth Circuit rejected an equal protection and substantive due process challenge to Virginia's funeral regulatory scheme, one substantially similar to Oklahoma's.

13 *See also City of Dallas v. Stanglin,* 490 U.S. 19, 26, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989); *Beatie v. City of New York,* 123 F.3d 707, 711–12 (2d Cir.1997) ("Supreme Court jurisprudence now informs us that when reviewing challenged social legislation, a court must look for 'plausible reasons' for legislative action, whether or not such reasons underlay the legislature's action.") (citing *United States R.R. Ret. Bd. v. Fritz,* 449 U.S. 166, 179, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980)); *Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.,* 21 F.3d 237, 240 (8th Cir.1994) ("[W]e are not bound by explanations of the [policy's] rationality that may be offered by litigants or other courts.") (quoting *Kadrmas v. Dickinson Pub. Schs.,* 487 U.S. 450, 463, 108 S.Ct. 2481, 101 L.Ed.2d 399 (1988)); *Burke Mountain Acad., Inc. v. U.S.,* 715 F.2d 779, 783 (2d Cir.1983) ("It is our job to try to divine what Congress left unstated [and] we resort to our own talents and those of counsel to discern the rationality of the classification in question.") (internal quotations omitted).

14 Citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 412, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983); *City of Philadelphia v. New Jersey,* 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978); *H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 537–38, 69 S.Ct. 657, 93 L.Ed. 865 (1949).

15 Citing *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 470, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981).

16 The Court has not limited this deferential jurisprudence to equal protection cases. In the substantive due process arena, the Court has stated "[t]he Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned." *Nebbia v. New York,* 291 U.S. 502, 527–28, 54 S.Ct. 505, 78 L.Ed. 940 (1934). Indeed, the Court stated that even the establishment of a monopoly is a legitimate state interest. *Id.* at 529.

17 Examples from states in this circuit abound. *See, e.g.,* John Greiner, *Henry to Back Tire Plant Bill,* The Oklahoman, May 26, 2004, at 1B (discussing the Oklahoma Quality Investment Act, which provides Oklahoma City's Bridgestone/Firestone tire manufacturing plant with $5 million in state financial assistance); Brice Wallace, *State Hopes to Lure Jobs,* Deseret Morning News, May 22, 2004, at D12 (noting that the Utah Board of Business and Economic Development extended

financial incentives to lure new jobs to the Qwest Bilingual and National Vinyl Products facilities already located in the state); Gargi Chakrabarty, *Kodak Picks Weld; Windsor Plant Wins Competition for New Investment, 60 Jobs,* Rocky Mtn. News, Mar. 23, 2004, at 1B (noting cash incentives, state job training funds, and property tax reductions given to Eastman Kodak Co. to encourage expansion in Windsor, Colorado); Andrew Webb, *Hydrogen Plan Lands Funds,* Albuquerque J., Mar. 5, 2004, at B6 (discussing New Mexico's Advanced Technologies Economic Development Act, which aims to use economic incentives to attract hydrogen research businesses to the state); Morgan Chilson, *Boeing Sees Future in 7E7,* Topeka Cap.-J., Sept. 7, 2003 (discussing a Kansas bill that allows the state to issue $500 million in bonds to help Boeing Wichita acquire a role in manufacturing the 7E7 jetliner); Jeff Gosmano, *Wyoming Pipeline Group Seeks to Jump Start Pipeline Building Process,* Natural Gas Week, Aug. 29, 2003 (noting the legislation adopted by Wyoming giving the state the power to issue $1 billion in bonds to revive gas pipeline development). Additionally, state and local governments often craft measures to protect current businesses from additional competition. *See, e.g.,* Annys Shin & Michael Barbaro, *Council Bill Targets Wal–Mart,* WASH. POST, , June 15, 2004, at E01(commenting on a proposed zoning restriction on "big box" stores that is crafted narrowly to apply almost exclusively to Wal–Mart Supercenters).

18 Brief of Amici Curiae Federal Trade Commission at 1, *Powers v. Harris,* CIV–01–445–F (W.D. Okla 2002). The FTC did not appear as amicus on appeal, but it did submit an amicus brief below. The parties did not include this brief in the record on appeal. *But see* http:// www.ftc.gov/os/2002/09/okamicus.pdf (last visited on July 6, 2004).

19 We also reject *Casket Royale, Inc.,* 124 F.Supp.2d 434 (S.D.Miss.2000), *Santos,* 852 F.Supp. 601 (S.D.Tex.1994), and *Brown v. Barry,* 710 F.Supp. 352 (D.D.C.1989) for these same reasons.

20 Plaintiffs push hard for a similar reading of *Romer v. Evans,* 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). For purposes of this appeal, our treatment of *Cleburne* applies equally to *Romer.*

21 Debate over whether the Court has developed a higher-order rational-basis review began not long after *Cleburne. See, e.g.,* Erwin Chemerinsky, *Constitutional Law: Principles and Policies,* 536 (1997) ("The claim is that in some cases where the Court says it is using rational basis review, it is actually employing a test with more 'bite' than the customarily very deferential rational basis review.... The claim is that there is not a singular rational basis test but one that varies between complete deference and substantial rigor."); Robert C. Farrell, *Legislative Purpose & Equal Protection's Rationality Review,* 37 Vill. L.Rev. 1, 65 (1992) (suggesting that there are two levels of rational basis review used by the Court in an unpredictable manner); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name,* 62 Ind. L.J. 779 (1987) (claiming that the Court's use of heightened rational basis review creates confusion in lower courts and legislatures by failing to delineate when differing types of rational basis review apply). Indeed, at least one commentator has argued that the Court employs at least six versions of rational-basis review. *See* R. Randall Kelso, *Standards of Review Under the Equal Protection Clause & Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model & Modern Supreme Court Practice,* 4 U. Pa. J. Const. L. 225, 231 (2002).

1 Three cases suggest that bare economic protectionism does not meet the legitimacy requirement: *Smith v. Cahoon,* 283 U.S. 553, 51 S.Ct. 582, 75 L.Ed. 1264 (1931) (holding that a bonding requirement favoring agricultural interests over other industries is not legitimate); *Metropolitan Life Ins. Co. v. Ward,* 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985) (holding that a desire to improve the local economy by fostering in-state insurance companies at the expense of out-of-state companies is not legitimate); *Allegheny Pittsburgh Coal Co. v. County Comm'n,* 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989) (holding that a county tax assessment system discriminating against recent sales and protecting certain property owners is "wholly irrational").

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712 F.3d 215
United States Court of Appeals,
Fifth Circuit.

ST. JOSEPH ABBEY; Mark Coudrain, Plaintiffs–Appellees

v.

Paul Wes CASTILLE; Royal J. David; Gerald L. Schoen, III; J. Steven Cox; Andrew Hayes; Margaret Shehee; Kelly Rush Williams; Louis Charbonnet, in their official capacities as Members of the Louisiana State Board of Embalmers and Funeral Directors; Patrick H. Sanders, in his official capacity in place of Oscar A. Rollins (deceased), Defendants–Appellants.

No. 11–30756. | March 20, 2013.

Synopsis

Background: Abbey that desired to sell hand-made caskets brought § 1983 action against members of Louisiana State Board of Embalmers and Funeral Directors, seeking declaratory and injunctive relief against enforcement of Louisiana Embalming and Funeral Directors Act as violative of their due process and equal protection rights under Fourteenth Amendment. The United States District Court for the Eastern District of Louisiana, Stanwood R. Duval, Jr., J., 835 F.Supp.2d 149, entered an order enjoining enforcement of Act, and members appealed.

Holdings: The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that:

[1] Act was not rationally related to a legitimate governmental interest in consumer protection, and

[2] Act was not rationally related to a legitimate governmental interest in promoting public health and safety.

Affirmed.

Attorneys and Law Firms

*217 Scott G. Bullock, William H. Mellor, III, Jeff Rowes, Darpana Sheth, Institute for Justice, Arlington, VA, Frederick Evans Schmidt, Sr., Koch & Schmidt, L.L.C., New Orleans, LA, for Plaintiffs–Appellees.

Walter Rimmer Woodruff, Jr., Bopp Law Corporation, Mandeville, LA, David W. Gruning, New Orleans, LA, Preston L. Hayes, Michael Harrison Rasch, George Brian Recile, Chehardy, Sherman, Ellis, Murray, Recile, Griffith, Stakelum & Hayes, L.L.P., Metairie, LA, for Defendants–Appellants.

Daniel A. Ranson, Gaudry, Ranson, Higgins & Gremillion, L.L.C., Gretna, LA, for Amicus Curiae Louisiana Funeral Directors Association.

Mary Grace Huebert Lang, Gibson, Dunn & Crutcher, L.L.P., Irvine, CA, for Amicus Curiae Todd J. Zywicki.

John F. Daly, Ruthanne Mary Deutsch, Federal Trade Commission, Washington, DC, for Amicus Curiae Federal Trade Commission.

Matthew Addison Dent Draper, Cara Tseng Duffield, Elbert Lin, Wiley Rein, L.L.P., Washington, DC, for Amici Curiae International Cemetery, Cremation, and Funeral Association and Funeral Consumers Alliance.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before HIGGINBOTHAM, HAYNES, and HIGGINSON, Circuit Judges.

Opinion

PATRICK E. HIGGINBOTHAM, Circuit Judge:

An Abbey of the Benedictine Order of the Catholic Church challenges as unconstitutional rules issued by the Louisiana Board of Funeral Directors granting funeral homes an exclusive right to sell caskets. The district court enjoined their enforcement, finding that they deny equal protection and due process of law. We will AFFIRM the judgment of the district court.

I.

The thirty-eight monks of St. Joseph Abbey earn their way in a pastoral setting. In years past, the Abbey's timberland provided a source of income. After Hurricane Katrina destroyed its timber, the Abbey began looking for other revenue sources. For generations the Abbey has made simple wooden caskets to bury its monks. Public interest in the Abbey's caskets increased after two bishops were buried in Abbey caskets in the 1990s. Seeing potential in this demand, the Abbey invested $200,000 in "St. Joseph Woodworks," managed by Mark Coudrain, a deacon of the Church and an employee of the Abbey. The business plan was simple. St. Joseph Woodworks offered one product—caskets in two models, "monastic" and "traditional," priced at $1,500 and $2,000 respectively, significantly lower than those offered by funeral homes. The Abbey offers no funeral services. It does not prepare a deceased for burial and its monks do not participate in funerals, except as pastors.

To be sure, Louisiana does not regulate the use of a casket, container, or other enclosure for the burial remains; has no requirements for the construction or design of caskets; and does not require that caskets be sealed. Individuals may construct their own caskets for funerals in Louisiana or purchase caskets from out-of- *218 state suppliers via the internet. Indeed, no Louisiana law even requires a person to be buried in a casket.

Nonetheless, the Abbey's plan for casket sales faced significant regulatory burdens. The Louisiana State Board of Embalmers and Funeral Directors ("State Board") argues that, under state law, intrastate sales of caskets to the public may be made only by a state-licensed funeral director and only at a state-licensed funeral home. [1] This stricture has two layers. First, a prospective casket retailer must become a licensed funeral establishment. [2] This requires building a layout parlor for thirty people, a display room for six caskets, an arrangement room, and embalming facilities. [3] Second, the establishment must employ a full-time funeral director. [4] A funeral director must have a high school diploma or GED, pass thirty credit hours at an accredited college, and complete a one-time apprenticeship. [5] The apprenticeship must consist of full-time employment and be the apprentice's "principal occupation." None of this mandatory training relates to caskets or grief counseling. A funeral director must also pass a test administered by the International Conference of Funeral Examining Boards. [6] The exam does not test Louisiana law or burial practices. In Louisiana, funeral directors are the only individuals authorized by law to provide funeral services. In sum, the State Board's sole regulation of caskets presently is to restrict their intrastate sales to funeral homes. There are no other strictures over their quality or use. The district court found the State's scheme to be the last of its kind in the nation. The State Board had never succeeded in any enforcement actions against a third party seller prior to its effort to halt the Abbey's consumer sales.

II.

Louisiana's restriction on the sales of caskets exists against the background of substantial federal regulation of the funeral industry. Beginning in the early 1980s, the FTC promulgated regulations, known as the Funeral Rule, to mitigate unfair or deceptive practices of funeral providers. [7] These practices included failing to disclose price information and "bundling" of products and services. Bundling forced consumers to buy a range of funeral goods and services—whether or not they needed or wanted the whole bundle. The FTC determined that it could not rely on state funeral licensing boards to curb such practices because the state boards were "dominated by funeral directors." [8] The funeral directors had organized themselves into industry groups, which lobbied state legislatures and made practices such as a refusal to disclose prices part of their professional "ethics" code. The Funeral Rule required funeral directors to provide consumers with itemized price lists and allow consumers to purchase only those goods and services they actually wanted. A principal objective of the Funeral Rule was to "encourage entry into the funeral market of new competitors seeking to attract business *219 by offering lower prices." [9]

After the Funeral Rule forced funeral homes to disclose casket prices, the significant mark-ups charged by the funeral homes became apparent, and a market for third-party casket sales emerged. Funeral directors responded to this growing competition by refusing to use third-party caskets unless consumers paid large "casket-handling" fees. The FTC responded by amending the Funeral Rule to ban casket-handling fees. [10] In its comments on that rulemaking, the FTC explained that "casket handling fees are unfair conditions on a consumer's right to decline unwanted items he or she may wish to purchase elsewhere." [11]

In 2008, the FTC not only decided to retain the Funeral Rule but also expressly declined to subject third-party casket vendors to the rule because, in contrast to state-

licensed funeral directors, "[t]he record [was] bereft of evidence indicating significant consumer injury caused by third-party sellers." [12] Because of the FTC's interventions, Louisiana funeral homes cannot discourage consumer choice by applying casket-handling fees or by forcing consumers to purchase bundled goods and services, and Louisiana consumers can now buy caskets from third-party retailers—unless those retailers reside in Louisiana.

As the district court found, a funeral director may charge a non-declinable service fee ranging from $3,000 to $4,000 in addition to charges for individually priced goods and services. [13] This non-declinable service fee includes advice about casket selection, and the funeral director is contractually bound to assist the consumer if a problem arises. Thus, whenever a consumer retains a funeral director in Louisiana, [14] the consumer pays the funeral director thousands of dollars to provide advice on every aspect of funeral planning, including casket purchase—whether the consumer is buying a casket from the funeral home or using a homemade casket or one purchased from an out-of-state third-party retailer.

III.

In December 2007, the State Board ordered the Abbey not to sell caskets to the public, and the next month, Boyd Mothe, Sr., the chair of the Legislative Committee for the Louisiana Funeral Directors Association and a state-licensed funeral director who owns several funeral homes, initiated a formal complaint against the Abbey. By law, the nine-member State Board must consist of four licensed funeral directors, four licensed embalmers, and just one representative not affiliated with the funeral industry. [15] In 2008 and 2010, the Abbey petitioned the legislature to change the law to allow non-profit charitable groups such as the Abbey to sell caskets. Although two bills to amend the law were drafted, it appears neither made it out of committee. No member of the public opposed the bills.

***220** Facing these hurdles, the Abbey and Deacon Mark Coudrain filed this suit in the district court under 42 U.S.C. § 1983. The Abbey and Coudrain sought declaratory and injunctive relief against enforcement of the Louisiana Embalming and Funeral Directors Act by the nine members of the State Board. These defendants are charged with the Act's enforcement under state law and are sued in their official capacity. The complaint asserted that the licensure requirements confine intrastate sales of caskets to sales by funeral directors at funeral homes, denying the Abbey and Coudrain equal protection and due process under the Fourteenth Amendment because they bear no rational relationship to any valid governmental interest. The State Board responded that the challenged rules, insulating funeral directors from competition, are rationally related to the State's legitimate interest in regulating the funeral profession. In the alternative, citing the Tenth Circuit's decision in *Powers v. Harris,* [16] the State Board maintained that economic protection of a particular industry is a legitimate state interest. After conducting a bench trial, the district court issued judgment for the Abbey, reaffirming its earlier finding that this brand of economic protectionism is not a legitimate state interest and finding no rational relationship between the challenged law and Louisiana's interests in consumer protection, public health, and public safety. The State timely appealed.

After examining the record, we had serious doubts about the constitutionality of the State Board's regulation of intrastate casket sales, but we saw a potential state law ground for deciding the case. Specifically, we questioned whether, under Louisiana law, the State Board has authority to regulate casket sales in and of themselves when such sales are not incidental to the seller's provision of any other funeral services. [17] Because under well-settled precedent this Court must avoid deciding a constitutional issue "if there is some other ground upon which the case may be disposed of" [18] and because resolution of the State Board's authority must come at the hand of the Louisiana Supreme Court, [19] we deferred a final decision in the case to allow the Louisiana Supreme Court to rule on the statutory uncertainty. In the interest of federalism and constitutional avoidance, we certified the following question to the Louisiana Supreme Court: Whether Louisiana law furnishes the Louisiana State Board of Embalmers and Funeral Directors with authority to regulate casket sales when made by a retailer who does not provide any other funeral services. [20] The Louisiana Supreme Court denied certification without explanation. [21] Ours cannot be the final word on uncertainty in state law. The parties do not challenge the Board's authority here, and the state has declined our request to clarify this statute's meaning. We turn to the issues the parties have brought and proceed to ***221** rule on the constitutionality of the challenged law.

IV.

[1] We review the district court's findings of fact for clear error and its conclusions of law de novo.[22]

A.

The State Board maintains that the regulation of intrastate casket sales enjoys the deference due classic economic regulation. Alternatively, the State Board contends that it is a rational draw upon the State's police powers in protection of consumers and public health. The Abbey responds that no rational basis can or has been articulated that it has not negated.

Chief Justice Stone's footnote 4 in *United States v. Carolene Products*, etched in the brains of several generations of law students, both described and prescribed a fundamental dichotomy of judicial review; it retreated from the aggressive review of state regulation of business in the *Lochner* period while proceeding in the opposite direction in matters of personal liberty.[23] Justice Douglas's opinion in *Williamson v. Lee Optical*[24] is generally seen as a zenith of this judicial deference to state economic regulation and the State Board invokes its protections, including its willingness to accept post hoc hypotheses for economic regulation. But even *Williamson* offers the State Board little succor. In *Williamson*, the Oklahoma legislature forbade opticians to fit or replace eyeglass lenses in frames without a lens prescription from an ophthalmologist or optometrist, even when the replaced lens could easily be duplicated by an optician.[25] Despite the coloration of wealth transfer to ophthalmologists and optometrists, the Court accepted the suggestion that the legislature might have concluded that some persons would benefit from seeing a doctor when replacing a lens and refused to strike down the legislation, in turn rejecting the opticians' due process and equal protection claims. It placed emphasis on the "evil at hand for correction" to which the law was aimed, concluding that the measure was a rational, if not "in every respect logically consistent," means of addressing the perceived ill.[26] The Supreme Court took the same approach in *City of New Orleans v. Dukes.*[27] It upheld a New Orleans ordinance that permitted only pushcart food vendors with eight or more years of experience in the French Quarter to continue to operate in the neighborhood. It reasoned that reducing the number of pushcart vendors, and limiting their ranks to those most likely to have the deepest ties to the area, advanced the City's legitimate objective of maintaining the French Quarter's historic character and tourist appeal.[28]

As a threshold argument, the State Board urges that pure economic protection of a discrete industry is an exercise of a valid state interest. It points to the ***222** Tenth Circuit's decision in *Powers v. Harris*, a case in which two members of the panel said as much in turning back an attack on an Oklahoma scheme similar to Louisiana's.[29] Judge Tymkovich, the third member of the panel, refused to join the majority opinion's broad approbation of "economic protectionism" as a valid governmental interest.[30] Rather, he concurred in the judgment, persuaded that the State had otherwise identified a sufficient public purpose.[31] The Abbey in turn points to *Craigmiles v. Giles*, in which the Sixth Circuit rejected "economic protectionism" as a rational basis for similar casket regulations, striking down those regulations as a denial of due process and equal protection.[32]

These two courts gave differing answers to the question of whether the legislation before them, both statutory schemes quite similar to that now before us, drew upon a legitimate state interest. *Craigmiles* found that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose."[33] The *Powers* court saw the statutory scheme before it as simple economic protectionism, "the favored pastime of state and local government," and in its mind a permissible basis for regulation.[34] In turn, it rejected the challenge to the regulations that limited the sale of caskets to funeral directors.[35]

The *Powers* court claimed that only three courts have held that " 'protecting a discrete interest group from economic competition is not a legitimate governmental purpose,' "[36] and criticized those courts' holdings as having no direct support in Supreme Court precedents. It then stated: "In contrast, the Supreme Court has consistently held that protecting or favoring one particular intrastate industry, absent a specific federal constitutional or statutory violation, is a legitimate state interest."[37] However, none of the Supreme Court cases *Powers* cites stands for that proposition. Rather, the cases indicate that protecting or favoring a particular intrastate industry is not an *illegitimate* interest when protection of the industry can be linked to advancement of the public interest or general welfare. *Craigmiles* and

Powers rest on their different implicit answers to the question of whether the state legislation was supportable by rational basis. *Craigmiles* looked for rationality and found none. *Powers* found economic protection to be a traditional wielding of state power and rational by definition.

[2] As we see it, neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose,[38] but economic protection, that is favoritism, *223 may well be supported by a post hoc perceived rationale as in *Williamson*—without which it is aptly described as a naked transfer of wealth.[39] Recently, we upheld against similar challenge a Houston taxi cab permitting scheme that disfavored small cab companies.[40] Notably, we approved of the *Craigmiles* court's reasoning, as it "confirm[ed] that naked economic preferences are impermissible to the extent that they harm consumers."[41] However, we found that even if Houston had been "motivated in part by economic protectionism, there is no real dispute that promoting full-service taxi operations is a legitimate government purpose under the rational basis test."[42] We thus sustained the City's measure. It follows that the State Board cannot escape the pivotal inquiry of whether there is such a rational basis, one that can now be articulated and is not plainly refuted by the Abbey on the record compiled by the district court at trial. We turn then to the State Board's alternative argument—that the challenged restrictions are rationally related to protection of public health, safety, and consumer welfare, beginning with some settled guiding principles.

B.

[3] As the Abbey points out, although rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality.[43] And of course, as we earlier observed, *Williamson* insists upon a rational basis, which it found. Mindful that a hypothetical rationale, even post hoc, cannot be fantasy, and that the State Board's chosen means must rationally relate to the state interests it articulates, we turn to the State Board's proffered rational bases for the challenged law. Our analysis does not proceed with abstraction for hypothesized ends and means do not include post hoc hypothesized facts. Thus, we will examine the State Board's rationale informed by the setting and history of the challenged rule.

1. *Consumer Protection*

[4] The State Board argues that the challenged law is rationally related to consumer protection because it restricts predatory sales practices by third-party sellers and protects consumers from purchasing a casket that is not suitable for the given burial space. Of course, this is a perfectly rational statement of hypothesized footings for the challenged law. But it is betrayed by the undisputed facts.

For one, the State Board's argument obscures the actual structure of the challenged law. No provision mandates licensure requirements for casket retailers or insists that a casket retailer employ someone trained in the business of funeral direction. Rather, the licensure requirements and other restrictions imposed on prospective casket retailers create funeral industry control over intrastate casket sales. The scheme is built on the statute's interlocking definitions of "funeral establishment" and "funeral directing":

> "**Funeral establishment**" means any place or premises duly licensed by the *224 board and devoted to or used in the care and preparation for burial of the body of a deceased person or maintained or held out to the public by advertising or otherwise as ***the office or place for the practice of funeral directing.***[44]

> "**Funeral directing**" means the operation of a funeral home, or, by way of illustration and not limitation, any service whatsoever connected with the management of funerals, or the supervision of hearses or funeral cars, the purchase of caskets or other funeral merchandise, and ***retail sale and display thereof,*** the cleaning or dressing of dead human bodies for burial, and the performance or supervision of any service or act connected with the management of funerals from time of death until the body or bodies are delivered to the cemetery, crematory, or other agent for the purpose of disposition.[45]

In other words, because a funeral establishment includes any "office or place for the practice of funeral directing," and "funeral directing" includes "the purchase of caskets or other funeral merchandise and the retail and display thereof," a casket retailer must comply with all the statutory requirements for funeral directors and funeral establishments. No rule addresses casket retailers or imposes requirements for the sale of caskets beyond confining intrastate sales to funeral homes. But, it is urged, this exclusivity will assure purchasers of caskets informed counsel.

The district court found that the extensive training the law requires of budding funeral directors does not include instruction on caskets, or how to counsel grieving customers. Given that Louisiana does not require a person to be buried in a casket, restrict casket purchases in any way by Louisianans over the internet or from other sources out of state, nor imposes requirements on any intrastate seller of caskets directly to consumers, including funeral directors, regarding casket size, design, material, or price, whatever special expertise a funeral director may have in casket selection is irrelevant to it being the sole seller of caskets.[46] ***225** This is because customers pay funeral directors a non-declinable service fee, which contractually binds a funeral director to assist the customer with funeral and burial logistics, including, for example, casket selection, even if the customer does not purchase the casket from the funeral director. As a consequence, the customer should receive the benefit of the funeral director's experience in matters of casket selection, including complexities that arise from burial conditions in any given area. Indeed the FTC has found that "[b]y allowing a basic services fee, the Rule ensures that consumers get the benefit of choosing goods and services among a variety of options—including the option to purchase goods from the funeral provider's competitors...."[47] A customer of a funeral home receives the same service whether or not he purchases the casket from the funeral home, and because only funeral homes can sell funeral services, and all disposing of dead bodies must be "through a funeral establishment," he must engage their service.[48]

[5] Moreover, like the district court and consistent with its findings, we find that the challenged law is not rationally related to policing deceptive sales tactics. In declining to expand the Funeral Rule's scope to cover third-party sellers of caskets and urns, the FTC found "there is insufficient evidence that ... third-party sellers of funeral goods are engaged in widespread unfair or deceptive acts or practices."[49] In fact, the Commission found the record "bereft of evidence indicating significant consumer injury caused by third-party sellers"[50] and recognized that third-party sellers do not have the same incentive as funeral home sellers to engage in deceptive sales tactics.[51]

But, even if independent third-party sellers pose a risk of engaging in deceptive sales practices, and assuming arguendo that the state legislature could so conclude, there is a disconnect between restricting casket sales to funeral homes and preventing consumer fraud and abuse. Putting aside the fact that funeral homes, not independent sellers, have been the problem for consumers with their bundling of product and markups of caskets,[52] Louisiana's Unfair Trade Practices and Consumer Protection Law already polices inappropriate sales tactics by all sellers of caskets. Louisiana's Unfair Trade Practices and Consumer Protection Law declares that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are ... unlawful" and empowers the state attorney general to make "rules and regulations" to interpret the provisions of the Chapter.[53] Under the section of Louisiana's administrative code implementing the law, the state attorney general is authorized to regulate unfair trade practices in casket sales, whether or not those sales are made by state-licensed funeral homes, but must do so consistent with rules promulgated by the FTC and court decisions interpreting ***226** those rules.[54] In short, Louisiana's consumer protection regime reaches the sales practices of all intrastate sellers of caskets and can strike at any unfair practices but interestingly only in a way complementary and consistent with the Federal Trade Commission Act.

To be clear, the FTC's Funeral Rule has not preempted Louisiana from making its own independent assessment of consumer abuse by third-party intrastate sellers. But, were the attorney general to promulgate a rule that, as the State Board's enforcement action here aims to do, shut out third-party sellers, implementing Louisiana's ability to create a consumer protection scheme would be in tension with the rules of the FTC—rules that compel funeral homes both to accept caskets purchased from others and to not charge fees for doing so. Nor would such a rule square with FTC findings or rulemaking resting on the conclusion that third-party sellers do not engage in consumer abuse. This matrix of Louisiana law, while not dispositive of our inquiry, sheds much light on the disconnect between the post hoc hypothesis of consumer protection and the grant of an exclusive right of sale to funeral homes. That grant of an exclusive right of sale adds nothing to protect consumers and puts them at a greater risk of abuse including exploitative prices.

2. *Public Health and Safety*

[6] Relatedly, we find that no rational relationship exists between public health and safety and restricting intrastate casket sales to funeral directors. Rather, this purported rationale for the challenged law elides the realties of Louisiana's regulation of caskets and burials. That Louisiana

does not even require a casket for burial, does not impose requirements for their construction or design, does not require a casket to be sealed before burial, and does not require funeral directors to have any special expertise in caskets leads us to conclude that no rational relationship exists between public health and safety and limiting intrastate sales of caskets to funeral establishments.[55]

[7] The great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation. The deference we owe expresses mighty principles of federalism and judicial roles. The principle we protect from the hand of the State today protects an equally vital core principle—the taking of wealth and handing it to others when it comes not as economic protectionism in service of the public good but *227 as "economic" protection of the rulemakers' pockets. Nor is the ghost of *Lochner* lurking about. We deploy no economic theory of social statics or draw upon a judicial vision of free enterprise. Nor do we doom state regulation of casket sales. We insist only that Louisiana's regulation not be irrational—the outer-most limits of due process and equal protection—as Justice Harlan put it, the inquiry is whether "[the] measure bears a rational relation to a constitutionally permissible objective."[56] Answering that question is well within Article III's confines of judicial review.

V.

The funeral directors have offered no rational basis for their challenged rule and, try as we are required to do, we can suppose none. We AFFIRM the judgment of the district court.

All Citations

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Footnotes

1 *See* LA.REV.STAT. §§ 37:831(37)–(39), :848.
2 *See id.* §§ 37:831(37), (39), :842(D).
3 *See id.* § 37:842(D)(3).
4 *Id.* § 37:842(D)(1).
5 *Id.* § 37:842(A).
6 *Id.* §§ 37:842(A)(6),:831(38).
7 Trade Regulation Rule; Funeral Industry Practices, 47 Fed.Reg. 42260 (Sept. 24, 1982); *see* 16 C.F.R. § 453.1 *et seq.*
8 *Id.* at 44289.
9 *Id.* at 42293.
10 Funeral Industry Practices Trade Regulation Rule, 59 Fed.Reg. 1592, 1593 (Jan. 11, 1994).
11 *Id.* at 1604.
12 73 Fed.Reg. 13740, 13745 (Mar. 14, 2008).
13 *See* Regulatory Review of the Trade Regulation Rule on Funeral Industry Practices, 16 C.F.R. § 453.2(b)(4)(iii)(C).
14 Indeed, it appears that all persons seeking to dispose of a deceased are obligated to engage a Louisiana funeral establishment. *See* La.Rev.Stat. § 37:848(D)(5).
15 *Id.* § 37:832(A)(2), (B)(1), (B)(d)(2).
16 379 F.3d 1208 (10th Cir.2004).
17 *St. Joseph Abbey v. Castille,* 700 F.3d 154, 165–68 (5th Cir.2012).
18 *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring), reh'g denied 297 U.S. 728, 56 S.Ct. 588, 80 L.Ed. 1011 (1936). *See also County Court of Ulster County v. Allen,* 442 U.S. 140, 154, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); *Burton v. United States,* 196 U.S. 283, 295, 25 S.Ct. 243, 49 L.Ed. 482 (1905).
19 *See Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 508, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985) (O'Connor, J., concurring).
20 *St. Joseph Abbey,* 700 F.3d at 169.
21 *St. Joseph Abbey v. Castille,* 106 So.3d 542 (La.2013).
22 *See One Beacon Ins. Co. v. Crowley Marine Servs., Inc.,* 648 F.3d 258, 262 (5th Cir.2011).

23 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938).

24 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

25 *Id.* at 485, 75 S.Ct. 461. The law was also challenged for exempting sellers of ready-to-wear glasses from the prescription requirement, barring advertising of lenses and frames, and prohibiting retailers from sharing commercial space with certain eye care professionals. *Id.* at 488–89, 75 S.Ct. 461.

26 *Id.* at 487–88, 75 S.Ct. 461.

27 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976).

28 *Id.*

29 379 F.3d 1208 (10th Cir.2004).

30 *Id.* at 1225–27 (Tymkovich, J., concurring).

31 *Id.*

32 312 F.3d 220 (6th Cir.2002).

33 *Id.* at 224.

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

35 *Id.* at 1225.

36 *Id.* at 1218 (quoting *Craigmiles,* 312 F.3d at 224).

37 *Id.* at 1220.

38 *See, e.g., Merrifield v. Lockyer,* 547 F.3d 978, 991 n. 15 (9th Cir.2008) ("We conclude that mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review.... [E]conomic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest.").

39 *See* Cass R. Sunstein, *Naked Preferences and the Constitution,* 84 COLUM. L.REV. 1689 (1984).

40 *Greater Houston Small Taxicab Co. Owners Ass'n v. City of Houston,* 660 F.3d 235 (5th Cir.2011).

41 *Id.* at 240.

42 *Id.*

43 *See F.C.C. v. Beach Commc'ns, Inc.,* 508 U.S. 307, 314–15, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993).

44 LA.REV.STAT. § 37:831(39) (emphasis added).

45 *Id.* § 37:831(37) (emphasis added).

46 Indeed, we highlight that the statute does not clearly extend State Board Authority to casket sales unconnected to funeral services. The monks, as carpenters and vendors of their wares, do little that equates to operating a funeral home. Whereas the State Board regulates the business of funeral directing, and specifically here, Section 848 ("Unlawful practice"), states "[n]o person, not certified and registered under the provisions of this Chapter, shall ... conduct the business of funeral directing," LA. REV. STAT. § 37:848(A), that prohibition only raises the question of whether the monks are conducting the business of funeral directing. We observe that Term 37 of Section 831 explains that " '[f]uneral directing' means the operation of a funeral home...." *Id.* § 37:831(37). This, the monks are not doing. As "illustration and not limitation," Term 37 clarifies that operating a funeral home encompasses: "any service whatsoever connected with the management of funerals," *id.*—not what the monks want to do; "any service whatsoever connected with ... the supervision of hearses or funeral cars," *Id.*—still not; "any service whatsoever connected with ... the purchase of caskets or other funeral merchandise," *Id.*—still not, but telling, because the broad interpretation of State Board authority, suggested by the State Board, would give it not just oversight of selling but also of all buying, which cannot be correct; and "any service whatsoever connected with ... the retail sale and display thereof...." *Id.* This is it, but not exactly. The monks do not clearly offer a funeral home "*service ... connected with* ... retail sale and display...." *Id.* (emphasis added). The remainder of Term 37 then lists services that unquestionably, like "hearses," are part of the "operation of a funeral home," such as "cleaning and dressing of dead human bodies...." *See id.*

47 73 Fed.Reg. at 13747.

48 *See* LA.REV.STAT. § 37:848(D)(5).

49 73 Fed.Reg. at 13742.

50 *Id.* at 13745.

51 *Id.* ("Indeed, third-party retailers have a strong economic incentive to display their prices to the public at large because offering a lower price is the primary way they compete against funeral providers for sales of funeral goods, such as caskets.").

52 *See supra* notes 7–12, 48–50 and accompanying text.

53 LA.REV.STAT. § 51:1405.

54 *See* LA. ADMIN. CODE 16, § 501 (2012). Section 501 provides:

> These rules and regulations shall be consistent with Section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C. 45(a)(1)], as from time to time amended, any rule or regulation promulgated thereunder, and any finally adjudicated court decision interpreting the provisions of said act, rules, and regulations. This consistency shall be, therefore, the same as the Federal Trade Commission's responsibility over both:
>
> 1. anti-trust or other restraint of trade types of activities; and
>
> 2. unfair or deceptive types of activities relating to trade and commerce as it affects consumer and business interests.

Section 5(a)(1) of the Federal Trade Commission Act is the provision under which the FTC enacted the Funeral Rule, and under which it declined to extend the Funeral Rule to third-party sellers of caskets and urns. *See* 73 Fed.Reg. at 13742 & nn. 1–2, 13745.

55 *Cf. Merrifield,* 547 F.3d at 989 ("[T]he singling out of a particular economic group, with no rational or logical reason for doing so, was strong evidence of an economic animus with no relation to public health, morals or safety.").

56 *Ferguson v. Skrupa,* 372 U.S. 726, 733, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963) (Harlan, J., concurring).

End of Document

From: Conrad, Donald
To: Perkovich, Mark
Subject: FW: Colorado City Mohave County Contact
Date: Thursday, November 12, 2015 10:53:15 AM

Mark, Please have Georgia call this person. She should not, however, take any action or agree to take any action until she talks to you and you and I discuss any proposed action on the part of the AGO.

From: Flores, Kirstin
Sent: Tuesday, November 10, 2015 5:13 PM
To: Conrad, Donald
Cc: Rodriguez, Lisa
Subject: Fwd: Colorado City Mohave County Contact

Don, please see below. Does the AGO still have a representative up in Colorado city?

Thanks,
Kirstin

Sent from my iPhone

Begin forwarded message:

> **From:** "Chapman, Colette" <Colette.Chapman@azag.gov>
> **Date:** November 10, 2015 at 3:50:47 PM MST
> **To:** "Flores, Kirstin" <Kirstin.Flores@azag.gov>
> **Subject: FW: Colorado City Mohave County Contact**
>
> Please advise. CC
>
> **From:** Jordyn DeWitt [mailto:Jordyn.DeWitt@mohavecounty.us]
> **Sent:** Tuesday, November 10, 2015 11:02 AM
> **To:** VictimRights
> **Subject:** Colorado City Mohave County Contact
>
> Good Morning,
>
> I received a call from a victim in Colorado City wanting to know who the contact person from the Attorney General's Office is in their area. If you could provide me with a name and phone number of someone that the residents of the community can reach out to, it would be much appreciated.
>
> Thank you,
> Jordyn DeWitt
>
> *Jordyn DeWitt*

North Canyon Justice Court Victim Advocate
Mohave County Attorney's Office
Victim/Witness Program
(435) [redacted]
Jordyn.Dewitt@mohavecounty.us

From: Conrad, Donald
To: Bailey, Michael
Subject: FW: Consumer protection
Date: Monday, November 09, 2015 10:24:53 AM

I inquired at your request about the do not call list. Dan's response follows.

-----Original Message-----
From: Woods, Dan
Sent: Friday, October 30, 2015 4:17 PM
To: Conrad, Donald
Subject: RE: Consumer protection

I don't think anything could be done at the local or state level. Preventing spoofing would require the cooperation of a lot of different telephony/Internet companies all over the world, and unfortunately, they lack the motivation to do anything. The FTC and FCC are best positioned to do something and I think even they would admit they're having very little impact.

From: Conrad, Donald
Sent: Friday, October 30, 2015 1:51 PM
To: Woods, Dan
Subject: FW: Consumer protection

Dan, do you have any ideas about this?

-----Original Message-----
From: Bailey, Michael
Sent: Friday, October 30, 2015 10:50 AM
To: Conrad, Donald; Perkovich, Mark; Woods, Dan
Subject: FW: Consumer protection

Is there any criminal hook for violating the do not call list repeatedly? Is there no way at all to get more info on spoofed phone numbers?

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

-----Original Message-----
From: Brnovich, Mark
Sent: Friday, October 30, 2015 9:05 AM
To: Bailey, Michael
Subject: Consumer protection

I guess Paul is out. But I'm genuinely perplexed how I keep getting calls every day if we are on a do not call list. And isn't there a way to track down who might have "sold" or provided our number to these various lists. There's got to be a consequence to violating do not call lists. This type of "call" happened recently before but I don't know if it's same number. 866-746-7622.

Attorney General Mark Brnovich
Sent from my iPhone

From: Conrad, Donald
To: Bailey, Michael; Ahler, Paul
Subject: FW: Contact Information
Date: Friday, October 30, 2015 3:30:37 PM

From: Kory Langhofer [mailto:[redacted]@statecraftlaw.com]
Sent: Friday, October 30, 2015 3:08 PM
To: Conrad, Donald
Subject: Contact Information

Don:

It was nice talking to you a moment ago about Commissioner Stump. As promised, I'm sending my contact information.

And as discussed, Comm. Stump is still considering whether he will oppose the production of all text messages that are not public records, or whether he will agree to the release of certain text messages that are not public record. I would therefore be grateful for advance notice before your office plans to produces anything in response to the lawsuit and/or the public records request.

Best wishes,
Kory

Kory Langhofer
STATECRAFT PLLC
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
Desk: (602) 382-4078
Cell: (602) [redacted]

From:	Conrad, Donald
To:	Perkovich, Mark
Subject:	FW: Conflict Matter re Todd House, Pinal County Board of Supervisors
Date:	Thursday, October 01, 2015 4:16:48 PM
Attachments:	[Untitled].pdf [Untitled].pdf

Please assign

From: Bailey, Michael
Sent: Thursday, October 01, 2015 1:42 PM
To: Conrad, Donald
Subject: FW: Conflict Matter re Todd House, Pinal County Board of Supervisors

Let's open this up. Thx.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: David Rodriguez [mailto:David.Rodriguez@pinalcountyaz.gov]
Sent: Thursday, October 01, 2015 1:29 PM
To: Bailey, Michael
Subject: Conflict Matter re Todd House, Pinal County Board of Supervisors

Mike,

Please find attached a letter requesting assumption of this matter and ceding jurisdiction. Also attached is a copy of the "news article". Please advise if you have a conflict in investigating this matter.
Please let me know if you or Don have any other questions.

Thanks, David

OFFICE OF THE PINAL COUNTY ATTORNEY

M. LANDO VOYLES
PINAL COUNTY ATTORNEY

October 1, 2015

Michael Bailey
Chief Deputy
Office of the Attorney General
1275 W. Washington St.
Phoenix, Arizona 85007-2926

RE: Investigation into News Article about Pinal County Board Supervisor Todd House

Dear Mr. Bailey,

The Pinal County Attorney's Office requests that the Attorney General's Office assume prosecutorial responsibility for the above-referenced matter. Pinal County Manager, Greg Stanley, has requested that allegations raised in a recent news article concerning a sitting board member be looked into. (The news article is attached)

In view of a potential conflict of interest, since our office advises the Pinal County Board of Supervisors on an ongoing basis, we are asking for your assumption of our powers and duties in this matter.

The Pinal County Attorney's Office hereby authorizes the Attorney General's Office to assume investigative and prosecutorial responsibility for the above-referenced matter.

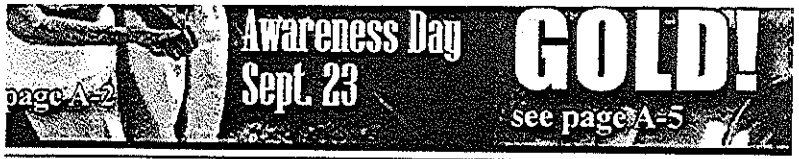
Please advise us as to the disposition of this matter once it is concluded. If you have any questions, please do not hesitate to contact me directly.

Thank you for your assistance. It is a pleasure to work with your office on this and other important issues.

Sincerely,

David Rodriguez
Chief Deputy
Pinal County Attorney's Office
(520) 866-5568

Sent via email and U.S. mail



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County Assistant Resigns— Cites 'Stress & Unoffic ial' Work

Highstreet was assigned personal tas ks by Pinal County official and his wife — "not county business"

Supervisor Todd House

By Bill Van Nimwegen
The News

Lora Highstreet, assistant to Pinal County Supervisor Todd House, resigned last month citing stress and too much time attending to "unofficial" tasks that House and his wife assigned to her.

In an email to House announcing her resignation, Highstreet said what began as her helping with a personal matter grew into her being treated "as a personal assistant for you and Tuni (House's wife) working on things [that] are not official county business."

Tuni House runs Paws 4 Life, a non-profit organization that trains service dogs and handlers—Todd House serves as treasurer for the organization.

In her resignation, Highstreet also refers to duties assigned to her to do on county time such as assisting with Paws 4 Life business as well as planning vacations and making doctor appointments for the Houses.

Following is a transcript of the email:

From: Lora Highstreet
To: Todd House
Sent: Saturday, August 22, 2015 6:04 PM
Subject: Resignation

Todd,

At this time I feel that it is best if we part ways. There has been too much over the last few weeks that have convinced me I'm doing the right thing. Since I started working for you things have escalated from helping on a personal matter to being a personal assistant for you and Tuni working on things that are not official county business. I don't understand what you guys did to plan vacations or doctor appointments before I started. I don't feel that downloading Paws pics and sending email and invitations are county business. There are several reasons for my resignation that I will prepare in a resignation letter. The stress and unhappiness is actually making me sick. Please do not call or show up at my house this I would like some quiet time to try and get healthier.

Lora

Highstreet began working as executive assistant for House after his election to Pinal County Supervisor, District 5 in November 2012. In February 2014, Highstreet was one of three Board of Supervisors executive assistants to receive a job reclassification to Assistant to the Board of Supervisor, Grade 129 and a pay raise.

At a time when the Board of Supervisors (BOS) faced a $9 million deficit and only OK'd 2.5% merit increases for other County employees, House had Highstreet's position reclassified, circumventing the county's human resources department recommendation. Her salary was bumped 28%—from $46,985 per year to $57,242.

At the February 5, 2014, BOS meeting, House defended the reclassification for Highstreet saying that the five districts have very different needs and require a different skill set from their assistants. Supervisors Steve Miller of Casa Grande and Pete Rios of Dudleyville strongly opposed the move and voted against the pay increases.

When reached for comment, Supervisor House said "I can't really comment on an employer/employee relationship. All I can say is that she resigned, she was a good worker."

There is currently no indication from the Board of Supervisors regarding an official inquiry into the circumstances of Highstreet's resignation.