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### Broken Records: Reconceptualizing Rational Basis Review to Address “Alternative Facts” in the Legislative Process

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# Broken Records: Reconceptualizing Rational Basis Review to Address “Alternative Facts” in the Legislative Process

*Joseph Landau\**

*In 2016, North Carolina passed “HB2,” also known as the “bathroom ban”—a law prohibiting transgender individuals from accessing public restrooms corresponding to their gender identity—based on the unfounded fear that cisgender men posing as transgender women would assault women and girls in bathrooms. Around the same time, Alabama enacted a punishing immigration law in which sponsors distorted statistics regarding the undocumented population by using the terms “Latino/Hispanic” and “illegal immigrant” interchangeably. These laws are reflective of a larger pattern. In our increasingly polarized political climate, policymakers are affirmatively distorting legislative records and promoting dubious justifications for their policy goals—that is, they are legislating on the basis of “alternative facts”—in ways that pose unique harms for those excluded from the political process.*

*Some scholars have responded to the phenomenon of alternative facts in the legislative process by arguing for an enhanced analysis of legislative motivation. Others argue for a more general reexamination of the relationship between courts and legislative fact. This Article argues instead for a middle-ground approach whereby courts perform a threshold legal analysis to determine whether a given piece of legislation was enacted over a “broken legislative record.” Should a litigant persuade the court that a challenged act is predicated on a distorted factual foundation, such that no rational legislator could have supported its enactment, the burden would shift to the government to demonstrate that its ends are grounded in some objective measure of basic truth or rationality. If the government cannot do so, the law should fail.*

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\* Professor of Law, Fordham Law School. I am grateful to Daniel Abowd, Edgar Aliferov, Jessica Barnhardt, Pam Bookman, Jim Brudney, Ben Clinger, Courtney Cox, Nestor Davidson, Joshua Deull, Mitchell Friedman, Ben Klein, Rebecca Kysar, Ethan Leib, Zachary Leibowitz, Rachel Manning, Emily Morrow, Joshua Phang, Sepehr Shahshahani, Johnny Shaw, Juliette Todd, Shannon Walker, and Tim Whitteaker for their comments and suggestions.

*Broken records review looks at facts relied upon (in all likelihood) in bad faith; it is not concerned with bad faith itself. This leads to a number of descriptive and normative implications. First, legislative rationales falling outside of the factual realm, including purely moral justifications, would not be reachable by a broken records challenge. Moreover, while the “bite” of broken records scrutiny may lead some to raise the specter of Lochnerian judicial overreach, the inquiry is far more limited and would not lead to the invalidation of appropriate legislative policy choices. Indeed, the breadth of a broken records challenge would be limited to a review of whatever factual bases were actually employed to support a given piece of legislation.*

*One appeal of broken records review is that it echoes a customary judicial determination grounded in fact: indeed, the reasonable-legislator standard bears a useful resemblance to the reasonable-juror standard routinely considered during summary judgment. And the roadmap for litigants to follow is clearer than what other scholars propose: groups seeking to invoke the Supreme Court’s countermajoritarian prerogative can focus on more objective criteria—either gross misrepresentations of the number of credible examples of the evil allegedly targeted or other evidence counter to the legislative narrative—instead of pushing for de novo review of legislative factfinding or divining the subjective impulses of legislatures to show animus. Far from an open-ended invitation for courts to undertake legislative factfinding, the process proposed by this Article would simply empower judges to scrutinize invidious legislation more carefully by addressing the structural defect of broken legislative records.*

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## INTRODUCTION

In 2016, North Carolina passed “HB2,” also known as the “bathroom ban”—a law prohibiting transgender individuals from accessing public restrooms corresponding to their gender identity—based on the unfounded fear that cisgender men posing as transgender women would attack women and girls in bathrooms.<sup>1</sup> Around the same

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1. See Public Facilities Privacy & Security Act, N.C. GEN. STAT. § 143-760 (2016) (repealed 2017). The legislation was a response to the City of Charlotte’s passage of an amendment to its nondiscrimination law that added protection for LGBT people. See Charlotte, N.C., Ordinance 7056 (Feb. 22, 2016). Under the threat of litigation and pressure from major financial and sporting institutions, the legislature agreed to a partial repeal. See Emery P. Dalesio & Jonathan Drew, *AP Exclusive: Price Tag of North Carolina’s LGBT Law: \$3.76B*, AP NEWS (Mar. 27, 2017), <https://www.apnews.com/fa4528580f3e4a01bb68bcb272f1f0f8> [<https://perma.cc/EH9U-XXVR>] (“[T]he law limiting LGBT protections will cost the state more than \$3.76 billion in lost business over a dozen years . . . .”); Barb Darrow, *Bank of America Joins Fight Against North Carolina Bathroom Law*, FORTUNE (Mar. 30, 2016), <http://fortune.com/2016/03/30/boa-pushes-slams-north-carolina-bathroom-law/> [<https://perma.cc/PP6-TRGC>]; David Goldman, *North Carolina Loses 400 Jobs as PayPal Pulls Facility*, CNN (Apr. 5, 2016), <http://money.cnn.com/2016/04/05/technology/paypal-north-carolina-lgbt/index.html> [<https://perma.cc/Y5SJ-P225>] (“PayPal has canceled its plans to open a new global operation center in Charlotte, following passage of a North Carolina law that prevents cities from creating non-discrimination policies based on gender identity.”); German Lopez, *HB2, North Carolina’s Sweeping Anti-LGBTQ Law, Explained*, VOX

time, when Alabama passed a law purporting to deny immigrants educational and other benefits they were lawfully entitled to receive,<sup>2</sup> a court struck down the law, noting that the state legislature, by construing data about the Hispanic population as tantamount to evidence about the *undocumented* population, manufactured the very problem it wished to solve.<sup>3</sup> These laws illustrate how facts central to constitutional decisionmaking generate competing narratives—deeply held, but reflecting divergent versions of reality<sup>4</sup>—and also how policymakers today often legitimate the justification for their preferred laws by twisting facts, peddling myths, trafficking in sheer speculation, and promoting conspiracy theories.

Though the reliance on such false bases for government actions is not a new phenomenon, its growing prevalence presents a number of especially stark consequences for groups that are generally excluded from, or disfavored by, the political process<sup>5</sup>—especially those who fall outside the protection of traditional heightened scrutiny categories.<sup>6</sup> As

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(Mar. 30, 2017), <https://www.vox.com/2016/2/23/11100552/charlotte-north-carolina-lgbtq-pat-mccrory> [<https://perma.cc/C58U-QHTU>].

2. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Laws 888 (codified as amended at ALA. CODE §§ 31-13-1 to 31-13-30, 32-6-9 (2020)) (referred to as H.B. 56); see *Court Cites Discriminatory Intent Behind Alabama's Anti-immigrant Law*, S. POVERTY L. CTR. (Dec. 14, 2011), <https://www.splcenter.org/news/2011/12/14/court-cites-discriminatory-intent-behind-alabamas-anti-immigrant-law> [<https://perma.cc/U8M5-VDYS>] (discussing a federal judge's "blistering court ruling" criticizing H.B. 56).

3. See *infra* note 40 and accompanying text (discussing *Central Alabama Fair Housing Center v. Magee*, 835 F. Supp. 2d 1165, 1192 (M.D. Ala. 2011), *vacated sub nom.* Cent. Ala. Fair Hous. Ctr. v. Comm'r, Ala. Dep't of Revenue, No. 11-16114-CC, 2013 WL 2372302 (11th Cir. May 17, 2013)).

4. Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 179 (2018).

5. One infamous example is *Korematsu v. United States*, in which a presidential executive order authorized the military to issue exclusion orders during World War II against persons of Japanese ancestry residing in certain areas on the West Coast. 323 U.S. 214, 215–17 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018). Korematsu's appeal of his conviction for defying the order was affirmed by the Supreme Court. *Id.* at 223–24. Today, the military's justifications for targeting Japanese persons are recognized as having reflected "race prejudice [and] war hysteria" rather than fact. 1 COMM'N ON WARTIME RELOCATION & INTERNMENT OF CITIZENS, PERSONAL JUSTICE DENIED 18 (1982), <https://www.archives.gov/files/research/japanese-americans/justice-denied/summary.pdf> [<https://perma.cc/QCT6-XNV9>]; see also *Korematsu*, 323 U.S. 214 at 235–36 (Murphy, J., dissenting) (describing the military's justifications as based on "erroneous assumption[s] of racial guilt rather than bona fide military necessity" and utterly lacking in "reliable evidence").

6. Transgender individuals and undocumented foreign nationals are not formally protected classes, nor are many of the other legislatively targeted groups discussed throughout this Article. See Robert I. Correales, *Workers' Compensation and Vocational Rehabilitation Benefits for Undocumented Workers: Reconciling the Purported Conflicts Between State Law, Federal Immigration Law, and Equal Protection to Prevent the Creation of a Disposable Workforce*, 81 DENV. U. L. REV. 347, 391 (2003) (noting that while there have been isolated instances in which the Court has intervened to protect undocumented immigrants, generally "the Court has refused to extend [this seemingly heightened scrutiny] to other situations involving rather compelling

a result, absent visible plus factors such as explicit animus (and sometimes even in the face of such animus), state action discriminating against these populations is not traditionally required to clear a higher scrutiny bar when challenged in court. This gap in equal protection coverage renders those groups especially vulnerable to the prejudicial aims of state legislatures, particularly when the flames of that prejudice are fanned by falsehoods.

Moreover, the Supreme Court's constitutional doctrines, as they have evolved, are strikingly ill-suited to address falsehoods and are mostly bereft of any explicit command for factual analysis.<sup>7</sup> Given the perverse effects of polarization and alternative facts on individual rights—with the attendant rejection of technical, scientific, evidence-based judgment and abandonment of time-tested and ordinary legislative procedure<sup>8</sup>—scholars have begun to contemplate the role of courts in evaluating legislative factfinding, particularly (though not exclusively) in cases involving the Equal Protection Clause of the Constitution. Some argue for more scrutiny of actual legislative purpose across the board,<sup>9</sup> while others propose more nuanced paradigms of judicial review expanding courts' capacity to reexamine, and possibly override, the legislative factfinding process.<sup>10</sup>

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facts"); see also Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 509 (2016) ("[I]n the context of a facially discriminatory federal law, no court or agency has analyzed whether transgender people are a 'suspect' or 'quasi-suspect' class . . . [and] the constitutional rights of transgender people remain uncertain."). Since that article was published, some recent lower-court rulings have moved towards heightened scrutiny in cases involving transgender rights. See, e.g., *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019) ("We conclude that the 2018 Policy [banning openly transgender individuals from serving in the military] on its face treats transgender persons differently than other persons, and consequently something more than rational basis but less than strict scrutiny applies.").

7. See *infra* Section I.B.

8. For a detailed discussion of how deviations from ordinary political-branch processes can help surface forms of improper intent that are otherwise hard for courts to recognize, see Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 119 COLUM. L. REV. 2147 (2019).

9. See Jeffrey D. Jackson, *Classical Rational Basis and the Right to Be Free of Arbitrary Legislation*, 14 GEO. J.L. & PUB. POL'Y 493, 511–12 (2016) (proposing that the rational basis test not require that "a legislature *could have thought* the law to be rationally related" to the government's stated goal but rather that the law "actually *be* rationally related" to its purpose); Clark Neily, *Litigation Without Adjudication: Why the Modern Rational Basis Test Is Unconstitutional*, 14 GEO. J.L. & PUB. POL'Y 537, 550 (2016) (arguing that the rational basis test is an insufficient judicial check on governmental action).

10. See William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 882–83 (2013) (arguing for a "more nuanced examination" of the "appropriate degree of judicial deference due to congressional fact-findings that support legislation affecting individual rights"); Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 3 (2009) (arguing that "courts should independently review the factual foundation of all legislation that curtails important individual rights protected by the federal Constitution"); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1171–72 (2001) (calling on

Given the shortcomings of both proposals, this Article proposes a middle-ground approach whereby courts address head-on a legislature's trafficking in inaccuracies, myths, or conspiracy theories in its assertions supporting a given law. Under this approach, the government's subjective intent is immaterial. Broken records analysis does not burden trial courts with an intent-driven inquiry into *why* a particular group has been targeted—an inquiry that often proves impossible to carry out with certainty.<sup>11</sup> Rather, broken records analysis offers courts a framework they are quite capable of following: an evaluation of the evidentiary foundation within a legislature's stated factual rationales for targeting that group.<sup>12</sup> Challengers to government actions would have an opportunity to demonstrate that a given piece of legislation is predicated on a false factual foundation and that no rational legislator could have supported its enactment.

Once a successful *prima facie* broken records claim is made, the burden would shift to the government to demonstrate that the problem it seeks to address is real—that its ends are grounded in some objective measure of basic truth or rationality. If the government cannot do so, the law should fail. If, however, the challenger cannot satisfy its burden, the court would proceed to apply the doctrine as it currently stands—rational basis would invite deference,<sup>13</sup> whereas heightened scrutiny would call for a closer analysis of the government's stated objective and its chosen means.<sup>14</sup>

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the Supreme Court “to check [congressional interest in factfinding] when the risk of special-interest capture seems especially significant”); Larsen, *supra* note 4, at 182 (suggesting “refocusing the standards of review in constitutional litigation so that courts are tasked with evaluating the process used to generate the factual claims presented”).

11. See, e.g., Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 553–54 (2016) (noting that legislative intent is a “protean concept,” inevitably colored by the particular fact pattern it inhabits); *id.* at 527–28 (arguing that the Supreme Court has adopted “varied approaches to the identification of legislative intent,” some of which “manifest ambiguity,” in part because “multimember legislatures typically have no unitary, collective intentions in the psychological sense”); see also Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1215 (2018) (observing that “the federal judiciary has not homed in upon a single definition of discriminatory intent” or “a consistent approach to the evidentiary tools through which discriminatory intent is substantiated”).

12. See *infra* Section III.C (distinguishing the kind of “fact”-supported state acts reachable by broken records review from the purely values-driven acts that fall outside of broken records review's purview).

13. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2402 (2018) (defining the rational basis inquiry as “whether the . . . policy is plausibly related to the Government's stated objective”); *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) (requiring only that “the classification challenged be rationally related to a legitimate state interest”); *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (asking that a classification have only a “relation to the purpose for which it is made”).

14. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“[Racial] classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.”); *United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (requiring an “exceedingly persuasive”

Broken records review concerns the process by which legislatures form the purpose and factual basis for legislation, an inquiry that avoids wholly refashioning the judicial power and the relationship among the coordinate branches.<sup>15</sup> It presents a practical approach that is aligned with contemporary practices and doctrine—particularly by analogy to summary judgment’s threshold evidentiary requirement.<sup>16</sup> Unlike a constitutional theory that requires a court to determine *ex ante* whether a particular group has suffered prejudice at the hand of a legislative majority—a subjective determination on which conservative and liberal justices largely disagree—an evidence-based, broken-record-style approach couched in more objective standards likely has broader appeal, while still coming to the aid of many (though not all) marginalized groups affected by the spread of alternative facts.

Moreover, under broken records review, the roadmap for litigants to follow is clearer: groups seeking to invoke the Court’s countermajoritarian prerogative can focus on more objective criteria—either a shortage of government evidence or evidence counter to the legislative narrative—instead of relying on the subjective interpretation of facts tending to show animus or trying to persuade federal courts, as some scholars have argued, to exercise plenary review of the legislative factfinding process. And although the “bite” of such rational basis scrutiny may lead some to raise the specter of Lochnerian judicial overreach, the limited inquiry proposed by this Article should not lead to the invalidation of most legislative policy choices. To be clear, the breadth of such a claim would be limited to the factual bases employed to support the legislation; indeed, legislative rationales falling outside of the factual realm, including purely moral justifications, would not be reachable by a broken records challenge. The process proposed by this Article would simply empower judges to invalidate invidious legislation by using rational basis review to address the structural defect of broken legislative records.

Following this Introduction, Part I explores a number of areas where alternative facts have recently loomed large, and where legislative trafficking in myth, hyperbole, or conspiracy theory has presented a puzzle and a doctrinal problem for courts. Part II frames how scholars have responded to the problem of alternative facts, as well

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justification for classifications on the basis of sex (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)); *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993) (“This burden [of justifying a restriction on commercial speech] is not satisfied by mere speculation or conjecture; rather, a governmental body . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”).

15. See *infra* Section II.B.

16. See *infra* Section III.B.



as the benefits and drawbacks of those approaches. Part III introduces the theory of broken records review as a superior mechanism to address the problem, noting its core features and fit with other commonly accepted procedural devices—summary judgment in particular. Part IV explores how leading constitutional frameworks such as the Court's discriminatory intent and animus doctrines address the problem of broken legislative records only tangentially and may actually lead courts astray from identifying the constitutional import of alternative facts. Part V considers the normative implications of broken records review, demonstrating why, despite the charge of returning to the discredited days of *Lochner*, the theory provides a workable and appropriately revived form of rational basis review.

### I. THE PROBLEM OF ALTERNATIVE FACTS IN LAWMAKING

Legislation predicated on falsehoods or mistaken facts is not a new phenomenon, but it has taken on greater salience in light of heightened polarization and advances in forms of communication that allow for faster dissemination of false facts.<sup>17</sup> This problem has reached a new order of magnitude of late in many different areas of lawmaking. Not only have some policymakers dispensed with any effort to ground law in objective facts or data, but when the actual science is misaligned with a preferred policy goal, or when the facts threaten the cultural values of a constituency, policymakers simply resort to presenting “alternative” ones.<sup>18</sup> Opponents of such myth-based legislation, particularly when it imperils the rights of politically vulnerable groups, have occasionally been successful waging boycotts in response<sup>19</sup> or using litigation to combat these laws. Courts have begun to take note of situations in which such sheer inaccuracies in the legislative process undermine the soundness of a given piece of legislation—for example, where legislatures rely on the testimony of unqualified “experts” or (more commonly) propound incorrect, misleading, or inapplicable information in favor of a given bill.<sup>20</sup> But they have been reticent to go too far in this direction, given the limitations of current doctrinal frameworks that leave little or no room to consider their constitutional salience.

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17. See, e.g., Larsen, *supra* note 4, at 177, 180–81 (arguing that “technological speed, infinite access to information, a balkanized press, and a diluted notion of expertise” have facilitated a “toxic political dialogue of rogue facts” imperiling both legislative processes and a constitutional jurisprudence “increasingly dependent on factual claims”).

18. *Id.* at 190–91.

19. See *infra* Section I.A.1.

20. See *infra* Sections I.A.2–3 & Part IV.

## A. “Public Safety” and Alternative Facts

## 1. Transgender Rights and Public Safety

Shortly after the Supreme Court’s 2015 decision recognizing the right of same-sex couples to marry, transgender rights emerged as a major flashpoint within a number of states where LGBT interests remain poorly represented, with legislatures stoking fears about purported threats that transgender people pose to public safety. One well-known example concerns North Carolina’s “HB2,” a law prohibiting transgender individuals statewide from accessing public restrooms corresponding to their gender identity.<sup>21</sup> The law was passed in swift reaction to the City of Charlotte’s passage of an LGBT nondiscrimination ordinance, and it ignited a nationwide firestorm about LGBT rights.<sup>22</sup> But HB2 also typified how legislators can deploy alternative facts to run roughshod over the rights of marginalized groups. To pass HB2, the state general assembly hastily threw together a single twelve-hour “special session”<sup>23</sup> to whirl through the entire legislative cycle (from introduction and passage in the general assembly, to passage in the state senate, to enactment into law by the governor’s signature) for a bill that legislators did not even see before its release.<sup>24</sup>

Around the time of HB2, nineteen states attempted to pass anti-LGBT ordinances, of which sixteen specifically targeted trans people.<sup>25</sup> Where the bathroom laws were concerned, politicians often promoted a fabrication that nondiscrimination laws increase the risk of assaults because of cisgender “men [taking] advantage of the law to enter women’s bathrooms to harass and sexually assault women.”<sup>26</sup> One such advertising campaign depicted “a young girl in a bathroom stall, with a

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21. Public Facilities Privacy & Security Act, N.C. GEN STAT. § 143-760 (2016) (repealed 2017).

22. Charlotte, N.C., Ordinance 7056 (Feb. 22, 2016); see discussion and sources cited *supra* note 1.

23. Dave Philipps, *North Carolina Bans Local Anti-Discrimination Policies*, N.Y. TIMES (Mar. 23, 2016), <https://www.nytimes.com/2016/03/24/us/north-carolina-to-limit-bathroom-use-by-birth-gender.html> [<https://perma.cc/WNF6-SPZ8>].

24. See *id.*; see also Lopez, *supra* note 1 (“HB2 [was] proposed and signed into law within 24 hours.”).

25. See *Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country (2016)*, ACLU, <https://www.aclu.org/other/past-lgbt-nondiscrimination-and-anti-lgbt-bills-across-country> (last visited Mar. 5, 2020) [<https://perma.cc/9A6Q-4PLL>]. If including religious exemption legislation, that number jumps to thirty-two. See *id.*

26. Lopez, *supra* note 1; see also Katy Steinmetz, *Why LGBT Advocates Say Bathroom ‘Predators’ Argument Is a Red Herring*, TIME (May 2, 2016), <http://time.com/4314896/transgender-bathroom-bill-male-predators-argument/> [<https://perma.cc/J7GN-EG6R>] (describing the bathroom safety argument and the rebuttal).

chilling voiceover warning that a man could enter at any time.”<sup>27</sup> Some of these laws did not succeed: in the case of North Carolina’s HB2, PayPal, Bank of America, and the NCAA (among others) cancelled or threatened to pull out of business ventures in the state unless the law was rescinded. In response to that pushback, the state legislature agreed to a partial repeal.<sup>28</sup>

## 2. The So-Called Immigration Threat

In addition to passing laws affecting LGBT rights, states have been unusually busy enacting legislation pertaining to immigration in a fashion that further demonstrates the utility of alternative facts to lawmakers willing to demonize a politically weak minority. In 2017 alone, lawmakers in forty-nine states enacted more than two hundred such laws.<sup>29</sup> Some of the more controversial measures, notably provisions purporting to criminalize at the state level violations of federal immigration law, as well as efforts to strip benefits from recipients of programs such as Deferred Action for Childhood Arrivals (“DACA”),<sup>30</sup> appear to place vulnerable communities under significant threat.

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27. Sarah Posner, *Anti-Trans Bathroom Debate: How a Local Religious-Right Faction Launched a National Movement*, ROLLING STONE (Jan. 22, 2018, 8:06 PM), <https://www.rollingstone.com/politics/how-houstons-religious-right-launched-the-anti-lgbtq-bathroom-movement-w515477> [<https://perma.cc/32GA-HMHP>]; see also Kathy Miller & Lisa Scheps, *The Lies Behind Texas Anti-Abortion Laws and “Bathroom Bills,”* TRIBTALK (July 20, 2017), <https://www.tribtalk.org/2017/07/20/the-lies-behind-texas-anti-abortion-laws-and-bathroom-bills/> [<https://perma.cc/P6TN-XFYT>] (criticizing the “buzzwords” of “privacy,” “safety,” and “protecting girls” as “based on lies”).

28. See sources cited *supra* note 1.

29. NAT’L CONFERENCE OF STATE LEGISLATURES, 2017 IMMIGRATION REPORT (2018), <http://www.ncsl.org/research/immigration/2017-immigration-report.aspx> [<https://perma.cc/6YFP-WYRN>].

30. DACA is an exercise of federal prosecutorial discretion, initiated in 2012, under which undocumented immigrants who arrived in the United States prior to the age of sixteen—and who meet other defined criteria—may receive deportation relief and work authorization for a renewable two-year period. Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/VTJ9-JANM>]. DACA approval plus work authorization qualifies an individual for a Social Security Number, which cumulatively should suffice for driver’s license eligibility in every state. Kendra Sena, *Driver’s Licenses and Undocumented Immigrants*, GOV’T L. CTR., ALB. L. SCH. 6, <https://www.albanylaw.edu/centers/government-law-center/Immigration/explainers/Documents/DriversLicensesExplainer.pdf> (last updated Jul. 15, 2019) [<https://perma.cc/8AHR-SBBZ>]. Nonetheless, three states—Arizona, Michigan, and Nebraska—initially refused to issue driver’s licenses to DACA recipients. Jonathan Blazer, *Nebraska Legislature Overrides Governor’s Veto and Gives Dreamers Their License to Drive*, ACLU (May 29, 2015, 12:30 PM), <https://www.aclu.org/blog/immigrants-rights/state-and-local-immigration-laws/nebraska->

In 2011, Alabama passed the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, one of the most restrictive state immigration laws in the country.<sup>31</sup> The law targeted undocumented foreign nationals in numerous ways, including by prohibiting them from receiving any state or local public benefits,<sup>32</sup> barring them from attending publicly owned colleges or universities,<sup>33</sup> and prohibiting them from applying for or performing work.<sup>34</sup> The law also forbade judicial enforcement of certain contracts made with undocumented foreign nationals,<sup>35</sup> prohibited rental agreements to provide them with accommodations,<sup>36</sup> and prohibited certain transactions between undocumented individuals and state or local government, including the provision of a license plate or nondriver identification card.<sup>37</sup> In support of the law, sponsors presented statistics that conflated race with immigration status, resulting in legislation that purported to address the issue of undocumented immigration but, owing to its false factual foundation, wound up distorting the law's necessity and underlying rationale. The bill's sponsor made a habit of substantiating his talking point that "Alabama has the second-fastest-growing illegal immigrant population in the nation" with references to growth in the state's *Hispanic* population, information that "sa[id] nothing about unauthorized immigration whatsoever."<sup>38</sup>

Another member of the state legislature also resorted to inaccuracies when attempting to document illegal immigration's drain on state resources, again by focusing on Latino populations that were immaterial to the noncitizen or immigrant population.<sup>39</sup> Such repeated attempts to use "illegal immigrant" interchangeably with "Latino" or "Hispanic" undermined confidence that the resulting law was grounded in fact; instead, it sounded alarms about the legality and rational basis

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legislature-overrides-governors [<https://perma.cc/ZLP2-S3YZ>]. Nebraska, the final holdout, did not relent until 2015. *Id.*

31. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Laws 888 (codified as amended at ALA. CODE §§ 31-13-1 to 31-13-30, 32-6-9 (2020)) (referred to as H.B. 56). This act has been partially enjoined. *United States v. Alabama*, 691 F.3d 1269 (2012).

32. § 7(b), 2011 Ala. at 898 (codified at ALA. CODE § 31-13-7(b)).

33. § 8, 2011 Ala. at 901 (codified at ALA. CODE § 31-13-8).

34. § 11(a), 2011 Ala. at 905 (codified at ALA. CODE § 31-13-11(a)), *enjoined by Alabama*, 691 F.3d 1269.

35. § 27(a), 2011 Ala. at 919 (codified at ALA. CODE § 31-13-26(a)), *enjoined by Alabama*, 691 F.3d 1269.

36. § 13(a)(4), 2011 Ala. at 908 (current version at ALA. CODE § 31-13-33), *enjoined by Alabama*, 691 F.3d 1269.

37. § 30(b), 2011 Ala. at 927 (codified as amended at ALA. CODE § 31-13-29(b)).

38. *Cent. Ala. Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1192 (M.D. Ala. 2011), *vacated sub nom.* *Cent. Ala. Fair Hous. Ctr. v. Comm'r, Ala. Dep't of Revenue*, No. 11-16114-CC, 2013 WL 2372302 (11th Cir. May 17, 2013).

39. *Id.* at 1192–93.

of the law, which was eventually set aside by a court willing to interrogate the legislation's manifestly shoddy factual foundation.<sup>40</sup>

Other such laws have often been legitimated through the lens of public safety. For example, in 2019, when Florida passed a bill forbidding sanctuary cities,<sup>41</sup> the senator who sponsored the measure touted the law's purpose as "about public safety and making sure we remove the criminal element of illegals that are here."<sup>42</sup> Yet recent studies have demonstrated that the presence of undocumented immigrants is not linked with an increase in violent crime or drug and alcohol problems.<sup>43</sup> Indeed, the Cato Institute found that criminal conviction and arrest rates for undocumented immigrants in Texas

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40. *Id.* (noting that H.B. 56's backers "conflated race and immigration status," thereby distorting the growth of the undocumented population in the state); *id.* at 1193:

[T]he county population figures [that Representative Kerry] Rich relies on are for Hispanics, not non-citizens or illegal immigrants. Moreover, his criticism (that "[t]he ones that I have a problem with are the ones that come here and create all kinds of social and economic problems") appears to be aimed at Hispanics in general, not illegal immigrants.

41. Tim Craig, *Florida House Passes Bill that Forbids 'Sanctuary Cities,' Would Issue Fines for Failing to Help Federal Immigration Authorities*, WASH. POST (Apr. 24, 2019, 1:34 PM), [https://www.washingtonpost.com/national/florida-house-passes-bill-that-forbids-sanctuary-cities-would-issue-fines-for-failing-to-help-federal-immigration-authorities/2019/04/24/8c95f1ce-65e5-11e9-a1b6-b29b90efa879\\_story.html](https://www.washingtonpost.com/national/florida-house-passes-bill-that-forbids-sanctuary-cities-would-issue-fines-for-failing-to-help-federal-immigration-authorities/2019/04/24/8c95f1ce-65e5-11e9-a1b6-b29b90efa879_story.html) [https://perma.cc/KKY5-U8QA]. House Bill 527 died in the Rules Committee, but a similar bill, Senate Bill 168, passed by both the House and Senate, was approved by the Governor on June 14, 2019, and largely took effect on October 1, 2019. Among other things, the new law prohibits sanctuary policies, requires state and local government entities (including law enforcement agencies) to use best efforts to support enforcement of federal immigration law, and under certain circumstances authorizes law enforcement agencies to transport individuals unlawfully present in the United States across state lines for transfer to federal custody. FLA. STAT. §§ 908.101–908.109 (2019); H.B. 527, 2019 Leg., Reg. Sess. (Fl. 2019). A judge from the U.S. District Court for the Southern District of Florida blocked the provision authorizing participation by state officials in the interstate transport of detainees. Monique O. Madan & Daniel Rivero, *All Florida Cops and Elected Officials Will Be Forced to Comply with ICE as of Tuesday*, MIAMI HERALD (Sept. 30, 2019 7:20 PM), <https://www.miamiherald.com/news/local/immigration/article235631727.html> [https://perma.cc/S23V-RX9L].

42. Craig, *supra* note 41.

43. Recent research by the University of Wisconsin, Madison, and published in the journal *Criminology* found that the increase in illegal immigration since 1990 did not correspond with an increase in violent crime, and another study showed that undocumented youth engage in less crime than their documented or U.S.-born counterparts. Michael T. Light & Ty Miller, *Does Undocumented Immigration Increase Violent Crime?*, 56 CRIMINOLOGY 370, 393–96 (2018); John Burnett, *Illegal Immigration Does Not Increase Violent Crime*, 4 *Studies Show*, NPR (May 2, 2018, 5:09 AM), <https://www.npr.org/2018/05/02/607652253/studies-say-illegal-immigration-does-not-increase-violent-crime> [https://perma.cc/ZRM9-6WEF]. Another study jointly conducted by four universities and published in the *Journal of Ethnicity in Criminal Justice* found that immigration is consistently linked to decreases in violent and property crime. Robert Adelman et al., *Urban Crime Rates and the Changing Face of Immigration: Evidence Across Four Decades*, 15 J. ETHNICITY CRIM. JUST. 52, 70 (2017).

were lower than those of native-born Americans for homicide, sexual assault, larceny, and other crimes.<sup>44</sup>

At the national level, the Trump Administration's travel ban is a paradigmatic example of the same phenomenon, albeit with Muslims rather than Latinos as the targeted out-group.<sup>45</sup> While President Trump grounded the policy in a claimed security need to protect the country,<sup>46</sup> experts within his own administration opposed the policy on national security grounds, finding that it would actually make the country less safe.<sup>47</sup> Among the many objections voiced across the national security establishment was that not a single national of any of the eight countries targeted by the travel ban had carried out a deadly terrorist attack in the United States in the forty years prior to its enactment.<sup>48</sup>

### 3. The Superpredator Myth in Criminal Sentencing

Another illustration of the influence of spurious facts in U.S. law comes from the sentencing context. Congress and state legislatures—responding to the imagined depredations of a made-up persona, the “superpredator”—prescribed a dramatic increase in lengthy and punitive sentences for violent crime, a remedy with grave consequences

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44. Alex Nowrasteh, *Criminal Immigrants in Texas*, CATO INST. 5 (Feb. 26, 2018), <https://www.cato.org/sites/cato.org/files/pubs/pdf/irpb-4-updated.pdf> [<https://perma.cc/LNX2-78VD>].

45. See Proclamation 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (restricting indefinitely the entry of certain nationals from Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen).

46. See *id.* (claiming that the travel ban, in keeping with “the policy of the United States to protect its citizens from terrorist attacks and other public-safety threats,” would “enhance our ability to detect foreign nationals who may commit, aid, or support acts of terrorism, or otherwise pose a safety threat, and . . . aid our efforts to prevent such individuals from entering the United States”).

47. Two unclassified Department of Homeland Security (“DHS”) memos undermined the President’s claimed security need. According to one memo, because “most foreign-born, U.S.-based violent extremists became radicalized many years after entering the United States,” the “increased screening and vetting” called for by the executive order was “unlikely to significantly reduce terrorism-related activity in the United States.” *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 575 (4th Cir. 2017) (quoting a DHS memo). Another memo found “that citizenship in any country is likely an unreliable indicator of whether a particular individual poses a terrorist threat.” *Id.*

48. See Brief of Amici Curiae Former National Security Officials in Support of Respondents at 18, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965), 2018 WL 1733146, at \*18 (“In fact, the Proclamation targets eight countries whose nationals have committed *no deadly terrorist attacks on U.S. soil in the last forty years.*”); see also Alex Nowrasteh, *President Trump’s New Travel Executive Order Has Little National Security Justification*, CATO INST. (Sept. 25, 2017, 6:47 AM), <https://www.cato.org/blog/zero-terrorists-eight-countries-new-trump-travel-executive-order> [<https://perma.cc/G3KC-7F9S>] (providing statistics demonstrating that “[f]rom 1975 through . . . 2015, zero Americans have been killed by foreign-born terrorists on U.S. soil who hail from any of the eight countries on the new executive order”).

for the adolescent and young-adult black men whose stifled political voice allowed the myth to flourish in the first place. The term “superpredator” was coined by Princeton academic John DiIulio as part of a multipronged agenda to convince others that a “generation of amoral youthful outlaws [and] . . . a wave of young killers was on the horizon.”<sup>49</sup> DiIulio preached that youths, particularly those of color<sup>50</sup> in urban areas, “were so morally corrupt that rehabilitation was useless.”<sup>51</sup> DiIulio, who did not view these individuals as children but instead as “fatherless, Godless, and jobless” superpredators,<sup>52</sup> was joined by criminologist James Alan Fox, who embraced the superpredator myth and warned that “[u]nless we act today, we’re going to have a bloodbath when these kids grow up.”<sup>53</sup> Although DiIulio and Fox’s prediction never came to fruition, the nation took notice—and responded. Some politicians exploited these public fears by pledging to “get tough” on juvenile criminals.<sup>54</sup> Hillary Clinton, referencing

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49. JOHN R. MILLS ET AL., PHILLIPS BLACK PROJECT, NO HOPE: RE-EXAMINING LIFETIME SENTENCES FOR JUVENILE OFFENDERS 10 (2015), <https://static1.squarespace.com/static/55bd511ce4b0830374d25948/t/5600cc20e4b0f36b5ccaab8a/1442892832535/JLWOP+2.pdf> [<https://perma.cc/EWZ6-76U4>] [hereinafter PHILLIPS BLACK PROJECT]; Joseph E. Kennedy, *Juries for Juveniles*, 46 TEX. TECH L. REV. 291, 296 n.15 (2013) (“The term ‘superpredator’ was coined by John DiIulio, who sounded the alarm about a coming wave of violent dangerous youths growing up in moral poverty.”); see also WILLIAM J. BENNETT, JOHN J. DI IULIO JR. & JOHN P. WALTERS, BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA’S WAR AGAINST CRIME AND DRUGS 27 (1996) (“America is now home to thickening ranks of juvenile ‘super-predators’—radically impulsive, brutally remorseless youngsters, including ever more pre-teenage boys who . . . do not fear the stigma of arrest, the pains of imprisonment, or the pangs of conscience.”).

50. Scholars have noted how the “superpredator” myth was racially charged, focusing specifically on the “dangers” of African-American youth. Sarah French Russell, *Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights*, 56 B.C. L. REV. 553, 610 (2015).

51. FAIR PUNISHMENT PROJECT, JUVENILE LIFE WITHOUT PAROLE IN PHILADELPHIA: A TIME FOR HOPE? 13 (2016), [http://fairpunishment.org/wp-content/uploads/2016/03/FPP\\_JLWOP\\_philadelphia\\_r601.pdf](http://fairpunishment.org/wp-content/uploads/2016/03/FPP_JLWOP_philadelphia_r601.pdf) [<https://perma.cc/Q7GZ-CXB5>].

52. John J. DiIulio, Jr., *Arresting Ideas*, HOOVER INSTITUTION POL’Y REV. (Sept. 1, 1995), <https://www.hoover.org/research/arresting-ideas> [<https://perma.cc/UZ4X-9B8G>].

53. See Brief of Jeffrey Fagan et al. as Amici Curiae in Support of Petitioners at 14, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9647, 10-9646), 2012 WL 174240, at \*14 (quoting Laurie Garrett, *Murder by Teens Has Soared Since ‘85*, N.Y. NEWSDAY (Feb. 18, 1995)) (alteration in original).

54. Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & FAM. STUD. 11, 31 (2007); see also JAMES ALAN FOX, TRENDS IN JUVENILE VIOLENCE: A REPORT TO THE UNITED STATES ATTORNEY GENERAL ON CURRENT AND FUTURE RATES OF JUVENILE OFFENDING (1996), <https://www.bjs.gov/content/pub/pdf/tjvfox.pdf> [<https://perma.cc/WE6C-4MFS>] (predicting a “future wave of youth violence that will be even worse than that of the past ten years”); MARK MAUER ET AL., THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT 1 (2004), <https://www.sentencingproject.org/publications/the-meaning-of-life-long-prison-sentences-in-context/> [<https://perma.cc/5D86-CVZ4>] (“Over the past three decades the political climate in the United States has increasingly embraced ‘get tough’ policies as the primary focus of a crime control strategy.”); JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 65 (2d ed. 2011) (“[C]rime was being

DiIulio's work, famously remarked, "[W]e have to bring [superpredators] to heel."<sup>55</sup>

"Superpredator" mania spurred federal and state governments toward harsh juvenile punishments that often proved ineffective. Congress soon passed, and President Clinton signed, the Violent Crime Control and Law Enforcement Act of 1994,<sup>56</sup> which authorized courts to try certain violent juvenile offenders as adults<sup>57</sup> and increased juvenile penalties for firearm possession.<sup>58</sup> Numerous states responded in kind, enacting harsher sentencing policies and "encouraging the trial of juvenile offenders in adult rather than juvenile courts."<sup>59</sup> Between 1992 and 1999, forty-five states adopted laws expanding their courts' jurisdictions over juveniles,<sup>60</sup> and forty-eight states increased sanctions for violent juvenile offenders.<sup>61</sup> In criminal court, where judges had little experience with juvenile justice, young offenders were essentially

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deliberately molded into a major issue, not on its merits, but through manipulation by politicians, Justice Department-funded researchers, and a media increasingly surviving on the sensational.").

55. Hillary Clinton, First Lady, Remarks at Keene State College (Jan. 28, 1996). For a partial recording of this speech, see Robert Mackey, *Hillary Clinton on "Superpredators" in 1996*, C-SPAN (Feb. 25, 2016), <https://www.c-span.org/video/?c4582473/user-clip-hillary-clinton-superpredators-1996> [<https://perma.cc/J2KG-RQNZ>].

56. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of the U.S.C.); see Note, *Mending the Federal Sentencing Guidelines Approach to Consideration of Juvenile Status*, 130 HARV. L. REV. 994, 1002 (2017) [hereinafter Note, *Mending the Federal Sentencing Guidelines*] ("[C]ultural lore around the superpredator claim contributed to Congress enacting and President Clinton signing the Violent Crime Control and Law Enforcement Act of 1994.").

57. *E.g.*, § 140001, 108 Stat. at 2031 (codified at 18 U.S.C. § 5032 (2012)) (allowing children as young as thirteen to be prosecuted as adults for assault, murder, and attempt to commit murder or manslaughter, as well as robbery, bank robbery, and aggravated sexual abuse if the offense involved possession of a firearm); § 140005, 108 Stat. at 2032 (codified at 18 U.S.C. § 5038 (2012)) (requiring courts to transmit juvenile conviction records to the Federal Bureau of Investigation if the juvenile could have been tried as an adult for commission of any of the crimes encompassed by § 140001).

58. See § 110201, 108 Stat. at 2010–12 (codified at 18 U.S.C. §§ 922, 924 (2012)) (prohibiting, with exceptions, the knowing possession by a juvenile of a handgun or handgun-specific ammunition, and allowing imprisonment of violators).

59. *State v. Null*, 836 N.W.2d 41, 53–54 (Iowa 2013); see, e.g., Law of May 25, 1995, ch. 191, § 8, 1995 Iowa Acts 462 (amending IOWA CODE § 232.8 to exclude juveniles sixteen and older from the jurisdiction of the juvenile court for the alleged commission of certain offenses).

60. PHILLIPS BLACK PROJECT, *supra* note 49, at 11; see also, SHAY BILCHIK, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN: CHALLENGING THE MYTHS 2 (2000), <https://www.ncjrs.gov/pdffiles1/ojdp/178993.pdf> [<https://perma.cc/7L6F-6T95>] ("Nearly every State changed its laws to make it easier to handle more youth as adult criminals."); PATRICIA TORBET ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 3–9 (1996) <http://www.ncjj.org/pdf/statresp.pdf> [<https://perma.cc/WTJ8-YV3R>] ("[L]egislatures have, since 1992, added significantly to the list of offenses now considered serious and/or lowered the age for which certain juveniles could be tried in criminal court.").

61. Megan McCabe Jarrett, Student Work, *Stifling the Shot at A Second Chance: Florida's Response to Graham and Miller and the Missed Opportunity for Change in Juvenile Sentencing*, 45 STETSON L. REV. 499, 502–03 (2016).



treated as adults and “*more* often sentenced to prison and for *longer* periods of time than their adult counterparts.”<sup>62</sup> While some federal and state courts would eventually reject the false equivalence between juveniles and adults,<sup>63</sup> the superpredator myth continued to loom over many juvenile sentencing schemes: juvenile life without parole (“JLWOP”) became mandatory for certain offenses,<sup>64</sup> and despite a decrease in the number of homicides by youths starting in 1994,<sup>65</sup> there was a “nearly tenfold increase” in the use of JLWOP for homicides between 1990 and 1999.<sup>66</sup>

Over time, the very notion of the juvenile superpredator unraveled. Indeed, the entire factual foundation for the superpredator has been repudiated by most of its adherents,<sup>67</sup> including DiIulio and Fox, who admitted that their predictions were incorrect, explained how scientific findings invalidated the superpredator myth, and noted that the rise in punitive juvenile sentencing during the 1990s resulted from

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62. *Null*, 836 N.W.2d at 54 (emphasis added) (citing Donna Bishop & Charles Frazier, *Consequences of Transfer, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT* 227, 234–36 (Jeffrey Fagan & Franklin E. Zimring eds., 2000)); see also Note, *Mending the Federal Sentencing Guidelines*, *supra* note 56, at 1002–03 (quoting Congressional findings that “[j]uveniles transferred for trial as adults in federal court are essentially treated as adults”).

63. The Supreme Court has held that juveniles are fundamentally different from adults for sentencing purposes because they are less mature, more vulnerable to outside influences, more likely to experience transient character traits, and less likely to be deterred by harsh penalties. See *Miller v. Alabama*, 567 U.S. 460, 471–72 (2012) (“[C]hildren are constitutionally different from adults for purposes of sentencing. . . . Juveniles have diminished culpability and greater prospects for reform.”); *Graham v. Florida*, 560 U.S. 48, 68 (2010) (noting “developments in psychology and brain science [that] continue to show fundamental differences between juvenile and adult minds”); *Roper v. Simmons*, 543 U.S. 551, 569–73 (2005) (“[T]he same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.”); see also *State v. Sweet*, 879 N.W.2d 811, 829 (Iowa 2016) (“[J]uveniles are less capable than adults of communicating with and giving meaningful assistance to their counsel.”); Brief of the American Bar Association as Amicus Curiae in Support of Petitioners at 9, *Miller*, 567 U.S. 460 (Nos. 10-9646, 10-9647), 2012 WL 166269, at \*9 (“[S]entences for juvenile offenders must recognize that, no matter how adult-like their offenses, they are not adults.”).

64. See PHILLIPS BLACK PROJECT, *supra* note 49, at 10 (“JLWOP sentencing policies were greatly expanded in response to this pseudo-science myth of the superpredator.”).

65. See *id.* at 11.

66. See *id.* at 12. According to another study, “in eleven out of the seventeen years between 1985 and 2001, youth convicted of murder in the United States were *more* likely to enter prison with a life without parole sentence than adult murder offenders.” HUM. RIGHTS WATCH & AMNESTY INT’L, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES* 2 (2005), <https://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf> [<https://perma.cc/7DVM-JUTS>].

67. According to a United States Surgeon General’s report, there is no evidence that youth in the early 1990s were involved in more violent crime than youth in earlier years. David S. Tanenhaus & Steven A. Drizin, “Owing to the *Extreme Youth of the Accused*”: *The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 643 (2002) (citing DEPT OF HEALTH & HUM. SERVS., *YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL* 5 (2001)).

“an environment of hysteria” rather than solid evidence.<sup>68</sup> Public opinion has moved in a similar direction, with prior supporters of the superpredator myth facing significant backlash. Indeed, Hillary Clinton’s embrace of the superpredator myth proved harmful during her unsuccessful bid for the presidency in 2016.<sup>69</sup>

Meanwhile, the Supreme Court’s occasional reliance on scientific evidence has brought about a mild decrease in some of the harshest penalties. For instance, in the 2005 case *Roper v. Simmons*, the Court ruled the death penalty unconstitutional for minors, in part based on “scientific and sociological studies” showing juveniles to be generally less mature, more impressionable, and less fixed in their personality traits than adults.<sup>70</sup> In 2010, in *Graham v. Florida*, the Court prohibited JLWOP for nonhomicide offenses, reasoning that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”<sup>71</sup> Finally, in the 2012 case *Miller v. Alabama*, the court held mandatory JLWOP for murder unconstitutional, having found evidence in the amicus briefs that the “science and social science” undergirding *Roper* and *Graham* had further solidified.<sup>72</sup>

State courts, drawing on the Supreme Court’s reliance on scientific data in *Roper*, *Miller*, and *Graham*, have gone further in directly addressing the problems wrought by the superpredator myth.<sup>73</sup>

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68. Brief of Jeffrey Fagan et al. as Amici Curiae in Support of Petitioners at 15–28, *Miller*, 567 U.S. 460 (Nos. 10-9647, 10-9646), 2012 WL 174240, at \*15–28.

69. See Anne Gearan & Abby Phillip, *Clinton Regrets 1996 Remark on ‘Super-Predators’ After Encounter with Activist*, WASH. POST (Feb. 25, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/02/25/clinton-heckled-by-black-lives-matter-activist/?noredirect=on&utm\\_term=.ac252d0de88a](https://www.washingtonpost.com/news/post-politics/wp/2016/02/25/clinton-heckled-by-black-lives-matter-activist/?noredirect=on&utm_term=.ac252d0de88a) [https://perma.cc/H57U-UUP6] (quoting Hillary Clinton as stating, “Looking back, I shouldn’t have used those words, and I wouldn’t use them today” in response to a question at a 2016 fundraising event).

70. 543 U.S. 551, 569–70, 578 (2005).

71. 560 U.S. 48, 68, 82 (2010).

72. 567 U.S. 460, 471–72, 472 n.5 (2012). In the wake of *Miller*, numerous state legislatures and the District of Columbia have prohibited LWOP for all juvenile offenses. Fair Sentencing of Minors Act of 2017, 2017 Ark. Acts 539; Parole: Youth Offender Parole Hearings, 2017 Cal. Legis. Serv. 684 (West); 2016 Colo. Sess. Laws 1447; 2015 Conn. Acts 332 (Spec. Sess.); 79 Del. Laws ch. 37 (2013); Comprehensive Youth Justice Amendment Act of 2016, 63 D.C. Reg. 15312, 15312–25 (Dec. 16, 2016) (effective Apr. 2017); 2014 Haw. Sess. Laws 693; 2019 Or. Laws ch. 634; 2017 N.D. Laws 563; 2017 N.J. Laws 1320; 2015 Nev. Stat. 617; 2016 S.D. Sess. Laws ch. 121 308; 2013 Tex. Gen. Laws 5020; Juvenile Sentencing Amendments, 2016 Utah Laws 1507; 2015 Vt. Acts & Resolves 209; 2014 W. Va. Acts 459; 2013 Wyo. Sess. Laws 75. The Massachusetts Supreme Judicial Court similarly prohibited LWOP for juveniles in *Diatchenko v. District Attorney for the Suffolk District*, 1 N.E.3d 270, 284–85 (Mass. 2013). The Massachusetts legislature codified this prohibition the next year. 2014 Mass. Acts 832.

73. See *State v. Bassett*, 428 P.3d 343, 355 (Wash. 2018) (holding that JLWOP sentences violate the Washington State Constitution); *State v. Sweet*, 879 N.W.2d 811, 836–37, 839 (Iowa 2016) (declaring JLWOP unconstitutional under the Iowa state constitution for all offenses);

For example, in *Diatchenko v. District Attorney for the Suffolk District*, the Massachusetts Supreme Judicial Court construed the “current scientific research on adolescent brain development” as irreconcilable with even discretionary JLWOP.<sup>74</sup> The court held that because a juvenile’s brain is still developing—both structurally and functionally—a conclusive finding of irretrievable depravity is never justified, and hence the imposition of a sentence as severe as JLWOP constitutes cruel and unusual punishment.<sup>75</sup> Likewise, in prohibiting discretionary JLWOP in *State v. Sweet*, the Iowa Supreme Court cited scientific briefs from the earlier U.S. Supreme Court cases<sup>76</sup> to conclude that judicial assessments of juvenile rehabilitative prospects are “too speculative and likely impossible given what we now know about the timeline of brain development.”<sup>77</sup> In light of these changes, the “overwhelming majority” of the JLWOP sentences that remain in force today were imposed during the 1990s.<sup>78</sup>

### *B. Alternative Facts in Doctrinal Context*

With a few exceptions, constitutional rights doctrines have been designed without concern for rooting out this unique brand of legislative falsehood.<sup>79</sup> The general tiers-of-scrutiny framework provides for heightened review in certain constitutional contexts, including laws that involve suspect or quasi-suspect classifications under the Equal Protection Clause<sup>80</sup> and laws that burden fundamental rights, such as decisions around childbearing or marriage, under the Due Process

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*Diatchenko*, 1 N.E.3d at 283–85 (holding that JLWOP sentences violate the Massachusetts Constitution, based partially on “current scientific evidence”).

74. 1 N.E.3d at 283–84.

75. *Id.* at 284–85.

76. 879 N.W.2d at 828–29, 839 (citing Brief of the American Bar Association as Amicus Curiae in Support of Petitioners, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647), 2012 WL 166269; Brief for the American Psychological Association et al. as Amici Curiae in Support of Petitioners, *Miller*, 567 U.S. 460 (Nos. 10-9646, 10-9647), 2012 WL 174239; Brief for the American Medical Association and the American Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party, *Graham*, 560 U.S. 48 (Nos. 08-7412, 08-7621), 2009 WL 2247127).

77. *Id.* at 836–37.

78. See PHILLIPS BLACK PROJECT, *supra* note 49, at 9.

79. One example of the exceptions to this proposition is abortion doctrine and its governing “undue burden” standard. The latest iteration of the standard calls for a balancing of claimed benefits against the burden—and for an examination of whether the challenged regulations are in fact “benefits.” See *infra* Section IV.B.

80. See, e.g., *United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (requiring an “exceedingly persuasive” justification for gender classifications (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982))); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding all racial classifications subject to strict scrutiny); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (subjecting discrimination against nonmarital children to intermediate scrutiny).

Clause.<sup>81</sup> Further, a narrow prong of equal protection doctrine imposes strict scrutiny on laws that discriminate among people in the exercise of certain rights deemed fundamental, such as the right to vote<sup>82</sup> and right to travel.<sup>83</sup> Surviving heightened scrutiny requires meeting two elements: first, that the government objectives be sufficiently weighty, and, second, that the means employed fit those objectives closely.<sup>84</sup> This prominent and widely used constitutional review framework is devoid of any explicit authorization to protect groups whose underrepresentation in legislative processes renders them vulnerable to the peddling of alternative facts in lawmaking.

In practice, however, and despite the lack of explicit language to this effect, heightened scrutiny does involve factual analysis, which occasionally benefits out-groups prone to legislative stereotyping.<sup>85</sup> But the result is often dissonant decisions that confront distorted legislative records by awkwardly tying that analysis back to the formal doctrine.<sup>86</sup> It is thus likely that courts, although occasionally willing to grapple with alternative facts under heightened scrutiny, do so less consistently

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81. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997) (“The Due Process Clause . . . provides heightened protection against government interference with certain fundamental rights and liberty interests.”); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 686 (1977) (“[W]here a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests . . . .”); *Roe v. Wade*, 410 U.S. 113, 155 (1973) (explaining that governmental action limiting fundamental rights, in this case the right to privacy, “may be justified only by a ‘compelling state interest’ ”); *Griswold v. Connecticut*, 381 U.S. 479, 503–04 (1965) (“[S]tatutes regulating sensitive areas of liberty do, under the cases of this Court, require ‘strict scrutiny . . . .’”) (White, J., concurring).

82. E.g., *Reynolds v. Sims*, 377 U.S. 533, 561–62, 566 (1964) (describing the right to vote as “a fundamental matter in a free and democratic society,” interference with which “must be carefully and meticulously scrutinized,” before holding that unequal-population voting districts offend the Equal Protection Clause “as much as invidious discriminations based upon factors such as race or economic status” (citation omitted)).

83. E.g., *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (invalidating, on equal protection grounds, states’ conditioning of welfare eligibility on length of residence, because such classification “touches on the fundamental right of interstate movement” without “promot[ing] a compelling state interest”).

84. E.g., *Adarand*, 515 U.S. at 227 (“[Racial] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

85. Indeed, recent overhauls of certain constitutional areas, such as judicial review of government classifications based on gender, are often based on repudiations of traditionally held conceptions now considered to be factually baseless and illegitimate grounds for government action. See, e.g., *Virginia*, 518 U.S. at 533 (“The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”); *Craig*, 429 U.S. at 199 (“[I]t was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact.”).

86. See *infra* Section IV.A; see also *infra* Section V.A.

and cogently than they would if factual review were formally integrated into the current doctrinal frameworks.<sup>87</sup>

More recently, another avenue has formed. The doctrine of animus, which has its roots in equal protection cases but can be found in other areas of constitutional law, reflects the belief that “a bare . . . desire to harm a . . . group cannot constitute a legitimate governmental interest.”<sup>88</sup> Animus is a transsubstantive doctrine that exhibits two primary features. First, it solidifies the simple order that government actions, in whatever context, should not be motivated by an intent to harm a class of people. Second, it invites inference from a variety of circumstances that animus may lurk beneath facially neutral government action. Animus is uncovered by examining the fit between the government action and the stated objective,<sup>89</sup> deviations from trending cultural or constitutional norms,<sup>90</sup> departures from procedural norms,<sup>91</sup> and, importantly, for purposes of this Article, the validity of factual assertions advanced in support of a given law.<sup>92</sup>

Not unlike heightened scrutiny, animus effectively but unofficially invites courts to look at facts. Yet, because it requires a showing of discriminatory intent against a group of people, the doctrine features a dissonance similar to that which appears under heightened scrutiny—tying factual analysis to a formal doctrine that does not explicitly authorize such investigation.<sup>93</sup> This renders courts’ work

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87. See *infra* Section V.A.

88. *E.g.*, *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis omitted).

89. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447–50 (1985) (comparing the unsatisfying alleged purposes of a zoning ordinance requiring a special permit for homes for mentally disabled individuals with the actions taken); *Moreno*, 413 U.S. at 534 (noting that “[t]he challenged statutory classification . . . is clearly irrelevant to the stated purposes of the Act”).

90. *United States v. Windsor*, 570 U.S. 744, 768 (2013) (finding that the federal Defense of Marriage Act upended a “history and tradition of reliance on state law to define marriage”); *Romer v. Evans*, 517 U.S. 620, 627–28 (1996) (noting that a state constitutional amendment prohibiting nondiscrimination protections for gays, lesbians, and bisexuals bucked “the structure and operation of modern antidiscrimination laws” and disrupted an “emerging tradition of statutory protection”).

91. *Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977) (noting how departures from ordinary procedures can be indicative of invidious intent). Though *Arlington Heights* is not often considered part of the anti-animus canon, it famously invites inference of discriminatory intent from context and circumstance. *Id.*

92. In *Cleburne*, for example, the Court used factual and logical contradictions and counterexamples to infer that government action “rest[s] on an irrational prejudice against the mentally [disabled].” 473 U.S. at 447–50. As explained *infra* in Section IV.A, the Supreme Court has generally preferred to engage in motivational analysis rather than confront factual invalidity head-on.

93. See, e.g., Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 927–29 (2012) (interpreting *Cleburne* and *Romer* as “providing plaintiffs with an opportunity to . . . affirmatively prove the presence of unconstitutional animus through close examination of the connection between the identifying trait and the interests—both individual and governmental—implicated by the law”).

needlessly complicated and denies politically weak groups the benefit of a clear pronouncement from the judiciary that distorted legislative records will not go unnoticed. This gap in constitutional doctrine, and the judiciary's awkward dance around it, is striking. Although nowhere does the doctrine formally authorize courts to employ factual analysis, they do so frequently in the heightened-scrutiny and animus realms, but less consistently and effectively than they might if given an explicit charge.

Most problematic is the lowest tier of the framework—rational basis review. Though it requires that government actions have some “rational relation” to a set of stated (or even unstated) objectives,<sup>94</sup> and though it originally presented a nonnegligible potential for invalidation of government actions,<sup>95</sup> the doctrine evolved into a standard that greatly defers to the political branches.<sup>96</sup> Needless to say, a doctrine of complete deference runs the risk of deferring to bogus legislative rationales as well.<sup>97</sup> This gross doctrinal omission has helped render rational basis review toothless in most cases of lawmaking based on

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94. *E.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (“[O]ur decisions . . . require . . . that the classification challenged be rationally related to a legitimate state interest.”); *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (requiring a regulatory classification to have “relation to the purpose for which it is made”).

95. Early rational basis review placed a burden on the challenger to introduce facts showing that there was no relation between the statute and its purported aims, a burden that “was difficult, but not impossible” to meet. *Jackson*, *supra* note 9, at 497–98. Over time, the rational basis test lost its impact as the judicial branch began conjecturing possible motives for the government’s legislation rather than accepting and evaluating only those offered by the government. This mode of decisionmaking, expressed in classic rational basis decisions such as *United States v. Carolene Products Co.*, 304 U.S. 144, 152–54 (1938) (restricting rational basis analysis “to the issue [of] whether any state of facts either known or which could reasonably be assumed affords support for [the statute]”), took full force in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), when, rather than looking “at the actual evidence regarding the relation of the statute to its purported aims,” the court decided “it would consider only whether legislators *might have thought* the statute had a rational basis.” *Jackson*, *supra* note 9, at 503–04. This more lenient strand of rational basis review, and the large amounts of deference that it heralded, defines our current constitutional age, in which the Court has “effectively de-fang[ed] [its] scrutiny of legislation outside of preferred rights.” *Id.* at 503.

96. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2402 (2018) (describing the rational basis inquiry as “whether the . . . policy is plausibly related to the Government’s stated objective”); *Heller v. Doe*, 509 U.S. 312, 319 (1993) (“[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity.”); *Dukes*, 427 U.S. at 303 (“[R]ational distinctions may be made with substantially less than mathematical exactitude.”); *Ry. Express*, 336 U.S. at 110 (“It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.”).

97. Rational basis is deferential not only as to asserted facts, but also as to justifications. Under the doctrine, courts are authorized to suggest conceivable justifications for the law even if these were neither advanced by the government nor based in reality. *See Williamson*, 348 U.S. at 487 (speculating about what the legislature might have concluded that led to the passage of the act); *Ry. Express*, 336 U.S. at 110 (speculating about what local authorities “may well have concluded” and noting that it would require omniscience to contradict those conclusions).

alternative facts,<sup>98</sup> a deficiency with special importance for marginalized classes whose group characteristics may not qualify them for heightened-scrutiny protection and for whom legislative animus may be difficult to prove. The doctrine as it stands is thus ill-suited to confront the unique problem that arises when government actions are premised on affirmative distortions of fact.

## II. SCHOLARLY RESPONSES TO ALTERNATIVE FACTS

Scholars who are concerned with the increasing salience of alternative facts in lawmaking tend to offer one of two solutions. Some argue that trial courts can and should take on the task of reviewing the legislative record, and the process by which the record was created, in spite of the concerns about judicial overreach that this raises.<sup>99</sup> Others argue instead that trial courts should engage not in factfinding as such, but in expanded forms of motivational inquiry, a proposal more squarely grounded in current equal protection doctrine and methodology.<sup>100</sup> But reframing the doctrine to consider broken legislative records might better respond to the problem that alternative facts pose for groups excluded from the lawmaking process without upending well-established norms about the separation of powers that underlie the otherwise enormously deferential posture courts apply to ordinary legislative acts under the rational basis doctrine.<sup>101</sup>

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98. See, e.g., Jackson, *supra* note 9, at 505 (“[T]he principles announced in *Williamson v. Lee Optical* essentially made the presumption of constitutionality irrebuttable.”); Neily, *supra* note 9, at 543 (describing the canonical rational basis test used in *Williamson* as “an essentially irrebuttable presumption that the government is pursuing constitutionally permissible ends, regardless of whether it actually is”).

99. Larsen, *supra* note 4, at 181–82 (“The traditional claim is that courts do not have the same fact-finding tools as legislatures and are thus not equipped to get the facts. . . . [But to] protect constitutional law from alternative facts, we must empower courts to proactively guard against them—and judges must rise to meet the challenge.”).

100. Jackson, *supra* note 9, at 511–12 (arguing for a stricter rational basis test that asks whether the legislature “actually” thought the law was rationally related to the purpose); Neily, *supra* note 9, at 550; see also *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (invalidating state constitutional amendment under rational basis review based on its animus against gays, lesbians, and bisexuals); *Pers. Adm’r v. Feeney*, 442 U.S. 256, 275–76 (1979) (declining to apply heightened scrutiny, notwithstanding the law’s disparate impact on women, when the challengers could not demonstrate discriminatory motive); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–66 (1977) (holding that discriminatory motive is the gravamen of a successful challenge to race-neutral government action); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (establishing that the disparate racial impact of a law or policy generally does not trigger heightened scrutiny unless a discriminatory motive can be shown).

101. See *supra* Section I.B.

*A. The Plenary Factfinding Model Versus the Intent-Based Model*

In her trenchant analysis of the constitutional implications of alternative facts, Allison Orr Larsen notes that America's increasing political divide has "evolved into 'my team-your team' facts."<sup>102</sup> Thus, "[w]hether one believes climate change is man-made or voter fraud is an epidemic, for example, may well depend on one's political affiliation."<sup>103</sup> In light of an increasing abundance of myth-based legislation, Larsen believes the judiciary should be empowered to more closely scrutinize legislative facts, and particularly the process used to generate them.<sup>104</sup> As compared to the legislature, which may be more inclined to feed the polarization vortex with alternative facts, courts have stronger incentives to "focus on the sources of the facts," producing outcomes more aligned with their truth-seeking function.<sup>105</sup>

Responding to traditionalist understandings that courts lack the institutional competency to digest factual information at a wholesale level, Larsen argues that courts can actually retain factfinding powers because of judges' engrained norms of professional judgment, their position in the adversarial process, and larger institutional incentives.<sup>106</sup> Judges, equipped with specialized legal training, are better able to sort the wheat from the chaff and resist the cognitive bias that leads others to accept alternative facts as truth.<sup>107</sup> Because trial courts are well equipped to evaluate process<sup>108</sup> as compared to legislative purpose, judicial deference to the legislature should be calibrated to the depth of the legislature's fact-checking process.<sup>109</sup> For example, a court could consider whether the hearing that generated a

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102. Larsen, *supra* note 4, at 190–91.

103. *Id.*

104. *Id.* at 182.

105. *Id.* at 223.

106. *Id.* at 182, 220–23.

107. *See id.* at 223 ("[C]ourts also seem to already possess a resistance to the infection that is plaguing the political discourse.").

108. *Id.* at 237 ("[J]udges are good at evaluating process."); *see also* Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 407 (noting the legal process conception of judicial review and its emphasis on "the relative institutional competence of courts, legislatures and agencies to make and implement social policy decisions").

109. *See* Larsen, *supra* note 4, at 218, 234. In making this argument, Larsen draws on the argument made by Dan Kahan and others, who posit that judges' "situation sense," developed through professional training, equips them with an increased capacity to focus purely on the facts pertinent to the resolution of a case and resist the distortion of myths and alternative facts. Dan M. Kahan et al., "Ideology" or "Situation Sense"? *An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 355 (2016).



legislative finding was impartial or unduly partisan, and adjust its deference accordingly.<sup>110</sup>

As an alternative to Larsen's transsubstantive approach,<sup>111</sup> Caitlin Borgmann provides a narrower take on the judicial role in addressing alternative facts, arguing that courts should reexamine the underlying factual predicates of laws that curtail individual rights.<sup>112</sup> In such cases, enhanced factual review would apply regardless of whether the law triggered heightened scrutiny<sup>113</sup> and irrespective of the quality of the legislature's factfinding process. Courts would thus have authority to review legislative facts in all rights cases, even where the legislature adhered to a sound and objective factfinding process or engaged in purely values-based decisionmaking, provided that the law potentially curtailed some constitutionally protected individual right.<sup>114</sup>

Other scholars, focusing less on the issue of alternative facts as such, but seemingly preoccupied by similar concerns, have argued for more judicial scrutiny of legislative purpose in virtually every case. Clark Neily, a proponent of an expanded motivational inquiry, reasons that courts have the capacity and capability to identify true legislative intent in all cases and that a decision made on anything less than an inquiry into genuine intent is an abdication of the judicial mandate.<sup>115</sup> For rational basis review to be meaningful, the court cannot merely defer to the government to present any conceivable rational relationship between means and ends, nor can it blindly accept its own conjecture.<sup>116</sup> Doing so would too often permit, if not invite, arbitrary legislation. The onus is thus on the court, using its subjective faculties of reason and judgment, to determine, based on the facts presented,

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110. See Larsen, *supra* note 4, at 234.

111. Larsen analogizes her proposed framework to two fixtures of administrative law—*Chevron* Step Zero on the one hand and “hard look” review on the other. See *id.* at 235–36.

112. Borgmann, *supra* note 10, at 3.

113. *Id.*

114. *Id.* at 49.

115. See Neily, *supra* note 9, at 550 (“[W]hen judges do not ask what the government is really up to—which they typically do not, since the rational basis test is the default standard in constitutional law—judges are no more engaged in adjudication than when they decide cases by coin toss . . .”); see also Jackson, *supra* note 9, at 511–12 (arguing for a return to classical rational basis review that would require courts to inquire into the actual purpose of the legislation).

116. See Neily, *supra* note 9, at 555 (arguing that “the modern rational basis test,” by “deciding constitutional cases on the basis of government-favoring conjecture and surmise instead of a good-faith effort to get at the objective truth,” is “an epistemologically incoherent, intellectually indefensible, and conscience-shocking ‘test’”); cf. Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL’Y 401, 410 (2016) (“[A]ny permissible purpose should continue to be sufficient to meet the rational basis test, but . . . courts should focus on the actual purpose of the legislature rather than ask whether there is a conceivable permissible purpose.”).

that the law does not bear the taint of improper motive such that it actually *is* rationally related to its stated purpose.<sup>117</sup>

### *B. Critiques of Current Proposals*

While the preceding proposals to address alternative facts have their appeal, they suffer from potential drawbacks. For example, there are problems with empowering judges across the board to engage in de novo review of the legislative process. Such a proposition risks turning some of the most basic separation-of-powers principles on their heads, especially the ordinary presumption that courts lack the competence to sit as superlegislatures and second-guess legislative procedure. Such a proposal could bring upheaval to the court system, clogging dockets with an endless stream of “independent, case-by-case assessments of the fairness of statutory classifications [that] would invite excessive litigation and generate unpredictable and conflicting results.”<sup>118</sup> In any event, as explained below, such a remedy may not be necessary to cure the problem of alternative-fact-based lawmaking.

While plenary judicial review of the factfinding process seems appealing from the standpoint of vindicating individual rights, it can also be used to undo protections for marginalized groups by judges who are more prone to rule based on their cognitive or cultural biases. Borgmann’s more tailored approach might seem responsive to this concern, as it would require more searching review of a law’s factual foundations only when individual rights are at stake. But this assumes that a given judge’s inability to distinguish fact from farce would not undermine his or her ability to discern a threat to individual rights, when in fact the analyses seem intertwined.

Proposals advocating closer review of actual legislative purpose, for their part, run into other difficulties. First, these approaches overlook the built-in limitations and inherent complications of discerning governmental intent, a task often rendered impossible when a discriminatory motive hides behind facially neutral statutory language.<sup>119</sup> A further pitfall arises if laws grounded in alternative facts

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117. Jackson, *supra* note 9, at 511–12.

118. Richard H. Fallon, Jr., *Implementing the Constitution*, 111 HARV. L. REV. 54, 64–65 (1997); see also Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213–20 (1978) (discussing institutional considerations underlying the judicial reluctance to enforce the U.S. Constitution to its fullest extent).

119. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997) (tracking the intent doctrine’s inability to keep up with the evolving “ways in which the legal system enforces social stratification”); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 764 (2011) (enumerating the many

have multiple explanations, including—but not limited to—invidious intent. Even more difficult are scenarios in which perfectly well-intentioned legislatures find themselves engaging in lawmaking based on faulty information; in such cases, a stepped-up intent inquiry leads to a dead end. An intent-based model could even license the trafficking in alternative facts, provided that such facts are not illustrative of improper motive and are the basis for facially neutral legislation. Such scenarios are especially likely where the subject of a legislature's faulty deliberation is a group without the political voice necessary to prevent the majority's unthinking assumptions from taking deeper root.

These drawbacks weigh in favor of crafting an objective test with a more limited judicial role in reexamining the legislative process. In that vein, focusing on the narrower and more concrete problem of broken legislative records—rooting out alternative facts, myths, or conspiracy theories through a pragmatic, neutral inquiry into the factual and evidentiary arguments made in support of a given piece of legislation—provides an appealing alternative, especially for the purpose of protecting politically underrepresented groups. Unlike models that would in effect require the government to subjectively persuade the court of the sufficiency of a law's factual foundation in many, if not all, cases, broken records review, more modestly, empowers courts to consider the arguably more familiar question of whether any rational legislator could have found the factual foundation sufficient.

### III. INTRODUCING BROKEN RECORDS REVIEW

Broken records review addresses the acute vulnerability of politically marginalized groups to myth-based legislation more squarely than either plenary factfinding or enhanced motivational review. Procedurally, it bears a resemblance to summary judgment in that it requires the government to meet a basic evidentiary threshold in a preliminary hearing, and thus it would not demand a dramatic expansion of the judiciary's repertoire. Moreover, broken records review, although technically resolved before a case is assigned to a particular tier of scrutiny, indirectly reinvigorates the traditional transsubstantive rights doctrines and complements their underlying mission. First, it revives the concept of rational basis review by highlighting how that inquiry, properly understood, contemplates a threshold assessment of the factual assertions made in support of a given law—at least on some occasions. Second, when a law predicated

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pitfalls of intent-driven doctrine, including the opportunity for legislators of ordinary sophistication to whitewash their true motives out of discriminatory measures).

on alternative facts contains a suspect classification or burdens a fundamental right, broken records review empowers a court to confront the problem head-on, rather than contort its analysis to fit a heightened-scrutiny doctrine that does not formally authorize myth-busting. Finally, broken records review offers a more promising vehicle than animus doctrine for smoking out and invalidating laws based on impermissible stereotyping. Indeed, a broken records analysis may even vindicate leading constitutional cases by offering a superior explanation for the correctness of their outcomes.<sup>120</sup> As courts begin to recognize that laws are tainted not because they are the product of improper motivation (assuming such intent can even be known),<sup>121</sup> but rather because those laws are predicated on the peddling of distortions and falsehoods, the benefits and utility of a broken records approach become increasingly clear.<sup>122</sup>

### A. *The Mechanics of Broken Records Review*

Under broken records review, a party challenging the constitutionality of a given piece of legislation would have an opportunity in a preliminary hearing to alert the court to certain telltale signs of alternative-fact-based lawmaking. Depending on the context, these might include the government's failure during the enactment process to produce credible examples of the evil allegedly targeted,<sup>123</sup> an avalanche of counterexamples vastly outnumbering the government's supporting examples,<sup>124</sup> or "facts" propounded by the legislature that are roundly refuted by scientific data<sup>125</sup> or by the government's own evidence.<sup>126</sup> As such, broken records review would offer politically marginalized groups an opportunity to confront, through litigation, the

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120. See *infra* Part IV.

121. See *supra* note 11 and accompanying text.

122. Broken records review arguably takes the court closer to its judicial roots by examining a piece of legislation according to the legislature's proposed purposes and avoiding any conjecture into what it thinks the legislature's aims, animus, or possible rationales for laws were. See *supra* note 95 and accompanying text. But even compared to the classical rational basis test, broken records review is different: it tests the accuracy of the government's stated justifications for a given law rather than looking for a link between the piece of legislation and its proposed aims.

123. See *infra* Section IV.A.3.

124. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 156–57 (1980) (contending that courts should be skeptical of legislation when there are a high number of counterexamples, but especially so when there is a "generalization whose incidence of counterexample is significantly higher than the legislative authority appears to have thought it was"); *infra* Section IV.A.1.

125. See *infra* Section IV.B.

126. See *infra* Section IV.A.3.

type of factual distortions they might have rooted out in the legislative process had they been given the chance.

Should a claimant's un rebutted proof of any such defect persuade the court that the legislation is predicated on the propagation of alternative facts—meaning that no rational legislator could have supported its enactment—the burden would shift to the government to demonstrate that the legislative ends were indeed grounded in some objective measure of basic truth or rationality. And should the government fail to carry its burden without resort to post hoc rationalizations—that is, solely by reference to the statutory text or legislative history—the law would fail.

A challenger's burden under broken records review would thus be substantial, but not insurmountable. As a basic matter, challenged legislation would fail where the court is satisfied that no rational legislator in possession of all relevant facts could have expected the law to serve the narrative(s) asserted by the legislature during the enactment process. Or, as Justice White recognized in *Vance v. Bradley*, the threshold for refuting the government's justification should be whether the government could reasonably believe its assertions.<sup>127</sup> Importantly, however, should a broken records challenge fail, ordinary means-ends analysis would reactivate. So, for example, if no suspect classification or fundamental right were implicated, the court would be bound to vindicate (as it does under current doctrine) any rational relationship between the means and the ends—whether argued by the government or hypothesized by the court.<sup>128</sup>

Moreover, broken records review does not displace the deference courts pay to the *mechanisms* chosen by legislatures to engage in factfinding—whether through committee structure, expert testimony, open floor debate, or otherwise.<sup>129</sup> Most matters of legislative process will remain within the province of the legislature,<sup>130</sup> just like most fact-

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127. See 440 U.S. 93, 111–12 (1979) (sustaining mandatory retirement at age sixty for federal Foreign Service personnel and noting that in “an equal protection case of this type, . . . those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker”).

128. See discussion *supra* notes 94–95.

129. Notably, there are certain constitutional contexts in which courts appear to scale deference based on the extent to which the political branches follow (or fail to follow) ordinary, well-established and time-honored procedural norms. See generally Landau, *supra* note 8.

130. Cf. Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976). While Linde did not believe that courts should review the means used to pass legislation such as considering evidence, attending committee meetings, or reading a bill before casting a vote, see *id.* at 224–27, he noted that other mandates (constitutional and otherwise) pertaining to the qualifications of legislators, terms of office, reapportionment, and voting and quorum requirements raise important questions regarding what, if any, judicial response might be warranted. *Id.* at 240–42.

based disputes remain within the province of the jury.<sup>131</sup> Instead, broken records review addresses the unique problem that arises when legislatures affirmatively distort the record, claiming to address harms that in reality do not exist.

### *B. Broken Records and Threshold Determinations*

The features of broken records review can be further explained, and legitimated, by analogy to other hallowed processes courts routinely engage in along the fact/law distinction—summary judgment especially.<sup>132</sup> Just as a judge can, as a matter of law, enter judgment against a party lacking evidence in support of a claim for relief, so can a judge require, as a purely legal matter, that the legislature meet a basic evidentiary threshold where it advances factual arguments in support of a given policy. In that regard, dubious factual predicates for state action raise the same kinds of legal red flags as claims in which there is insufficient evidence to support a *prima facie* case. And just as a party moving for summary judgment must discharge an initial burden before the court will entertain the inquiry,<sup>133</sup> so must a challenger point out the likely existence of alternative-fact-based lawmaking to trigger broken records review. Importantly, neither summary judgment nor broken records review performs a qualitative assessment of the relative strengths and weaknesses of the substantive merits; rather, the court in each case addresses the likelihood that no reasonable juror (at summary judgment) or legislator (under broken records review) could find evidence substantiating one or more elements of the nonmoving party's cause of action or in support of the legislative narrative propounded in favor of a law, respectively. Thus, both broken records review and summary judgment are an outer boundary, set by the court,

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131. See *infra* Section III.B (exploring the analogy between broken records review and summary judgment).

132. See FED. R. CIV. P. 56(a) (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”). The same standard is applied to motions for judgment as a matter of law, both during and after trial (pursuant to FED. R. CIV. P. 50(a) and FED. R. CIV. P. 50(b), respectively). See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (“[The] standard [for granting summary judgment] mirrors the standard for a directed verdict.” (alterations in original) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986))).

133. *Celotex*, 477 U.S. at 323 (“[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying” the sources “which it believes demonstrate the absence of a genuine issue of material fact”); *Bias v. Advantage Int'l, Inc.*, 905 F.2d 1558, 1560 (1990) (“The Supreme Court has stated that the moving party always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact.”).

regarding a threshold level of legal acceptability.<sup>134</sup> A litigant who establishes a modicum of evidence still has the right to trial, and a law whose justificatory rationale appears to be predicated on factual content still receives rational basis review (or whichever level of scrutiny is appropriate under the circumstances). But when a litigant, or legislative body, promotes only frivolous arguments, based entirely on falsehoods or innuendo, judges are permitted—indeed, required—to intercede on behalf of that judicially set boundary when the parties call on them to do so.<sup>135</sup>

Just as the ambiguous fact/law distinction can create uncertainty around summary judgment standards,<sup>136</sup> the precise contours of broken records review will be subject to debate. Judges disagree about how much evidence suffices to satisfy a minimum evidentiary standard at summary judgment, and judgment calls around the precise boundary for broken records review will be no different:<sup>137</sup>

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134. Scholars have subjected summary judgment to withering criticism. *See, e.g.*, Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007) (arguing that summary judgment violates the Seventh Amendment); *see also* John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 526 (2007) (“I think that the civil justice system would actually enjoy a net benefit from abolishing summary judgment, in terms of both efficiency and fairness.”); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705 (2007) (detailing a series of interconnected ways that summary judgment diminishes the voice of individual—especially female—litigants).

135. In addition to summary judgment, recent changes to pleading standards under FED. R. CIV. P. 8(a)(2) arguably provide an additional analogy to broken records review. In *Bell Atlantic v. Twombly*, 550 U.S. 544, 556 (2007), the Supreme Court required that claimants, to avoid a motion to dismiss, must provide “enough factual matter (taken as true) to suggest . . . plausible grounds . . . at the pleading stage.” The Court reiterated that standard in *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) (requiring that a pleading be “supported by factual allegations,” not “mere conclusory statements”). These recent interpretations of Rule 8 have not gone without criticism. *See, e.g.*, Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 17–18 (2010) (arguing that *Twombly* and *Iqbal*, by invigorating motions to dismiss for inadequate pleading, have replicated the problems with summary judgment, calling into question those decisions’ legitimacy).

136. Commentators have noted the vexing distinction between questions of law and fact. *See* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1769 (2003) (“The importance of the law-fact distinction is surpassed only by its mysteriousness.”); William W. Schwarzer, Alan Hirsch & David J. Barrans, *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441, 454 (1992) (“What is a ‘fact’ for summary judgment purposes is neither intuitively obvious nor easily determined. The rule itself contains no definition or other guidance. But this is not unique to Rule 56. The distinction between fact and law has long bedeviled common-law courts.”). Courts have made similar observations. *See, e.g.*, Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) (noting “the vexing nature of the distinction between questions of fact and questions of law”).

137. Although broken records review—like summary judgment—empowers the judge to consider the amount and quality of evidence supporting one party’s position, the inquiry is confined within narrow procedural parameters. For broken records review to commence, a challenger must first materialize. And should that challenger fail to persuade the court that no reasonable legislator could have believed a law’s stated rationale, the judge must resume a deferential posture toward the government’s factual claims.

some judges will require a mere “scintilla” and others may require more.<sup>138</sup> But such disagreements among judges are typical—if not healthy—and should be embraced as part of a natural evolutionary legal process in such contexts. While broken records review may thus at times require courts to venture into the foggy overlap between law and fact,<sup>139</sup> the inquiry is familiar—and in many ways analogous to the kinds of mixed questions of law and fact that courts routinely adjudicate in a variety of different situations.<sup>140</sup>

### C. Broken Records Review and Values Legislation

Broken records review looks at facts relied on, in all likelihood, in bad faith. But it is not concerned with the bad faith *itself*. Thus, while it might often arise in situations where litigants also attempt to prove animus, the narrow scope of broken records review does not involve consideration of the legislature’s subjective intent. Whether the factual predicates of a state act are furthered out of duplicity is immaterial. The factual predicates themselves are all that broken records review considers. As a result, broken records review is not conceived to address purely values-based legislation. State actions which, on their face, purport simply to further a purely moral end may leave no factual trail for broken records review to follow. Only when proponents of values legislation seek to redouble the justification for their actions by citing alternative facts does broken records review activate. Of course, the added flexibility that broken records review affords would not preclude litigants from making full use of other tools at their disposal, such as animus review, for which an intent-based inquiry is appropriate.

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138. In the context of summary judgment, compare *Manok v. Southeast District Bowling Ass’n*, 306 F. Supp. 1215, 1219 (C.D. Cal. 1969) (“Such a drastic procedure should be used sparingly so that no plaintiff, having a scintilla of merit to his cause should be denied his day in court.”), and *Morgan v. Sylvester*, 125 F. Supp. 380, 389 (S.D.N.Y. 1954), *aff’d*, 220 F.2d 758 (2d Cir. 1955) (finding that a scintilla of evidence is sufficient to preclude summary judgment), with *Patterson v. International Brotherhood of Teamsters, Local 959*, 121 F.3d 1345 (9th Cir. 1997) (stating that a movant “must produce more than a ‘mere scintilla’ of evidence to avoid summary judgment” (quoting *City of Vernon v. S. Cal. Edison Co.*, 955 F.2d 1361, 1369 (9th Cir. 1992)), and *Brownell v. Figel*, 950 F.2d 1285, 1289 (7th Cir. 1991) (“A scintilla of evidence in support of the nonmovant’s position is insufficient to successfully oppose summary judgment.”).

139. See discussion *supra* note 136.

140. Judges commonly engage in factfinding as part of a broader inquiry. See Stuart Minor Benjamin, *Stepping Into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 273–75 (1999) (discussing the centrality of both adjudicative and legislative facts to constitutional jurisprudence); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 261–62 (1985) (noting the manifold forms of “constitutional fact review” generally conducted by the Supreme Court); Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1047–51 (2003) (discussing the importance of judicial factfinding in adjudicating patent disputes).



#### IV. BROKEN RECORDS AND THE CURRENT JUDICIAL RESPONSE TO ALTERNATIVE FACTS

Courts have shown varying levels of interest and ability in confronting dubious factual predicates to state action. In some areas, as public opinion and scientific consensus have converged, courts have followed in kind—occasionally even citing the scientific literature along the way.<sup>141</sup> In other areas, courts have expressly relied on discredited science.<sup>142</sup> But more often, courts, perhaps leery of trammeling on legislative domain, have steered entirely clear of rigorous (or otherwise) inquiry into false or made-up legislative rationales, leaving politically excluded groups exposed to myth-grounded abuse. When alternative facts have arisen in an equal protection challenge, courts have tended to groove their analysis into intent or, on more limited occasions, animus review. When alternative facts have arisen in the substantive due process context, courts have sidestepped any direct confrontation by instead grounding the claim for relief in a more established doctrinal tool, such as liberty analysis, or again by interpreting the challenged law through the lens of the animus doctrine.

##### *A. Broken Records Review and Equal Protection*

###### 1. *Cleburne* and the Judicial Reaction to Legislative Panic

Traces of broken records review can be found in a small number of critical equal protection rulings. For example, the concept arguably explains the outcome in *City of Cleburne v. Cleburne Living Center*.<sup>143</sup> *Cleburne* invalidated, under rational basis review, a town's requirement that a group home for mentally disabled individuals secure a special housing permit that other group homes were not required to obtain.<sup>144</sup> Justice White's majority opinion expressed a clear preference for applying rational basis review rather than elevating the particular group involved—mentally disabled individuals—for special scrutiny, at least in cases where the underlying law appeared to lack any reasonable empirical basis.<sup>145</sup> Indeed, *Cleburne* noted, nothing in the record provided support for the city's special permit requirement.<sup>146</sup> First, the city's insistence on a special permit was based on concerns about the

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141. *See supra* Section I.A.3.

142. *See infra* Section IV.A.2.

143. 473 U.S. 432 (1985).

144. *Id.* at 447–50.

145. *Id.* at 442–48.

146. *Id.* at 448.

“negative attitude[s]” of nearby residents and “the fears” of others living close by.<sup>147</sup> “But mere negative attitudes, or fear . . . are not permissible bases for treating a home for the mentally [disabled] differently from apartment houses, multiple dwellings, and the like.”<sup>148</sup> Another basis for the special permit—that students at a nearby high school might harass mentally disabled residents living at the home—was undermined by a critical counterexample: “[T]he school itself is attended by about 30 mentally [disabled] students.”<sup>149</sup> In any event, the Court explained, it is constitutionally impermissible to render policy decisions based on nothing more than “vague, undifferentiated fear[.]”<sup>150</sup> The Court recognized, in sum, that “requiring [a] permit in this case appears to us to rest on an irrational prejudice against the mentally [disabled].”<sup>151</sup>

Justice Stevens’s concurring opinion also underscored the idea that a law based on distorted factual information presents unique concerns where groups excluded from the ordinary political process are concerned. “The term ‘rational,’ ” he wrote:

includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word “rational” . . . includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign’s duty to govern impartially. . . . We do not need to apply a special standard, or to apply “strict scrutiny,” or even “heightened scrutiny” . . . [when the record in this case] convinces me that this permit was required because of the irrational fears of neighboring property owners, rather than for the protection of the mentally [disabled] persons who would reside in respondent’s home. I cannot believe that a rational member of this disadvantaged class could ever approve of the discriminatory application of the city’s ordinance in this case.<sup>152</sup>

Of course, as an archetypal excluded class, the mentally disabled had no chance to register their disapproval of the ordinance at the legislative phase, much less dismantle its false premises. *Cleburne* thus represents the idea that courts possess an ability to provide protection to such groups by uncovering factual distortions within the government’s arguments, and that the presence of a broken record provides a means to strike down a law on rational basis grounds.<sup>153</sup>

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147. *Id.*

148. *Id.*

149. *Id.* at 449.

150. *Id.*

151. *Id.* at 450.

152. *Id.* at 452–55 (Stevens, J., concurring) (footnotes omitted).

153. *See id.* at 447–450.

## 2. The Gay Rights Cases and Proto-Broken Records Review

Historically, there are few areas of legislative interest in which alternative facts have played as prominent a role—both in shepherding public opinion and within statehouses themselves—as in the regulation of LGBT individuals and couples. Although the legacy of anti-LGBT ordinances can be traced back to well before the Revolution, the mobilization of contrived and questionable factual premises to support the subordination of LGBT Americans is a comparatively new phenomenon that did not begin in earnest until the twentieth century.<sup>154</sup> Though derived from varied sources, and taking varied forms, these suspect factual predicates have at least one thing in common: they played a very insignificant role in Supreme Court decisions toppling a wave of antigay laws. As much as the Supreme Court's gay rights jurisprudence is often the basis for celebration, it is striking how little the Court attended to the scurrilous underpinnings of many of those laws.

### *a. Antisodomy Laws and Alternative Facts*

Beginning in the 1940s and 1950s, amid “concern[s] about domestic security against child molesters and homosexuals,” state legislatures began to dramatically expand efforts to restrict, regulate, and ratchet up enforcement against homosexuals.<sup>155</sup> A few decades later, armed with a renewed moral fervor, trumpeting the devastation of the AIDS epidemic, and goaded by an increasingly adversarial scientific consensus,<sup>156</sup> the Religious Right would modernize the rhetoric surrounding these concerns, crystalizing what would become the late-century anti-LGBT one-two punch of scripture-driven *and* “fact”-based rhetoric.<sup>157</sup> This approach allowed anti-LGBT organizers to

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154. See DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS* 5 (2012); WILLIAM N. ESKRIDGE JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003*, at 1–6 (2008).

155. ESKRIDGE, *supra* note 154, at 90. It was not until the rise of the gay rights movement in the 1970s, by which point a critical mass of scientific literature debunking many of the most devoutly held “factual” homophobic prejudices had accumulated, that many states began to roll back their antisodomy laws. See *id.*; see also WILLIAM N. ESKRIDGE JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 60–61 (1999) (describing a public outcry that grew in response to publicized sexual assaults on children).

156. See ESKRIDGE, *supra* note 154, at 174 (“[A]fter 1973,” when the American Psychiatric Association no longer considered homosexuality a mental disease, “medical science was officially hostile not only to consensual sodomy laws, but also to most state laws having a discriminatory impact on lesbians and gay men”).

157. See Marie-Amélie George, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*, 36 *YALE L. & POLY REV.* 83, 122–23 (2017) (“The anti-gay activism of the Religious Right became a hallmark of its politics in 1977 after Anita Bryant launched a voter referendum

shape popular opinion by serving public health fears to voters, while also giving legislators and courts cover to make decisions on moral-majority grounds.<sup>158</sup>

Broadly, antisodomy laws “codified a particular cultural assumption about homosexuals as hypersexualized and dangerous.”<sup>159</sup> Though not, on their face, targeted only at homosexual activity, they stemmed directly from the conflation of homosexuality, pedophilia, and generally lewd or predatory conduct.<sup>160</sup> In fact, even when considering moderate reform to antisodomy laws, states still tended to drift into stereotypes lacking factual merit; the Texas legislature’s ultimate 1968 decision to reduce the penalty for same-sex offenses from a class B to a class C misdemeanor was not one of compassion, but rather based on “the suspicion that gay men would relish the opportunity to spend time in an all-male prison.”<sup>161</sup>

These sorts of stereotypes, facilitated by the effective exclusion (and silencing) of LGBT individuals from open participation in legislative politics, were not confined to antisodomy legislation. Consistent with the addition of medical language to the traditional morality-based anti-LGBT rhetoric, the conflation of homosexuality with predatory conduct had already launched a fleet of “sexual

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campaign to overturn Miami’s sexual orientation non-discrimination law.”). In 1977, when the Arkansas legislature elected to revive its law criminalizing “deviate sexual intercourse,” but now “only if between persons of the same sex,” one state senator succinctly summarized the dual values-based and “fact”-based roots typical of the era’s anti-LGBT legislation: “This bill is aimed at weirdos and queers who live in fairyland world and are trying to wreck family life.” ESKRIDGE, *supra* note 154, at 202.

158. For the sake of illustration: this “one-two punch” straddles the divide between the legislative rationales that broken records review can and cannot reach. To the increasing extent that legislatures began to expressly use it to justify their actions, the questionable, often roundly rejected, science stoking these public health fears falls squarely within broken records review’s wheelhouse. *See infra* Section IV.A.2. But actions justified on a purely values-driven, moral, or even scriptural basis are beyond broken records review’s reach, though of course these actions remain susceptible to various forms of intent-based challenges, including animus review. *See infra* Section IV.A.

159. CARPENTER, *supra* note 154, at 16.

160. *See* ESKRIDGE, *supra* note 154, at 93 (noting that during his stint as Governor of California, future Chief Justice Earl Warren encouraged the expansion of much harsher sex perversion laws “to include the thousands of persons (almost all of them homosexual men) convicted of lewd vagrancy, a crime with an infinitely elastic definition”). In Florida, the prolifically anti-LGBT Johns Committee, a wing of the state legislature, justified its recommendation for the state to enact stringent antihomosexuality measures by stating that “[t]he homosexual’s goal and part of his satisfaction is to ‘bring over’ the young person, to hook him for homosexuality.” *Id.* at 229. Similar concerns abounded in Texas, where a 1960s movement to reform the state sodomy laws was met with worried discussion regarding the “colonies of homosexuals in hotels” rumored to have spawned after a similar reform attempt had been codified in Illinois. *See id.* at 164.

161. *See* CARPENTER, *supra* note 154, at 11–12. The legislature had been guided in this direction by the longtime University of Texas School of Law Dean John Keeton’s proposed draft of the revisions—per Keeton, “imprisonment itself is very much like throwing Br’er Rabbit in the briar patch.” ESKRIDGE, *supra* note 154, at 164.

psychopath” laws that resulted in the indefinite institutionalization of Americans engaged in sexual activity between consenting adults.<sup>162</sup> Later, even as sexual psychopathy laws fell out of favor, and as some states began to roll back their antisodomy legislation and/or enforcement, the close of the twentieth century saw a rise in laws restricting or removing the ability of LGBT Americans to adopt children or serve as foster parents.<sup>163</sup> Although these laws were often justified, and then defended, using “values” language, they were also regularly grounded in alternative fact, discredited science,<sup>164</sup> and falsifiable stereotypes: for example, that gays and lesbians lived violent and “unstable” lives,<sup>165</sup> risked “infecting” their children, and were predisposed to child molestation.<sup>166</sup>

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162. See ESKRIDGE, *supra* note 154, at 95, 107; see also George, *supra* note 157, at 105 (remarking that sexual psychopathy laws were generally enacted in response to public outrage over child abuse, by a public who “equated homosexuality with pedophilia,” and therefore it was “not surprising that the statutes contained clear homophobic undertones”).

163. See Kari E. Hong, *Parens Patri[archy]: Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1, 40 (2003) (documenting that when New Hampshire and Florida first passed adoption bans for LGBT parents, they produced no “evidence of harm that children raised by gay people experienced,” instead relying on the perception that they were “morally inferior”). A Florida state legislator, defending Florida’s statute, explained that homosexuals are “‘an abomination’ in God’s eyes,” a stance Florida later defended in court as “permissibly ‘reflect[ing] the State’s moral disapproval of homosexuality.’” *Id.* at 40–41; see also Lofton v. Kearney, 157 F. Supp. 2d 1372, 1382 (S.D. Fla. 2001) (“According to Defendants, homosexuality has been long disfavored in the law based on beliefs firmly rooted in Judeo-Christian moral and ethical standards for a millenni[um].”), *aff’d sub nom.* Lofton v. Sec’y of the Dep’t of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004).

164. The state of Utah defended its ban by citing several purportedly scientific studies: Paul Cameron’s infamous 1993 study—gleaned from a sample of obituaries published during the height of the AIDS epidemic—claiming that homosexual men and women have decreased life expectancy. Hong, *supra* note 163, at 45. Cameron later “resigned from the American Psychological Association to avoid an investigation into charges of his unethical conduct as psychologist.” *Id.* His data analysis was later found to be so distorted that a Texas federal court considered it paramount to testimonial “misrepresentation.” *Id.* at 45–46. Another study, authored by a member of the scientific advisory board of a group that considers homosexuality to be a treatable developmental disorder, warned that “30% of all twenty-year-old homosexuals will be HIV positive or dead by the time they reach thirty.” *Id.* at 45.

165. See *id.* at 40 (quoting a Florida state legislator stating that “homosexuals lead unstable lives, as a rule”).

166. See Jodi L. Bell, *Prohibiting Adoption by Same-Sex Couples: Is It in the “Best Interest of the Child?”*, 49 DRAKE L. REV. 345, 351 (2001) (“A fear of AIDS and the mistaken presumption that homosexual parents will molest their children were the initial factors leading to the enactment of the New Hampshire prohibition statute.”); Hong, *supra* note 163, at 40 (“[S]tate legislators in New Hampshire enacted their statute by relying on the hate-driven stereotypes that all gay people have AIDS and gay parents will molest their children.”); see also George, *supra* note 157, at 129. Utah also cited the work of David Blankenhorn, who purported to establish that “married fatherhood [is] the primary inhibitor of male domestic violence,” because only through channeling natural male aggression and violence towards caring for a wife or child could those instincts be forestalled. Hong, *supra* note 163, at 51–52.

*b. The Supreme Court and Alternative Fact Avoidance*

While there are examples of courts engaging more directly with these kinds of questionable facts, they have not always done so in an enlightened manner.<sup>167</sup> For example, as William Eskridge has argued, when the Court in *Boutilier v. Immigration and Naturalization Service* applied a federal statute barring entry to noncitizens suffering from a “psychopathic personality . . . or a mental defect”<sup>168</sup> to the case of a gay foreign national, a majority of justices “apparently accepted stereotypes about gay people that were widely believed by men of their age group—not only the notion that homosexuals were afflicted with mental illness, but also that they were a threat to the social order. Even the dissenting justices treated the homosexual as a pitiable ‘freak,’ who is ‘the product of arrested development.’”<sup>169</sup> In his *Ratchford v. Gay Lib* dissent, then-Associate Justice Rehnquist analogized homosexuality to “measles,” emphasizing the danger of the affliction spreading in the “university setting where many students are still coping with sexual problems which accompany late adolescence and early adulthood.”<sup>170</sup> In child custody cases, even after the scientific consensus had disavowed these tropes, courts continued to vindicate the old gay “recruitment” stereotype, as well as the more general “threat of children becoming homosexual as . . . the result of living in a gay-friendly environment with gay role models.”<sup>171</sup> In more modern family-law cases, courts have given credence to the theory that heterosexuals may simply be more adept at raising children than similarly situated members of the LGBT community.<sup>172</sup>

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167. This discussion highlights a potential ancillary benefit of broken records review: compelling judges into a threshold confrontation with their own perhaps false assumptions about unfamiliar groups.

168. Immigration and Nationality Act, Pub. L. No. 82-414, § 212(a)(4), 66 Stat. 163, 182 (1952) (repealed 1990).

169. See ESKRIDGE, *supra* note 154, at 157–58 (quoting and characterizing *Boutilier v. Immigration & Naturalization Service*, 387 U.S. 118, 127 (1967) (Douglas, J., dissenting)).

170. See *id.* at 190–91, (quoting and characterizing *Ratchford v. Gay Lib*, 434 U.S. 1080, 1084 (1978) (Rehnquist, J., dissenting)).

171. See Marie-Amélie George, *The Custody Crucible: The Development of Scientific Authority About Gay and Lesbian Parents*, 34 LAW & HIST. REV. 487, 501, 518 (2016) (remarking that other courts denying LGBT parents custody and visitation rights “did not cite the conservative scientific research” and that “[t]he primary source of authority remained morality and common sense; courts ignored the scientific studies, even though they supported conservative positions, indicating they were unnecessary to justify the decisions”).

172. See *e.g.*, *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 822 (11th Cir. 2004); *Dep’t of Health & Rehab. Servs. v. Cox*, 627 So. 2d 1210, 1219 (Fla. Dist. Ct. App. 1993), *decision approved in part, quashed in part sub nom. Cox v. Fla. Dep’t of Health & Rehab. Servs.*, 656 So. 2d 902 (Fla. 1995); see also Elizabeth L. Maurer, *Errors That Won’t Happen Twice: A Constitutional Glance at a Proposed Texas Statute That Will Ban Homosexuals from Foster Parent*

As a general proposition, courts—and especially the Supreme Court—have been quite content to evaluate state actions directed at, or disproportionately affecting, LGBT Americans on terrain other than their “factual” heritage. In *Bowers v. Hardwick*, the Court anchored its analysis around whether the privacy right previously read into the Fourteenth Amendment’s Due Process Clause extended so far as to confer “a fundamental right upon homosexuals to engage in sodomy.”<sup>173</sup> Concluding that such a right would have to derive from American “history and tradition,” it declined to strike down Georgia’s antisodomy statute.<sup>174</sup> Writing for the majority, Justice White confined his reasoning to a comparative analysis of the privacy rights previously recognized in the Court’s due process jurisprudence, as applied to same-sex sexual activity in the home.<sup>175</sup> In his concurrence, Chief Justice Burger tapped into several oft-cited moral and biblical rationales for proscribing homosexual conduct, including the “crime against nature,” “crime not fit to be named,” and “an offense of ‘deeper malignity’ than rape.”<sup>176</sup> The sufficiency of these motivations was countered in Justice Stevens’s dissent,<sup>177</sup> but only Justice Blackmun, in dissent, engaged directly with the “factual” bases for the act, noting that “the record before us is barren of any evidence to support petitioner’s claim” that criminalizing sodomy was in the interest of “the general public health and welfare.”<sup>178</sup>

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*Eligibility*, 5 APPALACHIAN J.L. 171, 189 (2006) (noting that the court in question made this assumption in the “absence of conclusive research by either party”).

173. 478 U.S. 186, 190 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

174. *Id.* at 194.

175. *See generally id.* at 190–92 (“We first register our disagreement with the Court of Appeals and with respondent that the Court’s prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy . . .”).

176. *Id.* at 197 (Burger, C.J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*215).

177. *Id.* at 216–18 (Stevens, J., dissenting).

178. *Id.* at 202–03, 208 (Blackmun, J., dissenting) (acknowledging that the deficiencies in the record were in part attributable to the fact that the appeal came from the dismissal stage). Some such factual issues had been briefed. There had been an amicus brief in support of the state that went into fairly extraordinary and graphic detail about a litany of sexual practices and their respective effects on the transmission of the AIDS virus. Brief of David Robinson, Jr. as Amicus Curiae in Support of Petitioners, *Bowers*, 478 U.S. 186 (No. 85-140), 1985 WL 667941, at \*7, \*25–26 (“[T]his is not a homophobic brief. It is a labor of love, an effort to help keep homosexuals, and the rest of us, alive.”). The state’s own brief had argued that that “Georgia could reasonably believe that homosexuality . . . leads to other ‘deviate practices such as sado-masochism, group orgies, or transvestism, to name only a few’; that homosexuality is usually practiced in public parks, with adolescents, and is accompanied by violence; and that homosexuality is pervasively linked to the transmission of AIDS.” ESKRIDGE, *supra* note 154, at 240; *see also* Brief of Petitioner Michael J. Bowers Attorney General of Georgia, *Bowers*, 478 U.S. 186 (No. 85-140), 1985 WL 667939, at \*36–38. In addition to “rest[ing] on largely false stereotypes,” much of what Bowers’s attorneys argued was falsifiable (and indeed negated in the American Public Health Association’s amicus brief in support of *Hardwick*), particularly as applied to sex between women. *See* ESKRIDGE, *supra* note

Less than a month after *Bowers*, Missouri's own same-sex sodomy laws were upheld in the state's Supreme Court.<sup>179</sup> The court in *State v. Walsh* spoke directly to the state's "factual" public health rationales for the laws, including the "general promiscuity characteristic of the homosexual lifestyle" and holding that "[w]e need not refer to medical literature to suggest, for example, that there might rationally be health ramifications to anal intercourse and/or oral-genital sex."<sup>180</sup>

In its eventual repeal of *Bowers*, the Court again declined to wade into factual waters. Writing for the Court in *Lawrence v. Texas*, and later in *Obergefell v. Hodges*, Justice Kennedy devoted his energies to his signature "dignity" rhapsodies.<sup>181</sup> In *Lawrence*, he took aim at the moral underpinnings of antisodomy legislation, as well as their supposed traditional bearings, which had sustained the Georgia statute in *Bowers*—exalting Stevens's dissent, and tiptoeing around Blackmun's interactions with the factual record.<sup>182</sup> This values-based

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154, at 240. See generally Brief of Amici Curiae American Psychological Association and American Public Health Association in Support of Respondents, *Bowers*, 478 U.S. 186 (No. 85-140), 1986 WL 720445, at \*21–22 ("As applied to homosexual behavior, the Georgia statute is also overly broad. Lesbians as a group are not at risk for AIDS.").

179. See *State v. Walsh*, 713 S.W.2d 508, 512–13 (Mo. 1986) ("We believe further that punishing homosexual acts as a Class A misdemeanor . . . is rationally related to the State's constitutionally permissible objective of implementing and promoting the public morality.").

180. *Id.*

181. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594, 2603 (2015); *Lawrence v. Texas*, 539 U.S. 558, 567, 575 (2003). The choice to circumnavigate factual waters was not for lack of input. The surrounding factual issues had been briefed much more extensively in *Obergefell* and *Lawrence* than had been in *Bowers*. Indeed, although as a *Lawrence* amicus brief submitted by a broad coalition of medical groups noted, "The State of Texas has never defended the constitutionality of the Homosexual Conduct Law . . . based on any public health interest," that did not stop its amici from attempting to do so on its behalf. Brief of the American Public Health Association et al. as Amici Curiae in Support of Petitioners, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 164135, at \*3. These amici harvested an eclectic selection of unsubstantiated, speculative, and unsophisticated scientific sources in support of the anti-LGBT actions. See e.g., Brief Amicus Curiae of Professor Daniel N. Robinson, Ph.D. in Support of Respondents at 31–32, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1432638, at \*31–32 (treating as interchangeable the increased incidences of AIDS caused by being part of a population where the disease happens to exist, and the increased incidences because AIDS is inherent to behavior engaged in by members of that population); Brief of Amici Curiae Center for Arizona Policy and Pro-Family Network in Support of Respondent, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 367560, at \*12 (offering the unattributed assertion that "[i]f, as noted by the Amici APA, anti-gay harassment and violence are underreported by homosexuals, it is just as likely that changes in sexual orientation are underreported because of the American Psychiatric Association's unwillingness to validate their experiences"); Brief of the States of Alabama, South Carolina, and Utah as Amici Curiae in Support of Respondent, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 470172, at \*2 (taking care to refer to homosexual conduct as a "choice"); Brief of Amici Curiae Texas Legislators, Representative Warren Chisum, et al., in Support of Respondent, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 367560, at \*16 (seeking to protect the state of Texas from the "ravages of infection and disease" purportedly caused by same-sex sodomy).

182. *Lawrence*, 539 U.S. at 560.



(rather than fact-derived) framing teed up Justice Scalia's proclamation that *Lawrence* spelled "the end of all morals legislation."<sup>183</sup>

In *Obergefell*, Kennedy did spend a few paragraphs acknowledging the factual "deliberation . . . [,] referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, . . . popular and scholarly writings" and the general scientific consensus that had emerged in the final quarter of the twentieth century that "sexual orientation is both a normal expression of human sexuality and immutable."<sup>184</sup> He also weighed in on the factual underpinnings surrounding the role of marriage in childrearing, and the ability of same-sex couples to "provide loving and nurturing homes to their children."<sup>185</sup> Still, his conclusion relied much more heavily on the abstract intersection of liberty and equality interests than on any concrete factual or scientific premises.<sup>186</sup>

### *c. Spurning Alternative Facts in Court*

On the other hand, there are instances of courts critically examining the factual underpinnings of anti-LGBT state action, thereby coming to the defense of a group that political processes have

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183. *Id.* at 599 (Scalia, J., dissenting) ("If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review."). In a similar respect, Kennedy's rubric blunted a concurring Justice O'Connor's blanket (and clearer) edict that "[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause." *Id.* at 583 (O'Connor, J., concurring). By and large, the other *Lawrence* and *Obergefell* opinions provided little more factual fodder than did Kennedy's. In *Lawrence*, Justice O'Connor's concurrence and Justice Scalia's dissent faced off regarding the moral justifications for the statute, although Scalia's recoil from the "homosexual agenda" echoed the "factual" fearmongering conspiracies heralded by anti-LGBT operatives past. *Id.* at 602 (Scalia, J., dissenting). In *Obergefell*, Roberts focused his dissent on what he believed had been a judicial subversion of democratic processes, though he did briefly tread on factual ground when he compared the majority's assertion that its decision would pose no harm to same-sex couples or third parties to the infamous *Lochner* court's claim that "a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act." *Obergefell*, 135 S. Ct. at 2611, 2622, 2624 (Roberts, C.J., dissenting) (quoting *Lochner v. New York*, 198 U.S. 45, 57 (1905)). For his part, Justice Alito acknowledged that there were factual issues at play, though he suggested that no scientific consensus could be found on any of them. *Id.* at 2642 (Alito, J., dissenting) ("At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be.").

184. 135 S. Ct. at 2596, 2605 (citing Brief for American Psychological Association et al. as Amici Curiae in Support of Petitioners at 7–17, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004713, at \*7–17).

185. *Id.* at 2600 (citing Brief for Gary J. Gates as Amicus Curiae in Support of Petitioners at 4, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1021451, at \*4).

186. *See id.* ("[W]hile *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.").

historically failed to protect against alternative facts. Consider, for example, the litigation challenging the constitutionality of state marriage bans. In *Goodridge v. Department of Public Health*, an early state decision upholding the right to marry, the Massachusetts Supreme Judicial Court held that the state's same-sex marriage ban had no rational relationship to state-proffered justifications, such as "providing a 'favorable setting for procreation'" or "ensuring the optimal setting for child rearing."<sup>187</sup> As the court pointed out, the innumerable examples of childless opposite-sex marriages demonstrated that "fertility is not a condition of marriage"; neither could the state offer any evidence that same-sex couples are less capable of being "excellent" parents than opposite-sex couples.<sup>188</sup> The policies, in essence, were built on generalizations that seemed unsustainable, and the sheer number of counterexamples indicated that the states' rationales were, at bottom, meritless. More recently, in *Kitchen v. Herbert*, a Utah district court rejected the state's argument that "proceeding with caution" was a legitimate state interest justifying a same-sex marriage ban.<sup>189</sup> In doing so, it approvingly cited an amicus brief submitted by the District of Columbia and fourteen states asserting that recognizing same-sex unions "has not resulted in any decrease in opposite-sex marriage rates, any increase in divorce rates, or any increase in the number of nonmarital births."<sup>190</sup>

Additionally, some trial courts have engaged directly with the factual bases for anti-LGBT legislation. *DeBoer v. Snyder*, one of the matters later consolidated into *Obergefell*, was "replete" at trial with expert testimony and empirical evidence concerning "families headed by same-sex parents, academic achievement for children raised by same-sex couples, an ongoing study about relationship stability, and so on."<sup>191</sup> Similarly, the trial phase of *Perry v. Schwarzenegger* (later argued in the Supreme Court as *Hollingsworth v. Perry*) "was largely a battle of experts" with the court enthusiastically "engaged in a lengthy analysis of . . . empirical evidence" as well as "the methodological and substantive components of the underlying social science."<sup>192</sup> In

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187. 798 N.E.2d 941, 961 (Mass. 2003).

188. *Id.* at 961, 963.

189. 961 F. Supp. 2d 1181, 1213 (D. Utah 2013).

190. *Id.*

191. See Clare Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 247–48 (2018) (characterizing *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 760 (E.D. Mich. 2014), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584).

192. *Id.* at 229, 246 ("A crucial part of the decision was the finding that children of same-sex parents have similar outcomes to children raised by different-sex couples, undermining California's rationale for differentiating couples based on sexual orientation."); see *Perry v.*

undertaking this analysis, the court was able to refute a number of anti-LGBT stereotypes, including the suggestion that members of the LGBT community are twelve times more likely to molest children than heterosexuals.<sup>193</sup> But that inclination to delve into the details, at least in LGBT rights litigation, has not typically trickled down the procedural stream. For his analytical undertakings in *Perry*, Chief Judge Walker of the U.S. District Court for the Northern District of California earned a direct rebuke from Justice Alito in a lengthy footnote from his dissent in *United States v. Windsor*.<sup>194</sup>

### 3. Voter ID Laws and an Emerging Broken Records Rationale

During the past decade, legislatures have leveraged misplaced alarm about voter fraud, imposing highly restrictive voter ID measures. These laws purport to bring integrity to elections,<sup>195</sup> yet they rely on meritless claims<sup>196</sup> of voter fraud.<sup>197</sup> These provisions not only threaten

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Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom.* *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

193. Huntington, *supra* note 191, at 269–70.

194. *United States v. Windsor*, 570 U.S. 744, 815 n.7 (2013) (Alito, J., dissenting) (“[T]he trial judge . . . purported to make ‘findings of fact’ . . . . At times, the trial reached the heights of parody.”).

195. *See* Larsen, *supra* note 4, at 210 (outlining the rapid increase of voter ID laws between 2006 and 2018).

196. A number of studies have demonstrated the lack of factual foundation to many of these laws. Although the Heritage Foundation maintains a database of nearly 1,300 instances of voter fraud across the country dating back to the 1980s, *see Election Fraud Cases from Across the United States*, HERITAGE FOUND., <https://www.heritage.org/voterfraud> (last visited Mar. 5, 2020) [<https://perma.cc/WD9B-DVX3>], multiple studies have shown that so-called voter fraud happens in far more limited circumstances than is often alleged. For example, a 2014 study found that since 2000, in general, primary, special, and municipal elections, there were only thirty-one instances of actual voter fraud. Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Votes Cast*, WASH. POST (Aug. 6, 2014, 5:00 AM), [https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm\\_term=.3151e37c7440](https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.3151e37c7440) [<https://perma.cc/4BYX-C6NU>]. Indeed, research conducted by the Brennan Center suggests that mundane administrative errors and systemic shortcomings may be responsible for many of the circumstances commonly attributed to voter fraud. Justin Levitt, *The Truth About Voter Fraud*, BRENNAN CTR. FOR JUST. 7–11 (2007), <https://www.brennancenter.org/sites/default/files/analysis/The%20Truth%20About%20Voter%20Fraud.pdf> [<https://perma.cc/23BQ-ER5E>] [hereinafter Levitt, *The Truth About Voter Fraud*] (providing examples of circumstances often attributed to voting fraud, including clerical errors, errors and bad matching in the underlying data, innocent dual registration, complications due to death and criminal records, and voter mistakes). Seen in this light, President Trump’s claims of “millions” of illegal voters in the 2016 election continues to be without empirical support. Larsen, *supra* note 4, at 178. To put it bluntly, the claim about so-called voter fraud is largely grounded not in fact, but alternative fact. Furthermore, stricter identification laws, often proposed as a solution to voter fraud, would only address problems that occur at the polls on voting day (such as impersonation), which are very rare. Levitt, *The Truth About Voter Fraud*, *supra*, at 6.

197. *See, e.g.,* Borgmann, *supra* note 10, at 53–55 (discussing how an Indiana voter identification law was based on unfounded claims of voter fraud). Indeed, recent events have

core channels of political participation, but they restrict the ability of historically excluded groups to access those channels,<sup>198</sup> thereby undermining legislative legitimacy.<sup>199</sup> Thus, they present an especially pernicious application of alternative facts.

Because such laws tend to have disproportionate impacts on historically marginalized communities, the roadmap for most voter ID challenges involves the rather difficult hurdle of persuading courts that such disparate effects were the result of intentional efforts to discriminate.<sup>200</sup> Yet, under current Supreme Court doctrine, the effect of these laws on minority populations lacks constitutional relevance in the absence of a finding of discriminatory intent,<sup>201</sup> without which courts will not invoke more exacting scrutiny of facially neutral legislation or administrative action.<sup>202</sup>

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demonstrated that partisan racial discrimination may be the true underlying motive behind election policies that disenfranchise minorities while claiming a neutral purpose. For example, files on hard drives recovered from the estate of the late Thomas Hofeller, a top Republican Party strategist, reveal his role in prompting the Trump Administration to add a citizenship question to the 2020 census and revise legislative maps accordingly under the guise of protecting minority voting rights, though the plan was actually engineered to undercount traditionally Democratic Hispanic voters to the benefit of Republicans and non-Hispanic whites. Gary D. Robertson and Geoff Mulvihill, *Gerrymandering Architect's Files Figure in Census, Map Cases*, AP NEWS (June 28, 2019), <https://www.apnews.com/d53cafafac6b42429a88bb012d34907b> [<https://perma.cc/5CKS-SYYL>]; Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html?smid=nytcore-ios-share> [<https://perma.cc/U6VA-84JD>].

198. Voter identification laws can depress turnout and limit the number of eligible voters, specifically people of color, low-income individuals, the elderly, and students. *Voter Identification*, BRENNAN CTR. FOR JUST. (Sept. 12, 2006), <https://www.brennancenter.org/analysis/policy-brief-voter-identification> [<https://perma.cc/M6M2-PHDK>]; see Wendy Underhill, *Voter Identification Requirements: Voter ID Laws*, NAT'L CONF. ST. LEGISLATURES (Jan. 17, 2019), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [<https://perma.cc/V8LL-NKN2>] (presenting information on current voter registration laws in effect across the country).

199. In May 2017, the Trump Administration assembled a Presidential Advisory Commission on Election Integrity. See *Disbanded: Trump's "Voter Fraud" Commission*, BRENNAN CTR. FOR JUST. (July 30, 2019), <https://www.brennancenter.org/issues/trump-fraud-commission> [<https://perma.cc/H2BE-K9BW>]. President Trump created the Commission after repeatedly asserting the need to clamp down on instances of voter fraud. *Id.* President Trump disbanded the commission in early 2018 due to states' reluctance to comply with requests to submit extensive voter registration data and lawsuits challenging the same. See generally Robert Timothy Reagan, *The Presidential Advisory Commission on Election Integrity*, FED. JUD. CTR. (Sept. 12, 2019), <https://www.fjc.gov/content/330831/emereleclitig> [<https://perma.cc/3WFD-F3BB>] (case study examining the commission and its collapse).

200. Another route to receiving heightened scrutiny in such cases occurs by attacking the encumbrance on a fundamental right. See generally Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143 (2008) (analyzing the Supreme Court's inconsistent approach to voting rights).

201. *City of Mobile v. Bolden*, 446 U.S. 55, 70 (1980) (finding that the evidence in the present case fell far short of showing that the appellants "conceived or operated [a] purposeful device[e] to further racial . . . discrimination" (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971))).

202. *Washington v. Davis*, 426 U.S. 229, 240–42 (1976) (upholding an entrance exam for police officers in the District of Columbia that African Americans tended to fail at higher rates than

Under a broken records approach, by contrast, reviewing courts are spared the difficulty of uncovering an intent to discriminate on the basis of a protected characteristic, something courts find to be quite difficult.<sup>203</sup> Indeed, some courts have already shown an ability to think along these lines. In one such case, the U.S. Court of Appeals for the Fourth Circuit accused the North Carolina legislature of manufacturing a phony narrative for its voter ID law by “impos[ing] cures for problems that [do] not exist.”<sup>204</sup> In another case, the Fifth Circuit found that the Texas legislature had abused the legislative process by imposing restrictions on voters all for the sake of an “almost nonexistent problem.”<sup>205</sup> And in a third case involving executive (rather than legislative) action, the District Court for the Western District of Texas determined that an attempted voter purge, which inaccurately targeted tens of thousands of registered voters who had indicated they were noncitizens when they first applied for driver’s licenses, appeared to be “a solution looking for a problem.”<sup>206</sup>

The legislation invalidated by the Fourth Circuit in *North Carolina State Conference of the NAACP v. McCrory* purported to serve several purposes, including preventing voter fraud, achieving consistency in early voting among various counties, avoiding administrative challenges in mail verification for same-day registrants, and simplifying the process of on-boarding new voters aging into the registration system.<sup>207</sup> To accomplish these goals, the legislature implemented a photo ID requirement,<sup>208</sup> decreased Sunday voting days,<sup>209</sup> and eliminated same-day registration and preregistration.<sup>210</sup>

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whites and refusing to apply more exacting scrutiny in the absence of compelling evidence of racially based motivation); see also *Pers. Adm’r v. Feeney*, 442 U.S. 256, 280–81 (1979) (upholding legislation in Massachusetts giving preference for veterans in civil service positions despite the law’s discriminatory impact on female applicants); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270–71 (1977) (holding that a town’s refusal to rezone a tract of land to allow for development of multifamily dwellings was not motivated by a racially discriminatory purpose or intent, despite the disparate impact the zoning decision had on the African-American population).

203. See Siegel, *supra* note 119, at 1135–36 (addressing the “extraordinarily difficult to prove” terms in which the Court has defined discriminatory purpose); see also Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1785 (2012) (“The overwhelming consensus among constitutional scholars is that *Davis* is the source of today’s failed doctrine, insofar as it required direct proof regarding the minds of government actors.”).

204. See *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

205. *Veasey v. Perry*, 830 F.3d 216, 239 (5th Cir. 2016).

206. *Tex. League of United Latin Am. Citizens v. Whitley*, No. 5:19-CV-00074-FB, at 2 (W.D. Tex. Feb. 27, 2019) (order on preliminary matters).

207. 831 F.3d at 235–38.

208. *Id.* at 235.

209. *Id.* at 226.

210. *Id.* at 237–38.

Each restriction disproportionately affected African Americans at a time when that population, which overwhelmingly supported Democratic candidates, had, owing to the very voting mechanisms this law abolished, achieved increased access to and participation in the state's elections.<sup>211</sup>

The Fourth Circuit analyzed its findings through the standard doctrinal category of improper intent. Once the court was able to surmise “that, at least in part, race motivated the North Carolina legislature,”<sup>212</sup> the court closely examined the fit between the legislature's stated goals and the means it had chosen to carry them out.<sup>213</sup> Owing to the legislature's curious interest in and use of data about race in crafting the law,<sup>214</sup> and because that data undermined the law's proffered justifications, the court was able to find that the legislature had intentionally discriminated on the basis of race.<sup>215</sup>

In many ways, the court's analysis is congenial with a broken records approach. As the court observed, the “record . . . undermine[d] . . . [the] concerns of voter fraud” that were asserted to prop up the legislation.<sup>216</sup> In the face of the legislature's claimed need to address a serious problem, it had chosen not to address voting processes that needed to be reformed, instead focusing on those that did not. Indeed, the court pointed out, the government's own experts contradicted the legislature's assertions and its chosen means to meet its stated goals.<sup>217</sup> In short, the legislature had “contrived a problem in order to impose a solution.”<sup>218</sup>

While discriminatory intent doctrine may have arguably been the most readily available tool to address this law's constitutional infirmities, a broken records approach might have provided a more straightforward analysis. Broken records review would bypass the motive element entirely, relieving courts of the burden of divining intent when the asserted factual predicates of a given law are shown to be utterly lacking in evidentiary support. Moreover, a broken records approach would likely better address the widespread phenomenon in which marginalized groups, owing to their lack of representation in the

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211. *Id.* at 226.

212. *Id.* at 235.

213. *Id.* at 235–38.

214. *See id.* at 216–18 (describing the racial data requested by legislators).

215. *Id.* at 219, 226–27.

216. *Id.* at 236. The strict ID requirements lacked any factual connection to the objective of preventing voter fraud. *Id.* at 235. On the contrary, the legislature had specific evidence of fraud among absentee voters—and a request from the state elections board to take remedial action—but chose to allow mail-in absentee voting without photo ID. *Id.* at 235–36.

217. *Id.* at 225, 232.

218. *Id.* at 238.

legislative chamber, are easily targeted by lawmakers who can conceal their motivation by dressing up laws in neutral language while offering factually defective rationales for the legislation.

### *B. Broken Records Review and Substantive Due Process*

Putting aside equal protection, a broken records approach is also prevalent within substantive due process. In the context of abortion legislation, in which courts inquire whether proposed restrictions place an “undue burden” on the right to an abortion,<sup>219</sup> concerns about alternative facts frequently manifest when legislative requirements are enacted in the name of protecting maternal health. While such laws proclaim the altruistic goal of protecting women from increased risks of breast cancer, depression, suicide, infertility, infections, and medical complications, courts have invalidated laws based on claims about maternal health that either lack support from or have been discredited by mainstream scientific and medical communities.<sup>220</sup>

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court emphasized that the state must prove a medical requirement is “reasonably directed to the preservation of maternal health” in order to justify placing a burden on abortion access.<sup>221</sup> While numerous states have restricted abortion access in the name of protecting women’s health since *Casey*, this tactic reaches back even further than 1992. Indeed, state legislatures have been advancing abortion restrictions as a form of maternal health protection for more

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219. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (joint opinion).

220. *See Larsen, supra* note 4, at 177, 203–05 (discussing controversial informed consent laws that require abortion providers to tell women seeking an abortion that doing so increases the risk of breast cancer, despite statements by the National Cancer Institute to the contrary). Because there is a medical consensus that abortion is extremely safe, with less than 0.3 percent of patients in the United States experiencing a complication from the procedure that requires hospitalization, laws purporting to restrict abortions on health-related grounds are harder to support empirically. *See id.* at 207 (proffering statistical evidence about abortion complications); *see also Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014) (stating that the evidence demonstrated that abortion has low rates of serious complications and is much safer than many common medical procedures not subject to such intense regulation and scrutiny), *aff’d in part, vacated in part, rev’d in part sub nom.* *Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *modified*, 790 F.3d 598 (5th Cir. 2015), *rev’d sub nom.* *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 650 F. Supp. 2d 972, 983 (D.S.D. 2009) (citing professional associations that refute any connection between abortion and mental health problems), *aff’d in part, rev’d in part sub nom.* *Planned Parenthood Minn. v. Rounds*, 653 F.3d 662 (8th Cir. 2011), *vacated in part on reh’g en banc sub nom.* *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 662 F.3d 1072 (8th Cir. 2011), *and rev’d on reh’g en banc in part*, 686 F.3d 889 (8th Cir. 2012).

221. 505 U.S. at 900–01; *see also Planned Parenthood of Wis., Inc. v. Van Hollen*, 963 F. Supp. 2d 858, 860 (W.D. Wis. 2013) (quoting *Casey’s* specifications and concluding that “there is a troubling lack of justification for the hospital admitting privileges requirement”).

than forty years. In *Doe v. Bolton*, a case decided the same day as *Roe v. Wade*, the State of Georgia attempted to implement regulatory provisions requiring that abortions be conducted in accredited hospitals and that a total of three physicians plus a hospital staff abortion committee approve the procedure.<sup>222</sup> Reviewing data presented by the challengers, and the lack thereof by the state, the Court found that none of these three requirements bore a sufficient connection to the health of the patient to justify the burden imposed on abortion access.<sup>223</sup> Relying on the Court's ruling in *Doe*, an Alabama district court held that a state must show "more than general statements of concern and claims that the regulations conceivably might, in some cases, lead to better health outcomes."<sup>224</sup> The State's requirements in *Planned Parenthood Southeast, Inc. v. Strange* purportedly protected women's health by ensuring high-quality credentialed doctors and proper care for medical complications, but upon examining the evidence presented, the court concluded that the legislature's factual findings were "simply 'incorrect'"<sup>225</sup> and that the State's justifications for the requirements were "exceedingly weak" and "speculative."<sup>226</sup>

Courts have seized the opportunity in recent abortion cases to evaluate whether there is evidentiary support for a legitimate legislative purpose, finding in many cases that abortion restrictions are masquerading as health-protective policies without any benefit.<sup>227</sup>

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222. See *Doe v. Bolton*, 410 U.S. 179, 193–201 (1973) (describing the law's restrictions).

223. See *id.* at 195, 199–201; see also *Reprod. Health Servs. v. Webster*, 662 F. Supp. 407, 420 (W.D. Mo. 1987) (finding that the State failed to prove that its hospitalization requirement for post-sixteen-week abortions was reasonably related to the State's interest in maternal health), *aff'd in part, rev'd in part sub nom.* *Reprod. Health Serv. v. Webster*, 851 F.2d 1071 (8th Cir. 1988), *rev'd sub nom.* *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

224. *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1340–41 (M.D. Ala. 2014), *as corrected* (Oct. 24, 2014), *supplemented*, 33 F. Supp. 3d 1381 (M.D. Ala. 2014), *and amended by*, No. 2:13CV405-MHT, 2014 WL 5426891 (M.D. Ala. Oct. 24, 2014).

225. *Id.* at 1377 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007)).

226. *Id.* at 1378.

227. See, e.g., *Planned Parenthood of Wis., Inc. v. Van Hollen*, 963 F. Supp. 2d 858, 860 (W.D. Wis. 2013) (holding that the record strongly supported a finding that no medical purpose was served by the state's admitting privileges requirement); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 650 F. Supp. 2d 972, 983 (D.S.D. 2009) (finding that the state produced no evidence to support a claim that abortion causes an increased risk of suicide and related mental health problems), *aff'd in part, rev'd in part sub nom.* *Planned Parenthood Minn. v. Rounds*, 653 F.3d 662 (8th Cir. 2011), *vacated in part on reh'g en banc sub nom.* *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 662 F.3d 1072 (8th Cir. 2011), *and rev'd on reh'g en banc in part*, 686 F.3d 889 (8th Cir. 2012); *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1016 (D. Neb. 2004) (holding that Congress was wrong to conclude that the banned procedure seriously threatened women's health and that no credible medical evidence supports the safety of partial-birth abortions), *aff'd sub nom.* *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), *rev'd*, 550 U.S. 124 (2007); *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 1032 (N.D. Cal. 2004) (concluding that "Congress' 'finding' that the intact D & E procedure is never medically necessary is unreasonable and is not supported by substantial evidence as was available to Congress at the time"), *aff'd sub nom.* *Planned*



Perhaps the most noteworthy Supreme Court decision on this issue is *Whole Woman's Health v. Hellerstedt*, in which the Court affirmed the district court's findings that the State's surgical center and admitting privileges requirements provided few, if any, health benefits for women and thus did not justify the burden imposed on abortion access.<sup>228</sup> The legislature's stated purpose in enacting these provisions was to improve the standard of care for abortion patients,<sup>229</sup> but the district court found that the concerns the law sought to address were "largely unfounded" and "without a reliable basis" in evidence.<sup>230</sup> Rather than protecting patient health, the law would have the perverse effect of increasing health risks associated with delays in seeking early abortion care, would require longer-distance travel to obtain an abortion, and would potentially bring about more self-induced abortions.<sup>231</sup> Furthermore, the court "found no significant health-related problem for the new law to cure,"<sup>232</sup> as the record indicated that before the act's passage, "abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure."<sup>233</sup>

As these abortion cases demonstrate, courts are willing and able to engage in the type of evidentiary analysis that broken records review champions. The inquiry steers the court's review away from the subjective inquiry of whether a barrier to abortion is an undue burden in the eyes of individual jurists. Indeed, an objective, broken records examination of the evidence underlying contrived medical claims ensures that abortion legislation is not rooted in discredited myths about women's health, something the undue burden standard might otherwise allow.<sup>234</sup>

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Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006), *rev'd sub nom.* Gonzales v. Carhart, 550 U.S. 124 (2007).

228. 136 S. Ct. 2292, 2298, 2318 (2016).

229. Brief for Appellants at 35–36, *Whole Women's Health v. Lakey*, No. 14-50928, 2014 WL 5802849 (5th Cir. Nov. 3, 2014), at \*35–36.

230. *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014), *aff'd in part, vacated in part, rev'd in part sub nom.* *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *modified*, 790 F.3d 598 (5th Cir. 2015), *rev'd sub nom. Hellerstedt*, 136 S. Ct. 2292.

231. *Id.*

232. *Hellerstedt*, 136 S. Ct. at 2298 (summarizing the district court decision).

233. *Lakey*, 46 F. Supp. 3d at 684–85.

234. *See, e.g., Hellerstedt*, 136 S. Ct. at 2323–25 (Thomas, J., dissenting) (expressing astonishment that the majority found an undue burden existed, and maintaining that where a state provides medical justification for an abortion restriction that is "debatable," the law does not impose an undue burden on abortion access).

## V. BROKEN RECORDS' NORMATIVE IMPLICATIONS

Given the current patchwork of factual review within constitutional jurisprudence, a clearer and more direct route is needed to tackle legislative trafficking in false claims, especially where politically marginalized groups are concerned. The lack of such a mechanism has contributed to injustice where available constitutional tools have left courts powerless and have produced unclear and nontransparent doctrines in cases where factual analysis was imposed through the back door of other frameworks.<sup>235</sup> By contrast, a fact-based threshold inquiry could, at least in some cases and contexts, tailor the conventional two-tiered model of equal protection to the problem of underrepresented groups' victimization by alternative facts. If, as Gerald Gunther argued in 1972, equal protection is going to have "bite without 'strict scrutiny,'" <sup>236</sup> a broken records inquiry can provide the teeth, denying broad rational basis deference where legislatures traffic in alternative facts. The mechanism provides both a useful descriptive framework for understanding certain heightened-scrutiny and so-called animus cases as well as a normative framework for thinking about the dialectic of constitutionalism and civil rights.

*A. Fortifying Equal Protection Doctrine Through a Broken Records Approach*

In the heightened-scrutiny and animus contexts, broken records review allows courts to conduct openly and more effectively the factual analyses they currently conduct implicitly—but in a standalone, threshold inquiry that leaves existing doctrinal frameworks intact and spares courts the task of psychoanalyzing legislative purpose.<sup>237</sup> Similarly, broken records review does not meaningfully elevate rational basis's standard of review, nor detract from its deferential character. This is because the burden lies with the claimant to show, first, that dubious factual predicates underlie a given piece of legislation and that a baseline of evidence does not exist to support those predicates. If the claimant cannot do so, the court continues to be bound by the doctrine's

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235. See *supra* Section I.B (describing the dearth of doctrinal tools to address laws grounded in alternative facts).

236. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972).

237. Of course, broken records review supplements, rather than supplants, existing doctrine. Thus, to the extent a given law or policy is the result of an improper legislative motive, courts are naturally still equipped to apply existing doctrines to address those situations.

deference to the government's ends and its chosen means.<sup>238</sup> However, by requiring the government to earn deference where a challenger can discharge that duty, broken records review indirectly restores the rights-protective potential of rational basis review.

In her work on equal protection, Katie Eyer has noted ways in which the constitutional canon has sidelined rational basis review as an important locus of constitutional protection for underrepresented groups. As she explains,

[R]ational basis review has—in modern history—constituted one of the principal entry points for social movements seeking to effectuate constitutional change. It has been vital to the ability of social movements to create space for the disruption of the status quo—arguably as vital as the heightened scrutiny doctrines conceptualized as central in canonical constitutional law accounts. Moreover, far from the static, easily categorized doctrine that the canon portrays, rational basis review has in fact been a messy, inconsistent affair, in which courts—especially the lower and state courts that decide most constitutional law cases—have never consistently applied one single doctrinal formulation.<sup>239</sup>

Broken records review, by ferreting out factual distortions that give rise to law, arguably serves a similar objective, granting embryonic social movements and other political out-groups the rudiments of an otherwise unattainable objective hearing after legislatures have harmed them through alternative-fact-based lawmaking.

The fact that courts perform factual analysis as part of various constitutional review frameworks, from abortion's undue burden test, which explicitly calls for it,<sup>240</sup> to heightened scrutiny under equal protection, which effectively invites it,<sup>241</sup> means that its more formal inclusion would not upend courts' settled expectations around the relationship between factual accuracy and constitutional meaning. On the contrary, mainstreaming broken records review would bring harmony to a disjointed set of legal doctrines and provide a representation-reinforcing judicial check on the peddling of legislative falsehoods.

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238. *See supra* Section IV.A (situating broken records review within the context of equal protection methodology).

239. Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1319–20 (2018) (footnotes omitted).

240. *See supra* Section IV.B (emphasizing the problem of alternative facts in the context of abortion regulations purporting to safeguard maternal health).

241. *See supra* Section I.B (describing heightened scrutiny's occasional reliance on factual analysis).

*B. Broken Records Review, the Rational Basis Canon,  
and Lochnerism*

Broken records review fits neatly within the deeply rooted rational basis canon established by legendary decisions such as *United States v. Carolene Products Co.*<sup>242</sup> In fact, broken records review is merely an application of principles that those cases articulated. *Carolene Products*, not to mention *Lochner v. New York*,<sup>243</sup> primarily concerned the question of whether the Supreme Court was willing to sit as an unelected superlegislature when reviewing legislative policy choices addressing public problems. While broken records review cannot, as a rule, examine the wisdom of a legislature's chosen policy on its own, it absolutely can dissect the legislature's stated factual justifications for why it considers a policy to be wise—a capability of particular value to groups that were poorly positioned to resist the policy's enactment in law. A discussion of canonical rational basis cases reveals that *Lochner's* “bad constitutional odor”<sup>244</sup> does not taint broken records review.

*Carolene Products*, “the foundation for modern rational basis review,”<sup>245</sup> powerfully supports the idea of—and the need for—broken records review as advanced by this Article. In its decision, the Court wrote that “the constitutionality of a statute predicated on the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist”—or never existed in the first place<sup>246</sup>—something the challengers did not claim to be the case in *Carolene Products*. The Filled Milk Act banned products in which vegetable fats had been added to milk to replace the animal fat,<sup>247</sup> and the Defendants were being criminally prosecuted for the interstate transport of filled milk products.<sup>248</sup> They argued that the statute was unconstitutional because of its underinclusivity—that the “prohibition has not been extended to oleomargarine or other butter substitutes in

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242. 304 U.S. 144 (1938).

243. *Lochner v. New York*, 198 U.S. 45, 57 (1905), *overruled in part by* *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952), *and* *Ferguson v. Skrupa*, 372 U.S. 726 (1963), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

244. RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: AN UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 371 (2014).

245. Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1633 (2016).

246. *Carolene Prods.*, 304 U.S. at 153.

247. *See id.* at 145–46.

248. *Id.* at 146.

which vegetable fats or oils are substituted for butter fat.”<sup>249</sup> In dismissing this challenge, the Court surveyed the ample factual support for the statute in the legislative record,<sup>250</sup> noting that Congress undertook “[a]n extensive investigation” before concluding “that the use of filled milk as a substitute for pure milk is generally injurious to health and facilitates fraud on the public.”<sup>251</sup> There is no evidence that the defendant challenged the record, although “[i]t is hard to know if the Court believed the health claims or just ignored that the law more than likely represented the dairy industry’s desire to eliminate competition.”<sup>252</sup>

But acknowledging the dairy industry’s likely motivation in advocating for the Filled Milk Act’s passage<sup>253</sup> only demonstrates the value of a broken records approach to judicial review. As the Court acknowledged:

[N]o pronouncement of a Legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and . . . a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty, or property had a rational basis.<sup>254</sup>

It is unclear whether (and perhaps unlikely that) the *Carolene Products* challengers would fall within the kinds of categories of marginalized groups that broken records review is best equipped to protect. Nevertheless, had the litigants framed their arguments to undermine the law based on the legislative record instead of its underinclusiveness, perhaps the Court would have more squarely addressed whether a manufactured, bogus public health rationale had been advanced to protect a particular industry. Of course, any value judgments pertaining to the ills of industry capture, or the underlying wisdom of the resulting policy, would have fallen outside the purview of broken records review—as would value judgments regarding legal discrimination against LGBT people, immigrants, and other vulnerable groups. But to the extent that the legislature deployed false or misleading science in an attempt to masquerade the effects of that

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249. *Id.* at 151. The Court rejected that argument, finding that “[a] Legislature may hit at an abuse which it has found, even though it has failed to strike at another.” *Id.*

250. *Id.* at 148–50 nn.2 & 3.

251. *Id.* at 147–48.

252. James M. McGoldrick, Jr., *The Rational Basis Test and Why It Is So Irrational: An Eighty-Year Retrospective*, 55 SAN DIEGO L. REV. 751, 769 (2018).

253. Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 416 (1984) (“It is not too uncharitable, perhaps, to suggest that concern for the dairies’ pocketbooks rather than for the consumer’s health best explains the dairy lobby’s efforts.”).

254. *Carolene Prods.*, 304 U.S. at 152.

capture under the more politically palatable guise of public health, broken records review could have perhaps provided refuge for the act's challengers. To be sure, such protection would be all the more valuable where the civil rights of maligned political out-groups, as opposed to the legality of a given business practice, are at stake.

While some might fear that broken records review heralds a reversion to *Lochnerism*, the theory leads to no such outcome. The *Lochner* Court purported to review the end goal of the legislation without engaging in a serious confrontation with the factual justification for the challenged law. Instead, the Court made a values-based assertion that “[t]o the common understanding the trade of a baker has never been regarded as an unhealthy one.”<sup>255</sup> And to the extent that *Lochner* undermined a legislative value judgment through a judicial reconstruction of the arguments that the legislature might or might not have considered, a similar law would be unaltered by a broken records approach, which would not be triggered unless the legislature had promoted dubious justifications to advance its policy agenda.

Broken records review does not generally interfere with a legislature's ability to advantage, or disadvantage, groups according to its own whims. It merely provides a safeguard when those legislatures ground, articulate, or justify these choices using demonstrably faulty fact. Of course, in reality, bakers, producers of filled milk, and (for that matter) optometrists<sup>256</sup> do not appear to be anywhere near as likely to be victimized by legislative use of alternative fact as the traditionally marginalized populations documented throughout this Article. But even when those underrepresented groups are targeted via purely values-driven legislation, they would need to look to other sources of constitutional relief, with little refuge in broken records review—at least not until the legislature begins making falsifiable factual claims in support of the law.

Still, to further allay fears of judicial intrusion into legislative prerogatives, courts might consider adopting a “lookback period” beyond which even factually baseless laws must be allowed to stand unless and until the legislature decides to repeal them.<sup>257</sup> While the exact time period (which could be twenty years or more) is a matter for future consideration, such a constraint would limit broken records

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255. *Lochner v. New York*, 198 U.S. 45, 59 (1905), *overruled in part by* *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952), *and* *Ferguson v. Skrupa*, 372 U.S. 726 (1963), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

256. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 486 (1955).

257. *See generally* Benjamin, *supra* note 140 (discussing the effect of outdated factual findings on judicial precedent).

review's disruption of societal expectations and would be justified by the assumptions that a law that has stood the test of time without repeal likely has some factual basis, that legislative findings of fact would become harder to defend as memories fade and participants retire (or pass on), and that a genuinely victimized group would mount a challenge in the courts within such a timeframe.

### CONCLUSION

No matter how serious and important the underlying legislative purpose, laws grounded in alternative facts raise real problems of constitutional import for groups excluded from political processes. Currently, however, judicial review often takes on an awkward posture when it comes to alternative facts. This difficulty derives from the structure of constitutional deference norms—including the fundamental idea that, absent an improper motivation, if not animus, a law need only be grounded in a mere rational basis. It may also be a result of the Court's wariness to enter the political thicket.

The current predisposition to ignore the factual premises underlying legislation, and to favor exclusively intent-driven inquiries such as animus, can create a troubling blind spot. While legislative animus surely explains some of the motivation behind laws that target marginalized groups, other laws based in factual inaccuracies are not always amenable to intent-based frameworks. Thus, even if the Court's chosen animus label is not always inapt, it overshadows other important aspects of laws that (explicitly or not) target groups for second-class status.

By comparison, a broken records inquiry may ultimately better exemplify how laws grounded in factual distortion may be vulnerable to constitutional challenge. And because the federal judiciary appears generally unwilling to substantively expand the equal protection doctrine's scope, broken records review provides a procedural mechanism for securing substantive protections that a broader coalition of judges might find appealing, not to mention a more realistic framework through which groups unable to protect their interests in the legislature may vindicate substantive rights in the future.