

Perverse & Irrational

Meghan Boone*

In our system of representative democracy, legislatures are given a great deal of latitude to select and pass laws that they deem to be in the public interest. Assuming that no suspect class or fundamental right is involved, the Constitution has been interpreted to only require legislative action to satisfy rational basis review—a highly deferential standard that requires only that a legitimate purpose exist and the means adopted to achieve that purpose are rationally related to that purpose. Under rational basis review, legislatures can and do enact laws that are significantly over- or underinclusive to the identified problem. They can enact laws that do not even accomplish their intended purpose in most instances. They can even enact laws which are unsupported by any evidence, much less high-quality evidence. And yet . . . courts insist that rational basis review still means something. That it is something other than a blank check for legislatures to do as they will.

This Article explores one example of the outer bounds of rationality—demonstrated perversity. That is, a law that clearly contravenes the overarching legislative intent because the law is solely or primarily responsible for producing the opposite result of that intent. Although often unnamed as such, perversity presents itself across the legislative landscape, from mundane local ordinances to sweeping federal legislation. And while not explicitly recognized as a basis for finding a law unconstitutional, Supreme Court precedent clearly hints at the possibility that demonstrated perversity could be a basis for invalidating laws.

By defining perversity, identifying when and how it occurs, and exploring how it might be used to challenge the constitutionality of various government actions, this Article aims to illuminate an undertheorized corner of the already robust literature on rational basis review. It argues that current rational basis review precedent already employs a type of perversity analysis, although courts fail to explicitly acknowledge it as such. Moreover, it argues that modern changes in scientific and empirical methodologies and the explosion of the information economy demonstrate the need for this type of analysis; without it, rational basis review is meaningless. Ultimately, the Article concludes that while rational basis scrutiny gives legislatures wide latitude, courts must set a constitutional limit by striking down statutes which cause outcomes clearly counterproductive to legislative goals.

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* Associate Professor, Wake Forest University School of Law. The author presented prior versions of this article at the American Constitution Society Constitutional Law Scholars Forum, the Richmond Junior Faculty Forum, the Wake Forest University School of Law Junior Scholars Workshop, and at faculty workshops at UNC School of Law, University of Georgia School of Law and St. John's University School of Law. She would like to thank the participants of those workshops for their helpful critiques, comments, and questions. The author would like to thank all those that took the time to individually comment on this project, including Marie-Amelie George, Tara Leigh Grove, Ben McMichael, Wilson Parker, Lisa Tucker and Ron Wright. Finally, she would like to thank her research assistants Maria Aguilera, Amy Brosnahan, Megan Cobb, Finley Riordan, and Julia Zabinski for their invaluable research support.

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INTRODUCTION

In order to be constitutional, laws that do not implicate a fundamental right or suspect classification must survive rational basis review—that is, the law must be rationally related to some legitimate government purpose.¹ As a result of both the plain language of the standard, and decades of deferential interpretation by courts, the canonical conception of rational basis review likens it to review in name only—practically useless as a way to challenge the constitutionality of government action.² Recently, scholars have both problematized this canonical conception of rational basis review and suggested a slew of reforms intended to make rational basis review a more significant check on state power.³ Many of these proposals primarily focus on how rational basis review fails to meaningfully ferret out discriminatory in-

¹ *Romer v. Evans*, 517 U.S. 620, 631 (1996) (“[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”).

² See Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1318–19 (2018) (“The canonical account of rational basis review under the Equal Protection Clause is familiar. Rational basis review is a form of review that is ‘almost empty,’ ‘enormously deferential,’ and ‘meaningless.’ The plaintiff’s burden on rational basis review is ‘essentially insurmountable,’ and successful challenges ‘rare.’ So deferential is the standard of rational basis review that it is ‘more often a statement of a conclusion that the law is constitutional than a standard of actual evaluation.’”).

³ See Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015); Clark Neily, *Litigation Without Adjudication: Why the Modern Rational Basis Test Is Unconstitutional*, 14 GEO. J.L. & PUB. POLY 537, 540 (2016); Eyer, *supra* note 2; Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL L. REV. 481, 485 (2004).

tent, on the theory that state legislators are more likely to be intentionally discriminatory than well-meaning but inadvertently incorrect about the effect any individual piece of legislation will have.⁴ Therefore, the focal point has mainly been the legitimacy of the government's *purpose* and not the rationality of the *means* employed.⁵

While identifying and dismantling laws passed as a result of animus towards a disfavored group is undoubtedly an important project, with all due respect to the fine legislators of this country,⁶ this focus likely underestimates the incidence of government actors simply failing to correctly identify the likely results of their actions.⁷ As a result, they sometimes pass and enforce laws that do not work. And while legislators could amend or repeal these perverse laws, for a variety of reasons they do not always do so. This Article focuses on the importance of rational basis review in this context. Particularly, it focuses on the constitutional arguments available to litigants faced with state actors that pass and enforce laws that have the opposite effect of the legislature's stated intent. I argue that this demonstrated perversity—an unequivocal factual record showing that a law has the *opposite* effect of the

⁴ See Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1656–57 (2016) (“It’s not clear that this would be a particularly helpful thing for the Court to do, since it is unlikely that a legislature would be so oblivious as to the consequences of its actions as to adopt a means *not* rationally related to its chosen end.”); Neily, *supra* note 3, at 540 (“[T]he principal threat to liberty in a representative democracy is not from legislators acting under some collective delusion . . . or temporary loss of sanity [I]nstead, it comes from policies that are designed—quite rationally—to achieve some constitutionally impermissible end, such as expressing animus towards racial minorities, purging the “socially inadequate” from the gene pool, or punishing people for disfavored political associations. So the rational basis test starts off on the wrong foot by suggesting that it serves one interest—protecting people from well-meaning but delusional or insane policymakers—when in fact its main function is (or ought to be) protecting people from perfectly rational policymakers seeking to advance the constitutionally impermissible ends of private interest groups.”).

⁵ See Nachbar, *supra* note 4, at 1632 (“While the ‘rational basis’ of rationality review is ostensibly an evaluation of means, the Court uses rationality review almost exclusively to identify and evaluate legislative ends, thus imposing upon legislatures the Court’s own understanding of the legitimate objectives of republican government.”); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 900 (2012) (“[T]he real concern in many of these [modern rational basis review] cases was with ends and not means—that insufficient tailoring was merely symptomatic of an improper purpose: animus.”).

⁶ This is not intended facetiously. State legislators are called on to solve a wide variety of complicated problems and sometimes lack the material support—or even the time—necessary to craft thoughtful and comprehensive legislation. See *cf.* Brakke v. Iowa Dep’t of Nat. Res., 897 N.W.2d 522, 534–37 (Iowa 2017) (“State legislatures generally meet on a part-time basis. They do not generally employ the mechanisms of extensive public hearings, markups, and staff review that have characterized congressional action in the past. Further, large volumes of state legislation are often passed in the waning hours of a legislative session, with a flurry of last-minute amendments, thus increasing the possibility that legislation may be passed without a full linguistic vetting.”); Kristen Underhill, *Broken Experimentation, Sham Evidence-Based Policy*, 38 YALE L. & POL’Y REV. 150, 164 (2019) (“[T]he policy environment itself—with finite time, multiple demands for attention, many decision-makers, and high-stakes choices—affects both rational thinking and the capacity to receive and use nuanced information.”).

⁷ Cass Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 413 (1990) (“[N]early all of the paradoxes are a product of the government’s failure to understand how the relevant actors—administrators and regulated entities—will adapt to regulatory programs.”).

legislature's stated or legitimate purpose—should form the basis for a finding that the law is unconstitutional under rational basis review.

While the proposition that a law is irrational if it results in the opposite outcome from lawmakers' intentions likely strikes most as a fairly obvious contention, the Supreme Court has not interpreted the Constitution to require laws to work in any meaningful way to meet the rational basis threshold. Thus, there are examples of laws that have at least an arguably perverse effect—such as mandatory bike helmet laws,⁸ laws that increase criminal corporate liability,⁹ and even mandatory compensation schemes for government takings and constitutional torts.¹⁰ And while a perverse outcome may result in the law being repealed or simply unenforced, it is rare for such a law to be challenged as unconstitutional through litigation.¹¹ This is not altogether surprising, as the burden litigants face to show that government action is so irrational as to be unconstitutional is quite high.¹² Further, Supreme Court precedent does not clearly map out how litigants might use a perverse outcome as the basis of a successful challenge under rational basis review, although such a roadmap does exist if one is willing to read between the lines.¹³

To illustrate just how strangely the law responds to perverse outcomes, a brief (albeit hyperbolic) hypothetical may be useful. We could start with a topic on which there is wide popular and scientific consensus—for example,

⁸ See Piet de Jong, *The Health Impact of Mandatory Bicycle Helmet Laws*, 32 RISK ANALYSIS 782, 782 (2012) (“In jurisdictions where cycling is safe, a helmet law is likely to have a large unintended negative health impact. In jurisdictions where cycling is relatively unsafe, helmets will do little to make it safer. . . .”).

⁹ Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 836 (1994) (arguing that increasing criminal corporate liability may result in increased corporate crime).

¹⁰ Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 415 (2000) (arguing that the deterrence effects of mandatory compensation schemes on government behavior “seem as likely to be perverse as beneficial”).

¹¹ Legal scholars, too, have engaged with the problems of perversity, although generally through the lens of improving law and regulation to avoid perversity—not the constitutional implications of such perversity. See, e.g. Sunstein, *supra* note 7, at (stating the article’s “general goal” as describing “some [regulatory] reforms by which we might restructure regulatory institutions so as to achieve their often salutary purposes, while at the same time incorporating the flexibility, respect for individual autonomy and initiative, and productive potential of markets”).

¹² Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 340 (2015) (“Parties urging that government action is irrational must come with their litigation bags overflowing with arguments against actual and even hypothetical justifications for that action.”).

¹³ See *infra* Section IV.C. Further, the Court, and individual Justices, have sometimes hinted that perversity of outcome is a relevant part of a valid constitutional inquiry. See *North Carolina v. Alford*, 400 U.S. 25, 38–39 (1970) (stating that a complete prohibition on states’ ability to allow criminal defendants to represent themselves would be “counterproductive” to the mandates of the 14th amendment, and thus invalid); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 474 (2010) (Stevens, J., concurring in part) (noting that it would be “perfectly understandable” for the Court to “attend carefully to the choices the Legislature has made” when a regulation might prove to be “counterproductive”).

that smoking increases the risk of developing lung cancer.¹⁴ Leaving aside, for the moment, that there can be divergent opinions on the right way to address this issue, there is overwhelmingly consistent scientific evidence that smoking results in negative health consequences generally, and increased rates of lung cancer specifically.¹⁵ Additionally, there is wide popular and professional consensus to the same effect.¹⁶ Now consider a state legislature in State A. The legislature from State A enacts a law funding a campaign to encourage its citizens to take up smoking as a method to reduce cancer. In fact, the State A legislature conditions the receipt of certain government benefits on individuals' adherence to a strict pack-a-day smoking habit. The legislature states its belief that smoking will help reduce cancer rates because, historically, people used to smoke more,¹⁷ and rates of cancer also used to be lower.¹⁸ Thus, they believe that encouraging smoking will likely reduce cancer.¹⁹ This is, of course, incorrect and dangerous. Smoking will definitely increase cancer. And unsurprisingly, that's what happens in State A—an increase in smoking results in a statistically significant increase in cancer (among other ill effects). At what point could a citizen of the state, deprived of state benefits as a result of her refusal to comply with the smoking mandate (or harmed because of her acquiescence), challenge the law? And under what theory? The state correctly identified a problem (cancer) and attempted to solve it, utilizing its own observations and reasoning to develop a method to do so. Under the prevailing interpretation of rational basis review, the law is not constitutionally deficient.²⁰

¹⁴ See generally, *What Are the Risk Factors for Lung Cancer?*, CTNS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/cancer/lung/basic_info/risk_factors.htm#:~:text=people%20who%20smoke%20cigarettes%20are,the%20risk%20of%20lung%20cancer [https://perma.cc/6ADZ-UDXQ] (“People who smoke cigarettes are 15 to 30 times more likely to get lung cancer or die from lung cancer than people who do not smoke.”).

¹⁵ See *Health Effects of Cigarette Smoking*, CTNS. FOR DISEASE CONTROL AND PREVENTION, [cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm) [https://perma.cc/X9ZJ-FFML] (explaining that estimates show that smoking increases the risk for coronary heart disease by 2 to 4 times, for stroke by 2 to 4 times, of men developing lung cancer by 25 times, and of women developing lung cancer by 25.7 times).

¹⁶ *Smoking in America: Why More Americans Are Kicking the Habit*, AM. HEART. ASSOC. (Aug. 30, 2018), <https://www.heart.org/en/news/2018/08/29/smoking-in-america-why-more-americans-are-kicking-the-habit>

[https://perma.cc/F5TG-XER7] (“The overall cigarette smoking rate among U.S. adults has hit an all-time low, according to the Centers for Disease Control and Prevention.”).

¹⁷ *Id.* (noting that “fifty years ago . . . roughly 42 percent of American adults” were smokers).

¹⁸ It is true that death rates for lung and bronchus cancer were lower from when these deaths began to be tracked (around 1930) through the mid-1960s—at which point they started to increase, reaching their apex in the mid-1980s through the early 1990s. See AM. CANCER SOC'Y., *CANCER FACTS AND FIGURES 2001*, at 2 (2001), <https://www.cancer.org/content/dam/cancer-org/research/cancer-facts-and-statistics/annual-cancer-facts-and-figures/2021/cancer-facts-and-figures-2021.pdf> [https://perma.cc/4FJQ-V3RC]. Of course, this doesn't account for the increased *identification* of these deaths as cancer-related.

¹⁹ The old distinction between correlation and causation strikes again.

²⁰ Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 GEO. J.L. & PUB. POL'Y 373, 377 (2016) (“From the way courts often describe the rational-basis test, the analysis could take place in a vacuum, with the government making up the purpose of the law and

Of course, the law *is* woefully deficient. Can it be that the Constitution provides no shield to such obviously reckless legislative action? That cannot be. While it might be true that the legislature is not required to amass a factual record in support of its lawmaking function,²¹ it is still required to act *rationality* to further its articulated interest. Any meaningful definition of rationality, I argue, necessarily includes taking into consideration the widely available, widely accepted, consistent evidence that smoking increases lung cancer.

You may, at this point, *rationality* be wondering why any of this matters because no legislature would ever mandate its citizenry take up smoking. And you would be right—sort of. There are certainly historical and international examples of such perverse laws. Perhaps best known is the “Cobra Effect”—a term coined to describe how the colonial British government in India offered a bounty for dead cobras as a method to decrease the snake population, only to incentivize Indian citizens keen on collecting the bounty to undertake robust cobra breeding programs that resulted in more snakes than ever before.²² Similarly, a law passed in Mexico City in the 1980s in order to curb air pollution by reducing the number of cars on the road by 20% had the perverse effect of increasing air pollution as citizens forwent their own cars in favor of (more polluting) taxi cabs.²³

But you don’t have to go back in history or overseas for relevant examples. State legislatures across the United States (and the federal government) also pass perverse laws.²⁴ Some academics have argued that the Americans with Disabilities Act—passed with the intent of increasing employment opportunities for disabled employees—results in *less* employment opportunities as employers avoid the perceived additional costs of hiring disabled employees.²⁵ Others have claimed that patent laws designed to spur technological innovation might result in a dampening of such innovation.²⁶ The Endangered Species Act may encourage individual actors to destroy fragile species²⁷

untrue facts that a legislature might have believed that then form a relationship with the made-up purpose. It is a bizarre prospect, but rational-basis cases rarely proceed purely by exercises of imagination.”).

²¹ Nor, technically, are they required to state their legislative intent. See *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (“To be sure, the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification.”). Although for purposes of this illustration, they have done so.

²² Stephen J. Dunbar, *The Cobra Effect*, FREAKONOMICS (Oct. 11, 2012, 9:28 AM), <https://freakonomics.com/podcast/the-cobra-effect-a-new-freakonomics-radio-podcast/> [<https://perma.cc/ZP9A-XXHC>].

²³ Lucas W. Davis, *The Effect of Driving Restrictions on Air Quality in Mexico City*, 116 J. POL. ECON. 38, 40 (2008).

²⁴ See generally Sunstein, *supra* note 7 (describing six examples of regulations that result in perverse outcomes).

²⁵ Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 949–50 (2001).

²⁶ Katya Assaf, *Of Patents and Cobras: Exposing the Problem of Asymmetry*, 35 CARDOZO ARTS & ENT. L.J. 1, 3–4 (2016).

²⁷ See Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27, 30 (2003).

and the National Historic Preservation Act may stimulate the destruction of historical buildings.²⁸ Mandatory disclosures may harm the consumers they were designed to protect.²⁹ And as my co-author Ben McMichael and I have explored in prior work, laws that aim to protect fetal and infant life by criminalizing risky behavior in pregnancy often result in *higher* levels of fetal and infant death.³⁰ The laws designed to protect babies actually kills babies.³¹ As this last example illustrates, however, perverse laws that concern hot button issues are not generally discussed through the frame of perversity. Because these laws implicate more classic social justice concerns about animus, the legislation of morality, discriminatory effect, and the like, scholars and advocates tend to challenge them on these bases and not focus on the argument that the laws don't work—and often exacerbate the problems they are intended to solve.³² This strategic choice is understandable considering the lack of rationality that rational basis seems to require. But ceding a discussion of rationality foregoes a potentially fruitful method for challenging such laws that simultaneously avoids some of the thornier problems of identifying unspoken intent or unmasking unconscious bias.

This Article attempts to elaborate on how focusing on the *irrationality* of government action in pursuing perverse policies may be an overlooked and effective tactic in challenging the constitutionality of at least some egregious government action. While the argument about perversity is narrow, its potential impact is large. To demonstrate this potential impact, this Article explores how a perversity-as-irrationality framework might apply in a number of legal arenas, including aspects of the criminal justice system (such as mandatory arrest laws in the domestic violence context) and reproductive rights law (including abstinence-only sex education laws and the targeted regulation of abortion providers).

The Article proceeds in five parts. Part II provides an overview of the current state of rational basis review. Part III more specifically defines perversity and discusses how it is differentiated from non-perverse, but nonetheless potentially undesirable outcomes. Part IV puts the two pieces together, showing how demonstrated perversity, as I define it, should form the basis of a finding that a law is irrational and thus unconstitutional. It also explores how such a suggestion adds to an ongoing scholarly discussion of the proper scope of rational basis review and suggestions for its reform. Part

²⁸ See J. Peter Byrne, *Precipice Regulations and Perverse Incentives: Comparing Historic Preservation Designation and Endangered Species Listing*, 27 GEO. INT'L ENV'T. L. REV. 343, 352–54 (2015).

²⁹ Molly Mercer & Ahmed E. Taha, *Unintended Consequences: An Experimental Investigation of the (in)effectiveness of Mandatory Disclosures*, 55 SANTA CLARA L. REV. 405, 408 (2015).

³⁰ Meghan Boone and Benjamin McMichael, *State-Created Fetal Harm*, 109 GEO. L.J. 475, 477–78 (2021). As discussed in the paper, laws that criminalize pregnant women unsurprisingly disincentivize women from seeking prenatal care, resulting in considerably worse health outcomes for themselves and their pregnancies. *Id.* at 487.

³¹ *Id.* at 513–14.

³² Which is not to say they do not sometimes point out this unhappy circumstance, but only that it is rarely the focal point of legal scholarship or analysis.

V briefly delves into the procedures that could be used to evaluate a claim of perversity-as-irrationality. Part VI explores how this theory might most effectively be put into practice as a method to challenge government action in three areas—abortion, sex education, and mandatory arrest provisions in domestic violence statutes.³³

I. RATIONAL BASIS REVIEW

Rational basis review is the constitutional standard applied for both equal protection and due process claims³⁴ when the classification does not involve a suspect class (like race) or the infringement of a fundamental right (like the right to marry).³⁵ As all laws involve classifications,³⁶ there is always a potential equal protection challenge to all basic economic, social, or public health legislation that utilizes rational basis review. Rational basis review requires only that state action must be rationally related to a legitimate government interest.³⁷ Such a simple statement, however, belies the deep, sometimes conflicting precedent that exists. As Justice Rehnquist concluded in his majority opinion in *United States Railroad Retirement Board v. Fritz*,³⁸ the Court “has not been altogether consistent in its pronouncements in this area”³⁹ and, “[t]he most arrogant legal scholar would not claim that all of [the] cases applied a uniform or consistent [rational basis] test under equal protection principles.”⁴⁰ Thus, while there is undoubtedly a “canonical” un-

³³ See *infra* Part VI.

³⁴ The interpretation of the rational basis standard under the Due Process and Equal Protection clauses is identical. See *Gary v. City of Warner Robins*, 311 F.3d 1334, 1339 n.10 (11th Cir. 2002) (“[T]he rational basis test utilized with respect to an equal protection claim is identical to the rational basis test utilized with respect to a substantive due process claim.”). The rational basis test, however, precedes the 14th Amendment’s requirements of equal protection and due process. See *Nachbar*, *supra* note 4, at 1635 (describing the historical development of rational basis review).

³⁵ Heightened tiers of scrutiny are reserved for rights specifically outlined in the Constitution, core political rights, or discrimination against “discrete and insular minorities.” See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n. 4 (1938).

³⁶ See *Toll v. Moreno*, 458 U.S. 1, 39 (1982) (Rehnquist, J., dissenting) (“All laws classify, and, unremarkably, the characteristics that distinguish the classes so created have been judged relevant by the legislators responsible for the enactment.”); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1068 (1979) (“Every time an agency of government formulates a rule—in particular, every time a legislature enacts a law—it classifies.”).

³⁷ See *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972); *Membreno v. City of Hialeah*, 188 So. 3d 13, 22 (Fla. Dist. Ct. App. 2016) (“[C]ourts’ power and responsibility to determine whether a law violates substantive due process and equal protection are at their absolute minimum concerning laws, such as business and economic regulations, that do not establish suspect classes and do not infringe fundamental rights.”). Though most often applied to legislation, the test also applies to executive action.

³⁸ U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1980).

³⁹ *Id.* at 174.

⁴⁰ *Id.* at 176 n.10. Indeed, some scholars would be considerably less kind to the doctrine of rational basis, instead announcing that it is “nothing more than a Magic Eight Ball that randomly generates different answers to key constitutional questions depending on who happens

derstanding of rational basis review, such an understanding marks only the beginning and not the end of a complete picture of how rational basis review functions.⁴¹ Recently, scholarly interest in rational basis review has been steadily growing, leading scholars to declare that, “[t]he rational basis test is enjoying a bit of a comeback.”⁴² In light of these conflicting and evolving understandings of rational basis review, the following sections lay out a fuller picture of the nature and requirements of rational basis review.

A. Canonical Rational Basis Review

It is perhaps only a slight exaggeration to say that the canonical understanding of rational basis review is that the determination that rational basis review is the governing standard amounts to an announcement that the government wins.⁴³ Instead, it is useful to think of the rational basis test as a “constitutional floor”—a very low bar for the government to overcome, but a bar nonetheless.⁴⁴

The modern rational basis test evolved in part as a reaction against the judiciary’s persistent invalidation of economic regulation, including in such cases as the infamous *Lochner v. New York*.⁴⁵ Following the repudiation of *Lochner* and its underlying reasoning,⁴⁶ the Court shifted from employing a more searching reasonable basis requirement to the modern, extremely deferential rational basis standard.⁴⁷ While the former required courts to deter-

to be shaking it and with what level of vigor.” Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 897, 897 (2005).

⁴¹ Berliner, *supra* note 20, at 374 (“Like a padded résumé, there is a difference between what the rational-basis test says it is and what the test actually is.”).

⁴² See Bambauer & Massaro, *supra* note 12, at 284.

⁴³ Lawrence O. Gostin, *Public Health Theory and Practice in the Constitutional Design*, 11 HEALTH MATRIX 265, 310 (2001) (“[T]he Court uses the rational basis test and the government almost invariably wins.”).

⁴⁴ Bambauer & Massaro, *supra* note 12, at 283 (describing rational basis review as a “constitutional floor[] to provide a minimum of decency and order the government must maintain in all of its varied activities,” that “trigger non-elevated, highly deferential judicial review” and “provide[s] the lightest of checks on government power”).

⁴⁵ 198 U.S. 45 (1905). *Lochner* has cast a long shadow on judicial review ever since its repudiation, becoming a one-word stand-in for alleged “judicial activism.” Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 873 (1987) (“The spectre of *Lochner* has loomed over most important constitutional decisions, whether they uphold or invalidate governmental practices.”).

⁴⁶ Bambauer & Massaro, *supra* note 12, at 324 (“[*Lochner*] came to be understood as a low point in the history of judicial restraint because it enticed judges to question the value of labor and economic regulations and to substitute their own policy judgments for that of the legislatures.”).

⁴⁷ See James M. McGoldrick, Jr., *The Rational Basis Test and Why It Is So Irrational: An Eighty Year Retrospective*, 55 SAN DIEGO L. REV. 751, 758–74 (2018) (describing history of reasonable and rational review). It is perhaps overly simplistic to say that it was the repudiation of *Lochner* and similar cases that led to the creation of the tiers of review, however. As Tara Leigh Grove has argued, the change was also likely related to the need for the Supreme Court to provide additional guidance to lower courts as the Court itself could no longer hear as many cases on direct review. See Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GEO. J.L. & PUB. POL’Y 475 (2016).

mine whether the law actually worked to further the legislature's goals and whether more effective methods could have been employed, the latter does neither.⁴⁸ The decision in *United States v. Carolene Products Co.*,⁴⁹ is generally understood to be the beginning of the modern era of rational basis review, although versions of the test certainly predated that opinion.⁵⁰ The rational basis test reflects, at its core, the idea that the government in a representative democracy should normally be permitted to pass and enforce laws because the government reflects the will of the people and the democratic process.⁵¹ As a result of this necessary deference to the political branches, judicial invalidation of most categories of legislation should be greatly disfavored.⁵²

But of course, as this Article explores, such intervention is sometimes necessary in response to legislative action either undertaken for improper motives or that employs patently irrational means (and remains uncorrected by the legislature itself). Most scholars (and judges) thus concede that rational basis review involves two related but distinct inquiries—the legitimacy of the government interest (ends) and the rationality of its action in furthering that interest (means).⁵³ As to the former, canonical rational basis review only requires that the stated or *inferred* government interest is legitimate.⁵⁴ In other words, judges can assume legislative intent—even in the absence of evidence that the legislature was *actually* motivated by a particular goal—if it is “reasonably conceivable” that it could have been so motivated.⁵⁵ Likewise,

⁴⁸ *Id.*

⁴⁹ 304 U.S. 144, 152 (1938).

⁵⁰ See McGoldrick, *supra* note 47, at 758–74 (describing history of reasonable and rational review).

⁵¹ Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 405 (2016) (“Subjecting all laws that draw a distinction among people—which is virtually all laws—to heightened scrutiny would unduly limit the ability of the democratic process to govern.”).

⁵² Sunstein, *supra* note 45, at 874 (“[The] basic understanding. . . endorsed by the Court in many cases [that] the lesson of the *Lochner* period [is] the need for judicial deference to legislative enactments.”).

⁵³ See Nachbar, *supra* note 4, at 1631 (“Rational basis review not only assumes rationality is the objective of legislation, it makes means-ends rationality a constitutional condition of all legislation.”); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 362 (1993) (“[T]he Due Process Clause should be recognized as imposing a general duty on government officials to behave ‘rationally’ in their selection of both ends and means”). Justice Scalia’s opinion in *F.C.C. v. Beach Commc’ns*, 508 U.S. 307 (1993), complicates this understanding by appearing to suggest that rational basis review is not a two-step inquiry, but instead that “where there are ‘plausible reasons’ for Congress’ action,” the court’s, “inquiry is at an end.” *Beach* at 313–14. In other words, once a legitimate purpose has been identified, it is not for the courts to pass judgment on the “wisdom, fairness, or *logic* of legislative choices” to effectuate those ends. *Id.* at 313. For reasons discussed in Section IV.B, *infra*, even Justice Scalia’s opinion in *Beach* can be read to include an analysis of means, albeit an incredibly deferential one. Regardless, Supreme Court precedent following *Beach* validates the existence of both an end and means analysis as required in evaluating legislation under rational basis review.

⁵⁴ Chemerinsky, *supra* note 51, at 401 (“[T]he government’s objective only need be a goal that is legitimate for the government to pursue, which means any objective that it is legal for the government to pursue.”).

⁵⁵ See Berliner, *supra* note 20, at 375 (discussing the modern rational basis test and its willingness to incorporate inferred legislative intent, as well as post hoc rationalizations).

legislatures can come up with rationalizations *post hoc*.⁵⁶ In addition to the leniency in determining what their intentions were, legislatures are also given wide latitude to determine what interests are “legitimate;” only a slight few interests, such as bare animus to a politically unpopular group⁵⁷ or a “naked transfer of wealth” unmoored from other public-minded justifications,⁵⁸ have been described as impermissible.⁵⁹ If multiple government interests are articulated, only one need be legitimate in order to suffice.⁶⁰

The rationality of the means employed by the government to effectuate its purpose is judged on a similarly deferential standard, requiring neither precision⁶¹ nor “mathematical nicety,”⁶² but only that the means employed are not “patently arbitrary or irrational.”⁶³ Litigants challenging laws as irrational “must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.”⁶⁴ Laws that are underinclusive or overinclusive are permissible, as are laws that address one aspect of an identified problem but not other, related issues.⁶⁵

⁵⁶ *Williamson v. Lee Optical*, 348 U.S. 483, 487–89 (1955).

⁵⁷ Conversely, sometimes favoritism to a particular group is likewise found to be illegitimate. See *Berliner*, *supra* note 20, at 383–87.

⁵⁸ *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222–23 (5th Cir. 2013) (“As we see it, neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose, but economic protection, that is favoritism, may well be supported by a *post hoc* perceived rationale. . . without which it is aptly described as a naked transfer of wealth.”).

⁵⁹ See *USDA v. Moreno*, 413 U.S. 528, 534 (1973) (“For if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”); *Berliner*, *supra* note 20, at 376 (“Courts are mortally afraid of saying that something is an illegitimate interest.”).

⁶⁰ *N.J. Retail Merchs. Ass’n v. Sidamon-Eristoff*, 669 F.3d 374, 398 (noting a statute “will pass rational basis examination” where one of several stated purposes was not legitimate “as long as it was not the only legitimate purpose underlying the legislation”). If unlawful discrimination is shown to be the but-for cause of legislation, however, it can be invalidated even if there were potential, lawful reasons present, as well. See *Hunter v. Underwood*, 471 U.S. 222, 232 (1985) (invalidating §182 of the Alabama Constitution of 1901, which provided for the disenfranchisement of persons convicted of “crime[] involving moral turpitude” because the Court found it would not have been adopted in the absence of a racially discriminatory motivation).

⁶¹ *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959) (noting that the State “is not required to resort to close distinctions or to maintain a precise, scientific uniformity” in its laws in order to suffice for rational basis review).

⁶² *Dandridge v. Williams*, 397 U.S. 471, 485 (quoting *Lindsay v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)) (“If the classification has some ‘reasonable basis,’ it does not offend the Constitution simply because the classification ‘is not made with mathematical nicety or because in practice it results in some inequality.’”).

⁶³ *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 177 (1980).

⁶⁴ *Vance v. Bradley*, 440 U.S. 93, 111 (1979).

⁶⁵ See *Williamson v. Lee Optical*, 348 U.S. 483, 487–89 (1955).

B. *The Real Rational Basis Review*

Of course, rational basis review is not a static doctrine. Perhaps precisely because rational basis review is utilized to cover such a wide variety of circumstances, the protection it offers falls along a spectrum. In the Equal Protection context, for instance, groups that enjoy popular support seem to enjoy a more vigorous version of rational basis review than do less-favored groups.⁶⁶ And despite jurists' claims to the contrary, the socially or politically desirable outcome in any particular case certainly seems to affect the strength of courts' inquiries under rational basis review, as well.⁶⁷

The robustness of the review employed may also evolve. For instance, sometimes the path to greater protection under the Equal Protection or Due Process clauses winds through a more searching form of rational basis review, even if it ultimately ends up at a more heightened level of review. For instance, "many, if not most, of the early victories of the women's rights movement were won on a rational basis framework,"⁶⁸ even though sex classifications are now reviewed under an intermediate standard of scrutiny.⁶⁹ The right to marry, now understood as an aspect of substantive due process, was also originally reviewed under a deferential rational basis standard before being elevated to a higher—although still somewhat ambiguous—standard in the modern right to marry cases.⁷⁰ The rational basis test has also "played a starring role in the modern development of so-called 'gay' constitutional rights"—forcing governments to (try to) explain the rationality of laws that discriminated on the basis of sexual orientation.⁷¹

There is also a growing group of cases that purport to apply rational basis review but in practice apply a standard that is more stringent than the exceedingly deferential standard traditionally associated with it. These cases—often dubbed "rational basis with bite"—differ from the canonical approach in two ways. First, they pay special attention to the animus that is

⁶⁶ See Eyer, *supra* note 2, at 1323 ("[T]here has been variation in the availability of meaningful rational basis review: as emerging social movements gain credence, their use of rational basis review tends to expand opportunities—both for their own litigation priorities, and also for others to access more meaningful minimum-tier review.").

⁶⁷ See Nachbar, *supra* note 4, at 1633 ("Realists might argue that the rational basis test should not be taken seriously and serves only as doctrinal cover for what the Court wishes to do in particular cases."); Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & Liberty 898, 910–13 (2005) (describing four cases in which the Supreme Court "strayed from the literal commands of the rational basis test in order to achieve a preferred result").

⁶⁸ See Eyer, *supra* note 2 at 1328; see also *Reed v. Reed*, 404 U.S. 71, 76 (1971) (using rational basis review to find that a mandatory preference to males over females in deciding the administrator of an estate was "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment").

⁶⁹ *Craig v. Boren*, 429 U.S. 190, 208 (1976) (announcing the modern intermediate scrutiny approach now applied to sex classifications).

⁷⁰ See Eyer, *supra* note 2, at 1344–46.

⁷¹ Bambauer & Massaro, *supra* note 12, at 299.

directed at the group who is being regulated.⁷² Second, they require a tighter fit in the means-ends analysis that is at the heart of rational basis review,⁷³ often striking down laws that are significantly over or underinclusive.⁷⁴ The cases dealing with animus towards a disfavored group or that apply “rational basis with bite” are sometimes described as distinct and sometimes as inter-related phenomena.⁷⁵ Despite the breadth of cases that fall into this category, they are often derided as not “true” rational basis cases, but instead cases that employ a not-totally-defined heightened scrutiny while only purporting to apply rational basis. Other scholars, notably Katie Eyer, reject this characterization, describing these cases as reflective of a characteristic of—not a departure from—rational basis review.⁷⁶

Clearly, the “canonical” understanding of rational basis review as almost certain to result in a win for the government is incomplete.⁷⁷ The meaning of rational basis review has been evolving since its entrance into the constitutional conversation—and continues to evolve to this day.⁷⁸ During this evolution, courts have used, and continue to use, rational basis review to strike down laws that lack either a legitimate governmental interest or a rational means of achieving that interest.⁷⁹ But despite this nuance, it is still fair to say that courts still regularly employ the canonical version of rational basis review, resulting in validation for government action that is at best misguided and at worst downright foolish.⁸⁰

In the next section, the constitutionality of government action is considered at the nadir of rationality—undertaking an action that is likely to thwart one’s own purpose.

⁷² *Romer v. Evans*, 517 U.S. 620, 632 (1996) (“[The law at issue] has the peculiar property of imposing a broad and undifferentiated disability on a single named group. . . .”).

⁷³ *Id.* (“[The] sheer breadth [of the challenged law] is so discontinuous with the reasons offered for it that [it] seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”).

⁷⁴ *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (finding that ordinance requiring a special permit for a home for the mentally retarded was both over and underinclusive to its purported goals).

⁷⁵ *See Eyer, supra* note 2, at 1356–57 (“Sometimes conceived of as working in tandem, and sometimes as distinct theories, together [the animus and rational basis with bite cases] have provided the dominant canonical explanation for those cases not fitting the ultra-deferential model that the canon nevertheless cannot ignore.”).

⁷⁶ *See generally Eyer, supra* note 2.

⁷⁷ *See id.* at 1366 (“[T]he reality of rational basis review is far messier, and less consistent, than the canon acknowledges.”).

⁷⁸ *Id.* (“[T]he reality of the practice of rational basis review is that it is ‘up for grabs’ in the context of individual cases in a way that few other constitutional doctrines are.”).

⁷⁹ *See, e.g., Berger v. City of Mayfield Heights*, 154 F.3d 621, 625 (6th Cir. 1998) (holding a city ordinance that required vacant lots with less than 100 feet of street frontage to be “totally cut” to a height of eight inches failed rational basis review because the means chosen by the city did not rationally promote their purported interest in public peace, health, or safety).

⁸⁰ *Bambauer & Massaro, supra* note 12, at 287 (“Judges will continue to confront many scenarios in which they simply hold their noses and uphold government conduct that they find distasteful, stupid, clunky, corrupt, invasive, or worse.”)

II. DEMONSTRATED PERVERSITY

Scholarly attention on the very human problem of trying to do one thing and nevertheless doing something else entirely has a long and illustrious history.⁸¹ A foundational article by Robert K. Merton, *The Unanticipated Consequences of Social Action*, lays out the basic problems, from lacking evidence,⁸² to misunderstanding existing evidence,⁸³ to failing to understand how changing context can create different outcomes,⁸⁴ to narrowly focusing on one aspect of a problem such that other obvious consequences are overlooked.⁸⁵ Needless to say, many very smart people have set themselves to the task of answering *why* human action is so prone to failing to achieve its intended purpose. Further, legislators are certainly not alone in suffering outcomes different than their intent—doctors and scientists, religious leaders and car salespeople, all must contend with perversity of outcomes, as well as ineffective actions and unintended consequences.⁸⁶ Nevertheless, once such perversity occurs, the legal system, with its built-in system of review, is uniquely positioned to rectify such outcomes.

In order to successfully make an argument that legislation is constitutionally deficient as a result of its demonstrable perversity, it is necessary at the outset to have a meaningful and clear definition of what constitutes perversity. For purposes of this project, a perverse law is one that clearly contravenes the overarching legislative intent because the law is solely or primarily responsible for producing the opposite result from the stated or obvious legislative intent.⁸⁷ Legislature aims to do X. Instead, the resulting legislation

⁸¹ See Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOCIO. REV. 894, 894 n.1 (1936) (describing how the “unanticipated consequences of purposive action has been treated by virtually every substantial contributor to the long history of social thought” and listing modern theorists who have engaged with this issue including Machiavelli, Adam Smith, Marx, and Pareto, among others).

⁸² *Id.* at 898 (“The most obvious limitation to a correct anticipation of consequences of action is provided by the existing state of knowledge.”).

⁸³ See *Id.* at 899–900.

⁸⁴ *Id.* at 899 (“We have here the paradox that whereas past experience is the sole guide to our expectations on the assumption that certain past, present and future acts are sufficiently alike to be grouped in the same category, these experiences are in fact different. To the extent that these differences are pertinent to the outcome of the action and appropriate corrections for these differences are not adopted, the actual results will differ from the expected.”).

⁸⁵ *Id.* at 898 (“A frequent source of misunderstanding will be eliminated at the outset if it is realized that the factors involved in unanticipated consequences are precisely, factors, and that none of these serves by itself to explain any concrete case.”).

⁸⁶ See Merton, *supra* note 81, at 894 (noting the “diversity of context” in which unintended consequences occur which range from “theology to technology”). There is a robust scholarship on how social justice litigation itself—even and perhaps especially when it is successful—creates perverse outcomes to those intended by advocates. See, e.g., Margo Schlanger, *Stealth Advocacy Can (Sometimes) Change the World*, 113 MICH. L. REV. 897 (2015) (cataloguing scholarly attention to how social justice litigation was the cause of backlash that ultimately undermined plaintiffs’ goals).

⁸⁷ This definition tracks, but elaborates on, definitions of perversity in prior scholarship. See Sunstein, *supra* note 7, at 407 (“By ‘paradoxes of the regulatory state,’ I mean self-defeating

does -X. In the following sections, this definition is explored in greater detail.

A. *Determining Intent*

Of course, it is difficult to determine whether a law results in the opposite of its intended outcome if we do not first clearly ascertain the legislative intent in any particular instance.⁸⁸ Legitimate government interests can cover a broad range of traditional actions within the police power of the state, including “[p]ublic safety, public health, morality, peace and quiet, law and order”⁸⁹ In some cases, determining intent is relatively straightforward. Legislatures routinely include statements of purpose either in the preamble or text of legislation. While interpretive issues may arise if these statements are vague or otherwise ambiguous, canons of statutory interpretation can reasonably aid a jurist in determining what the text actually means. As previously mentioned, many scholars rightly question such statements as likely camouflaging actual, more insidious legislative intent, but for purposes of this project and determining legislative perversity, it is not necessary to probe for the “real” purpose of the law.⁹⁰ Taking written declarations of intent at face value is sufficient. Certainly, courts routinely espouse the importance of limiting their interpretations of intent to what the legislature actually said—not what the court thinks the legislature should have said or what the court thinks the legislature really meant.⁹¹

What does demonstrated perversity look like, however, in instances where the legislative intent goes unstated? Indeed, legislatures are not required to provide an explicit purpose when passing laws, and courts can thus infer legislative intent when evaluating whether the law survives rational basis review.⁹² In these instances, courts will simply look at whether the law rationally furthers *any* proper purpose, whether the legislature identified such a purpose or not.⁹³ Thus, laws are constitutionally permissible if there is

regulatory strategies—strategies that achieve an end precisely opposite to the one intended, or to the only public-regarding justification that can be brought forward in their support.”).

⁸⁸ *See id.* at 412 (“Any statute that fails to produce a net benefit to society can be described as self-defeating if its purpose is described as the improvement of the world. But if a statute’s purpose is to benefit a particular group or segment of society, and that purpose is achieved, then the statute is not self-defeating at all.”).

⁸⁹ *Berman v. Parker*, 348 U.S. 26, 32 (1954) (listing some of the “conspicuous”—but non-exhaustive—“examples of the traditional application of the police power to municipal affairs.”).

⁹⁰ And there is some precedent to suggest that such searching is improper. *See, e.g., F.C.C. v. Beach Commc’ns.*, 508 U.S. 307 (1993).

⁹¹ *See, e.g., Langdeau v. Langdeau*, 751 N.W.2d 722, 727 (S.D. 2008) (citing *US West Commc’ns, Inc. v. Pub. Utilities Comm’n*, 505 N.W.2d 115, 123 (S.D. 1993)) (“The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used.”).

⁹² *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (“To be sure, the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification.”).

⁹³ *Id.*

“any reasonably conceivable state of facts that could provide a rational basis for the classification.”⁹⁴ In doing this analysis, the court is allowed to make up potential legislative aims out of whole cloth, although it is constrained in doing so by the mandate that such aims must still be proper—i.e., for an allowable reason. Without a stated intent, it might seem impossible to determine perversity—how can a law have the opposite of an undefined intended effect? But courts are already, in essence, engaging in this inquiry when they look for evidence that the law furthers any proper purpose. If a law is having *no* effects that a legislature would properly seek, but instead resulting (or likely to result) in effects that would frustrate the will of any rational legislature, it could still be “perverse” under the framework laid out here.

One more aspect of legislative intent is worth exploring in further detail. If the goal of a piece of legislation is “poverty reduction” and a subsection of the law intends to provide low-cost housing vouchers to 15% more individuals than currently receive them, does the perversity analysis attach to “poverty reduction” or the goal of providing 15% more vouchers? One could imagine a system that successfully met its target of distributing more housing vouchers but nonetheless resulted in increased poverty.⁹⁵ All a government would have to do to arrive at this unhappy outcome would be to hand out more housing vouchers to people who *aren’t* experiencing poverty, thus reducing the number of vouchers available to the truly needy.

This concern can be addressed, however, by reference to the regularly applied “whole act rule.” The whole act rule instructs jurists to interpret a given piece of legislation in a way that makes sense given the entirety of the legislative text.⁹⁶ In the foregoing example, the law would still be perverse if it had a demonstrated effect of increasing poverty, even if the smaller, more technical “goal” was met.⁹⁷ The definition of perversity provided at the outset of this section incorporates the basic concept of the whole act rule, as it only labels laws perverse when they “clearly contravene the *overarching* legislative intent.”⁹⁸ Outcomes that include the opposite effect of smaller, component goals when the overarching intent of the legislature is satisfied would not be the basis, therefore, of a finding that the law is perverse.

⁹⁴ REO Enter. v. Village of Dorchester, 306 Neb. 683, 689 (2020).

⁹⁵ See Merton, *supra* note 81, at 902 (“[An action can be] rational, in the sense that it is an action which may be expected to lead to the attainment of the specific goal; irrational, in the sense that it may defeat the pursuit or attainment of other values which are not, at the moment, paramount but which none the less form an integral part of the individual’s scale of values.”).

⁹⁶ See Richards v. United States, 369 U.S. 1, 11 (1962) (“We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.”).

⁹⁷ See United States v. Kozeny, 541 F.3d 166, 171 (2d Cir. 2008) (“The whole act rule of statutory construction . . . exhorts us to read a section of a statute not in isolation from the context of the whole Act but to look to the provisions of the whole law, and to its object and policy.”).

⁹⁸ Cf. Galindo v. Johnson, 19 F. Supp. 2d 697, 702 (W.D. Tex. 1998) (“Congress cannot be presumed to act in a manner counterproductive to the purposes of the statute as a whole.”).

Thus, whether through the written statements of the legislature itself, an analysis of the potentially proper goals of the legislation, or an assessment of the “whole act” when determining the legislative intent undergirding a multi-part law, courts are more than capable of arriving at a conclusion regarding the legislative purpose that is the necessary first step in assessing constitutionality under rational basis review.

B. *Defining Perversity*

In the example from the introductory section about the mandatory smoking law, determining perversity would be relatively straightforward. The legislature stated in the text of the law itself that the goal was to reduce lung cancer and the clear effect of the law was to increase lung cancer. Those wishing to challenge the law need only show that it was the law itself, and not some other factor, that created the offensive result. But what if the law simply did nothing to change the lung cancer rate (either because people refused to comply or due to some other reason) or what if the lung cancer rate remained steady (or even slightly decreased), but the rates of chronic obstructive pulmonary disorder (COPD) skyrocketed? These outcomes are not technically perverse, as this project defines it, but instead deal with issues of inefficacy and unintended consequences.

An ineffective law is not necessarily a perverse one. Examples of ineffective legislation abound.⁹⁹ Occasional or even frequent inefficacy in law-making is actually understandable, considering the wide range of problems that legislatures are called upon to address, the limits of scientific knowledge, and the constraints on budget and political will that they face.¹⁰⁰ Some laws simply do nothing. Legislature aims to effect X. Instead, X is unchanged. But doing nothing is, importantly, distinct from doing the opposite of legislative intent. It at least preserves the status quo as it existed at the time of legislative enactment. As odious as they may be, ineffective laws are not generally unconstitutional.¹⁰¹

Another category of outcomes that are not necessarily included in the concept of perversity for purposes of this project are those that result in unintended consequences. Unintended consequences are outcomes that the

⁹⁹ See LAWRENCE M. FRIEDMAN, *IMPACT: HOW LAW AFFECTS BEHAVIOR* 229 (2016) (discussing studies that show the ineffectiveness of different methods of increasing compliance with tax laws).

¹⁰⁰ John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2395 (2003) (describing how political realities and unseen bargains sometimes create legislation that may appear irrational); Bambauer & Massaro, *supra* note 12, at 337 (“Political processes do, of course, involve compromises and deals brokered between legislators with disharmonious mindsets.”).

¹⁰¹ See *Heffner v. Murphy*, 745 F.3d 56, 85 (3d Cir. 2014) (“The Constitution does not protect against inefficient, wasteful, or meaningless legislation.”). Of course, even inefficacy, taken to the extreme, might present a compelling case for irrationality. One could certainly imagine a rationality challenge to a long-standing, very expensive and burdensome government program that clearly did *nothing*—and had clearly been doing nothing for a very long time. An interesting question for future research.

legislature did not intend, to be sure, but they are outcomes unrelated to the original intent of the legislation. Legislature aims to do X. It ends up doing Y and Z. But to say a law has unintended consequences does not, standing alone, speak to whether the law was ineffective in its purpose. A law could be perverse and *also* have unintended consequences (-X and Y) or be very effective at its intended purpose but still have unintended consequences that may be abhorrent enough to warrant repeal of the law (X and Z). For instance, taxes on single-use plastic bags have been effective at encouraging consumers to replace these products with reusable bags.¹⁰² But the failure of consumers to regularly launder reusable bags has resulted in a public health risk to consumers via the increased spread of harmful contaminants and bacteria that attach to unwashed reusable bags.¹⁰³ Another example are the so-called “fat taxes” that place a monetary tax on products deemed to be unhealthy, like sugary soda.¹⁰⁴ While these taxes have a fairly ambiguous effect in relation to the purpose of encouraging consumers to make healthier choices,¹⁰⁵ they can have other, unwanted effects such as moving revenue to areas not covered by the tax.¹⁰⁶ Because the presence of unintended consequences does not necessarily reveal anything about whether the law was effective in its intended purpose, it also does not help to answer the question of whether it is perverse.¹⁰⁷ Further, because unintended consequences address outcomes outside of the legislative intent, they are ancillary to the means-ends analysis central to rational basis review.¹⁰⁸

¹⁰² Rachele Holmes Perkins, *Salience and Sin: Designing Taxes in the New Sin Era*, 2014 BYU L. REV. 143, 181 (2014) (noting that plastic bag taxes have been successful in encouraging consumers to replace them with reusable options); Matthew Zeitlin, *Do Plastic Bag Taxes or Bans Curb Waste? 400 Cities and States Tried It Out*, VOX (Aug. 27, 2019), <https://www.vox.com/the-highlight/2019/8/20/20806651/plastic-bag-ban-straw-ban-tax> [<https://perma.cc/4BAT-AST9>] (“Before the tax, about 80 percent of Chicago consumers used disposable bags and fewer than 10 percent used no bags at all. In the year after it went into effect, ‘the tax led to a large decrease in the proportion of consumers using a disposable bag, with roughly half of consumers switching to reusable bags while the rest opted for no bags at all.’”).

¹⁰³ Perkins, *supra* note 102, at 181 (“[S]cientists have found that reusable bags can spread harmful contaminants such as e. coli and other bacteria, which can pose severe health risks to consumers.”).

¹⁰⁴ L.M. Powell, J.F. Chriqui, T. Khan, R. Wada & F.J. Chaloupka, *Assessing the Potential Effectiveness of Food and Beverage Taxes and Subsidies for Improving Public Health: A Systematic Review of Prices, Demand and Body Weight Outcomes*, 14 OBESITY REVS. 110 (2013).

¹⁰⁵ Perkins, *supra* note 102, at 180 (“Research also shows that any attempts to impose sin taxes on food must be done with extreme care, because there is no guarantee that consumers will not consume even less healthful foods as replacements. For instance, consumption patterns suggest that if fat is taxed, then individuals may increase their salt intake, thereby placing themselves at a greater risk of high blood pressure and cardiovascular disease.”)

¹⁰⁶ JEAN-FRANCOIS MINARDI & FRANCIS POULIOT, MONTREAL ECON. INST., *THE UNINTENDED CONSEQUENCES OF TAXES ON TOBACCO, ALCOHOL, AND GAMBLING* 3 (2014), https://www.iedm.org/files/note0214_en.pdf [<https://perma.cc/Q8W8-3UP8>].

¹⁰⁷ Although if the unintended consequences are desirable, a legislature could always escape constitutional challenge by arguing that the unintended consequences were the real intent of the law—a type of post hoc reasoning explicitly allowed under rational basis review.

¹⁰⁸ See *Heffner v. Murphy*, 745 F.3d 56, 81 (3d Cir. 2014) (“An otherwise rational legislative response to a given concern cannot be invalidated under the Due Process Clause merely because the chosen solution creates other problems while addressing the original concern.”).

This can get tricky when the “unanticipated” consequence should have been exceedingly obvious. For instance, revisiting our hypothetical mandatory smoking law once more, the “unanticipated” consequence of skyrocketing COPD rates could clearly have been anticipated by any legislature even passingly familiar with the voluminous science on the health hazards of smoking. Nonetheless, if the legislature’s intent was solely to reduce lung cancer, and the law did not increase lung cancer, it would not technically be a perverse law. It would be a narrow-sighted and bad law. But unanticipated consequences are generally not so obvious (nor are they always negative).

There is one more category of legislative action that must be addressed that might seem perverse to some but does not actually fit the definition as adopted here. These are circumstances where a legislature intends to do something that certain individuals or groups would find objectionable, and then is successful in doing just that. For instance, let us imagine a state legislature that was more forthcoming about the actual purpose of a law targeting abortion providers (“TRAP” laws)—stating in the preamble of the legislative text that the purpose of the legislation was limiting access to abortion services. Unsurprisingly, local reproductive justice advocates immediately challenge the law upon its passage. While litigants might have success arguing that the law was passed for an improper purpose (and would likely be right), they would not have a perversity argument—the law did (or was likely to do) exactly what it was intended to do.¹⁰⁹ Although the *ends* might be widely seen as illegitimate, the means were entirely rational. Similarly, even as opponents of the Prison Litigation Reform Act argue that it has unfairly limited access to justice for incarcerated people, they recognize that the law was devastatingly effective at one of its primary purposes—curbing litigation by prisoners.¹¹⁰

The relatively modest scope of this project comes into focus here. While other scholars may persuasively argue that ineffective laws, laws that have unintended consequences, or laws that adopt purposes that are explicitly improper should also be subject to repeal under rational basis review, there is something special about perversity that makes rational basis review a particularly compelling vehicle for challenging legislation.¹¹¹ The following section explores this special relationship between perversity and irrationality.

¹⁰⁹ Cf. *Romer v. Evans*, 517 U.S. 620, 621 (1996) (“The Fourteenth Amendment’s promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.”). See, e.g., *infra* notes 299–305, and accompanying text.

¹¹⁰ See ANDREA FENSTER & MARGO SCHLANGER, PRISON POLICY INITIATIVE, SLAMMING THE COURTHOUSE DOOR: 25 YEARS OF EVIDENCE FOR REPEALING THE PRISON LITIGATION REFORM ACT, (April 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html [<https://perma.cc/2HYQ-CPDD>].

¹¹¹ Of course, as we will see, laws that reflect multiple legislative goals can combine elements of perversity, inefficacy, and unintended consequences, as well. See *infra* Section V.A (discussing how abstinence-only education programs are ineffective at achieving certain legisla-

III. WHY DEMONSTRATED PERVERSITY IS PER SE IRRATIONAL

There are two pieces to rational basis review: legitimate purpose and rational means.¹¹² For purposes of this project, we assume that the legislature has articulated at least one legitimate purpose.¹¹³ Of course, the mere existence of a purpose does not, by itself, imply rationality. Our intent to have a particular effect does not suggest anything about the adequacy or efficacy of actions taken in furtherance of that goal.¹¹⁴ I can have an honest intent to increase my children's consumption of vegetables, but it would be patently irrational for me to present them with a plate of plain steamed spinach and expect a successful result. Thus, because the intent to have a particular effect tells us nothing about the rationality of the adopted means, we will now switch to a focus on the second portion of the rational basis test—the rationality of the means adopted.¹¹⁵

As a general rule, the “level of skepticism due for factual contentions in a legislative record should follow the corresponding level of deference in a constitutional case.”¹¹⁶ Thus, courts should more searchingly review the factual record relied on by the legislature when heightened or intermediate scrutiny is the appropriate standard of review. This creates an immediate roadblock to the efficacy of rational basis review to address perverse outcomes because it is the standard of review that results in the *highest* level of deference—i.e., when courts are least likely to probe the rationality of the legislative means. But if there is *no* review of the factual record underpinning a legislative action, it amounts to a complete lack of review of the rationality of state action, thereby nullifying the second part of the two-part rational basis test. Clearly, an interpretation that dictates the appropriate application of rational basis review includes a complete abdication of fifty percent of the underlying test cannot be right. There must be something else.¹¹⁷

tive goals, create unintended negative consequences, and create outcomes perverse to legislative intent in other respects).

¹¹² See Chemerinsky, *supra* note 51, at 402 (“That is, the law will be upheld unless the challenger proves that the law does not serve any conceivable legitimate purpose, or that it is not a reasonable way to attain the intended end.”).

¹¹³ Or failed to articulate any purpose, in which case the analysis would simply be whether the legislative action is non-perverse to any legitimate purpose. See *supra* notes 90–92, and accompanying text.

¹¹⁴ See Merton, *supra* note 81, at 896 (“Above all, it must not be inferred that purposive action implies ‘rationality’ of human action [that persons always use the objectively most adequate means for attainment of their end.]”); FRIEDMAN, *supra* note 99, at 45 (“[I]mpact and purpose are usually related, but they are analytically distinct. . .”).

¹¹⁵ See *cf.* FRIEDMAN, *supra* note 99, at 45 (“If we want to know if a new law ‘works,’ we are really asking two separate questions. First, did it have an impact? And second, did that impact further the [presumed] goal of the law?”).

¹¹⁶ Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 228 (2018).

¹¹⁷ See *Barletta v. Rilling*, 973 F. Supp. 2d 132, 136 (D. Conn. 2013) (“If it is a test with meaning—if it has ‘teeth’—rational basis review must mean something beyond absolute deference to the legislature; otherwise it is not review at all. . . . [E]ven where a state can identify a legitimate purpose in support of a statute, the state ‘may not rely on a classification whose

Certainly, there is an argument that if irrationality means *anything*, it means that legislatures cannot blithely pass laws that result in the opposite of the legislative intent.¹¹⁸ Stepping out of the academic treatment of the question momentarily, it is likely that if you asked a person at random if it was “rational” to engage in behavior that almost certainly would result in the opposite of your intended outcome, she would say no. The obviousness of the answer from a layperson’s perspective is apparent. But this argument, while appealing from a commonsense perspective, doesn’t engage with the body of case law delineating the scope of rational basis review and the theoretical framework underpinning this precedent. This is not to say that such a lay perspective is useless, but only that it is incomplete.

In the following sections, various arguments supporting the contention that demonstrated perversity should form the basis for a successful challenge using rational basis review are described. The first section explores the parallels between a perversity analysis and generally accepted canons of statutory interpretation. The second section looks at how the modern accessibility of knowledge should shift our understanding of the rationality of government action. The final section assesses how existing Supreme Court precedent still requires laws to have a minimum level of rationality that demonstrably perverse laws simply cannot meet.

A. *Statutory Interpretation*

Courts’ regular employment of certain canons of statutory construction lend support to the idea that it is necessary and appropriate for a court to interpret and apply the law in a manner that furthers legislative intent.¹¹⁹ For instance, courts often use the legislative history and purpose of the law to interpret the meaning of a law and its application to particular facts.¹²⁰ By taking into account what the legislature was attempting to achieve when it passed a law, courts can determine whether a given interpretation is likely to further or hinder that overarching goal.¹²¹ Interpretations more likely to do

relationship to an asserted goal is so attenuated as to render the distinction arbitrary and irrational.” (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446, (1985)).

¹¹⁸ Or, in the absence of a stated intent, laws that result in outcomes that no rational, legitimate legislature could hope for.

¹¹⁹ See *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 612 n.4 (1991) (“As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. . . . Our precedents demonstrate that the Court’s practice of utilizing legislative history reaches well into its past. . . . We suspect that the practice will likewise reach well into the future.”).

¹²⁰ See, e.g., *Reves v. Ernst & Young*, 494 U.S. 56, 60–61 (1990) (using legislative history to decide if a note issued by a co-op is a “security” under the Securities Exchange Act of 1934, 15 U.S.C. §73c(a)(10)).

¹²¹ See *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1263 (10th Cir. 2004) (Lucero, J., dissenting) (“[T]he art of statutory interpretation is to promote Congressional intent while avoiding counterproductive results.”).

the former are, unsurprisingly, preferred over those that do the latter.¹²² In this way, the court is aiming to interpret the law in such a way as to best effectuate the intent of the legislature in passing it.

For example, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,¹²³ the Supreme Court rejected an interpretation of the Sherman Act that would require the adoption of a per se rule regarding vertical retail price agreements, noting that such restraints can “have either procompetitive or anticompetitive effects, depending on the circumstances in which they were formed.”¹²⁴ As the “limited empirical evidence” the Court had in front of it did not foreclose the possibility of a the pro-competitive use of such restraints, the Court found that the adoption of a per se rule against their use would be “counterproductive, increasing the antitrust system’s total cost by prohibiting procompetitive conduct the antitrust laws should encourage.”¹²⁵ Stated differently, the Court refused to interpret the Sherman Act to require a ban on certain conduct because such an interpretation might thwart the overarching purpose of Congress to promote competition—it *might result in a perverse outcome*.

Under the absurdity doctrine, courts are even permitted to interpret laws in clear contravention of the plain meaning of the text of the law, if a law’s “plain, clear, literal meaning produces an unintended, absurd result.”¹²⁶ The Supreme Court has even endorsed such counter-textual interpretations if the result is not absurd, but “merely an unreasonable one ‘plainly at variance with the policy of the legislation as a whole.’”¹²⁷ The application of the conceptual underpinnings of the absurdity doctrine to a law that creates a perverse outcome is relatively straightforward. If courts cannot *construe* even a clearly worded statute so as to create an outcome opposite from the statute’s intent, it does not seem wholly different for a court to *enforce* a statute that does just that.¹²⁸ In both instances, a court would be permitting a law to thwart its own purpose—either through the operation of the court’s interpretation of the text or through the constitutional vindication of an exercise of state power that has resulted, or is likely to result, in perverse outcomes.

While dealing with the interpretation of statutes, and not determining their validity, this employment of canons of interpretation can be analogized to a court faced with a law that was perverse. In this scenario, invalidating the law that would avoid the perverse outcome would arguably better serve the legislative intent in passing the law. In the face of demonstrated perver-

¹²² *Spilker v. Shayne Lab’ys., Inc.*, 520 F.2d 523, 525 (9th Cir. 1975) (“It is a cardinal canon of statutory construction that statutes should be interpreted harmoniously with their dominant legislative purpose.”).

¹²³ 551 U.S. 877 (2007).

¹²⁴ *Id.* at 879 n. 3.

¹²⁵ *Id.*

¹²⁶ NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 45:12 (7th ed. 2014)

¹²⁷ *Perry v. Com. Loan Co.*, 383 U.S. 392, 400 (1966).

¹²⁸ *Cf. Berger v. City of Mayfield Heights*, 154 F.3d 621, 625–26 (6th Cir. 1998) (holding that enforcing the statute as written would render it an arbitrary exercise of governmental power in violation of both equal protection and due process).

sity, in other words, a court may be more faithfully executing the legislative will by actually refusing to enforce legislation. To be clear, employing a canon of statutory construction to interpret statutory language is a distinct enterprise from using the same theories to invalidate a law as irrational and thus unconstitutional. But canons of statutory construction support the acceptability—and desirability—of courts actively engaging with the statutory text and legislative intent in furtherance of ultimate legislative purpose. When courts use rational basis review to strike down legislation that is demonstrably perverse, they are serving the same function that they do in statutory interpretation—in essence, saving the legislature from itself and protecting individuals from the ill effects that would otherwise result if the court allowed the enforcement of the irrational law.

Of course, it is also an accepted feature of constitutional statutory construction that judges will do everything possible to *avoid* a finding that laws are unconstitutional. But this method is only viable if the law's text is susceptible to more than one reasonable construction. Certainly, if a law can reasonably be read to have more than one *intent*—both constitutionally permissible and impermissible—rational basis review allows judges to focus solely on the former. Nevertheless, judges cannot interpret their way out of actual demonstrated perversity, which has more to do with factual realities in the world than textual interpretations. Even if judges allow an interpretation that focuses only on permissible intentions to avoid a constitutional problem, they cannot uphold a law that is perverse to all permissible legislative goals, however broadly interpreted.

B. *Changes in the Accessibility and Accuracy of Information*

The theoretical underpinnings of rational basis review were developed at a historical moment when no one could know nearly as much about the likely outcome of legislative action as we do today. Deference to legislative reasoning in this context made sense, as legislatures were arguably in a better position to make educated guesses about how particular laws might operate in their home jurisdictions. For many of the laws passed in the present day, however, there is a wealth of evidence easily and *equally* available to both legislative and judicial bodies.¹²⁹ Additionally, new empirical and scientific methodologies allow us to better understand causal relationships, isolating the effect of individual factors and enabling more robust comparisons between individual inputs.¹³⁰

¹²⁹ See Larsen, *supra* note 116, at 187–88 (“In the last twenty years the world has undergone a revolutionary change in how information is transmitted and received. Factual information is now cheaply manufactured and easily posted to the world with a click of a mouse.”).

¹³⁰ In Robert K. Merton's foundational 1936 essay, *The Unanticipated Consequences of Purposive Social Action* he notes the difficulty of causal imputation without empirical foundation. While these issues have not been resolved entirely, the increasingly sophisticated empirical modeling available (coupled with the wealth of data now accessible) make such concerns less pressing than they were almost a hundred years ago. Merton, *supra* note 81, at 897; Wolfgang Wiedermann & Alexander von Eye (eds.), *STATISTICS AND CAUSALITY: METHODS FOR AP-*

To understand in context the Court's oft-repeated phrase that uncertain scientific evidence requires courts to defer to legislative decisions,¹³¹ it is useful to return to some of the original cases announcing the propriety of such an approach. In some of the earliest cases where the effect of scientific uncertainty on the court's review are discussed, the Court was confronted with questions such as the efficacy of smallpox vaccines¹³² and the amount of liquor that physicians could lawfully proscribe their patients to promote well-being.¹³³ While we cannot necessarily presume to know how any individual judge would view such challenges today, it seems exceedingly likely that a court would no longer ascribe to a view that there is a great deal of uncertainty regarding the public health benefits of smallpox vaccines or the usefulness of prescriptions for alcohol. While uncertainty existed at the time, a century of information on vaccines and alcohol consumption has resulted in a new level of certainty on these matters.¹³⁴ If a legislature attempted to pass a law that encouraged physicians to prescribe patients a couple of stiff drinks, for instance, it seems unlikely that a modern-day judge would throw up her hands and exclaim, "Maybe they are right! How can we possibly know?" Instead, they might reasonably strike down this law as unconstitutionally irrational in the face of modern knowledge on the matter. Of course, when presented with *new* problems around which there is uncertainty—such as the Covid-19 pandemic—the Court has indicated that deference to the legislature continues to be appropriate.¹³⁵

Harnessing the power of reliable evidence and utilizing it to promote more effective government action is a normatively desirable goal. The arc of the last century shows an increasing interest in, and reliance on, evidenced-based practices in law and legislation.¹³⁶ Thanks to the development of ever-more sophisticated methodologies and hyper-fast information and communications systems, evidence-based governmental action is considerably more

PLIED EMPIRICAL RESEARCH (2016) (describing developments in statistical methods in respect to causality).

¹³¹ *Marshall v. United States*, 414 U.S. 417, 427 (1974) ("When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, *arguendo*, that judges with more direct exposure to the problem might make wiser choices.").

¹³² *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905) (noting the "opposing theories" on the efficacy and potential dangerousness of vaccinations).

¹³³ *Lambert v. Yellowley*, 272 U.S. 581, 597 (1926) ("High medical authority being in conflict as to the medicinal value of spirituous and vinous liquors taken as a beverage, it would, indeed, be strange if Congress lacked the power to determine that the necessities of the liquor problem require a limitation of permissible prescriptions, as by keeping the quantity that may be prescribed within limits which will minimize the temptation to resort to prescriptions as pretexts for obtaining liquor for beverage uses.").

¹³⁴ *Health Risks and Benefits of Alcohol Consumption*, 24 ALCOHOL RESEARCH & HEALTH 5 (2000).

¹³⁵ *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, J., concurring) (noting that in the face of the "medical and scientific uncertainties," inherent in the Covid-19 pandemic, legislators' latitude "must be especially broad.").

¹³⁶ See Edward J. Imwinkelried, *A New Era in the Evolution of Scientific Evidence—A Primer on Evaluating the Weight of Scientific Evidence*, 23 WM. & MARY L. REV. 261, 273 (1981) (discussing the increased use of scientific evidence in criminal prosecutions).

attainable now than ever before.”¹³⁷ Both the accumulation of scientific knowledge and the potential for rapid dissemination of knowledge have increased exponentially since the dawn of the internet age. The potential up-sides of this new world for increasing the efficacy of government action has not escaped notice, as actors across the political and policy spectrum embrace evidence-based policy making.¹³⁸

Of course, empirical evidence is not always available, nor is it always conclusive.¹³⁹ And examples of legislatures’ use of questionable evidence—and questionable uses of valid evidence—are not hard to come by.¹⁴⁰ But these problems don’t necessarily undermine the potential efficacy of using rational basis review as a way to ferret out potentially perverse governmental action. Instead, they only serve to highlight the important role the judiciary can and should play in determining when the state of the scientific and professional consensus on a given topic results in governmental action being patently irrational.¹⁴¹ When legislators use evidence to bolster legislative agendas, courts can fulfill their duty of ascertaining whether such use was rational in light of the accuracy and magnitude of the existing evidence.¹⁴²

While determining the rationality of government action was always within the scope of judicial review mandated by our constitutional structure, the changes to the accuracy and accessibility of information that have occurred in the modern era must necessarily alter what that review looks like. For the judiciary to freeze its understanding of rationality in a historical moment when the nature and dissemination of knowledge was very different than it is today would render modern rational basis review meaningless. It would be hard for the jurists in the early 20th century—or even those in the mid- to late-20th century—to have envisioned the scientific knowledge or the information economy that now exists. More so than ever before, we have the ability to accurately determine the likely impact of government action. And as a result of the invention and explosion of the internet, and the availability of ultrafast research tools and search engines, we also now enjoy a

¹³⁷ See Underhill, *supra* note 6, at 161 (“Empirical evidence can [] improve the impact and efficiency of governmental choices.”).

¹³⁸ See, e.g., FOUNDATIONS FOR EVIDENCE-BASED POLICYMAKING ACT OF 2018, Pub. L. No. 115–435, 132 Stat. 5529 (2019).

¹³⁹ See Underhill, *supra* note 6, at 152–53 (“Frustration about the weight and direction of empirical evidence across a range of issues—the deterrence effect of the death penalty, the extent to which sanctions and walls deter migration, the extent to which supervised injection facilities reduce opioid overdoses, to name a few—has taken center stage. . . .”); *supra* notes 134, 163 and accompanying text.

¹⁴⁰ See Underhill, *supra* note 7, at 154 (“[Q]uestionable uses of evidence and evidence-based policymaking run rampant”).

¹⁴¹ See Scott R. Bauries, *Perversity as Rationality in Teacher Evaluation*, 72 ARK. L. REV. 325, 359 (2019) (“Reviewing—actually reviewing—legislation for whether it is rationally directed to serve a proper legislative purpose is therefore the proper and legitimate role for the courts, one they have abdicated over time by gradually ratcheting down the standards for legislative rationality.”).

¹⁴² See, *infra* Part V.

broad ability to access that information. Rational basis review must be updated to reflect this new reality.

IV. PERVERSITY, PRECEDENT, AND RATIONAL BASIS REVIEW IN THE SUPREME COURT

Of course, the wealth of information that exists and the strength of new methodologies still must contend with the reality that the Supreme Court has disavowed a requirement that legislators must base legislation on any factual evidence at all. In Justice Scalia's opinion in *Beach*, he declared that "[l]egislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."¹⁴³ This reiterates the accepted proposition that a legislature need not, at the outset, supply evidence that a law will be effective at its intended purpose. As *Beach* is generally thought of to be a high-water mark for deferential treatment of statutes under rational basis review,¹⁴⁴ it is a useful starting point to test the validity of the argument that demonstrably perverse laws should be found unconstitutional. If the theory can survive the interpretation of rational basis as it is contained in *Beach*, it can likely survive the less deferential review allowed in other Supreme Court approaches to rational basis review.¹⁴⁵

Despite the fact that the Supreme Court has been employing rational basis review for decades, there is no Court-validated, generally accepted definition for "rationality."¹⁴⁶ Justice Scalia's majority opinion in *Beach*, however states that legislative choice can permissibly rely on "rational speculation." I will take my cue from Justice Scalia's own fondness for textual interpretation,¹⁴⁷ then, when we consider what "rational speculation" requires.

¹⁴³ *F.C.C. v. Beach Commc'ns*, 508 U.S. 307, 301 (1993).

¹⁴⁴ See *Eyer*, *supra* note 3 (noting that, along with *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), *Beach*, 508 U.S., is a touchstone for the "ultradeferential formulation of rational basis review.").

¹⁴⁵ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445–46 (1985) (invalidating zoning ordinance that prohibited maintenance of group home for the mentally retarded under the theory that ordinance was irrationally over- and underinclusive).

¹⁴⁶ See *Nachbar*, *supra* note 4, at 1632 ("[T]he Court has never comprehensively described, much less defended, the conception of rationality it applies when conducting rationality review."). Justice Stevens, in his concurrence in *Cleburne*, provides a helpful explanation, albeit not one embraced by a majority of the Court, that indicates logic and neutrality are touchstones:

The term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word "rational"- for me at least-includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.

Cleburne, 473 U.S. at 452 (Stevens, J., concurring).

¹⁴⁷ See Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 273 (2020) (exploring Justice Scalia's defense of textualism and describing its normative justifications).

The word rational means “based on clear thought and reason.”¹⁴⁸ Not all thoughts are rational, just those that follow intelligible principles related in some way to a reasoned engagement with the question at hand. In other words, rationality implies a decision based on some principle that can be ascertained—logic, facts, even inferences. For instance, the statement “it’s Tuesday, so I need an umbrella,” is not rational, as it lacks the requisite nexus between the first principle (“it’s Tuesday”) with the second (“I need an umbrella”). There is no principle or system of engagement that fills in the gap between the two statements. On the other hand, the statement, “it’s Tuesday, and the weather report said it would rain on Tuesday, so I need an umbrella,” undoubtedly *is* rational. The principle used to arrive at the ultimate conclusion is clear—in this case, reliance on outside expertise in the form of the weather report. But even the statement “it’s Tuesday, and I’ve noticed it often rains on Tuesdays, so I need an umbrella,” is at least marginally rational because it is based on a principle or inference that connects the first statement to the second—albeit in a considerably less persuasive way. Thus, rationality requires more than thought—it requires a system of thinking. That this definition of rational is the correct one to employ in rational basis review is bolstered by the fact that it is the same inquiry at the heart of the means-ends reasoning that is the *sine qua non* of rational basis review: the requirement that there is a link, a nexus, a demonstrable connection between the goal and the method undertaken to achieve the goal.

But how does Justice Scalia’s requirement that legislators must only engage in rational *speculation* change this requirement for rationality? The word “speculation” means “the activity of guessing possible answers to a question *without having enough information to be certain.*”¹⁴⁹ Thus, speculation implies a scientific *uncertainty*. It implies that the answer is not known—and possibly that it is unknowable. In this space, where scientific evidence is nonexistent, scant, or conflicting, legislatures are permitted under rational basis review to pass laws that are merely “rough accommodations.”¹⁵⁰ A circumstance in which a legislator takes an action that, according to the widely available and credible evidence, will likely result in the opposite of his or her purported intent, however, is not speculation at all. It is something else entirely—a willful failure to engage with the known, likely effects of his or her own actions.

In sum, to act in the face of uncertain information *can* be rational—if the action comports with *some* ascertainable system of thought or logic.¹⁵¹

¹⁴⁸ *Rational*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/rational> [https://perma.cc/EY6L-4ZWJ].

¹⁴⁹ *Speculation*, CAMBRIDGE DICTIONARY, (emphasis added) <https://dictionary.cambridge.org/dictionary/english/speculation> [https://perma.cc/R63V-CFYQ].

¹⁵⁰ *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 302 (1993). As the Court has stated in other cases, if it is “arguable,” that is sufficient to “immunize the legislative choice from constitutional challenge” under rational basis review. *Heller v. Doe*, 509 U.S. 312, 333 (1993).

¹⁵¹ *Cf. FDA v. Am. Coll. of Obstetrics and Gynecologists*, 141 S.Ct. 578, 584–85 (2021) (Sotomayor, J., dissenting from denial of stay) (arguing that the Court should not defer to

But to act in a manner contrary to known information can never be rational because it belies the use of such a system. Thus, although Justice Scalia does not frame it in this way, even his very deferential take on rational basis review in *Beach* supports the idea that while legislators may not need to seek out evidence to support the rationality of their action, they also cannot blithely ignore the existing evidence. A process by which the legislature is still permitted to “guess” that an outcome will occur when overwhelming evidence shows that such an outcome is almost certainly not going to occur undermines the very foundation of rational basis review.¹⁵² Indeed, in the case widely accepted to be the first decided under the modern rational basis review standard, *United States v. Carolene Products Co.*,¹⁵³ the Court made clear that “the existence of facts supporting the legislative judgment is to be presumed . . . unless in light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon”¹⁵⁴ Returning again to our example from the introduction, the hypothetical state legislature’s action to mandate citizens take up smoking might, in a vacuum, be marginally rational (as it *is* based on their observations and inferences), it is not rational in the face of the absolute wealth of information and widely-held understanding that smoking causes cancer. The facts “made known or generally assumed” about the association of smoking with cancer, “preclude[s] the assumption” that a smoking mandate is rational.

Thus, while the Supreme Court has never explicitly articulated an approach to evaluating the constitutionality in the face of perversity, its language describing “rationality” certainly implies the existence of such an analysis. Additionally, Justice Brennan’s dissent in *Fritz* provides some insight into what such an approach might look like in practice. In *Fritz*, the Court was presented with a class action brought by former railroad employees arguing that the 1974 Railroad Retirement Act’s grandfather provision was unconstitutional because it made irrational classifications between categories of employees entitled to retirement benefits.¹⁵⁵ The majority opinion, authored by Justice Rehnquist, held that the “language of the statute is clear” and that, as a result, the Court was bound to “assume[] that Congress intended what it enacted.”¹⁵⁶ Justice Brennan, in contrast, noted that the “principal purpose of [the Act], as explicitly stated by Congress, was to preserve

legislature’s determination that it was medically necessary for women to pick up mifepristone in person despite exemptions to many other drugs during the Covid-19 pandemic because the government had failed to “submit[] a single declaration” explaining the decision, and as a result “[t]here simply [wa]s no reasoned decision here to which this Court can defer”).

¹⁵² *Vance v. Bradley*, 440 U.S. 93, 111 (1979) (“In an equal protection case of this type . . . those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.”).

¹⁵³ 304 U.S. 144 (1938).

¹⁵⁴ *Id.* at 152 (emphasis added).

¹⁵⁵ *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 173 (1980).

¹⁵⁶ *Id.* at 179.

the vested earned benefits of retirees who had already qualified for them.”¹⁵⁷ Because the result of the Act was to *deprive* some portion of the retirees of the benefits that Congress had specifically said it intended to protect, Justice Brennan found that “the classification is not only rationally unrelated to the congressional purpose; it is inimical to it.”¹⁵⁸ Unpersuaded by the majority’s “presuming purpose from result,” Justice Brennan argued that when legislation indisputably results in an outcome opposite from the “actual purposes,”¹⁵⁹ as stated by the legislative body that enacted it, such legislation must be struck down as unconstitutionally irrational. His approach in *Fritz*, although not adopted by the majority—who believed that Congress may indeed have intended the approach it adopted despite some of undesirable outcomes—nevertheless provides a roadmap for perversity arguments in the future.¹⁶⁰

In the end, the existence of facts that undermine the rationality of governmental action through a showing that those actions result in perversity *must* matter, otherwise courts wouldn’t have anything to do on the second step of the rational basis test. Courts’ unwillingness to grant motions to dismiss or motions for summary judgment in rational basis cases reflect the importance of facts in determining the rationality of government action.¹⁶¹ And while the Supreme Court has yet to strike down a statute as perversely irrational, its precedents more than support the contention that courts have the power to do just that. Their failure to engage in this type of analysis when it is relevant undermines the basic purpose of rational basis review specifically, and judicial review in a more general sense.¹⁶²

V. PROVING PERVERSITY

Having established what constitutes perversity and how such perversity can form the basis of a successful challenge under rational basis review, it is now necessary to move into one of the trickiest portions of the project—delineating how, both substantively and procedurally, a litigant might avail herself of this path. What type and quantum of evidence is necessary to show

¹⁵⁷ *Id.* at 186.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 187–88.

¹⁶⁰ Although not ultimately agreeing that the statute at issue was unconstitutionally perverse to its actual purpose, Justice Stevens wrote a concurrence that supported Brennan’s argument that the Supreme Court should not resort to a “mere tautological recognition of the fact that Congress did what it intended to do.” *Id.* at 180 (Stevens, J., concurring).

¹⁶¹ Berliner, *supra* note 20, at 393 (“The failure to grant motions to dismiss shows that courts believe that facts still play a role in rational basis cases. That is why courts allow plaintiffs an opportunity to prove their facts The role of facts can also be seen from the cases in which plaintiffs win rational basis cases. Many of these trial and appellate rational basis victories occurred after trial or a fact-intensive motion for summary judgment.”).

¹⁶² See Bauries, *supra* note 141 (discussing cases where courts failed to meaningfully engage with the perverse outcomes of teacher evaluation practices under rational basis review, thus incorrectly upholding them as unconstitutional).

that a law has, in fact, created a perverse outcome? How should a judge presented with such evidence evaluate it? I argue two conditions must be met—the weight of credible scientific or empirical evidence should firmly support the view that a perverse outcome has or will likely result from the legislative action and the relevant community of experts or professionals should have reached a consensus suggesting the same.

Certainly, the mere *allegation* of perversity is not sufficient. Likewise, anecdotal evidence of perversity is also likely insufficient to substantiate a constitutional challenge. In these circumstances, a claim of irrationality through perversity is not available because perversity simply cannot be “demonstrated” sufficiently to meet the standard.¹⁶³ Courts have recognized their inability to invalidate legislation when faced with “uncertain” medical or scientific evidence, instead necessarily deferring to the legislature as the body best situated to select a path when such certainty is not possible.¹⁶⁴ For instance, Justice Breyer, in his concurrence in *Martinez v. Court of Appeal of California*¹⁶⁵ noted that judges “closer to the firing line” had “expressed dismay” about the practical consequences of the Court’s ruling in *Faretta v. California*,¹⁶⁶ which had held that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so.¹⁶⁷ In particular, Justice Breyer noted the existence of arguments from lower courts that the right of self-representation protected in *Faretta* necessarily conflicts with the constitutional right to a fair trial.¹⁶⁸ While clearly sympathetic to this concern, Justice Breyer found that he had “found no empirical research . . . that might help determine whether, in general, the right to represent oneself furthers, or inhibits, the Constitution’s basic guarantee of fairness.” Absent such evidence, Justice Breyer was therefore, “without some strong factual basis for believing that *Faretta*’s holding has proved counterproductive in practice.”¹⁶⁹ Thus, because Justice Breyer lacked sufficient verifiable evidence to conclude that *Faretta* had resulted in perversity—hampering as opposed to guaranteeing the constitutional right to a fair trial—he was unwilling to revisit its constitutionality.

There are those who assert we now live in a “post-truth” world¹⁷⁰—and that courts can always claim “uncertainty” in the face of the conflicting, politically motivated presentation of evidence from either side of any issue.

¹⁶³ See Merton, *supra* note 81, at 898 (“The most obvious limitation to a correct anticipation of consequences of action is provided by the existing state of knowledge.”).

¹⁶⁴ *Planned Parenthood Minn., N.D., & S.D. v. Rounds*, 686 F.3d 889, 900–04 (8th Cir. 2012) (noting that medical uncertainty regarding causal link between abortion and suicide is not a basis for invalidating legislation instructing doctors to counsel patients on the possibility of a link.).

¹⁶⁵ 528 U.S. 152 (2000) (Breyer, J., concurring)

¹⁶⁶ 422 U.S. 806 (1975).

¹⁶⁷ *Id.* 835–36.

¹⁶⁸ *Martinez*, 528 U.S. at 164–65.

¹⁶⁹ *Id.*

¹⁷⁰ See Larsen, *supra* note 116, at 177–78 (describing the “post-truth” world and stating that “[o]bjective facts – while perhaps always elusive – are now endangered species”).

This manufactured “uncertainty” can thus allow courts to defer to legislators even when the credible evidence weighs heavily in one direction.¹⁷¹ Certainly, lawmakers can and do select the version of the facts that best supports their own worldview and agenda.¹⁷² But it is a bridge too far to say that there is *no* objective fact or that courts are not actively engaged in ferreting out fact from fiction. One of the central roles of the trial court system is to *find* facts—either by a judge or a jury. The paradigmatic task of the factfinder is to weigh competing evidence and determine the truth of a matter. Courts have engaged in such a task in many high profile constitutional cases in the last century, often heavily relying on social science evidence.¹⁷³ Courts have continued to play this vital role in the alleged “post-truth” era and, at least in some instances, have proved adept at separating political spin from reliable evidence.¹⁷⁴ Thus, if it is clear that courts can, should and *do* evaluate the weight of evidence as a matter of constitutional analysis, the question becomes just how to evaluate when there is sufficient evidence to foreclose a rational argument to the contrary. While a legislature would be irrational to conclude that the sun orbits around the earth and perfectly rational to conclude the opposite, such extremes do not represent useful (or particularly likely) examples. Instead, we can look to the methods that courts already employ when assessing evidence in other circumstances.

Courts engage in the weighing of competing scientific or empirical evidence using a variety of techniques, including considering lay and expert testimony, surveying the scientific literature, and determining scientific or professional consensus in the matter. In earlier work, my co-author Ben McMichael and I examined fetal endangerment laws—laws that expose pregnant people to criminal or civil sanction as a result of exposing their fetus to

¹⁷¹ See, e.g., Erica Frankenberg & Liliana M. Garces, *The Use of Social Science Evidence in Parents Involved and Meredith: Implications for Researchers and Schools*, 46 U. LOUISVILLE L. REV. 703, 720 (2008) (arguing that in the school desegregation cases, Justice Thomas “frequently distorts the findings of the large body of research by proposing that there is substantial disagreement in the social science community on issues where there is actually general agreement.”).

¹⁷² Joseph Landau, *Broken Records: Reconceptualizing Rational Basis Review to Address “Alternative Facts” in the Legislative Process*, 73 VAND. L. REV. 425, 428 (2020) (“[P]olicymakers today often legitimate the justification for their preferred laws by twisting facts, peddling myths, trafficking in sheer speculation, and promoting conspiracy theories.”).

¹⁷³ The (in)famous footnote 11 in *Brown v. Board of Education* uses a collection of social science to support its central holding that de jure racial segregation harms Black children. *Brown v. Bd. of Ed.*, 347 U.S. 483, 494 n.11 (1954). And the post-secondary affirmative action cases likewise rely heavily on expert and social science evidence, as well. See Frankenberg & Garces, *supra* note 171, at 705–06 (2008) (noting the Court’s use of social science evidence in determining the constitutionality of affirmative action programs).

¹⁷⁴ See, e.g., *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) (“[O]ur analysis does not proceed with abstraction for hypothesized ends and means do not include post hoc hypothesized facts. [The court will] examine the State Board’s rationale informed by the setting and history of the challenged rule.”). *But see* James R. Dillon, *Expertise on Trial*, 19 COLUM. SCI. & TECH. L. REV. 247, 251 (2018) (“Judges, lawyers, and academics have spent more than a century proposing reforms intended to make courts more effective at applying scientific evidence to the resolution of legal disputes.”).

a risk of harm.¹⁷⁵ Legislators consistently pass these laws with the stated intention of protecting fetal and infant life. Our earlier piece, however, used an empirical analysis of fetal endangerment laws to show that such laws resulted in a statistically significant *increase* in fetal and infant death.¹⁷⁶ While this damning empirical evidence was compelling, it was the combination of this evidence with the consistent, credible evidence from other sources and the absolute homogeneity of the professional, medical, and scientific community that fetal endangerment laws were harmful that provided the basis for our argument that the laws should be invalidated under rational basis review as perverse.¹⁷⁷ While that article did not delve deeply into what factors would be required to show perversity in different contexts, it provides a useful guide to factors that courts should consider.

First, the weight of credible scientific or empirical evidence should firmly support the view that a perverse outcome has or will likely result from the legislative action. Second, the relevant community of experts or professionals should have reached a consensus suggesting the same. These are similar to the factors that courts already use in weighing the validity of scientific evidence for purposes of admission in a trial.¹⁷⁸ Of course, weighing the admissibility of scientific evidence for purposes of trial differs in several important respects from the weighing of scientific evidence necessary for purposes of determining constitutional validity.¹⁷⁹ In the following sections, I undertake a more thorough explanation of what type and quantum of evidence might suffice to show that a law has, or will likely have, a perverse outcome.

A. *The Weight of Credible Scientific or Empirical Evidence*

While judges are not generally empiricists or scientists, they are often called upon to evaluate scientific or empirical evidence. To do so, they employ various methods and standards depending on the stage of proceeding and the actors involved. Across differences in litigants and procedural posture, however, there are consistencies in the type, source and quantum of evidence that courts seek. For instance, courts take into consideration the type of evidence proffered (anecdotal all the way to double-blind studies),

¹⁷⁵ Boone & McMichael, *supra* note 30.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Federal courts generally consider four factors: (1) whether the evidence can be and has been tested (known as falsifiability or refutability); (2) whether the evidence has been subjected to peer review and publication; (3) the known or potential rate of error for the technique or evidence seeking to be admitted; and (4) the general acceptance of the technique or evidence in the scientific community. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593–94 (1993).

¹⁷⁹ *See, e.g., Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999) (noting that judicial *Daubert* inquiries prevent the “dumping a barrage of questionable scientific evidence on a jury, who would likely be even less equipped than the judge to make reliability and relevance determinations and more likely than the judge to be awestruck by the expert’s mystique”).

the source of the evidence (industry-sponsored studies all the way to peer reviewed academic journals), and the quantum of the evidence (single studies all the way to multi-study meta reviews of data). This method of determining the weight of available evidence is not surprising—it incorporates commonsense ideas about how to sift through available information. The greater the quantum of evidence, from neutral and expert sources, the more trustworthy the conclusions drawn from it. The same method of determining the weight of the available evidence should apply to courts attempting to discern whether a particular law results in a perverse outcome.

While judges are often called upon to assess scientific evidence presented by litigants, however, they are often leery of assessing the scientific evidence relied on (or not) by legislatures.¹⁸⁰ When they do engage in this type of review, however, they are generally effective at determining when the weight of the evidence suggests a particular outcome. For instance, when dismantling the laws that resulted in harsh penalties for juvenile offenders, the Supreme Court relied on the mountain of social science evidence that juvenile offenders were both less able to control their actions and less morally culpable for criminal actions.¹⁸¹ Thus, while there may be persuasive evidence that the quantum of evidence required to overturn legislative action is higher than to find for an individual litigant, the method courts use to assess evidence is no different.

Other constitutional law scholars have advocated for judges to take a more robust role in reviewing evidence relied on by legislatures, either as part of traditional rational basis review¹⁸² or through new procedural mechanisms that aim to ferret out incorrectly relied on evidence.¹⁸³ Of course, there are also well-founded fears that the misuse and manipulation of science and scientific evidence can result in negative outcomes, as well.¹⁸⁴ Even scholars who recognize that appeals to science have their own inherent problems, however, generally advocate only for *better* science, not an abdication of the judiciary's role in determining the real state of scientific evidence.¹⁸⁵

¹⁸⁰ Landau, *supra* note 172, at 456 (“[C]ourts, perhaps leery of trammeling on legislative domain, have steered entirely clear of rigorous (or otherwise) inquiry into false or made-up legislative rationales, leaving politically excluded groups exposed to myth-grounded abuse.”).

¹⁸¹ *Miller v. Alabama*, 567 U.S. 460, 471, (2012) (noting that their decisions in this area “rest[] not only on common sense—on what ‘any parent knows’—but on science and social science as well.”).

¹⁸² Larsen, *supra* note 116, at 181.

¹⁸³ Landau, *supra* note 172, at 456.

¹⁸⁴ See generally Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613 (1995) (arguing that a “science charade” pervades much of environmental regulation and impedes the ability of agencies to promulgate science-based toxic risk standards); Larsen, *supra* note 116, at 181.

¹⁸⁵ Wagner, *supra* note 184, at 1712 (suggesting reforms, including a meaningful role for the judiciary in reviewing scientific evidence).

B. Professional or Expert Consensus

The weight of the evidence is also viewed in light of the professional or expert consensus on a particular matter. Courts may accept the widely held beliefs of a relevant professional community¹⁸⁶ as reflective of a strong evidentiary support for a certain proposition even absent a large quantum of consistent evidence.¹⁸⁷ For instance, there is not actually strong scientific evidence that breastfeeding results in demonstrably positive effects for babies.¹⁸⁸ Nevertheless, there is a strong and consistent professional consensus that it is so,¹⁸⁹ and courts have cited professional consensus of this in support of various breastfeeding laws.¹⁹⁰ Beyond consulting individual experts, courts also give weight to the positions of professional organizations.¹⁹¹ While the Supreme Court has rejected the requirement of a “general acceptance” of experts on a particular scientific approach when evaluating the admissibility of evidence under the Federal Rules of Evidence, in so doing it found such a “general acceptance” can still have “a bearing on the inquiry” because “[w]idespread acceptance can be an important factor in ruling particular evidence admissible, and [scientific techniques which have] been able to attract only minimal support within the community, may properly be viewed with

¹⁸⁶ Defining the relevant professional community, in most instances, should not present too much difficulty, although there are some instances in which multiple communities of professionals should be consulted. See *infra* Section V.A (describing the professional consensus about the ineffectiveness and harm of abstinence-only education by the medical, public health, and education communities).

¹⁸⁷ Indeed, courts can possibly rely on the widely held beliefs of the non-expert community, as well. *Jacobson v. Massachusetts*, 197 U.S. 11, 35 (1905) (“A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts.”). And of course, there are circumstances in which deference to relevant professional communities ends up being misplaced. See, e.g. Sarah Zhang, *The One-Paragraph Letter From 1980 That Fueled the Opioid Crisis*, ATLANTIC (June 2, 2017), <https://www.theatlantic.com/health/archive/2017/06/nejm-letter-opioids/528840/> [<https://perma.cc/4EBU-6JSD>] (discussing the professional overreliance on a small study regarding the addictiveness of opioids). In these instances, however, it is not irrational for the legislature to rely on the professional community, even if such a community is ultimately proven incorrect.

¹⁸⁸ See generally Emily Oster, *Is Breast Really Best? I Looked at All the Data to Find Out*, GUARDIAN (June 20, 2019, 12:07 PM), <https://www.theguardian.com/lifeandstyle/2019/jun/20/is-breast-really-best-i-looked-at-all-the-data-to-find-out#:~:text=they%20found%20that%20the%20children,medical%20and%20public%20health%20literature> [<https://perma.cc/S9Q9-Q7LV>]; SUZANNE BARSTON, BOTTLED UP: HOW THE WAY WE FEED BABIES HAS COME TO DEFINE MOTHERHOOD, AND WHY IT SHOULDN'T (2012) (asserting that many of the supposed health benefits of breastfeeding have been overstated).

¹⁸⁹ See, e.g. *Policy Statement: Breastfeeding and the Use of Human Milk*, 129 PEDIATRICS 827 (2012).

¹⁹⁰ See, e.g. *Gonzales v. Marriott Int'l, Inc.*, 142 F. Supp. 3d 961, 975 (C.D. Cal. 2015) (“The legislative history notes the health benefits of lactation for a woman who has given birth, for example; these are present whether the woman’s own child or another receives the expressed milk. Although Marriott does not mention portions of the legislative history that discuss experts’ opinions concerning the health benefits of expressing milk for the woman giving birth, this was clearly an important consideration the legislature took into account.”).

¹⁹¹ Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1252 (2016) (discussing role of professional associations as knowledge institutions).

skepticism.”¹⁹² Thus it is clear that widespread acceptance of a particular position by the relevant professional community is viewed as strong support for such a proposition.

In contrast, the lack of professional consensus allows courts to discount the weight of other types of evidence—using the disagreement among experts as a proxy for uncertainty in the existing evidence. In fact, the Supreme Court has pointed to the divergence of expert or professional opinion as evidence that courts should afford legislatures a wide latitude to take action.¹⁹³ Where the line between expert consensus and the lack of such a consensus lies, however, can be tricky. The Court has certainly indicated that a *complete* consensus of experts on a given topic is not required.¹⁹⁴ This is critical, because on almost every topic there are at least some experts—of dubious authority or not—that disagree with the prevailing consensus.¹⁹⁵

Requiring consensus from the relevant group of professionals is also important because it suggests the relevant evidence is likely widely available. In assessing the rationality of state action, the court cannot consider evidence that was not—and could not be known—by the state;¹⁹⁶ courts must take into account information that state actors were aware of or should have been aware of. While it would be perfectly rational for a state to act if it had no knowledge of information that indicated its action was likely to result in a perversion of its intent, it would not be rational for a state to take the same action if such information was widely and easily available. The Supreme Court has said as much, decreeing, that “[w]hat everybody knows the court must know,” including those beliefs commonly held by experts in the field.¹⁹⁷

¹⁹² *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 594 (1993).

¹⁹³ *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997) (“[The disagreements between professional organizations] do not tie the State’s hands in setting the bounds of its [] laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting [] statutes.”).

¹⁹⁴ *Jacobson v. Massachusetts*, 197 U.S. 11, 34, 35 (1905) (conceding that while “some physicians of great skill and repute” did not believe in the efficacy of the smallpox vaccine, “most members of the medical profession” did and concluding that “[t]he fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone”).

¹⁹⁵ *Frankenberg & Garces*, *supra* note 171, at 708 (noting that unanimity of opinion in the social sciences was rare, and Justice Thomas’ apparent requirement for unanimity in the school desegregation cases was therefore unwarranted).

¹⁹⁶ *Cf. Smith v. West*, 640 F. Supp. 2d 222, 241 (W.D.N.Y. 2009) (“In applying the rational basis test, [courts] defer to the Legislature, which is presumed to know all the facts that would support a statute’s constitutionality—a presumption which must be rebutted beyond a reasonable doubt.”); *see also* Rachel Rebouche, *The Public Health Turn in Reproductive Rights* 78 WASH. & LEE L. REV. 1355, 1378 (2021) (“[T]he evidentiary record in *June Medical Services* showcases litigators’ and public health researchers’ coordinated efforts to generate empirical evidence about the costs of navigating state restrictions. Courts cannot know such facts without research to support them.”).

¹⁹⁷ *Jacobson*, 197 U.S. at 30 (1905). Indeed, there are echoes of this idea in other areas of the law, including allowing judges to take “judicial notice” of information not submitted to the court by the parties but is widely publicly available and non-controversial. The doctrine of judicial notice allows a court to consider “a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” FED. R. EVID. 201; *see also Daubert*, 509 U.S. at 592 n.11 (1993) (taking judicial notice of “firmly

But if a large proportion of the relevant experts on a particular topic agree, it reflects a high likelihood that this information *is* widely available. That is, if you could ask almost any relevant professional in a given discipline and receive substantially the same answer to a question,¹⁹⁸ a blindness to that information seems to reflect a willful refusal to simply ask the question. Thus, when the relevant professional community has coalesced around a particular viewpoint, it reflects a strong likelihood that the state has reasonably easy access to the information necessary to avoid a perverse outcome—if it would only look.¹⁹⁹

Legislatures are constitutionally permitted to pass laws even if there is no certainty that a law will have a desired effect.²⁰⁰ Indeed, prohibiting lawmakers from acting until a positive (or at least neutral) outcome was assured would introduce harms of a different kind.²⁰¹ For the purposes of finding that a law creates or will create a perverse outcome, therefore, courts must determine whether the clear weight of the evidence and the presence of professional consensus leads to a high degree of certainty that a perverse outcome will result from a particular legislative action. A stronger showing in one of the categories can compensate for less strength in the other, but both must be present to a reasonable amount. When both criteria are met, however, under the perversity test this Article proposes, I argue courts shirk

established” scientific laws); *Barnes v. Indep. Auto. Dealers of Cal.*, 64 F.3d 1389, 1395 n.2 (9th Cir. 1995) (taking judicial notice of “[w]ell-known medical facts”); *Dippin’ Dots, Inc. v. Frosty Bites Distrib., LLC*, 369 F.3d 1197, 1204 (11th Cir. 2004) (taking judicial notice of the fact that color indicates flavor of ice cream); *Seminole Tribe of Fla. v. Butterworth*, 491 F. Supp. 1015, 1019 (S.D.Fla.1980), *aff’d*, 658 F.2d 310 (5th Cir.1981) (taking judicial notice that bingo is largely a senior citizen pastime).

¹⁹⁸ While individual professionals may diverge on some topics, there are still large areas where the vast majority of professionals agree. See Haupt, *supra* note 191, at 1250 (“Individual professionals ‘may differ in their individual judgments about particular issues, [but] their role as professionals traditionally implies their subscription to a body of knowledge that is shared among their peers.’”).

¹⁹⁹ Of course, there are instances in which the professional community does *not* coalesce around a position that is nevertheless supported by the evidence because of political, legal, or other concerns. See Christopher H. Rosik, *Sexual Orientation Change Efforts, Professional Psychology, and the Law: A Brief History and Analysis of a Therapeutic Prohibition*, 32 *BYU J. PUB. L.* 47, 60 (2017) (discussing the failed efforts by some inside the American Psychological Association in the 1990s to formally discourage psychologists from engaging in “conversion therapy”). In these instances, a perversity-as-irrationality argument would be harder to successfully mount but, depending on the weight of available evidence, not necessarily impossible.

²⁰⁰ See *Planned Parenthood Minn., N.D. & S.D. v. Rounds*, 686 F.3d 889, 900 (8th Cir. 2012) (finding that plaintiff challenging abortion law would have “to show that any ‘medical and scientific uncertainty’ ha[d] been resolved into a certainty *against*” the state’s assertion that there was a causal relationship between suicide and abortion. The court went on to say that, “[I]n order to render the suicide advisory unconstitutionally misleading or irrelevant, Planned Parenthood would have to show that abortion has been ruled out, to a degree of scientifically accepted certainty, as a statistically significant causal factor in post-abortion suicides.”).

²⁰¹ See Merton, *supra* note 81, at 901 (noting the argument that “excessive ‘forethought’ can ‘preclude[] any action at all’”).

their constitutional duty when they fail to rein in patently irrational state action.²⁰²

C. *Timing and Burdens of Proof*

While the preceding sections addressed what constitutes perversity and the evidence needed to prove it, they do not give courts or litigants the required level of detail on procedural requirements. To a large extent, these requirements already exist. Those challenging a law on the basis that the law violates the constitutional guarantees of equal protection or due process must allege those claims sufficiently to plausibly state a claim for relief.²⁰³ Laws reviewed under rational basis are presumptively legitimate, requiring challengers to carry the burden of proof that the law is either passed for an improper purpose, employs an irrational means to effectuate the legislative goal, or both.²⁰⁴ While rational basis places no affirmative burden of proof on the government initially, challengers can still succeed on the merits of a claim by providing their own evidence of irrationality.²⁰⁵

Likewise, there is already robust precedent regarding the differences between facial and as-applied constitutional challenges. But because of the unique circumstances surrounding alleged perversity, it is worthwhile to consider how this framework would play out in this context. Immediate challenges to recently enacted laws will be substantially more difficult to bring because litigants will have to show that the law *will* create the perverse outcome in the future without the benefit of the evidence that it already has done so in this particular circumstance. Allowing these facial challenges is important, however, to avoid the harm that might result from allowing a law to take effect that will clearly result in perversity.²⁰⁶ Of course, challenges to

²⁰² Cf. *Jacobson*, 197 U.S. at 25 (1905) (listing the “questions [that] must be answered” as: “What . . . is the scope and effect of the statute?” and “What results are intended to be accomplished by it?”).

²⁰³ Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary “Perplexity”*, 25 GEO. MASON U. CIV. RTS. L.J. 43, 45 (2014):

“Courts resolving motions to dismiss in rational basis cases should address the 12(b)(6) motion like any other such motion: if it appears on the face of the complaint that the plaintiff could, if given the opportunity, prove that the challenged law is not rationally related to a legitimate government interest, Rule 12(b)(6) entitles her to gather and introduce the evidence to do so. So long as the pleading itself is not flawed, a plaintiff in a rational basis case must have the chance to meet her difficult, but not impossible, burden of proving that the challenged law is irrational.”

²⁰⁴ *Heller v. Doe*, 509 U.S. 312, 320 (1993) (“A statute is presumed constitutional [] and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.” (internal quotations and citations omitted)).

²⁰⁵ *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) (“[A]lthough rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality.”).

²⁰⁶ *Bambauer & Massaro*, *supra* note 12, at 337 (“[The rational basis test focuses] on the fallout of the messy political process and allow[ing] individuals who bear the brunt of that fallout to seek judicial relief if political negotiations have been exploited to serve ends that add no value to society.”).

laws that have already gone into effect and resulted in a perverse outcome will be easier to bring because evidence of the actual perverse effect can be included in the overall evidence presented.²⁰⁷ Here, litigants would challenge the continued enforcement of the law as violative of equal protection or due process.

There is also the opportunity to argue that a law that once may have survived rational basis review can no longer do so because changed factual circumstances have resulted in demonstrated perversity.²⁰⁸ For instance, new information or changed factual circumstances can make the continued enforcement of a law invalid, even if it was valid at the moment it was passed. This approach was countenanced in *Carolene Products*. In that case, the Court held that the enforcement of a law when the factual premises for the law are no longer relevant can form the basis of a successful argument for invalidation under rational basis.²⁰⁹

VI. PERVERSITY IN PRACTICE

Hopefully, the foregoing sections have led to the inescapable conclusion that demonstrated perversity should form the basis for a finding that a law is irrational and thus unconstitutional. Perhaps such an assertion now seems obvious, unproblematic, and possibly a little dull. But the potential applications of such a framework are considerably less banal—and the following sections detail how large swaths of the criminal justice system and much of the state regulation of sex and reproductive rights might be susceptible to successful equal protection challenges on the basis that such state action is perverse and thus patently irrational.

Each of the following sections explores briefly how perversity arguments could be made in various contexts. Obviously, a full exploration of each could constitute an article on its own.²¹⁰ But applying the criteria for

²⁰⁷ See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2306 (2016), as revised (June 27, 2016) (“When individuals claim that a particular statute will produce serious constitutionally relevant adverse consequences before they have occurred—and when the courts doubt their likely occurrence—the factual difference that those adverse consequences *have in fact occurred* can make all the difference.”).

²⁰⁸ See *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 415 (1935) (“[A] statute valid when enacted may become invalid by change in the conditions to which it is applied.”).

²⁰⁹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) (“[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.”); see also Berliner, *supra* note 21, at 392 (discussing cases where changed circumstances resulted in a different outcome under rational basis review). The Court has also used changes in scientific knowledge to invalidate laws previously deemed constitutional under stricter tiers of scrutiny, as well. See, e.g., *Brown v. Bd. of Ed.*, 347 U.S. 483, 494 (1954) (stating that “[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*,” the finding that segregation harmed Black citizens was “amply supported by modern authority” and citing modern social science evidence to that effect).

²¹⁰ And, indeed, constitutes the entirety of my co-authored article on fetal endangerment laws. See generally Boone & McMichael, *supra* note 30.

perversity, as described above, to these government actions reveals some common themes and as of yet unexplored opportunities. While a perversity-as-irrationality argument may or may not ultimately be successful in each circumstance, they serve to illustrate the types of arguments that are contemplated by this framework.

A. Abstinence-Only Sex Education

Support for sex education in schools has enjoyed widespread support for over fifty years.²¹¹ The best approach to providing sex education in schools, however, has been the subject of sometimes fierce public debate since the 1980s.²¹² While public health organizations have consistently favored a comprehensive approach to sex education that includes both information about sexual health and contraception, other groups have advocated for instruction that discusses abstinence before marriage as the only safe and appropriate option.²¹³ The proponents of the latter often expressed concern that a more comprehensive approach would signal to students that sex outside of marriage is safe and/or morally permissible and thus would have the effect of increasing sexual activity among young people.²¹⁴ Proponents of abstinence education argue that teaching abstinence instead will delay teens' first sexual encounter, reduce the number of partners they have, and reduce rates of teen pregnancy and sexually transmitted diseases.²¹⁵ As youth are particularly vulnerable to sexually transmitted diseases and US youth in particular lead the world in adolescent pregnancy, there is no doubt that the goals of abstinence education are valid.²¹⁶

²¹¹ *History of Sex Education in the U.S.*, PLANNED PARENTHOOD (Nov. 2016) https://www.plannedparenthood.org/uploads/filer_public/da/67/da67fd5d-631d-438a-85e8-a446d90fd1e3/20170209_sexed_d04_1.pdf [<https://perma.cc/H5SH-D8D3>].

²¹² *Id.*

²¹³ Abstinence-only programs, in addition to obviously stressing abstinence before marriage as the only safe and moral option, also often contain factually incorrect information about the efficacy and safety of various methods of contraception. For instance, two abstinence-only programs in Ohio—"Me, My World, My Future" and "Sex Respect"—incorrectly report that condoms have a high failure rate and that condom use can lead to death. The latter program explicitly tells teens who have sex before marriage that they should "be prepared to die." See SCOTT H. FRANK, REPORT ON ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS IN OHIO (2005) [hereinafter OHIO REPORT], https://www.researchgate.net/profile/Scott_Frank/publication/266456924_Report_on_Abstinence-Only-Until-Marriage_Programs_in_Ohio/links/5564c33508ae94e95720517e/Report-on-Abstinence-Only-Until-Marriage-Programs-in-Ohio.pdf [<https://perma.cc/YY65-ÆEY2>].

²¹⁴ See Aaron E. Carroll, *Sex Education Based on Abstinence? There's a Real Absence of Evidence*, N.Y. TIMES (Aug. 22, 2017) <https://www.nytimes.com/2017/08/22/upshot/sex-education-based-on-abstinence-theres-a-real-absence-of-evidence.html> [<https://perma.cc/J8ME-5V4B>] ("Religious conservatives worry that teaching teenagers about birth control will encourage premarital sex.")

²¹⁵ *Abstinence Education Programs: Definition, Funding, and Impact on Teen Sexual Behavior*, WOM. HEALTH POL'Y. (Jun 01, 2018) <https://www.kff.org/womens-health-policy/fact-sheet/abstinence-education-programs-definition-funding-and-impact-on-teen-sexual-behavior/> [<https://perma.cc/2UEK-BETK>].

²¹⁶ AM. PUB. HEALTH ASS'N, ABSTINENCE AND U.S. ABSTINENCE ONLY EDUCATION POLICIES, POLICY STATEMENT NO: 200610 (Nov. 8, 2006); Lisa T. McElroy, *Sex on the*

Decisions about sex education are made at the state and local level.²¹⁷ In addition to state laws promoting or mandating abstinence-only education,²¹⁸ the federal government, under the Abstinence-Only-Until-Marriage program (AOUM) of Title V of the 1996 Social Security Act,²¹⁹ provides funding for abstinence education, the purpose of which is to “enable the State to provide abstinence education, and at the option of the State, where appropriate, mentoring, counseling, and adult supervision to promote abstinence from sexual activity, with a focus on those groups which are most likely to bear children out-of-wedlock.”²²⁰ Since 1996 when the Act was passed, billions of federal dollars have been spent on abstinence-only education programs.²²¹ In addition, in 2018, Congress passed a Consolidated Appropriations Act, which included a \$10 million funding increase for the abstinence-only Sexual Risk Avoidance Education grant program first established in 2012, bringing the total expenditures for this program to \$25 million a year—a 67% increase.²²² Federal funding for this program bypasses state authority by granting funds directly to community organizations.²²³ Further, the U.S. Department of Health and Human Services under the Trump administration provided funding under the Teen Pregnancy Prevention (TPP) Program—a grant program created by the Obama administration in 2010 to reduce teen pregnancy rates in the United States—solely to organizations promoting abstinence-only approaches.²²⁴

After multiple decades where some states and localities offer comprehensive sex education curriculum and others offer abstinence-only programs, the state of the professional consensus and empirical evidence has reached an interesting inflection point. As they have been almost since the inception of the abstinence-focused programs, the relevant professional organizations are

Brain: Adolescent Psychosocial Science and Sanctions for Risky Sex, 34 N.Y.U. REV. L. & SOC. CHANGE 708, 713-14 (2010).

²¹⁷ *History of Sex Education*, *supra* note 211 (“Decisions are made at the state and local level about which specific sex education programs are offered in U.S. schools, but the federal government influences programs in local schools and communities by offering some grant support for school-based efforts.”); Alyssa Varley, *Sexuality in Education*, 6 GEO. J. GENDER & L. 533, 534 (2005) (“Sex-education statutes vary widely throughout the fifty states and the District of Columbia. Each state has different limitations and requirements on what must be, may be and cannot be taught in public schools. Many states specifically regulate topics such as abstinence, homosexuality, sexually transmitted disease prevention, and HIV/AIDS education.”).

²¹⁸ See, e.g., TEX. EDUC. CODE ANN. § 28.004(e) (West 2021) (requiring “present[ing] abstinence from sexual activity as the preferred choice of behavior in relationship to all sexual activity for unmarried persons of school age”).

²¹⁹ PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996, Pub. L. No. 104-193, August 22, 1996, 110 Stat 2105.

²²⁰ *Id.*

²²¹ The program was allowed to lapse briefly in 2009 but was reinstated during the Obama administration.

²²² *Abstinence Education Programs*, *supra* note 215.

²²³ *Id.*

²²⁴ Sarah Shapiro and Catherine Brown, *Sex Education Standards Across the States*, CTR. FOR AM. PROG. (May 9, 2018) <https://www.americanprogress.org/issues/education-k-12/reports/2018/05/09/450158/sex-education-standards-across-states/> [<https://perma.cc/65PM-89ES>].

uniformly opposed to abstinence-only education as ineffective and potentially harmful. There is also significant evidence that abstinence-only programs either have no effect on youth behavior or, in some incidences, lead to counterproductive outcomes—namely, increasing STD rates and teen pregnancy.²²⁵ On the other hand, there is now substantial evidence that comprehensive sex education programs promote sexual health, reduce sexually risky behavior, and do *not* increase the incidence of sexual activity of young people.²²⁶ As the empirical evidence begins to coalesce around the long-standing professional consensus regarding the negative outcomes of abstinence-only education, the moment may soon be ripe to challenge laws that mandate abstinence-only education programs as irrationally perverse.

1. *Evidence of Perversity*

There is a large and growing body of evidence that abstinence-only programs are completely ineffective at a number of their intended goals—including meaningfully delaying age of first sexual encounter or reducing numbers of sexual partners.²²⁷ Study after study—and meta-reviews of those studies²²⁸—conclude that abstinence-only education has no identifiable effect on the desired outcomes.²²⁹ There is also evidence that the laws have a number of negative unintended consequences, such as increasing the spread of inaccurate information about the methods and effectiveness of various

²²⁵ See *infra* Sec. VI(A)(1).

²²⁶ See HB Chin, Theresa Ann Sipe, Randy Elder, Shawna L. Mercer, Sajal K. Chatopadhyay, Verugheese Jacob, Holly R. Wethington, Doug Kirby, Donna B. Elliston, Matt Griffith, Stella O. Chuke, Susan C. Briss, Irene Ericksen, Jennifer S. Galbraith, Jeffrey H. Herbst, Robert L. Johnson, Joan M. Kraft, Seth M. Noar, Lisa M. Romero & John Santelli, *The Effectiveness of Group-Based Comprehensive Risk-Reduction and Abstinence Education Interventions to Prevent or Reduce the Risk of Adolescent Pregnancy, Human Immunodeficiency Virus, and Sexually Transmitted Infections*, 42 AM. J. PREVENTATIVE MED. 272 (2012).

²²⁷ Douglas B. Kirby, *The Impact of Abstinence and Comprehensive Sex and STD/HIV Education Programs on Adolescent Sexual Behavior*, 5 SEXUALITY RESEARCH & PUB. POL'Y 18 (2008); Christopher Trenholm, Barbara Devaney, Ken Fortson, Ken Quay, Justin Wheeler & Melissa Clark, *Impacts of Four Title V, Section 510 Abstinence Education Programs: Final Report*, MATHEMATICA POL'Y RESEARCH (Apr. 2007).

²²⁸ KRISTEN UNDERHILL, DON OPERARIO & PAUL MONTGOMERY, ABSTINENCE-ONLY PROGRAMS FOR HIV INFECTION PREVENTION IN HIGH-INCOME COUNTRIES, COCHRANE DATABASE SYSTEMATIC REV. (2007); DEBRA HAUSER, FIVE YEARS OF ABSTINENCE-ONLY-UNTIL-MARRIAGE EDUCATION: ASSESSING THE IMPACT, ADVOCATES FOR YOUTH (2004).

²²⁹ Jillian B. Carr and Analisa Packham, *The Effects of State-Mandated Abstinence-Based Sex Education on Teen Health Outcomes*, 26 HEALTH ECON. 403 (2017) (concluding that abstinence-only education programs have no statistically significant effect on teen pregnancy rates, although not rejecting the possibility of more modest negative effects). There are a few studies that show some abstinence-only education programs have short term positive effects in delaying sexual debut, but that these positive effects do not endure. See HAUSER, *supra* note 228, at 4 (noting that in one of the state programs reviewed there was a “demonstrate[d] short-term success in delaying the initiation of sex,” but that “none of the[] programs demonstrates evidence of long-term success in delaying sexual initiation among youth exposed to the programs or any evidence of success in reducing other sexual risk-taking behaviors among participants”).

contraceptive methods,²³⁰ increasing gender stereotyping,²³¹ increasing stigma associated with sexuality generally and sexual orientation specifically,²³² and resulting in increased rates of teens engaging in oral or anal sex in order to maintain technical “virginity.”²³³

Importantly for our purposes, a small but growing body of research shows that abstinence-only education policies are not only ineffective, but they result in outcomes that are opposite of the legislative intent. First, research increasingly shows that abstinence-only education is positively correlated with increases in teenage pregnancy and birth rates.²³⁴ This trend remains significant even after accounting for socioeconomic status, education, ethnicity, and other factors. In other words, the programs funded by the federal government to the tune of billions of dollars—and which are specifically intended to reduce out-of-wedlock and teen pregnancy—instead may increase the incidence of these pregnancies. Additionally, there is growing research that suggests that abstinence-only programs also increase the rates of sexually transmitted diseases.²³⁵ This outcome makes sense, as these

²³⁰ H.R. COMM. GOV'T REFORM, THE CONTENT OF FEDERALLY FUNDED ABSTINENCE ONLY EDUCATION PROGRAMS (2004) (finding that 11 out of the 13 most commonly used abstinence-only education curriculum funded by federal monies contained false, misleading, or distorted information on contraception, abortion, or other scientific facts).

²³¹ John S. Santelli, Leslie M. Kantor, Stephanie A. Grilo, Ilene S. Speizer, Laura D. Lindberg, Jennifer Heitel, Amy T. Schalet, Maureen E. Lyon, Amanda J. Mason-Jones, Terry McGovern, Craig J. Heck, Jennifer Rogers & Mary A. Ott, *Abstinence-Only-Until-Marriage: An Updated Review of U.S. Policies and Programs and Their Impact*, 61 J. ADOLESCENT HEALTH 273, 278 (2017) (“Policies or programs offering abstinence as a single option for unmarried adolescents are scientifically and ethically flawed. [Abstinence Only Until Marriage] programs have little demonstrated efficacy in helping adolescents to delay intercourse, while prompting health endangering gender stereotypes and marginalizing sexual minority youth.”).

²³² SOC'Y FOR ADOLESCENT HEALTH & MED., *Abstinence-Only-Until-Marriage Policies and Programs: An Updated Position Paper of the Society for Adolescent Health and Medicine*, 61 J. ADOLESCENT HEALTH 400, 402 (2017) (“Abstinence-only programs] do not meet the needs of and may be harmful to sexual minority youth, as these programs are largely heteronormative and often stigmatize other sexualities as deviant.”).

²³³ FRANK, *supra* note 213 (noting the possibility that teens in abstinence-only programs are “more likely to participate in sexual behaviors other than vaginal intercourse, such as oral and anal sex, presumably in an effort to maintain ‘virginity.’”).

²³⁴ Kathrin F. Stanger-Hall and David W. Hall, *Abstinence-Only Education and Teen Pregnancy Rates: Why We Need Comprehensive Sex Education in the U.S.*, 6 PLOS ONE (2011); Pamela Kohler, Lisa Manhart & William Lafferty, *Abstinence-Only and Comprehensive Sex Education and the Initiation of Sexual Activity and Teen Pregnancy*, 42 J. ADOLESCENT HEALTH 344 (2008); Anthony Paik, Kenneth J. Sanchagrin & Karen Heimer, *Broken Promises: Abstinence Pledging and Sexual and Reproductive Health*, 78 J. MARRIAGE & FAM. 546, 556 (2016) (finding that 30% of teens who had taken an abstinence pledge experienced a non-marital pregnancy within six years of their sexual debut, whereas only 18% of non-pledgers did).

²³⁵ Carr & Packham, *supra* note 229 (finding a significant positive effect on STD rates in Maine and Colorado following implementation of abstinence-only education programs); M. Hogben, H. Chesson & S. O. Aral, *Sexuality Education Policies and Sexually Transmitted Disease Rates in the United States of America*, 21 INT'L J. STD & AIDS 293 (2010) (finding states with mandates emphasizing abstinence had the highest rates of gonorrhea and chlamydia infection); Paik, et al., *supra* note 234, at 556 (finding that teens who had taken an abstinence pledge experienced a greater risk of contracting HPV when controlling for number of sexual partners).

programs intentionally focus on the ineffectiveness and unreliability of contraception, likely leading some teens to forgo contraceptive use.²³⁶ As one researcher noted:

“If adolescents either are provided inaccurate information about condom use or contraception or are socialized to be hostile to these practices, they could be in a bind when they break [abstinence] pledges, as almost all of them do. Even though this research focuses on the effects of abstinence pledging, a direct implication is that abstinence-only beliefs, more generally, can have perverse unintended consequences.”²³⁷

There is also a large body of research showing that comprehensive sex education programs *are* extremely effective at furthering the legislative goal of reducing teen pregnancy.²³⁸ But of course, under rational basis review, legislatures are not required to select the best or most comprehensive means of achieving their end. Although the availability of highly effective alternatives proven to achieve legislative goals certainly bolsters the argument that selecting ineffective methods or methods that actually undermine legislative intent is patently irrational. Further, states that switch from a comprehensive sex ed curriculum to an abstinence-based curriculum are not preserving the status quo, but instead moving affirmatively to programs that ensure legislative goals will be undermined.

2. *Professional Consensus*

It is difficult to find a non-faith-based organization that supports abstinence-only education.²³⁹ From the medical community, the American Medical Association, the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, and the American Public Health Association, among many others, have disavowed abstinence-only education as

²³⁶ See FRANK, *supra* note 213, at 14 (“[In abstinence-only programs in Ohio] contraceptives are portrayed as ineffective in preventing pregnancy and STDs, and are mentioned only to convey a negative message about birth control and HIV/STD risk reduction, and to provide another reason to avoid remain abstinent until marriage.”); Paik et al., *supra* note 234, at 559 (“Young adults are slow to adapt their scripts and habits regarding contraceptive use and often fall back on previously acquired information, such as the mistrust of contraceptives conveyed by abstinence-only programs. This cultural context sets the stage for increased risk of nonmarital pregnancies and STIs.”).

²³⁷ Paik et al., *supra* note 234, at 559.

²³⁸ Kohler et al., *supra* note 234, at 344; Chin et al., *supra* note 226 (finding that comprehensive sex education was associated with favorable outcomes for all of the identified goals—including reducing unprotected sex, teen pregnancy, and rates of sexually transmitted infections).

²³⁹ There are a number of faith-based organizations that reject abstinence-only education, as well. See, e.g., *Religious Support for Comprehensive Sexuality Education in Public Schools*, THE RELIGIOUS INST., <http://www.religiousthought.org/religious-support-for-comprehensive-sexuality-education-in-public-schools/> [<https://perma.cc/GU58-GSK3>] (last accessed May 20, 2014).

ineffective and harmful.²⁴⁰ In a position paper by the Society for Adolescent Health and Medicine, it states that abstinence only programs, “undermine public health goals and the safe transition of young people into sexually healthy adults.”²⁴¹ Even the organization created by Congress to advise the nation on scientific and medical issues, the Institute of Medicine, released a report calling on Congress “to eliminate requirements that public funds be used for abstinence-only education.”²⁴² But the medical community is not the only relevant community when assessing an issue of education. Organizations that represent educators like the National Education Association and The American Federation of Teachers,²⁴³ too, have come out in support of comprehensive sex education. Even the National Association of School Nurses rejects abstinence-only education as harmful.²⁴⁴

The research around abstinence-only education has long shown its inefficacy. Professional consensus has been likewise consistent in its rejection of abstinence-only education as ineffective at best, and harmful at its worst. Of course, there are well-founded arguments that the “real” intent of these programs is to teach a Christian morality about sex.²⁴⁵ Evidence of this motivation could form the basis for an argument that abstinence-only programs have an improper goal.²⁴⁶ But in addition, the moment may be ripe to bring a claim that state and local laws that require abstinence-only education—and the federal laws that fund them—are irrational because they employ methods that are likely to have perverse outcomes from the stated legislative intent.²⁴⁷

²⁴⁰ Mary A. Ott & John S. Santelli, *Abstinence and Abstinence-Only Education*, 19 CURRENT OPS. OBSTETRICS & GYNECOLOGY 446, 449–50 (2007).

²⁴¹ SOC’Y FOR ADOLESCENT HEALTH & MED., *supra* note 232, at 402–03.

²⁴² COMM. HIV PREVENTION STRATEGIES IN THE U.S., INST. OF MED., NO TIME TO LOSE: GETTING MORE FROM HIV PREVENTION 120 (2000).

²⁴³ IN GOOD COMPANY: SUPPORT FOR COMPREHENSIVE SEXUALITY EDUCATION, SEXUALITY INFO. AND ED. COUNCIL OF THE U.S. (2014) <https://siecus.org/wp-content/uploads/2018/08/In-Good-Company-2014.pdf> [<https://perma.cc/9E6U-H8DF>].

²⁴⁴ *Sexual Health Education in Schools*, NAT. ASS’N OF SCHOOL NURSES (June 2017) <https://www.nasn.org/advocacy/professional-practice-documents/position-statements/ps-sexual-health> [<https://perma.cc/4X42-NCZC>](advocating for comprehensive sex education to be taught in schools).

²⁴⁵ AM. PUB. HEALTH ASS’N, *supra* note 216 (stating that the federal requirements of abstinence-only education programs “have little to do with public health priorities; instead they reflect[] the moral and ideological viewpoint of the majority of members of Congress at the time of the program’s authorization.”).

²⁴⁶ The constitutionality of “morals” legislation is not completely clear, as some Supreme Court cases seem to suggest it is not a legitimate government interest and others support its continuing viability. *Compare* *Romer v. Evans*, 517 U.S. 620 (1996) and *Lawrence v. Texas*, 539 U.S. 558 (2003) with *Washington v. Glucksberg*, 521 U.S. 702 (1997) and *Gonzales v. Carhart*, 550 U.S. 124 (2007).

²⁴⁷ Indeed, this is a question that the scientific community is already asking. *See* Paik et al., *supra* note 234 (“A key question centers on the possibility that abstinence-promotion efforts have perverse unintended consequences on the sexual and reproductive health of teenagers and young adults.”)

B. *Domestic Violence and Mandatory Arrest Requirements*

For most of human history, domestic violence has been seen as a private matter, with a focus on a man's control over his wife.²⁴⁸ The problem (and prevalence) of domestic violence was rarely scrutinized until the Battered Women's Movement began in the 1960s.²⁴⁹ In the intervening decades, there has been increased focus on domestic violence and, as a result, the development of special shelters, hotlines, and prevention programs—along with changes to both statutes and common law approaches.²⁵⁰ But it was not until the mid-1970s that the response to domestic violence began to focus on the arrests of abusers as the best—and most necessary—intervention to curb domestic violence.²⁵¹ In the decades to follow, this carceral approach gained steam, drowning out the voices of communities who doubted efficacy of a criminal law response to the problem of intimate violence.²⁵²

In 1994, Congress passed the Violence Against Women's Act (VAWA); the statute “outlined funding initiatives and proposed policy measures that jurisdictions should implement to better address domestic violence.”²⁵³ Amongst the many provisions in the Act designed to curb and combat domestic violence was the suggestion that states implement mandatory arrest laws for accused offenders.²⁵⁴ These mandatory arrest laws require a police officer to make an arrest when responding to a domestic violence call. Under VAWA, jurisdictions that implemented mandatory arrest laws would become eligible for federal grant money.²⁵⁵ The reauthorization of VAWA in 2005 included a change to a “pro-arrest” as opposed to a “mandatory arrest” policy. Nevertheless, mandatory arrest laws for perpetrators of domestic violence are still utilized heavily in at least 22 states.²⁵⁶

1. *Evidence of Perversity*

Obviously, the overarching goal of mandatory arrest provisions is to decrease domestic violence. The early advocates for mandatory arrest provisions believed that they would do so in two main ways—by serving an expressive function about the seriousness of the offense as well as a deterrence function.²⁵⁷ They had little empirical evidence for these claims, as there were

²⁴⁸ Alessandra DeCarlo, *No Drop Prosecution & Domestic Violence: Screening for Cooperation in the City that Never Speaks*, 25 J.L. & POL'Y 357, 361–62 (2016).

²⁴⁹ *Id.* at 362.

²⁵⁰ *Id.* at 362–63.

²⁵¹ See AYA GRUBER, *THE FEMINIST WAR ON CRIME* 67–93 (2021).

²⁵² *Id.*

²⁵³ Alayna Bridgett, *Mandatory Arrest Laws and Domestic Violence: How Mandatory-Arrest Laws Hurt Survivors of Domestic Violence Rather Than Help Them*, 30 HEALTH MATRIX 438, 444 (2020).

²⁵⁴ *Id.* at 445.

²⁵⁵ *Id.* at 444–45. This Act was renewed in 2000, 2005, and 2013 and kept similar provisions to encourage mandatory arrest statutes.

²⁵⁶ *Id.* at 449.

²⁵⁷ See GRUBER, *supra* note 251 at 68, 90.

no jurisdictions that had utilized them.²⁵⁸ And the earliest studies did seem to support an argument that mandatory arrest may be effective in reducing domestic violence.²⁵⁹

Since the implementation of mandatory arrest provisions beginning in the 1970s, however, research has shown that mandatory arrest laws are not an effective means of encouraging victims to leave their abusers²⁶⁰ or of keeping victims safe from domestic violence.²⁶¹ Research does not show that these laws reduce rates of domestic violence generally.²⁶² Mandatory arrest provisions also have the effect of increasing the lethality of the violence that does occur—resulting in increased homicides. Researchers who have studied the effect of mandatory arrest provisions on intimate partner homicides have found that such laws increase this type of homicide by up to 60%.²⁶³ In contrast, researchers who have studied *discretionary* arrest provisions have found that they can reduce rates of homicide, particularly among married partners.²⁶⁴

Unfortunately, mandatory arrest provisions may also have a perverse effect on domestic violence reporting. Under-reporting of domestic violence is extremely widespread.²⁶⁵ But research shows that reporting declined by 12% in states where mandatory arrest laws had been implemented.²⁶⁶ This reluctance to report in the face of mandatory arrest laws does not only affect victims of abuse. Third parties are also less likely to report in states with mandatory arrest provisions.²⁶⁷

²⁵⁸ *Id.* at 68, 76, 90.

²⁵⁹ *Id.* at 82–89 (detailing early study that showed mandatory arrests provisions might be successful at reducing violence and the many studies, including some by the authors of the original studies, that eventually concluded the opposite).

²⁶⁰ Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence from Mandatory and Recommended Arrest Laws*, 93 J. PUB. ECON. 85, 97 (2009).

²⁶¹ J. David Hirschel & Ira W. III Hutchinson, *Female Spouse Abuse and the Police Response: The Charlotte, North Carolina Response*, 83 J. CRIM. L. & CRIMINOLOGY 73, 102 (1992); Ruth E. Fleury-Steiner, Deborah Bybee, Cris M. Sullivan, Joanne Belknap, Heather C. Melton, *Contextual Factors Impacting Battered Women's Intentions to Reuse the Criminal Legal System*, 34 J. COMM. PSYCHOL. 327, 335 (2006); A. M. Pate, & E. E. Hamilton, *Formal and Informal Deterrents to Domestic Violence: The Dade County Spouse Assault Experiment*, 57 AM. SOCIO. REV. 691 (1992).

²⁶² Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J.L. & GENDER 53, 55–56 (2017) (“No reliable social science data ties the drop in the rates of intimate partner violence to criminalization or to the increased funding and criminal legal system activity spurred by the Violence Against Women Act.”).

²⁶³ Iyengar, *supra* note 261, at 85.

²⁶⁴ Yoo-Mi Chin & Scott Cunningham, *Revisiting the Effect of Warrantless Domestic Violence Arrest Laws on Intimate Partner Homicides*, 179 J. PUB. ECON. 1, 4 (2019).

²⁶⁵ JENNIFER L. TRUMAN & RACHEL E. MORGAN, U.S. DEP'T. OF JUST., NONFATAL DOMESTIC VIOLENCE 1 (2014), <https://www.bjs.gov/content/pub/pdf/ndv0312.pdf> [<https://perma.cc/VG8D-7L5F>] (stating that from 2003 until 2012, only fifty-six percent of domestic violence was reported to the police).

²⁶⁶ Iyengar, *supra* note 260. Reporting in states where there were only *recommended* arrest provisions increased as well, but less significantly. *Id.*

²⁶⁷ Laura Dugan, *Domestic Violence Legislation: Exploring Its Impact on the Likelihood of Domestic Violence, Police Involvement, and Arrest*, 2 CRIMINOLOGY & PUB. POL'Y 283, 303 (2003).

It is not surprising that mandatory arrest provisions result in increased underreporting in light of the fact that such provisions have an additional perverse outcome—they often increase arrests of domestic violence victims themselves.²⁶⁸ When police officers are required to make an arrest, they can be forced to arrest both parties, because it is unclear who is the primary aggressor.²⁶⁹ These “dual arrests” are consistently associated with the passage of mandatory arrest laws.²⁷⁰ For example, in 1987, Connecticut implemented a mandatory arrest policy for domestic violence offenders and, after the implementation of the policy, reported that thirty-three percent of the 25,000 family violence arrests in 1989 were dual arrests.²⁷¹ Already marginalized populations are at a greater threat of being swept up in these dual arrest scenarios.²⁷²

2. Professional Consensus

Many organizations and activists working to combat domestic violence in the 1960s supported an increased criminal justice response to domestic violence, often on the theory that such crimes were being underenforced. Organizations working within communities of color, however, recognized early on that increased involvement of the criminal justice system was unlikely to improve outcomes for victims of domestic violence, particularly for those people already over policed.²⁷³ As mandatory arrest laws were put into place, however, and the perverse results chronicled here began to emerge, professional consensus came to reflect an understanding that the original detractors were correct—while the laws might have served the expressive purpose of signaling the seriousness of domestic violence, the outcomes for actual victims were demonstrably poorer. The Battered Women’s Justice

²⁶⁸ Meghan A. Novisky & Robert L. Peralta, *When Women Tell: Intimate Partner Violence and the Factors Related to the Police*, 21 VIOLENCE AGAINST WOMEN 65, 67 (2014).

²⁶⁹ Susan L. Miller, *The Paradox of Women Arrested for Domestic Violence*, 7 VIOLENCE AGAINST WOMEN 1339, 1364 (2001).

²⁷⁰ Sherman, L. W., Smith, D. A., Schmidt, J. D., & Rogan, D. P., *Crime, Punishment, and Stake in Conformity: Legal and Informal Control of Domestic Violence*, 57 AM. SOCIO. REV., 680–90 (1992). Although mandatory arrest laws also increase incidence of single arrests of domestic violence victims, as well.

²⁷¹ Margaret E. Martin, *Double Your Trouble: Dual Arrest in Family Violence*, 12 J. FAM. VIOLENCE 139, 142, 147 (1997).

²⁷² Sarah Deer & Abigail Barefoot, *The Limits of the State: Feminist Perspectives on Carceral Logic, Restorative Justice and Sexual Violence*, KAN. J.L. & PUB. POL’Y, 505, 511 (2019) (“Mandatory arrest policies have resulted in an expanded oppressive police presence in many communities, which has led to higher arrest rates of women of color and lesbians compared to white and heterosexual peers, even when the victims initiate the call for police assistance.”).

²⁷³ Deborah M. Weissman, *The Community Politics of Domestic Violence*, 82 BROOK. L. REV. 1479, 1512 (2017) (“Women of color challenged mandatory arrest policies promoted by white feminists working in the movement who ignored other recommendations that were removed from the criminal justice system.”); GRUBER, *supra* note 251, at 62–63. Some law enforcement officers, too, recognized that mandatory arrest provisions might escalate violence. *See id.* at 45, 72.

Project²⁷⁴ and the Center for Survivor Agency and Justice²⁷⁵ are just two of the organizations that have come out as opposed to mandatory arrest policies.²⁷⁶ Legal scholars, too, have a long history of opposition to mandatory interventions in the domestic violence sphere.²⁷⁷ Professor Aya Gruber argues persuasively in her book *The Feminist War on Crime* that these laws don't work, increase violence, and disproportionately harm people of color and other marginalized communities.²⁷⁸

Mandatory arrests in the domestic violence context are not the only aspects of the criminal justice system vulnerable to an argument that government action that seeks to achieve one end actually achieves the opposite. For example, there are sound arguments that criminalizing the possession or use of drugs results in riskier drug use,²⁷⁹ as well as more crime and social instability. There are arguments that criminalizing the use of technology for trafficking purposes increases human trafficking.²⁸⁰ Mandatory segregation policies for suicidal inmates might increase suicides.²⁸¹ Three-strike laws meant to deter crime might result in increased violent crime against police officers, as those who seek to avoid a third criminal prosecution are incentivized to resist arrest.²⁸² A perversity-as-irrationality framework opens up additional possibilities for challenging these approaches.

C. Targeted Regulation of Abortion Providers

There are few topics in the 21st century as politically fraught as abortion. While the constitutional right to abortion remains technically in place, those opposed to legal abortion have waged a decades-long battle at the state

²⁷⁴ *Mandatory Arrests*, BATTERED WOMEN'S JUST. PROJECT, <https://www.bwjp.org/our-work/topics/mandatory-arrests.html> [<https://perma.cc/SVT9-HFMQ>].

²⁷⁵ Erika Sussman, *Reflections On Police Violence and the Implications for Survivors*, CTR. FOR SURVIVOR AGENCY & JUST. (Jul. 13, 2016) <https://csaj.org/news/view/we-are-reeling-after-last-week> <https://perma.cc/CKN4-2QG8>].

²⁷⁶ *National Domestic Violence Organizations*, NAT'L CTR. ON DOM. VIOLENCE, TRAUMA & MENTAL HEALTH, <http://www.nationalcenterdvtraumamh.org/resources/national-domestic-violence-organizations/> [<https://perma.cc/8PUB-WRF5>].

²⁷⁷ Natalie Nanasi, *Disarming Domestic Abusers*, 14 HARV. L. & POL'Y REV. 559, 572 (2020) ("Scholars have long criticized mandatory interventions as a means for the legal system to disempower survivors of domestic violence and remove from them a sense of agency and autonomy.").

²⁷⁸ See generally AYA GRUBER, *THE FEMINIST WAR ON CRIME* (2021).

²⁷⁹ *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States*, HUMAN RIGHTS WATCH (Oct. 12, 2016) <https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states#> [<https://perma.cc/CTJ8-9PPN>] ("[C]riminalization tends to drive people who use drugs underground, making it less likely that they will access care and more likely that they will engage in unsafe practices that make them vulnerable to disease and overdose.").

²⁸⁰ See generally, Lura Chamberlain, *FOSTA: A Hostile Law with A Human Cost*, 87 FORDHAM L. REV. 2171, 2205 (2019).

²⁸¹ See generally Margo Schlanger, *Regulating Segregation: The Contribution of the ABA Criminal Justice Standards on the Treatment of Prisoners*, 47 AM. CRIM. L. REV. 1421, 1438 (2010) ("[E]xperts agree that isolation is convenient but counterproductive.").

²⁸² Jeffrey L. Johnson & Michelle A. Saint-Germain, *Officer Down: Implications of Three Strikes for Public Safety*, 16 CRIM. JUSTICE POLICY REV. 443, 454-55 (2005).

level to enact ever more restrictive laws. Despite many legal challenges, these campaigns have had significant success—at least 38 states now have at least one law that restricts access to abortion or targets abortion providers with additional, often onerous, regulatory requirements.²⁸³ Many states have multiple such laws, including requiring waiting periods to access abortion,²⁸⁴ parental consent laws,²⁸⁵ mandatory ultrasound requirements,²⁸⁶ special licensing or admitting requirements for abortion providers,²⁸⁷ and requirements for the buildings that house abortion clinics.²⁸⁸ The stated intention of such abortion restrictions is often the protection of women’s health,²⁸⁹ although one does not have to search too far for evidence that these restrictions are intended to decrease rates of abortion by making it practically inaccessible.²⁹⁰ The latter goal is, at least for the moment, constitutionally impermissible.²⁹¹ In light of the tenuousness of the abortion right at the federal level, however, the following sections will address *both* of these legislative goals and how restrictions on abortion care create perverse outcomes regardless of whether the focus is on decreasing abortion or promoting the health of women and children. Therefore, even if the Court decides that abortion is no longer a constitutionally protected fundamental right, these arguments under rational basis review would still be viable avenues for advocates to use in attacking the constitutionality of abortion restrictions.

²⁸³ *An Overview of Abortion Laws*, GUTTMACHER INST. <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> []<https://perma.cc/H3UJ-3UF4> (last updated Dec. 1, 2021).

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* This is to say nothing of the laws—currently unenforceable as unconstitutional—that prohibit abortion entirely or do so at a certain number of gestational weeks.

²⁸⁹ Rachel Benson Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics—and the Women They Serve—Pay the Price*, GUTTMACHER POL’Y REV., Spring 2013, at 7, 11–12. (“For example, regulations in South Carolina say that ‘health licensing has the ultimate goal of ensuring that individuals . . . are provided appropriate care and services in a manner and, in an environment that promotes their health, safety, and well-being.’ In Pennsylvania, the state’s regulations set standards that are intended to ‘promote the health, safety and adequate care of the patients.’”). Of course, people who do not identify as women may also seek abortion care, although the language of these laws rarely takes that into account.

²⁹⁰ Katrina Trinko, *Will Mississippi’s Last Abortion Clinic Close?*, NAT’L REV. ONLINE (Dec. 18, 2012), <http://www.nationalreview.com/article/335814/will-mississippi-last-abortion-clinic-close-katrina-trinko> [<https://perma.cc/58J5-XJDZ>] (quoting Mississippi governor Phil Bryant, at the time he signed Mississippi’s TRAP bill into law in 2012, stating that “Today you see the first step in a movement to do what we campaigned on . . . to try to end abortion in Mississippi.”).

²⁹¹ *Planned Parenthood Se. Pa. v. Casey*, 505 U.S. 833, 877–78 (“Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.”).

1. Evidence of Perversity

The stated goal of many laws restricting abortion or regulating abortion providers is to protect women's health.²⁹² The history of abortion, as well as voluminous current research, all compellingly paint a picture of how it is the *restriction* of abortion, and not abortion itself, that is most damaging to women's health.²⁹³ Historically and cross-culturally, prohibiting access to safe and legal abortion has led to increased risks of serious medical complications and even death.²⁹⁴ As just one example, for many decades abortion was basically illegal in Romania and, during this time, the country had the highest maternal mortality rates in all of Europe.²⁹⁵ In the year after abortion was legalized and the procedure started to become available again, the maternal mortality rate nearly halved.²⁹⁶ A similar story occurred in South Africa when abortion became legal.²⁹⁷ Research from around the world suggests a similar picture—the more restricted abortion is, the higher the maternal mortality rate.²⁹⁸

But it is not necessary to look beyond our own borders and our own time to see how restrictions on abortion harm women's health and endanger their lives. States with the highest number of abortion restrictions match those with the worst maternal health outcomes.²⁹⁹ Indeed, as restrictions grow, so too does maternal mortality.³⁰⁰ Using a difference in difference analysis, researchers found that reducing the number of Planned Parenthood

²⁹² Caitlin E. Borgmann, *Borrowing from Dormant Commerce Clause Doctrine in Analyzing Abortion Clinic Regulations*, 26 HEALTH MATRIX 41, 49–51 (2016). This focal point reflects a shift in the rhetoric—if not the priorities—of the pro-life community following years of mostly unsuccessful campaigns that focused on the sanctity of fetal life.

²⁹³ Philip D. Darney, Marcos Nakamura-Pereira, Lesley Regan, Feiruz Serur & Kusum Thapa, *Maternal Mortality in the United States Compared with Ethiopia, Nepal, Brazil, and the United Kingdom: Contrasts in Reproductive Health Policies*, 135 OBSTETRICS & GYNECOLOGY 1362, 1363 (2020) (“Before legalization in the United States, there were at least 200 maternal deaths yearly from illegal abortion”).

²⁹⁴ Lisa B. Haddad & Nawal M. Nour, *Unsafe Abortion: Unnecessary Maternal Mortality*, 2 REV. OBSTETRICS & GYNECOLOGY 122, 124 (2009).

²⁹⁵ G. Benagiano & A. Pera, *Decreasing the need for abortion: challenges and constraints*, 70 INT'L J. GYNECOLOGY & OBSTETRICS 35, 44 (2000).

²⁹⁶ *Id.*

²⁹⁷ Haddad & Nour, *supra* note 294, at 124 (“[I]n South Africa, after abortion became legal and available on request in 1997, abortion-related infection decreased by 52%, and the abortion mortality ratio from 1998 to 2001 dropped by 91% from its 1994 level.”).

²⁹⁸ Su Mon Latt, Allison Milner & Anne Kavanagh, *Abortion Laws Reform May Reduce Maternal Mortality: An Ecological Study in 162 Countries*, 19 BOS. MED. CTR. WOMEN'S HEALTH 1 (2019) (“Our findings suggest that the liberalization of abortion laws will reduce maternal mortality.”)

²⁹⁹ CTR. FOR REPRODUCTIVE RTS., II EVALUATING PRIORITIES: MEASURING WOMEN'S AND CHILDREN'S HEALTH AND WELL-BEING AGAINST ABORTION RESTRICTIONS IN THE STATES 3 (2017), <https://www.reproductiverights.org/sites/default/files/documents/USPA-Ibis-Evaluating-Priorities-v2.pdf> [https://perma.cc/6QMJ-7KEQ].

³⁰⁰ A. Addante, D. Eisenberg, & J. Leonard, M. Hoofnagle, *The Association of Restricted Abortion Access and Increasing Rates of Maternal Mortality within the United States*, 100 CONTRACEPTION 305, 498–99 (2019) (“Restrictive states had a higher [maternal mortality rate] than protective states” in 2017 and the maternal mortality rate “decreased or remained stable for all races in protective states and increased for all races in restrictive states”).

clinics in a state by 20% increased the maternal mortality rate by 8% and the enactment of legislation to restrict abortions based on gestational age increased the maternal mortality rate by a shocking 38%.³⁰¹ These results were consistent across different race and ethnic groups.³⁰² This research is admittedly new, but as this body of evidence grows, it could form the basis for an argument that TRAP laws and similar abortion restrictions result in perverse outcomes.³⁰³ Considering the crisis in maternal health that is currently occurring in the United States,³⁰⁴ it is not only permissible—but critical—for state legislators to pass laws designed to promote and preserve maternal health. But laws restricting abortion access clearly do not do this. And it is becoming increasingly clear that they actively harm pregnant people—and even contribute to their deaths.³⁰⁵

Further, TRAP laws are also associated with perverse outcomes for fetal and infant health.³⁰⁶ In fact, the more state level abortion restrictions in place, the higher the rates of infant mortality.³⁰⁷ Pregnant people who seek but are denied abortion care are also more likely to delay or forgo prenatal care, negatively affecting both child and maternal health.³⁰⁸ As one researcher concluded, “the increase in the legal abortion rate is the single most important factor in reductions in [the neonatal mortality rate].”³⁰⁹

³⁰¹ Summer Sherburne Hawkins, Marco Ghiani, Sam Harper, Christopher F. Baum & Jay S. Kaufman, *Impact of State-Level Changes on Maternal Mortality: A Population-Based, Quasi-Experimental Study*, 58 AM. J. PREVENTATIVE MED. 165, 172 (2020).

³⁰² *Id.*

³⁰³ Nisha Verma & Scott A. Shinker, *Maternal Mortality, Abortion Access, and Optimizing Care in an Increasingly Restrictive United States: A Review of the Current Climate*, 44 SEMINARS PERINATOLOGY Aug. 2020, at 1, 4 (“Although limited, the current data does support the connection between restricting abortion access and the rising maternal mortality rate in the U.S.”).

³⁰⁴ *Id.* at 1 (noting that the pregnancy-related mortality rate has steadily climbed in the years between 1987 and 2016).

³⁰⁵ In fact, it has been clear for quite some time. *See* Sunstein, *supra* note 7 at 428 (“[R]estrictions on the availability of abortion, defended as a means of protecting human life, appear to have resulted in the death of many women per year and at the same time not to have protected a large percentage of fetuses from the practice of abortion.”).

³⁰⁶ Roman Pabayo, Amy Ehntholt, Daniel M. Cook, Megan Reynolds, Peter Muennig, & Sze Y. Liu, *Laws Restricting Access to Abortion Services and Infant Mortality Risk in the United States*, 17 INT. J. ENV'T RSCH. PUB. HEALTH May 2020 1, 5 (noting that each of the five most common types of TRAP laws was significantly associated with an increased odds for infant mortality, although only one type—parental involvement laws—remain significantly statistically related to negative infant mortality standing on its own).

³⁰⁷ *Id.* (finding that infants born in states with more restrictive laws had greater risk for infant mortality than those born in states with no restrictive laws). Inversely, states with the most funding for abortion services had lower rates of infant mortality. *See* N. Krieger, Sofia Gruskin, Nakul Singh, Matthew V. Kiang, Jarvis T. Chen, Pamela D. Waterman, Jason Beckfield & Brent A. Coull, *Reproductive Justice & Preventable Deaths: State Funding, Family Planning, Abortion, and Infant Mortality, US 1980-2010*, 2 SSM POPULATION HEALTH 277, 278 (2016).

³⁰⁸ *See* Jenna Jerman, Lori Frohwirth, Megan L. Kavanaugh and Nakeisha Blades, *Barriers to Abortion Care and their Consequences for Patients Traveling for Services: Qualitative Findings from Two States*, 49 PERSPS. ON SEXUAL & REPRODUCTIVE HEALTH 95, 96 (2017).

³⁰⁹ Michael Grossman, *Government and Health Outcomes*, 72 AM. ECON. REV. 191, 193 (1982)

As previously stated, however, legislators who introduce and pass laws restricting abortions may not actually be motivated by protecting the health of women.³¹⁰ There is abundant evidence that these laws aim to reduce or eliminate abortions altogether, by making it more difficult or impossible access abortion care.³¹¹ The research shows, however, that while the laws *do* make it more difficult for people to access abortion care, they *don't* reduce the incidence of abortion³¹²—and in fact some research shows that restrictive abortion laws are associated with an increase in the abortion rate.³¹³ Part of the reason that laws restricting access to abortions are so damaging to public health is because, while they do not decrease abortions, they do result in pregnant people having abortions later in pregnancy as a result of the impediments to access that such laws create. Later term abortions are, in general, associated with higher risks to maternal health and life.³¹⁴

Of course, there is one additional legislative “goal” of state-level abortion restrictions: promoting the “sanctity of life.”³¹⁵ Even if one could argue that these laws serve this more amorphous, expressive goal, it would be difficult to argue that a law serves such an expressive function when it results in

³¹⁰ Verma & Shinker, *supra* note 303, at 4 (“Many of these restrictions, instead of being grounded in science, are built on religious and/or political belief systems.”).

³¹¹ For instance, Justice Ruth Bader Ginsburg’s questioning during the oral argument for *Whole Women’s Health v. Hellerstedt* focuses on how the state’s actions cannot be squared with the goal of maternal health. See Mark Joseph Stern, “The Most Important Exchange of Wednesday’s SCOTUS Abortion Arguments,” SLATE (March 2, 2016) <https://slate.com/news-and-politics/2016/03/ruth-bader-ginsburg-asks-the-most-important-question-of-oral-arguments-in-whole-womans-health-v-hellerstedt.html> [<https://perma.cc/9NZ6-VBQH>].

³¹² Nichole Austin & Sam Harper, *Quantifying the Impact of Targeted Regulation of Abortion Provider Laws on US Abortion Rates: A Multi-State Assessment*, 100 CONTRACEPTION 374, 374 (2019) (finding that two common state TRAP laws has no statistically significant effect on rates of abortion.)

³¹³ Elizabeth Nash & Joerg Drewke, *The U.S. Abortion Rate Continues to Drop: Once Again, State Abortion Restrictions Are Not the Main Driver*, 22 GUTTMACHER POL’Y REV. 41, 43 (2019) (“While 32 states enacted 394 restrictions between 2011 and 2017, nearly every state had a lower abortion rate in 2017 than in 2011, regardless of whether it had restricted abortion access. Several states with new restrictions actually had abortion rate increases.”); Jonathan Bearakn, Anna Popinchalk, Bela Ganatra, Ann-Beth Moller, Özge Tunçalp, Cynthia Beavin, Lorraine Kwok & Leontine Alkema, *Unintended Pregnancy and Abortion by Income, Region, and the Legal Status of Abortion: Estimates from a Comprehensive Model for 1990–2019*, 8 LANCET GLOB. HEALTH e1106, e1159 (2020) (“In countries that restricted abortion, the percent of unintended pregnancies ending in abortion increased in every 5 year period in our analysis. . . . By contrast, in countries where abortion is broadly legal, excluding China and India, there was a 13% [] decrease in the percent of unintended pregnancies ending in abortion.”); Haddad & Nour, *supra* note 294, at 124 (“Less restrictive abortion laws do not appear to entail more abortions overall. The world’s lowest abortion rates are in Europe, where abortion is legal and widely available”).

³¹⁴ Linda Bartlett, Cynthia J. Berg,, Holly B. Shulman, Suzanne B. Zane, Clarice A. Green, Sara Whitehead & Hani K. Atrash, *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729, 736 (2004) (“Currently, gestational age at the time of the abortion is the strongest risk factor for death. If women who terminated their pregnancies after 8 weeks of gestation had accessed abortion services during the first 8 weeks of gestation, up to 87% of deaths might have been avoided.”).

³¹⁵ This more amorphous, moral goal is likely still a constitutionally permissible one. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992). Although, the legitimacy of morals legislation more generally is somewhat unsettled. See *supra* note 247.

increases in abortion, harm to women's and infants' health, and ultimately, increased death. The strong weight of the credible scientific evidence shows us that laws restricting abortion are perverse—resulting in *more* abortion and *poorer* maternal and infant health.³¹⁶ Such outcomes are perverse to even the professed expression of the importance for life.

2. *Professional Consensus*

While there are many organizations that identify as explicitly anti-abortion, mainstream medical organizations are uniformly opposed to the sort of abortion restrictive laws described here.³¹⁷ In May 2019, a coalition of physicians groups, including American Academy of Family Physicians, the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, the American College of Physicians, the American Osteopathic Association, and the American Psychiatric Association released a statement that they are “are firmly opposed to efforts in state legislatures across the United States that inappropriately interfere with the patient-physician relationship, unnecessarily regulate the evidence-based practice of medicine and, in some cases, even criminalize physicians who deliver safe, legal, and necessary medical care.”³¹⁸ The statement was made in response to Alabama legislation that would have made abortion unavailable in all cases except where the mother's life was endangered.

The World Health Organization has recognized that access to safe and legal abortion services is an important aspect of decreasing maternal mortality rates.³¹⁹ At the International Federation of Gynecology and Obstetrics' World Congress in 2018, the American College of Obstetricians and Gynecologists convened a panel of representatives from five national societies focused on reducing maternal mortality rates, in order to consider potential interventions that could be successful in reducing the United States' truly abysmal maternal mortality rate. The panel identified “expanded access to reproductive health care, particularly contraception and safe abortion, as key

³¹⁶ Pabayo et al., *supra* note 306 (noting that there are “unintended, and differentially strong adverse effects associated with abortion policies that restrict women's reproductive decision-making”).

³¹⁷ Allison Limmer, *Physicians for Life Attracts Opposing students with Diverse Lectures and Topics*, TEXAS RIGHT TO LIFE (July 24, 2018), <https://www.texasrighttolife.com/physicians-for-life-attracts-opposing-students-with-diverse-lectures-and-topics/> [<https://perma.cc/59LC-ULNU>] (“In medicine today, there is hardly a belief more unpopular than being Pro-Life.”).

³¹⁸ *Frontline Physicians Call on Politicians to End Political Interference in the Delivery of Evidence Based Medicine* (May 15, 2019), AM. ACAD. OF FAM. PHYSICIANS <https://www.aafp.org/news/media-center/more-statements/physicians-call-on-politicians-to-end-political-interference-in-the-delivery-of-evidence-based-medicine.html> [<https://perma.cc/JA59-EWZ7>].

³¹⁹ WHO, MATERNAL MORTALITY: FACT SHEET (2014), https://apps.who.int/iris/bitstream/handle/10665/112318/WHO_RHR_14.06_eng.pdf?sequence=5&isAllowed=Y [<https://perma.cc/LQ6D-W82S>] (“To avoid maternal deaths, it is also vital to prevent unwanted and too-early pregnancies. All women, including adolescents, need access to family planning, safe abortion services to the full extent of the law, and quality post-abortion care.”).

interventions that had proven effective in decreasing maternal mortality rates worldwide.”³²⁰ Whatever the political arguments surrounding abortion restrictions might suggest, the scientific and medical community seem firmly convinced that laws that reduce access to abortion are public health losers—resulting in the harms that they purportedly seek to redress.³²¹

Of course, restrictions on previability abortion are not currently analyzed under the rational basis standard. Instead, they are governed by the “undue burden” standard originally announced in *Planned Parenthood of Southeastern Pennsylvania v. Casey*³²² as interpreted by *Whole Women’s Health v. Hellerstedt*.³²³ But following the appointment of Amy Coney Barrett to the Supreme Court, Chief Justice Roberts’ lukewarm embrace of abortion rights in *June Medical Services, LLC v. Russo*,³²⁴ and the grant of certiorari in *Dobbs v. Jackson Women’s Health Organization*,³²⁵ it seems likely that, at very least, the constitutional right to abortion will be significantly eroded by the current Court. The arguments contained herein envision a world in which abortion advocates can use the standard reserved for the *lowest* level of scrutiny—rational basis review—to nonetheless argue that restrictions on abortion providers are perverse and thus irrational and unconstitutional. While a majority of the current Court is unlikely to be convinced that abortion is a fundamental right or for the need to evaluate the benefit of abortion restrictions in light of their burdens,³²⁶ even some conservative members of the Court have signaled both their willingness to consider evidence-based claims of how abortion restrictions create harm in the real-world—including those that undermine state legislature’s claims that no such harm exists.³²⁷

³²⁰ See Darney et al., *supra* note 293, at 1362.

³²¹ See NAT’L ACADS. SCI., ENG’G, AND MED., ABORTION CARE AND THE SIX ATTRIBUTES OF QUALITY HEALTH CARE (2018), www.nap.edu/resource/24950/03162018AbortionCareinsert.pdf <https://perma.cc/JGJ4-S6PJ> (detailing how state-level abortion restrictions negatively affect the quality of medical care). *But see* Aziza Ahmed, *Medical Evidence and Expertise in Abortion Jurisprudence*, 41 Am. J.L. & Med. 85, 87 (2015) (arguing that because medical and scientific expertise has been used to effectively undermine abortion rights, pro-choice advocates should no longer put such expertise at the center of their prochoice advocacy).

³²² 505 U.S. 833 (1992).

³²³ 136 S. Ct. 2292 (2016), as revised (June 27, 2016).

³²⁴ 140 S. Ct. 2103 (2020).

³²⁵ 945 F.2d 265 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 2619 (2021) (No. 19-1392).

³²⁶ *June Medical Servs.*, 140 S. Ct. at 2136 (Roberts, J., concurring) (rejecting the interpretation of *Casey* that the case required a balancing of costs and benefits, but instead only required an analysis of whether the laws create a “substantial obstacle” in the path of a patient seeking an abortion).

³²⁷ See Rebouche, *supra* note 196, at 1377 (discussing Chief Justice Roberts’ consideration—and acceptance of—evidence-based claims concerning the burden placed on pregnant people through abortion restrictions). As Professor Rebouche argues, even in the face of a Supreme Court that is likely willing to erode the foundation for the constitutional right to abortion, the Court will still have to contend with the large—and growing—body of evidence compiled since the Court’s questionable use of scientific evidence in *Gonzales v. Carhart* that shows the negative public health consequences that flow from many of the existing state restrictions on abortion. *See id.* at 1367–70 (discussing the proliferation of social science evidence compiled since the Court’s deference to the legislative findings in *Gonzales*, including the evidence relied on in *Whole Women’s Health* that showed a Texas law restricting abortion services was likely to harm women’s health).

CONCLUSION

There is a rich literature on *why* perversity of outcomes occurs. Unsurprisingly, psychology and the social sciences can tell us a great deal about why laws designed to have one effect end up having the opposite effect. While continuing to learn more about why perversity happens, the law still must address what to do when it occurs.

In many ways, arguing that demonstrated perversity should form the basis for an argument that a law is irrational is low-hanging fruit. It represents only the most obviously irrational legislative behavior that might be addressed by courts wielding rational basis review. But in doing so, it allows advocates to focus on an overlooked way to think about the litigation of hot button social issues—one that is divorced from the often weighty moral or political questions about legislatures' motivations.³²⁸ If there were a solid body of precedent that established that legislators were not constitutionally permitted to pass laws that resulted in demonstrable perverse outcomes, such precedent might be used to great effect in areas where litigants are instead trapped making difficult arguments about intent and animus.

Moreover, there is something inherently appealing about moving the argument away from the “real” intent of laws that harm marginalized or politically unpopular groups, and instead forcing legislatures to defend laws *on the terms that they themselves have set*. This strategy would allow advocates to accept for purposes of argument that TRAP laws are designed to protect women's health, that abstinence-only education is intended to reduce STD rates and teen pregnancy, and that harsh criminal sentencing laws are intended to reduce recidivism and deter criminality—and then to show that each of these laws is perverse—that it creates outcomes demonstrably at odds from the legislatures' intent.³²⁹ In so doing, it might even allow for a more robust focus on the reality of the often devastating effect of these laws on real peoples' lives.³³⁰

³²⁸ *Developments in the Law: Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1484 (1995) (contrasting law with science, and describing the latter as “a descriptive pursuit, which does not define how the universe should be but rather describes how it actually is.”).

³²⁹ In so doing, advocates will need to focus not only on amassing the relevant scientific evidence, but also presenting it to jurists in a way that can be understood and incorporated into legal opinions. See Frankenberg & Garces, *supra* note 171, at 745 (“Justices—and the legal community more broadly—may not have had any research training and they may not be necessarily inclined to consider social science evidence unless they can unambiguously understand: (1) the findings; (2) the strength of the research; and (3) how particular findings relate to an issue under consideration.”).

³³⁰ There is also a risk that assuming the “good intent” of legislators may obscure the root of problems that systematically disadvantage marginalized groups, including obscuring the dynamics between law and power. See Martha T. McCluskey, *How the “Unintended Consequences” Story Promotes Unjust Intent and Impact*, 22 BERKELEY LA RAZA L.J. 21, 30 (2012) ([T]he ‘unintended consequences’ message tends to attribute bad effects to the general powerlessness of law in the face of uncertainty and complexity, rather than to the foreseeable power of particular policy choices to lead to harm.”). However, perversity arguments can be made without agreeing that legislatures act with permissible intentions—but only assuming that intention for

The approach to rational basis review I advocate is at once radical and mundane. Courts are not currently reviewing laws for perversity as part of a standard rational basis review. And yet, I argue that the current understanding of rational basis review as it already exists contemplates courts doing just that. Existing frameworks for rational basis review require courts to invalidate laws that clearly contravene the overarching legislative intent because the law is solely or primarily responsible for producing the opposite result from legislative intent. Such an interpretation of rational basis review squares with the proper judicial role in interpreting and applying the law in light of legislative intent, reflects the modern information economy in which courts have equal access to a wealth of highly relevant information, and faithfully follows Supreme Court precedent that requires all government action to be non-arbitrary and, well, rational.

purposes of engaging in the specific perversity analysis. Arguments about impermissible intent can and should exist alongside perversity arguments, which are not meant in any way to excuse evidence of bad intent. *See id.* at 49 (“[J]ustice requires careful attention to both harmful intent and to complex harmful effects.”).