RESPONSE

Irrational Inequality: The Role of Fact-Based Review in Equality Change

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INTRODUCTION

In *Broken Records: Reconceptualizing Rational Basis Review to Address "Alternative Facts" in the Legislative Process*, Joseph Landau offers an important exposition of how legislative records "predicated on a false factual foundation" are, and ought to be, treated by constitutional equality law.[1] As Landau describes, "broken records" (i.e., legislative records predicated on a faulty factual foundation) have become ubiquitous in the modern polarized era, undergirding laws such as North Carolina's "bathroom ban," Alabama's anti-immigrant H.B. 56, and the harsh criminal sentencing regimes that brought us mass incarceration.[2] These "broken records"—often laden with stereotypes about the subordinated groups disadvantaged by the law—come apart

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1. Joseph Landau, *Broken Records: Reconceptualizing Rational Basis Review to Address "Alternative Facts" in the Legislative Process*, 73 VAND. L. REV. 425, 430–31 (2020).

2. *Id.* at 430, 433–42.

under factual inquiry, as they are revealed to rest on spurious or demonstrably false premises.[3]

This Response Essay suggests that the search for "broken records" is, as Landau suggests, important—and indeed is a part of a wider family of social movement strategies that has long been critical to effective equality change. This family of strategies—aimed at deconstructing "common sense" stereotypes about a subordinated group—relies on facts and social science expertise to undermine the reasons why people perceive discrimination as natural and justified.[4] Because such perceptions of discrimination as justified often stand as a profound obstacle to the enforcement of even established equality rights, these fact-based strategies are a critical aspect of the way that equality work is done—indeed arguably one of *the* most important predicates to meaningful equality change.[5]

If factual inquiry akin to broken records review is a key aspect of constitutional equality reform, ought we to formalize it in the way that Landau suggests? Counterintuitively, this Essay suggests that the answer to this question may be no. Currently, broken records review—and other fact-based equality arguments—are often (though not always) the product of inquiry on rational basis review, involving ad hoc departures from the deferential standards that are commonly assumed to govern in that context.[6] But the prospect of systematizing a meaningful fact-based inquiry as part of rational basis review is sure to be opposed by many—given the specter of *Lochner*—and perhaps for this reason, Landau proposes situating "broken records review" as a distinctive and deferential threshold inquiry.[7] In so doing, he crafts a proposal for systematization that may be more plausibly achievable, but which—as elaborated in Part III of this Essay—may have tradeoffs that are not worth the cost.[8]

Nevertheless, social movements, scholars, and judges alike will find much of value in *Broken Records*, which highlights an important feature of discrimination against subordinated groups (its often questionable factual premises), as well as an important constitutional strategy for identifying and addressing such discrimination (attacking those questionable factual premises in the context of equal protection

3. *Id.*
4. *See infra* Parts I–II.
5. *Id.*
6. *See infra* Part II.
7. *See infra* Part III. Although Landau in at least one place refers to his proposal as a "form of rational basis review," in other parts of the Article he makes clear that it would take place as a threshold inquiry, before the courts proceed to other aspects of equal protection review under the tiers of scrutiny. *See* Landau, *supra* note 1, at 432, 451–55.
8. *See infra* Part III.

review). While it may be impossible to systematically incorporate broken records review into equal protection doctrine without tradeoffs that could strip it of too much of its utility, recognizing its existence (formalized or not)—as well as its importance—may encourage its greater use.

This Essay addresses these issues in three Parts. Part I describes Landau's theory of broken records review for those readers not familiar with his Article. Part II situates broken records review within the larger family of fact-based social movement strategies of which it is a part, and suggests that such strategies are among the most important tools of equality work, both before and after formal equality has been obtained. Finally, Part III takes up the question of whether systematizing broken records review would be advantageous or disadvantageous to groups seeking equality change, and suggests that the set of tradeoffs required to do so may not be worth the cost. Nevertheless, this Part urges social movements, scholars, and judges to take seriously Landau's descriptive account of broken records, as well as his call to give such "broken records" significance in all forms of equal protection review.

I. THE THEORY OF "BROKEN RECORDS REVIEW"

Landau's theory of broken records review is partly descriptive and partly prescriptive. Descriptively, Landau draws attention to the fact that "broken records"—i.e., legislative records resting on false or unsubstantiated factual premises—commonly accompany legislation targeted at politically vulnerable groups and can provide a cover for inequality.[9] Prescriptively, he suggests that broken records review—which currently lacks any systematic stature within equal protection doctrine—ought to be systematically available, and proposes a way it could be systematized as a distinctive threshold inquiry.[10]

Landau's descriptive claims are undoubtedly correct and important. It is a hallmark of discriminatory action that such action often rests on thin factual foundations, or indeed even patently false assertions.[11] While Landau is mostly focused on the modern version of this phenomenon—"alternative facts"—inequality has, as Landau recognizes, long been perpetrated through false or poorly supported factual claims.[12] Indeed, at the very core of many people's

9. *See* Landau, *supra* note 1, at 432–42.

10. *Id.* at 451–55.

11. *See infra* Part II.

12. *See* Landau, *supra* note 1, at 429; *see also, e.g.*, Anders Walker, *The New Jim Crow? Recovering the Progressive Origins of Mass Incarceration*, 41 HASTINGS CONST. L.Q. 845, 850

understanding of invidious inequality is the notion that meaningful reasons for differentiation *do not* exist apart from group status.[13] In this sense, a lack of factual justification can be seen as definitional of the way that many people conceive of invidious inequality.[14]

As set out at greater length in Part II of this Essay, recognizing and exposing the tenuous factual underpinnings of inequality has—perhaps for this reason—long been a critical endeavor of identity-based social movements.[15] While much of this work of necessity goes on outside the courts, work within the courts can and has also played an important role in complementing and pushing forward those broader social movement efforts.[16] In particular, the validation that comes from judicial actors recognizing the limited factual underpinnings of discriminatory government action can provide a fulcrum for disrupting otherwise sticky beliefs about the legitimacy and non-discriminatory nature of the law.[17] In modern equal protection doctrine, however, such review is not systematically a part of the doctrine, and indeed most commonly occurs in a site where black letter law suggests it is nominally forbidden: rational basis review.[18]

A significant part of *Broken Records*, then, is devoted to offering a systematic approach to "broken records review"—something that Landau hopes will offer "groups unable to protect their interests in the legislature [a way to] vindicate substantive rights in the future."[19] Landau suggests that broken records review could take place as a threshold investigation, before proceeding to the current equal

(2014) (describing false allegations of rape and sexual assault that were used to persuade white voters to support Jim Crow laws).

13. *See, e.g.*, Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 753–56 (2011) (describing the requirements that many circuits impose on comparator evidence in discrimination lawsuits, requiring there to essentially be no differentiating factors).

14. Of course, there are other conceptions of invidious inequality as well which are far more capacious, but those conceptions tend to be not as widely shared, nor as well represented in our anti-discrimination doctrine. *See, e.g.*, Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1319 (2012).

15. I borrow the term "identity-based social movements" from Bill Eskridge. *See* William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001).

16. *See infra* Part II.

17. *See, e.g.*, Katie R. Eyer, *Protected Class Rational Basis Review*, 95 N.C. L. REV. 975, 1060–63 (2017) [hereinafter *Protected Class Rational Basis Review*] ("Such a messy long-range approach to addressing the equality issues of today may seem unsatisfying and inadequate to address the urgency of the contemporary racial and gender justice task. But realistically, this is how constitutional change operates, even when it ultimately culminates in a Supreme Court decision.").

18. *See* Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317 (2018) [hereinafter *The Canon of Rational Basis Review*].

19. Landau, *supra* note 1, at 478.

protection review.[20] In an inquiry akin to summary judgment, a plaintiff would have to first persuade a court that "no rational legislator" could have supported the law, given the thin or false factual underpinnings on which it rested.[21] The government would then have the opportunity to demonstrate that the law was "grounded in some objective measure of basic truth or rationality."[22] If the government is unable to make this showing, they would lose; if they make the showing, the case would proceed to a traditional equal protection inquiry.[23]

Although offered as an intervention intended to benefit subordinated groups seeking equality—and no doubt intended as such by Landau—the Article's "broken records" approach is also self-consciously styled as a "middle-ground approach."[24] Thus, throughout the piece, Landau emphasizes the limits of his approach, suggesting, for example, that the factual inquiry would continue to tip materially toward the government and that it would be divorced from an inquiry into the question of whether the actor was intentionally discriminatory or motivated by group-based animus.[25] Ultimately, Landau characterizes his version of broken records review as a more objective inquiry—targeted exclusively at basic factual adequacy, rather than discrimination per se—and, as such, one which may have "broader appeal" to conservatives and liberals alike.[26]

As set out in the following Part, the idea behind broken records review is consistent with long-standing and important social movement approaches to challenging inequality through fact-based strategies, and calling attention to such approaches is no doubt important. But colored by the need for realism, the prescriptive vision of broken records review offered by Landau also differs from those approaches in important respects—and is arguably more limited. As the final Part explores, while these tradeoffs might be necessary to secure a systematic role for fact-based review in equal protection doctrine, it is not clear whether from a social movement perspective the gains would outweigh the costs. Nevertheless, it remains important for social movements, scholars, and judges alike to attend to the phenomenon Landau identifies and to continue to advocate its significance to equal protection review.

20. *Id.* at 453–55.
21. *Id.* at 430.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 450–53.
26. *Id.* at 431.

II. UNDERMINING JUSTIFICATIONS, REVEALING INEQUALITY

Although we often think of the objective of identity-based social movements in terms of formal equality rights,[27] the reality is that such rights can rarely be secured or enforced without fact-based strategies.[28] So long as judges, and the public, perceive discrimination against a group as justified by neutral factors, they are unlikely to grant them formal equality rights.[29] And even once such rights have been obtained, the continued persistence of societal stereotypes means that majority group members will often continue to perceive stereotype-consistent discrimination to be justified on grounds other than group status—and thus nondiscriminatory.[30] For this reason, a critical part of the work of identity-based social movements has always involved engagement with fact-based strategies like broken records review: exposing the thin or erroneous factual underpinnings of discrimination.[31]

While this work is multifaceted and has taken place across a variety of spheres—political, public opinion-based, and judicial—constitutional law has historically been among its important sites.[32] In particular, most groups that have sought, and successfully achieved,

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27. I use the term "formal equality" herein as I have in the past: to connote "a legal regime in which invidious use of a particular classification is deemed presumptively unlawful." *See* Katie Eyer, Brown, *Not* Loving: Obergefell *and the Unfinished Business of Formal Equality*, 125 YALE L.J. F. 1, 1 n.3 (2015). As I have previously observed, "[i]n the statutory domain, this generally takes the form of an explicit statutory proscription on discrimination on the basis of a particular characteristic, and, in the contemporary constitutional domain, generally takes the form of 'protected class' status triggering heightened scrutiny." *Id.*

28. *See infra* notes 29–30 and accompanying text.

29. *See, e.g.*, Suzanne Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1980–81 (2006) (discussing the importance of the Court's "embrace[ ] [of] the normative value of sex equality" as a result of "earlier fact-based decisions" in advancing women's rights).

30. *See, e.g.*, Katie R. Eyer, *The New Jim Crow is the Old Jim Crow*, 128 YALE L. J. 1002, 1047–50 (2019) [hereinafter *The New Jim Crow*] ("[W]hite flight and the general trend towards white suburbanization created a geographic division that allowed racist stereotypes . . . to be cast as those of 'inner city communities' . . . So cast, white parents could oppose integration based on virtually identical concerns as their Jim Crow counterparts, while simultaneously understanding themselves to be 'colorblind.' ").

31. *See infra* notes 32–49 and accompanying text. As Suzanne Goldberg points out, a part of this dynamic also involves initially unacknowledged shifts in normative conclusions as well. For example, it remains true even today that women are more likely to shoulder a disproportionate amount of family obligations, and yet the Supreme Court in most contexts no longer accepts this statistical generalization as a valid basis for laws differentiating between men and women. *See* Goldberg, *supra* note 29, at 1980–81.

32. *See The Canon of Rational Basis Review*, *supra* note 18, at 1319–20, 1358–64 (arguing that the courts' exercise of rational basis review, and in particular fact-based approaches, "has been vital to the ability of social movements to create space for the disruption of the status quo," and providing examples of the ways that fact-based strategies have been used to do so); Goldberg, *supra* note 29, at 1959–61, 1975–84 (offering a descriptive theory of how courts intervene at the front end of social movement constitutional change by relying on fact-based review, and offering examples).

meaningful equal protection review in the modern era have done so via the iterative process of undermining the justifications for discrimination against them via fact-based means.[33] Thus, few groups have jumped to being immediately designated as suspect or quasi-suspect classes—rather they have first relied on fact-based arguments made in the context of rational basis review to undermine the perceived legitimacy of discrimination against them.[34] This iterative process has gradually eroded the "common sense" justifications that allowed society—and judges—to perceive discrimination against them as justified, and non-invidious.[35]

As Suzanne Goldberg has observed, both the constitutional campaign for women's equality, and the more modern efforts to secure L/G/B constitutional equality are excellent examples of this dynamic.[36] In the case of the campaign for women's equality, this approach ultimately, after several years of fact-based rational basis victories at the Supreme Court, resulted in the securing of formal equality, i.e., intermediate scrutiny.[37] And while the L/G/B rights movement has not yet secured formal heightened scrutiny, there can be little doubt that cases such as *Obergefell v. Hodges*, striking down the exclusion of same-sex couples from the right to marry, were possible only because of the groundwork of prior fact-based precedents.[38] Thus, for example, the *Obergefell* majority's conclusion that same-sex couples have equal interests in the right to marry—including the support that marriage provides for children and families—would not have been possible in an era in which the Court perceived there to be "no connection between

33. *See, e.g.*, *The Canon of Rational Basis Review*, *supra* note 18, at 1324–35 ("[M]ost modern social movements that have achieved meaningful constitutional review have initially relied on rational basis review to pave the way to durable constitutional change."); Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS. L. REV. 527, 529–66 (2014) [hereinafter *Constitutional Crossroads*] (discussing the development of the Court's sex- and illegitimacy-discrimination jurisprudence from the 1960s through the present); Goldberg, *supra* note 29, at 1980–84 ("[F]act-based adjudication is often the first step in a two-step decisionmaking dynamic through which courts tip from one view of a group's constitutional rights to another.").

34. *See* sources cited *supra* note 33.

35. *See* sources cited *supra* note 33.

36. Goldberg, *supra* note 29, at 1980–84.

37. *See, e.g.*, *The Canon of Rational Basis Review*, *supra* note 18, at 1324–35 ("Ultimately, [the] process of accretive rational basis victories would indeed lead to the reconfiguration of sex discrimination as subject to a formally heightened form of review."); *Constitutional Crossroads*, *supra* note 33, at 529–66 (discussing the development of the Court's sex- and illegitimacy-discrimination jurisprudence from the 1960s through the present).

38. *See, e.g.*, *The Canon of Rational Basis Review*, *supra* note 18, at 1344–46 ("[O]ver the twenty-year course of the modern marriage movement, rational basis review would repeatedly . . . provide the basis for judicial invalidation of same-sex marriage bans . . . ."); *see also* sources cited *infra* note 39.

family, marriage, or procreation, on the one hand," and same-sex intimacy, on the other.[39]

So, too, even after formal equality, groups have often needed to continue to rely on fact-based arguments to uncover the discriminatory nature of actions taken against them. Here, the example of the racial justice movement is illustrative.[40] While the advent of constitutional and statutory formal equality in the race context eliminated the ability for discriminatory actors to explicitly rely on race, it did not, and could not, eliminate the long-standing stereotype-based beliefs that white Americans possessed about racial minorities.[41] Whites who believed that they were justified in not wanting their children to go to majority-minority schools—or that aggressive policing of black and brown communities was justified by minority criminality—often continued to hold those beliefs, but were now incentivized to frame them, even to themselves, as bound up in "race neutral" concerns.[42] Thus, it has often been only by exposing the factually spurious groundings of such ostensibly race-neutral concerns that racial justice advocates have been successful in persuading others that they are in fact racially discriminatory.[43]

Numerous examples of both successful and unsuccessful efforts by racial justice advocates to take this approach exist, including several that Landau mentions in his Article.[44] Perhaps the most striking example, however, is the radical shift in perspectives on the crack/cocaine disparity that was brought about by this iterative process of fact-based argumentation in the courts.[45] Today, it is widely

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39. *Compare* Obergefell v. Hodges, 135 S. Ct. 2584, 2599–2602 (2015) (considering the reasons why the Supreme Court has traditionally recognized the right to marry as fundamental—including protection of families and children—and finding that all apply equally to same-sex couples), *with* Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (expressing the Court's view that "no connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated," and denying substantive due process protections to same-sex intimacy).

40. *See, e.g.*, *The New Jim Crow*, *supra* note 30, at 1047–50 (describing how even after the Supreme Court recognized formal equality in the context of race, "colorblind" discrimination based on stereotypes persisted); *Protected Class Rational Basis Review*, *supra* note 17, 993–1009, 1050–67 (discussing the continued use of rational basis claims to combat racial discrimination since the initial rise of the tiered system of equal protection review); *see also infra* notes 41–49 and accompanying text.

41. *See The New Jim Crow*, *supra* note 30, at 1047–50.

42. *Id.*

43. *See Protected Class Rational Basis Review*, *supra* note 17, at 993–1009, 1050–67 (discussing the continued use of rational basis claims to combat racial discrimination since the initial rise of the tiered system of equal protection review).

44. *See* Landau, *supra* note 1, at 437–42 (discussing the racialized "superpredator" myth that drove mass incarceration and its ultimate unraveling).

45. *See Protected Class Rational Basis Review*, *supra* note 17, at 1060–63 ("[P]rotected class rational basis review helped—over the course of twenty years—to create the space for a nearly

acknowledged that the crack/cocaine sentencing disparity, which treated crack-cocaine far more harshly than powder cocaine for the purposes of federal sentencing, was racially discriminatory.[46] But initial arguments by advocates to this effect were virtually never successful in the courts.[47] Rather, it was arguments on rational basis review, undercutting the factual bases for the crack/cocaine disparity, that saw sporadic success—and that appear to have spurred the Sentencing Commission, and ultimately Congress, to reevaluate the disparity's premises.[48] And it was only once the factual premises for the disparity came to be widely questioned that its racially discriminatory nature became apparent to many.[49]

The dynamic of the crack/cocaine disparity illustrates a common feature of fact-based strategies in the courts, which is that they are rarely the frontline choice of social movements, but rather something advocates are often pushed into by an *absence* of heightened review.[50] Thus, for example, the racial justice movement likely would have preferred for the courts to recognize immediately that the crack/cocaine disparity was racially discriminatory, thus triggering almost certainly dispositive strict scrutiny review, without a fact-bound inquiry into whether crack was, in fact, unusually dangerous as compared to cocaine.[51] So, too, many (though not all) sex equality advocates viewed case-by-case strategies focused on the factual irrationality of particular iterations of sex discrimination as undesirable, and indeed counter-productive, preferring to argue for strict scrutiny.[52] Thus, it has often been the very absence of formal equality protections—either because

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complete reversal of public perceptions regarding the fairness and necessity of the crack/cocaine disparity.").

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *See infra* notes 51–52 and accompanying text.

51. This assertion is, however, somewhat complicated by the relative slowness of the racial justice movement in recognizing the full racial justice implications of mass incarceration. *See e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 11–14 (rev. ed. 2011) (asserting that the "civil rights community" has failed to adequately appreciate "the enormity of the crisis"). Indeed, much of the initial advocacy around the crack/cocaine disparity took place instead in the context of the Federal Defenders' advocacy (and state-level public defenders' offices), an often-overlooked social-movement actor. *See, e.g.*, United States v. Watson, 953 F.2d 895, 897–98 (5th Cir. 1992) (unsuccessful challenge by Federal Defenders to federal crack/cocaine sentencing disparity); United States v. Madison, 781 F. Supp. 281, 285–86 (S.D.N.Y. 1992) (same); *see also* State v. Russell, 477 N.W.2d 886 (1991) (successful challenge by state-level public defender's office to state crack/cocaine sentencing disparity).

52. *See The Canon of Rational Basis Review*, *supra* note 18, at 1327–28 ("To the chagrin of some leading figures in the sex discrimination movement—some of whom were ambivalent or even hostile to rational basis as a constitutional argument—many, if not most of the early victories of the women's rights movement were won on a rational basis framework.").

the groups have not yet secured them, or because they are not assured of proving existing formal equality protections apply—that has forced groups into making fact-based arguments in order to attempt to invalidate government action on rational basis review.[53]

But this Essay suggests that although back-end fact-based arguments focused on the irrationality of government action are rarely the first choice of social movement actors, they are a highly important component of equality change. Indeed, as set out *supra*, for many people, the absence of "neutral" justifications is the sine qua non of invidious discrimination.[54] Thus, for example, as Landau also observes, for so long as judges—and society—viewed gays and lesbians as immoral actors likely to corrupt children, discrimination against gays and lesbians in marriage, custody, and adoption was not perceived as invidiously discriminatory, and the claims of gays and lesbians to rights were viewed as unjustified.[55]

Similarly, for those persuaded of the reality of the dangers of the crack epidemic—or the need for voter ID laws to deter fraud—the racially discriminatory nature of such policies has been obscured.[56] Thus, it is only by persuading judges—and the public—of the thin or spurious factual foundations of such policies that claims of invidious discrimination have become intelligible.[57] As such, while no group prefers to be relegated to rational basis review, the process it uniquely forces groups to engage in—deep contestation of the factual premises for a law—is arguably foundational to equality change.

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53. *See supra* notes 51–52 and accompanying text.

54. *See supra* notes 13–14 and accompanying text.

55. *See, e.g.*, Landau, *supra* note 1, at 458–60 (discussing how anti-LGBT laws based on unfounded stereotypes gave "legislators and courts cover to make decisions on moral-majority grounds"); Goldberg, *supra* note 29, at 1968–69 ("In the context of sexual orientation, the 'fact' that 'children benefit from the presence of both a father and mother in the home' . . . has become popular with courts as a justification for sexual orientation classifications in family law."); *see also* William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L. J. 322, 335–37 (2017) (describing the reasons why background stereotypes about LGBT people disrupted the ability of judges and others to perceive the applicability of Title VII to LGBT workers); Nan D. Hunter, *Proportional Equality: Readings of* Romer, 89 KY. L.J. 885, 898–901 (2001) (describing why *Romer*'s elimination of *Bowers'* "categorical inequality" approach—and demand of real reasons for gay inequality—was profoundly important to the ability of LGBT plaintiffs to begin the process of breaking down inequality).

56. *See, e.g.*, *Protected Class Rational Basis Review*, *supra* note 17, at 1055–63 (discussing the importance of fact-focused rational basis strategies to addressing the invisibility of race and gender discrimination to many Americans in the modern era); *see also The New Jim Crow*, *supra* note 30, at 1047–50 (describing the ways that the endurance of racial stereotypes made it easy for white Americans to reconceptualize themselves as colorblind even as they continued to hold racially discriminatory views).

57. *See* sources cited, *supra* note 56; *see also* Landau, *supra* note 1, at 142–45 (describing recent cases in which courts have relied on the thin factual underpinnings of voter ID laws to find intentional racial discrimination).

This descriptive account of rational basis review of course conflicts with the canonical account of rational basis review, which situates rational basis review as ultra-deferential and essentially useless.[58] Under the canonical account, typically drawn from cases like *FCC v. Beach Communications*, the reasons for the government's actions need not be genuine or substantiated—and over and under-inclusivity are irrelevant.[59] Under such an approach, deep factual inquiry ought not to be relevant or even possible.[60] And indeed, the courts have been far from consistent in applying the type of meaningful rational basis review described herein—though they have not been consistent in affording ultra-deferential review either (contra what many canonical accounts suggest).[61] Rather, the reality is a messy, inconsistent state of affairs in which the lower and state courts can typically pick and choose which type of rational basis review to apply, sometimes—but not always—leading to the type of meaningful factual work described above.[62] This of course has significant disadvantages for social movements, which cannot regularly be assured of a meaningful opportunity for fact-based equal protection review.

It is no doubt for this reason that Landau suggests a way of institutionalizing fact-based review that would give it a clear place within equal protection review. But rather than arguing for the institutionalization of fact-based review where it has typically resided—in the application of meaningful rational basis review—he instead argues for a separate threshold inquiry, divorced from the question of invidious discrimination.[63] While this choice no doubt arises in part from a desire to avoid the critiques that might result from an across-the-board ratcheting up of rational basis review standards—and the concomitant barriers to practical adoption that such critiques would create—it raises significant questions about how such review would operate and whether it would allow fact-based review to do its traditional work of exposing invidious discrimination. The following Part turns to these questions, and whether the tradeoffs necessary to obtain a systematized form of fact-based review are likely to be worth the costs.

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58. *See The Canon of Rational Basis Review, supra* note 18, at 1318–20 ("In short, the canonical account of rational basis review is a bleak one for those challenging the constitutionality of government action: a doctrine which is extraordinarily deferential and will virtually never result in government action being overturned.").

59. *See, e.g.*, 508 U.S. 307 (1993).

60. *Id.*

61. *See The Canon of Rational Basis Review, supra* note 18, at 1335–56 (discussing cases).

62. *Id.*

63. *See infra* Part III.

III. ARE THE TRADEOFFS OF SYSTEMATIZATION WORTH IT?

As set out above, fact-based review akin to broken records review has long occurred in the context of equal protection cases, and indeed has been a key part of what social movements have relied on in seeking equality change.[64] But that fact-based review has also been inconsistent, non-formalized, and indeed arguably in conflict with canonical accounts of how equal protection doctrine should operate.[65] *Broken Records* offers a proposal for a way that such fact-based review could be systematically incorporated into equal protection doctrine, which might plausibly appeal to conservatives and progressives alike.[66] Would that proposal benefit identity-based social movements?

Paradoxically, it seems possible that the answer to this question may be no. While the current state of affairs affords only partial and inconsistent access to fact-based review, in any given case it affords the opportunity to persuade a sympathetic judge that meaningful fact-based review should be applied, without any distinctive threshold inquiry.[67] Because modern Supreme Court precedents in the rational basis context are simply inconsistent—at times purporting to prohibit such fact-based review, and at other times applying it—lower courts (and certainly state courts) can pick and choose their approach.[68] For those that elect to apply meaningful rational basis review, they can—and do—significantly interrogate the thin factual underpinnings of allegedly discriminatory laws, questioning over and under-inclusivity, considering conflicts with social science, and the like.[69] Moreover, courts can and at important junctures have further relied on these thin factual underpinnings to suggest that the laws are indeed invidiously discriminatory against the subordinated groups that they disadvantage.[70]

In contrast, Landau's proposal would make broken records review systematically available, but would potentially strip it of some of its important features from the perspective of equality change. Rather than a fulsome factual battle, Landau suggests there would be significant limits on the scope of fact-based review in his systematized version of broken records review, and that indeed some courts might conclude that a "mere 'scintilla' " of evidence in support of the law would

64. *See supra* Part II.
65. *Id.*
66. *See supra* Part I.
67. *See supra* notes 61–62 and accompanying text.
68. *Id.*
69. *Id.*
70. *Id.*; *see also Protected Class Rational Basis Review*, *supra* note 17, at 1057–58.

suffice.[71] Moreover, in order to render the inquiry more "objective," and less subject to critique, his *Broken Records* proposal would also take place as a separate threshold inquiry, divorced from inquiries into whether the government action was in fact taken in bad faith or was otherwise invidiously discriminatory.[72] Finally, Landau posits that if this systematized form of broken records review were to fail, the ultra-deferential formulation of rational basis review should apply, with "the court . . . bound to vindicate . . . any rational relationship between the means and the ends—whether argued by the government or hypothesized by the court."[73] While Landau treats this last feature as simply the application of existing rational basis review requirements—as indeed canonical accounts suggest—the reality is that such deferential standards are not currently treated by the Supreme Court *or* the lower courts as mandatory in every case.[74]

As Landau notes, there are good reasons to believe that a proposal limited in the ways he suggests might be more widely palatable to judges, and thus could potentially provide a realistic alternative for systematizing fact-based review.[75] In contrast, it is likely that a proposal to institute meaningful fact-based rational basis review across the board would fail, with opposition from both the left and the right (though it might attract support from some on both the left and the right, as well).[76] For although contemporary rational basis doctrine descriptively *already* incorporates numerous instances of meaningful fact-based review, both liberals and conservatives alike have shown themselves dedicated to denying the existence of unconstrained fact-

71. *See* Landau, *supra* note 1, at 455.

72. *Id.* at 430. Interestingly, Landau also situates this—divorcing broken records review from the inquiry into invidious discrimination—as one of the benefits of his approach for social movements, arguing that it offers social movements a clearer and easier to fulfill approach. *Id.* at 431. But this assertion appears to be based at least in part on the premise that meaningful fact-based review only occurs in the rational basis context in the context of animus doctrine, *see id.* at 443–46, something that is not descriptively true. *See* Katie R. Eyer, *Animus Trouble*, 48 STETSON L. REV. 215, 218–26 (2019) [hereinafter *Animus Trouble*] (describing the numerous rational basis victories that have not depended on "animus" as a threshold requirement for meaningful review).

73. Landau, *supra* note 1, at 452.

74. *Id. But cf. The Canon of Rational Basis Review*, *supra* note 18, at 1335–56 (making clear that this canonical account is descriptively inaccurate).

75. *See* Landau, *supra* note 1, at 431 ("Unlike a constitutional theory that requires a court to determine ex ante whether a particular group has suffered prejudice at the hand of a legislative majority—a subjective determination on which conservative and liberal justices largely disagree—an evidence-based, broken-record-style approach couched in more objective standards likely has broader appeal.")

76. *See, e.g.*, *Constitutional Crossroads*, *supra* note 33, at 544–67 (describing the concerns of then-Justice Rehnquist about permitting across the board meaningful rational basis review); Suzanna Sherry, *Selective Judicial Activism: Defending* Carolene Products, 14 GEO. J.L. & PUB. POL'Y 559 (2016) (arguing from a progressive standpoint against an across the board meaningful form of rational basis review).

based review and normatively arguing against it (albeit for different reasons).[77]

The result has been a canonical account—sustained by those on both the right and the left—that essentially ignores the existence of modern rational basis cases which allow meaningful factual interrogation of the purportedly "rational" reasons for government action.[78] Despite the existence of dozens of Supreme Court cases—and many more lower and state court cases—which have deployed meaningful rational basis review in the modern era, the canonical account of rational basis review has remained fixed as an essentially empty, ultra-deferential affair.[79] To the extent that exceptions are

77. *See* sources cited *supra* note 76; *see also The Canon of Rational Basis Review*, *supra* note 18, *passim* (surveying top Constitutional Law casebooks, including ones authored by both conservative and liberal authors, and demonstrating an overwhelming trend towards obscuring the existence of meaningful rational basis review).

78. *See The Canon of Rational Basis Review*, *supra* note 18, *passim* (surveying the variety of ways that the current canonization of rational basis review misdescribes and obscures the tradition of meaningful rational basis review, including fact-based rational basis review).

79. Regarding the canonical account of rational basis review as empty and ultra-deferential, *see id.* Cases applying meaningful rational basis review in the modern era would be impossible to list fully here, but at the Supreme Court alone include, *e.g.*, United States v. Windsor, 570 U.S. 744, 775 (2013) (invalidating the Defense of Marriage Act, based on complicated reasoning, but not deploying formal heightened scrutiny); Village of Willowbrook v. Olech, 528 U.S. 562, 565 (2000) (finding homeowner who alleged that she was irrationally treated differently from others seeking municipal services stated a claim on rational basis review); Romer v. Evans, 517 U.S. 620, 632 (1996) (applying rational basis review to invalidate a state constitutional provision that precluded anti-discrimination protections for the L/G/B community); Allegheny Pittsburgh Coal Co. v. Cty. Comm'n, 488 U.S. 336, 346 (1989) (striking down county tax assessment procedure on rational basis review); Papasan v. Allain, 478 U.S. 265, 286–292 (1986) (declining to dismiss a rational basis challenge to a school funding scheme and remanding); Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612, 621–22 (1985) (invalidating state tax exemption for established Vietnam veteran residents in state prior to May 8, 1976, on rational basis review); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446–47 (1985) (applying rational basis review to invalidate the denial of a group home permit to people with intellectual disabilities); Logan v. Zimmerman Brush Co., 455 U.S. 422, 442–44 (1982) (Blackmun, J., concurring & Powell, J., concurring) (expressing the view of a majority of the justices that denying an employment discrimination plaintiff the right to have his claim heard because state fair practices agency did not process it within 120 days violated rational basis review); Zobel v. Williams, 457 U.S. 55, 65 (1982) (striking down Alaska dividend distribution program that favored established residents on rational basis review); Plyler v. Doe, 457 U.S. 202, 230 (1982) (striking down state statute denying education funding for undocumented children on minimum tier review); Stanton v. Stanton, 421 U.S. 7, 14 (1975) (striking down a law that discriminated on the basis of sex on rational basis review); Weinberger v. Wiesenfeld, 420 U.S. 636, 651, 653 (1975) (striking down a law that discriminated on the basis of sex on rational basis review); Weinberger v. Beaty, 418 U.S. 901 (1974), *aff'g* 478 F.2d 300, 308 (5th Cir. 1973) (striking down a law discriminating against nonmarital children on rational basis review); Jiminez v. Weinberger, 417 U.S. 628, 636 (1974) (striking down a law discriminating against nonmarital children on rational basis review); U.S. Dep't of Agriculture v. Moreno, 413 U.S. 528, 538 (1973) (applying rational basis review to invalidate a provision of federal law denying food stamps to households with unrelated individuals cohabiting); Eisenstadt v. Baird, 405 U.S. 438, 447 (1972) (striking down state law distinguishing between married and unmarried people in access to contraception on rational basis review); Weber v. Aetna, 406 U.S. 164, 176 (1972) (striking down a law discriminating against nonmarital children on rational basis review); Richardson v. Griffin, 409 U.S. 1069 (1972), *aff'g* 346 F. Supp. 1226, 1234, 1237 (D. Md.

recognized, they are characterized as simply "purporting" to apply rational basis review, or are described—inaccurately—as having permitted meaningful review only because the plaintiffs showed "animus."[80] For progressives, this commitment appears to have arisen from an apparent desire to confine meaningful equal protection review to government actions implicating subordinated groups and rights; for conservatives, to preserve deferential review of government action generally.[81] Regardless of the reasons, the result has been a canonical account that stubbornly denies the reality of fact-based rational basis review.[82]

Cast against this backdrop, it is readily apparent why efforts to systematize the current messy, uncabined form of fact-based rational basis review would be likely to fail—and why a proposal such as Landau's may well be more practically feasible. Because Landau's proposal does not situate itself as a fulsome form of fact-based rational basis review—but instead as a limited threshold inquiry—it would not require either progressives or conservatives to abandon their commitments to limitations on rational basis review, or to descriptively recharacterize the way they have understood the doctrine.[83] It is thus no doubt the case that an approach like that which Landau describes would have a greater possibility of systematic adoption than arguments for systematizing the current ad hoc application of meaningful fact-based rational basis review.

1972) (striking down a law discriminating against nonmarital children on rational basis review); Richardson v. Davis, 409 U.S. 1069 (1972), *aff'g* 342 F. Supp. 588, 593 (D. Conn. 1972) (striking down a law discriminating against nonmarital children on rational basis review); Lindsey v. Normet, 405 U.S. 56, 79 (1972) (striking down "double bond" provision applicable only to landlord/tenant disputes on rational basis review); Reed v. Reed, 404 U.S. 71, 75–76 (1971) (striking down a law discriminating on the basis of sex on rational basis review); Levy v. Louisiana, 391 U.S. 68, 71–72 (1968) (striking down a law discriminating against nonmarital children on rational basis review); Glona v. American Guarantee & Liability Ins., 391 U.S. 73, 75 (1968) (striking down a law discriminating against nonmarital children on rational basis review); Rinaldi v. Yeager, 384 U.S. 305, 310 (1966) (striking down requirement that imprisoned criminal defendants—but not those who received a suspended sentence or fine—pay transcript fee if their appeal was unsuccessful on rational basis review). For other examples in the state and lower federal courts, *see, e.g.*, *Animus Trouble*, *supra* note 72, *passim*; *The Canon of Rational Basis Review*, *supra* note 18, *passim*; *Constitutional Crossroads*, *supra* note 33, *passim*; *Protected Class Rational Basis Review*, *supra* note 17, *passim*.

80. *See, e.g.*, *Animus Trouble*, *supra* note 72, at 218–26 (arguing that the contemporary scholarly focus on animus as the gatekeeper to meaningful rational basis review is descriptively inaccurate); *The Canon of Rational Basis Review*, *supra* note 18, at 1320, 1335–41 (documenting the phenomenon of scholars describing successful rational basis cases as only "purporting" to apply rational basis review).

81. *See, e.g.*, sources cited note 76, *supra*.

82. *See, e.g.*, *The Canon of Rational Basis Review*, *supra* note 18, *passim*.

83. *See* sources cited notes 75–77, *supra*.

But if that is the case, it is unclear that any proposal to systematize fact-based review is likely to offer greater benefits to social movements than the current unsettled state of affairs. While the current ad hoc rational basis review approach to fact-based review is no doubt limited in important respects, it has been an important engine of modern equality change.[84] We ought to be chary of stripping it of some of its most critical features, including its factual rigor, as well as its ability to draw the connection directly between thin factual underpinnings and the invidiousness of discrimination.[85] In short, there may well be some important benefits of a systematized approach (even a more limited one), but it is unclear that those benefits would outweigh the costs.

Regardless, there is much for social movements, scholars, and judges alike to gain from attending to Landau's account of broken records review. As Landau makes clear, broken records are often a hallmark of discriminatory action. Attending to them—in arguments, in opinions, and in scholarship—is thus important, regardless of whether they possess a formal place within equal protection review.

CONCLUSION

Broken Records is an important piece of scholarship, which brings needed attention to a critical, but often overlooked, component of equality change: fact-based review. Social movements, scholars, and judges alike will benefit from attending to its descriptive account of the ways in which "broken records" often accompany discriminatory government action—as well as the importance of interrogating such records in equal protection review. *Broken Records* is thus important reading for those who care about constitutional equality law and its ability to meaningfully address invidious inequality.

Broken Records is, moreover, admirable, insofar as it attempts to offer a realistic suggestion for systematization, rather than one that

84. *See Animus Trouble*, *supra* note 72, at 216–17 ("This Article suggests that . . . messiness—while an anathema to scholars—is likely critical to the success that social movements have seen in relying on rational basis review.").

85. Landau himself seems perhaps torn on this point, as parts of his work seem to cut in the opposite direction. For example, in other works, he has written of other process failures that "can help surface forms of improper intent that are otherwise hard to see." Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 119 COLUM. L. REV. 2147, 2150 (2019). "Broken records," of course, can be seen as a particular form of process failure—a failure to premise legislation on anything resembling genuine factual information. *See also* Landau, *supra* note 1, at 451 (describing why broken records review could be helpful in "smoking out and invalidating laws based on impermissible stereotyping" but simultaneously suggesting that such an inquiry should be divorced from an inquiry into improper motive).

is surely unachievable in the current climate. The current site of fact-based review—meaningful back-end rational basis review—is one that both conservatives and liberals have reasons for opposing, and it is unlikely to be systematically incorporated into equal protection doctrine any time soon. Landau's proposal, in contrast, of a deferential threshold inquiry into "broken records," might well be less controversial. Nevertheless, the set of compromises necessary to render the proposal achievable renders it unclear whether it would create greater—or fewer—opportunities for identity based social movements seeking to effectuate equality change.

But recognizing this too is important. Often as law professors and as lawyers, our desire is to systematize and to bring order to the doctrine—but such systematization also comes with costs. Arguably for those groups seeking to disrupt the status quo—in equality law or otherwise—there are benefits to messy, inconsistent doctrine which provides opportunities for judges to question old truths and break new ground.[86] Rational basis review has, in the modern era, offered such opportunities. As such, we ought to carefully consider the tradeoffs of giving up such opportunities in favor of a systematized—but ultimately less fulsome—form of fact-based review.[87]

86. *See, e.g.*, *Animus Trouble*, *supra* note 72, at 217–18 ("[R]ational basis victories have continued to be messy affairs."); *see also* Christopher Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 BYU L. REV. 575, 617–20 (2016) (defending the merits of "durable confusion" in the context of contested constitutional issues).

87. *See Animus Trouble*, *supra* note 72, at 215–18 (raising a similar concern in the context of scholarly attempts to systematize the Court's unsettled animus doctrine and to situate it as the exclusive gatekeeper to meaningful rational basis review).