

# Economic Protectionism: Irrationally Constitutional

## *Abstract*

*The Constitution is built on the principle that all citizens are created equal. Naturally, we believe that no law should be passed solely for the sake of benefiting one group over another. Yet, governments continue to pass economic regulations that have no purpose other than maintaining wealth within a specific group, and the judiciary continues to uphold such regulations. While the judiciary purports to uphold challenged legislation only if it passes “rational basis review,” the term “review” is a misnomer because the analysis has essentially become automatic deference.*

*Under the judiciary’s modern treatment of the Equal Protection Clause, successfully challenging these regulations is nearly impossible unless the regulations address matters that the court deems worthy of intermediate or strict scrutiny. But no court has ever deemed economic regulation to be worthy of such scrutiny, even though such regulation is capable of unconstitutionally facilitating naked transfers of wealth to businesses that enjoy high levels of political clout. To remedy this regulatory blind spot, this Comment analyzes the circuit split regarding whether economic protectionism should be a legitimate government interest. After establishing that it should not, this Comment proposes a new approach for equal protection challenges to economic regulations.*

*“No single individual, of course, and no single group has an exclusive claim to the American dream.”<sup>1</sup>*

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1. Eleanor Roosevelt, *What Has Happened to the American Dream?*, THE ATLANTIC (Apr. 1961), <https://www.theatlantic.com/magazine/archive/1961/04/eleanor-roosevelts-american-dream/306023/>. This is an essay that Eleanor Roosevelt wrote regarding her concern about the spread of Russian influence and the need to rededicate ourselves to the “American dream.” *Id.*

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I. INTRODUCTION

James Truslow Adams coined the phrase “the American Dream,” which he defined as “that dream of a land in which life should be better and richer and fuller for everyone, with opportunity for each according to ability or

achievement.”<sup>2</sup> The idea that certain groups would be advantaged, not for their ability, but for their raw political power is the very antithesis to this dream.<sup>3</sup> Indeed, much of the Constitution is focused on preventing “the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.”<sup>4</sup> Yet, at the cost of societal and technological progress, unconstitutionally preferential treatment continues to this day; it is simply masked as economic regulation that need only pass the pseudo-scrutiny of “rational basis review.”<sup>5</sup>

As early as 1886, it was clear that San Francisco could not exclude Chinese competition from the laundromat industry by arbitrarily banning wooden laundromats, especially when “[n]o reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on . . . their harmless and useful occupation.”<sup>6</sup> Today, however, the steady erosion of equal protection jurisprudence has made it difficult to invalidate arbitrary and blatantly protectionist laws.<sup>7</sup> For example, Uber<sup>8</sup> continues to be hindered in certain states, like Nevada, which allow new market entrants only if they do not “adversely affect other carriers.”<sup>9</sup> This law and others like it are

2. Jonas Clark, *In Search of the American Dream*, THE ATLANTIC (June 2007), <https://www.theatlantic.com/magazine/archive/2007/06/in-search-of-the-american-dream/305921/>.

3. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984) (referring to this as a “naked preference”).

4. *Id.*

5. See *infra* Part VI.

6. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886). The Court emphasized that it could find no rationale other than an unconstitutional naked preference when it stated that “[i]t appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health.” *Id.* at 374.

7. See *infra* Part V.

8. Chris Higson, *The Value of Uber*, FORBES (Oct. 9, 2015, 12:15 PM), <http://www.forbes.com/sites/lbsbusinessstrategyreview/2015/10/09/the-value-of-uber/>. Uber is a \$50 billion company known for offering efficient alternatives to traditional taxis. See *id.*

9. John Kerr, *Uber Latest Victim of Protectionism*, LAS VEGAS REV.-J. (Nov. 30, 2014, 3:34 PM), <https://www.reviewjournal.com/opinion/uber-latest-victim-of-protectionism/>. Kerr’s article explains that Nevada has gone so far as to hire armed, undercover officers to intimidate and impound Uber drivers in “paramilitary sting operation[s].” *Id.* More recently, Nevada has been implementing a new law that would require Uber drivers—as well as drivers for other ride-sharing companies—to acquire a “business license” before applying for the job. Seth A. Richardson, *Lawmaker’s Late Amendment Could Crush Uber in Nevada*, RENO GAZETTE-J. (May 29, 2017, 12:24 PM), <http://www.rgj.com/story/news/politics/2017/05/29/ride-hailing-companies-say-bill-would-effectively-kill-industry-nevada/353355001/>. Even under such reformulation, activists remain concerned and

deemed constitutional even though they “exist more as a tribute to the lobbying and financial clout of trade organizations intent on limiting fledgling enterprises than as a reflection of concern for the public welfare.”<sup>10</sup> The judiciary must reconsider the way in which it evaluates such economic regulations.<sup>11</sup>

Accordingly, Part II of this Comment considers the modern understanding of intrastate economic protectionism.<sup>12</sup> Part III explains Tesla’s current legal battles regarding naked economic protectionism—battles that serve as the primary example throughout this Comment.<sup>13</sup> Part IV explains modern equal protection jurisprudence.<sup>14</sup> Part V explores the current circuit split regarding whether naked economic protectionism is a legitimate government interest.<sup>15</sup> Part VI establishes that naked economic protectionism is not a legitimate government interest.<sup>16</sup> Part VII explores two leading critiques of current equal protection analyses and explains why neither of those critiques adequately addresses economic regulations.<sup>17</sup> Part VIII suggests a new approach for evaluating equal protection claims for economic regulations.<sup>18</sup> Part IX concludes.<sup>19</sup>

## II. THE CONCEPT OF INTRASTATE ECONOMIC PROTECTIONISM

In the broadest sense, economic protectionism refers to “government actions and policies that restrict or restrain international trade, often done with the intent of protecting local businesses and jobs from foreign competition.”<sup>20</sup> The application of this principle to *intrastate*<sup>21</sup> economic protection-

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have stated that “[s]ingling out ridesharing with licensing requirements not placed on any other business in the state is a blatant attempt by the taxi industry to squash competition and innovation.” *Id.*

10. Kerr, *supra* note 9.

11. *See infra* Part VIII.

12. *See infra* Part II.

13. *See infra* Part III.

14. *See infra* Part IV.

15. *See infra* Part V.

16. *See infra* Part VI.

17. *See infra* Part VII.

18. *See infra* Part VIII.

19. *See infra* Part IX.

20. *Protectionism*, INVESTOPEdia, <http://www.investopedia.com/terms/p/protectionism.asp> (last visited Nov. 3, 2017).

21. It is important to distinguish the topic of this Comment as intrastate economic protectionism, rather than interstate economic protectionism, because it is well established that the dormant Com-

ism equates to “a state isolating a local industry from . . . competition by legislatively securing for the industry a steady stream of customers or a larger market share.”<sup>22</sup> It thus follows that the concept of *naked* economic protectionism relates to the idea of passing a law purely for the purpose of protecting one industry over another, without the guise of a more legitimate end.<sup>23</sup> However, to distinguish between truly protectionist legislation and legislation that happens to have a protectionist effect, it must be determined whether the law was passed with the affirmative goal of protecting a specific “segment of the local population.”<sup>24</sup> In other words, intrastate economic protectionism is the practice of passing laws with the *sole purpose* of intentionally protecting a specific, *intrastate* industry from competition.<sup>25</sup>

Such laws have been at the forefront of some of the Supreme Court’s most influential decisions.<sup>26</sup> For example, in *Williamson v. Lee Optical of Oklahoma, Inc.*, the Court considered a law that prohibited an “optician from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist,” notwithstanding the fact that, to fit or duplicate glass lenses,

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merce Clause already restricts the ability of the states to discriminate against interstate commerce. See *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988) (“It has long been accepted that the Commerce Clause . . . prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”) (citations omitted). Some have argued that an economic protectionism analysis should be incorporated into the Dormant Commerce Clause. See, e.g., Catherine Gage O’Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 575 (1997). Although a full consideration of those arguments is beyond the scope of this Comment, this Comment will nonetheless consider them tangentially. See *infra* Section VI.C.

22. O’Grady, *supra* note 21, at 580.

23. See *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222–23 (5th Cir. 2013) (“As we see it, neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose, but economic protection, that is favoritism, may well be supported by a post hoc perceived rationale as in *Williamson*—without which it is aptly described as a naked transfer of wealth.”).

24. See O’Grady, *supra* note 21, at 594.

25. See *id.* Such interests must be distinguished as “naked” or “sole purpose” because it is always plausible that a court may find that the law was passed for another purpose, which would thus avoid consideration of whether economic protectionism is legitimate. See, e.g., *Powers v. Harris*, 379 F.3d 1208, 1225–26 (10th Cir. 2004) (Tymkovich, J., concurring). It is through this distinction that, by finding that the law in question furthers a different and less controversial purpose, some judges have explicitly avoided determining whether economic protectionism is a legitimate government interest. See *id.* (making it clear that Judge Tymkovich does not wish to go so far as to “confer legitimacy to . . . unvarnished economic protectionism” and finding the law valid because it advanced an element of consumer protection).

26. See *infra* notes 27–29 and accompanying text.

opticians typically did not need to refer to a prescription.<sup>27</sup> In *City of New Orleans v. Dukes*, the Court considered a New Orleans ordinance that was amended to prohibit pushcarts from selling food unless they had operated continuously for eight or more years prior to 1972<sup>28</sup>—a law that the Court recognized as “solely an economic regulation.”<sup>29</sup> Today, similar challenges to protectionist laws are prevalent and will likely shape the direction of multimillion dollar corporations like Tesla.<sup>30</sup>

### III. TESLA AND THE RISK OF RAMPANT PROTECTIONISM

Described as an engineer, inventor, and explorer, Elon Musk is a South African billionaire who once stated: “Failure is an option here. If things are not failing, you are not innovating enough.”<sup>31</sup> In 1999, Musk broke onto the scene with his role in creating PayPal, which eBay later acquired for \$1.5 billion in stock options.<sup>32</sup> Since that time, Musk has continued building on his entrepreneurial vision; his recent projects include developing reusable rocket technology and developing a high-speed train between Los Angeles and San Francisco.<sup>33</sup> Nonetheless, Musk is best known for his work with

27. 348 U.S. 483, 486 (1955).

28. 427 U.S. 297, 298 (1976).

29. *Id.* at 303. Many protectionist laws were initially enacted to protect “mom and pop” shops during difficult times, such as the Great Depression; but, given the evolution of the American economy, it is questionable whether many of these laws are necessary today. Daniel A. Crane, *Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism*, 101 IOWA L. REV. 573, 576–79 (2016) (citing STEWART MACAULAY, *LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS* 5–12 (1966)). For example, although small car dealerships were once vulnerable to large manufacturers and could be subject to exploitation—such as being forced to take unwanted cars—prohibitions against such activity are now commonplace in all fifty states. *See id.* Further, the car dealership industry bears no resemblance to the miniscule businesses that were common in the 1930s. *See NADA Data*, NAT’L AUTOMOBILE DEALERS ASS’N, <https://www.nada.org/nadadata/> (last visited Oct. 14, 2017). In 2016, the National Automobile Dealers Association reported that employment topped 1.1 million, and that “[d]ealerships wrote more than 300 million repair orders, with service and parts sales of nearly \$110 billion.” *Id.*

30. *See infra* Part III.

31. *Elon Musk*, BIOGRAPHY, <http://www.biography.com/people/elon-musk-20837159> (last visited Oct. 14, 2017).

32. *Id.*

33. Chris Heath, *How Elon Musk Plans on Reinventing the World (and Mars)*, GQ (Dec. 12, 2015), <http://www.gq.com/story/elon-musk-mars-spacex-tesla-interview>. These projects are called SpaceX and the Hyperloop, respectively. *See id.* Still, Musk is likely best known for his work with Tesla, a company that some expect will reach \$700 billion in total valuation. *See, e.g.*, Don Reisinger, *Here’s Why Tesla Could Eventually Be Worth \$700 Billion*, FORTUNE (June 8, 2016),

Tesla, an American car company specializing in the development of electric vehicles, which Musk describes not as cars but as “sophisticated computer[s] on wheels.”<sup>34</sup> Like the rest of Musk’s projects, Tesla has continued to stay on the cutting edge of technology.<sup>35</sup> As a result, products such as Tesla’s Model S have enjoyed tremendous success in the premium car market.<sup>36</sup>

It is clear that Tesla does not suffer from typical business challenges such as a lack of intellectual innovation or market demand.<sup>37</sup> Yet—perhaps as an extension of Musk’s entrepreneurial mindset—Tesla has further distinguished itself from more traditional manufacturers by implementing direct-to-consumer distribution and bypassing the use of car dealerships.<sup>38</sup> In an attempt to oppose Tesla’s direct-to-consumer method, car dealerships have invoked dated laws that mandate selling automobiles through dealerships.<sup>39</sup>

<http://fortune.com/2016/06/08/tesla-ron-baron/>.

34. Jerry Hirsch, *Elon Musk: Model S Not a Car but a ‘Sophisticated Computer on Wheels,’* L.A. TIMES (Mar. 19, 2015, 2:38 PM), <http://www.latimes.com/business/autos/la-fi-hy-musk-computer-on-wheels-20150319-story.html> (“Analysts agreed, saying Tesla is taking a design approach that looks at a vehicle as an electronic device rather than a machine. Cars will become platforms for apps that can change or improve their functions rather than having their performance frozen in place at the time of purchase.”).

35. *See id.* (describing features to be implemented into the Model S, such as automatic braking, partial autopilot systems, and robotic parking programs).

36. *See* Tom Randall, *Tesla Dominates U.S. Luxury Sedan Sales*, BLOOMBERG TECH. (Oct. 12, 2016, 12:42 PM), <https://www.bloomberg.com/news/articles/2016-10-12/tesla-dominates-u-s-luxury-sedan-sales> (“Tesla Motors Co. is facing some serious challenges keeping up with its ever-expanding ambitions, but one thing is certain: It’s selling a lot of luxury cars.”).

37. *See id.* Maintaining the trend of unconventional business performance, Tesla posted a profit without raising additional cash to market the upcoming Model 3, a move that Musk described as throwing a “pie in the face of all the naysayers on Wall Street.” Dana Hull & David Welch, *Musk Throws ‘Pie’ at Naysayers as Tesla Posts Rare Profit*, BLOOMBERG (Oct. 26, 2016, 8:25 PM), <http://www.bloomberg.com/news/articles/2016-10-27/tesla-s-rare-profit-delivers-pie-musk-ordered-f-or-his-skeptics>. Further, Tesla plans to make only 500,000 cars a year, even though pre-orders of the Model 3 have already been filled for its first twelve months of production. *Id.* By comparison, Toyota manufactures more than two million vehicles in the United States annually. Sue Callaway, *Cars Made in America? Chrysler, Ford No Longer Qualify*, FORTUNE (June 29, 2015), <http://fortune.com/2015/06/29/cars-made-in-america/>.

38. Sarah Rubenoff, *Direct-to-Consumer Sales Debate Goes Way Beyond Tesla*, AUTO REMARKETING (Jan. 22, 2016, 11:01 AM), <http://www.autoremarketing.com/retail/direct-to-consumer-sales-debate-goes-way-beyond-tesla>.

39. Crane, *supra* note 29, at 575; *see also* Marina Lao et al., *Direct-to-Consumer Auto Sales: It’s Not Just About Tesla*, FED. TRADE COMMISSION (May 11, 2015, 11:00 AM), <https://www.ftc.gov/news-events/blogs/competition-matters/2015/05/direct-consumer-auto-sales-its-not-just-about-tesla> (“For several years now . . . [T]he company has faced legislative and litigation resistance to its business plan to sell its products without using a network of third-party dealers like other auto manufacturers.”). Musk himself described these laws as a “perversion of democracy.” Daniel Fisher,

In state after state, Tesla has encountered a deeply rooted web of laws that were passed with an unabashed and single-minded interest in using intrastate economic protectionism to insulate car dealerships from competition.<sup>40</sup> In other words, “the Tesla wars [are] a case study in state economic protectionism and crony capitalism that lay largely unchallenged for decades until a maverick technology appeared in the market and began radically to disrupt the status quo.”<sup>41</sup>

Tesla’s initial strategy was to challenge these prohibitions on a state-by-state basis.<sup>42</sup> This strategy had mixed results.<sup>43</sup> Although some states have given Tesla access, other states, such as Michigan and Texas, still maintain a complete ban on Tesla’s direct-to-consumer model; this ban recently prompted Tesla to begin challenging the constitutionality of the laws in federal courts.<sup>44</sup> Because successful challenges to these state protectionist laws could have national implications, the conversation as to the constitutionality of intrastate economic protectionism has become increasingly prevalent.<sup>45</sup> Indeed, Tesla’s first federal lawsuit prompted the Federal Trade Commission

*Tesla’s Elon Musk Learns an Old Lesson Fighting Protectionist Dealer Laws*, FORBES (Mar. 18, 2014, 1:07 PM), <https://www.forbes.com/sites/danielfisher/2014/03/18/teslas-elon-musk-learns-an-old-lesson-fighting-protectionist-dealer-laws/>.

40. See Crane, *supra* note 29, at 577–79 (detailing the history of dealer franchise laws spanning from 1898 to the modern day and emphasizing that the laws were “all about protecting *dealers* in franchise relationships from the exigencies of superior manufacturer bargaining power”).

41. *Id.* at 576.

42. See Dana Hull & Margaret Cronin Fink, *Tesla Cranks Up Pressure to End Ban on Direct Auto Sales*, BLOOMBERG (Sept. 22, 2016, 7:37 AM), <http://www.bloomberg.com/news/articles/2016-09-22/tesla-lawsuit-claims-michigan-direct-sales-ban-unconstitutional>.

43. See *Where You Can Buy a Tesla*, CNN MONEY, <http://money.cnn.com/interactive/pf/autos/where-you-can-buy-a-tesla/> (last visited Oct. 14, 2017). State legislation remains pending in many states, such as Washington; however, states such as California and Colorado have authorized Tesla to sell directly to consumers. See *id.*

44. Hull & Fink, *supra* note 42 (“Tesla Motors Inc. is cranking up the pressure to sell electric cars directly to customers, filing its first federal lawsuit over the practice on the home turf of General Motors and Ford. Tesla sued the state of Michigan to overturn its ban on direct sales by auto manufacturers.”).

45. See *id.* The importance of this topic is not limited to car dealerships; conceptually, there are elements of economic protectionism any time an industry hopes to prevent competition or increase costs. See, e.g., Daniel Gold, *Protectionism Is All Around us*, FOUND. FOR ECON. EDUC. (Aug. 17, 2016), <https://fee.org/articles/protectionism-is-all-around-us/#0>. For example, hotel owners or taxi drivers that are opposed to up and coming businesses like AirBnB and Uber stand on a platform of economic protectionism—namely, an insistence that their more well-established business practices “need to be protected from cheap competition offered in the sharing economy.” *Id.* Tesla is currently the most prevalent example, however, because there has already been state and federal litigation on the topic. See *supra* notes 43–44 and accompanying text.

to publish several letters and memoranda expressing support for the movement to allow direct sales to consumers.<sup>46</sup> Additionally, during a debate about the issue, Professor Dan Crane from the University of Michigan Law School rebutted the assumption that such protectionist laws are passed out of an interest in *consumer* protection and firmly asserted that such laws are instead motivated solely by *dealer* protection.<sup>47</sup> Nonetheless, the Supreme Court has not decided whether naked economic protectionism is a legitimate government interest, and the federal courts are left uncertain as to whether laws passed out of such an interest can withstand challenges under the Equal Protection Clause.<sup>48</sup>

#### IV. EQUAL PROTECTION

When a litigant challenges a law on the basis that the law was improperly passed out of an interest in naked economic protectionism, the challenge is most commonly framed as an equal protection issue.<sup>49</sup> Thus, it is important to establish the foundation on which the Equal Protection Clause rests.<sup>50</sup> The Fourteenth Amendment states that “[n]o State shall make or en-

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46. See Lao et al., *supra* note 39 (“Our point: States should allow consumers to choose not only the cars they buy, but also how they buy them.”). The FTC further stated:

FTC staff supports the movement to allow for direct sales to consumers—not only Tesla or Elio, but for any company that decides to use that business model to distribute its products. . . . Absent some legitimate public purpose, consumers would be better served if the choice of distribution method were left to motor vehicle manufacturers and the consumers to whom they sell their products.

*Id.*

47. See Rubenoff, *supra* note 38 (“Crane contends ‘current rules are motivated by dealer protection, not consumer protection.’”); see also David Bernstein, *Do Laws that Embody ‘Naked Economic Protectionism’ Violate the Equal Protection Clause?*, THE WASH. POST (Sept. 14, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/14/do-laws-that-embody-naked-economic-protectionism-violate-the-equal-protection-clause/?utm\\_term=.1f81df4d73de](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/14/do-laws-that-embody-naked-economic-protectionism-violate-the-equal-protection-clause/?utm_term=.1f81df4d73de) (discussing a federal circuit split over “whether courts are obligated to uphold laws for which the court is unable to find any public-spirited rationale”).

48. See *infra* Part V.

49. See, e.g., *Powers v. Harris*, 379 F.3d 1208, 1215 (10th Cir. 2004) (“Here, Plaintiffs have cast their challenge to the FSLA as both a substantive due process and an equal protection claim. Although Plaintiffs forward both contentions, their challenge is most properly presented as an equal protection claim, as evidenced by the fact that they almost exclusively cite to equal protection cases . . . and that the Court itself has most often analyzed regulatory challenges under the equal protection rubric.”).

50. See *infra* notes 51–56 and accompanying text. While substantive due process challenges are

force any law . . . depriv[ing] any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>51</sup> Since laws are often prone to drawing classifications between citizens,<sup>52</sup> the interpretative challenge of the Equal Protection Clause has been whether such classifications are justified “in light of the purpose behind the legislation.”<sup>53</sup> When the judiciary first began recognizing equal protection rights—a period known as the *Lochner* era—the Supreme Court often invalidated state regulations, actively looking for a direct need for the law in question.<sup>54</sup> However, due to the Great Depression and

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often raised alongside equal protection challenges, courts deal primarily with the Equal Protection Clause because of the similarity between the two doctrines and the body of case law that is usually cited. See *Powers*, 379 F.3d at 1215.

51. U.S. CONST. amend. XIV, § 1. Because courts have analyzed due process and equal protection similarly, the difference between the two provisions is often overlooked. See *Powers*, 379 F.3d at 1215. On one hand, substantive due process is meant to provide “heightened protection against government interference with certain fundamental rights and liberty interests.” *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). On the other hand, “the essence of the equal protection requirement is that the state treat all those similarly situated similarly.” *Id.* (quoting *Bartell v. Aurora Pub. Sch.*, 263 F.3d 1143, 1149 (10th Cir. 2001)). While challenges to protectionist laws have typically claimed both due process and equal protection violations, Roger V. Abbott, *Is Economic Protectionism a Legitimate Governmental Interest Under Rational Basis Review?*, 62 CATH. U. L. REV. 475, 479 (2013), courts tend to categorize such challenges primarily as equal protection cases, see *Powers*, 379 F.3d at 1215. Court have found that the two analyses are similar enough that an “equal protection discussion sufficiently addresses both claims.” *Id.*

52. See Robert C. Farrell, *Classes, Persons, Equal Protection, and Village of Willowbrook v. Olech*, 78 WASH. L. REV. 367, 369 (2003) (internal quotations and citations omitted) (“But once it is admitted that the legislature is free to enact laws with less than universal impact, thus treating different groups differently, then we have arrived at the point at which the demand for equality confronts the right to classify. This is . . . the basic paradox, that the equal protection of the laws is a pledge of the protection of equal laws. But laws may classify. And the very idea of classification is that of inequality. The way out of this bind turns out to be the doctrine of reasonable classifications where the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.”).

53. Abbott, *supra* note 51, at 479.

54. See Katharine M. Rudish, *Unearthing the Public Interest: Recognizing Intrastate Economic Protectionism as a Legitimate State Interest*, 81 FORDHAM L. REV. 1485, 1494–98 (2012). The *Lochner* era refers to equal protection jurisprudence following *Lochner v. New York*, a case in which the Supreme Court invalidated a law regulating the maximum number of hours that bakery employees could work per week. See 198 U.S. 45, 53 (1905), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). The *Lochner* holding encouraged more judicial activism in terms of invalidating state statutes under the Equal Protection Clause and finding that statutes were passed out of un-constitutional interests. See *id.* at 64 (“It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives.”). *But cf.* *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955) (“The Oklahoma law may exact a

mounting political pressure from scholars that viewed government economic regulation as necessary for economic recovery,<sup>55</sup> the Court eventually settled on the following three standards of review: rational basis, intermediate scrutiny, and strict scrutiny.<sup>56</sup>

### A. *Strict and Intermediate Scrutiny*

Strict scrutiny is reserved for laws that impinge on “fundamental rights” or distinguish between certain “suspect characteristics.”<sup>57</sup> Such laws are constitutional “only if they are narrowly tailored measures that further compelling governmental interests.”<sup>58</sup> For example, in *Skinner v. Oklahoma ex rel. Williamson*, the Supreme Court considered a challenge to an Oklahoma law mandating compulsory sterilization of habitual criminals.<sup>59</sup> Observing first that “[m]arriage and procreation are fundamental [rights],” the Court applied strict scrutiny and found that the law violated the Equal Protection Clause.<sup>60</sup> In *Gratz v. Bollinger*, the Supreme Court again applied strict scrutiny, this time on the basis that race is a suspect classification, and found that the University of Michigan’s affirmative action program violated the Equal Protection Clause.<sup>61</sup>

Classifications that are less suspect are subject only to intermediate

needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.”).

55. See Rudish, *supra* note 54, at 1498 (citation omitted) (“Due to the economic and social upheaval during the Great Depression, by the mid-1930s, the Court was under enormous pressures . . . to abandon the laissez-faire philosophy of the *Lochner* era, as many viewed government economic regulation as essential to economic recovery. In response to the political climate, the Court began to overrule its previous decisions, and embraced a more expansive view of regulatory power . . .”).

56. Abbott, *supra* note 51, at 480–82.

57. *Craigsmiles v. Giles*, 312 F.3d 220, 223 (6th Cir. 2002). Fundamental rights include the right to vote and the right to receive an abortion; suspect characteristics include race and national origin. *Id.*

58. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”).

59. *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 536 (1942).

60. *Id.* at 541–42 (“But the instant legislation runs afoul of the equal protection clause, though we give Oklahoma that large deference which the rule of the foregoing cases requires. We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”).

61. *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003).

scrutiny and are upheld if they are substantially related to the achievement of an important governmental objective.<sup>62</sup> Intermediate scrutiny typically applies to two “quasi-suspect classifications”—namely, gender and illegitimacy.<sup>63</sup> For example, in *City of Cleburne v. Cleburne Living Center, Inc.*, the Supreme Court explained that legislative classifications based on gender call for a heightened standard of review because such classifications likely rest not on “meaningful considerations,” but on “outmoded notions of the relative capabilities of men and women.”<sup>64</sup> The Court explained that classifications based on illegitimacy also warrant heightened review because “illegitimacy is beyond the individual’s control and bears no relation to the individual’s ability to participate in and contribute to society.”<sup>65</sup>

### B. *Rational Basis Review*

In contrast, every other law is subject only to rational basis review, meaning that the law will be upheld if its classification is rationally related to a legitimate government interest.<sup>66</sup> This includes protectionist laws such

62. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197–98 (1976) (stating that classifications based on gender “must serve important governmental objectives and must be substantially related to achievement of those objectives”).

63. Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887, 895 (2012) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–42 (1985)).

64. 473 U.S. at 440–41.

65. *Id.* at 441 (internal quotation marks omitted). While this explanation is useful for intermediate scrutiny, *Cleburne Living Center* is a case in which the Supreme Court ultimately declined to extend the same protection to the mentally handicapped as a quasi-suspect class, deciding that such classifications are subject only to rational basis review. See *id.* at 446 (“Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.”).

66. See *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) (“Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be *rationaly related* to a legitimate state interest.”) (emphasis added). The judiciary is primarily concerned with ensuring that state legislatures are given proper deference in areas not involving fundamental rights or suspect classifications. See *id.* at 303 (“In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . .”). Phrased differently, “if a law neither burdens a fundamental right nor targets a suspect class, [the Court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end.” *Romer v. Evans*, 517 U.S. 620, 631 (1996).

as Michigan's car dealership laws.<sup>67</sup> Rational basis review is deferential, with the Supreme Court going so far as to say that the law in question "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 new requirement."<sup>68</sup> The Supreme Court has further stated that "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."<sup>69</sup> In other words, these inquiries "must be restricted to the issue [of] whether any state of facts either known or which could reasonably be assumed affords support for it."<sup>70</sup>

Rational basis review is deferential, but it is not toothless.<sup>71</sup> The Supreme Court has stated that "even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained."<sup>72</sup> The Court must ultimately be able to "ascertain *some* relation between the classification and the purpose it served."<sup>73</sup> By requiring at least "a rational relationship to an independent and legitimate legislative end, [the Court ensures] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."<sup>74</sup> Nonetheless, it is rare for a court to invalidate

67. See Fisher, *supra* note 39 (predicting the difficulty Elon Musk will face in overcoming rational basis review); see also *Craigsmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) ("All of the parties concede that rational basis review is the proper standard for evaluating the FDEA. . . . Although the licensing requirement has disrupted the plaintiffs' businesses, the regulations do not affect any right now considered fundamental and thus requiring more significant justification.")

68. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955); see also *infra* note 125 and accompanying text.

69. *Williamson*, 348 U.S. at 487–88. Although *Williamson* is often cited to demonstrate the deferential nature of rational basis review, the Supreme Court was likely more interested in moving away from the *Lochner* era of judicial activism. See, e.g., *id.* at 488 ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.")

70. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938).

71. See *Mathews v. Lucas*, 427 U.S. 495, 510 (1976).

72. *Romer v. Evans*, 517 U.S. 620, 632 (1996). The Court went on to state that "[t]he search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority." *Id.*

73. *Id.* at 633 (emphasis added).

74. *Id.* (citing *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring) ("If

state economic legislation on the basis of an equal protection challenge, leading some scholars to argue that the Supreme Court, in this area of the law, has abdicated its judicial review power.<sup>75</sup> Indeed, the circuit courts are split as to how rational basis review should apply to laws that are passed in the interest of naked economic protectionism.<sup>76</sup>

## V. THE CIRCUIT SPLIT

Over the last decade, a split has developed among the circuit courts as to whether, under the Equal Protection Clause, a court should invalidate a law for which it is unable to find a separate, legitimate government interest beyond economic protectionism.<sup>77</sup> The issue is as follows: can a state legislature pass licensing requirements that have no public health or safety rationale, but are instead passed at the “behest of special interest groups seeking to keep competitors out of the market”<sup>78</sup>

### A. *The Fifth and Sixth Circuits Hold that Intrastate Economic Protectionism Is Not a Legitimate Government Interest*

In *Craigmiles v. Giles*, the Sixth Circuit was the first to decide the issue.<sup>79</sup> In that case, the court considered an equal protection challenge to a

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the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.”).

75. See, e.g., Brandon S. Swider, *Judicial Activism v. Judicial Abdication: A Plea for a Return to the Lochner Era Substantive Due Process Methodology*, 84 CHI.-KENT L. REV. 315, 326 (2009) (“Based on this opinion, the Court seemed willing to uphold any state or federal legislation that was an admissible means to an appropriate end. Indeed, the Court in *West Coast Hotel* presumed that the evil at hand existed (apparently, below market wages), even in the absence of the slightest factual record for support. Thus, the Court decided that it would no longer require the government to offer any evidence from which to infer that an evil at hand exists.” (citing *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937))).

76. See *infra* Part V.

77. See Bernstein, *supra* note 47 (“[A] split among the federal appellate courts has developed over whether courts are obligated to uphold laws for which the court is unable to find any public-spirited rationale, laws that instead seem to embody naked economic protectionism favoring an incumbent professional group seeking to stifle upstart competitors.”).

78. See Abbot, *supra* note 51, at 476.

79. 312 F.3d 220, 224 (6th Cir. 2002). To be clear, the issue is whether, under equal protection doctrine, intrastate economic protectionism, without any other plausible purpose, is a legitimate governmental interest. See *supra* text accompanying note 50. Although the *Craigmiles* Court relied—perhaps a little too heavily—on its reading of prior Supreme Court cases seeming to hold that such an interest was not legitimate, the cited cases mostly dealt with the Dormant Commerce Clause,

Tennessee law that forbade “anyone from selling caskets without first being licensed by the state as a ‘funeral director.’”<sup>80</sup> As a threshold matter, the court decided that the law would face rational basis review<sup>81</sup> because it did not involve a classification based on fundamental rights or suspect characteristics.<sup>82</sup> Still, the court cited Supreme Court precedent and found that “protecting a discrete interest group from economic competition is not a legitimate governmental purpose.”<sup>83</sup> Since the Tennessee law was “nothing more than an attempt to prevent economic competition,” the law had no interest other than imposing a competition barrier on the casket market.<sup>84</sup> Thus, the court invalidated Tennessee’s “naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers [because the] 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.”<sup>85</sup>

In 2013, the Fifth Circuit joined the Sixth Circuit in holding that intrastate economic protectionism is not a legitimate government interest.<sup>86</sup> In *St. Joseph Abbey v. Castille*, the Fifth Circuit considered an equal protection challenge to the Louisiana Embalming and Funeral Directors Act, which disallowed public intrastate sale of caskets unless the caskets were made by a state-licensed funeral director at a state-licensed funeral home.<sup>87</sup> The court rejected the claim that pure economic protection of an industry is a valid government interest, holding that “neither precedent nor broader principles

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which addresses interstate rather than intrastate protectionism. *See Powers v. Harris*, 379 F.3d 1208, 1218–19 (10th Cir. 2004).

80. *Craigmiles*, 312 F.3d at 222.

81. *Id.* at 224. Rational basis review is the most lenient of the three levels of scrutiny that courts use to assess equal protection challenges. *See supra* Section IV.B.

82. *Craigmiles*, 312 F.3d at 223–24.

83. *Id.* at 224.

84. *Id.* at 225–26.

85. *Id.* at 229. The court emphasized that it was not “elevat[ing] its economic theory over that of legislative bodies [because] [n]o sophisticated economic analysis is required to see the pretextual nature of the state’s proffered explanations for the 1972 amendment.” *Id.*

86. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013).

87. *Id.* at 218. An active licensee was defined as “an individual that holds a funeral director or embalmer and funeral director license issued by the board and who has complied with all requirements of this Chapter.” LA. STAT. ANN. § 37:831(1) (2015). Such a license was required to sell “funeral merchandise,” which included “caskets, rental caskets, rental casket inserts, alternative containers, combo/shipping caskets, and other receptacles . . . where human remains are directly placed for disposition.” *Id.* § 37:831(46).

suggest that mere economic protection of a particular industry is a legitimate governmental purpose” and that a “naked transfer of wealth” is impermissible for purposes of rational basis review.<sup>88</sup> Thus, like the Sixth Circuit in *Craigmiles*, the Fifth Circuit rejected any other possible legitimate interest and invalidated the law.<sup>89</sup>

*B. The Second and Tenth Circuits Hold that Intrastate Economic Protectionism Is a Legitimate Government Interest*

The Tenth Circuit has considered a case that was factually indistinguishable from *Craigmiles*.<sup>90</sup> Yet, due to the inconsistency of current Equal Protection Clause analyses, the court reached the opposite conclusion.<sup>91</sup> After considering a law requiring that any seller of caskets be a licensed funeral director, the court held that “intrastate economic protectionism, absent a violation of a specific federal statutory or constitutional provision, is a legitimate state interest and that the [law] is rationally related to this legitimate end.”<sup>92</sup> The court emphasized that rational basis review does not allow courts to speculate as to the effectiveness of a law or overturn a statute on the basis that it does not regulate the evil that it is supposed to regulate.<sup>93</sup> The court specifically rejected the Sixth Circuit’s holding in *Craigmiles*, arguing that *Craigmiles* misread Supreme Court precedent purporting to hold that economic protectionism is not a legitimate government interest.<sup>94</sup>

88. *Castille*, 712 F.3d at 222–23.

89. *Id.* at 227. Other interests that are often advanced as potentially legitimate include consumer protection and public health. *See, e.g., id.* at 223–27. However, regarding consumer protection, the Fifth Circuit stated that there was a “disconnect between restricting casket sales to funeral homes and preventing consumer fraud and abuse.” *Id.* at 225. That is because the funeral homes had primarily been the source of fraud, and Louisiana already had a separate entity policing inappropriate sales tactics, thus eliminating any need for the protectionist law. *Id.* The court also rejected public health as a possible interest, because Louisiana did not require caskets for burial, did not impose requirements for their construction, and did not require that caskets be sealed. *Id.* at 226. Notwithstanding the deference given to state economic regulation, the Fifth Circuit held that such deference did not demand “judicial blindness . . . requir[ing] courts to accept nonsensical explanations for regulation[s].” *Id.*; *see also* Fisher, *supra* note 39 (“The problem is, such laws *only* protected funeral directors against competition and didn’t have the sort of health and safety justification that could overcome close scrutiny . . .”).

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

91. *Id.* at 1225.

92. *Id.*

93. *Id.* at 1217.

94. *Id.* at 1218–19. The Tenth Circuit emphasized that the Supreme Court cases cited in *Craig-*

Most recently, in *Sensational Smiles, LLC v. Mullen*, the Second Circuit joined the Tenth Circuit in concluding that intrastate economic protectionism passes rational basis review under the Equal Protection Clause.<sup>95</sup> The state statute in *Mullen* mandated that only licensed dentists could provide certain teeth-whitening procedures.<sup>96</sup> *Mullen* is distinguishable from the other cases because the court in *Mullen* found that the law had a rational basis beyond naked economic protectionism.<sup>97</sup> However, the court still substantively analyzed the dentist's claim that the law was an attempt to protect the monopoly of licensed dentists in Connecticut.<sup>98</sup> Assuming that the law was passed for no basis other than economic protection, the court first concluded "that the Supreme Court has long permitted state economic favoritism of all sorts."<sup>99</sup> The court also opined that it was almost impossible to distinguish between naked economic protectionism and a more "legitimate" public purpose, because the two will often coexist.<sup>100</sup> The most interesting part of the court's analysis is its conclusion that

[m]uch of what states do is to favor certain groups over others on economic grounds. We call this politics. Whether the results are wise or terrible is not for us to say, as favoritism of this sort is cer-

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*miles* dealt with the Dormant Commerce Clause and interstate commerce, not intrastate commerce. *Id.* at 1219–22 ("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 . . .").

95. *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 285 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1160 (2016).

96. *Id.* at 283.

97. *Id.* at 286.

98. *Id.*

99. *Id.* at 286. The court cited seminal equal protection cases—such as *New Orleans v. Dukes* and *Williamson v. Lee Optical of Oklahoma Inc.*—and concluded that those cases held that "state economic favoritism of all sorts [is permissible], so long as that favoritism does not violate specific constitutional provisions or federal statutes." *Sensational Smiles, LLC*, 793 F.3d at 286. Such conclusions are a stretch, however. While the Supreme Court did uphold a protectionist law in *Williamson*, it did not discuss whether economic protectionism, by itself, is a legitimate government interest. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 490–91 (1955). Rather than engage in much analysis, the Court decided to take a deferential approach toward state legislatures, an approach that formed the foundation of today's equal protection doctrine. See *id.* at 487. Similarly, in *City of New Orleans v. Dukes*, the Supreme Court upheld a New Orleans law because the legislature could have passed the law with other plausible interests in mind. See 427 U.S. 297, 305 (1976). Thus, by no means do these cases stand for the proposition that naked economic protectionism is a legitimate government interest.

100. *Sensational Smiles, LLC*, 793 F.3d at 287.

tainly rational in the constitutional sense. . . . To hold otherwise would be to interpret the Fourteenth Amendment in a way that is destructive to federalism and to the power of the sovereign states to regulate their internal economic affairs.<sup>101</sup>

Based on the factual similarities among these cases, it is clear that the circuit split rests solely on whether naked economic protectionism is a legitimate government interest for the purposes of the Equal Protection Clause.<sup>102</sup>

## VI. LEGITIMATE GOVERNMENT INTEREST

### A. *What Makes a Government Interest Legitimate?*

As the law currently stands, equal protection challenges to regulations that are passed in the interest of intrastate economic protectionism are subject only to rational basis review because such laws do not create suspect or quasi-suspect classifications.<sup>103</sup> Thus, the relevant question is whether statutes passed purely in the interest of intrastate economic protectionism—that is to say, to protect the economic interests of a specific industry within a specific state—are constitutional for purposes of rational basis review.<sup>104</sup> To answer this question, it is necessary to define “legitimate” government interests.<sup>105</sup>

The judiciary is usually very deferential in finding a legitimate state in-

101. *Id.*

102. *See infra* Part VI. After a brief reading of the opinions forming this circuit split, a reader might believe that this issue could be resolved by asking whether the Supreme Court has already decided if naked intrastate economic protectionism is a legitimate government interest. *See* *Craig-miles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (citing Supreme Court opinions to argue that the “[c]ourts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose”). However, as the Tenth Circuit noted, the cases cited by the Sixth Circuit dealt primarily with interstate commerce, for which the Dormant Commerce Clause provides well-established prohibitions against state regulation. *See* *Powers v. Harris*, 379 F.3d 1208, 1219–20 (10th Cir. 2004). Thus, the Supreme Court has not considered whether *intrastate* economic protectionism is a legitimate government interest. *See id.* at 1218–19.

103. *See, e.g., Powers*, 379 F.3d at 1215 (“As a state economic regulation that does not affect a fundamental right and categorizes people on the basis of a non-suspect classification, we determine whether the FSLA passes constitutional muster, both as a matter of substantive due process and equal protection, by applying rational-basis review.”).

104. *See supra* Section IV.B.

105. *See infra* notes 112–17 and accompanying text.

terest.<sup>106</sup> Rarely has the judiciary employed rational basis review as a material standard with which to judge regulations; rather, rational basis review often acts as a presumption of constitutionality, absent an egregious violation.<sup>107</sup> Nonetheless, courts are equally quick to offer lip service in finding that a state regulation could potentially be based on an illegitimate state interest.<sup>108</sup> Indeed, courts have reviewed certain regulations and, after finding an illegitimate government interest under some semblance of rational basis review, held that such regulations are unconstitutional.<sup>109</sup>

In *Romer v. Evans*, the Supreme Court considered a state regulation amendment that effectively prohibited any state action designed to protect people of homosexual, lesbian, or bisexual orientation from discrimination.<sup>110</sup> After establishing that the regulation was subject to rational basis review, the Court held that the regulation was unconstitutional notwithstanding the fact that rational basis review is traditionally applied deferentially.<sup>111</sup>

106. Melanie E. Meyers, *Impermissible Purposes and the Equal Protection Clause*, 86 COLUM. L. REV. 1184, 1186–87 (1986) (stating that rational basis review has led to the “virtual abdication of judicial review”); see also *Sensational Smiles, LLC*, 793 F.3d at 290 (Droney, J., concurring) (“The majority, by contrast, essentially renders rational basis review a nullity in the context of economic regulation.”); *Powers*, 379 F.3d at 1226 (Tymkovich, J., concurring) (“The end result of the majority’s reasoning is an almost per se rule upholding intrastate protectionist legislation.”).

107. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 453 (1985) (Stevens, J., concurring) (“In most cases the answer to these questions will tell us whether the statute has a ‘rational basis.’ The answers will result in the virtually automatic invalidation of racial classifications and in the validation of most economic classifications . . . .”); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955) (stating that it is immaterial that the state regulation may be needless and wasteful, and that the judiciary should not question the legislature’s motives for passing such a law).

108. See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 425 (1961) (stating that a classification will not survive an equal protection challenge if it “rests on grounds wholly irrelevant to the achievement of the State’s objective”); see also *Mathews v. Lucas*, 427 U.S. 495, 510 (1976) (stating that rational basis review is not “toothless”).

109. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996).

110. *Id.* at 623–24. The amendment stated the following:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

*Id.* at 624.

111. *Id.* at 632.

Of particular note, the Court stated that

even in the ordinary equal protection case calling for the most differential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority. In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. . . . By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, *we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.*<sup>112</sup>

The Court then held that the regulation was unconstitutional because it inflicted “immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.”<sup>113</sup> This language indicates that an illegitimate government interest is that which creates classifications for the purpose of advantaging one group over another without legitimate justification.<sup>114</sup>

Basic Fourteenth Amendment considerations support this definition of an illegitimate government interest.<sup>115</sup> As Justice Brennan has noted, “[l]egislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of ‘class or caste’

112. *Id.* at 632–33 (emphasis added). Commentators now recognize that, in *Romer v. Evans*, because the law seemed to have been passed with particular animus, the Supreme Court used a heightened form of rational basis review. *See, e.g.*, Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 *IND. L. REV.* 357, 408–11 (1999). Nonetheless, this explanation still provides useful background regarding legitimate government interests. *See infra* notes 113–17 and accompanying text.

113. *Romer*, 517 U.S. at 635.

114. *See supra* notes 112–13 and accompanying text.

115. *See* U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

treatment that the Fourteenth Amendment was designed to abolish.”<sup>116</sup> Put more succinctly, the Equal Protection Clause guards against naked preferences, which represent “a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.”<sup>117</sup>

### *B. Applications to Intrastate Economic Protectionism*

Intrastate economic protectionist regulations are passed solely to protect the economic interests of a specific industry.<sup>118</sup> If naked preferences are unconstitutional, then naked intrastate economic protectionism cannot be a legitimate government interest.<sup>119</sup> Even the Tenth Circuit, which held that naked economic protectionism was a legitimate state interest, recognized that these regulations attempt to protect a discrete interest group from economic competition.<sup>120</sup> Such legislation is passed to disadvantage the group burdened by the law—mainly, the group that does not possess the political

116. *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). This statement was part of a broader footnote in which Justice Brennan explained the rationale behind the Equal Protection Clause. *See id.* (“The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment.”).

117. Sunstein, *supra* note 3, at 1689. This article further explains that “[t]he framers’ hostility toward naked preferences was rooted in the fear that government power would be usurped solely to distribute wealth or opportunities to one group or person at the expense of another.” *Id.* at 1690.

118. *See, e.g., Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (“[T]he [regulation] was designed only for the economic protection of funeral home operators.”).

119. *See Bernstein, supra* note 47 (“Blatantly favoring one group over another for no reason other than that the former has more political power is the essence of what has always been considered arbitrary class legislation.”); *see also Ranschburg v. Toan*, 709 F.2d 1207, 1211 (8th Cir. 1983) (“Although states may have great discretion in the area of social welfare, they do not have unbridled discretion. They must still explain why they chose to favor one group of recipients over another. Thus, it is untenable to suggest that a state’s decision to favor one group of recipients over another by itself qualifies as a legitimate state interest.”).

120. *Powers v. Harris*, 379 F.3d 1208, 1218–22 (10th Cir. 2004). Although the opinion was uniform, the court split on the issue of whether intrastate economic protectionism is a legitimate state interest. *See id.* at 1225–26 (Tymkovich, J., concurring). In a concurring opinion, Judge Tymkovich noted that the majority went far beyond established authority in conferring legitimacy to the broad concept of “unvarnished economic protectionism,” and that “[n]o case holds that the bare preference of one economic actor while furthering no greater public interest advances a ‘legitimate state interest.’” *Id.* at 1226. Thus, *Powers* was in fact sharply split on the issue of whether naked intrastate economic protectionism is in fact a legitimate state interest. *See id.* at 1225–26.

strength to acquire a protected status.<sup>121</sup> Even beyond funeral home laws, little doubt remains as to the protectionist motivation of similarly situated laws.<sup>122</sup> For example, the protectionist laws that Tesla now faces were passed, beginning in the 1950s, to protect car dealers from the superior bargaining power of manufacturers.<sup>123</sup>

These regulations exemplify naked preferences that distribute wealth and opportunity to one group at the expense of another; any court that holds otherwise simply reverts to a standard of automatic deference because such economic classifications have not been considered suspect.<sup>124</sup> Courts often justify this practice of turning the other cheek in the face of naked preferences by citing sweeping language from *Williamson v. Lee Optical*, where the court stated that “it is for the legislature, not the courts, to balance the advantages and disadvantages of” the state regulation.<sup>125</sup> While this is certainly true, there is a stark difference between considering the advantages of a state regulation and evaluating whether it was passed out of an unconstitutional motive.<sup>126</sup> If rational basis review is to mean anything at all—i.e., if courts are to engage in anything more than automatic deference to state legislatures—there must be a point at which a regulation’s unconstitutional

121. *Compare* *Romer v. Evans*, 517 U.S. 620, 632–33 (1996) (stating that rational basis review ensures that “classifications are not drawn for the purpose of disadvantaging the group burdened by the law”), *with* Sunstein, *supra* note 3, at 1689 (stating that the Equal Protection Clause focuses on combatting a “single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want”).

122. *See* *Crane*, *supra* note 29, at 574–76.

123. *Id.* at 577–79.

124. *See* Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 N.Y.U. J.L. & LIBERTY 1055, 1096 (2014) (“[T]radition has long tolerated courts looking the other way when legislatures act upon naked preferences, but a court cannot look such preferences in the face without balking.”).

125. *See, e.g., Powers*, 379 F.3d at 1225 (“We do not doubt that the FLSA ‘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 [FLSA’s] requirements.’” (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955))). *But see supra* note 99 and accompanying text.

126. *See* *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) (“We conclude that mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review. . . . [E]conomic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest.”); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 316 n.38 (1993) (“For rationality review to be real rather than sham, the court must be willing to make some independent assessment of legislative purpose.”).

purpose is so clear that an honest court cannot claim that a completely “hypothetical alternative is a plausible explanation for the enactment.”<sup>127</sup>

### C. *Dormant Commerce Clause*

Dormant Commerce Clause considerations further delegitimize the notion that intrastate economic protectionism is a legitimate government interest.<sup>128</sup> The Dormant Commerce Clause is derived from the Commerce Clause, which vests Congress with the power to regulate *interstate* commerce.<sup>129</sup> The dormant, or “negative,” implication of such legislative power is that the states are prohibited from engaging in economic protectionism or enacting regulations that are “designed to benefit in-state economic interests by burdening out-of-state competitors . . . . Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down, . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.”<sup>130</sup> The first step in any Dormant Commerce Clause analysis is to determine whether the regulation is nondiscriminatory, “with only ‘incidental’ effects on interstate commerce,” or whether it is intentionally discriminatory.<sup>131</sup> While an intentionally discriminatory regulation is per se invalid, a nondiscriminatory regulation with incidental effects on interstate commerce is constitutional unless “the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>132</sup>

127. See Menashi & Ginsburg, *supra* note 124, at 1098–99; Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 290 (2d Cir. 2015) (Droney, J., concurring) (“If even the deferential limits on state action fall away simply because the regulation in question is economic, then it seems that we are not applying any review, but only disingenuously repeating a shibboleth.”); see also Gold, *supra* note 45 (“Protectionism fails because the harms of protectionist policies are guaranteed to exceed the benefits. Any benefits transferred to the producers are passed onto the consumer in the form of higher prices. However, because less exchange takes place at a higher price, there is a deadweight loss to the economy as a whole.”).

128. See *infra* notes 129–55 and accompanying text.

129. See *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994). Justice Marshall may have been one of the first to use the label “dormant” when he stated that the enumerated powers, including the power to regulate commerce, “can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant.” *Gibbons v. Ogden*, 22 U.S. 1, 189 (1824).

130. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988) (citations omitted).

131. *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93, 99 (1994) (citation omitted).

132. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (“Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive

Federal courts have long implied that naked economic protectionism is not a legitimate government interest under the Dormant Commerce Clause.<sup>133</sup> For example, as the Supreme Court stated in *City of Philadelphia v. New Jersey*, “the opinions of the Court through the years have reflected an alertness to the evils of ‘economic isolation’ and protectionism . . . . [W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.”<sup>134</sup> The Court has also stated that providing a benefit to special interests is not a legitimate public purpose.<sup>135</sup> Thus, it is indisputable that federal courts are already weary of naked economic protectionism, at least as it relates to the Dormant Commerce Clause.<sup>136</sup>

Of course, the Dormant Commerce Clause pertains only to a state regulation of *interstate* commerce.<sup>137</sup> However, given that intentional discrimination of interstate commerce is *per se* invalid under the Dormant Commerce Clause, and given that inter- and intrastate commerce are not drastically different, states should not freely be allowed to regulate *intrastate* commerce regardless of how intentionally they may discriminate against certain citizens.<sup>138</sup> Put another way, if a state is not allowed to intentionally discriminate against other states, then it should not be allowed to protect a particular industry by intentionally discriminating against its competitors (naked economic protectionism), because the same concerns underlying economic protectionism in the Dormant Commerce Clause context can be applied to economic protectionism in the intrastate commerce context.<sup>139</sup>

For example, one objection to state regulation of interstate commerce is that it is “inefficient because it diverts business away from presumptively

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in relation to the putative local benefits.”)

133. See *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (“Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose.”).

134. *City of Phila. v. New Jersey*, 437 U.S. 617, 623–24 (1978).

135. See *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 412 (1983); see also *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 531 (1949) (stating that it is unconstitutional for a state to pass regulation unsupported by health or safety considerations, but instead solely for the protection of local economic interests, such as “limitation of competition”).

136. See Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENT. 395, 395–96 (1986) (stating that the Dormant Commerce Clause serves two purposes, one of them being the furtherance of “the national interest in free trade among the states”).

137. See *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988).

138. See *supra* Section VI.B.

139. See *supra* Section VI.B.

low-cost producers without any colorable justification in terms of a benefit that deserves approval from the point of view of the nation as a whole . . . . [B]are transfer[s] of welfare between similarly situated parties . . . creates no benefit at all.”<sup>140</sup> The same can be said of *intrastate* regulations based on naked economic protectionism.<sup>141</sup> For example, the regulations placed on Tesla’s direct-to-consumer model divert business from low-cost producers because such sales would allow Tesla (the producer) to eliminate the extra cost of using a dealership.<sup>142</sup> Tesla specifically cites the lower cost of its business model as the most compelling reason for trying to sell directly to consumers because, to make a profit, dealerships mark up the price of cars they sell.<sup>143</sup> Further, transferring the right to sell the car is nothing more than a bare transfer of wealth from the manufacturer to the dealerships, both of which are similarly situated.<sup>144</sup> Thus, concerns related to the regulation of interstate commerce apply to intrastate regulations that are passed out of an interest in naked economic protectionism.<sup>145</sup>

The Dormant Commerce Clause also implicates the “concept-of-union.”<sup>146</sup> “[Interstate] protectionism is unacceptable because it is inconsistent with the very idea of political union . . . . Protectionist legislation is

140. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1118 (1986).

141. See *supra* Section VI.B.

142. See Lao et al., *supra* note 39 (observing other direct sale models meant to keep the price of the products down); see also Fisher, *supra* note 39 (“[Elon Musk] joins a growing chorus of critics who are challenging laws that protect car dealers, taxi services, funeral directors and many other industries under the guise of public safety or economic regulation. In many cases those laws represent the fruits of lobbying by powerful economic interests—how many legislators *don’t* have an auto dealer in their district?—and result in consumers paying higher costs or having narrower choices.”).

143. See Katie Fehrenbacher, *7 Reasons Why Tesla Insists on Selling Its Own Cars*, FORTUNE (Jan. 19, 2016), <http://fortune.com/2016/01/19/why-tesla-sells-directly/> (citing Tesla’s explanation that selling directly to consumers affords customers the option to go online and “buy a Tesla car without the additional markup”).

144. See, e.g., Crane, *supra* note 29, at 578–79. Although at one point dealerships were severely disadvantaged compared to manufacturers, that disadvantage was remedied long ago. See *id.* (describing well-established state law provisions that protect car dealerships, such as “prohibitions on forcing dealers to accept unwanted cars, protections against termination of franchise agreements, and restrictions on granting additional franchises in a franchised dealer’s geographic market area”).

145. See *supra* notes 140–44 and accompanying text.

146. Regan, *supra* note 140, at 1113; see also *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994) (stating that the central purpose of the Dormant Commerce Clause is to prohibit “laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent”).

the economic equivalent of war. It is hostile in its essence.”<sup>147</sup> However, regulations of *intrastate* commerce based on naked economic preference can be equally disruptive.<sup>148</sup> To continue with the Tesla example, the wildly inconsistent state regulation of Tesla’s direct-to-consumer model is disruptive to the “concept-of-union.”<sup>149</sup> In heavily populated states such as California, Florida, and Texas, the restrictions on Tesla range from free access, to limited access, to a complete ban on sales.<sup>150</sup> This inconsistency incentivizes customers to purchase Tesla vehicles in neighboring states,<sup>151</sup> which “excite[s] those jealousies and retaliatory measures the Constitution was designed to prevent.”<sup>152</sup>

Further, the fact that these regulations force customers to travel to neighboring states to purchase their vehicles can also be viewed as an “unreasonable clog upon the mobility of commerce.”<sup>153</sup> Thus, the concerns underlying the Dormant Commerce Clause can also be applied to intrastate regulations that are passed out of an interest in naked economic protectionism; courts should therefore strike down such regulations with the same force.<sup>154</sup> In this way, Dormant Commerce Clause considerations also provide insight into why naked economic protectionism is not a legitimate government interest, even in the context of *intrastate* regulation.<sup>155</sup>

147. Regan, *supra* note 140, at 1113. Another concern is that protectionist legislation can “cause resentment and invite protectionist retaliation. If protectionist legislation is permitted at all, it is likely to generate a cycle of escalating animosity and isolation . . . .” *Id.* at 1114.

148. See *Where You Can Buy a Tesla*, *supra* note 43.

149. *Id.*; Regan, *supra* note 140, at 1113.

150. See *Where You Can Buy a Tesla*, *supra* note 43.

151. See, e.g., Fehrenbacher, *supra* note 143.

152. *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994) (“The central rationale for the [Dormant Commerce Clause] is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.”).

153. *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 532 (1949) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935); see also Mark Rogowsky, *Want a Model 3? Move to California (or Buy Another Tesla)*, FORBES (Mar. 22, 2016, 12:11 AM), <https://www.forbes.com/sites/mark-rogowsky/2016/03/22/want-a-model-3-move-to-california-or-buy-another-tesla/> (encouraging prospective customers to travel to California to purchase a Tesla).

154. See Farber, *supra* note 136, at 400.

155. See *id.* There may also be an argument that economic protectionist regulations will almost always violate the Dormant Commerce Clause because the relationship between *intrastate* and *interstate* commerce is becoming increasingly strained; for example, in 2014, seven of the top ten selling car brands in the United States were made by foreign manufacturers, and the remaining three brands conducted significant business in every state. See Bertel Schmitt, *America’s Best-Selling Car Brand*

*D. Practical Considerations*

Naked economic protectionism is not—at least in theory—a legitimate government interest for purposes of the Equal Protection Clause.<sup>156</sup> However, due to the persistent reluctance of federal courts to invalidate blatantly protectionist laws,<sup>157</sup> it is possible that rational basis review is a standard of automatic deference allowing judges to uphold such laws.<sup>158</sup> Courts have so infrequently found violations of the Equal Protection Clause under rational basis review that this may be the more realistic conclusion. And even in those rare instances<sup>159</sup> in which courts have found violations, legal experts assume that the courts employed a new, heightened level of review rather than considering the possibility that the courts had in fact found violations under rational basis review.<sup>160</sup>

Thus, we are left with equal protection jurisprudence that is “incoherent, ‘rudderless,’ unprincipled, and ultimately ‘astonishing.’”<sup>161</sup> Because of this, it is difficult to trust courts to use the current model to come to the correct conclusion—that naked economic protectionism is not a legitimate government interest for purposes of the Equal Protection Clause—and thus it may be necessary to consider an alternative approach by which courts can evalu-

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*Is Not American*, DAILY KANBAN (Feb. 14, 2015), <http://dailykanban.com/2015/02/americas-best-selling-car-brand-not-american/>.

156. See *supra* Sections VI.A–VI.C.

157. See *Powers v. Harris*, 379 F.3d 1208, 1225 (10th Cir. 2004).

158. Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 512–17 (2004) (describing the “weak” process by which federal courts can apply the Equal Protection Clause, leading to predictable results and almost invariable rejections of equal protection challenges).

159. See *id.* at 512–13. Some estimate that there have been fewer than twelve successful rational basis arguments and more than one hundred unsuccessful rational basis arguments. *Id.* at 512–13. Still, “the Court’s selection of cases to which it will give a heightened, less deferential rationality review follows no obvious pattern. The Court never explains why it has selected a particular case for heightened rationality. The Court’s analysis differs from case to case. . . . For the most part, once the case has been decided, the Court ignores it.” Farrell, *supra* note 112, at 357–58.

160. See generally *Romer v. Evans*, 517 U.S. 620 (1996). Before *Romer*, classifications of homosexuals had not been considered a violation of either a fundamental right or a suspect classification; indeed, it was uncontested that the Court would employ rational basis review. *Id.* at 631. After recognizing the presumption of deference associated with such a test, the Court nonetheless found that the law was unconstitutional. *Id.* at 635–36. Because it has been so difficult to find a violation under rational basis review, many commentators have concluded that courts employ a different test—“rational basis with bite”—for classifications based on sexual orientation. See Note, *The Benefits of Unequal Protection*, 126 HARV. L. REV. 1348, 1362 (2013).

161. Meyers, *supra* note 106, at 1184.

ate economic regulations.<sup>162</sup> After all, if the willingness of courts to deviate from the current multi-level system is any indication, overhauling the way in which courts evaluate economic regulations might not be as difficult as it seems.<sup>163</sup>

## VII. CURRENT CRITIQUES

Since the inception of the tripartite approach to analyzing equal protection claims, critiques of it have ranged from calls to eliminate the entire structure,<sup>164</sup> to more modest proposals such as adding additional standards of review to the existing three.<sup>165</sup> However, neither of these approaches adequately ensures that courts will hold that state regulations passed out of illegitimate government interests—such as naked economic protectionism—violate the Equal Protection Clause.<sup>166</sup>

### A. *Eliminating the Three-Part Test*

Critiques of the existing three-part structure are grounded in a concern that the over-formalized analytical “tiers” drown out analysis of the more important considerations behind the equal protection doctrine.<sup>167</sup> As Justice Marshall stated in his partial dissent in *City of Cleburne v. Cleburne Living Center, Inc.*:

The Court’s opinion approaches the task of principled equal protection adjudication in what I view as precisely the wrong way. The formal label under which an equal protection claim is reviewed is less important than careful identification of the interest at stake and the extent to which society recognizes the classification as an invid-

162. See *infra* Part VIII.

163. See Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 165 (1984) (“Dissatisfaction with the multi-level system is also manifest in the increasingly frequent departures from it. The creation of intermediate scrutiny, which itself was a departure from the two-tier approach, was able to abate further deviation from the system only temporarily. Thereafter, defections from the system have increased in number.”).

164. See, e.g., Goldberg, *supra* note 158, at 482–84.

165. See generally Marc P. Florman, *The Harmless Pursuit of Happiness: Why “Rational Basis with Bite” Review Makes Sense for Challenges to Occupational Licenses*, 58 LOY. L. REV. 721 (2012).

166. See *infra* Sections VII.A.–VII.B.

167. See Goldberg, *supra* note 158, at 518–19.

ious one. Yet in focusing obsessively on the appropriate label to give its standard of review, the Court fails to identify the interests at stake or to articulate the principle that classifications based on mental retardation must be carefully examined to assure they do not rest on impermissible assumptions or false stereotypes regarding individual ability and need. No guidance is thereby given as to when the Court's freewheeling, and potentially dangerous, "rational-basis standard" is to be employed, nor is attention directed to the invidiousness of grouping all retarded individuals together.<sup>168</sup>

Justice Marshall was not alone in this concern; indeed, Justice Stevens has consistently expressed similar concerns about the way in which the modern Court analyzes equal protection challenges.<sup>169</sup> Furthermore, scholars have expressed concern that if the interest at hand is not a fundamental right warranting strict scrutiny, then the three-tiered approach gives the Court an excuse to avoid any level of substantive constitutional review.<sup>170</sup>

While critiques have been easy to come by, proposing an adequate alternative has proven to be a challenge.<sup>171</sup> Justice Stevens believes that equal protection challenges must be governed by a single standard of review and that it is nonsensical to evaluate one constitutional provision under three different standards.<sup>172</sup> Similarly, Justice Marshall was a proponent of a single,

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168. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 478 (1985) (Marshall, J., concurring in part and dissenting in part).

169. *See id.* at 451–52 (Stevens, J., concurring) (establishing that Justice Stephens had “never been persuaded that these so-called ‘standards’ adequately explain the decisional process. Cases involving classifications based on alienage, illegal residency, illegitimacy, gender, age . . . do not fit well into sharply defined classifications”).

170. Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1079–80 (2011) (“The familiar tiered framework for judicial analysis means that the results in equal protection cases will almost always depend on the ability to convince a court that there is a racial or gender classification present or discrimination with regard to a fundamental right. . . . These levels of scrutiny allow the Court to justify rulings in favor of the government with little analysis of the competing constitutional interests. To explain a denial of a constitutional claim, the Court need only state why the interest involved warrants analysis under the rational basis test . . .”).

171. *See Goldberg, supra* note 158, at 524–25.

172. *See Craig v. Boren*, 429 U.S. 190, 212 (1976) (Stevens, J., concurring) (“I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.”).

flexible standard that takes into account “varying levels of scrutiny depending upon ‘the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn,’” rather than a forced and rigid three-tiered approach.<sup>173</sup> Other critics have rejected both approaches, instead proposing more nuanced standards and tests that the Court should use to avoid the current three-tier approach.<sup>174</sup> Nonetheless, this group of critiques can loosely be characterized as favoring a single standard that is more flexible, rather than the more structured, three-tiered approach in place today.<sup>175</sup>

Despite the fact that some support eliminating the current structure entirely, it does have merit; without guiding principles, courts would be left to their own devices in determining which interests are more valuable than others.<sup>176</sup> It is easy to imagine the wild inconsistencies that such a lack of structure would cause.<sup>177</sup> Indeed, from 1897 to 1937, a period known as the *Lochner* Era,<sup>178</sup> the Supreme Court regularly invalidated state regulations based on broad principles and inconsistent conclusions “as to the wisdom or necessity of the law[s].”<sup>179</sup> Further, a system that scrutinizes certain classifications more heavily allows the justice system to more accurately reflect the political process.<sup>180</sup> For example, racial classifications were not always considered suspect, and the fact that they are now suspect reflects years of political strife and cases dealing with issues such as racial exclusion from jury

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173. *Plyler v. Doe*, 457 U.S. 202, 231 (1982) (Marshall, J., concurring).

174. See Goldberg, *supra* note 158, at 491–92 (proposing a single standard consisting of an “intracontextual” inquiry, an “extracontextual” inquiry, and a “bias” inquiry).

175. See *id.* at 524.

176. See Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 957–59 (2002) (discussing the difficulty of appropriately conceptualizing equality and stating that such answers “do not come from the abstract concept of quality but, at best, from more particularized conceptions of equality and other norms”).

177. See Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 221 (1991). Until 1937, federal courts were free to determine equal protection challenges as they saw fit, which resulted in the Supreme Court striking down approximately “200 regulatory statutes on no apparent ground but the Justices’ own policy preferences.” *Id.* at 221–22.

178. See *supra* note 54.

179. See Abbott, *supra* note 51, at 480. This inconsistency caused the Supreme Court to swing to the opposite extreme and presume that all state legislation was generally constitutional as long as it was not “arbitrary or capricious.” *Id.* at 481. This lasted until the Supreme Court eventually settled on the three-level judicial scrutiny used today. *Id.* at 481–82.

180. See Klarman, *supra* note 177, at 219–20 (explaining that one of the shortcomings of early equal protection jurisprudence was its failure to consider the political process).

service and Japanese internment during World War II.<sup>181</sup> The current system preserves progress and ensures that the judiciary persists in upholding certain values that have been extensively vetted through the political process.<sup>182</sup> Thus, while it is clear that the tripartite approach is flawed, certain justifications weigh against scrapping it in favor of a single standard.<sup>183</sup>

### B. *Adding More Tiers*

Other suggested changes to the current system involve simply adding more tiers to the existing three tiers of scrutiny—rational basis review, intermediate scrutiny, and strict scrutiny.<sup>184</sup> This concept of adding more tiers is nothing new; scholars often speculate that, whenever the Supreme Court unexpectedly invalidates a regulation under the Equal Protection Clause, it does so by introducing a new level of scrutiny.<sup>185</sup> For example, there is a general consensus that the Supreme Court employed a “rational basis with bite” test when invalidating the regulation in *Romer v. Evans*, notwithstanding the fact that the Court made no mention of employing a test other than rational basis.<sup>186</sup> In the same way, members of the legal community have assumed that the Fifth and Sixth Circuits employed a “rational basis with bite” test when both Circuits held that a state regulation passed solely in the interest of naked economic protectionism violates the Equal Protection

181. See *id.* at 231–32 (referring to cases such as *Hirabayashi v. United States*, in which the Supreme Court foreshadowed the strict scrutiny with which it would eventually review racial classifications); see also *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (“Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”).

182. See Klarman, *supra* note 177, at 230 (discussing how, before the Supreme Court developed strict or intermediate scrutiny, racial classifications were subject to the “same general rationality test”); see also Andrew Koppelman, *Doma, Romer, and Rationality*, 58 *DRAKE L. REV.* 923, 924 (2010) (explaining that the country’s shifting attitude towards homosexuality has led to the increased scrutiny applied to classifications of homosexuals).

183. See *supra* text accompanying note 170. This is less a critique of the current system and more an alternative way of interpreting how the Supreme Court evaluates the Equal Protection Clause. See Menashi & Ginsburg, *supra* note 124, at 1085–86.

184. See Menashi & Ginsburg, *supra* note 124, at 1085 (suggesting a new test of “rational basis review with ‘bite’”).

185. See *supra* notes 156–60 and accompanying text.

186. See *The Benefits of Unequal Protection*, *supra* note 160, at 1363 (noting also that *Romer v. Evans*, *Lawrence v. Texas*, and *City of Cleburne v. Cleburne Living Center, Inc.* are considered seminal examples of the rational basis with bite standard).

Clause.<sup>187</sup>

However, because “rational basis with bite” is not a recognized tier of scrutiny, this assumption fails to adequately ensure that the Equal Protection Clause will invalidate regulations passed out of naked economic protectionism.<sup>188</sup> Defining the phrase and determining when it might be applied are puzzles that remain difficult to solve.<sup>189</sup> Assuming that the Fifth and Sixth Circuits in fact applied a rational basis with bite test when they invalidated the economic regulations in *St. Joseph Abbey v. Castille* and *Craigmiles v. Giles*,<sup>190</sup> there is no explanation as to why the Tenth Circuit might not have applied the same test when it upheld a nearly identical economic regulation in *Powers v. Harris*.<sup>191</sup> Even assuming that the Tenth Circuit applied a rational basis with bite test rather than a rational basis test, there is no indication as to why the Tenth Circuit, when it considered nearly identical circumstances, came to a different result than the Fifth and Sixth Circuits.<sup>192</sup> In sum, continued speculation as to additional tiers provides no clear guidance by which a court can be expected to invalidate state regulations passed out of an interest in naked economic protectionism.<sup>193</sup>

187. See Menashi & Ginsburg, *supra* note 124, at 1069 (evaluating the circuit split over whether naked economic protectionism is a legitimate governmental interest for purposes of the Equal Protection Clause).

188. Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2770 (2005) (observing that the Supreme Court has not acknowledged the existence of a “rational basis with bite” test); see also Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 *IND. L.J.* 779, 801 (1987) (arguing that rational basis with bite does not exist and is simply a level of intermediate scrutiny “without articulating the factors that trigger[] it”).

189. See *The Benefits of Unequal Protection*, *supra* note 160, at 1363–64 (defining rational basis with bite by piecing together dialogue from multiple Supreme Court cases). Rational basis with bite is less a tier of scrutiny than an explanation of how the Supreme Court could ever find a violation of the Equal Protection Clause using rational basis review. See *id.*

190. See *supra* Section V.A.

191. See *supra* Section V.B.

192. See *supra* Part V. To account for this ambiguity, “rational basis with economic bite” proponents have stated that, while the Tenth Circuit demonstrated a more “deferential attitude,” it nonetheless used the rational basis with bite test to “squarely face[] the reality of special-interest legislation.” See Menashi & Ginsburg, *supra* note 124, at 1093. However, this doesn’t change the fact that the Tenth and Second Circuits found that regulations passed out of an interest in naked economic protectionism were constitutional. See *supra* Section V.B.

193. See Smith, *supra* note 188, at 2812 (“The rational basis with bite approach . . . is also unsatisfactory due to the courts’ failure to acknowledge explicitly their use of heightened scrutiny and thereby opening up those decisions to compelling criticism. . . . Employing heightened scrutiny un-

## VIII. APPROPRIATE MODEL

For the reasons discussed above, it is not appropriate to eliminate the current tripartite structure or to rely on courts to further develop a rational basis with bite level of scrutiny.<sup>194</sup> Yet, the equal protection doctrine, as it currently stands, remains an awkward framework for analyzing economic regulations because it focuses on classifications of individuals rather than classifications of industries or companies.<sup>195</sup> Indeed, the Equal Protection Clause originally protected disenfranchised African-Americans, an interest entirely dissimilar to corporate or company interests.<sup>196</sup>

Under the current framework, strict and intermediate scrutiny are reserved for fundamental rights and suspect classifications, but the Supreme Court has never explained how an economic regulation might violate a fundamental right or create a suspect classification.<sup>197</sup> For example, the Supreme Court has considered the following to be fundamental rights: “rights to privacy, interstate travel, access to the courts, and an equal, unburdened vote in state elections.”<sup>198</sup> And suspect classifications include ethnicity and

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der the guise of rational basis review is circuitous and ultimately may lead to greater resentment of bold judicial decisions by making unfounded exceptions or modifying the appropriate standards rather than following the court’s traditional framework, however imperfect it may be.”) (footnotes omitted); *see also* Meyers, *supra* note 106, at 1191–92 (“[I]ncreased rationality is incurably vague, minimizing the potential for consistent application. . . . [B]y relying on case by case judicial assessment of the ‘fit’ of governmental classifications without explicit standards, the model contemplates ad hoc decisionmaking and inconsistent results.”).

194. *See supra* Part VII.

195. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 631 (1996) (“The Fourteenth Amendment’s promise that no *person* shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various *groups* or *persons*.”) (emphasis added).

196. *Klarman, supra* note 177, at 226 (“Justice Stone plainly had in mind protection for blacks . . .”).

197. *See* Randal S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 L. & INEQ. 239, 261 (1999) (“In fact, the Supreme Court has never articulated a standard for determining what rights the Constitution implicitly guarantees, or even designated a right as an implicit right.”).

198. *Id.* at 261–62; *see also, e.g.*, *Roe v. Wade*, 410 U.S. 113, 153 (1973) (finding that the fundamental right to privacy extends to a woman’s decision whether to terminate her pregnancy); *United States v. Guest*, 383 U.S. 745, 758 (1966) (“[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution.”); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (“[T]he right to vote is too precious, too fundamental to be so burdened or conditioned.”).

gender.<sup>199</sup> Based on these examples, a state regulation passed out of an interest in naked economic protectionism (e.g., a state law preventing Tesla from selling directly to consumers) is never going to violate an individual's fundamental rights or create a suspect classification.<sup>200</sup> This is improper because such regulations are equally capable of infringing on fundamental constitutional principles, notwithstanding the fact that they pertain to companies and industries rather than individuals or classes of individuals.<sup>201</sup> Thus, this Comment proposes the following three-part test for analyzing economic regulations under the Equal Protection Clause: (1) is the regulation economic?; (2) can the claimant show that the regulation was passed out of an interest in protecting a specific industry?; and (3) can the government rebut this showing by demonstrating that another, permissible interest was determinative in enacting the regulation?<sup>202</sup> If the government cannot rebut the claims that the regulation was passed out of an interest in protecting a specific industry, then the regulation should be deemed unconstitutional for being passed out of an interest in naked economic protectionism.<sup>203</sup>

#### A. Step One: Defining “Economic Regulation”

“Economic regulation” is defined as the “imposition of rules by a government, backed by the use of penalties, that are intended specifically to modify the economic behavior of individuals and firms in the private sector.”<sup>204</sup> “Economic” in this sense is defined as something that pertains “to the production, distribution, and use of income, wealth, and commodities.”<sup>205</sup> Thus, economic regulations include state laws regulating Tesla’s

199. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (“Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”); *Craig v. Boren*, 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting) (discussing the majority opinion’s application of an intermediate level of scrutiny to gender-based classifications).

200. See *supra* Part IV.

201. See *supra* Part VI; see also Sunstein, *supra* note 3, at 1689 (stating that modern constitutional law is focused on a single underlying evil: “the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want”).

202. See *infra* Sections VIII.A.–VIII.C.

203. See *infra* Section VIII.C.

204. W.T. Stanbury, *Economic Regulation*, HISTORICA CAN. (Feb. 7, 2006), <http://www.thecanadianencyclopedia.ca/en/article/economic-regulation/>.

205. *Economic*, DICTIONARY.COM, <http://www.dictionary.com/browse/economic> (last visited Oct. 17, 2017).

ability to sell directly to consumers because those laws are government imposed and intended to modify the economic behavior of a group of individuals in the private sector.<sup>206</sup> Other economic regulations include state regulations allowing only licensed dentists to perform certain teeth-whitening procedures or forbidding anyone from selling caskets without a funeral director license.<sup>207</sup>

On the other hand, regulations that involve “matters of personal liberty” include regulations prohibiting discrimination on the basis of sexual orientation and race-based affirmative action programs.<sup>208</sup> These regulations are wholly distinguishable from economic regulations.<sup>209</sup> Therefore, as a threshold matter, courts should determine whether challenged laws are economic regulations rather than regulations involving matters of personal liberty. If the regulation involves a matter of personal liberty, then the court may analyze it within the existing structure.<sup>210</sup> This is likely the simplest step in the process because courts are accustomed to drawing distinctions between economic regulations and regulations involving matters of personal liberty.<sup>211</sup>

*B. Step Two: Was the Regulation Passed out of an Interest in Protecting a Specific Industry?*

As previously established, naked economic protectionism is not a legitimate government interest.<sup>212</sup> However, there is an inherent tension between

206. See Christopher Koopman, *Tesla: Free Market Antihero*, U.S. NEWS & WORLD REP. (June 30, 2014, 1:00 PM), <http://www.usnews.com/opinion/economic-intelligence/2014/06/30/teslas-fight-against-regulations-makes-it-a-free-market-antihero> (describing Tesla’s conflict with state regulations).

207. See *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 283 (2d Cir. 2015); *Craigsmiles v. Giles*, 312 F.3d 220, 222 (6th Cir. 2002).

208. See *Romer v. Evans*, 517 U.S. 620, 624 (1996); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 265 (1978).

209. See, e.g., *St. Joseph Abbey v. Castille*, 712 F.3d 215, 221 (5th Cir. 2013) (drawing a distinction between economic regulations and regulations involving matters of personal liberty).

210. See *supra* Part IV.

211. See *Castille*, 712 F.3d at 221 (drawing a distinction between economic regulations and regulations involving matters of personal liberty); Allison B. Kingsmill, *Of Butchers, Bakers, and Casket Makers: St. Joseph Abbey v. Castille and the Fifth Circuit’s Rejection of Pure Economic Protectionism as a Legitimate State Interest*, 75 LA. L. REV. 933, 936 (2015) (“The Court has not invalidated a single piece of economic legislation on due process or equal protection grounds since, opting for a more deferential, rational basis review of state laws.”).

212. See *supra* Part VI.

the ability of courts to find that a law was passed out of an illegitimate interest and the argument that “it is for the legislature, not the courts, to balance the advantages and disadvantages of [regulations].”<sup>213</sup> But courts can balance these conflicting interests by placing the burden of proof on the claimant. In other words, the claimant must make a threshold showing that the regulation might have been passed out of an impermissible purpose, such as naked economic protectionism.<sup>214</sup> Having made this showing, claimants will trigger the rest of the analysis.<sup>215</sup>

In this way, the government need only consider the claim that the regulation was passed out of an unconstitutional purpose, which is a separate inquiry from balancing the advantages and disadvantages of the regulation.<sup>216</sup> This framework is nothing new, since claimants often have the burden of proof in making threshold showings, and courts are accustomed to making such determinations.<sup>217</sup> Since regulations are often passed out of a protectionist interest, this would be a relatively low threshold to meet,<sup>218</sup> but the risk of an overbearing judiciary is heavily mitigated by the last step of the analysis.<sup>219</sup>

213. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955); *see also Powers v. Harris*, 379 F.3d 1208, 1225 (10th Cir. 2004).

214. *See, e.g., Meyers, supra* note 106, at 1206–07 (suggesting—in the context of societal prejudice—that claimants should have the burden of proof because that would avoid undue interference with the government’s ability to regulate).

215. *See, e.g., id.* (“In other words, a demonstration of governmental accommodation of societal prejudice, either through ultimate goals or through the means employed to achieve an otherwise legitimate end, is a prerequisite to court assessment of the constitutionality of the government’s action.”).

216. *See id.* at 1204 (“[T]he claimant must bear the initial burden of demonstrating that a governmental classification furthers unconstitutional discrimination through the presence of impermissible purposes. Only then should a court take an active role, balancing the social harms presented by the impermissible interest against those benefits of the classificatory action existing apart from this purpose.”).

217. *See, e.g., Messerschmidt v. Millender*, 565 U.S. 535, 547 (2012) (describing the threshold that claimants must meet to overcome a claim of qualified immunity); *Doggett v. United States*, 505 U.S. 647, 651–52 (1992) (explaining that claimants must make a threshold showing of presumptively prejudicial delay); *Bowen v. Yuckert*, 482 U.S. 137, 145 (1987) (upholding language in the Social Security Amendments Act that requires disability claimants to make a threshold showing that they are sufficiently injured); Andy G. Olree, *The Continuing Threshold Test for Free Exercise Claims*, 17 WM. & MARY BILL RTS. J. 103, 104–05 (2008) (describing the threshold showing that claimants must make to allege a violation of the Free Exercise Clause of the First Amendment).

218. *See Powers v. Harris*, 379 F.3d 1208, 1222 (10th Cir. 2004) (noting that many professions have licensing requirements that seem to have been passed out of a protectionist interest).

219. *See infra* Section VIII.C.

*C. Step Three: Does the Legislation Advance a Perceived Public Benefit?*

Lastly, courts must determine—without reference to rational, intermediate, or strict scrutiny—whether there is a perceived public benefit for which the regulation could have been passed; if not, the regulation should be deemed unconstitutional.<sup>220</sup> In making this determination, and to ensure that this model does not encourage a return to *Lochner* era jurisprudence,<sup>221</sup> courts may look to precedent in which rational basis review was employed to find a perceived public benefit.<sup>222</sup> If a court cannot find a perceived public benefit for a regulation, then the regulation is unconstitutional.<sup>223</sup> In other words, the regulation will have been passed out of an interest in naked economic protectionism—naked in the sense that the regulation advances no perceived public benefit and was passed out of an interest in protecting a specific industry because of the industry’s superior political position.<sup>224</sup>

Departing from rational basis review provides two main benefits. First, courts will have an opportunity to make constitutional determinations without the implicit expectation that the regulation should be upheld absent some extraordinary finding.<sup>225</sup> Without this implicit expectation, courts are less likely to incorrectly interpret Supreme Court precedent as requiring that rational basis be a form of automatic deference.<sup>226</sup> Second, when a court finds

220. *See, e.g.*, *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 288 (2d Cir. 2015) (Droney, J., concurring) (“In my view, there must be at least some perceived public benefit for legislation or administrative rules to survive rational basis review under the Equal Protection and Due Process Clauses.”); *Powers*, 379 F.3d at 1225 (Tymkovich, J., concurring) (“The Supreme Court has consistently grounded the ‘legitimacy’ of state interests in terms of a public interest.”).

221. *See supra* note 54.

222. *See, e.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 490–91 (1955) (finding that a regulation was constitutional because it advanced the public benefits of safety and health).

223. *See, e.g.*, *Craigsmiles v. Giles*, 312 F.3d 220, 228 (6th Cir. 2002) (“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.”).

224. *See* Sunstein, *supra* note 3, at 1689 (stating that the Equal Protection Clause is focused on a “single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want”).

225. *See supra* Section IV.B.

226. *Compare* *Romer v. Evans*, 517 U.S. 620, 632 (1996) (“[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained.”), *and* *Mathews v. Lucas*, 427 U.S. 495, 510 (1976) (stating that rational basis, while deferential, is not “toothless”), *with* *Powers v. Harris*, 379 F.3d 1208, 1225 (10th Cir. 2004) (stating that economic regulations are rational “absent a violation

an economic regulation to be unconstitutional because it was passed with an illegitimate purpose and without advancing a perceived public benefit, no one will need to speculate whether the court introduced a stricter tier of scrutiny, such as rational basis with bite.<sup>227</sup> This will limit confusion over whether rational basis with bite is a recognized tier of scrutiny.<sup>228</sup> In a broader sense, a court will no longer need to spend the majority of its time explaining which tier of scrutiny it is using, and thus the court will be able to spend more time explaining the constitutionality of the regulation.<sup>229</sup>

Upon first impression, this model might seem to suggest a sweeping change to Equal Protection Clause analyses, but that is not the case.<sup>230</sup> First, the model preserves the current structure of rational basis review, intermediate scrutiny, and strict scrutiny for regulations that involve matters of personal liberty, since those tests are better suited for such regulations.<sup>231</sup> Second, by requiring that claimants first make a threshold showing that the regulation was passed out of an interest in economic protectionism,<sup>232</sup> the model preserves the tradition of exceptional deference towards economic regulations.<sup>233</sup> Lastly, the model compartmentalizes the analytical steps, at no point requiring courts to “balance the advantages and disadvantages”<sup>234</sup> of a regulation; instead, it requires only that courts determine that a regulation might have been passed out of some perceived public benefit.<sup>235</sup>

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of a specific federal statutory or constitutional provision”).

227. *See supra* Section VII.B.

228. *See supra* Section VII.B.

229. *See, e.g.,* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 478 (1985) (Marshall, J., concurring in part and dissenting in part) (“Yet in focusing obsessively on the appropriate label to give its standard of review, the Court fails to identify the interests at stake or to articulate the principle that classifications based on mental retardation must be carefully examined to assure they do not rest on impermissible assumptions or false stereotypes regarding individual ability and need. No guidance is thereby given as to when the Court’s freewheeling, and potentially dangerous, ‘rational-basis standard’ is to be employed, nor is attention directed to the invidiousness of grouping all retarded individuals together.”).

230. *See infra* notes 231–35 and accompanying text.

231. *See supra* Part IV.

232. *See supra* Section VIII.B.

233. *See* *Kingsmill*, *supra* note 211, at 959 (“The Supreme Court has not invalidated a single piece of economic legislation on economic substantive due process grounds since the 1930s.”).

234. *See* *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955).

235. *See supra* Section VIII.C.

## IX. CONCLUSION

With respect to economic regulation, rational basis review has eroded nearly to the point of automatic deference.<sup>236</sup> This erosion has created an environment in which naked economic protectionism—an unconstitutional interest—has thrived.<sup>237</sup> As a result, archaic, protectionist laws that have long been presumed “rational” in fact hinder up-and-coming companies that provide advancements in technology and efficiency.<sup>238</sup> While there are certainly instances in which other public interests could justify such classifications, when courts cannot find an interest besides blatant and unnecessary protection of specific industries, they cannot continue to turn a blind eye.<sup>239</sup> Rather than simply excusing unconstitutional classifications as “politics”<sup>240</sup> or stating that the judiciary should not weigh the advantages or disadvantages of legislation,<sup>241</sup> courts should adopt a different approach.<sup>242</sup> Since modern equal protection jurisprudence is ill equipped to handle challenges to economic regulations,<sup>243</sup> the judiciary should consider the three-step approach that this Comment suggests. This approach preserves the benefits of the three-tiered approach to regulation of personal liberty, while ensuring that courts will deem regulations passed out of an interest in naked economic protectionism unconstitutional.<sup>244</sup>

Joshua Park\*

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236. See *supra* note 106 and accompanying text.

237. See *supra* Part VI.

238. See *supra* Part III.

239. See *supra* Part VI.

240. See *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 287 (2d Cir. 2015) (“Much of what states do is to favor certain groups over others on economic grounds. We call this politics. Whether the results are wise or terrible is not for us to say, as favoritism of this sort is certainly rational in the constitutional sense. . . . To hold otherwise would be to interpret the Fourteenth Amendment in a way that is destructive to federalism and to the power of the sovereign states to regulate their internal economic affairs.”).

241. See *Powers v. Harris*, 379 F.3d 1208, 1225 (10th Cir. 2004) (“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].” (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955))).

242. See *supra* Part VIII.

243. See *supra* Part VII.

244. See *supra* Part VIII.

\* J.D. Candidate, Pepperdine University School of Law; B.A. in Political Science and Philoso-

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