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THE UTILITY OF RATIONAL BASIS REVIEW

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INTRODUCTION

AS every lawyer knows, the standard of review a court applies in a dispute is critical. Perhaps this is best exemplified in constitutional equal protection and due process litigation, in which courts traditionally apply three tiers of scrutiny. At one end of the scale is "strict scrutiny," which has been described as "strict in theory but, fatal in fact."[1] At the other end is "rational basis" review, typically applied to review of economic and social regulations, under which the challenged governmental action will be upheld if it is "rationally related to a legitimate government purpose."[2] More loosely, the governmental action will be upheld if the court can conceive of any valid reason for the action, whether or not the legislature or executive had that reason in mind when taking the action.[3]

This kind of extremely lenient standard is also found outside of the equal protection and due process contexts. A similar kind of rational basis review is applied to congressional decisions regarding who may enter and remain in the country.[4] As the recent litigation concerning the Trump administration's travel ban has illustrated, courts will uphold executive action excluding immigrants if the government can provide one "facially legitimate and bona fide" reason for the government's action, a standard often equated with rational basis review.[5] The standard also echoes in corporate law. There, a court reviewing a board's decision will let the board's

* Associate, Wachtell, Lipton, Rosen & Katz. This Article was written and went to press while litigation over the administration's travel ban was ongoing; the sections discussing the ban will be quickly out-of-date. I thank the staff of the *Villanova Law Review* for their editing.

1. Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J., concurring); *see* Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575, 578 & 578 n.7 (2013).

2. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES § 9.2.1, at 651 (2d ed. 2002); *see, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 n.6 (1993).

3. *See, e.g.*, *Beach*, 508 U.S. at 315.

4. *See, e.g.*, Ledezma-Cosino v. Sessions, 857 F.3d 1042, 1049 (9th Cir. 2017) (en banc) (plurality opinion) ("[O]rdinary rational basis review is the appropriate standard in the immigration context."); *see also* Reno v. Flores, 507 U.S. 292, 305 (1993) (holding that "over no conceivable subject is the legislative power of Congress more complete," but noting that an INS regulation concerning detention proceedings "must still meet the (unexacting) standard of rationally advancing some legitimate government purpose"). *But see Ledezma-Cosino*, 857 F.3d at 1049–51 (Kozinski, J., concurring) (arguing that, in the immigration context, "the government's burden is even lighter than rational basis").

5. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 769 (1972).

decision stand if the board had "any rational business purpose" for its decision.[6]

These standards of review differ, but they all have common features: they are all extremely lenient, and, under certain conceptions of them, they provide no review at all. It has been remarked that in constitutional litigation, any sympathetic court should be able to supply a "rational basis" for any government action.[7] In immigration law, the government should easily be able to supply a "facially legitimate" justification for any action. And in business law, a court should, without problem, be able to figure a "valid business reason" for any decision. Notably, none of the reasons that the courts or litigants supply has to be a *good* reason. It need only meet the low bar of rationality—which should not be hard for a species called *homo sapiens*.

But despite this apparently hyper-lenient standard of review, decisions do flunk these rational basis tests. Most prominently, same-sex marriage bans[8] and the Trump administration's travel bans[9] have been stricken down under these standards. This shows that the standards of review are not always as lenient as they appear. But it is never predictable that a certain item of legislation or a particular government action will fail the rational basis test. What is predictable, though, is that the court's decision will provoke criticism. When a court applying the rational basis standard upholds a law, it will be criticized for applying a toothless standard; when a court strikes down a law, it will be accused of judicial activism. For this reason, rational basis review presents something of a conundrum: it is a vague standard that on its face calls for almost no review, provides no guidance to anyone, and seems to make nobody happy, but is a firmly fixed feature of the legal landscape.

This Article attempts to explain the use of the standard in constitutional, immigration, and corporate law. Part I describes the history of rational basis review in the equal protection and due process contexts. Part II then proposes four potential explanations why courts continue to use this standard. Given the well-established nature of the rational basis standard in constitutional litigation, I propose only descriptive explanations

6. *See, e.g.*, Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).

7. *See, e.g.*, Neelum J. Wadhwani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 804 (2006) ("No court, already operating under a presumption that the government's action is constitutional, would be unable either to envision or invent a rational purpose underlying the governmental conduct or view that conduct as a conceivably rational approach to realizing that purpose."); *see also* DeBoer v. Snyder, 772 F.3d 388, 404 (6th Cir. 2014) ("[S]till a rational basis [for the opposite sex definition of marriage], some rational basis, must exist for this definition. What is it?"), *rev'd by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

8. *E.g.*, Baskin v. Bogan, 766 F.3d 648, 660–72 (7th Cir. 2014) (striking down the Indiana and Wisconsin same-sex marriage bans under both rational basis review and heightened scrutiny), *aff'd by Obergefell*, 135 S. Ct. 2584.

9. *E.g.*, Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 572 (4th Cir. 2017) (en banc), *vacated and remanded*, 138 S. Ct. 353 (2017) (remanding for mootness because the underlying Executive Order expired).

for its use, and do not seek to make normative proposals about how judicial constitutional decision-making could be improved, or indeed whether the standard should exist at all. Instead, I posit reasons why rational basis review might have lasted so long as it has—why, as a practical matter, it might have some utility and why a judge might value it.

First, I suggest that rational basis review serves an important purpose in forcing the government to put forward an explanation for a law, which may lead to agreement between the parties about what is and what is not an acceptable government purpose for it. Second, and relying heavily on the work of Meir Dan-Cohen, I suggest that rational basis review may have a subtly beneficial effect on legislative and governmental decision-making.[10] Under this account, courts treat rational basis review as a rule for deciding cases, but hold legislatures to a higher standard of conduct than simply being rational. Third, following Richard Saphire and Cass Sunstein, I suggest that the amorphous rational basis standard of review may allow courts to decide cases on relatively narrow grounds when they cannot agree on the fundamental questions animating the case.[11] Fourth, I propose that use of the rational basis standard may in some situations enhance judicial legitimacy.

I suggest that the rational basis review standard in the equal protection and due process contexts exerts a gravitational pull on other areas of law: judges who want a very deferential standard of review naturally follow the well-known constitutional law standard. Part III analyzes the role of this standard in immigration law. Although immigration law is a weakly theorized area of law, I suggest that the reasons for the use of rational basis review basis in constitutional law may also justify its use in immigration law. Part IV suggests, by contrast, that there is no good justification for the standard in corporate law: courts could reach the same or better results by not invoking a rationality test. In the conclusion, I suggest that rational basis review should not be casually imported from constitutional law into other areas of law, but only on a careful review of the merits and drawbacks of its use in the given context.

I. RATIONAL BASIS REVIEW IN THE EQUAL PROTECTION AND DUE PROCESS CONTEXTS

This Part discusses rational basis review in its most familiar form: the review of federal and state legislation under the Equal Protection and Due Process Clauses.[12]

10. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 626 (1984).

11. *See* Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 KY. L.J. 591, 638 (2000); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735 (1995).

12. I do not discuss the differing standards of review that may apply when Congress enacts legislation pursuant to one of its enumerated powers. *See generally* Huq, *supra* note 1.

A. *Origins of Rational Basis Review*

The origins of rational basis review can, with not too much imagination, be traced back to at least the start of the seventeenth century, when Lord Coke held in *Dr. Bonham's Case*[13] that "when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void."[14] The doctrine did not endure in any strong form in England, however: by Blackstone's time, it appeared accepted that Parliament had the power to pass even an unreasonable law.[15] The notion that courts were able to overturn unreasonable acts of the legislature was stronger in America at this time, and, as shown by Dean Treanor's exhaustive review of the available evidence, appeared to persist through the revolution and ratification of the Constitution, until it was explicitly endorsed by the Supreme Court in *Marbury v. Madison*.[16] The evidence suggests that judicial review was not at this time designed to protect individual liberties or minority rights.[17] Similarly, Dean Treanor's study suggests that judicial review in this period was not concerned with comparing legislative acts to a "higher" or "fundamental" law.[18] Rather, the courts were principally concerned with protecting their powers against legislative encroachments,

13. (1610) 77 Eng. Rep. 646, 652.

14. *Id.*; *see* Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 854–56 (1978).

15. *See* Grey, *supra* note 14, at 858. *See generally* Matthew P. Harrington, *Judicial Review Before John Marshall*, 72 GEO. WASH. L. REV. 51, 55–62 (2003) (discussing English theory of legislative supremacy and judicial review).

16. *See* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 457 (2005); *see also* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 976 (2003) (arguing, on the basis of Dean Treanor's manuscript, that it was "generally accepted" after the ratification of the Constitution that the Constitution authorizes judicial review). Matthew Harrington argues that Americans were initially committed to the notion of legislative supremacy, until it became clear that state legislatures were prone to overreaching. *See* Harrington, *supra* note 15, at 53. As Dean Treanor points out, the validity of judicial review was not completely unchallenged in the early days of the republic. *See* Treanor, *supra*, at 555–56. Thus, in 1825, in a "strong" dissenting opinion, Chief Justice Gibson of Pennsylvania "wholly denied it under any constitution which did not expressly give it." *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 17, 17 (1893) (citing Eakin v. Raub, 12 Serg. & Rawle 330, 344 (Pa. 1825) (Gibson, C.J., dissenting)). Twenty years later, Chief Justice Gibson publicly abandoned his view. *See* Norris v. Clymer, 2 Pa. 277, 281 (1845); *see also* Thayer, *supra*, at 130 n.1. Gibson gave two reasons for now endorsing judicial review. First, he noted that the Pennsylvania citizenry, in the constitutional convention of 1838, had "by their silence, sanctioned the pretensions of the courts to deal freely with the acts of the legislature"; and cryptically but perhaps more importantly, he adverted to the "experience of the necessity of the case." *Norris*, 2 Pa. at 281.

17. *See* Treanor, *supra* note 16, at 561–62.

18. *See id.* For an argument to the contrary, see generally Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

and protecting the powers of the national government.[19] It appears that over the first half of the nineteenth century, however, courts began to incorporate theories of minoritarian protection into judicial review.[20] This coincided with an increasing democratization of legislative bodies, and, perhaps, increased confidence in the ability of judges to exercise their discretion in ways that were independent of the other branches of government.[21]

The Fourteenth Amendment, ratified in 1868, made it possible for federal courts to exercise the power to review state legislation just as it reviewed federal legislation.[22] This was a power that was difficult to exercise. By its plain language, the phrase "equal protection of the laws" may mean either that laws should be applied equally to all people who are subject to them, or that the legislature has a duty to enact laws that treat all people in the exact same way.[23] The Supreme Court swiftly adopted the view that nothing prevented legislatures from adopting laws that imposed "special burdens" on a particular class on people.[24]

The first appearance of the "rational basis" language in the Supreme Court came in the 1914 case of *Singer Sewing Machine Co. v. Brickell*.[25] There, the Court upheld against an equal protection challenge an Alabama statute that provided that itinerant sellers of sewing machines should pay an annual tax for each county in which they operated, but non-

19. *See* Treanor, *supra* note 16, at 458–60; *see also* Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 586 (2005) (noting that in the early and mid-nineteenth century, the Supreme Court struck down six state statutes per decade).

20. Thus, Professor Nelson observed that until the 1820s, conflicts between interest groups were rarely resolved in the courts, but were left for legislative resolution. William E. Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790–1860*, 120 U. PA. L. REV. 1166, 1176 (1972). Similarly, to the extent that ideas of natural law had played a role in judicial review up to this time, they too disappeared. *See* Sherry, *supra* note 18, at 1176.

21. *See id.* at 1186. Shortly after independence, the idea that judges were simply lackeys of government power, which had taken root in colonial times, remained strong. *See, e.g.*, Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1056, 1062 (1997); *see also* Harrington, *supra* note 15, at 63 ("The low regard in which most Americans seem to have held the colonial judiciary appears to be the primary obstacle to the rise of judicial review in the years immediately following independence.").

22. U.S. CONST. amend. XIV, § 1, cl. 2 ("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."); *see, e.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80–81 (1872) (noting that the Fourteenth Amendment gave the courts the power to review state legislation).

23. *See, e.g.*, Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949).

24. *See* Barbier v. Connolly, 113 U.S. 27, 31 (1884).

25. 233 U.S. 304 (1914).

itinerant sellers of sewing machines should not pay a tax. The Court noted that there was an "evident difference" between selling sewing machines as an itinerant merchant and doing so from a fixed establishment, and it was unable to say that this distinction was "arbitrar[y]."[26] A state's tax laws, the Court held, should not "be set aside as discriminatory unless it clearly appears that there is no rational basis for the classification."[27]

Rational basis review also emerged in the closely related due process context. (There may be little significance in the particular constitutional clause invoked to challenge legislation: 100 years ago, the Court and scholars appeared less concerned with identifying a specific hole in which an asserted right could be placed.)[28] The 1905 case of *Lochner v. New York*[29] concerned a due process challenge to New York's law preventing employees from working more than sixty hours per week.[30] The *Lochner* Court held that New York's law was illegal and could not be justified as either a labor law or on the grounds of protecting public health, but the Court also reiterated the right of the legislature to make "reasonable" regulations concerning public health and welfare.[31] In 1919, the Supreme Court first employed the specific "rational basis" language in a due process case. In that case, *New York Central Railroad Co. v. Bianc*,[32] the Court held that New York was permitted to adopt a workers' compensation law that provided for payments for facial disfigurement even where the worker suffered no loss of earning power.[33] The statute was not "unreasonable, arbitrary, or contrary to fundamental right."[34]

The rational basis test was firmly established in constitutional law (and the casebooks) by *United States v. Carolene Products*,[35] in which the Court upheld the Filled Milk Act of 1923 that prohibited the shipment of artificial milk or cream in interstate commerce.[36] The Court held that commercial legislation was presumed constitutional and that courts were to assume that it "rest[ed] upon some rational basis within the knowledge and experience of the legislators."[37] The Court made clear that, when

26. *See id.* at 315.

27. *Id.* at 316.

28. *See* Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 763 (2009); *see also* Sherry, *supra* note 18, at 1176 (noting that in the *Lochner* era, courts did not attempt to "link all of its decisions to specific clauses of the Constitution").

29. 198 U.S. 45 (1905).

30. *See id.* at 46.

31. *See id.* at 53. For a limited defense of the *Lochner* decision, noting how the challenged legislation appeared to be driven by protectionism and racial bias, see generally DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

32. 250 U.S. 596 (1919).

33. *See id.* at 602–05.

34. *Id.* at 603.

35. 304 U.S. 144 (1938).

36. *See id.* at 154.

37. *Id.* at 152–53.

seeking this rational basis, it would not restrict itself to a declaration of legislative findings in the preamble to an act, but it would examine whether "any state of facts either known *or which could reasonably be assumed* affords support for it."[38] The Court of course went on to suggest cautiously that this presumption of constitutionality might not apply when the legislation appeared to be specifically prohibited by the Constitution, potentially distorted the "political processes," or targeted religious, ethnic or racial minorities.[39] This gave rise to the tiers of constitutional scrutiny known today.

In *Williamson v. Lee Optical*,[40] the Court upheld against due process and equal protection challenges an Oklahoma law that provided that only a licensed optometrist or ophthalmologist could fit corrective lenses.[41] As to the Due Process Clause, the Court held that "[i]t 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."[42] The equal protection challenge was turned back on the ground that "[t]he prohibition of the Equal Protection Clause goes no further than the invidious discrimination."[43] In the view of one scholar, the *Lee Optical* case "drained the rationality requirement of much, and perhaps of any, meaningful content"[44]: courts would not ask whether the statute was reasonable, and would not even attempt to determine for themselves, based on the information available to them, whether the statute was a rational means to further a legislative goal.[45] The willingness of the courts to hypothesize for themselves about the potential bases for legislative action has been criticized.[46]

Predictions of the death of rational basis review after *Lee Optical* were premature, however. In *City of Cleburne v. Cleburne Living Center*,[47] the

38. *Id.* at 154 (emphasis added).

39. *Id.* at 152 n.4 ("It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny . . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." (citations omitted)).

40. 348 U.S. 483 (1955).

41. *See id.* at 486.

42. *Id.* at 488.

43. *Id.* at 489.

44. Saphire, *supra* note 11, at 605.

45. *See id.* at 605–06.

46. *See, e.g.*, Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 23 (1972) (advocating for a "means-oriented scrutiny," under which courts would focus on whether the challenged legislation was sufficiently inclusive, rather than focusing on the desired ends).

47. 473 U.S. 432 (1985).

Court purported to apply rational basis review to hold that a municipal ordinance in Cleburne, Texas, was invalid in a case in which it was applied to prevent landowners from operating a home for individuals with intellectual disabilities.[48] By this time, the three tiers of judicial scrutiny were in effect. The district court held that "mental retardation was neither a suspect nor a quasi-suspect classification," and therefore applied rational basis scrutiny.[49] Under this lenient standard, the district court ruled that the statute was constitutional as applied.[50] The Fifth Circuit reversed, applying "intermediate-level scrutiny."[51] The Supreme Court went all-in on the importance of the three tiers of scrutiny: certain legislative classifications, such as classifications on the basis of race, would trigger strict scrutiny; others, such as classifications on sex, would trigger "a heightened standard of review"; and still other classifications, such as age, would not trigger any heightened review.[52] The Court then ruled that the intellectually disabled were not a "quasi-suspect class."[53] But, having determined that the appropriate standard of review was rational basis, the Court took the surprising step of striking down the ordinance as applied in this case.[54] The Court ruled that if the city were motivated by prejudice against the intellectually disabled, this was not a legitimate government interest that the statute could support.[55] It then turned to analyze the city's purported bases for blocking the home, such as the "concentration of population," "congestion of the streets," and the home's location on a flood plain, and ruled that the barring of the group home did not rationally advance any of these goals.[56]

48. *See id.* at 435.

49. *See id.* at 437.

50. *See id.*

51. *See id.* at 437–38.

52. *See id.* at 440–42. The Court's reluctance to increase the number of classifications accorded heightened scrutiny was an example of what Professor Yoshino has called "pluralism anxiety." *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 758–59 (2011). Professor Yoshino argues that the Court has, in the recent past, shrunk from identifying new suspect classes for the purpose of equal protection analysis and has instead advanced civil rights by relying on the concepts of liberty. *See id.* Professor Yoshino claims that the Court has been beset by "pluralism anxiety," and has resisted attempts to create new protected groups because of concerns about the rise of "group-based identity politics." *Id.* at 747. Professor Yoshino's article was written in 2011, at which point the Court had "formally accorded heightened scrutiny to classifications based on five characteristics—race, national origin, alienage, sex, and nonmarital parentage." *Id.* at 756 (citations omitted). Professor Yoshino's article pre-dates the Court's decision in *Obergefell v. Hodges*, which added a sixth classification, sexual orientation, and shows that the canon has not "closed." *See id.* at 757. Nevertheless, I agree with the thrust of Professor Yoshino's article.

53. *See Cleburne*, 473 U.S. at 442 ("[T]he Court of Appeals erred in holding mental retardation a quasi-suspect classification . . . .").

54. *See id.* at 442–47, 450.

55. *See id.* at 446–47.

56. *See id.* at 449–50.

Three justices dissented from the application of rational basis review in *Cleburne*, although they agreed with the result.[57] The dissenters would have found that the intellectually disabled were a suspect class and that heightened scrutiny should apply.[58] The dissenters noted that, unless the intellectually disabled were given judicial protections as members of a suspect class, in future they would be left to "run the gauntlet" of showing that statutes that applied to them were irrational (including in any future applications of the municipal ordinance in that case).[59] Commentators also believed that the Court had injected "real bite into the rational basis standard."[60]

B. *Modern Developments*

The degree of "bite" in rational basis review has fluctuated in the last thirty years. In the 1993 case of *FCC v. Beach Communications*,[61] the Court reviewed an agency interpretation of a statute that provided that a satellite broadcaster that was broadcasting to a group of buildings that shared an antenna and were connected by cables that did not use a public right of way did not need to get a municipal franchise if the buildings were under common management.[62] By contrast, the agency interpretation provided that the broadcaster did need to get a municipal franchise if all the circumstances were the same, but the buildings were under separate management.[63] The D.C. Circuit ruled that there was no "rational basis on the record" for distinguishing between facilities that were under common management and separate management, and thus held that the statute violated the "equal protection guarantee of the [Fifth Amendment's] Due Process Clause."[64] The Supreme Court reversed, suggesting "two possible bases"—neither of which was found in the record before the district court, and one of which had been suggested by a dissenting appellate judge.[65]

57. *See id.* at 455 (Marshall, J., concurring in part and dissenting in part).

58. *See id.* at 456–60.

59. *Id.* at 478.

60. *See, e.g.*, Saphire, *supra* note 11, at 615 (citing Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 234 (1991); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 61 n.248 (1992); and Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 317 n.123 (1998)).

61. 508 U.S. 307 (1993).

62. *See id.* at 309.

63. *See id.* at 309–10.

64. *See id.* at 312 (citing Beach Commc'ns, Inc. v. FCC, 959 F.2d 975 (D.C. Cir. 1992)).

65. *See id.* at 317–20. One of these reasons was that buildings under common management would be small complexes and thus less needing of regulatory oversight; the second was that excluding buildings under separate control from the franchise requirement would prevent a broadcaster that had an antenna on a building from undercutting competitors simply by adding cable to reach nearby buildings at low cost. *See id.*

The Court reaffirmed the extremely deferential level of review set out in *Lee Optical*: "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition . . . . The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."[66]

In the same year, the Court decided *Heller v. Doe*,[67] another equal protection challenge involving the rights of the intellectually disabled.[68] Under Kentucky's statutory scheme, the state could commit the intellectually disabled against their will by a showing of clear and convincing evidence, whereas the mentally ill could only be civilly committed if their mental illness had been established beyond a reasonable doubt.[69] A majority of the Court held that the differential treatment of the two classes was rational, on the ground that intellectual disabilities are "easier to diagnose" and thus need a lower standard of proof to avoid errors.[70] The dissent, citing *Cleburne*, would have held that the difference in standards was irrational.[71] The majority and the dissenters also disagreed about the extent to which the government purpose for the legislation had to be based in reality. The majority, applying the traditional deferential standard, held that a legislative choice might simply "be based on rational speculation," did not require any support in the record, and could lead to "an imperfect fit between means and ends."[72] The dissent would have applied the more searching *Cleburne* standard, which would have required record support for the legislative determination and "a rational relationship between the disparity of treatment and some legitimate governmental purpose."[73]

The combination of *Beach* and *Heller* might have been thought to have put rational basis review back in its box. Under *Beach*, economic legislation would almost certainly be held rational. *Heller* left open the possibility that Kentucky's statutory scheme would not have survived a challenge under heightened scrutiny, but the plaintiffs had not pressed that argument below, and, if a statute discriminating against a particular class was not found to trigger a more searching standard of review, the statute would certainly survive. The standard of review would thus be outcome-determinative. This led, not unpredictably, for more demands for rational basis review to have bite.[74]

But rational basis review was not quite dead. In the gay rights litigation of the 1990s and 2000s, litigants frequently chose to challenge statutes

66. *Id.* at 316 (quoting Williamson v. Lee Optical, 348 U.S. 483, 489 (1955)).
67. 509 U.S. 312 (1993).
68. *See id.* at 314–15.
69. *See id.* at 315.
70. *See id.* at 321–23.
71. *See id.* at 335–37 (Souter, J., dissenting).
72. *Id.* at 320–21 (majority opinion) (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993)).
73. *See id.* at 336–37 (Souter, J., dissenting).
74. *See, e.g.*, Wadhwani, *supra* note 7, at 802–03.

under rational basis review rather than heightened scrutiny.[75] Although this spared the government the potential burden of justifying laws under the demanding heightened scrutiny standard, it also spared the plaintiffs from tackling "thorny issues" of whether gays should be considered a suspect class, and put the onus on the government to explain why facial discriminations on the basis of sexual orientation made sense.[76] The strategy did not enjoy unqualified success, but chalked up some victories.[77] Principal among these was *Romer v. Evans*,[78] in which the Court applied a more searching rationality review to a Colorado constitutional amendment that banned any protections on the basis of sexual orientation.[79] The Court held that Colorado's aim in withdrawing protection for a particular class of people could not be a legitimate state interest.[80]

Most recently, as noted above, challenges to state law same-sex marriage bans under rational basis review had some success. Thus, Judge Posner held that Indiana's same-sex marriage ban "flunk[ed]" the "undemanding" requirement that it must "bear a rational relationship to a legitimate government purpose."[81] Even more strikingly, so have certain challenges to state regulatory schemes, a type of economic legislation. A federal district court in California has held that California's regulatory scheme governing cosmetology was unconstitutional as applied to hair braiders, as the scheme required them to undertake 1600 hours of study that did not actually include hair braiding.[82] In 2002, the Sixth Circuit held that the sole basis it could discern for Tennessee's statute limiting sales of funeral caskets to licensed funeral directors was economic protectionism, which was not a valid state interest, and violated the Due Process and Equal Protection Clauses.[83] The same reasoning was adopted in an almost identical due process challenge to Louisiana's scheme governing coffin sales by the Fifth Circuit in 2013.[84] The Ninth Circuit has ruled that

75. Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 299–301 (2016).

76. *See id.*

77. *See, e.g.*, Pruitt v. Cheney, 963 F.2d 1160, 1165–66 (9th Cir. 1991) ("active" rational basis review under *Cleburne*); Cammermeyer v. Aspin, 850 F. Supp. 910, 914 (W.D. Wash. 1994), *appeal dismissed as moot*, 97 F.3d 1235 (9th Cir. 1996). *See generally* Saphire, *supra* note 11, at 625–28 (discussing the gay rights litigation).

78. 517 U.S. 620 (1996).

79. *See id.* at 630.

80. *See id.* at 632.

81. *See* Baskin v. Bogan, 766 F.3d 648, 665, 660–72 (7th Cir. 2014) (striking down the Indiana and Wisconsin same-sex marriage bans under both rational basis review and heightened scrutiny). Ultimately, the Court held that the right of same-sex couples to marry was fundamental. *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015). The dissenters would have held that state law bans on same-sex marriage withstood scrutiny under a lenient rational basis review. *See id.* at 2611 (Roberts, C.J., dissenting).

82. *See* Cornwell v. Hamilton, 80 F. Supp. 2d 1101, 1118–19 (S.D. Cal. 1999).

83. *See* Craigmiles v. Giles, 312 F.3d 220, 225 (6th Cir. 2002).

84. *See* St. Joseph Abbey v. Castille, 712 F.3d 215, 217–18 (5th Cir. 2013).

part of California's regulatory scheme governing pest control was unconstitutional under the Equal Protection Clause.[85] But such decisions are "rare," leading academics to speculate whether it might be more fruitful for plaintiffs to challenge such schemes under antitrust laws.[86] Even here, though, the Supreme Court has reaffirmed that a state's regulatory scheme is immune from review under the antitrust laws, provided that it is administered by a state actor.[87] In short, rational basis review remains very lenient and somewhat unpredictable.

II. THE UTILITY OF RATIONAL BASIS REVIEW IN THE CONSTITUTIONAL CONTEXT

Rational basis review is thus firmly entrenched in the equal protection and due process contexts, but does not provide any definitive guidance to the courts. Why, then, do judges use it? This part seeks to answer this question in a descriptive, not normative, way. I do not take up the question of whether rational basis review is beneficial or not, or address in any serious way the constitutional considerations concerning its use, but simply offer what are in my view the most compelling reasons for its use by the courts.[88] Its persistence indicates that there are certain things to commend it; I propose here what they might be.

A. *Potential Explanations for Rational Basis Review*

Before assessing how the rational basis test works in the constitutional context, it is necessary to unpack it. The rational basis test, as it is most commonly articulated, has two parts: the challenged law must "bear a rational relationship to a legitimate governmental purpose."[89] Thus, the proponent of the law (or the court) must find that there exists both a legitimate policy goal and that the law bears a rational relationship to that goal.

85. *See* Merrifield v. Lockyer, 547 F.3d 978, 992 (9th Cir. 2008).

86. *See, e.g.*, Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1129 (2014).

87. *See* N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1116–17 (2015).

88. For this reason, some of the following discussion may not be to the taste of those who believe strongly that the courts should play a smaller, or a greater, role in policing legislative and executive action. For a small sample of influential writing on this subject, see, e.g., RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1982); Thayer, *supra* note 16.

89. *See* Baskin v. Bogan, 766 F.3d 648, 665 (7th Cir. 2014) (quoting Romer v. Evans, 517 U.S. 620, 635 (1996)); *see also* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 n.6 (1993).

The two-part nature of the test is important, and goes some way to rebut the criticism that is sometimes leveled at it. As noted above, commentators have criticized the rational basis test on the ground that it is possible for lawyers or a court to invent a rational basis for any law.[90] Commentators have claimed that the rational basis test is "fundamentally flawed" and have periodically demanded that the courts put more bite into it.[91] Richard Saphire has posited that "[w]hy the Court continues . . . to mouth rational basis review when it so infrequently has any real meaning is anyone's guess."[92] But the standard gets more bite when lawyers also have to tie that rational basis to a "legitimate purpose." It is possible to come up with a rational, although quite possibly immoral, justification for any law in the abstract.[93] When that rational justification has to tie the law to a moral and legitimate justification, it becomes harder. I rely on the two-part nature of the rational basis test in the potential explanations for it that follow.

1. *Information-Forcing*

The first potential explanation for the rational basis test is that it forces the government to propose what it believes are its best reasons for a law—the "legitimate government purposes" that animate it. (For the purposes of this section, I assume that although an executive branch lawyer will be defending the law, the lawyer will be faithfully representing the

90. *See* CHEMERINSKY, *supra* note 2, § 9.2, at 658 ("Government lawyers can invent some legitimate conceivable purpose for virtually every law."); Wadhwani, *supra* note 7, at 803–04 ("What judge or panel of judges, if they set their minds to it, could not conceive of a rational purpose animating any governmental action?").

91. *See, e.g.*, Gunther, *supra* note 46, at 24 (urging the courts to "rais[e] the level of the minimal [judicial review] from virtual abdication to genuine judicial inquiry"); Wadhwani, *supra* note 7, at 802.

92. Saphire, *supra* note 11, at 638. Professor Yoshino has noted that "the task of rebutting an infinite number of conceivable rationales that need only be loosely fitted to the legislation is an endless one," but courts do it nonetheless. Kenji Yoshino, *Why the Court Can Strike Down Marriage Restrictions Under Rational-Basis Review*, 37 N.Y.U. REV. L. & SOC. CHANGE 331, 335 (2013).

93. On various occasions, the Court and individual Justices have suggested that legislation that is motivated by prejudice is inherently irrational, because the underlying prejudice is irrational. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 455 (1985) (Stevens, J., concurring) ("The record convinces me that this permit was required because of the irrational fears of neighboring property owners . . . ."). This of course ends up in the same place as finding that the law was rationally designed to achieve the government's goals, but that the goals were illegitimate. Parsing the two parts of the rational basis test separately—governmental purpose and logical connection to that purpose—allows for more cabined decision-making. In my view, whether a court will choose to run together the two parts of the rational basis test in this way depends on other factors, such as the court's concern about public reaction to the ruling or whether the court wishes to encourage the legislature to revisit the legislation to produce a better law in the future.

majority views of the legislature.)[94] As set out above, a court reviewing legislation under the rational basis test is under a duty to supply its own potential explanations for a law, and on occasions the courts have done so.[95] But a government lawyer defending a law will not rely on the courts' inventiveness: the lawyer will put forward the government's own best reasons for the law.

This has a useful effect on the courts' review. First, it helps establish the terms of the debate. The government's failure to put forward a certain reason may well be a concession that such a reason would not be a legitimate government purpose. For example, in the same-sex marriage cases, no government lawyer dared claim that the same-sex marriage bans were motivated by animus against homosexuals and that such animus was a permissible legislative motive. The general acceptance among all the parties that animus was impermissible narrowed the courts' inquiry. In the Seventh Circuit decision that struck down Wisconsin and Indiana's same-sex marriage bans under the rational basis standard, the court was permitted to focus on the rational connection (or lack thereof) between the reviewed legislation and the legitimate purposes that the defendants did assert.[96]

Second, the court can test the credibility of the government's proposed legitimate purposes by comparing the different reasons set forth by the government. Suppose the government sets forth two purposes for challenged legislation, one of which is illegitimate and the other is not. Suppose also that of the two reasons, the illegitimate purpose fits the body of the legislation much better than the legitimate reason. The court may conclude that the true reason for the legislation appears to be the illegitimate one, and may strike down the challenged law, even though conceivably it could be rationally related to the legitimate purpose.[97] Forcing the

94. There are, of course, exceptional cases where the legislature will defend, or attempt to defend, the law itself. *See, e.g.*, INS v. Chadha, 462 U.S. 919 (1983) (House of Representatives and Senate appearing as amici); Coleman v. Miller, 307 U.S. 433 (1939) (granting legislative standing to members of Kansas Senate and House).

95. *See, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 319–20 (1993) (proposing "theoretical[ ]" and "conceivable" reason for distinction in regulation of cable providers to residential buildings).

96. *See* Baskin v. Bogan, 766 F.3d 648, 660–65 (7th Cir. 2014).

97. This appears to have been the process that took place in *Castille*. In that case, the state proposed that economic protectionism of coffin-makers was a valid governmental purpose for the challenged law, but argued in the alternative that the law served the valid purpose of protecting consumers and promoting public health and safety. *See* St. Joseph Abbey v. Castille, 712 F.3d 215, 222–23, 226–27 (5th Cir. 2013). The court found that there was no rational connection between the law and the latter two explanations. *See id.* at 220, 226. By contrast, in the court's view, the law was aimed at economic protectionism and transferring wealth from society at large to a few: "The principle we protect from the hand of the State today protects an equally vital core principle—the taking of wealth and handing it to others when it comes not as economic protectionism in service of the public good but as 'economic' protection of the rulemakers' pockets." *Id.* at 226–27.

government to put forward rational explanations for its law thus narrows the field of dispute and helps the court assess the validity of these explanations more easily.

2. *Promoting Better Decision-Making*

The information-forcing nature of the rational basis standard suggests that the rational basis standard is more than just a mere tool for courts to decide cases. As Professor Linde pointed out, it is clear that the government may not simply argue that its rational basis for a law was that a majority of the legislature wanted to pass it: "many lawyers and judges feel that there must be a better reason for a law than that it was enacted by more than one-half of those voting on the issue in a legislative body."[98] A legislature may not simply defend a law on the ground that its members wanted to enact the law, and the acts of a legislative body are presumed to be constitutional. The legislature must affirmatively justify the law. This is the case even when a court, when analyzing a law, upholds the law with little more reasoning than a terse invocation of the presumption of constitutionality.

This aspect of rational basis review is reminiscent of the distinction between "conduct rules" and "decision rules" first described by Jeremy Bentham, but later theorized by Meir Dan-Cohen.[99] On Dan-Cohen's account, a conduct rule is a standard of behavior to which courts (and society as a whole) wish actors to aspire.[100] The standard is usually perfection—aspirational indeed. A decision rule, by contrast, is a method that courts use to decide particular cases where it is evident that humans, through their nature, have fallen short of perfection but it would be unfair to judge them harshly for that.[101] Dan-Cohen proposed the example of the duress doctrine in criminal law as an example: a person who commits a crime through duress has performed a criminal act, but may escape punishment because it would be unfair to impose criminal liability in such a situation.[102]

A notable feature of decision rules, however, is that they are only good to be used by the court. A criminal who wants to abuse the duress

98. Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 206 (1976).

99. *See* Dan-Cohen, *supra* note 10, at 626 (quoting JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 430 (W. Harrison ed., 1948)) (crediting Bentham as the inspiration for his article). In discussing decision rules and conduct rules in this Article, I am using them in the sense that Dan-Cohen applied. Mitchell Berman has contrasted "constitutional decision rules"—rules that determine how cases should be decided—with "constitutional operative propositions," which are statements of "what the Constitution means." *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 15 (2004). I am focused on courts' attempts to guide human conduct rather than to expound the Constitution.

100. *See* Dan-Cohen, *supra* note 10, at 630–34.

101. *See id.*

102. *See id.* at 633, 637–45.

defense to commit a criminal act that she would not otherwise will not be able to use the defense: decision rules "melt away as soon as one relies upon them."[103] The rational basis standard of review has this feature as well. A legislature that appears to have enacted a law for no better reason than it believed that the court would accept its acts as constitutional may find itself without the benefit of the lenient standard. The rational basis standard would "melt away" if relied on in such a manner.

The fact that a legislature knows that it will be forced to propound better reasons for a law than simply that the legislature believed that the law would be deemed constitutional may lead the legislature to run a better decision-making process. To be sure, there is nothing within rational basis review that explicitly authorizes a court to review the quality of the legislature's decision-making process. But courts do nevertheless. Thus, in *Carolene Products*, the Supreme Court held that even if there were no comprehensive committee reports setting out the rationale for Congress's ban on filled milk, the rationality of the legislation was to be presumed—but the Court still lavishly praised the thoroughness of Congress's work.[104] In the *Castille* case, the Fifth Circuit focused on how Louisiana's state board of funeral directors, which had been charged by the legislature with protecting the public, was instead "dominated by funeral directors," and how the legislature had refused to amend the law.[105] As the court put it, "[t]he great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption."[106]

Rational basis review is thus a decision rule, but it has implications for the legislature's standard of conduct. A high-quality legislative process may make it more likely for a court to deem a law rational, and a poor process may make it more likely that the court will deem the law irrational. A legislative decision to favor one part of society need not be irrational, and it is most likely not motivated by animus.[107] But as a society, we should prefer that legislative decisions not be the product of legislative capture, and that they not lead to economic favoritism toward a particular

103. *Id.* at 671.

104. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 148–49, 152–53 (1938).

105. *See* St. Joseph Abbey v. Castille, 712 F.3d 215, 218 (5th Cir. 2013) (quoting Trade Regulation Rule; Funeral Industry Practices, 47 Fed. Reg. 42,289 (Sept. 24, 1982)).

106. *Id.* at 226.

107. In *Merrifield v. Lockyer*, the United States Court of Appeals for the Ninth Circuit used the phrase "economic animus" to describe an act of the Tennessee legislature protecting coffin makers. *See* Merrifield v. Lockyer, 547 F.3d 978, 989 (9th Cir. 2008) (discussing Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002)). The concept of legislators adopting "economic animus" against virtually the entire population of a state (themselves included) is hard to understand.

group.[108] The rational basis test is flexible enough to let almost any economic regulation survive, and only imperil the most blatantly unsound.[109]

Another subtle way in which rational basis review may improve the quality of judicial decision-making is through its lack of clarity. As I have noted, rational basis review is not as amorphous as it first appears: the judicial focus is properly not on the rationality of the law per se, but the logical connection between the law and its avowed purposes.[110] But despite this, the rational basis review remains very flexible. What one person deems rational may be irrational to another.

The flexibility of the rational basis standard may encourage a legislature to improve its decision-making processes. A legislature that is not perfectly sure what governmental interests will be deemed legitimate, and what connections with legislation will be deemed rational, may avoid sailing too close to the wind. In this regard, rational basis review again recalls Dan-Cohen's distinction between conduct rules and decision rules. Dan-Cohen hypothesized that the key to the distinction between conduct rules and decision rules was "acoustic separation."[111] This is the phenomenon that the people who might be punished (or not) by the decision rules do not know perfectly how they will be applied: the public is "acoustically separated" from criminal defense doctrines, such as duress, which they might be tempted to abuse.[112] Without acoustic separation, the Holme-

108. *See, e.g.*, John A.C. Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U. L. REV. 226, 248–49 (1959) ("The difficulty is that not infrequently economic pressure groups are able to procure the enactment of regulatory legislation which furthers their own rather than the public interest."). Whether courts *should* play any role in reviewing legislation in this way is, of course, contested. Courts that seek to impose their own views of the public good are liable to be criticized on separations-of-powers grounds. Judge Easterbrook has noted that statutes may be public-interest legislation (designed to benefit society at large), private-interest legislation (designed to benefit only a few groups), or both. *See* Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 16 (1984). Indeed, under an economic analysis, the kind of regulatory scheme in *Castille* might be justifiable. *See id.* at 45 ("[L]icensing statutes are the playgrounds of interest groups."); *see also* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 894 (1975) (arguing that the "Court's role [is not to] act as a general brake on legislation promoting . . . special interests"). That the *Castille* court struck down the scheme, and the Supreme Court denied the petition for certiorari, and other courts have struck down similar regulations suggests that courts see a limit to this kind of economic analysis.

109. In that regard, it is no accident that the *Castille* court mentioned that Louisiana's scheme regulating coffin sales was "the last of its kind in the nation." *See Castille*, 712 F.3d at 218.

110. *See supra* note 93 and accompanying text.

111. *See* Dan-Cohen, *supra* note 10, at 630–34.

112. Acoustic separation in the criminal law context is not perfect—but nor is it illusory. *See id.* at 634–45. Dan-Cohen also cites the example of acoustic separation in English contract law, see *id.* at 665 n.109 (citing P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 193 (1979)). Professor Eisenberg has argued that there is partial acoustic separation in corporate law, see *infra* note 262 and accompanying text. Although Dan-Cohen limited his analysis to criminal law, he be-

sian "bad man," who does not care for the moral prohibition of the laws, but is only concerned with what the "courts are likely to do in fact," will be far more likely to commit crimes and then rely on an affirmative defense to remain free.[113]

Rational basis review has a feature in common with this: the actors whose conduct will be reviewed under the decision rule cannot predict perfectly what the results of the review will be, which may encourage them to refrain from enacting laws that could be interpreted as having an invidious effect on particular groups.[114] And legislatures that sense that laws that would clearly withstand judicial review at some point in the past, might no longer do so, may be motivated to update them.[115] Just as in the case of Dan-Cohen's theory of acoustic separation in criminal law, it is impossible to tell what effect the uncertainty on the part of the legislators concerning the review of legislation will have on their decision-making process. But there is most likely some beneficial effect. As then-Judge Benjamin Cardozo put it:

> The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth . . . in guiding and directing choice within the limits where choice ranges.[116]

3. *Incompletely Theorized Agreements*

Another potential explanation for courts' use of rational basis review is the "incompletely theorized agreement." This concept was popularized by Cass Sunstein, and has been proposed as an explanation for rational basis review by Richard Saphire.[117] When judges and courts cannot agree on fundamental principles to decide cases, they may instead reach an "incompletely theorized agreement" and instead try to decide cases on the

lieved that the distinction between conduct rules and decision rules would be found valid in other spheres. *See* Dan-Cohen, *supra* note 10, at 626.

113. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460–61 (1897).

114. *See supra* note 112 and accompanying text.

115. Again, marriage legislation supplies the example. For a list of state legislation legalizing same-sex marriage before the Supreme Court's decision, see Obergefell v. Hodges, 135 S. Ct. 2584, 2611 app.B (2015).

116. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 94 (1921) *quoted in* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1132 (1999).

117. *See* Sunstein, *supra* note 11, at 1737; *see also* Saphire, *supra* note 11, at 638 ("Perhaps the rationality requirement represents an example of what Professor Sunstein has called an 'incompletely theorized agreement'. . . ."). *See generally* David L. Shapiro, *Essays Commemorating the One Hundredth Anniversary of the Harvard Law Review: In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 734–36, 742–43 (1987) (describing how the need to build a majority may affect the final result, with reference to Baker v. Carr, 369 U.S. 186 (1962)).

basis of lower-level details.[118] Sunstein has argued that it would frequently be easier for lawyers to reach agreement on the correct result than to agree on a general principle that would explain that result, and therefore, in the interests of reaching a consensus, lawyers try to agree on particularized details. Thus, for example, judges may disagree on the general point whether the death penalty, in a world with flawless evidence and prosecutors, defenders and jurors that have perfect understanding and competence and no bias, would ever be a legitimate punishment; but they may be able to agree that the death penalty should be proscribed because these conditions do not obtain.[119]

Of course, it is not the case that members of multi-judge panels who cannot agree on the reasoning behind a particular outcome will always reach an agreement on particular details that will suffice to decide the case; as Professors Lewis Kornhauser and Lawrence Sager have observed, judges may be incapable on deciding on even smaller details, and may vote against their preferences in order to arrive at an agreement.[120] But the concept of an incompletely theorized agreement may play a valuable role in breaking through a deadlock. Such an agreement presents advantages that go beyond simply allowing people to agree (important though that is). It is hard enough for legal scholars—let alone busy judges—to produce a coherent "theory of everything."[121] It is very unlikely that a "simple top-down theory" will actually be able to adequately explain a set of human values in areas of constitutional law.[122] And an agreement on narrow grounds may leave open the possibility of evolution toward broad principles in the future.[123] Thus, as Sunstein points out, economic efficiency is now a leading principle in antitrust law, even though it took a long time for this to be made explicit in the cases.[124]

The use of the rational basis standard may be a signal of incompletely theorized agreements. Same-sex marriage litigation provides an example. Reviewing same-sex marriage bans under the rational basis standard allowed judges the option of ruling that the bans were not rational in that the legislation did not have a sufficient logical connection with the avowed

118. *See* Sunstein, *supra* note 11, at 1735–36. Speaking of society, rather than a court or the Supreme Court in particular, Bickel noted that "no society . . . can fail in time to explode if it is deprived of the arts of compromise, if it knows no ways to muddle through." Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 49 (1961); *cf.* Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 1020–24 (2008) (casting doubt on the claim that unanimity in important cases is necessary to support judicial legitimacy).

119. *See* Sunstein, *supra* note 11, at 1747.

120. *See* Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 53–55 (1993).

121. *Cf.* Sunstein, *supra* note 11, at 1749.

122. *See id.* at 1748.

123. *See id.* at 1749.

124. *See id.* at 1765.

ends.[125] Courts were able to avoid the more fundamental question of whether a state had the right to discriminate on the basis of sexual orientation.[126] Thus, for example, in *Romer*, the Supreme Court ruled that Colorado's constitutional amendment preventing the state or municipalities from enacting legislation that protected gays from discrimination could not survive rational basis review, and explicitly disavowed the ruling of the Colorado Supreme Court that the constitutional amendment should be reviewed under strict scrutiny.[127] Eventually, the Supreme Court reached, and theorized, this question.[128]

An incompletely theorized agreement may also be a relevant explanation for the use of rational basis review by a single-member court. It is quite possible that an individual judge has not theorized an area of law to her own satisfaction, or that, even if she has, she is not convinced that her theory will convince others. The rational basis standard allows courts to focus on the logical link between the stated government purpose and the means used to advance it, and avoid a more sweeping, fully theorized judgment on the governmental purpose per se.[129]

4. *Protecting Judicial Legitimacy*

Another reason that may help explain the rational basis standard of review in equal protection and due process cases is a judicial desire to avoid controversy. Avoiding controversy helps defend the institutional legitimacy of the courts, which is necessary for a functioning society whose members accept the rule of law.[130]

Avoiding controversy is important. A plausible explanation for the existence of rational basis review—although not necessarily a justification for the existence of the standard that a judge would be willing to offer, and thus not one that I treat separately in this Article—is that judges are for most purposes, when faced with a challenge to the validity of legislative

125. *See, e.g.*, Bambauer & Massaro, *supra* note 75, at 299–301.

126. *See id.*

127. *See* Evans v. Romer, 882 P.2d 1335, 1341 (Colo. 1994) (applying strict scrutiny), *aff'd on other grounds*, 517 U.S. 620, 625, 632 (1996) (applying rational basis review).

128. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2598–99 (2015).

129. This judicial restraint may in turn enhance the judicial legitimacy of the court's decision. *See infra* Part II.C.4. In some instances, of course, the court cannot avoid passing on the legitimacy of the governmental purpose. *See, e.g.*, St. Joseph Abbey v. Castille, 712 F.3d 215, 222–23 (5th Cir. 2013) (holding that economic protectionism was not a proper government purpose and disagreeing with the Tenth Circuit's contrary holding in *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004)).

130. *See generally* BICKEL, *supra* note 88. For just two statements by Supreme Court jurists to this effect, see Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) ("The Court's authority . . . rests on sustained public confidence in its moral sanction."); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (arguing that deciding constitutional questions "is legitimate only in the last resort").

or executive action, the last possible decision-makers. It does not seem farfetched to believe that when a judge has the ability to exercise this kind of final decision-making powers in *some* clear types of cases, such as whether a statute conflicts with the federal or state constitutions, she will seek to extend it to *other*, less clear, types of cases, such as whether a statute is sufficiently "rational" to be a valid exercise of the legislative power. In other words, it is likely asking too much for a judge to willingly abrogate her power.[131]

The question then becomes *how* a (likely unelected) judge is to exercise this power in a way that minimizes concerns about separation of powers—the principle that a judge should not intrude on the legislative function.[132] One general response is that rational basis review is an extremely lenient "residual category" of review, under which laws are almost invariably waved through.[133] Even though the judge remains the last possible decision-maker, she abstains from exercising her power. In some ways, the application of the rational basis review standard is akin to the Supreme Court exercising its discretionary power not to grant certiorari.[134]

There are two other features of rational basis review that support judicial legitimacy and may limit concerns about separation of powers. First, it permits the government to put forward its best reasons for the challenged legislation, and, by corollary, *not* to put forward certain reasons. If the government chooses not to assert that a particular reason is valid, the court may avoid broaching the question at all. The court may thus avoid

131. Against this argument it might be said that no judge would willingly arrogate to herself such a vague power: the exercise of such a power when it was not clearly granted would, it could be argued, always be questioned for lack of legitimacy. *See, e.g.*, Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J. L. & PUB. POL'Y 87, 98 (1984).

132. As the Court noted in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, an administrative law case: "[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." 467 U.S. 837, 866 (1984).

133. *See* Yoshino, *supra* note 52, at 759. Courts have sometimes expressed this statement by noting that a statute should never be stricken down as unconstitutional unless its unconstitutionality is quite clear. *See, e.g.*, Dartmouth Coll. v. Woodward, 17 U.S. 518, 625 (1819) (opinion of Marshall, C.J.) ("[T]his court . . . has declared, that in no doubtful case, would it pronounce a legislative act to be contrary to the constitution."); Fletcher v. Peck, 10 U.S. 87, 128 (1810) ("The question, whether a law be void for its repugnancy to the constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case."). The same principle has historically applied in state courts. *See, e.g.*, Respublica v. Duquet, 2 Yeates 493, 501 (Pa. 1799) ("As to the constitutionality of these laws, a breach of the constitution by the legislature, and the clashing of the law with the constitution, must be evident indeed, before we should think ourselves at liberty to declare a law void and a nullity on that account . . . .").

134. *See* BICKEL, *supra* note 88, at 200–01, 207 (describing the denial of certiorari as a "passive low" in the exercise of the Court's power).

getting unnecessarily entangled in contested matters of social and economic policy.

Second, the rational basis test allows the courts to focus on the logical connection between the stated governmental purpose and the challenged legislation, rather than the stated government purpose itself. If the government has been forced to produce a strained explanation for a law that does not comport with its true motivation, it is quite likely that the connection between the law and the government's proposed explanation will be rather tenuous.[135] In this instance, a court that doubts that the legislators were well-motivated in passing the law may choose to focus on the lack of the rational connection between the law and its avowed purpose. The court then has two options: it can either explicitly conclude that the legislators did not have a legitimate purpose in mind, or it may end its analysis with the holding that there is an insufficient connection between the means and the end. Under the first option, the court may be holding that the legislators were motivated by animus or irrational prejudice—a holding that carries the necessary implication that the legislators were acting immorally or in ways unbefitting of legislators. Under the second option, the court is simply holding that the legislators made a mistake, a ruling that carries little or no stigma. The court may thus invite the legislators to revisit the legislation to produce a more careful bill that can survive the basic test of rationality or to pursue their policy goals in a more rational way in the future.[136]

In reality, the court that strikes down a law under rational basis review will likely deliver a ruling that incorporates aspects of both options. As observed above, legislators, like all humans, are rational: a law that fails rational basis review will likely have an improper basis and will not simply be badly thought out. But the court has a choice about how much stigma it attaches to the legislature's judgment. Thus, for example, in *Romer*, the Court held that Colorado's proposed constitutional amendment failed rational basis review because it was "discontinuous with the reasons offered for it," but went on to hold that it was "inexplicable by anything but animus."[137] On the other hand, in *Castille*, the Fifth Circuit emphasized that it did not "doom state regulation of casket sales," but "insist[ed] only that Louisiana's regulation not be irrational."[138] A court can use the rational basis test to calibrate the moral opprobrium it wishes to attach to the legis-

135. *See, e.g.*, Zobel v. Williams, 457 U.S. 55, 61 (1982) (noting that reasons advanced by Alaska for a scheme of distributions from its oil fund could not be rationally tied to the statute).

136. For example, in *Cleburne*, the Court left Cleburne's zoning ordinance on the books, leaving open the possibility that it might be applied in a rational way in a future case. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 474 (1985) (Marshall, J., dissenting); *see also* Whittington, *supra* note 19, at 585 (noting that the Court may strike down a statute as overbroad "while indicating that the law's aims [are] constitutionally legitimate").

137. *See* Romer v. Evans, 517 U.S. 620, 632 (1996).

138. *See* St. Joseph Abbey v. Castille, 712 F.3d 215, 227 (5th Cir. 2013).

lators' choice. If the court is concerned about a popular backlash, the court may focus on a legislature's lack of rationality rather than ill will and may moderate the stigma it attaches to the legislature's acts.

B. *The Gravitational Pull of Constitutional Law*

The explanations above may explain the presence of rational basis review in the equal protection and due process contexts. But they do little to rebut the criticisms that rational basis review is too lenient, too unpredictable, and gives too much leeway to judges. Indeed, they make provoke further criticisms. For example, as Dan-Cohen noted, when courts apply decision rules that are different from the underlying standard of conduct, there is a form of "deceit": courts are secretly applying softer standards than they claim actors should live up to.[139] Under the acoustic separation that Dan-Cohen described, the law by which people's actions are judged is hidden from them—"a blatant violation of the ideal of the rule of law."[140]

Nevertheless, the long life of the rational basis standard, without more, suggests that its advantages outweigh its disadvantages—and the explanations proposed above suggest what these advantages are. But they may not apply in other fields of law.

It would be unwise to ignore the influence that constitutional law standards of review tend to have on other areas of law. Every law student studies the three standards of review; they may occasionally be reported in newspapers.[141] And so it would not be surprising if constitutional law's rational basis review has had an influence in other fields. Helen Hershkoff has observed that state court judges have imported federal rational basis review into their jurisprudence even though the policy considerations that motivate the use of rational basis review in the federal context do not so clearly apply in state court.[142] Chief Justice Strine in Delaware has acknowledged that the intermediate standard of review in corporate law—a standard applied when there is a greater than usual potential for self-interested behavior on the part of the fiduciaries—has its

139. *See* Dan-Cohen, *supra* note 10, at 677.

140. *Id.* at 666. In the criminal context, these defects are offset, and perhaps overcome, by the ability of the law to use selective transmission to reconcile the goals of deterrence and leniency.

141. *See, e.g.*, Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), https://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html [https://perma.cc/W2YP-2F8X].

142. *See* Hershkoff, *supra* note 116, at 1153–69; *see also, e.g.*, Lawrence Friedman, *Ordinary and Enhanced Rational Basis Review in the Massachusetts Supreme Court: A Preliminary Investigation*, 69 ALB. L. REV. 415, 416–17 (2006) ("Though the provisions of the Massachusetts Declaration of Rights express the commitment to equality differently than the Equal Protection Clause of the Fourteenth Amendment, the Massachusetts courts have traditionally applied the federal equal protection framework when addressing claims raised under the state constitution.").

"progenitor[ ]" in constitutional intermediate scrutiny.[143] Of course, the gravitational influence of constitutional review standards cannot explain the presence of the rational basis standard in constitutional law itself—but it would be naïve to imagine that judges deciding cases in one area of the law would be blind to all others.

The next two parts discuss whether the explanations offered above for rational basis review in the constitutional context apply in the immigration and corporate law contexts.

III. IMMIGRATION LAW

A. *Rational Basis Review in Immigration Law*

1. *The Slow Rise of Deferential Review*

Immigration law, governing the admission and expulsion of aliens, is an area where courts have been notably deferential to the legislative and executive branches.[144] "In the canon of classical immigration law, judges should be seen—if absolutely necessary—but not heard."[145] In 1889, the Supreme Court, in a case whose "very name" was described years ago as an "embarrassment," ruled that Congress had the power to prevent Chinese permanent residents from reentering the country.[146] The Chinese Exclusion Act was first enacted in 1882 and lasted until 1965. In 1893, the Su-

143. *See* Leo E. Strine, Jr., Keynote Dialogue, *"Old School" Law School's Continuing Relevance for Business Lawyers in the New Global Economy: How a Renewed Commitment to Old School Rigor and the Law as a Professional and Academic Discipline Can Produce Better Business Lawyers*, 17 CHAP. L. REV. 137, 144 (2013).

144. As scholars in this area have noted, the deference that is found in immigration law, so defined, is not found so generally in areas of law governing the rights of aliens in the United States. *See, e.g.*, Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256 (1984); *see also, e.g.*, Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."). But even in the context of the rights of aliens within the United States, the actions of the federal government—if not the states—may still be reviewed with extreme deference. Thus, in *Mathews v. Diaz*, the Court unanimously upheld a statute requiring that aliens live in the United States for five years and be applicants for permanent residence, before being eligible for federal medical insurance, on the ground that it was not "wholly irrational." *See* Mathews v. Diaz, 426 U.S. 67, 83 (1976). In the same year, the Court decided *Hampton v. Mow Sun Wong*, in which it ruled that permanent residents could not be denied the right to participate in the competitive civil service examinations. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 116–17 (1976); *see also* Korab v. Fink, 748 F.3d 875, 892 (9th Cir. 2014) (Bybee, J., concurring) (contrasting the deference given to the federal regulations of the privileges of aliens within the United States with the demanding scrutiny given to similar regulations by the states).

145. Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 14 (1984).

146. The Chinese Exclusion Case, 130 U.S. 581 (1889); Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and its Progeny*, 100 HARV. L. REV. 853, 863 (1987).

preme Court, over strong dissents, ruled that Congress had the power to deport even aliens who were lawfully present in the United States.[147] These cases marked the origin of the "plenary power" doctrine: the concept that Congress has total power over immigration policy, unfettered by constitutional restrictions.

The absence of any constitutional restrictions on congressional immigration and deportation decisions leads directly to some anomalous results. Of all areas of law, immigration law is the most likely to involve discrimination on the grounds of race or national origin, suspect categories under the Constitution—yet constitutional law provides no protection. For example, in *Fiallo v. Bell*,[148] the Court ruled that Congress could discriminate against the fathers of illegitimate children who were natural-born U.S. citizens in rules providing for the immigration of those fathers. Since the 1890s, however, the courts have gradually chipped away at the congressional plenary power doctrine.

First, the plenary power doctrine is now generally limited to decisions on admissibility, not exclusion, possibly on the ground that the Constitution is generally seen as a source of rights to people within the territory of the United States, whether legally or not.[149] The qualifier "possibly" is important: even the neat, "intuitive," argument that the Constitution protects all those within the United States, and not those without, is not unassailable.[150]

Second, the courts have, even in the area of admissibility and the related area of citizenship applications, shrunk back from the full application of the plenary power doctrine. Courts have applied what Hiroshi Motomura has termed "phantom constitutional norms" to interpret immigration statutes and regulations that are more favorable to aliens.[151] In essence, "phantom norm decision-making" is statutory decision-making in the shadow of the constitutional norms that would undoubtedly apply if

147. *See* Fong Yue Ting v. United States, 149 U.S. 698, 743 (1893).

148. 430 U.S. 787 (1977).

149. *See* Legomsky, *supra* note 144, at 275.

150. *Id.* at 276. The Court has held that the "people" protected by the First, Second, and Fourth Amendments are "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990). An alien does not immediately acquire full constitutional rights by stepping on U.S. soil. *See id.* at 272–74. For example, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) permits the government to deport, without hearing, any alien who has been in the United States for less than two years. 8 U.S.C. § 1225(b)(1)(A)(i) (2012). The constitutionality of this provision has never been challenged, partly because Congress provided that any constitutional challenge to IIRIRA could only be brought within sixty days of the statute's enactment. *See, e.g.*, Am. Immigration Lawyers Ass'n v. Reno, 18 F. Supp. 2d 38, 47 n.8 (D.D.C. 1998), *aff'd*, 199 F.3d 1352 (D.C. Cir. 2000).

151. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549, 572 (1990).

the statute affected the rights of a U.S. citizen. For example, in 1953, the Court ruled in *Chew v. Colding*[152] that a regulation permitting the government to exclude a returning permanent resident did not apply to the petitioner at issue—even though it almost certainly did, and the Court's "underlying reasoning was unmistakably constitutional."[153] To a very limited degree, constitutional law has begun to take root even in the stony terrain of immigration law. For example, in *Landon v. Plasencia*,[154] the Supreme Court ruled that a returning permanent alien did have a constitutional right to due process in her exclusion hearing—a holding unnecessary to enable the respondent permanent resident to prevail and remain in the country.[155]

Third, and of greatest relevance for this Article, the courts have gradually equated plenary power—which, by its literal terms, connotes unreviewable despotism—with rational basis review.[156] Of course, given the deference applied under rational basis review, the effect most of the time is the same. For example, the Eleventh Circuit Court of Appeals has emphatically rejected a claim that there is no "rational basis" for Congress to make it harder for criminal aliens wrongly inside the United States to apply for lawful admission than those outside it, finding that there were "at least five rational bases for the classifications defined by Congress and the Board."[157] But, every so often, a rational basis claim succeeds. Thus, in *Wauchope v. Department of State*,[158] the Ninth Circuit held that there was no valid basis for Congress's decision to award United States citizenship to the foreign-born offspring of citizen fathers but not citizen mothers.[159]

152. 344 U.S. 590 (1953).

153. *See* Motomura, *supra* note 151, at 571.

154. 459 U.S. 21 (1982).

155. *See id.* at 36–37; Motomura, *supra* note 151, at 579. Plasencia, a permanent resident, had been excluded from the country upon returning from a trip to Mexico on the ground that she had helped aliens to illegally enter the United States. *See Plasencia*, 459 U.S. at 23. She was granted the writ of habeas corpus in the district court, and the Ninth Circuit affirmed. *See id.* at 25. The Ninth Circuit held that Plasencia should have been given a deportation hearing where she would have received substantial procedural protections, rather than an exclusion hearing. *See id.* at 30–31. The Supreme Court ruled that the statute was clear that Plasencia was only entitled to an exclusion hearing, but held that Plasencia did have the ability to raise a due process challenge to her exclusion hearing. *See id.* at 31–36. Of course, phantom constitutional norms are still alive and strong in immigration law. More than ten years after Motomura published his article, the Supreme Court decided in *INS v. St. Cyr* that Congress did not intend to deprive criminal aliens of the right to seek review of their deportation orders through the writ of habeas corpus. *See* INS v. St. Cyr, 533 U.S. 289, 317–19 (2001). In the dissent's view, the Court found "ambiguity in the utterly clear language of a statute." *See id.* at 326 (Scalia, J., dissenting).

156. *See, e.g.*, Resendiz-Alcaraz v. Ashcroft, 383 F.3d 1262, 1271 (11th Cir. 2004).

157. *See* Poveda v. U.S. Att'y Gen., 692 F.3d 1168, 1177 (11th Cir. 2012).

158. 985 F.2d 1407 (9th Cir. 1993).

159. *See id.* at 1418.

The extremely deferential review of congressional rules on immigration is paralleled in the deferential review of executive action under those rules. The seminal example of this lenient review is found in the 1975 case of *Kleindienst v. Mandel*.[160] In *Mandel*, the eponymous appellee, a self-described revolutionary Marxist from Belgium, had been denied the right to enter the country in order to address a conference: Mandel had been found ineligible to enter the country and the Department of State refused to grant him a waiver.[161] Because it was clear that Mandel, as a foreigner living outside the United States and with no ties to the country, had no constitutional rights to assert, his inviters sued the government alleging that their First Amendment right to hear and speak to Mandel had been violated.[162] The Court ruled that if the Attorney General excluded an alien "on the basis of a facially legitimate and bona fide reason, the courts will [not] look behind the exercise of that discretion."[163]

The *Mandel* Court set out a standard of review that was extremely close to the deferential rational basis review of *Beach*: the only apparent difference was that the Court would not attempt to think of a reason why the alien had been excluded, but would rely on the Attorney General to propound a reason.[164] *Mandel* was not an outlier; even aliens within the United States could be the subject of seemingly arbitrary classifications. In *Kerry v. Din*,[165] five members of the Court agreed that the government had not violated the constitutional rights of a U.S. citizen by excluding her husband from the country.[166] The controlling opinion in that case, by Justice Kennedy, reaffirmed *Mandel*'s "facially legitimate and bona fide" standard for testing government exclusions, but also appeared to open the door a crack to the judicial review of consular decision-making, by suggesting that a court *could* "look behind" a consular decision if there was an "affirmative showing of bad faith."[167] The circuit courts of appeal have equated Mandel's "facially legitimate and bona fide" standard with rational basis review.[168]

2. *The Executive Travel Ban*

Given the very deferential review given to executive decisions on admissibility, the challenges to the Executive's travel ban, which are ongoing

160. 408 U.S. 753 (1972).

161. *See id.* at 758–59.

162. *See id.* at 762.

163. *Id.* at 770.

164. *See id.* ("What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address or decide in this case.").

165. 135 S. Ct. 2128 (2015).

166. *See id.* at 2138.

167. *Id.* at 2139–41 (Kennedy, J., concurring).

168. *See, e.g.*, Ashki v. INS, 233 F.3d 913, 919–20 (6th Cir. 2000); Breyer v. Meissner, 214 F.3d 416, 422 n.6 (3d Cir. 2000); Ablang v. Reno, 52 F.3d 801, 804 (9th Cir. 1995); Azizi v. Thornburgh, 908 F.2d 1130, 1133 n.2 (2d Cir. 1990).

at the time of writing this Article, are notable.[169] The President's first travel ban purported to ban all residents of seven Muslim-majority countries—whether they were legal permanent residents or not—from the United States.[170] This ban, announced with little apparent forethought and without the sign-off of all the government agencies affected, caused chaos and was immediately challenged in the courts.[171] A federal district court in Seattle issued a temporary restraining order against the ban.[172] The Ninth Circuit upheld the restraining order in full, holding that the plaintiffs were likely to succeed on the merits of their Due Process challenge to the Executive Order, even though the government had stipulated that it would not attempt to enforce the ban as to permanent residents.[173]

The Ninth Circuit's ruling was notable in that it did not apply *Mandel*'s "facially legitimate and bona fide reason" standard to the proposed order, arguably contrary to Ninth Circuit precedent.[174] Following this setback, the government withdrew the proposed travel ban and replaced it with a new Executive Order. The new order restricted travel from six Muslim-majority countries, not seven; did not include legal permanent residents within its scope; and set out reasons why, on national security grounds, the government was restricting travel.[175] This new ban was also challenged in the courts. In May 2017, the Fourth Circuit, sitting en banc, upheld a lower court's injunction against the ban.[176] Unlike the Ninth Circuit, the Fourth Circuit applied *Mandel*'s facially legitimate and bona fide reason standard, but relying in part on Justice Kennedy's concurring opinion in *Din*, ruled that the word "facially" did not govern "bona fide."[177] Therefore, the court could test a government exclusion order to determine whether it was "bona fide," i.e., enacted in good faith.[178]

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169. *See, e.g.*, Amy Howe, *Trump Administration Returns to Supreme Court on Travel Ban*, SCOTUS BLOG (Jan. 6, 2018, 12:07 AM), http://www.scotusblog.com/2018/01/trump-administration-returns-supreme-court-travel-ban/ [https://perma.cc/VE32-R3EJ].

170. *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

171. *See, e.g.*, Michael D. Shear & Ron Nixon, *How Trump's Rush to Enact an Immigration Ban Unleashed Global Chaos*, N.Y. TIMES (Jan. 29, 2017), https://www.nytimes.com/2017/01/29/us/politics/donald-trump-rush-immigration-order-chaos.html [https://perma.cc/NST2-HRF2].

172. *See* Washington v. Trump, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017), *stay pending appeal denied by* 691 F. App'x. 834 (9th Cir. 2017), *stay pending appeal denied by* 847 F.3d 1151 (9th Cir. 2017).

173. *See* Washington v. Trump, 847 F.3d 1151, 1169 (9th Cir. 2017), *reh'g en banc denied*, 853 F.3d 933 (9th Cir. 2017).

174. *See* Washington v. Trump, 858 F.3d 1168, 1179–80 (9th Cir. 2017) (Bybee, J., dissenting from denial of rehearing en banc) ("The appropriate test for judging executive and congressional action affecting aliens who are outside our borders and seeking admission is set forth in *Kleindienst v. Mandel* . . . .").

175. *See* Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 9, 2017).

176. *See* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017) (en banc), *vacated and remanded*, 138 S. Ct. 353 (2017).

177. *See id.* at 590–92.

178. *See id.* at 590.

The dissenting judges in the Fourth Circuit pointed out that this ruling invited reviewing courts to "look behind" the motives of the government officials responsible for an exclusion order to determine whether they had acted in good faith, an inquiry that in their view the Supreme Court had made clear was impermissible.[179] All the judges in *Mandel* itself apparently believed that such an inquiry would be impossible.[180] The Fourth Circuit's ruling thus appeared to open up a new standard of judicial scrutiny for exclusion orders.

Almost simultaneous with the Fourth Circuit decision, the second travel ban was the subject of a legal challenge in federal district court in Hawai'i, which preliminarily enjoined the ban and ruled that it violated the Establishment Clause.[181] Consistent with *Mandel*, the government argued to the Hawai'i court that "courts may not look behind the exercise of executive discretion taken on the basis of a facially legitimate and bona fide reason."[182] The Hawai'i court held that it was entitled to evaluate the purpose of the executive action—and produced a long list of public statements from the Executive that suggested that the travel ban had an illegitimate "religious objective of temporarily suspending the entry of Muslims."[183] The Ninth Circuit heard an expedited appeal and upheld the district court's injunction almost in its entirety.[184] However, the Ninth Circuit upheld the travel ban only on statutory, not constitutional, grounds. It thus avoided the need to address whether to apply the deferential facially legitimate and bona fide reason standard that the Fourth

179. *See id.* at 639 (Niemeyer, J., dissenting). *But see id.* at 590–91 (majority opinion) (arguing that courts may "look behind" an action to assess its justification).

180. *See Mandel*, 408 U.S. at 770 ("We hold that when the Executive exercises [its exclusion power] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion . . . ."); *see also id.* at 777 (Marshall, J., dissenting) ("[T]he majority demands only 'facial' legitimacy and good faith, by which it means that this Court will never 'look behind' any reason the Attorney General gives.").

181. *See* Hawai'i v. Trump, 241 F. Supp. 3d 1119, 1140 (D. Haw. 2017) (granting temporary restraining order against travel ban), *converting temporary restraining order into preliminary injunction*, 245 F. Supp. 3d 1227 (D. Haw. 2017), *aff'd in part, vacated in part, remanded by* 859 F.3d 741 (9th Cir. June 12, 2017), *cert. granted, order vacated*, No. 16-1540, 2017 WL 4782860 (U.S. Oct. 24, 2017), *order vacated*, 874 F.3d 1112 (9th Cir. Nov. 2, 2017).

182. *See* Hawai'i v. Trump, 241 F. Supp. 3d at 1135 (alterations omitted).

183. *See id.* at 1137 (internal quotations omitted).

184. *See generally* Hawai'i v. Trump, 859 F.3d 741 (9th Cir. 2017), *cert. granted, order vacated*, No. 16-1540, 2017 WL 4782860 (U.S. Oct. 24, 2017), *order vacated*, 874 F.3d 1112 (9th Cir. Nov. 2, 2017); Adam Liptak, *Supreme Court Wipes out Travel Ban Appeal*, N.Y. TIMES (Oct. 24, 2017), https://www.nytimes.com/2017/10/24/us/politics/supreme-court-travel-ban-appeal-trump.html [https://perma.cc/E4ZQ-H4QY] ("[The Supreme Court] also vacated the decision under appeal, from the United States Court of Appeals for the Ninth Circuit, in San Francisco, meaning it cannot be used as precedent.").

Circuit had grappled with, although it did find that the reasons that the Executive had put forth to support the ban were insufficient.[185]

The Supreme Court granted certiorari to review the decisions of both the Fourth and the Ninth Circuits.[186] The Court ruled that the injunctions were overbroad insofar as they prevented enforcement of the Executive Order with respect to foreign nationals "who lack any bona fide relationship with a person or entity in the United States."[187] The Court narrowed the scope of the injunction to such persons. As three justices writing separately pointed out, this would naturally lead to litigation about who had such a "bona fide relationship."[188] Such litigation rapidly commenced, and the U.S. District Court for the District of Hawai'i ruled that grandparents, and refugees whom resettlement agencies were prepared to assist, qualified as having a bona fide relationship.[189] The Ninth Circuit affirmed this ruling per curiam, but the Supreme Court subsequently stayed the court's mandate in part.[190]

On September 24, 2017, the same day as the ninety-day period in the second travel ban expired, the government announced a third iteration of the travel ban.[191] The presidential proclamation barred most citizens from Iran, Libya, Syria, Yemen, Somalia, Chad, and North Korea from entering the United States.[192] It also applied enhanced scrutiny to applicants from Venezuela.[193] The ban exempts legal permanent residents and

185. *See Hawai'i*, 859 F.3d at 769 n.9, 770–71 ("We reject the first three reasons provided in Section 2(c) [of Travel Ban No. 2] because they relate to preservation of government resources to review existing procedures and ensure adequate vetting procedures. There is no finding that present vetting standards are inadequate, and no finding that absent the improved vetting procedures there likely will be harm to our national interests.").

186. Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (granting petitions for certiorari and granting stay applications in part).

187. *See id.* at 2087.

188. *See id.* at 2089–90 (Thomas, J., with Alito & Gorsuch, JJ., concurring).

189. *See* Hawai'i v. Trump, No. 17-00050DKW-KSC, 2017 WL 2989048, at *10 (D. Haw. July 13, 2017) (enjoining the Department of Homeland Security and Department of State from "exclud[ing] grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, nieces, nephews, and cousins of persons in the United States"), *granting stay in part*, 138 S. Ct. 34 (July 19, 2017), *aff'd*, 871 F.3d 646 (9th Cir. Sept. 7, 2017) (per curiam), *granting stay in part*, 138 S. Ct. 1 (Sept. 11, 2017).

190. *See generally* Hawai'i v. Trump, 871 F.3d 646 (9th Cir. Sept. 7, 2017) (per curiam), *granting stay in part*, 138 S. Ct. 1 (Sept. 11, 2017).

191. *See* White House, Presidential Proclamation: Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats (Sept. 24, 2017), https://www.whitehouse.gov/the-press-office/2017/09/24/enhancing-vetting-capabilities-and-processes-detecting-attempted-entry [https://perma.cc/8JFG-LQ93].

192. *See* Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,165–67(2)(a)–(h) (Mar. 6, 2017) [hereinafter Travel Ban No. 3]; *see also, e.g.*, Michael D. Shear, *New Order Indefinitely Bars Almost All Travel from Seven Countries*, N.Y. TIMES (Sept. 24, 2017), https://www.nytimes.com/2017/09/24/us/politics/new-order-bars-almost-all-travel-from-seven-countries.html [https://perma.cc/D9X4-ZSKS].

193. *See* Travel Ban No. 3, *supra* note 192, at 45,166(2)(f).

did not purport to affect the visa status of visitors already visiting from the covered countries. The third travel ban, which was fifteen pages long, specifies different treatment for different countries in light of the security situation in those countries, and also provides a process (albeit a difficult one) for countries to be removed from the list.[194] The day following the announcement of the ban, the Supreme Court cancelled the oral arguments it had scheduled concerning the second travel ban, and subsequently dismissed the litigation challenges to the decisions of the Fourth and Ninth Circuits as moot.[195]

Litigation against the third travel ban began almost immediately. In Hawai'i, the federal district court blocked implementation of the travel ban on the ground that it did not sufficiently set out its reasons for banning entry by nationals of the six affected countries.[196] The court did not rely on constitutional grounds. The ban was also enjoined by the district court in Maryland on substantially similar grounds, and to a similar extent, though the court found that the plaintiffs were likely to succeed on their Establishment Clause challenge to the ban.[197] At the government's request, the Supreme Court stayed both injunctions against the ban until the Ninth and Fourth Circuits had had time to review the decisions.[198] The Ninth Circuit affirmed the Hawai'i court's injunction, but only to the extent that the visitors did not have a "bona fide relationship with a person or entity in the United States."[199] The Fourth Circuit, hearing the appeal en banc in the first instance, affirmed the injunction of the Maryland district court on Establishment Clause grounds, with five of the court's thirteen judges also opining that the plaintiffs were likely to succeed on their statutory claims.[200]

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194. *See id.* at 45,165–67(2)(a)–(h) (country-by-country treatment of Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia); *id.* at 45,170(4)(c) (allowing the Secretary of Homeland Security to recommend to the President that a country be exempted from the list covered by the Executive Order).

195. *See* Trump v. Hawai'i, 138 S. Ct. 377 (Oct. 24, 2017); Trump v. Hawai'i, 138 S. Ct. 50 (Sept. 25, 2017); Michael D. Shear et al., *Supreme Court Cancels Hearing on Previous Trump Travel Ban*, N.Y. TIMES (Sept. 25, 2017), https://www.nytimes.com/2017/09/25/us/politics/trump-travel-ban-supreme-court.html [https://perma.cc/BLD7-DF6K].

196. *See* Hawai'i v. Trump, 265 F. Supp. 3d 1140 (D. Haw. 2017), *aff'd in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017) (per curiam), *cert. granted*, 138 S. Ct. 923 (Jan. 19, 2018).

197. *See* Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570, 628–29 (D. Md. 2017).

198. *See* Trump v. Hawai'i, 138 S. Ct. 542 (Dec. 4, 2017) (mem.) (granting stay of Hawai'i injunction); Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 542 (Dec. 4, 2017) (mem.) (granting stay of Maryland injunction).

199. *See Hawai'i*, 878 F.3d at 674.

200. Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 256 n.4 (4th Cir. 2018) (en banc), *cert. petition docketed*, No. 17-1270 (U.S. Mar. 9, 2018).

B. *Assessing Rational Basis Review in Immigration Law*

The potential explanations set out above for the rational basis standard of review are useful in analyzing courts' decisions in immigration law. Certainly, some explanation is required. For starters, courts have equated rational basis review with Congress's "plenary power."[201] This makes no sense, strictly speaking: true plenary power would require no review at all. And even if rational basis review did make sense, any immigration decision, whether by the legislature or the executive branch, could be justified by some invocation of the "national interest," or even the invocation of another country's national interest.[202] The only ground on which courts might overturn an executive or legislative action is a showing of some kind of animus against a particular group of people protected by the Constitution—in the case of the executive travel ban, minorities who are U.S. citizens, residents, or otherwise have strong ties to the United States. The facially legitimate and bona fide standard for reviewing executive exclusion decisions is also curious. Any executive decision should be justifiable under this standard; yet this standard too has been equated with rational basis review.[203]

I start with the first possible reason: information-forcing. It appears that the standard of review in exclusion cases—*Mandel*'s facially legitimate and bona fide standard—has an information-forcing effect, which will narrow the potential grounds that a court must consider for the exclusion order. For example, in the travel ban cases, the Executive has never argued that the government is entitled to exclude persons on the basis of religious faith. Similarly, in review of congressional immigration legislation, the government may accept that certain bases for immigration classifications—such as classifications on grounds of sex—are invalid and may refrain from suggesting them.

I now jump to the fourth reason, judicial legitimacy. Control over immigration is seen as a core aspect of national sovereignty; this concern for sovereignty was a motivating force behind the plenary power doctrine, which connotes no judicial review at all.[204] A concern for judicial legitimacy might militate in favor of *no* review of any governmental action in

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201. *See supra* note 156 and accompanying text.

202. For example, in *INS v. Pangilinan*, the Supreme Court rejected the suggestion of the respondents, Filipino soldiers who fought on behalf of the United States in the Second World War, that the United States had denied them the ability to become U.S. citizens because of "racial animus." INS v. Pangilinan, 486 U.S. 875, 886 (1988). Rather, the Court noted that the reason the United States had withdrawn the consular official in charge of naturalization from the Philippines was because the United States had been asked by Filipino officials to staunch the "manpower drain." *See id.*

203. *See supra* notes 4 & 168 and accompanying text.

204. *See* Kleindienst v. Mandel, 408 U.S. 753, 765 (1972).

the area of immigration, or at least a standard even lighter than rational basis review.[205]

The litigation over the Executive travel ban suggests that courts are applying the rational basis standard in immigration law like a decision rule, but are not afraid to look at the actors' conduct and the motivations for their conduct. This implies that the second potential explanation for rational basis review—improving governmental decision-making—has explanatory power. The Hawai'i federal district court that enjoined the second travel ban relied heavily on the President's public statements about the religious nature of the travel ban, as did the Fourth Circuit.[206] The plaintiff's lawyer in the challenge before the Fourth Circuit stated in oral argument that the ban "could be constitutional" if enacted by a president who had not made anti-Muslim statements—thus inviting the court to apply a conduct rule.[207] In these cases, the government's lawyers pressed hard on the argument that they only needed to supply one "facially legitimate and bona fide" reason for the travel ban—and failed.[208]

The equivalence of the facially legitimate and bona fide standard with rational basis review also helps courts find flexibility in the standard. As described above, rational basis review gives courts considerable license to strike down, or uphold, legislation. Similarly, the equation of the plenary power standard with rational basis review has granted courts the ability to exercise meaningful review of legislative immigration laws. The courts have thus gradually applied an amorphous standard of review to executive and legislative decisions in this area, and have used this new-found flexibility to hold the government to a higher standard of conduct than the decision rules would facially suggest.

That is not to say that the distinction between decision rules and conduct rules does not have disadvantages also in this context. The rational basis or facially legitimate and bona fide standard is unclear, and like all unclear decision rules, it risks delegitimizing the law. Furthermore, law-

205. *See, e.g.*, Ledezma-Cosino v. Sessions, 857 F.3d 1042, 1049–51 (9th Cir. 2017) (en banc) (Kozinski, J., concurring) (arguing that, in the immigration context, "the government's burden is even lighter than rational basis").

206. *See* Hawai'i v. Trump, 241 F. Supp. 3d 1119, 1137–38 (D. Haw. Mar. 15, 2017) (granting temporary restraining order against travel ban), *converting temporary restraining order into preliminary injunction*, 245 F. Supp. 3d 1227 (D. Haw. 2017), *aff'd in part, vacated in part, remanded by* 859 F.3d 741 (9th Cir. June 12, 2017), *cert. granted, order vacated*, 138 S. Ct. 377 (Oct. 24, 2017), *order vacated*, 874 F.3d 1112 (9th Cir. Nov. 2, 2017); *see also* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 575–77 (4th Cir. 2017) (en banc), *vacated and remanded*, 138 S. Ct. 353 (Oct. 10, 2017).

207. *See, e.g.*, Ilya Somin, *So What If Trump's Travel Ban Order Might Be Constitutional If Another President Issued it?*, WASH. POST (June 2, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/02/so-what-if-trumps-travel-ban-might-be-constitutional-if-another-president-did-it [https://perma.cc/5HYG-EH5L].

208. *See, e.g.*, Brief for Appellants at 33–38, *Int'l Refugee Assistance Project*, 857 F.3d 554 (4th Cir. 2017) (No. 17-1351).

yers rely on it—to their detriment, because, as Dan-Cohen pointed out, when a defendant attempts to rely too hard on a decision rule, it "melt[s] away."[209] A rule that trips up lawyers has serious shortcomings.

I finish with the third explanation for the use of the rational basis standard: the lack of agreement concerning governmental power about legislation. The true scope of congressional or executive power in immigration law is unknown.[210] Immigration law is incompletely theorized. But the incomplete nature of the theory is different from cases involving equal protection or due process legislation. In constitutional cases, the standards of review are settled, and rational basis review plays a useful role when judges cannot agree on general theories underlying a case. In immigration law, courts disagree even on whether rational basis review is an appropriate backstop standard of review at all.

Immigration law is another area of law where equal protection and due process law have exerted a gravitational pull. It seems likely that this area will become better theorized in the future on account of the judicial attention it is attracting: rational basis review may not last for long here. But it is hard to deny that there are benefits to some kind of rational basis-style review in the immigration context: even critics of the third executive travel ban concede that it is better thought out than the first two, even though its implications for national security are disputed.[211] Immigration law thus appears to be an area where the application of the rational basis review standard, although vague and not without disadvantages, conveys real benefits.

IV. CORPORATE LAW

The analogue of rational basis review in business litigation is the business judgment rule.[212] Put simply, the business judgment rule holds that

209. *See* Dan-Cohen, *supra* note 10, at 671.

210. *See, e.g.*, Motomura, *supra* note 151, at 606 ("Plenary power has prevented the growth of a coherent constitutional framework for immigration law . . . .").

211. *See, e.g.*, Editorial Board, *A Trump Travel Ban We've Seen Before*, N.Y. TIMES (Sept. 25, 2017), https://www.nytimes.com/2017/09/25/opinion/editorials/trump-travel-ban.html [https://perma.cc/RGL3-VTC4]; Noah Feldman, *Trump's New Travel Ban Could Win over Justices*, BLOOMBERG (Sept. 25, 2017, 10:09 AM), https://www.bloomberg.com/view/articles/2017-09-25/trump-s-new-travel-ban-could-win-over-justices [https://perma.cc/F9TV-STX7]. The Fourth Circuit acknowledged that the third version of the travel ban had gone through a review process that the other versions had not, even though it found that it was still "infected" by the taint of anti-Muslim bias. Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 268 (4th Cir. 2018). The Ninth Circuit likewise observed that the third travel ban contained better justifications than the second, although it found these justifications insufficient. *See* Hawai'i v. Trump, 878 F.3d 662, 692–94 (9th Cir. 2017) (per curiam).

212. I take a Delaware-centric approach to corporate law, in light of that state's importance as the place of incorporation for companies and thus the provider of companies' rules of internal governance. *See, e.g.*, Kamen v. Kemper Fin.

courts will not interfere with a board's decision on how to run a company. How it operates in reality, however, is not always clear.

A. *The Business Judgment Rule*

The business judgment rule has numerous slightly different formulations.[213] In the 1984 case of *Aronson v. Lewis*,[214] the Delaware Supreme Court held that the business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[215] The court continued that "[a]bsent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption."[216] Even if a stockholder plaintiff disagrees with the decision, she will not be successful in challenging it in court, as the court "will not substitute its own notions of what is or is not sound business judgment."[217]

The rule has a long history.[218] The rule has historically been limited, however, by the notion of what is properly seen as the directors' "business judgment." One clear limitation is the bounds placed on director power in a company's charter: if the company has restricted its directors from taking certain kinds of actions, they have no business judgment to exercise, and an action in violation of the charter is *ultra vires*.[219] Another clear historical limitation on the rule is if the company, or its directors,

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Servs., 500 U.S. 90, 98 (1991) (corporations' internal affairs are governed by law of state of incorporation).

213. *See* R. Franklin Balotti & James J. Hanks, Jr., *Rejudging the Business Judgment Rule*, 48 BUS. LAW. 1337, 1137–38 (1993).

214. 473 A.2d 805 (Del. 1984).

215. *Id.* at 812; Balotti & Hanks, Jr., *supra* note 213, at 1337. What exactly a "presumption" means in this context, however, is less clear. As commentators have pointed out, under the rules of evidence, a presumption "compels the shifting of the burden of producing evidence on the question to the party's adversary." Balotti & Hanks, Jr., *supra* note 213, at 1345 (internal quotation omitted). In any case in which the business judgment rule would apply, however—just like any negligence action—the plaintiff already bears the burden of proof and concomitantly the burden of producing evidence. The "presumption" here may instead operate as a "super-presumption"—a requirement for the plaintiff to plead facts rebutting the application of the business judgment rule with particularity and with more evidence.

216. *Aronson*, 473 A.2d at 812.

217. *See* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).

218. *See, e.g.*, Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 108–09 (2004) (citing cases). In the United States, the rule may be traced back as far as 1829. *See* S. Samuel Arsht, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93, 97 (1979) (citing Percy v. Millaudon, 8 Mart. (n.s.) 68, 77–78 (La. 1829), as the oldest case expressing the business judgment rule in the United States).

219. *See, e.g.*, Grimes v. Donald, 673 A.2d 1207, 1212 (Del. 1996).

stand on both sides of the transaction.[220] A third limit, related to the previous one, is if the directors can be shown to have some financial interest in the transaction that causes their interests to diverge from those of the stockholders at large.[221] If a stockholder plaintiff can plead that any of these circumstances applies, the plaintiff will be considered to have rebutted the presumption of the business judgment rule.[222] The directors will then have the burden of showing that the challenged action was entirely fair to the company or the stockholders as a whole.[223]

1. *Rationality and Bad Faith*

In the 1971 case of *Sinclair Oil v. Levien*,[224] the Delaware Supreme Court expressed the business judgment rule in language close to *Aronson*'s: the court would "not interfere with the judgment of a board of directors unless there [was] a showing of gross and palpable overreaching," and there was a "presumption" that the board had sound business judgment.[225] The court further held that a board's decision would not be set aside if it could be "attributed to any rational business purpose."[226] That statement obviously implied the possibility that there might be board decisions that could *not* be attributed to any rational business purpose. The court's analysis, however, showed that it believed that any board action would be legal unless it was in some way unfair to another party to whom the board owed duties—for example, minority stockholders, or a majority-

220. *See, e.g.*, Weinberger v. UOP, Inc., 457 A.2d 701, 715 (Del. 1983).

221. *See, e.g.*, *Aronson*, 473 A.2d at 815 ("Certainly, if this is an 'interested' director transaction, such that the business judgment rule is inapplicable to the board majority approving the transaction, then the inquiry ceases."); *accord In re* Trados, Inc. S'holder Litig., 73 A.3d 17, 36 (Del. Ch. 2013).

222. *See Trados*, 73 A.3d at 43.

223. The Delaware Supreme Court has held that the rebuttal of any of the underlying presumptions of the business judgment rule results in application of the entire fairness standard. *See* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 370–71 (Del. 1993). It has been persuasively argued that where the only presumption that is rebutted is that the directors failed to act on an appropriately informed basis—i.e., that they violated their duty of care—it makes little sense to invoke the entire fairness doctrine, which historically was a concept used to police potential self-dealing in trust law, but it would be more appropriate to require the plaintiff to show that she had suffered damage on account of the violation of the duty of care. *See, e.g.*, William T. Allen et al., *Function over Form: A Reassessment of the Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1318–19 (2001).

224. 280 A.2d 717 (Del. 1971).

225. *Id.* at 720.

226. *Id.* Whether "rational" means something different from "reasonable" is not clear. For the view that "rational" is a less demanding standard, see William T. Allen et al., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of* Van Gorkom *and its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449, 452 n.13 (2002). For a different view, see Arsht, *supra* note 218, at 106 n.60 ("'reasonable' and 'reasoning' are synonyms of 'rational'").

owned subsidiary.[227] The court did not suggest that, absent this kind of unfairness, a board action would be illegal.

The presumption that board action was legal unless shown to be unfair was soon shaken. In 1975, the Delaware Court of Chancery issued a temporary restraining order against an action by a majority stockholder that would have eliminated minority stockholders from the corporation on the ground that the sole purpose of the action was to eliminate the minority, and it did not have a "valid business purpose."[228] The court did not suggest what a valid business purpose might be. The court apparently believed that a valid business purpose is one that would benefit the corporation, not the majority stockholder, but the presumption that a going-private transaction would not benefit the corporation went unexplained. In three cases in the late 1970s, the Delaware Supreme Court applied this rule and held that any action taken to squeeze out the minority from a subsidiary had to have a "valid business purpose," without explaining what this valid purpose might be.[229] Those cases were unceremoniously overruled a few years later, but the courts held open the possibility, apparently foreclosed by *Sinclair*, that a business decision by a board could be set aside even if there was no sign of unfairness to a minority stockholder or self-interest on the part of the board.[230] In *Brehm v. Eisner*,[231] the Delaware Supreme Court held that the business judgment rule would not protect a board's decision if the decision was "irrational[ ]."[232]

A stockholder plaintiff usually cannot get money damages from a board for a board's poor decision just by showing that the decision was "irrational."[233] Rather, the plaintiff must generally show that the board's decision was disloyal or not taken in good faith. Although the two con-

227. It has been observed that the court's decision was confusing in that it "refer[red] to no less than three ostensible business judgment standards in various parts of its opinion." *See* Arsht, *supra* note 218, at 106.

228. *See* S. Samuel Arsht, *Minority Stockholder Freezeouts Under Delaware Law*, 32 BUS. LAW. 1495, 1496 (1977).

229. *See* Roland Int'l Corp. v. Najjar, 407 A.2d 1032, 1036 (Del. 1979); Tanzer v. Int'l Gen. Indus., Inc., 379 A.2d 1121, 1123 (Del. 1977); Singer v. Magnavox Co., 380 A.2d 969, 975 (Del. 1977). *See generally* William H. Narwold, *Going Private—The Need for a Valid Business Purpose in Delaware*, 10 CONN. L. REV. 511 (1978) (discussing *Singer*).

230. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 703 (Del. 1983).

231. 746 A.2d 244 (Del. 2000).

232. *See id.* at 264.

233. This is because almost all corporations have an exculpatory provision in their charters protecting its directors against money damages for breaches of the duty of care. *See, e.g.*, DEL. CODE ANN. tit. viii, § 102(b)(7) (West 2017). The absence of such a provision is extremely rare and, where it is absent, quite possibly the result of oversight or negligence. *See, e.g.*, *In re* Brocade Commc'ns Sys., Inc. Derivative Litig., 615 F. Supp. 2d 1018, 1046–47 (N.D. Cal. 2009) (noting that absence of exculpatory provision in charter was possibly the result of a scrivener's error); Turner v. Bernstein, 776 A.2d 530, 542–43 (Del. Ch. 2000) (granting summary judgment that directors breached their duty of care to company, in absence of charter provision).

cepts are closely linked, and good faith is an aspect of loyalty, the two terms are generally used to refer to slightly different things: a decision that is disloyal connotes subjective wrongful intent, but a decision taken in bad faith implies a conscious disregard of responsibilities.[234] The Delaware courts have linked the concept of bad faith with irrationality: a plaintiff may state a claim for bad faith if the plaintiff adequately alleges that "the decision under attack is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."[235] The Delaware Court of Chancery has also noted that bad faith may be a necessary inference from a decision that seems irrational on its face.[236] On the other hand, the Delaware courts have held that, at the pleading stage, the defendants may rebut an allegation of bad faith by offering a "plausible and legitimate" explanation of the defendants' actions.[237] The "irrationality" or "bad faith" exception has been called an "escape hatch" from the business judgment rule.[238]

A very limited (and somewhat disputed) role for rationality review is also found in the doctrine of corporate waste. A stockholder plaintiff may sue a board on the ground that it has "wasted" the company's assets by effectively giving them away.[239] As boards of directors rarely simply give away assets—other than as charitable donations, which are legal, and generally have a clear business purpose[240]—the test for waste under Delaware law is whether the board has entered into an exchange that is so one-sided that nobody of sound business judgment would believe that the exchange is fair.[241] The waste test asks whether the board has entered into a transaction that is completely irrational.[242] The waste doctrine may also be seen as an escape hatch from business judgment rule review; waste is historically

234. *See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 64 (Del. 2006). *See generally* Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629 (2010) (arguing that the obligation to act in good faith is an aspect of the duty of loyalty).

235. *See In re* Alloy, Inc., No. 5625-VCP, 2011 WL 4863716, at *7 (Del. Ch. Oct. 13, 2011) (internal quotation omitted).

236. *See In re* RJR Nabisco, Inc. S'holders Litig., No. 10389, 1989 WL 7036, at *13 n.13 (Del. Ch. Jan. 31, 1989). This reflects the near-impossibility—if not actual impossibility—of finding cases where directors appear to have made irrational decisions that are not in fact tainted by some lack of self-interest or, at least, a lack of due consideration. *See* Jay P. Moran, *Business Judgment Rule or Relic?:* Cede v. Technicolor *and the Continuing Metamorphosis of Director Duty of Care*, 45 EMORY L.J. 339, 359–60 & 359 n.107 (1996).

237. *See Alloy*, 2011 WL 4863716, at *12.

238. *See, e.g.*, *In re* J.P. Stevens & Co. S'holders Litig., 542 A.2d 770, 781 n.5 (Del. Ch. 1988).

239. *See, e.g.*, Saxe v. Brady, 184 A.2d 602, 604–05 (Del. Ch. 1962).

240. *See, e.g.*, Harwell Wells, *The Life (and Death?) of Corporate Waste*, 74 WASH. & LEE L. REV. 1239, 1261–64 (2017).

241. *E.g.*, *Saxe*, 184 A.2d at 610 (holding that waste is only present if "what the corporation has received is so inadequate in value that no person of ordinary, sound business judgment would deem it worth what the corporation has paid").

242. *See, e.g.*, Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000).

a remnant of the *ultra vires* doctrine, and an act would be deemed wasteful because the directors did not have the power to give away the corporation's assets.[243] Because there is a "strong trend" nowadays to treating waste as a species of bad faith, I shall for the most part focus on the role of rationality review in handling good faith claims in the discussion that follows.[244]

2. *The Rationality Limit in Practice*

The rationality limit of the business judgment rule bears more than a passing resemblance to the rational basis test used to judge constitutional action. Directors of Delaware companies who have been accused of acting in bad faith by taking an apparently inexplicable decision may, at the pleading stage, seek to rebut these allegations by offering reasons why their actions were not irrational.[245] These reasons do not need to be founded in the record—perhaps for the reason that any record at the pleading stage is usually minimal.[246] The Delaware Court of Chancery has held that if there is "one plausible, and legitimate" reason why a board has acted in the way it has, the board will not be held to have acted in bad faith.[247]

Like the rational basis standard in corporate law, this standard is amorphous. For one thing, it is not clear what is a "plausible" reason, let alone a "legitimate" reason.[248] More importantly, it is possible for every

243. *See* Wells, *supra* note 240, at 1243–67.

244. *Id.* at 1279.

245. For example, in the *Alloy* case, a plaintiff stockholder sued a company's chief executive officer and chief operations officer for allegedly acting in bad faith in selling the company. The stockholders complained, among other things, was that the CEO and COO, who were also directors, had acted in bad faith towards the company stockholders by accepting continued employment positions at the company in the course of the merger negotiations. The defendants raised the argument that the acquirer wanted to keep them as they had the best knowledge of the company, and that they had not improperly looked out for their own interests. The Court accepted this argument. *See Alloy*, 2011 WL 4863716, at *12.

246. *See id.*

247. *See id.*

248. Nor is it obvious how the "plausibility" standard interlocks with the usual pleading rules on motions to dismiss. In the federal courts, a complaint survives if the plaintiff states a "plausible" claim. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Delaware uses the more plaintiff-friendly "reasonable conceivability" standard. *See* Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC, 27 A.3d 531, 537 (Del. 2011). When applied at the pleading stage, the "plausible and legitimate" standard appears to reverse these usual rules, in favor of the defendant. It may be that allegations the board was simply asleep at the switch—as opposed to making a careful but poor decision, or motivated by disloyalty—are so inherently implausible that any reason explaining away those allegations will be plausible by comparison. However, this is an argument in favor of increasing the precision of the bad faith standard, so that the parties and the court can both express what they really mean.

board action to be rationalized by a lawyer after the event.[249]

But the standard is—perhaps surprisingly—not toothless, and claims that a board either acted irrationally or in bad faith do survive at the pleading stage. Most famously in Delaware, a claim that the board of Disney had acted in bad faith by paying $140 million in severance to an unsuccessful president survived a motion to dismiss and was only rejected after trial.[250] More recently, litigation relating to the recent SunEdison bankruptcy provides a striking example. The Delaware Court of Chancery held that a plaintiff stockholder had stated a claim that a director of one of SunEdison's publicly traded subsidiaries acted in bad faith by approving a transaction between the subsidiary and SunEdison that transferred cash from the subsidiary to SunEdison, which was nearly bankrupt.[251] The director had reason to believe that the transaction could be beneficial to the subsidiary, even though there was a risk that it would not get the money back.[252] The counsel for the defendant director unsuccessfully urged that "all [the court] need[ed]" was one legitimate reason why the director's actions might have been taken in good faith—a position reminiscent of the position taken by the government's lawyers before the Fourth Circuit in the travel ban case.[253] Just like the Fourth Circuit, the court rejected counsel's attempt to rely heavily on the rational basis standard.[254]

The number of cases in which a director has been found to have been disinterested and independent, and to have acted with due care, but has nevertheless been adjudged liable for making an "irrational" decision, is zero. It could not be higher.[255] However, the ability of the parties to litigate, at the pleading stage, the question whether or not there is a rational basis for the board's decision is important. If a corporate case survives a motion to dismiss because the challenged decision appears either irrational or taken in bad faith, the pressure to settle may become so intense, because of the potential financial liability involved, that it may almost be

249. For example, in *Kamin v. American Express Co.*, the New York Supreme Court suggested that a decision by the American Express board of directors to distribute shares of another company to its stockholders, rather than sell them and realize the tax loss, was rational, because the directors had considered the effect on the company's stock price. *See* Kamin v. Am. Express Co., 383 N.Y.S.2d 807, 811–12 (1976). Even though the board's decision was "indisputabl[y] . . . wrong," the court went out of its way to suggest that the board had a reasonable basis for its decision. *See* Bainbridge, *supra* note 218, at 98.

250. *See In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 760 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006).

251. *See* Transcript of Oral Argument at 24–25, Aldridge v. Blackmore (Del. Ch. Dec. 8, 2016) (C.A. No. 12196-CB).

252. *Id.* at 66.

253. *Id.* at 19; *cf.* Brief for Appellants at 33–38, Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017) (No. 17-1351).

254. *See* Transcript of Oral Argument at 59–60, *Aldridge* (Del. Ch. Dec. 8, 2016) (C.A. No. 12196-CB).

255. *See* Allen et al., *supra* note 223, at 1298.

akin to a decision on the merits.[256] For present purposes, then, the rationality standard of the business judgment rule continues to play a role in corporate law.

B. *Assessing Rationality Review in Corporate Law*

Part II set out four potential explanations for rational basis review in the equal protection and due process contexts: information-forcing, promoting better decision-making, permitting incompletely theorized agreements and supporting judicial legitimacy. This part assesses whether these explanations have any power to explain why courts look to (or appear to look to) a rational basis standard when assessing bad faith claims in corporate law.

The first and third reasons, in my view, have little explanatory power. There is only one "valid business reason" in corporate law: to make long-term wealth for the stockholders.[257] And the different ways in which a corporate board can choose to promote long-term wealth—for example, deciding to invest in certain lines of business, pay a certain amount to a chief executive, or accept a merger offer from another company—are relatively limited. A board of directors is not a legislature that may have myriad different conceptions of social welfare and tools to advance it. A court will not appreciably narrow the field of debate by forcing a board of directors to state its reasons for a decision, nor will a board make the rationality of the corporate decision easier to assess by focusing on the logical connection between the board action and the board's stated purpose for it. And for a related reason, the concept of the incompletely theorized agreement has little or no explanatory power in the corporate law context: it is settled that a corporate board must act in good faith to advance the long-term interests of the stockholders.[258]

Judicial legitimacy is also an unsatisfying explanation. Corporate law rarely creates questions of judicial legitimacy or backlash. Unlike when reviewing legislative action, when a court disapproves of a director's decision, there is no benefit to terming the behavior irrational rather than venal or the product of a conflict of interest to minimize controversy. Corporations are creatures of state law, and courts lack no legitimacy when they review board's decisions. To the contrary, it has been argued that the Delaware courts use their decisions as "morality tales" to guide the correct

256. The pressure to settle after losing a motion to dismiss is driven in part by the fact that an unfavorable decision on the merits will deprive directors of the benefit of corporate indemnification, and may even in some situations deprive them of the benefit of corporate liability insurance funded by the company.

257. *See* Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 155, 167 (2012).

258. In this regard, Delaware law differs from that of most other states, which provides that corporate boards may seek to promote interests other than those of stockholders. *See, e.g.*, Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 85 (1999).

behavior of corporate directors.[259] A court can generally describe a director's conduct in the terms it sees fit.[260]

That leaves the second potential explanation: promoting better decision-making. Professor Dan-Cohen's distinction between conduct rules and decision rules is now well accepted in corporate law.[261] It was first adopted by Melvin Eisenberg, who noted that "corporate law presents a textbook case of the distinction between conduct rules and decisional rules."[262] Eisenberg noted that standards of conduct are extremely stringent—a director is required to act with "unflinching" loyalty—but that the standards of review are not.[263] In cases involving the duty of care, there are two possible explanations for the divergence between the standard of conduct and the standard of review. First, society wishes to encourage directors simultaneously to act with due care but also to ensure that they are not risk-averse, in order for them to take wealth-maximizing decisions on behalf of diversified stockholders.[264] Second, it may be unfair for courts to judge directors' decisions with the benefit of hindsight, and so the legal system will only impose liability if the decision turns out to be irrational.[265]

More generally, in cases involving issues of care or loyalty, there is a "differential knowledge of legal rules."[266] Businesspersons are not expected to know, and cannot know, all of corporate law. The standards of conduct directed to company managers and directors should be simple and easily communicated; the legal standards that may be applied by a reviewing court can be much more complicated.[267] For many business decisions, of course, it is to be expected that lawyers will be consulted. In these situations, complex conduct rules can be more "acceptable."[268] Nevertheless, even where a lawyer is involved, it is not certain that the businessperson will fully internalize the standard of review, and may be safer

259. *See* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1045, 1101 (1997). It has earlier been claimed that courts prefer to label directors as careless rather than venal, and that "negligence is a euphemism for dishonesty." *See* Joseph W. Bishop, Jr., *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1101 (1968).

260. The only restriction that Delaware faces is that its corporations might relocate out of state. But investors are probably in favor of blunt speaking by the courts. "[T]he state which 'rigs' its code to benefit management will drive debt and equity capital away." Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 289 (1977).

261. *See, e.g.*, *In re* Trados, Inc. S'holder Litig., 73 A.3d 17, 35 (Del. Ch. 2013) ("Delaware corporate law distinguishes between the standard of conduct and the standard of review." (citation omitted)).

262. *See* Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 463 (1993).

263. *See id.* at 440–41.

264. *See id.* at 465.

265. *See id.*

266. *See id.* at 466.

267. *See id.*

268. *See id.*

by following a brighter-line conduct rule. The difference between the standard of conduct and standard of review, on Professor Eisenberg's account, will have a beneficial effect.

But as Professor Dan-Cohen noted, and as alluded to above, the distinction between conduct rules and decision rules comes at a cost. It casts a shadow of illegitimacy over the law. A court, when assessing a good faith claim, should be able to figure a "plausible and legitimate reason" for any business decision. When a court chooses not to, it looks as if the court is applying a double standard—which, of course, it is.

Professor Eisenberg has justified this acoustic separation on the ground that "primary actors"—corporate directors and executives—will guide their conduct better by relying on a simple conduct rule than trying to conform to complicated decision rules.[269] And it is surely better to instruct a corporate executive to act with perfect care at all times, rather than to inform her that even if she does not, she will not be held liable in damages: if the executive is given the first instruction, at least she will try to do her best. Similarly, in cases implicating the duty of loyalty, it may be better for the executive to hear an uncompromising message that she must act with complete and total fidelity for the interests of the stockholders—rather than that, so long as she makes a reasonable effort, she will be all right.[270]

But employing something close to a rational basis standard as a decision rule in assessing good faith claims does not obviously advance the public interest in having directors act carefully and with perfect good faith at all times. As Eisenberg concedes, the acoustic separation in corporate law is minimal.[271] Significant corporate decisions will be vetted by in-house lawyers, and quite likely outside lawyers too. Holmesian "bad executives" may hear the courts' true decision rule in the absence of acoustic separation. Not only that, but lawyers may confuse the true nature of the rational basis decision rule with a conduct rule, and accordingly may rely too hard on the standard and may make arguments that are fated to lose, as the SunEdison case cited above shows.[272] A standard that even skilled lawyers find confusing is very unhelpful. For these reasons, there seems to be little benefit in testing corporate directors' decisions against the standard of whether there is any "valid business reason" for them.

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269. *See id.* at 462–68.

270. The most famous formulation of this comes from then-Chief Judge Cardozo in *Meinhard v. Salmon*, in which he exhorted that the "standard of behavior" for joint venturers was "[n]ot honesty alone, but the punctilio of an honor the most sensitive." *See* Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928). The language is cryptic, but the aspirational standard of conduct shines through.

271. *See* Eisenberg, *supra* note 262, at 466 ("Of course, the complex standards of review of corporate law will often be heard by, and will therefore affect the conduct of, primary actors.").

272. *See supra* note 251–56 and accompanying text.

In my view, it is not helpful for business courts to speak as if they are reviewing directors' decisions for their rationality, or to encourage the parties to speak in such terms. Nor is there any need for the courts to do so. In dismissing a claim that a defendant director failed to act in good faith, a court need not point to a single valid business reason that insulates the director from a charge of bad faith; instead, the court may hold that the plaintiff failed to plead sufficiently convincingly that the director consciously disregarded her duties. The court could also note whether other attributes of a traditional loyalty claim are also present—for example, whether there are allegations that at the same time as disregarding her duties, the director was laboring under a conflict of interest. This would promote a more realistic analysis that would more clearly address the fundamental question posed by any good faith claim—whether the director was disloyal and should therefore be liable in damages—without producing dictum that is liable to confuse the real issues.[273]

The same considerations apply when a court is presented with a waste claim. Professor Wells has noted that a plaintiff's allegations that a board has acted "irrational[ly]" in dissipating the corporation's assets are somewhat "fictive," and there is always a "whiff" of an underlying fiduciary violation in such a case.[274] In this situation, it would be more realistic—and honest—simply to focus on the alleged fiduciary violation, rather than whether the board had acted rationally. To my knowledge, no cases or motions in the Delaware courts would have been decided any differently if courts avoided assessing whether directors had acted rationally, and focused more directly on questions of loyalty and attention to duties.[275]

CONCLUSION

This Article has analyzed rational basis review in the constitutional, corporate, and immigration law contexts. I have attempted to explain what practical benefits the rational basis test in the constitutional context may provide. The Article has then examined whether the rational basis test may also provide similar benefits in immigration law: in my view, the answer is yes. By contrast, there is little justification for using the standard in corporate law. Setting aside the constitutional considerations behind use of the rational basis standard of review by courts, which this Article has not attempted to explore, when courts are considering importing the ra-

273. *See* Strine et al., *supra* note 234, at 634 (arguing that the "important work of substance" is to focus on whether or not there has been a breach of the duty of loyalty).

274. Wells, *supra* note 240, at 1290.

275. It is questionable whether a court really needs to focus on whether the directors have sufficiently attended to their duties, rather than self-dealing. Even when it was possible for a shareholder to bring a damages case for breach of the duty of care, "[t]he search for cases in which directors of industrial corporations have been liable in derivative suits for negligence uncomplicated by self-dealing is a search for a very small number of needles in a very large haystack." Bishop, Jr., *supra* note 261, at 1099.

tional basis standard into a new area of law, they should carefully consider the advantages and disadvantages of doing so, and should not simply adopt the standard that is well-known from constitutional law.