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FUNERAL HOME FIELD ADVANTAGE: HOW PENNSYLVANIA FUNERAL DIRECTORS SCORED A VICTORY WITH THE THIRD CIRCUIT'S DECISION IN *HEFFNER V. MURPHY*

Michael Begovic

I. INTRODUCTION

Benjamin Franklin famously said there are two things certain in life: death and taxes.[1] However, the laws that govern how we dispose of, commemorate, and memorialize the dead are anything but certain. Regulations governing the funeral home industry are no exception. Not even Benjamin Franklin could have envisioned the number of burdensome and protectionist regulations governing who can own and operate funeral homes now on the books. Originally passed and implemented to protect the health, safety, and well-being of the industry,[2] funeral home regulations have far overstepped that goal, and now serve as a mechanism to shield local practitioners from outside competition.[3] This Casenote will look at some of those regulations. Specifically, the focus will be on the regulatory scheme enacted and implemented by the Pennsylvania General Assembly.

Part II of this Casenote sets the backdrop by providing a brief overview of regulations governing the funeral home industry and looking at how courts have handled constitutional challenges to some of these regulations. Part II also describes the regulatory scheme enacted by the Pennsylvania General Assembly and the measures the legislative body subsequently took to reexamine the scheme in light of growing criticism. Part III focuses on the Third Circuit's decision in *Heffner v. Murphy* upholding most of Pennsylvania's controversial funeral home regulations. The analysis of the case will hone in on two key provisions and how they were viewed under the Commerce Clause. Finally, Part IV will argue that the Third Circuit's approach was flawed because it

1. Letter from Benjamin Franklin to Jean-Baptiste Leroy (1789), www.someworthwhilequotes.com/certaintychange.html (last visited Nov. 2, 2015).

2. Tanya D. Marsh, *Rethinking the Law of the Dead*, 48 WAKE FOREST L. REV. 1327, 1329-31 (2013).

3. Lana Harfoush, *Grave Consequences for Economic Liberty: The Funeral Industry's Protectionist Occupation Licensing Scheme, the Circuit Split, and Why it Matters*, 5 J. BUS. ENTREPRENEURSHIP & L. 135, 136 (2011).

awarded excessive deference to the legislature and placed too much weight on the neutral language of the law. Additionally, Part IV will explore the economic arguments surrounding Pennsylvania's regulatory scheme and other regulations of this type within the funeral home industry and will discuss how the *Heffner* ruling may affect future trends within the funeral home industry.

II. BACKGROUND

A. Licensing in General

Like many other professional industries, the funeral home industry has experienced a growing number of licensing regulations.[4] In this sense, the funeral home industry is a microcosm of a larger trend: the number of licensing regulations permeating all professions is continuing to increase.[5] Licensing boards, comprised of market veterans, usually pass and enforce these regulations.[6] Herein lies the conflict of interest: many licensing boards have a strong incentive to limit price competition and restrict the quantity of services available.[7] The ongoing debate over the necessity of licensing requirements and the barriers to entry continues to percolate, but many studies show that the effects of licensing on consumer quality are either negligible or nonexistent, and that strict licensing schemes cost consumers billions of dollars each year.[8] While legislative solutions to the licensing problem are being proposed,[9] many entrepreneurs, businesses, and advocacy groups—

4. *See* Marsh, *supra* note 2, at 1332-33 (noting that widespread requirements now include that funeral directors be trained embalmers, that funeral directors complete lengthy apprenticeships before licensure, and that funeral homes contain an embalming room).

5. *See* Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. 1, 4 (2013) (alluding to a study which found that by 2009, the number of workers nationwide that were subject to state-level licensing requirements had skyrocketed to twenty-nine percent, compared to about eighteen percent in the late 1980s). *See also* Marc T. Law & Sukkoo Kim, *Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation*, 65 ECON. HIST. 723, 723-24 (2005).

6. Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSP. 189, 191 (2000) (defining occupational licensing and explaining the composition of state licensing boards); *see also* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face AntiTrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1103 (2014) (finding that in two states, Florida and Tennessee, license-holders active in the profession have a majority on over ninety percent of boards).

7. Harfoush, *supra* note 3, at 147 (noting that the benefits of licensing are felt mainly by established practitioners).

8. *See* Edlin & Haw, *supra* note 8, at 1098.

9. *See New State Panel Begins Review of Professional Licenses*, INDIANAPOLIS BUS. J. (Sept. 18, 2014), ibj.com/new-state-panel-begins-review-of-professional-licenses/PARAMS/article/49594 (discussing a newly passed Indiana state bill that creates a Job Creation committee tasked with

faced with the systematic challenges of gaining influence over state legislatures—are not waiting around for legislative action and instead, are looking to the courts for assistance.[10] However, challenges to licensing regulations have, for the most part, been unsuccessful.[11]

B. Trends in the Funeral Home Industry

The funeral home industry is traditionally a localized practice.[12] Recently, it has become much more competitive as new businesses are seeking to break into the market and established businesses are looking to expand their operations.[13] Local practitioners and small funeral home businesses often feel threatened by this trend and have pushed back by lobbying for laws that make it harder for new businesses to enter the market and for existing ones to expand.[14]

Only two states do not have some type of law or regulatory scheme that prohibits unlicensed funeral directing.[15] In many states, the term "funeral directing" has been expanded to include a number of activities, including: (a) preparing the remains of a body; (b) arranging the logistical details of the funeral; and (c) selling related products and

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reviewing the state's myriad regulatory requirements for professionals). *See also* Benjamin Brown, *Audit Says NC Doing Bad Job of Ooverseeing Licensing Boards,* NEWS OBSERVER (Sept. 9. 2014), www.newsobserver.com/2014/09/10/4140847/audit-nc-doing-a-bad-job-of-overseeing.html (discussing how an audit of North Carolina's professional licensing boards concluded that the system is so deficient that there is no record of how many professional licensing boards there are).

10. *See* Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014).

11. Anthony B. Sanders, *Exhumation Through Burial: How Challenging Casket Regulations Helped Unearth Economic Substantive Due Process in Craigmiles v. Giles*, 88 MINN. L. REV. 668, 671 (2004) (noting that courts in the post-*Lochner* era have been hesitant to strike down laws under the substantive due process clause for fear that in doing so, they would be making policy judgments that are more suited for legislatures). *See also* Harfoush, *supra* note 3, at 152 (arguing that in recent cases, the courts have suggested that litigants upset with the status quo should seek recourse through the legislature).

12. Marsh, *supra* note 2, at 1329 (noting that up until the late 20th century, funeral services were performed by local churches and families).

13. Heffner v. Murphy, 866 F.Supp. 2d 358, 371 (M.D. Pa. 2012), *aff'd in part, rev'd in part*, 745 F.3d 56 (3d Cir. 2014).

14. *See, e.g.*, Craigmiles v. Giles, 312 F.3d 220, 225 (6th Cir. 2002); St. Joseph Abbey v. Castille, 712 F.3d 215, 219 (5th Cir. 2013); Powers v. Harris 379 F.3d 220, 225 (6th Cir. 2004) (all three of these cases involve challenges to laws that made it illegal to sell caskets without a funeral director's license).

15. David E. Harrington, *Markets: Preserving Funeral Markets with Ready-to-Embalm Laws*, 21 J. ECON. PERSP. 201, 202 (2007). Nineteen states and the District of Columbia explicitly require funeral directors to have embalming training and/or experience to become licensed. Fourteen additional states require funeral directors to have graduated from a mortuary science or funeral service school accredited by the American Board of Funeral Services. All accredited mortuary schools in the United States require courses in embalming for graduation. Forty-three states and the District of Columbia require applicants for a funeral director's license to have an embalmer's license or to have served as an apprentice or resident trainee to a licensed funeral director for periods ranging from one to three years.

services to the family.[16] Some states explicitly prohibit the sale of funeral services and products, such as caskets and urns, without a license.[17] Requirements for obtaining a funeral directing license differ by state, but most states require the completion of costly apprenticeship programs or education programs.[18] For example, many states require funeral directors to attend a two-year mortuary science school, which emphasizes an outdated curriculum that has not changed since the 1950s.[19] While these educational requirements may have been necessary at one point, some courts have found that they no longer serve a legitimate purpose.[20]

Supporters of these regulations feel they are needed to protect the industry and promote public health. But, many experts argue these regulations create high barriers to entry in the market and increase the cost of funeral services and products for consumers.[21] The average cost for a traditional funeral service in 2012 was $7,045—up $2,000 from 2000 and more than $6,000 from 1970.[22] The funeral home regulatory industry, comprised of established practitioners, has been blamed for advocating laws and regulations that thwart competition and have a

16. *See, e.g.*, N.C. GEN. STAT. § 90-210.20(k) (2011) ("'Practice of funeral service' means engaging in the care or disposition of dead human bodies or in the practice of disinfecting and preparing by embalming or otherwise dead human bodies for the funeral service, transportation, burial or cremation, or in the practice of funeral directing or embalming as presently known, whether under these titles or designations or otherwise; Practice of funeral service also means engaging in making arrangements for funeral service, selling funeral supplies to the public or making financial arrangements for the rendering of such services or the sale of such supplies."). *See also Occupational Outlook Handbook: Funeral Directors: What Funeral Directors Do*, BUREAU LAB. STAT., U.S. DEPT. LAB. (Mar. 29, 2012), http://www.bls.gov/ooh/Personal-Care-and-Service/Funeral-directors.htm #tab-2 (listing the common tasks of a funeral director).

17. Marsh, *supra note* 2, at 1334 n. 37 (noting that at least eleven states define "funeral directing" to include the sale of merchandise related to funerals or otherwise prohibit the sale of funeral goods without a license).

18. *Id.* at 1333.

19. *See* Brief of Appellees at 3, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591). *See also* Brief for the Funeral Consumers Alliance as Amicus Curia in Support of Appellees at 5, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591) (noting that despite the recognition that embalming is an outdated practice with no health or scientific benefits, many schools still require it as part of the curriculum, and many states still require embalming rooms in all funeral homes); *see also* Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002) (striking down a Tennessee law that required the completion of a mortuary science program for anyone that wanted to sell funeral services, emphasizing that the program, which included extensive training in embalming, was in no way related to advancing public health or the sale of caskets).

20. *Craigmiles*, 312 F.3d at 225 (6th Cir. 2002) (finding that since the plaintiffs merely wished to sell caskets, forcing them to receive education in handling dead bodies, disposing of dead bodies, and embalming, was unnecessary and burdensome).

21. Harfoush, *supra* note 3, at 148.

22. *See Statistics*, NAT'L FUNERAL DIRS. ASS'N, nfda.org/about-funeral-service-/trends-and-statistics.html (last visited Feb. 6, 2016) (full breakdown of funeral costs over the years).

negative effect on consumers.[23]

C. Circuit Court Split

A recent circuit court split has placed the constitutional spotlight on the funeral home industry and raised new questions about the substantive Due Process Clause.[24] Although the circuit court split is not the main focus of this Casenote, it illustrates the contentious battle ensuing over funeral home regulations and provides an appropriate backdrop to the discussion about Pennsylvania's funeral home regulations. The circuit split involves three cases addressing the same regulation prohibiting casket retailers from selling caskets in the state without obtaining a funeral director's license.[25]

In *Craigmiles v. Giles*, the Sixth Circuit Court of Appeals held that the regulation violated the Equal Protection and Due Process clauses of the Fourteenth Amendment.[26] In its ruling, the Sixth Circuit rejected the state's argument that protection of the local funeral home industry was a legitimate state interest that could be pursued.[27] The *Craigmiles* court found that the regulation bore no rational relation to the state's supposed goal of protecting the health and safety of the public and, instead, the regulation only advanced the goal of protecting the local business from outside competition, which the court found to be an illegitimate independent purpose.[28] In *St. Joseph Abbey v. Castille*, the Fifth Circuit Court of Appeals considered the same question.[29] Ultimately, the Fifth Circuit sided with the Sixth Circuit in *Craigmiles*, holding that the licensing law was enacted for the sole purpose of protecting local funeral directors from competition and accordingly, bore no relation to a legitimate state interest.[30]

In *Powers v. Harris*, the Tenth Circuit Court of Appeals reached a different conclusion by upholding a similar regulation.[31] Although the

23. *See Craigmiles*, 312 F.3d at 229 (invalidating a funeral director licensing requirement. Judge Bogg wrote "we invalidate only the General Assembly's naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers"). *See also* Brief of Appellees at 39, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591).

24. *Craigmiles*, 312 F.3d at 225; St. Joseph Abbey v. Castille, 712 F.3d 215, 219 (5th Cir. 2013); Powers v. Harris 379 F.3d 220, 225 (6th Cir. 2004).

25. *Craigmiles*, 312 F.3d at 225; *St. Joseph Abbey*, 712 F.3d at219; *Powers*, 379 F.3d at 225.

26. *Craigmiles*, 312 F.3d at 225.

27. *Id.*

28. *Id.* (noting that when the Tennessee legislature originally enacted the licensing law in 1951, the statutory definition of funeral directing did not include the sale of caskets. Twenty years later, the law was amended to include "the selling of caskets" under the definition).

29. *St. Joseph Abbey*, 712 F.3d 215.

30. *Id.*

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

Tenth Circuit applied the same rational basis test required by the substantive due process framework, it applied a standard more deferential to the government and held that the state's interest in protecting the local market was valid.[32]

The inconsistent results in these cases underscore the difficulties courts face while analyzing policy justifications underlying certain laws, as well as the varying standards courts adopt under the rational basis test.[33] This circuit split is one example of the legal battles that have ensued over controversial regulations in the funeral home industry—regulations that dictate how parties will be able to vie for control of the market. It is also important to note that while the outcomes of other cases hinged mainly on a substantive due process question, *Heffner v. Murphy* raised a Commerce Clause question as well, because the plaintiffs argued that the regulations were designed and maintained to give an advantage to in-state funeral home directors. It was the first case involving funeral home regulations to do so.

D. Pennsylvania's Funeral Home Regulations

Although many states have set up regulatory schemes that insulate local practitioners from outside competition,[34] Pennsylvania has far exceeded the norm by enacting and maintaining one of the most protectionist regulatory schemes in the country.[35] In 1952, Pennsylvania enacted the Funeral Director Law (FDL).[36] While the statute has been amended on occasion, there have not been significant changes since enactment of the law.[37] The purpose behind the FDL was to "provide for the better protection of life and health of the citizens . . . by requiring and regulating the examination, licensure and registration of persons and registration of corporations engaging in the care, preparation and

32. *Id.* at 1222 (in its ruling, the Tenth Circuit emphasized that there was no precedent to suggest that a state could not favor one industry over another. The Tenth Circuit also criticized the *Craigmiles* court, for employing a standard that was not deferential enough).

33. *See* Sanders, *supra* note 11, at 696 (noting that in light of recent decisions, fears that a more active rational basis test would lead to a usurpation of legislative power and that the Supreme Court has reserved a narrow area for striking down laws for violating economic substantive due process).

34. *See* Harrington, *supra* note 15.

35. Expert Report of David E. Harrington at 4, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591) (noting that Pennsylvania is the only state in the country that imposes all of the following regulations on funeral markets: (1) funeral homes may operate only one principal location and branch; (2) only licensed funeral directors may own funeral homes; (3) funeral directors may only practice at one principal location and a branch; (4) all funeral home locations must have an embalming preparation room; and (5) all home locations must have a full-time, dedicated supervisor).

36. 63 PA. STAT. ANN. §479.1 (2014).

37. Complaint at 15, Heffner v. Murphy, 866 F. Supp. 2d 358 (M.D. Pa. 2012) (No. 08-cv-990).

disposition of the bodies of deceased persons."[38] The Pennsylvania State Board of Funeral Directors (BFD) is the administrative body charged with enforcement of the law, meaning that the BFD is authorized to formulate rules and regulations to carry out the law's purpose.[39] The FDL provides that the BFD must be comprised of nine members, five of whom must be licensed funeral directors.[40] The Pennsylvania Funeral Directors Association (PFDA), the state's largest trade association of funeral directors, exerts unfettered influence over the BFD.[41] In fact, a majority of members serving on the BFD are simultaneously members of the PFDA.[42] Given that the PFDA's outspoken purpose is to "protect and promote the independent, family-owned funeral home and the traditional funeral," it is not surprising that the BFD has been accused of promulgating rules and regulations aimed at advancing the interests of established funeral directors instead of the funeral home market as a whole.[43] In fact, many people, both inside and outside the industry, feel the BFD is driven by anti-competitive and protectionist motives.[44] This likely is due, at least in part, to pressure applied by market veterans who see the increased competition in Pennsylvania's funeral home industry as a threat to their market share and an affront to the traditionally localized nature of the market.[45] Although the FDL's provisions are relatively straightforward, the BFD

38. Brief of Appellees at 4, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591) (Board Member Murphy, the PFDA's former counsel, even conceded that most funeral directors do not know the difference between the PFDA and the BFD).

39. 63 PA. STAT. ANN. § 479.16(a) (the board also is authorized to appoint an inspector or inspectors to "serve all processes and papers of the board, and [who] shall have the right of entry into any place, where the business or profession of funeral directing is carried on."). *See id.* § 479.16(b).

40. 63 PA. STAT. ANN. § 479.19(a) (the FDL provides that the board shall consist of "the Commissioner of Professional and Occupational Affairs, the Director of the Bureau of Consumer Protection in the Office of Attorney General, or his designee, two members appointed by the Governor, who shall be representing the public at large, and five members appointed by the Governor who shall be licensed funeral directors of good moral character and who shall also have been actively engaged in the practice of funeral directing for at least 10 years.").

41. Brief of Appellees at 3, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591).

42. *Id.*

43. *Id.* at 3-4 (it should also be noted that most members of the PFDA are "small, mom-and-pop businesses consisting of one to two people.").

44. *See* Brief for John F. Givnish as Amicus Curia in Support of Appellees at 3, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591) (arguing that the exceptions to the rules created by the BFD for family owned funeral directors serve no purpose other than to ensure that the dominance of small, family-owned funeral homes in Pennsylvania remains undisturbed by out-of-state competition).

45. *See* Complaint at 20-21, Heffner v. Murphy, 866 F. Supp. 2d 358 (M.D. Pa. 2012) (No. 08-cv-990) (pointing out that increased competition in the funeral home industry not only includes new funeral directors, but: (a) licensed insurance agents, who may be selling life insurance to fund pre-need policies; (b) insurance companies; (c) crematoriums and cemetarians and (d) market giants such as Costco beginning to sell caskets). *See also id.* at 21 (noting that over the past several years, the PFDA has expressed its concerns that the industry is "under attack" in newsletters, memos, and solicitations for money).

exerts considerable enforcement discretion, and has, at times, enforced the provisions rather selectively.[46]

E. The FDL's Regulatory Scheme

The regulatory scheme embodied in the FDL contains a number of distinct, yet complicated, regulations supposedly aimed at advancing the FDL's purpose: promoting the health and safety of the industry.[47] One of the most controversial regulations involves a restriction on who can possess an ownership interest in a funeral home.[48] Generally, a funeral home in Pennsylvania can be owned only by a licensed funeral director.[49] Pennsylvania, like many states, requires the completion of extensive training and education programs in order to become licensed.[50] Once licensed, funeral directors can operate the business as a sole proprietorship, partnership, professional corporation, or restricted business corporation (RBC).[51]

However, there are a number of exceptions to these licensure requirements. While a funeral home owner must generally possess a license, a license can be passed on to the licensee's estate or the licensee's widow upon his or her death.[52] Essentially, the license can be

46. *See* Heffner v. Murphy, 866 F. Supp. 2d 358, 381 (M.D. Pa. 2012), *aff'd in part, rev'd in part*, 745 F.3d 56 (3d Cir. 2014) (the district court struck down the FDL's provision granting the BFD the authority to inspect funeral homes, given that the provision did not impose any constraints on frequency, time, or scope, and given that the frequency, nature, and extent of an inspection, is usually up to the inspector). *See also* Brief of Appellees, Heffner v. Murphy, 745 F.3d 56 at 11 (3d Cir. 2014) (No.12-3591) (citing an Audit Report compiled by the state legislature, where findings of the report included that: (a) the BFD had a goal of inspecting each funeral home annually, but only half had been inspected in a fourteen-month period; (b) a current board report shows that some funeral homes have not been inspected in years; and (c) while some are not inspected for years, others receive multiple inspections).

47. 63 PA. STAT. ANN. § 479.1 (2014).

48. *Id.* § 479.8(a), (d), (e).

49. Brief for John F. Givinish as Amicus Curiae in Support of Appellees at 3 Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591); 63 PA. STAT. ANN. § 479.1 (2014); 63 PA. STAT. ANN. §479.2 (2014) ("the term 'funeral director' shall also mean a person who makes arrangements for funeral service and who sells funeral merchandise to the public incidental to such service or who makes financial arrangements for the rendering of such services and the sale of merchandise.").

50. 63 PA. STAT. ANN. § 479.3 (listing the requirements for licensure: each applicant shall have successfully completed a course of actual class work in didactic and laboratory studies in a school of embalming for a period fixed by the board at not less than 900 hours, nor more than 2,400 hours, and shall have completed two years as a resident trainee. Applicants must also successfully complete two years of academic work at a college or university accredited by the Department of Education, and a one year course at a mortuary college or university accredited by the American Board of Funeral Service Education Inc.).

51. 63 PA. STAT. ANN. § 479.8.

52. *Id.* § 479.8(a) (The board is authorized to issue a license to the estate of a deceased funeral director for a period not exceeding three years. If the license is transferred directly to a widow or widowers, there are no time limitations, as long as they remain unmarried and seek approval from the

"handed down" to the licensee's estate or widow. Individuals falling under this exception can circumvent the burdensome process of obtaining a license and can meet the FDL's requirements for funeral home ownership and operation merely by appointing a funeral director to manage and supervise the funeral home because, pursuant to the FDL, every funeral home must have a full-time dedicated supervisor who is a licensed funeral director.[53] The estate of a deceased funeral director may possess the license for up to three years, but a widow can possess the license forever.[54]

Additionally, the spouse, children and grandchildren of either a licensed funeral director or a deceased licensed funeral director may own the stock of an RBC.[55] This is the case even if the license is not "handed down" from a deceased funeral director, or, in the case of a deceased licensee's estate, the three year time limit for possessing the "handed down" license has expired.[56] An RBC is a corporate license issued to licensed funeral directors; it can only be issued to a Pennsylvania corporation that is formed for the sole purpose of conducting a funeral directing practice.[57] Therefore, corporations not incorporated under Pennsylvania law are ineligible for an RBC license.[58] Anyone who owns shares in an RBC can own and operate a funeral home, as long as they comply with all other rules and guidelines.[59] In order to receive and keep the license, a number of requirements must be met, including, but not limited to: (1) all shareholders of the corporation must be licensed funeral directors or family members of a licensed funeral director; (2) the corporation must have a licensed funeral director employed as a full-time supervisor and; (3) the corporation cannot own shares of stock or any property interest in another funeral establishment.[60] Individuals owning RBC shares can transfer those shares freely to their family members as long as the

board).

53. *Id.* § 479.8(a), (b)(6), (d), (e).

54. *Id.* § 479.8(a).

55. *Id.* § 479.8 (b)(4).

56. *Id.*

57. 63 PA. STAT. ANN. § 479.8(b).

58. *Id.*

59. *Id.*

60. *Id.* § 479.8 (b) (A full list of the requirements includes: (a) the corporation engages in no other business activity; (b) it holds no shares of stock or any property interest in any other funeral establishment; (c) one or more of its principal corporate officers is a licensed funeral director who also is a member of the board of directors; (d) all of its shareholders are licensed funeral directors or the members of the immediate family of a licensed funeral director or deceased licensed funeral director who was a shareholder at death; (e) the proper paperwork has been filed; and (f) the corporation has, for each place of business, registered with the board, the name of the licensed funeral director who will serve as the full-time supervisor).

transfer of those shares does not place the RBC in violation of the FDL requirements for receiving and maintaining a license.[61]

Under Pennsylvania law, there is only one way for an out-of-state corporation to own and operate funeral homes in the state: they must purchase a rare pre-1935 license.[62] These are shares of corporations that were incorporated for the purpose of owning funeral homes prior to 1935 and were grandfathered in by the FDL.[63] There are approximately seventy-five pre-1935 licenses in existence and, due to their rarity, these licenses are expensive and hard to find.[64] Any individual or corporation in possession of one of these pre-1935 licenses can own and operate a funeral home without obtaining a license.[65]

The FDL's provisions, taken together, severely limit the legal options for an out-of-state corporation seeking to expand its funeral home operation into Pennsylvania. The only avenue for such a corporation is to purchase one of the rare and expensive pre-1935 licenses.[66] One other key restriction under the FDL prohibits individuals in possession of any corporate license—whether it be an RBC or a pre-1935 license—from owning more than one restricted corporate license or own shares in more than one restricted corporation.[67] The FDL does not require any unlicensed owners—that is, owners who either are handed down a license from a deceased licensed funeral director, own a share in an RBC, or own a corporation with a pre-1935 license—to possess any skill, training, or knowledge in funeral directing.[68] They must only appoint a funeral director to serve as a full-time supervisor.[69]

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61. Heffner v. Murphy, 866 F. Supp. 2d 358, 390 n. 20 (M.D. Pa. 2012), *aff'd in part, rev'd in part*, 745 F.3d 56 (3d Cir. 2014) (noting the plaintiff's correctly pointed out that the FDL contains no restriction on the number of RBCs or the number of RBC shares. Owners routinely take advantage of this by transferring ownership shares to family members while continuing to manage the day-to-day operations of their facility).

62. 63 PA. STAT. ANN. §479.8(a) (2014). *See also* Heffner v. Murphy, 745 F.3d 56, 63 (3d Cir. 2014) (noting that prior to 1935, Pennsylvania issued funeral directing licenses to individuals and corporations, and that when the Pennsylvania General Assembly imposed restrictions on corporate licensure, the Pennsylvania General Assembly eventually allowed a total of seventy-five pre-1935 licenses to be grandfathered into the new law).

63. *Heffner*, 745 F.3d at 63.

64. Brief of John F. Givinish as Amicus Curia in Support of Appellees at 3, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591). *See also* Brief of Appellees at 17, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No.12-3591) (noting that pre-1935 licenses were once selling for around $100,000).

65. Brief of Appellees, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591).

66. *Id.* at 18. *See also* Heffner v. Murphy, 866 F. Supp. 2d 358, 388 (M.D. Pa. 2012), *aff'd in part, rev'd in part*, 745 F.3d 56 (3d Cir. 2014) (finding that the effect of the FDL provisions, was to prevent out-of-state corporations from entering the market, unless they purchase a pre-1935 license. This limitation heavily burdens out-of-state parties while benefiting in-state economic interests).

67. 63 PA. STAT. ANN. §479.8(b), (d) (2014).

68. *Id.* §§479.8(a), (b)(6).

69. *Id.*

To summarize, any out-of-state party seeking to own and operate a funeral home in Pennsylvania must either satisfy the burdensome requirements of licensure or purchase an interest in an expensive pre-1935 license.[70] However, the FDL creates an exemption for the families of licensed Pennsylvania funeral directors which enables them to circumvent these burdens.[71] It is important to note that the FDL regulations do not explicitly mention in-state residency; all of the exemptions apply to funeral directors *licensed* in the state of Pennsylvania, meaning that licensure exemptions could apply to the families of funeral directors licensed in Pennsylvania but living outside of the state.[72] Although the Third Circuit, in *Heffner*, acknowledged that the majority of funeral directors who obtain a license in Pennsylvania will choose to reside in Pennsylvania, the court emphasized this distinction when concluding that the regulatory scheme did not violate the Commerce Clause.[73]

1. The "One and a Branch" Restriction

The FDL not only imposes restrictions on who can own a funeral home in Pennsylvania, but it also imposes restrictions on the number of funeral home locations a party can own.[74] Generally, the FDL restricts ownership to two individual funeral homes—one principal location and one branch location.[75] This is known as the "one and a branch" restriction.[76] This restriction applies to any party authorized to own and operate a funeral home, regardless of whether they are family members being handed down a license, corporations possessing a pre-1935 share, or family members who are transferred shares of an RBC.[77] This regulation prevents out-of-state parties from "clustering," which is one of the primary advantages for out-of-state competitors and one of the only ways in which they can affordably and feasibly operate funeral

70. *See supra* text accompanying notes 62-68.

71. Aside from purchasing a pre-1935 share, which anybody can do, the only way that an unlicensed individual can own a funeral home is if they are related to a Pennsylvania funeral director.

72. 63 PA. STAT. ANN. §479.8(a), (b), (c) (2014).

73. Heffner v. Murphy, 745 F.3d 56, 76 (3d Cir. 2014).

74. 63 PA. STAT. ANN. §479.8(e) (2014).

75. *Id.* ("No licensed funeral director shall be eligible to apply for more than one restricted corporate license or own shares in more than one restricted corporation. Nor shall any licensed funeral director who obtains a restricted corporate license or holds shares in a restricted corporation have any stock or proprietary interest in any other funeral establishment, except a branch place of practice as authorized by subsection (e).").

76. Heffner v. Murphy, 745 F.3d 56, 71 (3d Cir. 2014).

77. 63 PA. STAT. ANN. §479.8(a), (e) (2014).

homes in Pennsylvania without residing in the state.[78] The term "clustering" describes the method by which firms open and operate numerous locations in one centralized area so they can share personnel across locations, lower labor costs, and operate a centralized facility where bodies are prepared.[79] In order for an out-of-state firm to "cluster" in Pennsylvania, it would have to purchase multiple pre-1935 licenses, but licensed Pennsylvania funeral directors can easily circumvent this restriction by transferring shares of an RBC to a family member.[80] For example, families in the funeral home industry can easily expand their operation simply by having the licensed funeral director transfer some of their RBC shares to another family member who would then be able to open a new facility.[81] The FDL does not contain any limitation on the number of RBC shares that a funeral director's family members may own, nor does it require the licensed funeral director to supervise facilities operated by family members.[82]

The inability to "cluster" negatively affects prospective funeral home owners attempting to break into the market by driving up costs.[83] It also disproportionately affects out-of-state parties since they are forced to equip each funeral home with a preparation room and cannot consolidate embalming operations in one location—a strategy that would undoubtedly make it easier for out-of-state parties who cannot

78. Brief of Appellees at 25, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591). Expert Report of David E. Harrington at 19, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591).

79. Expert Report of David E. Harrington at 18, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No.12-3591) (finding that funeral homes can lower the average cost of producing funerals by operating multiple funeral homes in close proximity to one another. This increases productivity of the funeral directors, because they can be moved to where they are needed. Clustering decreases the average cost of funerals because embalming facilities are operated closer to capacity and directors, embalmers, and cosmetologists are kept busier, allowing a firm to reduce hiring). Brief for John F. Givnish as Amicus Curiae in Support of Appellees at 4, Heffner v. Murphy, 745 F.3d 56 (3d. Cir. 2014) (No. 12-3591) (arguing that the FDL's ownership limitations prevents out-of-state parties from utilizing the benefits of clustering; out-of-state parties have to either purchase multiple pre-1935 licenses to own and operate more than two facilities, while licensed directors can freely transfer their shares in "RBCs" to enable family members to open multiple facilities.)

80. Brief of Appellees at 25, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591).

81. Expert Report of David Harrington at 31, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591) (while the FDL limits who can own a funeral home, it does not restrict who can own or lease the assets of a funeral home. One member of the board sold substantially all of the assets of his funeral home to an unlicensed corporation, while remaining a nominal shareholder of the funeral home entity).

82. 63 PA. STAT. ANN. §479.8(b)(4) (2014). *See also* Brief for John F. Givinish as Amicus Curiae in Support of Appellees at 4, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591).

83. Heffner v. Murphy, 866 F. Supp. 2d 358, 400 (M.D. Pa. 2012), *aff'd in part, rev'd in part*, 745 F.3d 56 (3d Cir. 2014) (citing a report estimating that today it would cost between $193,000 and $223,000 to build and equip a new preparation room).

micromanage each facility like a local practitioner.[84]

F. Pennsylvania General Assembly Investigates and Makes Findings

In 1994, the Pennsylvania General Assembly Legislative Budget and Finance Committee (the Committee) conducted a performance audit of the State Board of Funeral Directors and published its findings in an Audit Report.[85] The Committee found that the FDL is "essentially the same in purpose and scope as laws dating back to the 1930s" and that "advances in mortuary science and health regulation have virtually eliminated the public health risks associated with preparation and disposition of the deceased."[86] The Audit Report concluded that the BFD, through its regulations, was not performing functions that were essential to public health and safety.[87] Chief among the report's findings was that the FDL lacked "consumer protection, and imposes upon funeral directors and funeral homes requirements which add to the cost of funerals but do not really benefit or protect the general public."[88] Finally, the Audit Report verified what many had known for a long time: the Pennsylvania funeral home market is dominated by small, family-owned business. Furthermore, the audit concluded that the FDL's various provisions perpetuate this trend by shielding the market from outside competition.[89] In light of the Committee's findings, the BFD recommended that the FDL be amended to address the growing concerns expressed in the Audit Report, but the Pennsylvania General Assembly has not acted on these recommendations to modify the law or limit the BFD's enforcement power.[90]

III. THE THIRD CIRCUIT'S DECISION IN *HEFFNER*

A. Dormant Commerce Clause

The Commerce Clause grants Congress the authority to regulate commerce among the several states.[91] The dormant Commerce

84. *Id.*

85. PA. GEN. ASSEMB., LEGISLATIVE BUDGET & FIN. COMM, PERFORMANCE AUDIT: STATE BOARD OF FUNERAL DIRECTORS (1994).

86. *Id.* at 0705 and 0694-95.

87. *Id.* at 0698.

88. *Id.* at 0914 (the Board Chairman even testified that the FDL serves the interests of Pennsylvania Funeral Directors and not the general public). *See also id.* at 1321.

89. *Id.* at 0842.

90. Brief of Appellees at 3, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591). *See also* Complaint at 6, Heffner v. Murphy, 866 F. Supp. 2d 358 (M.D. Pa. 2012) (No. 08-cv-990).

91. U.S. CONST. art. I, § 8, cl. 3.

Clause—a judicially created doctrine—was born when the Supreme Court held that the Commerce Clause does not only grant Congress the sole power to regulate interstate commerce, but it also prevent states from passing laws and regulations that interfere with interstate commerce.[92] The Supreme Court subsequently expounded on this interpretation to hold that the dormant Commerce Clause prevents states from treating in-state economic interests and out-of-state economic interests differently in a way that provides in-state parties with an unfair advantage over out-of-state parties.[93] A dormant Commerce Clause analysis involves a two-prong test: (1) a court must determine whether a law discriminates against out-of-state commerce in either purpose or effect, and if it is discriminatory, the law must withstand heightened scrutiny; and (2) if a law is not found to be discriminatory in either purpose or effect, a court must employ a balancing test to determine whether the law's burden on interstate commerce substantially outweighs its putative local benefits.[94] A state law is discriminatory in effect when, in practice, it affects similarly situated entities in a market by imposing disproportionate burdens on out-of-state interests and conferring advantages upon in-state interests.[95] The second prong of the test was established in *Pike v. Bruce Church*, and is commonly referred to as the *Pike* balancing test.[96] Courts have considerable discretion under the first prong, and, because of this, there is wide disagreement over how deferential a dormant Commerce Clause analysis should be.[97] While some courts are more accepting of a state's articulated reasons for

92. *See* Quill Corp. v. N.D., 504, U.S. 298, 309 (1992) (noting that the U.S. Constitution does not say anything about the protection of interstate commerce in the absence of any action by Congress). *See also* Gibbons v. Ogden, 22 U.S. 1, 9 (1824) (Johnson, J., concurring) (suggesting that the Commerce Clause is more than an affirmative grant of power; it has a negative implication as well. The Clause, "by its own force" prohibits states from interfering with interstate commerce, even if Congress has not acted.)

93. *See* Granholm v. Heald, 544 U.S. 460, 472 (2005) (noting that the framers wanted to avoid the tendencies of economic balkanization that plagued the early colonies). .

94. Heffner v. Murphy, 745 F.3d 56, 70 (3d Cir. 2014). *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). *See also* United States v. Lopez, 514 U.S. 549, 579-80 (1995) (explaining that the *Pike* Balancing Test is needed because "states may not impose regulations that place an undue burden on interstate commerce, even where those regulations do not discriminate."). *See also* Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93 (1994).

95. *Or. Waste Sys.*, 511 U.S. 93.

96. *Pike*, 397 U.S. 137 (striking down an Arizona law that prohibited interstate shipment of cantaloupes that did not meet strict packaging requirements, finding that the state's interest in protecting the reputation of growers was legitimate, but not justified, in light of the burden imposed by the law on interstate commerce). *But see* Am. Trucking Ass'ns v. Mich. PSC, 545 U.S. 429 (2005) (upholding a Michigan law that imposed a flat $100 annual fee on trucks engaged in intrastate commercial hauling. Since the law only affected activity within the state, it did not have an effect on interstate commerce).

97. Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1213 (1986) (noting that the criteria for determining the validity of state statutes effecting the Commerce Clause has varied widely).

a law,[98] other courts heavily scrutinize the policy justifications behind a law and attempt to discern a hidden motive not explicit in the language of a law.[99] Similarly, some courts are reluctant to look at a law's practical impact if it does not facially discriminate based on state interests.[100] Conversely, other courts do not hesitate to find a discriminatory effect despite the absence of facially discriminatory language.[101] In *Heffner v. Murphy*, the Third Circuit was reluctant to look beyond the language of the law, discern any hidden motives, or consider the broad impact of the law, and, instead, emphasized the FDL's neutral language with respect to Pennsylvania residency.[102]

B. The Third Circuit's Approach in Heffner

The Third Circuit began its analysis by first looking at whether the FDL discriminates against interstate commerce in either its purpose or its effect.[103] The plaintiffs in *Heffner* maintained that all of the FDL's provisions, taken together, had the effect of imposing high barriers to entry on out-of-state parties, thereby violating the dormant Commerce Clause.[104] However, the Third Circuit decided to analyze each challenged provision separately.[105]

1. The "One and a Branch" Limitation

The plaintiffs in *Heffner* argued that the one and a branch limitation negates the advantage out-of-state competitors would gain by clustering, thereby discriminating in favor of small, family-owned Pennsylvania funeral homes.[106] The plaintiffs also challenged the state's claim that

98. *See Heffner*, 745 F.3d 56 (upholding Pennsylvania's controversial funeral home regulations on the grounds that the regulations contained no explicit discriminatory language).

99. *See* Jones v. Gale, 470 F.3d 1261 (8th Cir. 2006) (striking down a bill that favored in-state farmers on the grounds that the legislative history leading up to the voter approved amendment evinced a discriminatory intent).

100. *See Heffner*, 745 F.3d at 72.

101. *See* Family Winemakers of Cal. v. Jenkins, 592 F.3d 1, 9-17 (1st Cir. 2010) (striking down a Massachusetts statute that mandated differential distribution methods of wines based on the size of the winery on the grounds that the law, despite containing no discriminatory language, had the effect of advantaging Massachusetts wineries).

102. *Heffner*, 745 F.3d at 72.

103. *Id.* at 70.

104. Brief for the Funeral Consumers Alliance as Amicus Curiae in Support of Appellees at 1-4, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591).

105. Heffner v. Murphy, 745 F.3d 56, 71 (3d Cir. 2014).

106. *Id.* at 71. *See also* Brief for John F. Givnish as Amicus Curiae in Support of Appellees at 5, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591) (highlighting interrogatory answers submitted to the district court whereby it was admitted that the ownership restrictions are intended to "serve the legitimate interest in having a local business owned by local people").

the restriction was needed to preserve the fairness of the marketplace and prevent corporate monopolization.[107] In support of this argument, the plaintiffs pointed to the FDL's exemption for families of Pennsylvania licensed funeral directors, which allows them to transfer RBC shares freely and open multiple funeral homes, as evidence that the state was being duplicitous and failing to meet its own purported goal.[108] According to the plaintiffs, the FDL's obvious goal is to protect small, high-cost Pennsylvania funeral homes, because a licensed funeral director practicing in another state cannot open a location in Pennsylvania without violating the one and a branch provision.[109] Even if the court was unable or unwilling to discern a discriminatory purpose in light of the evidence presented, the plaintiffs still urged the court to find a discriminatory effect.[110] The thrust of the plaintiffs' overarching argument was that the FDL's discriminatory purpose and effect could not be justified by any legitimate goal the state was pursuing and, therefore, the FDL should be invalidated under the first prong.[111]

Furthermore, the plaintiffs maintained that even if the court did not find that the FDL discriminated in either purpose or effect, it should still be struck down under the *Pike* balancing test because the FDL's discriminatory impact outweighs its putative local benefits—benefits that, according to the plaintiffs, amount to nothing more than having a local industry owned by local people.[112] The plaintiffs claimed that this was not a legitimate benefit because "preservation of a local industry by protecting it from interstate competition is the type of protectionism" that the Commerce Clause prohibits.[113] To prove that the FDL's discriminatory impact outweighed any putative local benefits, the plaintiffs presented numerous economic studies supported by economic data.[114] These studies showed that the market in Pennsylvania was dominated by Pennsylvania businesses and that the FDL's provisions

107. Heffner v. Murphy, 866 F. Supp. 2d 358, 390 (M.D. Pa. 2012), *aff'd in part, rev'd in part*, 745 F.3d 56 (3d Cir. 2014).

108. Brief of Appellees at 28, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591) (arguing that the FDL cannot possibly advance the goal of preventing market domination when a licensed Pennsylvania funeral director can own any number of funeral homes by transferring RBC shares to family members; the fact that many members on the board own more than 10 funeral homes is evidence of this).

109. Brief of Appellees at 34, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591).

110. Brief of Appellees at 25, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591) (arguing that the FDL has the effect of discriminating against out-of-state interests since out-of-state funeral home owners cannot exploit the advantages of clustering).

111. Heffner v. Murphy, 866 F. Supp. 2d 358, 384 (M.D. Pa. 2012), *aff'd in part, rev'd in part*, 745 F.3d 56 (3d Cir. 2014).

112. *Id.* at 384.

113. *Id.*

114. *Id.*

were actually harming the market and consumers.[115]

The Third Circuit found none of these arguments persuasive.[116] Despite the plaintiffs' insistence that the court should look beyond the text of the statute, the Third Circuit focused primarily on the neutral language of the FDL provisions, which does not facially discriminate against out-of-state residents.[117] Rather, the FDL treats all parties the same with respect to residency.[118] While the Third Circuit recognized that the law probably makes it more difficult for out-of-state funeral home directors to practice in the state and that the vast majority of individuals who obtain a Pennsylvania funeral directing license will choose to reside in-state, it did not subject the law to heightened scrutiny because the FDL "operates evenhandedly as to both in-state and out-of-state interests."[119] Although out-of-state funeral directors cannot utilize the advantages of "clustering," the Third Circuit found that the neutral language of the law meant that all interests were burdened in the same way under the FDL.[120] The key distinction that ultimately dictated the outcome for the Third Circuit was that all of the FDL provisions and exemptions were predicated on Pennsylvania *licensure* and not Pennsylvania *residency*;[121] a licensed funeral director who lives in Ohio and a licensed funeral director who lives in Pennsylvania both are barred from owning more than two establishments.

Finding that the one and a branch restriction did not discriminate in either purpose or effect, the Third Circuit looked at the overall effect of the provision to determine whether it disproportionately burdened out-of-state interests under the second prong.[122] The Third Circuit ultimately found that the one and a branch provision survived the *Pike* balancing test.[123] Once again, the Third Circuit emphasized that the neutral language of the law signaled that the restriction was imposed equally on both out-of-state and in-state parties.[124] For that reason, the Third Circuit viewed the provision as a "burden on commerce" but not a

115. *See* Expert Report of David Harrington at 15, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591) (noting that there is a disproportionately high number of funeral homes in Pennsylvania owned by small family-owned businesses). *See also Heffner*, 866 F. Supp. 2d at 385 (arguing that an excessive number of small funeral homes performing fewer funerals actually increases costs for consumers, because the establishments are forced to raise prices)

116. Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014).

117. *Id.* at 72.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Heffner*, 745 F.3d at 73 (noting that the FDL imposes the same benefits on Pennsylvania residents as it imposes on non-residents).

122. *Id.*

123. *Id.*

124. *Id.*

"discriminatory burden on interstate commerce."[125] Essentially, the economic realities of Pennsylvania's funeral home market could not be attributed to the one and a branch provision if the provision did not, in theory, make a distinction based on residency.

2. Licensing Restrictions

The plaintiffs in *Heffner* also sought to invalidate the FDL's licensure provisions regulating who can own and operate a funeral home in Pennsylvania under the dormant Commerce Clause test.[126] The plaintiffs argued that while out-of-state parties must either fulfill the burdensome process of licensure or buy an expensive pre-1935 share, the families of Pennsylvania funeral directors are exempted from these requirements.[127] The Third Circuit's analysis of the FDL's licensing restrictions was similar to its analysis of the one and a branch provision in the sense that the Third Circuit emphasized the neutral language of the provisions.[128] The Third Circuit found that, because the FDL's provisions do not discriminate with respect to residency, the FDL did not "erect a barrier" protecting in-state interests from out-of-state competition.[129] For example, under the FDL, all general corporations are ineligible for a license, regardless of their location.[130] Furthermore, anyone, regardless of residency, can obtain a license under the FDL and enjoy the same benefits that the FDL grants all other licensees.[131] With respect to state residency, the FDL's neutrality was enough to shield it from further judicial scrutiny. The Third Circuit concluded that the FDL did not discriminate in either effect or purpose against out-of-state residents, and it declined to draw inferences of the FDL's purpose or effect from extrinsic evidence proffered by the plaintiffs absent explicit language to indicate a discriminatory purpose or effect.[132] The Third Circuit's analysis of this provision differed drastically from the district court's approach; the district court, when scrutinizing the provision's purported rationale and ascertaining the impact of the FDL on out-of-state parties, placed significant weight on findings made by the BFD and studies quantifying the economic impact of the provision.[133] For the

125. *Id.*

126. *Heffner*, 745 F.3d at 73.

127. *Id.* at 73-76.

128. *Id.* at 74.

129. *Id.*

130. 63 PA. STAT. ANN. §479.8 (b) (2014).

131. *Id.* §479.8(b), (a). *Heffner*, 745 F.3d at 75 (pointing out that family members qualifying for the exemptions may live in another state while still enjoying the benefit).

132. *Id.*

133. Heffner v. Murphy, 866 F. Supp. 2d 358, 398-99 (M.D. Pa. 2012), *aff'd in part, rev'd in*

district court, the absence of any explicit discriminatory language in the FDL did not preclude a finding that the FDL has a discriminatory effect and purpose or that the FDL warranted invalidation under the *Pike* balancing test.[134]

IV. CRITICISM OF THIRD CIRCUIT'S DECISION IN *HEFFNER*

The Third Circuit's decision to focus primarily on the FDL's language while blindly accepting the state's articulated goals, despite evidence suggesting that the goals were not being advanced, stands in stark contrast to approaches taken by other courts.[135] It also highlights the different approaches courts will employ when presented with a dormant Commerce Clause question. More specifically, the difference is centered on how deferential a court should be towards a legislature when attempting to discern a law's purpose and effect. The Third Circuit's approach in *Heffner* demonstrates a highly deferential approach—an approach where a court is hesitant to discern a law's underlying purpose or effect by looking at extrinsic evidence out of fear that it might usurp legislative power. With this approach, courts ignore extrinsic evidence that has the tendency to refute, or at least weaken, the state's policy justifications for a law. Furthermore, the Third Circuit's decision to analyze each of the provisions separately, without considering the cumulative impact of the provisions, is an approach that should be eschewed in favor of one that looks at the collective impact of individual provisions.

A. The Third Circuit's Decision to Separate the FDL Provisions

The Third Circuit's decision to analyze each FDL provision separately disregards the practical function of laws and regulatory schemes. A regulatory scheme must be viewed holistically when discerning its purpose and effect. Rarely is it the case that the individual provisions embodied in a statutory scheme function independently of one another. A holistic approach is more appropriate when courts must discern legislative intent. Courts, when discerning legislative intent, have acknowledged that words or phrases must be viewed in the context

part, 745 F.3d 56 (3d Cir. 2014) (highlighting the board's own recognition that the FDL's ownership restriction is inconsistent with its policy permitting one funeral director to assist another funeral director to rebut the state's claim that the provision promotes public health and safety. The court also pointed to the board's recognition that this area needs clarification so that in-state and out-of-state interests are not burdened by the threat of prosecution to illustrate the burden placed on interstate commerce).

134. *Id.*

135. *See* Jones v. Gale 470 F.3d 1261 (6th Cir. 2006). *See also* Family Winemakers of Cal. v. Jenkins, 592 F.3d 1 (1st Cir. 2010).

of the comprehensive statutory scheme.[136] This principle of statutory interpretation should also apply to a dormant Commerce Clause analysis because discerning legislative intent is an integral part of ascertaining the purpose of a law. Some lower courts have applied this principle to a dormant Commerce Clause analysis, concluding that the purpose of a statute must be discerned from the statute as a whole, not its isolated bits.[137] Although individual provisions in a comprehensive regulatory scheme might be facially non-discriminatory, the law or regulatory scheme embodying those individual provisions can indicate a discriminatory effect or purpose that is masked by the facially neutral language of each individual provision. This is especially true if individual provisions each have a negligible effect on out-of-state parties but have a much more profound effect when functioning together.

Separating a law's individual provisions may be easier for courts that are wary of usurping judicial power by pointing to a law's incidental impact as evidence of a discriminatory effect or purpose. However, the Commerce Clause framework requires more than a naked inquiry into the language of each individual provision; it requires courts to examine the context surrounding a challenged law.[138] The Third Circuit ignored evidence showing a marketplace in which in-state interests thrived mainly because the individual provisions, according to the Third Circuit, could not *in theory* have that effect. But state laws that alter conditions of competition to favor in-state interests over out-of-state competitors in a market have always been invalidated,[139] regardless of how facially neutral the individual provisions may be.[140] The Third Circuit's

136. Edwards v. Aguillard, 482 U.S. 578, 594 (1987) (the plain meaning of the statute's words, enlightened by their context and contemporaneous legislative history, can control the determination of legislative purpose). *See also* Dolan v. United States Postal Serv., 546 U.S. 481, 486 (2006) (noting that "interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities to inform the analysis); Davis v. Mich. Dep't of Treasury, 489 U.S. 803 (1989) (noting that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"); Kenneth A. Klukowski, *Severability Doctrine: How Much of a Statute Should Federal Courts Invalidate?*, 16 TEX. REV. L. & POL. 1, 50 (2011) (when examining statutes—especially long and complex statutes—readers must get a gestalt of the statute and derive a sense of the overall scheme created by the statute).

137. Alliance of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 37-38 (1st Cir. 2005) (focusing on the original statue and the two added amendments to determine whether the law had a discriminatory purpose or effect).

138. *See* S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 596 (8th Cir. 2003) (pointing to indications from the drafters of an amendment, such as a "pro" and "pro-con" statement compiled by the Secretary of State and disseminated to voters).

139. Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 376-77 (1964).

140. Maine v. Taylor, 477 U.S. 131, 138 (1986) (even if a state law responds to legitimate local concerns and is not discriminatory either in its purpose or on its face, the law could discriminate arbitrarily against interstate commerce by having a discriminatory effect).

decision to separate the challenged provisions foreclosed a proper inquiry into the law's discriminatory effect. This is because the current market conditions in Pennsylvania cannot be attributed to any one of the FDL's individual provisions, given that the provisions operate evenhandedly in theory. The current market conditions can only be attributed to the FDL as a whole. If the Third Circuit had not analyzed the individual provisions separately, it may have been easier and more feasible to attribute the conditions of Pennsylvania's funeral home market to the FDL. Because the Third Circuit decided to separate the FDL's provisions, its inquiry into the FDL's effect on out-of-state parties fell far short of what is demanded by the Commerce Clause.

B. The Third Circuit's Deferential Standard

The Supreme Court of the United States has made it unequivocally clear that while the language of a law may not evince a discriminatory purpose or effect, the law may still do so by its practical effect and design.[141] However, different courts have applied varying degrees of scrutiny and deference when deciding whether a law violates the dormant Commerce Clause.[142] Some courts handling a dormant Commerce Clause challenge are more critical of the arguments advanced by the state in support of a law, and are more willing to draw conclusions about legislative intent based on the extrinsic evidence offered.[143] Examples of evidence that some circuit courts consider include: (1) statements by lawmakers and decision makers; (2) the sequence of events leading up to a law's passage; and (3) whether the link between the state's purported goal and the means used to achieve

141. C & A Carborne v. Town of Clarkstown, 511 U.S. 383, 394 (1994) (striking down a local ordinance that required all solid waste generated in the town to pass through its waste recycling center on the grounds that it increased the cost for out-of-state interests to dispose of their waste, deprived out-of-staters access to the local market, and discriminated by allowing only the favored operators to process waste in the town).

142. *See* Jones v. Gale, 470 F.3d 1261 (8th Cir. 2006) (striking down a Nebraska farm law on the grounds that, despite the law's non-discriminatory language, the goal of the law was to benefit Nebraska farmers). *See also* Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014).

143. Smithfield Foods Inc. v. Miller, 367 F.3d 1061, 1065 (8th Cir. 2004) (courts look to indirect and direct evidence to determine whether a state adopted a statute with a discriminatory purpose. This evidence can include: (1) statements by lawmakers; (2) the sequence of events leading up to the statute's adoption; (3) the state's consistent pattern of disparately impacting members of a particular class of persons; (4) the statute's historical background; and (5) the statute's use of highly ineffective means to promote the legitimate interest asserted by the state). *See also* Waste Mgmt. Holdings v. Gilmore, 252 F.3d 316, 336 (4th Cir. 2001) (listing the following factors as important: (1) evidence of a consistent pattern of actions by the decision-making body disparately impacting members of a particular class; (2) historical background of the decision, which may take into account any history of discrimination; (3) specific sequence of events leading up to the act and; (4) contemporary statements by decision makers on the record in minutes or in their meetings).

that goal is tenable.[144] The consideration of these factors reflects a standard that is less deferential to legislatures and one that heavily scrutinizes the link between the state's articulated goal and the policy itself. However, the Third Circuit in *Heffner* failed to consider these or any other factors commonly considered by courts.[145] Unlike the District Court, the Third Circuit placed very little weight on extrinsic evidence that challenged the state's purported goal and indicated an underlying discriminatory intent.[146] Additionally, the Third Circuit emphasized that the FDL provisions are facially non-discriminatory with respect to in-state residency and refused to draw an inference of discriminatory effect or purpose from evidence highlighting an uncompetitive marketplace, despite overwhelming evidence of the FDL's discriminatory effect.[147]

Some courts have found that laws have a discriminatory purpose or effect even though the language of the law in question is neutral with respect to state residency.[148] In *Jones v. Gale*, for example, the Eighth Circuit was faced with a voter-approved amendment to the Nebraska Constitution. The amendment prohibited farming in Nebraska by corporations and syndicates, but carved out an exception for "family farm or ranch corporations" defined as corporations in which at least one family member resided on or *engaged in the daily operation* of the farm.[149] Despite acknowledging that the language of the law was facially neutral with respect to state residency because the term "engaged in the daily operation of a farm" applied to out-of-state residents as well, the Eighth Circuit rejected the state's argument that the voter-approved amendment did not favor Nebraska residents.[150] In reaching its conclusion, the Eighth Circuit looked at the history leading up to the amendment, which revealed that the state was encouraging

144. *Smithfield Foods*, 367 F.3d 1061; *Gilmore*, 252 F.3d 316.

145. *See Heffner*, 745 F.3d at 70-77.

146. Heffner v. Murphy, 866 F. Supp. 3d 358, 398 (M.D. Pa. 2012), *aff'd in part, rev'd in part*, 745 F.3d 56 (3d Cir. 2014). *Heffner*, 745 F.3d at 70-77.

147. Expert Report of David E. Harrington at 14-15, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591) (citing studies which show that Pennsylvania's strict regulatory scheme decreases the number of crematories, increases the number of small-independently owned funeral homes, and drives up costs for consumers).

148. Jones v. Gale, 470 F.3d 1261, 1267 (8th Cir. 2006) (finding that an interstate commerce claim is not precluded by the absence of an express prohibition on non-resident ownership or the fact that in-state corporations will suffer some negative impact). *See also* Family Winemakers of Cal. v. Jenkins, 592 F.3d 1 (1st Cir. 2010) (striking down a Massachusetts law that established different methods of distribution for "small" and "large" wineries on the grounds that, since most of the wineries in the state were small, the law had a discriminatory effect and purpose, despite the fact that the law only discriminated with respect to the size of wineries, and not with respect to in-state residency).

149. *Jones*, 470 F.3d 1261.

150. *Id.* 1267-70.

voters to protect Nebraska farms by passing the amendment.[151] The Court found that the state appropriately made the logical assumption that most people who are engaged in the daily operation of a Nebraska farm probably will be Nebraska residents.[152] According to the Eighth Circuit, because the amendment's exception was for corporations in which "a family member resides on or *engages in work on* Nebraska farm land," the language was a naked attempt to hide the discriminatory intent of the law by substituting language that was neutral with respect to state-residency.[153] The First Circuit also has found that a law can discriminate in purpose and effect despite an absence of discriminatory language.[154] In doing so, the First Circuit pointed to extrinsic evidence showing that the law significantly benefitted in-state businesses at the expense of out-of-state businesses.[155] It also noted that even without examining the extrinsic evidence, it was clear that in-state businesses could maximize efficiency under the law.[156]

The Third Circuit in *Heffner* focused primarily on the language of the law, which should be the first step in a dormant Commerce Clause analysis. However, the Third Circuit should have placed more weight on other factors, such as the link between the state's articulated goal and the FDL provisions; any relevant findings made by decision-making bodies; and the broad economic impact of the law. When closely scrutinizing the link between the state's goal and the FDL licensing scheme, the Third Circuit had enough extrinsic evidence to reach its own conclusions about that link without overstepping its bounds. Given that the FDL makes exceptions for RBC's, it is clear that the state's articulated goal of preventing monopolization is not being achieved by the FDL. The exception carved out for RBC's effectively gives directors licensed in Pennsylvania the unrestricted ability to expand their operations.

The Third Circuit's continued insistence that the exception applies to everyone equally might seem to neutralize this argument, but this is

151. *Id.*

152. *Id.*

153. *Id.* (emphasis added).

154. *Family Winemakers*, 592 F.3d at 9-15 (plaintiffs challenged a Massachusetts law that allowed "small" wineries to distribute directly to consumers, but forced "large" wineries to either purchase a direct shipping license or sell their wine through wholesalers. Almost all of the wineries in Massachusetts, at the time, qualified as "small" wineries under the law. The court rejected the state's argument that since the law treated all "small" wineries the same, its goal was to provide a competitive advantage to all small wineries in the country.).

155. *Id.* at 11 (noting that after the first year the law was in effect, Massachusetts's wineries distributed twenty-nine percent of their annual production through wholesalers and seventy-one percent through direct shipping to consumers).

156. *Id.* at 11-12.

where the Third Circuit erred in its analysis. Although the FDL is non-discriminatory with respect to residency, it still treats in-state and out-of-state economic interests differently by discriminating with respect to licensure, because the FDL advances the interests of funeral homes licensed in Pennsylvania. While licensure is not directly attached to residency, there is a strong and substantiated connection between Pennsylvania licensure and Pennsylvania residency. Also, Pennsylvania licensed directors are practicing in the state, regardless of where they live, indicating that the FDL's exceptions are directly benefiting Pennsylvania businesses. The Third Circuit could have easily made this connection, as the Supreme Court has never suggested that an in-state interest must be predicated solely on in-state residency.[157]

Under the FDL, an out-of-state party would have to comply with Pennsylvania's licensure requirements just to be eligible for an RBC, which can then be freely transferred upon procurement.[158] The one and a branch restriction makes moving to Pennsylvania an unwritten requirement for owning and operating funeral homes in the state, given that operating only two establishments from out-of-state would not be feasible. Because of this, the FDL licensing provisions are clearly designed to give in-state parties an advantage. In *Jones*, the Eighth Circuit recognized that the majority of people working on Nebraska farms are Nebraska citizens. Similarly, the majority of licensed funeral directors practicing in Pennsylvania are residents of the state.[159] Therefore, the majority of people benefiting from the licensing and ownership restrictions are Pennsylvania residents with no out-of-state competition. These ownership and licensing restrictions impose barriers on out-of-state parties that limit their participation in the market without advancing any legitimate goal. The existence of barriers that unduly burden out-of-state parties is all that is needed for a dormant Commerce Clause violation; a plaintiff does not need to prove that there is an absolute prohibition on out-of-state business.[160]

The record was filled with evidence indicating that the FDL's purpose has fallen out of line with the FDL's provisions. This conclusion is further supported by the lack of changes made to the FDL's provisions in the past fifty years despite a changing landscape. Aside from the

157. Bacchus Imports, Ltd. v. Dias 469 U.S. 263, 269 (1984) (holding that the undisputed motivation for the law in question was to aid Hawaiian industry).

158. *See supra* Part II of this Casenote.

159. *See* Brief for John F. Givinish as Amicus Curiae Supporting Appellees at 4, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591) (pointing to reports finding that it is common for a funeral director to reside in the funeral home with his family, and also noting that as a practical matter, Pennsylvania funeral directors live in Pennsylvania with their families).

160. *See* Jones v. Gale, 470 F.3d 1261, 1267 (8th Cir. 2006) (an interstate commerce claim is not precluded by the absence of an express prohibition on non-resident ownership).

BFD's own recognition that some of the policies were nonsensical and unnecessary,[161] there was also the Audit Report finding that the industry had become dominated by small, family-owned businesses and that some of the provisions were no longer related to the FDL's initial goal.[162] While the Audit Report is not direct evidence of legislative intent at the time of the FDL's passage, it does prove that a decision-making body has concluded that something has gone awry with the FDL. This evidence should have quelled any fears the Third Circuit had about usurping legislative power, because it indicates that the legislature also was questioning the FDL's efficacy and necessity in light of market shifts and technological changes.

C. Economic Protectionism as a Legitimate State Interest

The Third Circuit's dormant Commerce Clause analysis cannot escape the difficult question of whether protecting a local market is a legitimate state interest, and, if so, how far the state may go in protecting the local market. While this question may not be an explicit component of the dormant Commerce Clause framework,[163] in many cases, it still informs a court's ultimate decision on a dormant Commerce Clause challenge. For example, the BFD in *Heffner* articulated three reasons for the FDL's licensing restrictions and exceptions: (1) disfavoring ownership of funeral homes by unlicensed individuals or corporations; (2) advancing the public interest in the continued operation of a funeral home after the licensee's death; and (3) alleviating the financial loss to survivors who might find themselves in a precarious situation.[164] The second and third reasons are tied to protection of a local market. Although it may be argued that the third reason is aimed at protecting an individual—namely, the estate or family member of a deceased funeral director—the reason for granting them an exception under the law is to ensure their continued participation in the market. When evaluating and weighing these articulated interests, the Third Circuit found that they were legitimate goals worth pursuing and proved that the state did not run afoul of the limitations imposed by the Dormant Commerce Clause.[165] Circuit courts are divided on whether local economic

161. Heffner v. Murphy, 866 F. Supp. 2d 358, 400 (M.D. Pa. 2012), *aff'd in part, rev'd in part*, 745 F.3d 56 (3d Cir. 2014) (alluding to the BFD's recognition that eliminating the requirement that every facility have an embalming requirement makes sense and would "reduce costs without harming the public.").

162. *See* Brief of Appellees at 5, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591).

163. *See supra* paragraph one of Part IV.

164. Heffner v. Murphy, 745 F.3d 56, 74 (3d Cir. 2014).

165. *Id.* at 76.

protection is a legitimate interest that can be articulated by a state for purposes of a substantive due process analysis.[166] However, the Supreme Court has held that laws motivated purely by economic protectionism face a "per se rule of invalidity" in the dormant Commerce Clause context.[167] This comports with the general principle that "preservation of a local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits."[168]

Labeling a state interest as protectionist may be difficult for courts, because laws aimed at promoting legitimate interests, such as the health and safety of the pubic, can incidentally provide advantages to certain parties. This has the effect of blurring the line between legitimate and illegitimate interests. Additionally, reasons articulated by the state in support of certain policies usually have the effect of both providing an advantage to parties or local markets and promoting a legitimate non-discriminatory interest. This is why, as the Third Circuit in *Heffner* noted, "virtually all state regulation involves increased costs for those doing business within the state, including out-of-state interests doing business in the state," and, in this sense, "virtually all state regulation burdens interstate commerce."[169] Nevertheless, the purpose of the Commerce Clause seems antithetical to pure economic protectionism that: (1) does more than just promote the safety and health of the market as a whole and (2) has the effect of giving a certain group of parties an advantage over another group of parties participating in the same local markets. As the goal of propping up a family funeral director constitutes this type of pure economic protectionism, the Third Circuit should have excluded this reason from the analysis altogether.

The FDL's provisions supposedly are aimed at doing more than protecting the local market, because the state's justifications were predicated on advancing the health and safety of the industry. The Third Circuit should have scrutinized those justifications, but, instead, the court awarded excessive deference to the state. Given that many of the FDL provisions have fallen out of line with evolving health and safety practices,[170] and that many of the exceptions had little, if anything, to do

166. *See supra* Part II on circuit court split.

167. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 339 (2007) (county's flow control ordinances did not violate the Commerce Clause because they treated all private companies the same and benefited a public facility). *See also* Philadelphia v. New Jersey, 437 U.S. 617 (1978) (New Jersey statute prohibiting the importation of most solid or liquid waste which originated or was collected outside of the state violates the dormant Commerce Clause because it erects a barrier against interstate commerce).

168. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 205 (1994).

169. Heffner v. Murphy, 745 F.3d 56, 74 (3d Cir. 2014).

170. Heffner v. Murphy, 866 F. Supp. 2d 358, 398 (M.D. Pa. 2012), *aff'd in part, rev'd in part,*

with health and safety,[171] there was plenty of room to criticize and rebuff the state's assertions. The Third Circuit had enough evidence at its disposal to conclude that the licensing and ownership restrictions did little more than promote the local market.[172]

D. The FDL is Bad Economic Practice

There is myriad evidence questioning the benefits of licensing schemes in general.[173] The amount and degree of harm that strict licensing inflicts on consumers and markets varies by study, but the growing consensus is that the harms caused by licensing outweigh any potential benefits.[174] The funeral home industry is greatly affected by strict licensing schemes.[175] Pennsylvania's licensing scheme has a negative impact on consumers by driving up prices and protecting traditional funeral establishments.[176] Studies show that the high barriers to entry and prohibition on corporate ownership without a pre-1935 license ensure that a high number of small, family-owned funeral homes will continue to dominate the market.[177] Many of these funeral homes handle a small number of funerals per year, and, consequently, cannot exploit economies of scale.[178] The FDL's provisions protect these small funeral homes by making it impossible to own more than two locations associated with an ownership interest and limiting the number of

745 F.3d 56 (3d Cir. 2014) (noting that the FDL's requirement that every facility must have a full-time supervisor is, by the BFD's own recognition, outdated and makes little sense).

171. *See* Brief of Appellees at 3, Heffner v. Murphy, 745 F.3d 56 (3d. Cir. 2014) (No. 12-3591) (alluding to the 1994 Audit Report, which found that the FDL, in light of advances in mortuary science, has little to do with health and safety).

172. *Heffner*, 866 F. Supp. 2d at 383-90 (this evidence included reports showing the cost of obtaining licensure and the cost of obtaining a pre-1935 license, economic studies quantifying the detrimental impact on out-of-state parties, the BFD's own admission that some of the regulations are unnecessary, and studies showing that the funeral market in Pennsylvania is saturated with Pennsylvania businesses).

173. *See supra* Part II of this Casenote.

174. *See id.*

175. Expert Report of David Harrington at 13, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591).

176. Brief of Appellees at 39, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591) (referencing the 1994 Audit Report and noting that the one and a branch provision, coupled with the FDL requirement that every facility have an embalming room, results in added costs for funeral directors and leads to higher costs for consumers). Expert Report of David Harrington at 3, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591) (discussing findings that the Pennsylvania's funeral home regulations increase the cost of funerals to consumers by, on average, $550 per funeral).

177. *See* Expert Report of David Harrington at 13, Heffner v. Murphy, 745 F.3d 56 (3d Cir. 2014) (No. 12-3591) (noting that according to U.S. census data, Pennsylvania ranks second in the U.S. with 2,146 total establishments, only slightly behind New York's 2,150. If Pennsylvania had the same number of funeral homes per capita as the rest of the country, it would have only 1,144 funeral homes).

178. *See id.*

corporations that can enter into the market.[179] While this may benefit small funeral home owners, it drives up the costs of funeral services and funeral products for Pennsylvania residents and drastically reduces the number of places offering low-cost cremation services.[180] In its decision, the Third Circuit dismissed most of this data on the grounds that it failed to show a discriminatory impact or purpose. However, other courts have considered the impact that a law had on economic markets and the extent to which legislators were aware of such an impact.[181] In *Heffner*, the only economic data available showed that the FDL was having a negative impact on consumers and the industry as a whole.[182]

While the FDL is bad economic practice, new competitors may not be able to restore competitive balance by utilizing the political process. The inability of new competitors to change the FDL exacerbates its negative economic impact by perpetuating the status quo. The FDL is a perfect example of what happens when regulatory bodies entrusted to protect markets are only concerned with advancing their own interests.[183] Not surprisingly, these regulatory bodies exert tremendous lobbying power, which places new competitors at a serious disadvantage. Aside from hostile regulatory bodies, another problem is the overwhelming amount of laws in general, making it difficult and impractical for legislatures to change and monitor them all.[184] This presents another obstacle for new competitors seeking to engender competitive balance in the funeral home market. Due to the sheer volume of laws, acknowledgments from within the legislature or regulatory boards that certain laws need to be modified might not materialize in an actual change to the law. In sum, the cards are stacked against out-of-state funeral homes looking to break into the market. The inability of these newcomers to utilize the political process in order to

179. *Id.*

180. *Id.*

181. *See* Allstate Ins. Co. v. Abbott, 495 F.3d 151, 161 (5th Cir. 2007) (upholding a Texas law regulating insurance and pointing to the legislative record, which revealed that legislators heard extensive testimony from witnesses on the legitimate consumer protection concerns sought to be remedied by the bill and testimony on how the law would affect insurance rates).

182. *See* Heffner v. Murphy, 866 F. Supp. 2d 358, 383-389 (M.D. Pa. 2012), *aff'd in part, rev'd in part*, 745 F.3d 56 (3d Cir. 2014).

183. DAVID YOUNG, THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA (1987) (as one commentator put it, "the benefits of licensing are heavily concentrated in current practitioners and the liabilities are dispersed among potential newcomers, so those that are currently licensed have a much stronger incentive to lobby for stricter licensing laws.").

184. See Edward J. Imwinkelried, *A More Modest Proposal than a Common Law for the Age of Statutes: Greater Reliance in Statutory Interpretation on the Concept of Interpretive Intention*, 68 ALB. L. REV. 949 (2005) (noting that the sheer number of statutes makes it hard for legislatures to monitor them).

change the FDL further supports a rejection of the Third Circuit's more deferential approach in *Heffner*.

E. Future Trends

The lawsuit brought in *Heffner* was unique in the sense that it presented a dormant Commerce Clause challenge to a funeral home regulatory scheme. The dormant Commerce Clause challenge was warranted because, unlike other funeral home regulatory schemes, the FDL had a measurable impact on out-of-state parties and any potential newcomers to the market. After the Third Circuit upheld the FDL's controversial provisions by employing a relaxed standard of scrutiny, governments and licensing boards seeking to insulate local practitioners from out-of-state competition will see the ruling as a green light to either advance legislation or maintain a status quo that imposes high barriers to entry for out-of-state parties. In lieu of the current trend, which is moving towards stricter licensing restrictions, the *Heffner* holding sets a precedent that limits the ability of courts to strike down laws and regulations under the dormant Commerce Clause. *Heffner* confines the reach of judicial scrutiny when courts are dealing with laws that are facially neutral with respect to state residency. If courts choose to follow the *Heffner* precedent, protectionist laws passed under the guise of promoting the health and safety of the industry will be immune from Commerce Clause scrutiny as long as those laws are facially neutral. Ultimately, this ruling raises questions about the dormant Commerce Clause as a tool to strike down laws that have a negative impact on out-of-state parties.

V. CONCLUSION

In *Heffner v. Murphy*, Pennsylvania's controversial Funeral Director's Law, which governs Pennsylvania's funeral home industry, was challenged under the dormant Commerce Clause. This challenge was set against the backdrop of a growing licensing problem, not only in the funeral home industry, but in many professional industries. Two of the controversial regulations at issue govern who can own a funeral home in Pennsylvania and place limitations on how many establishments can be owned. The Third Circuit ultimately upheld these two provisions, and, in doing so, rejected a dormant Commerce Clause challenge brought by the plaintiffs. When analyzing these provisions under the dormant Commerce Clause, the Third Circuit employed a relaxed standard of scrutiny by focusing primarily on the neutral language of the FDL. This Casenote advocates that courts should

employ a more stringent standard of scrutiny when analyzing a law under the dormant Commerce Clause. This standard, adopted by other courts, does not foreclose a finding that the dormant Commerce Clause has been violated after a finding that a law contains neutral language. It also places more weight on extrinsic evidence and forces courts to closely examine the link between a state's articulated rationale and the broader impact that a law is having. The dormant Commerce Clause reflects the idea that it is in the best interest of the country to repudiate policies that protect local markets; instead, it suggests that policies that promote a market without rigid state barriers is superior to protectionism. By easing the burden placed on licensing boards to justify the regulations they promulgate, the Third Circuit has made it harder for plaintiffs seeking to cultivate a competitive market to challenge these types of laws under the dormant Commerce Clause. As licensing boards continue to perpetuate a harmful status quo, people will continue to explore new avenues for recourse. A more stringent standard of judicial scrutiny under the dormant Commerce Clause would serve as an effective tool to combat this growing problem.