to which members of Congress who are dissatisfied with the present regime, which looks to a host of sources to inform statutory meaning (including what Judge Posner identifies as the ''traditional props of statutory interpretation''[151]), can minimize the impact of such sources within the framework of existing rules. While Congress and the federal judiciary do not ''bargain'' over indicia of legislative intent, individual congressmen can include statements in the legislative record, either on the floor of the relevant house or in the relevant committee reports. If particular assertions included in the record are dubious, other members of Congress can include opposing statements. Does this suggest that a default rule permitting or excluding reliance on legislative history is more effective in lowering the relevant transactions costs? Why?

Consider also the more ambitious legislative proposals that would allow courts to update statutes without regard to the preferences of the enacting legislators. Are there comparable mechanisms that would allow members of Congress to insist that they do not want the statutes they enact updated? For instance, consider the unusual admonition in the legislative history to the Civil Rights Act of 1991:

> No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record § 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.[152]

Does this example help in identifying the preferred default rule? From a Coasian perspective, which of the various sets of approaches to statutory interpretation offered in this chapter seems optimal? Why? Is your answer to this question consistent with the teachings of public choice? Is it consistent with the legal process school? Why? Can the two be reconciled? Why or why not?

III. STATUTORY INTERPRETATION CASES

A. STATUTORY INTERPRETATION AND INTEREST–GROUP DYNAMICS

Consider the following cases in light of the discussion in this chapter. We present two opinions from the first case, the panel opinion in *Mississippi Poultry Ass'n, Inc. v. Madigan*,[153] and the *en banc* opinion from the same case.[154] *Mississippi Poultry* raised the issue of how a judge should deal with a question of statutory interpretation in a situation where there was substantial reason to believe that interest-group politics were at work. Applying the *Chevron* doctrine, the Court in the case was required to

151. Posner, *supra* note 11, at 195.

152. Civil Rights Act of 1991, Pub. L. No. 102–166, Sec. 105(b), 105 Stat. 1071, 1075.

153. 992 F.2d 1359 (5th Cir. 1993).

154. 31 F.3d 293 (5th Cir. 1994).

determine whether the United States Department of Agriculture's regulation providing that foreign poultry inspection rules must be ''at least equal to'' the American regime was a reasonable interpretation of federal law requiring foreign poultry inspection regimes to be ''the same as'' those under domestic law. The Mississippi Poultry Association challenged the USDA's regulation, claiming that it was inconsistent with the plain language of the statute, and that the phrase ''the same as'' required the inspection regime to be identical to the domestic regime. In response to this claim, the USDA argued that such an interpretation would be an ''absurd'' interpretation of the law because it would bar poultry inspected under rules superior to the American system. As we will see, answering this challenge required the Court to determine what exactly the purpose of the law is. We also present an excerpt from the Fifth Circuit's *en banc* opinion in the case, which achieved the same result as the panel court but did so based upon an alternative analysis. As you read these opinions, consider how the various theorists we have described, such as Easterbrook, Posner, Macey, and Hart and Sachs, would go about interpreting the statute in question.

The second case is *Powers v. Harris*.[155] In the opinions presented below, the judges offer three different approaches to the appropriate judicial role when reviewing the constitutionality of a statute that appears to be the product of special-interest group influence. The majority opinion of Chief Judge Tacha acknowledged that the law under review was plainly the product of interest group influence, yet concluded that under the Supreme Court's established jurisprudence, judges are constrained from striking down such laws and that a legislative desire to create a regime of intrastate protectionism and to enrich in-state special interest groups at the expense of in-state consumers is a legitimate governmental purpose that does not run afoul of the Constitution. In a separate concurrence, Judge Tymkovich offered an alternative approach. While Judge Tymkovich generally appeared to share the majority's view about the motivations and effects of the law, he would not go so far as to describe it as having *no* purpose other than to enrich an influential interest group at the expense of the public at large. Instead, he suggested that it is inappropriate for judges to ''call out'' the interest-group influences that might have animated and preserved a given law over time, especially if the Court then goes on to uphold the law as consistent with the Constitution. Judge Tymkovich's opinion might imply that when necessary, judges should engage in the ''noble lie'' in which despite a potential interest group motivation behind a statute, the court seeks to identify a legitimate governmental purpose. And only if the court is unable to do so should it strike the law down. As you read his opinion, consider why Judge Tymkovich might urge this approach rather than adopting the one taken by the majority, which provides the court a more active role in policing interest group bargains. Finally, the case summarized the holding of the Sixth Circuit in *Craig-*

155. 379 F.3d 1208 (10th Cir. 2004).

miles v. Giles,[156] in which the statute in question and facts of the case are virtually identical to *Powers*. Contrary to the Tenth Circuit's holding in *Powers*, however, Judge Danny Boggs held that the statute advances no cognizable public purpose and thus struck down the prohibition as violating the rational basis test.

Mississippi Poultry Ass'n, Inc. v. Madigan[157]

Weiner, Circuit Judge.

This is an appeal from the district court's grant of summary judgment rejecting the Secretary of Agriculture's interpretation of a critical inspection standard contained in the Poultry Products Inspection Act (PPIA). Like Pertelote, we heed Chanticleer's clarion call to resolve the central issue of this most recent in a long and illustrious line of gallinaceous litigation: whether the interpretation of poultry importation standards by the Defendant–Appellant Secretary of Agriculture (the Secretary) is entitled to deference under *Chevron USA v. Natural Resources Defense Council*. Finding the language employed by Congress both clear and unambiguous, we conclude not only that we owe no such deference to the Secretary's interpretation, but also that his interpretation is unsupportable under the plain language of the statute.

At issue in this appeal is the interpretation of § 17(d) of the PPIA and the implementing regulation promulgated jointly by the Secretary and the Food Safety and Inspection Services (FSIS) (collectively, ''the Agency''). Section 466(d) provides that all imported poultry products

> shall . . . be subject to *the same* inspection, sanitary, quality, species verification, and the residue standards applied to products produced in the United States; and . . . have been processed in facilities and under conditions that are *the same as* those under which similar products are processed in the United States.

The Agency promulgated a regulation interpreting the foregoing statutory language as requiring that ''[t]he foreign inspection system must maintain a program to assure that the requirements referred to in this section, *at least equal to* those applicable to the Federal System in the United States, are being met.''

During the required notice and comment period, the FSIS received thirty-one comments on the proposed rule, more than 75% of which opposed the ''at least equal to'' language. Nonetheless, in the preamble to the final rule, the FSIS stated that it did not believe that a literal application of the term ''the same as'' was the intent of Congress, although the FSIS acknowledged that ''there are certain

156. 312 F.3d 220 (6th Cir. 2002).

157. 992 F.2d 1359 (5th Cir. 1993).

features that any system must have to be considered 'the same as' the American system.''

Congress reacted to the effrontery of the ''at least equal to'' language in the regulation by enacting § 2507 of the Food, Agriculture, Conservation, and Trade Act of 1990 (1990 Farm Bill). In that section, Congress addressed the Agency's interpretation, stating that ''the regulation promulgated by the Secretary of Agriculture, through the [FSIS], with respect to poultry products offered for importation into the United States does not reflect the intention of the Congress.'' It then ''urge[s]'' the Secretary, through the FSIS, to amend the regulation to reflect the true legislative intent. Further, in the House Conference Report accompanying the 1990 Farm Bill, Congress declares that although certain technical deviations from United States standards, such as dye color and materials used for knives, may be acceptable, the ''fundamental inspection system, intensity, procedures, and food safety standards, . . . should be *the same as* those prevalent in the United States for any such country to be certified for export to the United States.'' The Agency resisted Congress' expressed wishes, however, and the regulation remained unchanged.[158]

In addition, § 2507(b)(2) of the Farm Bill ''urge[d] the secretary . . . to repeal the October 30, 1989 regulation and promulgate a new regulation reflecting the intention of the Congress.''

Two nonprofit trade associations representing domestic poultry producers, the Mississippi Poultry Association, Inc., and the National Broiler Council (the ''Associations''), challenged USDA regulation as arbitrary and capricious under the Administrative Procedure Act. The Associations argued that the statutory language requiring that foreign poultry inspection regimes be ''the same as'' those in the United States meant that foreign poultry regimes must be *identical* to that in the United States, thus barring the USDA standard which only demanded that the foreign scheme be ''at least equal to'' the domestic scheme. The district court had agreed with the Associations' argument and held that USDA's regulation violated the plain language of the statute and that therefore no *Chevron* deference was owed.

Writing for the Fifth Circuit, Judge Weiner agreed that the statutory language was unambiguous and barred the USDA's regulation. After discussing various dictionary definitions of ''the same,'' Weiner concluded that it was unambiguously meant ''identical.'' Judge Weiner also pointed to Congress's rebuke in the 1990 Farm Bill as corroborating his interpretation:

In that Act, Congress stated emphatically and unequivocally that the Agency has misinterpreted the ''same as'' standard. The Agency's efforts to make much of Congress' failure actually to amend the statute is a red herring. There simply was no need for Congress to amend the statute; it already stated precisely what Congress wanted

158. *Id.* at 1360–62 (footnotes omitted).

it to state. Congress desired the ''same as'' language, and that is the language it placed in the statute. It is not required to respond to the Agency's disregard of unequivocally expressed congressional intent by amending a statute that is both clear and unambiguous on its face.

In response, the government argued that this literalist interpretation would produce absurd results, such as barring the importation of poultry products processed under superior inspection systems. Judge Weiner responded that this would be the case only if the purpose of the law was believed to be the advancement of health and safety goals. Weiner stated:

> Even if the Agency is correct, however, we cannot agree that the result is absurd. Had the Agency labeled the actions of Congress *protectionism*, we would not necessarily disagree. But, while that may be deemed in some quarters to be unwise or undesirable, it cannot be labeled ''absurd'' in the context of divining the *result intended by Congress*. The Agency's complaint, therefore, is one implicating the clear policy choice of Congress—a choice made, undoubtedly, in response to effective lobbying by domestic poultry producers. It is not within the purview of the Agency, however—or of the courts for that matter—to alter, frustrate, or subvert congressional policy. Our ''third branch'' role under the constitutional scheme of separation of powers is limited—as is the role of the Agency—to determining whether that policy is clearly expressed. We conclude that it is in this instance.
>
> . . . .
>
> This final argument exposes the true nature of this case as a dispute between the Executive and Legislative branches over the propriety of Congress' policy choices. Although the Agency makes a compelling argument that the ''at least equal to'' language is the better standard, it simply is not the court's role to judge which branch has proposed the preferable rule. Congress has made clear that ''the same as'' requires *identical* inspection and processing procedures, and the fact remains that it is Congress that has the right to make the choice, even if it proves to be the wrong choice.[159]

Weiner concluded:

> . . . After application of the traditional tools of statutory construction, we conclude that the plain language of § 466(d) of the PPIA clearly demonstrates that Congress intended ''the same as'' to be a synonym for ''identical.'' Any lingering doubt as to Congress' intent is dispelled by its subsequent passage of the 1990 Farm Bill in which it expressly rejected the Agency's unilateral mutation of ''the same as'' standard to the ''at least equal to'' language in its regulation.
>
> The Agency's attempts to conjure up ambiguity are unavailing. As we find under the first step of the *Chevron* methodology that the language of the statute is unambiguous, there is neither need nor

159. *Id.* at 1365, 1367–68 (footnotes omitted).

authority for us to proceed further. We therefore owe no deference to the Agency's interpretation and grant none.

For the foregoing reasons, the district court's summary judgment is AFFIRMED.[160]

Judge Reavley issued a dissenting opinion in which he argued that as a matter of plain language, the phrase ''the same as'' was ambiguous and that Congress had not actually chosen ''identicality over equivalence.''[161] Reavley explained:

In describing the statutory structure in which Congress placed ''same'' in section 466(d), the majority ignores an argument that contravenes its decision. In 21 U.S.C. § 451, Congress bases the entire PPIA on its finding that ''[u]nwholesome, adulterated, or misbranded poultry products'' hurt people and destroy markets for poultry. . . . [T]he Secretary's interpretation of ''same'' to mean ''equivalent'' results in wholesomeness, absence-of-adulteration, and proper-marking qualities which *meet* or *better* the results of an identicality standard. In fact, the *only* result of substituting an identicality standard for the Secretary's equivalence standard is to erect a trade barrier, as the majority recognizes.

While the majority claims to strictly adhere to the principle that words ''take their purport from the setting in which they are used,'' it ignores the fact that section 466(d) appears in a poultry-inspection act which is expressly based upon Congress' exclusive finding that *unwholesome*, *adulterated*, *and misbranded* poultry must be eliminated to protect people and poultry markets. Where is the majority's explanation of how an identicality standard is consistent with section 451?

My analysis of the extant structural arguments shows that the ones relied upon by the majority are inconclusive, and the section 451 argument indicates that Congress did not choose identicality. Thus, even under the majority's understanding of ''make[s] some sense,'' the Secretary's interpretation of ''same'' is entitled to deference. . . .[162]

Judge Reavley also examined the legislative history and policy of the statute and concluded that it supported his argument that Congress had not foreclosed the USDA's regulation through the plain language of the statute. In particular, Reavley argues that the legislative history reveals no evidence that Congress intended this measure to serve as a form of backdoor trade protectionism for the benefit of the domestic poultry industry.

Legislative history and policy together affirmatively establish that Congress has *not* ''directly spoken to the precise question'' of whether ''same'' means ''identical'' or ''equivalent'' in section 466(d). The *only*

160. *Id.* at 1368 (footnote omitted).

161. *Id.* (Reavley, J., dissenting).

162. *Id.* at 1374–75 (citations and footnotes omitted).

rational policy effect of choosing identicality over equivalence is that fewer foreign birds will enter the United States under an identicality standard than would enter under an equivalence standard. By definition, the Secretary's equivalence standard results in poultry that is *at least* as safe and correctly-packaged as that produced under federal standards. If Congress chose between identicality and equivalence in enacting section 466(d) as the majority holds, it must have done so because of the trade implications of an identicality standard. No one suggests another reason. But there is no record anywhere of any congressional consideration of the trade implications of an identicality standard before Congress passed section 466(d). This wholesale lack of attention to the *only* rational policy difference between identicality and equivalence establishes that Congress never chose between identicality and equivalence.

The majority evades this critical point with the truism that neither courts nor agencies can alter policy choices made by Congress. This truism does not alter the fact that we sit to determine *whether* Congress has in fact made a policy choice, regardless of the merit of that choice. I would decide this case according to the simple logic that if Congress wanted to erect a trade barrier, someone, somewhere, would have said something about why a barrier was justified, what it was supposed to accomplish, or how its effectiveness would be monitored.

Judge Reavley noted that from 1972 to 1984, the Secretary applied an equivalence standard to foreign poultry. Reavley explains:

While the 1985 Farm Bill was under consideration on the Senate floor, Senator Helms offered an amendment which substituted ''the same as'' for ''at least equal to'' in the portion of the 1985 Farm Bill that became section 466(d). Senator Helms explained that his amendment was ''purely technical'' and intended to ''clarif[y] the provision to reflect the original intent of the provision as adopted by the committee in markup.'' Without any debate, further explanation, or recorded vote, the Senate adopted Senator Helms's amendment. A conference committee adopted the Senate's version of what became section 466(d) without any recorded consideration of the effect of Senator Helms's amendment.

Either Senator Helms meant to incorporate an identicality standard in section 466(d) by amending the statute to use ''same,'' or he did not intend to incorporate an identicality standard. He did not affirmatively indicate that he desired an identicality standard or that he wanted to change the substance of the Agriculture Committee's equivalence standard. Nor did he mention the trade consequences of a substantive change. Instead, he said that he wanted the provision to reflect the Agriculture Committee's ''original intent,'' which it expressed in an equivalence standard. These points indicate that Senator Helms did not subjectively desire an identicality standard.

But even if Senator Helms harbored this subjective intent, are we to attribute it to Congress *as an institution* when Senator Helms indicated that his amendment was of minimal importance, failed to call Congress' attention to the major trade consequences of such an interpretation of the amendment, and most importantly, *used equivocal language* to institute an identicality standard? The facts of this case provide no basis on which to hold that Congress ''directly spoke[] to the precise question'' of whether section 466(d) mandates identicality.

Finally, Judge Reavley addresses the 1990 ''sense of Congress'' resolution:

Predictably, the majority turns to section 2507 of the 1990 Farm Bill, where Congress declares that its ''sense'' is to ''urge'' the Secretary to substitute ''same'' for the equivalence standard challenged in this case. But a careful study of section 2507 and its background teaches that section 2507 better explains why the Secretary clings to an equivalence standard rather than adopting the position that the majority would have him take.

Section 2507 undeniably has the force of federal law. But by its own terms, this ''law'' only states a fact that the 101st Congress believes to be true and makes a suggestion to the Secretary. The plaintiffs do not contend that Congress established an identicality standard in section 2507; in their complaint, they only seek a declaratory judgment that 9 C.F.R. § 381.196 is inconsistent with the *PPIA*, which includes section 466(d) and does not include section 2507.

The plaintiffs contend that the intent of the 101st Congress as expressed in the 1990 Farm Bill is relevant to determine what the intent of the 99th Congress was in drafting the 1985 Farm Bill. I am aware of no case where any court has held that subsequent legislative history is at all relevant to cases like this one, where, rather than determine what a statute means, we must determine ''whether Congress has directly spoken to the precise question at issue.'' Even the most unambiguous intent in 1990 cannot establish the intent of a different group of people five years earlier. Section 2507 has no bearing on our present inquiry. . . .

Nowhere in section 2507 or its history does Congress suggest that the Secretary adopt an identicality standard, even though the Secretary publicly explained in 1989 that he understood his choices to be between identicality and equivalence. Instead of helping the Secretary interpret ''same,'' Section 2507 and its history simply ''urge'' the Secretary to adopt a ''same'' standard, and to ignore technical deviations from this standard. But the Secretary understood his equivalence standard to operate just like a ''same'' standard that permits various technical deviations. If Congress demands something different, it has yet to say so.[163]

Judge Reavley concluded his dissent by stating:

> The decision of what ''same'' means should remain with the Secretary until Congress says otherwise, and no one contends that the Secretary's choice has an unreasonable effect. I would reverse the district court's decision and render judgment for the Secretary.[164]

The Fifth Circuit reheard *Mississippi Poultry en banc.* While the *en banc* decision vacated the panel decision, in this case it achieved the same result. More notably, while Judge Weiner, who authored both the majority panel decision and the majority decision for the *en banc* court, applied different reasoning. The Court reiterated the panel decision's argument concerning Congress's power to enact a protectionist measure, but added a second rationale: Congress demanded identicality to reduce the administrative costs associated with reviewing different inspection regimes.

Mississippi Poultry Ass'n v. Madigan (En Banc)[165]

Weiner, Circuit Judge:

> Under the PPIA, Congress devised a two-track system for regulating domestic poultry production: Domestic producers who wish to sell products *inter* state must comply with the *federal* standards embodied in the federal regulatory program; domestic producers who wish to sell products only *intra* state may do so by complying with any *state* regulatory program with standards ''at least equal to'' the federal program. Reduced to the simplest terms, Congress thus subjected all domestic poultry production sold in *inter*state commerce to a single, federal program with uniform standards.
>
> Congress also addressed the issue of foreign standards. Under § 17(d) of the PPIA, Congress directed the Secretary to require imported poultry products to be ''subject to *the same* . . . standards applied to products produced in the United States.'' Were that congressional mandate to be enforced strictly, all poultry sold in *inter* state commerce—whether produced in this country or anywhere else in the world—would be inspected pursuant to the uniform federal standards. Despite this congressional command, however, the Secretary promulgated the challenged regulation allowing foreign—but not domestic—poultry products to be imported and sold in interstate commerce, even though such poultry is inspected under *different* standards, as long as the foreign standards are determined by the Secretary to be ''at least equal to'' the federal standards. Given the plain language and structure of the PPIA, we conclude that this regulation cannot withstand the instant challenge. Because the phrase ''at least equal to,'' as used in the PPIA, inescapably infers the

163. *Id.* at 1377–80 (citations and footnotes omitted).

164. *Id.* at 1380.

165. 31 F.3d 293 (5th Cir. 1994).

existence of a *difference*—and the phrase ''the same as,'' as used in the PPIA, eschews any possibility of more than a technical or de minimis difference, neither phrase can ever be synonymous with the other in the PPIA.

. . . In 1957 Congress enacted the PPIA, thereby establishing a comprehensive federal program for the regulation of poultry products. The PPIA was enacted to serve a two-fold purpose: To protect consumers from misbranded, unwholesome, or adulterated products, and to protect the domestic poultry market from unfair competition.

Typically, the safety and unfair competition goals are closely related. Of significance here, however, was Congress' concern with more than differences in *product* when it addressed unfair competition. Specifically, Congress also recognized that differences in *regulation* could also cause unfair competition. Indeed, in its original form, § 2 of the PPIA justified regulation of poultry sold in ''large centers of population'' on the belief that uninspected poultry products—regardless of whether such products were unsafe—adversely affected the national market for inspected poultry products.[166]

Weiner explained that in 1968 Congress established a two-tier system of poultry inspection. This regime applied the federal inspection standards to poultry sold in interstate commerce and ''large centers of population'' affecting interstate commerce. For poultry traveling only in intrastate commerce, however, Congress permitted the relevant state inspection regime to govern provided that regime was ''at least equal to'' the federal regulatory regime. Judge Weiner observed that against this background of jockeying between state and federal inspection regimes loomed a separate question concerning the applicable regulatory standards for imported foreign poultry. Weiner explained:

The 1968 amendments did not alter the standards for imported poultry products. The House Report accompanying these amendments candidly states the then-extant trade considerations underlying this omission:

> The committee concluded that more stringent regulation of imports, when not required might result in the enactment of measures abroad which could hamper the exportation of U.S. slaughtered poultry and poultry products, the volume of which far exceeds the imports.[167]

This hybrid system required the USDA to oversee two distinct poultry inspection programs: the federal program for interstate sales and state programs for intrastate sales that were required to be ''at least equal to'' the federal program. In 1985 Congress passed the law requiring imported poultry to be subject to ''the same'' inspection standards as poultry produced and processed in the United States. Judge Weiner continued:

166. *Id.* at 295–96 (footnotes omitted).

167. *Id.* at 296.

> Despite Congress' command to hold foreign producers of poultry destined for interstate commerce in this country accountable to ''the same'' standards as domestic producers of poultry destined for that market, in 1989 the Secretary and the Food Safety and Inspection Service (''FSIS'') (collectively, the ''Secretary'') promulgated the challenged regulation, thereby retaining the subjective ''at least equal to'' standard. Congress reacted to that effrontery the following year by enacting § 2507 of the Food, Agriculture, Conservation, and Trade Act of 1990 (''1990 Farm Bill''). In that section, Congress addressed the Secretary's interpretation, stating that ''the regulation promulgated by the Secretary of Agriculture, through the [FSIS], with respect to poultry products offered for importation into the United States *does not reflect* the intention of the Congress.'' It then ''urge[d]'' the Secretary, through the FSIS, to amend the regulation to reflect the true legislative intent. The Secretary ignored Congress' entreaty, however, and allowed the regulation to remain unchanged.[168]

Judge Weiner reiterated, as in his vacated panel opinion, that the plain language of ''the same as'' prohibited the USDA's proffered reading as ''at least equal to.''

> The structure of the PPIA is plain: Domestic poultry producers who comply with state inspection programs that are ''at least equal to'' the standards in the federal program may sell their products, but only *intra* state. If a domestic poultry producer wishes to sell his product *inter* state, he must comply with ''the same'' standards that are embodied in the federal program.
>
> The history of the PPIA regarding imports is likewise plain. When the Secretary in 1972 adopted (and in 1989 readopted) standards for imported poultry he had two choices: Either to require imported poultry to comply with the standards applied to all poultry sold in interstate commerce—i.e., the federal standards—or to adopt an ''at least equal to'' standard as used for poultry sold in *intra* state commerce under state programs. To the surprise and dismay of Congress and the domestic poultry industry, the Secretary followed the *intra* state, state-standards approach by promulgating the ''at least equal to'' standard.
>
> Not to be outdone, Congress in 1985 rejected the ''at least equal to'' approach and explicitly provided that imported poultry must meet ''the same . . . standards applied to products produced in the United States.'' The language of the statute is critical here because the *only* standards applicable to domestic poultry products sold in interstate commerce are the federal standards that make up the federal program: There are no parallel or alternative state programs or state

168. *Id.* at 297–98 (footnotes omitted).

standards applicable to poultry sold interstate. As all imported poultry is free to be sold in interstate commerce, only one, inescapable conclusion can be reached: When Congress stated ''the same'' standards it meant for imported poultry to be held to those federal program standards.

The referent for the phrase ''the same'' is thus unmistakably clear. It is also clear that there would be no way for imported poultry sold interstate and domestic poultry sold interstate to be treated ''the same'' under the PPIA's structure if imported poultry were allowed to be imported under the ''at least equal to'' standard. Under such an approach, imported poultry, which the Secretary would attempt to regulate under myriad programs that are ''at least equal to'' the federal program, could move in interstate commerce, whereas domestic poultry that is likewise regulated under ''at least equal to'' programs could move only in *intra* state commerce. In short, by adopting the ''at least equal to'' standard, the Secretary is or could be treating imported and domestic interstate poultry in a substantially different manner. Such diverse treatment can never properly be viewed as applying to imported poultry ''the same . . . standards [as are] applied to products produced in the United States.'' Accordingly, when § 17(d) is read in light of the structure of the PPIA as a whole, the unavoidable conclusion is that the words ''the same'' as used in § 17(d) cannot be stretched to include ''at least equal to.''[169]

Judge Weiner maintained that the 1990 Farm Bill confirmed his reading that with respect to foreign poultry imports, the 1989 ''same as'' requirement demanded identicality rather than equivalency:

[The [1990 Farm Bill was enacted,] not surprisingly, within one year following the Secretary's promulgation of the ''at least equal to'' regulation. In § 2507 of the 1990 Farm Bill Congress first reiterated the facts of this inter-branch dispute: In 1985 Congress had enacted a statute requiring imported poultry to meet ''the same'' standards as domestic interstate poultry, and in 1989 the Secretary had promulgated a regulation imposing merely ''at least equal to'' standards. Congress then stated in plain, direct, and unequivocal language that the Secretary's regulation ''does not reflect the intention of the Congress.''

Congress' store of ''institutional knowledge'' is important. Accordingly, courts have long held that subsequent legislation is relevant to ascertaining the intent of Congress. Although subsequent legislation has been characterized as being anything from of ''great weight'' or having ''persuasive value,'' to being of ''little assistance'' to the interpretative process, resolution of the proper weight to be accorded such legislation depends on the facts of each case. Here, given: 1) the substantial overlap in membership between the Congress that passed the 1985 Farm Bill and the Congress that passed

169. *Id.* at 301–02 (footnotes omitted).

§ 2507;[170] 2) the close temporal proximity between the passage of the 1985 Farm Bill and of § 2507; 3) the unmistakable specificity and directness with which § 2507 addressed the Secretary's interpretation; and 4) the alacrity with which Congress through § 2507 responded to the Secretary's interpretation, we find § 2507 to be highly persuasive, albeit not per se binding. Further, given the structure and history of the PPIA discussed earlier, we also conclude that § 2507 merely states the obvious: That the Secretary's adoption of the ''at least equal to'' standard ''does not reflect'' the intent of Congress as plainly expressed in § 17(d) of the PPIA.[171]

Finally, Judge Weiner rejected what he regarded as the USDA's attempt to rewrite the statute to bring about a more desirable policy:

> The Secretary strenuously argues that an ''at least equal to'' standard protects American consumers from ''unhealthful, unwholesome, or adulterated'' products while allowing foreign poultry products to be imported at reasonable costs. In contrast, the Secretary asserts that imposition of ''the same'' standards with accompanying ''jot for jot'' identicality would raise these costs to a prohibitive, protectionist level without any concomitant increase in the safety and quality of the imported product. According to the Secretary, holding foreign poultry producers to ''the same'' standards even contains the seed of an absurdity: That such a practice would prohibit the importation of poultry products produced under *superior* foreign standards!
>
> Even though there is superficial appeal to some of the Secretary's policy arguments, they are overdrawn. As a preliminary matter, we observe that although the Secretary places much weight on his prohibiting-superior-standards-is-absurd argument, he has failed to cite even one instance in which a foreign country actually uses a superior standard. All we have been offered is hypotheticals. As the Secretary must certify the production and inspection practices in foreign countries—and hence is presumably familiar with such practices—we find this omission strange.
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> . . . .
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> As a parting comment, we also observe that the Secretary's arguments fail to account for the various legitimate reasons why Congress might want to hold imported poultry to the federal standards. For example, requiring such congruity between foreign and federal standards means that *all* poultry—domestic and foreign—sold *inter* state must be produced and inspected according to *one* set of rules. Accordingly, such an approach maintains uniformity in the national market, thereby presumably engendering the lowered infor-

170. Four hundred and thirty-five members of the Congress that passed § 2507 [in 1990] were members of the Congress that added 'the same' language to § 17(d) as part of the 1985 Farm Bill.

171. *Id.* at 302–03 (footnotes omitted).

mation costs and enhanced consumer confidence commonly associated with such uniformity.

In addition, adopting such an approach offers the traditional advantage associated with ''bright line'' rules—agency personnel would no longer be required to make subjective, fact-specific judgments as to whether one country's standards are somehow in globo ''at least equal to'' federal standards. If we operate from the uncontested assumption that the Secretary has devised a federal program that ensures safety, then lessening of subjectivity here also reduces the risk that unsafe products might be imported—i.e., that agency personnel might err, even once, in concluding that a foreign program which differs substantially from our own nevertheless offers safety standards ''at least equal to'' the federal program.

Finally, we note that—as a matter of policy—there would be little reason for the Secretary to single out domestic ''state program'' poultry producers, who must likewise meet an ''at least equal to'' standard to sell intrastate, and prevent them from entering the interstate market. Of course, there is a simple rebuttal to this argument: The statute prevents such producers from selling their products interstate. And that rebuttal applies equally to the Secretary's impassioned plea for the ''at least equal to'' standard for foreign poultry producers: The statute flatly forbids it! These points place the foregoing policy discussion in proper perspective. Although such a discussion is helpful to our understanding of the PPIA and § 17(d)—and is necessary as a check for any ''absurdities''—these policy concerns cannot control the disposition of this case. Policy choices are for Congress—not the courts. And here Congress has chosen—twice.[172]

Judge Weiner concluded:

For the foregoing reasons, the district court's summary judgment holding that the Secretary's 1989 regulation implementing § 17(d) was arbitrary and capricious and thus invalid is

AFFIRMED.[173]

Judge Higginbotham issued a dissenting opinion in which he determined that the statute was ambiguous and that the USDA's interpretation, and promulgated regulation, was reasonable. Even though the *en banc* opinion downplayed the protectionism rationale for insisting upon an identicality standard, Judge Higginbotham argued that protectionism was a forseeable consequence of such a reading and that absent explicit congressional guidance, the court should not lightly infer an intent to produce this result. Higginbotham explained:

This case is simple. Congress has insisted that foreign poultry meet the ''same'' standards as domestic poultry. It did so in a statute

172. *Id.* at 308–10 (footnotes omitted).

173. *Id.* at 310.

> addressed to ''unwholesome, adulterated or misbranded poultry products.'' Our court today holds that under this statute, the Department of Agriculture must forbid the importation of all foreign poultry produced by quality standards higher and lower than those in the United States. It reads ''same'' standards to mean identical processes and identical plants. Make no mistake about it: as the majority interprets the statute, virtually all importation of poultry is illegal. The majority insists on this literalism despite the common sense reading of ''same'' in the context of standards of quality to mean the same minimum level of wholesomeness, that is, ''at least equal to.'' This absurdity is a lion in the street for the majority, and it never deals with it. It does not because it cannot. The Department of Agriculture has implemented the statute by regulations that allow importation of poultry produced by standards ''at least equal to'' our own. Dictionaries of the English language permit not ''different in relevant essentials,'' or ''equivalent'' as meanings of the word ''same.'' This reference to dictionary meanings is quite different from a game-like use of ''modify.'' Rather, these are meanings as old as the republic. The choice of meanings is found in context.

Higginbotham considered the political implications of the majority ruling:

> Deny, deny, explain, explain—the inescapable reality is that under the majority's view, we must tell France and Israel, for example, that they may not import poultry into the United States because their standards for cleanliness and wholesomeness are higher or lower than those in the United States. The standards are not, and it is doubtful if they could be, implemented in identical ''facilities'' and under identical ''conditions,'' as the majority insists they must be. Further, by the majority opinion, we allow Canada and Mexico [under the North American Free Trade Agreement (NAFTA)] to meet some undefined, but lesser standard. First the panel opinion, and now the en banc opinion, hints at a latent congressional purpose of trade protectionism. It is indeed a curious blend of protectionism that would protect American poultry interests from the threat of foreign poultry that is superior because it is healthier for the consumer. This insistence that a foreign producer lower its standards of health to meet the statutory command of sameness may be a form of trade protectionism, but it remains an absurdity.[174]

Judge Higginbotham then argued that the statutory language does not recognize the majority's distinction between state and federal standards. The only policy purpose expressly recognized in the legislative history was the protection of consumers from unsafe poultry products. In contrast, there was no mention in the legislative history of a protectionist purpose.

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174. *Id.* at 310–11 (Higginbotham, J., dissenting) (footnotes omitted).

> If Senator Helms in submitting his amendment or Congress in adopting it intended to embed a protectionist measure in a bill dedicated to health issues, neither gave any sign or signal.
>
> . . . .
>
> The majority's second argument, as I understand it, is that by using alternative processes to ensure the quality of poultry, a foreign nation might gain some strategic advantage. That the statute does not say same processes, but same standards, does not slow the majority. Congress might indeed be unhappy if it unwittingly deprived domestic poultry producers of processes for ensuring the quality of chickens that were less expensive than, and as effective as, those required by federal law. If foreign poultry producers adopted these processes of poultry production, and thereby increased their sales in the United States, Congress might well respond. It could do so by banning the less expensive foreign poultry, the approach the majority opinion takes, or by allowing American poultry producers to adopt the foreign process, the approach I myself would think preferable. It is crucial to point out, however, that Congress has not as of yet done either. The majority has simply grafted onto the PPIA its own policy concern, reading it into the word ''same,'' and never, I repeat, confronting the question—same as what?[175]

Judge Higginbotham concluded his dissent by questioning the majority's use of subsequent legislative enactments:

> The majority relies on legislation passed subsequent to the PPIA to support an identicality standard. Congress responded to the Secretary's regulation in section 2507 of the Food, Agriculture, Conservation, and Trade Act of 1990 by stating that the regulation ''does not reflect the intention of Congress'' and ''urg[ing] the Secretary . . . to repeal the October 30, 1989 regulation and promulgate a new regulation reflecting the intention of Congress.'' Congress did not purport to amend the PPIA nor did it make a finding as to its intentions at the time it passed the PPIA. The Secretary did not change the regulation in response to Congress' admonition.
>
> The Supreme Court has made clear how to approach this legislation. ''If th[e] language [of the 1990 Act] is to be controlling upon us, it must be either (1) an authoritative interpretation of what the [1985] statute meant, or (2) an authoritative expression of what the [1990] Congress intended. It cannot, of course, be the former, since it is the function of the courts and not the Legislature . . . to say what an enacted statute means.'' Nor can it be the latter because the 1990 Act made no claim to enact a new or to alter an old law. The language of the Act is clear: Congress urged the Secretary of Agriculture to repeal the October 30, 1989 regulation and to promulgate a new one.

175. *Id.* at 313–14 (footnotes omitted).

If, as I believe, the language of the PPIA permitted the Secretary's interpretation, Congress's later urging did not alter that fact.[176]

DISCUSSION QUESTIONS

1. How would the various commentators we have interpreted the statute at issue here? Consider the following possibilities. Judge Easterbrook would follow the majority panel opinion and read the statute as having a protectionist purpose. On this reading, ''same'' means ''identical.'' Judge Posner would instead agree with the reasoning of the *en banc* majority, acknowledging the dual purposes of the law (consumer protection and economic protectionism) while also recognizing that Congress could elect a bright-line rule for administrative convenience. It is less clear whether Posner would find the law to be ambiguous and thus subject to administrative interpretation. Professor Macey would agree with the holding of the dissent from the *en banc* opinion. He would stress that if Congress had a protectionist intent, that intent was ''hidden-implicit.'' The court therefore should enforce law's stated purpose of consumer protection, or perhaps the USDA interpretation, which advances the public interest. Finally, Hart and Sachs, and perhaps those scholars who consider themselves heir to the Legal Process tradition, would side with the dissenting opinion, reading the law to advance the public interest goals of consumer welfare and to prevent ''unfair'' competition (rather than competition *per se*). Can any of these approaches be said to be ''correct''?

2. In the panel opinion, Judge Weiner observes that the definition of ''same'' as ''identical'' is not absurd if the judge recognizes that one purpose of the law was protectionism. Writing in dissent, Judge Reavley, however, claims that this protectionist purpose is nowhere expressly stated. To what extent should a Court try to infer implicit interest-group purposes of legislation when the legislation is not explicit on the point?

3. Following the initial promulgation of the USDA's regulation, Congress announced a ''Sense of Congress'' resolution that criticized the USDA's interpretation. Congress did not, however, amend the statute or take other corrective action. The *en banc* opinion notes that the Congress that enacted the ''Sense of Congress'' resolution was virtually identical to the composition of Congress that enacted the initial legislation (with 435 members of the 1985 Congress who supported the original legislation also supporting the ''Sense of Congress'' resolution as active members of both houses in 1990). What relevance, if any, should a subsequent statement of Congress have in interpreting legislation? Should the degree of continuity in the composition of the Congress make a difference?

4. What weight might Easterbrook attach to the ''sense of Congress'' resolution? How does the question relate to his analysis of the hypothetical failure to amend the Communications Act after a court, apparently contrary to congressional intent, held it inapplicable to cable[177]? From a public choice perspective, if it is the case that the poultry industry sought protectionism through this legislation, would it be easier to overturn the USDA's definition

176. *Id.* at 314 (footnotes omitted).

177. *See supra* pp. 269–70.

of ''same'' as meaning ''at least equal'' or ''identical''? Should that make a difference in how the court interprets the statute?

5. In the majority panel opinion, Judge Weiner justifies his reading of the law by emphasizing its implicit protectionist purposes. In his *en banc* opinion reaching the same result, however, he instead emphasizes a claimed public interest justification for the law, namely that it will serve to minimize administrative costs in monitoring different poultry inspection regimes. Why might Weiner, on further consideration, have based his opinion on a public interest justification for the law? Might this have been necessary to forge a majority coalition on the *en banc* court, but not for a majority panel decision? If so, why might that difference in bargaining dynamics have arisen?

B. CONSTITUTIONAL JUDICIAL REVIEW OF INTEREST–GROUP LEGISLATION

The next case, *Powers v. Harris*,[178] from the United States Court of Appeals for the Tenth Circuit, considers the constitutional implications of interest-group theory for constitutional judicial review of interest-group driven legislation. The various opinions in *Harris* also consider a related case from the United States Court of Appeals for the Sixth Circuit, *Craigmiles v. Giles*.[179]

The *Harris* opinions present three different approaches to the question of the appropriate judicial role when reviewing a statute that appears to be the product of special-interest group influence. Writing for a majority, Chief Judge Tacha acknowledges that the enacted statute is a protectionist measure. He concludes, however, that under established Supreme Court case law, a legislative scheme that benefits an in-state interest group at a cost imposed upon in-state consumers does not violate the Constitution.

While Judge Tymkovich, writing in concurrence, generally shares the majority's reading of the statute as motivated by interest group pressures, he would not go so far as to describe it as having *no* other purpose than to pay off an influential interest group at the expense of consumers. Instead, he suggests that it is inappropriate for judges to ''call out'' the interest group influence underlying the law especially when the court proceeds to sustain the statute against a constitutional challenge. On one reading, Judge Tymkovich encourages judges to engage in the noble lie that interest group driven laws nonetheless further a legitimate governmental purpose. Alternatively, Tymkovich's opinion might be construed to imply that if the court can locate no such legitimate purpose, it should then proceed to strike down the challenged law. As you read his opinion, consider why Tymkovich might urge this choice rather than allowing a frank acknowledgement of an interest group payoff while still sustaining the challenged law.

178. 379 F.3d 1208 (10th Cir. 2004).

179. 312 F.3d 220 (6th Cir. 2002).

Finally, the *Powers* majority distinguished its holding from that of the Sixth Circuit in *Craigmiles v. Giles*,[180] a case presenting nearly identical facts. In contrast with *Harris*, however, Judge Danny Boggs, writing for the *Craigmiles* Court, struck down the challenged law as violating rational basis scrutiny.

Powers v. Harris dealt with an Oklahoma law, similar to those in other states, demanding that funeral caskets only be sold by licensed funeral directors operating a funeral home. This regulation did not apply to other related merchandise, including urns, grave markers, and monuments. The prohibition also did not apply to ''pre-need'' sales, meaning caskets sold in connection with funeral arrangements prior to a person's death, but only to ''time-of-need'' sales.

The Oklahoma State Board of Embalmers and Funeral Directors, which was empowered to enforce the legislation, limited its application to intrastate casket sales. As a result, an unlicensed Oklahoman could sell a time-of-need casket to a customer *outside* Oklahoma; an unlicensed *non-Oklahoma* salesman could sell a time-of-need casket in Oklahoma; and an unlicensed person could sell a *pre-need* casket within Oklahoma. As a result, the requirement that a salesperson possess both a funeral director's license and operate out of a licensed funeral home only applied to the intrastate sale of time-of-need caskets between an Oklahoma seller and an Oklahoma consumer.

Obtaining a funeral director's license was both time consuming and expensive, and most of the relevant training did not relate to casket sales. Applicants were required to complete sixty credit hours of specified undergraduate training, a one-year apprenticeship that included embalming no fewer than twenty-five bodies, and to pass both a subject-matter and an Oklahoma law exam. Finally, businesses seeking to be licensed funeral homes were required to have a fixed physical location, a preparation room that met embalming requirements, a merchandise room with an inventory of no fewer than five caskets, and suitable areas for public viewing of human remains.

The plaintiff in the case was an Oklahoma corporation that sought to sell funeral merchandise, including caskets, over the Internet. Judge Tacha, writing for the *Harris* majority, held that the law was not unconstitutional.[181] Tacha explained:

> Hornbook constitutional law provides that if Oklahoma wants to limit the sale of caskets to licensed funeral directors, the Equal Protection Clause does not forbid it. . . .
>
> . . . .
>
> In *United States v. Carolene Products Co.*, the Court held, pursuant to rational basis review, that when legislative judgment is called into question on equal protection grounds and the issue is debatable,

180. 312 F.3d 220 (6th Cir. 2002).

181. 379 F.3d 1208 (10th Cir. 2004).

the decision of the legislature must be upheld if ''any state of facts either known or which could reasonably be assumed affords support for it.'' Second-guessing by a court is not allowed.

Further, rational-basis review does not give courts the option to speculate as to whether some other scheme could have better regulated the evils in question. In fact, we will not strike down a law as irrational simply because it may not succeed in bringing about the result it seeks to accomplish, or because the statute's classifications lack razor-sharp precision. Nor can we overturn a statute on the basis that no empirical evidence supports the assumptions underlying the legislative choice.

Finally, ''because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.'' ''[T]hose attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it[.]' '' As such, we are not bound by the parties' arguments as to what legitimate state interests the statute seeks to further. In fact, ''this Court is *obligated* to seek out other conceivable reasons for validating [a state statute.]'' Indeed, that the purpose the court relies on to uphold a state statute ''was not the reason provided by [the state] is irrelevant to an equal protection inquiry.''

These admonitions are more than legal catchphrases dutifully recited each time we confront an equal protection challenge to state regulation—they make sense. First, in practical terms, we would paralyze state governments if we undertook a probing review of each of their actions, constantly asking them to ''try again.'' Second, even if we assumed such an exalted role, it would be nothing more than substituting our view of the public good or the general welfare for that chosen by the states. As a creature of politics, the definition of the public good changes with the political winds. There simply is no constitutional or Platonic form against which we can (or could) judge the wisdom of economic regulation. Third, these admonitions ring especially true when we are reviewing the regulatory actions of states, who, in our federal system, merit great respect as separate sovereigns.

Thus, we are obliged to consider every plausible legitimate state interest that might support the [Funeral Service Licensing Act] FSLA—not just the consumer-protection interest forwarded by the parties. Hence, we consider whether protecting the intrastate funeral home industry, absent a violation of a specific constitutional provision or a valid federal statute, constitutes a legitimate state interest. If it does, there can be little doubt that the FSLA's regulatory scheme is rationally related to that goal.[182]

182. *Id.* at 1211, 1216–18 (citations and footnotes omitted).

After reviewing various justifications offered for the law, the court turned to the key proffered justification, which was whether the desire to transfer wealth from in-state consumers to an in-state interest group (in this case, licensed funeral home directors) was a legitimate state interest. Judge Tacha held that it was:

> Implicit in Plaintiffs' argument is the contention that intrastate economic protectionism, even without violating a specific constitutional provision or a valid federal statute, is an illegitimate state interest. Indeed, Plaintiffs describe Oklahoma's licensure scheme as ''a classic piece of special interest legislation designed to extract monopoly rents from consumers' pockets and funnel them into the coffers of a small but politically influential group of businesspeople—namely, Oklahoma funeral directors.'' Amici are not so coy. In their view, Oklahoma's licensure scheme ''is simply . . . protectionist legislation[,]'' and ''[u]nder the Constitution, . . . economic protectionism is not a legitimate state interest.''[183]

The court then considered whether the Supreme Court's dormant Commerce Clause opinion, *H.P. Hood & Sons*, relied upon by the *Craigmiles* court, provided the basis for relief on the case facts:

> . . . The *Craigmiles* court cites to the following passage from *H.P. Hood & Sons*, which is clearly limited to the regulation of *interstate* commerce, to support its conclusion that *intrastate* economic protectionism is an illegitimate state interest:
>
> > This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. . . .
>
> When read in context, *H.P. Hood & Sons*'s admonition is plainly directed at state regulation that shelters its economy from the larger national economy, i.e., violations of the ''dormant'' Commerce Clause.
>
> . . . As such, these passages do not support the contention espoused in *Craigmiles* . . . that intrastate economic protectionism, absent a violation of a specific federal statutory or constitutional provision, represents an illegitimate state interest. Our country's constitutionally enshrined policy favoring a national marketplace is simply irrelevant as to whether a state may legitimately protect one intrastate industry as against another when the challenge to the statute is purely one of equal protection. . . .
>
> In contrast, the Supreme Court has consistently held that protecting or favoring one particular intrastate industry, absent a specific federal constitutional or statutory violation, is a legitimate state interest. . . .
>
> . . . .

183. *Id.* at 1218 (citations omitted).

We also note, in passing, that while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments. While this case does not directly challenge the ability of states to provide business-specific economic incentives, adopting a rule against the legitimacy of intrastate economic protectionism and applying it in a principled manner would have wide-ranging consequences. Thus, besides the threat to all licensed professions such as doctors, teachers, accountants, plumbers, electricians, and lawyers, *see, e.g.*, Oklahoma Statutes, title 59 (listing over fifty licensed professions), every piece of legislation in six states aiming to protect or favor one industry or business over another in the hopes of luring jobs to that state would be in danger. While the creation of such a libertarian paradise may be a worthy goal, Plaintiffs must turn to the Oklahoma electorate for its institution, not us.[184]

Judge Tacha added:

. . . [We] part company with the Sixth Circuit's *Craigmiles* decision, which struck a nearly identical Tennessee statute as violating the Equal Protection Clause and substantive due process. Our disagreement can be reduced to three points. First, as noted by the District Court, *Craigmiles*'s analysis focused heavily on the court's perception of the actual motives of the Tennessee legislature. ''The state could argue that the Act as a whole . . . actually provides some legitimate protection for consumers from casket retailers. The history of the legislation, however, reveals a different story. . . .'' The Supreme Court has foreclosed such an inquiry. Second, the *Craigmiles* court held that ''protecting a discrete interest group from economic competition is not a legitimate governmental purpose.'' As discussed above, we find this conclusion unsupportable. Third, in focusing on the actual motivation of the state legislature and the state's proffered justifications for the law, the *Craigmiles* court relied heavily on *Cleburne v. Cleburne Living Center, Inc.* We find this emphasis misplaced. . . .

Despite the hue and cry from all sides, no majority of the Court has stated that the rational-basis review found in *Cleburne* and *Romer v. Evans* differs from the traditional variety applied above. Perhaps, as Justice O'Connor suggests, *Cleburne* and *Romer* represent the embryonic stages of a new category of equal protection review. But ''[e]ven if we were to read *Cleburne* to require that laws discriminating against historically unpopular groups meet an exacting rational-basis standard,'' which we do not, ''we do not believe the class in which [plaintiffs] assert they are a member merits such scrutiny.''

On the other hand, *Romer* and *Cleburne* may not signal the birth of a new category of equal protection review. Perhaps, after considering all other conceivable purposes, the *Romer* and *Cleburne* Courts

184. *Id.* at 1219–22 (citations and footnotes omitted).

found that ''a bare . . . desire to harm a politically unpopular group,'' constituted the only conceivable state interest in those cases. Under this reading, *Cleburne* would also not apply here because we have conceived of a legitimate state interest other than a ''bare desire to harm'' non-licensed, time-of-need, retail, casket salespersons.

Finally, perhaps *Cleburne* and *Romer* are merely exceptions to traditional rational basis review fashioned by the Court to correct perceived inequities unique to those cases. If so, the Court has ''fail[ed] to articulate [when this exception applies, thus] provid[ing] no principled foundation for determining when more searching inquiry is to be invoked.'' Regardless, the Court itself has never applied *Cleburne*-style rational-basis review to economic issues. Following the Court's lead, neither will we. Thus, we need not decide how *Cleburne* alters, if at all, traditional rational-basis review because, even under a modified rational basis test, the outcome here would be unchanged.[185]

Judge Tacha concluded:

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

As Winston Churchill eloquently stated: ''[D]emocracy is the worst form of government except for all those other forms that have been tried.'' Perhaps the facts here prove this maxim. A bill to amend the FSLA to favor persons in the Plaintiffs' situation has been introduced in the Oklahoma House three times, only to languish in committee. While these failures may lead Plaintiffs to believe that the legislature is ignoring their voices of reason, the Constitution simply does not guarantee political success.

Because we hold that intrastate economic protectionism, absent a violation of a specific federal statutory or constitutional provision, is a legitimate state interest and that the FSLA is rationally related to this legitimate end, we AFFIRM.[186]

Judge Tymkovich offered a concurring opinion.[187] While he agreed with the holding, he was troubled by the majority's candid acknowledgement of a protectionist purpose. Tymkovich explained:

. . . I write separately because I believe the majority overstates the application of ''intrastate economic protectionism'' as a legitimate state interest furthered by Oklahoma's funeral licensing scheme.

The majority opinion usefully sets forth an overview of the rational basis test. Under the traditional test, judicial review is

185. *Id.* at 1223–25 (citations and footnotes omitted).

186. *Id.* at 1225 (citations omitted).

187. *Id.* at 1225 (Tymkovich, J., concurring).

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

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

The Supreme Court has consistently grounded the ''legitimacy'' of state interests in terms of a public interest. The Court has searched, and rooted out, even in the rational basis context, ''invidious'' state interests in evaluating legislative classifications. Thus, for example, in the paradigmatic case of *Williamson v. Lee Optical, Inc.*, the Supreme Court invoked consumer safety and health interests over a claim of pure economic parochialism. Rather than hold that a government may always favor one economic actor over another, the Court, if anything, insisted that the legislation advance some public good.

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

The end result of the majority's reasoning is an almost per se rule upholding intrastate protectionist legislation. I, for one, can imagine a different set of facts where the legislative classification is so lopsided in favor of personal interests at the expense of the public good, or so far removed from plausibly advancing a public interest that a rationale of ''protectionism'' would fail. No case holds that the bare preference of one economic actor while furthering no greater public interest advances a ''legitimate state interest.''

> We need not go so far in this case for two reasons. First of all, the record below and the district court's findings of fact support a conclusion that the funeral licensing scheme here furthers, however imperfectly, an element of consumer protection. The district court found that the Board had in fact brought enforcement actions under the Act to combat consumer abuse by funeral directors. The licensing scheme thus provides a legal club to attack sharp practices by a major segment of casket retailers. Secondly, the history of the licensing scheme here shows that it predates the FCC's deregulation of third-party casket sales or internet competition, and, at least in the first instance, was not enacted solely to protect funeral directors facing increased intrastate competition. I would therefore conclude that the district court did not err in crediting the consumer protection rationale advanced by the Board.
>
> The licensing scheme at issue here leaves much to be desired. The record makes it clear that limitations on the free market of casket sales have outlived whatever usefulness they may have had. Consumer interests appear to be harmed rather than protected by the limitation of choice and price encouraged by the licensing restrictions on intrastate casket sales. Oklahoma's general consumer protection laws appear to be a more than adequate vehicle to allow consumer redress of abusive marketing practices. But the majority is surely right that the battle over this issue must be fought in the Oklahoma legislature, the ultimate arbiter of state regulatory policy.
>
> I therefore conclude that the legislative scheme here meets the rational basis test and join in the judgment of the majority.[188]

Finally, consider the following brief excerpt from Judge Danny Boggs opinion in *Craigmiles v. Giles*[189]:

> Finding no rational relationship to any of the articulated purposes of the state, we are left with the more obvious illegitimate purpose to which licensure provision is very well tailored. The licensure requirement imposes a significant barrier to competition in the casket market. By protecting licensed funeral directors from competition on caskets, the FDEA harms consumers in their pocketbooks. If consumer protection were the aim of the 1972 amendment, the General Assembly had several direct means of achieving that end. None of the justifications offered by the state satisfies the slight review required by rational basis review under the Due Process and Equal Protection clauses of the Fourteenth Amendment. As this court has said, ''rational basis review, while deferential, is not toothless.''
>
> Judicial invalidation of economic regulation under the Fourteenth Amendment has been rare in the modern era. Our decision today is not a return to *Lochner,* by which this court would elevate its economic theory over that of legislative bodies. No sophisticated

188. *Id.* at 1225–27 (citations and footnote omitted).

189. 312 F.3d 220 (6th Cir. 2002).

economic analysis is required to see the pretextual nature of the state's proffered explanations for the 1972 amendment. We are not imposing our view of a well-functioning market on the people of Tennessee. Instead, we invalidate only the General Assembly's naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers. This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review.[190]

DISCUSSION QUESTIONS

1. Together, *Powers* and *Craigmiles* suggest three possible approaches to judicial review of rent-seeking legislation: (1) Determining that the judiciary has no role in policing rent-seeking legislation; (2) Deferring generally to legislative rent seeking unless the court cannot identify any other legitimate purpose (however implausible) that is independent of payoffs to a special interest group; or (3) Engaging in a less deferential and more searching inquiry to determine the actual purposes of the statute, including rent seeking, and invalidating the statute if that appears to be the sole motivation. Which approach is most consistent with the insights of public choice theory? Is it possible to select among these options without first having adopted a normative baseline premise concerning the appropriate (or at least tolerable) extent of interest group involvement in legislative processes? It is possible to select among these options without first embracing an independent theory concerning the role that interest groups play in the process of legislative procurement? For example, will you reach a different result if you view interest groups as necessary facilitators of overall legislative processes that help to produce general interest legislation, on the one hand, or if you instead view interest groups solely as securing rents, without providing any corresponding benefits to the legislative process, on the other?

2. In *Powers* the court observed that legislation to repeal the restriction on casket sales had been introduced into the state legislature three times, only to ''languish in committee'' each time. Does this result reflect a lack of public support for repeal of the regulation? Is the court correct in thinking that the legislature will repeal the restriction if it fails to advance the public interest or becomes obsolete (as suggested by the concurring opinion)? Does the failure to repeal suggest that this might be a suitable case for a more dynamic judicial role, per Eskridge; for weighing enactable preferences, per Elhauge; or for a more cautious judicial approach, per Farber and Frickey? Why?

3. *Powers* rests on the assumption that the effects of the legislation in question are purely intrastate, merely transferring wealth from in-state consumers to in-state funeral home directors. Is that assumption correct? If so, does it support the ruling?

4. Consider Judge Tacha's analysis of whether *Cleburne* and *Romer* demand a more exacting rational basis scrutiny test. Tacha concludes that the Supreme Court has never applied the test announced in these cases, triggered

190. *Id.* at 228–29 (citations omitted).

by a conclusion that the law was motivated by a ''bare . . . desire to harm a politically unpopular group,'' in a case involving economic regulation. How does this relate to the suggestion in chapter 2 by Bruce Ackerman and Geoffrey Miller that insularity is a strength rather than a weakness in the context of legislative participation?[191] Does Tacha's analysis of when the *Cleburne* and *Romer* test does and does not apply support the claim that these scholars might be committing a category error within the framework of the Wilson–Hayes model? Why or why not?

191. *See supra* chapter 2, section IV.C (discussing Ackerman and Miller).