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# The Canon of Rational Basis Review

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# THE CANON OF RATIONAL BASIS REVIEW

Katie R. Eyer\*

*The modern constitutional law canon fundamentally misdescribes rational basis review. Through a series of errors—of omission, simplification, and recharacterization—we have largely erased a robust history of the use of rational basis review by social movements to generate constitutional change. Instead, the story the canon tells is one of dismal prospects for challengers of government action—in which rational basis review is an empty, almost meaningless form of review.*

*This Article suggests that far from the weak and ineffectual mechanism that most contemporary accounts suggest, rational basis review has, in the modern era, served as one of the primary equal protection entry points for social movements seeking to disrupt the status quo. Moreover, it suggests that unlike the narrowly constrained theories of robust rational basis review that predominate today, the actual history (and present) of rational basis review has included a wide diversity of more meaningful forms of review.*

*To elucidate the problems with canonical accounts of rational basis review, this Article focuses on four ways in which the contemporary constitutional canon misdescribes or distorts our understanding of the real role of rational basis review: (1) by misdescribing how contemporary*

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social movements achieve meaningful scrutiny under the Equal Protection Clause; (2) by recharacterizing successful rational basis cases as only “purporting” to apply rational basis review; (3) by ignoring many sites of constitutional contestation, including the lower and state courts and the political branches; and (4) by oversimplifying and thus narrowly cabinning any acknowledgment of more meaningful forms of rational basis review.

Correcting these errors would afford a far different vision of rational basis review. Rather than a uniformly deferential form of review, rational basis review would be understood, correctly, as a deeply inconsistent, “persistently confused” area of constitutional law. Moreover, this very inconsistency would be understood as offering social movements—both historically and today—among the most promising avenues for generating constitutional change.

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## INTRODUCTION

The canonical account of rational basis review under the Equal Protection Clause is familiar.<sup>1</sup> Rational basis review is a form of review that is

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1 I use the term “canon” in the way that Jill Hasday has defined it: as “ways of thinking about [an area of the law] that are widely shared by legal scholars and especially by legal authorities, like legislators and judges,” which in turn define which sources—which cases and statutes, which stories and examples—are deemed relevant. See Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 825–27 (2004). The canon is of course broader than, but deeply related to, how constitutional law is taught in law schools. Because law school teaching forms the foundation for how lawyers think about the law, it often serves as the mode of transmission of canonical perspectives, especially with respect to subjects that are a required part of the first-year curriculum. For this reason, and to permit a more systematic assessment than would otherwise be possible, I rely on popular constitutional law casebooks as the basis for substantiating my claims about the content of the canon. Parts I–IV, *infra*, which are the core of my substantive analysis, rely on updated editions of the ten commonly used constitutional law casebooks identified by Jamal Greene in his 2011 *Harvard Law Review* article, *The Anticanon*. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 395–96 (2011); see also RANDY E. BARNETT & HOWARD E. KATZ, CONSTITUTIONAL LAW: CASES IN CONTEXT (2d ed. 2013); PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING (6th ed. 2015); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (5th ed.

“almost empty,”<sup>2</sup> “enormously deferential,”<sup>3</sup> and “meaningless.”<sup>4</sup> The plaintiff’s burden on rational basis review is “essentially insurmountable,”<sup>5</sup> and successful challenges “rare.”<sup>6</sup> So deferential is the standard of rational basis review that it is “more often a statement of a conclusion that the law is constitutional than a standard of actual evaluation.”<sup>7</sup> In short, the canonical account of rational basis review is a bleak one for those challenging the constitutionality of government action: a doctrine which is extraordinarily deferential and will virtually never result in government action being overturned.

There are some limited exceptions within this narrow account. For example, the modern canon also acknowledges that so-called “animus” doctrine, or “rational basis with bite,” can involve a deviation from this exceptionally deferential version of rational basis review.<sup>8</sup> Thus, in certain narrow circumstances—where the Court suspects animus, or where a subordinated group is targeted—it may invalidate government action, even where heightened scrutiny<sup>9</sup> is not applicable.<sup>10</sup> But even here, meaningful applications of rational basis review have been construed as fundamentally distinct from “true” or “traditional” rational basis review; a deviation from the canonical account, rather than a component of it.<sup>11</sup>

This Article suggests that the canonical account of rational basis review is fundamentally incomplete, and thus fundamentally misleading. In fact, rational basis review has—in modern history—constituted one of the principal entry points for social movements seeking to effectuate constitutional

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2017); JESSE H. CHOPER ET AL., *CONSTITUTIONAL LAW: CASES, COMMENTS, AND QUESTIONS* (12th ed. 2015); DANIEL A. FARBER ET AL., *CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION’S THIRD CENTURY* (5th ed. 2013); CALVIN MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* (5th ed. 2016); RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW: CASES AND NOTES* (11th ed. 2015); GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* (7th ed. 2013); KATHLEEN M. SULLIVAN & NOAH FELDMAN, *CONSTITUTIONAL LAW* (19th ed. 2016); JONATHAN D. VARAT ET AL., *CONSTITUTIONAL LAW: CASES AND MATERIALS* (14th ed. 2013).

2 Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 *Geo. J.L. & Pub. Pol’y* 401, 410 (2016).

3 *Id.* at 402.

4 Richard E. Levy, *Escaping Lochner’s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 *N.C. L. Rev.* 329, 426 (1995).

5 JEROME A. BARRON & C. THOMAS DIENES, *CONSTITUTIONAL LAW* 305 (9th ed. 2013).

6 CHEMERINSKY, *supra* note 1, at 732.

7 JEROME A. BARRON ET AL., *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY* 699–700 (8th ed. 2012).

8 *See infra* Part IV.

9 “Heightened scrutiny” is sometimes used to refer collectively to strict and intermediate scrutiny and at other times as a synonym for intermediate scrutiny only. Herein, I use it in the broader sense, to refer collectively to strict and intermediate scrutiny. *See, e.g.*, Christopher R. Leslie, *The Geography of Equal Protection*, 101 *MINN. L. REV.* 1579, 1584 n.9 (2017) (using the term in this way).

10 *See infra* Part IV.

11 *See infra* Part IV.

change.<sup>12</sup> 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.<sup>13</sup> 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>14</sup>

These omissions from the canon are important. Generations of students continue to learn that heightened scrutiny is the path to social movement success and that rational basis review is a weak and fundamentally meaningless form of review.<sup>15</sup> Cases stepping outside of this canonical account are generally characterized as “purporting” to apply rational basis review or as falling within some other narrow exception.<sup>16</sup> The true diversity of approaches and outcomes on rational basis review—and the actual role it has played in contemporary social movements’ success—is thus largely absent from the standard accounts that students—our future lawyers, judges, and politicians—study and absorb.<sup>17</sup>

This Article seeks to begin a conversation about how the canon of rational basis review could be reimagined in a way that more accurately represents its actual role in the process of constitutional change.<sup>18</sup> In order to do so, it identifies and describes four ways that the contemporary canon misdescribes or distorts the actual practice and outcomes of rational basis review in modern legal history: (1) by misdescribing how contemporary social movements actually achieve meaningful scrutiny under the Equal Protection Clause (which, contra canonical accounts, since the 1970s has virtually always been through the gateway of rational basis review);<sup>19</sup> (2) by recharacterizing

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12 See *infra* Parts I–V. Note that although my focus herein is on canonical accounts of rational basis review under the Equal Protection Clause, rational basis arguments by social movements have not been restricted to that context. In particular, the Due Process Clause has at times also provided the basis for successful rational basis review arguments by social movements seeking to generate constitutional change.

13 See *infra* Parts I–V.

14 See *infra* Parts I–V.

15 See *infra* Part I.

16 See *infra* Part II.

17 Cf. Hasday, *supra* note 1, at 829–30 (observing that similarly, in the context of the canon of family law, the canon shapes how “the next generation of lawyers” will understand the law).

18 This Article thus joins a growing literature calling on scholars to consider and interrogate the common sense canons that pervade the teaching and practice of law. See, e.g., JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* (2014); J.M. Balkin & Sanford Levinson, Commentary, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998); Greene, *supra* note 1; Hasday, *supra* note 1; Jill Elaine Hasday, *Women’s Exclusion from the Constitutional Canon*, 2013 U. ILL. L. REV. 1715. For my own prior work in this area, see Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527 (2014).

19 See *infra* Part I.

robust rational basis cases as only “purporting” to apply rational basis review;<sup>20</sup> (3) by ignoring the vast majority of constitutional litigation, which goes on in the lower and state courts, as well as by ignoring constitutional change in the legislative and executive branches;<sup>21</sup> and (4) by oversimplifying and thus narrowly cabining any acknowledgment of more meaningful forms of rational basis review.<sup>22</sup>

This Article contends that, collectively, revising these ways of understanding rational basis review would paint a far different picture than the canonical account we have today. Rather than a uniformly weak and ineffectual doctrine, rational basis review would be understood as a varying and variegated doctrine; a “persistent[ly] . . . confus[ed]”<sup>23</sup> area of the law that social movements have repeatedly mined successfully to create initial entry points for constitutional change.<sup>24</sup> Although heightened scrutiny might still be understood as the ultimate mark of social movement success, rational basis review would (accurately) be situated as the initial means by which most modern social movements undermine existing understandings and create pathways to change.<sup>25</sup> Moreover, rather than a single narrow pathway out of ultradeferral review (such as animus doctrine), rational basis review would be understood as offering an array of possibilities to social movements (and judges) in conceptualizing why—even under the lowest level of review—certain forms of group-categorizing or group-burdening government action must fail.<sup>26</sup>

This Article proceeds in five parts. Parts I–IV describe the four ways in which the canonical account of rational basis review misdescribes or distorts our understanding of the contemporary cases decided under the minimum tier<sup>27</sup> of equal protection review. Part I suggests that the canonical account of how “protected classes” are made—via a “test” for immutability, political

20 See *infra* Part II.

21 See *infra* Part III.

22 See *infra* Part IV.

23 See Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 BYU L. REV. 575, 575.

24 See *infra* Parts I–V. Of course, as other scholars have observed, the Court has not been consistent in its approach to review within the heightened tiers either. See, e.g., Suzanna Sherry, *Selective Judicial Activism: Defending Carolene Products*, 14 GEO. J.L. & PUB. POL’Y 559, 561–62 (2016).

25 See *infra* Parts I–V.

26 See *infra* Parts I–V.

27 Because the courts have used a variety of approaches in cases not subject to formally heightened scrutiny, I consider the term “minimum scrutiny,” borrowed from then-Justice Rehnquist, to be a more accurate descriptive term than “rational basis review.” See, e.g., Memorandum from William H. Rehnquist, Assoc. Justice, Supreme Court of the U.S., to Lewis F. Powell, Jr., Assoc. Justice, Supreme Court of the U.S. 5 (May 25, 1976), [http://law2.wlu.edu/deptimages/powell%20archives/74-1044\\_MassBoardRetirementMurgia1976May25\\_30.pdf](http://law2.wlu.edu/deptimages/powell%20archives/74-1044_MassBoardRetirementMurgia1976May25_30.pdf) (using the term “minimum scrutiny,” rather than “rational basis review” in a discussion of *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976)). I nevertheless also use the more familiar term “rational basis review” herein. References to the two are used interchangeably throughout this Article.

powerlessness, history of discrimination, and relevance to ability to contribute—is descriptively inaccurate and has erased from the constitutional canon the important role that rational basis review has played for most modern social movements in achieving meaningful equal protection review. Part II turns to the pervasive tendency within the canon to exclude any rational basis cases applying meaningful scrutiny through omission, skepticism, and separate categorization, arguing that such exclusion is erroneous and fails to take seriously the actual practice of rational basis review. Part III takes up a widespread problem of the constitutional canon generally: its exclusive focus on the Supreme Court and failure to account for the arenas in which most constitutional change occurs, i.e., the lower and state courts, in conversation with the political branches. Part IV describes the existing ways that the canon does account for more meaningful rational basis review (“rational basis with bite” and “animus doctrine”), and suggests that, as canonized, both are descriptively misleading and substantively problematic. Finally, Part V discusses how taking seriously the aforementioned critiques would shift our understanding of rational basis review and how such a revised understanding could fundamentally alter our canonical accounts of how social movements make constitutional change.

\* \* \*

Three caveats are in order before proceeding to the substance of the discussion. First, I should be clear that this Article critiques and seeks to challenge *the canon*, i.e., the collective common wisdom about rational basis review, rather than any particular casebook, treatise, or scholar. Many scholars have offered more nuanced accounts of rational basis review, and yet the misleading and oversimplified canonical account presented herein remains.<sup>28</sup> The challenge this Article presents is to take seriously the ways

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28 For example, although all ten of the casebooks have some aspects of their discussion that are exemplary of one or more of the critiques set out in Parts I–IV, *infra*, several do make some efforts to offer more nuanced accounts of rational basis review generally and/or rational basis review’s relationship to social movement change efforts specifically. See, e.g., BREST ET AL., *supra* note 1; CHOPER ET AL., *supra* note 1; FARBER ET AL., *supra* note 1; MASSEY, *supra* note 1. It is a testament to the canon’s power to reproduce itself that even among those casebooks that attempt to offer more nuanced accounts of rational basis review, every one nevertheless also engages in common tropes of the canon that deemphasize and marginalize the role of rational basis review in social movements’ efforts to generate constitutional change. For examples of recent law review articles providing a more nuanced account, see Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281 (2015); Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 GEO. J.L. & PUB. POL’Y 373 (2016); Robert C. Farrell, *Equal Protection Rational Basis Cases in the Supreme Court Since Romer v. Evans*, 14 GEO. J.L. & PUB. POL’Y 441 (2016); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004); Earl M. Maltz, *The Burger Court and the Conflict over the Rational Basis Test: The Untold Story of Massachusetts Bd. of Retirement v. Murgia*, 39 J. SUP. CT. HIST. 264 (2014); Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627 (2016) [hereinafter Nachbar, *Rationality*]. See generally Symposium, *Is the Rational Basis Test Unconstitutional?*, 14 GEO. J.L.

that the canon errs and endeavor to remake our central account of rational basis review.

Second, I note that although the constitutional canon often presumes that doctrine is static, in fact doctrine inevitably fluctuates over time.<sup>29</sup> Specifically, as to rational basis review, there has been variation in the availability of meaningful rational basis review: as emerging social movements gain credence, their use of rational basis review tends to expand opportunities—both for their own litigation priorities, and also for others to access more meaningful minimum-tier review.<sup>30</sup> Thus, although I critique the canon on its own terms herein—as a fixed picture of the doctrine—one could further critique the canon for its failure to account for the ever-changing nature of the doctrine in response to social movement forces.<sup>31</sup>

Finally, although this Article suggests a fundamental rethinking of the value of rational basis review, its message is not that rational basis review is a panacea for social movement efforts to achieve equality. As many other scholars have observed, there are serious limitations to the operation of equal protection doctrine generally as an engine of equality, and rational basis review is certainly no exception. There are many times that the courts indeed do apply the “almost empty,”<sup>32</sup> “enormously deferential”<sup>33</sup> version of rational basis review that the canon portrays. Thus, rational basis review, like heightened scrutiny, is no “silver bullet” for groups seeking constitutional change. Rather, it is one tool—and this Article suggests, contra the canon, an important one—for social movements seeking constitutional transformation.

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& PUB. POL’Y 347 (2016) (offering an array of perspectives on what rational basis review is and ought to be). It is not clear why the canonical account of rational basis review persists despite acknowledgment among many scholars that aspects of the canon are erroneous, but it may be simply a reflection of the self-reproducing nature of the canon itself. See, e.g., Balkin & Levinson, *supra* note 18, at 1002. It is also the case that taking seriously the diversity of ways that rational basis review has been applied poses a serious challenge to the *Carolene Products* framework for modern equal protection doctrine, a framework that many modern scholars endorse. See, e.g., Thomas B. Nachbar, *Rational Basis “Plus,”* 32 CONST. COMMENT. 449, 476–77 (2017) [hereinafter Nachbar, *Rational Basis “Plus”*]; Sherry, *supra* note 24.

29 This is true both in the era during which the modern rational basis test has existed, as well as throughout the rational basis test’s early history. See, e.g., Eyer, *supra* note 18, at 562–67 (discussing fluctuations in rational basis review in the modern era); see also Nachbar, *Rationality*, *supra* note 28 (describing the longer history of rationality review in the Court); cf. Bambauer & Massaro, *supra* note 28, at 284 (“The rational basis test is enjoying a bit of a comeback.”).

30 See, e.g., Eyer, *supra* note 18, at 562–67.

31 A few of the casebooks discussed herein do provide this type of more nuanced account with respect to the fluctuations of rational basis review over time in response to social movement efforts, but most do not. For an example of a casebook providing a more nuanced and time-dependent account, see BREST ET AL., *supra* note 1.

32 Chemerinsky, *supra* note 2, at 410.

33 *Id.* at 402.

## I. THE MYTH OF A “TEST” FOR PROTECTED CLASSES

The equal protection canon has long embraced the myth of a “test” for protected class status: that the pathway to social movement success is (and has been) to prove that the group in question satisfies certain criteria for heightened review (history of discrimination, relevance of group-status to ability to contribute, political powerlessness, and immutability).<sup>34</sup> Rational basis review, in contrast, is not situated by the canon as a pathway to meaningful review. This Part suggests that the first way that the canon errs is by misdescribing how social movements—including those that ultimately achieve “protected class” status—achieve durable constitutional change. Contra canonical accounts, rational basis review—rather than any “test” for protected class status—has been the pathway to meaningful review for most modern social movements.<sup>35</sup>

Under contemporary equal protection doctrine, protected class status has long been seen as the gold standard for social movement success.<sup>36</sup> Upon being designated a “suspect” or “quasi-suspect” class, government discrimination against a group is subject to regularized heightened scrutiny (strict or intermediate) by the courts, typically resulting in its invalidation.<sup>37</sup> Thus, despite recent scholarly critiques questioning the value of this tiered approach for historically subordinated groups, protected class status continues to be situated by the canon as the ultimate mark of a social movement’s success.<sup>38</sup>

How, then, is protected class status achieved? Under the canonical account, the Court applies certain criteria to assess whether suspect class status is appropriate.<sup>39</sup> Thus, a history of discrimination, the relevance of the

34 See *infra* notes 35–39 and accompanying text.

35 See *infra* notes 44–78 and accompanying text. Note that I do not mean to suggest in this section that social movements’ analogical arguments to race, which form the basis for the modern “test,” have not been helpful in shifting judicial outcomes or creating constitutional change, but rather that they have not, descriptively, been the doctrinal mechanism through which courts have been willing to effectuate such change (although they have often provided the justification for such change after the fact). For an in-depth discussion of one social movement’s complicated relationship with such analogical arguments, see generally SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* (2011).

36 See, e.g., David Schraub, *The Siren Song of Strict Scrutiny*, 84 UMKC L. REV. 859, 868 (2016) (making a similar observation).

37 Gerald Gunther famously referred to “strict scrutiny,” the level of scrutiny applicable to “suspect classes,” as “‘strict’ in theory and fatal in fact.” Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

38 See, e.g., RUSSELL L. WEAVER ET AL., *CONSTITUTIONAL LAW: CASES, MATERIALS, & PROBLEMS* 759–71 (2d ed. 2011).

39 As noted in footnote 1, I focus herein on the ten commonly used casebooks identified by Jamal Greene in his 2011 article, *The Anticanon*. The Chemerinsky casebook states the classic canonical account. See CHEMERINSKY, *supra* note 1, at 728–29 (posing the question, “How has the Court decided which level of scrutiny to use for particular classifications?” and responding, “[s]everal criteria are applied in determining the level of scrutiny”;

classification to a permissible government purpose, political powerlessness, and immutability (or difficulty of change) are described by the canon as the criteria by which the Court will “evaluate such requests [for protected class status].”<sup>40</sup> Under the canonical account, then, it is the application of this “test” that leads to groups receiving protected class status and ultimately to social movement success.

Several prominent scholars have recognized that the Court has, in recent years, been reluctant to create new protected classes, despite the arguable satisfaction of the canonical test.<sup>41</sup> But many fewer scholars have recognized that such a test has never, in actuality, been the path to regularized heightened scrutiny for emerging<sup>42</sup> social movements.<sup>43</sup> Rather, rational

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going on to identify immutability, political powerlessness, history of discrimination, and the likelihood that the classification might form a valid basis for discrimination as the relevant criteria). There is some variation in how other casebooks approach this issue, but the vast majority either state or imply that these standard criteria (or some similar formulation) determine which classes receive suspect or quasi-suspect status. See BREST ET AL., *supra* note 1, at 1376–88 (strongly implying that the race-analogical criteria that comprise the modern test are the basis for affording groups, other than race, heightened scrutiny); CHOPER ET AL., *supra* note 1, at 1478–81 (strongly suggesting that the race-analogical criteria articulated in *Frontiero* were the basis for the application of heightened scrutiny to sex); FARBER ET AL., *supra* note 1, at 393–98, 503–04 (critiquing some aspects of the analogical test but offering a fairly standard descriptive account of its influence on the sex discrimination movement and relevance for contemporary suspect class analysis); MASSEY, *supra* note 1, at 643–44, 672–73 (providing a fairly standard account, but focusing on *Carolene Products*); SULLIVAN & FELDMAN, *supra* note 1, at 760, 763, 783, 798 (offering a somewhat more complicated account, but strongly implying that the classic race-analogical criteria are the relevant criteria for determining what groups get sustained meaningful scrutiny); see also BARNETT & KATZ, *supra* note 1, at 1001–06 (implying its account in the structuring of the sex discrimination section); ROTUNDA, *supra* note 1, at 806–14 (same); cf. STONE, *supra* note 1, at 644, 685–90 (describing the canonical test, but presenting it as only one possible rationale for heightened scrutiny); VARAT ET AL., *supra* note 1, at 691–730, 813–43 (not explicitly suggesting any theory for how and why groups receive heightened scrutiny).

40 CHEMERINSKY, *supra* note 1, at 728–29.

41 See, e.g., *id.*; see also Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 757 (2011) (suggesting, with respect to the Supreme Court’s designation of new groups as suspect or quasi-suspect, “this canon has closed”).

42 I use the term “emerging social movements” herein to connote social movements whose constitutional arguments are at the early stages of beginning to gain traction in the courts, regardless of the length of time that the social movement has been in existence. Cf. Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1975–76 (2006) (describing the stages of a social movement seeking constitutional change, including that at the outset, there is ordinarily a period in which norms are so fully entrenched that “norm contests at the margins tend to have little effect on either adjudication or outcomes”).

43 See *infra* notes 44–78 and accompanying text. A number of other scholars identify problems with the standard historical account. See, e.g., BREST ET AL., *supra* note 1, at 1487–90 (noting that our contemporary view of equal protection doctrine treats it as far more static and well-settled than is appropriate given the historically contingent evolution of the modern system of tiered scrutiny, and explicitly describing the role of rational basis review, albeit often characterizing meaningful rational basis cases as somehow outside of

basis review has served as the pathway to meaningful scrutiny for most modern social movements, even those that have ultimately achieved protected class status.<sup>44</sup> The factors identified in the canonical test, in contrast, have typically provided the post hoc explanation for protected class status, rather than the actual mechanism for its accomplishment.

The path of the women's rights movement—one of two canonical movements profiled in the vast majority of constitutional law casebooks<sup>45</sup>—is illustrative. At the time that the first modern sex discrimination case, *Reed v. Reed*, came to the Court in 1971, a majority of the Justices were not prepared to categorically deem discrimination against women “suspect.”<sup>46</sup> Just a decade earlier, the Court had unanimously affirmed the constitutionality of a law automatically exempting women from jury service without any indication that discrimination against women might warrant searching review.<sup>47</sup> And in *Reed* itself, there was no great enthusiasm, even among most of the Court's liberals, for categorically reversing course.<sup>48</sup>

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canonical rational basis review); Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 742 (2014) (noting that the test criteria for heightened scrutiny “are useful (and indeed, are invoked) only in cases where the prejudice at issue has already been recognized and understood as unfair” but “do nothing to force identification of unrecognized and evolving (that is, contemporary) prejudices”); Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1046–47 (2014) (noting that the Court has rarely invoked the analogical criteria that many contemporary scholars treat as dispositive of suspect class status in the context of decisions affording groups higher levels of scrutiny and has mostly described it in the context of denying suspect class status); cf. Goldberg, *supra* note 42 (describing in detail the tendency of courts to hew to fact-based adjudication in the early stages of social movement development rather than making broader normative judgments).

44 For all of the social movements discussed in this Part, their earliest victories were under a meaningful form of rational basis review, and rational basis review thus formed the basis for their initial access to meaningful review of any kind under the Equal Protection Clause. Several, but not all, of those social movements eventually moved on to receive formal heightened scrutiny after a series of these rational basis decisions had undermined the justifications typically given for discrimination against them. The social movement discussed herein that has not yet done so, sexual orientation, may well do so in the future. See, e.g., Autumn L. Bernhardt, *The Profound and Intimate Power of the Obergefell Decision: Equal Dignity as a Suspect Class*, 25 TUL. J.L. & SEXUALITY 1, 22–41 (2016). But regardless of whether it does, most observers agree that sexual orientation already receives consistent meaningful review under the minimum tier itself. See *infra* note 75.

45 But cf. Hasday, *supra* note 18 (observing that sex discrimination is not as prominent as race discrimination in our constitutional law canon and arguably has been excluded from the canon in important respects).

46 See *Reed v. Reed*, 404 U.S. 71 (1971); see also *infra* notes 47–52 and accompanying text.

47 See *Hoyt v. Florida*, 368 U.S. 57 (1961). Three Justices—Chief Justice Warren and Justices Black and Douglas—initially expressed the view in conference that the exclusion of women was unconstitutional, but all three ultimately went along with the rest of the Court. See *THE SUPREME COURT IN CONFERENCE (1940–1985)*, at 566–67 (Del Dickson ed., 2001).

48 Despite the fact that the suspect classification argument was clearly the predominant argument raised by the appellants in *Reed*—occupying a full forty-six pages of Sally Reed's brief (as compared to seven pages—tacked on to the end of the brief—regarding

Thus, despite the urgings of Ruth Bader Ginsburg and the ACLU to deem sex discrimination suspect,<sup>49</sup> the first victory for the modern sex discrimination movement was on rational basis review.<sup>50</sup> In *Reed*, Chief Justice Burger, writing for a unanimous Court, held that “[t]he question presented by this case . . . is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective.”<sup>51</sup> Noting that “[a] classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation,’” he, together with the rest of the Court, concluded that the classification under review did not have such a relation.<sup>52</sup>

During the years that followed, *Reed* and its rational basis arguments quickly gained traction.<sup>53</sup> In a series of cases, in both the lower courts and at the Supreme Court itself, judges struck down sex-based classifications and other laws burdening women, finding that, as in *Reed*, they lacked a “rational” basis.<sup>54</sup> To the chagrin of some leading figures in the sex discrimination

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rational basis review)—it appears from available records that only Justice Blackmun indicated any interest in pursuing it. See Brief for Appellant, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4); see also Justice Harry A. Blackmun Notes in *Reed v. Reed* (Oct. 18, 1971) (on file with Harry A. Blackmun Papers, Library of Congress, Box 153, Case No. 70-4) (Blackmun preconference notes, observing that suspect class status was appropriate, but that plaintiff should prevail on rational basis review). Most of the Justices appear to have simply ignored the argument. See, e.g., Justice Harry A. Blackmun Conference Notes in *Reed v. Reed* (undated) (on file with Harry A. Blackmun Papers, Library of Congress, Box 153, Case No. 70-4) (showing no Justice advocating for the suspect class argument, and noting Justice Stewart as advocating the use of an argument that “w[oul]d n[ot] h[a]v[e] broad ramifications”); Justice William O. Douglas Conference Notes in *Reed v. Reed* (Oct. 22, 1971) (on file with William O. Douglas Papers, Library of Congress, Box 1524, Case No. 70-4) (showing no Justice advocating for the suspect class argument). In later cases, the Court would confront the suspect class issue directly, and it would become clear that a majority of the Justices did not support suspect class status for sex. See *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion). Indeed, even intermediate scrutiny was not a project supported by a majority of the Justices until the late 1970s—later than *Craig v. Boren*, 429 U.S. 190 (1976), commonly thought of today as instantiating intermediate scrutiny, and almost a decade after *Reed* was decided. See Eyer, *supra* note 18, at 557–58.

49 At the time that *Reed v. Reed* was decided, Justice Ginsburg was employed at Rutgers Law School, and the Women’s Rights Project of the ACLU had not yet been founded. Thus, although she and Mel Wulf of the ACLU collaborated on the *Reed* brief, they were not yet colleagues. See, e.g., Brief for Appellant, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) (listing Wulf and Ginsburg’s separate affiliations on the cover page).

50 See *Reed*, 404 U.S. at 76–77; see also Hasday, *supra* note 18, at 1724 (noting that *Reed* was the first time the Court “struck down a statute for denying women equal protection of the laws”).

51 *Reed*, 404 U.S. at 76.

52 *Id.* at 76–77 (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

53 See sources cited *infra* notes 54–55 and accompanying text.

54 See, e.g., *Stanton v. Stanton*, 421 U.S. 7 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Kalina v. R.R. Ret. Bd.*, 541 F.2d 1204 (6th Cir. 1976), *aff’d sub nom.* *R.R. Ret. Bd. v. Kalina*, 431 U.S. 909 (1977); *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976); *White v. Fleming*, 522 F.2d 730 (7th Cir. 1975); *Women’s Liberation Union of R.I. v. Israel*, 512 F.2d 106 (1st Cir. 1975); *Green v. Waterford Bd. of Educ.*, 473 F.2d 629 (2d Cir. 1973);

movement—some of whom were ambivalent or even hostile to rational basis as a constitutional argument—many, if not most, of the early victories of the women’s rights movement were won on a rational basis framework.<sup>55</sup>

During this time frame, although many of the Justices were willing to find individual instances of sex discrimination unconstitutional on rational basis review—and some felt greater scrutiny was warranted—there was not a majority willing to commit to formal heightened scrutiny.<sup>56</sup> Even as late as *Craig v. Boren* in 1976—today widely characterized as having instantiated

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Schaefer v. Tannian, 394 F. Supp. 1128 (E.D. Mich. 1974); *Scott v. Opelika City Sch.*, 63 F.R.D. 144 (M.D. Ala. 1974); *Smith v. City of East Cleveland*, 363 F. Supp. 1131 (N.D. Ohio 1973), *aff’d in part, rev’d in part sub nom. Smith v. Troyan*, 520 F.2d 492 (6th Cir. 1975); *Bowen v. Hackett*, 361 F. Supp. 854 (D.R.I. 1973); *see also Perry v. Grenada Mun. Separate Sch. Dist.*, 300 F. Supp. 748 (N.D. Miss. 1969) (invalidating, pre-*Reed*, the exclusion of unwed mothers from public school as “arbitrary”); *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966) (invalidating, pre-*Reed*, a total ban on women’s jury service as “arbitrary”). *See generally* Katie R. Eyer, *Protected Class Rational Basis Review*, 95 N.C. L. REV. 975 (2017) (extensively describing the significant role of rational basis arguments in early pregnancy discrimination and intersectional discrimination victories by the women’s rights movement). *Cf. Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion) (equal division among the Justices favoring invalidation between strict scrutiny and rational basis review). In addition to those cases in which the Court relied explicitly on equal protection rational basis principles, some of the early 1970s cases in which sex or pregnancy discrimination were challenged—today thought of as due process “irrebuttable presumption” cases—were based at least in part on the irrationality of the sex or pregnancy discrimination at issue therein. *See, e.g., Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

55 *See* sources cited *supra* notes 46, 54; *see also, e.g.,* MAYERI, *supra* note 35, at 62 (observing that Wulf and many feminists criticized *Reed*); Letter from Melvin Wulf, Legal Dir., ACLU, to Allen Derr (Dec. 20, 1971) (on file with Princeton University Mudd Library, ACLU Collection, Box 1654-55) (criticizing the attorney who argued *Reed*, and characterizing the resulting rational basis opinion as “bland and very narrow”); Letter from Melvin Wulf, Legal Dir., ACLU, to Norman Redlich, Office of Corp. Counsel, ACLU (July 1, 1971) (on file with Princeton University Mudd Library, ACLU Collection, Box 1654-55) (deriding Redlich for the alteration of the City’s amicus brief in *Reed v. Reed* to list its rational basis argument first). *But cf.* Brief for the Appellee at 13–14, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (No. 73-1892) (post-*Frontiero* brief authored by Ruth Bader Ginsburg and others at the ACLU Women’s Rights Project, making the strict scrutiny argument only one paragraph); MAYERI, *supra* note 35, at 62–63 (noting that Ginsburg publicly proclaimed her satisfaction with the *Reed* decision and apparently fully understood that the path to constitutional sex equality was likely to be gradual). Note that not all of the cases during this era were successful—there were significant losses—but many of the victories that did occur were under *Reed* and its rational basis holding.

56 This divide was on full display in 1973’s *Frontiero v. Richardson*. *See Frontiero*, 411 U.S. 677 (eight Justices finding a violation of equal protection, but dividing equally on the rationale—four Justices finding “suspect class status” appropriate and four others arguing for invalidation under *Reed*); *see also* Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1, 22 (noting that “[t]he majority of the Justices . . . have avoided articulating any standard of review for gender-based classifications distinct from the command of rational relationship”).

intermediate scrutiny for sex<sup>57</sup>—two of six Justices to join the majority separately concurred to emphasize that the proper understanding of the case was within a rational basis or untiered frame, leaving only four arguably supporting a “heightened scrutiny” approach.<sup>58</sup> It thus was through the gradual, accretive process of accumulating rational basis precedents—iteratively rejecting the rationality of a variety of forms of sex discrimination—that the Court was pushed toward more meaningful scrutiny.<sup>59</sup>

Ultimately, this process of accretive rational basis victories would indeed lead to the reconfiguration of sex discrimination as subject to a formally heightened form of review.<sup>60</sup> But it did so not through the application of the canonical “test,” but rather through the much more gradual process of rational basis review.<sup>61</sup> Indeed, in no case until *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>62</sup> decided in 1985, long after meaningful scrutiny was already being applied, did a majority of the Court identify the canonical test factors as being relevant to the application of heightened scrutiny to sex discrimination.<sup>63</sup> And, even in *Cleburne*, the majority focused only on the lack

57 See, e.g., Hasday, *supra* note 18, at 1726 (describing *Craig* as the case the Justices chose to instantiate intermediate scrutiny).

58 See *Craig v. Boren*, 429 U.S. 190, 210 n.\*, 211 (1976) (Powell, J., concurring) (noting that he “would not endorse” the characterization of *Craig* as a case involving “middle-tier” scrutiny, and applying the “fair and substantial relation” test to the legislation (third quotation quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971)) (internal quotation marks omitted in third quotation)); see also *id.* at 211–12 (Stevens, J., concurring) (noting that “[t]here is only one Equal Protection Clause[,]” “[i]t does not direct the courts to apply one standard of review in some cases and a different standard in other cases,” and applying an analysis focused on contextual factors to the legislation); *id.* at 214–15 (Stewart, J., concurring in the judgment) (declining to join majority, instead applying *Reed*, and finding the classification “irrational[ ]”).

59 As set out in much greater length in my prior article, *Constitutional Crossroads and the Canon of Rational Basis Review*, this accumulation of rational basis victories during the early 1970s—in both the sex context and in the context of nonmarital children—created a foundation for progressive Justices’ application of more meaningful scrutiny and also created substantial pressures on the conservative wing of the Court to characterize sex and illegitimacy as subject to specialized heightened scrutiny. As early rational basis victories accumulated, Justices such as then-Justice Rehnquist began to fear that they might be used to propel an “across-the-board expansion” of the minimum scrutiny test. Rehnquist, *supra* note 27, at 5. Thus, conservative Justices were among the first to characterize explicitly the Court’s treatment of sex and illegitimacy discrimination as a kind of differentiated “intermediate level scrutiny.” See Eyer, *supra* note 18, at 544–62.

60 See generally Eyer, *supra* note 18. Note, however, that it is only from the vantage of history that it appears clear that *Craig* marked the decisive turn to a formally distinct intermediate tier. See *id.* at 557–62, 562 n.136.

61 See *id.* at 537–63; see also *supra* notes 46–59 and accompanying text; *infra* notes 63–64 and accompanying text.

62 473 U.S. 432 (1985).

63 This is not to suggest that the types of race-analogical arguments today encapsulated within the canonical test—which were made by the women’s rights movement—were not persuasive to some judges, including some of the Justices of the Supreme Court. Indeed, as evidenced by *Frontiero*, and much more extensively delineated in Serena Mayeri’s excel-

of relationship between sex and the “ability to perform or contribute”—a conclusion it could arguably reach only because prior rational basis precedents had eviscerated the commonly shared assumptions about women’s role in society that had historically been understood to justify differential treatment.<sup>64</sup>

This story—of the success of a major social movement in achieving change via rational basis review—has been almost entirely erased by the canonical account of equal protection doctrine. *Reed*, to the extent it is discussed in modern casebooks, is treated as only “purporting” to apply rational basis review.<sup>65</sup> Later cases in which a majority of the Court applied rational basis review to find for legal feminists (such as *Stanton v. Stanton*<sup>66</sup> or *Weinberger v. Wiesenfeld*)<sup>67</sup> are rarely, if ever, discussed.<sup>68</sup> In contrast, Justice Bren-

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lent book on the subject, *Reasoning from Race*, many found them at least partially persuasive. The fact nevertheless remains that a *majority* of the Supreme Court remained unwilling to endorse them as the *reason* for heightened scrutiny or indeed even the *fact* of presumptive heightened scrutiny for the early years of the women’s rights constitutional campaign. Rather, it was rational basis that provided the leading edge of victories that permitted a later transition to formal heightened scrutiny. See generally MAYERI, *supra* note 35; *supra* notes 46–60 and accompanying text.

64 See *Cleburne*, 473 U.S. at 440–41 (suggesting that the reason that heightened scrutiny is applied to sex discrimination is because it “generally provides no sensible ground for differential treatment” and because sex-based classifications typically do not rest on “meaningful considerations”).

65 See BARNETT & KATZ, *supra* note 1 (not including *Reed* as a separate case or discussing it in the case notes); BREST ET AL., *supra* note 1, at 1376 (characterizing *Reed* as only “purport[ing]” to apply rational basis review); CHEMERINSKY, *supra* note 1, at 886 (same); CHOPER ET AL., *supra* note 1, at 1477 (questioning “Did *Reed* really involve ‘rational basis’ review, or did the Court in fact apply elevated scrutiny?” and implying the latter); FARBER ET AL., *supra* note 1, at 394 (questioning whether *Reed* is “really” an application of rational basis review); MASSEY, *supra* note 1, at 755 (arguing that the result in *Reed* suggested a “de facto higher level of scrutiny”); ROTUNDA, *supra* note 1 (not including *Reed* as a separate case or discussing it in the case notes); STONE ET AL., *supra* note 1, at 637 (noting that “whatever it said in its opinions, the Court was subjecting gender classifications to some form of heightened scrutiny” in describing *Reed* and the rational basis cases that followed it striking down sex-discriminatory laws); SULLIVAN & FELDMAN, *supra* note 1, at 760 (characterizing *Reed* as only “purport[ing]” to apply rational basis review); VARAT ET AL., *supra* note 1, at 654–55 (same); see also *infra* Part II (describing how the description of rational basis cases as only “purporting to apply” rational basis review has been used more generally to marginalize and systematically exclude rational basis cases that apply meaningful forms of scrutiny).

66 421 U.S. 7 (1975) (striking down a sex-discriminatory law on rational basis review).

67 420 U.S. 636 (1975) (striking down a sex-discriminatory law on rational basis review).

68 See BARNETT & KATZ, *supra* note 1 (not discussing *Stanton* or *Weinberger*); BREST ET AL., *supra* note 1, at 1401–02 (discussing *Weinberger* and *Stanton* very briefly, but only in the context of a discussion of cases striking down gender stereotypes, not as rational basis cases); CHOPER ET AL., *supra* note 1 (not discussing *Stanton* or *Weinberger*); FARBER ET AL., *supra* note 1, at 401–02 (discussing *Weinberger* and *Stanton* very briefly, but only in the context of a discussion of cases striking down gender stereotypes, not as rational basis cases); ROTUNDA, *supra* note 1 (not discussing *Stanton* or *Weinberger*); SULLIVAN & FELDMAN,

nan's plurality opinion in *Frontiero v. Richardson*<sup>69</sup>—which applied the canonical test to conclude that sex was a suspect class—is often presented as central to modern canonical accounts.<sup>70</sup> Despite the fact that only four Justices supported the heightened scrutiny approach in *Frontiero* (with five supporting a rational basis approach)—and that the Court returned to the use of rational basis review in sex discrimination cases after *Frontiero* was decided (often ruling in sex equality advocates' favor)—Justice Brennan's plurality opinion is often afforded greater prominence than any other pre-*Craig* case.<sup>71</sup> Thus, the prominent role that rational basis review played in the women's rights movement's campaign for constitutional sex equality is fundamentally obscured in favor of the canon's preferred account.

Nor is the experience of the women's rights movement unique. Rather, most modern social movements that have achieved meaningful constitutional review have initially relied on rational basis review to pave the way to durable constitutional change.<sup>72</sup> Since the solidification of the modern tiered system

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*supra* note 1, at 790 (not discussing *Stanton* and not describing *Weinberger* as a rational basis case in brief discussion of the case); VARAT ET AL., *supra* note 1, at 729–30 (not discussing *Stanton* and including *Weinberger* only as an exemplar of whether to treat differential treatment of male spouses of female wage-earners as discrimination against men or women); cf. CHEMERINSKY, *supra* note 1, at 889, 902 (including a very brief discussion of *Stanton* and *Weinberger*—as to *Weinberger*, not mentioning it as a rational basis review case); MASSEY, *supra* note 1, at 756 (same); STONE ET AL., *supra* note 1, at 635, 637 (including a discussion of *Weinberger* and *Stanton*, but characterizing them as only “purport[ing] to use only . . . rational basis review”).

69 411 U.S. 677, 678–91 (1973) (plurality opinion) (finding that sex should be designated a suspect classification).

70 See BARNETT & KATZ, *supra* note 1, at 1001–06; BREST ET AL., *supra* note 1, at 1376–1401; CHEMERINSKY, *supra* note 1, at 886–88; FARBER ET AL., *supra* note 1, at 393–401; ROTUNDA, *supra* note 1, at 806–10; see also CHOPER ET AL., *supra* note 1, at 1477–82 (including brief excerpts of *Reed* and *Frontiero*, but framing discussion only around the *Frontiero* plurality's race-analogical arguments); MASSEY, *supra* note 1, at 755–56 (including a very brief discussion of *Reed* and *Frontiero*, but treating *Craig*, the excerpted case, as a heightened scrutiny case). But cf. STONE ET AL., *supra* note 1, at 631–37 (including *Frontiero*, but not giving it undue prominence); SULLIVAN & FELDMAN, *supra* note 1, at 760–63 (same); VARAT ET AL., *supra* note 1, at 691–702 (same).

71 See *supra* note 70; see also *Frontiero*, 411 U.S. at 678–91 (plurality opinion) (finding sex discrimination should be treated as a suspect class based on the race-analogical criteria that are today treated as a “test” for heightened scrutiny); *id.* at 691 (Stewart, J., concurring in the judgment) (concurring on the basis of *Reed v. Reed*, a rational basis decision); *id.* (Rehnquist, J., dissenting) (dissenting for the reasons stated by the lower court, which relied on rational basis as the standard of review); *id.* at 691–92 (Powell, J., concurring in the judgment) (concurring with Chief Justice Burger and Justice Blackmun and finding that the case should be decided on the basis of *Reed*, a rational basis decision); cf. *supra* notes 66–68 and accompanying text (describing how, after *Frontiero*, a majority of the Court returned to invalidating sex-discriminatory laws based on rational basis review in cases such as *Stanton* and *Weinberger*).

72 See *infra* notes 73–78 and accompanying text.

of scrutiny in the aftermath of *Brown v. Board of Education*,<sup>73</sup> only four groups have succeeded in achieving sustained meaningful scrutiny under the Equal Protection Clause: women, nonmarital children, noncitizens,<sup>74</sup> and gays and lesbians.<sup>75</sup> Three (women, nonmarital children, and gays and lesbians) have

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73 347 U.S. 483 (1954). As scholars such as Michael Klarman have described, the modern system of tiered scrutiny, including its attendant doctrines of “strict scrutiny” and “protected classes” emerged fully only in the aftermath of *Brown v. Board of Education*. See generally Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991) (describing the emergence of the post-*Brown* conception of equal protection doctrine). Thus, the modern doctrinal structure of equal protection doctrine was developed post hoc in response to a need to justify an existing commitment on the part of the Court to subject race discrimination to meaningful scrutiny, rather than the reverse. *Id.*; see also Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004) (also detailing this history). *But cf.* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2255–56 (2002) (placing the emergence of the tiered system earlier, in the 1940s and 1950s, although acknowledging it was not clear how committed the Court was to its verbal formulation of the standard until the mid-1960s). As such, the path to heightened scrutiny for race is sui generis, as it formed the basis for the creation of the modern system of tiered scrutiny, rather than an application of it. See also Goldberg, *supra* note 42, at 1981–82 n.106 (noting the Court’s failure to actually apply its *Korematsu v. United States* dicta characterizing the use of race as suspect until twenty years later in *McLaughlin v. Florida*).

74 Note that immigrants and their descendants have long been the subjects of the Court’s equal protection jurisprudence, and indeed, their claims generated some of the earliest cases in which the tiered system of scrutiny began to be articulated. See, e.g., *Oyama v. California*, 332 U.S. 633, 646 (1948); *Korematsu v. United States*, 323 U.S. 214, 216 (1944). However, in these cases the Court generally treated the relevant issue as implicating race discrimination, perhaps because many of the challenged state actions discriminated equally against even U.S. citizens. Thus, as discussed *supra* note 73, these cases are largely sui generis as they were the building blocks of the system of tiered scrutiny being built around the paradigm case of race, rather than an application of it. *Graham v. Richardson*, 403 U.S. 365, 372 (1971), discussed *infra* note 76, is thus treated by modern scholars as the case in which the Court designated alienage “suspect.” See, e.g., Jenny-Brooke Condon, *The Preempting of Equal Protection for Immigrants?*, 73 WASH. & LEE L. REV. 77, 88 (2016) (characterizing *Graham* as the case in which “the Supreme Court declared for the first time that alienage is a suspect classification”). This Article follows that common approach.

75 See *United States v. Virginia*, 518 U.S. 515, 531 (1996) (“Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ . . . .” (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982))); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (classifications based on illegitimacy are subjected to “intermediate scrutiny” and must be “substantially related to an important governmental objective”); *Graham*, 403 U.S. at 372 (“[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.” (footnotes omitted)). Sexual orientation presents a somewhat more complicated case, as it is still in the “rational basis” or “minimum tier” stage. However, most observers agree that regardless of whether sexual orientation is formally designated a suspect or quasi-suspect class, it currently receives regularized meaningful scrutiny from the Supreme Court. See, e.g., *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014) (“There is no precise legal label for what has occurred in Supreme Court jurisprudence beginning with *Romer* in 1996 and culminating in *Windsor* in 2013, but this Court knows a

followed the rational basis path. Two of these, women and nonmarital children, ultimately moved on to formal heightened scrutiny, while gays and lesbians continue to simply receive meaningful scrutiny under rational basis review itself.<sup>76</sup> None of the four groups, including noncitizens, achieved consistently meaningful scrutiny as a result of a Supreme Court decision applying the canonical test.<sup>77</sup> In short, the canonical account of how modern social movements achieve constitutional change is simply descriptively inaccurate—it is rational basis review, not the posited objective criteria for protected class status, that has ordinarily played the most prominent role in opening the doors to more sustained constitutional change.<sup>78</sup>

To some extent, this should be unsurprising. It is widely acknowledged that judges, including Justices on the Supreme Court, share the social context of the society that they are a part of—the very society that has perpe-

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rheterical shift when it sees one.”), *aff'd on other grounds sub nom.* Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014); Schraub, *supra* note 36, at 859 (“By striking down anti-gay classifications on rational basis or due process grounds, the Court has given the LGBT movement the advantages of significant, serious judicial protection without the drawbacks of modern strict scrutiny doctrine.”).

76 Sexual orientation, as noted *supra* note 75, is still in the rational basis/minimum tier stage. The history of sex and illegitimacy as quasi-suspect classes, and how early rational basis precedents ultimately led to their instantiation in the heightened tiers, is extensively explored in my earlier article, *Constitutional Crossroads and the Canon of Rational Basis Review*. See generally Eyer, *supra* note 18 (detailing this history). Alienage did not go the rational basis route, but also did not involve the application of the canonical “test.” It was summarily granted heightened scrutiny by the Court in *Graham v. Richardson*, with the Court stating, without further development, that “[a]liens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.” See *Graham*, 403 U.S. at 372 (citation omitted) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

77 Indeed, in the case of illegitimacy, the canonical test for heightened scrutiny was applied by the Court, but only to deny that heightened scrutiny was appropriate. See *Mathews v. Lucas*, 427 U.S. 495 (1976). Emphasizing how focused the Justices remained on rational basis review as the vehicle for striking down illegitimacy distinctions at that juncture, the Court majority in *Mathews* observed:

The Court recognized in *Weber* that visiting condemnation upon the child in order to express society’s disapproval of the parents’ liaisons “is illogical and unjust. . . .”

But where the law is arbitrary in such a way, we have had no difficulty in finding the discrimination impermissible on less demanding standards than those advocated here. And such irrationality in some classifications does not in itself demonstrate that other, possibly rational, distinctions made in part on the basis of legitimacy are inherently untenable.

*Id.* at 505 (citations omitted) (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

78 Of course, the objective criteria are not so objective in practice, as other scholars have observed. See Pollvogt, *supra* note 43, at 742 (pointing out that the objective criteria “do nothing to force identification of unrecognized and evolving (that is, contemporary) prejudices” and are typically only applied or invoked *after* prejudice against a group has been recognized as unfair).

trated discrimination against the group seeking constitutional protections.<sup>79</sup> Thus, it would be surprising if the courts were willing to leap directly to finding discrimination against a historically oppressed group presumptively illegitimate.<sup>80</sup> The accretive process of undermining the presumed rationality of group-based discrimination via rational basis review makes far more sense of how one would expect constitutional change to occur.<sup>81</sup> And indeed, historical experience confirms that it is rare to find groups that have achieved change in a single leap to heightened scrutiny, rather than through the longer iterative process of rational basis review.<sup>82</sup>

In short, the canon mistakes how social movements achieve constitutional change under the modern tiered equal protection framework. Although social movements may ultimately achieve durable “suspect class” status—and may profit along the way by arguing analogically to the criteria that have justified prior groups’ “protected class” status—they typically do so via the accretion of rational basis review victories, rather than in a one-shot application of an objective “test.”<sup>83</sup> Just as the NAACP did not win *Brown v. Board of Education* out of the blue—first spending years undermining *Plessy*’s underpinnings—most modern social movements have experienced their initial successes in the iterative process of undermining the presumptive constitutionality of group discrimination via rational basis review.<sup>84</sup> Ignoring this dynamic distorts our understandings of how social movements make constitutional change and fails to account for the important role that rational basis review has played in the success of social movements’ efforts to achieve constitutional transformation.

79 See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 310 (2007) (“[J]udges are subject to the same cultural influences as everyone else—they are socialized both as members of the public and as members of particular legal elites.”).

80 Cf. Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 187 (characterizing the step of leaping to presumptive invalidity as “extraordinary,” and noting that the Court has been unwilling to take it thus far in the case of LGBT rights).

81 Cf. Goldberg, *supra* note 42, at 2001–02 (making a similar observation regarding fact-based adjudication); Miranda Oshige McGowan, *Lifting the Veil on Rigorous Rational Basis Scrutiny*, 96 MARQ. L. REV. 377, 439, 457 (2012) (describing meaningful rational basis review as “nudg[ing]” society towards taking more seriously the equality claims of groups and arguing that its incremental nature makes it “just the right tool for helping groups to integrate into and gain acceptance from the larger democratic community”).

82 This process might roughly be equated to the process of moving a constitutional idea from “off-the-wall” to “on-the-wall” that has been described by Jack Balkin and Sandy Levinson. See, e.g., JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION* 11–12 (2011); JACK M. BALKIN & SANFORD LEVINSON, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 GEO. L.J. 173, 181 (2001).

83 See *supra* notes 72–82 and accompanying text.

84 See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (2004) (tracing the history leading up to *Brown v. Board of Education*).

## II. THE ERASURE OF MEANINGFUL CASES FROM THE CANON: “PURPORTING” TO APPLY RATIONAL BASIS REVIEW

Entwined with the first error that the canon of rational basis review makes is a second: excluding cases from the canon that do not fit the presumed model of ultradeferral rational basis review. Thus, cases that apply more meaningful forms of rational basis review are excluded from the canon by a variety of mechanisms including omission, skepticism, and separate categorization.<sup>85</sup> Especially, but not exclusively, cases that have involved groups that ultimately have achieved sustained meaningful review under the Equal Protection Clause—such as sex, illegitimacy, and sexual orientation—are treated as only “purporting” to apply rational basis review and are not included among the canonical cases stating the basic rational basis doctrine.<sup>86</sup> This second error erases from the canon most meaningful rational basis review cases.

Again, the example of sex discrimination is illustrative. Major rational basis precedents such as *Reed v. Reed* are almost never included among the canonical cases illustrative of rational basis principles.<sup>87</sup> Rather, to the extent that *Reed* or the other early rational basis/sex discrimination precedents are mentioned at all, they are generally characterized as only “purporting” to apply rational basis review.<sup>88</sup> Moreover, any mention of such precedents is generally confined exclusively to the discussion of constitutional *sex discrimination*, rather than being included in the general standards applicable on minimum-tier (i.e., rational basis) review.<sup>89</sup> In short, the canon teaches that such cases are not “real” rational basis precedents and thus can be excluded from our accounts of canonical rational basis review.

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85 See *infra* notes 87–101 and accompanying text.

86 See *infra* notes 87–89, 92–94 and accompanying text.

87 Of the ten leading constitutional law casebooks identified by Greene, nine do not include *Reed*, or any of the other sex/rational basis cases, as cases representative of rational basis principles. See BARNETT & KATZ, *supra* note 1 (not discussing *Reed* or any of the other sex/rational basis cases at all in the casebook); CHEMERINSKY, *supra* note 1, at 731–54 (not including any of the sex/rational basis cases as an exemplar of rational basis review); CHOPER ET AL., *supra* note 1, at 1332–51 (same); FARBER ET AL., *supra* note 1, at 368–82 (same); MASSEY, *supra* note 1, at 645–71 (same); ROTUNDA, *supra* note 1, at 705–12 (same); STONE ET AL., *supra* note 1, at 497–520 (same); SULLIVAN & FELDMAN, *supra* note 1, at 644–58 (same); VARAT ET AL., *supra* note 1, at 497–520, 654–56 (referencing *Reed* once briefly in the section on rational basis review, but characterizing it, as well as all of the other meaningful rational basis review cases referenced, as “purporting to apply the rational basis standard,” rather than as an exemplar of it). The Brest casebook does not include a distinctive section on rational basis review, but does seem to largely take *Reed* seriously as a rational basis precedent, although not as an exemplar of contemporary doctrine. See, e.g., BREST ET AL., *supra* note 1, at 1487–90.

88 See sources cited *supra* note 87 (demonstrating that of the ten leading casebooks, all that include discussion of *Reed* characterize it as purporting to apply rational basis review or use other similar language suggesting that *Reed* is not a true rational basis precedent).

89 See sources cited *supra* note 87.

Although sex discrimination is one prominent example of the post hoc erasure of meaningful cases from the rational basis canon, it is hardly the only one. Rather, most modern cases in which the Court has applied meaningful rational basis review have been marginalized from the canon through similar approaches of skepticism, separate categorization, and outright omission.<sup>90</sup> Thus, cases like<sup>91</sup> *Weber v. Aetna Casualty & Surety Co.*<sup>92</sup> (invalidating a state statute discriminating on the basis of illegitimacy on rational basis review), *Romer v. Evans*<sup>93</sup> (invalidating a state constitutional provision dis-

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90 See *infra* notes 92–106 and accompanying text. A related, and much more systematic error has been to treat all cases in which the plaintiff was not successful as if only deferential rational basis review were applied. See, e.g., Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships*, 86 WASH. L. REV. 281, 290–91, 291 n.47 (2011) (supporting the proposition that “the deferential version [of rational basis review] is the established version used in a very high percentage of rationality decisions” and looking to the success rate of rationality cases reviewed by the Supreme Court). But of course, the fact of the application of a meaningful standard of review need not lead automatically to invalidation. *Vacco v. Quill*, for example, can be seen as an instance of this, as the Court applied quite extensive review, but ultimately concluded that the justifications given were reasonable and acceptable. See generally *Vacco v. Quill*, 521 U.S. 793 (1997).

91 This is not an exhaustive list. In addition to the numerous additional sex and illegitimacy discrimination cases that the Court resolved on rational basis review in the late 1960s and early 1970s, see Eyer, *supra* note 18, at 538 nn.37 & 39, there are a number of other occasions on which the Court has found for litigants in the modern era of rational basis review. See Farrell, *supra* note 28 (cataloging successful rational basis claims since *Romer*); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357 (1999) (cataloging successful rational basis claims through *Romer*). As elaborated in Part III, there are also far more examples of social movement success on rational basis review if one widens her view to include the state and lower federal courts.

92 406 U.S. 164 (1972); see CHEMERINSKY, *supra* note 1, at 938 (implying that *Weber* is an intermediate scrutiny case and discussing it only under a section titled “Discrimination Against Nonmarital Children”); STONE ET AL., *supra* note 1, at 717 (describing *Weber* as a case where the Court applied “something more than conventional rational basis review” and discussing it only under a section titled “Other potentially suspect classifications”); see also BARNETT & KATZ, *supra* note 1 (nowhere mentioning *Weber*); CHOPER ET AL., *supra* note 1 (same); MASSEY, *supra* note 1 (same); SULLIVAN & FELDMAN, *supra* note 1 (same); cf. BREST ET AL., *supra* note 1, at 1488 (strongly implying that *Weber* was a case of “heightened scrutiny under the guise of rational basis,” but also describing it in the context of a more complicated and fluid historical account of the tiers of scrutiny); FARBER ET AL., *supra* note 1, at 378, 380 (describing *Weber* briefly under a section titled “Note on the Court’s Application of Heightened Scrutiny to Non-Race Classifications: A ‘Double Standard?’”); ROTUNDA, *supra* note 1, at 799, 804 (briefly discussing *Weber* under the header “Illegitimacy”); VARAT ET AL., *supra* note 1, at 822 (very briefly referencing *Weber* under a section titled “What Other Classifications Will Provoke Heightened Scrutiny?”).

93 517 U.S. 620 (1996); see BARNETT & KATZ, *supra* note 1, at 1020–38 (discussing *Romer* and *Cleburne* in a section on “‘Heightened’ Rational Basis Scrutiny” and querying whether it is “strict scrutiny in disguise”); BREST ET AL., *supra* note 1, at 1648–56, 1676 (discussing *Romer* primarily under a section titled “Sexual Orientation: Liberty and Equality” and describing it as “nominally using the rational basis test” and applying a form of “heightened scrutiny”); CHOPER ET AL., *supra* note 1, at 1349, 1513–21 (characterizing *Romer* as among the cases in which the Court has “identified equal protection violations, purport-

criminating on the basis of sexual orientation on rational basis review), *United States v. Windsor*<sup>94</sup> (invalidating Section 3 of the Federal Defense of Marriage Act on rational basis/minimum tier review), *Eisenstadt v. Baird*<sup>95</sup>

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edly pursuant to a rational basis test” and discussing it almost exclusively in a section titled “Special Scrutiny for Other Classifications: Sexual Orientation”); SULLIVAN & FELDMAN, *supra* note 1, at 553–39, 649 (discussing *Romer* almost exclusively under the section header “Substantive Due Process and Privacy” and characterizing the Court as “purport[ing] to rely entirely on rationality review”); VARAT ET AL., *supra* note 1, at 654–55, 835–42 (describing the Court as “purporting to apply the rational basis standard” in *Romer* and discussing it predominantly under a section titled “Suspect Classifications: Classifications Disadvantaging the Retarded, Homosexuals, the Elderly, the Poor, etc.”); *cf.* FARBER ET AL., *supra* note 1, at 53, 473–87 (discussing *Romer* almost exclusively in a section titled “Sexual Orientation,” but not denigrating its stature as a rational basis case); ROTUNDA, *supra* note 1, at 936, 938–44 (discussing *Romer* in a section titled “Fundamental Rights: Homosexuality,” but not including any discussion one way or the other as to its stature as a rational basis case). *But cf.* CHEMERINSKY, *supra* note 1, at 732–38, 947–48 (taking *Romer* seriously as a true rational basis case); MASSEY, *supra* note 1, at 655–59 (same); STONE ET AL., *supra* note 1, at 506–08, 675–96 (same).

94 133 S. Ct. 2675 (2013); *see* RANDY E. BARNETT, 2013 SUPPLEMENT, CONSTITUTIONAL LAW 68–85 (2013) (adding *Windsor* to substantive due process section, and implying that Justice Kennedy applied “heightened scrutiny”); BREST ET AL., *supra* note 1, at 1693 (discussing *Windsor* under a section on “Same Sex Marriage” and questioning whether the Court has “begun to increase the degree of scrutiny for sexual orientation without formally saying so”); CHEMERINSKY, *supra* note 1, at 957–66 (discussing *Windsor* in a section on the “right to marry” and describing it as a case about the fundamental right to marry); MASSEY, *supra* note 1 (not including *Windsor* at all in the casebook); ROTUNDA, *supra* note 1, at 936, 949–60 (discussing *Windsor* in a section titled “Fundamental Rights: Homosexuality,” but not including any discussion one way or the other as to its stature as a rational basis case); GEOFFREY STONE ET AL., 2015 SUPPLEMENT, CONSTITUTIONAL LAW 937 (2015) (adding *Windsor* to a section titled “Fundamental Rights: Same-Sex Marriage”); *cf.* CHOPER ET AL., *supra* note 1, at 1529 (discussing *Windsor* in a section labeled “Special Scrutiny for Other Classifications: Sexual Orientation”); DANIEL FARBER ET AL., 2016 SUPPLEMENT, CONSTITUTIONAL LAW 33–41 (2016) (adding *Windsor* to a section called “What Level of Scrutiny for Other Suspect Classifications: Sexual Orientation”); SULLIVAN & FELDMAN, *supra* note 1, at 572 (discussing *Windsor* in a section on “Substantive Due Process, Sexuality and Hybrid Due Process-Equal Protection Rights”); JONATHAN D. VARAT ET AL., 2013 SUPPLEMENT, CONSTITUTIONAL LAW 35–46 (2013) (adding *Windsor* to a section titled “Suspect Classifications: Classifications Disadvantaging the Retarded, Homosexuals, the Elderly, the Poor, etc.”).

95 405 U.S. 438 (1972); *see* BARNETT & KATZ, *supra* note 1 (omitting any discussion of *Eisenstadt* in the casebook); BREST ET AL., *supra* note 1, at 1488, 1531 (characterizing *Eisenstadt* as one of several cases “we would today call heightened scrutiny under the guise of rational basis” and discussing *Eisenstadt* primarily in section on “Contemporary Fundamental Rights Adjudication”); CHEMERINSKY, *supra* note 1, at 1012–13 (discussing *Eisenstadt* in “Fundamental Rights: Constitutional Protection for Reproductive Autonomy” section and not discussing its stature as a rational basis precedent); CHOPER ET AL., *supra* note 1, at 441–42 (discussing *Eisenstadt* in section on “the Right of Privacy” and not emphasizing it as a rational basis precedent); FARBER ET AL., *supra* note 1, at 625 (describing *Eisenstadt* as “purport[ing]” to apply rational basis review and discussing it only in a section on fundamental rights); MASSEY, *supra* note 1, at 496, 507 (describing *Eisenstadt* in section on “The Modern Revival: ‘Privacy’ Rights,” but accurately describing it as a rational basis precedent); ROTUNDA, *supra* note 1, at 905 (discussing *Eisenstadt* briefly in section on fundamen-

(invalidating state restriction on access to contraception by unmarried people on rational basis review), *City of Cleburne v. Cleburne Living Center, Inc.*<sup>96</sup> (finding that denial of a special use permit to group home for people with developmental disabilities was invalid on rational basis review), *Village of Willowbrook v. Olech*<sup>97</sup> (finding that a homeowner who alleged that she was irrationally treated differently from others seeking municipal services stated a claim on rational basis review), *Papasan v. Allain*<sup>98</sup> (declining to dismiss a

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tal rights and excerpting only its fundamental rights dicta rather than its rational basis holding); STONE ET AL., *supra* note 1, at 852–53 (characterizing *Eisenstadt* as “[p]urporting to apply traditional rational basis review” and discussing it in the “Implied Fundamental Rights” section); SULLIVAN & FELDMAN, *supra* note 1, at 518 (describing *Eisenstadt* as “purport[ing]” to apply rational basis review and addressing it in the context of “Substantive Due Process and Privacy”); VARAT ET AL., *supra* note 1, at 565 (discussing *Eisenstadt* in section on “Protection of Personal Liberties” and editing out parts of the decision that made clear it was a rational basis decision, instead focusing on its fundamental rights dicta).

96 473 U.S. 432 (1985); see BARNETT & KATZ, *supra* note 1, at 1021–28 (questioning whether the approach applied in *Cleburne* is really “strict scrutiny in disguise”); BREST ET AL., *supra* note 1, at 1490–1501, 1676 (indicating that *Cleburne* applied a form of “heightened scrutiny” and discussing it primarily in a section titled “Other Suspect Bases for Classification: Thinking Outside the Tiers of Scrutiny Model”); FARBER ET AL., *supra* note 1, at 450, 462–72, 491, 508 (describing *Cleburne* in a section titled “What Level of Scrutiny for Other ‘Suspicious’ Classifications: Physical or Mental Disability,” and treating the standard of review therein as a fourth tier of scrutiny—also elsewhere referring to said standard as “so-called ‘rational basis’ review”); MASSEY, *supra* note 1, at 661 (characterizing *Cleburne* as one of several cases in which the Court “purports” to apply rational basis review); SULLIVAN & FELDMAN, *supra* note 1, at 649, 798–803 (characterizing *Cleburne* as “purport[ing]” to apply rational basis review and primarily describing it in a section on “Discrimination Based on Other Potentially Suspect Classifications”); VARAT ET AL., *supra* note 1, at 654–55, 829–35 (characterizing *Cleburne* as “purporting to apply the rational basis standard” and including case excerpt in a section on “Suspect Classifications”); see also CHOPER ET AL., *supra* note 1, at 1541–47 (excerpting *Cleburne* in a section titled “Special Scrutiny for Other Classifications: People With Intellectual Disabilities”); ROTUNDA, *supra* note 1, at 712, 834 (briefly excerpting *Cleburne* in a section titled “Suspect Classes and Other Classifications: The Mentally Retarded”); cf. CHEMERINSKY, *supra* note 1, at 732, 747, 750–54 (including *Cleburne* as a rational basis case, but querying whether it is applying a different rational basis test). *But cf.* STONE ET AL., *supra* note 1, at 505–06, 517, 531, 719 (taking *Cleburne* seriously as a rational basis case).

97 528 U.S. 562 (2000) (per curiam); see VARAT ET AL., *supra* note 1, at 654–55, 654 n.a (describing *Olech* only in a footnote that implies that it is among those “purporting to apply” the rational basis standard); see also BARNETT & KATZ, *supra* note 1 (not mentioning *Olech* at all); BREST ET AL., *supra* note 1 (same); CHEMERINSKY, *supra* note 1, at 730 (discussing *Olech* only in a footnote for the fact that “class of one” claims can be brought); MASSEY, *supra* note 1 (not mentioning *Olech* at all); ROTUNDA, *supra* note 1 (same). *But cf.* CHOPER ET AL., *supra* note 1, at 1350–51 (taking *Olech* seriously as a rational basis case); FARBER ET AL., *supra* note 1, at 376 (same); STONE ET AL., *supra* note 1, at 519–20 (same); SULLIVAN & FELDMAN, *supra* note 1, at 651–52 (same).

98 478 U.S. 265, 286–92 (1986); see BARNETT & KATZ, *supra* note 1 (not including *Papasan* in the casebook); BREST ET AL., *supra* note 1 (same); CHEMERINSKY, *supra* note 1 (same); CHOPER ET AL., *supra* note 1, at 1638 (discussing *Papasan* briefly, but only for its language suggesting that it remains unsettled whether a right to a minimally adequate education might be a fundamental right); FARBER ET AL., *supra* note 1 (not including

rational basis challenge to school funding scheme and remanding), and *United States Department of Agriculture v. Moreno*<sup>99</sup> (invalidating a portion of a federal law denying food stamps to households with unrelated individuals cohabiting on rational basis review) are, to the extent they are mentioned as rational basis precedents at all, often referred to as only “purporting” to apply rational basis review. Many such cases are further marginalized from the core canon of rational basis precedents through their categorization—apart from the discussion of minimum tier/rational basis standards—under separate headers such as “fundamental rights,” “sexual orientation,” “welfare payments,” or “disability.”<sup>100</sup> Finally, it is common to see several of these meaningful precedents—including *Olech*, *Weber*, *Moreno*, and *Papasan*—simply omitted from equal protection discussions altogether, as if they did not exist.<sup>101</sup>

These approaches of marginalization, separate categorization, and omission take seriously neither what the Supreme Court has said, nor what it actually does with respect to the minimum tier of review. The canon *does* take seriously certain statements by the Supreme Court: that rational basis is the standard applicable outside of the context of recognized protected classes, or fundamental rights, and that it is an extraordinarily deferential standard of review.<sup>102</sup> And yet the canon refuses to credit other equally explicit state-

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*Papasan* in the casebook); MASSEY, *supra* note 1 (same); SULLIVAN & FELDMAN, *supra* note 1 (same); *cf.* ROTUNDA, *supra* note 1, at 831–32 (offering *Papasan* as a counterpoint in the notes following *Rodriguez*, but in a section on “Suspect Classes and Other Classifications” rather than in the rational basis section); STONE ET AL., *supra* note 1, at 834–35 (offering *Papasan* as a counterpoint in the notes following *Rodriguez*, but placing it in the “Implied Fundamental Rights: Education” section instead of the rational basis section); VARAT ET AL., *supra* note 1, at 974 (briefly mentioning *Papasan* in a section titled “Protection of Personal Liberties: Education”).

99 413 U.S. 528 (1973); *see* BREST ET AL., *supra* note 1, at 1488, 1490 (characterizing *Moreno* as an example of “what we would today call heightened scrutiny under the guise of rational basis” and discussing it under a section titled “Other Suspect Bases of Classification: Thinking Outside the Tiers of Scrutiny Model”); CHOPER ET AL., *supra* note 1, at 1349 (characterizing *Moreno* as one of several cases in which the Court has “purported[ ]” to apply the rational basis test); SULLIVAN & FELDMAN, *supra* note 1, at 649 (characterizing *Moreno* as “purporting” to apply rational basis review); *see also* BARNETT & KATZ, *supra* note 1 (not mentioning *Moreno* in the casebook); ROTUNDA, *supra* note 1 (same); VARAT ET AL., *supra* note 1 (same); *cf.* CHEMERINSKY, *supra* note 1, at 747–50 (including *Moreno* as a rational basis test and querying whether it is applying a different rational basis test). *But cf.* FARBER ET AL., *supra* note 1, at 381–82 (taking *Moreno* seriously as a rational basis case); MASSEY, *supra* note 1, at 653–55, 659 (same); STONE ET AL., *supra* note 1, at 504–05, 531, 713 (same).

100 *See supra* notes 92–99 and accompanying text.

101 *See supra* notes 92–99 and accompanying text.

102 For a commonly quoted articulation of this standard account, *see* FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993) (“[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”).

ments by the Court that it is, in cases like *Reed*,<sup>103</sup> *Eisenstadt*,<sup>104</sup> *Romer*,<sup>105</sup> and *Olech*,<sup>106</sup> applying real rational basis review. Thus, the canon selects one set of judicial statements to treat as canonical, ignoring the existence of an inconsistent account.

This selection—of one of a competing set of inconsistent accounts—is especially problematic because it creates a misleading account of what the Supreme Court actually does. The canon teaches that outside of the arena of recognized protected classes and fundamental rights, rational basis review applies and that such claims are generally doomed to failure due to the ultradeferral nature of such review.<sup>107</sup> And yet emerging social movements, and sometimes others, have repeatedly persuaded the Court to afford meaningful review under a rational basis framework, without the prior recognition of protected class status or any applicable fundamental right.<sup>108</sup> Thus, the canon, by ignoring one set of statements while crediting another, tells an incomplete, and inaccurate, story about the actual operation of the Court's minimum tier of review.

The canon is always built through a process of selection: of picking and choosing which cases and materials to include and, conversely, which to exclude.<sup>109</sup> But in the case of the rational basis canon, this process has systematically resulted in the exclusion, devaluation, and marginalization of the cases in which the Court has applied a meaningful form of review.<sup>110</sup> In so doing, the canon has constructed a distorted image of what the Court actually does outside of the heightened tiers of equal protection review. It is true

103 *Reed v. Reed*, 404 U.S. 71, 76–77 (1971) (“The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective . . .”); see also *Eisenstadt v. Baird*, 405 U.S. 438, 447 n.7 (1972) (describing *Reed* explicitly as a rational basis case).

104 405 U.S. at 447. The *Eisenstadt* Court observed, “The question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under Massachusetts General Laws Ann., c. 272, §§ 21 and 21A.” *Id.* The Court further emphasized:

Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griswold*, the statutory classification would have to be not merely *rationally related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest. But just as in *Reed v. Reed*, we do not have to address the statute's validity under that test because the law fails to satisfy even the more lenient equal protection standard.

*Id.* at 447 n.7 (citations omitted).

105 *Romer v. Evans*, 517 U.S. 620, 631–36 (1996) (holding that Colorado Amendment 2 “lacks a rational relationship to legitimate state interests”).

106 *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 563–65 (2000) (per curiam) (finding that the plaintiffs' allegation that the defendant's actions were “irrational and wholly arbitrary” was “sufficient to state a claim for relief under traditional equal protection analysis” “quite apart from the Village's subjective motivation”).

107 See *supra* notes 1–6 and accompanying text.

108 See *supra* notes 92–99 and accompanying text; see also *supra* Part I; *infra* Part III.

109 See, e.g., Balkin & Levinson, *supra* note 18, at 1009.

110 See *supra* notes 92–99 and accompanying text.

that the Court does not consistently apply a meaningful form of review outside of the heightened tiers. But neither does it consistently apply the ultradeferral version that the canon recounts.<sup>111</sup> Failing to take seriously this messy history distorts the canon and offers a misleadingly bleak picture of the nature of rational basis review.

### III. SINGULAR FOCUS ON THE SUPREME COURT, TO THE EXCLUSION OF LOWER AND STATE COURTS AND THE POLITICAL BRANCHES

It is no secret that the constitutional canon, as a general matter, fails to account for the existence of constitutional lawmaking outside of the Supreme Court. Despite an increasing array of scholarly voices positing the existence and importance of constitutional lawmaking across a host of other legal domains (including lower and state courts, as well as the political branches), the canon itself remains steadfastly mired in a Supreme Court-centric approach.<sup>112</sup> And indeed, the canon of rational basis review—like the rest of the constitutional canon—overwhelmingly looks exclusively to a single situs of constitutional lawmaking for its content: published opinions of the Supreme Court.<sup>113</sup> This Part contends that, in ignoring the rich array of ways that rational basis review has been used to spur constitutional change outside of the Supreme Court, the canon offers an impoverished and misleading account of the transformative opportunities that rational basis review can afford.

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111 It appears that this inconsistency reflects enduring disagreements on the Court regarding the appropriate approach to rational basis review. *See generally* Maltz, *supra* note 28 (describing the Justices' efforts to bring consistency to rational basis review doctrine in the 1970s and 1980s, and noting that the Justices ultimately ceased their efforts to do so, apparently acquiescing to inconsistency in the standard).

112 For examples of recent scholars calling for a more multifaceted, descriptive account of the role of lower and state courts and the political branches in constitutional interpretation, see 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 23–36 (2014); SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT* 3–4 (2014); Balkin & Levinson, *supra* note 18, at 1002–05; Neal Devins, *How Constitutional Law Casebooks Perpetuate the Myth of Judicial Supremacy*, 3 GREEN BAG 2D 259, 259–65 (2000); Eyer, *supra* note 18; Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183 (2017). For a fascinating account of constitutional change entirely extrinsic to the courts, see Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96 (2008).

113 *See* BARNETT & KATZ, *supra* note 1, at 1020–38 (focusing exclusively on Supreme Court cases in section on rational basis review); CHEMERINSKY, *supra* note 1, at 731–54 (same); CHOPER ET AL., *supra* note 1, at 1331–50 (same); FARBER ET AL., *supra* note 1, at 368–82 (same); MASSEY, *supra* note 1, at 645–71 (same); ROTUNDA, *supra* note 1, at 705–12 (same); STONE ET AL., *supra* note 1, at 497–520 (same); SULLIVAN & FELDMAN, *supra* note 1, at 644–58 (same); VARAT ET AL., *supra* note 1, at 641–56 (same). *But cf.* BREST ET AL., *supra* note 1, at 1373–1504 (including no separate section on rational basis review, but including a broader perspective generally on constitutional development, focused on social movements, and including the work of the political branches and the lower courts).

It is in many ways unsurprising that the constitutional law canon has hewed to a Supreme Court-centric approach. The Supreme Court itself has repeatedly situated itself as the dominant, if not exclusive, expositor of constitutional doctrine.<sup>114</sup> And it is surely far easier to track, describe, and summarize the caselaw that the Court produces than it is to attempt to incorporate the messy, vast, and often hidden world of constitutional lawmaking that goes on in other lawmaking arenas, such as lower and state courts, legislatures, and executive agencies.<sup>115</sup>

But there are also obvious problems with excluding the lower and state courts, as well as the political branches, from our canonical accounts of constitutional law. The vast majority of constitutional litigation today—and thus constitutional decisionmaking—goes on in the lower and state courts, not at the Supreme Court level.<sup>116</sup> Moreover, as scholars such as Bruce Ackerman have observed, there are major constitutional transformations that are rendered largely invisible if we fail to include the political branches in our account of constitutional change.<sup>117</sup> But perhaps most significantly, the reductionist account that a Supreme Court-centric canon gives us necessarily provides only a thin and misleading account of what future lawyers ought to know, i.e., the *how* of constitutional transformation.<sup>118</sup>

The rational basis canon exemplifies all of these problems. As set out in the other Parts of this Article, the practice of rational basis review is less uniformly deferential than the canon suggests, even at the Supreme Court level.<sup>119</sup> But when the lens is expanded to include the lower and state courts (including the application of state constitutions),<sup>120</sup> it becomes apparent just

114 See, e.g., *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).

115 Cf. Devins, *supra* note 112, at 263 (making a similar observation). Social movements are, of course, often the key drivers of such change, both within and without the Court. See, e.g., Lani Guinier & Gerald Torres, Essay, *Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014) (describing the central role of social movements in generating enduring legal and constitutional change).

116 See Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 U. MICH. J.L. REFORM 971, 987–88 (2010) (making a similar observation).

117 ACKERMAN, *supra* note 112, at 7; see also Hasday, *supra* note 112, at 97–98 (making a similar observation in the context of the invisibility of extrajudicial change regarding the constitutional stature of women in the military).

118 This can be seen as a wider problem with standard law school pedagogy, which sometimes tends to focus exclusively on the content of the doctrine (rather than how the doctrine was made or how it can be used). However, this problem arguably is more pronounced in the context of constitutional law, where legal change is often bound up in much broader processes of social change.

119 See *supra* Parts I–II.

120 Arguing for the inclusion of state constitutional law decisions in the canon could be critiqued on the grounds that state judges are not bound by federal doctrine in applying state constitutions—and indeed, any number of states have explicitly differentiated their minimal equal protection review from that afforded under the Federal Constitution. See, e.g., *Premera Blue Cross v. State, Dep’t of Commerce, Cmty. & Econ. Dev., Div. of Ins.*, 171 P.3d 1110, 1124 (Alaska 2007) (“[U]nder Alaska’s equal protection clause, we do subject legislation to a more exacting inquiry than under the federal rational basis test.”).

how incongruous the canonical account of rational basis review is with its actual practice—and with the opportunities that it has afforded social movements to make constitutional change.<sup>121</sup> Similarly, the political branches have both developed, and been spurred to action by, applications of rational basis review that bear scant resemblance to the standard canonical account.<sup>122</sup> And yet all of this “work” done by rational basis review is simply invisible under the standard canonical account.

A number of examples may help illustrate the ways that the exclusion of the lower and state courts from the canon—as well as the political

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Although this is an argument with some formal appeal, ultimately I believe it fails for two interrelated reasons. First, this critique takes as a given the fundamental assumption that the canon of constitutional law should be exclusively the canon of federal constitutional law—precisely the point being challenged here. Second, it ignores the mutually constitutive nature of federal and state constitutional law and in particular the spillover effects that change in one arena can have on the other.

On the first point, I could put it no better than Sanford Levinson, who has observed that the current canon invariably identifies the Federal Constitution as the exclusive subject matter of “American constitutional law,” something Levinson characterizes as “a mistake, in every conceivable way.” Sanford Levinson, *America’s “Other Constitutions”: The Importance of State Constitutions for Our Law and Politics*, 45 *TULSA L. REV.* 813, 813 (2010) (internal quotation marks omitted). As Levinson observes, “Almost all of the 300+ million residents of the United States . . . live under two constitutions.” *Id.* (emphasis omitted). Thus, to the extent the constitutional law canon that future lawyers absorb is one exclusively focused on federal doctrine, they have learned an erroneously reductive version of the law, one that omits one half of the relevant picture. Constitutional law is not *only* the law of the Federal Constitution, and our transmission of canonical doctrine should reflect that.

On the second point, federal and state rational basis review are often mutually constitutive, and thus, omitting either one necessarily leaves out important aspects of how constitutional change is made. For example, the same-sex marriage campaign, which started in the state courts under state constitutions, but ultimately led to virtually identical rulings by federal courts under the Federal Constitution, illustrates how a single movement of constitutional change can move across fora, with state constitutional decisions—even under doctrinally dissimilar rational basis standards—paving the way for federal ones. *See, e.g.,* *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1288–96 (N.D. Okla. 2014) (early federal decision striking down Oklahoma’s ban on same-sex marriage, citing repeatedly to state precedents in invalidating same-sex marriage bans on rational basis review), *aff’d on other grounds sub nom.* *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); *cf.* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 *S. CAL. L. REV.* 323, 370–80 (2011) (arguing that state constitutional decisions should play a greater role in federal constitutional doctrine and describing some of the contexts where it has played such a role). Doctrine, too, has often moved across federal/state rational basis contexts, with, for example, some state courts adopting the “fair and substantial relation” test from *Reed v. Reed* and continuing to apply it even after the Federal Supreme Court no longer did so. *See, e.g.,* *City of Dover v. Imperial Cas. & Indem. Co.*, 575 A.2d 1280 (N.H. 1990) (continuing to apply the “fair and substantial” standard even after the federal courts had moved to a more deferential rational basis approach).

121 *See infra* Sections III.A–C.

122 *See infra* Sections III.A–C.

branches—has distorted our understandings of the possibilities afforded by rational basis review.

### A. *Bans on Same-Sex Marriage*

One of the best known examples of the role of the lower and state courts in constitutional transformation is the LGBT rights movement's multiyear litigation campaign to secure the right to marry.<sup>123</sup> Beginning with decades of litigation and legislative action in the states, followed by a brief but intense avalanche of litigation in the lower federal courts, and culminating in a successful Supreme Court opinion, it is widely acknowledged that the process of winning same-sex marriage involved multiple points of legal engagement in coordination with a widespread campaign for social change.<sup>124</sup>

Rational basis review was key to these efforts. Although the LGBT rights movement always raised heightened scrutiny arguments—and sometimes prevailed on those arguments—they also, from the start, understood the power of judicial findings that bans on same-sex marriage were irrational.<sup>125</sup> And indeed, over the twenty-year course of the modern marriage movement, rational basis review would repeatedly (although not exclusively) provide the basis for judicial invalidation of same-sex marriage bans, with lower and state court judges opining that the reasons given for maintaining such bans were simply irrational.<sup>126</sup> As scholars such as Jane Bambauer and Toni Massaro

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123 For example, despite the Supreme Court-centric focus of most constitutional law casebooks, several have traditionally included some discussion of this history. See, e.g., FARBER ET AL., *supra* note 1, at 487–502; STONE ET AL., *supra* note 1, at 693–95. As noted below, at least some casebooks appear to have responded to *Obergefell* by removing this discussion and only including *Obergefell* itself, an approach that seems likely to accelerate as casebooks issue full new editions post-*Obergefell*. See sources cited *infra* note 129.

124 See, e.g., Mary Bonauto & James Esseks, *Marriage Equality Advocacy from the Trenches*, 29 COLUM. J. GENDER & L. 117 (2015) (extensively describing the multisited strategy and process of social and legal change leading up to nationwide marriage equality); Siegel, *supra* note 112 (discussing the influence of lower federal court decisions on the development of same-sex marriage doctrine).

125 See, e.g., Mary L. Bonauto, Shikes Fellow in Civil Liberties and Civil Rights Lecturer on Law, Harvard Law Sch., State Constitutional Law Lecture at Rutgers Law School (Feb. 2, 2016) (noting that LGBT rights advocates—even in the early state court marriage ban challenges—presented strong rational basis arguments, because they wanted the courts to see and address the irrationality of the reasons for bans on same-sex marriage).

126 For decisions under state constitutions, see, for example, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 958–68 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196, 217–20 (N.J. 2006); *People v. Greenleaf*, 780 N.Y.S.2d 899, 900–05 (Just. Ct. 2004); *People v. West*, 780 N.Y.S.2d 723, 725 (Just. Ct. 2004); *Baker v. State*, 744 A.2d 864, 877–86 (Vt. 1999). There was also an avalanche of decisions invalidating same-sex marriage bans in the federal courts following *Windsor*, much of which relied on rational basis review. See, e.g., *Innis v. Aderhold*, 80 F. Supp. 3d 1335, 1358–59 (N.D. Ga. 2015); *Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1160–63 (S.D. Ind. 2014), *aff'd*, 766 F.3d 648 (7th Cir. 2014); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1139–46 (D. Or. 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 769–75 (E.D. Mich. 2014), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014)

have observed, this process was important insofar as it “put on public display the states’ inability to assert a single objectively reasonable, secular and constitutionally adequate basis for discriminating against same-sex couples.”<sup>127</sup> Thus, rational basis review worked—arguably better than an early finding of suspect class status or fundamental rights could have—to undermine the legitimacy of same-sex marriage bans in the courts and among large swaths of the general public.

Although the role of rational basis review in the same-sex marriage campaign, and of the lower and state courts, is at this juncture fresh in our memory, it is easy to see how it is already beginning to be erased from the canon. *Obergefell v. Hodges*,<sup>128</sup> the Supreme Court decision that, after twenty years, finally held that same-sex marriage must be permitted nationwide, was a fundamental rights decision, not a rational basis case. And it is in this fundamental rights frame that the LGBT rights movement’s multiyear campaign for same-sex marriage is increasingly being represented.<sup>129</sup> Rather than the

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(equal protection claim), *rev’d sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom.* *Obergefell*, 135 S. Ct. 2584; De Leon v. Perry, 975 F. Supp. 2d 632, 652–56 (W.D. Tex. 2014) (equal protection claim), *aff’d on other grounds sub nom.* De Leon v. Abbott, 791 F.3d 619 (5th Cir. 2015); Bourke v. Beshear, 996 F. Supp. 2d 542, 549–53 (W.D. Ky. 2014), *rev’d sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom.* *Obergefell*, 135 S. Ct. 2584; Bishop v. United States *ex rel.* Holder, 962 F. Supp. 2d 1252, 1282–96 (N.D. Okla. 2014), *aff’d on other grounds sub nom.* Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014); Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1209–15 (D. Utah 2013) (equal protection claim), *aff’d on other grounds*, 755 F.3d 1193 (10th Cir. 2014); *cf.* Campaign for S. Equal v. Bryant, 64 F. Supp. 3d 906, 942–48 (S.D. Miss. 2014) (concluding that heightened scrutiny was appropriate, but nevertheless only applying rational basis review and finding the law irrational), *aff’d*, 791 F.3d 625 (5th Cir. 2015); Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014) (applying rational basis reasoning and also concluding that the case warranted, and failed, heightened scrutiny), *aff’d sub nom.* Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 991–95 (S.D. Ohio 2013) (applying rational basis reasoning and also concluding that the case warranted and failed heightened scrutiny), *rev’d sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom.* *Obergefell*, 135 S. Ct. 2584; Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 990–1003 (N.D. Cal. 2010) (after trial, concluding that strict scrutiny would be warranted, but that ban on same-sex marriage failed even rational basis review), *aff’d sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

127 Bambauer & Massaro, *supra* note 28, at 300.

128 135 S. Ct. 2584 (2015).

129 See RANDY E. BARNETT & HOWARD E. KATZ, 2016 SUPPLEMENT, CONSTITUTIONAL LAW: CASES IN CONTEXT (2016) (adding *Obergefell* to a section on “Modern Substantive Due Process”—no discussion of prior cases); CHEMERINSKY, *supra* note 1 at 950, 967–81 (adding *Obergefell* to a section titled “Fundamental Rights: The Right to Marry” and not referencing rational basis history of same-sex marriage litigation); JESSE H. CHOPER ET AL., 2016 SUPPLEMENT, CONSTITUTIONAL LAW 25–39, 95–97 (2016) (adding *Obergefell* to a Section on “the Right of Privacy: Same-Sex Marriage” and removing notes that had discussed the rational basis history of same-sex marriage caselaw); FARBER ET AL., *supra* note 94, at 61–84 (adding *Obergefell* to section on “The Right to Marry,” following a description of cases such as *Zablocki*, and with almost no discussion of rational basis marriage precedents); MASSEY, *supra* note 1, at 561–67 (discussing *Obergefell* exclusively in the section on fundamental due process rights and treating it as an outgrowth of prior marriage fundamental rights deci-

reality—that the fight for same-sex marriage was a complex, multisited campaign, in which the practice of rational basis review in the lower and state courts was a vital element—the story the canon tells is one that supports its own mythmaking of how social movements succeed (i.e., through protected class status or fundamental rights arguments).<sup>130</sup> The fact that such a result almost certainly could not have been achieved without the process that rational basis review uniquely facilitates—the erosion of the reasons why people believed bans on same-sex marriage were justified—is erased from the canonical account.<sup>131</sup>

### B. *The New Jim Crow*

What Michelle Alexander has dubbed “the New Jim Crow”—the interlocking legal frameworks that result in the mass criminalization of racial minorities, coupled with a regime of pervasive legitimized criminal records discrimination—has been widely characterized as one of the most urgent civil rights challenges of our time.<sup>132</sup> But, as Alexander and others have detailed, the heightened scrutiny frameworks that the canon designates as responsible for affording protections, both for racial minorities as a protected class and for all criminal defendants, have largely been foreclosed by the Court, or have proven ineffectual.<sup>133</sup>

Rather, to the extent that we see cracks in the constitutional legitimacy of the New Jim Crow regime, it has often been rational basis review that has helped pave the way.<sup>134</sup> As the lowest standard of review, rational basis

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sions like *Zablocki*); RONALD D. ROTUNDA, 2016 SUPPLEMENT, MODERN CONSTITUTIONAL LAW 19–31 (2016) (adding *Obergefell* to a section titled “Fundamental Rights: Homosexuality”—not including any discussion of the marriage/rational basis cases); STONE, *supra* note 94, at 96–118 (adding *Obergefell* to a Section titled “Fundamental Rights: Same-Sex Marriage” and framing the issue as a fundamental rights issue); SULLIVAN & FELDMAN, *supra* note 1, at 581–90 (adding *Obergefell* to a section titled “Substantive Due Process, Sexuality and Hybrid Due Process-Equal Protection Rights,” offering no discussion of rational basis same-sex marriage decisions leading up to it, and removing prior edition’s discussion of lower court litigation); VARAT ET AL., *supra* note 94, at 565 (adding *Obergefell* to a Section titled “Protection of Personal Liberties: Family and Marital Relationships,” without any discussion of rational basis history); *cf.* PAUL BREST ET AL., 2016 SUPPLEMENT, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 148–96 (2016) (including a fairly nuanced discussion of *Obergefell*, including adding it to a section including some discussion of earlier marriage cases—however, omitting all mention of the role that rational basis played in those earlier decisions).

130 See *supra* note 129.

131 See *supra* note 129. This is not to suggest that contemporary scholars do not understand the role that rational basis review played on the path to *Obergefell*—many do. Rather, the point is that—despite that understanding—the canonical understandings recorded in our casebooks, to be taught to future lawyers, ignore that reality in favor of an understanding that situates *Obergefell* solely as a victory of the fundamental rights paradigm.

132 See generally MICHELLE ALEXANDER, THE NEW JIM CROW (2010).

133 *Id.*; see also IAN HANEY LÓPEZ, DOG WHISTLE POLITICS (2014).

134 See *infra* notes 136–45 and accompanying text. Of course, as the recent surge in social movement activity around this issue demonstrates, constitutional law is not the only way, nor even necessarily the best way, to undermine the legitimacy of an unjust regime.

review has been available to those few judges persuadable to see the injustice of some facet of the New Jim Crow regime. Moreover, such an approach has not required the fraught (and thus unlikely) conclusion that a modern legislature engaged in intentional race discrimination by deliberately criminalizing African Americans.<sup>135</sup> As such, there have been—across a number of contexts, including state bans on employment of those with criminal records, the crack/cocaine disparity, and bail reform—lower and state court judges that have embraced rational basis arguments to argue for the unconstitutionality of a variety of aspects of the New Jim Crow regime.<sup>136</sup> While such deci-

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Whether the Black Lives Matter movement will lead to larger shifts in the constitutional culture—and ultimately the constitutional law—surrounding the New Jim Crow remains to be seen, but certainly it has pushed the legitimacy of certain aspects of the regime into the public discourse in new and highly important ways.

135 *But cf.* N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016) (finding intentional discrimination in omnibus voting restrictions act). Note of course that a rational basis invalidation may well carry significant normative import of its own—since it suggests that a law is so devoid of justification as to be irrational. *See, e.g.,* Katie R. Eyer, *Marriage This Term: On Liberty and the “New Equal Protection,”* 60 UCLA L. REV. DISCOURSE 2, 10 n.37 (2012). However, courts in the modern era have been especially reluctant to label governmental action as intentional race discrimination. *See, e.g.,* HANEY LÓPEZ, *supra* note 133, at 86–87.

136 For crack/cocaine laws, *see infra* notes 138–45 and accompanying text. For criminal records bans on employment, *see, for example,* Barletta v. Rilling, 973 F. Supp. 2d 132 (D. Conn. 2013) (holding, on rational basis review, that an absolute ban on felons holding license to trade in precious metals violated Equal Protection Clause); Lewis v. Ala. Dep’t of Pub. Safety, 831 F. Supp. 824 (M.D. Ala. 1993) (striking down ban on employment of those convicted of crimes of moral turpitude, alleged to have a racially disparate impact, on rational basis grounds); Smith v. Fussenich, 440 F. Supp. 1077 (D. Conn. 1977) (holding, on rational basis review, that a statute categorically barring felony offenders from employment with detective or security guard agencies violated the Equal Protection Clause); Butts v. Nichols, 381 F. Supp. 573 (S.D. Iowa 1974) (striking down ban on civil service employment for those with felony convictions on rational basis review); Chunn v. State *ex rel.* Miss. Dep’t of Ins., 156 So. 3d 884 (Miss. 2015) (finding, on rational basis review, that a statute that categorically prohibited those with felony convictions from serving as bail agents violated the Equal Protection Clause); *see also* Nixon v. Commonwealth, 839 A.2d 277 (Pa. 2003) (applying a form of rational basis review in finding that a Pennsylvania statute disqualifying certain persons with criminal records from employment in facilities catering to older adults violated the Pennsylvania state constitution’s due process clause); Peake v. Commonwealth, 132 A.3d 506 (Pa. Commw. Ct. 2015) (same); *cf.* Shimose v. Haw. Health Sys. Corp., 345 P.3d 145 (Haw. 2015) (finding that, under statute allowing criminal records discrimination only upon a showing of a rational relationship to the “duties and responsibilities” of the position, no such relationship had been shown). For bail reform, *see, for example,* ODonnell v. Harris County, 227 F. Supp. 3d 706 (S.D. Tex. 2016) (denying a motion to dismiss challenge to bail scheme on the grounds that certain aspects of the scheme failed even rational basis review); Hernandez v. Lynch, No. 16-00620, 2016 WL 7116611, at \*27 (C.D. Cal. Nov. 10, 2016) (concluding that plaintiffs had a likelihood of success on the merits on an equal protection challenge to an immigration bail/detention scheme because scheme lacked a rational basis as applied to certain immigration detention practices); State v. Blake, 642 So. 2d 959 (Ala. 1994) (partially invalidating bail scheme on rational basis review under the Equal Protection Clause); Bourdon v. State, 28 P.3d 319

sions have been sporadic, and sometimes even overturned, they have offered legitimacy and heft to social movement arguments that have helped spur further political and/or legal change.<sup>137</sup>

Perhaps the most striking example of this dynamic arises in the context of the reduction and possible elimination of the crack/cocaine sentencing disparity.<sup>138</sup> Long held up by racial justice advocates as emblematic of the racialized nature of the modern system of mass incarceration, the crack/cocaine sentencing disparity has played a key role in the disproportional incarceration of African Americans.<sup>139</sup> Despite powerful evidence about both its racial implementation and the racialized discourse that surrounded its enactment, direct arguments for the disparity to be treated as race discrimination have almost universally been rejected.<sup>140</sup>

Rational basis arguments have also not commonly resulted in the direct invalidation of state or federal crack/cocaine disparities, although they have occasionally led to direct judicial invalidation of state laws.<sup>141</sup> Perhaps more importantly, they have, in a number of cases, led individual judges to powerfully question the justifications that underlie the disparity, noting the very slender factual basis underlying a system with devastating effects on the African-American community.<sup>142</sup> Embracing, and thus legitimizing, the

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(Alaska Ct. App. 2001) (invalidating bail restriction on rational basis review under the Alaska state constitution).

137 See *supra* note 136.

138 It is not clear how the current composition of the federal government will affect the possibility of a total elimination of the crack/cocaine disparity. On the one hand, mass incarceration critiques have increasingly become bipartisan, and current Attorney General Jeff Sessions was among those who was intimately involved in the congressional deal that significantly lessened the disparity. See, e.g., Emily Cadei, *Sessions's Crack Compromise: Anomaly or Opening?*, NEWSWEEK (Jan. 9, 2017), <http://www.newsweek.com/sessions-crack-sentences-539894>. On the other hand, Sessions quickly repealed Obama-era Justice Department policies that sought to alleviate the harsh effects of mandatory minimum sentences in the context of drug prosecutions. See Memorandum from Jeff Sessions, Attorney Gen., U.S. Dep't of Justice, to All Federal Prosecutors (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download> (regarding changes to Department of Justice charging and sentencing policy). Even if a total elimination does not occur under the current Congress and administration, it does not seem likely that the momentum against the role of drug laws in mass incarceration will be entirely reversed.

139 See, e.g., ALEXANDER, *supra* note 132, at 51–54, 112–14.

140 *But cf.* *United States v. Clary*, 846 F. Supp. 768 (E.D. Mo. 1994) (concluding that the crack/cocaine disparity was racially discriminatory), *rev'd*, 34 F.3d 709 (8th Cir. 1994).

141 *See State v. Russell*, 477 N.W.2d 886, 889–91 (Minn. 1991).

142 See, e.g., *id.* (invalidating state crack/cocaine disparity on rational basis grounds); see also *United States v. Willis*, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring) (two of three judges on panel articulating view that they were bound by circuit precedent to reject equal protection argument, but concurring to state that “[n]either this record nor the ones on prior occasions support the view that Congress had a sound basis to make the harsh distinction between powder and crack cocaine”); *United States v. Burroughs*, 897 F. Supp. 205, 213 n.13 (E.D. Pa. 1995) (ultimately rejecting the NAACP’s arguments for the invalidity of the crack/cocaine disparity on rational basis review, but noting that if it were addressing the issue *de novo*, rather than under the weight of circuit precedent, “it might

arguments of social movement actors that, contra the standard account of urgent danger, the disparity lacked even a rational basis, such decisions have helped to create space in the discourse<sup>143</sup> for a competing account of the crack/cocaine disparity's legitimacy.<sup>144</sup> Ultimately, such decisions have

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well have declared the sentencing scheme to be unconstitutional under rational review" given the total lack of relationship between the extent of the disparity and the extent of the disparate risk); *cf.* *United States v. Alton*, 60 F.3d 1065 (3d Cir. 1995) (overruling a district court decision that had departed from the crack mandatory minimum based on the district court's conclusion that the crack/cocaine disparity was "arbitrary and capricious" and that the Sentencing Commission had not adequately considered its racial impacts); *Clary*, 846 F. Supp. at 768 (concluding that the crack/cocaine disparity was racially discriminatory and that it failed equal protection review, based in part on the "arbitrary" and "irrational" nature of Congress's actions in enacting the 100 to 1 ratio); *United States v. Majied*, No. 8:CR91-00038(02), 1993 WL 315987 (D. Neb. July 29, 1993) (rejecting constitutional challenge based on circuit precedent, but departing downward based on racial impact and thin factual underpinnings), *vacated in relevant part sub nom.* *United States v. Maxwell*, 25 F.3d 1389 (8th Cir. 1994). *See generally* *United States v. Blewett*, 746 F.3d 647, 666–68 (6th Cir. 2013) (en banc) (Moore, J., concurring in the judgment) (finding that the issue of the constitutionality of sentences imposed under the old 100 to 1 crack/cocaine regime were not properly before the court, but expressing the opinion that the regime and the pattern of racial effects it produced were likely invalid under both strict scrutiny and rational basis review); *id.* at 670–71 (Merritt, J., dissenting) (arguing that failing to apply Fair Sentencing Act (FSA) retroactively was "irrational" and would disproportionately affect African Americans and would violate the Equal Protection Clause); *id.* at 673–75 (Cole, J., dissenting) (arguing that failure to apply FSA retroactively failed rational basis review and relying both on racial justice concerns and cases like *Romer* and *Windsor*); *id.* at 680–685 (Clay, J., dissenting) (arguing that failing to apply the FSA retroactively would violate both the Equal Protection Clause under both a strict scrutiny and a rational basis standard); *id.* at 696–98 (White, J., dissenting) (concluding that failing to apply the FSA retroactively would violate equal protection under rational basis standards); *United States v. Byars*, No. 8:10CR50, 2011 WL 344603, at \*11 (D. Neb. Feb. 1, 2011) (finding that failing to apply the FSA to pending cases "in the pipeline" would be "arbitrary and irrational" and unconstitutional under both the Equal Protection and Due Process Clauses).

143 As I discussed more fully in a prior article, the conventional wisdom among political elites in the early 1990s was that crack cocaine was exceptionally and uniquely dangerous and that the disparity was justified. *See Eyer, supra* note 54, at 1061–62. Contrary arguments by racial and criminal justice advocates—that crack was not uniquely dangerous, and that the disparity was unjustified and racially discriminatory—were not taken seriously until they began to be endorsed by individual courts and judges, typically on rational basis review. *Id.* This process created a space for endorsement of these perspectives that would have been politically impossible for most members of Congress (and certainly the President) in the late 1980s and early 1990s. *Id.*

144 This dynamic can be seen most strikingly in the contrast between the disfavor with which a majority of Congress greeted the rationales behind the U.S. Sentencing Commission's original recommendations to eliminate the disparity in 1995 and the wide acceptance of such arguments in public discourse today. *Compare* *United States v. Lewis*, 90 F.3d 302, 305 (8th Cir. 1996), *and* H.R. REP. NO. 104-272 (1995), *with* *Byars*, 2011 WL 344603, at \*4–6 (quoting commentary from members of Congress, the Attorney General, and the Sentencing Commission from the debates leading up to the enactment of the FSA, as well as following its enactment), *and* *Blewett*, 746 F.3d at 672–73 (Cole, J., dissenting) (similar), *and* *id.* at 677–80 (Clay, J., dissenting) (similar), *and* Mike Sacks, *Obama Commutes Sentences*

helped to spur a process of legislative and administrative change, which has led to a dramatic reduction in the federal disparity and could ultimately lead to its demise.<sup>145</sup>

This process of change is invisible under canonical constitutional law accounts, which, to the extent they mention the New Jim Crow regime, focus on the failures of the Supreme Court to deploy heightened scrutiny to address it.<sup>146</sup> The complicated ways that social movements have retained the

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*of 95 Prisoners, Pardons 2 Others*, NAT'L L.J. (Dec. 18, 2015), <https://www.law.com/national-lawjournal/almID/1202745248384>. For a fuller account of how these rational basis decisions helped open up a political dialogue leading to the reduction of the disparity, see Eyer, *supra* note 54, at nn. 447–55.

145 The U.S. Sentencing Commission's first Notice of Proposed Rulemaking on the issue of whether the crack/cocaine disparity was justified was issued almost exactly one year after the Minnesota Supreme Court in *State v. Russell* became the first court to strike down a crack/cocaine disparate sentencing law on rational basis review. See 477 N.W.2d 886; Issue for Comment, 57 Fed. Reg. 62,851 (Dec. 31, 1992) (soliciting comments on whether the Sentencing Commission should ask Congress to modify or eliminate the crack/cocaine disparity—relying on both the thin empirical underpinnings of the law and its racially disparate impact). The report and recommendations issued by the Sentencing Commission several years later (which embraced some of the arguments developed by racial justice litigators in cases like *Russell*) would help fuel a multiyear series of efforts to eliminate or reduce the crack/cocaine disparity in federal law—efforts that ultimately succeeded in significantly reducing the disparity. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified in scattered sections of 21 and 28 U.S.C.); Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074 (proposed May 10, 1995); U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995); see also *Unfairness in Federal Cocaine Sentencing: Is It Time to Crack the 100 to 1 Disparity?: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. (2009); *Federal Cocaine Sentencing Laws: Reforming the 100-to-1 Crack/Powder Disparity: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 110th Cong. (2008); *Federal Cocaine Sentencing Policy: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 107th Cong. (2002). See generally Byars, 2011 WL 344603, at \*3–4 (describing the origins of the FSA and noting that it was enacted after “more than 15 years of discussion and policy debate” because “it had become clear that there was no evidentiary basis for the 100-to-1 crack/powder ratio” and in order to “remedy the racially discriminatory impact of the ratio”). Since that time, a number of decisions in the lower federal courts have continued to question the remaining disparity, as well as the lack of full retroactivity of the FSA, often deploying rational basis review. See, e.g., *Blewett*, 746 F.3d at 666–68, 670–71, 673–75, 680–85, 696–98 (discussing this point in several concurring and dissenting opinions); *Byars*, 2011 WL 344603, at \*11. Multiple bills have been introduced in Congress that would further reduce or eliminate the disparity entirely, and/or make the FSA fully retroactive. See, e.g., Sentencing Reform Act of 2015, H.R. 3713, 114th Cong. (2015); Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. (2015); H.R. 3530, Mandatory Minimum Reform Act of 2015, 114th Cong. (2015).

146 Taking, for example, the crack/cocaine disparity, emblematic of the New Jim Crow, most casebooks have no coverage and focus on the Supreme Court to the extent they address the issue at all. See BARNETT & KATZ, *supra* note 1 (omitting any discussion of the crack/cocaine disparity); CHEMERINSKY, *supra* note 1 (same); CHOPER ET AL., *supra* note 1, at 1428–29 (discussing the crack/cocaine disparity only briefly in the context of a Supreme Court opinion); MASSEY, *supra* note 1 (omitting any discussion of the crack/cocaine dispar-

ability to destabilize and undermine the status quo through constitutional law—including prominently through rational basis arguments—are not mentioned.<sup>147</sup> Thus, the process of social and legal change brought about by the lower and state courts and political branches is eliminated from our canonical account of rational basis review.<sup>148</sup> Unlike a Supreme Court decision, which no doubt would be central to modern canonical accounts, the results achieved by the less visible, more complicated processes of constitutional change that have occurred in the lower and state courts, in conversation with the political branches, are rendered invisible.<sup>149</sup>

### C. *Economic Liberties Litigation*

Progressive social movements have not been alone in their use of rational basis arguments to create space within the status quo for disfavored constitutional arguments.<sup>150</sup> Most notably, since the early 1990s, libertarian litigation organizations such as the Institute for Justice and the Pacific Legal Foundation have relied on rational basis arguments—under both equal protection and due process—to create a body of caselaw challenging state and local occupational licensing regimes that impose training or other requirements on certain professions.<sup>151</sup> Arguing that, in a variety of circumstances, such regimes lack any rational relationship to those swept within their purview, conservative organizations have succeeded in marshaling credible arguments that government can overstep its authority in demanding onerous

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ity); ROTUNDA, *supra* note 1 (same) STONE, *supra* note 1, at 559–61 (discussing the crack/cocaine disparity only briefly in the context of a Supreme Court decision); SULLIVAN & FELDMAN, *supra* note 1 (omitting any discussion of the crack/cocaine disparity); VARAT ET AL., *supra* note 1 (same). *But cf.* BREST ET AL., *supra* note 1, at 1215–19 (including a brief discussion of the crack/cocaine disparity, including at least some lower court and legislative coverage); FARBER ET AL., *supra* note 1, at 249 (same).

147 See *supra* note 146.

148 See *supra* note 146.

149 For an excellent discussion of whether this type of change counts as “constitutional change,” see Hasday, *supra* note 112. As Hasday observes, such extrajudicial change “does count as constitutional change if the question seeks to understand the foundational normative commitments that shape the meaning of constitutional equal protection as it evolves.” *Id.* at 103. My own perspective is that constitutional change descriptively is not exclusively judicial and, rather, is an iterative process involving social movements, the public, courts, and the political branches. See, e.g., Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. ONLINE 197, 197–98 (2013). In this process, there are few reasons to “count” constitutionally inflected legislative change as somehow less legitimate—or less constitutional—than change that culminates in a successful Supreme Court opinion. See *id.*

150 See *infra* notes 151–60 and accompanying text. Cf. Christopher W. Schmidt, *Beyond Backlash: Conservatism and the Civil Rights Movement*, 56 AM. J. LEG. HIST. 179, 179–81 (2016) (arguing for greater and more nuanced study of the role of conservatives and conservative legal claims in the context of the Civil Rights Movement).

151 See *infra* note 152.

training and certification requirements of those who wish to engage in a particular trade.<sup>152</sup>

This litigation campaign, while by no means universally successful, is especially striking since it goes to the very heart of the story of deference told by canonical rational basis review. Under the canonical account, economic

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152 Many of these cases have additionally, or in the alternative, been decided under due process rational basis principles. *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (invalidating a funeral director licensing scheme under rational basis review, both equal protection and due process); *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008) (applying rational basis review under the Equal Protection Clause and concluding that certain distinctions in state regulatory scheme with regard to pest control were unconstitutional); *Craigsmiles v. Giles*, 312 F.3d 220, 224–29 (6th Cir. 2002) (invalidating requirements for extensive training for those selling funeral merchandise and applying rational basis review under the Equal Protection and Due Process Clauses); *Bos. Taxi Owners Ass'n v. City of Boston*, 180 F. Supp. 3d 108, 118–19 (D. Mass. 2016) (denying a motion to dismiss in a rational basis challenge to the city's differential treatment of traditional taxicabs and ride services like Uber and Lyft); *Brantley v. Kuntz*, 98 F. Supp. 3d 884, 890–94 (W.D. Tex. 2015) (applying the rational basis test under the Due Process Clause and concluding that certain licensing requirements for African hair-braiding school were unconstitutionally burdensome); *Waugh v. Nev. State Bd. of Cosmetology*, 36 F. Supp. 3d 991, 1014–25 (D. Nev. 2014) (applying rational basis test under the Due Process Clause and concluding that applying requirements of cosmetology schools to a makeup artist school partially violated due process), *vacated*, No. 14-16674, 2016 WL 8844242 (9th Cir. Jan. 27, 2016); *Eck v. Battle*, No. 1:14-CV-962, 2014 WL 11199420, at \*7–9 (N.D. Ga. July 28, 2014) (denying a motion to dismiss in a case challenging the application of dental licensing requirements to prevent nondentists from providing teeth-whitening services on rational basis review under the Due Process and Equal Protection Clauses); *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 698–702 (E.D. Ky. 2014) (invalidating certain regulatory requirements for moving companies on rational basis review under both the Due Process and Equal Protection Clauses); *Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1214–16 (D. Utah 2012) (applying rational basis review under Due Process and Equal Protection Clauses, and concluding that cosmetology licensing scheme was irrational as applied to African hair braider); *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434, 437–41 (S.D. Miss. 2000) (finding that a statute requiring sellers of caskets to hold funeral director licenses was invalid under rational basis review, due process, and equal protection); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999); *Peachtree Caskets Direct, Inc. v. State Bd. of Funeral Serv. of Ga.*, No. 1:98-CV-3084, 1999 WL 33651794, at \*1–2 (N.D. Ga. Feb. 9, 1999); *Santos v. City of Houston*, 852 F. Supp. 601, 607–09 (S.D. Tex. 1994) (finding an antijitney ordinance violated Equal Protection and Due Process Clauses on rational basis review); *Coleman v. City of Mesa*, 284 P.3d 863, 872–74 (Ariz. 2012) (denying a motion to dismiss in a lawsuit challenging the denial of a permit for a tattoo parlor partly on rational basis reasoning under the Due Process and Equal Protection Clauses); *Astramecki v. Minn. Dep't of Agric.*, No. A14-1367, 2015 WL 2341509, at \*3–4 (Minn. Ct. App. May 18, 2015) (reversing a motion to dismiss on the grounds that further factual development was needed to know whether certain regulatory requirements imposed on home bakers and canners would survive rational basis review under the equal protection clause of the state constitution); *see also* *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 87–91 (Tex. 2015) (invalidating licensing requirements on a somewhat elevated form of rational basis review under the due process clause of the state constitution). As noted *supra* note 12, rational basis review under the Due Process Clause has also been a strategy embraced (at times successfully) by other social movements.

legislation—and the still reviled paradigm case of *Lochner v. New York*—is the very reason for deferential rational basis review.<sup>153</sup> Thus, according to the canonical account, since the advent of the post-*Lochner* era “[t]he Court will not [under either the Equal Protection or Due Process Clause] exercise any significant review of legislative decisions to classify persons in terms of general economic legislation.”<sup>154</sup> The libertarian licensing cases are thus within the core scope of cases that canonical accounts suggest should simply be afforded no meaningful review under equal protection doctrine.

And yet it is difficult, if not impossible, to characterize the licensing cases categorically in this way. Rather, many, albeit not all, of the lower and state courts have applied meaningful rationality review, despite the canonical stature of economic legislation as subject to ultradeferential review.<sup>155</sup> Such cases have included none of the indicia that the canon suggests could make such meaningful review plausible (such as animus), and yet have meaningfully interrogated the rationality of the reasons given for the application of the licensing laws.<sup>156</sup> While such cases have not (yet) resulted in the type of national shift in constitutional culture that has occurred in the context of same-sex marriage and the crack/cocaine disparity, they arguably have begun the process of resurrecting economic liberties from the dustbin of constitutional history.<sup>157</sup>

Thus, just as for progressive social movements, rational basis review has offered conservative social movements opportunities to use litigation in the lower and state courts to further their constitutional change objectives.<sup>158</sup>

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153 Although *Lochner* was a substantive due process case, it is often thought to lie at the heart of the Court’s contemporary resistance to applying meaningful review to economic legislation. See, e.g., David E. Bernstein & Ilya Somin, *The Mainstreaming of Libertarian Constitutionalism*, 77 LAW & CONTEMP. PROBS. 43, 69–70 (2014); Goldberg, *supra* note 28, at 559 n.326. There remain debates today about whether *Lochner* was a rational basis case—it predated the Court’s modern tiers of scrutiny but used the language of “reasonableness.” See, e.g., Jeffrey D. Jackson, *Classical Rational Basis and the Right to Be Free of Arbitrary Legislation*, 14 GEO. J.L. & PUB. POL’Y 493, 500 (2016) (arguing that *Lochner* was a fundamental rights case); Nachbar, *Rationality*, *supra* note 28, at 1640 (implying that *Lochner* was of a piece with the form of rational basis review that existed in that era).

154 See JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 380 (3d ed. 2007); see also JETHRO K. LIEBERMAN, A PRACTICAL COMPANION TO THE CONSTITUTION: HOW THE SUPREME COURT HAS RULED ON ISSUES FROM ABORTION TO ZONING 411–12 (1999) (making a similar observation and tracing the advent of the modern deferential rational basis test, in both the equal protection and due process contexts, to the demise of *Lochnerian* economic substantive due process).

155 See *supra* note 152.

156 See *supra* note 152; cf. *infra* Part IV.

157 See, e.g., David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 YALE L.J. FORUM 287 (2016); Bernstein & Somin, *supra* note 153, at 70.

158 This fact suggests a reason why progressives may be reluctant to deviate from current canonical accounts of rational basis review. As described in Part IV, *infra*, contemporary canonical accounts countenance more meaningful rational basis review only in very narrow circumstances, which likely would not render meaningful review available to most

Even within the most central arena in which deferential rational basis review is supposed to be present, economic regulatory legislation, rational basis review has created space for litigants to persuade the courts of the oppressiveness and irrationality of certain state licensing regimes.<sup>159</sup> And yet, like other contexts in which rational basis review has played a role in emerging constitutional norms, this erosion of the strong presumption against Lochnerian economic liberties arguments—and the central role of rational basis review in facilitating it—goes unrecognized by the canon, because it has taken place in the lower and state courts.<sup>160</sup>

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As the above examples make clear, many highly significant arenas of social movement contestation have been, or are being, fought primarily outside of the Supreme Court, and substantially through the successful use of rational basis review.<sup>161</sup> But these are just a few of the most recent examples of the role that rational basis review has played in the lower and state courts and in the political branches in creating space for social movements to create constitutional change.<sup>162</sup> Stretching back further in time, rational basis

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conservative causes. In contrast, taking seriously the diversity of approaches that the courts have taken to rational basis review tilts the Equal Protection Clause's protection away from an approach that exclusively favors groups that progressives tend to favor (such as classic *Carolene Products* "discrete and insular minorities") toward a much more universally available tool for spurring constitutional change. But as set out in Part IV, *infra*, there are significant reasons to think that even for groups that progressives favor, the current canonical account—if taken seriously as doctrine—would radically undermine the ways that rational basis review has allowed such groups to create constitutional change. Indeed, precisely the features that have rendered rational basis review realistically available *as a mechanism of creating change* for minority groups (its universal availability, the lack of requirement of a front-end showing that a group is "worthy" of global coverage or that discrimination against them is "animus") are those that render rational basis review also available to conservative change makers. For a recent article by a leading constitutional law scholar defending the *Carolene Products* formulation (and suggesting that inconsistency within modern rational basis review can be explained within that framework), see Sherry, *supra* note 24.

159 See *supra* notes 152–57 and accompanying text.

160 For example, no casebook includes a discussion of any of the rational basis decisions that Bernstein includes in his recent article on developments in this area. See Bernstein, *supra* note 157, at 288 n.4. See generally BARNETT & KATZ, *supra* note 1 (including no mention of any of the cited cases); BREST ET AL., *supra* note 1 (same); CHEMERINSKY, *supra* note 1 (same); CHOPER ET AL., *supra* note 1 (same); FARBER ET AL., *supra* note 1 (same); MASSEY, *supra* note 1 (same); ROTUNDA, *supra* note 1 (same); STONE ET AL., *supra* note 1 (same); SULLIVAN & FELDMAN, *supra* note 1 (same); VARAT ET AL., *supra* note 1 (same).

161 See *supra* notes 123–60 and accompanying text.

162 See *infra* notes 163–64 and accompanying text; see also, e.g., *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1065–67 (9th Cir. 2014) (applying rational basis review in a decision in favor of undocumented immigrants); *Bush v. City of Utica*, 558 F. App'x 131, 134 (2d Cir. 2014) (applying rational basis review and finding that decedents who alleged they were denied municipal services because they were of low socioeconomic status stated a claim); *Mason v. Granholm*, No. 05-73943, 2007 WL 2541769 (E.D. Mich. Aug. 31, 2007)

review in the lower and state courts and/or in the political branches was a major force in a host of other social movement efforts, including the early origins of the welfare rights movement, the reconfiguration of pregnancy discrimination as a civil rights issue, and the willingness to question the legitimacy of second-generation race discrimination measures, such as discriminatory testing regimes.<sup>163</sup> All of these efforts succeeded in at least partially transforming the legal and discursive space surrounding key civil rights issues by undermining widely shared understandings of the reasonableness and appropriateness of longstanding practices burdening historically subordinated groups.<sup>164</sup> But because none resulted in a canonized rational basis decision in the Supreme Court (although many did result in significant legal reform), they have been erased from the canon and from our understandings of the potential of rational basis review.

This erasure leaves a vital part of the story of constitutional change untold. The story the canon tells us is an all or nothing tale, in which social movements either succeed in securing a Supreme Court victory—the canon would further suggest by persuading the Court to apply heightened scrutiny—or they lose.<sup>165</sup> But in reality, the process of constitutional change is a much more amorphous, complicated, and iterative one.<sup>166</sup> And amidst this more fluid and complicated process, rational basis review—as deployed in the lower and state courts, as well as within the political branches—has often afforded one of the most plausible openings for social movements to create space for constitutional change.<sup>167</sup> Through the multisited and iterative process of questioning the rationality and legitimacy of widely accepted social practices, social movements have used rational basis review time and again as

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(finding in favor of prisoner plaintiffs on rational basis review), *quoted in* Doe v. Dep't of Corr., 878 N.W.2d 293, 332 (Mich. Ct. App. 2015). See generally JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION § 4:30 (2016), Westlaw (database updated 2017) (collecting cases).

163 See generally Eyer, *supra* note 54 (describing the use of rational basis review in challenging racially discriminatory testing and in the context of pregnancy discrimination advocacy); Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825 (2015) (describing the use of a meaningful rational basis standard in agency practice and how it influenced the modern welfare rights movement).

164 See Eyer, *supra* note 54, at 994–1009, 1022–34 (describing rational basis arguments for racial justice advocacy and pregnancy discrimination); Tani, *supra* note 163, at 844–89 (describing the development of a meaningful form of rational basis review as an element of Department of Health, Education, and Welfare agency practice, as well as how that administrative practice influenced the early welfare rights movement).

165 See sources cited *supra* note 113 (demonstrating that the vast majority of the major casebooks only include Supreme Court cases in their section on rational basis review).

166 See generally Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 378–87 (2007) (developing theory of “democratic constitutionalism” and the multisited influences on constitutional law’s development).

167 See *supra* notes 123–64 and accompanying text.

a “disruptive technology”<sup>168</sup> in the process of creating constitutional change.<sup>169</sup> By ignoring many of the primary sites in which this process takes place, the canon distorts our understanding of the myriad ways in which social movements create change and of the important role that rational basis review plays in that process.

#### IV. THE PROBLEM OF OVERSIMPLIFICATION: WHY “ANIMUS DOCTRINE” AND “RATIONAL BASIS WITH BITE” ARE NOT ENOUGH

As described above, many instances of meaningful rational basis review have simply been erased from the canon.<sup>170</sup> But others, such as *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>171</sup> and *Romer v. Evans*,<sup>172</sup> have been more difficult to ignore. This Part describes why the solutions the canon has come up with—“rational basis with bite” and/or “animus doctrine”—fail to provide an accurate accounting of the scope and significance of meaningful rational basis review.<sup>173</sup> It argues, moreover, that taking seriously these oversimplified canonical accounts could foreclose many of the most important roles that rational basis review has traditionally played in opening up space for social movements to create constitutional change.<sup>174</sup> Finally, this Part describes how these accounts, as they have been absorbed by the canon, have often served to shore up the ultradeferral account of rational basis review by providing a basis for treating cases not fitting that account as a separate form of review.<sup>175</sup>

Two interrelated explanations have long dominated canonical explanations for the few meaningful minimum-tier cases that the canon acknowledges: (1) “rational basis with bite” and (2) “animus doctrine.”<sup>176</sup> Sometimes

168 I borrow this term from the business field (where it is used to connote new and potentially transformational technologies), to signify legal doctrines or mechanisms that permit social movements to disrupt the status quo and begin the process of generating desired constitutional change. See, e.g., Simone Rose, *Further Reflections on Extinguishing the Fountainhead of Knowledge: A Call to Transition to the “Innovation Policy” Narrative in Patent Law*, 66 SMU L. REV. 609, 617 (2013) (defining this term as “technologies that have a disruptive effect or displace existing technologies”).

169 See *supra* notes 123–64 and accompanying text.

170 See *supra* Parts I–III.

171 473 U.S. 432 (1985).

172 517 U.S. 620 (1996).

173 See *infra* notes 181–84, 194–219 and accompanying text.

174 See *infra* notes 199–213 and accompanying text.

175 See *infra* notes 219–20 and accompanying text.

176 There is more variety among the casebooks on this issue than on many of the others. Some casebooks seem to subscribe primarily to an animus explanation of existing rational basis cases in which the court has invalidated government action, although even among these, many differ on whether it is conceived of simply as a proscription on particular purpose or a trigger for rigorous front-end review. See CHOPER ET AL., *supra* note 1, at 1349, 1519–20, 1529; STONE, *supra* note 1, at 503–07; SULLIVAN & FELDMAN, *supra* note 1, at 643–44, 649, 650, 652. Others appear to subscribe primarily to a “rational basis with bite” account, although again there are differences in how it is conceived. See BARNETT & KATZ, *supra* note 1, at 1020–38; CHEMERINSKY, *supra* note 1, at 729, 732–33, 747–54; see also VARAT

conceived of as working in tandem, and sometimes as distinct theories, together they have provided the dominant canonical explanation for those cases not fitting the ultradeferential model that the canon nevertheless cannot ignore.<sup>177</sup> Although expressed in a variety of forms, in their most common versions, both theorize a form of review distinct from “real” or “traditional” rational basis review—a subintermediate tier of rational basis “plus” or a “silver bullet” of invalidation—which a litigant must make a special showing to access (subordinated group status or animus).<sup>178</sup> Thus, both of the ways that the canon accounts for more meaningful rational basis review tend to situate such review as a distinctive form of review, for which a special showing—of animus and/or of a status close to, but not quite sufficient to confer protected class status<sup>179</sup>—is a prerequisite.

But the reality of meaningful minimum-tier review is far more complex.<sup>180</sup> While it is certainly true that descriptively the courts are much more

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ET AL., *supra* note 1, at 654–56 (not specifically using the term “rational basis with bite,” but clearly expressing the view that cases like *Romer* and *Cleburne* “purport[ed]” to apply rational basis review, but in fact applied a higher standard of review). Still others appear to subscribe to both and/or to treat the two as an interrelated phenomenon. See BREST ET AL., *supra* note 1, at 1488, 1490–1500, 1656–57, 1676, 1712–14; FARBER ET AL., *supra* note 1, at 53, 470, 483–84, 491. At least one casebook seems to offer deferential rational basis review as the only account and all deviations from it as essentially aberrational. See ROTUNDA, *supra* note 1, at 705–12. Finally, one casebook does not appear to hew to any of the standard explanations for the meaningful rational basis review cases. See MASSEY, *supra* note 1, at 645–71. Both of these explanations have also attracted much attention in the scholarly literature. For a few recent scholarly perspectives, see, for example, WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW (2017); Carpenter, *supra* note 80; McGowan, *supra* note 81, at 385; Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887 (2012); Raphael Holoszyk-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 *N.Y.U. L. REV.* 2070 (2015). For the original article describing meaningful rational basis review as rational basis review with “bite” (albeit not linking it to quasi-quasi-suspect groups), see Gunther, *supra* note 37.

177 See sources cited *supra* note 176.

178 For a classic statement of animus doctrine, see SULLIVAN & FELDMAN, *supra* note 1, at 643–44, 649–50, 652 (in which almost all of the meaningful rational basis cases are characterized as “animus” cases and it is implied that animus is the virtually exclusive path to constitutional invalidation under rational basis review). For a classic statement of rational basis with bite, see BARNETT & KATZ, *supra* note 1, at 1021, stating, for example, that

[t]here have also been a handful of exceptional cases where the Court has given rational basis scrutiny more “bite” and struck down a law despite the seemingly deferential standard of review. One possible explanation for these latter cases is that there is some reason why the Court does not want to identify a “suspect classification”—the designation that triggers strict scrutiny—yet the Court nevertheless thinks the complainants are worthy of some enhanced protection.

*Id.*

179 Although not commonly noted in casebooks, some scholars have also noted that in several of the cases it appears that it is an important (but not fundamental) right at issue. See, e.g., Farrell, *supra* note 28, at 467.

180 I focus herein on the ways it is more favorable. But neither are courts consistent in applying meaningful review in the contexts (subordinated group status or animus) where the canon suggests it should be warranted.

likely to apply meaningful review where a historically subordinated group or animus is factually present, there are many cases in which these factors are not present, or even more commonly, are present but unacknowledged.<sup>181</sup> But perhaps more importantly, even where present and/or acknowledged, courts often do not apply a “front-end” analysis—requiring a showing of animus or “quasi-protected class status” as a prerequisite—of the kind the canon suggests should be determinative.<sup>182</sup> Rather, many of the cases in which social movements have successfully made use of rational basis review have rested on messier, “back-end” findings of a lack of rational basis, without any front-end, prerequisite showing of the kind that the canonical accounts suggest is required.<sup>183</sup>

This last fact is critical to understanding why taking canonical accounts seriously in their claim to exclusivity could be deeply problematic for the role that rational basis review has traditionally played for social movements in creating space for constitutional change. As Suzanne Goldberg and others have observed, there are stages of social change that any social movement must pass through.<sup>184</sup> And, at the early stages “courts go to great lengths to avoid acknowledging their role in norm selection.”<sup>185</sup> Although Goldberg here is referring to the general propensity of courts to engage in fact-based (rather than norm-based) adjudication at the front end of social movement change, such an observation is an equally apt descriptor for the amorphous back-end approach—focused on a finding of lack of rational basis—that courts have taken to rational basis review during the early stages of social movement success.<sup>186</sup>

Although one can critique this back-end approach as dissimulation, it in many ways makes sense. At the beginning of social movement efforts, when norms have only begun to be destabilized, courts may be predictably reluctant to proclaim a group subject to across-the-board protections, as canonical accounts of rational basis with bite arguably require, or to find that still widely shared social norms about the group should be characterized as “animus,” as canonical animus doctrine arguably requires. In contrast, the amorphous and back-end approach that courts have typically taken—finding a lack of rational basis without undertaking a rigorous front-end inquiry and often using muddled reasoning—does not require courts to make such judgments.<sup>187</sup> In this way, rational basis review, though inconsistently applied—and perhaps theoretically unsatisfying—serves as one of the few universally

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181 See *infra* notes 194–219 and accompanying text.

182 See *infra* notes 194–219 and accompanying text.

183 See *infra* notes 194–219 and accompanying text.

184 See Goldberg, *supra* note 42, at 1975–84; see also Eskridge, *supra* note 73, at 2065, 2192, 2371–74; William N. Eskridge, Jr., Lawrence’s *Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1064–1069 (2004).

185 Goldberg, *supra* note 42, at 1964.

186 *Id.*; cf. *infra* notes 194–214 and accompanying text.

187 See *infra* notes 194–219 and accompanying text.

available arguments to social movements seeking to begin the process of creating the conditions for constitutional change.<sup>188</sup>

Experience has shown that there are reasons to be deeply concerned that an exclusively front-end-focused rational basis doctrine—globally requiring a showing of animus or of group status warranting rational basis with bite—would not provide comparable disruptive access.<sup>189</sup> Indeed, by demanding a front-end showing for access, rational basis with bite and animus doctrine would, if taken seriously as doctrine, mimic almost exactly the most troubling features that scholars have observed about the operation of the higher tiers.<sup>190</sup> Thus, scholars of animus doctrine have drawn quite explicitly on intent doctrine in equal protection in describing what a showing of animus requires, despite the fact that contemporary groups saddled with this same intent showing (such as racial minorities and women) have found it virtually impossible to meet.<sup>191</sup> Similarly, there are few reasons to think that a category driven rational basis with bite—situated by the canon as a sort of quasi-quasi-suspect class—would escape the concerns that have driven the Court to decline to recognize further classes as protected.<sup>192</sup> In short, in the drive to make sense of the messy, contextual nature of existing rational basis review doctrine, the canon has imported into rational basis review many of the same problematic features that exist in the heightened tiers; features that are arguably especially problematic for groups at the front end of constitutional change efforts.

The example of the same-sex marriage cases shows the simultaneous power of a messy back-end process, as well as the limits of a front-end approach.<sup>193</sup> In the twenty years of litigation that paved the way for *Obergefell v. Hodges*,<sup>194</sup> the courts repeatedly invalidated marriage limitations, often on rational basis review.<sup>195</sup> But few of those courts followed the canonical path to meaningful rational basis review.<sup>196</sup> Thus, very few of the lower or state

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188 Cf. Maltz, *supra* note 28, at 282 (“[B]y the late 1980s, the Justices had abandoned the effort to bring consistency and coherence to the Court’s rational basis jurisprudence. . . . However unsatisfactory it might be from a theoretical perspective, this use of the rational basis test [as a kind of doctrinal safety valve] remains a staple of the Court’s equal protection jurisprudence to this day.”).

189 See *infra* notes 191–218 and accompanying text.

190 Cf. FARBER ET AL., *supra* note 1, at 470, 508 (characterizing “rational basis with attitude” as one of four tiers of scrutiny).

191 See, e.g., ARAIZA, *supra* note 176, at 89–104 (drawing extensively on intent doctrine in describing how animus may be shown); cf. HANEY LÓPEZ, *supra* note 133, at 86–87 (describing the problems that intent/animus doctrine has created for constitutional race discrimination jurisprudence); Hasday, *supra* note 18, at 1727–28 (describing the problems that intent/animus doctrine has created for constitutional sex discrimination jurisprudence).

192 See, e.g., Yoshino, *supra* note 41, at 748, 755–76 (theorizing that the era of the Court recognizing new suspect classes may have come to an end and describing the reasons why).

193 See *infra* notes 195–209 and accompanying text.

194 135 S. Ct. 2584 (2015).

195 See sources cited *supra* note 126.

196 See *infra* note 200 and accompanying text.

courts striking down same-sex marriage bans engaged in a front-end animus analysis of the type that the canon suggests.<sup>197</sup> And, although some courts were willing to entertain group-based arguments for meaningful scrutiny, those willing to do so typically, albeit not always, proved willing to take the more forthright step of declaring protected class status to be appropriate.<sup>198</sup> Thus, very few courts engaged in the type of front-end analysis that canonical rational basis with bite and/or animus doctrine suggests should be required.

Rather, the dominant analytical approach taken by courts in successful marriage litigation cases has been a much messier, back-end affair.<sup>199</sup> Thus, courts have typically focused on the irrationality of the reasons provided by states for same-sex marriage bans, without engaging in any meaningful threshold analysis of why such inquiry should be permitted.<sup>200</sup> And, in so

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197 See *infra* note 200 and accompanying text.

198 See, e.g., *Latta v. Otter*, 771 F.3d 456, 468–76 (9th Cir. 2014) (applying the Ninth Circuit’s established standard of “heightened” scrutiny to sexual orientation classifications and concluding that the State’s ban on same-sex marriage failed review); *In re Marriage Cases*, 183 P.3d 384, 440–53 (Cal. 2008) (concluding that sexual orientation discrimination warranted strict scrutiny and that California’s ban on same-sex marriage could not satisfy that standard), *superseded by constitutional amendment*, CAL. CONST. art. 1, § 7.5; *Kerigan v. Comm’r of Pub. Health*, 957 A.2d 407, 426–81 (Conn. 2008) (concluding that sexual orientation discrimination warranted intermediate scrutiny and that the state’s ban on same-sex marriage could not satisfy that standard); *Varnum v. Brien*, 763 N.W.2d 862, 889–904 (Iowa 2009) (applying heightened scrutiny standard to sexual orientation classifications and concluding that a ban on same-sex marriage failed review).

199 See *infra* note 200 and accompanying text.

200 For decisions under state constitutions, see, for example, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 958–68 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196, 217–20 (N.J. 2006); *People v. Greenleaf*, 780 N.Y.S.2d 899, 900–05 (Just. Ct. 2004); *People v. West*, 780 N.Y.S.2d 723, 725 (Just. Ct. 2004); *Baker v. State*, 744 A.2d 864, 877–86 (Vt. 1999). There was also an avalanche of decisions invalidating same-sex marriage bans in the federal courts following *Windsor*, much of which relied on back-end rationality review. See, e.g., *Innis v. Aderhold*, 80 F. Supp. 3d 1335, 1358–59 (N.D. Ga. 2015) (denying a motion to dismiss a lawsuit challenging Georgia’s ban on same-sex marriage since there was no rational relationship to a legitimate state interest); *Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1160–63 (S.D. Ind. 2014) (concluding that a state marriage ban failed back-end rational basis review as to equal protection claim and that refusal to recognize out-of-state marriages of same-sex couples was also irrational regardless of whether it was motivated by animus), *aff’d*, 766 F.3d 648, 656 (7th Cir. 2014) (conducting a more complicated analysis, but also suggesting that the only significant reason given by the state “is irrational, and therefore [the discrimination is] unconstitutional even if the discrimination is not subject to heightened scrutiny”); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1139–46 (D. Or. 2014) (concluding that a same-sex marriage ban failed back-end rational basis review); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 769–75 (E.D. Mich. 2014) (invalidating marriage law without finding “trigger” for meaningful scrutiny), *rev’d*, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom.* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Tanco v. Haslam*, 7 F. Supp. 3d 759, 769 (M.D. Tenn. 2014) (concluding that an equal protection challenge to a law barring recognition of out-of-state same-sex marriages would likely succeed on the merits, even on rational basis review; not discussing animus), *rev’d sub nom.* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom.* *Obergefell*, 135 S. Ct. 2584; *De Leon v. Perry*, 975 F. Supp. 2d 632, 652–56 (W.D. Tex. 2014) (concluding that heightened review was probably warranted

doing, the courts presented the public again and again with findings that the reasons for excluding same-sex couples from the institution of marriage were simply irrational.<sup>201</sup> In so doing, they paved the way for the Court to find, in *Obergefell*, that same-sex couples were not differentially situated vis-à-vis the right to marry at all, and accordingly that same-sex marriage bans must fall.<sup>202</sup>

It is not at all clear that a similar pathway to constitutional change would have been available to same-sex couples if the types of front-end showings that the canon suggests are a prerequisite to meaningful review were truly required. Especially at the time of the first successful marriage and civil union victories—such as *Goodridge v. Department of Public Health*,<sup>203</sup> *Baker v. State*,<sup>204</sup> and *Lewis v. Harris*<sup>205</sup>—moral disapproval of gay people was seen as appropriate by many people, and preserving opposite-sex marriage was widely seen as serving vital social goals.<sup>206</sup> To characterize gays and lesbians

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on an equal protection claim, but that the law in any event failed back-end rational basis review), *aff'd on other grounds sub nom.* De Leon v. Abbott, 791 F.3d 619 (5th Cir. 2015); Bourke v. Beshear, 996 F. Supp. 2d 542, 549–53 (W.D. Ky. 2014) (concluding that it was not clear whether animus was shown, but that regardless the law failed back-end rational basis review), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* *Obergefell*, 135 S. Ct. 2584; Bishop v. United States *ex rel.* Holder, 962 F. Supp. 2d 1252, 1282–96 (N.D. Okla. 2014) (invalidating on regular, back-end rational basis review), *aff'd on other grounds sub nom.* Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014); Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1207–15 (D. Utah 2013) (rejecting an animus argument as to equal protection claim; applying regular rational basis review and concluding that the statute failed such review), *aff'd on other grounds*, 755 F.3d 1193 (10th Cir. 2014); *cf.* Campaign for S. Equal. v. Bryant, 64 F. Supp. 3d 906, 942–48 (S.D. Miss. 2014) (concluding that heightened scrutiny was appropriate, but nevertheless only applying rational basis review and finding law irrational; also applying animus reasoning, but after applying back-end rational basis review), *aff'd*, 791 F.3d 625 (5th Cir. 2015); Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014) (applying rational basis reasoning after concluding that heightened scrutiny was warranted and failed), *aff'd sub nom.* Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 991–95 (S.D. Ohio 2013) (applying both animus and back-end rational basis reasoning and also concluding the case warranted and failed heightened scrutiny), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* *Obergefell*, 135 S. Ct. 2584; Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 994–1003 (N.D. Cal. 2010) (concluding that strict scrutiny would be warranted, but that a ban on same-sex marriage failed even rational basis review; suggesting animus, but not as a threshold requirement for meaningful review), *vacated sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

201 See cases cited *supra* note 200. In a prescient early article, law professor Toni Massaro recommended pursuing precisely this approach to gay rights. See Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45 (1996).

202 See *Obergefell*, 135 S. Ct. at 2597–2605.

203 798 N.E.2d 941 (Mass. 2003).

204 744 A.2d 864 (Vt. 1999).

205 908 A.2d 196 (N.J. 2006).

206 See, e.g., *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (June 26, 2017), <http://www.pewforum.org/2016/05/12/changing-attitudes-on-gay-marriage/> (demonstrating that in 2003, 59% of Americans opposed same-sex marriage, while only 32% were in favor); *Gay and Lesbian Rights*, GALLUP, <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx>

as categorically protected—or their exclusion from marriage as animus—at that time would likely have been impossible. Nor would it arguably have been persuasive to those in the undecided middle who the LGBT rights movement needed to bring on board.<sup>207</sup> But courts could and did question the factual underpinnings of same-sex marriage bans, something that helped spur a national conversation about same-sex marriage and ultimately created durable, nationwide constitutional change.<sup>208</sup>

Nor is same-sex marriage alone in its reliance on a messier, back-end approach to meaningful rational basis review. Many of the ways that rational basis review has served social movements in opening space for constitutional change have similarly rested on this type of undertheorized, back-end approach.<sup>209</sup> Thus, for example, the women's rights movement's early victories on rational basis review, such as *Reed*, often had no threshold showing, instead relying simply on a finding that the reasons for laws burdening women were irrational.<sup>210</sup> Similarly, the variety of successful uses to which the racial justice movement has put rational basis review in the modern era (typically to challenge racially burdensome laws) have most often involved findings of back-end irrationality rather than any formal "triggering" of

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(last visited Jan. 19, 2017) (demonstrating that in 2003, 52% of those polled thought that engaging in "gay or lesbian relations" was "morally wrong," 48% thought gays and lesbians should not be permitted to adopt, 48% thought allowing same-sex marriage would change society for the worse (far more than thought it would make society better—only 10%), and 50% favored a constitutional amendment banning same-sex marriage). There were two even earlier marriage equality cases that seemed poised to result in victories for the gay rights movement, but they were overturned by state constitutional amendments—neither of those cases relied on rational basis review. See *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88743, at \*6 (Alaska Super. Ct. Feb. 27, 1998) (finding the right to marry was a fundamental right and applied to same-sex couples), *superseded by constitutional amendment*, ALASKA CONST. art. I, § 25 (defining marriage as the union of a man and a woman); *Baehr v. Lewin*, 852 P.2d 44, 60–68 (Haw. 1993) (concluding that a statute denying same-sex couples the right to marry was sex discrimination and thus must satisfy strict scrutiny), *abrogated by* HAW. CONST. art. I, § 23 ("The legislature shall have power to reserve marriage to opposite-sex couples.").

207 Notably, the few successful early cases to rely on this type of categorical reasoning (by directly invoking heightened scrutiny) were overturned by state constitutional amendment. See *supra* note 206.

208 See cases cited *supra* note 200; see also *supra* notes 201–02 and accompanying text (describing the importance of the marriage rational basis decisions in paving the way for nationwide constitutional change around same-sex marriage); cf. Massaro, *supra* note 201, at 91 (observing in 1996 that "[t]he primary obstacle to gay constitutional rights . . . is not *Hardwick* . . . but the powerful judicial presumption that animated it: that homosexuality is wrong," and suggesting that reliance on the "thin" strategy of irrationality review might be the best way to erode those background norms).

209 See *infra* notes 210–13 and accompanying text.

210 See *supra* notes 46, 54. Some lower courts did conclude that only sex discrimination received this more meaningful form of rational basis review, but many others did not. See, e.g., Eyer, *supra* note 18, at 539–42; Eyer, *supra* note 54, at 1024–26.

meaningful rational basis review.<sup>211</sup> Successful economic justice cases too have almost always rested on a back-end approach.<sup>212</sup> In short, many if not most of the ways that rational basis review in the modern era has helped create space for constitutional change have not followed the canonical approach; nor would they necessarily be plausible under such an approach.<sup>213</sup>

Moreover, even those cases that serve as the core of the canonical account of rational basis with bite and/or animus doctrine—such as *Cleburne* and *Romer*—are far less clear exemplars than the canon typically represents.<sup>214</sup> Critically, neither *Cleburne* nor *Romer* acknowledges, much less mandates, any special front-end showing in order to leave the realm of deferential rational basis review.<sup>215</sup> Rather, like the overwhelming majority of successful minimum-tier cases, both cases proceed without differentiating the Court’s approach from the general standards of rational basis review, and without facially demanding any special showing.<sup>216</sup> Indeed, both are sufficiently opaque in defining the contours of their approach that they have, over time, generated widely varying scholarly and judicial accounts of their meaning.<sup>217</sup>

211 See *supra* note 137. This has been somewhat of a shift since the early 1970s, when litigators sometimes, albeit not always, argued for “disparate impact” as a trigger for meaningful scrutiny—an approach that was largely repudiated by *Washington v. Davis*, 426 U.S. 229 (1976). See Eyer, *supra* note 54, at 1058 n.455.

212 See *supra* note 152; see also Berliner, *supra* note 28, at 388–92.

213 Cf. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Ginsburg, J., concurring) (reasoning that, in view of real-world facts, “it is beyond rational belief that H.B. 2 could genuinely protect the health of women”).

214 Cf. McGowan, *supra* note 81, at 385 (noting that “[t]he Court has never addressed what triggers” meaningful rational basis review).

215 See *Romer v. Evans*, 517 U.S. 620, 631–36 (1996) (nowhere suggesting that it was applying more meaningful rational basis scrutiny because sexual orientation, as a class, required rational basis with bite); *id.* at 632–36 (prior to even addressing the animus argument, suggesting that Amendment 2 “fail[ed]” “ordinary equal protection” standards; certainly not suggesting that it was required to find animus in order to conduct meaningful review); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (specifically stating that classifications based on mental retardation should not be subject to across-the-board “more searching evaluation”); *id.* at 447 (treating “a bare . . . desire to harm a politically unpopular group,” i.e., animus, as simply an impermissible purpose in the context of back-end review, rather than a required element to trigger more stringent review (alteration in original) (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted)). Indeed, other cases such as *Village of Willowbrook v. Olech*, fairly explicitly reject any account dependent on a front-end showing of animus or protected group status, as opposed to allowing for invalidation based on mere irrationality. See *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564–65 (2000) (per curiam); see also Farrell, *supra* note 28, at 471 (making a similar observation).

216 See *supra* note 215.

217 See, e.g., STONE ET AL., *supra* note 1, at 685 (canvassing the wide array of interpretations that scholars have given to *Romer*); Brienne J. Gorod, Case Note, *Does Lochner Live?: The Disturbing Implications of Craigmiles v. Giles*, 21 YALE L. & POL’Y REV. 537, 543–44 (2003) (“[L]ower courts, litigators, and legal scholars have all struggled to make sense of [*Cleburne*].”).

Thus, while cases such as *Cleburne* and *Romer* arise in circumstances that descriptively satisfy the requirements of rational basis with bite (subordinated and somewhat suspect group) and animus doctrine (animus), they do not, as the canon implies, prescriptively suggest that any such showing is required for meaningful minimum-tier review.<sup>218</sup>

Finally, it should be noted that not only are the canon's solutions to meaningful minimum-tier review—rational basis with bite and animus—erroneously reductive, but they also serve to further shore up accounts of “true” rational basis review as solidly deferential. By positioning successful minimum-tier cases as outside of the core canonical accounts of rational basis review—as “animus” or “rational basis with bite” cases, rather than simply “rational basis” cases—the canon can treat its account of rational basis review as ultradefential as far more settled than it actually is. Thus, even in the ways that the canon acknowledges meaningful minimum-tier review, it simultaneously marginalizes and excludes from the canon those cases which do not comport with the traditional deferential account.

In short, even the ways that the canon acknowledges more meaningful rational basis review serve to cabin and constrain the potential applications of such review and to shore up the traditional ultradefential account. By positioning as mandatory and exclusive what are, in actuality, descriptive and partial characteristics of successful rational basis review cases, the canon further marginalizes and misdescribes the ways that rational basis review has in fact offered opportunities for meaningful review. Rather than the messy back-end affair—focused on a lack of rational basis—that has characterized much successful rational basis litigation, meaningful rational basis is, like the heightened tiers, treated as subject to gatekeeping criteria that many emerging social movements are unlikely to meet. Thus, even in its attempts to accommodate meaningful rational basis review, the canon furthers its own ultradefential account and undermines the diversity of ways that social movements have actually used rational basis review to disrupt the constitutional status quo.<sup>219</sup>

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218 Indeed, Bill Araiza's fascinating recent exploration of the internal debates in *Cleburne* strongly suggests that the features that have caused many scholars to read it as an “animus” decision (in which meaningful review was triggered by suspected animus) and/or rational basis with bite decision (in which those with intellectual disabilities, having narrowly been denied intermediate scrutiny, were deemed as a group to warrant some meaningful review) were not the result of deliberate doctrinal choices at all, but rather the result of a series of ad hoc unrelated compromises among the Justices in the majority. See generally William D. Araiza, *Was Cleburne an Accident?*, 19 U. PA. J. CONST. L. 621 (2017) (providing an in-depth history of the internal debates in *Cleburne*).

219 As noted *supra* notes 29–30 and accompanying text, the claim here is not that rational basis review is not sometimes—or even often—ultradefential, but rather that it is not consistently so. The current canon obscures this key point, as well as the ways that this inconsistency affords social movements meaningful opportunities to generate change.

## V. RETHINKING RATIONAL BASIS REVIEW

Few law students asked to identify what arguments a constitutional lawyer would want to make on behalf of a social movement challenging inequality would be likely to identify rational basis review. So completely has the constitutional canon erased the role of rational basis review in contemporary social movements' projects of constitutional change that heightened scrutiny, despite ongoing scholarly critiques, still dominates our widely shared intuitions about what forms of arguments are likely to serve social movements seeking to achieve constitutional change.<sup>220</sup> Despite the fact that it has typically been rational basis review—not heightened scrutiny—that has provided the initial openings for social movements to generate constitutional transformation during the modern era, we continue to apotheosize heightened scrutiny as the way that social movements make change.<sup>221</sup>

The flip side of our preoccupation with heightened scrutiny is our depreciation of rational basis review. The canonical account that has long dominated our understandings of rational basis review is one in which rational basis review is an essentially empty and meaningless form of review—of little use to anyone.<sup>222</sup> As the canonical account holds, “real” rational basis review is ultradeferential and essentially impossible to win.<sup>223</sup> While the Court may sometimes “purport” to apply rational basis review while affording meaningful scrutiny, our common sense and the canon tells us that such applications are, by definition, really just heightened scrutiny in disguise, and thus not relevant to how we understand rational basis review.<sup>224</sup>

But as the foregoing sections make clear, this perspective fundamentally distorts the reality of rational basis review. Few would contest that rational basis review is, as the canon suggests, often highly deferential. But it is just as clearly not exclusively so.<sup>225</sup> Rather, both the Supreme Court, and perhaps more importantly the lower and state courts, have often applied meaningful

220 See *supra* notes 33–37 and accompanying text. Obviously this is not true of all scholars, although it is a dominant theme in the teaching canon. For recent critiques of the pursuit of heightened scrutiny, specifically by the LGBT rights movement, see, for example, Robinson, *supra* note 43; Schraub, *supra* note 36.

221 As I have previously suggested, I do believe that heightened scrutiny and formal equality generally are important to social movements' solidification of constitutional and legal change. See Katie Eyer, Brown, *Not Loving: Obergefell and the Unfinished Business of Formal Equality*, 125 YALE L.J. FORUM 1 (2015). But that is distinct from arguing that they are the entry point through which a social movement can generate constitutional change (as opposed to the end point of that process).

222 See *supra* notes 2–7 and accompanying text.

223 See *supra* notes 2–7 and accompanying text; *cf. supra* Part II (describing the pervasive tendency to describe meaningful rational basis cases as only “purporting” to apply rational basis review and not as exemplars of the rational basis standard).

224 See *supra* notes 2–7 and accompanying text.

225 See *supra* Parts I–III. For additional discussion of the history of the successful use of rational basis review by social movements, see Eyer, *supra* note 18; Eyer, *supra* note 54; Katie R. Eyer, *Sex Discrimination and Rational Basis Review: Lessons for LGBT Rights* (Nov. 22, 2017) (work in progress).

review in minimum tier/rational basis contexts.<sup>226</sup> Nor have these applications of meaningful review been restricted to the contexts that the canon suggests might be appropriate—such as upon a showing of animus or of a specially protected subordinated group (quasi-quasi-suspect class) status.<sup>227</sup>

Instead, the reality of rational basis review is far messier, and less consistent, than the canon acknowledges. The Court has stated principles of deferential rational basis review—such as the irrelevance of real reasons and of over- and underinclusivity—but those principles do not consistently guide either the Court or the lower and state courts in their application of minimum-tier review.<sup>228</sup> Nor have the courts demanded any predictable threshold showing for escaping deferential rational basis review.<sup>229</sup> Rather, the reality of the practice of rational basis review is that it is “up for grabs” in the context of individual cases in a way that few other constitutional doctrines are.<sup>230</sup> The very inconsistency in the corpus of rational basis precedents—and lack of clearly delineated doctrinal explanations for meaningful review—makes plausible a wide array of competing claims in any given context.<sup>231</sup>

While this feature of rational basis review has some obvious drawbacks for social movements,<sup>232</sup> there are strong reasons to believe that it is precisely the unsettled, undertheorized nature of rational basis review that has allowed it to serve as one of the few true “disruptive technologies” for social movements seeking constitutional change. As set out in the foregoing sections, rational basis review—often applied meaningfully by the courts without clear explanation—has served as the leading edge of a wide array of successful modern social movement campaigns for constitutional change.<sup>233</sup> There are substantial reasons to think that that is no accident, and that it is precisely the universal application of rational basis review as the minimum standard of review—and the lack of clear, consistent doctrine as to where it may be applied meaningfully—that has allowed social movements to repeatedly leverage it to generate pathways to constitutional transformation.<sup>234</sup>

How might the canon better reflect this reality of the variegated nature of rational basis review and its important role for social movement actors? Viewed from the perspective of the teaching canon,<sup>235</sup> it is not difficult to

226 See *supra* note 225.

227 See *supra* Part IV.

228 See *supra* Parts I–III.

229 See *supra* Part IV.

230 See Eyer, *supra* note 18; Eyer, *supra* note 54; Eyer, *supra* note 225; *supra* Parts I–IV.

231 Cf. Nachbar, *Rational Basis “Plus,”* *supra* note 28, at 475–77 (criticizing this aspect of “rational basis ‘plus’”).

232 Most notably, it means that even after initial victories, courts may continue to apply deferential rational basis review to find discrimination against the group permissible. See, e.g., *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004).

233 See Eyer, *supra* note 18; Eyer, *supra* note 54; Eyer, *supra* note 225; *supra* Parts I–III.

234 See *supra* Part IV for a theoretical discussion of why this might be so.

235 For academics, too, this would arguably open up new vistas of further inquiry, such as: why certain rational basis campaigns seem to stall out, while others lead to more durable change; where and when even established social movements seeking to destabilize the

imagine how relatively small changes could radically shift our canonical understandings toward a more accurate account.<sup>236</sup> Students could still be taught as a starting point the ultradeferral formulation of rational basis review presented in cases like *Railway Express Agency, Inc. v. New York*<sup>237</sup> and *FCC v. Beach Communications, Inc.*<sup>238</sup> But rather than being presented as authoritative, this formulation would serve simply as the start of discussions of the fact that there is vast inconsistency—even during the post-*Railway Express* time frame—in the actual application of rational basis review. Cases such as *Romer*<sup>239</sup> and *Cleburne*,<sup>240</sup> *Weber*<sup>241</sup> and *Reed*,<sup>242</sup> and *Eisenstadt*<sup>243</sup> and *Olech*<sup>244</sup> would be situated alongside the deferential account as exemplars of the ways that the Court’s jurisprudence has often diverged from its claimed principles.<sup>245</sup> Rather than a single “exception” to deferential rational basis review, such as rational basis with bite or animus, students would be encouraged to see the messy absence of clear doctrine in defining where meaningful rational basis review can be applied.<sup>246</sup> Directly inconsistent

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status quo might benefit from undermining the rationality of the status quo through rational basis review; how social scientists and other researchers may contribute to, or hinder, social movement efforts in this regard; how the lower courts and the Supreme Court may differ in their application of rational basis review—and how the state courts construing their own state constitutions differ further; how social movements effectively use rational basis review to lead to extrajudicial political solutions—and how perhaps those political compromises may bleed back into constitutional law; which social movements are beginning to see success in deploying rational basis review, and what this may augur for the future of those movements; whether there are particular contexts in which rational basis arguments are more likely to be effective for social movements as compared to heightened scrutiny arguments, or where the reverse may be true.

236 For a model casebook section reflecting these suggestions and available for use for free with attribution, see Katie R. Eyer, *A Casebook Companion to the Canon of Rational Basis Review*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3086830](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3086830).

237 336 U.S. 106 (1949).

238 508 U.S. 307 (1993).

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

240 *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

241 *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

242 *Reed v. Reed*, 404 U.S. 71 (1971).

243 *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

244 *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam).

245 Many casebooks do include some of these cases in their section on rational basis review. However, the vast majority also either (1) state that the meaningful rational basis review cases that are excerpted or discussed are only “purporting” to apply rational basis review, see, e.g., VARAT ET AL., *supra* note 1, at 641–56; or (2) treat such cases as applying a special differentiated standard because of their stature as animus and/or “rational basis with bite” cases, see, e.g., BARNETT & KATZ, *supra* note 1, at 1021–36. The effect is thus to delegitimize the meaningful rational basis cases as true exemplars of the rational basis standard, rather than to illustrate the actual inconsistency in the doctrine. *But cf.* MASSEY, *supra* note 1, at 645–71 (sometimes using the “purport[ing]” language to characterize meaningful rational basis cases, but also encouraging students to see the genuine inconsistency in the Court’s doctrine).

246 See *supra* Part IV.

rational basis precedents in the lower and state courts could be mined to help students think like lawyers in conceptualizing how the very inconsistency and indeterminacy of rational basis caselaw affords an array of plausible arguments to constitutional litigators today.<sup>247</sup>

Such a revised teaching canon would also be attentive to the connection of constitutional change to social movements and the ways that rational basis review has enabled the process of social movement driven change.<sup>248</sup> Rather than a predefined process in which certain stock criteria determine which groups and rights get protections and which do not, students would be provided with an account of the ways in which social movements' social and constitutional change efforts are intertwined—and the ways in which rational basis review has facilitated the success of both.<sup>249</sup> Both the women's rights and LGBT rights movements provide highly teachable exemplars of this point and could provide a much more realistic picture than the current canonical account of the ways that rational basis review opens up opportunities to social movements and can ultimately lead to more durable change.<sup>250</sup>

This type of approach may seem messy and antithetical to the desire to have 1L students understand and absorb the law. But in fact, such an approach would simply redirect students' intellectual efforts to the real ballgame of contemporary rational basis review. Rather than struggling to construct the "rules" of ultradeferral review, students would instead be presented fairly simply with the ultradeferral account. From this vantage point students could then be encouraged to see the inconsistencies in the doctrine and how such inconsistencies can be, and have been, deployed by social movement advocates.<sup>251</sup> By scaffolding the complexity of rational basis review onto the ultradeferral canonical account, students can be taught the real skill of rational basis practice and indeed of lawyering generally:

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247 The LGBT rights context as well as the economic rights context both provide ample exemplars of such conflicting approaches, sometimes even within the context of the history of litigation regarding a single statute. *See, e.g.*, *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (rejecting a federal rational basis challenge to Florida's ban on adoption by gay prospective parents); *Fla. Dep't of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010) (concluding that a statute failed rational basis review under the state constitution).

248 Several casebooks already incorporate significant content regarding social movements and their impacts on constitutional change, so this need not be a dramatic shift in the content of the casebook, although it certainly would be for many popular casebooks. *See generally* BREST ET AL., *supra* note 1 (including significant social movement content); FARBER ET AL., *supra* note 1 (same).

249 The same-sex marriage movement provides an excellent example of this. *See generally* Bonauto & Esseks, *supra* note 124.

250 *See supra* notes 44–61, 123–27 and accompanying text.

251 For an example of how this can be done, with the use of notes and questions to help guide students in understanding what these inconsistencies are, what they mean, and how they can be applied by lawyers, see Eyer, *supra* note 236.

identifying and making arguments from inconsistency or ambiguity in the law.<sup>252</sup>

In short, it is not difficult to imagine how we might begin the process of transforming the canon of rational basis review.<sup>253</sup> By offering to the next generation of lawyers, academics, and judges a meaningful accounting of rational basis review's inconsistent but pervasive promise, we can begin the process of abandoning a legal culture that currently brands rational basis an exclusively "meaningless" and "empty" form of review. We need only be attentive to, and take seriously, the ways that rational basis review has, in fact, been applied in the world. We need only investigate and speak about the actual pathways of change.

### CONCLUSION

As Jill Elaine Hasday has observed, legal canons are "[b]y definition . . . hard to alter."<sup>254</sup> Like other mental frameworks that shape our understanding of the world, canons provide the intuitive frameworks through which we make sense of the proliferation of information that confronts us.<sup>255</sup> They tell us which information—which cases, legislation, histories, and texts—is important and which can be disregarded.<sup>256</sup> They are widely shared, and operate largely "at the level of common sense."<sup>257</sup> It is thus precisely canons' ability to "reproduce themselves" that some scholars have defined as the key quality of canonicity.<sup>258</sup>

But the very characteristics of legal canons that make them resistant to change are also their power. Canons, as the widely shared intuitive understandings of the legal community, have the power to shape our understandings of what the law permits and what it does not.<sup>259</sup> They have the power to

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252 This of course implicates the question of whether law students ought to be taught lawyering (i.e., the process of making or using the law), as opposed to simply learning the black letter doctrine. While there may be some disputes about this, it seems unlikely that most law professors seek to teach students exclusively the black letter doctrine, for which memorization from an outline could arguably suffice. The approach presented herein has the advantage of both teaching the students the black letter law—what they might expect to see on the bar exam—while also teaching them how to approach the black letter law like lawyers (i.e., as contingent and open to contestation, not as fixed and immovable).

253 Whether one views this type of transformation of the canon as a positive development may depend on one's perspective on meaningful rational basis review. For an extended critique of such review as essentially irrefutable and encouraging dissimulation, see Nachbar, *Rational Basis "Plus,"* *supra* note 28. Of course, such normative arguments aside, there may be value in having a canon that more accurately portrays the doctrine, especially in the teaching context where junior lawyers are being trained.

254 Hasday, *supra* note 1, at 832.

255 See Balkin & Levinson, *supra* note 18, at 1001.

256 See *id.*

257 Hasday, *supra* note 1, at 827.

258 Balkin & Levinson, *supra* note 18, at 1002.

259 See Hasday, *supra* note 1, at 829–30.

affect legal decisionmaking, and to effect legal change.<sup>260</sup> They have the ability to make certain legal arguments seem obvious, or conversely, invisible to advocates.<sup>261</sup> Thus, there are very real reasons why we should care about getting the canon right.

This Article has contended that in the case of rational basis review, our current canon—situating “real” rational basis review as ultradeferral and meaningless—gets it wrong. Rather, the reality of rational basis review is much more complex: a doctrine that is deeply and persistently unsettled; a “persistent[ly] . . . confus[ed]”<sup>262</sup> area of constitutional law. And amidst that confusion, social movements have repeatedly found the space—often denied them elsewhere—to make constitutional change. The canon’s continued failure to recognize this role of rational basis review—and continued adherence to a model in which heightened scrutiny marks the path to social movement success—represents a serious failing in our accounts of constitutional transformation.

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260 *See id.*

261 *See, e.g.*, Communication from Chai Feldblum, Comm’r, EEOC, to author (Apr. 4, 2014) (on file with the author) (commenting that “without a doubt” her lack of awareness of the role of rational basis review in the early sex and illegitimacy cases shaped her thinking in arguing for heightened scrutiny in the context of her work on *Romer* and her early academic work on sexual orientation issues).

262 *See* Schmidt, *supra* note 23, at 575.