THE OLD RIGHTS OF BURIAL: FREE EXERCISE IN FOUNDING ERA FUNERALS

"I commit my . . . Soul into The hands of God . . . to be buried in the Jews Burying Ground according To the Jewish Custom."
–Last Will and Testament of Mordecai Gomez, New York City 1750[1]

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INTRODUCTION

It is often forgotten that the first religious liberty case at the Supreme Court challenged a ban on Catholic funerals.[2] The case, *Permoli v. Municipality No. 1 of New Orleans*,[3] reached the Court in

1. ALLAN AMANIK, DUST TO DUST: A HISTORY OF JEWISH DEATH AND BURIAL IN NEW YORK 24 (2019).

2. Michael W. McConnell, *Schism, Plague, and Last Rites in the French Quarter: The Strange Story Behind the Supreme Court's First Free Exercise Case*, *in* FIRST AMENDMENT STORIES 39, 40 (Richard W. Garnett & Andrew Koppelman eds., 2012).

3. 44 U.S. (3 How.) 589 (1845).

1845 when a priest violated a New Orleans ordinance limiting the Catholic practice of holding open-casket funerals[4] to one church within the city.[5] Invoking the Free Exercise Clause for the first time in the Court's history,[6] the priest argued that the ordinance unconstitutionally "legislate[d] for the priest as priest" by "punish[ing] the performance of a religious function by individuals acting in their religious capacity."[7] Ultimately, the Court dismissed the case without considering the priest's arguments, holding that the First Amendment did not apply to the states.[8]

Much has changed in the 179 years since *Permoli*. Today, occupational licensing in forty-eight states grants funeral directors the exclusive right to supervise funerals, sell caskets, and prepare the dead for burial.[9] These statutes were passed at the turn of the nineteenth century when funeral directors lobbied states to eliminate competition from clergy and surgeon-embalmers in the market for funeral services.[10] Since their passage, they have driven up funeral directors' wages,[11] induced families to spend more on funerals,[12] and

4. *Id.* at 601 (reporting that "Catholics" in New Orleans "perform[ed] . . . mortuary services with the corpse exposed in open church," whereas Protestants "performed [funeral services] at the cemeteries where the bodies are deposited").

5. The ordinance stated: "[I]t shall be unlawful to carry to, and expose in, any of the Catholic churches of this municipality, any corpse, under the penalty of a fine. . . . [A]ll the corpses shall be brought to the obituary chapel, situated in Rampart street, where all funeral rites shall be performed." *Id.* at 590.

6. *See id.* at 591.

7. *Id.* at 597.

8. *Id.* at 610. Interestingly, the Louisiana Constitution of 1812, in effect when the priest violated the ordinance, lacked an analog to the Free Exercise Clause. *See* LA. CONST. (1812).

9. Colorado and Hawaii are the exceptions. *See* COLO. REV. STAT. § 12-135-110(1) (2024); HAW. REV. STAT. § 469-1 (2024). In Colorado, funeral directing is regulated by licensing funeral homes rather than individuals. COLO. REV. STAT. § 12-135-110(1). By contrast, Hawaii requires a funeral director's license only for those who wish to embalm. HAW. REV. STAT. § 469-1.

10. Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 CALIF. L. REV. 487, 501 (1965).

11. The repeal of Colorado's funeral director licensing eliminated an 11% to 12% wage premium previously enjoyed by licensed funeral directors. Brandon Pizzola & Alexander Tabarrok, *Occupational Licensing Causes a Wage Premium: Evidence from a Natural Experiment in Colorado's Funeral Services Industry*, 50 INT'L REV. L. & ECON. 50, 59 (2017).

12. David E. Harrington & Kathy J. Krynski, *The Effect of State Funeral Regulations on Cremation Rates: Testing for Demand Inducement in Funeral Markets*, 45 J.L. & ECON. 199, 222 (2002) (estimating that funeral directors increased the total cost of funerals by 2.6% by steering customers towards costlier goods and services).

erected barriers to entry into the profession.[13] Funerals, once the domain of religion and families, are now a $16 billion industry.[14]

Scholars have explored the harmful effects of funeral director licensing on economic liberty[15] and grieving families.[16] But less attention has been paid to the unique way occupational licensing regulates religious worship. Unlike other forms of regulation, funeral director licensing specifies who can and who cannot perform funerals. This regulation of inherently religious activity raises questions about the boundaries between church and state. Can states force clergy to hire a third party to conduct funerals? Or, conversely, can the government force clergy to spend thousands of dollars and undergo years of training for the right to bury the dead, like their ancestors did, according to their religious tradition?

These questions are not merely theoretical. Throughout the twentieth century, funeral director licensing sparked conflict as it gradually stripped control of funerals away from clergy.[17] For example, in 2009, Rabbi Daniel Wasserman performed a funeral for his deceased congregant.[18] According to the tenets of the Orthodox Jewish faith, he ritually washed the body, wrapped it in a linen shroud, and buried it in a wooden coffin.[19] For the offense of performing these activities "without a licensed funeral director present," the State of Pennsylvania surveilled the rabbi's synagogue, warned cemeteries not to allow him to conduct funerals on their grounds, and threatened criminal and civil prosecution.[20] As a result,

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13. Tanya D. Marsh, *Regulated to Death: Occupational Licensing and the Demise of the U.S. Funeral Services Industry*, 8 WAKE FOREST J.L. & POL'Y 5, 19–21 (2018) (explaining that becoming a funeral director in some states requires more than three years of training and a $4 million up-front investment in capital expenditures).

14. *Statistics*, NAT'L FUNERAL DIRS. ASS'N (Sept. 24, 2024), https://perma.cc/GCM5-KJ54.

15. *See, e.g.*, Lana Harfoush, *Grave Consequences for Economic Liberty: The Funeral Industry's Protectionist Occupational Licensing Scheme, the Circuit Split, and Why It Matters*, J. BUS. ENTREPRENEURSHIP & L. 135, 141 (2011); Jeff Rowes, *Caskets and the Constitution: How a Simple Box Has Advanced Economic Liberty*, 8 WAKE FOREST J.L. & POL'Y 63, 64–65 (2018).

16. Victoria J. Haneman, *Funeral Poverty*, 55 U. RICH. L. REV. 387, 411–12 (2021); Marsh, *supra* note 13, at 25–27.

17. A study in the 1950s found "extensive conflict" in the "relationship between clergy and funeral directors" because "funeral directors have largely 'seized' control of the funeral by providing not only physical arrangements, but also such services as grief counseling." Cecil D. Bradfield & R. Ann Myers, *Clergy and Funeral Directors: An Exploration of Role in Conflict*, 21 REV. RELIGIOUS RSCH. 343, 343 (1980).

18. Complaint at 8, Wasserman v. Burrell, No. 12-cv-01521, 2012 U.S. Dist. LEXIS 182830 (M.D. Pa. 2012) [hereinafter Wasserman Complaint].

19. *Id.* at 30.

20. *Id.* at 9, 14–15.

Rabbi Wasserman had to stop performing funerals while he waged a legal battle in the courts.[21]

Recently, in *Kennedy v. Bremerton School District*,[22] the Supreme Court ushered in a new era of religion clause jurisprudence. Overturning *Lemon v. Kurtzman*,[23] a cornerstone of the Court's approach to the Establishment Clause for the past half-century, Justice Gorsuch, writing for the majority, announced that the religion clauses should be interpreted with respect to "historical practices and understandings."[24] Applying this historical approach to the Establishment Clause, the Court ruled that a high school could not ban a football coach from praying publicly on the field after games.[25] But the majority opinion went even further. The Court suggested that its current approach to the Free Exercise Clause, embodied in *Employment Division v. Smith*,[26] may need to be revised.[27]

In light of *Kennedy*, the priest's questions in *Permoli* may soon enjoy new relevance. This Comment aims to show that funeral director licensing creates problems for a historically grounded approach to free exercise doctrine. Furthermore, it argues that these constitutional problems can be avoided by extending exemptions to perform secular funerals that already exist in many states to religious organizations. Part I introduces funeral director licensing statutes in several states and explains how they regulate religious practice. Part II canvases the problems that such licensing creates for religious exercise. Part III explores evidence from the Founding Era, concluding that religious organizations were free to conduct funerals subject only to public health regulations. Finally, Part IV argues that granting an exemption for religious organizations to conduct funerals would restore freedoms that religious organizations enjoyed during the Founding Era with minimal downsides.

I. THE RISE OF FUNERAL DIRECTOR LICENSING

In much of the United States, hiring a funeral director—like death and taxes—is an unavoidable part of life. Despite their ubiquity, funeral director licensing regulations can seem obscure even

21. *Id.* at 14–15. Eventually, the State settled, allowing Rabbi Wasserman to perform funerals without the supervision of a funeral director. But, by that time, he had endured a three-year ordeal. *See* Ben Cohen, *Orthodox Rabbi Triumphs in Funerals Dispute*, TABLET (Dec. 19, 2012), https://perma.cc/3M6G-86T3.

22. 142 S. Ct. 2407 (2022).

23. 403 U.S. 602 (1971).

24. *Kennedy*, 142 S. Ct. at 2428 (quoting Towne of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

25. *Id.* at 2431–33.

26. 494 U.S. 872 (1990).

27. *See Kennedy*, 142 S. Ct. at 2422 n.1 ("[W]hile the test we do apply today [from *Smith*] has been the subject of some criticism . . . we have no need to engage with that debate today because no party has asked us to do so.").

to lawyers. But a lack of attention does not equate to a lack of importance. This Part introduces funeral director licensing statutes, explaining their origins, historical justifications, and regulation of religious practice.

A. Origins and Historical Justifications

Before the Civil War, families and religious communities cared for the dead in their homes and houses of worship.[28] A typical funeral in colonial Virginia, for example, involved a family preparing the remains of their loved one in their home followed by a graveside funeral officiated by a religious minister.[29] Preparations for deceased persons were relatively simple. Most Americans practiced natural burial, a form of death care where the body of the deceased is washed and wrapped in cloth before interment.[30] In colonial America, families commonly purchased coffins, but burial without a coffin remained the majority practice even in prosperous cities.[31] Undertakers played a role in funerals, if at all, by acting as specialized carpenters who sold coffins and other funeral-related furniture.[32] Over time, as the engines of capitalism spurred economic specialization, undertakers began offering a broader array of services.[33] By the 1850s, a distinct business of undertaking began to materialize.[34] Though home funerals were still the norm, many undertakers started to take care of what we now might recognize as the event planning and transportation aspects of funerals.[35]

The first stepwise change to American burial practices occurred during the Civil War. As Americans died *en masse* on the battlefield, the desire to preserve the remains of dead soldiers grew so that funerals could be performed in hometowns miles away from the front line.[36] At the same time, a new science of embalming was emerging. Years earlier, in 1838, the French chemist Jean Gannal published *Histoire des Embaumements*, which explained a procedure for preserving human remains for days or even weeks after death.[37]

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28. ROBERT W. HABENSTEIN, THE HISTORY OF AMERICAN FUNERAL DIRECTING 404 (1st ed. 1955).

29. Thomas Jefferson's funeral conformed to this simple pattern. *See Jefferson's Funeral*, THOMAS JEFFERSON FOUND. (2024), https://perma.cc/ELB7-BMVL.

30. *See* HABENSTEIN, *supra* note 28, at 253.

31. *See id.* at 256.

32. *Id.* at 220.

33. *Id.* at 404–05.

34. *See id.* at 409 (discussing the emergence of particular forms of dress and etiquette associated with the profession).

35. *Id.* at 404, 406.

36. Brian Walsh, *When You Die, You'll Probably Be Embalmed. Thank Abraham Lincoln for That*, SMITHSONIAN MAG. (Nov. 1, 2017), https://perma.cc/9EAD-TJKS.

37. *Id.*

Histoire des Embaumements became an influential book, which surgeons put to good use on the battlefield.[38] When President Lincoln was embalmed after his assassination, the popularity of embalming accelerated and continued to rise throughout the century.[39]

The second stepwise shift in American burial practices occurred after the war. By the late nineteenth century, a transformative movement emerged.[40] Undertakers, influenced by the successful professionalization of law and medicine, started to form occupational associations.[41] These organizations sought to associate themselves with more prestigious elements of society and ward off competition from their economic rivals by "regulating the care and burial of the dead the same as . . . the practice of medicine."[42] The result was a movement to license the business of funeral directing. By 1890, the National Funeral Directors Association drafted model legislation that granted funeral directors monopoly control over a wide range of funeral-related activities, including the lucrative, quasi-medical practice of embalming.[43] Although licensing initially faced opposition, by the turn of the twentieth century, it was adopted in twenty-four states.[44]

Protecting the economic interests of funeral directors was the driving force behind the initial push for licensure.[45] But, by the time states passed funeral director statutes, public health had emerged as a new justification for licensure.[46] Under dominant theories of nineteenth-century science, dead bodies were thought of as reservoirs for disease that spread illness through putrid air.[47] It was believed that embalming sanitized human remains.[48] As early as 1909, however, courts challenged the strength of this rationale.[49] In *People*

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38. *Id.*

39. *Id.*

40. HABENSTEIN, *supra* note 28, at 457–58.

41. *Id.*; *see also* Friedman, *supra* note 9, at 501.

42. HABENSTEIN, *supra* note 28, at 473 (quoting Hudson Sampson's speech to the National Association of Funeral Directors, which occurred in the 1880s).

43. HABENSTEIN, *supra* note 28, at 471–73.

44. Friedman, *supra* note 10, at 501.

45. *Id.*

46. *See id.* at 512–13 (discussing early court cases that questioned whether public health and protectionism were valid justifications for funeral director licensing).

47. Mary Elizabeth Hotz, *Down Among the Dead: Edwin Chadwick's Burial Reform Discourse in Mid-Nineteenth-Century England*, 29 VICTORIAN LITERATURE & CULTURE 21, 25–27 (2001) (offering a mechanistic explanation of how corpses transmitted disease through foul smells based on the miasma theory of disease).

48. HABENSTEIN, *supra* note 28, at 322–23.

49. *See* Wyeth v. Thomas, 86 N.E. 925, 928 (Mass. 1909) (challenging whether it was constitutional for a health board to require all undertakers to possess a funeral directors license on the basis of its "mere general authority [of a health board] to make rules and regulations" alone).

v. Ringe,[50] an undertaker who had been practicing in a rural town for many years challenged a New York funeral director licensing statute that required all undertakers to learn embalming.[51] The *Ringe* Court stated that it could not "refrain from the thought that the act in question was conceived and promulgated in the interests of those then engaged in the undertaking business."[52] It further questioned whether "health, morals, and welfare of the state" were the true motivation for the passage of the law, or whether the true motivation was the "monopoly that could be exercised with the aid of its provisions."[53] By the 1940s, a third and final justification for funeral director licensing was offered: consumer protection.[54] Here, the idea was that funeral directors are needed to prevent vulnerable families from being taken advantage of during the grieving process.[55]

B. The Regulatory Landscape of Funeral Director Licensing

Funeral director statutes in every state but Colorado and Hawaii form a patchwork quilt of regulations, granting funeral directors a legal monopoly over the care of the dead.[56] Funeral director licensing regimes transform otherwise legal conduct into a punishable offense. Although differences exist from state to state, these regimes follow the same general pattern first established by the National Funeral Directors Association in the 1890s.[57] They begin by defining a set of activities that constitutes "funeral directing."[58] Next, they limit the practice of "funeral directing" to the holders of a funeral director license.[59] Finally, they impose qualifications and training requirements that persons must satisfy before becoming a funeral director.[60] Subsequently, anyone who performs "funeral directing" without a license breaks the law.

1. The Definition of Funeral Directing

Each state sets its own definition for funeral directing.[61] These definitions are contained in statutes promulgated by state legislatures.[62] Most states also create a funeral board, usually

50. 90 N.E. 451 (N.Y. 1910).
51. *Id.* at 452.
52. *Id.* at 454.
53. *Id.*
54. *See* Gale B. Robinson, Jr., *Regulating Death: Occupational Licensing and Efficiency in the Deathcare Industry*, 29 LOY. CONSUMER L. REV. 343, 348–49 (2017).
55. *See id.*
56. *See supra* note 9 and accompanying text.
57. *See* TANYA MARSH, THE LAW OF HUMAN REMAINS 70 (2015).
58. *Id.* at 70–71.
59. *Id.* at 71.
60. *Id.* at 71–73.
61. *Id.* at 70.
62. *Id.*

comprised of licensed funeral directors, that is vested with the authority to refine the statutory definition.[63] In all states, the definition of funeral directing encompasses a wide range of activities.[64] Take, for instance, Oklahoma, whose definition for funeral directing is representative of many states. Oklahoma defines the practice of funeral directing as

> the work of preparing for the burial or disposal of dead human remains, otherwise than by embalming, or for the care of dead human remains for funeral services, transportation, burial or cremation, or the holding of oneself out as being engaged in such work or being in the general control, supervision or management of the operations of a funeral service establishment.[65]

From this definition, you will see that funeral directing encompasses everything from "supervis[ing] . . . a funeral service establishment" to "transport[ing]" human remains to "preparing for the burial or disposal of dead human remains."[66] Even "the holding of oneself out as being engaged" in another listed activity falls under the definition.[67]

Troublingly, Oklahoma's definition is not only broad but vague. What exactly does "preparing for the burial or disposal of human remains" mean? Conducting a religious funeral ceremony might constitute funeral directing on one construction of the statute, but an equally reasonable construction may nevertheless reach the opposite conclusion. Indeed, this was the very dispute at issue in the case of Rabbi Wasserman, who was threatened with prosecution for conducting an Orthodox Jewish funeral without an occupational license.[68] In practice, vagueness in the statutory definition of funeral directing creates considerable uncertainty about exactly which death and burial rituals are subject to licensing requirements.

For the purposes of this Comment, it will be important to point out three categories of activities that plausibly fall under the definition of funeral directing in most or all states. First, funeral

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63. *Id.*

64. *Id.* (listing the "key activities" of funeral directing as: "(1) preparing human remains for burial or other deposition (other than embalming which is defined separately); (2) managing a funeral home or mortuary; (3) making funeral arrangements; and (4) holding oneself out to be in the business of a funeral director or undertaker").

65. This definition was promulgated by the Oklahoma Funeral Board. OKLA. ADMIN. CODE § 235:10-1-2 (2024). Elsewhere, the Oklahoma legislature defines funeral directing vacuously as "directing funeral services from the time of the first call until final disposition or release to a common carrier or release to next of kin of the deceased or the designee of the next of kin." OKLA. STAT. tit. 59, § 396.2 (2024).

66. OKLA. ADMIN. CODE § 235:10-1-2.

67. *Id.*

68. *See supra* Introduction.

directing encompasses the performance of religious rituals connected in space and time to the presence of human remains.[69] Thus, a pastor performing a church funeral with human remains present, an imam ritually cleansing a corpse before burial, and a rabbi officiating a graveside funeral would all count as funeral directing under this category.

Second, funeral directing encompasses a host of commercial activities related to funerals, such as the sale of certain funeral goods and the operation of funeral homes.[70] Some states require the dead to be buried in caskets, which only funeral directors have the legal authority to sell.[71] This can create problems for religious groups, such as Muslims who are religiously obligated to practice natural burial by burying the dead in a plain shroud.[72] Even in states that do not have casket laws, problems can arise because funeral directors have a financial incentive to sell caskets that contradict the religious beliefs of the families they serve.

Third, funeral directing encompasses speech about the practice of funeral directing.[73] Under this category, a rabbi instructing a congregant about the steps needed to prepare their deceased family member's body for burial under religious law may fall under the definition of funeral directing. This category captures the fact that courts have found that pure speech can count as funeral directing.[74]

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69. This is a plausible construction of the "preparing for the burial or disposal of dead human remains" language in Oklahoma's definition of funeral directing. *See supra* notes 64–65 and accompanying text.

70. In Oklahoma's definition, this is captured in the language of "being in the general control, supervision or management of the operations of a funeral service establishment." OKLA. ADMIN. CODE § 235:10-1-2.

71. *See* N.C. GEN. STAT. § 90-210.20(k) (2024) ("'Practice of funeral service' also means . . . selling funeral supplies to the public."); *see also* MARSH, *supra* note 57, at 71 ("Statutes like the one in North Carolina are referred to as 'casket laws,' because only licensed funeral directors are permitted to sell funeral goods and merchandise such as caskets.").

72. A.R. Gatrad, *Muslim Customs Surrounding Death, Bereavement, Postmortem Examinations, and Organ Transplants*, 309 BMJ 521, 522 (1994).

73. This comes from the "holding of oneself out as being engaged in such work" language of Oklahoma's definition. *See supra* notes 65–67 and accompanying text.

74. Pure speech cases are not uncommon. In Indiana, for example, a death doula was sued by the state funeral board for running a business that helped customers create individualized death care plans in violation of Indiana's funeral directing statute. Richwine v. Matuszak, No. 23-cv-00370-HAB, 2023 WL 8747471, at *3 (N.D. Ind. Dec. 19, 2023); s*ee also* Full Circle of Living & Dying v. Sanchez, No. 202-cv-01306-KJM, 2023 U.S. Dist. LEXIS 12317, at *10 (E.D. Cal. Jan. 23, 2023) (a pure speech case in California).

2. Training Requirements

As with the definition of funeral directing, states set their own requirements for obtaining a funeral director's license.[75] These requirements involve some combination of educational, age, character, examination, apprenticeship, and experience qualifications.[76] In the aggregate, these requirements impose considerable burdens on anyone hoping to obtain a funeral directing license. For example, while all states set minimum educational requirements, fourteen states require candidates to earn a mortuary science degree from a school accredited by the American Board of Funeral Services Education.[77] These degrees require two or more years to complete.[78] And, even after a candidate has earned a degree, their training is not done. They must pass a licensing exam, complete additional apprenticeships, and work under the supervision of another funeral director for a statutorily defined time before obtaining a license.[79]

Regarding the content of licensure requirements, states fall into two camps: Single-Track states and Dual-Track states.[80] In Single-Track states, one license is issued to practice funeral directing and embalming.[81] Anyone who wants to be a funeral director must also learn how to embalm. No exceptions. In Dual-Track states, on the other hand, funeral directing is licensed separately from embalming.[82] Dual-Track states give candidates the freedom to practice funeral directing without also obtaining an embalming license.[83] Currently, nineteen states and the District of Columbia are Dual-Track states while twenty-nine are Single-Track states.[84]

3. The Family Exemption

Before turning the page, it is important to point out a key exception to funeral director licensing statutes. Currently, thirty-nine states exempt immediate family members from funeral director licensing requirements if they choose to conduct a home funeral

75. *See* MARSH, *supra* note 57, at 71.
76. *Id.* at 71–72.
77. *Id.* at 72.
78. *Id.*
79. *Id.*
80. *See* Emily A. Solley, Comment, *Death Will Have His Day: Overly Restrictive Funeral Director Licensing Statutes Harm the Public and Violate the Constitution*, 57 WAKE FOREST L. REV. 829, 833 (2022). Hawaii, which only licenses embalming, but not funeral directing, does not fit into the two-track framework. *See supra* note 9.
81. Solley, *supra* note 80, at 833.
82. *Id.*
83. *Id.* at 856.
84. *See* MARSH, *supra* note 57, at 71.

without the aid of anyone else.[85] Provided they file all necessary paperwork and comply with all health regulations regarding the handling of human remains, immediate family members in these states do not have to hire a funeral director.[86]

In many states, the family exemption is expressly created by statute.[87] Mississippi's funeral director licensing statute, for example, provides that the statute "shall not prevent a family from burying its own dead without charge."[88] In other states, funeral director licensing statutes do not expressly provide for the family exemption, but the exemption arises from reasonable interpretations of vaguely drafted statutes backed by the decision of state regulators to not prosecute families for conducting home funerals.[89] In these states, people are conducting home funerals without being prosecuted, even though no official interpretation of the statutes or government action permits them.[90]

Importantly, while the family exemption is available for family members to conduct home funerals, the exemption reasonably does not extend to families who want clergy to participate in the funeral. First, in states where the exemption is provided for expressly by statute, the language plainly exempts immediate family members but not religious organizations.[91] Thus, even if an immediate family

85. *See What Is a Home Funeral?*, FUNERAL CONSUMERS ALL. (2024), https://perma.cc/SQ5Y-PNGE ("Nine states* [sic] require a family to hire a funeral director to file paperwork, transport the body, and/or supervise the disposition of the body. In the remaining states, families may choose to do all or part of the process.").

86. *See id.*

87. *See, e.g.*, WIS. ADMIN. CODE DHS § 135.05(1)(b) (2024) ("Any member of the immediate family of a deceased person may prepare the body for burial or other final disposition, except that no person may embalm a corpse unless that person is licensed as a funeral director, and no member of the immediate family may prepare a corpse for burial or other final disposition if there is risk of transmitting a communicable disease from the corpse, either because a communicable disease was the cause of death or the individual had a communicable disease at the time of death, unless the local health officer determines that the risks of transmitting the disease from the corpse are minimal.").

88. MISS. CODE ANN. § 73-11-65 (2024).

89. *See* Full Circle of Living & Dying v. Sanchez, No. 202-cv-01306-KJM, 2023 U.S. Dist. LEXIS 12317, at *5–6 (E.D. Cal. Jan. 23, 2023) (noting that California's Cemetery and Funeral Bureau allows families to conduct "home death care").

90. Despite lacking express legal permission to conduct home funerals, grassroots advocacy organizations, such as the National Home Funeral Association, are prevalent across the United States. *See, e.g.*, *NHFA Directory*, NAT'L HOME FUNERAL ALL. (2024), https://perma.cc/3MHC-WE8U (containing a list of local guides available to teach families how to conduct home funerals in nearly every state).

91. *See, e.g.*, WIS. ADMIN. CODE DHS § 135.05(1)(b).

member arranged all other aspects of a funeral, a clergy member would be swept under the broad definition of "funeral directing" as soon as they perform a religious ceremony with human remains present.[92] This creates a scenario where secular home funerals are legal under the statute, but religious home funerals are not.

Second, in states where the family exemption is not expressly provided for by statute, religious organizations fall under the umbrella of funeral directing on reasonable constructions of the statutes, creating a situation where religious organizations may officiate in home funerals at the mercy of state regulators' decision not to prosecute. As discussed in Part IV, in these states where the exemption arises from selective enforcement, the family exemption could be extended to religious organizations by narrowly constructing the statutes.

II. THE CONFLICT BETWEEN FUNERAL DIRECTING AND RELIGION

As we have seen, a unique feature of funeral director licensing is that it regulates religious worship. Because funeral director licensing can impose liability on those who fail to comply with its requirements, it creates a flashpoint for conflict between church and state. This Part identifies four problems arising from such licensing.

A. The Autonomy Problem

Funeral director licensing statutes force religious organizations to hire funeral directors to supervise the performance of funerary rituals on threat of civil and criminal sanction. This grant of monopoly control violates an ideal of religious liberty core to the American project—that individuals should be free to practice their faith according to the dictates of their own consciences.

But the Supreme Court has long recognized that religions have jurisdiction over religious worship.[93] This wall of separation between the church and state is perhaps most conspicuous in the recent line of church autonomy cases dealing with the ministerial exception.[94] In those cases, the Court has repeatedly affirmed that the Constitution grants "special solicitude to the rights of religious organizations" to practice their faith free from government intrusion.[95] Under the ministerial exception, the Supreme Court has exempted religious organizations from certain antidiscrimination provisions of Title VII,

92. *See* OKLA. STAT. tit. 59, § 396.2; CONN. GEN. STAT. § 20-207 (2024).

93. VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES 56 (2022) (citing cases and arguing that the religion clause read in light of state constitutions prove this result).

94. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012).

95. *Hosanna-Tabor*, 565 U.S. at 189.

allowing religious institutions to fire religious ministers who fail to embody the tenets of their faith.[96] In *Our Lady of Guadalupe School v. Morrissey-Berru*,[97] the Court made clear that who counts as a minister is determined based on the religious function performed, not the job title of the person performing it.[98]

Here, the activity that falls under the scope of funeral director licensing, such as the preparation of human remains for burial and the supervision of funerals, serve religious functions at the core of religious worship. Though courts have yet to embrace this reasoning, the Supreme Court's broadening of protections for religious liberty, especially its recent approach of interpreting the religion clauses as mutually reinforcing provisions of the Constitution, suggests that funeral director licensing statutes could face constitutional challenges.

Even if courts do not accept that particular line of reasoning, the autonomy of religious organizations is susceptible to infringements in the context of funerals. Funeral directors may not fully understand the religious beliefs or requirements of the clients they serve and might show less inclination to fulfill religious requests that are uncommon. In certain situations, funeral directors may even display resistance or doubt towards different religious communities.

B. The Discrimination Problem

In states that recognize the family exception, families can perform home funerals for their loved ones without hiring a licensed funeral director.[99] Meanwhile, the same family, were they to ask clergy to conduct the funeral, would be forced to hire a funeral director.[100] In other words, funeral director licensing in these states discriminates between the performance of secular home funerals and religious home funerals. In *Roman Catholic Diocese of Brooklyn v. Cuomo*,[101] the Supreme Court granted a preliminary injunction blocking COVID-19 restrictions that allowed businesses to stay open but required churches and synagogues to close, indicating that the Court would likely strike down such restrictions as an unconstitutional form of religious discrimination on the merits.[102] Plausibly, funeral director laws that allow grieving secular families to perform home funerals, but not religious families, run afoul of the antidiscrimination component of the First Amendment.

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96. *Id.* at 196.
97. 140 S. Ct. 2049 (2020).
98. *Id.* at 2064 ("What matters, at bottom, is what an employee does.").
99. *See supra* Section I.B.3.
100. Harrington & Krynski, *supra* note 12, at 202 (using FTC reports to note that consumers spent $3,748 more on burial services when they hired a funeral director instead of cremation).
101. 141 S. Ct. 63 (2020) (per curiam).
102. *Id.* at 69.

Additionally, the Discrimination Problem raises another question: What purpose do funeral director statutes serve? If home funerals are safe enough for private individuals to perform on their own, public health cannot be a justification. On the other hand, if funeral director statutes are justified with respect to consumer protection, why does the government trust funeral directors—who operate for-profit funeral homes—to protect consumer's interest, but not religious organizations?

C. The Principal-Agent Problem

In economics, principal-agent problems occur where the interests of an agent conflict with the interests of a principal on whose behalf the agent is acting.[103] By requiring families to hire funeral directors to act as agents, funeral director licensing creates an environment ripe for principal-agent problems. Because funeral directors make money from selling goods and services, they have an incentive to encourage their customers to buy pricier options. But these goods and services are often unnecessary or even forbidden under religion doctrine.[104] Over time, this small but constant influence of conflicting incentives can lead to a shift in religious practice, as religious organizations subtly change to accommodate the presence and authority of funeral directors.[105]

On a larger scale, principal-agent problems have led to rent-seeking in the funeral industry.[106] Through the process of regulatory capture, funeral directors who dominate state funeral boards pass funeral regulations that favor their own interests at the expense of the broader public.[107] Examples of these laws abound.[108] For instance, some states have casket laws, which allow only funeral directors to sell caskets.[109] These casket laws increase the cost of caskets for

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103. Stephen A. Ross, *The Economic Theory of Agency: The Principal's Problem* 63 AM. ECON. REV. 134, 134 (1973) (explaining the economic theory of principal-agent problems).

104. *See supra* note 72 and accompanying text (noting that the Islamic faith mandates natural burials).

105. For example, in 1963, the Vatican changed its stance to allow cremation done for "sanitary, economic or social considerations," noting that "the practice of cremation has notably increased in many countries." Ludwig Müller & Luis Francisco Ladaria Ferrer, *Instruction* Ad Resurgendum cum Christo *Regarding the Burial of the Deceased and the Conservation of the Ashes in the Case of Cremation*, HOLY SEE (Oct. 25, 2016), https://perma.cc/LWF7-ELBD.

106. *See* Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 WAKE FOREST L. REV. 569, 570–71, 580 (2012) (defining regulatory capture).

107. *See id.*

108. Friedman, *supra* note 10, at 501 (noting that twenty-four states have licensing laws); *see, e.g.*, LA. REV. STAT. ANN. § 37:848(D)(5) ("Every dead human body shall be disposed of and prepared through a funeral establishment and under the supervision of a licensed funeral home or embalmer.").

109. *See supra* note 71 and accompanying text.

consumers by creating an artificial monopoly. Other states impose restrictions on the minimum size of funeral homes, driving up the cost of hiring a funeral director by making it harder for new funeral directors to enter the industry and compete for business.[110]

D. The Unnecessary Regulations Problem

Funeral director licensing saddles religious organizations with regulations that are unrelated to the goals of advancing public health and protecting consumers. Take embalming, which modern science has long recognized does not prevent the spread of infection.[111] Another example of an unnecessary regulation is the transportation fees that some states require families to pay.[112] In these states, families must pay for these expenses, even though they are wholly unnecessary to promote safety.[113] What is more, the unnecessary regulations problem and the principal-agent problem go hand in hand. Because funeral directors have an incentive to sell more goods and services, religious families are often talked into purchasing more expensive funeral items, some of which may even violate their religious conscience.

Finally, any clergy who want to train to become a funeral director must undergo a grueling process, which costs thousands of dollars and requires years of training.[114] Funeral director licensing erects considerable barriers to entry.[115] For example, some statutes require funeral homes to be a certain square footage, meaning that someone who wants to own their own funeral home has to make a substantial investment.[116] In Single-Track states, funeral director licensing statutes require candidates to undergo training in embalming to obtain a license.[117] For practitioners of natural burial—which is universally mandated in Judaism and Islam—embalming is seen as the desecration of the corpse and a violation of religious law.[118] Thus, funeral director statutes in these states require practitioners of natural burial to violate their religious conscience to obtain a funeral director's license.

III. FREE EXERCISE IN FOUNDING ERA FUNERALS

This Part examines Founding Era funeral regulations, arguing that religious organizations were free to bury the dead and conduct funerals subject only to public health regulations. In the Founding

110. Marsh, *supra* note 13, at 20–21.
111. Solley, *supra* note 80, at 856–57.
112. *See* Harrington & Krynski, *supra* note 12, at 210.
113. Solley, *supra* note 80, at 852–53.
114. Marsh, *supra* note 13, at 21.
115. *Id.* at 19–20, 26.
116. *Id.* at 20–21.
117. Marsh, *supra* note 13, at 72.
118. Solley, *supra* note 80, at 853.

Era, public health laws did not regulate *who* had the right to carry out funerary rites. Instead, American common law granted jurisdiction over the performance of funeral rites to the diverse religious institutions that existed in the colonies.

A. Confirmatory Evidence in the Common Law

From the establishment of Jamestown until the late nineteenth century, the right to perform funerals, bury the dead, and operate cemeteries belonged to religious institutions.[119] Under English common law, authority over funerals and burial was entrusted solely to the ecclesiological courts of the Church of England.[120] This grant of authority was motivated by Christian beliefs about the resurrection.[121] Burial plots were seen as "dormitories" for the deceased, and the church was responsible for watching over the dead under their care until the resurrection.[122] The importance of religious burial is reflected in Blackstone's Commentaries, which notes that an English lord was allowed to allocate his tithings to a local church only if the church had a consecrated burial ground.[123] Elsewhere, Blackstone lists burial alongside other Christian sacraments as a kind of public good that a municipality had to provide through a parish to be fully recognized as a township.[124]

But for the colonies which lacked an established church,[125] the common law's grant of authority over burial to ecclesiological courts presented problems.[126] First, ecclesiological courts did not exist in colonial America.[127] The absence of ecclesiological courts made vindicating one's rights in a burial dispute impracticable.[128] More importantly, however, religious pluralism flourished in the American

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119. PERCIVAL E. JACKSON, LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES 24 (1937); Marsh, *supra* note 13, at 5 n.1.

120. Marriage and divorce, too, fell within the ambit of ecclesiastical courts. *See* Franklyn C. Setaro, *A History of English Ecclesiastical Law*, 18 B.U. L. Rev. 102, 119–22 (1938); JACKSON, *supra* note 119, at 27.

121. *Id.* at 22–23.

122. *Id.* at 27 n.13.

123. 1 WILLIAM BLACKSTONE, COMMENTARIES *108–09.

124. *Id.* at *110–11.

125. Although some colonies had established churches, no one established church governed all of the colonies. *See generally* Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385 (2004) (discussing the intellectual undercurrents motivating disestablishment before and after the Revolutionary War).

126. *See* JACKSON, *supra* note 119 at 28–29.

127. *See* Peter W. Walker, *The Bishop Controversy, the Imperial Crisis, and Religious Radicalism in New England, 1763-74*, 90 NEW ENG. Q. 306, 308–10 (2017) (discussing problems arising from the Church of England's refusal to appoint Bishops in the American colonies).

128. *See id.* at 312–13 (discussing the issues of a lack of bishop in different regions throughout America).

colonies to a greater degree than in England.[129] For a host of practical and theological reasons, colonists were more distrustful of established churches than the English.[130] Many colonists had immigrated to America to escape religious persecution levied upon them by the Church of England.[131]

In practice, the problems with implementing English common law in the New World resulted in a situation where authority over burial and funerals belonged not to a single established church, but to the religious institutions that existed in colonial America.[132] While the canon law of the Church of England determined how people were buried in the Old World, in the colonies, religious pluralism in the practice of funerals flourished.[133] In contrast to Anglicans who adhered to the structured funeral rite outlined in the Book of Common Prayer,[134] the Quakers opted for unscripted gatherings focused on remembrance and silent reflection.[135] Puritans avoided any semblance of "Popish" extravagance, practicing austere burial rituals without graveside prayers,[136] whereas Catholic requiem masses were replete with supplications designed to aid souls passing through purgatory.[137]

The right to bury the dead according to the dictates of one's own religion was not limited to Christianity.[138] An interesting example of funeral pluralism in the Founding Era is the operation of the Jewish

129. *See* Michael W. McConnell, *Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421 (1990) (discussing the higher degree of religious diversity the American states experienced because of religious conflict in England).

130. *Id.* at 1515 ("As with the establishment solution, however, the toleration solution seemed less than realistic from the American side of the Atlantic. Too many Americans had come to these shores precisely because they could not practice their faith in the controlled environs of Europe. Too many sectarians were spreading their views, and religious factionalism was already too deeply ingrained. Dissenters were a vexatious minority in Britain; in America they were (in the aggregate) a large majority, divided into many sects."); *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 183 (2012) (explaining that Southern colonists who were generally sympathetic to religious establishments "chafed at the control exercised by the Crown and its representatives over religious offices").

131. *Id.*

132. *See* JACKSON, *supra* note 119, at 30 ("Before the enactment of general statutes authorizing and regulating cemetery corporations throughout the United States, the control of the churchyards was vested in the trustees of the respective religious societies controlling them, under the general or special acts under which they were organized.").

133. *Id.* at 28.

134. HABENSTEIN, *supra* note 28, at 118–19.

135. *See id.* at 196–97.

136. *Id.* at 197.

137. *Id.* at 146, 149.

138. *See* AMANIK, *supra* note 1, at 19–20.

burial societies called *chevra kadisha*. Among the first tasks of Jewish settlers arriving to the New World was purchasing land to build cemeteries and forming *chevra kadisha* to carry out the Jewish burial rituals.[139] *Chevra kadisha* were comprised of volunteers in good standing in the Jewish community.[140] Throughout the Founding Era, *chevra kadisha* operated independently from government and other religious authorities. When local disagreements about burial arose, *Chevra kadisha* settled disputes apart from secular courts.[141] For example, when Judith Levy married the Revolutionary War solider James Pettigrew in a church, the local Jewish community appealed to *chevra kadisha* to decide whether the Christian marriage would disqualify the couple from being buried in a Jewish cemetery.[142] The authority of *chevra kadisha* to settle burial disputes such as these highlights a key feature of early American religious life: the freedom for religious communities to manage their own customs and funerary practices without government supervision.

The 1829 case, *Beatty v. Kurtz*,[143] is an important touchpoint for understanding the nature of religious authority over death and burial under American common law.[144] In *Beatty*, members of a rundown Lutheran church sued to enjoin the heirs of the church from destroying a graveyard that sat on the property.[145] The case eventually found its way to the Supreme Court.[146] Authoring the opinion of the Court, Justice Story granted the challengers' injunction on grounds that destroying the graveyard rose to the level not of "a mere private trespass but a public nuisance."[147] He further explained that the "protecting power of the court of chancery" was necessary "to preserve the repose of the ashes of the dead[] and the religious sensibilities of the living."[148] Implicit in Justice Story's reasoning was the understanding that, in a nation without an established church, courts of equity would need to step into the breach to protect the repose of the dead.[149] For the first time in history, an American court exercised authority over what English common law had granted solely to the Church of England.[150]

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139. *Id.* at 50–51.
140. *Id.* at 47–48.
141. *Id.* at 6–7.
142. *Id.* at 30–31.
143. 27 U.S. 566 (1829).
144. *See* Tanya D. Marsh, *You Can't Always Get What You Want: Inconsistent State Statutes Frustrate Decedent Control over Funeral Planning*, 55 REAL PROP., TR. & EST. L.J. 147, 154 (2020).
145. *Beatty*, 27 U.S. at 567.
146. *See id.* at 566.
147. *Id.* at 584.
148. *Id.* at 585.
149. *See id.* at 584–85.
150. *See* Marsh, *supra* note 144, at 154.

Beatty's solution to the common law's lack of jurisdiction over graveyards was to wield the Court's equitable powers to assert authority over graveyards in service of protecting religious convictions about care for the dead.[151] This approach is consistent with the exercise of equitable powers by early American courts.[152] As Stephanie Barclay has argued, "judicially created exemptions were frequently employed during the Founding period to protect a wide variety of liberties from laws that swept too broadly."[153] These exemptions often came in the form of equitable constructions of statutes that interpreted laws to avoid conflict with constitutional rights.[154]

Beatty fits squarely into this mold. In *Beatty*, the Court characterized itself as granting an equitable exemption to the common law rules of property.[155] Before holding that the land at issue was validly transferred to the Lutheran church, it noted that "this Court considered cases of an appropriation or dedication of property to particular or religious uses *as an exception to the general rule* requiring a particular grantee."[156]

Before turning the page, it is important to point out what *Beatty* does not stand for: the idea that courts of equity have jurisdiction over the performance of religious funerary rituals. As Vincent Munoz has argued, baked into the Founding Fathers' understanding of religious liberty was the idea that courts lack jurisdiction, or to put in Madison's words, "cognizance," over religious worship.[157] Indeed, this was the very idea that the priest in *Permoli* appealed to when he argued that New Orleans's ordinance unconstitutionally regulated the performance of Catholic funerals by "legislat[ing] for the priest as priest."[158] Consistent with this principle, religious institutions

151. *See Beatty*, 27 U.S. at 585.

152. *See* Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 86 (2020) (citing Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 713 (2018)).

153. *Id.* at 60. Justice Story himself seems to have explicitly affirmed this view. *See id.* at 84–85 (citing United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (noting that courts should not "construe the generality of words [in a statute], as to extend them beyond [the statute's] lawful authority, unless the conclusion is unavoidable").

154. *See id.* at 84.

155. *See Beatty*, 27 U.S. at 577–78.

156. *Id.* at 583 (emphasis added).

157. Vincent Phillip Munoz, *James Madison's Principle of Religious Liberty*, 97 AM. POL. SCI. REV. 17, 22–23 (2003) ("We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.").

158. Permoli v. Mun. No. 1 of New Orleans, 44 U.S. (3 How.) 589, 597 (1845). As Michael McConnell and Stephanie Barclay have observed, the petitioner and the respondent in *Permoli* "seemed to assume that religious exemptions were a possibility." *See* Barclay, *supra* note 152, at 65 n.51 (citing Michael W. McConnell,

throughout the nineteenth century continued to exercise control over the performance of funerary rituals.[159] That jurisdictional control over religious practice remained mostly unfettered until the enactment of funeral director statutes at the turn of the century.[160]

B. Confirmatory Evidence in Founding Era Death Care Practices

Funeral director licensing is an invention of the late nineteenth century. In a speech at the National Funeral Directors Association in the 1880s, E. L. Devore remarked: "The burial of the dead as a distinct and separate business is of comparatively recent origin or necessity."[161] From this speech, we see that Americans did not conceive of funeral directing as a separate and distinct business until long after the Founding. Certainly, reference to undertakers appeared in colonial newspapers as early as 1768.[162] But, these undertakers functioned as carpenters who specialized in the construction of coffins.[163] Unlike their late nineteenth-century counterparts, they did not offer a suite of services related to the arrangement of funerals.[164] Instead, that suite of services was provided by several different actors. Although undertakers supplied the coffins, sextons dug graves, clergy presided over funerals, and family members, neighbors, and nurses gathered the community and prepared human remains for burial.[165] Perhaps the most important difference is that, unlike their late nineteenth-century counterparts, families transacted with undertakers on a purely voluntary basis.[166]

Although undertakers sometimes found themselves appointed to positions where they were responsible for implementing public health measures, these positions were separate and distinct from their work as undertakers.[167] For example, an undertaker was appointed to be the coroner of Baltimore, Maryland, in 1799.[168] In other instances, undertakers were appointed to be town registrars who maintained official records about deaths and other vital statistics.[169] Later, in the 1800s, towns sometimes appointed "town undertakers" who were

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The Origins and Historical Understanding of Free Exercise of Religion, 103 HARV. L. REV. 1409, 1503 (1990)).

159. *See* HABENSTEIN, *supra* note 28, at 239.

160. *See supra* Section I.A.

161. HABENSTEIN, *supra* note 28, at 246.

162. On January 7, 1768, Blanch White published an advertisement in *The New Journal or General Advertisement* calling herself an "Undertaker" who "[m]akes all kind[s] of Upholstery-Work" and "furnish[es] [funerals] with all things necessary." *Id.* at 226.

163. *See id.* at 206, 245.

164. *See id.* at 245.

165. *See id.* at 245–46.

166. *See id.* at 206, 209, 403.

167. *See* HABENSTEIN, *supra* note 28, at 242.

168. *Id.*

169. *Id.*

tasked with crafting coffins and other funeral-related goods for the entire municipality.[170] Although these official government positions were loosely connected with funerals, they were importantly distinct from the business of undertakers. One did not have to be a registrar or coroner to perform the role of an undertaker, selling coffins or transporting the remains of the deceased to the graveyard. Neither did being an undertaker mean you would be required to hold a government position. Most undertakers did not also hold government roles.[171]

C. Confirmatory Evidence in Public Health Regulations

So far, this Part has argued that religious organizations exercised a sphere of control over the performance of funerals free from state intervention during the Founding Era. This Section argues that, although public health regulations sometimes placed limitations on religious organizations' performance of funerals, those regulations bear little resemblance to funeral director licensing statutes of the twentieth century.

States passed public health regulations that governed burial and funerals during and after the Founding. Unlike the complex web of public health regulations that exist at the state and federal level today, Founding Era public health regulations were exclusively creatures of state law.[172] Though colonial towns passed one-off legislation regulating medical practices, quarantine, and sanitariness long before the founding, state-wide boards of health would not exist until 1855.[173] Before the formation of statewide health boards, public health laws existed exclusively at the level of municipal governments.[174] Baltimore, Maryland was the first town to form a local health board in 1793.[175] Towns in other states soon formed their own health boards.[176]

Local health boards were granted the power to regulate funerals and burials. Charlestown's health board, established in 1832, is one such example.[177] The statute establishing Charlestown's health board read:

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170. *Id.*

171. *See id.* at 245–46.

172. James G. Hodge, Jr., *The Role of New Federalism and Public Health Law*, 12 J.L. & HEALTH 309, 331 (1998).

173. *Id.* at 326.

174. *Id.*

175. *Id.*

176. *Id.*

177. *See* Act Authorizing the Town of Charlestown to Establish a Board of Health, CHARLESTOWN, M.A., CHAP. 0150 §§ 1–2 (1832), https://archives.lib.state.ma.us/server/api/core/bitstreams/b32996d6-929e-4306-8c76-e8bc7bed618d/content.

> Be it enacted . . . that the selectmen of the town of Charlestown be . . . authorized and empowered, from time to time, to make and establish rules, orders, and regulations, for the interment of the dead in said town, to establish the police of the burying grounds, appoint and locate the places where the dead may be buried in said town, to make regulations for funerals, and appoint all necessary officers and persons to carry the same into effect, and to prescribe their duties and fees.[178]

Charlestown's ordinance demonstrates that health boards had regulatory authority over numerous aspects of funerals, cemeteries, and interments. The concern of health boards with regulating death care was influenced by the miasma theory of disease, which posited that diseases spread through contaminated air.[179] This outdated theory, a cornerstone of nineteenth-century science, was superseded at the turn of the century by the germ theory of disease.[180]

Permoli shows how laws passed by local health boards functioned in practice to regulate funerals. The regulation in that case was an ordinance passed by the city of New Orleans's health board.[181] Recall that the ordinance limited open-casket funerals, a common Catholic practice, to one church within the city.[182] At the Supreme Court of the United States, New Orleans defended the ordinance, asserting that it was enacted to reduce the transmission of yellow fever, which frequently ravaged the city.[183] Although New Orleans's open-casket funeral ban was ultimately allowed to stand, the Supreme Court disposed of the case on jurisdictional grounds.[184] Additionally, it is important to point out that Louisiana's Constitution, unlike those of many other states, did not have provisions corresponding to the religion clauses of the Federal Constitution. Thus, conclusions about the constitutionality of funeral director laws cannot be drawn from *Permoli*. But *Permoli* does provide confirmatory evidence that public health regulations sometimes hemmed in religious exercise in the practice of funerals.

The above discussion shows that Founding Era public health regulations were importantly different from modern funeral director licensing. First, although Founding Era public health regulations placed limitations on how funerals could be performed, they did not restrict *who* could perform them. This stands in contrast to modern

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178. *Id.* § 1.

179. *See supra* note 47 and accompanying text.

180. *See* Permoli v. Mun. No. 1 of New Orleans, 44 U.S. (3 How.) 589, 602 (1845).

181. *Id.* at 590.

182. *Id.*

183. At the Supreme Court, New Orleans argued that it was "visited annually with yellow fever, in either the sporadic or epidemic form, and strong sanitary measures are deemed indispensable there to check the range and prevalence of the pestilence when it comes." *Id.* at 600.

184. *Id.* at 610.

funeral director licensing, whose chief function is to restrict the performance of funeral directing to a limited number of license holders. As a result, Founding Era regulations were substantially less burdensome on religious practice because determining who has ultimate authority over funerals is a more intrusive exercise of power than limiting how funerals are conducted.

IV. THE CASE FOR RETURNING FUNERALS TO RELIGION

Funeral director laws create a host of problems for religious exercise. They violate religious autonomy, discriminate between secular and religious activity, and impose significant and unnecessary burdens on religious exercise. This Part argues for a simple solution: religions should be granted the same exemption that secular families in most states already enjoy. Simply extending the family exemption to religious organizations would be a boon for religious liberty with minimal potential downsides. In effect, the solution proposed here would return jurisdiction over burial of the dead to religious organizations, aligning modern funeral regulations with the status quo that existed during the Founding Era.

From the outset, it is important to address four objections. First is the objection that granting religious organizations exemptions from funeral director licensing would harm public health. As an initial matter, this objection has a tough hill to climb because the government already grants exemptions to families to perform home funerals. To justify not extending the same exemption to religious organizations, one would need to offer some reason why families performing home funerals do not pose health risks, but religious organizations do. It is doubtful that any such justification be found, or that such suspicion of religious practices is warranted. More importantly, however, modern science affirms that so long as burial occurs within a reasonable time, handling human remains poses no special risks of spreading disease.[185] Indeed, this recognition of the relative harmlessness of natural burial has been affirmed by public health boards and enshrined into state laws for years without any public health crises. Importantly, even if religious exemptions were extended to religious organizations, clergy would still be required to comply with existing health and safety regulations governing the handling of corpses.[186] In the rare scenario of a disease outbreak that spreads through the handling of corpses, such as Ebola, then religious families would be subject to health and safety regulations—just like everyone else.

185. *See* Solley, *supra* note 80, at 856–57 (arguing that "alternative death care options" such as natural burial pose fewer health risk than the more invasive practice of embalming); *see also id.* at 856 n.174 (collecting scientific authorities showing that natural burial poses few risks).

186. KAN. ADMIN. REGS. § 63-3-10 (2024).

The second objection is that funeral director licensing is needed to protect consumers. Similar to the first objection, however, this second objection suffers from the fact that families are already exempted from funeral director laws.[187] One advancing this objection would need some explanation as to why for-profit funeral directors can protect consumers, but non-profit religious organizations cannot. On this front, there is good reason to believe that funeral directors fare worse than religious organizations at protecting consumers' rights. As discussed above,[188] principal-agent problems are a structural feature of funeral director licensing statutes as they currently exist. Funeral directors face incentives to push families towards buying more expensive funeral services and these incentives do not always align with the interests or religious convictions of grieving families. Accordingly, the consumer protection rationale cuts in favor of granting religious exemptions to allow trusted clergy members to supervise funerals, as the incentives of clergy are more closely aligned with the needs and values of religious families.

Third is the objection that granting the family exemption to religious organizations would open up a Pandora's box of religious funerary practices that would conflict with community values. For example, Buddhists in Tibet practice sky burial, where human remains are left in open-air sites, often mountaintops, for birds to scavenge or pick apart.[189] Hindu cremation on funeral pyres is yet another burial practice that raises the possibility of conflict with community values.[190] However, the third objection is unwarranted because, even if exemptions from funeral directing laws were granted, other laws governing the desecration of corpses and public health would remain in place. Evidence of laws prohibiting the desecration of a corpse predates the colonies and is firmly established in English common law.[191]

Finally, leaning on the original justification for funeral directing statutes, the fourth objection is that such statutes are necessary to protect the economic interests of funeral directors. This objection sits on shaky ground because it is far from clear that economic protectionism is a legitimate state interest. Currently, a circuit split divides the Fifth and Tenth Circuits on this very question.[192] Even if

187. *See supra* Section I.B.3.

188. *See supra* Section II.B.3.

189. Team Earth, *Sky Burials and Other Eco-Friendly Funerals*, EARTH FUNERAL (Nov. 7, 2023), https://perma.cc/4ZWG-DHRY.

190. Jerome Taylor, *The Burning Issue of Hindu Funeral Pyres*, INDEPENDENT (Oct. 14, 2008), https://perma.cc/G6HD-MZDF .

191. Mary Lowth, *Charles Byrne, Last Victim of the Body Snatchers: The Legal Case for Burial*, 29 MED. L. REV. 252, 254–55 (2021).

192. *See* Powers v. Harris, 379 F.3d 1208, 1225 (10th Cir. 2004) (holding that the government has an interest in protecting the private economic interests of funeral directors); St. Joseph Abbey v. Castille, 712 F.3d 215, 226–27 (5th Cir.

the split were resolved in favor of recognizing economic protectionism as a valid government interest, funeral director licensing statutes would then face the challenge that religious liberty is a fundamental right. In a rights conflict where an individual's religious liberty is weighed against the funeral industry's economic interest in maintaining a monopoly, strict scrutiny would apply. Without a clear and overriding public interest, economic protectionism is unlikely to survive such judicial review.

Having addressed objections, the question arises of how religious exemptions to funeral director licensing regimes may be implemented. Family exemptions from funeral director laws in many states arise from reasonable interpretations of funeral director statutes. This raises the possibility that courts could construct funeral director statutes narrowly to avoid conflict with religious exercise. In many states, funeral directing covers the "business" of funeral directing.[193] Seizing on the fact that religious organizations are not engaged in for-profit activity might be one way to accomplish this.

By contrast, a straightforward way of implementing religious exemptions is to enlist the help of legislatures. For example, an exemption for clergy is expressly provided for in New York's funeral directing statute: "Nothing herein shall be construed as prohibiting religious supervision of the funeral service by a member or members of the clergy designated by the family of the deceased person."[194]

So far, I have argued that extending religious exemptions to religious organizations would be a good thing, but might the Constitution require it? Currently, the *Smith* test controls whether government laws violate religious liberty.[195] Under the *Smith* test, religious activity will not enjoy constitutional protection so long as it is burdened only by a "neutral" and "generally applicable" law.[196] A law that facially discriminates against religious activity fails the *Smith* test. Plausibly some funeral director statues succumb to facial discrimination. Moreover, within the past five years, the Supreme Court has repeatedly held that laws may not discriminate between religious and secular activity.[197] Justice Gorsuch has gone so far as to characterize granting individualized exceptions for secular but not religious activity as a form of impermissible discrimination.[198] This raises the possibility that funeral director licensing regimes that offer

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2013) (reaching the opposite conclusion); *see also* Rowes, *supra* note 15, at 63, 84–86 (discussing the wider ramifications of the circuit split).

193. *See, e.g.*, CONN. GEN. STAT. § 20-207(3) (defining "funeral directing" as "the business practice or profession, as commonly practiced").

194. N.Y. PUB. HEALTH § 77.7 (2024).

195. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2422 n.1 (2022).

196. *Id.* at 2422.

197. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–69 (2020) (per curium); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021).

198. *Roman Cath. Diocese*, 141 S. Ct. at 72 (Gorsuch, J., concurring).

the family exemption may be unconstitutionally discriminatory under current federal doctrine.

As discussed earlier, however, the Supreme Court seems poised to overturn *Smith*.[199] What will replace *Smith* is a matter of scholarly debate. Some argue that a historically grounded construction of the religion clauses will require returning to a modified version of the balancing approach of strict scrutiny applied by the Court before *Smith*.[200] Others argue that the Court should instead apply a historical analog approach to the free exercise that is similar to the test employed by the majority in *New York State Rifle & Pistol Ass'n v. Bruen*.[201]

While debates about the correct approach to the religion clauses are sure to continue for some time, funeral director statutes appear to be unconstitutional on either of the approaches on offer following *Bruen*. First, under the pre-*Smith* strict scrutiny approach, states would bear the burden of proving that funeral director laws are narrowly tailored to achieving a compelling government interest. But it is hard to see how funeral director licensing statutes can withstand strict scrutiny when, as argued in this Part, they fail to advance consumer protection and public health. Second, as argued in Part IV, funeral director licensing laws are without a Founding Era analog; thus, if the Court follows *Bruen*'s historical analog approach, funeral director licensing statutes are likely unconstitutional.

CONCLUSION

Evidence from the Founding Era suggests that religious organizations enjoyed the right to choose who planned, supervised, and carried out funerary practices subject only to public health regulations. Today's funeral director licensing regimes have strayed considerably from the freedom in religious funeral practices that existed during the Founding Era. But a simple remedy exists. Legislatures and courts can extend exemptions that already exist for families to perform home funerals to religious organizations. Extending the family exemption to religious organization may be required under future Supreme Court doctrine. In fact, it may even be required under current doctrine.

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199. *See supra* notes 23–27 and accompanying text.

200. *See* Stephanie H. Barclay, *Replacing* Smith, YALE L.J.F. 436, 439 (2023).

201. 142 S. Ct. 2111 (2022). For a recent articulation of this argument, see William J. Haun, *Keeping Our Balance: Why the Free Exercise Clause Needs Text, History, and Tradition*, 46 HARV. J.L. & PUB. POL'Y 419, 420–21 (2023).

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