Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity"

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Introduction

The Federal Rules of Civil Procedure allow a trial court to dismiss a case prior to discovery if the plaintiff cannot prove any set of facts that would entitle her to judgment on the merits.[1] Courts applying this rule are expected to be lenient, assuming all the complaint's allegations to be true and drawing every inference in the light most favorable to the plaintiff.[2] If the complaint pleads facts sufficient to support a plausible inference that the defendant is responsible for the alleged harm, the court should refuse to throw the case out,[3] even where recovery seems unlikely.[4] Only where the plaintiff makes allegations that could not plausibly support an ultimate judgment should a court grant a motion to dismiss.

This black-letter rule is simple enough, but things get complicated when the case at hand involves the "rational basis" test that courts apply to the merits of many constitutional claims. That test imposes an exceptionally severe burden on plaintiffs—one at least as severe as the 12(b)(6) rule is lenient. Indeed, courts have often expressed "perplex[ity]"[5] and "confus[ion]"[6] about the apparent clash of the pro-plaintiff 12(b)(6) standard and the pro-defendant rational basis stan-

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1 Fed. R. Civ. P. 12(b)(6).

2 H. J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 249-50 (1989).

3 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

4 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

5 Brown v. Zavaras, 63 F.3d 967, 971 (10th Cir. 1995).

6 Baumgardner v. Cnty. of Cook, 108 F. Supp. 2d 1041, 1055-56 (N.D. Ill. 2000).

dard. Because plaintiffs in rational basis cases face the difficult task of proving that the challenged law is positively irrational, some courts have been tempted to short-circuit such lawsuits by dismissing them prior to any fact-finding, on the theory that plaintiffs could never introduce enough evidence to disprove every conceivable basis for the laws they challenge, and thus could not possibly prevail under the rational basis test.[7]

Yet plaintiffs *can* win rational basis cases—many have done so.[8] Paradoxically, some precedents seem to say that they cannot introduce the evidence necessary to do so. If a rational basis lawsuit can be dismissed whenever a court can imagine a rationale for the challenged law, then applying rational basis analysis at the 12(b)(6) stage would mean reaching the merits on a motion to dismiss. But courts are not supposed to do this;[9] courts are supposed to indulge plausible inferences in the plaintiff's favor at that point. In short, this truncation of rational basis cases perverts that test into a set of magic words whereby a government defendant can have a constitutional challenge dismissed on its mere say-so. It makes rational basis review into what courts have long said it is not: "a rubber stamp of all legislative action."[10]

Fortunately, some often-overlooked cases provide a solution to this "dilemma."[11] The perplexity courts have expressed is caused by exaggerated language in some decisions that inaccurately describe the

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[7] *See, e.g.*, Hettinga v. United States, 677 F.3d 471, 479 (D.C. Cir. 2012); Jones v. Temmer, 829 F. Supp. 1226, 1233 (D. Colo. 1993), *vacated as moot* 57 F.3d 921 (10th Cir. 1995).

[8] *See* Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CAL. L. REV. 1049, 1055 n.35 (1979) (citing cases); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 416-17 (1999) (same). Robert McNamara and Clark Neily of the Institute for Justice estimate that the Supreme Court has ruled in favor of plaintiffs in 21 out of 105 rational basis cases filed between 1970 and 2010, which is about 17 percent of the cases. *See* Brief of Appellants at 23, Flynn v. Holder, No. 10-55643 (9th Cir. Sept. 1, 2010).

[9] *See* Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 40 (1992) ("The judicial practice of hypothesizing conceivable purposes conflicts with the ordinary practice under Rule 12(b)(6) of the Federal Rules of Civil Procedure under which '[a] motion to dismiss for failure to state a claim. . . is to be evaluated only on the pleadings.'").

[10] Hadix v. Johnson, 230 F.3d 840, 843 (6th Cir. 2000); *accord* Nunez-Reyes v. Holder, 646 F.3d 684, 715 (9th Cir. 2011), *overruled on other grounds*, 446 F. App'x. 851 (9th Cir. 2011) (en banc).

[11] Giarratano v. Johnson, 521 F.3d 298, 303 (4th Cir. 2008).

rational basis test in extreme and formalistic terms.[12] The better understanding of rational basis, as explained in these earlier cases, views the test as an evidentiary presumption, not a conclusive presumption or a rule of law.[13] It does not impose on plaintiffs the logically impossible task of proving an infinite set of negatives or overcoming "fanciful conjecture[s]."[14] Courts resolving motions to dismiss in rational basis cases should address the 12(b)(6) motion like any other such motion: if it appears on the face of the complaint that the plaintiff could, if given the opportunity, prove that the challenged law is not rationally related to a legitimate government interest, Rule 12(b)(6) entitles her to gather and introduce the evidence to do so. So long as the pleading itself is not flawed, a plaintiff in a rational basis case must have the chance to meet her difficult, but not impossible, burden of proving that the challenged law is irrational.

This article begins in Part I with an overview of the rational basis test, and specifically with the source of all the confusion: two competing understandings of rational basis, the "formalist" and the "realist" views. The formalist view holds that so long as a hypothetical legislature might have thought the challenged statute would promote a valid governmental objective, the actual facts of the matter are irrelevant to the statute's constitutionality. The realist view, by contrast, holds that rational basis is an evidentiary presumption, admittedly a strong one, but one which can be rebutted by sufficient proof. Part II, describes how, from the earliest days of the rational basis test's application, the Supreme Court has held it to be only an *evidentiary* presumption, and has allowed plaintiffs to introduce facts to prove a challenged law unconstitutional—and has even reversed lower courts that ruled otherwise. Indeed, the Supreme Court has ruled in favor of plaintiffs on the merits in many rational basis cases. Part III addresses the standards applied in 12(b)(6) motions and the confusion some courts have expressed when deciding whether to dismiss rational basis cases at the pleading stage. Part IV describes the leading recent decision on the interplay between the rational basis standard and the motion to dismiss.[15] This article concludes that plaintiffs whose complaints make clear specific, factual allegations supporting the contention that a chal-

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[12] *See, e.g.*, FCC v. Beach Commc'ns, 508 U.S. 307, 313-16 (1993); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 178-79 (1980).

[13] *See Beach Commc'ns.*, 508 U.S. at 313-16; *Fritz*, 449 U.S. at 178-79.

[14] Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209 (1934).

[15] *See generally* Wroblewski v. City of Washburn, 965 F.2d 452, 458-60 (7th Cir. 1992).

lenged law is not rationally related to a legitimate government interest ought to have their day in court.

I. FORMALISM AND REALISM IN RATIONAL BASIS SCRUTINY

The rational basis test is the lowest tier of constitutional scrutiny. As the "paradigm of judicial restraint,"[16] it prohibits only the most excessively arbitrary government action.[17] This test accords the government extensive deference in discerning and addressing social problems.[18] A court employing rational basis scrutiny presumes that the challenged law or government action is constitutional, and requires the plaintiff to prove that it is not rationally related to a legitimate government interest.[19] So long as there is some plausible justification for the challenged law, and the relationship between the legislature's goal and the means it chooses is not so attenuated as to become arbitrary or irrational, the law will be upheld.[20] A court applying this test will rule the law constitutional even if it only partially addresses the perceived problem.[21]

The rational basis test has been criticized by those who view it as excessively lenient toward the government.[22] Be that as it may, the law of rational basis review is complicated by the inconsistent and often needlessly exaggerated language with which courts have described the test.[23] This has resulted in two different approaches to the rational basis test: the "formalist" and the "realist" approaches.[24]

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16 *Beach Commc'ns*, 508 U.S. at 314.

17 District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008).

18 Armour v. City of Indianapolis, Ind., 132 S. Ct. 2073, 2080 (2012).

19 *Id.*

20 *Id*.

21 New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("Legislatures may implement their program step by step, in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.") (citations omitted).

22 *See, e.g.*, Hettinga v. United States, 677 F.3d 471, 480-83 (D.C. Cir. 2012) (Brown, J., concurring); Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 898, 908 (2005); TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW 127-28 (2010).

23 *See, e.g.*, Robert G. Natelson, *Constitution and the Public Trust*, 52 BUFFALO L. REV. 1077, 1175-76 (2004); Suzanne B. Goldberg, *Equality Without Tiers,* 77 S. CAL. L. REV. 481, 512-18 (2004); Farrell, *supra* note 8, at 413-15.

24 These terms have often been abused. As Brian Tamanaha and others have shown, the judges of the early twentieth century who were often accused by their Progressive opponents of being formalists were often innocent of that charge under any reasonable interpretation of the

The formalist approach is most notably articulated in *FCC v. Beach Communications*,[25] a 1993 decision in which the Court said that the rational basis test requires courts to uphold a law "if there is any reasonably conceivable state of facts that could provide a rational basis" for it.[26] Although a plaintiff must "negative every conceivable basis which might support" the challenged law if she is to prevail,[27] the *Beach Communications* Court added that the actual facts considered by the legislature when it passed the challenged law are "entirely irrelevant for constitutional purposes," and that "the absence of legislative facts explaining the [challenged law] . . . has no significance."[28] These statements seem to render the rational basis test impregnable, because a plaintiff could not possibly disprove an infinite set of theoretically imaginable facts and speculations so as to prove the law irrational, especially if the genuine facts she relies upon to prove this are declared irrelevant at the outset.[29] Such an approach is "formalistic" because it eschews the actual facts of legislative and social experience in favor of an abstract formula that seeks to give one right answer to any constitutional challenge.[30] And that one right answer would seem

term. *See generally* BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE 28-30, 34 (2010). But even if the word "formalism" is inadequate for historical purposes, what it purports to describe—a syllogistic or mechanistic legalism which reduced the court to a machine churning out decisions through ratiocination without recourse to sociological facts, *id.* at 1-2, does accurately characterize the *Beach Communications* Court's version of the rational basis test.

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

[26] *Id*. at 313.

[27] *Id.* at 315 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

[28] *Id.* (citation and quotation marks omitted).

[29] *Cf.* United States v. Wilgus, 638 F.3d 1274, 1289 (10th Cir. 2011) ("In the abstract, such a thing can never be proven conclusively; the ingenuity of the human mind, especially if freed from the practical constraints of policymaking and politics, is infinite.").

[30] *Cf.* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 199 (1992) (characterizing formalism as an approach to law that depends on "deductive legal reasoning" and "aspir[es] to be able to render one right answer to any legal question."); Avery Wiener Katz, *The Economics of Form And Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 516 (2004) ("Formalism entails restriction to a smaller set of decisional materials (for example, the presence or absence of a wax seal, as it relates to the enforceability of a written promise); while substantive interpretation permits and sometimes directs attention to a larger set of decisional materials (for example, the underlying facts of a business relationship, as they relate to the presence or absence of contractual consideration)."). In his seminal article, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908), Roscoe Pound contrasted the formalistic legal approach which judged law "by the niceties of its internal structure" and "the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation," *id.* at 605, with the modern, realistic approach by which courts considered the "vital needs of present-day life," *id.* at 614, and "the existing commercial and industrial situation." *Id.* at 616. He condemned Supreme Court decisions that relied on

always to be a ruling against the plaintiff. As Justice John Paul Stevens observed in his separate opinion in *Beach Communications*, "this formulation sweeps too broadly, for it is difficult to imagine a legislative classification that could *not* be supported by a 'reasonably conceivable state of facts.' Judicial review under the 'conceivable set of facts' test is tantamount to no review at all."[31]

Other decisions, however, have taken a less extreme, "realist" view of rational basis. In these cases, the Court has indicated that in rational basis cases, a judge is not required to "accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation."[32] And it has several times relied upon the facts introduced into evidence to declare laws invalid under the rational basis test, instead of imagining theoretical justifications. For example, in *City of Cleburne v. Cleburne Living Center*,[33] the Court ruled that a city's decision to deny a permit to the Featherston home for the mentally handicapped lacked any rational basis. In *Romer v. Evans*,[34] the Court likewise invalidated a Colorado law prohibiting homosexuals from obtaining certain benefits. In *Lawrence v. Texas*,[35] it ruled state laws criminalizing private, adult, consensual sexual acts unconstitutional. In *Department of Agriculture v. Moreno*,[36] it found that a federal rule barring "hippies" from receiving food stamps violated the Constitution. In all of these cases, and more,[37] courts have struck down laws as unconstitutional on the basis of actual evidence, even though the plaintiff could not actually have disproved every conceptually possible foundation for the challenged laws. One could easily have imagined, for example, that the restriction on the availability of food stamps in *Moreno* was motivated by a

"logical deduction" without "inquir[ing] what the effect of such a deduction will be, when applied to the actual situation." *Id.* This appears to be a very apt description of the *Beach Communications* understanding of rational basis, under which the plaintiff's actual situation is explicitly declared to be irrelevant.

31 FCC v. Beach Commc'ns, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring in result).

32 Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975).

33 City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

34 Romer v. Evans, 517 U.S. 620 (1996).

35 Lawrence v. Texas, 539 U.S. 558 (2003).

36 Dept. of Agric. v. Moreno, 413 U.S. 528 (1973).

37 *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985). *See also* Bennett, *supra* note 8, at 1055 n.35 (1979) (citing cases); Farrell, *supra* note 8, at 416-17 (same).

desire to preserve the public fisc,[38] or that the criminalization of private sexual acts in *Lawrence* was meant to safeguard public morality.[39]

Decisions like these have tempted commentators to argue that there is an unacknowledged sub-category of rational basis cases, "rational basis with bite," in which courts will invalidate laws that appear to target disfavored groups.[40] But when Justice Thurgood Marshall made this claim in his concurring opinion in *Cleburne*,[41] the majority did not agree.[42] Instead, it viewed its means-ends analysis as an ordinary application of rational basis review. That standard requires some minimum level of genuine *rationality*, a standard the City did not meet when it refused to permit the Featherston home.[43] The mere fact that the home would house the mentally handicapped was not enough to sustain differential treatment because "this difference is largely irrelevant unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses . . . would not."[44] Because there was no

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[38] Justice Rehnquist and Chief Justice Burger made this argument in their dissent. 413 U.S. at 545-46 ("our role is limited to the determination of whether there is any rational basis on which Congress could decide that public funds made available under the food stamp program should not go to a household containing an individual who is unrelated to any other member of the household."). To highlight the inconsistent nature of the rational basis test, note that in *Armour v. City of Indianapolis, Ind.*, preserving the public fisc was held to be sufficient justification for discriminatory treatment of taxpayers. 132 S. Ct. 2073, 2081-82 (2012).

[39] *See Lawrence*, 539 U.S. at 601-02 (Scalia, J., dissenting).

[40] *See, e.g.*, Andrew Koppelman, *DOMA, Romer, And Rationality*, 58 DRAKE L. REV. 923, 928 (2010); Michael Allan Wolf, *Taking Regulatory Takings Personally: The Perils of (Mis)reasoning by Analogy*, 51 ALA. L. REV. 1355, 1377-78 (2000); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987).

[41] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 458 (1985) (Marshall, J., dissenting) ("[T]he Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called 'second order' rational-basis review rather than 'heightened scrutiny.'").

[42] *Id.* at 448. The Court has maintained ever since that there is only one rational basis standard. *See, e.g.*, Heller v. Doe, 509 U.S. 312, 321 (1993); Schweier v. Wilson, 450 U.S. 221, 234 (1980). Interestingly, Justice Marshall himself appears to have accepted this view. *See* Lyng v. Int'l Union, 485 U.S. 360, 375 (1988) (Marshall, J., dissenting) ("The rational basis test contains two substantive limitations on legislative choice: legislative enactments must implicate legitimate goals, and the means chosen by the legislature must bear a rational relationship to those goals. In an alternative formulation, the Court has explained that these limitations amount to a prescription that 'all persons similarly situated should be treated alike.'" (quoting *Cleburne*, 473 U.S. at 439)); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 184 (1980) (Brennan and Marshall, JJ., dissenting) ("[T]he rational-basis standard . . . will not be satisfied by flimsy or implausible justifications for the legislative classification, proffered after the fact by Government attorneys.").

[43] *Cleburne*, 473 U.S. at 448.

[44] *Id*.

reasonable justification for the denial of the permit, that denial failed ordinary rational basis scrutiny.[45] Justice Stevens and Chief Justice Burger made this point more clearly when they answered Justice Marshall in their concurring opinion:

> In *every* equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a "rational basis." The answers will result in the virtually automatic invalidation of racial classifications and in the validation of most economic classifications, but they will provide differing results in cases involving classifications based on alienage, gender, or illegitimacy. But *that is not because we apply an "intermediate standard of review" in these cases*; rather it is because the characteristics of these groups are sometimes relevant and sometimes irrelevant to a valid public purpose, or, more specifically, to the purpose that the challenged laws purportedly intended to serve.[46]

Since then, the Court has consistently maintained that there is only one rational basis test—and that the test, though deferential, has limits.[47] In *Romer,* the Court reiterated that the rational basis test is not a formalistic ritual whereby courts conjure up justifications for a law; it is an assessment of basic reasonableness in light of actual facts.[48] Even in rational basis cases, courts must "insist on knowing the relation between the classification adopted and the object to be attained."[49] This basic level of means-ends scrutiny is deferential enough that "a law will be sustained if it can be said to advance a legitimate government interest," even if the rationale for that law "seems tenuous"—but every law must be "narrow enough in scope

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[45] *Id*.

[46] *Id*. at 453-54 (emphasis added).

[47] In *Lawrence*, for instance, Justice O'Connor again suggested that there are two different rational basis standards, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring), but the Court again refused to endorse that view. *Id.* at 578.

[48] Romer v. Evans, 517 U.S. 620, 632 (1996).

[49] *Id*.

and grounded in a sufficient factual context for us to ascertain some relation between the classification and the purpose it serve[s]."[50]

Four years later, in *Village of Willowbrook v. Olech*,[51] the Court held that, although negative attitudes or a desire to single out a particular person or group for disfavored treatment will indicate the lack of a rational basis, a plaintiff can also prevail on a rational basis challenge "quite apart from the [government]'s subjective motivation," if the difference in treatment does not rationally relate to a legitimate government interest.[52] In *Metropolitan Life Insurance v. Ward*,[53] the Court even applied this fact-based rational basis inquiry to an economic regulation. That case involved an Alabama law that gave preferences to in-state insurance companies. Such an effort to "give[ ] the 'home team' an advantage"[54] would violate the Equal Protection Clause, the Court observed. But the Justices did not invalidate that law—they remanded to the lower courts to determine whether, in light of the evidence, the law was rationally related to a legitimate government interest.[55]

Thus, the precedent does not establish two fixed categories of rational basis review. Rather, it reveals confusion as to how the single, basic standard of rationality applies; a confusion exacerbated by the formalistic language of *Beach Communications* and similar cases. While *Cleburne, Romer, Olech, Ward*, and other decisions employ a realistic approach to the question of whether a challenged law "rationally advances a reasonable and identifiable governmental objective,"[56] the language of *Beach Communications* implies that courts should engage in a hypothetical enterprise, conjuring up rationalizations for challenged laws in disregard of the actual facts. As Professor Bice has observed, this formalist approach almost inevitably results in a ruling for the government, because the judge acts like an anthropologist who

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[50] *Id.* at 632-33. *See also* Vance v. Bradley, 440 U.S. 93, 97 (1979) (Rational basis is violated if "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.").

[51] Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam).

[52] *Id.* at 565.

[53] Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985).

[54] *Id*. at 878. Although ordinarily a law discriminating against out-of-state businesses would violate the Commerce Clause, such a challenge was not raised in *Ward* because Congress had waived its Commerce Clause exclusivity. *See id.* at 880.

[55] *Id.* at 875 n.5.

[56] Schweiker v. Wilson, 450 U.S. 221, 235 (1981) (emphasis added).

"posits bizarre goals to explain unusual activity and then uses those bizarre goals to determine that the behavior is rational."[57] Whether or not the judge imagines "bizarre" goals,[58] this approach is formalistic because it eschews any consideration of the facts and asks only whether an imaginary lawmaker might theoretically have believed the law was a good idea,[59] and upholds the law on the basis of deduced abstractions, rather than experience. In the realist category of cases, by contrast, the court "conceive[s] of its task as identifying the legislature's *probable* goals based on the available evidence."[60] In these decisions—which another writer calls "'true rational basis' cases because they involve a true search for rationality"[61]—the court asks whether the facts broadly support the government's decision as a basically reasonable approach to the problem at issue, or whether such facts are lacking, or merely pretextual. Such a realistic approach "is necessary," writes Professor Bice, "if the rational basis test is to be capable of invalidating legislation" at all.[62] Or, as Professor Fallon puts it, "[f]or rationality review to be real rather than a sham, the court must be willing to make some independent assessment of legislative purpose."[63]

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57 Scott H. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 30 (1980).

58 There are such cases. *See, e.g.*, Meadows v. Odom, 360 F. Supp. 2d 811, 824 (M.D. La. 2005), *vacated as moot* 198 F. App'x. 348 (5th Cir. 2006) (upholding a burdensome licensing requirement for florists on the fanciful notion that legislators might have feared that consumers would scratch their fingers on the wires untrained florists use to hold flower arrangements together).

59 As Judge Irving Goldberg put it, this conception of rational basis review "can hardly be termed scrutiny at all. Rather, it is a standard which invites us to cup our hands over our eyes and then imagine if there could be anything right with the statute." Arceneaux v. Treen, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring).

60 Bice, *supra* note 57 at 30. *Cf.* Schweiker v. Wilson, 450 U.S. 221, 235 (1981) (challenged law is constitutional if it "rationally advances *a reasonable and identifiable governmental objective*.") (emphasis added).

61 Donald Marritz, *Making Equality Matter (Again): The Prohibition Against Special Laws in the Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 161, 176 (1993).

62 Bice, *supra* note 57, at 30-31.

63 Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 316 n.38 (1993). *See also* Frank I. Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487, 505 (1979) ("the framers obviously were concerned that majoritarian legislatures would, unless externally controlled, be too insensitive to the need for evenhandedness . . . [and] the more we thought that majoritarian legislators were prone to search for gains from exploitation rather than for gains from trade, the more importance and value we should attach to rationality review."); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 69 (1985) (rationality review should "ensure that disparate treatment is justified by reference to something other than an exercise of political power by those benefited"). One commentator

In fact, the Supreme Court has explicitly endorsed this realist approach to rational basis since the earliest days of that test, and it has repeatedly disavowed the formalist approach. Notwithstanding the hyperbolic language found in some rational basis decisions, that test does not require judges to "muse endlessly about [a] regulation's conceivable objectives,"[64] and it never has. Instead, it requires judges, while presuming the validity of the law in question, to address the merits of a constitutional argument in light of actual evidence that the plaintiff bears the burden of introducing. Only this understanding of rational basis preserves the right of plaintiffs to prove their cases when they challenge the constitutionality of a law.

II. RATIONAL BASIS AS AN EVIDENTIARY PRESUMPTION

The constitutional standard now known as rational basis was first adopted by the Supreme Court in *Nebbia v. New York*, in 1934.[65] That case eliminated the "affected with a public interest" standard, in use since 1876,[66] and adopted the far more expansive rule that government may "adopt whatever economic policy may reasonably be deemed to promote public welfare," so long as "the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory."[67] Courts must indulge "every possible presumption . . . in favor of [the challenged law's] validity," and must not rule such a law invalid "unless palpably in excess of legislative power."[68]

As Professor Solove has noted, one central question raised by the advent of rational basis review was whether a court could uphold a challenged statute on a formalistic basis by hypothesizing rationalizations for that law, or whether the court was confined to actual, judi-

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described Justice Stevens' realistic approach to rational basis, as articulated in his *Cleburne* concurrence, as "de-mystification." Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146, 1161-64 (1987).

64 Brown v. Barry, 710 F. Supp. 352, 356 (D.D.C. 1989).

65 Nebbia v. New York, 291 U.S. 502 (1934). There were, of course, precursors to the rational basis test. *See, e.g.*, Powell v. Pennsylvania, 127 U.S. 678, 685-86 (1888). But it was *Nebbia* that marked the final adoption of that test as the standard of review across the whole range of economic and social legislation.

66 *See* Munn v. Illinois, 94 U.S. 113, 126 (1876).

67 *Nebbia*, 291 U.S. at 537.

68 *Id.* at 538.

cially determinable facts.[69] In other words, could a judge rule a law unconstitutional where the plaintiff proved that lawmakers had proceeded on a factual misunderstanding, error, or pretext (the realist view)? Or could a judge uphold such a law on the grounds that it *might hypothetically have been believed* to serve a legitimate interest (the formalist view)? In the same vein, could a law, which on its face appeared reasonable, nevertheless be found unconstitutionally irrational once the real facts on the ground became known? Or could a law that was reasonable at one time be rendered unreasonable and unconstitutional by a proven *change* in facts?

Very soon after adopting the rational basis test in *Nebbia,* the Supreme Court answered these questions in a series of decisions that have often been misread or even ignored outright.[70] *United States v. Carolene Products*,[71] for example, is often seen as one of the cornerstones of the New Deal retreat from judicial skepticism.[72] There, the Court announced a "narrower scope for operation" of the rational basis test in cases involving laws that infringed one of the first ten amendments, or restricted democratic processes, or targeted minorities.[73] But it also reiterated the relevance of real facts when applying the rational basis test. Laws "affecting ordinary commercial transactions" should be presumed valid, the Court said,[74] if, "in the light of the facts made known or generally assumed," it was shown to lack a reasonable foundation.[75] Where the question of a challenged law's rationality "depends upon facts beyond the sphere of judicial notice,

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69 *See* Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 982-89 (1999).

70 Before *Nebbia*, of course, courts allowed plaintiffs to introduce evidence to determine the constitutionality of statutes. *See, e.g.*, Chastleton Corp. v. Sinclair, 264 U.S. 543, 548-89 (1924); James D. Barnett, *External Evidence of The Constitutionality of Statutes*, 3 OR. L. REV. 195, 198-200 (1924).

71 United States v. Carolene Prods., 304 U.S. 144 (1938).

72 *See, e.g.*, J.M. Balkin, *The Footnote*, 83 Nw. U.L. REV. 275, 296 (1989) ("*Carolene Products* is the humble servant of the messianic *West Coast Hotel*, playing St. Paul to the latter's Jesus. If Jesus came to offer a message of salvation for the world, St. Paul told us what that message was."); Evan Davis, *Why Should I Have To Tell Them? The Necessary Role of the Judiciary in Achieving Reform*, 69 ALB. L. REV. 863, 867 (2006) ("The *Carolene Products* case is one of the cases that mark the divide between the Supreme Court's effort to strike down everything the New Deal did, and after this case and *West Coast Hotel v. Parrish*, to support the right of the legislature to pass economic legislation.").

73 *Carolene*, 304 U.S. at 152 n.4.

74 *Id.* at 152.

75 *Id.*

such facts may properly be made the subject of judicial inquiry."[76] Thus, a plaintiff can prevail in a rational basis challenge "by showing to the court" that the "facts" upon which the statute's constitutionality is predicated "have ceased to exist," or by "proof of facts tending to show that the statute as applied to a particular article is without support in reason."[77] In addition to specifying categories in which the presumption of constitutionality might not apply,[78] *Carolene Products* also sought to clarify that facts matter in rational basis cases, and can be used to prove that a law is irrational—or, in *Nebbia*'s words, that it is "discriminatory or arbitrary."[79]

The Court explicitly endorsed the realist view of rational basis in *Borden's Farm Products v. Baldwin*,[80] issued only nine months after *Nebbia*. The plaintiff in that case was a company that, like the plaintiff in *Nebbia*, challenged the constitutionality of New York state laws fixing prices for milk; the company argued that the law gave its competitors an arbitrary and discriminatory economic advantage.[81] District Judge Learned Hand dismissed the complaint prior to fact-finding, on the formalist grounds that the legislature might hypothetically have thought the statute would rationally address a public problem: "[t]he situation here was such that the Legislature *might fear* that the larger dealers would gather into their hands substantially all sales

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[76] *Id.* at 153.

[77] *Id*. at 153-54.

[78] *Id.* at 152 n.4.

[79] The Carolene Products Company ultimately did just that. Professor Josh Blackman has observed that Charles Hauser, the owner of the Carolene Products company, later renamed Milnot, continued his crusade against the "filled-milk" law that the Supreme Court upheld in the original case. *See* Josh Blackman, *Constitutional Faces: Charles Hauser, President of Milnot, Defendant in* United States v. Carolene Products, JOSH BLACKMAN'S BLOG (Aug. 23, 2012), http://joshblackman.com/blog/2012/08/23/constitutional-faces-charles-hauser-president-of-milnot-defendant-in-united-states-v-carolene-products/. In *Milnot Co. v. Richardson*, 350 F. Supp. 221 (S.D. Ill. 1972), the company ultimately prevailed. The court found on the basis of "facts and conditions occurring after the prior judgment," *id.* at 223, that the law was unconstitutional. Given the "new factual situation"—specifically, the availability of other products fundamentally similar to "filled milk"—the court could reexamine the constitutionality of the law. *Id.* at 224. "While Congress may select a particular evil and regulate it to the exclusion of other possible evils in the same industry, any distinction drawn must at least be rational." *Id.* It was "crystal clear that certain imitation milk and dairy products are so similar to Milnot . . . that different treatment as to interstate shipment caused by application of the Filled Milk Act to Milnot violates the due process of law to which Milnot Company is constitutionally entitled." *Id.*

[80] Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 204 (1934).

[81] *See id.* at 201-03.

of milk to stores," he wrote.[82] "[I]t *may have been thought* that there were enough [milk producers] in the field already."[83]

But on appeal, the Supreme Court unanimously reversed the dismissal.[84] The presumption of constitutionality, it held, "is a rebuttable presumption" "of fact," and "not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault. Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack."[85] Emphasizing that it is "imperative" for courts in rational basis cases to engage in fact-finding and "not proceed upon false assumptions,"[86] the Court explained that a plaintiff who challenges an economic regulation "must carry the burden" of proving its irrationality either by facts "which may be judicially noticed, *or [by] other legitimate proof*. . . . Still, the statute may show on its face that the classification is arbitrary *or that may appear by facts admitted or proved*."[87] Where a statute is challenged under the rational basis test, the validity of that statute is "properly the subject of evidence and of findings."[88] On remand, the district court engaged in fact-finding,[89] and the Supreme Court then reviewed the case a second time,[90] this time upholding the law on the basis of facts determined by the district court. It again emphasized that "the constitutionality of the challenged provision should be determined in the light of evidence," rather than on the face of the complaint.[91]

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[82] Borden's Farm Prods. Co. v. Baldwin, 7 F. Supp. 352, 353 (S.D.N.Y. 1934) (emphasis added).

[83] *Id.* at 354 (emphasis added).

[84] *Borden's*, 293 U.S. at 213.

[85] *Id.* at 209.

[86] *Id.* at 210-11.

[87] *Id.* at 209-10 (emphasis added) (citations omitted).

[88] *See id.* at 210.

[89] Borden's Farm Prods. Co. v. Ten Eyck, 11 F. Supp. 599 (S.D.N.Y. 1935).

[90] Borden's Farm Prods. Co. v. Ten Eyck, 297 U.S. 251 (1936).

[91] *Id.* at 258. On remand, the district court had expressed its disagreement with the Supreme Court's requirement of factfinding:

> [S]o far as we can find, the question comes up for the first time whether when the court has undertaken an inquiry as to the facts on which the validity of a statute turns, the result is dependent upon its decision in the same sense as the result of an ordinary suit. If it finds to its own satisfaction that the necessary facts do not exist, is the law invalid? Or must it go further, as in the case of the choice of values, and find not only that the facts did not exist, but that reasonable people could not believe that they did? The question has an especial importance, because the Supreme Court has announced in this very case that the procedure here adopted ought to be generally followed. It seems to us that there can be no doubt that the second is the only tolerable doctrine.

11 F. Supp. at 600. But on its second review of the case, the Court rejected this, reiterating that

A year after *Borden's* was decided, the Court reiterated the need for fact-finding in the rational basis cases. In *Nashville, C. & S. L. Railway v. Walters,* a railroad company challenged the constitutionality of a Tennessee law that imposed various costs related to railway crossings, and the trial court engaged in extensive fact-finding before striking down the statute as irrational.[92] But the state supreme court reversed on the grounds that fact-finding was improper under the rational basis test.[93] Regulation of railroads "involves matter[s] of legislative policy," and because that policy could have been thought consistent with a legitimate government interest, it was improper for the trial judge to resort to evidence when determining the constitutionality of that regulation.[94] But the U.S. Supreme Court overruled this, in a decision by Justice Brandeis.[95] The state court was wrong to "decline[ ] to consider the [s]pecial facts," the Court declared.[96] "A rule to the contrary [is] settled by the decisions of this Court. A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied."[97] A court should invalidate an economic regulation if its arbitrariness is proven by "the evidence," and the state court "obviously erred in refusing to consider [those facts]."[98] In particular, the plaintiff's allegation of arbitrariness was "based primarily upon the revolutionary changes incident to transportation wrought in recent years by the widespread introduction of motor vehicles."[99] By failing to consider the plaintiff's evidence, the lower court disabled itself from fairly deciding the question of rationality.[100] The Supreme Court

constitutionality "should be determined in the light of evidence." *Borden's Farm Prods.*, 297 U.S. at 258.

92 Nashville C. & S. L. Ry. v. Walters, 294 U.S. 405, 414 (1935).

93 Nashville C. & S. L. Ry. v. Baker, 71 S.W.2d 678, 680 (Tenn. 1934).

94 *Id.*

95 *Walters*, 294 U.S. 405 (1935).

96 *Id.* at 414, 416.

97 *Id.* at 414-15.

98 *Id.* at 415-16. *See also id.* at 428.

99 *Id.* at 416.

100 Nashville C. & S.L. Ry. v.Walters, 294 U.S. 405, 416 (1935). *See also id.* at 432 ("The Supreme Court of Tennessee did not consider whether, in view of the facts relied upon, it was arbitrary and unreasonable to impose upon the railway one-half the cost of the underpass. It assumed that the state action was valid because it found that the action was taken 'to promote the safety of persons traveling the highways at grade crossings as well as to promote the safety of persons traveling the railroads at such crossings by eliminating dangerous grade crossings.'").

remanded to give the state courts the opportunity to address that matter in light of the plaintiff's evidence.[101]

In 1938, the Court once more emphasized that rational basis cases are to be decided in light of the facts, not just judicial speculation. In *Polk Co. v. Glover*,[102] it again reversed dismissal of a rational basis challenge, this time involving the constitutionality of a Florida law governing the labeling of citrus fruit. The district court dismissed the plaintiffs' due process allegations because the law's purpose was "to prohibit fraud and deception, and [the statute] is, therefore, clearly within the police power."[103] But the Supreme Court ruled that the district court "erred in dismissing," because "[f]or the purpose of [the 12(b)(6)] motion, the court was confined to the [complaint]."[104] The plaintiff's allegations "were sufficient to entitle the plaintiffs to an opportunity to prove their case, if they could, and that the court should not have undertaken to dispose of the constitutional issues (as to which we intimate no opinion) in advance of that opportunity."[105]

Borden's, *Walters*, and *Polk* thus characterized the rational basis test not as a formalistic ritual whereby imaginary justifications suffice to defeat an evidence-based challenge, nor as an insurmountable rule of law, but as a rebuttable evidentiary presumption. A plaintiff could overcome that presumption by introducing sufficient proof that a *prima facie* reasonable law is actually irrational —"arbitrary or discriminatory," as the *Nebbia* Court put it[106]—or that the factual basis asserted for that law is only pretextual. Other cases in subsequent years followed this path.[107] As Justice Black, who dissented in *Polk*[108] later acknowledged, "[a] law which is constitutional as applied in one manner may still contravene the Constitution as applied in

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101 *Walters,* 294 U.S. at 432-34.

102 Polk Co. v. Glover, 305 U.S. 5 (1938).

103 Polk Co. v. Glover, 22 F. Supp. 575, 579 (S.D. Fla. 1938).

104 *Polk*, 305 U.S. at 9.

105 *Id.* at 9-10.

106 Nebbia v. New York, 291 U.S. 502, 537 (1934).

107 *See, e.g.*, Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552, 557 (1947) (determining rational basis challenge by evidence-based "consider[ation of] the relationship of the method of appointing pilots to the broad objectives of the entire Louisiana pilotage law."). By 1948, one writer felt confident in declaring that the proposition that "facts established by the evidence" can be used to determine "the validity of a statute" had been "thoroughly settled in the United States Supreme Court." Note, *Consideration of Facts in Due Process Cases*, 23 IND. L.J. 176, 181 (1948).

108 *Polk*, 305 U.S. 5, 18-19 (1938) (Black, J., dissenting).

another."[109] Thus, "[m]any questions of a statute's constitutionality as applied can best await the refinement of the issues by pleading, construction of the challenged statute and pleadings, and, sometimes, proof."[110]

In the decades that followed, this rule became confused. Although it never explicitly abandoned the realistic approach to rational basis favored in *Borden's*, *Walters*, and *Polk*, the Warren Court issued a series of decisions that employed extremely strong, formalistic language to describe the rational basis test.[111] In *Berman v. Parker*, for example, Justice Douglas wrote that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive,"[112] and in *Williamson v. Lee Optical*, that a law would be upheld even if logically inconsistent, so long as "it might be thought" that the law "was a rational way" to address a perceived problem.[113] Yet notwithstanding the extremism of this language, the Court never abandoned the proposition that a plaintiff might prove by sufficient facts that a challenged law was irrational[114] nor has the Court ever overruled *Borden's*, *Walters*, or *Polk*.

On the contrary, it later backed away from the Warren era's extreme descriptions of the rational basis test—to such a degree that by 1975, Justice Brennan was prepared to say that the Court had abandoned the formalistic approach to rational basis: "[w]hile we have in the past exercised our imaginations to conceive of possible rational justifications for statutory classifications," he wrote, the Justices had "recently declined to manufacture justifications in order to save an apparently invalid statutory classification," and had even "analyzed asserted governmental interests to determine whether they were in fact the legislative purpose of a statutory classification."[115] In *Eisenstadt v. Baird*,[116] the Court used rational basis scrutiny to strike down

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109 Watson v. Buck, 313 U.S. 387, 402-03 (1941).

110 United States v. Petrillo, 332 U.S. 1, 6 (1947).

111 New Orleans v. Dukes, 427 U.S. 297 (1976); Williamson v. Lee Optical, 348 U.S. 483 (1955); Berman v. Parker, 348 U.S. 26 (1954).

112 *Berman*, 348 U.S. at 32.

113 *Williamson*, 348 U.S. at 488.

114 *See, e.g.*, Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 239 (1957) (holding an occupational licensing law unconstitutional under the rational basis test).

115 Schlesinger v. Ballard, 419 U.S. 498, 520-21 (1975) (Brennan, J., dissenting) (citations omitted).

116 Eisenstadt v. Baird, 405 U.S. 438, 447 (1972) ("The question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons.").

a state law that restricted the availability of birth control for unmarried couples, relying heavily on evidence both in and not in the record,[117] and refused to rely upon justifications for the statute that the legislature had not considered when passing it.[118] In *Moreno*[119] and *Zobel v. Williams*,[120] the Court invalidated restrictions on economic benefits because the state "ha[d] shown no valid state interests which are rationally served by" the challenged laws.[121] These cases, like *Cleburne*, *Romer*, and others, indicate that, although the rational basis test is deferential, it is not as extreme as the formalistic language of *Beach Communications* claims.[122] In fact, only a year after *Beach Communications*, the Court ruled that "even the standard of rationality as we so often have defined it must find *some footing in the realities of the subject* addressed by the legislation."[123]

Plaintiffs can prevail in rational basis challenges if they muster evidence to show that a challenged law lacks that footing—that the law is not a reasonable approach to a perceived social problem, or that the problem is a ruse, masking an unconstitutional legislative action. And that requires, as in *Borden's*, *Walters*, and *Polk,* that courts allow plaintiffs to produce such evidence so long as they adequately plead the facts to support a cause of action. The only alternative would be the sort of "toothless" rational basis standard the Court has consistently disavowed.[124] If rational basis review "is not a rubber stamp,"[125]

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117 For instance, the Court "not[ed] that not all contraceptives are potentially dangerous." *Id*. at 451. Under the formalist approach to rational basis, this would be irrelevant—the question would have been whether the legislature could have believed they are.

118 *See id.* at 450-52 ("The Supreme Judicial Court . . . held that the purpose of the amendment was to serve the health needs of the community. . . . It is plain that Massachusetts had no such purpose in mind. . . . [D]espite the statute's superficial earmarks as a health measure, health, on the face of the statute, may no more reasonably be regarded as its purpose than the deterrence of premarital sexual relations.").

119 Dep't. of Agric. v. Moreno, 413 U.S. 528, 537 (1973) (invalidating restriction on availability of food stamps because it "does not operate so as rationally to further the prevention of fraud.")

120 Zobel v. Williams, 457 U.S. 55 (1982).

121 *Id.* at 65.

122 *See* Neily, *supra* note 22 at 910 ("the 'prove a negative' standard is . . . another of the many linguistic hyperboles with which the rational basis test is polluted. . . ."). The Court has at times repented the use of unguarded language in its opinions. *See, e.g.*, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542 (2005); Tidal Oil Co. v. Flanagan, 263 U.S. 444, 454 (1924). *See also* Kelo v. City of New London, 545 U.S. 469, 501-02 (2005) (O'Connor, J., dissenting).

123 Heller v. Doe, 509 U.S. 312, 321 (1993) (emphasis added).

124 *See, e.g.*, Mathews v. De Castro, 429 U.S. 181, 185 (1976) (citing Mathews v. Lucas, 427 U.S. 495, 510 (1976)).

125 Hadix v. Johnson, 230 F.3d 840, 843 (6th Cir. 2000).

then there must be a role for actual fact-finding, and it must be possible for a plaintiff to prove facts sufficient to overcome the presumption of constitutionality.

Justice Kennedy recently employed this realistic understanding of the rational basis test in his decisive concurring opinion in *Kelo v. New London*.[126] Cases involving the condemnation of property through eminent domain, may be subject to rational basis scrutiny, he wrote, but that does not "alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden."[127] Trial courts must therefore employ a measured deference under which they fairly examine the facts underlying a condemnation: "[a] court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit."[128] If the plaintiff makes "a clear showing" to the trial court that the condemnation "is intended to favor a particular private party," and that the government's justifications for the taking are "pretextual," then the court should rule the taking invalid under the Public Use Clause.[129]

Over the past decade, the Sixth and Ninth Circuits have used a similar approach in cases challenging the constitutionality of occupational licensing laws, which are subject to rational basis scrutiny.[130] In *Craigmiles v. Giles*,[131] the district court invalidated a Tennessee licensing law that prohibited the sale of coffins or other funeral merchandise unless the person was a licensed funeral director. Judge Edgar rejected the government's motion to dismiss, notwithstanding his agreement that regulating the disposal of human remains "is clearly a legitimate governmental interest."[132] He found that "a genuine issue of material facts exists as to whether defendants' asserted reasons for

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126 *See Kelo*, 545 U.S. at 490-93 (Kennedy, J., concurring).

127 *Id*. at 490 (Kennedy, J., concurring).

128 *Id*. at 491 (Kennedy, J., concurring).

129 *Id.*

130 Under Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 239 (1957), an occupational licensing law must be rationally related to the applicant's fitness and capacity to practice the profession, and not merely to any legitimate government interest. *See* Dittman v. California, 191 F.3d 1020, 1030-31 (9th Cir. 1999).

131 Craigmiles v. Giles, 110 F. Supp. 2d 658, 662 (E.D. Tenn. 2000), *aff'd*, 312 F.3d 220, 226, 229 (6th Cir. 2002).

132 Craigmiles v. Giles, 2000 U.S. Dist. LEXIS 22435, at *18 (D. Tenn. 2000) (denying motion to dismiss).

the [challenged statute] are rationally related" to those interests,[133] and, reasoning that "the mere assertion of a legitimate government interest has never been enough to validate a law,"[134] he convened a full-scale trial, hearing testimony and other evidence, to "ascertain whether [the statute had] a rational basis."[135] He concluded that the law was unconstitutional,[136] and the Sixth Circuit affirmed.[137] It acknowledged the deferential nature of the rational basis test, but concluded, based on the evidence, that the state's defenses of the statute "come close to striking us with 'the force of a five-week-old, unrefrigerated dead fish.'"[138] The rational basis test may be lenient, but a court employing that test must still allow a plaintiff the opportunity to prove her case.[139]

Similarly, in *Merrifield v. Lockyer*,[140] the district court rejected the government's effort to dismiss a rational basis case, because it was inappropriate to rule on the merits prior to fact-finding. The government defendants argued for dismissal by asserting that the occupational licensing law challenged in that case was supported by a rational basis, but the district court ruled that "the issue of whether the Legislature lacked a rational basis to . . . [impose the challenged law was] premature."[141] Later, after weighing the evidence, the district court upheld the statute, but the Ninth Circuit reversed and ruled for the plaintiff, relying on evidence in the "record [that] highlight[ed] that

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133 *Id.*

134 *Craigmiles*, 110 F. Supp. 2d at 662.

135 *Id.*

136 *Id*. at 665.

137 Craigmiles v. Giles, 312 F.3d 220, 229 (6th Cir. 2002).

138 *Id*. at 225 (citing United States v. Searan, 259 F.3d 434, 447 (6th Cir. 2001); United States v. Perry, 908 F.2d 56, 58 (6th Cir. 1990)).

139 In *Powers v. Harris*, 379 F.3d 1208, 1216-17, 1223, 1225 (10th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005), the Tenth Circuit upheld a law almost identical to that invalidated in *Craigmiles*. But although they ruled differently on the merits, the *Powers* court agreed with the *Craigmiles* court that the plaintiff was entitled to introduce evidence to prove her allegations. The district court convened a full, two-day trial to weigh the evidentiary basis of the complaint, *see* Powers v. Harris, 2002 U.S. Dist. LEXIS 26939, at *5 (W.D. Okla. 2002), and the court of appeals relied on the evidence presented at trial when it affirmed. *See, e.g*., 379 F.3d at 1222.

140 Merrifield v. Lockyer, 388 F. Supp. 2d 1051 (N.D. Cal. 2005), *rev'd*, 547 F.3d 978 (9th Cir. 2008).

141 Merrifield v. Schwarzenegger, 2004 WL 2926161, at *5 (N.D. Cal. July 16, 2004). The district court also rejected a subsequent motion requesting dismissal on the same ground. *See* Merrifield v. Schwarzenegger, 2004 WL 2926160, at *1 (N.D. Cal. Sept. 23, 2004).

the [statute] . . . was designed to favor economically certain constituents at the expense of others similarly situated. . . ."[142]

As these and other cases show, a plaintiff can prevail in a rational basis case if she satisfies the pleading standards and then later proves as a factual matter the irrationality of the challenged law.[143] These cases demonstrate the continuing vitality of the realist view of rational basis endorsed by the Court in *Borden's*, *Polk*, *Carolene Products*, and other decisions.

III. THE 12(b)(6) MOTION IN RATIONAL BASIS CASES

The ambiguity in precedents characterizing the rational basis test has had serious consequences for plaintiffs challenging the constitutionality of laws or regulations, and who are confronted with motions to dismiss.[144] The formalistic, hypothetical approach of *Beach Communications* would seem to bar plaintiffs from any opportunity to prove that the targeted law is actually irrational.[145] On the other hand, the realistic approach endorsed in *Borden's*, *Walters*, *Polk*, and other cases, confronts plaintiffs with a difficult, but not insurmountable task. That approach makes better sense of the rules of pleading, preserves the right of plaintiffs to prove their well-pleaded allegations, and explains the many cases in which courts have ruled in favor of rational basis plaintiffs. Given the Supreme Court's endorsement of this approach, or, at least, its insistence that the rational basis test is not an insurmountable barrier to constitutional challenges, trial courts should resolve 12(b)(6) motions in rational basis challenges the same way they resolve such motions in any other kind of case: by asking whether the complaint sufficiently alleges facts that would plausibly entitle the plaintiff to relief if those facts are proven. Judges should not skip ahead to the merits and dismiss such cases on the theory that plaintiffs can never prevail.

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142 *Merrifield*, 547 F.3d at 991.

143 *Cf.* United States v. Carolene Prods., 304 U.S. 144, 152 (1938) ("commercial transactions is not to be pronounced unconstitutional unless in the light of *the facts made known* or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.") (emphasis added).

144 *See* Farrell, *supra* note 9 at 38-40.

145 *See id.* at 39 ("When courts apply the rationality standard in this extremely deferential way, a complaint cannot be drafted that will survive a motion to dismiss.").

A. *The Standard of 12(b)(6) Pleading*

Rule 12(b)(6) allows a court to dismiss a complaint where the plaintiff has failed to plead facts that, if proven, would entitle her to judgment on the merits. Courts have long emphasized that Rule 12(b)(6) imposes "minimal standards" on plaintiffs and that dismissal should be an unusual step.[146] A judge addressing such a motion must assume the truth of all factual allegations in the complaint and construe the complaint liberally in favor of the plaintiff[147]—should, in short, give the plaintiff "the benefit of the doubt."[148] The Supreme Court narrowed the leniency of this rule somewhat in *Bell Atlantic Corp. v. Twombly*[149] and *Ashcroft v. Iqbal*,[150] when it explained that dismissal is proper if the complaint fails to set forth sufficient facts to make liability "plausible"[151] on the face of the complaint, but it made clear that a plaintiff need only "plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[152] While "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" will not withstand a motion to dismiss,[153] courts should "assume [the] veracity" of "well-pleaded factual allegations" and "determine whether they plausibly give rise to an entitlement to relief."[154] This means that the complaint must allege facts that, if true, would constitute a legally cognizable harm caused by the defendant, which the court can remedy.

Some have criticized *Iqbal* and *Twombly* for being unduly conservative or "pro-defendant."[155] Professor Sherry, for instance, writes that these decisions impose "a very high burden on plaintiffs in any case in which the evidence—such as evidence of illicit motive—is in the hands of the defendants and is thus unavailable to plaintiffs with-

146 Stone Motor Co. v. GMC, 293 F.3d 456, 464-65 (8th Cir. 2002).

147 Lawrence v. Ch. Court of Tenn., 188 F.3d 687, 691 (6th Cir. 1991).

148 Charfauros v. Bd. of Elections, 249 F.3d 941, 956-57 (9th Cir. 2001).

149 Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

150 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

151 *Twombly*, 550 U.S. at 570.

152 *Iqbal*, 556 U.S. at 678.

153 *Id.*

154 *Id*. at 679.

155 Glenn S. Kopel, *Fruits of Shady Grove: Seeing The Forest for The Trees*, 44 AKRON L. REV. 999, 1002-03 (2011). *See also* Suzanna Sherry, *The Four Pillars of Constitutional Doctrine*, 32 CARDOZO L. REV. 969, 993-94 (2011).

out discovery."[156] She points to evidence that civil rights cases are more likely to be dismissed at the pleading stage after these decisions.[157] Others contend that requiring a higher pleading standard reduces the amount of discovery abuse and frivolous litigation,[158] and argue that statistics purporting to show that these decisions have deterred meritorious cases are misleading.[159] However that debate may resolve itself, it is still clear after *Twombly* and *Iqbal* that a court reviewing a motion to dismiss must assume the truth of the plaintiff's allegations and draw all inferences in her favor. According to *Twombly*, the "plausibility" requirement "does not impose a probability requirement"[160]—that is, it does not require a trial judge to determine whether the harm actually occurred or whether the plaintiff is likely to prevail. If the Court had intended in *Twombly* and *Iqbal* to allow judges to reach the merits at the 12(b)(6) stage, or to dismiss cases just because the plaintiff is unlikely to win, then those cases would have marked a dramatic change in the pleading standards. The moderate language in those cases does not justify such a reading.[161] On the contrary, as *Twombly* explained, the plausibility requirement "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [the alleged wrong]. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'"[162] *Iqbal* and *Twombly* are not meant to bar plaintiffs who have valid legal claims from obtaining the discovery necessary to prove their cases.

In *Iqbal*, the plaintiff claimed that the government had targeted members of racial minorities for disfavored treatment; this required him to prove that the government's agents had acted with an inten-

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156 Sherry, *supra* n.155, at 994.

157 *Id.* at 994 n.100 (citing Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008)); Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AMER. U. L. REV. 553 (2010).

158 *See* Daniel W. Robertson, Note, *In Defense of Plausibility:* Ashcroft v. Iqbal *and What The Plausibility Standard Really Means*, 38 PEPP. L. REV. 111, 144-47 (2010).

159 *See* Lonny Hoffman, Twombly *and* Iqbal*'s Measure: An Assessment of The Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1, 30 (2011).

160 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

161 *See* Edward A. Hartnett, *The Changing Shape of Federal Civil Pretrial Practice: Taming* Twombly*, Even After* Iqbal, 158 U. PA. L. REV. 473, 481-82 (2010).

162 *Twombly*, 550 U.S. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

tional discriminatory purpose.[163] But the Court held that the complaint did not include "factual allegation[s] sufficient to plausibly suggest petitioners' discriminatory state of mind."[164] The complaint was inadequate because its factual allegations failed to allege all of the elements necessary to the claim for relief. Recovery was thus not just improbable, but impossible, given the state of the complaint. Because the allegations, when assumed true, still did not "plausibly suggest . . . the conclusion that the pleader wishes the court to make regarding an element of the claim,"[165] dismissal was warranted.

Crucially, courts have maintained, with very few exceptions, that it is improper for judges to reach the merits in a motion to dismiss.[166] Rather, "[a] 12(b)(6) motion simply tests the sufficiency of the pleadings, and does not resolve the facts."[167] *Twombly* reiterated this rule.[168] The reason is simple: granting judgment on the merits before allowing the plaintiff to obtain discovery and proffer evidence would be "patently unfair."[169] In *Gibson v. Chicago*,[170] for instance, when the plaintiff sued the city for wrongful death and violations of civil

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163 Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009). In fact, while the *Iqbal* complaint described in detail the alleged mistreatment suffered by the plaintiffs, it provided virtually no allegations regarding the claimed discrimination. For example, paragraphs 48-49 stated that the plaintiffs "were classified as being 'of high interest' to the government's post-September-11th investigation by the FBI without specific criteria or a uniform classification system" and that "[i]n many cases, including Plaintiffs', the classification was made because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees' involvement in supporting terrorist activity." *See* First Amended Complaint, *Elmaghraby v. Ashcroft*, No. 04-CV-1809 (JG) (JA), 2004 WL 3756442 (E.D.N.Y., filed Sept. 30, 2004). These types of allegations are best characterized as conclusory because they "assert[ ] the final and ultimate conclusion which the court is to make in deciding the case for him, that is . . . [they] allege[ ] an element of a claim. Such an allegation is not itself assumed to be true, but must be supported by the pleader going a step further back and alleging the basis from which this conclusion follows." Hartnett, *supra* note 161, at 491 (citations and quotation marks omitted).

164 *Iqbal*, 556 U.S. at 683.

165 Hartnett, *supra* note 161, at 494.

166 *See, e.g.*, *Twombly*, 550 U.S. at 585; Carter v. Stanton, 405 U.S. 669, 671 (1972); Dolgaleva v. Va. Beach City Pub. Sch., 364 F. App'x. 820, 825-26 (4th Cir. 2010); Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001).

167 Cox v. Shelby State Cmty. College, 48 F. App'x. 500, 503 (6th Cir. 2002).

168 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

169 Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 365 F. Supp. 975, 981 (E.D. Pa. 1973); *see also* Szabo v. Birdgeport Machs. Inc., 249 F.3d 672, 675 (7th Cir. 2001) ("The reason why judges accept a complaint's factual allegations when ruling on motions to dismiss under Rule 12(b)(6) is that a motion to dismiss tests the legal sufficiency of a pleading. Its *factual* sufficiency will be tested later—by a motion for summary judgment under Rule 56, and if necessary by trial.").

170 Gibson v. Chicago, 910 F.2d 1510 (7th Cir. 1990).

rights, the district court granted summary judgment to the City prior to any discovery or fact-finding. The court of appeals reversed, finding that although styled as a summary judgment, the decision was actually a dismissal under Rule 12(b)(6), and was thus improper because courts should not reach the merits before the plaintiff has an opportunity to introduce evidence.[171] The plaintiff's allegations were sufficient to state a cause of action, so dismissal was erroneous.

The prohibition against reaching the merits at the pleading stage is especially important in cases involving the rational basis test. Because rational basis seems to invite judges to ignore actual facts as "irrelevant,"[172] trial courts are often tempted to reach the merits of rational basis cases at the motion to dismiss stage. If the only thing necessary to uphold a law against a rational basis challenge is to speculate that a legislator might have thought the law would serve some public good, then courts can save time by collapsing the entire lawsuit into the 12(b)(6) stage and ruling for the government prior to discovery. Yet the courts have emphasized that rational basis is not an impenetrable shield, and that judges should not resolve the merits on a motion to dismiss.

Borden's, *Walters*, *Polk,* and more recent cases make clear that trial courts must respect the multi-step process established in the rules of pleading. Because rational basis is only a strong evidentiary presumption which the plaintiff must overcome after discovery and fact-finding, and not a barrier to all judicial review, a court should resolve a motion to dismiss a rational basis case not by skipping ahead to the merits, but by asking whether the plaintiff has offered allegations sufficient to make liability "plausible on its face."[173] If so, the court must allow the plaintiff to prove her case. This imposes a meaningful burden on plaintiffs. Conclusory allegations will not suffice, and a plaintiff must still produce strong evidence to overcome a very substantial level of deference. But when a plaintiff adequately pleads a rational basis cause of action, she is entitled to try.

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171 *Id.* at 1520.

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

173 *Twombly*, 550 U.S. at 570.

B. *The "Perplexity" of 12(b)(6) Motions in Rational Basis Cases*

Many courts have found the interaction between rational basis test and Rule 12(b)(6) to be "confusing"[174] and "perplexing."[175] How should a judge proceed when a government defendant moves to dismiss a rational basis challenge by merely asserting without evidence that the challenged law is rational? Courts have reached conflicting results on this question, both between and within the circuits.

A plaintiff who challenges the constitutionality of a law under the rational basis test faces an "uphill battle,"[176] but still a theoretically possible one. To prevail, she must overcome the presumption of constitutionality and show that the law does not rationally advance the purposes the government sought to accomplish, or that the legislation's purpose is *per se* invalid. Under the standards of *Twombly* and *Iqbal*, the plaintiff must file a complaint that states sufficient facts to raise a plausible inference that the challenged law is not rational—by showing that the justifications of the law are a pretext, or that they lack any realistic connection to a legitimate government interest,[177] or that they are rationally explicable only by an intent to impose burdens on a disfavored group,[178] or that they extend unjust favors to preferred insiders.[179]

On the other hand, under the formalist approach to rational basis, a plaintiff would face a logically impossible task. She would have to draft a complaint that guessed at every possible purpose for the law, including speculative ones that perhaps no legislator or official ever thought of before, and then positively disprove each of these

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174 Baumgardner v. Cnty. of Cook, 108 F. Supp. 2d 1041, 1055-56 (N.D. Ill. 2000).

175 Brown v. Zavaras, 63 F.3d 967, 971 (10th Cir. 1995). *See also* Giarratano v. Johnson, 521 F.3d 298, 303 (4th Cir. 2008) ("dilemma"); Wroblewski v. Washburn, 965 F.2d 452, 460 (7th Cir. 1992) (a "close[ ] question"); Brace v. Cnty. of Luzerne, 873 F. Supp. 2d 616, 630 (M.D. Pa. 2012) ("District courts in the Third Circuit have recognized the 'perplexing situation' that occurs when, on a motion to dismiss, the district court must determine whether a rational basis existed for the alleged differential treatment."); Cradle of Liberty Council, Inc. v. City of Philadelphia, 2008 U.S. Dist. LEXIS 74515, *17 (E.D. Pa. Sept. 25, 2008) ("perplexing situation"); Tipton v. Mohr, 2012 U.S. Dist. LEXIS 41378, at *10 (S.D. Ohio Mar. 27, 2012) ("applying general pleading standards to the rational basis review 'poses unique challenges.'").

176 Ileto v. Glock, Inc., 565 F.3d 1126, 1140 (9th Cir. 2009).

177 *See, e.g.*, Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000).

178 *See, e.g.*, Pruitt v. Cheney, 963 F.2d 1160, 1165-66 (9th Cir. 1992), *cert. denied*, 506 U.S. 1020 (1992).

179 *See, e.g.*, Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 878 (1985); Smith Setzer & Sons v. S.C. Procurement Review Panel, 20 F.3d 1311, 1320-23 (4th Cir. 1994); Ranschburg v. Toan, 709 F.2d 1207, 1211 (8th Cir. 1983).

foundations. Because the potential range of justifications for any law is infinite, and because it is impossible to prove a negative, such a standard would impose a logically incoherent burden on plaintiffs. This burden would be made all the heavier if the legislature's actual reasoning is "irrelevant,"[180] and if the judge can devise a *post hoc* rationalization for the law after the close of evidence.[181] Under this theory, the government can simply file a motion to dismiss on the basis of its *ipse dixit*, saying that the law might have been adopted for some legitimate purpose, and thus have cases challenging government action dismissed by the use of magic words. A plaintiff who alleges that the government's proffered justifications are a mere pretext would be thrown out of court with no chance to introduce facts or obtain discovery needed to prove her allegations. This approach would not only deprive the plaintiff of her fair day in court, but would conflate the motion to dismiss with the motion for summary judgment, in violation of the basic rule against reaching the merits at the preliminary stage.[182]

Jones v. Temmer[183] is a good example of the formalistic approach. There, the district court dismissed a lawsuit alleging that Colorado laws regulating the taxicab industry were unconstitutional.[184] Employing the formalistic approach to rational basis, the court ruled that the plaintiffs failed to state a claim because "the Colorado General Assembly could rationally have concluded" that the licensing scheme promoted a legitimate government interest.[185] The government had identified a group of reasons that "justif[ied] public utility regulation,"[186] such as preventing damage to public highways. Without

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[180] FCC v. Beach Commc'ns, 508 U.S. 307, 318 (1993).

[181] *See, e.g.*, Shaw v. Or. Pub. Emps.' Ret. Bd., 887 F.2d 947, 948 (9th Cir. 1989) ("[C]ourts may properly look beyond the articulated state interest in testing a statute under the rational basis test. . . . A court may even hypothesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack.") (citations and quotation marks omitted).

[182] Indeed, it would seem to deprive the plaintiff of due process of law every bit as much as if the court employed a coin toss or a Ouija board. *Cf.* United States v. Redondo-Lemos, 955 F.2d 1296, 1299 (9th Cir. 1992) ("[I]t would offend common notions of justice to have [certain legal decisions] made on the basis of a dart throw, a coin toss or some other arbitrary or capricious process.").

[183] Jones v. Temmer, 829 F. Supp. 1226 (D. Colo. 1993), *vacated as moot* 57 F.3d 921 (10th Cir. 1995).

[184] *Id.* at 1229.

[185] *Id.* at 1234-35.

[186] *Id.* at 1235.

explanation or analysis, the court accepted these assertions, and held that the challenged laws "clearly [were] rationally related" to them.[187] The court dismissed the plaintiffs' argument that distinguishing between different kinds of transportation services was irrational because "the Colorado General Assembly could have determined" that various goals would be advanced by the law; the legislature might even have decided to create the law "as an experiment."[188] There was no evidence whatsoever to support these conclusions. Indeed, the court was issuing this decision prior to discovery. But the court considered evidence unnecessary, and barred the plaintiffs from introducing any evidence.[189] In the court's view, the plaintiffs could not possibly discover or proffer evidence sufficient to overcome the presumption of constitutionality.[190] Its conception of the rational basis test led the *Temmer* court to transform that test into just what the Supreme Court said it is not: "a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault."[191]

Other courts have rejected such an abuse of the motion to dismiss. In *Dragovich v. United States Department of the Treasury*,[192] the court rejected a 12(b)(6) motion in a rational basis case challenging the constitutionality of the federal Defense of Marriage Act.[193] The government defendants offered various hypothetical bases for the Act—for instance, that the Act allowed states to resolve the issue of same-sex marriage without federal interference, and ensured uniformity in the allocation of marriage-related benefits.[194] However the district court ruled that the plaintiffs should have an opportunity to prove their allegations that the Act lacked any rational connection to these or other public interests.[195] Many other district courts have

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187 *Id.*

188 *Id.* at 1236.

189 Jones v. Temmer, 829 F. Supp. 1226 (D. Colo. 1993), *vacated as moot* 57 F.3d 921 (10th Cir. 1995).

190 *Id.*

191 Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209 (1934).

192 Dragovich v. U.S. Dep't of the Treasury, 764 F. Supp. 2d 1178 (N.D. Cal. 2011).

193 Although *Dragovich* involved marriage, the court found that the plaintiffs' Equal Protection claims were subject to rational basis review because the classification involved—same-sex couples—was not a suspect or semi-suspect class. *Id.* at 1189.

194 *Id.* The court noted that these were not the purposes advanced by Congress when passing the Act. *Id.*

195 *Id.* at 1190-92. The plaintiffs ultimately prevailed. Dragovich v. U.S. Dep't of the Treasury, 872 F. Supp. 2d 944 (N.D. Ca. 2012).

refused to dismiss rational basis cases at the pleading stage where the government baldly asserts that the challenged law is rationally related to a legitimate interest.[196] In *Munie v. Koster*,[197] the plaintiffs challenged a Missouri licensing law for moving companies, which was similar in many respects to the law challenged in *Temmer*.[198] The plaintiffs alleged that the law was not rationally related to protecting the general public from any legitimate harm, but existed solely to protect existing firms against legitimate economic competition, a purpose that several courts have held to be unconstitutional.[199] The government moved to dismiss on the grounds that the legislature might have thought the licensing law would protect public health and safety.[200] The court, however, rejected this motion, holding that the plaintiffs

196 *See, e.g.*, Dawkins v. Richmond Cnty. Sch., No. 1:12CV414, 2012 U.S. Dist. LEXIS 62518, at *14 (M.D.N.C. May 4, 2012) ("Plaintiff's claim can proceed beyond [the 12(b)(6) stage] unless the court must conclude, as a matter of law, that [the government's] alleged action bore a rational connection to a legitimate governmental interest. The court cannot make that determination at this juncture."); Immaculate Heart Cent. Sch. v. N.Y. State Pub. High Sch. Athletic Ass'n, 797 F. Supp. 2d 204, 211, 216 (N.D.N.Y 2011) (citations omitted) (acknowledging that "conducting rational basis review at the motion to dismiss stage poses unique challenges," and declining to dismiss because "[t]he complaint . . . provide[s] a basis to conclude that there is a complete and utter lack of 'rational relationship between the disparity of treatment and some legitimate governmental purpose.'"); Frank v. Gov't of the V.I., No. 2009-66, 2010 U.S. Dist. LEXIS 32341, at *37-38 (D.V.I. Mar. 31, 2010) (rejecting motion to dismiss predicated on a bald assertion of rationality); Bench Billboard Co. v. City of Cincinnati, No. 1:07cv589, 2008 U.S. Dist. LEXIS 42517, at *27-28 (S.D. Ohio May 28, 2008) (same); Lazy Y Ranch, Ltd. v. Wiggins, No. CV06-340-S-MHW, 2007 U.S. Dist. LEXIS 19899, at *21-26 (D. Idaho Mar. 13, 2007) (same); Cornwell v. Cal. Bd. of Barbering & Cosmetology, 962 F. Supp. 1260, 1273 (S.D. Cal. 1997) (same). Several state courts have also held that plaintiffs bringing rational basis cases under state law are entitled to introduce evidence to disprove the purported rational basis of a challenged government act. *See, e.g.*, Brigham v. State, 889 A.2d 715 (Vt. 2005); WHS Realty Co. v. Town of Morristown, 684 A.2d 1376 (N.J. 1996); Comprehensive Accounting Serv. Co. v. Md. State Bd. Pub. Accountancy, 397 A.2d 1019 (Md. 1979); Thorn v. Jefferson Cnty., 375 So. 2d 780 (Al. 1979); Purdie v. Univ. of Utah, 584 P.2d 831 (Ut. 1978). My thanks to Christina Sandefur for pointing this out to me.

197 Munie v. Koster, No. 4:10CV01096 AGF, 2011 U.S. Dist. LEXIS 22841 (E.D. Mo. Mar. 7, 2011).

198 *See generally* Timothy Sandefur, *A Public Convenience and Necessity and Other Conspiracies Against Trade: A Case Study from the Missouri Moving Industry*, 24 GEO. MASON U. CIV. RTS. L.J. 159 (2014).

199 *See, e.g.*, St. Joseph Abbey v. Castille, 700 F.3d 154, 161-62 (5th Cir. 2012); Merrifield v. Lockyer, 547 F.3d 978, 991 (9th Cir. 2008); Craigmiles v. Giles, 312 F.3d 220, 224-29 (6th Cir. 2002). *Contra* Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005).

200 By barring plaintiffs from even pursuing discovery, such an approach would do precisely what critics of *Twombly* and *Iqbal* have complained about: denying plaintiffs the opportunity to prove their claims where the best evidence of unconstitutionality is in defendants' hands. *Cf.* Sherry, *supra* note 155 at 994.

satisfied the pleading requirements, and that "[t]o prevail on their due process and equal protection claims, plaintiffs will have to show that the statute's treatment of carriers of household goods bears no rational relation to a legitimate state interest. This determination cannot be made on the record now before the court."[201] And in *Cornwell v. California Board of Barbering & Cosmetology*,[202] the district court denied the government's motion to dismiss a lawsuit challenging the constitutionality of a licensing requirement for hair-braiders. "Although at trial, the burden would be on plaintiff to establish that there is no rational connection between the regulations and their asserted purpose," the court observed, "in the context of a motion to dismiss, the Court must take all allegations in the complaint as true, must draw all inferences in favor plaintiffs, and must construe the complaint in the light most favorable to plaintiffs."[203] Thus, "if plaintiff comes forward with evidence" supporting her claims, she would be entitled to judgment.[204] The plaintiff ultimately prevailed.[205]

Courts of appeals have even reversed dismissals of rational basis cases and instructed district courts to allow plaintiffs to prove their allegations.[206] For example, in *Dias v. City & County of Denver*,[207] the

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201 *Munie*, No. 4:10CV01096 AGF, 2011 U.S. Dist. LEXIS 22841 at *7-8 (citation and internal quotations omitted). *Accord* Bruner v. Zawacki, No. 3: 12-57-DCR, 2013 U.S. Dist. LEXIS 25035 at *13 (E.D. Ky. Feb. 25, 2013). Although *Munie* was resolved prior to judgment, the plaintiff prevailed in *Bruner*. *See* Bruner v. Zawacki, No. 3: 12-57-DCR, 2014 WL 375601 at *2 (E.D. Ky. Feb. 3, 2014).

202 Cornwell v. Cal. Bd. of Barbering & Cosmetology, 962 F. Supp. 1260 (S.D. Cal. 1997).

203 *Id.* at 1276 (citations omitted).

204 *Id.* at 1278.

205 Cornwell v. Hamilton, 80 F. Supp. 2d 1101, 1119 (S.D. Cal. 1999).

206 *See, e.g.*, Silveira v. Lockyer, 312 F.3d 1052, 1089-1092 (9th Cir. 2002), *cert. denied*, 540 U.S. 1046 (2003) (reversing dismissal of rational basis challenge where court of appeals could "discern no legitimate state interest" advanced by the law); Stemler v. City of Florence, 126 F.3d 856, 874 (6th Cir. 1997), *cert. denied sub nom.*, City of Florence v. Chipman, 523 U.S. 1118 (1998) (dismissal of rational basis reversed where "defendant officers [were] unable, and indeed have not even attempted, to demonstrate that there is any conceivable rational basis for a decision to enforce the drunk-driving laws against homosexuals but not against heterosexuals."); Pruitt v. Cheney, 963 F.2d 1160, 1166 (1991) (rational basis "require[s] the government to establish on the record that its policy ha[s] a rational basis." Case law does not "support[ ] the contention . . . that [a discriminatory policy] . . . should be held to be rational as a matter of law, without any justification in the record at all."); Mahone v. Addicks Util. Dist., 836 F.2d 921, 937-8 (5th Cir.1988) (reversing dismissal of rational basis challenge and remanding for factfinding). *Cf.* Lundblad v. Celeste, 874 F.2d 1097, 1101 (6th Cir. 1989), *cert. denied*, 501 U.S. 1250 (1991) (reversing dismissal of a "class of one" case in which the plaintiff alleged that he was denied a city contract because he was a registered Republican).

207 Dias v. City & Cnty. of Denver, No. 07-cv-00722-WDM-MJW, 2008 U.S. Dist. LEXIS 92811 at *2-3 (D. Colo. Mar. 20, 2008), *rev'd*, 567 F.3d 1169 (10th Cir. 2009).

plaintiffs alleged that a city ordinance banning pit bulls violated the Fourteenth Amendment. The district court dismissed, but the court of appeals reversed, declaring that "the complaint plausibly alleges that the Ordinance is not rationally related to a legitimate government interest."[208] The plaintiffs alleged that there was no evidence that pit bulls are a significant threat to public safety or constitute a nuisance, and that the categorical prohibition on the breed was irrational.[209] In other words, "[w]ithout [improperly] drawing factual inferences against the plaintiffs, the district court could not conclude at this early stage in the case that the Ordinance was rational as a matter of law."[210] Although other courts had upheld similar laws, they had "done so based on a developed evidentiary record."[211] The court recognized that it was "a different matter entirely" whether the plaintiffs could "marshal enough evidence to prevail on the merits,"[212] but gave them their day in court.

Unfortunately, other courts have taken the path of *Temmer*, and decided the merits of rational basis cases at the 12(b)(6) stage. For example, in *Hettinga v. United States*,[213] the plaintiffs alleged that Congress adopted an amendment to federal milk marketing regulations that were designed to target their business and bar it from competing with other dairies.[214] The plaintiffs had formerly been exempt from federal rules setting minimum prices for milk, but at the behest of non-exempt milk producers, Congress enacted legislation that eliminated the exemption for a class of businesses, which the law described in such a way as to refer solely to them.[215] When they filed suit, alleging that this violated their right to equal protection, the government moved to dismiss for failure to state a claim, asserting that federal dairy laws were rationally related to a legitimate government interest.[216] The district court dismissed[217] and the court of appeals

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208 *Dias,* 567 F.3d at 1183.

209 *Id.*

210 *Id.* at 1184.

211 *Id.* at 1183 n.12.

212 *Id.* at 1184.

213 Hettinga v. United States, 770 F. Supp. 2d 51 (D.D.C. 2011), *aff'd*, 677 F.3d 471 (D.C. Cir. 2012), *cert. denied*, 81 U.S.L.W. 3365 (2013).

214 *See* Note, *D.C. Circuit Rejects Challenge to Milk Regulation*-Hettinga v. United States*, 677 F.3d 471 (D.C. Cir. 2012) (Per Curiam), Reh'g En Banc Denied, No. 11-5065 (D.C. Cir. June 21, 2012)*, 126 HARV. L. REV. 1146 (2013).

215 *Hettinga*, 770 F. Supp. 2d at 54-55.

216 *Id.* at 59-60.

217 *Id.* at 60.

affirmed. Although the plaintiffs asked for the opportunity to prove that the government's justifications for the law were pretextual, and that the law was actually not rationally related to a legitimate government interest, the judges would allow no further proceedings once the government had "provided an explanation" that was "rational on its face."[218] Similarly, in *Carter v. Arkansas*,[219] the Eighth Circuit allowed a district court to dismiss rational basis cases prior to fact-finding or weighing of evidence. A judge, it declared, "may conduct a rational basis review on a motion to dismiss," because under that test, speculation suffices to uphold a challenged government action; it was therefore "not necessary to wait for further factual development."[220] Other circuits have allowed district courts to dismiss rational basis cases when the government defendant merely says a challenged law is constitutional.[221]

Some circuits are even in internal conflict over the question. In *Midkiff v. Adams County Regional Water District*,[222] the Sixth Circuit dismissed a complaint in which the plaintiffs alleged that the government arbitrarily discriminated against non-property owners in allocating water service. On appeal, the plaintiffs pointed out that the Water District had produced no evidence to show that its policy was rationally related to a legitimate government interest.[223] The Water District had simply asserted in its appellate brief that the challenged policy "avoid[ed] problems," and "serve[d] the interest in water conserva-

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218 *Hettinga*, 677 F.3d at 479. Judges Brown and Sentelle added a concurring opinion that was highly critical of the rational basis test in general. *See id.* at 480 (Brown, J., concurring). But they did not address its interaction with the 12(b)(6) standard.

219 Carter v. Arkansas, 392 F.3d 965, 969 (8th Cir. 2004).

220 *Id.* at 968 (quoting Knapp v. Hanson, 183 F.3d 786, 789 (8th Cir. 1999)). *See also* Gilmore v. Cnty. of Douglas, 406 F.3d 935, 940 (8th Cir. 2005) (quoting *Knapp*, 183 F.3d at 789) (affirming dismissal in rational basis case where court could "formulate a conceivable basis for the government action."). *But see* City of St. Paul v. Chi., St. Paul, Minneapolis & Omaha Ry. Co., 413 F.2d 762, 767 (8th Cir. 1969) (rational basis is to be decided "upon the whole record . . . .").

221 *See, e.g.*, Star Scientific, Inc. v. Beales, 278 F.3d 339, 349 (4th Cir. 2002) (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)) (using 12(b)(6) motion to "determine whether [plaintiff] has demonstrated that the [state] 'acted in an arbitrary and irrational way' when it passed its qualifying statute."). *But see* Phan v. Virginia, 806 F.2d 516, 521 n.6 (4th Cir. 1986) (reversing dismissal of a rational basis challenge because "we proceed from the modest proposition that the simple articulation of a justification for a challenged classification does not conclude the judicial inquiry.").

222 Midkiff v. Adams Cnty. Reg'l Water Dist., 409 F.3d 758, 769-71 (6th Cir. 2005).

223 *Id.* at 770.

tion."[224] However, the court of appeals concluded that this sufficed to dismiss the complaint because "a purported rational basis may be based on 'rational speculation unsupported by evidence or empirical data' and need not have a foundation in the record."[225] Thus, the plaintiffs' "attempts to rebut the presumption of constitutionality of the Water District's policy f[e]ll short," even though they had been given no opportunity to introduce evidence to rebut that presumption.[226] On the other hand, in *Bower v. Mount Sterling*,[227] the same circuit reversed the district court's dismissal of a complaint, holding that the allegations did state an Equal Protection cause of action under the rational basis test. The plaintiff claimed that city officials illegally denied him an employment opportunity in the police department, in retaliation for his family's political opposition to the mayor.[228] The city answered that the plaintiff had been charged with sexual harassment, which justified the employment decision, and that the plaintiff had failed to allege that similarly situated individuals were treated differently.[229] The court nevertheless found that the allegations in the complaint "could be reasonably construed" to state a rational basis claim, and remanded for fact-finding.[230]

The Seventh Circuit has also contradicted itself. In *Keenon v. Conlisk*,[231] it reversed dismissal of a rational basis case in which the government said—without supporting evidence—that the challenged policy was rationally related to a legitimate government interest.[232] The court held that "[t]he district judge could not properly have determined that the practices complained of were reasonable from the record before him."[233] The allegations in the complaint were "sufficient to require a showing by the defendants of some justification for the allegedly discriminatory treatment," and "bald assertions that the [government's actions] are reasonable cannot be considered."[234] Yet

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224 *Id.*

225 *Id.* (quoting Heller v. Doe, 509 U.S. 312, 320-21 (1993)).

226 *Id.* at 771.

227 Bower v. Vill. of Mount Sterling, 44 F. App'x. 670, 678-79 (6th Cir. 2002).

228 *Id.* at 672.

229 *Id.* at 677.

230 *Id.* at 678-79.

231 Keenon v. Conlisk, 507 F.2d 1259 (7th Cir. 1974).

232 *Id.* at 1260-61.

233 *Id.* at 1261.

234 *Id.*

in *Hager v. City of West Peoria*,[235] the same circuit affirmed dismissal of a lawsuit challenging the constitutionality of an ordinance that restricted the use of roads by vehicles of certain weights, which the plaintiffs claimed violated the Equal Protection Clause. Without considering evidence or allowing discovery, the court concluded that "the language of the ordinances themselves" showed that the ordinance was "rationally related" to the city's "legitimate ends."[236] It therefore refused to allow the plaintiff to prove the allegations in the complaint.

The Fifth Circuit has tried to split the difference. It has refused to "fashion a single rule for all circumstances,"[237] and left it to district courts to decide, "according to the circumstances of the individual case . . . as the circumstances dictate," whether to "look[ ] beyond the pleadings to perform a rational relationship analysis" at the motion to dismiss stage."[238]

No wonder courts are "perplexed" by the interaction of Rule 12(b)(6) and the rational basis standard. Although that rule forbids district courts from reaching the merits, and allows dismissal only where the plaintiffs cannot possibly prove an entitlement to relief, precedents invoking the formalistic understanding of rational basis suggest that plaintiffs never *can* be entitled to relief, and that lawsuits seeking such relief are so futile as to warrant *per se* dismissal. The cure for this confusion is not far to seek: it lies in adhering to the ordinary rules of pleading and allowing plaintiffs the opportunity to prove their well-pleaded allegations of unconstitutionality.

IV. THE *WROBLEWSKI STANDARD*

The leading modern case to address the interplay of 12(b)(6) and rational basis is the Seventh Circuit's decision in *Wroblewski v. Washburn*,[239] which declared that courts should not dismiss well-pleaded rational basis challenges prior to fact-finding. *Wroblewski* has been adopted by the Fourth[240] and Tenth[241] Circuits, and has been cited with

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235 Hager v. City of West Peoria, 84 F.3d 865, 872-74 (7th Cir. 1996).

236 *Id.* at 873.

237 Mahone v. Addicks Util. Dist. of Harris Cnty., 836 F.2d 921, 937 (5th Cir.1988).

238 *Id.* The *Mahone* court ultimately reversed the dismissal and remanded for factfinding. *Id.* at 937-38.

239 Wroblewski v. City of Washburn, 965 F.2d 452, 453-55, 459-60 (7th Cir. 1992).

240 Giarratano v. Johnson, 521 F.3d 298, 303-04 (4th Cir. 2008).

241 Brown v. Zavaras, 63 F.3d 967, 971-72 (10th Cir. 1995).

approval by several others.[242] Although the context of *Wroblewski* itself has caused some confusion, that case offers a workable answer for courts facing the apparent dilemma of the deferential rational basis test and the leniency of Rule 12(b)(6).

The plaintiff in *Wroblewski* operated a city-owned marina on Lake Superior.[243] He alleged that over the course of two decades, city officials adopted various tactics to make his business operations impossible, including obstructing his efforts to renegotiate the lease, initiating eviction proceedings against him, pressuring other firms not to do business with him, and finally suing and defaming him.[244] He filed suit alleging, among other things, that the city had violated his rights to due process and equal protection of the laws.[245] As Wroblewski was not a member of a protected class, the court applied rational basis scrutiny and dismissed the complaint for failure to state a claim.[246]

On appeal, the Seventh Circuit explained the differences between the 12(b)(6) pleading standard and rational basis scrutiny:

> A perplexing situation is presented when the rational basis standard meets the standard applied to a dismissal under Fed. R. Civ. P. 12(b)(6). The rational basis standard requires the government to win if any set of facts reasonably may be conceived to justify its classification; the Rule 12(b)(6) standard requires the plaintiff to prevail if relief could be granted under any set of facts that could be proved consistent with the allegations. The rational basis standard, of course, cannot defeat the plaintiff's benefit of the broad Rule 12(b)(6) standard. The latter standard is procedural, and simply allows the plaintiff to progress beyond the pleadings and obtain discovery, while the rational basis standard is the substantive burden that the plaintiff will ultimately have to meet to prevail on an equal protection claim.
>
> While we therefore must take as true all of the complaint's allegations and reasonable inferences that follow, we apply the resulting "facts" in light of the deferential rational basis standard. To survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts suffi-

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242 *See, e.g.*, Rucci v. Cranberry Twp., 130 F. App'x. 572, 575 (3d Cir. 2005); Bower v. Vill. of Mount Sterling, 44 F. App'x. 670, 677 (6th Cir. 2002).

243 *Wroblewski*, 965 F.2d at 454.

244 *Id.* at 454-55.

245 *Id.* at 455.

246 *See id.* at 455-56.

> cient to overcome the presumption of rationality that applies to government classifications.[247]

Distinguishing in this way between the pleading requirement imposed by the rules of procedure and the constitutional burden a plaintiff must meet if she is to prevail respects the different purposes served by rules for testing the pleadings and those guiding the court's resolution of the merits. Moreover, it honors the realist approach to rational basis as a rebuttable evidentiary presumption, consistent with cases from *Borden's* to *Romer*.[248] As *Wroblewski* concluded, a plaintiff who alleges facts that plausibly demonstrate a violation of constitutional standards should be free to proceed to discovery and proof.

The *Wroblewski* court did affirm dismissal.[249] However, it did so *not* on the theory that a district court should bar evidence gathering if it can imagine some rationale for the government's action. Rather, it found that the complaint only made "conclusionary [*sic*] assertion[s],"[250] in violation of ordinary pleading requirements. Conclusory assertions are not sufficient in any case, whatever the standard of scrutiny.[251] Dismissal was therefore appropriate, not because the rational basis test allows judges to reach the merits at the pleading stage, but because conclusory allegations do not withstand Rule 12(b)(6) in any case.

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247 *Id.* at 459-60 (citations omitted) (internal quotation marks omitted).

248 It is also consistent with Seventh Circuit decisions that have invalidated government actions for lacking a rational basis. In *May v. Sheahan*, 226 F.3d 876, 884 (7th Cir. 2000), the Seventh Circuit affirmed the district court's refusal to dismiss a rational basis challenge to a sheriff department policy of chaining prisoners with AIDS to their beds. "Perhaps after some discovery [the sheriff] can produce evidence justifying both his shackling policy in general and his shackling of May in particular," the court ruled, "but May's allegations are more than adequate to survive a motion to dismiss." In *Evans v. City of Chicago*, 689 F.2d 1286, 1299-1300 (7th Cir. 1982), the court ruled, on the basis of evidence, that there was no rational basis for differentiating between which tort judgments it paid first and which it did not. In *Arnold v. Carpenter*, 459 F.2d 939, 943-44 (7th Cir. 1972), it relied on the evidentiary record to conclude that a school code requiring male students to wear short hair lacked a rational basis.

249 Wroblewski v. City of Washburn, 965 F.2d 452, 460 (7th Cir. 1992).

250 *Id*. at 460.

251 Ashcroft v. Iqbal, 556 U.S. 662, 681 ("bare assertions" and "a 'formulaic recitation of the elements' of a constitutional discrimination claim," are insufficient to withstand dismissal motion; "the conclusory nature of respondent's allegations . . . disentitles [those allegations] to the presumption of truth."). *See also* Smith v. Reg'l Dir. of Fla. Dep't of Corr., 368 F. App'x. 9, 12-13 (11th Cir. 2010) (dismissal of conclusory complaint raising strict-scrutiny racial discrimination claims); Sullivan v. City of Springfield, 561 F.3d 7, 15-16 (1st Cir. 2009) (same). *Cf.* Williams v. Hansen, 326 F.3d 569, 584 (4th Cir. 2003) (in strict scrutiny case, complaint must not be conclusory).

Unfortunately, the Seventh Circuit muddled things in *Flying J Inc. v. City of New Haven*.[252] Like *Wroblewski*, *Flying J* involved a "class of one" equal protection claim,[253] a subset of equal protection law in which a plaintiff claims that she was singled out for disfavored treatment. Courts—and particularly the Seventh Circuit—have long struggled with the problem of whether plaintiffs making such claims must prove that the government was motivated by specific personal animosity.[254] Thus, *Flying J*'s discussion of what precise allegations are necessary to a cause of action may be inapplicable to other types of rational basis claims. Nevertheless, while acknowledging that *Wroblewski* requires trial judges to assume the truth of allegations and to deny a dismissal motion where those allegations would, if proven, overcome the presumption of constitutionality,[255] the *Flying J* court commented that "only when courts can *hypothesize* no rational basis for the action that allegations of animus come into play."[256] This is not correct, because a court could always hypothesize a basis for any law and using such an approach, at least at the 12(b)(6) stage, would deprive the plaintiff of her right to introduce evidence, and violate the *Wroblewski* rule.

The *Flying J* court gave an illustration that proves this point:

> [T]he classic example of irrational government action in a class of one equal protection case in this circuit is an ordinance saying: No one whose last name begins with 'F' may use a portable sign in front of a 24-hour food shop, but everyone else may. What makes the ordinance in the example irrational is not simply the act of singling out, but rather that the singling out is done in such an arbitrary way.[257]

But this hypothetical does not support the idea that courts may indulge in imaginative justifications for challenged laws without regard to actual facts. On the contrary, a judge confronted with that

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[252] Flying J Inc. v. City of New Haven, 549 F.3d 538 (7th Cir. 2008).

[253] *Id.* at 548.

[254] *See, e.g.*, Marcelle v. Brown Cnty. Corp., 680 F.3d 887 (7th Cir. en banc), *cert. denied*, 133 S. Ct. 654 (2012).

[255] *Flying J*, 549 F.3d at 547.

[256] *Id.* (emphasis added). In a footnote, the court reiterated that courts "can hypothesize a rational basis for an action even if the plaintiff's pleading states facts demonstrating that the action was also motivated by animus." *Id.* at 547 n.2.

[257] *Id*. at 547 (quoting Falls v. Town of Dyer, 875 F.2d 146, 147 (7th Cir. 1989)) (internal quotation marks omitted).

hypothetical ordinance could only determine whether it is rational or not by referring to evidence: at the very least, some showing that there are just as many signs owned by people whose names start with other letters. Rule 12(b)(6) would require the plaintiff to allege at least this fact in order to show that there are similarly situated others.[258] A plaintiff who plausibly makes such allegations would be entitled to prove that singling out persons with names beginning with "F" was not rationally related to a legitimate government interest. This was precisely what the Tenth Circuit held in *Dias* when it allowed the challenge to Denver's ban on pit bulls to proceed. The circuit court ruled that a judge could not determine whether singling out pit bulls for prohibition was rational without some evidence about the dangerous propensities of different dog breeds.[259]

By contrast, a court that confines itself to asking whether an imaginary legislature might hypothetically have thought the challenged law was reasonable would probably uphold the sign rule and the pit bull prohibition because it is easy to hypothesize justifications for such ordinances. Perhaps the legislators were experimenting with ways to reduce the use of signs, and chose to begin with a common letter, and prohibit the rest of the alphabet later.[260] Perhaps they believed that the ugliest or most disruptive signs are typically owned by people whose names begin with 'F'. Maybe they thought it would reduce the city's administrative costs to bar only some residents, and not others, from displaying signs.[261] These justifications might seem farfetched, but courts have employed similarly fanciful reasoning in rational basis decisions. A court indulging in hypothetical rationalizations, and holding facts to be "irrelevant,"[262] would find itself rejecting the constitutional challenge to the 'F' sign ordinance—as another Seventh Circuit panel acknowledged when it admitted that "[i]mplicit in the example is the assumption that there is no nondisreputable reason

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258 *See, e.g.*, LaBella Winnetka, Inc. v. Vill. of Winnetka, 628 F.3d 937, 942 (7th Cir. 2010). The *Flying J* court also appears to have confused the 12(b)(6)/rational basis distinction with the facial/as-applied distinction.

259 Diaz v. City and Cnty. of Denver, 567 F.3d 1169, 1184 (10th Cir. 2009).

260 *Cf.* City of New Orleans v. Dukes, 427 U.S. 297, 305 ("[R]ather than proceeding by the immediate and absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage.").

261 *Cf.* Armour v. City of Indianapolis, Ind., 132 S. Ct. 2073, 2081 (2012) (The city could choose to refund tax money to some and not to others because equal treatment "would have meant adding yet further administrative costs. . . .").

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

for singling out persons whose last name begins with 'F' for unfavorable treatment. . . ."[263]

Thus, contrary to the *Flying J* court's suggestion, the *Wroblewski* rule does *not* require courts to accept a purely hypothetical rationalization for a law as sufficient to order dismissal of a plaintiff's well-pleaded allegations of irrationality. *Wroblewski* requires that district courts assess 12(b)(6) motions in rational basis cases as they would in any other case: by determining whether the complaint, viewed in the light most favorable to the plaintiff, states facts that plausibly give rise to a claim for relief—not by resolving the merits or disregarding the allegations in favor of hypothetical conjectures.[264]

Sadly, district courts have not always heeded *Wroblewski*. For example, a Virginia district court recently dismissed a complaint challenging the constitutionality of the state's restrictions on the purchase of certain medical equipment.[265] Although the Fourth Circuit has adopted the *Wroblewski* rule,[266] the district court ignored it, and instead reached the merits, concluding that the law was constitutional regardless of any allegations the plaintiffs might make, because the legislature might have believed the challenged law was rational. "The concept of" the law, according to the court, was to "avoid private parties making socially inefficient investments,"[267] and because this was "a legitimate government interest," the plaintiffs' allegations regarding "the benefits of allowing them to engage in their profession" or "about the negative effects of [the challenged] laws" were "entirely beside the point."[268] Making no mention of the *Wroblewski* rule,[269]

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[263] Esmail v. Macrane, 53 F.3d 176, 180 (7th Cir. 1995).

[264] Wroblewski v. City of Washburn, 965 F.2d 452, 459-60 (7th Cir. 1992). The Sixth Circuit seemed to recognize this in Bower v. Vill. of Mount Sterling, 44 F. App'x. 670, 677-78 (6th Cir. 2002), when it relied on *Wroblewski* to reverse dismissal of an equal protection claim, focusing on the facts alleged in the complaint, instead of conjectural justifications of the government's actions. And the Illinois District Court complied with *Wroblewski* when it refused to dismiss a rational basis case on the grounds that the government asserted its defenses of the law "prematurely," and that those defenses "fail[ed] to defer sufficiently to the Plaintiffs' version of the facts." King-Cowser v. Sch. Dist. 149, 2008 U.S. Dist. LEXIS 75321 at *9 (N.D. Ill. Aug. 25, 2008).

[265] Colon Health Ctrs. of Am., LLC v. Hazel, No. 1:12CV615, 2012 U.S. Dist. LEXIS 132445 (E.D. Va. Sept. 14, 2012), *aff'd in part*, *rev'd in part*, 733 F.3d 535 (4th Cir. 2013).

[266] Giarratano v. Johnson, 521 F.3d 298, 303-04 (4th Cir. 2008).

[267] *Colon Health Ctrs.*, 2012 U.S. Dist. LEXIS 132445 at *15.

[268] *Id.* at *16.

[269] *Id.* at *13-17. In fact, the court relied heavily on *Star Scientific Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002), *cert. denied sub nom.*, *Star Sci., Inc. v. Kilgore*, 537 U.S. 818 (2002), which was decided before *Giarratano*.

the court concluded that "[e]ven if plaintiffs had evidence" that the challenged laws "do not in fact advance" the government's asserted interest, such evidence "would be of no moment."[270] By employing the formalistic approach to rational basis, the district court ruled that facts were irrelevant, reached the merits at the motion to dismiss stage, and threw out a complaint that made specific factual allegations setting forth a plausible claim for relief. Sadly, the Fourth Circuit affirmed, making no mention of the *Wroblewski* rule.[271]

A more sensible approach would have been to assume the allegations in the complaint to be true, and to determine whether those allegations would, if proven, entitle the plaintiffs to judgment. If so, the court should have allowed them to introduce evidence to prove that the restrictions on the purchase of medical equipment were irrational—either because modern technology has rendered such laws obsolete[272] or because those laws only prohibit economic competition rather than advancing public health and safety concerns.[273]

Courts will remain perplexed by the interaction of Rule 12(b)(6) and the rational basis test just so long as they are pulled between the two competing conceptions of rational basis.[274] The formalist approach by which the government can have cases against it dismissed merely by *saying* that the challenged law is rational would, indeed, bar any plaintiff from ever successfully challenging the constitutionality of a law. That approach commits the error that the *Borden's* Court warned against: it makes rational basis into a form of immunity from judicial review because it "treat[s] any fanciful conjecture as enough to repel attack."[275] The Supreme Court has repeatedly and explicitly

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270 *Colon Health Ctrs.*, 2012 U.S. Dist. LEXIS 132445 at *17.

271 Colon Health Ctrs. of Am., LLC v. Hazel, 733 F.3d 535 (4th Cir. 2013).

272 *See* Nashville C & S. L. Ry. v. Walters, 294 U.S. 405, 416 (1935) (allowing rational basis challenge to proceed which was "based primarily upon the revolutionary changes incident to transportation wrought in recent years by the widespread introduction of motor vehicles. . . .").

273 *See* Sams v. Ohio Valley Gen. Hosp. Ass'n, 413 F.2d 826, 829 (4th Cir. 1969) (invalidating anti-competitive regulation of medical doctors under rational basis review because rational basis review requires courts to rely on "practical considerations based on experience rather than by theoretical inconsistencies") (quoting Ry. Express Agency v. New York, 336 U.S. 106, 110 (1949)).

274 *See* Farrell, *supra* note 9 at 42 ("Where rationality review takes its most deferential form . . . evidence of facts becomes entirely irrelevant and the procedural rules must be interpreted away. On the other hand, when courts have determined that the actual legislative purpose is relevant, then . . . it becomes possible for a claimant to state a case upon which relief can be granted.")

275 Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209 (1934).

rejected that approach, and has ruled for plaintiffs in many rational basis cases. Notwithstanding the sometimes confusing language in which it has described the rational basis test, the Supreme Court has endorsed the realist approach, which holds that the rational basis test is a *rebuttable evidentiary presumption*. The *Wroblewski* rule—which allows plaintiffs to introduce evidence to overcome the presumption of constitutionality so long as the complaint makes nonconclusory allegations that raise a plausible entitlement to relief—respects this presumption, preserves the distinction between the 12(b)(6) motion and a ruling on the merits, and protects right of plaintiffs to challenge the constitutionality of irrational laws. Although often overlooked and sometimes misunderstood, Rule 12(b)(6) ensures that trial courts do not hastily dispose of valid constitutional arguments and deprive plaintiffs of their day in court.

CONCLUSION

Although courts have expressed considerable confusion as to how Rule 12(b)(6)'s lenient standard should be applied in cases involving the deferential rational basis test, that confusion has its source in a misunderstanding of the nature of the rational basis test. That test is not, as some courts have claimed, a formalistic ritual in which judges ignore actual realities and employ hypothetical conjectures as to whether a challenged statute might have been thought reasonable. Instead, it is a rebuttable evidentiary presumption by which the court assumes a challenged law is constitutional until the plaintiff proves otherwise by competent evidence. Thus, when a defendant moves to dismiss a rational basis challenge, the court should address the 12(b)(6) motion like any other—dismissing complaints based on conclusory allegations or lacking sufficient facts to support a cause of action, but allowing a case to proceed where the well-pleaded complaint plausibly alleges that the government has acted irrationally. Once past the motion to dismiss stage, the plaintiff will then face the uphill battle of disproving the rationality of the challenged law. This approach preserves the plaintiff's day in court and ensures that the rational basis test does not become a conclusive bar to judicial review.