MANUFACTURING UNCERTAINTY IN CONSTITUTIONAL LAW

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Civil rights litigation is awash in misinformation. Litigants have argued that abortion causes cancer, that gender-affirming hormone therapy for adolescents is irreversible, and that in-person voter fraud is a massive problem. But none of that is true. The conventional scholarly account about law and misinformation, disinformation, and dubious claims of fact focuses on the power of legislatures and amici to engage in perfunctory fact-finding and to rely on "alternative facts" or outright falsehoods to justify laws that harm and restrict the rights of marginalized populations. At the same time, the literature suggests that judges and the law are inundated with uninterrogated claims, incapable of sifting through the muck, and held hostage by rules of deference. So framed, the conventional account proposes to empower judges to interrogate the processes of legislative fact-finding and the factual predicates of legislative action.

This Article challenges that account. It demonstrates that the problem of misinformation in the law is not limited to legislatures and amici. Rather, the problem is built into judging and the indeterminacy of doctrine itself. This Article argues that in fact-intensive constitutional cases, opportunistic judges manufacture factual uncertainty when there is none by reframing doctrines of constitutional scrutiny as demands for scientific infallibility. And because few, if any, scientific studies are perfect, this strategy opens the door for any study, any screed, or any claim, no matter how dubious or unproven, to put rights at risk. The result is not just uncertainty and chaos. This pattern of doctrinal collapse and biased judging routinely and consistently serves to reify traditional hierarchies of power.

Learning lessons from the legal realist and critical legal studies traditions, this Article reframes the problem of misinformation in constitutional litigation from a narrow focus on fact-checking to a broader problem of legal

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doctrine and judicial power. Therefore, contrary to the current literature, which seeks to give judges more power to distinguish among factual claims, this Article takes a more holistic approach, focusing on political, economic, doctrinal, and institutional change.

INTRODUCTION

Dylan Brandt, a transgender adolescent living in Arkansas, challenged the constitutionality of a state law—HB 1570—that would deny all transgender minors access to gender-affirming hormone therapy.[1] The case, *Brandt v. Rutledge*,[2] centers the lived experience of transgender kids: the pain of gender dysphoria, the liberatory potential of hormonal therapy, and the difficult journey to living authentically in a hostile world.[3]

Brandt also bears striking similarity to an increasing number of civil rights cases that turn on so-called "legislative" or "social" facts,[4] or broad social questions about the world: Does classroom diversity enhance educational outcomes? Do voter ID laws disenfranchise minority voters? Do children of same-sex couples fare just as well as children of opposite-sex couples? Science matters in these cases not because it speaks to some adjudicative fact about who did what, when, and with what. Rather, evidence about social facts speaks to the strength of the state's justifications for restricting rights. Based on the opinions and briefs in the case, the question in *Brandt* is whether gender-affirming hormone therapy for adolescents is irreversible and dangerous or necessary and lifesaving.[5] If it is the former, the state might have a sufficient justification for banning it; if it is the latter, the state's discriminatory actions would be unjustified.

Notably, though, *Brandt* does not feature a genuine scientific controversy. The scientific community generally agrees that gender-affirming hormone therapies are safe, necessary, and, if it comes to it, reversible.[6] *Brandt*—like cases involving affirmative action, voting rights, same-sex marriage, and,

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1. *See* H.B. 1570, 2021 Gen. Assemb., 93d Reg. Sess. (Ark. 2021).

2. No. 21-CV-00450 (E.D. Ark. filed May 25, 2021); *see also* 551 F. Supp. 3d 882 (E.D. Ark. 2021) (granting motion for preliminary injunction), *aff'd sub nom.* Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022), *reh'g and reh'g en banc denied*, No. 21-2875 2022 WL 16957734 (8th Cir. Nov. 16, 2022).

3. This case is one of a growing number of cases in the lower federal and state courts advancing the rights of transgender individuals. For an up-to-date summary of some of those cases, see Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4173202 [https://perma.cc/LG53-5FCF].

4. Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955) (noting that legislative facts are "ordinarily general" rather than specific to the case at hand); Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 403 (1942) (stating that legislative facts are concerned with empirical data about the broader world); *see also* John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CALIF. L. REV. 877 (1988).

5. *See Brandt*, 551 F. Supp. 3d at 887–88.

6. *See id.* at 891–92. The Arkansas legislature made opposite findings but did not cite authorities for its claims. *See* H.B. 1570 §§ 3, 5, 8, 10A (stating that for those who take these therapies, "suicide rates, psychiatric morbidities, and mortality rates remain" high, that hormone therapy causes "serious known risks," that "most physiological interventions [for gender dysphoria are] unnecessary," and that gender-affirming procedures are "irreversible" and "invasive").

before recent changes in the law, abortion[7]—instead features a broad scientific consensus that supports marginalized populations' claims for justice and an opposing set of factual claims that constitute manipulation at best or misinformation at worst.[8]

Recognizing this trend, scholars have aimed their fire at a combustible mix of professionalized amici who present data in biased ways,[9] partisan legislatures that rationalize restricting the rights of marginalized populations with manipulated or false factual claims,[10] and rules of deference, which bring many of those claims into law.[11] This account, which I describe in Part I, presents appellate judges as either hopelessly inundated with uninterrogated factual claims and incapable of distinguishing between good and bad data or held hostage by legislative fact-finding to which they must often defer.[12] So framed, scholars' proposed solutions to a legal system awash in misinformation almost all call for judges to take more active roles in interrogating legislative facts.[13]

This Article surfaces a more insidious and troubling problem, one that calls into question the wisdom of relying on judges as fact-checkers. I demonstrate in Part II that, in fact-intensive constitutional litigation, opportunistic, partisan, or ideologically driven judges help manufacture scientific uncertainty by reframing different standards of judicial scrutiny—rational basis, strict scrutiny, and balancing tests—as demands for scientific infallibility for only one set of litigants. And because few if any social science studies are perfect, even those that form the basis of a broad consensus, this strategy gives judges cover for restricting rights despite

7. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overturning precedent and replacing the social and medical evidence-based "undue burden" standard for adjudicating abortion restrictions with one based entirely on history).

8. *See, e.g.*, Brief for Yaacov Sheinfeld, Jeanne Crowley, Ted Hudacko, Lauren W., Martha S., Kellie C., Kristine W., Bri Miller, Helen S. and Barbara F. as Amici Curiae in Support of Defendants-Appellants, Supporting Reversal, Brandt v. Rutledge, 551 F. Supp. 3d 882 (2021) (No. 21-2875), 2021 WL 5754550; Brief of Amici Curiae Medical and Mental Health Professionals Supporting Defendants-Appellants and Urging Reversal at 1, 3, 5, Brandt v. Rutledge, 551 F. Supp. 3d 882 (2021) (No. 21-2875), 2021 WL 5754522. Misinformation is "erroneous or misleading information to which the public may be exposed, engage with, and share." Ryan Calo, Chris Coward, Emma S. Spiro, Kate Starbird & Jevin D. West, *How Do You Solve a Problem Like Misinformation?*, SCI. ADVANCES, Dec. 8, 2021, at 1, 1.

9. *See generally* Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757 (2014).

10. *See, e.g.*, Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175 (2018); Joseph Landau, *Broken Records: Reconceptualizing Rational Basis Review to Address "Alternative Facts" in the Legislative Process*, 73 VAND. L. REV. 425 (2020); Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 111 (2008).

11. *See, e.g.*, Clark Neily, *Litigation Without Adjudication: Why the Modern Rational Basis Test Is Unconstitutional*, 14 GEO. J.L. & PUB. POL'Y 537 (2016); Jeffrey D. Jackson, *Classical Rational Basis and the Right to Be Free of Arbitrary Legislation*, 14 GEO. J.L. & PUB. POL'Y 493 (2016); Caitlin Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1 (2009).

12. *See* Larsen, *supra* note 9, at 1763–64.

13. *See, e.g.*, Larsen, *supra* note 10, at 182, 234–35; Borgmann, *supra* note 11, at 49.

overwhelming evidence supporting the contrary outcome. Judges and indeterminate legal standards are parts of the problem, not the answers to it.

A controversy about social facts is manufactured in law when a litigant or a judge claims that there is an ongoing empirical debate about a matter "for which there is actually an overwhelming scientific consensus."[14] Faced with a consensus in favor of legal outcomes that expand the rights of the marginalized, judges with ideological commitments to the contrary engage in tactics reminiscent of the industry-funded pushback to the scientific consensus about the dangers of smoking, using chlorofluorocarbons, and burning fossil fuels.[15] They manufacture doubt when there is none by forbidding any equivocation, misrepresenting scholarship, and claiming that more research is needed.[16] Together, these tactics reflect a broader strategy—namely, to unfairly move the goalposts on the standards of judicial scrutiny such that the only way to protect the rights of marginalized populations is for the science to be infallible, unassailable, and not subject to the slightest doubt or uncertainty.[17]

The roles of doctrines and judges in manufacturing uncertainty have both specific and systemic effects, neither of which bode well for the rights of the marginalized. Part III describes how, in any given case that turns on factual claims about social phenomena, judges can "equalize" evidence-backed knowledge and unsupported claims such that any factual claim about the world is just as (im)plausible as the next. In other words, for Dylan Brandt and other transgender Arkansans, it would no longer matter that the vast majority of experts agree that gender-affirming hormone therapies are necessary and safe. The result, instead, is a version of what Professors Bobby Chesney and Danielle Citron called the "liar's dividend": when everything is uncertain, anything could be false.[18] And when the law constructs a scenario in which anything could be false, those seeking to influence law and policy through misinformation have a leg up.

On a more systemic level, the manipulation of legislative facts has contributed to a steady stream of policy wins in the courts that have made it harder for poor and immigrant communities to vote,[19] harder for voters to

14. Leah Ceccarelli, *Manufactured Scientific Controversy: Science, Rhetoric, and Public Debate*, 14 RHETORIC & PUB. AFFS. 195, 196 (2011).

15. *See, e.g.*, NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT (2010).

16. *Id.* at 13, 18, 31, 59–60, 72–73, 86, 102, 115–17, 127–29, 187–91.

17. This argument is related to but distinct from the argument offered by Edward Herman and Noam Chomsky. *See* EDWARD HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA (2d ed. 2002) (critiquing a media business model in which personal prejudices and beliefs trump documented facts and science). This Article focuses on the way that judges—much like Chomsky's "sovereigns"—use doctrine, not simply propaganda and discourse.

18. Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1785–86 (2019); *see infra* Part III.B.

19. *See* Crawford v. Marion Cnty. Elections Bd., 553 U.S. 181 (2008) (holding that a state voter ID law did not violate the U.S. Constitution); *infra* Part II.C.1.

ensure that their vote matters,[20] harder for individuals to access abortion,[21] harder for those seeking abortions to escape manipulative screeds about the procedure's effects,[22] harder for racial minorities to overcome the effects of systemic racism,[23] and harder for queer people to live authentically.[24] These victories then push restrictive norms about access to rights and the reach of constitutional protections while entrenching underlying factual claims through the precedential nature of constitutional law.[25] As a result, the law actively entrenches false and misleading discourses in defense of intersectional socioeconomic, racial, gender, and sexual hierarchies, or what constitutional law scholar Nikolas Bowie calls "antidemocracy."[26] If that is the case, it is not only Dylan but all members of marginalized populations who are at risk when methods of constitutional interpretation skew the social construction of knowledge. Put another way, if the canonical Brandeis brief began a process of tethering law to its real-world consequences, courts have vandalized that process to achieve unjust ends.[27]

There are no easy solutions to this problem. Law will always play a role in influencing norms, beliefs, and conceptions of right, wrong, true, and false.[28] Doctrinal collapse into demands for infallibility and the resulting manufactured uncertainty are the results of complex and overlapping political, economic, doctrinal, and institutional forces. Therefore, solutions should be multifaceted as well.[29]

The conventional narrative of misinformation and the law focuses on media literacy and fact-checking. Part IV makes initial suggestions for how we can go further. The easy access to misleading and uncorroborated claims is in part a product of the political economy of misinformation, academic publishing, and right-wing advocacy. Platforms collect data and profit from viral sharing.[30] Predatory academic publishers, weak standards of peer review, influential grantmakers, and academic pressures fuel the rise of

20. *See* Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (upholding partisan gerrymandering in the states); *infra* Part II.C.1.

21. *See* Gonzales v. Carhart, 550 U.S. 124 (2007); *see infra* Part II.C.2.

22. *See* Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889 (8th Cir. 2012) (en banc); *see infra* Part II.A.1.

23. Grutter v. Bollinger, 539 U.S. 306 (2003); *see infra* Part II.B.1.

24. DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *overruled by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Otto v. City of Boca Raton, 981 F.3d 854 (11th Cir. 2020) (striking down bans on conversion therapy for minors); *see infra* Parts II.A.3, II.B.2.

25. *See infra* Part III.A.

26. Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 161 (2021).

27. MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 209 (1992) ("[T]he Brandeis brief, by highlighting social and economic reality" in *Muller v. Oregon*, 208 U.S. 412 (1908), a case about a maximum work-hour law for women, "suggested that the trouble with existing law was that it was out of touch with that reality").

28. *See* Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 373–74 (2009).

29. *See infra* Part IV.

30. VICTOR PICKARD, DEMOCRACY WITHOUT JOURNALISM 126 (2020).

journals that sound reputable but print faulty research.[31] And the tangled web of advocacy groups fronting as research institutes and supported by unknown donors creates a steady stream of quotable (and citable) falsehoods. Law plays a role in all three, and reform can help rein in the chaos.

While that is happening, both institutional and doctrinal reform is necessary to prevent appellate judges from transforming tiers of scrutiny into little more than finding an article on Google Scholar. Judicial humility is a good first step; a commitment to antisubordination goals is an even better one. That is, in the face of inevitable uncertainty (manufactured or real) and disagreement within scientific communities, the law should consider historical marginalization and err on the side of more rights, more freedom, and more protections for the institutionally oppressed. Otherwise, consequential decisions that turn on judicial misconstruction of social reality to achieve political ends will be the beginnings of a long-term pattern.

This Article teases out examples of courts manufacturing factual uncertainty, describes the implications of this narrative, and offers lessons for advocates, scholars, and the legal field. Part I summarizes the existing literature on misinformation, law, and deference and concludes by highlighting practical, structural, and scope limitations of scholars' proposals to date. Part II lays out the Article's descriptive claim—namely, that judges can use almost any kind of scrutiny to manufacture factual uncertainty in the law when none exists in science. Part III describes the normative implications of this pattern, focusing on how manufactured uncertainty about social phenomena helps to reify traditional structures of power. Part IV urges scholars to look beyond the four walls of the courtroom to consider structural reform to the political economy of misinformation and the institutional role of judges and judging. The Article concludes with warnings and hopes for the future.

I. SOCIAL FACTS AND THE ROLE OF DEFERENCE

The current narrative of misinformation in the law has three primary players: amici, legislatures, and deference. *Amici* overwhelm a judiciary that is institutionally incompetent to separate the wheat from the chaff of factual claims about social phenomena, *legislatures* rationalize discrimination with "alternative" facts to enforce values that are inconsistent with scientific knowledge, and *deference* allows those misrepresentations to justify policy. There are undoubtedly other sources of misinformation in the law,[32] but scholars are right to focus on the flood rather than the trickle.

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31. *See* Jevin D. West & Carl T. Bergstrom, *Misinformation in and About Science*, PNAS, Apr. 13, 2021, at 1, 3–5, art. no. e1912444117.

32. Courts, for example, do their own fact-finding too. Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1286–305 (2012); Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 97–108 (2013); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 43–50 (2011). Expert witnesses will often offer debunked claims of fact about broad social phenomena. *See, e.g.*, WILLIAM ESKRIDGE, JR. & CHRISTOPHER RIANO, MARRIAGE EQUALITY 255–56, 555–58, 565–71 (2020) (describing how David Blankenhorn, the chief expert witness offered by the

This focus has led scholars to a variety of proposals with two primary goals: reining in amici and disrupting doctrines and norms of deference, at least when it comes to factual claims in civil rights cases. The following sections briefly review this conventional account, ultimately highlighting several limitations to be addressed in this Article.

A. Sources of Misinformation

One source of misinformation in the law is the amicus brief, which often introduces uninterrogated factual claims into appellate litigation. Professor Allison Orr Larsen has shown the way in which amicus briefs have become vehicles for "lopsided, unreliable, and untested information" submitted to appellate courts by professionalized and biased advocacy groups.[33] In *Obergefell v. Hodges*,[34] to take only one example, amici that supported denying marriage to same-sex couples argued that homosexuality causes negative health consequences,[35] that only opposite-sex marriages can maintain stability and kinship between children and biological parents,[36] and that opposite-sex couples provide the optimal settings for raising children,[37] among many other baseless claims. Professor Aziza Ahmed parsed amicus briefs in abortion cases to find antiabortion rhetoric repackaged as statements of medical fact.[38] And yet, despite these problems, courts often cite amicus briefs as the sources of support for a factual claim.[39]

Another source of misinformation is the legislature. For example, to rationalize laws that punish transgender individuals for using public restrooms that match their gender identities, legislatures fabricated the myth that heterosexual cisgender men often use trans-inclusive nondiscrimination laws to enter women's restrooms and prey on cisgender women and girls.[40] In March 2023, the American Civil Liberties Union was tracking 116 bills introduced in the previous three months alone that sought to ban transgender adolescents from accessing gender-affirming hormone therapy on the false

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proponents of California's ban on same-sex marriage, and Mark Regnerus, an expert witness in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), used debunked and misleading studies to argue that children are harmed when they grow up in homes without one mother and one father).

33. Larsen, *supra* note 9, at 1815; *see also id.* at 1763–64.

34. 135 S. Ct. 2584 (2015).

35. Brief of *Amici Curiae* Mike Huckabee Policy Solutions and, Family Research Institute in Support of Respondents at 14–15, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571 & 14-574), 2015 WL 1534336.

36. *See* Brief of Amicus Curiae State of Alabama in Support of Respondents at 6, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571 & 14-574), 2015 WL 1534344.

37. *See id.* at 7.

38. Aziza Ahmed, *Medical Evidence and Expertise in Abortion Jurisprudence*, 41 AM. J.L. & MED. 85, 99–108 (2015).

39. *See* Larsen, *supra* note 9, at 1779.

40. *See* Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159, 192–93 (2015).

grounds that hormone therapy is harmful and irreversible.[41] In 2020, eleven states required individuals seeking abortions to be told that the procedure could cause depression, infertility, or breast cancer.[42] And yet, as Larsen notes, "none of these claims withstand medical scrutiny."[43] Targeted restrictions on abortion providers (TRAP) laws may have been rationalized as making abortions safer,[44] but abortion is already incredibly safe.[45] And voter ID laws, limitations on absentee voting, and other voting restrictions have been justified as necessary to protect against a kind of voter fraud that rarely, if ever, happens.[46]

Of course, amici and legislatures do not exist in vacuums. Like all of us, they operate in a fractured modern digital and media ecosystem.[47] The internet has eroded traditional gatekeeping barriers that could stanch the flow of false claims.[48] Social media platforms, which algorithmically curate information based on what they think people want to hear, create sociocultural echo chambers that trigger and reinforce prior beliefs, even if they are not true.[49] Myth-based lawmaking and legal argumentation may be nothing new, but many scholars have recognized technology's role in catalyzing a particularly cacophonous era of "alternative" facts.[50]

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41. *See Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, ACLU, https://www.aclu.org/legislative-attacks-on-lgbtq-rights?impact=health [https://perma.cc/LC82-EFTD] (last visited Apr. 3, 2023).

42. *See* Rachel Benson Gold & Elizabeth Nash, *Flouting the Facts: State Abortion Restrictions Flying in the Face of Science*, GUTTMACHER POL'Y REV. (May 9, 2017), https://www.guttmacher.org/gpr/2017/05/flouting-facts-state-abortion-restrictions-flying-face-science [https://perma.cc/Z9UD-3AJX].

43. Larsen, *supra* note 10, at 203.

44. *Id.* at 207.

45. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2320–21 (2016) (Ginsburg, J., concurring) (citing studies demonstrating the safety of abortion procedures), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

46. Terri Peretti, *Judicial Partisanship in Voter Identification Litigation*, 15 ELECTION L.J. 214, 218 (2016); Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 645–48 (2007).

47. David Nakamura, *Media Critic Obama Is Worried That "Balkanized" Media Is Feeding Partisanship*, WASH. POST (Mar. 27, 2016), https://www.washingtonpost.com/politics/media-critic-obama-is-worried-that-balkanized-media-are-feeding-partisanship/2016/03/27/8c72b408-f1e3-11e5-89c3-a647fcce95e0_story.html [https://perma.cc/42E2-XWGB].

48. Philip M. Napoli, *What If More Speech Is No Longer the Solution?: First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMMC'NS L.J. 55, 71–74 (2018).

49. Dimitar Nikolov, Alessandro Flammini & Filippo Menczer, *Right and Left, Partisanship Predicts (Asymmetric) Vulnerability to Misinformation*, MISINFORMATION REV. (Feb. 15, 2021), https://misinforeview.hks.harvard.edu/article/right-and-left-partisanship-predicts-asymmetric-vulnerability-to-misinformation/ [https://perma.cc/G6GE-7AXA]; Kelly Garrett, *Echo Chambers Online?: Politically Motivated Selective Exposure Among Internet News Users*, 14 J. COMPUT.-MEDIATED COMMC'N 265, 279 (2009).

50. *See, e.g.*, Larsen, *supra* note 10, at 190–201; Larsen, *supra* note 9, at 1776–77; PICKARD, *supra* note 30, at 17–19, 29–41; Matteo Cinelli, Gianmarco De Francisci Morales, Allesandro Galeazzi, Walter Quattrociocchi & Michele Starnini, *The Echo Chamber Effect on Social Media*, PNAS, Feb. 23, 2021, art. no. e2023301118, at 1.

B. Deference and Standards of Review

Though sometimes highly contestable and outright false, legislatures' "alternative" factual claims that describe their understanding of broad social phenomena are often given considerable deference.[51] For many scholars and judges, this is a matter of separation of powers and institutional competence. As Caitlin Borgmann has described, the conventional account suggests that legislatures are better at "'amass[ing] and evaluat[ing] the vast amounts of data' bearing upon legislative questions."[52] The U.S. Supreme Court has restated this as a truism many times for over a century.[53] Legislatures are depicted as closer to the immediate and evolving needs of those they represent.[54] And because they are assumed to be more diverse than judiciaries,[55] legislatures are supposed to have a better understanding of how social problems affect a wider variety of people.[56] Given these perceived advantages, judges often take a modest approach when faced with legislative pronouncements of social facts.

Therefore, it should come as no surprise that scholars have criticized deference as complicit in the spread of misinformation in the law. Professor Joseph Landau argues that "doctrines have been designed without concern for rooting out . . . legislative falsehood."[57] Landau also argues that strict scrutiny—which requires narrowly tailored state action and compelling justifications for certain forms of discrimination and impingements on fundamental rights[58]—is "devoid of any explicit authorization to protect groups whose underrepresentation in legislative processes renders them vulnerable to the peddling of alternative facts in lawmaking."[59] This is also

51. *See* DAVID FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 10 (2008); Borgmann, *supra* note 11, at 6 ("[F]ederal courts have generally deferred to congressional and state legislative fact-finding.").

52. Borgmann, *supra* note 11, at 18–21 (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997)).

53. *E.g.*, Rast v. Van Deman & Lewis Co., 240 U.S. 342, 357 (1916) (noting that even when the factual bases for state legislation are "opposed by argument and opinion of serious strength," it is "not within the competency of the courts to arbitrate"); United States v. Morrison, 529 U.S. 598, 628 (2000) (Souter, J., dissenting) ("Congress['s] . . . institutional capacity for gathering evidence and taking testimony far exceeds ours.").

54. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 68 (1999); *see also* Washington v. Glucksberg, 521 U.S. 702, 788 (1997) (Souter, J., concurring) (asserting that legislatures "have more flexible mechanisms for factfinding than the Judiciary" and have "the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions").

55. *But see* Renuka Rayasam, Nolan D. McCaskill, Beatrice Jin & Allan James Vestal, *Why State Legislatures Are Still Very White—and Very Male*, POLITICO (Feb. 23, 2021, 2:13 PM), https://www.politico.com/interactives/2021/state-legislature-demographics/ [https://perma.cc/28CZ-NAD4] (profiling the lack of diversity of state legislatures).

56. Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1179 (2001).

57. Landau, *supra* note 10, at 442.

58. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268 (2007); Republican Party of Minn. v. White, 536 U.S. 765, 774–75 (2002).

59. Landau, *supra* note 10, at 443.

true of rational basis review, he says, because any judicial standard that "greatly defers to the political branches . . . runs the risk of deferring to bogus legislative rationales as well."[60] Clark Neily has made a similar argument, noting that a requirement of merely "any conceivable justification" from the state allows laws based on little more than "government-favoring conjecture" to pass constitutional scrutiny.[61]

In sum, the two strands of scholarship on misinformation in constitutional law conceptualize the problem as dangerous combinations of either amici run amok and overwhelmed judges or biased claims and outdated doctrines that require deference to those making those claims. Unsurprisingly, scholars' proposed solutions track these frames.

To rein in amici, Larsen proposes quality control measures, including limiting the number of amicus briefs, outsourcing scrutiny of amici's factual claims to the parties in a case, requiring amici to choose between making only factual claims or legal claims, and requiring source transparency.[62] She also recommends that the Supreme Court flag factual questions in grants of petitions for certiorari, invite disinterested parties to make arguments, "discipline itself" to not rely on any other "extra-record facts,"[63] and respond in its opinions to factual assertions that, if true, would change the result.[64]

To disrupt misinformation's path through deference, Larsen and Borgmann suggest introducing judicial fact-checking into the adjudicative process to make sure that legislatures are not basing their claims on demonstrable falsehoods. Larsen suggests that standards of review and deference "should closely probe the process through which the factual claims were made"; deference should be earned, not assumed.[65] A legislature should do its "homework and produce[] authorities such that a fact-checker would feel satisfied a connection" between underlying facts and state action "was plausible."[66] Borgmann recommends a broad judicial power to interrogate legislative facts in individual-rights cases even when legislatures rely on statements of values.[67] Neily and Professor Jeffrey D. Jackson have suggested that courts should use the facts before them, their own judgment, and independent analysis to investigate the underlying intent of the

60. *Id.* at 445.

61. Neily, *supra* note 11, at 555. On the other hand, heightened and strict scrutiny have taken less fire. Landau acknowledges that heightened scrutiny's more searching judicial interrogation of the factual predicates of legislative action can involve "factual analysis, which occasionally benefits out-groups prone to legislative stereotyping." Landau, *supra* note 10, at 443 (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996), and *Craig v. Boren*, 429 U.S. 190, 199 (1976), as examples). Some scholars have even gone so far as to say that legislative facts have little impact on the outcome of cases involving strict scrutiny. *See, e.g.*, Kathryn Abrams, *The Legal Subject in Exile*, 51 DUKE L.J. 27, 66–67 (2001); William E. Lee, *Manipulating Legislative Facts: The Supreme Court and the First Amendment*, 72 TUL. L. REV. 1261, 1319 (1998).

62. Larsen, *supra* note 9, at 1809–12.

63. *Id.* at 1813–14.

64. *See id.* at 1816.

65. *See* Larsen, *supra* note 10, at 234.

66. *Id.* at 235.

67. Borgmann, *supra* note 11, at 49.

legislature.[68] They would reform all rational basis review in this way to ensure that state actions are neither based on an improper motive nor irrationally divorced from a legislature's stated motives.[69]

In between these ideas for aggressive judicial fact-checking and bowing out of factual interrogation altogether sits Landau's proposal for "broken records review."[70] Broken legislative records are those based on distortions, alternative facts, and misinformation.[71] To avoid the harms of myth-based lawmaking, broken records review would operate like summary judgment: if parties challenging a law's constitutionality can prove at a pretrial hearing that the legislature acted on false or distorted factual claims, the burden would shift to the state to prove that it indeed acted on a demonstrably factual basis.[72] If the state wins, the case would proceed normally; if the challengers win, the law would be overturned.[73]

C. Limitations of the Conventional Account

Although innovative, these proposals are practically and structurally risky. Proposals that ask judges to conduct more searching reviews of factual claims run headfirst into a sharply and increasingly partisan judiciary.[74] Nor can we be confident that judges with new fact-checking powers will be able or willing to escape the same cognitive biases that make us all susceptible to believing whatever confirms our priors. They may have professional training, but judges are just like us: they make decisions pursuant to "subconscious, extralegal influences on their perception of legally consequential facts."[75] Even a judge who sits as a fact-checker may view one set of sources and procedures to be sufficient when another would not, especially when their political views align with the legislature and when contestable claims are laundered through academic journals with respectable names but without respectable standards. This is one way in which Landau's proposal for broken records review falls short. Although it uses well-worn tools of the adversarial system—burden-shifting in a hearing akin to summary judgment—broken records review nevertheless relies on litigants and judges to discern alternative facts from real ones when making decisions about fact sufficiency in a preliminary hearing. Proposals that seek to focus

68. Neily, *supra* note 11, at 550, 555; Jackson, *supra* note 11, at 511–12.
69. Jackson, *supra* note 11, at 511–12.
70. Landau, *supra* note 10, at 450.
71. *Id.*
72. *See id.* at 451–53.
73. *See id.* at 452.
74. *See* Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 8 SUP. CT. REV. 301, 303–18 (2017); John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/ [https://perma.cc/VP57-XYPY] (describing how Trump administration appointments made the federal judiciary less diverse).
75. Dan M. Kahan, *"Ideology in" or "Cultural Cognition of" Judging: What Difference Does It Make?*, 92 MARQ. L. REV. 413, 417 (2009).

judicial review on legislative motives are even more difficult to implement in practice. Legislative intent is often obscure, pretextual, multifaceted, or simply unknowable.[76]

On a structural level, focusing on deference is a necessary, but incomplete, solution. Proposals for new standards of deference do not address the excess judicial power that allows judges to pick and choose when they defer to legislative fact-finding and when they don't.[77] Larsen rightly acknowledges that the rules and norms governing deference to legislative facts are "murky" at best.[78] She and others have found that sometimes, courts are inconsistent; sometimes, individual judges are inconsistent from case to case.[79] In other words, the reality is that doctrines of deference are not set in stone. To use the language of critical legal studies, these doctrines are techniques that judges use to "rationaliz[e]" value judgments, levers to be pulled when judges want or need them.[80] So too are burdens of proof in constitutional litigation.[81] New standards, however innovative, do not address law's indeterminacy.

There is also a political agnosticism running through some scholarship on misinformation in the law. Scholars note that both the left and right traffic in misinformation.[82] Larsen's research on Supreme Court citations to amici as experts found no ideological trends.[83] When suggesting that Supreme Court litigants can serve as amicus gatekeepers for "the one or two amici with the most reliable information,"[84] Larsen implies that both sides will have reliable information. That is indeed possible. But in many civil rights cases that determine the fate of marginalized populations, misinformation-based rationales in the law are often weaponized by the right, including by those who want to restrict an individual's right to terminate a

76. *See* Emily Sherwin, *Rules and Judicial Review*, 6 LEGAL THEORY 299, 307 (2000); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 323 (1997).

77. *See* Kenji Yoshino, *Appellate Deference in the Age of Facts*, 58 WM. & MARY L. REV. 251, 254 (2016) (noting that the Supreme Court and individual judges have been inconsistent in affording deference to legislative fact-finding); Bertrall Ross, *The State as Witness:* Windsor, Shelby County, *and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. REV. 2027, 2031–62 (2014) (describing conflicting approaches to deference).

78. Larsen, *supra* note 10, at 227.

79. *Id.* at 227–29.

80. Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 206 (1984).

81. *See, e.g.*, FAIGMAN, *supra* note 51, at 101–02 (interpreting *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448–50 (1985), as placing the burden on the legislature in rational basis review); *id.* at 102 (interpreting *Burson v. Freeman*, 504 U.S. 191, 208–09 (1992), as placing the burden on petitioners even under heightened scrutiny).

82. Larsen, *supra* note 10, at 177–78.

83. Larsen, *supra* note 9, at 1778.

84. *Id.* at 1810.

pregnancy,[85] discriminate against LGBTQ+ people,[86] and deny the state the ability to address the lasting effects of systemic racism.[87]

A similar agnosticism underlies scholarly focus on deference. As a form of judicial modesty based on norms of separation of powers and institutional competence,[88] deference positions the law as a neutral force through which misinformation merely passes. When judges defer to legislative facts, they maintain that they are doing so because they believe that their judgment should not replace that of the political branches, even when they disagree with the legislature's factual claims, the resulting law, or both.[89] Therefore, by zeroing in on deference, scholars implicitly reduce the law and judges to mere conduits of information within a larger lawmaking process.

But that absolves judges and the doctrinal tools they use of responsibility for misinformation, placing it instead on the legislature or amici. Not so fast. As a long scholarly tradition in sociology and critical studies teaches us, the law is not neutral.[90] Nor are there any neutral conduits in the flow of information.[91] Information flows through social institutions—the media, digital platforms, schools, corporate organizations, interest and affinity groups, families, and churches, among many others—and those institutions influence the meaning and legitimacy of that information in a society.[92] Law is an integral and interested part of this process, both as a sociopolitical institution and as a norm-setter that influences what a society should think is

85. *See, e.g.*, Ruth Colker, *Uninformed Consent*, 101 B.U. L. REV. 431, 448–51 (2021); Tobin, *supra* note 10; Larsen, *supra* note 10, at 202–09.

86. *See, e.g.*, ESKRIDGE & RIANO, *supra* note 32, at 552–79.

87. *E.g.*, LILIANA M. GARCES & OIYAN POON, ASIAN AMERICANS AND RACE-CONSCIOUS ADMISSIONS: UNDERSTANDING THE CONSERVATIVE OPPOSITION'S STRATEGY OF MISINFORMATION, INTIMIDATION & RACIAL DIVISION 22–25 (2018), https://www.civilrightsproject.ucla.edu/research/college-access/affirmative-action/asian-americans-and-race-conscious-admissions-understanding-the-conservative-opposition2019s-strategy-of-misinformation-intimidation-racial-division/RaceCon_GarcesPoon_AsianAmericansRaceConsciousAdmi.pdf [https://perma.cc/2F7A-AT5W].

88. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997) (making the institutional competence argument); Oregon v. Mitchell, 400 U.S. 112, 207 (1970) (Harlan, J., concurring) (adding the separation-of-powers argument), *superseded by constitutional amendment*, U.S. CONST. amend. XXVI; *see also* Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 99–108 (1966).

89. *See, e.g.*, Rast v. Van Deman & Lewis Co., 240 U.S. 342, 357 (1916) (arguing that factual predicates of legislative action are owed deference even when "opposed by argument and opinion of serious strength"); Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (noting that it is not judges' duty to decide a case based on their agreement with a policy "because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law"), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

90. *See* David Kairys, *Introduction* to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1, 3–6 (David Kairys ed., 3d ed. 1998).

91. *See generally* JULIE COHEN, CONFIGURING THE NETWORKED SELF 5 (2012) (arguing that institutions modulate the flow of information).

92. *See id.*; Trevor J. Pinch & Wiebe E. Bijker, *The Social Construction of Facts and Artifacts: Or How the Sociology of Science and the Sociology of Technology Might Benefit Each Other*, *in* THE SOCIAL CONSTRUCTION OF TECHNOLOGICAL SYSTEMS 11, 21–34 (Wiebe Bijker, Thomas Hughes & Trevor Pinch eds., 2012).

good or bad and true or false.[93] The law also engages in what sociologists call the social construction of knowledge, or the process by which different social groups and institutions engage in the contestation and development of social phenomena.[94] In other words, court decisions help construct what society thinks is true, especially when the science is unclear. As the next part demonstrates, one of the many ways this distorts public understanding of law and science is through mechanisms of constitutional interpretation that pave the way for fringe, uncorroborated factual claims. That problem remains unaffected by reforms to the rules and norms of amicus briefing and agnostic deference.

II. DOCTRINE AND FACTUAL QUESTIONS

Using case studies on laws about abortion, LGBTQ+ rights, race-based classifications, and elections, all of which have hinged on the legal construction of legislative facts, this part describes how some courts have used rational basis, strict scrutiny, and balancing tests to create the false impression of ongoing scientific uncertainty by imposing impossible demands of infallibility on parties seeking to protect the legal equality of marginalized populations. Because no study is infallible, these doctrines have become affirmative vehicles for misinformation in support of conservative policy goals rather than merely points on a sliding scale of judicial scrutiny of state action.

Rather than telling a story about science and scientists, this part tells a story about law and judging. It recognizes that there exists no single, epistemically best study, that new methods and theories may replace old ones, and that not all good science looks the same.[95] At the same time, it shows how each

93. *See* Mark Tushnet, *Post-Realist Legal Scholarship*, 15 J. SOC'Y PUB. TCHRS. L. 20 (1979); Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996) (noting that law has an "expressive function" underlying its coercive capacities).

94. *See* Kenneth Gergen, *The Social Constructionist Movement in Modern Psychology*, 40 AM. PSYCH. 266, 266 (1985) (on social construction in psychology generally); *see also* PETER BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY 7–11 (1966); DAVID BLOOR, KNOWLEDGE AND SOCIAL IMAGERY 5 (2d ed. 1992) ("[K]nowledge for the sociologist is whatever people take to be knowledge. . . . [T]he sociologist will be concerned with beliefs which are . . . invested with authority by groups of people."); BRUNO LATOUR & STEVE WOOLGAR, LABORATORY LIFE (1986) (arguing that our understanding of technology and new forms of knowledge is based on social forces interacting to create, distribute, regulate, and use that technology).

95. *See* BRUNO LATOUR, WE HAVE NEVER BEEN MODERN 1–9 (Catherine Porter trans., 1993); Edward J. Imwinkelried, *Evidence Law Visits Jurassic Park: The Far-Reaching Implication of the* Daubert *Court's Recognition of the Uncertainty of the Scientific Enterprise*, 81 IOWA L. REV. 55, 58–65 (1995). This Article is not about *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Judges apply the *Daubert* test to both sides' experts and scientific evidence in adversarial litigation on a case-by-case basis, in a process that often results in the introduction of nonestablished theories, methods, and research. *See, e.g.*, Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 318 (7th Cir. 1996) (noting that, under *Daubert*, scientists' evidence may be "admissible even if the particular methods they have used in arriving at their opinion are not yet accepted as canonical"). But *Daubert* does not apply to legislative facts about broad social phenomena, which is this Article's chief concern. *See* Rachel F. Moran, *What Counts as Knowledge?: A Reflection on Race, Social Science, and the Law*, 44 LAW &

method of constitutional interpretation can be leveraged to create enough uncertainty about social facts to allow judges to decide cases however they want.[96]

A. Rational Basis Review

Rational basis review is a convenient place to start for three reasons: it has received the most attention in the law and misinformation literature, its role can be easily confused with that of deference,[97] and it is the new standard for courts to evaluate the constitutionality of abortion restrictions after the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.[98]

Rational basis review requires state action to be "rationally related" to a "legitimate" objective.[99] That objective need not be articulated or even in the minds of the legislators when they passed the law; in some cases, "any reasonably conceivable" rationale will do.[100] Given this low threshold for judicial acceptance of a legislature's rationale, one scholar considers rational basis to be "toothless" as a means of guarding against myth-based lawmaking.[101] In fact, this assessment gives rational basis too much credit. As demonstrated below, rational basis does not just let false or misleading

SOC'Y REV. 515, 533 (2010). That said, the *Daubert* Court, which noted that "there are no certainties in science" and that journal publications "do[] not necessarily correlate with reliability," recognized that science is at least partly socially constructed. 509 U.S. at 590, 593, 597. *But see* David S. Caudill & Richard E. Redding, *Junk Philosophy of Science?: The Paradox of Expertise and Interdisciplinarity in Federal Courts*, 57 WASH. & LEE L. REV. 685, 695–96 (2000) (suggesting that *Daubert* did not effectively incorporate social constructivism).

96. This part categorizes cases based on the doctrine that each court uses to evaluate state action, even if that doctrine may be contested. In abortion litigation, for example, different courts and different judges on the same court have used different methods of judicial review. The U.S. Court of Appeals for the Eighth Circuit used rational basis review to assess the constitutionality of restrictions on abortion. Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 904 (8th Cir. 2012) (en banc). In 2015, a five-justice majority on the Supreme Court clarified that appellate courts should undertake their own balancing of harms and benefits to determine whether an abortion restriction constitutes an "undue burden." Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). In a subsequent opinion, the chief justice articulated a different test that restricts judges to assessing burdens alone. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2135–38 (2020) (Roberts, C.J., concurring), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). This debate has been foreclosed by *Dobbs*, which reversed precedent to create a uniform rational basis test for abortion restrictions. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2283–84 (2022). This Article takes the cases' analytical frames as they come to illustrate a broader point about all standards of review.

97. *See supra* notes 10–11 and accompanying text.

98. 142 S. Ct. 2228 (2022); *see id.* at 2283–84.

99. *See* Thomas Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1629 (2017); Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 412–13 (2016) (critiquing the "any conceivable purpose" version of rational basis).

100. *See, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

101. Landau, *supra* note 10, at 445.

factual claims about social phenomena pass by; rational basis today operates in a way that legitimizes those claims.

1. Required Disclosures by Abortion Providers (the *Rounds* Litigation)

Consider, for example, *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*.[102] *Rounds* involved a challenge to South Dakota's 2005 abortion statute,[103] which required a physician to inform a pregnant person in writing of "all known medical risks . . . and statistically significant risk factors to which the pregnant [person] would be subjected, including: (i) Depression and related psychological distress; [and] (ii) Increased risk of suicide ideation and suicide."[104] The court used a form of rational basis review to assess the truthfulness of the required warnings.[105] As a result, both sides made factual claims in support of their positions.

The state and its supporting amici relied on studies published in international medical journals purporting to show higher rates of suicidal ideation among women who have had induced abortions.[106] But this research was debunked. The American Psychological Association (APA) convened a task force to review all existing literature on the alleged mental health effects of abortion and found the risks to be no greater than for those who took their pregnancies to term.[107] Planned Parenthood offered studies showing no causal connection between abortion and suicide and showed that the studies cited by the state did not show that any higher rates of depression or suicide were actually associated with or caused by having an abortion.[108] They also argued that the scientific evidence does not prove that suicidal ideation is a "known" risk of abortion because studies showing correlation—the only conclusion made by studies introduced by the state—cannot establish that a risk really exists.[109]

In this context, in which the state and its amici offered unreliable and uncorroborated evidence to support its claims, rational basis review became a demand for factual perfection from the plaintiffs: to overcome the presumption that "the state legislature, rather than a federal court, is in the best position to weigh the divergent results and come to a conclusion about the best way to protect its populace," the court demanded that Planned Parenthood "show that abortion has been ruled out . . . as a statistically

102. 686 F.3d 889 (8th Cir. 2012) (en banc).

103. *Id.* at 891.

104. S.D. CODIFIED LAWS § 34-23A-10.1(1)(e) (2023).

105. *Rounds*, 686 F.3d at 904 (deferring to the legislature); *see also id.* at 893 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882–83 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)).

106. *Id.* at 898.

107. BRENDA MAJOR, MARK APPELBAUM, LINDA BECKMAN, MARY ANN DUTTON, NANCY FELIPE RUSSO & CAROLYN WEST, AM. PSYCH. ASS'N, REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION 4 (2008), http://www.apa.org/pi/women/programs/abortion/mental-health.pdf [https://perma.cc/3DSB-W3X2].

108. Appellee's Brief at 25–26, 30–34, Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889 (8th Cir. 2012) (No. 05-3093), 2005 WL 4902901.

109. *Rounds*, 686 F.3d at 899.

significant causal factor in post-abortion suicides."[110] No study can do that, so the case was lost.

In its opinion, the court spent four pages (out of a total of ten) picking apart every study offered into evidence by the challengers.[111] It demanded peer-reviewed studies from Planned Parenthood and the American College of Obstetricians and Gynecologists (ACOG) but accepted non-peer-reviewed studies from the state.[112] It demanded "unequivoc[ation]" from Planned Parenthood but accepted studies from the state that failed to conduct standard statistical tests to show how much, if at all, abortion affected future suicidal ideation risk.[113] It found that the vast consensus among medical professionals that abortion is safe and does not cause depression or suicide was insufficient because those studies included honest statements about their limitations, a feature of the scientific method and good scholarship.[114] And the court suggested that statements from the American Medical Association discrediting a supposed link between abortion and depression were insufficient because several—the court described them as "many"—antiabortion doctors disagreed.[115]

As a result, the court's use of rational basis review created factual uncertainty: it was impossible, the court said, to determine "whether some of the studies are more reliable than others."[116] It reviewed the evidence of a scientific consensus but implied that no such consensus existed because no study could provide "unequivocal evidence" that abortion does not cause any negative mental health effects.[117] Because no study could prove the counterfactual,[118] rational basis created factual uncertainty about abortion. By demanding infallibility from the plaintiffs but accepting the state's speculation, rational basis affirmatively demotes the legitimacy of widely accepted medical knowledge while creating a false equivalency with uncorroborated claims.

2. Admitting Privileges (the *Abbott* Litigation)

The U.S. Court of Appeals for the Fifth Circuit took an even more radical approach to rational basis in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*.[119] Whereas the *Rounds* court turned the standard into an impossible demand for infallible empirical studies, the *Abbott* court

110. *Id.* at 900, 904.
111. *Id.* at 900–05.
112. *Id.* at 900.
113. *Id.* at 901.
114. *Id.* at 902.
115. *Id.* at 901–02.
116. *Id.* at 904.
117. *Id.* at 901.
118. *See* Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1328 (1989) (highlighting the difficulties inherent in trying to prove a counterfactual in a disparate impact case).
119. 748 F.3d 583 (5th Cir. 2014).

used rational basis to legitimize a single, unsupported claim from a single witness.

Abbott featured a Texas law that required abortion providers to have admitting privileges in full-service hospitals within thirty miles from the clinic or office where they provide abortion services.[120] As with the warning in *Rounds*, the medical consensus is clear that this restriction is unnecessary. On average, abortions are safer than routine procedures that happen in gastroenterologists' offices.[121] But that doesn't matter for rational basis, which, in an age of easily accessible, uncorroborated sources for factual claims, can be satisfied with a single statement. And that's what happened in *Abbott*.

Abortion providers, Planned Parenthood, and their amici provided evidence in the form of peer-reviewed, replicated studies showing that fewer than 0.3 percent of those receiving abortions experience complications that require full hospitalization.[122] Empirical studies and witness testimony spoke to specific and identifiable harms caused by the admitting privileges requirement, including the likely closure of some clinics, the subsequent need for women to travel hundreds of miles, and the difficulty that remaining clinics would have in recruiting physicians that could meet the law's requirements.[123] The ACOG cited to peer-reviewed studies, statistical analyses of publicly available data, medical practices manuals from the Institute of Medicine (now the National Academy of Medicine), and studies conducted by independent scholars, researchers, and doctors.[124]

The state's case rested primarily on the testimony of a single physician, Dr. John Thorp, who delivered evidence in two forms: his expert testimony about the continuity of care given his personal experience as an obstetrician-gynecologist and a roundly criticized expert report in which he falsely and without evidence claimed that abortions carry a "2 to 10 percent" complication rate.[125] Notably, Dr. Thorp was forced to retract and amend that claim in an earlier case, in which he admitted that he omitted a decimal point—the lower end of his estimate should have been 0.2 percent.[126] That did not stop the Fifth Circuit from referencing and incorporating Dr. Thorp's opinion, again offered without support, that abortion complications go

120. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a)(1), (b) (West 2021). *See generally Abbott*, 748 F.3d 583.

121. *See* Brief of *Amici Curiae* American College of Obstetricians and Gynecologists and the American Medical Association in Support of Plaintiff-Appellees and in Support of Affirmance at 4, Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583 (5th Cir. 2014) (No. 13-51008), 2013 WL 6837500.

122. *See Abbott*, 748 F.3d at 591.

123. *Id.* at 591–92.

124. *See* Brief of *Amici Curiae* American College of Obstetricians and Gynecologists and the American Medical Association in Support of Plaintiff-Appellees and in Support of Affirmance, *supra* note 121 (citing to corroborating evidence in footnotes).

125. *See* Planned Parenthood of Wis., Inc. v. Van Hollen, 94 F. Supp. 3d 949, 968 (W.D. Wis. 2015).

126. *Id.* at 968–69.

underreported.[127] Amici supported the state's case by making factual claims about the alleged dangers of abortion by, among other things, citing to Dr. Thorp's debunked studies or referencing their own briefs.[128]

As the Fifth Circuit noted, the weakest form of rational basis review requires only "rational speculation" from the legislature.[129] In this case, with a medical consensus and credible evidence lined up against the Texas law, rational basis became a search for any possible contrary voice, no matter how erroneous or debunked. The court credited the personal opinion of a single doctor that continuity of care requires admitting privileges.[130] It was enough that "some women" have complications requiring hospitalizations, even though Texas's own vital-statistics data proved that over a four-year period, there were no reported maternal deaths out of 227,912 abortions in Texas.[131] Applied in this way, rational basis review is little more than a quest for a single expert witness statement, report, or brief that could conceivably manufacture an iota of factual uncertainty to legitimize the legislature's speculation.

3. Same-Sex Marriage (the *DeBoer* Litigation)

The U.S. Court of Appeals for the Sixth Circuit decision in *DeBoer v. Snyder*[132]—the case that created the circuit split on the constitutionality of same-sex marriage bans[133]—also hijacked rational basis review to demand perfection and infallibility from the plaintiffs. *DeBoer* was the only federal appellate court case that upheld same-sex marriage bans in the run up to *Obergefell*, which invalidated them nationwide.[134] What distinguished it from other circuit court decisions was not deference, but rather the court's approach to the scientific consensus about whether same-sex parents could create an "optimal" environment for raising children.[135]

That scientific consensus had existed for some time. When the Massachusetts Supreme Judicial Court declared the state's same-sex marriage ban to be unconstitutional in *Goodridge v. Department of Public Health*,[136] amicus briefs from family law scholars, the Massachusetts

127. *Abbott*, 748 F.3d at 593.

128. *See, e.g.*, *Amicus Curiae* Brief for Alliance Defending Freedom, Bioethics Defense Fund, Family Research Council in Support of Defendants-Appellants and Reversal of District Court at 5, Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583 (5th Cir. 2014) (No. 13-51008), 2013 WL 6385218.

129. *Abbott*, 748 F.3d at 595.

130. *Id.* at 594.

131. *See* Brief of *Amici Curiae* American College of Obstetricians and Gynecologists and the American Medical Association in Support of Plaintiff-Appellees and in Support of Affirmance, *supra* note 121, at 3.

132. 772 F.3d 388 (6th Cir. 2014).

133. At the time, the U.S. Courts of Appeal for the Fourth, Seventh, and Tenth Circuits had all issued decisions holding that same-sex marriage bans were unconstitutional. *See generally* Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014); Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014).

134. 135 S. Ct. 2584, 2608 (2015).

135. ESKRIDGE & RIANO, *supra* note 32, at 554–71.

136. 798 N.E.2d 941 (Mass. 2003).

Psychiatric Society, seven other professional organizations, and four doctors detailed the many peer-reviewed studies, resolutions of physician groups, and reports showing that children raised by gay couples fared just as well as children raised by opposite-sex couples.[137] As early as 1997, a year after same-sex marriage was on trial in Hawai'i, professional medical and scientific associations started passing resolutions stating that sexual orientation "made no difference for successful child-rearing."[138]

The *DeBoer* plaintiffs presented that scientific consensus at trial. One witness described the more than 150 peer-reviewed articles concluding that there were no differences in outcomes for children raised by gay parents and those raised by opposite-sex parents.[139] Another witness described a study that used 2010 census data from a random sample of same-sex and opposite-sex households showing that family instability and poverty, not same-sex parentage, negatively affected grade school progress.[140] Other experts testified about the documented tendency of one parent, regardless of their biological sex, to fill the emotional gaps left by the other parent.[141] The plaintiffs also introduced a broad-based, empirical study showing that same-sex couples broke up at the same rate as opposite-sex couples.[142]

The state's case rested primarily on a single study. A sociologist at the University of Texas at Austin, Mark Regnerus, received funding from an anti-same-sex-marriage organization to compare the outcomes of children in same-sex and opposite-sex households.[143] The study, which found that children of same-sex couples experienced higher rates of sexually transmitted diseases, lower levels of education, higher likelihood of drug and tobacco use, and more sexual partners than children of opposite-sex households, was deeply flawed.[144] The study included in its sample children in same-sex households whose parents had divorced and who were adopted from foster care after living in unstable, opposite-sex or single-parent homes.[145] Regnerus intentionally did not consider the impact of these variables. What is more, the author and his supporters manipulated the peer-review process to publish it. Regnerus secured favorable reviews from the journal *Social Science Research* because his reviewers included a director of an anti-same-sex marriage advocacy group that helped fund the study and

137. ESKRIDGE & RIANO, *supra* note 32, at 218. Notably, the dissent in *Goodridge* demonstrates how rational basis review can demand perfection in the scientific consensus as well. *See* 798 N.E.2d at 1004 (Cordy, J., dissenting) ("So long as the question is *at all* debatable, it must be the Legislature that decides." (emphasis added)).

138. ESKRIDGE & RIANO, *supra* note 32, at 317. The list of organizations included the American Academy of Child and Adolescent Psychiatry, American Psychological Association, American Academy of Pediatrics, National Association of Social Workers, American Psychiatric Association, and American Medical Association. *See id.* at 317–18.

139. *Id.* at 565–66.

140. *Id.* at 566; *see also* DeBoer v. Snyder, 772 F.3d 388, 425 (6th Cir. 2014) (Daughtrey, J., dissenting), *overruled by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

141. ESKRIDGE & RIANO, *supra* note 32, at 565.

142. *Id.* at 566; *see also DeBoer*, 772 F.3d at 426 (Daughtrey, J., dissenting).

143. ESKRIDGE & RIANO, *supra* note 32, at 555.

144. *Id.* at 556–57.

145. *Id.* at 568.

someone who had consulted on the project in its early stages.[146] Regnerus's own department criticized the study as "flawed on conceptual and methodological grounds."[147]

Despite the flaws in the state's case, Michigan framed its empirical argument around creating factual uncertainty. As Professor William Eskridge, Jr. and Christopher Riano describe in their comprehensive study of the marriage equality litigation, the state's narrative focused on the alleged lack of any "statistically rigorous study based upon a random sample of the population" confirming comparable outcomes among children of same and opposite-sex households.[148] The strategy did not work at trial: the district court found Regnerus's study to be "entirely unbelievable and not worth of serious consideration."[149]

However, by using rational basis review as a search for any hint of imperfection in the plaintiffs' case, the Sixth Circuit could ignore the district court's assessment of the evidence. The court held that the state's interest in protecting children from the alleged harmful outcomes associated with same-sex-parent households was one of the primary reasons that states regulate marriage.[150] Society needed marriage, the court said, to "create and maintain stable relationships within which children may flourish," and plaintiffs provided no evidence to challenge that assumption.[151] The Sixth Circuit was not alone in taking this route. During oral argument at the Supreme Court about California's ban on same-sex marriage, Justice Antonin Scalia stated that "there's considerable disagreement among . . . sociologists as to . . . the consequences of raising a child" in a same-sex household, "whether that is harmful to the child or not." He continued: "I don't think we know the answer to that. Do you know the answer to that?"[152] In other words, rational basis allowed courts to find a single study, no matter how flawed or improper, to manufacture factual uncertainty when none exists, undermining the connection between scientific consensus and social justice.

B. Strict Scrutiny

The previous section suggested that, when applied in cases involving disputes over legislative facts, rational basis review delegitimizes the scientific consensus by unreasonably demanding infallibility. Strict scrutiny, which sits on the other end of the judicial review spectrum, can do precisely the same thing.

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146. *Id.* at 557.

147. *DeBoer*, 772 F.3d at 426 (Daughtrey, J., dissenting).

148. ESKRIDGE & RIANO, *supra* note 32, at 555 (quoting WITHERSPOON INST., MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES 6 (2008)).

149. DeBoer v. Snyder, 973 F. Supp. 2d 757, 765–68 (E.D. Mich.), *rev'd*, 772 F.3d 388, 425 (6th Cir. 2014), *overruled by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

150. *See DeBoer*, 772 F.3d at 404.

151. *Id.* at 405.

152. Transcript of Oral Argument at 19, Hollingsworth v. Perry, 570 U.S. 693 (2013) (No. 12-144).

1. Affirmative Action (the *Grutter* Litigation)

Grutter v. Bollinger[153] was a challenge to the admissions policies at the University of Michigan Law School.[154] The plaintiffs argued that the school's consideration of race as part of a holistic analysis of each individual applicant discriminated against white applicants on account of their race.[155] The case turned on empirical claims about the educational benefits of diversity.[156]

The Court found the benefits of a diverse law school classroom to be "substantial."[157] To support this conclusion, the law school and its supporting amici submitted expert reports and empirical research. The American Educational Research Association cited peer-reviewed literature demonstrating that diverse schools lead to better educational and professional outcomes for minority students.[158] Businesses and military leaders argued the same.[159] The Association for American Law Schools offered evidence demonstrating the unique importance of diversity in law schools in particular, which produce a large share of the nation's leaders.[160] This provided ample evidence for the Court to recognize that considering race in admissions under certain circumstances was a compelling state interest.

Justice Thomas disagreed, arguing that the law school's evidence was imperfect. He pointed to a study conducted by Stanley Rothman, a professor emeritus at Smith College, suggesting that racial diversity in schools "hinders students' perception of academic quality."[161] That may be an accurate description of the 4,000-person survey,[162] but Justice Thomas leveraged it to challenge evidence that diversity "leads to educational benefits," even though the Rothman study only assessed student perceptions of their then-current

153. 539 U.S. 306 (2003).
154. *Id.* at 311.
155. *Id.* at 316–17.
156. *Id.* at 328–33.
157. *Id.* at 330.
158. *See* Brief of the American Educational Research Association, the Association of American Colleges and Universities, and the American Association for Higher Education as Amici Curiae in Support of Respondents at 3–4, 12–13, 23–24, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 398292.
159. Brief of 3M et al. as *Amici Curiae* in Support of Defendants-Appellants Seeking Reversal at 5, Grutter v. Bollinger, 288 F.3d 732 (2002) (No. 01-1447), 2001 WL 34624918; Brief of General Motors Corporation as Amicus Curiae in Support of Respondents at 3–4, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241 & 02-516), 2003 WL 399096; Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae in Support of Respondents at 5, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241 & 02-516), 2003 WL 1787554.
160. Brief of Amicus Curiae Association of American Law Schools in Support of Respondents at 7–9, 24–25, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399076.
161. *Grutter*, 539 U.S. at 364 (Thomas, J., concurring in part and dissenting in part) (citing Stanley Rothman, Seymour Martin Lipset & Neil Nevitte, *Racial Diversity Reconsidered*, PUB. INT., Spring 2003, at 25, 30).
162. Stanley Rothman, Seymour Martin Lipset & Neil Nevitte, *Racial Diversity Reconsidered*, PUB. INT., Spring 2003, at 25, 30–31.

educational environment.[163] Justice Thomas also cited an article from the *Harvard Education Review* suggesting that Black students experience greater development and feel happier at historically Black colleges and universities (HBCU) than among diverse student populations in which they are a minority.[164] Justice Thomas also cited a law review article implying that minority students admitted under affirmative action initiatives "are underperforming in the classroom."[165]

In other words, Justice Thomas painted a misleading picture of the available data to create factual uncertainty about the benefits of classroom diversity. Putting his citations together, Justice Thomas concluded that "no social science has disproved the notion that this discrimination 'engender[s] attitudes of superiority or, alternatively, provoke[s] resentment among those who believe that they have been wronged by the government's use of race.'"[166] Therefore, Justice Thomas's dissent endorsed a vision of strict scrutiny that requires perfection and infallibility in the state's empirical case for its factual claims. Once again, a standard of review is transformed into a demand for one party to prove the counterfactual.[167]

2. Gay Conversion Therapy (the *Otto* Litigation)

Justice Thomas's dissent in *Grutter* is not the only example of strict scrutiny being transformed into demands for infallible evidence. The U.S. Court of Appeals for the Eleventh Circuit's decision in *Otto v. City of Boca Raton*,[168] a challenge to a city's ban on gay conversion therapy, is another. Conversion or "reparative" therapy uses psychoanalytic and behavior therapies to try to change an individual's sexual orientation or gender identity.[169] It includes a wide variety of strategies: "inducing nausea and

163. *Id.*

164. *Grutter*, 539 U.S. at 364–65 (Thomas, J., concurring in part and dissenting in part).

165. *Id.* at 371.

166. *Id.* at 373 (alterations in original) (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 241 (1995)).

167. Some scholars argue that the *Grutter* Court seemed to apply a more deferential form of strict scrutiny. *See, e.g.*, Pamela S. Karlan, *Compelling Interests/Compelling Institutions: Law Schools as Constitutional Litigants*, 54 UCLA L. REV. 1613, 1621–22 (2007) ("Nowhere in its prior decisions had the Court delegated responsibility for deciding the weight of a governmental interest to some other governmental entity."). *But see* Michelle Adams, *Searching for Strict Scrutiny in* Grutter v. Bollinger, 78 TUL. L. REV. 1941, 1943 (2004) ("[T]he Court employed strict scrutiny not to strike down mechanically the University of Michigan Law School's . . . use of race, but instead to assist it in determining which governmental uses of race were particularly socially relevant."). Suffice it to say, Justice Thomas's opinion, which preferred a strong form of strict scrutiny, leveraged demands for infallibility against the law school. *Grutter*, 539 U.S. at 356–57 (Thomas, J., concurring in part and dissenting in part).

168. 981 F.3d 854 (11th Cir. 2020), *reh'g en banc denied*, 41 F.4th 1271 (11th Cir. 2022) (mem.).

169. *See* Douglas C. Haldeman, *Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination*, *in* HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 149 (John C. Gonsiorek & James D. Weinrich eds., 1991). For excellent discussions of conversion therapy in the legal literature, see generally Marie-Amélie George, *Expressing Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793 (2017)

paralysis; providing electric shock therapy; providing shame-aversion therapy; and attempting 'systematic desensitization,'" as well as "assertiveness and dating trainings . . . or hypnosis."[170] Twenty states, the District of Columbia, and ninety counties and municipalities ban performing conversion therapy on minors.[171]

Legal challenges to these laws have so far focused primarily on the speech rights of therapists, but appellate courts have applied different levels of scrutiny when evaluating these laws' constitutionality.[172] And yet, even under the highest standard—strict scrutiny—competing factual claims about conversion therapy's harms come into play when judges have to evaluate whether a ban furthers a compelling interest in protecting children from practices that it and the wider medical community consider to be harmful, even torturous.[173]

In *Otto*, the Eleventh Circuit enjoined Boca Raton's conversion therapy ban as an unconstitutional content-based restriction on speech despite medical evidence attesting to the practice's harms.[174] The city and the APA introduced significant empirical evidence, including peer-reviewed empirical research.[175] Their submissions were based "as much as possible on findings

(arguing that changing norms is one goal of litigation against gay conversion therapy); Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002) (situating gay conversion therapy in an assimilatory historical context); David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297 (1999).

170. Brief of American Psychological Association, Florida Psychological Association, National Association of Social Workers Florida Chapter, and American Association for Marriage and Family Therapy as *Amici Curiae* in Support of Defendants-Appellees and Affirmance at 10, Otto v. City of Boca Raton, 981 F.3d 854 (11th Cir. 2020) (No. 19-10604), 2019 WL 2912375.

171. *Conversion "Therapy" Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/conversion_therapy [https://perma.cc/C2WM-YT5A] (last visited Apr. 3, 2023) (noting that twenty states, plus the District of Columbia, and ninety cities and counties explicitly ban practicing conversion therapy on minors, and that five states and Puerto Rico have restrictions in place).

172. The U.S. Courts of Appeals for the Third and Ninth Circuits found that conversion therapy bans restrict professional speech and, therefore, used intermediate scrutiny or rational basis to hold that the laws were constitutional. *See* King v. Governor of N.J., 767 F.3d 216, 234–37 (3d Cir. 2014), *abrogated by* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018); Pickup v. Brown, 740 F.3d 1208, 1231 (9th Cir. 2014), *abrogated by* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018).

173. Otto v. City of Boca Raton, 981 F.3d 854, 861–62 (11th Cir. 2020) (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)), *reh'g en banc denied*, 41 F.4th 1271 (11th Cir. 2022) (mem.); *see also* Appellee, County of Palm Beach, Florida's, Brief at 9–15, 30–33, Otto v. City of Boca Raton, 981 F.3d 854 (11th Cir. 2020) (No. 19-10604-A), 2019 WL 2451113.

174. *Otto*, 981 F.3d at 859. The preliminary injunction standard requires the movant to show, among other things, that "the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party." *Id.* at 860. The Eleventh Circuit did not explore this prong of the standard in *Otto*, stating "that neither the government nor the public has any legitimate interest in enforcing an unconstitutional ordinance. *Id.* at 870.

175. Brief of American Psychological Association, Florida Psychological Association, National Association of Social Workers Florida Chapter, and American Association for Marriage and Family Therapy as *Amici Curiae* in Support of Defendants-Appellees and Affirmance, *supra* note 170, at 7, 8.

that have been replicated across studies rather than on the findings of any single study," following traditional research practices.[176] The APA's systematic review of the literature suggested that conversion therapy did not reduce same-sex attraction. Nor did it provide benefits to participants. Indeed, the only study the APA identified that purported to show conversion therapy's effectiveness was conducted by religious ministries and "suffer[ed] from methodological flaws."[177] The "best available evidence" demonstrated that conversion therapy exacerbated depression and suicidal ideation.[178] Ethnographic studies suggested that conversion therapy caused "anger, anxiety, . . . hopelessness, deteriorated relationships, . . . self-hatred, and sexual disfunction," as well as increased drug abuse and other "high-risk sexual behaviors."[179] And studies showed that minors were particularly vulnerable to these harms because conversion therapy exposes them to dangerous messages about homosexuality and gender identity at a time when they "have not yet developed the resources to reject these messages."[180] As the APA's brief made clear, these conclusions were based on a combination of peer-reviewed, replicated studies and publications based on ethnographic interviews, as well as the findings of an independent task force of experts created by the APA to assess the literature on conversion therapy.[181]

The therapists made factual claims about conversion therapy's benefits. One therapist submitted their informed consent form as evidence.[182] The therapists reported that their own clients "have been living lives inconsistent with their faith" and, therefore, seek conversion therapy to resolve "internal conflicts, depression, anxiety, or substance abuse."[183] They also cited the fact that neither therapist had ever "received any complaint or report of harm" from their clients.[184] They noted that the APA's report included some individual clients' self-reported benefits of conversion therapy, including "cognitive frameworks that permitted them to reevaluate their sexual orientation identity" and "strategies for living consistently with their religious faith."[185] Perhaps most notably, the therapists pointed to the lack of recent published research on conversion therapy's harms.[186]

176. *Id.* at 9.
177. *Id.* at 14–15.
178. *Id.* at 16; *see also Otto*, 981 F.3d at 875–76 (Martin, J., dissenting).
179. Brief of American Psychological Association, Florida Psychological Association, National Association of Social Workers Florida Chapter, and American Association for Marriage and Family Therapy as *Amici Curiae* in Support of Defendants-Appellees and Affirmance, *supra* note 170, at 17; *Otto*, 981 F.3d at 875–76 (Martin, J., dissenting).
180. Brief of American Psychological Association, Florida Psychological Association, National Association of Social Workers Florida Chapter, and American Association for Marriage and Family Therapy as *Amici Curiae* in Support of Defendants-Appellees and Affirmance, *supra* note 170, at 20.
181. *See id.* at 5–9.
182. Brief of Plaintiffs-Appellants at 6, Otto v. City of Boca Raton at 6, 981 F.3d 854 (11th Cir. 2020) (No. 19-10604), 2019 WL 1578285.
183. *Id.* at 9.
184. *Id.* at 7, 9.
185. *Id.* at 15.
186. *Id.* at 17–18, 24–25.

The Eleventh Circuit sided with the therapists. It characterized the APA's report as "a series of reports and studies setting out harms" that were mere "assertions rather than evidence."[187] The report actually included peer-reviewed studies and more. The court also suggested that conversion therapies "have not been rigorously evaluated" and that there was a "complete lack" of "rigorous recent prospective research" on conversion therapy's harms.[188] The court also selectively quoted the studies cited by the APA, including language in summarizing the studies' limitations, to characterize the evidence as a series of "equivocal conclusions."[189]

In other words, the *Otto* majority manufactured scientific disagreement when none existed by demanding perfection from the city. The court wanted recent peer-reviewed studies that could be replicated on random samples of minors in order to prove the veracity of the city's and the APA's claims that conversion therapy causes significant harm. That is an impossible demand. Medical researchers do not conduct those kinds of studies about conversion therapy anymore, specifically because of its dangers—ethical standards counsel against harming minors merely to prove that the methods being studied actually harm minors.[190] And by interpreting language common to almost all medical and social studies about the papers' limitations as evidence for a lack of consensus, the majority demanded something that rarely, if ever, exists in any research that follows the scientific method. The dissent understood this, noting that "it seems as though no study (or studies) would satisfy the majority."[191]

In this way, *Otto* illustrates that strict scrutiny can function like an infallibility standard. Although strict scrutiny requires "compelling" rationales and "narrowly tailored" action, the *Otto* court took that as an opportunity to flip the rational basis standard in *Rounds* and *Abbott* on its head. Whereas, in the latter two cases, Planned Parenthood, abortion providers, and amici need infallible empirical evidence to prove irrationality, Boca Raton and its amici could only meet strict scrutiny in *Otto* with infallible evidence of its own. In both scenarios, courts raised the hurdle for one side's proof such that the other sides' claims seemed equally as plausible.

C. Balancing Tests

This section features cases that use balancing tests to compare factual claims about broad social phenomena. Increasingly common in constitutional litigation, balancing tests are supposed to offer the benefits of

187. *Otto*, 981 F.3d at 868.

188. *Id.* at 868–69. Even that suggestion is not true. As the dissent noted, there was "a mountain of rigorous evidence" and significant "professional organizations' judgments." *Id.* at 878–79 (Martin, J., dissenting).

189. *Id.* at 869 (majority opinion).

190. Brief of American Psychological Association, Florida Psychological Association, National Association of Social Workers Florida Chapter, and American Association for Marriage and Family Therapy as *Amici Curiae* in Support of Defendants-Appellees and Affirmance, *supra* note 170, at 8–9.

191. *Otto*, 981 F.3d at 877 (Martin, J., dissenting).

proportionality and evolve with changing dynamics on the ground.[192] Like rational basis and strict scrutiny, which have devolved into demands for infallible proof from those seeking protection for marginalized populations, balancing tests not only structure legal analysis as evaluating comparable factual claims even when those claims are not fungible, but also allow judges to demand perfection and unequivocation from only some litigants.

1. Voter ID Laws (the *Crawford* Litigation)

The right to vote is a fundamental right protected by the U.S. Constitution,[193] but it is under attack from partisan forces.[194] Eight states have strict voter ID laws that require registered voters to show photo identification in order to vote.[195] Only a few forms of photo identification will suffice, a restriction that disproportionately burdens some voters—particularly young people, members of racial and ethnic minorities, and the poor—many of whom tend to vote for Democratic candidates.[196] Proponents of voter ID laws argue that they are commonsense approaches to election security.[197] The problem is that mass voter fraud does not exist, and the photo identification requirement guards against a form of fraud—voter impersonation at the polls—that almost never happens.[198] These and other voting restrictions persist in part because the balancing test that courts use in voter ID cases structurally equate litigants' empirical claims.

The empirical question at the heart of voter ID cases is whether the burdens imposed by the requirement outweigh the benefits. In *Anderson v. Celebrezze*,[199] the Supreme Court held that it was unconstitutional for Ohio to require independent candidates (and not candidates affiliated with a political party) running for president to file statements of candidacy and

192. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945–46 (1987).

193. *E.g.*, Dunn v. Blumstein, 405 U.S. 330, 336 (1972).

194. *See State Voting Bills Tracker 2021*, BRENNAN CTR., https://www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021 [https://perma.cc/L6DJ-BM7H] (May 28, 2021); Ian Millhiser, *There Are Two Kinds of GOP Attacks on Democracy—and One Is Much Worse*, VOX (June 3, 2021, 8:00 AM), https://www.vox.com/22463490/voting-rights-democracy-texas-georgia-suppression-jim-crow-supreme-court-sb7 [https://perma.cc/T42T-52S6].

195. *Voter ID Laws*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx [https://perma.cc/SM84-HK8H] (Mar. 9, 2023). Another ten states have less strict requirements, but nonetheless require or request identification. This is a far cry from the three states that had such requirements in 2007. Overton, *supra* note 46, at 639 ("As of 2006, only Georgia, Indiana, and Missouri required photo identification as an absolute condition to vote.").

196. Michael D. Gilbert, *The Problem of Voter Fraud*, 115 COLUM. L. REV. 739, 741 (2015).

197. *See* Greg Abbott, *Voter Fraud Is Real, and We Must Stamp It Out*, DALL. MORNING NEWS (July 19, 2017, 11:59 AM), https://www.dallasnews.com/opinion/commentary/2017/07/19/voter-fraud-is-real-and-we-must-stamp-it-out/ [https://perma.cc/6AVD-F463].

198. *Debunking the Voter Fraud Myth*, BRENNAN CTR. (Jan. 31, 2017), http://www.brennancenter.org/analysis/debunking-voter-fraud-myth [https://perma.cc/JPD2-JCXN].

199. 460 U.S. 780 (1983).

nominating petitions six months before the election.[200] The Court evaluated the constitutionality of the law through an "analytical process" that assessed the "character and *magnitude* of the asserted injury" against the "legitimacy and *strength*" of the "precise interests put forward by the State as justifications for the burdens imposed by its rule."[201] In other words, the Court balanced competing empirical claims. It analyzed the "magnitude" of the injury against the "strength" of the state's rationales.

The Supreme Court explicitly relied on the *Anderson* test in *Crawford v. Marion County Election Board*.[202] *Crawford* was a challenge to Indiana's voter ID law, which, at the time, was one of the strictest in the country. It permitted voters to show only a few forms of photo ID and would have required thousands of voters to travel hundreds of miles to obtain these IDs from only a handful of offices around the state.[203] As soon as the law took effect, a group of Democrats filed a facial challenge in federal court, arguing that the law "substantially burden[ed]" the right to vote because it would depress lawful votes in violation of the Fourteenth Amendment.[204] The district court, appellate court, and Supreme Court framed the case as a contest between empirical claims: were the harms greater than the strength of the state's rationales or were the state's rationales stronger than the magnitude of the harms to voters? That standard requires both parties to offer at least some empirical proof of their claims.[205] But courts at every level of the *Crawford* litigation manufactured factual uncertainty by applying a permissive standard to the state and demanding infallibility from the challengers.

Indiana's first justification for the law was to guard against voter fraud.[206] At the district court, the state failed to produce any evidence of actual in-person voter fraud in Indiana or any evidence that anyone had ever been charged with voter impersonation.[207] The state did produce affidavits and reports suggesting that some voter fraud exists, including a newspaper article stating that "dozens, possibly hundreds"—which is it?—of incidents occurred elsewhere, an analysis suggesting that fourteen dead people voted in St. Louis, Missouri, a report stating that sixty-three dead voters voted in Maryland over twenty-four years, and a handful of incidents of double voting

200. *Id.* at 786.

201. *Id.* at 789 (emphasis added). The *Anderson* petitioners anticipated this, dedicating more than ten out of nearly fifty pages of briefing to tallying up the harms of Ohio's law. Brief for Petitioners at 6–20, Anderson v. Celebrezze, 460 U.S. 780 (1983) (No. 81-1635), 1982 WL 1044640.

202. 533 U.S. 181, 189–91 (2008).

203. *Id.* at 212–14 (Souter, J., dissenting).

204. *Id.* at 186–87 (majority opinion).

205. *Id.* at 209 (Souter, J., dissenting); *see also* Burdick v. Takushi, 504 U.S. 428, 430–31 (1992).

206. *Crawford*, 553 U.S. at 194–97.

207. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 792–93 (S.D. Ind. 2006), *aff'd sub nom.* Crawford v. Marion Cnty. Election Bd., 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).

in a recent Wisconsin election.[208] Remarkably, one of the sources that the state cited as evidence of voter fraud—a text written by the political scientist Larry Sabato and journalist Glenn Simpson—actually disproves the myth of mass voter fraud, pointing only to "one woman in California in 1994."[209] To prove its claim that the voter ID law would enhance popular integrity of the voting process, the state produced public opinion polls that showed, among other things, that majorities of respondents felt that voter fraud existed, that voter ID laws were a good thing, and that the electoral system does not inspire confidence.[210] The district court found this evidence to be sufficient to prove the "strength" of the state's rationales under *Anderson*.

But when it came time to evaluate the "magnitude" of the harm, the court employed a different standard. The district court demanded that the plaintiffs show that an undefined yet significant number of actual voters would be unable to vote as a result of the law, an impossible task on a facial challenge.[211] The court discredited some of the challengers' surveys detailing the significant barriers to obtaining a photo ID as "very informal and unscientific" but credited the state's admittedly "[u]nscientific exit polling" about how fewer than 100 voters obtained their IDs as evidence that the burden was less severe.[212] The court dedicated six pages of its opinion to picking apart the methodologies and assumptions of one of the plaintiffs' expert reports[213] but declined to interrogate the quality of the state's polling data or the veracity of the newspaper reports introduced as evidence of voter fraud.[214] Although it is true that the challengers had a higher burden in this case, this was not a case of judicial deference to legislative facts.[215] Rather, each side's evidence was analyzed under starkly different standards.

The same pattern played out on appeal at the U.S. Court of Appeals for the Seventh Circuit and at the Supreme Court. Explicitly adopting a balancing test of harms versus benefits rather than deferring to the legislature,[216] Judge Richard A. Posner demanded significant empirical evidence of the law's negative consequences but accepted the "indirect evidence" used by the district court to support the "strength" of the state's rationales.[217] To the challengers' point that there had never been a single incident or charge of voter impersonation in Indiana, the court explained away the lack of data as a product of "underenforcement" and the "vagaries of journalists' and other

208. *Id.* at 793–94.
209. LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS 292 (1996).
210. *Rokita*, 458 F. Supp. 2d at 794.
211. *Id.* at 822.
212. *Id.* at 794–95, 824.
213. *Id.* at 803–09.
214. *Id.* at 793–94.
215. *Id.* at 825 ("[T]he constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves." (quoting Griffin v. Roupas, 385 F.3d 1128, 1130 (7th Cir. 2004))).
216. Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 951–53 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).
217. *Id.* at 953.

investigators' choice of scandals to investigate."[218] Yet it found the challengers' evidence from advocates that work with marginalized populations to be insufficiently robust to demonstrate harm.[219] At the Supreme Court, the challengers were expected to provide statistical evidence for their claims rather than affidavits and surveys.[220] The state's lack of evidence of fraud was immaterial.[221]

In other words, three courts in the *Crawford* litigation wanted "statistics or aggregate data" and "reliable, specific evidence" about the law's harms[222] but absolved the state of having to provide such "hard data" to meet its admittedly lower burden to prove the "strength" of its rationales. Some might argue that this imbalance could be explained by the overriding importance of the state's interest in guarding against elections tainted by fraud; that is, the court did not need to interrogate the evidence because the interest was so substantial anyway.[223] There are two problems with that argument. First, the *Anderson* test is not written as a probabilistic analysis.[224] The test's language makes plain that "strength" is not compared or relative to the state's "rationales" but rather describes them. The whole point of the evidence was to prove the "strength" of the voter fraud and popular perceptions of election integrity rationales. Second, even probabilistic analyses do not obviate the need for factual evidence.

2. Health Exceptions to Late-Term Abortions (the *Carhart* Litigations)

Uneven demands for infallibility influenced the Court's decisions in *Stenberg v. Carhart*[225] and *Gonzales v. Carhart*.[226] The cases addressed the constitutionality of the state and federal bans on a procedure known as intact dilation and evacuation (D&E), which, though particularly rare, could be conducted during the latter half of a pregnancy to protect against serious health risks for the pregnant person.[227] The bans did not permit even that narrow exception, so a group of abortion providers challenged the laws, arguing that the failure to include a health exception amounted to an "undue burden" on those seeking abortion.[228] Therefore, some of the factual evidence in the records offered by all parties focused on the medical need, or lack thereof, of the exception. But in adjudicating competing factual

218. *Id.*
219. *Rokita*, 458 F. Supp. 2d at 796, 828.
220. *Crawford*, 553 U.S. at 201–02.
221. *Id.* at 194–95.
222. *Rokita*, 458 F. Supp. 2d. at 822–23, 826.
223. This was essentially Judge Posner's reasoning on appeal. *See Crawford*, 472 F.3d at 952.
224. *Id.* at 956 (Evans, J., dissenting).
225. 530 U.S. 914 (2000).
226. 550 U.S. 124 (2007).
227. *Stenberg*, 530 U.S. at 921–22 (quoting NEB. REV. STAT. §§ 28-326, 28-328 (1999)); *Gonzales*, 550 U.S. at 132 (referring to the federal Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (codified as amended at 18 U.S.C. § 1531)).
228. *Stenberg*, 530 U.S. at 922–23; *Gonzales*, 550 U.S. at 133, 147.

claims—Is D&E ever medically necessary? Do the harms of the law outweigh its benefits?—infallibility was demanded of only some litigants.

In *Stenberg*, the Association of American Physicians and Surgeons (AAPS) submitted a brief with several antiabortion groups stating that "significant numbers of physicians and health care providers . . . hold that intact [D&E] is both medically and ethically objectionable."[229] They suggested that the medical community at large was ambivalent about the procedure, offering conflicting and changing positions over time.[230] And they described the procedure's risks as evidence that performing D&E is not within the standard of care, never medically necessary, and thus ripe for prohibition without an exception for the health of the pregnant person.[231]

The ACOG, alongside broad-based medical organizations like the American Nurses Association, submitted evidence stating that the procedure was safe and medically necessary in certain circumstances. They relied on testimony and studies to remind the Court that "pregnancy is fraught with health risks."[232] They cited clinical guides, referenced studies cited in previous abortion cases, and included testimony describing that the weight of medical evidence establishes that D&E is safe and may be necessary.[233] And the brief demonstrated that many of the statements in the AAPS brief about D&E risks were simply untrue.[234]

The Court took these competing factual claims to mean that the medical community and the current literature were split, counseling against upholding the state's ban.[235] But it is not entirely clear that the medical community was split. As Ahmed noted, the Court took the factual claims from antiabortion groups at face value, "legitimiz[ing]" them by putting them "on par with" the more accepted position in the medical community.[236] In other words, the Court did not just fail to interrogate the underlying factual claims of one party, it also went further by implying that one side's disproved claims and the other side's proven claims deserved equal weight. This was a boon to antiabortion litigants: "In the abortion context, leveling this playing field

229. Brief of Amici Curiae of Association of American Physicians and Surgeons et al. in Support of Petitioners at 17, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830), 2000 WL 228448.

230. *Id.* at 19–20.

231. *Id.* at 22–24.

232. Brief of Amici Curiae American College of Obstetricians and Gynecologists, American Medical Women's Association, National Abortion Federation, Physicians for Reproductive Choice and Health, and American Nurses Association in Support of Respondent at 19, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830), 2000 WL 340117.

233. *Id.* at 20–24.

234. *Id.* at 23–24.

235. Stenberg v. Carhart, 530 U.S. 914, 937 (2000) ("[T]he division of medical opinion about the matter at most means uncertainty, a factor that signals the presence of risk, not its absence. That division here involves highly qualified knowledgeable experts on both sides of the issue.").

236. Ahmed, *supra* note 38, at 100.

means that undue weight is given to discredited experts, while the majority position (that there should be a health exception) is discounted."[237]

This equalization of expertise in *Stenberg* set the stage for the Court's even more explicit uneven demands for infallibility in *Gonzales*. *Gonzales*'s factual claims were almost identical to those in *Stenberg*, but the Court's conclusion was different. The *Gonzales* majority let Congress's late-term abortion ban stand because "medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden."[238] This opposite conclusion was not the result of deference; rather, it stemmed from the demands placed on abortion defenders to prove the infallibility of their factual claims.

In *Gonzales*, the ACOG filed another brief supported by medical evidence available in the years since *Stenberg*. They cited "authoritative medical texts and articles in peer-reviewed journals."[239] Two leading textbooks used in medical schools described the procedure as safe and necessary to minimize injury and harm to the pregnant person.[240] Many schools taught the procedure.[241] A peer-reviewed study confirmed its safety.[242] And they provided several studies, trial tests, and experts to show that Congress's conclusions about late-term abortions were contrary to medical evidence.[243] The ACOG even convened a neutral, independent task force of experts, including at least one physician who opposed abortion, to study the D&E procedure. That task force found that "intact D&E could be the safest or most appropriate procedure for a given patient, and that the decision whether to choose such a procedure should be left to a woman and her physician."[244]

On the other hand, the AAPS submitted a brief in *Gonzales* that suggested that the courts below relied more on the subjective views of the physicians who wrote the ACOG studies.[245] They claimed that there was insufficient evidence presented at trial to demonstrate the safety of the procedure, as only one of the handful of testifying doctors had actually performed a D&E.[246] The brief cited the United Kingdom's Royal College of Obstetricians and Gynaecologists's opposition to late-term abortions as evidence of its

237. Aziza Ahmed, *The Future of Facts: The Politics of Public Health and Medicine in Abortion Law*, 92 COLO. L. REV. 1151, 1153 (2021).

238. Gonzales v. Carhart, 550 U.S. 124, 164 (2007); *see* Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (codified as amended at 18 U.S.C. § 1531).

239. Brief of American College of Obstetricians and Gynecologists as Amici Curiae Supporting Respondents at 17, Gonzales v. Carhart, 550 U.S. 124 (2007) (Nos. 05-0380 & 05-1382), 2006 WL 2867888.

240. *Id.* at 17–18.

241. *Id.* at 18–19.

242. *Id.* at 18.

243. *Id.* at 20–22.

244. *Id.* at 9.

245. Brief of Amici Curiae Congressman Ron Paul and Association of American Physicians and Surgeons in Support of Petitioner at 11, Gonzales v. Carhart, 550 U.S. 124 (2007) (Nos. 05-0380 & 05-1382), 2006 WL 1436689.

246. *Id.* at 18.

danger.[247] It scrutinized the OCEG's evidence, falsely arguing that there was only one peer-reviewed study on D&E's safety.[248] Other amici followed this same strategy. The American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG) suggested that there was an "absence of empirical evidence to support the safety" of the procedure because the studies offered by petitioners were either not peer reviewed or not controlled experiments.[249] The evidence that pro-life amici offered to contend that D&E was dangerous and unnecessary included testimony to Congress from a single nurse and statements from pro-life medical organizations.[250]

The Court again took this to mean that the medical community was divided. In the absence of incontrovertible empirical evidence that Congress was wrong,[251] the Court affirmed the law's constitutionality because there was "uncertainty over whether the barred procedure is ever necessary to preserve a woman's health."[252] But that conclusion only makes sense if the Court used two different standards to evaluate the reliability of the evidence. As the amicus brief for the American Women's Medical Association and Medical Students for Choice noted, new surgeries are not well suited for extensive random trials in the way that medicines and vaccines are. Surgeons cannot conduct controlled experiments with surgical procedures; they use a different approach: "widespread communication regarding common problems, theoretical approaches and ultimately practical solutions."[253] That form of reliability check was insufficient for the Court. But it applied no form of reliability check on the factual claims of antiabortion litigants. Ahmed anticipated the consequences: "The reality," she noted, "that no body of evidence on late-term abortion meets the rigorous evidentiary standards of the randomized control trial[] opens the door to a greater range of evidence."[254]

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247. *Id.* at 19 n.20.

248. *Id.* at 20.

249. Brief of *Amici Curiae* American Association of Pro Life Obstetricians and Gynecologists (AAPLOG), Senator Tom Coburn, M.D., Congressman Charles Boustany, Jr, M.D., Congressman Michael Burgess, M.D., Congressman Phil Gingrey, M.D., Congressman Dave Weldon, M.D., C. Everett Koop, M.D., Edmund D. Pellegrino, M.D. in Support of Petitioner at 21–22, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05-380), 2006 WL 1436688.

250. Brief of Sandra Cano, the Former "Mary Doe" of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05-380), 2006 WL 1436684; Brief for Amici Curiae Jill Stanek and the Association of Pro-Life Physicians in Support of Petitioner, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05-1382), 2006 WL 2281977.

251. The Court did not defer to these findings; it retains an "independent constitutional duty to review factual findings where constitutional rights are at stake." Gonzales v. Carhart, 550 U.S. 124, 165 (2007). Notably, some of Congress's findings did prove to be demonstrably false, a fact the Court dismissed as irrelevant. *Id.* at 165–66.

252. *Id.* at 166–67.

253. Brief of *Amici Curiae* for American Medical Women's Association, American Public Health Association, et al. in Support of Respondents at 3, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05-1382), 2006 WL 2710731.

254. Ahmed, *supra* note 38, at 106.

That greater range of evidence also came into play on the question of the state's interest, particularly about the risks that abortion poses to the pregnant person. In his majority opinion, Justice Anthony Kennedy noted that there was sufficient evidence to support the government's interests in banning late-term abortions: "[S]ome women come to regret their choice to abort the infant life they once created and sustained . . . . Severe depression and loss of esteem can follow."[255] That conclusion was based entirely on an amicus brief that presented "first person anecdotes" compiled by the antiabortion Justice Foundation to suggest that abortions cause depression and suicidal ideation.[256] Justice Kennedy never interrogated the quality of this evidence—which was based on the work of a discredited psychologist and testimonials from a small, nonrandom sample of women[257]—but nevertheless cited it and elevated it as "the principal expert on women's post-abortion experiences."[258] By allowing one side's unreliable evidence to sustain its factual case and considering the weight of medical evidence debunking it to be too equivocal, Justice Kennedy implicitly demanded not just less evidence generally, but less reliable evidence from one side and perfect evidence from the challengers.

Reliability, of course, is not necessarily (or exclusively) correlated with peer review or publication in a scientific journal.[259] The problem is the double standard. In *Gonzales*, one side presented evidence about the lack of significant psychological harm in the form of medical journals, medical association reports, and other sources.[260] The other side's evidence was based on a collection of first-person accounts. Using that evidence to conclude that the medical community was divided requires two different standards.

3. Admitting Privileges (the *Whole Woman's Health* Litigation)

Whole Woman's Health v. Hellerstedt[261] and *June Medical Services L.L.C. v. Russo*[262] rejected nearly identical laws in Texas and Louisiana, respectively, that required abortion providers to have admitting privileges at

255. *Gonzales*, 550 U.S. at 159.

256. Ahmed, *supra* note 38, at 108; *see also id.* at 107 (citing Brief of Sandra Cano, the Former "Mary Doe" of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05-380), 2006 WL 1436684).

257. Linda Greenhouse, *The Counter-Factual Court: Brandeis Lecture, Louis D. Brandeis School of Law, University of Louisville, March 5, 2008*, 47 U. LOUISVILLE L. REV. 1, 11–13, 16 (2008).

258. J. Shoshanna Ehrlich, *Ministering (In)justice: The Supreme Court's Misreliance on Abortion Regret in* Gonzales v. Carhart, 17 NEV. L.J. 599, 605 (2017).

259. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589–85, 593 (1993).

260. Much of that evidence was cited in *Gonzales*, 550 U.S. at 184 n.7 (Ginsburg, J., dissenting).

261. 136 S. Ct. 2292 (2016), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

262. 140 S. Ct. 2103 (2020), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

full-service hospitals.[263] The majority in *Whole Woman's Health* and the plurality in *June Medical* stated that courts evaluating abortion restrictions used balancing tests.[264] They observed that courts "independently . . . review the legislative findings upon which an abortion-related statute rests and . . . weigh the law's 'asserted benefits against the burdens' it imposes on abortion access."[265] Professor Melissa Murray has argued that this balancing test was meant to "add rigor" to the substantial burden test, a clarifying point that made explicit what the Court was doing anyway.[266] According to Linda Greenhouse and Professor Reva Siegel, a balancing test is necessary to determine what kind of restrictions are "undue."[267] And this sort of balancing test pervades constitutional law.[268]

Balancing harms and benefits of the law, the district court and Supreme Court decisions in *Whole Woman's Health* show what happens when a court applies appropriate standards to judge the reliability of factual claims. Larsen describes how Judge Lee Yeakel of the U.S. District Court for the Western District of Texas fact-checked all the evidence about the law's harms and benefits.[269] Judge Yeakel considered the "great weight of the evidence," including eight peer-reviewed studies that showed that abortion was "extremely safe."[270] He found the state's speculation that abortion-caused emergencies go unreported to be "largely unfounded and . . . without a reliable basis."[271] He noted that no reliable evidence demonstrated that

263. *See Whole Woman's Health*, 136 S. Ct. at 2300; *June Med.*, 140 S. Ct. 2103 at 2112.

264. *See Whole Woman's Health*, 136 S. Ct. at 2300; *June Med.*, 140 S. Ct. 2103 at 2112.

265. *June Med.*, 140 S. Ct. at 2112 (quoting Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)).

266. Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 319 (2020).

267. Linda Greenhouse & Reva B. Siegel, Casey *and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. 1428, 1466–1473 (2016).

268. *See* Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944, 1969–72, 1970 n.111 (2012) (citing cases and examples). The chief justice, who concurred only in the judgment in *June Medical*, departed from that view. He argued that the law's benefits would only come into play when determining whether the law at issue is "reasonably related" to achieving a "legitimate" state goal. *June Med.*, 140 S. Ct. at 2135–39 (Roberts, C.J., concurring) (suggesting that the "undue burden" test does not involve balancing factual claims but rather an independent assessment of whether the law at issue imposes a "substantial obstacle" without a discussion of the law's benefits); Leah Litman, *Opinion: A So-Called Victory Shows How the Supreme Court Will Kill 'Roe v. Wade,'* WASH. POST (Feb. 8, 2019, 5:29 PM), https://www.washingtonpost.com/opinions/a-so-called-victory-shows-how-the-supreme-court-will-kill-roe-v-wade/2019/02/08/9229852a-2bd3-11e9-b2fc-721718903bfc_story.html [https://perma.cc/R6Z7-ML9R]. Under any formulation, though, abortion litigation involves factual claims from both sides. Note, though, that *Dobbs* changed the way in which courts evaluate abortion restrictions, requiring only rational basis review. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2283 (2022).

269. Larsen, *supra* note 10, at 207–08.

270. Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014), *aff'd in part, rev'd in part sub nom.* Whole Woman's Health v. Cole, 790 F.3d 598 (5th Cir. 2015), *rev'd sub nom.* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); *Whole Woman's Health*, 136 S. Ct. at 2311.

271. *Whole Woman's Health*, 46 F. Supp. 3d at 684.

abortions are any safer in surgical centers or when done by doctors with admitting privileges at hospitals nearby.[272] On the other hand, reliable testimony and statistical evidence demonstrated what would happen if Texas's law went into effect: millions of women, particularly those of limited means, would be denied access to abortion.[273] Because he applied the same standard to both litigants' factual claims, Judge Yeakel found that the admitting privileges law was unconstitutional.[274]

As Greenhouse and Siegel note, a similar narrative played out at the Supreme Court, where Justice Stephen Breyer's majority opinion fact-checked the evidence from providers, the state, and amici.[275] The Court relied on amicus briefs and "undisputed general fact[s]" to connect the law to clinic closures.[276] It looked at the restrictions on providers as part of the totality of the barriers that the state had placed in front of individuals seeking abortions.[277] Justice Breyer then evaluated the evidence from the state that admitting privilege and surgical center rules bring health benefits, finding that evidence to be either nonexistent or lacking.[278] Conducting an independent review, Justice Breyer agreed with the district court that the state's evidence was "unreliable," based as it was on first-person anecdotes and misleading data.[279] For example, the Court called out the state for judging the law's effects on abortion access by using the average capacity across abortion clinics because averages papered over stark differences between clinics.[280]

Unlike the majority, the dissent in *Whole Woman's Health* showed how demands for infallibility could have changed the outcome. Justice Alito delegitimized the evidence that Texas's law resulted in the closure of roughly half of the abortion clinics in the state by demanding that the challengers provide an absolute "precise" causal chain showing that a specific requirement—and only that specific requirement—was the cause of a specific clinic shutting down.[281] In the real world, such evidence is impossible. And such an exacting standard is not required in abortion jurisprudence or in any other area of law.[282] The dissent also tried to discredit the plaintiff's expert by noting that he had previously made an inaccurate preliminary prediction about clinic closures.[283] But, as the majority noted,

272. *See id.*
273. *Id.* at 681–84.
274. *Id.* at 685.
275. Greenhouse & Siegel, *supra* note 267, at 159.
276. *Whole Woman's Health*, 136 S. Ct. at 2312.
277. Greenhouse & Siegel, *supra* note 267, at 162.
278. *Whole Woman's Health*, 136 S. Ct. at 2299 ("This evidence, along with the absence of any contrary evidence, supports the District Court's conclusions.").
279. *Id.*
280. *Id.* at 2318; *see also id.* at 2348 (Alito, J., dissenting) (using averages).
281. *Id.* at 2343–46, 2349–50 (Alito, J., dissenting).
282. *Id.* at 2313 (majority opinion) ("[P]etitioners satisfied their burden to present evidence of causation by presenting direct testimony as well as plausible inferences to be drawn from the timing of the clinic closures.").
283. *Id.* at 2346–47 (Alito, J., dissenting).

hinging experts' reliability and the admissibility of their testimony on perfection is another impossible demand: the scientific method necessarily involves "making a hypothesis . . . and then attempting to verify that hypothesis with further studies."[284] Justice Alito was effectively creating a perfection standard. Notably, these heightened demands for perfection were not applied to the state's experts and evidence.

Although it is less clear how Chief Justice Roberts's alternative standard would have played out in practice, it is likely that demands for infallibility would have made it even harder to invalidate an abortion restriction. At first, the chief justice suggested that he wanted to take factual questions out of abortion litigation entirely. He noted that weighing the state's interests in "'protecting the potentiality of human life' and the health of the woman, on the one hand, against the woman's liberty interest in defining her 'own concept of existence, of meaning, of the universe, and of the mystery of human life' on the other"[285] would require "assign[ing] weight to such imponderable values."[286] Ahmed suggests that this might "collapse" abortion litigation into questions of values, taking it out of the realm of factual claims entirely.[287] Alternatively, as the constitutional and federal courts scholar Leah Litman has suggested, the chief justice "weaken[ed] the legal standard" governing abortion law by eliminating the state's need to justify its restrictions at all while requiring challengers to demonstrate the resulting burdens.[288] Given how some courts have treated factual claims about those restrictions, it is not hard to imagine strict demands for precision, exactitude, and absolute perfection, making those cases difficult to win.

III. THE SOCIAL CONSTRUCTION OF KNOWLEDGE

As we have seen, judges applying rational basis, strict scrutiny, or balancing tests have required some litigants to prove counterfactuals, conduct impossible studies, demonstrate perfection, and eliminate all possible limitations from social science studies. Because those requirements are generally out of reach, courts have manufactured factual uncertainty when none exists in science. This uncertainty allows judges to plead ignorance and validate the dubious claims of those trying to restrict rights as being just as plausible as the scientific consensus, ultimately defaulting back to traditional structures of power in the law.

This part explores the broader characteristics and implications of this phenomenon. Relying on literature in sociology and critical studies, this part

284. *Id.* at 2317 (majority opinion).

285. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851, 871 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

286. *Id.*

287. Ahmed, *supra* note 38, at 1158.

288. Leah Litman, June Medical *as the New* Casey, TAKE CARE (June 29, 2020), https://takecareblog.com/blog/june-medical-as-the-new-casey [https://perma.cc/RW9D-RY8S].

shows how manufactured factual uncertainty reifies existing structures of power in both specific and systemic ways. It first describes how asymmetrical demands for infallibility are really double standards about the social construction of science and knowledge that put impossible burdens on marginalized populations seeking to realize freedom and equality. It then demonstrates how that double standard privileges those who traffic in misinformation. Finally, it illustrates how collapsing methods of constitutional analysis into demands for perfection more broadly orient the law's structural posture toward power.

A. Legal Construction of Science

There is, of course, nothing neutral about the law.[289] Law is one of the many social forces that influence society's conception of knowledge. The many forms of science and technology in the cases discussed in Part II are all creations of institutions and social, political, and historical contingencies rather than just creatures of laboratories.[290] Similarly, popular understanding of this knowledge is not static, received wisdom as if it came off a nutrition label. Knowledge goes through what sociologists of science call social construction, a process through which different social institutions help define what constitutes knowledge and science.[291] Courts that transform standards of review into demands for perfection from scientific studies incoherently apply two different visions of the sociology of science to two different litigants.

A "positivist" view imagines scientific inquiry as objective research into nature or reality, leading to epistemically reliable conclusions.[292] A "constructivist" view recognizes that what constitutes science and knowledge is, at least in part, constructed by institutions and social forces like the choice of theories and variables, the cognitive capacities and biases of scientists, rhetorical and linguistic limitations, availability of material resources, institutional interests and constraints, and gender and cultural bias, among many others.[293] A radical positivist view maintains that scientific truth exists, that some methods are stronger or more reliable than others, and that mistakes are the product of bad models or bad theories rather than

289. *See, e.g.*, HORWITZ, *supra* note 27; Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1516–17 (1991); Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1792–94 (2020).

290. *See, e.g.*, BRUNO LATOUR, THE PASTEURIZATION OF FRANCE (1984).

291. *See, e.g.*, Margaret G. Farrell, Daubert v. Merrell Dow Pharmaceuticals, Inc.*: Epistemilogy and Legal Process*, 15 CARDOZO L. REV. 2183, 2193–96 (1993) (describing the constructivist view).

292. *See, e.g.*, ROBERT MERTON, THE SOCIOLOGY OF SCIENCE 258–63 (1973) (describing the "ethos of science" as based on norms of objective inquiry).

293. Barry Barnes, *How Not to Do the Sociology of Knowledge*, *in* RETHINKING OBJECTIVITY 21, 28–31 (1994); LATOUR, *supra* note 95, at 1–9; THEODORE PORTER, TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE 211–12 (1995); DAVID HESS, SCIENCE STUDIES: AN ADVANCED INTRODUCTION 5 (1997).

intervening social forces.[294] The most radical version of the constructivist view is almost anarchic: it conceptualizes all facts as socially constructed by different interests and can collapse into relativism.[295] Bruno Latour characterized this view as holding that all "facts are made up, that there is no such thing as natural, unmediated, unbiased access to truth."[296] As a result, no one version of facts has any more claim to truth than another.[297] Although the constructivist view has debunked the positivist view in the social sciences, both remain in the law.[298]

Specifically, in the cases described above, demands for infallibility weaponize a pure positivist view to make it more difficult for marginalized populations to access their rights. In *Gonzales*, the Court wanted those challenging Congress's late-term abortion ban to provide evidence in the form of randomized, controlled trials, suggesting that this form of scientific study is always epistemically better or more reliable.[299] For the Fifth Circuit in *Rounds*, the only way that challengers to South Dakota's informed consent law could win is if they produced statistical studies that concluded with absolute certainty that abortion never leads to depression or suicide.[300] Again, this implies the existence of such uncontestable truths in science.

Justice Alito used his dissent in *Whole Woman's Health* to demand studies ruling out every other possible cause of clinic closures other than Texas's hospital admission requirements; he also suggested that scientists are per se unreliable if they once had a different view or made a mistake in the past.[301] Even a positivist recognizes that science makes mistakes and new theories take over old ones. And in *Otto*, the Eleventh Circuit critiqued proponents of gay conversion therapy bans for not providing recent definitive and unequivocal studies about the practice's harms.[302] Demands for unequivocal statements from scientists stem directly from the positivist view that science is a neutral inquiry toward truth.

At the same time, courts apply an anarchic "anything goes" constructivist view to the other side, opening the door to a free-for-all of pseudoscience in the name of traditional structures of power. This conception of knowledge sits behind *Crawford*, in which the existence of voter fraud was just as plausible as it not existing because Indiana was allowed to provide proof in

294. Caudill & Redding, *supra* note 95, at 704.

295. JONATHAN POTTER, REPRESENTING REALITY: DISCOURSE, RHETORIC AND SOCIAL CONSTRUCTION 36 (1996).

296. Bruno Latour, *Why Has Critique Run Out of Steam?: From Matters of Fact to Matters of Concern*, 30 CRITICAL INQUIRY 225, 227 (2004).

297. Bruno Latour, *One More Turn After the Social Turn: Easing Science Studies into the Non-Modern World*, *in* THE SCIENCE STUDIES READER 276, 276 (Mario Biagioli ed., 1999).

298. Farrell, *supra* note 291, at 2185, 2189–99 (identifying both constructivist and positivist approaches in *Daubert*); Gary Edmond & David Mercer, *Representing the Sociology of Scientific Knowledge and Law*, 19 SCI. COMMC'N 307 (1998) (arguing that the law has not accommodated social constructivism).

299. *See supra* Part II.C.2.

300. *See supra* Part II.A.1.

301. *See supra* Part II.C.3.

302. *See supra* Part II.B.2.

the form of uncorroborated newspaper accounts of impersonation in other states. Even though there was "no reliable data to measure the phenomenon" in *Gonzales*, claims that abortion caused psychological harms were just as plausible as claims that abortion did not because both anecdotes and broader studies had equal claim to "proof."[303] The same pattern played out in *Otto* and *DeBoer*. In *Otto*, the Eleventh Circuit implied that the studies described in the APA's brief had just as much claim to truth as the statements of two therapists.[304] In *DeBoer*, the Sixth Circuit concluded that it was just as possible that the state needed to incentivize opposite-sex marriage as it did not.[305]

Social constructivists do not generally believe that anything goes, that every claim is just as plausibly true as every other claim.[306] And although, as Professor Margaret Farrell has argued, the law should be free to develop its own constructs for "using science's truth in the interests of justice,"[307] there are two problems with judges' asymmetric and incoherent use of the objective and radical constructionist approaches. First, "anything goes" is neither an administrable nor desirable standard for evidence.[308] Second, even if it were, the assumption of objective, truth-seeking scientific inquiry is often imposed asymmetrically and unfairly on only one litigant in a case. As a result, only certain types of knowledge were legitimized by the judiciary in these cases: evidence that sought to democratize society, promote equal rights for marginalized populations, and protect against discrimination was seen as unreliable because it was judged against a standard of epistemic truth; evidence that sought to maintain current structures of power was seen as just as reliable because it was judged against a view that any claim is just as legitimate as the next.

This has a self-reinforcing effect. Future legislatures seeking to restrict abortion, the right to vote, and the rights of queer people can rely on a judicial opinion to demonstrate their good faith in the next case. *Gonzales* suggested that abortion harms women, so another state could claim that its previability abortion ban does the same. *Crawford* accepted Indiana's claim that voter impersonation is a significant problem, so another state has a leg to stand on when trying to justify restricting absentee voting. *Otto* found that conversion therapy helps some gay adolescents, so it is only a matter of time before other litigants justify demands for religious exemptions to equality laws on a pretextual desire to help.

303. Gonzales v. Carhart, 550 U.S. 124, 159 (2007).
304. Otto v. City of Boca Raton, 981 F.3d 854, 868–69 (11th Cir. 2020).
305. DeBoer v. Snyder, 772 F.3d 388, 405 (6th Cir. 2014).
306. Caudill & Redding, *supra* note 95, at 693–94.
307. Farrell, *supra* note 291, at 2217.
308. The Supreme Court vacillated between this and an "established science" view in *Daubert*, choosing neither of the extremes. Caudill & Redding, *supra* note 95, at 695–96.

B. Legitimization of Biased Counternarratives

In any given case, collapsing constitutional analysis into demands for infallibility demotes some wisdom and elevates counternarratives: everything—from the peer-reviewed consensus of the APA to the anecdotal accounts of two Christian therapists—becomes at least arguable, contestable, and possibly true. The result is a clouded consensus that boosts discredited or loosely supported claims into the mainstream—if anything is possible, then nothing is true. This puts the rights of people like Dylan Brandt at risk.

1. The Liar's Dividend

Writing about the effect of synthetic images and videos, or deepfakes, Chesney and Citron call this boost in confusion the "liar's dividend."[309] A liar's dividend is the benefit that accrues to opportunists from popular skepticism about the veracity of all things in an ecosystem awash in lies: the more people know that what they hear or read can just as easily be true or false, real or synthetic, accepted or discredited, "a skeptical public will be primed to doubt the authenticity" of the truth, the real, and the accepted knowledge.[310] As a result, everything is equally legitimate: the evidence of climate change becomes just as potentially credible or noncredible as claims that China created the notion of global warming to gain economic advantage; the evidence that former president Barack Obama was born in Hawai'i becomes just as credible as the claims that he was not; the evidence that there was no mass election fraud becomes just as credible as the conspiracy theory that there was. This benefits those who traffic in misinformation, intentional lies, or unsupported claims.

We saw this liar's dividend in Part II. The district court in *Crawford* called the challengers' surveys showing the likelihood that the law would make it difficult for voters of color and the poor to obtain qualifying IDs as "informal," putting it on par with the state's "unscientific" exit polling of 100 random (non-minority) voters suggesting that many of those 100 voters would not have trouble complying with the law.[311] In *Gonzales*, the Court considered two very different kinds of evidence to be equally reliable: it credited the testimony of a single nurse and doctors who had moral objections to abortion as equally, if not more, reliable than medical texts, several peer-reviewed studies, and analyses of most medical professionals.[312] It manufactured a "documented medical disagreement" by legitimizing certain factual claims without interrogating them, allowing Congress's late-term abortion ban to survive.[313] In *Rounds*, the Eighth Circuit said that it was impossible to determine the reliability of any study, even though Planned

309. Chesney & Citron, *supra* note 18, at 1785.

310. *See id.*

311. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 794–95 (S.D. Ind. 2006), *aff'd sub nom.* Crawford v. Marion Cnty. Election Bd., 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).

312. *See supra* notes 255–58 and accompanying text.

313. Gonzales v. Carhart, 550 U.S. 124, 162–63 (2007).

Parenthood's brief demonstrated how studies purporting to show a causal relationship between abortion and depression or suicide did no such thing.[314]

In other abortion cases, courts characterized single briefs based on first-person accounts as just as reliable as (and reliable enough to undermine) the mountain of medical evidence showing that abortion procedures are extremely safe.[315] And in *Otto*, the Eleventh Circuit stated that the therapists' claims that their clients report benefiting from conversion therapy were enough to question the APA studies demonstrating the practice's harms.[316] Considering the lack of evidence provided by the therapists, the court must have found the mere existence of an informed consent form to be equally as relevant and powerful as a task force review of all extant research on the harms of conversion therapy. This manufactured disagreement within the medical and scientific community about the efficacy of conversion therapy allowed the court to classify bans as "[b]road prophylactic rules" aimed at protecting and expressing "majority preferences" rather than as limitations on torture.[317]

After reading these and other opinions, we are left asking: Which is it? Does conversion therapy help or hurt? Does abortion harm or help women? Do voter ID laws impose a burden or don't they? The opinions are written in such a way as to imply that there are no clear answers, only lots of possible answers.

This problem has echoes in the legal realist and critical studies conception of law's indeterminacy. Although it comes in a variety of colors, the indeterminacy thesis generally argues that the legal system, including its norms, structures, doctrines, and practices, can support multiple plausible results in any given case.[318] The strongest version of the indeterminacy thesis is that a doctrine's inability to require a specific result allows judges the freedom to select any number of tools, values, precedents, and ideas to decide a case.[319] What has happened here is even more troubling for the rule of law. By manufacturing factual uncertainty when there wasn't any, judges have the opportunity to dismiss scientific claims they do not like and decide factual questions as they see fit.[320]

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314. Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 904 (8th Cir. 2012) (en banc.).

315. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2320–21 (2016) (Ginsburg, J., concurring), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

316. *See supra* notes 182–89 and accompanying text.

317. Otto v. City of Boca Raton, 981 F.3d 854, 869–70 (11th Cir. 2020).

318. *See, e.g.*, Hanoch Dagan, *Doctrinal Categories, Legal Realism, and the Rule of Law*, 163 U. PA. L. REV. 1889 (2015); Ryan Calo, *Privacy Law's Indeterminacy*, 20 THEORETICAL INQUIRIES L. 33, 37 (2019); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 31 (1997).

319. *See* David Kairys, *Introduction* to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1, 3–5 (David Kairys ed., 3d ed. 1998); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 258–60 (1987) (arguing that the system of rules, norms, and doctrines in the law allows judges to decide cases in opposite ways). For an excellent discussion of the place of the indeterminacy thesis in legal realism and the critical legal studies movement, see ROBIN WEST, NORMATIVE JURISPRUDENCE 157–66 (2011).

320. I acknowledge Professor Robin West's trenchant critique of the incompatibility of the indeterminacy thesis and moral responsibility: "One simply cannot assert the lawlessness . . .

This should surprise no one. As the historians of science Naomi Oreskes and Erik M. Conway have shown, manufacturing doubt and uncertainty in the face of a broad-based scientific consensus supporting progressive reform has been the strategy of choice for industrial interests seeking to stop tobacco and climate change regulations.[321] And they have even used the same strategies as judges used in the above cases: using a single study to cast doubt on a scientific consensus, asking questions that demanded no equivocation in the consensus studies, suggesting that the consensus could never make conclusions "with certainty," cherry-picking data, exaggerating statements in studies' limitations sections, critiquing the consensus as biased or politically motivated, and demanding that all other possible explanations be unequivocally eliminated, among others.[322]

Like the doubt about climate change that was manufactured by industry, which paralyzed the U.S. government's ability to respond meaningfully to the systemic risk of catastrophe, manufacturing uncertainty in civil rights litigation has significant implications for constitutional rights. The factual reality that a segregated Black law school would be qualitatively unequal and provide an inadequate legal education was critical to the Supreme Court's decision in *Sweatt v. Painter*,[323] a prelude to the broader decision in *Brown v. Board of Education*.[324] And empirical proof of the effects of segregation was central to *Brown* itself.[325] Even today, conservative litigants opposed to universities considering race as part of a holistic admissions process use the same strategy when they argue that they "don't think there's any evidence" of educational benefits from classroom diversity.[326] If the answers to the social questions at the heart of those cases were clouded by manufactured factual uncertainty, the results could have been quite different.

Looking to the future, manufactured uncertainty bodes poorly for the fate of new suits challenging injustice. For instance, in 2021, nineteen states passed thirty-three new voting restrictions grounded on the false claim that the 2020 election was rife with absentee and mail-in ballot fraud.[327]

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of an adjudicator, of all people, if one simultaneously holds some version of the claim that statements purporting to say 'what the law is' cannot possibly be true or false, because of the thorough-going radical indeterminacy of legal texts. There is no actus reus for the larceny, in other words, even if there is intent . . . . There are only arguments, good or bad, congenial or not." Robin West, *The Lawless Adjudicator*, 26 CARDOZO L. REV. 2253, 2257–58 (2005). But the indeterminacy I describe here is manufactured by a judge who demands infallibility to delegitimize one litigant's evidence.

321. ORESKES & CONWAY, *supra* note 15, at 10–35, 169–215.

322. *Id.* at 13, 18, 31, 59–60, 72–73, 86, 102, 115–17, 127–29, 187–91.

323. 339 U.S. 629 (1950); *see id.* at 632–35.

324. 347 U.S. 483 (1954).

325. *See id.* at 493–95.

326. Transcript of Oral Argument at 49, 60, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. argued Oct. 31, 2022) (statement of Mr. Strawbridge).

327. *Voting Laws Roundup: October 2021*, BRENNAN CTR., https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021 [https://perma.cc/AQD4-8MFP] (last visited Apr. 3, 2023).

Fifty-four suits were filed.[328] If, following *Crawford*, states need barely any evidence to prove the "strength" of the fraud rationale, but challengers need infallible proof of the "magnitude" of the laws' harms, those laws will be difficult to stop. If collapsing doctrines of constitutional analysis into demands for infallibility makes all factual claims about the state of medical evidence equally as reliable or unreliable as the next, ongoing challenges to anti-transgender laws premised on assertions that adolescent hormone therapy is dangerous could fail. The stakes are high.

2. Revisiting *Brandt*

In particular, Dylan Brandt and many other transgender plaintiffs could lose their cases. Recall that *Brandt* is a challenge to Arkansas's ban on gender-affirming hormone therapy, a ban that was premised on the factual claim that such therapies are harmful and irreversible.[329] Copying the strategies of the defendants in *Rounds*, *DeBoer*, and *Gonzales*, and the therapists' strategy in *Otto*, Arkansas framed the case as a search for imperfection in the challengers' empirical evidence. The state argued that "there is a lack of credible scientific evidence that gender-transition procedures improve children's health."[330]

Just like those seeking to expand the rights of women, LGBTQ+ people, persons of color, and other marginalized populations, Dylan's attorneys presented evidence of the scientific consensus. The "consensus recommendation of medical organizations" is that gender-affirming therapy is the only effective treatment for gender dysphoria.[331] The banned therapies mitigate adolescents' distress, provide an avenue for happiness, and give them time to assess their gender identity without being forced into a particular identity.[332] Several medical organizations, including the American Academy of Family Physicians, American Academy of Pediatrics, American College of Obstetricians and Gynecologists, American College of Physicians, American Osteopathic Association, and American Psychiatric Association submitted an amicus brief and resolutions affirming this consensus.[333]

The district court saw through the state's strategy, finding the state's justifications to be "pretextual" in part because they were based on unsound science.[334] But that can change when an appellate court considers the case

328. *Voting Rights Litigation Tracker 2021*, BRENNAN CTR., https://www.brennancenter.org/our-work/research-reports/voting-rights-litigation-tracker-2021 [https://perma.cc/AV6Y-64NS] (last visited Apr. 3, 2023).

329. H.B. 1570, 2021 Gen. Assemb., 93d Reg. Sess. §§ 3, 5, 8, 10A (Ark. 2021).

330. Brandt v. Rutledge, 551 F. Supp. 3d 882, 889 (E.D. Ark. 2021) (granting motion for preliminary injunction), *aff'd sub nom.* Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022), *reh'g and reh'g en banc denied*, No. 21-2875 2022 WL 16957734 (8th Cir. Nov. 16, 2022).

331. *Id.* at 890.

332. *Id.*

333. *See id.* at 890–91 nn.5–6.

334. *Id.* at 891.

on the merits, especially since the court can turn any standard of review into a demand for infallibility from the scientific consensus. And the defendants and amici have already set the stage. An amicus brief submitted by seven individuals who regretted their decision to take hormones for gender dysphoria suggested that the medical establishment supports gender-affirming hormone therapy without cognitive therapy to "address contributing or complicating mental health issues."[335] The brief mischaracterizes the American Academy of Pediatrics's position that gender-affirming therapy is the "only effective treatment" for gender dysphoria as suggesting that hormones are perfect treatments for all symptoms.[336] The remainder of the brief suggests that the scientific consensus acknowledged by the district court is biased and not academically rigorous.[337]

Another brief tells the story of ten parents who objected to their children receiving gender-affirming care.[338] One parent was "shocked"; another did "her own research" to conclude that hormone therapy causes "loss of bone density and diminished cognitive development."[339] Another parent who signed onto the brief lost custody of his child because he opposed their gender transition; this parent also conducted his own research online about the risks of hormones.[340] And a brief from four physicians and researchers who self-identify as "experts in gender-identity theory" argued that there are "serious gaps in the research underlying" gender-affirming hormone therapy.[341] One of those physicians, Quentin Van Meter, runs a conservative pediatric group and had previously been discredited as an expert in a Texas court.[342] Another physician, Michael Laidlaw, had previously published an essay with several anti-transgender slurs in the online journal of the

335. Brief of Amici Curiae for Keira Bell, Laura Becker, Sinead Watson, Kathy Grace, Duncan, Laura Reynolds, and Carol Freitas as Amici Curiae in Support of Defendants, Supporting Reversal at 3, Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2021) (No. 21-2875), https://www.aclu.org/legal-document/brandt-et-al-v-rutledge-et-al-amicus-brief-keira-bell-et-al [https://perma.cc/AT6Z-Z8J6].

336. *Id.* at 4.

337. *Id.* at 6.

338. Brief for Yaacov Sheinfeld Jeanne Crowley, Ted Hudacko, Lauren W., Martha S., Kellie C., Kristine W., Bri Miller, Helen S. and Barbara F., as Amici Curiae in Support of Defendants-Appellants, Supporting Reversal, Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022) (No. 21-2875), 2021 WL 5754550.

339. *Id.* at 10, 12.

340. *Id.* at 13–14.

341. Brief of *Amici Curiae* Medical and Mental Health Professionals Supporting Defendants-Appellants and Urging Reversal at 1, 3, 5, Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022) (No. 21-2875), 2021 WL 5754522.

342. Stephen Caruso, *A Texas Judge Ruled This Doctor Was Not an Expert. A Pennsylvania Republican Invited Him to Testify on Trans Health Care*, PA. CAP. STAR (Sept. 15, 2020, 7:24 AM), https://www.penncapital-star.com/government-politics/a-texas-judge-ruled-this-doctor-was-not-an-expert-a-pennsylvania-republican-invited-him-to-testify-on-trans-health-care/ [https://perma.cc/33HD-KJAS].

Witherspoon Institute, the organization primarily responsible for the debunked Regnerus study in the marriage equality litigation.[343]

Most independent observers could debunk these claims, but the same could be said about many of the claims in abortion and conversion therapy cases. In *Gonzales*, the suggestion that abortion may cause depression was based entirely on a single brief from an antiabortion group that detailed personal narratives of the experiences of some women who had abortions.[344] The brief from a handful of parents or the brief from four individuals who regretted taking gender-affirming hormone therapy could fill the same role in *Brandt*. The Eleventh Circuit's finding of factual uncertainty about the harms of gay conversion therapy was based in part on the litigants' own assessment that many of their clients are happy with their treatment.[345] The claims of four biased medical professionals that hormone therapy is harmful is even stronger. Any one of these briefs allows courts to manufacture factual uncertainty despite a medical consensus, especially when standards of review are little more than demands for perfection.

C. Antidemocratic Wins

Anyone familiar with the historical relationship between queer or feminist liberation and medical science might be surprised to see the scientific consensus lined up in favor of more rights for sexual minorities. As Michel Foucault famously argued, social institutions like law, science, and religion have been the chief protectors of traditional values and central players in gatekeeping knowledge that could support the liberation of marginalized groups.[346] But today, conservative causes are the primary beneficiaries of manufactured factual uncertainty in the social and medical sciences. *Crawford* allowed Indiana to make it harder for marginalized populations to vote in part because courts denied challengers the ability to use empirical evidence to show how voting restrictions would harm socioeconomic and racial minorities, while allowing the state to prove in-person voter impersonation with uncorroborated claims.[347] Antiabortion forces benefited

343. *See* Michael K. Laidlaw, *Gender Dysphoria and Children: An Endocrinologist's Evaluation of* I Am Jazz, PUB. DISCOURSE (Apr. 5, 2018), https://www.thepublicdiscourse.com/2018/04/21220/ [https://perma.cc/SC6T-8E6N]; *see also* ESKRIDGE & RIANO, *supra* note 32, at 555–57, 565, 570.

344. *See supra* notes 255–58 and accompanying text.

345. *See supra* notes 182–84 and accompanying text.

346. *See generally* 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY (Robert Hurley trans., Knopf Doubleday Publ'g Grp. 1990) (1978); Abram J. Lewis, *"We Are Certain of Our Own Insanity": Antipsychiatry and the Gay Liberation Movement, 1968–1980*, 25 J. HIST. SEXUALITY 83 (2016).

347. *Crawford* was not the only decision that empowered states to restrict the right to vote. More important was the Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), which weakened the protections of the Voting Rights Act of 1965, *see* Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 and 52 U.S.C.), which had the effect of diminishing the power of minority voters. *See, e.g.*, Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism, and Voting Rights*, 2015 U. CHI. LEGAL F. 113; Bridgette Baldwin, *Backsliding: The United States Supreme Court,* Shelby County v. Holder *and the Dismantling of Voting Rights Act of 1965*, 16 BERKELEY J. AFR.-AM. L. & POL'Y 251 (2015);

from heightened demands for infallibility in *Gonzales* and *Rounds*. They even eked out a victory from defeat in *June Medical* through Chief Justice Roberts's concurrence.[348] And *Otto*'s legitimization of anecdotal reports over a variety of forms of credible evidence allowed gay conversion therapists to continue enforcing traditional sexual norms on queer adolescents.[349] Those who lost their cases in part because they were subject to infallibility demands all have something in common: they are all marginalized. The poor and racial minorities seeking access to the vote, individuals seeking access to abortion, and queer adolescents sit toward the bottom of traditional hierarchies of power. In these cases, uneven demands for perfection cemented that status.

These decisions also generate associated norms. As many scholars have argued, law is an instrument of norm production, signaling what society should consider good or bad.[350] For instance, before the Supreme Court's decision in *Lawrence v. Texas*,[351] which declared anti-sodomy laws to be unconstitutional, it was routine for states to justify anti-gay discrimination and police harassment on the ground that gay people were defined by criminal conduct.[352] The *Lawrence* litigation itself constructed a different factual narrative—namely, one of committed same-sex couples, many of whom were already raising children successfully.[353] Studies show that public support for queer equality increased after these narratives played out.[354]

Ellen D. Katz, *Election Law's Lochnerian Turn*, 94 B.U. L. REV. 697 (2014). *But see* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Pathological Racism, Chronic Racism & Targeted Universalism*, 109 CALIF. L. REV. 1107, 1133–34 (2021) (cautioning that putting too much blame on *Shelby County* distracts from deeper problems in statutory and constitutional approaches to voting rights).

348. *See* Litman, *supra* note 288.

349. These all qualify as forms of what Bowie called "antidemocracy protect[ing] dominating social hierarchies." *See* Bowie, *supra* note 26, at 175.

350. Matthew Tokson & Ari Ezra Waldman, *Social Norms in Fourth Amendment Law*, 120 MICH. L. REV. 265, 279–84 (2021) (summarizing the literature on law and social norms); *see, e.g.*, Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 625–28 (2000) (discussing the role of law in delegitimizing smoking); Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1926–27 (2000) (showing how truancy laws positively impacted public perception of the need for adolescent education); Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 64 (2002) (discussing the norm-setting role of seatbelt laws); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 370 (1992) (connecting law to changing gender norms).

351. 539 U.S. 558 (2003).

352. Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000).

353. *See* DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* (2012) (describing how the two men at the heart of *Lawrence* were portrayed in respectable, heteronormative ways).

354. *Attitudes on Same-Sex Marriage*, PEW RSCH. CTR. (May 14, 2019), https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/ [https://perma.cc/H67R-LFVP].

Manufacturing factual uncertainty will likely have the opposite effect. The more the law legitimizes claims that voter fraud exists, that fetuses can feel pain, that abortion causes depression, suicide, and cancer, and that some people enjoyed conversion therapy, the more the public and policy makers are likely to attribute at least some truth to those claims. Future legal victories become even harder. The social perception, however misleading, of law as a trusted institution neutrally mediating adversarial claims makes it particularly capable of being an arbiter of what a society should conceptualize as true.[355]

IV. PROBLEMS IN SEARCH OF SOLUTIONS

To some extent, judges have always been able to use a variety of doctrinal tools to manufacture uncertainty in service of traditional structures of power. That concern is at the core of the legal realist and critical legal studies thesis of the law's indeterminacy.[356] But we now face particularly volatile combinations of social, political, and technological pressures that amplify the presence and effects of misinformation.[357] Something must be done; what to do depends on our understanding of the problem.

Part of the problem of manufacturing uncertainty through demands for infallibility is sociotechnical—namely, contingent on a moment of social media, broken gatekeepers, and algorithmic virality. Therefore, part of the answer may be exogenous to constitutional doctrine. This cluster of proposals focuses on regulating platform design, algorithms, and power, but it should also focus on how scientific research is developed, published, and shared.

The problem is also legal. The tangled web of right-wing advocacy groups, unleashed by deregulatory decisions like *Buckley v. Valeo*[358] and *Citizens United v. FEC*,[359] provides the money, reports, witnesses, and public discourse that validates dubious factual claims in support of conservative policy goals. These decisions must be reversed. Doctrines of constitutional analysis are also too indeterminate and insensitive to viral misinformation. And judicial supremacy entrenches manufactured uncertainty as an ongoing and dangerous problem capable of affecting the law for a generation. As a result, a little judicial humility or, more radically, proposals for jurisdiction-stripping and limiting the power of appellate courts may have merit. I offer tentative and preliminary suggestions on what a mix of these proposals might look like.

355. Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339, 340 (1996).

356. *Id.* at 340–45.

357. Larsen, *supra* note 10, at 190–201; Larsen, *supra* note 9, at 1776–77.

358. 424 U.S. 1 (1976) (declaring individual limits on campaign contributions as violations of free speech rights).

359. 558 U.S. 310 (2010) (declaring as unconstitutional laws that limit the rights of corporations to contribute to political issue advocacy).

A. The Political Economy of Misinformation

Many scholars argue that the best way to address the problem of misinformation in the law is to cure the infection at the root of the symptoms: an information ecosystem flooded with misinformation, conspiracy theories, and deeply partisan divides over basic conceptions of reality. Enhancing media literacy is a common proposal.[360] Some platforms have chosen to cooperate with independent fact-checking institutions.[361] Fact-checking may not work,[362] but scholars have suggested that social media websites should include source alerts on political posts, warning and nudging users to pay close attention to the potential for bias.[363] A program at the University of Washington called the "Misinformation Escape Room" attends to the emotional, psychological, and affective dimensions of misinformation, aiming to use game-based approaches to build user resistance to the enticing lure of fake news.[364] All of us, including judges, can benefit from strengthening those muscles. Focusing on political misinformation, some legal scholars urge campaign finance regulators to demand transparency from social media platforms about political ads and targeting algorithms.[365] Several policy makers have called for banning political microtargeting because it amplifies echo chambers and crowds out correct information.[366]

360. *See, e.g.*, Erica Weintraub Austin, Porismita Borah & Shawn Domgaard, *COVID-19 Disinformation and Political Engagement Among Communities of Color: The Role of Media Literacy*, MISINFORMATION REV. (Mar. 8, 2021), https://misinforeview.hks.harvard.edu/article/covid-19-disinformation-and-political-engagement-among-communities-of-color-the-role-of-media-literacy/ [https://perma.cc/PN9U-PSZ7].

361. *See* Dawn Carla Nunziato, *The Varieties of Counterspeech and Censorship on Social Media*, 54 U.C. DAVIS L. REV. 2491, 2520–36 (2021); Tessa Lyons, *Hard Questions: What's Facebook's Strategy for Stopping False News?*, FACEBOOK NEWSROOM (May 23, 2018), https://newsroom.fb.com/news/2018/05/hard-questions-false-news [https://perma.cc/ZRR8-9C4W].

362. *See, e.g.*, Chris J. Vargo, Lei Guo & Michelle A. Amazeen, *The Agenda-Setting Power of Fake News: A Big Data Analysis of the Online Media Landscape from 2014 to 2016*, 20 NEW MEDIA & SOC'Y 2028, 2041, 2044 (2018); Fabiana Zollo, Alessandro Bessi, Michela Del Vicario, Antonio Scala, Guido Caldarelli, Louis Shekhtman, Shlomo Havlin & Walter Quattrociocchi, *Debunking in a World of Tribes*, 12 PLOS ONE 1, 8 (2017); Adrien Friggeri, Lada A. Adamic, Dean Eckles & Justin Cheng, *Rumor Cascades*, 8 PROC. INT'L AAAI CONF. ON WEBLOGS & SOC. MEDIA 101, 107–08 (2014).

363. *See, e.g.*, Jason Ross Arnold, Alexandra Reckendorf & Amanda L. Wintersieck, *Source Alerts Can Reduce the Harms of Foreign Disinformation*, MISINFORMATION REV. (May 10, 2021), https://misinforeview.hks.harvard.edu/article/source-alerts-can-reduce-the-harms-of-foreign-disinformation/ [https://perma.cc/RH9D-LXLX]; Jan Kirchner & Christian Reuter, *Countering Fake News: A Comparison of Possible Solutions Regarding User Acceptance and Effectiveness*, 4 PROC. ASS'N FOR COMPUTING MACH. ON HUM.-COMPUT. INTERACTION 1 (2020).

364. LOKI'S LOOP ESCAPE ROOM, https://www.lokisloop.org/ [https://perma.cc/EES7-HH66] (last visited Apr. 3, 2023).

365. Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating "Fake News" and Other Online Advertising*, 91 S. CAL. L. REV. 1223, 1255–68 (2018).

366. Kate Cox, *Proposed Bill Would Ban Microtargeting of Political Advertisements*, ARS TECHNICA (May 26, 2020, 3:19 PM), https://arstechnica.com/tech-policy/2020/05/proposed-bill-would-ban-microtargeting-of-political-advertisements/ [https://perma.cc/H8MR-CQ57].

Despite the popularity of these proposals, they remain insufficient. Their focus on the public may help foster a healthier media ecosystem, but they ignore the political economy of misinformation, disinformation, and propaganda. Social media platforms profit from the kind of high, intense engagement fostered by misinformation, and free speech maximalism insulates platform decisions from scrutiny.[367] The wealthiest platforms also fund research that diverts attention away from their roles in disseminating misinformation and toward individual interventions. Taking this critique seriously means using the law to regulate an informational, capitalistic business model that thrives and profits from the creation and exchange of misinformation.[368]

More specifically, media literacy projects insufficiently address the problem of biased amici and judicial mischief in constitutional scrutiny. To tackle the system that allowed Mark Regnerus to publish faulty scholarship in respected journals and permitted conservative groups to launder antiabortion scholarship through academic-sounding journals, Professors Jevin West and Carl Bergstrom highlight the need for structural reforms to academic publishing.[369] Predatory publishers exchange gatekeeping for profit. And institutional pressures for academics to publish, not to mention the scholarly incentive to follow the interests of grantmakers, drive many researchers to forego traditional peer review, ignore research ethics, and engage in dubious research tactics.[370] Universities and funders could shrink the lucrative cottage industry of predatory publishing if their demands on scholars change. If that happens, perhaps there would be fewer poorly researched, biased journal articles stating that abortion harms women or that gay parents harm children or that adolescents benefit from conversion therapy.

B. The Law and "Merchants of Doubt"

Many of the citations to dubious claims of fact discussed in Part II and throughout the broader legal literature come from litigants and amici with ties to a tangled web of conservative interest and advocacy groups.[371] Oreskes and Conway call these groups "merchants of doubt"; for them, manufacturing uncertainty in the face of scientific agreement that smoking causes cancer or that chlorofluorocarbons damage the ozone layer or that humans are contributing to catastrophic climate change is their job.[372] These

367. JULIE COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 89–97 (2019); Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119 (2015).

368. Sanjay Jolly & Victor Pickard, *Towards a Media Democracy Agenda: The Lessons of C. Edwin Baker*, LAW & POL. ECON. PROJECT BLOG (Nov. 29, 2021), https://lpeproject.org/blog/towards-a-media-democracy-agenda-the-lessons-of-c-edwin-baker/ [https://perma.cc/6S9G-RGV2].

369. West & Bergstrom, *supra* note 31, at 5.

370. *Id.* at 3–4.

371. *E.g.*, Larsen, *supra* note 9; Ahmed, *supra* note 38.

372. ORESKES & CONWAY, *supra* note 15, at 9.

organizations distribute money to researchers, volunteer witnesses to legislatures and litigants, disseminate findings through the popular press, coordinate campaigns, publish reports, and file their own briefs, all of which give judges convenient citations to counternarratives.[373] They are also shrouded in secrecy thanks to increasingly conservative Supreme Court interpretations of the First Amendment.

In *Citizens United*, the Supreme Court continued an almost unbroken streak of cases, dating back to *Buckley*, that insulated political expenditures from regulation under the umbrella of free speech. The Court accomplished that through the "merging of First Amendment speech with commerce,"[374] or, in other words, conflating money and speech. Freed from any constraints to gather and spend money, issue-oriented organizations could funnel undisclosed donations to individuals willing to align their research with their benefactors' political views. This strategy has been central to manufacturing uncertainty in the science of tobacco's harms and climate change—money flowed in the form of research grants, funding for counternarrative studies, and media campaigns that disseminated claims contrary to science.[375]

A similar narrative is playing out in civil rights litigation. An anti-LGBTQ+ organization funded Mark Regnerus's damaging and flawed study.[376] Antiabortion organizations bankroll dubious studies and identify witnesses for legislatures.[377] These and other groups are part of a tangled web of highly professionalized organizations, almost all of whom can hide their donations from public scrutiny. Transparency and disentangling money from speech could help litigants identify biased misinformation and provide much needed sunshine to dark money–funded, opportunistic litigation.

C. Doctrinal Reform

Even if we assume that focusing on the misinformation ecosystem can alleviate the worst pressures on judges, it does not fix the problems inherent in the tiers of scrutiny themselves. Those problems are both structural and arise as applied. Legal realists critique the tiers of scrutiny framework as malleable, ex post justifications that could be attached to any decision to give it the guise of technical neutrality.[378] In addition, three seemingly distinct tiers can ossify over time, making it difficult for new rights and new groups

373. *See, e.g.*, Mary Ziegler, *Some Form of Punishment: Penalizing Women for Abortion*, 26 WM. & MARY BILL RTS. J. 735, 770–71 (2018).

374. Britton-Purdy et al., *supra* note 289, at 1809.

375. ORESKES & CONWAY, *supra* note 15, at 34–35, 38–40, 54–63, 170, 193.

376. ESKRIDGE & RIANO, *supra* note 32, at 555.

377. *E.g.*, Ziegler, *supra* note 373, at 770–71; Ahmed, *supra* note 38, at 108; *see also id.* at 107 (citing Brief of Sandra Cano, the Former "Mary Doe" of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner at 1, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05-380), 2006 WL 1436684).

378. Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 98–99 (1993). *But see* Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1458 n.20 (1995).

of emerging consciousness to receive the same constitutional protections as others.[379]

When applied in practice, strict scrutiny is vague enough that Professor Richard H. Fallon, Jr. identified three different kinds in the case law.[380] Professor Suzanne Goldberg has demonstrated how the different tiers are inconsistently applied across cases and how strict scrutiny can be too rigid, especially when evaluating state action attempting to remedy past discrimination or protect marginalized groups.[381] A number of scholars writing from critical race and queer perspectives have also critiqued strict scrutiny's laser focus on identity as insufficiently protective of the performative aspects of identity.[382] Justice Thurgood Marshall levied an even more comprehensive critique of the entire project: many cases involve overlapping forms of discrimination and, therefore, defy the rigid categorizations required by each tier.[383]

This Article's critique is different. Part II illustrated how almost any level of scrutiny can be distorted into demands for scientific perfection in cases involving critical or determinative facts about social phenomena. Scholars' proposed reforms to the scrutiny framework do not address that problem. Justice Marshall thought a flexible, contextual balancing test should replace the tiers of scrutiny,[384] but, as we have seen, balancing tests can also legitimize a single brief, article, or baseless factual claim. Justice John Paul Stevens would identify rationality based on what an "impartial lawmaker" would believe.[385] In a similar vein, Professor Cass R. Sunstein has called for judicial review to ensure that legislative choices are based on public values rather than "naked preferences."[386] Interrogating the objective rationality of legislative action sits at the core of Larsen's and Landau's proposals for fact-checking and broken records review, respectively.[387] But Part II demonstrates how facts themselves are malleable. A legislature can "do its homework," in Larsen's words, while still relying on a single study that challenges the scientific consensus. A legislature can also insulate its process from claims that the record is "broken" by pointing to language in a study's limitations section and using hedged claims to demonstrate the plausibility

379. Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 485, 511–12 (2004).

380. Fallon, *supra* note 58, at 1271.

381. *See generally* Goldberg, *supra* note 379, at 503–10, 512–18.

382. *See, e.g.*, KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 17–19 (2007) (highlighting the limits of current civil rights law because of its focus on identity rather than performance); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 710–19 (2001).

383. *See* Dandridge v. Williams, 397 U.S. 471, 520–21 (1970) (Marshall, J., dissenting).

384. *See id.*

385. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 452 (1985) (Stevens, J., concurring); *see also* Craig v. Boren, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring).

386. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1713 (1984).

387. *See* Larsen, *supra* note 10, at 234–35; Landau, *supra* note 10, at 450–53.

of its approach. Therefore, perhaps the focus of reform should not be law or doctrine, but rather judges and judging.

D. Judges and Judging

Law will always be involved in the social construction of knowledge, influencing society's conception of reality, science, and right and wrong. Law needs science to answer pressing questions about how the world works.[388] Therefore, any time judges have the power to assess the reliability of evidence, they participate in an inherently social process that is, as the sociologist Latour describes, supposed to get us closer to answering questions about broader social phenomena.[389]

But the dominance of the judicial voice comes with risks. Even accepting that judges do not always behave in radically partisan ways and that their decisions are generally predictable,[390] judges are unrepresentative of the people. Federal judges skew older, whiter, and wealthier than the average person living in the United States.[391] Judges overwhelmingly identify as heterosexual and cisgender.[392] They represent a class with a vested interest in a rough approximation of the status quo.[393] And thanks to repeated Republican administrations' laser focus on appointing conservative ideologues, the judiciary has become another weapon in the fight to enact conservative policy goals.[394] Therefore, the histories, perspectives, and ideologies of most federal judges do not reflect the intersectional narratives of the people most vulnerable to their decisions. What is more, as Fallon has noted, even the kinds of reforms to judicial analysis suggested above can only bind judges if they are willing to "subject [themselves] to self-discipline."[395] At a moment of precarious precedents and lawless appellate courts,[396] that discipline is more necessary—but also less likely—than it has ever been.

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388. *See* Farrell, *supra* note 291, at 2217.

389. Latour, *supra* note 296, at 231.

390. *See* STEVEN WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND 152–54 (2001); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 12 (1984).

391. *See* DANIELLE ROOT, JAKE FALESCHINI & GRACE OYENUBI, CTR. FOR AM. PROGRESS, BUILDING A MORE INCLUSIVE FEDERAL JUDICIARY 2, 12 (2019), https://cdn.americanprogress.org/content/uploads/2019/10/02142759/JudicialDiversity-report-3.pdf [https://perma.cc/4ZKZ-JEW7].

392. *See* LAMBDA LEGAL, YEAR ONE OF THE BIDEN ADMINISTRATION: A LGBTQ+ PROGRESS REPORT 2 (2022), https://www.lambdalegal.org/sites/default/files/publications/downloads/biden_report_2022_final.pdf [https://perma.cc/9PK3-ZZG4].

393. Edgar Bodenheimer, *The Inherent Conservatism of the Legal Profession*, 23 IND. L.J. 221, 226 (1948).

394. *See* Sarah Posner, *Trump's Christian Judges March On*, ROLLING STONE (Oct. 9, 2020, 9:00 AM), https://www.rollingstone.com/politics/politics-features/trump-christian-judges-supreme-court-1072773/ [https://perma.cc/AJJ2-EADJ].

395. Fallon, *supra* note 58, at 1293–94, 1301.

396. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224, 226 (1977), *overruled by* Janus v. AFSCME Council 31, 138 S. Ct. 2448 (2018); Nevada v. Hall, 440 U.S. 410 (1979), *overruled by* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485 (2019); Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), *overruled in part by* Knick v. Township of Scott, 139 S. Ct. 2162 (2019); *see also* Ruth Marcus, *The 5th Circuit Is Staking*

There is another problem with judicial domination over the social construction of knowledge; that is, when judges decide the reality of broad social phenomena, they can freeze the law's construction of knowledge with a "dead hand."[397] The dead hand problem is a broad critique of a political system in which current generations are constrained from effectively addressing pressing problems by a constitution written by very different people a long time ago.[398] In the context of judicial collapse of tiers of scrutiny into demands for infallibility, the dead hand problem is less about constitutions and originalist interpretations limiting the power of current popular majorities than about judges more permanently instantiating a particular understanding of science in society and the law. As Professor Jeremy Waldron has argued, federal judges appointed to life tenure by the executive are less accountable than legislatures in a democratic society.[399] Their decisions are harder to overturn than the decisions of a democratically elected legislature with seats up for election over two, four, or six years.[400] Therefore, in a system of judicial and federal supremacy in which federal judges' decisions are final,[401] the courts can have a more lasting impact on public perceptions of truth and reality when those perceptions must evolve.

However, the social construction of knowledge must be ongoing, flexible, and changing; it is supposed to reflect both evolving science and the sociopolitical and sociohistorical contingency of knowledge.[402] Court decisions, Waldron argues, reframe political disagreements about the good life as questions for which legal "scholasticism" has definite answers.[403] This cuts off the voices of other groups—from on-the-ground advocates and marginalized populations to policy makers who represent popular interests—and impairs the public's "right to participate on equal terms in social decisions on issues of high principle."[404] In other words, robust judicial

Out a Claim to Be America's Most Dangerous Court, WASH. POST (Aug. 31, 2021, 6:37 PM), https://www.washingtonpost.com/opinions/2021/08/31/5th-circuit-is-staking-out-claim-be-americas-most-dangerous-court/ [https://perma.cc/6MUJ-YHVZ]; Mark Joseph Stern, *What Happened When Trump Reshaped a Powerful Court*, SLATE (Dec. 26, 2019, 6:31 PM), https://slate.com/news-and-politics/2019/12/fifth-circuit-trump-judges-devastating.html [https://perma.cc/5D53-9DFM].

397. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 10–11 (1980); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 (1980).

398. DAVID STRAUSS, THE LIVING CONSTITUTION 99–114 (2010) (recognizing the "dead hand" problem and describing responses); *see also* Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *reprinted in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 395–96 (Julian P. Boyd ed., 1958). *But see* Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127 (1998) (responding to dead hand critiques).

399. JEREMY WALDRON, LAW AND DISAGREEMENT 213 (1999).

400. *See id.*

401. As Chief Justice John Marshall said in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), "[i]t is emphatically the province and duty of the judicial department to say what the law is."

402. *See* Latour, *supra* note 296, at 226–27. That is why *Daubert* involves a case-by-case analysis of expertise and scientific evidence, both of which can change quickly.

403. WALDRON, *supra* note 399, at 220.

404. *Id.* at 213.

supremacy squeezes the people out of the contest to socially construct knowledge.[405]

This sparks a common objection: what about the judges that do construe knowledge in a way more attuned to political equality? That is, if some judges, like those in the district courts in *Whole Woman's Health*, *DeBoer*, *Otto*, and *Brandt*, approached the evidence for both sides' factual claims fairly, why is this a problem of judicial power generally and not just a problem of a few overtly partisan bad apples at the appellate level? Plus, what about the judges in *Stenberg* who faced manufactured uncertainty about the necessity of a rare abortion procedure and decided to err on the side of more rights?[406] This may be one reason why Larsen's and Landau's distinct solutions to the problem of myth-based lawmaking look to district courts to engage in either more fact-checking or assessment of legislative records.[407] As Larsen notes, "[t]rial judges have their hands on the levers of the adversarial system and they are well-positioned to debunk facts that deserve debunking."[408]

There is evidence to back up this assertion. In *Perry v. Schwarzenegger*,[409] a case challenging California's ban on same-sex marriage and the only one of the last decade's same-sex marriage cases to actually go to trial, the trial judge went through a deliberate process and debunked baseless, unsupported testimony when faced with factual claims about the quality of same-sex parents and the success of their children.[410] Trials could be further strengthened as bulwarks against misinformation with specific standards to be met for a court to accept claims of legislative fact. Courts could extend Larsen's proposal for limiting amici to only disinterested parties to any party making claims about social phenomena. Plus, when parties cannot agree about the social and factual context in which their dispute occurs, district courts can appoint an independent special master with expertise in the relevant field—sociology, statistics, medicine, and so forth—to parse litigants' claims.

If we assume that manufacturing uncertainty will always be a litigation strategy, new norms can help judges navigate those uncertainties, however fabricated they are. If a judge is unwilling or unable to engage in the kind of fact-checking that Larsen and Landau recommend, there is just as much to decide in favor of more rights, not less. That is what the court did in *Stenberg* when it declared Nebraska's ban on late-term abortions unconstitutional,

405. *See* Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1855 (2020) (referring to the judiciary's power to influence policy decades after the political coalition that appointed them collapses); *see also* Bowie, *supra* note 26, at 203 (identifying the antidemocratic problem of judicial supremacy as when it joins with federal supremacy to "leav[e] no democratic procedure that can reverse the Court's decision" even if the people firmly believe that the decision is wrong).

406. *See* Stenberg v. Carhart, 530 U.S. 914, 937 (2000).

407. *See* Larsen, *supra* note 10, at 182; Landau, *supra* note 10, at 450–53.

408. Larsen, *supra* note 10, at 182.

409. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

410. *See id.* at 944–52.

despite succumbing to litigants' strategy to manufacture uncertainty in the face of scientific consensus.[411] The *Stenberg* Court noted:

> Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that [the procedure] is a safer abortion method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences. If they are wrong, the exception will simply turn out to have been unnecessary.[412]

In other words, when in doubt, err on the side of safety, err on the side of the vulnerable, and err on the side of liberty.

I wish I could be sanguine about the likelihood that conservative judges would adopt what amounts to an antisubordination norm in their judging. The fact that some judges demand infallibility and some do not demonstrates that results in cases that may be critical to political equality depend on which judge gets the case, which panel hears the appeal, which beliefs about the world those judges hold, and which among many tools they use to analyze litigants' evidence. That poses a substantial risk to freedom. Therefore, some scholars are considering limits to judicial power. Professors Christopher Jon Sprigman and Bowie have advocated for limited jurisdiction-stripping.[413] Waldron has called for legislative supremacy in constitutional questions.[414] A myriad of scholars have called for reforms to democratize politics as a way of reducing the antidemocratic influence of the courts.[415] Democracy reform is a necessary predicate to a future of political equality.

But what do they have to do with misinformation in constitutional litigation? One goal of structural democratic reform is to make the system of government more responsive to and reflective of the will of the people.[416] If the political branches were more representative, they may make findings that better reflect that will. And if enough people disagreed, they could vote in a new legislature in a few years to construe facts about the world in a different way. The people cannot have the same type of impact when judges have the final say. Therefore, democratizing the political process is necessary to erode the indelible impact of judges manufacturing factual uncertainty. Democracy reform gives the people more say, both in how society answers pressing political debates and how it understands the reality in which those debates exist.

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411. *Stenberg*, 530 U.S. at 937.

412. *Id.* at 938.

413. *See* Sprigman, *supra* note 405; Nikolas Bowie, *How the Supreme Court Dominates Our Democracy*, WASH. POST (July 16, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/07/16/supreme-court-anti-democracy/ [https://perma.cc/W6TZ-6CTY].

414. WALDRON, *supra* note 399.

415. *See* Bowie, *supra* note 26, at 218.

416. *See id.* at 215–19.

CONCLUSION

That said, none of these proposals may be enough. They are the beginnings of a discussion, not the end. Dylan Brandt is hoping that the court that hears his appeal will follow the science, where the consensus is that gender-affirming care is safe and necessary. But, as this Article has shown, a court applying any level of scrutiny is just as likely to defy the consensus, pointing to a single study or brief, however dubious or uncorroborated, that claims that the consensus is wrong. This demand for infallibility could manufacture enough scientific uncertainty for a judge to reject claims for equal protection.

This Article surfaced many examples of this pattern, including those about abortion, same-sex marriage, affirmative action, gay conversion therapy, and voter ID laws. In each, judges transformed wildly different mechanisms of constitutional analysis—rational basis, strict scrutiny, and balancing tests—into demands for infallibility in the scientific consensus about social phenomena. By highlighting this pattern, this Article has contributed to scholarship on constitutional interpretation and levels of scrutiny. It has also reconsidered the narrower literature on legislative facts, deference, and misinformation in constitutional law. Whereas that literature has focused on amici, legislatures, and deference—implying that judges and the law are held hostage to exogenous forces beyond their control—this Article shows that the law is playing an aggressive and hostile role.

Even more importantly, this Article has demonstrated the symbiosis among law, misinformation, and power. Factual uncertainty not only benefits those who traffic in lies, but also those who seek to maintain traditional structures of power that have long outlived their time. That, in the end, is this Article's story. Heteronormative forces once sought to manufacture factual uncertainty to deny gay people the right to marry and to maintain traditionalists' power to torture queer minors over their sexual orientation. The same forces are repeating that strategy to enforce a sexual hierarchy that would deny Dylan Brandt and all transgender adolescents access to lifesaving and gender-affirming therapy.[417] Those who seek to deny individuals bodily autonomy manufacture factual uncertainty to pretextually claim that abortion bans benefit those who become pregnant. Those who want to maintain systems of institutionalized racism also use misinformation and manufactured uncertainty to make it harder for persons of color to vote and access educational opportunities. The pattern is unmistakable.

There is hope that highlighting both the law's and judges' roles in the legitimization of misinformation in service of traditional hierarchies of power will galvanize legal scholars, advocates, policy makers, and progressive social movements. Pioneering plaintiffs like Dylan Brandt are

417. *See* Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* CULTURE, SOCIETY AND SEXUALITY: A READER 150, 152–55 (Richard Parker & Peter Aggleton eds., 2d ed. 2007).

doing more than arguing that science is on their side; they are urging courts to use the law to amplify, not deny, their quest for political equality. Manipulated doctrines should not stand in their way.