THE STATE AS WITNESS: *WINDSOR*, *SHELBY COUNTY*, AND JUDICIAL DISTRUST OF THE LEGISLATIVE RECORD

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More than ever, the constitutionality of laws turns on judicial review of an underlying factual record, assembled by lawmakers. Some scholars have suggested that by requiring extensive records, the Supreme Court is treating lawmakers like administrative agencies. The assumption underlying this metaphor is that if the state puts forth enough evidence in the record to support the law, its action will survive constitutional scrutiny. What scholars have overlooked, however, is that the Court is increasingly questioning the credibility of the record itself. Even in cases where the state produces adequate evidence to support its action, the Court sometimes invalidates the law because it does not believe the state's facts. In these cases, the Court treats the state like a witness in its own trial, subjecting the state's record and the conclusions drawn from it to rigorous cross-examination and second-guessing.

In this "credibility-questioning" review of the record, the Court appears to be animated by an implicit judgment about the operation of the political process. When Justices consider the political process to have functioned properly, they treat the state as a good faith actor and merely check the adequacy of its evidence in the record. But when Justices suspect that the democratic process has malfunctioned because opponents of the law were too politically weak or indifferent to challenge distortions in the record, they treat the state as a witness, suspecting bias in its factual determinations supporting the law.

In this Article, I both support and critique this new form of review. Contrary to conventional wisdom, I argue courts should engage in credibility-questioning review of the record when the political process has malfunctioned. Public choice and pluralist defect theory imply that the record supporting a law is more likely to be distorted in contexts of democratic malfunction. But for reasons of institutional legitimacy and separation of powers, I argue courts should limit credibility-questioning review to contexts where there is actual proof of democratic malfunction.

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INTRODUCTION

In two recent civil rights cases, the Supreme Court's liberal and conservative blocs took strikingly different approaches to evaluating the legislative records. In *Shelby County v. Holder*, a conservative majority struck down a vital provision of the Voting Rights Act (VRA).[1] The majority spent less than a page of its opinion reviewing the 15,000-page legislative record. To the limited extent that the conservative Justices did consider evidence from the record, they treated

[1] 133 S. Ct. 2612 (2013).

it quite skeptically.[2] The next day, however, when the Court struck down the Federal Defense of Marriage Act's (DOMA's) denial of equal benefits to same-sex married couples in *United States v. Windsor*, Justices Antonin Scalia, Clarence Thomas, and Samuel Alito dissented.[3] These Justices, members of the conservative majority in *Shelby County*, now criticized *Windsor*'s liberal majority for failing to properly consider evidence in the record supporting the law.[4] In contrast to their approach in *Shelby County*, the conservative dissenters in *Windsor* uncritically accepted the testimony and justifications contained in the record, arguing that they provided an adequate basis for upholding DOMA.[5]

The conservative Justices were not alone in their inconsistent treatment of the legislative record in *Shelby County* and *Windsor*. In *Shelby County*, the four most liberal Justices dissented. They broadly recounted and accepted at face value the findings in the voluminous record that Congress had amassed in support of the VRA and chastised the conservative majority for not doing the same.[6] Yet in *Windsor*, these four Justices joined Justice Anthony Kennedy's opinion striking down the DOMA provision, an opinion that selectively emphasized some parts of the record and completely ignored others.[7]

The decisions of the majorities in *Shelby County* and *Windsor* to cross-examine, second-guess, and discount the record were striking in light of the common understanding of the relevant constitutional standards. Scholars have noted that in recent decades the Court has shifted toward requiring more comprehensive records to support the constitutionality of state actions.[8] Some have even suggested that the

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[2] *See id.* at 2629 (dismissing the record because it was determined to have "played no role in shaping" the statute).

[3] 133 S. Ct. 2675 (2013).

[4] *Id.* at 2707 (Scalia, J., dissenting) (criticizing the majority for "affirmatively concealing from the reader the arguments that exist in [justifying DOMA]" and for making "only a passing mention of the 'arguments put forward' by the Act's defenders, and . . . not even troubl[ing] to paraphrase or describe them" (quoting *Windsor*, 133 S. Ct. at 2693)).

[5] *See id.* at 2708 (finding, after examining the record, that DOMA was not motivated by animus toward same sex couples).

[6] *See Shelby Cnty.*, 133 S. Ct. at 2644 (Ginsburg, J., dissenting) (criticizing the majority for "mak[ing] no genuine attempt to engage with the massive legislative record that Congress assembled").

[7] *Windsor*, 133 S. Ct. at 2693–94 (finding, after selectively emphasizing certain record evidence and omitting discussion of other evidence, that the DOMA provision was motivated by "a bare congressional desire to harm a politically unpopular group").

[8] *See, e.g.*, Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 474–77 (2013) (describing record review in the context of judicial review of congressional exercises of authority under Section 5 of the Fourteenth Amendment and identifying inconsistencies in the Court's approach); A. Christopher

Court is treating lawmakers like administrative agencies, which must support their decisionmaking with an adequate factual record.[9] This trend, however, cannot explain the form of constitutional review in *Shelby County* and *Windsor*. The decisions in the two cases appeared to have little to do with the adequacy of the evidence in the record. The two majorities' treatment of the record instead seemed to rest on whether they believed the evidence supporting the law in the first place.

The Court's approach to the records in these two cases points to an aspect of the shift in constitutional review that has thus far gone unnoticed by scholars. The Court has not simply shifted to examining the adequacy of the record; the Court has always done so in at least

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Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 369–89 (2001) (criticizing judicial review of the adequacy of legislative records); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 138–39 (2001) (identifying the emergence of legislative record review when Congress seeks to expand its authority and describing it as a means by which the Court "forc[es] Congress to articulate the predicates for its action in a written compilation"); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 115–16 (2001) ("The Court's new heightened review of the legislative record has transformed Congress's role from a coequal branch warranting judicial deference to an entity charged with extensive factfinding responsibilities."); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 360 (1999) (describing the shift toward examining the record under heightened rationality review); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1740 (2002) ("In the federalism cases, the Court expects Congress to reveal information about its policy goals, about the objective facts that are brought to the attention of its members, and about its constitutional and causal reasoning, and to do so in the statute or in its formal legislative record."); Note, *Judicial Review of Congressional Factfinding*, 122 HARV. L. REV. 767, 767–69 (2008) [hereinafter *Judicial Review*] (describing the history of judicial deference to legislative findings of fact but identifying a shift toward greater scrutiny in the Court's review of congressional exercises of power). Other scholars have made more normative claims about whether and how the Court should review legislative findings of fact. *See* William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 905–30 (2013) (identifying the types of findings of fact for which Congress should be given deference in legislation enforcing and limiting individual rights); John O. McGinnis & Charles W. Mulaney, *Judging Facts like Law*, 25 CONST. COMMENT. 69, 103–09 (2009) (arguing that judges should engage in their own fact-finding when presented with congressional fact-finding supporting a law); Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 3 (2009) ("[C]ourts should independently review the factual foundations of all legislation that curtails important individual rights protected by the federal Constitution.").

[9] *See, e.g.*, Bryant & Simeone, *supra* note 8, at 369 ("Congress is not an agency, and the reasons for 'on-the-record' review in the administrative context do not apply to the legislative branch."); Frickey & Smith, *supra* note 8, at 1752 (suggesting that judicial review of legislative records "forc[es] Congress to behave like an administrative agency"); Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 733 (1996) (identifying the costs associated with treating a legislature like an agency).

some of its cases.[10] Rather, the more important shift has been toward judicial assessments of the credibility of the state's record.[11]

In the past, the relevant constitutional tests provided the framework for scrutinizing the permissibility of state actions. For example, when applying the Equal Protection Clause, the Court determined whether the state's purpose for the law was sufficiently important. It then looked to the record to see whether there was a close enough relationship between the law's ends and its means.[12] If the state provided enough evidence to satisfy the constitutional standard, the Court upheld it. But if the state did not, the Court invalidated the action. Importantly, when the Court engaged in what I describe as "adequacy-checking review" of the record, the credibility of the state's evidence in support of a law was assumed and rarely challenged.[13]

Over time, however, members of the Court began supplementing constitutional standards with a skeptical review of the record.[14] The liberal Justices initiated this approach in the late 1960s, and by the late 1980s the conservatives had adopted a similarly skeptical approach. For both the liberals and the conservatives, this scrutiny has taken the form of cross-examining and second-guessing certain state actors' findings of fact and discounting entire parts of records supporting state actions. The Court has therefore not only treated state institutions like administrative agencies, it has also treated state actors as witnesses in their own trial by testing the credibility of the evidence they offer in support of their actions. In entire categories of cases, the Court questions whether the state's record can be believed as a complete and unbiased presentation of evidence related to the constitu-

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[10] *See infra* Part I.A (describing judicial assessment of the adequacy of the evidence in the record in cases applying strict scrutiny).

[11] I identified this shift after reviewing all 1464 cases referencing "equal protection" since 1938, a year many view as inaugurating the Court's modern equal protection jurisprudence. In this review, I examined how members of the Court treated the factual record supporting the constitutionality of laws: Did Justices defer to the fact-based judgments or second-guess, cross-examine, and discount them?

[12] *See infra* Parts I.A, II.A (showing how the level of importance of purpose and the closeness of the relationship required between means and ends varied with the tiers of scrutiny applied under the Equal Protection Clause).

[13] *See infra* Parts I.A, II.A (describing judicial application under strict scrutiny and rational basis review of adequacy-checking review of the record); *see also* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 367 (1949) (offering reasons for the Court's early reluctance to question the credibility of legislative fact-finding in its equal protection jurisprudence).

[14] *See infra* Parts I.B, II.B (describing judicial application under strict scrutiny and rational basis review of credibility-questioning review of the record).

tionality of the law—a form of judicial scrutiny of the record that I describe as "credibility-questioning review" of the record.[15]

What has motivated the Court to assess the credibility of the state's factual record in this way? The Justices' inconsistent treatment of the record in *Shelby County* and *Windsor* offers initial clues. As the two cases demonstrate, the apparent judicial propensity for assessing the credibility of the state's factual record bridges the partisan divide. A conservative majority in *Shelby County* and a more liberal majority in *Windsor* both tested the credibility of the record. Notably, both sides appear to agree that a credibility assessment of the state's record is not appropriate in all cases, as neither the liberal dissenters in *Shelby County* nor the conservative dissenters in *Windsor* challenged the record's credibility.

More clues can be found in the pattern and reasoning of the Court's past equal protection jurisprudence. Based on my comprehensive review of equal protection case law since the late 1930s, I conclude that Justices question the credibility of the record when they suspect a malfunctioning of the political process that shaped the record. *Shelby County*, *Windsor*, and prior cases indicate, however, that conservative and liberal Justices have different views about when the political process has malfunctioned.

Conservative Justices, on the one hand, tend to treat the record of laws benefitting minorities skeptically. The Justices' skepticism has accompanied their oft-voiced concern about "simple racial politics," in which an "ethnic, religious, or racial group with the political strength [is able to] negotiate 'a piece of the action' for its members."[16] This conservative jurisprudential reasoning corresponds with a conception of politics found in public choice theory.[17] According to this theory, the comparative ease of coordinating small groups gives minorities an advantage in political organizing relative to the diffuse members of the majority.[18] These minorities therefore have the political power to

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[15] *See* McGinnis & Mulaney, *supra* note 8, at 95–97 (describing ways in which the record can be distorted by legislators focused on "put[ting] the legislation in the most favorable light").

[16] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493, 510–11 (1989) (quoting Fullilove v. Klutznick, 448 U.S. 448, 539 (1980) (Stevens, J., dissenting)).

[17] This more conservative variant of public choice theory is associated with James Buchanan and other academics from the so-called Virginia School. *See* William C. Mitchell, *The Old and New Public Choice: Chicago Versus Virginia*, *in* THE ELGAR COMPANION TO PUBLIC CHOICE 3, 5–11 (William F. Shugart II & Laura Razzolini, eds., 2001) (describing the basic tenets of the Virginia School of public choice theory).

[18] *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 273–77 (1965) (theorizing about the different capacities of groups to act collectively); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 10–36 (1965)

capture state institutions and secure legislative benefits for themselves at the expense of the diffuse, politically weaker majority.[19] The conservative Justices seem to have staked out a role in correcting this perceived democratic malfunction. They not only scrutinize proffered justifications for laws benefitting minorities, as suggested by the conventional account, but they also treat skeptically the underlying record, which they presume the victorious minority has corrupted. In constitutional law, these credibility determinations have emerged most saliently in the more rigorous strict scrutiny that a conservative majority of the Court began applying to racial classifications benefitting minorities in the 1980s.[20] More recently, the unusual scrutiny that the conservative bloc of the Court applied to the record underlying the minority-protective Voting Rights Act in *Shelby County* evidenced a similar credibility assessment.[21]

The liberal Justices, on the other hand, appear to have adopted a conception of politics diametrically opposed to public choice theory. The Justices' skepticism about the record correlates with a concern that the state may adopt laws harming politically marginalized minorities while hiding the invidious motivation for such laws behind pretextual facts. The liberal bloc's reasons for questioning the credibility of the state's factual determinations accord with insights from pluralist theory. This theory suggests that democratic politics is composed of groups competing in a political marketplace,[22] in which certain groups

(describing the comparative organizational advantage that small groups have over large groups through their greater capacity to police and sanction free riding).

[19] In the public choice literature, this activity is referred to as "rent-seeking." *See* Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291, 291 (1974) (coining the term); *see also* Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967) (describing the phenomenon of rent-seeking). Politically organized groups rent-seek when they "provide legislators with rents in the form of election-related benefits such as money and votes, as well as opportunities for subsequent employment [in exchange for] legislative enactments . . . ultimately paid for by the broader public." Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CALIF. L. REV. 1565, 1611 (2013); *see also* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975) ("In the economists' version of the interest-group theory of government, legislation is supplied to groups or coalitions that outbid rival seekers of favorable legislation.").

[20] *See infra* Part I.B (describing the conservative Justices' application under strict scrutiny of credibility-questioning review of the record).

[21] *See infra* Part I.D (examining the conservative Justices' application of credibility-questioning review of the record in *Shelby County*).

[22] *See, e.g.*, ARTHUR F. BENTLEY, THE PROCESS OF GOVERNMENT: A STUDY OF SOCIAL PRESSURES 204–22 (1908) (establishing a pluralist conceptual framework with groups at the center); Earl Latham, *The Group Basis of Politics: Notes for a Theory*, 46 AM. POL. SCI. REV. 376, 385–89 (1952) (describing group formation and political behavior); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND

may be marginalized due to the prejudice or willful indifference of other groups.[23] In response, the liberal Justices seek to correct this process failure by providing certain marginalized minorities with special protection from the majoritarian process. Previously, the Court did this by applying heightened standards of scrutiny to actions burdening presumptively marginalized groups. But as conservative Justices increasingly resisted extending heightened standards of scrutiny to new classifications, the liberal Justices found a new form of special protection for minorities: questioning the credibility of the record supporting laws harming marginalized groups. In equal protection law, the liberal Justices' credibility assessments came in the form of a more rigorous rational basis scrutiny.[24]

When courts assess the credibility of lawmakers' factual records, two normative questions arise. First, should courts engage in such credibility assessments? Contrary to the conventional wisdom, which calls for judicial deference to the state's factual determinations,[25] I argue that courts should do so. State actors are usually concerned with the constitutionality of the actions they adopt. To the extent prevailing doctrine demands certain record evidence to support the constitutionality of an action, sophisticated state actors are in a position to tailor the record to meet the constitutional standard. Tailoring is especially

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PUBLIC OPINION 33, 56–62 (1951) (describing how groups form and advance their interests in the political process); *see also* FRANK R. BAUMGARTNER & BETH L. LEECH, BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND IN POLITICAL SCIENCE 48–50 (1998) (describing the emergence of groups and group political activity as the central focal points of study in political science).

[23] *See* JEFFREY M. BERRY, THE INTEREST GROUP SOCIETY 12 (1984) (arguing that the marginalization of African Americans from pluralist politics in the 1960s undermined pluralist assumptions about the marketplace); BAUMGARTNER & LEECH, *supra* note 22, at 58 (describing an emerging consensus in the 1970s "that the pluralists had overlooked significant and systematic barriers to entry into the group system"); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103 (1980) (describing process defects that can arise in a pluralist model: "[T]hough no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest"); THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 57–58 (1979) (criticizing the failure of pluralism to account for the imperfect competition in the political market).

[24] *See infra* Part II.B (examining the liberal Justices' application under rational basis review of credibility-questioning review).

[25] For commentators calling for more deferential judicial review of state factual determinations, see Berger, *supra* note 8, at 502–03 (arguing that when Congress rigorously investigates an issue, its factual record should be respected); Buzbee & Schapiro, *supra* note 8, at 143–48 (criticizing hard look review for its lack of judicially manageable standards); Colker & Brudney, *supra* note 8, at 117–18 (praising Congress's information-gathering process); *Judicial Review*, *supra* note 8, at 767–68 (finding the Court's lack of deference troubling from constitutional, institutional, and prudential perspectives).

likely when the Court has clearly identified the evidence necessary to meet a particular standard. In these situations, when the record is likely to be distorted, courts should question the credibility of the record as part of their Constitution-enforcing role.

The second normative question is: Should courts make such credibility assessments based on their assessment of the underlying political process? I argue, conditionally, that they should. Here, I focus on the two theories of democratic malfunction to which the Justices have apparently subscribed: public choice theory and pluralist theory.[26] If the process leading to the adoption of a state action has malfunctioned—whether as a result of minority capture of politics or minority exclusion from politics—there is a greater likelihood that the state will distort the record. This distortion arises from a principal feature of these process malfunctions: the absence of countervailing interests capable of introducing evidence into the record that undercuts the law's constitutionality. When the political process has malfunctioned—according to either the public choice or "defective pluralist" conception of politics—the law's opponents may be too politically weak or uninformed to push legislators to include evidence that undermines the constitutionality of the law.[27] In these instances of process malfunction, it may be appropriate for courts to discount the record and engage in their own fact-finding.

Courts should not, however, rely on wholesale categorical assessments about the operation of politics, as the Justices appear to have done in *Shelby County*, *Windsor*, and similar cases. In these wholesale assessments, the conservative Justices seem to categorically presume that laws that *benefit* minorities are the product of a public choice malfunction while the liberal Justices seem to categorically presume that laws that *harm* minorities are the product of a defective pluralist malfunction. Such wholesale assessments, in which Justices view evidence skeptically in entire categories of cases, undermine judicial legitimacy. They exacerbate the counter-majoritarian dilemma inherent in judicial review by enabling unelected judges to overturn a whole category of democratically enacted laws without proper consideration of state findings of fact.

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[26] In this Article, I reserve the question of which theories of political process malfunction should be relied upon by courts, and focus only on public choice and pluralist theory, which are both well-established, viable theories within political science. The question of whether courts might rely upon other theories of process malfunction raises more difficult substantive and procedural issues, which I lack space to grapple with here but hope to address in future work.

[27] *See infra* Part III.A (arguing for the application of credibility-questioning review in certain cases).

Rather than rely on categorical presumptions of malfunction, judges should engage in case-by-case "retail-level" assessments of whether the political process leading to the adoption of a state action has malfunctioned. Courts should make these assessments by closely evaluating actual evidence presented by the parties. Such an approach would provide courts with a reasoned basis for deciding whether to question the credibility of state factual determinations, which will bolster the institutions' legitimacy when reviewing laws. Perhaps more far-reachingly, such retail-level assessments might improve the political process itself, as state actors will have an incentive to create a more inclusive lawmaking process to avoid intrusive judicial review.

Importantly, however, in the overwhelming majority of the cases, parties will not be able to prove that democratic malfunction has distorted the record. In those cases, courts should presume that the process leading to the adoption of the state action operated properly and accept the credibility of the resulting record. Such a presumption better accords with the role of courts in our constitutional democracy than the alternatives.

The Article proceeds in three parts. In Parts I and II, I advance two claims. The first is descriptive. I argue that the Justices have moved away from simply evaluating the adequacy of the evidence supporting the constitutionality of state actions and toward assessing the credibility of state findings of fact. The second claim is interpretive. I argue that the Court's shift to assessing the credibility of state findings of fact is best understood as a response to judicial concerns about democratic process malfunction. I support both claims with an analysis of how credibility assessments emerged as part of two important constitutional standards under the Equal Protection Clause: (1) the more rigorous strict scrutiny standard that conservative Justices have applied to racial classifications benefitting minorities and (2) the more rigorous rational basis review standard that the liberal Justices have applied to laws burdening groups they see as illegitimately marginalized, including the disabled, sexual minorities, hippies, felons, out-of-state residents, and other politically vulnerable groups. In Part III, I make the normative case for judicial assessment of the credibility of state findings of fact in cases in which democratic malfunction has been proven. I conclude with prescriptions for state actors and lawyers seeking to defend state findings of fact to skeptical courts.

I
Judicial Credibility Determinations in Strict Scrutiny Review

The equal protection tiers of scrutiny compose one of the most familiar frameworks in constitutional law. The seeds of the framework emerged at the end of the *Lochner* era in the early twentieth century, a period in which the Supreme Court aggressively overturned economic regulations under the Due Process and Equal Protection Clauses.[28] Critics of this jurisprudence attacked the Court for engaging in value-laden and standardless invalidations of democratically enacted laws.[29] In response, the Court created a new constitutional framework that mandated greater deference to democratic judgments in most cases and reserved closer judicial scrutiny for laws obstructing the political process or discriminating against "discrete and insular minorities."[30]

In the years that followed, the Court began to elaborate on this basic framework by developing the familiar tiers of scrutiny.[31] For most classifications, the Court applied lenient rational basis review in which challengers had the high burden of proving that the law was not reasonably related to a legitimate purpose.[32] For laws that discriminated against discrete and insular minorities or burdened fundamental rights such as the right to vote, the Court applied strict scrutiny, in

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[28] *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 221 (1991) ("The *Lochner* era, especially in its waning years, witnessed a Supreme Court run amok, striking down approximately 200 regulatory statutes on no apparent ground but the Justices' own policy preferences.").

[29] *See* Barry Friedman, *The Birth of an Academic Obsession, The History of the Countermajoritarian Difficulty*, *Part Five*, 112 Yale L.J. 153, 171 (2002) (describing the criticisms of the era "that class bias and laissez-faire economic views were causing judges to disregard the true meaning of the Constitution"); Klarman, *supra* note 28, at 219 (noting the "barrage of criticism" that the Supreme Court was subjected to at the end of the *Lochner* era for its "systematic second-guessing of legislative policy judgments . . . without clear constitutional warrant").

[30] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1270 (2007) (describing the tiers of scrutiny framework as a means "to impose discipline, or at least the appearance of discipline, on judicial decisionmaking and thus to escape the taint both of *Lochner*esque second-guessing of legislative judgments and of flaccid judicial 'balancing'"); Klarman, *supra* note 28, at 223 (describing *Carolene Products* footnote four as representing a conscious effort by Justice Stone "to fashion a theory of constitutional interpretation that would preserve judicial review while disavowing the grosser abuses of the *Lochner* era").

[31] *See* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481, 485 (2004) (describing the emergence of equal protection tiers of scrutiny in the 1970s).

[32] *See, e.g.*, Richardson v. Belcher, 404 U.S. 78, 84 (1971) ("If the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action . . . is not so arbitrary as to violate the [Equal Protection Clause].").

which the government had the burden of proving that the challenged law was necessary to fulfill a compelling purpose.[33]

These formal standards give the impression that the constitutionality of a law turns on evidence about its purpose and the government's chosen means for achieving that purpose. However, constitutional scholars note that in the early equal protection cases, the state's evidence in support of the classification was essentially irrelevant. The only thing that seemed to matter was the judicial choice about how to classify the law.[34] When the Court applied strict scrutiny, it usually struck down the law as lacking a compelling purpose.[35] But when the Court applied rational basis review, it ordinarily upheld the law as one rationally related to a legitimate purpose.[36]

For the most part, this scholarly account accurately describes early equal protection case law. But the standards of scrutiny have evolved since then. Scholars examining this evolution have largely focused on the judicial shift to more context-specific standards.[37] In recent decades, they have noted that the Court has increasingly examined the adequacy of the state's factual record supporting the law's purpose and chosen means for achieving that purpose.[38]

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[33] *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) ("[A]ny racial classification 'must be justified by a compelling governmental interest' [and] the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'" (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984); Fullilove v. Klutznick, 448 U.S. 448, 480 (1980))). In the 1970s, the Court added an intermediate level of scrutiny that applied to laws that classified on the basis of gender and legitimacy. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."). The Court has applied this scrutiny to ascertain classifications that "reflect[ed] archaic and stereotypic notions" about gender and legitimacy. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

[34] *See, e.g.*, Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787, 1787–88 (1992) ("[T]he choice between strict scrutiny and the rational relation standard often determines whether the court strikes down or upholds a law . . . .").

[35] *See infra* note 60 (citing cases in which the Court struck down laws for lacking a compelling purpose).

[36] *See infra* Part II.A (describing a judicial pattern of upholding state actions under rational basis review).

[37] *See* Goldberg, *supra* note 31, at 518–24 (describing judicial rethinking of the rigid application of tiers of scrutiny); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006) (arguing that strict scrutiny is no longer an inflexible rule, but varies depending on the context in which it is applied).

[38] *See, e.g.*, Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships*, 86 WASH. L. REV. 281, 288 (2011) (contrasting the court's historical application of deferential rational basis review in which they were "willing to hypothesize purpose or accept post-hoc assertions of purpose by government lawyers" with the recently emerged rigorous rational basis review in which courts "look[ ] to the record in the case for evidence of the actual purpose of a law").

Another shift, however, has also taken place. In the next two Parts, I show that over the past forty years, members of the Court have shifted from adequacy-checking review to credibility-questioning review of the record under both strict scrutiny and rational basis review. In whole categories of cases, Justices have begun to rigorously cross-examine and discount state findings of fact. I argue that this credibility-questioning review of the record is the result of judicial presumptions about political process malfunction. In this Part, I examine the Court's evolving strict scrutiny jurisprudence. In Part II, I shift my focus to rational basis review.

A. Adequacy-Checking Review of the Record in Early Strict Scrutiny Cases

Scholars have generally viewed the Court's early application of strict scrutiny as "strict in theory and fatal in fact."[39] While some have disputed this account,[40] no one has yet separately assessed judicial application of strict scrutiny as it applied to evaluation of the state's record in the early cases. In most cases, the Court found the government-stated purpose for the classification not to be compelling and thus did not review the state's factual record.[41] But in a small number of cases, the Court found the purpose for the classification to be compelling and reviewed the adequacy of the state findings of fact to see whether the state had shown that the means were necessary to achieve the purpose. The latter category included three early cases that scholars ordinarily do not connect to each other: *Korematsu v. United States*,[42] *Regents of the University of California v. Bakke*,[43] and *Fullilove v. Klutznick*.[44] The Justices writing the pivotal opinions in

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[39] Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[40] *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995) (O'Connor, J.) (announcing the Court's "wish to dispel the notion that strict scrutiny is 'strict in theory and fatal in fact'"); Winkler, *supra* 37, at 794 (suggesting "strict in theory and fatal in fact" is "[a] popular myth in American constitutional law"); *but see* Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049, 1054 (1979) (supporting Gunther's account of strict scrutiny as descriptive of early cases); Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny after* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 4 (2000) ("Despite its name—strict 'scrutiny'—it ordinarily amounts to a finding of invalidity, not a tool of analysis.").

[41] *See infra* note 60 (citing cases in which the Court invalidated state actions under strict scrutiny).

[42] 323 U.S. 214 (1944).

[43] 438 U.S. 265 (1978).

[44] 448 U.S. 448 (1980).

these cases treated the state as a good-faith factfinder; they never questioned the credibility of state findings of fact.

In the notorious case of *Korematsu v. United States*, the Court upheld a World War II military exclusion order that applied only to persons of Japanese descent.[45] The case marked one of the earliest instances where the Court subjected a racial classification to a variation of strict scrutiny.[46] In articulating the standard, the majority explained, "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and must be subject "to the most rigid scrutiny."[47] While the Court did not detail the precise requirements of the test, it did hold that "[p]ressing public necessity may sometimes justify the existence of such restrictions."[48] The focus in the majority opinion was on whether the military exclusion order met the standard of "pressing public necessity."

In upholding the exclusion order, the Court focused on the adequacy and not the credibility of the evidence that the military proffered to support it. The Court, in fact, was quite deferential to the military's findings of fact. The majority explained, "we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained."[49] The majority continued, "[w]e cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons . . . constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it."[50] On the basis of this and similar evidence,[51] the majority concluded that Korematsu was not excluded because of racial antagonism.[52] Instead, pointing to the institutional

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[45] *Korematsu*, 323 U.S. at 219.

[46] Prior to *Korematsu*, the Court had applied another variation of strict scrutiny to invalidate a law requiring the sterilization of habitual criminals. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) ("[S]trict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.").

[47] *Korematsu*, 323 U.S. at 216.

[48] *Id.*

[49] *Id.* at 218 (quoting Hirabayashi v. United States, 320 U.S. 81, 99 (1943)).

[50] *Id.* (quoting *Hirabayashi*, 320 U.S. at 99).

[51] For example, the *Korematsu* majority also cited the military's finding that persons of Japanese ancestry maintained loyalty to Japan because "[a]pproximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan." *Id*. at 219.

[52] *See id.* at 223 ("Korematsu was not excluded from the Military Area because of hostility to him or his race.").

context of the military acting in a time of war, the majority explained that the military exclusions were motivated by the necessities of war and the fear of the "properly constituted military authorities" of "an invasion of our West Coast."[53]

Thus, although the *Korematsu* court applied strict scrutiny, it also uncritically accepted the military's factual determinations supporting the exclusion order. Satisfaction of the strict scrutiny standard appeared to turn exclusively on whether there was sufficient evidence in the record to support the decision.[54] The dissenters, in contrast, focused not merely on the adequacy of the evidence in support of the racial classification, but also on whether the record should be believed.

Justice Murphy began his dissent by questioning the military's assumption about the dangerous tendency of all persons of Japanese descent. He found it "difficult to believe that reason, logic[,] or experience could be marshalled in support of such an assumption."[55] He concluded that the military's findings were based "mainly upon questionable racial and sociological grounds not ordinarily within the

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[53] *Id.* The Court explained, "[t]o cast this case into outlines of racial prejudice, without reference to the real military dangers [that] were presented, merely confuses the issue." *Id.*

[54] Many scholars have suggested that the *Korematsu* Court did not really apply strict scrutiny. *See, e.g.*, Fallon, *supra* note 30, at 1277 (arguing the Court in *Korematsu* applied a lesser form of scrutiny than strict scrutiny); Klarman, *supra* note 28, at 232 (contending that in *Korematsu*, "notwithstanding the grandiose rhetoric, the Court actually applied its most deferential brand of rationality review"); Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 382 (2006) (describing the analysis in *Korematsu* as "a form of rational basis review that was exceedingly deferential to the military's claims"). It cannot be overlooked, however, that *Korematsu* was the first and only case until the affirmative action case of *Regents of the University of California v. Bakke*, decided more than thirty years later, in which the Court found a purpose supporting a racial classification to be compelling. One can certainly criticize the ad hoc and standardless manner in which the Court found "pressing public necessity" to be a compelling purpose, but that criticism would be applicable to all cases applying strict scrutiny after *Korematsu* in which the Court found some purposes compelling and others not. *See, e.g.*, Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 308 (1997) (describing the view of commentators and a number of Justices that "the Court has never identified any guiding principles upon which it could base judgments about the validity of democratically-selected purposes"); Fallon *supra* note 30, at 1321 (noting the Supreme Court's "astonishingly casual approach to identifying compelling interests"); Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 937 (1988) ("[W]ith few exceptions, the Court has failed to explain the basis for finding and deferring to compelling governmental interests."). Other scholars have argued that the Court in *Korematsu* was applying strict scrutiny. *See, e.g.*, Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 140 (suggesting the Court did apply heightened scrutiny in *Korematsu*); Winkler, *supra* note 37, at 805, 812 (noting that the Court evaluated "a law under heightened review" in *Korematsu*).

[55] *Korematsu*, 323 U.S. at 235 (Murphy, J., dissenting).

realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence."[56] The military's determinations, Justice Murphy surmised, were derived from "misinformation, half-truths[,] and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation."[57]

In his separate dissent, Justice Jackson offered a striking critique of the presumption of good faith that the Court gave to the military and its findings of fact. He explained that, because the military is predisposed toward adopting measures that are successful rather than legal, "[t]here is sharp controversy as to the credibility of the [military] report" in support of the exclusion order.[58] However, because the Court had no evidence—other than the report—about whether the orders had "a reasonable basis in necessity," the majority had "no choice but to accept . . . [an] unsworn, self-serving statement, untested by any cross-examination" as satisfying the constitutional standard.[59] Close scrutiny of the exclusion order, according to the *Korematsu* dissenters, required an assessment of the credibility of the military's evidence. The dissenters thought the Court should have challenged and second-guessed the military's findings and filled in any perceived evidentiary gaps with judicial fact-finding.

Thirty-four years later, when the Court in *Regents of the University of California v. Bakke*[60] revisited the issue of how to treat record evidence in support of state action under strict scrutiny, the Justice

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[56] *Id.* at 236–37.

[57] *Id.* at 239.

[58] *Id.* at 245 (Jackson, J., dissenting).

[59] *Id.*

[60] 438 U.S. 265 (1978). The Court, in several cases between *Korematsu* and *Bakke*, reviewed classifications under strict scrutiny. In these cases, the Court either found the purposes supporting the classification not compelling or, without addressing whether the purpose was compelling, the Court determined that the means for achieving the purpose were too over- or under-inclusive. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634, 642 (1973) (holding a law prohibiting non-citizens from employment in the state civil service "applies to many positions with respect to which the State's proffered justification has little, if any, relationship[,]" while "[a]t the same time . . . [having] no application at all to positions that would seem naturally to fall within the State's asserted purpose"); Graham v. Richardson, 403 U.S. 365, 375 (1971) (finding a concern for "fiscal integrity" not to be a compelling enough purpose to support a welfare law that discriminated against non-citizens); Loving v. Virginia, 388 U.S. 1, 11 (1967) (concluding, "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies [the anti-miscegentation statute]"); McLaughlin v. Florida, 379 U.S. 184, 193–94 (1964) (finding a statute prohibiting interracial cohabitation to be unconstitutionally under-inclusive with respect to the purpose of "prevent[ing] breaches of the basic concepts of sexual decency"). In these cases, the Court did not scrutinize the credibility of the state's finding of facts supporting the constitutionality of the classification.

writing the pivotal opinion backed the *Korematsu* majority's approach. In *Bakke*, the Court addressed the constitutionality under the Equal Protection Clause of a special admissions program for disadvantaged and minority students at the University of California, Davis, School of Medicine.[61] In a splintered opinion, the Court struck down the program.[62] Justice Powell, writing alone, subjected the racial classification to strict scrutiny and invalidated the program under the Equal Protection Clause.[63] But he did so only after suggesting a compelling purpose that could support the racial classification.

The strict scrutiny that Justice Powell applied in *Bakke* was very similar to that which the *Korematsu* majority applied. As with the *Korematsu* majority's reliance on the concept of "pressing public necessity,"[64] Justice Powell announced, without guidance from any discernible standard, that creating a "diverse student body" was "clearly . . . a constitutionally permissible goal for an institution of higher education."[65] Also similarly to the *Korematsu* majority, Justice Powell pointed to factors concerning the institutional context of the challenged decision that supported giving a presumption of good faith to the university. The justice explained that "[a]cademic freedom . . . long has been viewed as a special concern of the First Amendment" and entailed "[t]he freedom of a university to make its own judgments as to education[,] [which] includes the selection of its student body."[66]

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[61] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 269–81 (1978).

[62] Four Justices voted to uphold the program under the Equal Protection Clause by applying a more deferential intermediate scrutiny. *Id*. at 356–61 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part). Four other Justices voted to invalidate the program under Title VI of the Civil Rights Act and did not reach the constitutional question. *Id.* at 408, 412–21 (Stevens, J., concurring in part and dissenting in part). While Justice Powell's reasoning did not obtain a majority and was therefore not binding on future courts, it was treated as authoritative in subsequent affirmative action cases. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 323 (2003) ("Since this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as a touchstone for constitutional analysis of race-conscious admissions policies."); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224–25 (1995) (quoting Justice Powell's defense of "the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judiical scrutiny"); Metro Broad., Inc. v. FCC, 497 U.S. 547, 568 (1990) (citing authoritatively Justice Powell's view that achieving diversity is a "constitutionally permissible goal") (quoting *Bakke*, 438 U.S. at 311–13 (opinion of Powell, J.)); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (referring to Justice Powell's opinion in *Bakke* for the proposition that "[c]lassifications based on race carry a danger of stigmatic harm").

[63] *Bakke*, 438 U.S. at 290–91, 320.

[64] *Korematsu*, 323 U.S. at 216.

[65] *Id.* at 311–12.

[66] *Id.* at 312.

Finally, Justice Powell, following the approach of the *Korematsu* majority, relied on this presumption of good faith in applying adequacy-checking review of the record. He never questioned the credibility of the medical school's assertions that reserving seats for minority group members was tailored to achieve the educational benefits of diversity. In fact, Justice Powell assumed without question that the medical school's approach was designed to "contribute to the attainment of considerable ethnic diversity in the student body."[67] Where the medical school went wrong was in its misconception of the nature of the compelling state interest in diversity. Justice Powell argued that the relevant interest must include not only ethnic diversity but also diversity along a wide spectrum of factors.[68] He pointed to Harvard's admissions process, which used race as one "plus" factor among many in an individualized review of each applicant, as a constitutionally appropriate method for pursuing the compelling purpose of diversity.[69] If any institution of higher education adopted an affirmative action plan that operated like the Harvard plan, it would be presumed to have acted in good faith and its program would apparently survive strict scrutiny.[70]

Two years later, a plurality of the Court in *Fullilove v. Klutznick* once again applied strict scrutiny to a racial classification. The plurality again presumed the credibility of state findings of fact. *Fullilove* involved a challenge to a congressional program that, subject to waiver, set aside ten percent of federal contracting funds to members of racial minority groups.[71] The plurality found remedying past discrimination to be a compelling purpose and required Congress to prove that the racial classification was necessary to achieve this purpose.

In evaluating whether Congress presented adequate evidence to meet its burden, the plurality started by extensively recounting the record evidence supporting the law. They cited the sponsor's reference to statistical disparities in government procurement and his description of the law's objective as being "to ensure that minority

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[67] *Id.* at 315.

[68] *Id.*

[69] *Id.* at 316–18.

[70] Responding to the concern that universities' use of race as one factor in admissions "is simply a subtle and more sophisticated—but no less effective—means of according racial preference than the Davis program[,]" Justice Powell explained that a court should "not assume that a university, professing to employ a facially nondiscriminatory admissions policy would operate it as a cover for the functional equivalent of a quota system." *Id.* at 318. Instead, "good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases." *Id.* at 318–19.

[71] 448 U.S. 448, 453 (1980).

firms would obtain a fair opportunity to share in the benefits" of the government procurement program.[72] The plurality also described the statements of other supporters of the law that "echoed the sponsor's concern that a number of factors, difficult to isolate or quantify, seemed to impair access by minority businesses to public contracting opportunities."[73] The Justices uncritically accepted the legislators' testimony that the disparities in minority contracting were the result of "the longstanding existence and maintenance of barriers impairing access by minority enterprises to public contracting opportunities" and not from any lack "of capable and qualified minority enterprises who are ready and willing to work."[74] Finally, the plurality cited a 1975 Committee Report of the House Committee on Small Business that provided a statistical accounting of the disparities in minority contracting. The report found that the disparities were "not the result of random chance."[75] Instead, the report concluded that "[t]he presumption must be made that past discriminatory systems have resulted in present economic inequities."[76]

Although the plurality made clear that it was required to strictly scrutinize the congressional set-aside program, this close scrutiny did not involve questioning or second-guessing the evidence in support of the law. The plurality noted that "Congress . . . may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." Given this lesser standard, the plurality determined that the evidence in the congressional record adequately supported the program's objective of remedying the effects of past discrimination.[77]

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[72] *Id.* at 459.

[73] *Id.* at 461. The plurality pointed to Representative John Conyers of Michigan, who "spoke of the frustration of the existing situation, in which, due to the intricacies of the bidding process and through no fault of their own, minority contractors and businessmen were unable to gain access to government contracting opportunities." It also quoted Representative Mario Biaggi of New York, who explained that, without the set-aside, the Public Works Employment Act "'may be potentially inequitable to minority businesses and workers' in that it would perpetuate the historic practices that have precluded minority businesses from effective participation in public contracting opportunities." *Id.* Lastly, the plurality cited Senator Edward Brooke of Massachusetts, the sponsor of the amendment in the Senate, who "reiterated and summarized the various expressions on the House side that the amendment was necessary to ensure that minority businesses were not deprived of access to the government contracting opportunities generated by the public works program." *Id.* at 462.

[74] *Id.* at 463 (quoting a statement by Senator Edward Brooke) (internal quotations omitted).

[75] *Id.* at 465 (citing H.R. Rep. No. 94-468, at 1–2 (1975)).

[76] *Id.*

[77] *Id.* at 478. As if to preempt any confusion about the level of scrutiny that the plurality applied, Justice Powell, who joined Chief Justice Burger's plurality opinion, wrote

As in *Korematsu* and Powell's *Bakke* opinion, the *Fullilove* plurality justified the presumption that the state's findings of fact were made in good faith by referencing the institutional context. The plurality explained, "we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment."[78] Congress's stature as a co-equal branch with constitutional enforcement authority, like the military acting during a time of war and the university exercising academic freedom in the selection of its student body, required judicial deference to its judgment and findings of fact in support of it.

The three equal protection cases of *Korematsu*, *Bakke*, and *Fullilove* thus reveal a less familiar side of strict scrutiny where members of the Court found certain purposes to be compelling and, for a variety of reasons related to the nature of the institutional defendant, presumed the credibility of state factual determinations supporting the racial classifications. These state institutions continued to have the burden of putting forth adequate evidence in the record to satisfy the standard, but neither the record they assembled nor the factual conclusions they drew from it were subject to judicial cross-examination or second-guessing.

Ten years after *Fullilove*, however, a new conservative majority on the Court rejected this approach to strict scrutiny. In the next section, I describe how conservative Justices began to assess the credibility of state findings of fact under strict scrutiny. I then argue that these credibility assessments appear to have arisen out of the Justices' concern with a specific type of political process malfunction.

B. The Emergence of Credibility-Questioning Strict Scrutiny

The reasoning in *Bakke* and *Fullilove* provided a blueprint for future state actors seeking to adopt racial classifications that would survive constitutional scrutiny. Many universities employing affirmative action in their admissions processes shifted toward using race as one "plus" factor among many, justifying affirmative action with evi-

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a concurrence. In it, he explained, "[r]acial classifications must be assessed under the most stringent level of review." *Id.* at 496 (Powell, J., concurring). But, like the plurality, Justice Powell merely assessed the adequacy of the evidence in the record. *See id.* at 502–06 (examining the "total contemporary record of congressional action" designed to respond to racial discrimination against minority businesses).

[78] *Id.* at 472 (opinion of Burger, C.J.).

dence showing the educational benefits of diversity.[79] Lawmakers adopting racial set-asides in contracting relied on evidence similar to that found adequate in *Fullilove* to prove the necessity of these programs for remedying past discrimination.[80] These state actors, however, did not anticipate the emergence of credibility-questioning review of the record.

City of Richmond v. Croson marked the first occasion in which a majority of the Court assessed the credibility of state findings of fact as part of strict scrutiny review. In the case, the Court reviewed a minority set-aside program for contracting that the city of Richmond, Virginia adopted three years after *Fullilove*.[81] Like the congressional program, the city set aside a percentage of funds for minority business enterprises and included a waiver provision.[82] Also like Congress, the city justified the program as "remedial" and said it was adopted "for the purpose of promoting wider participation by minority business enterprises in the construction of public projects."[83] As evidence of past discrimination, the city relied on racial disparities in contracting in Richmond,[84] the congressional reports documenting past racial discrimination in contracting,[85] the absence of minority business membership in various contractors' associations,[86] and the testimony of the law's legislative proponents.[87]

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[79] *See generally* ARTHUR L. COLEMAN & SCOTT R. PALMER, THE COLLEGE BD., ADMISSIONS AND DIVERSITY AFTER MICHIGAN: THE NEXT GENERATION OF LEGAL AND POLICY ISSUES (2006) (providing guidance for college admissions officials on how to shape their affirmative admissions programs in light of Supreme Court rulings).

[80] *See* Brief for the Respondents in Opposition at 11–20, Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (No. 93-1841) (comparing the congressional set-aside program challenged by Adarand Constructors with the set-aside program reviewed in *Fullilove* and arguing that it should also be upheld); Brief of Appellant City of Richmond at 7–9, 19–47, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (No. 87-998) (describing the features of the city of Richmond's set-aside program and justifying it under the strict scrutiny standard applied in *Fullilove*).

[81] *Croson*, 488 U.S. at 477.

[82] *Id.* at 477–78.

[83] *Id.* (citing Minority Business Utilization Plan, Ordinance No. 83-69-59, codified in Richmond, Va. City Code § 12-156(a) (1985)).

[84] According to a study of racial disparity in contracting cited by the Court, "while the general population of Richmond was 50% black, only 0.67% of the city's prime construction contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983." *Id.* at 479–80. The percentage of funds that Richmond set aside (30%) was higher than the percentage that Congress set aside (10%), but this was in response to the demographic differences between Richmond (approximately 50% black) and the rest of the Nation (15–18% minority). *See id.* at 551 (Marshall, J., dissenting).

[85] *Id.* at 531–34 (Marshall, J., dissenting).

[86] *See id.* at 480 (opinion of O'Connor, J.) (noting that the contractors' associations opposing the ordinance "had virtually no minority businesses within their membership").

[87] For example, in testimony similar to that of the Representatives and Senators supporting the congressional set-aside program, Richmond Councilperson Marsh asserted,

Despite the similarities between the city and congressional set-aside programs—and the evidence used to justify them—a conservative majority of the Court struck down Richmond's program under strict scrutiny.[88] While the justices agreed that remedying demonstrated past discrimination was a compelling purpose,[89] the *Croson* majority, unlike the *Fullilove* plurality, did not uncritically accept the evidence that the city council put forth in support of the program. Instead, the *Croson* majority subjected the city's evidence to rigorous cross-examination.[90]

Five differences between the *Croson* majority's and the *Fullilove* plurality's treatments of the record show the judicial shift from adequacy-checking to credibility-questioning review of the record. First, the majority in *Croson* overruled the District Court's decision to "accord[ ] great weight" to the city's description of the purpose of the set-aside program as remedial.[91] Justice O'Connor, writing for the *Croson* majority, asserted, "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight."[92] In rejecting the state's articulation of purposes, the *Croson* majority implicitly repudiated the standard of deference that members of the Court had given to state assertions of purpose in *Korematsu*, *Bakke*, and *Fullilove*.

Second, the *Croson* majority discounted the testimony of the law's proponents. This type of testimony, which was considered highly probative in the *Fullilove* plurality's strict scrutiny analysis, was deemed "highly conclusionary" in the *Croson* majority's strict scrutiny

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> I have been practicing law in this community since 1961, and I am familiar with the practices in the construction industry in this area, in the State, and around the nation. And I can say without equivocation that the general conduct of the construction industry in this area, and the State, and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread.

Id. at 480 (citing Brief for Appellant at 24, *Croson*, 488 U.S. 469 (No. 87-998)).

[88] Only Justice White was part of both the *Fullilove* plurality and the *Croson* majority. The other two members of the *Fullilove* plurality, Justices Burger and Powell, had retired by the time the Court decided *Croson*. In addition to Justice White, the *Croson* majority included Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy, who joined the Court after *Fullilove*.

[89] *Id.* at 492.

[90] Justice O'Connor, writing for a plurality of conservative Justices, suggested that the city did not offer adequate evidence in support of the law. She argued that "[n]one of these 'findings,' singly or together, provide[d] the city of Richmond with a strong basis in evidence for its conclusion that remedial action was necessary." *Id.* at 500 (internal quotations omitted). However, it is readily apparent from the reasoning in the opinion that Justice O'Connor's assessment of the credibility of the city council's findings drove the determination about the adequacy of the evidence.

[91] *Id.*

[92] *Id.*

analysis.[93] In discounting the testimony, the conservative Justices made clear that they would not assume the credibility of the state's testimonial evidence.[94]

Third, the *Croson* majority second-guessed the statistical findings supporting an inference of the city's past discrimination in contracting, which had gone unchallenged in *Fullilove*. The conservative Justices determined that the city council's dependence on the statistical difference between the percentage of the city's minority population and the percentage of contracts awarded to minority business enterprises was "misplaced."[95] According to the *Croson* majority, the city should have determined the number of minority business enterprises in the relevant market that were "qualified to undertake prime or subcontracting work in public construction projects" and compared that to the number of contracts actually given.[96] Fourth, the *Croson* majority discounted the city council's evidence of the extremely low participation of minority business enterprises in local contractors' associations. Rather than accept the state's linking of low participation rates with the city's past discrimination in contracting, the Justices asserted that there were "numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices."[97] Finally, the *Croson* majority determined that the congressional report of nationwide discrimination in contracting that the *Fullilove* plurality had relied upon had limited value for proving the existence of discrimination in Richmond.[98]

Once the conservative majority in *Croson* had found the city's findings of fact wanting, it discounted and ignored other evidence that supported the classification's constitutionality. The majority ignored testimony of city officials describing the "exclusionary history of the local construction industry."[99] It failed to acknowledge evidence that "confirmed that Richmond's construction industry did not deviate from th[e] pernicious national pattern" of discrimination in con-

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[93] *Id.* Justice O'Connor concluded, "It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination . . . ." *Id.* at 499.

[94] Justice O'Connor explained for the majority that there would not be a "presumption of regulatory and deferential review by the judiciary" for such evidence. *Id.* at 500. The racial classifications would not be upheld on the basis of "a generalized assertion as to the classification's relevance to its goals" and that the "governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists." *Id.* at 500–01.

[95] *Id.* at 501.

[96] *Id.* at 501–02.

[97] *Id.* at 503.

[98] *Id.* at 504.

[99] *Id.* at 534–35 (Marshall, J., dissenting).

tracting found in the congressional report.[100] And it gave no consideration to the district court's finding that "not a single person who testified before the city council denied that discrimination in Richmond's construction industry had been widespread."[101]

Thus, in the *Croson* majority opinion we see credibility assessments of state findings of fact emerge as a component of the equal protection strict scrutiny analysis.[102] The most obvious explanation for the conservative Justices' abandonment of *Croson*'s presumption of good faith is the absence of institutional or contextual factors justifying deference to state findings of fact. The city council was not the military acting in a time of war, or a university exercising its constitutionally protected academic freedom, or even Congress exercising its authority to enforce the Constitution. The city council was simply employing its general police power to increase the opportunities for racial minorities in contracting.[103] Despite this explanation's neat fit with precedent, only Justice O'Connor, writing for two other Justices, relied on it.[104]

However, a majority did support Justice O'Connor's description of strict scrutiny as designed to "'smoke out' illegitimate uses of race."[105] The *Croson* majority explained that otherwise "there is simply no way of determining what classifications are 'benign' or

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[100] *Id.* at 540. Justice Marshall also argued that the huge statistical disparity in public construction expenditures given to minority businesses, "despite the city's racially mixed population, strongly suggests that construction contracting in the area was rife with 'present economic inequities.'" *Id.*

[101] *Id.* at 534–35.

[102] Justice Thurgood Marshall's dissent revealed just how stark of a departure the majority's cross-examination of the city council's evidence was from prior judicial treatment of the record under strict scrutiny. He found "[t]he majority's perfunctory dismissal of the testimony of Richmond's appointed and elected leaders" to be "deeply disturbing." *Id.* at 543 (Marshall, J., dissenting). He suggested "the majority's trivialization of the testimony of Richmond's leaders . . . does violence to the very principles of comity within our federal system which this Court has long championed." *Id.* at 543–44.

[103] An institutional and contextual case could be built for granting the city council a presumption of good faith. Principles of federalism favor federal courts deferring to local government actors with expert knowledge as presumptively good faith finders of fact. As Justice Marshall, dissenting in *Croson*, explained, "[l]ocal officials, by virtue of their proximity to, and their expertise with, local affairs, are exceptionally well qualified to make determinations of public good 'within their respective spheres of authority.'" *Croson*, 488 U.S. at 544 (Marshall, J., dissenting) (quoting Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 244 (1984)).

[104] Justice O'Connor explained that the deference given to Congress in *Fullilove* was not applicable in *Croson* because "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment . . . [which] include[s] the power to define situations which Congress determines threatens principles of equality and to adopt prophylactic rules to deal with those situations." *Id.* at 490 (O'Connor, J., plurality opinion) (emphasis omitted).

[105] *Id.* at 493.

'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[106] Apparently, assessing the adequacy of the evidence under strict scrutiny was not sufficient to "smoke out" illegitimate uses of race. Instead, discerning such motivations required an assessment of the credibility of the evidence as well.

Richmond v. Croson was only the beginning of the conservative Justices' skeptical treatment of the record in equal protection cases. After *Croson*, the conservative Justices divided into two camps. On the one hand, to the more conservative Justices, institutional contextual factors underlying the decision did not seem to matter. They argued that the Court should apply strict scrutiny in the form of credibility-questioning review to all racial classifications benefitting minorities. On the other hand, Justice O'Connor continued to rely on institutional and contextual factors in determining whether adequacy-checking or credibility-questioning strict scrutiny should apply. This division was reflected in a series of cases that followed *Croson*.

A year after *Croson*, the Court decided *Metro Broadcasting, Inc. v. Federal Communications Commission*.[107] In that case, the Court addressed the constitutionality of the FCC's race-conscious policies for awarding broadcast licenses.[108] A liberal majority of the Court applied intermediate scrutiny and upheld the policy as substantially related to the important government interest in broadcast diversity.[109] Moreover, this liberal majority uncritically accepted the findings of the FCC and Congress.[110]

To support their return to adequacy-checking review of the record, the liberal Justices looked again to the institutional context of the decision. The Court explained, "[i]t is of overriding significance . . . that the FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress."[111] Then, quoting *Fullilove*, the Court held that when a program

> employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress, we are 'bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to . . .

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[106] *Id.*

[107] 497 U.S. 547 (1990).

[108] *Id.* at 552.

[109] *Id.* at 564–66.

[110] The Justices recounted without challenge the full extent of the FCC and congressional deliberations that led to the adoption of the race-conscious policies and the evidence that supported the action's constitutionality. *See id.* at 566–600 (reviewing FCC, Office of Telecommunications Policy and congressional legislative history).

[111] *Id.* at 563.

> enforce, by appropriate legislation' the equal protection guarantees of the Fourteenth Amendment.[112]

Four conservative Justices who were in the majority in *Croson* dissented and made clear their view that the majority did not properly scrutinize the law and the record underlying it. Justice O'Connor writing for the dissenters explained that the racial classification should be subject to a "searching judicial inquiry into [its] justification" to ensure that the enacting officials were not "in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[113] The dissenters proceeded to question the credibility of the record, challenging and second-guessing certain findings of fact while discounting other findings on which the liberal majority had relied.[114]

Justice O'Connor justified the dissent's credibility-questioning review of the record by distinguishing between the institutional context of the FCC decision to apply the race-conscious policy and the congressional decision reviewed in *Fullilove* to adopt a race-conscious law. The Justice explained that the more deferential adequacy-checking review of the record in *Fullilove* showed proper respect for Congress as a co-equal branch of government. But the FCC, as an agency of the political branches, was not entitled to the same deference.

Five years after *Metro Broadcasting*, a majority of the Court for the first time strongly suggested that credibility-questioning review was applicable to a congressional racial classification that benefitted historically subordinated minorities. In *Adarand Constructors, Inc. v. Peña*, the Court reviewed a congressional set-aside program similar to the one upheld in *Fullilove*.[115] A conservative majority rejected the adequacy-checking review of the record applied by the lower court and remanded the case.[116] While the majority in *Adarand* remanded the case, and so did not actually review the record, it did explain that racial classifications should be subject to the same scrutiny that the Court applied in *Croson*. The Court, notably, did not even mention the co-equal status of Congress that, in *Fullilove*, justified a presumption of good faith to its findings of fact.[117] Instead, the majority again

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[112] *Id.* (quoting Fullilove v. Klutznick, 448 U.S. 448, 472 (1980)).

[113] *Id.* at 609 (O'Connor, J., dissenting) (internal quotation marks omitted).

[114] *Id.* at 621–29.

[115] 515 U.S. 200, 204 (1995).

[116] *Id.* at 205.

[117] *Id.* at 219–25.

emphasized its concern that "simple racial politics" may have driven the decision to adopt the racial classification.[118]

Importantly, however, Justice O'Connor revealed her reticence about engaging in credibility-questioning review of congressional actions. She wrote a concurrence to her own majority opinion emphasizing that strict scrutiny should not be understood to be strict in theory and fatal in fact.[119] By making this point, the Justice left the door open for the continued application of adequacy-checking review in some contexts.

Eight years later, for institutional and contextual reasons, Justice O'Connor joined the four liberal members of the Court in applying adequacy-checking review of the record in support of a racial classification benefitting a minority. In *Grutter v. Bollinger*, the Court upheld the University of Michigan Law School's use of race in its admissions process.[120] The *Grutter* majority applied a presumption of credibility to the law school's factual determinations supporting the racial classification. Justice O'Connor, writing for the majority, explained, "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."[121] From this starting point, the *Grutter* majority proceeded to engage in adequacy-checking review, uncritically examining the evidence the Law School had gathered in support of the constitutionality of the affirmative action program. This included the law school's description of the educational benefits of diversity, as well as evidence that the admission of a critical mass of minority students was necessary to achieve these benefits.[122]

Notably, Justice O'Connor was the only one of the five conservative Justices composing the majority in *Adarand* who agreed that the more deferential form of strict scrutiny applied in *Grutter*. The four other conservative Justices dissented, contending that the deference given to the law school was "inconsistent with the very concept of 'strict scrutiny'" and rejecting any suggestion that a presumption of credibility should be given to the law school's findings of fact.[123] Instead, the Justices skeptically reviewed the university's justifications

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118 *Id.* at 226 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (O'Connor, J., plurality opinion) (internal quotation marks omitted)).

119 *Id.* at 237 (O'Connor J., concurring) (announcing the Court's "wish to dispel the notion that strict scrutiny is 'strict in theory and fatal in fact'") (quoting *Fullilove*, 488 U.S. at 519 (Marshall, J., concurring)).

120 539 U.S. 306 (2003).

121 *Grutter*, 539 U.S. at 328.

122 *Id.* at 329–43.

123 *Id.* at 350 (Thomas, J., concurring in part and dissenting in part); *see also id.* at 380 (Rehnquist, C.J., dissenting) ("Although the court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.").

and supporting evidence. For example, Chief Justice Rehnquist, writing for the four dissenters, asserted that he did "not believe . . . that the [Law School's] means are narrowly tailored to the interest it asserts."[124] He argued that the notion of a "critical mass" was just a "veil" designed to hide the university's "naked effort to achieve [the illegitimate goal of] racial balancing."[125] Justice Scalia, in a separate dissent, openly doubted the university's credibility, arguing the goal of achieving a diverse student body was "a sham to cover a scheme of racially proportionate admissions."[126] Justice Thomas also second-guessed the Michigan law school's evidence supporting the educational benefits of diversity, offering evidence of his own that contradicted the law school's findings.[127]

The *Grutter* dissents proved to be a harbinger of things to come. Once Justice O'Connor retired from the Court, a conservative bloc, now in the majority, continued questioning the credibility of records supporting racial classifications ostensibly benefitting minorities, regardless of the institutional context. In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court struck down two school districts' uses of race in school assignment programs.[128] The conservative plurality not only rejected integration and diversity as compelling purposes for the plans, they also questioned the credibility of the districts' evidence supporting their use of race, and did not presume any good faith or defer to any of the districts' educational judgments.[129] Finally, in *Fisher v. University of Texas*, the Court admonished the Fifth Circuit Court of Appeals for presuming the university's decision to use race as a factor in admissions decisions "was made in good faith."[130] Vacating the Fifth Circuit's opinion, the majority criticized the appellate court's refusal to "second-guess the merits" of the university's decision to use race as a factor in admissions because doing so was a task it was "ill-equipped to perform."[131] Writing for the majority, Justice Kennedy found unavailing the Fifth Circuit's view of its role as "ensur[ing] that [the University's] decision

124 *Id.* at 379 (Rehnquist, C.J., dissenting).

125 *Id.* To support this argument, Chief Justice Rehnquist cross-examined the admissions statistics and found that the pattern of admissions did not accord with the university's critical mass objectives for all racial groups. *Id.* at 381.

126 *Id.* at 347 (Scalia, J., concurring in part and dissenting in part).

127 *See id.* at 354–64 (Thomas, J., concurring in part and dissenting in part) (closely scrutinizing the credibility of the stated justifications of the affirmative action program).

128 551 U.S. 701, 710–11 (2007).

129 *Id.* at 726–32 (finding after close scrutiny of state findings of fact that racial balancing and not racial diversity was the real motivation for the school district integration plans).

130 133 S. Ct. 2411, 2420 (2013) (quoting Fisher v. Univ. of Tex., 631 F.3d 213, 236 (5th Cir. 2011)).

131 *Id.* (quoting *Fisher*, 631 F.3d at 231).

to adopt a race-conscious admissions policy followed from [a process of] good faith consideration."[132] Justice Kennedy rejected this form of scrutiny, explaining, "[s]trict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice."[133] In other words, strict scrutiny requires more than adequacy-checking review of the record. It also requires a skeptical review of the credibility of the university's factual determinations.

C. Understanding Credibility-Questioning Strict Scrutiny

What accounts for the conservative Justices' choice to question the credibility of the record in these racial classification cases? Their decision to assess the credibility of the record did not turn on the institutional context of the decision. With the exception of Justice O'Connor, the conservative Justices rejected the prior presumption of good faith that the *Metro Broadcasting* and *Adarand* courts had given to the findings of fact of Congress as a co-equal branch of government, and to the university exercising academic freedom in *Grutter* and *Fisher*. The conservative Justices apparently consider these institutional contextual factors irrelevant to the application of strict scrutiny.

Perhaps the conservatives' decision turned on their adherence to a colorblind interpretation of the Constitution—an interpretation that tolerates racial classifications for only the narrowest of reasons.[134] The conservative Justices articulated a colorblind vision of the Constitution in several of the opinions. For example, in *Croson* and *Adarand*, the conservative majority opinion quoted Justice Powell's statement in *Bakke* that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[135] Similarly, Justice Thomas in dissent in *Grutter* quoted Justice John Marshall Harlan's dissent in *Plessy v. Ferguson* that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."[136] Chief Justice Roberts in *Par-*

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[132] *Id.* (quoting *Fisher*, 631 F.3d at 231).

[133] *Id.* at 2421.

[134] *See* Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383, 475–93 (2000) (describing the conservative judicial development of a colorblind interpretation of the Constitution).

[135] Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 218 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989).

[136] Grutter v. Bollinger, 539 U.S. 306, 378 (2003) (Thomas, J., dissenting) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)) (internal quotation marks omitted).

ents Involved suggested that the most faithful interpretation of *Brown v. Board of Education* is that "[t]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race."[137]

However, colorblindness cannot entirely explain the conservative Justices' approach to record review. First, the colorblindness explanation does not answer why the conservative Justices would presume that state actors are capable of systematically distorting the record when they adopt racial classifications. This is especially puzzling once we consider that the racial classifications in question favored the minority at the expense of the majority. Conventional wisdom suggests that a majority burdened by the law would be able to muster sufficient opposition to prevent any distortion of the record in favor of the law.

Second, the conservative Justices have been inconsistent in their skeptical treatment of records justifying explicit racial classifications. The most committed adherents to colorblindness, Justices Thomas and Scalia, did not question the credibility of state factual determinations supporting racial classifications in every case. In between *Grutter* and *Parents Involved*, the two conservative Justices dissented from the decision in *Johnson v. California*, invalidating a state prison authority's policy of racially segregating prisoners.[138] *Johnson* was notable because it was the first and only case since 1984 in which the Court reviewed a facially discriminatory classification that allegedly harmed racial minorities.[139] Contrary to their approach in the affirmative action cases, the conservative Justices argued that a more deferential standard of review (borrowed from the Court's Eighth Amendment jurisprudence) should have applied to the prison administrators' race-based decisions.[140] Applying this more deferential form of review, Justices Scalia and Thomas engaged in adequacy-checking review, uncritically accepting the prison authority's justification for the segregation policy and its supporting evidence as sufficient to support the classification.[141] The two conservative Justices' asymmetrical application of rigorous strict scrutiny in *Grutter* and *Parents Involved*,

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137 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747 (2007) (internal quotation marks omitted).

138 543 U.S. 499, 524 (Thomas, J., dissenting) (2005).

139 *See* Palmore v. Sidoti, 466 U.S. 429, 434 (1984) (overturning a judicial custody decision premised on considerations of race).

140 *Johnson*, 543 U.S. at 541–44 (Thomas, J., dissenting) (arguing that a more deferential form of scrutiny given to decisions by prison administrators under the Eighth Amendment should trump the strict scrutiny ordinarily applied to racial classifications).

141 *See id.* at 541–44 (criticizing the majority's lack of deference to the prison administrators' fact-based judgments).

on the one hand, and the more deferential scrutiny in *Johnson*, on the other, requires explanation beyond the colorblindness principle.

Finally, if the conservative Justices' decisions to test the credibility of the state's findings of fact were, in fact, driven by their concerns about illegitimate uses of race, then one might think the Justices would treat the record skeptically in cases reviewing race-neutral state actions that disparately harm minorities. But in these cases, rather than questioning the credibility of the record underlying these laws, the conservative Justices have placed an increasingly onerous burden on challengers to these laws to prove that the lawmakers were motivated by race.[142] In doing so, the conservative Justices have essentially presumed the good faith of state actors.

One response is that these laws do not involve the explicit use of race. But if all it takes to avoid skeptical record review is to use proxies for race, then colorblindness is an extraordinarily thin principle of constitutional law. The conservative Justices' unwillingness to sign on to Justice Kennedy's concurrence in *Parents Involved*, which expressed support for using proxies for race to achieve school integration, suggests that they have a more robust conception of colorblindness in which both race and proxies for race are problematic.[143] If that is the case, then why haven't the Justices sought to smoke out illegitimate uses of race through closer scrutiny of the record supporting facially neutral state actions that burden racial minorities? This deferential treatment of race-neutral laws that in practice burden minori-

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[142] *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 279–306 (2005) (Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting) (arguing for the imposition of an onerous intent requirement on challenges to prosecutor's racially disparate use of peremptory strikes in jury selection, and criticizing the majority's dismissal of the State's justification for the strikes); Purkett v. Elem, 514 U.S. 765, 766–69 (1995) (presuming good-faith, non-racial motivations in the decision to strike certain racial minority jurors); Hernandez v. New York, 500 U.S. 352, 360 (1991) (explaining in a peremptory strike case that "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral"); McCleskey v. Kemp, 481 U.S. 279, 298–99 (1987) (rejecting a challenge to the Georgia capital punishment system that imposed documented disparities on African Americans, explaining that "[a]s legislatures necessarily have wide discretion in the choice of criminal laws and penalties, and as there were legitimate reasons for the Georgia Legislature to adopt and maintain capital punishment, we will not infer a discriminatory purpose on the part of the State of Georgia") (citation omitted); Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose' . . . implies that the decisionmaker . . . reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

[143] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring) (suggesting non-race-conscious measures that the school districts can pursue that would be permissible such as "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race").

ties, and of the record justifying them, seems contrary to a robust conception of colorblindness.

Colorblindness cannot fully account for the conservative Justices' decisions to engage in credibility-questioning review, but another recurring concern in the conservative Justices' opinions offers a more complete explanation: that of "simple racial politics." The phrase appears in the *Croson* majority opinion where Justice O'Connor explained that the function of strict scrutiny is to "'smoke out' illegitimate uses of race" from laws "motivated by illegitimate notions of racial inferiority or simple racial politics."[144] In offering this account, Justice O'Connor explicitly drew from Justice Stevens's earlier use of the phrase in which he defined "simple racial politics" as a form of politics in which "ethnic, religious, or racial group[s] with . . . political strength [are able] to negotiate 'a piece of the action' for [their] members."[145] In *Croson*, this concern with simple racial politics focused on African American control of a majority of the seats on the Richmond City Council. Justice O'Connor appeared to be concerned that the black political majority might be acting to disadvantage the white minority on the basis of "unwarranted assumptions or incomplete facts."[146]

In concurrence, Justice Scalia was even more explicit about his concern with "simple racial politics." He compared the African American providers and beneficiaries of the set-aside program to the oppressive majority factions that James Madison predicted would tyrannize the people if left unchecked.[147] Justice Scalia then juxtaposed the dominant African American faction with the vulnerable white members of the public that stood as victims of the classification. He reminded us "it is important not to lose sight of the fact that even 'benign' racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race."[148]

The conservative Justices' concern with "simple racial politics" thus emerged in the context of a majority-minority body adopting a law advantaging minorities and seemed to be directed at a concern about a majority faction oppressing a minority. In later cases, however, fear of "simple racial politics" appeared to evolve into a concern

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144 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493.

145 *Id.* at 510–11 (opinion of O'Connor, J.) (quoting *Fullilove*, 448 U.S. at 539 (Stevens, J., dissenting)).

146 *Id.* at 495–96 (majority opinion).

147 *Id.* at 523 (Scalia, J., concurring) (citing THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961)).

148 *Id.* at 527.

about minority capture of majority institutions. In *Metro Broadcasting*, the liberal majority suggested that the fact that a majority-white FCC and Congress adopted the minority preferences ameliorated concerns that "simple racial politics" motivated the decision. As the *Metro Broadcasting* majority explained, "Congress as a National Legislature . . . stands above factional politics."[149] It is therefore "unlikely to be captured by minority racial or ethnic groups and used as an instrument of discrimination."[150] Despite this appeal to Madisonian logic, the conservative dissenters argued that credibility-questioning review of the record remained necessary to ensure that the racial classification was not "motivated by illegitimate notions of racial inferiority or simple racial politics."[151] For the conservatives, the concern about "simple racial politics" appeared no longer limited to a Madisonian concern about dominant majority factions oppressing minorities. It now seemed to extend to a concern about racial minority control over mostly white institutions.[152]

The conservative Justices again referenced "simple racial politics" in *Adarand* and *Parents Involved*.[153] But, notably, the conservatives did not mention this concern in their decision to uphold the racial classification in *Johnson*, or in cases reviewing facially neutral state actions that burdened racial minorities.[154] The Justices treated the record very differently in these two sets of cases. They subjected or threatened to subject the records supporting the state actions to rigorous credibility assessments in *Adarand* and *Parents Involved* while deferentially checking the adequacy of state findings of fact in *Johnson* and cases challenging facially-neutral laws.[155] This asymmetric treatment of the record, which cannot be accounted for in the colorblind interpretation, can be explained if we focus on the Justices' concern about "simple racial politics" and the presumptions about the operation of politics that underlie it.[156]

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149 Metro Broad., Inc. v. FCC, 497 U.S. 547, 565–66 (1990).

150 *Id.* at 566.

151 *Id.* at 609 (O'Connor, J., dissenting).

152 *See supra* text accompanying notes 18–19 (discussing the principal components of public choice theory).

153 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 783 (2007) (Kennedy, J., concurring) (quoting *Croson,* 488 U.S. at 493); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 226 (1995) (quoting same).

154 In fact, it was the liberal Justices writing for the majority who mentioned the concern with "simple racial politics"; the conservative dissenters seemed to ignore the concern altogether. Johnson v. California, 543 U.S. 499, 506 (2005) (citation omitted).

155 *See supra* text accompanying notes 140–42 (examining Justices Scalia and Thomas's application of a deferential form of strict scrutiny in *Johnson*).

156 *See* Ross II, *supra* note 19, at 1620–24 (arguing that the shift in the conservative Justices' racial equal protection jurisprudence was driven by a concern about minority

Public choice concerns about process malfunction most plausibly account for the conservative Justices' limitation of credibility-questioning review of the record to those racial classifications that benefit minorities. Public choice theory posits that minorities, through their greater capacity to overcome collective action problems, possess an organizational advantage over the broader, more diffuse majority.[157] Organized minorities use this advantage to lobby, fund, and elect lawmakers in exchange for legislative actions benefitting themselves, often at the majority's expense. As applied to racial classifications benefitting minorities, this theory would suggest that, through their unique political organizational advantages over the majority and their capacity to influence lawmakers, racial minorities secure the passage of favorable laws at the expense of the diffuse majority. Importantly, and as further developed in Part III, this conception of politics implies that the organized minority proponents would be able to influence legislators to distort the factual record supporting the law. Opponents to the law are too diffuse, uninformed, and politically weak to prevent them from doing so. When the state adopts classifications that harm minorities, however, there is less reason to be concerned with potential distortion of the factual record. Because of their organizational advantages, the minorities harmed by the law are presumed politically capable of defending themselves against state actions and of preventing distortions of the record supporting these actions.[158]

In sum, over the last two and a half decades, the conservative Justices have incorporated a test of the credibility of the state's factual record as a new element in strict scrutiny when racial classifications benefitting minorities are at stake. This decision to test the credibility of the evidence appears driven by a conservative judicial presumption, based on public choice theory, that the political process has malfunctioned in such cases, necessitating judicial intervention.

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capture of white political institutions); Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 7 (2013) (describing the transformation of judicial review of racial classifications to a type "that cares more about protecting members of majority groups from actions of representative government that promote minority opportunities than it cares about protecting 'discrete and insular minorities' from actions of representative government that reflects 'prejudice'" (quoting U.S. v Carolene Products, 304 U.S. 144, 152 n.4 (1938)).

157 *See supra* notes 17–19 and accompanying text (describing the major tenets of public choice theory).

158 *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 723–24 (1985) ("Other things being equal, 'discreteness and insularity' will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics.").

D. Borrowing from Strict Scrutiny: Credibility-Questioning Review in Shelby County v. Holder

The conservative majority's approach to Congress's findings of fact in *Shelby County v. Holder* appears to have been driven by a presumption about political process malfunction. In *Shelby County*, the Court addressed the continued validity of the Voting Rights Act's coverage formula used to identify states and political subdivisions with a history of voting discrimination. These states and political subdivisions—covered jurisdictions—were required to obtain federal preapproval for changes to voting laws or practices.[159] A conservative majority of the Court held that current needs did not justify the burdens that the provision placed on the jurisdictions.[160] To support this holding, the majority selectively emphasized certain record evidence, second-guessed other evidence, and simply ignored other evidence.

The majority selectively emphasized evidence in the congressional record about significant progress "'in eliminating [barriers to voting] experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices.'"[161] The Justices also pointed to record evidence of registration and turnout statistics and the low number of federal objections to covered jurisdictions' voting changes.[162]

The Justices expressed doubt about the congressional finding that these improvements were a result of the deterrent effects of the VRA's pre-approval requirement. The conservative majority argued that, if they were to accept that congressional finding, Congress "would be effectively immune from scrutiny; no matter how 'clean' the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior."[163] Instead, the conservative Justices refused to credit the deterrence claim.

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[159] Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2620 (2013). The coverage formula was contained in Section 4 of the Voting Rights Act. *See* 42 U.S.C. § 1973b(b). The provision required federal preclearance requirements of Section 5 for jurisdictions that maintained a voting test or device in November 1964, 1968, or 1972, and in which less than 50% of persons of voting age voted in the 1964, 1968, or 1972 presidential elections. *Id.*

[160] *See Shelby Cnty.*, 133 S. Ct. at 2624–30 (finding that the Voting Rights Act was adopted to combat discriminatory practices that have been largely eliminated and to spur racial minority political participation that has been largely achieved).

[161] *Id.* at 2625 (quoting Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(1), 120 Stat. 577 (2006)).

[162] *See id.* at 2626.

[163] *Id.* at 2627.

The conservative Justices essentially disposed of the remainder of the 15,000 page congressional record supporting the Act in one sentence: "Regardless of how [we] look at the record, . . . no one can fairly say that it shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time."[164] Responding to the liberal dissenters' accusation that they had ignored the record, the conservative Justices in the majority replied, "we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today."[165] In the eyes of the conservative majority in *Shelby County*, the record lacked relevance; the majority believed Congress had constructed it to support a decision already made.

Shelby County, unlike the Court's previous cases addressing racial classifications, did not involve an equal protection claim. Instead, the Court in *Shelby County* held that the VRA coverage formula exceeded congressional authority under Section 2 of the Fifteenth Amendment.[166] But the conservatives' underlying concern with the statute and its process of adoption was similar. Justice Scalia, who joined the majority in *Shelby County*, offered his insights about the statute and its presumed process of adoption during oral argument. The Solicitor General argued that the scrutinized provisions of the VRA represented a proper exercise of congressional authority, as Congress made its decision based on findings of fact provided in the record. In response, Justice Scalia suggested that the record was not worth crediting because Congress's reenactment of the statute more likely represented "[a] perpetuation of [a] racial entitlement."[167] Such racial entitlements, Justice Scalia continued, are "very difficult to get out of . . . through the normal political processes."[168] The Justice did

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[164] *Id.* at 2629. In addition to failing to account for what the dissenters described as "countless examples" in the record of "flagrant racial discrimination" and "systematic evidence" of serious and widespread "intentional racial discrimination in voting," the conservative majority also failed to give any heed to evidence in the record about the continued persistence of voting measures designed to dilute minority voting strength, *id.* at 2636 (Ginsburg, J., dissenting) (quoting Shelby Cnty. v. Holder, 679 F.3d 848, 866 (D.C. Cir. 2012)).

[165] *Id.* at 2629 (majority opinion). The formula was unchanged from the prior reauthorization, but the more generous reading of the record would have been that Congress had considered the ongoing relevance of the formula and chose not to change it.

[166] *See id.* at 2631 (holding the reauthorized VRA coverage formula to be unconstitutionally overbroad when applied to current conditions).

[167] *See* Transcript of Oral Argument at 47, Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96) (arguing that decreasing resistance to VRA reauthorization did not demonstrate an increasing need for the VRA, but rather a political entanglement attributable to the perpetuation of the racial entitlement).

[168] *Id.*

not explain what made these so-called entitlements "difficult to get out of." But one interpretation that fits the conservative Justices' past jurisprudence is that Justice Scalia believed the racial minorities who stood to benefit from the law had captured the political process. It is difficult for a captured entity to reject policies benefitting the controlling minority. By extension, the record underlying such policies should also not be trusted because it was likely distorted in favor of facts supporting the policy's constitutionality.

The conservatives have not been alone in questioning the credibility of state findings of fact. In the next Part, I argue that the liberal Justices on the Court have also engaged in credibility-questioning review of the record. But the liberals' decision to engage in such credibility assessments, largely under the rational basis standard, appears to have been in response to a concern about a different form of democratic malfunction.

II
Judicial Credibility Determinations in Rational Basis Review

Over the past forty years, the more liberal Justices on the Court have increasingly engaged in credibility-questioning review of the state's record. In this Part, I describe the liberal Justices' shift from a form of rational basis review that verified only the adequacy of the record supporting a state action to one that questioned its credibility. I argue that this shift to credibility-questioning review was a result of the Justices' desire to "smoke out" illegitimate motives. However, the illegitimate motives that concern the liberal Justices are the polar opposite of those that have concerned the conservatives. The liberal Justices apply credibility-questioning review not because of the risks of minority capture, but because they are concerned with a democratic malfunction arising from minority group exclusion and marginalization from politics.

A. Adequacy-Checking Review in the Early Rational Basis Cases

Prior to the late 1960s, the Court extended heightened scrutiny only to classifications based on race or national origin. All other classifications were subject to rational basis review, which the Court usually applied in a manner that was very deferential to state actors.[169] In these cases, the challenger to the state action had the burden of showing that the classification was not rationally related to any con-

[169] *See Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1078 (1969) (describing the deferential approach to rational basis review).

ceivable legitimate government purpose.[170] This proved to be an impossible standard for most challengers to meet.[171] When the state proffered a purpose, the Court invariably considered it legitimate even if it was unwise.[172] When the state did not explain its actions, the Court was willing to imagine a conceivable legitimate purpose for the classification.[173]

The Court also consistently found that the relationship between the means and the ends of the law was rational. When the classification was under-inclusive, in that it targeted fewer people than would be necessary to satisfy the legitimate purpose, the Court gave the state actor leeway to pursue reforms "one step at a time [in order to] address[ ] itself to the phase of the problem which seems most acute to the legislative mind."[174] When the classification was over-inclusive—

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[170] *See, e.g.*, McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 809 (1969) ("Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them."); McGowan v. Maryland, 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."); N.Y. Rapid Transit Corp. v. City of New York, 303 U.S. 573, 578 (1938) ("[I]t has long been the law under the 14th Amendment that 'a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it . . . .'" (quoting Rast v. Van Deman & Lewis Co., 240 U.S. 342, 357 (1916))).

[171] *See, e.g.*, Farrell, *supra* note 38, at 288 ("Even the most egregiously unfair laws could survive" [deferential rational basis review]."); Scott H. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 3–4 (1980) ("For many years . . . the rational basis test in federal constitutional law was so toothless that its application was tantamount to declaring that the legislation was constitutional." (citation omitted)); Bennett, *supra* note 40, at 1057 (suggesting that the deferential rational basis requirement amounted "in practice [to] no requirement at all"); Gunther, *supra* note 39, at 8 (describing deferential rational basis as "minimal scrutiny in theory and virtually none in fact").

[172] *See, e.g.*, United States v. Petrillo, 332 U.S. 1, 9 (1947) ("Nor could we strike down such legislation, even if we believed that as a matter of policy it would have been wiser not to enact the legislation or to extend the prohibition over a wider or narrower area.").

[173] *See, e.g.*, Allied Stores, Inc. v. Bowers, 358 U.S. 522, 528–29 (1959) (explaining that a "state legislature need not explicitly declare its purpose" for a tax classification and then proceeding to imagine conceivable purposes for the classification); Ry. Express Agency v. New York, 336 U.S. 106, 110 (1949) (imagining conceivable purposes for a law that prohibited the placement of advertisements on all vehicles except business delivery vehicles).

[174] Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) ("The legislature may select one phase of one field and apply a remedy there, neglecting the others."). The Court, in several subsequent cases applying rational basis review, quoted this language as justification for the state's authority to adopt an under-inclusive classification. *See, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 316 (1993) (citing language from *Williamson*); Bowen v. Owens, 476 U.S. 340, 347 (1986) (same); Cleland v. Nat'l Coll. of Bus., 435 U.S. 213, 220 (1978) (same); City of New Orleans v. Dukes, 427 U.S. 297, 305 (1976) (same); Geduldig v. Aiello, 417 U.S. 484, 495 (1974) (same); Jefferson v. Hackney, 406 U.S. 535, 546 (1972) (same); Schilb v. Kuebel, 404 U.S. 357, 364 (1971) (same); *see also Developments in the Law*, *supra* note 169, at 1080 ("How far a court will go in attributing a purpose which,

in that it targeted more people than necessary to fulfill the legitimate purpose—the Court excused the state because "[a] classification having some reasonable basis does not offend [the Equal Protection Clause] merely because it is not made with mathematical nicety or because in practice it results in some inequality."[175] Neither significant under- nor over-inclusiveness evidenced to the Court an arbitrary government classification under this standard. In its early applications of rational basis review, the Court demonstrated that it was very comfortable assuming that the state gave proper consideration to "the obvious possibility of evil" that could arise from a given classification.[176] There was therefore no need to question the state's motives, even when it never articulated a purpose for the classification or when the classification was under- or over-inclusive.[177]

Goesaert v. Cleary[178] is an example of this deferential form of review applied to an under-inclusive classification. The case involved a Michigan statute prohibiting all women, except the wives and daughters of male owners of liquor establishments, from tending bar.[179] In upholding the classification, a majority of the Court simply imagined that the state could have adopted the gender classification in response to the potential moral and social problems that might arise when women bartended.[180] Even though the statute—through its exemption

though perhaps not the most probable, is at least conceivable . . . depends upon its imaginative powers and its devotion to a theory of judicial restraint.").

175 Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). The Court, in several subsequent cases, relied on this language to validate over-inclusive laws under rational basis review. *See, e.g.*, Heller v. Doe, 509 U.S. 312, 321 (1993) (citing language from *Lindsley*); City of Dallas v. Stanglin, 490 U.S. 19, 26 (1989) (same); Bowen v. Gilliard, 483 U.S. 587, 600–01 (1987) (same); Schweiker v. Wilson, 450 U.S. 221, 234 (1981) (same); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175 (1980) (same); Vance v. Bradley, 440 U.S. 93, 108 (1979) (same); *Cleland*, 435 U.S. at 221 (same); Idaho Dep't of Emp't v. Smith, 434 U.S. 100, 101 (1977) (same); Mathews v. De Castro, 429 U.S. 181, 185 (1976) (same); Weinberger v. Salfi, 422 U.S. 749, 769 (1975) (same); Jimenez v. Weinberger, 417 U.S. 628, 632 (1974) (same); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (same).

176 Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552, 563 (1947).

177 In many ways, the early rational basis standard reflected the prescriptions of the leading legal process school of thinking of the latter part of the era. *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Making of* The Legal Process, 107 HARV. L. REV. 2031, 2040–48 (1994) (describing the influence of the legal process school in the 1950s). According to the theory employed by judges in the statutory interpretation domain, to ascertain the purposes of a law, courts should assume that the legislature comprises "reasonable persons pursuing reasonable purposes reasonably." 2 HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1415 (10th ed. 1958). Beneath this assumption lies another one: The state acts in good faith, considering the interests of all individuals and groups, when it adopts a classification.

178 335 U.S. 464 (1948).

179 *Id.* at 465.

180 *Id.* at 466.

of wives and daughters of male owners of liquor stores—did not reach all the individuals necessary to satisfy this conceivable purpose, the Court explained that "the legislature need not go to the full length of prohibition if it believes that as to a defined group of females other factors are operating which either eliminate or reduce the moral and social problems otherwise calling for prohibition."[181] The Court further suggested, "Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight."[182]

The Court presumed these good faith intentions, even in the face of evidence that the male owners of these liquor establishments were almost always absent—a fact that "belie[d] the assumption that the statute was motivated by a legislative solicitude for the moral and physical well-being of women . . . ."[183] For the majority, this countervailing evidence did not matter. It was simply not the role of the Court to "cross-examine either actually or argumentatively the mind of Michigan legislators nor question their motives."[184] As long as there exists some "basis in reason" for the classification, the majority explained, "we cannot give ear to the suggestion that the real impulse behind the legislation was an unchivalrous desire of male bartenders to try to monopolize the calling."[185]

In these early cases, the Court looked to the record only to identify actual purposes for the law, or to negate conceivable purposes that the Court imagined for the law. For example, after constructing a conceivable purpose for a Sunday closing law that exempted certain businesses, the Court asserted, "[t]he record is barren of any indication that this apparently reasonable basis does not exist . . . ."[186] Under deferential rational basis review, the challenger to the classification thus had the burden of negating every conceivable purpose for the law.[187] With only one exception, the Court did not question

181 *Id.*

182 *Id.*

183 *Id.* at 468 (Rutledge, J., dissenting).

184 *Id.* at 466–67 (majority opinion).

185 *Id.* at 467.

186 McGowan v. Maryland, 366 U.S. 420, 426 (1961).

187 *See, e.g.*, Bhd. of Locomotive Eng'rs v. Chi. Rock Island & Pac. R.R., 382 U.S. 423, 437 (1966) (finding that the record does not support the argument that the classification is irrational); Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) (finding that the record does not preclude the judicially conceived legitimate purpose for the law).

whether the record provided an adequate basis for the classifications it reviewed.[188]

B. The Shift to Credibility-Questioning Rational Basis Review

This deferential form of review changed in the late 1960s, when a shifting composition of liberal Justices began applying more rigorous scrutiny to certain classifications. What scholars have termed rational basis "with bite,"or what Justice Thurgood Marshall described as "second-order" rational basis review,[189] emerged as a regular feature of liberal majority and dissenting opinions.

Two primary features stand out in this more rigorous form of rational basis review. First, conceivable purposes are insufficient to satisfy the standard. Whether the conceivable purposes were judicially imagined or constructed by the state as a post hoc rationalization for the action, they cannot serve as a substitute for evidence in the record of the actual purpose of the law. As Justice Brennan put it in his dissent from an opinion in which the majority imagined a legitimate purpose in order to uphold a gender classification, "[w]hile we have in the past exercised our imaginations to conceive of possible rational justifications for statutory classifications, we have recently declined to manufacture justifications in order to save an apparently invalid statutory classification."[190]

Second, the Justices closely scrutinized the relationship between means and ends. Applying the more rigorous form of review, the liberal Justices no longer excused statutory under-inclusiveness as part of an effort to pursue reform "one step at a time," or statutory over-inclusiveness as a product of the challenge of legislating with "mathematical nicety." Instead, any under-inclusiveness or over-inclusiveness

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[188] *See* Morey v. Doud, 354 U.S. 457, 465–69 (1957) (invalidating an Illinois law—which exempted the American Express Company from a statutory requirement that applied to every other firm in the business of selling or issuing money orders—after engaging in a more rigorous scrutiny of the State's evidence in support).

[189] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 458 (1985) (Marshall, J., concurring in judgment and dissenting in part); s*ee* Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 784 (1987) ("Because the level of scrutiny employed determined the outcome of the challenge, equal protection analysis for the Warren Court consisted primarily of choosing between strict scrutiny or rational basis review."); Gunther, *supra* note 39, at 18–19 (recognizing a rising trend of Court intervention in equal protection claims on the basis of the traditionally deferential rational basis standard).

[190] Schlesinger v. Ballard, 419 U.S. 498, 520 (1975) (Brennan, J., dissenting) (citation omitted); *see also* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 187 (1980) (Brennan, J., dissenting) ("Over the past 10 years, this Court has frequently recognized that the actual purposes of Congress, rather than the *post hoc* justifications offered by Government attorneys, must be the primary basis for analysis under the rational basis test.").

served as a basis for invalidation. For example, in *Eisenstadt v. Baird*, the Court applied rigorous rational basis review to a state prohibition on the provision of contraceptives to single women.[191] In assessing the relationship between the means—the prohibition on contraceptive sales to single persons—and the ends—deterring premarital sex—the Court concluded, on the basis of its own findings of fact, that "it is abundantly clear that the effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation to the proffered objective."[192] Even assuming that the relationship between means and ends was indeed marginal, such under-inclusiveness would have likely survived the older, deferential form of rational basis review.

The object of credibility-questioning review under rational basis differed from that of its more deferential counterpart. The Court made clear that the deferential form of review had the very limited goal of protecting against purely arbitrary classifications.[193] In contrast, the credibility-questioning review had the more ambitious goal of identifying the real motives underlying classification. Even when there was recorded evidence of the actual purpose of the law, the liberal Justices sometimes questioned the credibility of the stated purpose, often finding when they did so that the stated purpose did not represent the real motive for the law.[194] Similarly, when assessing the fit between the means of the classification and the ends, the Justices did not merely assess whether the legislature's conclusion was reasonable. Rather, they second-guessed evidence of the fit between the

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[191] 405 U.S. 438, 448 (1972) (finding a "marginal relation" to the states proferred objective insufficient to withstand constitutional scrutiny).

[192] *Id.* at 448; *see also* Plyler v. Doe, 457 U.S. 202, 228 (1982) (scrutinizing the fit between the means of denying undocumented children an education and the end of "mitigating the potentially harsh economic effects of sudden shifts in population"); Levy v. Louisiana, 391 U.S. 68, 71–72 (1968) (denying the State great latitude under rational basis review available to social and economic legislation to define the relationship between the means and the ends of a legitimacy classification).

[193] *See, e.g.*, Walters v. City of St. Louis, 347 U.S. 231, 237 (1954) ("[Equal protection] only requires . . . that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary.").

[194] *See, e.g.*, Heller v. Doe, 509 U.S. 312, 348 (1993) (Souter, J., dissenting) (questioning the motives underlying a statute classifying the mentally disabled); Mathews v. Lucas, 427 U.S. 495, 520 (1976) (Stevens, J., dissenting) (suggesting that habit and stereotypes, not administrative convenience, were the real motives for a legitimacy classification); Hurtado v. United States, 410 U.S. 578, 599 (1973) (Brennan, J., dissenting) (questioning the stated purpose for a witness compensation scheme that discriminated against those who were already incarcerated); Pettinga, *supra* note 189, at 791 (describing the Court's greater scrutiny of purpose).

means and ends.[195] For example, in *Plyler v. Doe*, in which the Court invalidated Texas's denial of a free public education to undocumented children, the liberal majority addressed the State's claim that "undocumented children [were] appropriately singled out for exclusion because of the special burdens they impose on the State's ability to provide high-quality public education."[196] The Court, applying the more rigorous means-ends test, criticized the State for failing "to offer any 'credible supporting evidence that [the] proportionately small diminution of the funds spent on each child . . . will have a grave impact on the quality of education.'"[197] While these types of assessments of the fit between means and ends often resembled judicial questioning of the wisdom of state actions, the Justices were actually trying to determine the State's true motive.[198]

The language in some of the liberal Justices' opinions clearly demonstrates this search for motivation through credibility-questioning review of the record. In a case reviewing a classification on the basis of legitimacy status, the Court explained that the law "must be considered in light of [its] motivating purpose."[199] In another case, involving a statute distinguishing between widowed and divorced spouses for purposes of Social Security benefits, Justice Marshall explained, "our task must always be to determine whether a particular rational purpose *actually* motivated the Legislature."[200] In a third case reviewing a statute classifying on the basis of mental health institutionalization, Justice Powell, joined by three liberal Justices,

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[195] *See, e.g.*, Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612, 618–23 (1985) (questioning the fit between the means and ends of a classification that discriminated against out-of-state residents); *Fritz*, 449 U.S. at 196–97 (Brennan, J., dissenting) (second-guessing whether the classification of employees, who possessed similar years of railroad employment, as eligible for pension benefits—based on whether they had a current connection with the railroad industry as of the date either of their retirement or when the Railroad Retirement Act went into effect—was rationally related to the stated purpose for the classification).

[196] 457 U.S. 202, 229 (1982).

[197] *Id.* (quoting In re Alien Children Educ. Litigation, 501 F. Supp. 544, 583 (S.D. Tex. 1980)).

[198] *See id.* at 217 ("With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest."). Rather than assessing the rationality of the relationship between means and ends, the Court engaged in a cost-benefit analysis of the classification based on its own findings of fact to determine the classification's constitutionality. *See id.* at 230 ("It is . . . clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation."). Such cost-benefit assessments are analogous to measuring the classification against an ideal.

[199] Trimble v. Gordon, 430 U.S. 762, 768 (1977).

[200] Bowen v. Owens, 476 U.S. 340, 353 (1986) (Marshall, J., dissenting).

described the importance in rational basis review of identifying the "conscious policy choice" that motivated the legislation.[201]

Why the concern with motives under the more rigorous rational basis review when there was no such concern under the more deferential form of review? Justice Marshall's statement, in a dissent to a decision to uphold a statute that imposed a special burden on the indigent, provides some insight. Disagreeing with the majority's application of deferential rational basis review, Justice Marshall reminded the Justices in the majority that "the Constitution is concerned with 'sophisticated as well as simple-minded modes of discrimination.'"[202] "Simple-minded" modes of discrimination, on the one hand, appeared to refer to arbitrariness that was the object of the more deferential rational basis review. "Sophisticated" modes of discrimination, on the other hand, seemed to refer to hidden prejudice that the more liberal Justices applying credibility-questioning review were committed to rooting out.

The liberal Justices' application of credibility-questioning review of the record encountered substantial conservative resistance, and the more liberal Justices were rarely able to secure a majority in cases applying this more rigorous form of review.[203] In the few cases in which a majority of the Court agreed to apply credibility-questioning review, the conservative Justices vigorously dissented. Most often, they cited concerns about the propriety of the Court subjecting the state to evidentiary requirements ordinarily applicable to a trial, along with judicial second-guessing of officials' motives and judgments.

For example, in a dissent from the application of credibility-questioning review to a statute classifying on the basis of legitimacy status, Justice Rehnquist criticized the majority for searching for the state's motives. He argued that the Court's analysis "require[d] a conscious second-guessing of legislative judgment in an area where this

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[201] Schweiker v. Wilson, 450 U.S. 221, 239–44 (1981) (Powell, J., dissenting).

[202] Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 467 (1988) (Marshall, J., dissenting) (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).

[203] Contrary to the deferential rational basis review, which has nearly always resulted in the Court upholding the statute, applications of rigorous rational basis review have usually led to the invalidation of the statute. *See* Miranda Oshige McGowan, *Lifting the Veil on Rigorous Rational Basis Scrutiny*, 96 MARQ. L. REV. 377, 385 (2012) ("In every case in which courts have applied rigorous rational basis scrutiny, . . . the added rigor has proved fatal to the challenged law."). The infrequency of the application of this form of review can therefore be measured according to the number of times the Court overturned statutes under rational basis review. *See* Farrell, *supra* note 8, at 357 (noting that in the last quarter of the twentieth century, the Court invalidated only ten state actions when applying rational basis review and upheld one hundred).

Court has no special expertise whatever."[204] In another case, Justice Rehnquist chastised the majority for its application of credibility-questioning review to impose what he perceived to be a requirement that the government "present evidence to justify each and every classification that [it] chooses to make."[205] Such a proposition was "far removed from traditional principles of deference to legislative judgment."[206] In a later case, Justice Thomas sought to preemptively stem the further advance of credibility-questioning review. He explained, in a quotation that he would repeat in future cases, that "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."[207]

Despite this resistance, the liberal Justices did secure a majority for the application of credibility-questioning review of the record in certain cases. Three cases best illustrate the resulting form of review: *United States Department of Agriculture v. Moreno*,[208] *City of Cleburne v. Cleburne Living Center, Inc.*,[209] and *Romer v. Evans*.[210]

In *Moreno*, the Court reviewed a provision of the Food Stamp Act that excluded from participation in the food stamp program "any household containing an individual who is unrelated to any other member of the household."[211] The legislative history did not contain any clear evidence of the purpose of the particular provision, but in its brief the government argued that Congress could have adopted it for the purpose of preventing fraud in the food stamp program.[212] Rather than give credence to this conceivable purpose, the liberal majority second-guessed it, finding that fraud was adequately addressed by another provision in the Food Stamp Act. The majority also pointed to the over-inclusiveness of the statute, explaining (on the basis of its own finding of fact) that the provision would exclude persons "who

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204 Trimble v. Gordon, 430 U.S. 762, 783–84 (1977) (Rehnquist, J., dissenting). Justice Rehnquist also pointed out that "[t]he question of what 'motivated' the various individual legislators to vote for this [statute], and the Governor . . . to sign it, is an extremely complex and difficult one to answer even if it were relevant to the constitutional question." *Id.* at 782–83.

205 Jimenez v. Weinberger, 417 U.S. 628, 640 (1974) (Rehnquist, J., dissenting).

206 *Id.*

207 FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993); *see also* Heller v. Doe, 509 U.S. 312, 320 (1993) (Kennedy, J.) (quoting 508 U.S. at 315).

208 413 U.S. 528 (1973).

209 473 U.S. 432 (1985).

210 517 U.S. 620 (1996).

211 *Moreno*, 413 U.S. at 529.

212 *Id.* at 535. The government argued in its briefs that "Congress might rationally have thought (1) that households with one or more unrelated members are more likely than 'fully related' households to contain individuals who abuse the program . . . and (2) that such households are 'relatively unstable,' thereby increasing the difficulty of detecting such abuses." *Id.*

are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility."[213] This over-inclusiveness, which the Court ordinarily excused under the deferential rational basis review,[214] raised suspicion about the real motives underlying the legislation. The majority keyed in on a single statement by a senator in the congressional record: "[The] amendment was intended to prevent so-called 'hippies' and hippie communes from participating in the food stamp program."[215] Leaving aside questions about the weight the Court gave to one particular statement in the record, this targeting of hippies and hippie communes could have been construed as an effort by Congress to address an element of fraud that "seems most acute to the legislative mind."[216] But the majority proved unwilling to accept the good faith of Congress. Instead, the Court concluded from this evidence that the statute was motivated by "a bare congressional desire to harm a politically unpopular group."[217] Such a motive, the majority explained, was clearly illegitimate.[218]

In *Cleburne v. Cleburne Living Center, Inc.*,[219] the Court again questioned the proffered justification in its search for the real motive for the government classification. In *Cleburne*, the Court reviewed a municipality's denial of a special permit for a group home for the mentally disabled under the rational basis standard.[220] The Court

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213 *Id.* at 538.

214 *See supra* note 175 (citing cases upholding, under rational basis review, over-inclusive state actions). The Court quoted the standard language from prior rational basis opinions that "[t]raditional equal protection analysis does not require that every classification be drawn with precise 'mathematical nicety,'" but then proceeded to the rather questionable holding, in light of precedent, that "the classification . . . is not only 'imprecise,' it is wholly without any rational basis." *Moreno*, 413 U.S. at 538 (quoting Dandridge v. Williams, 397 U.S. 471, 483 (1970)).

215 *Moreno*, 413 U.S. at 534 (quoting 116 CONG. REC. 44,439 (1970) (statement of Sen. Spressard Lindsey Holland)).

216 Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

217 *Moreno*, 413 U.S. at 534.

218 *See id.* at 534–35 ("A purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment." (quoting Moreno v. U.S. Dep't of Agric., 345 F. Supp. 310, 314 n.11 (1972))).

219 473 U.S. 432 (1985).

220 Despite the majority's application of a more rigorous rational basis review, the more liberal Justices—Justices Marshall, Brennan, and Blackmun—merely concurred in judgment and dissented in part. Justice Marshall, writing for the concurrence, highlighted the majority's failure to apply ordinary rational basis review, explaining, "however labeled, the rational-basis test invoked today is most assuredly not the rational-basis test." *Id.* at 458 (Marshall, J., concurring in judgment and dissenting in part). The concurrence pointed to the majority's shifting of the burden to the State to defend the law, its failure to account for legitimate concerns that justified the classification, and its refusal to allow for a looser fit between the means and ends of the classification. *Id.* at 458. The reason for the liberal

scrutinized each of the stated justifications for the denial of the permit and found them all wanting. The Court refused to consider the city council's concern about surrounding property owners' opposition to the home that was rationally driven by a desire to protect property values or business interests. Instead, the Court discounted such opposition as reflecting "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding."[221] The Court dismissed the city council's objections to the location of the facility close to a junior high school and its concern about potential student harassment of the mentally disabled as representing "vague, undifferentiated fears."[222] The Court second-guessed the city council's concern about the home's location on the flood plain, noting that other institutions like nursing homes or hospitals that would not require a special permit were similarly situated.[223] The Court concluded, "it is difficult to believe" the State's determination that a home for the mentally disabled would present any different or special hazard.[224] Finally, as to the city's concerns about the size of the home and the number of people that would occupy it, the Court pointed to the fact that "there would be no restrictions on the number of people who could occupy this home as a boarding house, nursing home, family dwelling, fraternity house, or dormitory."[225] While the Court conceded that the mentally disabled were different from these other potential occupants, the Court faulted the State for failing to show why this difference mattered.[226] Given that each of the proffered justifications for the denial of the permit was found either inadequately supported or not credible, the Court concluded that the denial of the permit "rest[ed] on an irrational prejudice against the mentally [disabled]."[227]

Finally, in *Romer v. Evans*, the Court reviewed a Colorado state constitutional amendment repealing city ordinances that prohibited discrimination on the basis of sexual orientation.[228] The law enjoined "*all* legislative, executive, or judicial action at *any* level of state or

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Justices' unusual abandonment of rigorous rational basis review was their view that the disabled should be treated as a suspect class, and the classification, therefore, should have been subjected to heightened scrutiny. *Id.* at 465–72.

221 *Id.* at 448 (majority opinion).

222 *Id.* at 449.

223 *Id.*

224 *Id.*

225 *Id.*

226 *Id.* at 449–50.

227 *Id.* at 450.

228 517 U.S. 620 (1996).

local government designed to protect the named class."[229] The Court did not give any credence to the State's asserted rationale for the law, which was to protect the "freedom of association . . . of landlords or employers who have personal or religious objections to homosexuality,"[230] or to the conservative dissenters' imagined purpose of the law, which was to "preserve traditional sexual mores."[231] Instead, the Court explained that the referendum's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."[232]

Moreno, *Cleburne*, and *Romer* represented three of the most important triumphs of the liberal Justices' credibility-questioning review. Rather than accept state classifications as representing the good-faith efforts of reasonable people pursuing policy in the public interest, the Court treated the state as a witness and tested the credibility of the justifications for its actions. And after rigorous review of the evidence that involved both the second-guessing and discounting of certain fact-based determinations, the Court concluded that each of the actions was driven by an invidiously discriminatory motive.

Importantly, however, even the liberal Justices conceded that credibility-questioning review was not appropriate for all statutes applicable to non-suspect classes. There continued to be a place in the review of most economic, tax, and welfare legislation for the more deferential form of rational basis review. The Justices' determination for when credibility-questioning review applied provides insights into the reasons for this form of review and the search for illegitimate motives. I argue in the next section that the liberal shift toward credibility-questioning review is best understood as being driven by a concern about political process malfunction. However, unlike conservative Justices' apparent concern with minority capture of politics, the liberal Justices appeared to target potential minority exclusion and marginalization from democratic decisionmaking. Where laws burdened marginalized minorities, these Justices presumed democratic malfunction and treated the record skeptically.

C. Understanding Credibility-Questioning Rational Basis Review

In most cases involving economic, tax, and welfare classifications, the liberal Justices joined their more conservative counterparts in

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229 *Id.* at 624 (emphasis added).

230 *Id.* at 635.

231 *Id.* at 636 (Scalia, J., dissenting) (describing the referendum as "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws").

232 *Id.* at 632 (majority opinion).

applying deferential rational basis review.[233] In these cases, the liberal Justices were just as willing as the conservatives to imagine conceivable purposes for the state action and to excuse a state actor for pursuing reforms "one step at a time" or for regulating without "mathematical nicety." For example, in a case upholding a welfare regulation that distinguished between small and large families in terms of the money received, the unanimous opinion reasoned, "the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."[234] In a later case involving a communications regulation, a unanimous Court further stated, "[economic and social welfare] legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality."[235]

It was only when classifications were perceived to burden certain groups that the liberal Justices employed credibility-questioning

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[233] *See, e.g.*, Fitzgerald v. Racing Ass'n, 539 U.S. 103 (2003) (tax classification); Gen. Motors Corp. v. Tracy, 519 U.S. 278 (1997) (tax classification); FCC v. Beach Commc'ns, Inc., 508 U.S. 307 (1993) (communications regulation); Nordlinger v. Hahn, 505 U.S. 1 (1992) (tax classification); Burlington N. R.R. v. Ford, 504 U.S. 648 (1992) (statutory restriction for lawsuits against corporations); United States v. Sperry Corp., 493 U.S. 52 (1989) (statutory fee imposed on claimants of the Iran-United States Claims Tribunal); City of Dallas v. Stanglin, 490 U.S. 19 (1989) (age restriction for admission to dance halls); Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (tax classification); Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983) (tax classification); Rice v. Norman Williams Co., 458 U.S. 654 (1982) (licensing restriction); Hodel v. Indiana, 452 U.S. 314 (1981) (special requirements of surface mining operations); Barry v. Barchi, 443 U.S. 55 (1979) (statutory distinction between harness racing and thoroughbred racing); Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59 (1978) (statutory imposition on liability for nuclear accidents); Cnty. Bd. of Arlington Cnty. v. Richards, 434 U.S. 5 (1977) (statutory restriction of on-street parking); Ohio Bureau of Emp't Servs. v. Hodory, 431 U.S. 471 (1977) (restriction on unemployment benefits); City of New Orleans v. Dukes, 427 U.S. 297 (1976) (pushcart vendor prohibition); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (plan for ridding a state of abandoned automobiles); City of Charlotte v. Local 660, Int'l Ass'n of Firefighters, 426 U.S. 283 (1976) (regulation limiting to the city the authority to withhold money from city employees' paychecks); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (land use restriction); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) (tax classification); Dandridge v. Williams, 397 U.S. 471, 485 (1970) ("In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."); *see also* Levy v. Louisiana, 391 U.S. 68, 71 (1968) (distinguishing between "applying the Equal Protection Clause to social and economic legislation," for which the Court gave "great latitude to the legislature," and rights "involv[ing] the intimate, familial relationship between a child and his own mother," for which a more rigorous rational basis review applies); Tussman & tenBroek, *supra* note 13, at 372–73 (offering reasons for judicial deference to legislative judgments in these areas of the law).

[234] *Dandridge*, 397 U.S. at 487.

[235] *Hodel*, 452 U.S. at 331–32.

review.[236] The liberal Justices did not always agree amongst themselves about the laws to which credibility-questioning review should apply. But there was at least some liberal judicial support for applying credibility-questioning scrutiny to the record supporting classifications that targeted or burdened the disabled, the poor, the aged, members of the LGBTQ community, hippies, felons, and out-of-state residents.[237]

The liberal Justices' choice to deferentially review most economic and welfare classifications and skeptically review the record underlying state classifications that burdened these groups corresponds to

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[236] For some classifications, such as gender and legitimacy, a majority of the Court eventually supported raising the standard applicable to intermediate scrutiny. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 196 (1976) (applying what would subsequently be referred to as intermediate scrutiny to a gender classification); Trimble v. Gordon, 430 U.S. 762, 769 (1977) (applying a heightened form of scrutiny to a classification on the basis of legitimacy status). When the liberal Justices were unable to secure the majority necessary to raise the level of scrutiny for certain classifications, they supported application of a more rigorous rational basis review to laws that they found burdened members of certain groups. But the liberal Justices were only rarely successful in securing the necessary support for this rigorous form of rational basis review. *See, e.g.*, Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898 (1986) (statute that gave preference in civil employment to resident veterans); Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612 (1985) (tax exemption limited to Vietnam veterans who resided in the state prior to a certain date); Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (statute that taxed out-of-state insurance companies at a higher rate than domestic insurance companies); Plyler v. Doe, 457 U.S. 202 (1982) (applying something in between rigorous rational basis review and intermediate scrutiny to a law denying undocumented immigrants a free education); Zobel v. Williams, 457 U.S. 55 (1982) (law that distributed benefits on the basis of residency status). For cases in which liberal Justices argued in dissent that the Court should have applied rigorous rational basis review to the classification, see Heller v. Doe, 509 U.S. 312, 335 (1993) (Souter, J., dissenting) (classification of the mentally disabled); Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 466 (1988) (Marshall, J., dissenting) (imposition of a school transportation fee because it burdened the poor); Lyng v. Castillo, 477 U.S. 635, 643, 645–46, 647 (1986) (Marshall, J., dissenting) (federal food stamp restriction); Bowen v. Owens, 476 U.S. 340, 350 (1986) (Marshall, J., dissenting) (law that distinguished between widowed and divorced spouses); Schweiker v. Wilson, 450 U.S. 221, 239–40 (1981) (Powell, J., dissenting) (statute that declined benefits to a class of individuals institutionalized in public mental hospitals); Vance v. Bradley, 440 U.S. 93, 112 (1979) (Marshall, J., dissenting) (federal mandatory retirement statute that discriminated against the aged); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 317–18 (1976) (Marshall, J., dissenting) (state mandatory retirement statute that discriminated against the aged); Marshall v. United States, 414 U.S. 417, 430–31 (1974) (Marshall, J., dissenting) (law that burdened certain individuals with felony convictions); Hurtado v. United States, 410 U.S. 578, 591–92 (1973) (Brennan, J., concurring in part and dissenting in part) (compensation scheme that penalized the poor); McGinnis v. Royster, 410 U.S. 263, 277 (1973) (Douglas, J., dissenting) (criminal regulation that disparately harmed the poor); Jefferson v. Hackney, 406 U.S. 535, 551 (1972) (Douglas, J., dissenting) (welfare spending restriction that purportedly discriminated against blacks and Latinos); Richardson v. Belcher, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting) (federal social security benefits classification that burdened "destitute, disabled, or elderly individuals").

[237] *See supra* note 236 (citing cases applying the more rigorous rational basis review to classifications harming members of these groups).

what some view as the post-*Lochner* era New Deal settlement.[238] According to this settlement, grounded in pluralist theory, courts should defer to most state judgments. But courts should intervene when the political process leading to the adoption of these judgments has malfunctioned or has burdened discrete and insular minorities. For liberal Justices, this meant subjecting classifications burdening groups presumed to be politically marginalized to intermediate and strict scrutiny when they could secure enough votes to do so and applying credibility-questioning review of the record under rational basis when they could not. The groups to which the liberal Justices applied credibility-questioning review of the record under rational basis met the presumption of political marginalization because they were unable to vote (out-of-state residents and felons) or were perceived incapable of developing political coalitions with other groups due to prejudice and stereotypes (the disabled, the poor, members of the LGBTQ community, and hippies).[239]

It is not only the pattern of cases that support this interpretation of the liberal Justices' application of credibility-questioning rational basis review. Statements made in the cases themselves support this understanding as well. For example, in reviewing a statute that classified felons, four liberal Justices in dissent chastised the majority for applying a deferential rational basis review. Justice Marshall

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238 This settlement was represented in the famous *Carolene Products* footnote four. United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938). *See also* Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 122 (2001) (describing the terms of the New Deal settlement).

239 *See* McGowan, *supra* note 203, at 387–88 (suggesting that the Court applied rational basis with bite in response to concerns about the political marginalization of the group burdened); Pettinga, *supra* note 189, at 792 (same). But other scholars, pointing to the inconsistencies in judicial application of rigorous rational basis review to classifications targeting politically marginalized groups, suggest that it was not a central factor and that the application of such scrutiny has been random. *See* Farrell, *supra* note 8, at 412 (arguing that inconsistencies in the judicial application of rational basis with bite do not support the idea that it was intended to protect politically marginalized groups); Jerald W. Rogers, Note, Romer v. Evans: *Heightened Scrutiny Has Found a Rational Basis—Is the Court Tacitly Recognizing Quasi-Suspect Status for Gays, Lesbians, and Bisexuals?*, 45 U. KAN. L. REV. 953, 962 (1997) (suggesting that inconsistencies in past Supreme Court precedent do not support the theory that rational basis with bite functions to protect politically unpopular groups); Neelum J. Wadhwani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801, 803 (2006) (describing the Court's application of rational basis scrutiny as a "schizophrenic oscillation between various approaches to the test"). The disagreement can be resolved by moving away from the treatment of the Court as an "it" rather than a "they." Once the Court is disaggregated in this way, a pattern is revealed in which liberal Justices consistently joined opinions—sometimes as part of the majority, sometimes in dissent—that applied rigorous rational basis review to laws that they perceived as burdening groups whom they deemed to be unjustly or disproportionately politically marginalized.

explained, "[t]his case does not involve discrimination against business interests more than powerful enough to protect themselves in the legislative halls, but the very life and health of a man caught up in the spiraling web of addiction and crime."[240] In another case reviewing statutory classifications applied to Social Security beneficiaries, Justice Marshall, joined by Justice Brennan in dissent, argued that "the [deferential] 'rational basis' test used by this Court in reviewing business regulation has no place."[241] He explained that such "legislation regulating business cannot be equated with legislation dealing with destitute, disabled, or elderly individuals."[242] As Justice Powell pointed out in dissent in a case upholding a law burdening the mentally ill, "[t]he deference to which legislative accommodation of conflicting interests is entitled rests in part upon the principle that the political process of our majoritarian democracy responds to the wishes of the people."[243] When it is not responsive, as is presumably the case when a law classifies against the politically vulnerable, such deference is not appropriate.

The liberal Justices were willing to presume that the political process responded to the "wishes of the people" in cases involving economic, tax, and welfare legislation not burdening the politically marginalized. As proffered in an oft-repeated quote, the Justices were willing to "presume[ ] that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and . . . judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."[244] But when it came to laws burdening particular groups, the Justices shifted to inferring antipathy presumably out of concern that such groups lacked the political power to protect themselves. For such laws, the Justices thought it necessary to provide extra protection from majoritarian processes through credibility-questioning review of the record.

D. Credibility-Questioning Rational Basis Review in United States v. Windsor

Last term, in *United States v. Windsor*, the conflict continued between liberal and conservative Justices over the propriety of

240 Marshall v. United States, 414 U.S. 417, 432–33 (1974) (Marshall, J., dissenting).

241 Richardson v. Belcher, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting).

242 *Id.*

243 Schweiker v. Wilson, 450 U.S. 221, 243 (1981) (Powell, J., dissenting).

244 Vance v. Bradley, 440 U.S. 93, 97 (1999).

credibility-questioning rational basis review.[245] The Court reviewed the Defense of Marriage Act's definition of marriage as "a legal union between one man and one woman as husband and wife . . . ."[246] Edith Windsor, a woman validly married to Thea Spyer under New York laws, challenged the DOMA definitional provision that resulted in the denial of federal benefits for which she otherwise qualified.[247] Justice Kennedy and the four liberal Justices invalidated the definitional provision.[248]

As in prior cases applying credibility-questioning rational basis review, the liberal majority's starting point was that "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group."[249] The role of the judiciary was to determine, through "especially . . . careful consideration," whether "a law is motivated by an improper animus or purpose."[250] In *Windsor*, this "careful consideration" came in the form of selectively emphasizing some evidence in the record and ignoring other evidence. As the Court had done in *Moreno* with respect to a Senator's statement about hippies and hippie communes being the target of a welfare law,[251] the liberal majority selectively quoted statements from the DOMA House Report to support its conclusion that the law was really motivated by animus toward same sex couples. The majority cited the House Report's finding that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage."[252] The majority also pointed to the Report's classification of "[t]he effort to redefine 'marriage' to extend to homosexual couples" as "a truly radical proposal that would fundamentally alter the institution of marriage."[253] Most tellingly, the

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[245] In the twenty years prior to *United States v. Windsor*, the Court reviewed only six cases under rational basis review. Armour v. City of Indianapolis, 132 S. Ct. 2073, 2079–80 (2012); Fitzgerald v. Racing Ass'n, 539 U.S. 103, 107 (2003); Cent. State Univ. v. Am. Ass'n of Univ. Professors, 526 U.S. 124, 127 (1999); Vacco v. Quill, 521 U.S. 793, 799 (1997); Gen. Motors Corp. v. Tracy, 519 U.S. 278, 311 (1997); Romer v. Evans, 517 U.S. 620, 631 (1996).

[246] United States v. Windsor, 133 S. Ct. 2675, 2683 (2013) (quoting 1 U.S.C. § 7) (2012).

[247] *Id.*

[248] In prior cases, Justice Kennedy had proven to be a strong defender of the equal dignity and liberty rights of members of the LGBTQ community. *See* Lawrence v. Texas, 539 U.S. 558, 567–74 (2003) (extending the liberty protected under the Constitution to homosexuals engaging in sexual conduct in the privacy of their homes).

[249] *Windsor*, 133 S. Ct. at 2693 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

[250] *Id.*

[251] *See supra* note 215 (describing the Court's emphasis on a congressperson's statement in the record disparaging hippies and hippie communes).

[252] *Windsor*, 133 S. Ct. at 2693 (quoting H.R. Rep. No. 104-664, at 12 (1996)).

[253] *Id.*

majority pointed to the report's description of DOMA as expressing "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."[254]

These statements in the record were certainly damning, but they were far from a full accounting of the congressional record. The liberal majority ignored other evidence justifying the law, including the description in the record of choice-of-law issues that would arise without a uniform federal definition of marriage.[255] The Justices also omitted record evidence of the cost-saving rationales for enacting DOMA that arose from the large and unpredictable effect on agency budgets of recognizing same-sex marriage.[256] Justice Scalia, joined by Justices Roberts and Thomas in dissent, argued that such evidence "[gave] the lie to the Court's conclusion that only those with hateful hearts could have voted 'aye' on this Act."[257] The fact that the appellate briefs presented, and the dissent cited, this record evidence suggests that the majority was well aware of it. Their decision to ignore this evidence therefore suggests that the Justices did not really believe these alternative rationales or the evidence supporting them.

The similarity between the judicial approaches to the record in *Windsor* and in prior cases applying rigorous rational basis review supports the view that judicial credibility assessment is being driven by a concern about process malfunction. It appeared that the *Windsor* majority considered same-sex couples to be like the gays and lesbians in *Romer*, the disabled in *Cleburne*, and the hippies in *Moreno* in that they lacked the political power to influence democratic decision-making and, accordingly, the construction of the record in support of the legislation. The Justices in *Windsor* thus filled in the presumed democratic gap by providing same-sex couples with judicial protection in the form of careful scrutiny of the justifications supporting the action. This careful scrutiny included an implicit assessment of the credibility of the record.

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254 *Id.* (quoting H.R. Rep. No. 104-664, at 16).

255 *See id.* at 2708 (Scalia, J., dissenting) (describing the choice-of-law concerns); *see also* Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 33–36, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307) (describing the choice-of-law concern to which DOMA was allegedly intended to be responsive and citing supporting statements in the congressional record from congresspersons).

256 *See* Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 38–39, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307) (describing the budget concerns that allegedly motivated the enactment of DOMA and supporting statements in the congressional record).

257 *Windsor*, 133 S. Ct. at 2707.

III
THE CONDITIONAL CASE FOR CREDIBILITY-QUESTIONING REVIEW

In the first two Parts, I argued that the Court in its application of strict scrutiny and rational basis review has treated the state as a witness, subjecting the state's findings of fact to credibility assessments. In this Part, I make two normative claims. First, I argue that courts should question the credibility of the record in some cases because state institutions do have incentives to preserve the constitutionality of their laws and may shape the factual record in light of that goal. Borrowing from statutory interpretation theory, I argue that the Justices' apparent intuition is justified. The record is more likely to be distorted when the political process leading to the decision to adopt a law has malfunctioned.

Second, I argue that the decision to engage in credibility-questioning review should, therefore, be informed by judicial assessments of the operation of politics. Courts, however, should not presume democratic malfunction in entire categories of cases—what I refer to as a "wholesale-level" presumption about the operation of politics. Instead, they should engage in a fine-grained inquiry, based on evidence presented by the parties, into the actual process that led to the adoption of the state action being reviewed—what I refer to as a "retail-level" assessment of the operation of politics. In the absence of evidence of democratic malfunction, courts should presume that the political process operated properly and that the state's factual record is credible and should only be reviewed for its adequacy in satisfying the applicable constitutional standard. Such a presumption, I contend, is more consistent with the separation-of-powers framework and better maintains judicial legitimacy than the alternatives.

A. The Need for Credibility-Questioning Review: Record Distortion and Democratic Process Malfunction

Every state institution has an incentive to preserve the constitutionality of its actions. State actors expend political capital, time, and resources to secure the adoption of laws, regulations, or other forms of state actions. These actors often obtain electoral benefits in the form of votes, campaign support, or good publicity when a state action is adopted.[258] Such benefits can be diminished when a court subse-

[258] A principal tenet of political science is that politicians are principally motivated by their desire to be reelected. *See, e.g.*, DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 13 (1974) (contending that members of Congress "are interested in getting reelected—indeed, in their role here as abstractions, interested in nothing else").

quently strikes the law down as unconstitutional. Legally sophisticated state actors thus may seek to preserve the constitutionality of their state actions by tailoring them to meet the relevant constitutional standard. Often, when the Supreme Court strikes down a state action, it defines the constitutional limits for future state actions and even provides state actors with a blueprint for what would be considered a constitutional state action. For example, in *Bakke*, Justice Powell provided universities with a blueprint for an affirmative action admissions plan.[259]

Sophisticated state institutions may also attempt to shape the record supporting the state action. As discussed in Part I, constitutional standards impose evidentiary requirements on state actors. Courts often provide state actors with guidance about facts that support or undercut the constitutionality of a state action. For example, when the Court struck down welfare legislation in *Moreno* and cited the legislative history's mention of hippies and hippie communes as the target of the law, future state actors were on notice to hide evidence of such motivation.[260]

In some instances, shaping the record to meet the constitutional standard can bleed into distortion of the record. Consider the two theories of political process malfunction to which the Justices appear to subscribe: pluralism and public choice. These theories suggest that politically powerless minorities may be excluded from, or politically powerful minorities may capture, the political process. In a particular case, if the political process operates properly, the record is not likely to be distorted because there are countervailing interest groups with sufficient powers to force state decisionmakers to at least account for evidence that might undercut the constitutionality of the law. However, insights from statutory interpretation theory suggest that if the political process malfunctions, the record supporting the state action may well be distorted.

In a seminal article on statutory interpretation, Jonathan Macey identifies why and how legislators might distort the record when politics operates as public choice theory predicts.[261] Macey argues that

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[259] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316–19 (1978) (suggesting that the affirmative action plan adopted by Harvard College would survive constitutional scrutiny).

[260] *See supra* note 215 (describing the Court's emphasis on a statement of a congressperson expressing disdain for hippies and hippie communes).

[261] Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 250–55 (1986); *see also* McGinnis & Mulaney, *supra* note 8, at 94 ("Once one recognizes that well organized interest groups have an incentive to use their power to the detriment of others, and elected politicians have an incentive to seek rewards in votes and money, the reliability of

legislators who pass special interest laws face the threat of "the loss of support from individuals and groups who are aware that they are harmed by the legislation."[262] But if individuals or groups are unable to trace those harms to a particular law, the legislator is less likely to lose their support.[263] Lawmakers therefore have electoral incentives to hide special interest deals behind a public interest façade.[264] At the same time, interest groups incur a lower cost to secure the legislative enactment of "hidden-implicit" statutes that disguise the special interest deal than they do for the enactment of "open-explicit" statutes that nakedly reveal "wealth transfers to a particular, favored group."[265] The result is that both special interest deals and public interest legislation will be supported by legislative histories listing public-regarding purposes that may or may not be the real purposes for the law.[266]

In the contexts of democratic malfunction described in public choice theory, lawmakers and special interest groups have similar incentives to distort the legislative record to avoid judicial invalidation of state actions. Lawmakers, on the one hand, will want to avoid the electoral costs from the invalidation of a special interest deal. These include the costs of a public judicial statement that the state institution violated the Constitution and that it did so to benefit a special interest group at the expense of the broader public.[267] Special interest groups,

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congressional fact-finding should be immediately called into question."); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1182 (2001) ("Under [the public choice] view, lawmakers could not care less about getting the facts right—what matters is delivering the goods.").

262 Macey, *supra* note 261, at 232.

263 Most individuals will not be able trace harms to a particular law because information costs are high and political awareness is correspondingly low. *See, e.g.*, R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 8 (1990) (discussing the challenges that the mostly inattentive public faces in trying to trace harms to particular laws); JOHN R. ZALLER, THE NATURE AND ORIGINS OF MASS OPINION 16 (1992) (describing Americans' low level of political awareness).

264 Macey, *supra* note 261, at 251 (arguing that the risks to legislators are reduced); *see also* Richard A. Posner, *Economics*, *Politics*, and the Reading of Statutes and the Constitution, 49 U. CHI. L. REV. 263, 273 (1982) ("[E]ven where it is obvious that a particular statute was procured by some particular interest group . . . it will not be clear, at least without an inquiry that is beyond the judicial competence to undertake, how completely the group prevailed upon Congress to do its will.").

265 Macey, *supra* note 261, at 232–33.

266 *See id.* at 250 (explaining that the "publicly articulated purpose [for a law] will almost invariably be a public-regarding purpose"); *see also* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 292 (1988) ("Typically, an interest group or groups seek to avert public debate by cloaking their rent-seeking objectives in public regarding terms.").

267 *See supra* text accompanying notes 144–53 (discussing judicial opinions suggesting affirmative action laws were the product of "simple racial politics").

on the other hand, have strong incentives to ensure that the statutory deals they secure are upheld as constitutional not only to sustain the current deal but also similar future deals.[268] If the Court invalidates the current deal as inconsistent with the Constitution, the decision will establish a precedent that may also undermine similar future deals. The only recourse would then be a change in the form of the deal to provide a basis for ensuring its constitutionality. This change might dilute the legislative benefit sought by the special interest group.

Lawmakers and special interest groups facing these potential costs from constitutional invalidation will therefore have strong incentives to distort the record to increase the likelihood that the state action is upheld. The parties to the deal will seek to emphasize in the record the evidence that supports the constitutionality of the state action while omitting evidence that might undercut its constitutionality. Potential opponents of the deal may be too diffuse, disorganized, and politically weak to ensure the inclusion of countervailing evidence. The result will be a distorted record composed exclusively, or almost exclusively, of evidence supporting the constitutionality of the state action.

A similar analysis would apply to the type of malfunction that concerns the liberal Justices: state actions arising from a process that marginalizes minorities. Lawmakers may distort findings of fact in order to insulate state actions that are harmful to a marginalized minority from constitutional attack. Pluralist defect theory suggests that such marginalized minority groups will not be adequately represented in the political process because of their inability to vote or develop coalitions to influence lawmakers. As a result, these groups might not be strong enough to defend themselves against distortions in the record.

Macey offers a solution for the distortion of the legislative record when courts interpret statutes, but this solution is not available when courts review the constitutionality of state actions. Macey suggests that courts should interpret statutes in accordance with the public-regarding purposes contained in the legislative record.[269] If these public-regarding purposes are the product of special interest distortions of the record, then such an interpretive approach will dilute spe-

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[268] *See* Landes & Posner, *supra* note 19, at 895 ("The possibility that the judiciary will not enforce the deals worked out by the legislature reduces the expected value of legislation, which in turn reduces the benefits to the groups procuring the legislation and the payments to the enacting legislators.").

[269] Macey, *supra* note 261, at 252–55.

cial interest gains to the benefit of the public interest.[270] There is, however, no analogy for this redemptive effect in the context of judicial review of the constitutionality of state actions. Courts should not simply accept the evidence in the distorted record as the real evidence and review state actions on that basis; doing so would undercut courts' constitutionally delegated role to enforce the Constitution. Courts should make constitutional determinations on the basis of the real facts underlying a state action. If courts simply take for granted the government's findings of fact in support of a state action as genuine in all instances, then state institutions subject to democratic malfunction will easily be able to exceed constitutional limits through distortions of the record.

To enforce the Constitution in the face of potential distortion of the record, courts should question the credibility of the record when assessing the constitutionality of a state action. In the following section, I argue that courts should question the credibility of the record only after determining that the process of adopting the state action at issue malfunctioned in some way. In the absence of proof of such malfunction, however, I argue on the basis of separation-of-powers principles that courts should rely on a presumption that the political process operated properly, and should not question the credibility of the record. I conclude this Part by addressing potential objections to judicial assessments of the operation of politics.

B. A Blueprint for Retail-Level Judicial Assessments of the Operation of Politics

It is extremely difficult, if not impossible, to determine the proportion of records that are distorted as a result of democratic malfunction. Credibility-questioning review in entire categories of cases, based only on assumptions about such probabilities instead of actual evidence of political process malfunction, raises concerns about judicial institutional limitations. The wholesale approach can result in inappropriately activist courts whose legitimacy is undermined by their overly assertive invalidation of state actions without proper consideration of the evidence underlying them. To avoid generating these threats while preserving the courts' Constitution-enforcing role, I

[270] Macey argues that interpreting statutes in accord with the public-regarding purposes contained in the legislative record will minimize the effect of hidden special interest deals since such interpretations will advance the public interest, presumably at the expense of the special interest. *Id.* at 252–54. It will also diminish the incentives for interest groups to seek such deals in the future. Macey predicts that the result of judicial reliance on legislative history in the interpretation of statutes will be an overall decline in the number of special interest deals. *Id.* at 255.

argue that courts should assess the operation of politics at a retail level. Only when the parties present evidence about political process malfunction should courts evaluate the operation of the process for adopting the state action. If after this evaluation the court determines that the political process has malfunctioned, it should engage in credibility-questioning review. It should treat the state like a witness, cross-examine its evidence, second-guess its findings, and discount evidence that does not appear to be genuine. If, however, the court determines that the political process has not malfunctioned, or if there is no evidence presented by the parties of such malfunction, the court should limit itself to adequacy-checking review, uncritically accept the findings of fact in the record, and assess whether the evidence satisfies the constitutional standard.

The recent case of *Ricci v. DeStefano* provides a blueprint for the retail-level approach to evaluating the operation of politics.[271] In *Ricci*, the Supreme Court invalidated the city of New Haven's decision to discard a promotion test because of its disparate impact on minority firefighters.[272] In their briefs, the white firefighter petitioners offered evidence of a biased and dysfunctional process that led to the decision to discard the test. According to the white firefighters' account, the city agency responsible for deciding whether to certify the tests refused to accept reports of the exams' content-validity and scoring methodology from the city's consultants hired to develop and administer the exam.[273] When the city's Civil Service Board met to discuss the validity of the exam, the Board credited the opinion of two experts who testified to the tests' significant adverse impact and the availability of alternative tests that would have less disparate impact.[274] But the Board dismissed the countervailing testimony of a third expert witness who actually studied the exam.[275] The white

[271] 557 U.S. 557 (2009). *Ricci* involved a review of a state action under Title VII of the Civil Rights Act, but the case had strong constitutional undertones.

[272] *Id.* at 585–92 (finding no strong basis in evidence for the employer to believe that it would be subject to disparate impact liability under Title VII for failure to discard the promotion test).

[273] Petitioners' Brief on the Merits at 11, Ricci v. DeStefano, 557 U.S. 557 (2009) (Nos. 07-1428, 08-328).

[274] *Id.* at 13–14. The white firefighters claimed that neither expert had actually studied the exam. *Id.*

[275] *Id.* at 13. The third expert testified that the exam properly measured the skills needed for the job. This testimony was critical because it supported a finding that the test was job-related, which would immunize it from invalidation under Title VII. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) ("An unlawful employment practice based on disparate impact is established . . . only if . . . a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of [a protected category] and the respondent fails to demonstrate that the challenged practice is job related . . . .").

firefighters alleged that at a board meeting proponents for abandoning the exam testified while the top two officials in the New Haven Fire Department, who were involved in the exam development process and viewed the exam as fair and valid, were not allowed to speak.[276]

Borrowing language from the Court's affirmative action jurisprudence, the white firefighters argued that the process was infected with "racial politics."[277] An African American minister by the name of Boise Kimber played a central role in the white firefighters' account of racial politics. The firefighters described Reverend Kimber as "a local political activist and valuable vote-getter for [New Haven] Mayor John DeStefano."[278] According to the white firefighters' brief:

> From the start, [Reverend] Kimber and his friends in city government set out to thwart the promotions for reasons relating to racial politics. The mayor's inner circle even discussed among themselves the need to make the process *appear* neutral and deliberative to cover their racial motivations. Kimber threatened board members with political reprisals if they allowed the promotions to go forward. Intimidated, they voted the promotions down.[279]

The white firefighters' description of the process of decisionmaking had strong public choice undertones. They alleged that the process of democratic decisionmaking proceeded on the basis of improper influence of a leader of a racial minority group in the city of New Haven. Their description of Reverend Kimber as a "valuable vote-getter" suggested that the minority group that he led was organized and powerful and that its members were willing to trade votes for legislative goods benefitting the group. Finally, the Board's decision to discount or entirely ignore evidence inconsistent with the preferences of the minority group suggested that the countervailing interests were too weak to influence the decision and the record underlying it.

The respondents, Mayor DeStefano and others, had a much different account of the process that led to the decision. They described an agency hearing process that involved five public meetings to consider whether to certify the test results.[280] They asserted that no ex parte contacts were allowed and that the Board heard testimony from

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[276] Petitioners' Brief on the Merits at 14, *Ricci*, 557 U.S. 557 (Nos. 07-1428, 08-328).

[277] *Id.* at 30 ("The Constitution . . . cannot permit governments to use claimed fears of disparate-impact liability as cover for what may actually be crude racial politics in action—a noxious and divisive practice this Court has roundly condemned in other circumstances.").

[278] *Id.* at 11.

[279] *Id.* at 30–31 (citations omitted).

[280] Respondents' Brief on the Merits at 6, Ricci v. DeStefano, 557 U.S. 557 (Nos. 07-1428, 08-328).

witnesses and experts on all sides of the issue.[281] The respondents alleged that the board also heard from three experts and that their testimony was given fair consideration.[282] After the hearings, the Board members split evenly, with two members voting for and two members voting against certifying the exam.[283]

The Supreme Court majority opinion in *Ricci* did not engage the dispute about the operation of politics in the case, but the concurring and dissenting opinions did. Justice Alito's concurrence, joined by Justices Scalia and Thomas, spent several pages detailing the decision-making process.[284] The conservative plurality portrayed the process as one in which "city officials worked behind the scenes to sabotage the promotional examinations because they knew that, were the exams certified, the Mayor would incur the wrath of [Reverend Boise] Kimber and other influential leaders of New Haven's African-American community."[285] The Justices cited evidence of Reverend Kimber's personal ties to Mayor DeStefano, including the Reverend's leadership role in all of the Mayor's campaigns and the Mayor's appointment of Kimber to serve as Chairman of the New Haven Board of Fire Commissioners, despite his lack of experience.[286] The Justices also found that Reverend Kimber aggressively tried to influence the hearing process with threats of "political recriminations if they voted to certify the test results."[287] Finally, the concurring Justices depicted the Mayor as pre-committed to not certifying the test results irrespective of the Board's decision because of his "desire to please a politically important racial constituency."[288] The conservative Justices in the concurrence concluded that the decisionmaking process had malfunctioned due to racial minority group capture of the Civil Service Board and the Mayor's office, and supported the majority's dismissal of the city's record-based justifications for discarding the test.

The liberal Justices dissented, disputing the conservative Justices' characterization of the decisionmaking process as dysfunctional. Instead, the Justices agreed with the city's portrayal of the process as inclusive and one in which the Civil Service Board "heard from numerous individuals on both sides of the certification question."[289]

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281 *Id.* at 6–7.
282 *Id.* at 9–10.
283 *Id.* at 10.
284 *Ricci*, 557 U.S. at 598–605 (Alito, J., concurring).
285 *Id.* at 598 (quoting Ricci v. DeStefano, 554 F. Supp. 2d 142, 162 (D. Conn. 2006)).
286 *Id.* at 598–99.
287 *Id.* at 601.
288 *Id.* at 605.
289 *Id*. at 640 (Ginsburg, J., dissenting).

The liberal Justices noted that the Civil Service Board was an unelected and politically insulated body, which suggested to them that the concurring Justices' exaggerated the influence of both proponents and opponents of the decision.[290] The Justices concluded that "[t]here is scant cause to suspect that maneuvering or overheated rhetoric, from either side, prevented the [Civil Service Board] from evenhandedly assessing the reliability of the exams and rendering an independent, good-faith decision on certification."[291] The decisionmaking process, in other words, operated properly and the evidence in the record supporting the decision was credible.

For present purposes, I need not take a position on whether the conservatives or the liberals got the operation of politics right in *Ricci*. The key point is that the Justices properly considered, on the basis of evidence presented by the parties, the operation of politics in the challenged action. The more fine-tuned, case-by-case consideration of the operation of politics exemplified in *Ricci* provides an alternative to wholesale categorical presumptions about the operation of politics on the basis of whether a law benefits or harms a minority. Importantly, the operation of politics appears to have been a key factor in the Justices' decision about how to treat the record. Thus, the approach also provides an alternative to wholesale skepticism of state factual determinations.

Ricci points to three factors that should be relevant to judicial determinations of the operation of politics. One factor is whether the decision was made according to the legally prescribed procedures. This factor has long been relevant to the determination of whether a law was motivated by discriminatory intent under the Equal Protection Clause, and it should also be germane to findings about the operation of politics.[292] When opponents to an action are sufficiently strong, they should ordinarily be able to force decisionmakers to abide by legally prescribed procedures either through parliamentary maneuvers or future campaign threats. Decisionmaking through corrupt procedures is thus an indicator that the process has malfunctioned and that the views of opponents were not properly considered.

A second factor is the level of electoral accountability of the decisionmaking body. In *Ricci*, a Civil Service Board lacking the political

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290 *Id.*

291 *Id.* at 641.

292 *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977) ("Departures from the normal procedural sequence . . . might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.").

accountability of other state decisionmakers had some authority over the decision to discard the test. The cost of capture of such an institution might be lower, and the opportunity for political exclusion greater, than it would be for a decisionmaking body electorally accountable to the people.[293] In addition, because the cost of information to learn about the transactions of these institutions is typically quite high, politically marginalized minorities are more likely to be excluded from the decisionmaking process.

A third, related factor is the size of the political unit that the decisionmaker represents. Decisionmakers representing smaller units, such as the mayor of the city of New Haven in *Ricci*, are typically more prone to capture than representatives of larger political units such as states or the nation.[294] In addition, since these smaller political units tend to be more homogeneous across most demographic dimensions than larger political units, there is a greater likelihood that discrete and insular minorities will be politically marginalized because of their inability to develop coalitions as a result of other minorities' indifference or prejudice toward them.[295]

Other cases described in Part I point to additional factors that might also be relevant to determinations of the operation of politics. These include two determinations that have been central to the ques-

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[293] Since members of these bodies generally do not run for office, interest groups do not need to provide them with campaign contributions or votes in exchange for goods. Rather, providing these decisionmakers with future employment opportunities, reputation-enhancing benefits, or other perks will often be sufficient. *See, e.g.*, KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 342 (1986) (describing one mechanism of agency-capture as the provision of employment opportunities to public servants once they leave office).

[294] The insights of capture theory suggest that representatives of smaller political units should typically be cheaper for powerful interest groups to capture because they usually require interest groups to spend less in terms of campaign finance money and votes to secure advantageous state actions. For a comparison of expenditures in state elections and federal elections, see Center for Responsive Politics, *The Money Behind the Elections*, OPENSECRETS.ORG, https://www.opensecrets.org/bigpicture/ (last visited Aug. 17, 2014) (showing total expenditures in federal elections in 2012 to be approximately $6.2 billion); National Institute on Money in State Politics, *National Overview Map*, FOLLOWTHEMONEY.ORG, http://www.followthemoney.org/database/nationalview.phtml (last visited Aug. 17, 2014) (showing the total expenditures for state elections in 2012 to be about $2.8 billion).

[295] *See* THE FEDERALIST NO. 10 at 82–84 (James Madison) (Clinton Rossiter ed., 1961) (discussing the tendency for smaller societies to have fewer parties and interests, which leads to their ability to more frequently find a majority of the same party, and noting that "the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression"); *see also* James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 881–85 (2004) (describing the Madisonian relationship between the size of the republic and the potential for majority factionalism and minority oppression).

tion of whether a class of individuals should be considered suspect under the tiers of scrutiny framework: the existence of voting restrictions that exclude groups from political participation and a history of laws either benefiting or burdening particular minority groups. The level of support for a state action, has not been as central to past judicial determinations. But as Justice Scalia surmised during oral argument in *Shelby County*, unanimity or near-unanimity in support of a law may also be relevant to assessing whether the process has functioned properly.[296] However, contrary to Justice Scalia's assumptions, unanimous or near-unanimous support for a law may be a better indicator of minority exclusion from the process, insofar as the law targets a particular group for harm, rather than an indication of minority capture, insofar as the law benefits a particular minority group. Unanimous or near-unanimous support for a law harming a minority would be a strong indicator that members of a minority group were not represented in the enactment process. In a properly functioning pluralist bargaining process, minorities should be able to develop coalitions with other groups to ensure a certain modicum of support in the lawmaking process. This support does not necessarily guarantee legislative victories, but it does make it highly unlikely that, in any lawmaking transaction, only a few or even no representatives oppose a state action that targets the group.

In contrast, similar unanimous or near-unanimous support for a state action benefiting a minority would not seem to suggest much at all about whether the enactment process had been captured. In the context of capture, the cost to a powerful minority of securing the benefits of a state action increase with each lawmaker the minority needs to convince to support the state action.[297] A rational powerful minority group will seek to pay the least cost to obtain the benefit. This suggests that unanimous or near-unanimous support for a state action is an unlikely outcome of a captured political process since the powerful minority can obtain the same benefit with a mere majority, which would come at a much lower cost.

This list of factors relevant to the consideration of the operation of politics is not comprehensive. It is a rough outline of factors that courts may want to consider. Neither these factors alone nor all of them together will necessarily prove democratic malfunction. Rather, they should be considered, along with other factors, as part of a

[296] *See supra* note 165 and accompanying text (describing Justice Scalia's suggestion that near-unanimous support of the Voting Rights Act indicated the corruption of the statutory adoption process).

[297] *See supra* notes 261–66 and accompanying text (identifying the costs to special interest groups of securing legislative deals from Congress).

detailed, fact-intensive assessment of the operation of politics in any particular context.

In most cases, the parties will not be able to present probative evidence of political process malfunction.[298] This might be because such evidence does not exist or because it cannot be gleaned from the witnesses to the process. In these cases, courts face a choice: They may presume that the political process has either malfunctioned or operated properly. A judicial presumption of democratic malfunction, even if only in a certain category of cases, raises concerns about the institutional role of courts that are not raised by the presumption of a properly operating political process. Courts, as part of an unelected branch of government, need to exercise particular care when overturning state actions, particularly those promulgated by the democratically elected branches of government. Carelessly overturning laws can subject courts to public charges of improper willfulness and personal value imposition in their constitutional judgments. Such charges threaten to undermine not only the individual judgments of the Court, but also the legitimacy of the institution itself. Courts have historically protected themselves against threats to their legitimacy by exercising restraint in overturning state actions and by providing reasoned opinions to support such invalidations. Presuming a malfunctioning political process and therefore automatically engaging in credibility-questioning review undercuts these judicial efforts.

To avoid these risks, courts should instead presume that the political process has operated properly. In doing so, courts should appropriately respect other state actors. State officials should be presumed to be good-faith enforcers of the Constitution who consider evidence that both supports and undercuts the constitutionality of the actions they adopt. This presumption forces courts to carefully examine the operation of politics prior to questioning the credibility of the record, and to provide a more complete justification for the invalidation of state actions. These more complete justifications will in turn protect the courts' legitimacy when they act in a counter-majoritarian fashion.

One concern is that if courts assume that the political process operates properly, officials may have incentives to hide evidence about the operation of politics from anyone who would potentially challenge a state action. As a result, the political process will be made less transparent to the public. However, if the court regularly engages in retail-level assessments of the operation of politics, the law's chal-

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[298] *See, e.g.*, Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 42 (1991) ("Interest groups always face some opposition, even if relatively underrepresented.").

lengers will have strong incentives to monitor the process and report process malfunctions that result in the omission of facts from the record, the failure to call witnesses to testify, or other biased transactions.

Thus, even if minority groups have captured the political process or have been marginalized from it, the losers would maintain the ability to intervene through legal challenges to state actions using evidence of democratic malfunction that undercuts the credibility of the record supporting the state action. To the extent that state actors, seeking to avoid judicial scrutiny of their findings of fact, open the process to fair consideration of all interests, this incentive to police the political process might ultimately help transform it.[299]

C. Applying Retail-Level Assessments to Windsor *and* Shelby County

How might an assessment of the operation of politics have looked in *Windsor* and *Shelby County*? The concurring and dissenting opinions in *Ricci* were unusual in their focus on the operation of the political process given that the case was not ultimately about the legal validity of that process. Even with their focus on the operation of the political process, the Justices in *Ricci* were not explicit about how it affected their treatment of the record. Therefore, as can be expected, the parties to *Windsor* and *Shelby County* did not treat the operation of the political process as a focal point in their briefs. Nonetheless, evidence from amicus briefs and law review articles discussing the operation of the political process leading to the enactment of DOMA and the VRA offer a basis for engaging in a retail-level assessment in the two cases. Such an assessment could have provided a better and more nuanced guide to the judicial determinations about how to treat the records than the Justices' wholesale assumptions about the operation of the political process based on who won and who lost.

Congress enacted both DOMA and the VRA. As an institution that is accountable to, and representative of, a broad electorate, Congress is less prone to being captured by a powerful minority group or excluding a marginalized minority group from the development of the record and the enactment of laws.[300] But when we examine the particulars about the processes leading to the laws' enactments, suspicions

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[299] *See* CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 54 (2001) ("[A] democratic government should aspire to be impartial rather than merely majoritarian: it should respond to the interests and opinions of all the people, rather than merely serving the majority, or some other fraction of the people.").

[300] *See supra* note 294 (explaining that it is more difficult for special interest groups to capture larger political units).

arise regarding distortions of the legislative record supporting DOMA that do not appear to be applicable to the VRA.

In *Windsor*, three briefs opposing the constitutionality of DOMA touched upon the operation of the political process leading to the adoption of the Act. These included the merits briefs of the respondent Edith Windsor;[301] an amicus brief in support of Windsor filed by four former Senators who voted in favor of DOMA;[302] and another amicus brief in support of Windsor filed by 172 members of the U.S. House of Representatives and forty U.S. Senators, including members of Congress who voted for DOMA, members who voted against it, and some members who were not in Congress at the time the statute was passed.[303] From the perspective of a retail-level assessment, the viewpoints of members of Congress who actually participated in the enactment of DOMA are quite valuable in providing insights into the operation of politics.

In their briefs, both Edith Windsor and the congresspersons described an unusually hasty process of enactment for such an extraordinary law.[304] The challenged provision in DOMA that defined marriage as being between a man and a woman for purposes of federal benefits implicated thousands of federal statutes that used the terms "marriage" or "spouse."[305] These included laws touching on "bankruptcy, burial rights, the civil service, consumer credit, copyright, education, federal lands and resources, health, housing programs, immigration, inheritance, the judiciary, the military, social security tax, veterans benefits, and welfare."[306] The bill was also

[301] Brief on the Merits for Respondent Edith Schlain Windsor, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307).

[302] Brief for Amici Curiae Former Senators Bill Bradley, Tom Daschle, et al. on the Merits in Support of Respondent Windsor, 133 S. Ct. 2675 (2013) (No. 12-307).

[303] Brief of 172 Members of the U.S. House of Representatives and 40 U.S. Senators as Amici Curiae in Support of Respondent Edith Schlain Windsor, Urging Affirmance on the Merits, 133 S. Ct. 2675 (2013) (No. 12-307).

[304] The ostensible reason for the accelerated process of enactment was the need to respond to the possibility that Hawaii might permit same-sex marriage after a decision of its supreme court favorable to same-sex partners. This need to expedite the enactment process was disputed. According to the brief of Edith Windsor, "one Representative noted, '[t]here is no likelihood that Hawaii will complete this process until well into next year at the earliest, giving us plenty of time to legislate with more thought and analysis.'" Brief for Respondent Edith Schlain Windsor, *supra* note 301, at 8–9.

[305] Acccording to one study, "[t]he word 'marriage' is used in more than 800 sections of federal statutes, and the word 'spouse' appears more than 3100 times." Scott Ruskay-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1467 (1997).

[306] *Id.* at 1468; *see also* Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1, 3 (1997) (describing the broad range of federal laws that DOMA's change in the definition of marriage affected).

extraordinary because it was the first federal law to define marriage, a family law issue that had previously been left to the states.[307] As one commentator noted, "for the first time in U.S. history, [a federal law] purports to declare that as *a general matter* (and not just for a particular purpose . . .), Congress and every federal agency will not recognize a particular peoples' marriages—marriages that are fully, equally, and lawfully valid under applicable state law."[308]

Yet despite the extraordinary nature of the statute, members of Congress spent very little time deliberating the effects of the bill or its constitutionality. According to the amicus briefs of the former Senators, DOMA went from "an obscure idea to a federal law" in less than five months.[309] The amicus brief of the other Congressmembers further asserted, "Congress deliberately chose to forgo any examination of how DOMA would affect the many federal laws that take marital status into account, the families that it hurts, or the federal government's long history of respecting the significant variability in state marriage laws for purposes of federal law."[310] For example, the bill was never sent to any of the congressional committees with jurisdiction over the federal laws governing benefits implicated by DOMA's change to the definition of marriage.[311] The House of Representatives rejected a proposal to require a General Accounting Office's assessment of the budgetary effects of the bill on the federal government.[312] It would take another eight years after the law's passage before the Congressional Budget Office released an estimate of DOMA's potential budgetary impact.[313] Despite the far-ranging effects of the bill on federal programs and families, and the many assertions about how the bill would serve the welfare of children, the apparent urgency sur-

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307 Charles J. Butler, Note, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate over Same-Sex Marriage*, 73 N.Y.U. L. Rev. 841, 848 (1998).

308 Evan Wolfson & Michael F. Melcher, *The Supreme Court's Decision in* Romer v. Evans *and Its Implications for the Defense of Marriage Act*, 16 Quinnipiac L. Rev. 217, 219 (1996).

309 Brief for Amici Curiae Former Senators Bill Bradley, et al. on the Merits in Support of Respondent Winsor, *supra* note 302, at 9.

310 Brief of 172 Members of the U.S. House of Representatives and 40 U.S. Senators as Amici Curiae in Support of Respondent Edith Schlain Windsor, Urging Affirmance on the Merits, *supra* note 303, at 13.

311 *Id.*

312 Brief for Respondent Edith Schlain Windsor, *supra* note 301, at 9. The brief quotes a comment from one of the sponsors of the bill, Senator Robert Byrd, admitting ignorance about the costs of the bill: "How much is it going to cost . . . if the definition of 'spouse' is changed? . . . I know I do not have any reliable estimates of what such a change would mean, but then, I do not know of anyone who does." *Id.*

313 Brief of 172 Members of the U.S. House of Representatives and 40 U.S. Senators as Amici Curiae in Support of Respondent Edith Schlain Windsor, Urging Affirmance on the Merits, *supra* note 303, at 14.

rounding a uniform definition of marriage led Congress to hold only one day of hearings on the bill.[314] In this single day of hearings, congresspersons did little in the way of examining the constitutionality of the DOMA definitional provision, the validity of the justifications for the provision, or the evidence in support of the justifications.[315] According to dissenting views in the House Report in support of DOMA, because "'consequences [were] not adequately analyzed,' and because the 'committees of the Congress [did not] hold[ ] hearings on the various aspects of' the law, the majority was able to 'use ignorance as an excuse for haste.'"[316] Congressional ignorance arose from the institution's failure "to consult any family- or child- welfare experts on whether denying federal recognition to married gay and lesbian couples would serve child welfare or promote stability of American families" and to "evaluate critically the many mistaken assertions about the supposed need for a 'uniform' federal definition of marriage."[317]

Instead of deliberating about the constitutionality of the law and its effects, members of Congress spent much of their time moralizing about heterosexual marriage and directing antipathy towards gays and lesbians.[318] While a few congresspersons expressed opposition to some of the more hostile and insensitive views about same-sex marriage, the record shows no advocacy for the same-sex partners harmed by the law.[319] Proponents, therefore, had free reign to distort the record in support of the law. Such distortion came in the form of trumping up unsubstantiated evidence and justifications and omitting

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314 Brief for Amici Curiae Former Senators Bill Bradley, et al. on the Merits in Support of Respondent Windsor, *supra* note 302, at 9.

315 Most of the discussion in the day of hearings on DOMA focused on another controversial provision adopted pursuant to congressional power under the Full Faith and Credit Clause that gave states permission to not recognize the valid marriages of another state. *See id.* at 9–10 n.12 ("The constitutional discussion that took place focused almost exclusively on whether DOMA contravened principles of federalism, not on whether Section 3 of DOMA violated the Equal Protection clause.").

316 Brief of 172 Members of the U.S. House of Representatives and 40 U.S. Senators as Amici Curiae in Support of Respondent Edith Schlain Windsor, Urging Affirmance on the Merits, *supra* note 303, at 13.

317 *Id*. at 15–16.

318 For quotes from congresspersons during floor debate on the bill, see Brief for Respondent Edith Schlain Windsor, *supra* note 301, at 9–10; Brief for Amici Curiae Former Senators Bill Bradley, et al. on the Merits in Support of Respondent Windsor, *supra* note 302, at 8–9; Brief of 172 Members of the U.S. House of Representatives and 40 U.S. Senators as Amici Curiae in Support of Respondent Edith Schlain Windsor, Urging Affirmance on the Merits,, *supra* note 303, at 17.

319 Brief for Amici Curiae Former Senators Bill Bradley, et. al., *supra* note 302, at 7–8 (explaining that even opponents who "staunchly oppos[ed] discrimination against gays in employment, adoption, military service, and other spheres" supported DOMA).

(mostly as a result of a failure to investigate) countervailing evidence that would potentially undermine the law.

To be fair, this account is based exclusively on the briefing of opponents to the law, as the proponents did not address the operation of the political process in their briefs. But if the DOMA opponents' retail-level assessment ultimately held up, then it would have been proper for the Court to engage in its credibility-questioning review of the record. Through cross-examination, second-guessing, and discounting of the justifications and evidence in the record supporting the law, the liberal majority was able to perform the function of challenging justifications and evidence that is ordinarily performed by opponents of the law in the committees and on the floors of Congress. In this credibility-questioning review of the record, the Court served as a critical substitute representative of individuals harmed by the law who did not have the political power to force a deeper consideration of the constitutionality of the law and prevent distortions of the record.

In contrast to the somewhat extensive discussion of the process of enactment of DOMA in the briefs of Edith Windsor and members of Congress, the briefs for the parties to *Shelby County* and the more than ninety amicus briefs spent virtually no time discussing the process of the VRA's reauthorization. This failure to engage the process of reauthorization can again be explained by the absence of a doctrinal standard explicitly subjecting the operation of the political process to judicial scrutiny. However, given the discussion of the enactment process in the *Windsor* briefs in the absence of such an explicit doctrinal standard, it could also be explained by the unremarkable nature of the reauthorization process. This latter explanation finds some support in the surrounding law review commentary about the reauthorization process.[320]

The reauthorization of the VRA, like the enactment of DOMA, proceeded through an expedited process,[321] but the degree and consequence of accelerating the process were substantially different. Unlike the DOMA process, Congress did not bypass the committees with jurisdiction over the Act during the VRA reauthorization process.[322]

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[320] *See, e.g.*, Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 179–92 (2007) (describing the reauthorization process).

[321] *See id.* at 180–81 (describing how Representative James Sensenbrenner, a key Republican supporter of the Voting Rights Act, pushed the reauthorization process up a year and set the bill on a fast track because his term as the Chairman of the House Committee on the Judiciary was set to expire at the end of 2006).

[322] *See* Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 402 nn.98–99 (2008) (explaining how congressional committees and

Rather than the single day of hearings it held for DOMA, Congress held twenty-one hearings and collected over 15,000 pages of evidence prior to the reauthorization of the VRA.[323] Both proponents and opponents of the reauthorization testified about the constitutionality of the Act, the justifications for the continued differential treatment of certain states and jurisdictions under the Act, the propriety of the Act's procedures and evidentiary standard, and the length of the sunset period.[324] On the floor of the House, opponents of the bill, who included representatives of the states and jurisdictions covered by the law, introduced several amendments.[325] Although these amendments were ultimately defeated, they received a substantial portion of the Republican vote.[326] Finally, the committee reports for the reauthorized Acts did not only include evidence and justifications supporting the law, as the proponents might have wished.[327] Instead, two groups of Republicans filed minority reports describing the problematic features of the reauthorized Act, including the maintenance of the coverage formula and bailout procedures, and introduced countervailing evidence that undermined the constitutionality of the Act.[328] While it was certainly unusual that the principal minority report was not filed until six days after the bill passed Congress,[329] such a procedure does not suggest any particular process dysfunction that would contribute to the distortion of the record in favor of the minority group. Rather, what we know about the reauthorization process indicates that it operated properly insofar as the evidence and viewpoints of opponents of the law were integrated into a relatively balanced record.

Even if we assume that the reauthorization process operated properly, and that the record in support of the VRA was not distorted, it does not necessarily follow that striking down the law was

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subcommittees were heavily involved in the process of enactment and particularly the development of the evidentiary record).

323 Brief for the Federal Respondent, Shelby Cnty. v. Holder, 133 S. Ct. 2612, at 20 (2013) (No. 12-96).

324 *See* Persily, *supra* note 321, at 183–84 (describing the serious reservations that members of the Senate Judiciary Committee had about the proposed bill).

325 *Id.* at 183 ("[The amendments] ranged from proposals to alter the coverage formula or bailout procedures to others attempting to accelerate the sunsetting of the law or to change the langauge assistance provisions.").

326 *Id.* (identifying three amendments for which a majority of the Republican members voted in favor).

327 *See id*. at 187 (describing the Democratic party's desire to issue a committee report that "would present the legislative record as unambiguously supporting reauthorization, and as providing substantial evidence to support its constitutionality").

328 *See id*. at 187–92 (providing some details on the two Republican minority reports).

329 *Id.* at 186.

improper. It only means that the Court should not have engaged in credibility-questioning review. Rather than cross-examine, second-guess, and discount the evidence that Congress compiled in support of the law, the Court should have instead checked the adequacy of the evidence in the record under the relevant constitutional standard. This adequacy-checking review, which would still have required a much more extensive review of the record than the conservative majority provided in *Shelby County*,[330] may have led to a similar constitutional result. But it would have been a result reached through a fair and proper consideration of the record rather than credibility-questioning review of the record premised on the assumption that the reauthorization process *must* have been captured merely because the law benefited racial minorities.

D. Three Objections to Retail-Level Assessments of the Operation of Politics

Some might consider the proposal that courts should engage in retail-level assessments of the operation of politics to be radical. Others might simply think it is wrong. Critics would likely assert that courts are simply not competent to engage in such retail-level assessments, and that it is inconsistent with the judicial role to scrutinize the lawmaking process. In this section, I anticipate these objections and offer responses that demonstrate not only the moderate nature of the proposal, but also that it is preferable to the alternatives.

Opponents might offer three objections to authorizing judicial evaluation of the political process in specific cases. The first is a procedural objection suggesting that appellate courts, like the Supreme Court in *Ricci*, should not fact-find about the political process. A second objection is that it is constitutionally illegitimate for courts to scrutinize the lawmaking process because of separation-of-powers concerns. The third objection is that courts are not competent to evaluate the operation of politics. Addressing each of these three objections, I argue that they do not significantly undercut the case for judicial consideration of the operation of politics at a retail level.

The first potential objection is procedural and can be lodged specifically at the concurring and dissenting opinions in *Ricci*. The two opinions can be criticized for deciding disputed issues of fact surrounding the operation of the decisionmaking process at the appellate stage. Procedurally, such findings of facts should be made at the trial level, but the two opinions in *Ricci* appeared to decide the question of

[330] *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2629 (2013) (asserting that the legislative record was irrelevant to the content of the coverage formula).

the operation of politics de novo. To the extent that the trial court failed to make specific findings of fact about the operation of politics, the Court should have remanded the case to the district court for additional findings on the question. Judicial findings of fact about the operation of politics should be made at the trial level for the same reason any judicial finding of fact should be made at that level. In trial proceedings, judges have the opportunity to make determinations about disputed facts through an adversarial process in which witnesses are examined and cross-examined and documentary evidence is rigorously reviewed. The trial judge is better positioned than an appellate judge to make these types of fact determinations and assess the credibility and expertise of witnesses.[331] In future cases where the district court fails to make clear findings on the operation of politics, the Court should remand the case, and when the trial court does make such findings, the Court should review these findings under the very deferential clear error standard.[332]

A second potential objection is that courts lack constitutional authority to assess the operation of politics. The Justices' analysis of the operation of politics in *Ricci* was unusual because federal courts have generally been reluctant to engage in a fine-tuned, individualized review of the processes that lead to a particular state action.[333] The reluctance arises from a concern that when courts do so, they exceed their institutional role in the separation of powers framework.[334] This concern is particularly salient when courts are reviewing the legislative process. For example, courts have generally declined to review Congress's alleged failure to follow constitutionally prescribed procedures in the enactment of laws.[335] According to the Court, "[j]udicial

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331 The Supreme Court has explained, "[t]he rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985) (interpreting FED. R. CIV. P. 52(a)).

332 *See* FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous.").

333 *See, e.g.*, Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915, 1917–18 (2011) (describing this judicial resistance to review of the lawmaking process); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 242–43 (1976) ("[M]ost courts and commentators find it improper to question legislative adherence to lawful procedures.").

334 *See* Bar-Siman-Tov, *supra* note 333, at 1927 (discussing the separation-of-powers concerns associated with due process of lawmaking procedures); Linde, *supra* note 333, at 243 (identifying concerns with due process of lawmaking arising from a "problem of proof, or of respect between coordinate branches").

335 *See, e.g.*, Field v. Clark, 143 U.S. 649, 672 (1892) (announcing the enrolled bill doctrine, which has been used by subsequent courts to justify judicial reluctance to review lawmaking procedures); *see also* Ittai Bar-Siman-Tov, *Legislative Supremacy in the United*

action based upon such a suggestion is forbidden by the respect due a coordinate branch of the government."[336] At the same time, federalism concerns constrain federal courts from addressing challenges to state legislatures' failures to follow procedures prescribed by state constitutions,[337] as these are considered questions of state law.[338]

There are important parallels between judicial review of legislative procedures and judicial evaluation of the operation of politics. It is necessary, however, to distinguish the effects of judicial review in these two contexts. When a court finds that the legislature failed to follow constitutionally prescribed procedures in the enactment of a law, such a determination would result in the invalidation of the law.[339] This puts courts in the role of supervising the lawmaking process. When, however, courts find that the process leading to the adoption of a law has malfunctioned, the consequence is not the invalidation of the law. Instead, the result is that the Court treats skeptically the legislative findings of fact. This form of review may increase the probability that the Court will invalidate the law, but insofar as courts are engaging in case-by-case evaluations of the operation of politics, it will not affect the judicial treatment of the record supporting other laws. At most, it might incentivize legislatures to open up their process for consideration of other laws to ensure more deferential treatment of the record from the courts.[340] This is a

States: Rethinking the Enrolled Bill Doctrine, 97 GEO. L.J. 323, 330–31 (2009) (identifying the numerous cases in which lower courts have relied on the enrolled bill doctrine).

336 Field v. Clark, 143 U.S. at 673; *see also* United States v. Munoz-Flores, 495 U.S. 385, 409–10 (1990) (Scalia, J., concurring) (arguing that "courts should not undertake an independent investigation" into the process of enactment because it "manifest[s] a lack of respect due a coordinate branch and produce[s] uncertainty as to the state of the law").

337 *See* Victor Goldfeld, Note, *Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation Through Judicial Review of Congressional Processes*, 79 N.Y.U. L. REV. 367, 380 (2004) ("[F]ederal court review of state legislative procedures could raise significant federalism issues not involved in the review of congressional procedures.").

338 The only federal constitutional limit is that states must maintain a republican form of government, but the Supreme Court has held that federal courts are precluded from actually enforcing that mandate. *See* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 149–50 (1912) (finding a claim under the republican form of government clause nonjusticiable); Luther v. Borden, 48 U.S. 1, 42 (1849) (same).

339 *See* Bar-Siman-Tov, *supra* note 333, at 1923 ("[Judicial review of the legislative process] grants courts the power to examine the legislative process . . . and to invalidate an otherwise constitutional statute based solely on defects in the enactment process."); Linde, *supra* note 333, at 242 (arguing that the problem of judicial review of the process of statutory enactment "lies in the consequences of its violation," which may mean that the law promulgated is no longer a law).

340 This account of improving the legislative process through judicial evaluation of the operation of the political process is very much consistent with the judicial use of tools of statutory interpretation to improve lawmaking, deliberation, and accountability. *See, e.g.*, Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405,

positive externality, and one that raises fewer separation-of-powers or federalism concerns.

The third objection is that courts are simply not competent to evaluate the operation of politics. Judges are not social scientists, and judges on their own lack the investigative tools to uncover evidence of political process malfunction. Both of these points must be conceded. However, judicial determinations about the operation of politics do not require judges to act as social scientists or investigators of the political process. Rather, it is up to the parties to investigate the political process and introduce evidence about its operation to the court, as the petitioners and respondents did in their briefs to the Supreme Court in *Ricci*. The judges are then in the familiar position of making a judgment after weighing the evidence. From the perspective of judicial competence, judgments about the operation of politics seem no different from the dozens of other contexts in which judges make judgments despite lacking expertise and the investigative tools to fully research the question.[341]

Furthermore, the Supreme Court has been judging the operation of politics for at least the past seventy-five years. A plurality of the Supreme Court announced in the famous footnote four of *United States v. Carolene Products* that courts should consider "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[342] Since *Carolene Products*, the Court has evaluated the operation of politics at the wholesale level when it has decided which classes are considered suspect and therefore entitled to heightened judicial scrutiny of the state actions burdening them.[343] When the Court has

457–59 (1989) (describing the statutory interpretation tools designed to improve lawmaking, deliberation, and accountability).

341 For example, in the constitutional domain, when engaging in an assessment of the original meaning of a provision in the Constitution, judges weigh historical evidence and make judgments about what the Constitution means. The judges do so despite the fact that they are not historians and lack the investigative tools of historians. When deciding the meaning of a statutory term, judges weigh evidence of the meaning of language. The judges do so even though they are not linguists and lack the investigative tools to study the meaning of language. In antitrust law, judges lack the knowledge and tools of economists, but nonetheless must weigh economics-based evidence. In patent law judges lack the knowledge and tools of scientists, but still must make science-based judgments.

342 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

343 According to equal protection doctrine, classes of individuals will be considered suspect if they share an immutable characteristic, have suffered a history of discrimination, and are politically powerless. *See* Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (Brennan, J., plurality opinion) (arguing that sex is a suspect classification because of our "long and unfortunate history of sex discrimination"); Lyng v. Castillo, 477 U.S. 635, 638

decided that a particular group needs protection from the majoritarian process, the Court has subjected laws discriminating against members of that group to close scrutiny,[344] but when the Court has determined that the group can protect itself in the majoritarian process, laws burdening members of the group have been subject only to rational basis review.[345]

Judicial evaluation of the operation of politics is therefore nothing new. If we consider the Court competent to engage in such evaluations at the wholesale level, we should be willing to consider the Court competent at the retail level as well, not least because of the gains in accuracy from retail-level assessments. Courts considering the unique procedural context underlying the adoption of each law are likely to produce more accurate assessments. While courts will surely make mistakes in some cases, they are likely to improve over wholesale assessments that rely on overbroad assumptions about the operation of the political process.

In sum, concerns with judicial roles and competence do not undercut the case for retail-level judicial evaluation of the operation of politics. Trial judges have both the institutional legitimacy and the competence to make an individualized determination of the political process underlying the record. Some may still continue to view courts' scrutiny of the operation of politics as a dramatic expansion of their authority. In certain respects this proposal does call for more intrusive judicial review of the political process, but that intrusion is accompanied by more transparent judicial decisionmaking regarding the overturning of state actions. It also, paradoxically, might actually lead to less judicial intervention into state actions, as state actors correct political process malfunction in order to avoid more intrusive judicial review.

(1986) (identifying the attributes of suspect classes); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (describing "the traditional indicia of suspectness" as "a history of purposeful unequal treatment, or relegat[ion] to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

344 *See* Graham v. Richardson, 403 U.S. 365, 372 (1971) (determining that classifications based on alien status "are inherently suspect and subject to close judicial scrutiny [because] [a]liens as a class are a prime example of a 'discrete and insular' minority"); *see also* Sugarman v. Dougall, 413 U.S. 634, 641 (1973) (re-asserting aliens' status as a discrete and insular minority).

345 *See* Heller v. Doe, 509 U.S. 312, 321 (1993) (subjecting a classification burdening the mentally disabled only to rational basis review on the basis of *Cleburne*'s determination that the class was not suspect); Vance v. Bradley, 440 U.S. 93, 96–97 (1979) (noting the lack of dispute between the parties about the classification status of the aged).

CONCLUSION

In the same term that it decided *Shelby County* and *Windsor*, the Court left unresolved a third significant constitutional case—the affirmative action case of *Fisher v. University of Texas*.[346] After finding that the trial court did not apply the proper standard of scrutiny to the university's use of race in admissions, the Court remanded the case to the district court.[347] A conventional view of the equal protection standards would predict that if the university produces enough evidence to show that the use of race is narrowly tailored to achieve the compelling purpose of diversity, the affirmative action plan will survive constitutional scrutiny.

Separately, legislators in Congress are pursuing a fix for the Voting Rights Act. The fix responds to the *Shelby County* decision in the form of a new coverage formula that would restore the federal pre-approval requirement for voting changes in a smaller number of jurisdictions.[348] The congressional focus is on building the legislative record with more evidence in the form of testimony from nationwide hearings, expert opinions, and statistical studies of voting discrimination to demonstrate that the "current burdens [of the statute are] justified by current needs."[349]

Shelby County, *Windsor*, and the many cases that came before suggest, however, that the amount of evidence in support of a state action will not matter as much as the judicial determination of whether the evidence is credible. Currently, this determination will turn on which ideological wing's conception of the operation of politics controls when cases challenging these state actions inevitably reach the Court.

But state actors may have the capacity to influence these credibility assessments by engaging in a process that evidences fair consideration of all interests in the decisions to adopt a state action, including those of the politically diffuse and weak, and ensuring that these interests have the opportunity to introduce countervailing facts into the record. It is also imperative that state actors put greater emphasis in the record on describing this process of inclusion. Through these two moves, the state can perhaps blunt the force of any

346 133 S. Ct. 2411 (2013).

347 *Id.* at 2422–23.

348 *See* Ari Berman, *Members of Congress Introduce a New Fix for the Voting Rights Act*, THE NATION (Jan. 16, 2014, 12:53 PM), http://www.thenation.com/blog/177962/members-congress-introduce-new-fix-voting-rights-act# (describing the features of the proposed amendments to the Voting Rights Act).

349 Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2630 (2013) (internal quotation marks omitted).

judicial presumption of process malfunction. They could also push Justices toward assessing the operation of politics at the retail level, an approach that would protect state authority to pursue actions so long as they are supported with enough evidence to satisfy the constitutional standard.

It is also important for lawyers defending these laws to counter wholesale categorical presumptions of process malfunction. They will need to do so by probing the details of the processes leading to the adoption of state actions. They should identify evidence that opposing interests were represented and had the opportunity to introduce countervailing facts into the record. Such evidence presented in trial briefs or testimony can undermine unsubstantiated judicial presumptions about the credibility of the record.

Ultimately, even with proof of a properly operating political process, the record will not necessarily be immunized from judicial skepticism, but at the very least, such tactics should provide the state with a stronger basis for defending laws arising from an inclusive process, while exposing those laws arising from a dysfunctional one.