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I. INTRODUCTION

The Fourteenth Amendment states that no State shall "deny to any person within its jurisdiction the equal protection of the laws."[1] The Amendment was a direct response to problems surrounding racial discrimination during Reconstruction.[2] Since its ratification, however, the Equal Protection Clause of the Fourteenth Amendment has protected citizens against various forms of discrimination, including discrimination based on gender, age, religion, disability, etc.[3] Historically, this provision also protected certain economic liberties by disallowing laws that arbitrarily treat similar groups differently,[4] or different groups similarly.[5] Following the New Deal, however, courts have granted legislatures a large amount of deference regarding economic discrimination laws that classify individuals into different groups and then treat the groups differently—often favoring one group over another.[6] When these laws are challenged under the Fourteenth Amendment, courts generally apply the rational basis test.[7]

With respect to the rational basis test, the Supreme Court has stated that "rational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative

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1. U.S. CONST. amend. XIV, § 1.

2. Brianne J. Gorod, *Does* Lochner *Live?: The Disturbing Implications of* Craigmiles v. Giles, 21 YALE L. & POL'Y REV. 537, 537 (2003) (citing MICHAEL J. PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT 50–52 (1999)).

3. *See, e.g.*, Amy B. Gendleman, *The Equal Protection Clause, the Free Exercise Clause and Religion-Based Peremptory Challenges*, 63 U. CHI. L. REV. 1639 (1996).

4. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (listing a number of cases upholding liberties outlined in the Fourteenth Amendment).

5. *See* Jenness v. Fortson, 403 U.S. 431 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . . .").

6. *See Constitutional Law—Economic Legislation—D.C. Circuit Rejects Challenge to Milk Regulation.*—Hettinga v. United States*, 677 F.3d 471 (D.C. Cir. 2012) (per curiam)*, reh'g en banc denied*, No. 11-5065 (D.C. Cir. June 21, 2012)*, 126 HARV. L. REV. 1146, 1146 (2013) [hereinafter *Constitutional Law—Economic Legislation*].

7. Heller v. Doe, 509 U.S. 312, 320 (1993) (applying the rational basis test).

choices.'"[8] Rather, rational basis review requires a court to uphold a law as constitutional "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[9] While courts will often attempt to discern the intent of the legislature and adopt it as the appropriate rationale for the law, "the legislature need not articulate any reason for enacting its economic regulations."[10] Courts, therefore, are often left to come up with their own explanation or "rational basis" for the law. In fact, courts are even "*obligated* to seek out other conceivable reasons for validating [a state statute]."[11] However, "it is entirely irrelevant for constitutional purposes whether the conceived reason . . . actually motivated the legislature."[12]

In recent years, courts have disagreed about whether one such judicially derived rationale—naked economic protectionism (a term used to describe a law enacted with the sole purpose of shielding a particular group from economic competition)—satisfies the rational basis test.[13] Part II of this Comment uncovers how courts currently analyze naked economic protectionism, Part III discusses why naked economic protectionism should not be a sufficient rationale to pass rational basis review, Part IV lays out the effects that legitimized naked economic protectionism may have on the legislative and judicial processes, and Part V concludes.

8. *Id*. at 319 (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993)).

9. *Beach Commc'ns*, 508 U.S. at 313; *see also* Sullivan v. Stroop, 496 U.S. 478, 485 (1990); Bowen v. Gilliard, 483 U.S. 587, 600–03 (1987); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174–79 (1980); Dandridge v. Williams, 397 U.S. 471, 484–85 (1970).

10. Sensational Smiles, L.L.C. v. Mullen, 793 F.3d 281, 286 (2d Cir. 2015).

11. Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 146 (1st Cir. 2001) (emphasis added); *see also* Powers v. Harris, 379 F.3d 1208, 1218 (10th Cir. 2004) ("[W]e are obliged to consider every plausible legitimate state interest that might support the [state law] . . . .").

12. *Beach Commc'ns*, 508 U.S. at 315 (citing *Fritz*, 449 U.S. at 179).

13. *Compare Sensational Smiles*, 793 F.3d at 286 ("We . . . conclude that economic favoritism is rational for purposes of our review of state action under the Fourteenth Amendment."), *and Powers*, 379 F.3d at 1221 ("[A]bsent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest."), *with* St. Joseph Abbey v. Castille, 712 F.3d 215, 222 (5th Cir. 2013) ("[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose . . . .") (footnote omitted), *and* Merrifield v. Lockyer, 547 F.3d 978, 991 n.15 (9th Cir. 2008) ("[M]ere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review."), *and* Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002) ("[P]rotecting a discrete interest group from economic competition is not a legitimate governmental purpose.").

II. CONTEXT AND APPLICATION OF NAKED ECONOMIC PROTECTIONISM

Since 2002, five circuit courts have explicitly addressed naked economic protectionism. This Part introduces all five decisions by summarizing each court's analysis and holding regarding naked economic protectionism. The three circuits (Fifth, Sixth, and Ninth) that invalidated naked economic protectionism as a sufficient rationale to satisfy rational basis review under the Fourteenth Amendment are addressed first,[14] followed by a discussion of the two circuits (Second and Tenth) that validated naked economic protectionism as a sufficient rationale.[15]

A. Decisions Holding that Naked Economic Protectionism is an Insufficient Government Purpose to Withstand Equal Protection Rational Basis Review

Three circuit court decisions have explicitly held that naked economic protectionism is not a sufficient rationale for passing a law under rational basis review. This section summarizes those three cases and gives an overview of each court's analysis and reasoning for their respective holdings.

1. Fifth Circuit: St. Joseph Abbey v. Castille

In *St. Joseph Abbey v. Castille*, an abbey of the Catholic Church challenged rules issued by the Louisiana Board of Funeral Directors, which granted funeral homes the exclusive right to sell burial caskets.[16] The abbey had begun selling caskets as a way to provide income to its monks.[17] While the abbey historically used the caskets only to bury its monks, public interest in the caskets increased, in part, because they were priced significantly lower than caskets offered by funeral homes.[18]

Louisiana law did not regulate the design specifications of caskets, nor did it prohibit individuals from creating their own caskets or from

14. *St. Joseph Abbey*, 712 F.3d at 222; *Merrifield*, 547 F.3d at 991 n.15; *Craigmiles*, 312 F.3d at 224.

15. *Sensational Smiles*, 793 F.3d at 286; *Powers*, 379 F.3d at 1221.

16. *St. Joseph Abbey*, 712 F.3d at 217.

17. *Id.*

18. *Id.*

purchasing caskets from out of state.[19] However, Louisiana law restricted intrastate casket sales by requiring a casket retailer to become a licensed funeral establishment and employ a full-time funeral director.[20] Since St. Joseph Abbey did not meet these requirements, the Louisiana State Board of Embalmers and Funeral Directors[21] ordered the abbey not to sell any caskets to the public.[22] St. Joseph Abbey challenged the rules issued by the board as a violation of the Fourteenth Amendment Equal Protection Clause because the rules bore no rational relationship to a valid government purpose.[23]

The Fifth Circuit sided with St. Joseph Abbey in finding that "neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose."[24] In reaching this conclusion, the court referenced decisions by the Sixth Circuit and the Tenth Circuit.[25] In *Craigmiles v. Giles*, the Sixth Circuit struck down a similar Tennessee casket law, holding that economic protectionism is not a rational basis for a law.[26] In *Powers v. Harris*, on the other hand, the Tenth Circuit upheld an Oklahoma casket regulation and held that economic protection of an industry (e.g., the funeral home industry), is a valid state interest.[27]

The Fifth Circuit was critical of the holding in *Powers*, and stated that "none of the Supreme Court cases *Powers* cites stands for that proposition."[28] The Fifth Circuit articulated that, instead, the Supreme Court cases cited in *Powers* stood for the proposition that economic protection of an industry "is not an *illegitimate* interest

19. *Id*. at 217–18.

20. *See id*. at 218; *see also* LA. STAT. ANN. §§ 37:831(37)–(39), :842(A), :842(D), :848 (2007).

21. By law, the nine-member State Board consisted of four licensed funeral directors, four licensed embalmers, and one representative who was not affiliated with the funeral industry. *St. Joseph Abbey*, 712 F.3d at 219; LA. STAT. ANN. § 37:832(A)(2), (B)(1)–(2) (2007).

22. *St. Joseph Abbey*, 712 F.3d at 219.

23. *Id*. at 220.

24. *Id*. at 222.

25. *Id*. at 221–22.

26. *See* Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002). This case will be discussed in more detail in Section II.A.2.

27. *See* Powers v. Harris, 379 F.3d 1208, 1218 (10th Cir. 2004). This case will be discussed in more detail in Section II.B.2.

28. *St. Joseph Abbey*, 712 F.3d at 222.

when protection of the industry can be linked to advancement of the public interest or general welfare."[29]

The Fifth Circuit went on to address other proposed rational bases for the casket law, such as consumer protection and public health and safety.[30] But finding the law related to none of these bases, the court concluded that the Louisiana Board of Funeral Director's rules were a violation of the Equal Protection Clause of the Fourteenth Amendment.[31]

2. Sixth Circuit: Craigmiles v. Giles

In *Craigmiles v. Giles*, the Sixth Circuit considered whether a Tennessee law requiring those who sell funeral merchandise to be licensed funeral directors was rationally related to any legitimate state interest.[32] As part of the regulation, the Tennessee Funeral Directors and Embalmers Act (FDEA) required that anyone who engaged in "funeral directing" be a licensed funeral director by the state board.[33] An amended version of the statute defined "funeral directing" to include "the selling of funeral merchandise."[34]

The Tennessee Board of Funeral Directors and Embalmers issued a cease and desist order to Nathaniel Craigmiles, who operated two retail casket stores.[35] Craigmiles filed a lawsuit challenging the FDEA as a violation of the Fourteenth Amendment.[36]

The Sixth Circuit considered various potential purposes for the FDEA, including increased consumer protection and casket quality.[37] However, even though these were legitimate state interests, the court found that the law was not related to any of these purposes.[38] In fact, the court believed that both consumers and casket quality were likely worse off as a result of the FDEA.[39]

29. *Id*.
30. *Id*. at 223–27.
31. *Id*. at 227.
32. Craigmiles v. Giles, 312 F.3d 220, 225 (6th Cir. 2002).
33. TENN. CODE ANN. § 62-5-201 (2009); *Craigmiles*, 312 F.3d at 222.
34. TENN. CODE ANN. § 62-5-101(6)(A)(ii) (2009); *Craigmiles*, 312 F.3d at 222.
35. *Craigmiles*, 312 F.3d at 222–23.
36. *Id*. at 223.
37. *Id*. at 225–28.
38. *See id*.
39. *Id*.

The court then turned to economic protectionism and held that the "naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers" is an invalid state purpose.[40] The court further articulated that favoring "certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review."[41] Because the FDEA bore no rational relationship to a legitimate government purpose, the Sixth Circuit found that the application of the FDEA to Craigmiles' businesses was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.[42]

3. Ninth Circuit: Merrifield v. Lockyer

At issue in *Merrifield v. Lockyer* was a California law requiring anyone engaged in structural pest control to obtain a license through the state's Structural Pest Control Board.[43] Alan Merrifield's business was to install mechanical devices, such as wires, screens, or spikes, on buildings in order to deter pests like pigeons, raccoons, skunks, and rats.[44] Merrifield contended that the state's regulatory scheme was intended for pesticide-based pest control, and since he did not use any pesticides in his business, he should be exempt from obtaining a pest control license.[45]

The Ninth Circuit addressed the question of whether the California regulatory scheme was a violation of the Fourteenth Amendment equal protection rights of pest controllers.[46] The court found that the exemptions to the law, for which Merrifield did not qualify, were irrational and "designed to favor economically certain constituents at the expense of others similarly situated, such as Merrifield."[47] Further, the court stated that "economic protectionism for its own sake, regardless of its relation to the common good, cannot

40. *Id*. at 228–29.

41. *Id*. at 229.

42. *Id*.

43. *See* CAL. BUS. & PROF. CODE § 8550(a) (West 2008); Merrifield v. Lockyer, 547 F.3d 978, 980 (9th Cir. 2008).

44. *Merrifield*, 547 F.3d at 980.

45. *Id*.

46. *Id*.

47. *Id*. at 991.

be said to be in furtherance of a legitimate governmental interest."[48] The court concluded that the state licensing scheme was an unconstitutional violation of the Fourteenth Amendment Equal Protection Clause.[49]

B. Decisions Holding that Naked Economic Protectionism is a Sufficient Government Purpose to Withstand Equal Protection Rational Basis Review

Two circuit court decisions have explicitly held that naked economic protectionism is a sufficient rationale for enacting a law. This section summarizes those two cases and gives an overview of the courts' reasoning for their respective holdings.

1. Second Circuit: Sensational Smiles, LLC v. Mullen

In *Sensational Smiles, LLC v. Mullen*,[50] the Connecticut State Dental Commission issued a ruling that permitted only licensed dentists to provide certain teeth whitening procedures.[51] Sensational Smiles, a non-dentist teeth-whitening business, filed suit and specifically challenged a part of the Commission's ruling that prohibited non-licensed dentists from performing a specific teeth-whitening procedure, which used LED lamps.[52] Sensational Smiles argued that the rule violated the Equal Protection Clause because no rational relationship existed between the rule and a legitimate government legitimate interest.[53]

The parties agreed that the government had a legitimate interest in protecting the public's oral health.[54] They disputed, however, whether the Commission's ruling related to that interest.[55] The Second Circuit addressed this concern by discussing some plausible reasons why the ruling related to the public's oral health, such as

48. *Id*. at 991 n.15.

49. *Id*. at 992.

50. 793 F.3d 281 (2d Cir. 2015).

51. JEANNE P. STRATHEARN ET AL., CONN. STATE DENTAL COMM'N, DECLARATORY RULING: TEETH WHITENING (2011), http://www.ct.gov/dph/lib/dph/phho/dental_commission/declaratory_rulings/2011_teeth_whitening_declaratory_ruling_-_corrected.pdf; *see also* Sensational Smiles, L.L.C. v. Mullen, 793 F.3d 281, 283 (2d Cir. 2015).

52. *Sensational Smiles*, 793 F.3d at 283, 283 n.1.

53. *Id*. at 283–84.

54. *Id*. at 284.

55. *Id*.

potential harms or health risks resulting from the use of the LED lamps that licensed dentists would be better able to treat.[56] Sensational Smiles argued that dentists are neither trained to use the LED lamps nor required to have any knowledge of LED lamps in order to obtain a dental license.[57] The court rebutted this argument, however, by stating that the Commission might have reasoned that if a customer experienced side effects from the LED lamp, such as sensitivity or burning, a dentist would be better equipped to minimize or treat the side effects.[58] Additionally, the court stated that the Commission might have thought it best that customers receive an individualized oral assessment prior to receiving this type of teeth whitening procedure.[59]

The court acknowledged that the law was rationally related to the government's legitimate interest in the public's oral health, and therefore valid under the rational basis test.[60] However, the court extended its opinion by addressing Sensational Smile's claim that the true purpose for the Commission's rule was to continue the monopoly of dental services by licensed dentists.[61]

According to the Second Circuit, even if the sole rationale for the Dental Commission's ruling was "to shield licensed dentists from competition," it would not violate the Equal Protection Clause because "economic favoritism is rational" for purposes of rational basis review.[62] The court reasoned that naked economic protectionism is a legitimate and valid governmental purpose for creating a law because of "precedent, principle, and practicalities."[63]

First, the court stated that economic favoritism of all sorts has been permitted by a long line of Supreme Court cases.[64] Second, the

56. *Id*. at 284–85.

57. *Id*. at 285.

58. *Id*.

59. *Id*.

60. *Id*.

61. *Id*. at 285–86. For a detailed review of the dental monopoly of teeth whitening procedures, see ANGELA C. ERICKSON, WHITE OUT: HOW DENTAL INDUSTRY INSIDERS THWART COMPETITION FROM TEETH-WHITENING ENTREPRENEURS (2013), https://ij.org/wp-content/uploads/2015/03/white-out1.pdf.

62. *Sensational Smiles*, 793 F.3d at 286.

63. *Id*.

64. *Id*. at 286–87; *see, e.g.*, Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 109 (2003) (upholding state tax scheme that favored riverboat gambling over racetrack gambling); Nordlinger v. Hahn, 505 U.S. 1, 12 (1992) (upholding state property tax scheme

court reasoned that the principle of separation of powers dictates that a state legislature is free to pursue any purpose it chooses so long as the purpose is rational, and that it is not for the judiciary to decide whether those rational purposes are wise.[65] Economic favoritism of one group over another, the court points out, is simply a result of "politics," and that "[c]hoosing between competing economic theories is the work of state legislatures."[66]

Third, the court recognized that, as a practical matter, it is often difficult to distinguish between a protectionist purpose and a more legitimate purpose.[67] Therefore, without a "consistent way to determine acceptable levels of protectionism," it would be too easy for a court to find "improper" economic protectionism if it were intent on doing so.[68]

The court concluded by holding that "there are any number of constitutionally rational grounds for the Commission's rule, and that one of them is the favoring of licensed dentists at the expense of unlicensed teeth whiteners."[69]

2. Tenth Circuit: Powers v. Harris

In *Powers v. Harris*,[70] the Tenth Circuit addressed an Oklahoma statute which provided that in order to sell funeral merchandise, including caskets, one must be a licensed funeral director operating out of a funeral home.[71] An Oklahoma corporation designed to sell

that favored long-term owners over new owners); City of New Orleans v. Dukes, 427 U.S. 297 (1976) (upholding New Orleans city ordinance that banned street vendors, with an exception made for existing vendors in operation for more than eight years); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 490–91 (1955) (upholding regulation that prohibited "any person purporting to do eye examination or visual care to occupy space in [a] retail store"). As I will attempt to demonstrate in *infra* Section III.A, however, each of these U.S. Supreme Court decisions also failed to rely exclusively on the idea of naked economic protectionism as the basis for upholding their respective laws.

65. *Sensational Smiles*, 793 F.3d at 287.

66. *Id*. In *infra* Section III.B.2, I will address this point in more detail by discussing the difference between protectionism as the *basis* for a law and protectionism as the *result* of a law.

67. *Sensational Smiles*, 793 F.3d at 287.

68. *Id*. This line of reasoning will be addressed throughout *infra* Part III.

69. *Id*. at 288.

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

71. OKLA. STAT. ANN. tit. 59, § 396.3a, 396.6(A) (West 2010).

funeral merchandise over the Internet challenged the law as a violation of the Equal Protection Clause of the Fourteenth Amendment.[72]

As part of its argument, the corporation claimed that the license required to be a funeral director was irrelevant to the online sale of caskets.[73] On this point, the district court agreed.[74] However, even though the court found that the funeral director licensing requirement was unrelated to the business of online casket sales, the district court concluded that the funeral-licensing scheme furthered another state interest in consumer protection[75]—an interest which the parties had previously conceded was a legitimate state interest.[76]

On appeal, however, the Tenth Circuit discussed naked economic protectionism, as the court was "obliged to consider every plausible legitimate state interest" in support of the law.[77] In its discussion of naked economic protectionism, the Tenth Circuit referenced three decisions that held that economic protectionism is not a legitimate governmental interest,[78] but stated that each of those courts were misguided by precedent that was directed at violations of the dormant Commerce Clause, not the illegitimacy of economic protectionism.[79]

The Tenth Circuit also addressed *Craigmiles v. Giles*—a Sixth Circuit case striking down a nearly identical statute as a violation of the Equal Protection Clause—describing it as too narrowly focused on the stated intent of the legislature, rather than putting forward every conceivable legitimate interest that may have motivated the

72. *Powers*, 379 F.3d at 1213, 1215 ("[The Corporation] contend[s], as a matter of equal protection, that the [law] is unconstitutional because the Board is 'arbitrarily treating similarly-situated people differently, and . . . arbitrarily treating differently-situated people the same.'") (citing Opening Brief of Appellants Kim Powers, Dennis Bridges, and Memorial Concepts Online, Inc. at 24, Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004) (No. 03-6014), 2003 WL 24305240, at *24).

73. *Id.* at 1213.

74. *Id.* at 1213–14 (quoting Powers v. Harris, No. CIV–01–445–F, 2002 WL 32026155, at *5 (W.D. Okla. Dec. 12, 2002), aff'd, 379 F.3d 1208 (10th Cir. 2004)).

75. *See Powers*, 2002 WL 32026155, at *3–7, aff'd, 379 F.3d 1208 (10th Cir. 2004).

76. *Powers*, 379 F.3d at 1215.

77. *Powers*, 379 F.3d at 1218; *see also* Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 146 (1st Cir. 2001) ("[T]his Court is obligated to seek out other conceivable reasons for validating [a state statute].").

78. *Powers*, 379 F.3d at 1218 (citing Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002)); Cornwell v. Hamilton, 80 F. Supp. 2d 1101, 1117 (S.D. Cal. 1999); Santos v. City of Houston, 852 F. Supp. 601, 608 (S.D. Tex. 1994)).

79. Powers, 379 F.3d at 1218–20.

legislature.[80] Citing the U.S. Supreme Court as precedent, the Tenth Circuit held that the Oklahoma statute also related to the "legitimate state interest" of "intrastate economic protectionism."[81]

III. NAKED ECONOMIC PROTECTIONISM'S INSUFFICIENT JUSTIFICATION

The *Sensational Smiles* court recognized "the difficulty in distinguishing between a protectionist purpose and a more 'legitimate' public purpose in any particular case," and that "[o]ften, the two will coexist."[82] While courts may experience difficulty in distinguish between a (more) legitimate purpose and a protectionist purpose, judicial struggle does not justify the creation of a new legitimate purpose—naked economic protectionism. The rationale in favor of legitimizing naked economic protectionism is insufficient because it relies on weak interpretation of precedent, is virtually impossible to negate, and does not align with the public nature of other legitimate government purposes under rational basis review.

A. Naked Economic Protectionism's Weak Precedent and Legal Fiction

The Second and Tenth Circuit decisions relied on precedent that should not have led them to conclude that naked economic protectionism is a legitimate state interest that, standing alone, should pass the rational basis test. This section discusses the Supreme Court decisions the Second and Tenth Circuits relied on in reaching their conclusions. It attempts to point out that in each of these Supreme Court cases, the law under consideration was either not economic protectionist, or the law was upheld under a legitimate government interest *other than* naked economic protectionism. The Second and Tenth Circuits relied on many of the same cases; this section addresses those cases in the order they were cited by the *Sensational Smiles* court.

In the first decision cited by the *Sensational Smiles* court, *Fitzgerald v. Racing Ass'n of Central Iowa*, the Supreme Court upheld a state tax law that increased the tax rate for racetrack slot machine

80. *Id.* at 1223.

81. *Id.* at 1220. Most of the U.S. Supreme Court cases cited by the Tenth Circuit in support of this holding are identical to those cited by the *Sensational Smiles* court, and will be addressed in Section III.A.

82. Sensational Smiles, L.L.C. v. Mullen, 793 F.3d 281, 287 (2d Cir. 2015).

operators to thirty-six percent, while leaving the tax rate for riverboat slot machine operators at twenty percent.[83] The Court considered plausible rationales for the law "*aside* from simply aiding the financial position of the riverboats," including the legislature's desire "to encourage the economic development of river communities or to promote riverboat history, say, by providing incentives for riverboats to remain in the State, rather than relocate to other States," or "to protect the reliance interests of riverboat operators, whose adjusted slot machine revenue had previously been taxed at the 20 percent rate."[84] In other words, the Court did not rely exclusively on naked economic protectionism of the riverboats to uphold the law, but rather, hypothesized other rationales that the legislature could have used when creating the law.

Sensational Smiles also cited *Nordlinger v. Hahn*, in which the Supreme Court upheld a state property tax scheme favoring long-term property owners over new property owners by basing the property tax on the value of the property at the time it was acquired rather than the current value of the property.[85] This is unlike the naked economic protectionism discussed in *Sensational Smiles* or *Powers*, because the property tax scheme did not protect certain groups from "economic competition." Further, the *Nordlinger* Court stated that the property tax scheme might not be considered discriminatory (i.e., protectionist) at all, since the law "d[id] not discriminate with respect to either the tax rate or the annual rate of adjustment in assessments," but only "the basis on which their property is initially assessed."[86] Because of the lack of economic protectionism in *Nordlinger*, the *Sensational Smiles* and *Powers* courts incorrectly cited *Nordlinger* as validating economic protectionism as a legitimate state interest.

In addition to classifying the law as nondiscriminatory, the *Nordlinger* Court highlighted several legitimate, non-protectionist state interests for the tax scheme. The first of these was "a legitimate interest in local neighborhood preservation, continuity, and stability,"[87] such that "[t]he State therefore legitimately can decide to structure its tax system to discourage rapid turnover in ownership of

83. Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 105 (2003).
84. *Id*. at 109 (emphasis added).
85. *See* Nordlinger v. Hahn, 505 U.S. 1 (1992).
86. *Id*. at 12.
87. *Id*. (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).

homes and businesses."[88] Second, "the State legitimately can conclude that a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner."[89] In other words, the *Nordlinger* Court did not establish naked economic protectionism as a rational basis for state statutes. Rather, it characterized the law it upheld as nondiscriminatory and identified other rational bases the legislature could have contemplated when enacting the law.

In *New Orleans v. Dukes*, another case relied on by both *Sensational Smiles* and *Powers*, the Supreme Court upheld a New Orleans ordinance that effectively banned street vendors who had not continuously operated for at least eight years.[90] Although this ordinance is similar to the statutes upheld in *Sensational Smiles* and *Powers*, the *New Orleans* Court did not rely on naked economic protectionism as the basis for upholding the law. Instead, the Court proposed that the legislature could have contemplated certain legitimate state interests other than protecting the older street vendors from economic competition.[91] One such legitimate reason could be "to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists."[92] The Court acknowledged that the legislature may have reasoned that the newer vendors "tend to interfere with the charm and beauty of a historic area and disturb tourists and disrupt their enjoyment of that charm and beauty,"[93] while the veteran vendors may have "themselves become part of the distinctive character and charm that distinguishes" the French Quarter.[94] Again, the Court did not uphold the law on protectionist grounds, but identified other legitimate legislative purposes, that would have survived rational basis review under the Equal Protection Clause.

Finally, *Sensational Smiles* and *Powers* cited *Williamson v. Lee Optical of Oklahoma Inc.*, in which the Supreme Court upheld a state regulation that prohibited anyone purporting to do eye examinations

88. *Id.*

89. *Id.*

90. City of New Orleans v. Dukes, 427 U.S. 297, 305 (1976).

91. *Id.* at 304–05.

92. *Id.* at 304 (citing Dukes v. City of New Orleans, 501 F.2d 706, 709 (1974), *rev'd*, 427 U.S. 297 (1976)).

93. *Id.*

94. *Id.* at 305.

or visual care from occupying commercial retail space.[95] The practical effect of this law was to prevent opticians from suppling lenses or fitting old glasses into new frames without a prescription from an ophthalmologist or optometrist, making certain portions of opticians' business subject to ophthalmologists and optometrists.[96] Even though the state legislature was almost certainly motivated by a desire to protect the economic interests of optometrists,[97] the Court speculated as to other rationales for the regulation apart from protecting ophthalmologists and optometrists from economic competition.[98] The Court discussed a number of legitimate purposes centering on the perceived public interest in eye examinations, and that an eye examination was needed often enough to require one in every case where someone wants new eyeglass frames or new lenses.[99] Additionally, the Court suggested that the regulation could have been "an attempt to free the profession, to as great an extent as possible, from all taints of commercialism."[100]

Similar to the cases discussed previously, the *Williamson* Court did not rely on economic protectionism as the sole rationale for upholding the statute under rational basis review. Rather, it put forth other possible legitimate government interests which could have withstood rational basis review.

In each of these cases, the Supreme Court either stated that the law was not discriminatory (i.e., not protectionist), or identified potential rationales other than naked economic protectionism that were sufficient to uphold the respective laws.

The *Sensational Smiles* court and the *Powers* court also discussed other legitimate government purposes on which they could have, or did, uphold the laws they considered.[101] Unfortunately, both courts unnecessarily extended their opinions to discuss naked economic protectionism. As the concurring opinion in *Powers* states, "[w]hile relying on [cited] authorities, the majority goes well beyond them to

95. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 490–91 (1955).

96. *Id*. at 486.

97. *See* Chris M. Franchetti, *Not Seeing Eye to Eye: Chapter 8 and the Battle Over Prescription Eyewear*, 30 MCGEORGE L. REV. 474, 489 (1999).

98. *Williamson*, 348 U.S. at 487–88.

99. *Id*. at 487.

100. *Id*. at 491.

101. *See supra* Section II.B.

confer legitimacy to a broad concept not argued . . . - unvarnished economic protectionism."[102]

Even though the *Sensational Smiles* and *Powers* courts ultimately legitimized naked economic protectionism as a valid government purpose, they did so by relying on precedent that did not fully support naked economic protectionism as a rational basis for a law. That precedent identified other reliable rationales to justify the challenged laws. The *Sensational Smiles* and *Powers* courts unnecessarily legitimized naked economic protectionism—both courts had already identified other well-accepted rational bases for upholding the laws under consideration. This demonstrates that naked economic protectionism has never really been tested as the sole government purpose under rational basis review, thus creating a legal fiction. The *Sensational Smiles* and *Powers* decisions only perpetuate this legal fiction by unnecessarily discussing and validating naked economic protectionism as an acceptable government purpose under rational basis review.

B. Logical Arguments Against Naked Economic Protectionism as a Legitimate Government Interest

1. Naked Economic Protectionism is Virtually Impossible to Negate

Even though the ratification of the Fourteenth Amendment was a response to problems surrounding Reconstruction, the Amendment's broad equal protection language made it applicable outside the context of race.[103] This leads to a paradox stemming from a literal interpretation of the Equal Protection Clause: "Since virtually all legislation creates classifications, and classifications almost necessarily entail differential treatment between groups, broad, literal application of the Amendment would invalidate nearly all legislation."[104] These inevitable legislative classifications provide that "[t]here are winners

102. Powers v. Harris, 379 F.3d 1208, 1226 (10th Cir. 2004) (Tymkovich, J., concurring). The concurring opinion and its rationale will be discussed more thoroughly in Section III.

103. Gorod, *supra* note 2, at 537 (citing MICHAEL J. PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT 50–52 (1999)); *see also* Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 KY. L.J. 591, 599–601 (2000).

104. Gorod, *supra* note 2, at 537 (citing Trimble v. Gordon, 430 U.S. 762, 780 (1977) (Rehnquist, J., dissenting)).

and losers in virtually all legislation."[105] Of course, not every law is invalidated under the Fourteenth Amendment, and the Equal Protection Clause was not enacted to mitigate all such discrepancies. Neither is it the role of the courts to lessen the blow to all disfavored groups.

The framework used by courts today to analyze equal protection claims arising under the Fourteenth Amendment has been used for over forty years.[106] The varying levels of judicial scrutiny provide different levels of protection, depending on the type of classification created by the law. The reviewing court will usually choose one of three standards of review: (1) rational basis scrutiny, (2) intermediate scrutiny, or (3) strict scrutiny.[107] An economic rights claim arising under the Equal Protection Clause is subject to rational basis review,[108] the lowest level of judicial scrutiny.

Rational basis review is a very low threshold for upholding a law, and "a paradigm of judicial restraint."[109] In the majority of cases, courts give extreme deference to the legislature, since the court is only concerned with whether the law rationally relates to some legitimate government purpose. As Richard B. Saphire put it, the judge is merely asking:

> Given the information that was actually before the legislature, or information that might have been available to the legislature, or information which the legislature reasonably might have thought existed, or information of which the court can take judicial notice, could the legislature conceivably have believed (not did it *actually* believe) that this statute would or might, even if only in the most remote or tenuous way, further or promote a legitimate actual or hypothetical goal?[110]

At the same time, the court avoids questions like:

105. *Constitutional Law—Economic Legislation*, *supra* note 6, at 1153.

106. *See* Saphire, *supra* note 103, at 595–96.

107. *Id*. at 596.

108. Heller v. Doe, 509 U.S. 312, 319–20 (1993) ("[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.") (internal citations omitted).

109. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 (1993).

110. Saphire, *supra* note 103, at 606.

> (1) whether the classification represented a good, wise, or sensible way to further a legislative goal; (2) whether the statute was an effective or efficient way to further a legislative goal, or whether, in a qualitative or quantitative sense, the statute was "reasonable"; (3) whether there were other ways to further relevant legislative goals that would have imposed less restriction on the individual interests implicated by the statute; and (4) whether, given the information available to the court, the judge could conclude independently that the statute was a rational way to further a legislative goal.[111]

Richard H. Fallon considered rational basis review so deferential that he described it as a "virtual rubber stamp."[112] Emphasizing the broad judicial deference in rational basis review, Gerald Gunther, in one of the more influential discussions on modern equal protection, described rational basis review as "virtual judicial abdication."[113]

When courts give naked economic protectionism their stamp of approval, judicial abdication is at an all-time high. If protecting a favored group from intrastate economic competition is a legitimate government interest under rational basis review, virtually all legislation affecting the state's economics could satisfy the Equal Protection Clause. Since every piece of legislation favors one group over another,[114] a court can legitimize legislation by simply hypothesizing that the legislature intended to protect the favored group from the economic competition of non-favored groups (even if the legislature was motivated by something else[115]). Stated another way, naked economic protectionism is virtually impossible to negate or "negative."[116]

111. *Id*. at 605–06 (internal footnotes omitted).

112. Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 79 (1997).

113. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 19 (1972).

114. *See Constitutional Law—Economic Legislation*, *supra* note 6, at 1153.

115. FCC v. Beach Commc'ns, 508 U.S. 307, 315 (1993).

116. *See id*. For a law to be deemed unconstitutional under rational basis review, "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" *Id*. (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

Of course, legislation aimed at disfavoring or punishing a certain classification due to the legislature's irrational dislike or hatred for the group will not pass constitutional muster. This issue was most prominently addressed in *Lawrence v. Texas.*[117] In *Lawrence*, the Supreme Court found that a Texas law criminalizing "deviate sexual intercourse with another individual of the same sex" was unconstitutional because the state singled out one identifiable class of citizens for punishment that did not apply to everyone else.[118] While the discrimination employed by this Texas law differs in some respects from the economic discrimination discussed in this Comment, the equal protection analysis is worth noting, as it could foreshadow analysis for economic discrimination laws enacted due to legislative animus—an issue which has yet to be fully explored. In one similarity, for example, Justice O'Connor reemphasized that "a bare . . . desire to harm a politically unpopular group,"[119] including "moral disapproval" of the group, is not a legitimate state interest under rational basis review.[120] Further, because the law exhibited a "desire to harm" an unpopular group, the Court applied a "more searching form of rational basis review."[121] While not specifically addressing economic liberties, the Court emphasized that "legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'"[122]

Again, the issue of legislative animus has not been fully explored in the economic context, but if analyzed in a similar way to the animus discussed in *Lawrence*, economic discrimination due to legislative animus would likely be an exception to the nearly blanket-approval that would follow a legitimized naked economic protectionism.

While legislative animus toward a certain group may be grounds for striking down certain economic legislation, if courts recognize naked economic protectionism as a legitimate government interest, it is nearly impossible to show that the legislature was not merely protecting an economically favored group—even if it was intent on harming a certain group economically. Since some groups always benefit more than others from economic legislation, in order to avoid

117. Lawrence v. Texas, 539 U.S. 558 (2003).
118. *Id.* at 581–82 (O'Connor, J., concurring).
119. *Id.* at 580 (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).
120. *Id.* at 582.
121. *Id.* at 580.
122. *Id.* at 583 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).

Lawrence animus and withstand rational basis review, a court would simply need to hypothesize that the statute was intended to favor a benefitted group. The law would withstand rational basis review and be nearly impossible to negate.

2. The Public Nature of Legitimate Government Purposes

In *Powers v. Harris*, Judge Tymkovich points out in his concurring opinion that the Supreme Court has always found that a legitimate government interest must advance the public good.[123] Even though the *Sensational Smiles* and *Powers* courts legitimized naked economic protectionism, those courts relied on precedent that did not fully support such limited economic protectionism.[124] Rather, *Sensational Smiles* and *Powers* relied on Supreme Court cases that upheld seemingly protectionist laws because the laws also served other, more legitimate public purposes.[125] For example, in *Fitzgerald v. Racing Ass'n of Central Iowa*, where an Iowa tax law favored riverboat gambling over racetrack gambling, the Court upheld the tax law because it served the public purpose of encouraging economic development of river communities.[126] Similarly, in *Nordlinger v. Hahn*, the Supreme Court found that a California tax law favoring long-term property owners over new property owners served a public purpose in neighborhood preservation, continuity, stability, and in protecting reliance interests.[127] When a New Orleans ordinance effectively banned newer street vendors, the Court in *New Orleans v. Dukes* identified historical preservation and tourism attraction as acceptable public purposes.[128] Consumer safety and health interests are also common public interests, such as those described in *Williamson v. Lee Optical*, when an Oklahoma law subjected portions of opticians' business to ophthalmologists and optometrists.[129] Judge Tymkovich's concurring opinion in *Powers*, summarizes this principle even more boldly: "None of these cases overturned the principle that the Equal Protection

123. Powers v. Harris, 379 F.3d 1208, 1225–26 (10th Cir. 2004) (Tymkovich, J., concurring) ("Rather than hold that a government may always favor one economic actor over another, the Court, if anything, insisted that the legislation advance some public good.").

124. *See supra* Section III.A.

125. *See supra* Section III.A.

126. Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 109 (2003).

127. Nordlinger v. Hahn, 505 U.S. 1, 12 (1992).

128. City of New Orleans v. Dukes, 427 U.S. 297 (1976).

129. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).

Clause prohibits invidious state interests; to the contrary, they ratified the principle."[130]

Courts have not yet determined how general a purpose must be in order to advance the public good. Because the rational basis inquiry is highly fact specific, it is unlikely that courts will adopt a bright line definition. For example, the public purposes articulated in *Lee Optical* (consumer protection, safety, and health), may be more general than the public purposes articulated in *Fitzgerald* (economic development of river communities). Stated another way, since those who may be in the market for optics is a less concentrated group than those who live along a river community, a consumer protection law aimed at protecting those in the market for optics is much less likely to be considered rent-seeking legislation than a law aimed at enhancing economic development for those who may live or work along a river community. Rent-seeking legislation, or legislation lobbied by a concentrated interest group, is more likely to serve the interests of the concentrated group over those of the general public. Therefore, rent-seeking legislation is often synonymous with naked economic protectionism, and because of its concentrated benefits, should be less likely to qualify as a legitimate government interest.

However, a law does not necessarily become naked economic protectionism simply because it results in some economic protection to a classified group—the legislation could result in other public benefits. For example, urban revitalization legislation may protect certain local businesses economically, but may also make neighborhoods safer, spur economic growth in the area, attract tourism, increase tax revenues, etc. These *more public* benefits may accrue either during or after the economic protection of the local businesses, but as long as some basis for the law is legitimately dressed as a public benefit, the economic protection ceases to be "naked." If, however, the only potential basis for a law is to shield a certain category of local businesses from economic competition with no public benefit (either simultaneous or subsequent), the economic protection is "naked" because it is not covered by a public purpose, and therefore should not be considered a legitimate government purpose. Instead, only those laws that serve a general public interest—

130. Powers v. Harris, 379 F.3d 1208, 1226 (10th Cir. 2004) (Tymkovich, J., concurring) (citing *Williamson*, 348 U.S. at 487–88; *Fitzgerald*, 539 U.S. at 123; *City of New Orleans*, 427 U.S 297; *Nordlinger*, 505 U.S. 1).

not merely the narrow, economic interests of a preselected group—should be deemed legitimate.

IV. EFFECTS OF PURE NAKED ECONOMIC PROTECTIONISM

If rational basis review is already so easy to satisfy, why does it matter if courts consider naked economic protectionism a legitimate rationale for legislation? While rational basis review is not a demanding standard, recognizing naked economic protectionism as a legitimate government interest, further dilutes rational basis review until it is no standard at all. Effectively, courts would rubber-stamp nearly every piece of economic legislation challenged under the Fourteenth Amendment Equal Protection Clause.

Naked economic protectionism will also present a variety of problems in the context of occupational licensing. Many equal protection claims arise from occupational licensing requirements, such as those for doctors,[131] dentists,[132] attorneys,[133] taxicabs,[134] funeral directors,[135] pest controllers,[136] cosmetologists,[137] and florists.[138] These occupational licensing requirements are a form of classification that treats the licensed professional differently than unlicensed practitioners. A legitimized naked economic protectionism presents problems when the licensing qualifications are unrelated to a certain specialty. When naked economic protectionism qualifies as a valid governmental interest, legislatures can protect interest groups, such as licensed professionals, from economic competition, even in areas outside the licensed professional's specialty.

For example, as discussed previously,[139] the court in *Powers v. Harris* examined an Oklahoma law forbidding the sale of caskets

131. *E.g.*, Dent v. West Virginia, 129 U.S. 114 (1889).

132. *E.g.*, Sensational Smiles, L.L.C. v. Mullen, 793 F.3d 281 (2d Cir. 2015).

133. *E.g.*, Schware v. Bd. of Bar Exam'rs, 353 U.S. 232 (1957).

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

135. *E.g.*, St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013); *Powers*, 379 F.3d 1208; Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002).

136. *E.g.*, Merrifield v. Lockyer, 547 F.3d 978 (9th Cir. 2008).

137. *E.g.*, Cornwell v. Hamilton, 80 F. Supp. 2d 1101 (S.D. Cal. 1999).

138. *E.g.*, Meadows v. Odom, 360 F. Supp. 2d 811 (M.D. La. 2005), *vacated as moot*, Meadows v. Odom, 198 Fed. App'x 348 (5th Cir. 2006).

139. *See supra* Section II.B.

except by licensed funeral directors.[140] However, ninety-five percent of funeral directors' licensing requirements were wholly unrelated to the sale of caskets.[141] Legislators, therefore, were able to protect licensed funeral directors, a special interest group, from economic competition in an area outside their specialty (casket sales) by distancing the occupational licensing requirements from the actual occupation being protected.

Cornwell v. Hamilton provides another example where practitioners of a certain skillset were required to obtain an occupational license even though the occupational licensing requirements were unrelated to the specialty skillset.[142] In this case, African hair braiders challenged California's cosmetology licensing requirement claiming that it treated persons with different skills as if their professions were one and the same.[143] In essence, the occupational licensing requirements in California protected licensed professionals from the economic competition of those who were likely more experienced and more skilled practitioners. The court held that the cosmetology licensing requirement was a violation of the Fourteenth Amendment because "just over six percent of the curriculum [was] relevant . . . [to] a would-be African hair braider."[144] While the law in this case was ruled a violation of the Fourteenth Amendment because the licensing examination and cosmetology requirements were not rationally related to a legitimate government purpose, if the court had allowed the legislature to engage in naked economic protectionism at the time,[145] the court could easily have upheld the law on the basis that it was meant to protect licensed cosmetologists from the economic competition of African hair braiders. With naked economic protectionism as a valid governmental interest, legislatures could pass a law requiring would-be African hair braiders to attend cosmetology school and pass an exam, ninety-four percent of which covers material that an African hair braider would never use in practice.[146]

140. *Powers*, 379 F.3d at 1213.

141. *Id*. at 1213–14; *see supra* Section II.B. and text accompanying note 72.

142. *See Cornwell*, 80 F. Supp. 2d 1101.

143. *Id*.

144. *Id*. at 1111.

145. Naked economic protectionism was later explicitly ruled invalid by the Ninth Circuit in Merrifield v. Lockyer, 547 F.3d 978 (9th Cir. 2008).

146. *Cornwell*, 80 F. Supp. 2d at 1111 ("[R]equiring a would-be African hair braider to attend a school of cosmetology is irrational and certainly unreasonable.").

This type of law not only seems unfair to the would-be African hair braiders, but it also harms the public by limiting access to the most experienced and skilled practitioners. A legitimized naked economic protectionism would unnecessarily prevent some of the most skilled practitioners from working in their fields, and in turn, would harm the general public by reducing access to the services of those skilled practitioners.

The law at question in *Meadows v. Oldham* provides another example of how naked economic protectionism rewards rent-seeking and limits public access to the services of skilled workers.[147] In this case, a federal district court upheld Louisiana's licensing requirements for florists.[148] The law required prospective florists to obtain a license, which required a one-hour written exam and a four-hour practice exam graded on subjective factors, such as "scale," "harmony," "accent," and "unity."[149] Sandy Meadows, a widow, found a job in a floral department at a supermarket.[150] She worked as a florist for nine years and was so proficient at creating floral arrangements that she was put in charge of the supermarket's floral department.[151] However, she was never able to pass the florist licensing exam.[152]

At trial, Meadows presented extensive evidence showing that the law was enacted to protect established florists from new competition.[153] The evidence included testimony from the state's Commissioner of Agriculture and Chairman of the Louisiana Horticulture Commission, who said he had committed to florists when he ran for office that he would support florist licensing.[154] While the knowledge required to obtain a florist license was not entirely irrelevant to the profession (as it was in *Powers* and *Cornwell*), testimony about the procedure for obtaining a license evidenced a

147. Meadows v. Odom, 360 F. Supp. 2d 811 (M.D. La. 2005), *vacated as moot*, Meadows v. Odom, 198 Fed. App'x 348 (5th Cir. 2006).

148. *See id.*

149. Timothy Sandefur, *Insiders, Outsiders, and the American Dream: How Certificate of Necessity Laws Harm Our Society's Values*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 381, 401 (2012).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 401–02 (citing Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment at 29–30, Meadows v. Odom, No. 03–960 (M.D. La. Dec. 28, 2004)).

154. *Id.*

protectionist agenda.[155] The procedure for obtaining a license included testing where "licensed florists . . . [sat] in judgment of the very people who wish[ed] to compete against them."[156] Nonetheless, the court upheld the law as "rationally related to the state's desire that floral arrangements will be assembled properly in a manner least likely to cause injury to a consumer and will be prepared in a proper, cost efficient manner."[157] While naked economic protectionism was not the sole grounds for upholding the law,[158] *Meadows* shows how legitimized naked economic protectionism could limit the public's access to the most skilled workers.

Additionally, this type of protectionist, rent-seeking legislation would become more prevalent if naked economic protectionism were considered a legitimate government interest under rational basis review. Indeed, judicial recognition of naked economic protectionism as a valid basis for statutes would encourage more rent-seeking legislation. As Judge Janice Rogers Brown writes:

> The practical effect of rational basis review of economic regulation is the absence of any check on the group interests that all too often control the democratic process. It allows the legislature free rein to subjugate the common good and individual liberty to the electoral calculus of politicians, the whim of majorities, or the self-interest of factions.[159]

Even though, as Judge Brown points out, rent-seeking is prevalent in much of today's economic legislation, rational basis review is still extremely deferential to economic legislation. Recognizing naked economic protectionism as a judicially endorsed rationale for creating

155. *Let a Thousand Florists Bloom: Uprooting Outrageous Licensing Laws in Louisiana*, INST. FOR JUST., http://ij.org/case/meadows-v-odom (last visited Feb. 1, 2017).

156. *Id*.

157. Meadows v. Odom, 360 F. Supp. 2d 811, 823 (M.D. La. 2005), *vacated as moot*, Meadows v. Odom, 198 Fed. App'x 348 (5th Cir. 2006).

157. *See id*.

158. The court agreed with the *Powers v. Harris* decision that naked economic protectionism is not unconstitutional, but also stated that the law might somehow protect the public's welfare and safety as licensed florists are better trained on how to prevent exposed wires (used to hold the flower arrangements together) which could scratch consumer's hands. *Id*. at 824; *cf*. Timothy Sandefur, *State "Competitor's Veto" Laws and the Right to Earn a Living: Some Paths to Federal Reform*, 38 HARV. J.L. & PUB. POL'Y 1009, 1018–19 (2015) (stating that this conclusion was a "laughable rationalization" and "lacked evidentiary support").

159. Hettinga v. United States, 677 F.3d 471, 482–83 (D.C. Cir. 2012) (Brown, J., concurring).

a law would only loosen the free rein already afforded legislatures at the expense of the common good.

Courts and lawmakers should consider at what point reduced competition harms consumers, and at what point the protection of interest groups harms the public interest or general welfare. For example, funeral directors may benefit from economic protection, but suppressing competition may lead to a decrease in funeral-casket quality and selection, which harms consumers. Or cosmetologists may benefit from reduced economic competition of African hair braiders, but the public is harmed by limited access to the most skilled workers because cosmetologists may not be the best African hair braiders. Similarly, while dentists may benefit from laws prohibiting non-dentists from performing teeth whitening procedures, the public sees a substantial price increase on routine dental examinations. Or, in a more dramatic, real-life example, Sandy Meadows, the manager of the floral department in the *Meadows*, lost her job of nine years and was unable to regain employment, relegating her to poverty-like conditions and severe health problems.[160] As these examples illustrate, there is a point where naked economic *overprotection* of rent-seeking interest groups harms the public by decreasing access to skilled workers, increasing prices, decreasing service and product selection, and erecting barriers to earning a living.

V. CONCLUSION

If the only plausible rationale for a law is to protect a certain group from economic competition, the law should not be upheld. The Fourteenth Amendment states that the government cannot deny to any person the equal protection of the laws. When the legislature denies one person certain economic liberties but grants those same economic liberties to another similarly situated person, and there is no rational basis for the classification, equal protection of the law has been denied, and the classification is a violation of the Fourteenth Amendment's Equal Protection Clause. On the other hand, if there is some rational basis for the law, including some legitimate government

160. *See* Sandefur, *supra* note 149, at 402–03; *Let a Thousand Florists Bloom: Uprooting Outrageous Licensing Laws in Louisiana*, *supra* note 155; Remarks of Clark Neily at a book forum discussing *The Right to Earn a Living*, CATO INST. (Sept. 20, 2010), http://www.cato.org/event.php?eventid=7312.

interest, the law does not violate the Fourteenth Amendment, and should be upheld.

Finding some rational basis for economic legislation is a very low threshold; however, naked economic protectionism should not be a rational basis for law because (1) Supreme Court precedent is weak and untested when it comes to naked economic protectionism, (2) naked economic protectionism is virtually impossible to negate, and (3) a rational basis for a law should include a government interest that serves (to some extent) the public good, not simply the group receiving economic protection.

The Supreme Court has not explicitly endorsed naked economic protectionism as a rational basis under the Equal Protection Clause. In each decision where the Court upheld economic legislation that resulted in an economic benefit to a certain group, the Court upheld the law on other, legitimate rational bases—not naked economic protectionism. Even in the two circuit court decisions that explicitly legitimize naked economic protectionism, the courts relied on some rationale apart from mere economic protectionism of a certain group. Therefore, naked economic protectionism as a rational basis is, for the time being, a legal fiction that has not been tested as an exclusive basis for upholding a law.

Naked economic protectionism is virtually impossible to negate. Since every piece of legislation favors some group over another, and courts only need to find some possible reason that the legislature enacted the law, courts could simply hypothesize that the economic legislation was enacted to protect the benefited group. This protection does not even need to be the actual purpose for which the legislature enacted the statute, nor does the law need to show any sign of effectuating that purpose. Barring the potential for legislative animus against the disfavored group, naked economic protectionism is virtually impossible to negate.

Rational basis review should include a government interest that serves, at least to some extent, the public interest or the general welfare. In the decisions discussed in this Comment, there is no precedent established for upholding economic legislation that lacks some strand of public interest. Rational basis review provides a low threshold, and the possibilities for a legitimate public interest are many, including consumer protection, consumer safety, public health,

economic development, neighborhood preservation, protecting reliance interests, historical preservation, and tourism attraction. While otherwise publicly minded laws may result in the economic protection of certain groups, economic protectionism should not stand as the sole basis for enacting a law.

Legitimizing naked economic protectionism as a rational basis for enacting a law may seriously harm the general public. For example, we may see occupational licensing requirements protect certain professions from economic competition in areas where the licensed professional is not specialized, the most skilled, or even qualified. These unfounded protections harm the public by reducing supply, choice, and quality. Courts should not uphold a law when the only basis for the law is naked economic protectionism.

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