

October 2016

Real Bite: Legal Realism and Meaningful Rational Basis in Dog Law and Beyond

Ann L. Schiavone

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Animal Law Commons](#), [Constitutional Law Commons](#), and the [Fourteenth Amendment Commons](#)

Repository Citation

Ann L. Schiavone, *Real Bite: Legal Realism and Meaningful Rational Basis in Dog Law and Beyond*, 25 Wm. & Mary Bill Rts. J. 65 (2016), <https://scholarship.law.wm.edu/wmborj/vol25/iss1/3>

REAL BITE: LEGAL REALISM AND MEANINGFUL RATIONAL BASIS IN DOG LAW AND BEYOND

Ann L. Schiavone*

INTRODUCTION	65
I. THE SUPREME COURT’S FIRST REVIEW OF THE REGULATION OF DOGS	79
II. THE FOUNDING, THE POLICE POWER, AND THE ROLE OF JUDICIAL REVIEW . .	75
III. THE FOURTEENTH AMENDMENT AS A TOOL OF JUDICIAL REVIEW	83
A. <i>A Tentative Beginning to Fourteenth Amendment Analysis</i>	83
B. <i>From Lochner to Legal Realism</i>	87
IV. MODERN APPLICATION OF RATIONAL BASIS TEST AND LEGAL REALISM. . .	96
V. BREED-SPECIFIC LAWS VIOLATE EQUAL PROTECTION UNDER A MEANINGFUL RATIONAL BASIS ANALYSIS	109
CONCLUSION	119

INTRODUCTION

On August 5, 2002, the City of Toledo, Ohio issued a warrant for the arrest of resident Paul Tellings on the charge of violating the limitation on harboring vicious dogs.¹ Both the Toledo ordinance and Ohio state law in effect in 2002 labeled “pit bull” type dogs per se vicious purely based on their visual identification.² Toledo’s ordinance specifically limited citizens to only one “vicious” dog per household.³ During a routine lead-based paint inspection⁴ in Tellings’s home, the health inspector noted three dogs that looked like pit bulls in the household, reported it to the dog warden,⁵ and set in motion a legal action that proceeded all the way through the state’s highest court, and ended in a denial of certiorari from the United States Supreme Court.⁶

* Ann L. Schiavone is an Assistant Professor at Duquesne University School of Law.

¹ *Case Information*, VALLIE BOWMAN—ENG. CLERK CT., [http://www.tmc-clerk.com/case information/criminaltraffic/Default.aspx](http://www.tmc-clerk.com/case%20information/criminaltraffic/Default.aspx) [<https://perma.cc/WNG3-HQHD>] (search in “Case Number” search bar for “CRB-02-15267”; then click link for Case Number “CRB-02-15267-0104”).

² TOLEDO, OHIO, MUNICIPAL CODE § 505.14 (repealed Oct. 12, 2010); OHIO REV. CODE §§ 955.11, 955.22 (repealed 2012).

³ § 505.14.

⁴ Toledo v. Tellings (*Tellings I*), No. L-04-1224, 2006 WL 513946, at *1 (Ohio Ct. App. Mar. 3, 2006), *rev’d*, 871 N.E.2d 1152 (Ohio 2007).

⁵ *Id.*

⁶ See Toledo v. Tellings (*Tellings II*), 871 N.E.2d 1152 (Ohio 2007), *cert. denied*, 2008 U.S. LEXIS 2006 (Feb. 19, 2008).

The Tellings's three dogs had exhibited no history of aggression or violence.⁷ No prior allegations of bites or attacks were laid upon their doorstep.⁸ Not even the health inspector claimed any of the three dogs stepped a paw out of line during the inspection.⁹ Their only crime was their appearance.¹⁰ Prior to seizure of the dogs, Tellings was able to transfer ownership of one of his dogs to keep it safe, and he was permitted to keep another under the ordinance.¹¹ The dog warden seized and destroyed the third.¹² Instead of quietly taking his punishment for violating the ordinance, Tellings challenged the constitutionality of the Ohio statute, claiming it violated procedural and substantive due process, as well as equal protection under both the Ohio and United States Constitutions.¹³

While this case was not the first nor the last in the country to challenge the constitutionality of breed-specific canine laws, *Toledo v. Tellings*¹⁴ is unique in that its robust procedural history and opinions at both the court of appeals level and the Ohio Supreme Court illustrate a very real tension existing in rational basis analysis under the due process and equal protection guaranteed by the Fourteenth Amendment.¹⁵ Namely, the opinions stand for very different views of how rational basis analysis should be conducted.¹⁶ The Ohio Supreme Court championed the view of the rational basis test as essentially a rubber stamp of approval for any legislative act that does not violate a specific fundamental right or disadvantage a particular suspect or quasi-suspect class.¹⁷ On the other hand, the Ohio Court of Appeals for the Sixth District applied a meaningful rational basis test, analyzing whether the means utilized to achieve the purported legislative goal were rationally related to that

⁷ *Tellings I*, 2006 WL 513946, at *1.

⁸ *See id.*

⁹ *See id.*

¹⁰ *See id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at *5–6.

¹⁴ *Toledo v. Tellings (Tellings II)*, 871 N.E.2d 1152 (Ohio 2007); *Toledo v. Tellings (Tellings I)*, No. L-04-1224, 2006 WL 513946, at *1 (Ohio Ct. App. Mar. 3, 2006).

¹⁵ *See Tellings I*, 2006 WL 513946; *Tellings II*, 871 N.E.2d 1152.

¹⁶ *Compare Tellings I*, 2006 WL 513946, at *11 (opining, after reviewing the evidence present in the record and the municipal court ruling, that when “a specific breed does not inherently represent a greater danger than any other breed, a law that regulates that breed on the basis of mere ownership is arbitrary, unreasonable, and discriminatory”), *with Tellings II*, 871 N.E.2d at 1157 (opining, with only minimal attention to the expert witness testimony in the record that “[t]he state and the city have a legitimate interest in protecting citizens against unsafe conditions caused by pit bulls”).

¹⁷ *See Tellings II*, 871 N.E.2d at 1158 (“Laws limiting rights, other than fundamental rights, are constitutional with respect to substantive due process and equal protection if the laws are rationally related to a legitimate goal of government.”).

intended goal.¹⁸ Unsurprisingly, these analyses resulted in markedly different outcomes.¹⁹ The Ohio Supreme Court ultimately upheld the state law that classified dogs as vicious based on appearance, overturning the court of appeals ruling that such classification was not rationally related to public health, safety, or welfare.²⁰ While the “rubber-stamp” approach of the Ohio Supreme Court prevailed in *Tellings*, this was certainly not the final word on rational basis analysis generally, nor is it likely the last word on canine breed-specific laws specifically.²¹ The tension between the application of traditional rational basis and meaningful rational basis is not new.²² It is a symptom of the fundamental tension existing since the Founding between support for the broad police power of the government and the desire to protect the rights of the individual.²³

Since the decision in *Tellings*, the United States Supreme Court has provided more evidence that meaningful rational basis analysis is alive and well and, perhaps, gaining momentum.²⁴ Specifically, the gay marriage cases of *United States v. Windsor*,²⁵ decided in 2013, and *Obergefell v. Hodges*,²⁶ decided in 2015, lend

¹⁸ See *Tellings I*, 2006 WL 513946, at *11 (“We agree that the protection of property and people from injuries by dogs is clearly a legitimate governmental interest. Nevertheless, this interest must bear a rational or ‘real and substantial relationship’ to the conduct being regulated by the statute, in this case the mere ownership of pit bulls.”).

¹⁹ Compare *id.* at *12 (“[W]e conclude that both R.C. 955.22, 955.11 (A)(4)(a)(iii) and T.M.C. § 505.14(a), which relied on the now disproved presumption that pit bulls, as a breed, are inherently dangerous, are unconstitutional since they lack a rational or real and substantial relationship to a legitimate governmental interest.”), with *Tellings II*, 871 N.E.2d at 1159 (“We hold that the state of Ohio and the city of Toledo have a legitimate interest in protecting citizens from the dangers associated with pit bulls, and that R.C. 955.11 (A)(4)(a)(iii), 955.22 and Toledo Municipal Code 505.14 are rationally related to that interest and are constitutional.”).

²⁰ *Tellings II*, 871 N.E.2d at 1159.

²¹ See *Dias v. City of Denver*, 567 F.3d 1169, 1181 (10th Cir. 2009) (concluding plaintiff dog owners affected by Denver’s pit bull ban had, under a rational basis analysis, “alleged a substantive due process violation sufficient to survive a motion to dismiss for failure to state a claim”). Following this decision by the Tenth Circuit, the United States District Court for the District of Colorado, on remand, also ruled in favor of the plaintiffs on this issue of summary judgment, finding “a reasonable trier of fact may find that Plaintiffs’ experts are correct and there exists no rational basis for a breed specific ordinance.” *Dias v. City of Denver*, No. 07-CV-00722-WDM-MSW, 2010 WL 3873004, at *7 (D. Colo. Sept. 29, 2010) (order denying summary judgment).

²² See Aaron Belzner, *Putting the “Review” Back in Rational Basis Review*, 41 W. ST. U. L. REV. 339, 346–54 (2014).

²³ See discussion *infra* Part II.

²⁴ See generally *United States v. Windsor*, 133 S. Ct. 2675 (2013); Belzner, *supra* note 22, at 348–54.

²⁵ 133 S. Ct. 2675, 2693 (2013).

²⁶ 135 S. Ct. 2584, 2601–08 (2015). “While the opinion does not specifically apply a rational basis analysis, it eschews development of the law by ‘formula’ and avoids many of

support to this argument. When viewed in concert with previous gay rights cases of *Romer v. Evans*²⁷ and *Lawrence v. Texas*,²⁸ as well as other cases that have employed similar analyses, such as *United States Department of Agriculture v. Moreno*²⁹ and *City of Cleburne v. Cleburne Living Center, Inc.*,³⁰ this recent case law may be signaling the rise of meaningful rational basis review of laws under the Fifth and Fourteenth Amendments, at least under certain circumstances.³¹ Since the decision in *Moreno* in 1973, scholars have debated what issues and circumstances would prompt the Supreme Court to employ meaningful rational basis.³² Now, over forty years later, we have more evidence to show that the Court seems willing to strike down a law under a more thorough rational basis analysis upon the presence of three specific factors.³³ First, the law in question must, at least in a general sense, impinge upon a fundamental right.³⁴ Second, the law must be based, at least in part, on animus of the community.³⁵ Lastly, ample sociological or empirical data should be available to show no rational relationship between the goals of the statute and the means used to achieve it.³⁶

While there is no absolute assurance that meaningful rational basis will be employed more regularly by the Court, the body of law has grown enough in recent years to reveal the similarities noted above, and to draw analogies in other contexts.³⁷ In this Article, I argue that canine breed-specific laws of the type challenged in *Toledo v. Tellings* should be reviewed under meaningful rational basis. Importantly, should the Supreme Court review a breed-specific law, it would not be the

the trappings of traditional tiered-scrutiny analysis, focusing instead on the lofty goals of ‘liberty’ and ‘equality.’” Ann L. Schiavone, *Unleashing the Fourteenth Amendment*, 2016 WIS. L. REV. FORWARD 27, 33 (2016), <http://wisconsinlawreview.org/unleashing-the-fourteenth-amendment> [<https://perma.cc/XJ86-EM7Y>].

²⁷ 517 U.S. 620 (1996) (holding that an Amendment to the Colorado constitution, “Amendment 2,” violated the Equal Protection Clause when subjected to a rational basis standard of review).

²⁸ 539 U.S. 558 (2003) (holding that a Texas law that criminalized homosexual intercourse was a violation of the Fourteenth Amendment and therefore unconstitutional).

²⁹ 413 U.S. 528 (1973) (finding that legislative classification was a bare congressional desire to harm a politically unpopular group and could not constitute a legitimate governmental interest).

³⁰ 473 U.S. 432 (1985) (finding that Cleburne’s ordinance was too broad to overcome the suspicion that the ordinance rested “on a bare desire to treat the retarded as outsiders”).

³¹ Schiavone, *supra* note 26, at 27.

³² See Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.*, 88 KY. L.J. 591, 615 (2000).

³³ Schiavone, *supra* note 26, at 33.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See *Toledo v. Tellings (Tellings I)*, No. L-04-1224, 2006 WL 513946 (Ohio Ct. App. Mar. 3, 2006).

first time that the Court has reviewed canine law under the Fourteenth Amendment.³⁸ In the 1897 case of *Sentell v. New Orleans & Carrollton Railroad*,³⁹ the United States Supreme Court found that the regulation of dogs is a valid exercise of police power.⁴⁰ However, the Court left the door open to invalidate certain types of dog laws under the Fourteenth Amendment.⁴¹

In order to prove that meaningful rational basis analysis is justifiable under the Constitution, and that canine breed-specific laws are an ideal subject for that analysis via the Fourteenth Amendment, we must first explore how we got here. How did Fourteenth Amendment jurisprudence develop such that the Court has the power to review state laws, and how has it been applied to canine law specifically? Only then can we explore how the Court might respond to breed-specific laws now. Part I of this Article begins with a reconsideration of the conventional interpretation of the primary Fourteenth Amendment dog law case, *Sentell v. New Orleans & Carrollton Railroad*, to show that the legislative power over dogs was never intended to be unlimited, and that judicial review of dog law is legitimate under certain circumstances. Part II explores the history of the police power and legitimacy of judicial review as a check on that power since the Founding. Part III considers the development of judicial review of state legislative action following the ratification of the Fourteenth Amendment, including the rise of legal realism principles as a legitimate means of supporting or invalidating laws and the establishment of the rational basis test. Part IV discusses the shift in Fourteenth Amendment analysis away from a rubber-stamp approach to most legislative action, toward meaningful rational basis review, with special focus on Justice Anthony Kennedy's opinions in the gay rights cases. Finally, in Part V, I show why courts should apply a meaningful rational basis analysis to breed-specific laws and why those laws may fail rational basis. Specifically, this Article shows that breed-specific cases may share many common characteristics with other cases where the Supreme Court has employed this heightened analysis and invalidated those laws.

I. THE SUPREME COURT'S FIRST REVIEW OF THE REGULATION OF DOGS

Ratified in July of 1868 as one of three amendments to the Constitution proposed and ratified in the wake of the Civil War, the Fourteenth Amendment provided

³⁸ See *Sentell v. New Orleans & Carrollton R.R.*, 166 U.S. 698 (1897).

³⁹ 166 U.S. 698 (1897).

⁴⁰ *Id.* at 704. The "police power" is generally defined as the right of the sovereign to govern men and things. *Thurlow v. Massachusetts (License Cases)*, 46 U.S. (7 How.) 504, 527–28 (1847), *overruled in part by Leisy v. Hardin*, 135 U.S. 100 (1890). A more modern term for this concept is legislative power. See Robert F. Williams, *Comment: On the Importance of A Theory of Legislative Power Under State Constitutions*, 15 QLR 57, 61 (1995).

⁴¹ See *infra* Part I.

protection to citizens against certain actions of individual states.⁴² At the close of the nineteenth century, the Supreme Court continued to struggle with many questions concerning the interpretation and applicability of the Fourteenth Amendment, and what power it granted (or did not grant) to courts to invalidate state legislation that violated individual rights of citizens.⁴³ Within this context, the Supreme Court took up a case concerning the intersection of dog law and Fourteenth Amendment jurisprudence, *Sentell v. New Orleans & Carrollton Railroad* in 1897. Since then, *Sentell* has become the singular starting point for almost any constitutional question in dog law and is therefore a necessary focus for the inquiry of this Article.⁴⁴ I make no argument that *Sentell* was wrongly decided under the circumstances, however the following discussion will attempt to show that courts have extrapolated the rationale of the case beyond its original application. Rather than blindly citing it in new contexts, *Sentell* deserves a fresh look.

Sentell arose from a dog owner's action to recover damages from the New Orleans Railroad for the death of a valuable Newfoundland bitch which he kept for breeding purposes.⁴⁵ The owner took the dog for a walk while she was pregnant with a litter of puppies.⁴⁶ The dog stopped on railroad tracks and was hit and killed by an electric car.⁴⁷ The owner sued the railroad for negligence in the death of the dog.⁴⁸ The facts of the case itself were not at issue in the Supreme Court case.⁴⁹ Instead, the Court had only to pass judgment on the constitutionality of a Louisiana statute used by the railroad as an affirmative defense.⁵⁰ The statute required that dogs owned by citizens be registered with the tax assessor as personal property, and that a value be

⁴² *Slaughter-House Cases*, 83 U.S. 36, 59 (1872) (Swayne, J., dissenting):

These amendments are all consequences of the late civil war. The prejudices and apprehension as to the central government which prevailed when the Constitution was adopted were dispelled by the light of experience. The public mind became satisfied that there was less danger of tyranny in the head than of anarchy and tyranny in the members.

⁴³ DAVID E. BERNSTEIN, *REHABILITATING LOCHNER* 91–92 (2011) [hereinafter *REHABILITATING LOCHNER*] (discussing the slow development and controversy of employment of the Fourteenth Amendment as “protection for civil liberties” against infringement by the states).

⁴⁴ *See, e.g.*, *Nicchia v. New York*, 254 U.S. 228, 231 (1920) (upholding a law requiring dog licenses as a valid exercise of police power); *Altman v. City of High Point*, 330 F.3d 194, 204 (4th Cir. 2003) (recognizing property rights in dogs for Fourth Amendment purposes); *Scharfeld v. Richardson*, 133 F.2d 340, 343 (D.C. Cir. 1942) (upholding an owner's property right in his dog, even when unlicensed); *Thiele v. City of Denver*, 312 P.2d 786, 789 (Colo. 1957) (upholding an ordinance prohibiting dogs from running-at-large as a valid exercise of police power).

⁴⁵ *Sentell*, 166 U.S. at 700.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 698.

⁴⁹ *Id.* at 700.

⁵⁰ *Id.*

assigned to the dog.⁵¹ Upon such registration, the owner would be given personal property rights in the dog up to the value assigned by the owner on the tax rolls.⁵² Since the dog owner never registered the Newfoundland, the statute indicated he was not entitled to recovery for the death of the dog.⁵³ The dog owner then argued that the statute violated the Fourteenth Amendment by depriving him of his property without due process.⁵⁴

The Court began its opinion by recounting that, at common law, dogs are very different than other types of domesticated animals, and a person's property interest in them is "imperfect."⁵⁵ The right of property in a dog lay somewhere between wild animals not owned until they are captured or killed, and domestic animals like horses, cows, sheep, pigs etc., "in which the right of property is perfect and complete."⁵⁶ The Court further specified several reasons for why dogs and "domestic animals" differ in their status as property.⁵⁷ First, dogs have no "intrinsic value" according to the Court, because they have no common use as either labor or food.⁵⁸ Rather, they are generally kept for "pleasure, curiosity or caprice."⁵⁹ Further, dogs as a species encompassed a wide range of differences, including both positive and negative characteristics.⁶⁰ The Court stressed that while some dogs "rank among the noblest representatives of the animal kingdom,"⁶¹ others are "little better than a public nuisance"⁶² and that all dogs, noble or nuisance, are "subject to attacks of hydrophobic madness."⁶³ Thus the Court set up the dichotomy of the dog in *Sentell*—a community should be able to protect the good ones through the force of law, and be able to destroy the bad ones with no consequence under the law.⁶⁴

The Court then argued that because it is "practically impossible by statute to distinguish between the different breeds, or between the valuable and the worthless,"⁶⁵ states may draw upon their police power to regulate ownership of dogs.⁶⁶ The Court theorized that if an owner values a dog sufficiently, he or she will comply with

⁵¹ *Id.* at 698–700.

⁵² *Id.* at 698.

⁵³ *Id.*

⁵⁴ *Id.* at 699.

⁵⁵ *Id.* at 701.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* (likening dogs to parrots, monkeys, cats, and birds).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *See id.* at 701–02.

⁶⁵ *Id.* at 701.

⁶⁶ *Id.* at 701–02.

reasonable regulation and thus protect the animal and distinguish it from worthless or ferocious ones of which the community may seek to rid itself.⁶⁷

To support its rationale, the Court cited to numerous cases upholding statutes that promote the killing of dogs not under the protection of owners.⁶⁸ Evidence of the failure to protect a dog included failure to place a collar on the dog, failure to license the dog, or allowing the animal to wander off the owner's property.⁶⁹ These regulations were consistent with policy objectives explained by the Court: protect the good and eliminate the bad.⁷⁰ These regulations were also consistent with traditional notions of police power, which focused on eliminating nuisance while protecting personal property rights.⁷¹

The second group of cases the Court pointed to in defense of the assertion that personal property, at times, is subject to police power concerned the destruction of property when it becomes dangerous.⁷² Examples included food stuffs that have decayed or become rancid and are dangerous to public health, clothing which may spread illness or infection, or homes that are structurally dangerous.⁷³ In its reasoned approach, none of the Court's citations suggested that property can be taken or destroyed "just because."⁷⁴

Ultimately, the opinion validated the argument that regulation of dogs is under the police power of the state.⁷⁵ However, the opinion did not suggest that this power is limitless.⁷⁶ Specifically, the Court admitted that the destruction of personal property without due process very well may violate the Fourteenth Amendment unless there is an immediate danger that warrants summary destruction of the property.⁷⁷ The Court even went so far as to suggest that the Louisiana statutory requirement of dog registration on the tax rolls, and a New Orleans ordinance requiring all dogs be

⁶⁷ *Id.* at 702.

⁶⁸ *Id.* at 702–04.

⁶⁹ *Id.*

⁷⁰ *Id.* at 701–02.

⁷¹ *Id.* at 701 (stating that some dogs are "little better than a public nuisance"). As will be discussed in the next section, police power in the nineteenth century and before focused on eliminating nuisance. *See infra* Part II. In the late nineteenth and early twentieth centuries, that focus progressed to using the police power to promote goals of health, safety, and welfare. *See* discussion *infra* Part II.

⁷² *Sentell*, 166 U.S. at 704–05.

⁷³ *Id.*

⁷⁴ *See id.*

⁷⁵ *Id.* at 706.

⁷⁶ *Id.* at 705.

⁷⁷ *Id.* Today, the idea of dogs as constitutionally protected property is well-established. Numerous United States Circuit Courts of Appeal have opined that dogs are subject to Fourth Amendment protection and the unjustified shooting of a dog by the police is subject to a claim under 42 U.S.C. § 1983. *See, e.g.,* *Altman v. City of High Point*, 330 F.3d 194, 200–03 (4th Cir. 2003) (analyzing the history of the law of dogs as property and concluding that dogs are subject to Fourth Amendment protection as "effects"); *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 209–10 (3d Cir. 2001) (holding that dogs are "effects" subject to Fourth Amendment protection).

licensed by the treasurer, were “more than ordinarily stringent,”⁷⁸ and if they were applied to other domestic animals they could very well be held unconstitutional.⁷⁹

A careful reading of *Sentell* suggests the case does not support breed-specific laws at all.⁸⁰ While the Court believed some dogs are valuable and others worthless, differentiating the valuable from the worthless was clearly not tied to breed.⁸¹ Instead, the Court tied this differentiation to an owner’s willingness to jump through certain hoops to claim ownership.⁸² If a dog is good and valuable, the owner will obtain the license or register the dog with the tax office.⁸³ Once such dominion is exercised, due process rights attach.⁸⁴ The traditional concept of police power pervades this opinion.⁸⁵ It is police power used as a means of eliminating nuisance, while protecting the property rights of people who do no harm, not a police power that authorizes a state to enter a person’s home and confiscate dogs with no history of viciousness or dangerousness.⁸⁶

Additionally, the Court made the point that it is “practically impossible”⁸⁷ to differentiate dogs based on breed or “between the valuable and the worthless” via statute,⁸⁸ thus reasonable regulations must be applied to all dogs.⁸⁹ What the Court considered “reasonable” is clear through the examples used: leash laws, licensing laws, and destruction of dogs that pose imminent danger.⁹⁰ Nothing in this opinion supports rounding up and destroying a particular breed or a type of dog.⁹¹ Breed-specific laws attempt to do what the *Sentell* Court calls “impossible.”⁹² As I will discuss later in Part V, the Court’s instincts were correct here; studies show even persons who work in canine-related fields cannot accurately or consistently identify breeds.⁹³

⁷⁸ *Sentell*, 166 U.S. at 706.

⁷⁹ *Id.*

⁸⁰ *See id.* at 698–706.

⁸¹ *Id.* at 701.

⁸² *Id.*

⁸³ *Id.* at 706 (“The statute really puts a premium upon valuable dogs, by giving them a recognized position, and by permitting the owner to put his own estimate upon them.”).

⁸⁴ *Id.*

⁸⁵ *See id.* at 701, 706.

⁸⁶ *See id.* at 702–04 (discussing numerous cases where the police power was used to justify the elimination of dogs that became a nuisance by virtue of violating regulations, like being found without a collar, while protecting the property rights of people who followed the regulation and collared the found dog).

⁸⁷ *Id.* at 701.

⁸⁸ *Id.*

⁸⁹ *See id.*

⁹⁰ *See id.* at 702–04.

⁹¹ *See id.*

⁹² *Id.* at 701 (noting that “it is practically impossible by statute to distinguish between the different breeds”).

⁹³ K.R. Olson et al., *Inconsistent Identification of Pit Bull-Type Dogs by Shelter Staff*, 206 VETERINARY J. 197, 199–200 (2015); Victoria L. Voith et al., *Comparison of Visual and DNA Breed Identification of Dogs and Inter-Observer Reliability*, 3 AM. J. SOC. RES. 17, 20, 24 (2013).

Since 1897, at least some of our attitudes towards dogs have progressed.⁹⁴ American dogs have moved from “the barnyard to the backyard to the bedroom—and into the bed itself.”⁹⁵ In 2015, it was estimated that the United States spent over \$60 billion on the care of pets.⁹⁶ An estimated 54.4 million households in the United States care for 77.8 million dogs.⁹⁷ We have dog parks and dog spas; we have pet sitters and pet hotels; we make bucket lists for our canine companions.⁹⁸ At the same time, our dog laws, at least where breed-specific laws are applicable, have devolved.⁹⁹ Owners of targeted breeds have no opportunity to prove the “worthiness” of their individual dogs.¹⁰⁰ Owners of targeted breeds are treated differently than other dog owners under these laws.¹⁰¹ Both due process and equal protection are arguably infringed upon, yet few courts have undertaken an analysis that does more than quote a few choice lines from *Sentell*, and miss the point of the case.¹⁰²

As we will see in later sections, *Sentell* was decided just as the Court began to explore meaningful review of state statutes under due process and equal protection analysis.¹⁰³ Acknowledging the statutes in question were “more than ordinarily stringent”¹⁰⁴ the Court implied that property rights in animals (even dogs) can implicate Fourteenth Amendment protections.¹⁰⁵ How then would the *Sentell* Court have viewed statutes that more egregiously violate due process and equal protection

⁹⁴ See generally Marty Becker, *Should Our Puppy Sleep with Us, or Be Banned from the Bedroom?*, HUFFPOST HEALTHY LIVING (Oct. 21, 2012), http://www.huffingtonpost.com/2012/10/21/dog-in-bed-sleep-bedroom_n_1957972.html [<https://perma.cc/56N3-STQB>] (“In my lifetime, and in my more than three decades as a practicing veterinarian, I have seen dogs move from the barnyard to the backyard to the bedroom . . .”); Hal Herzog, *Should Pets Be Banned from the Bedroom?*, PSYCHOL. TODAY (July 22, 2014), <http://www.psychologytoday.com/blog/animals-and-us/201407/should-pets-be-banned-the-bedroom> [<https://perma.cc/P9VY-5QDS>] (stating that “about 70 percent of American dogs . . . at least occasionally share their owner’s bed”).

⁹⁵ Becker, *supra* note 94.

⁹⁶ *Pet Industry Market Size & Ownership Statistics*, AM. PET PRODUCTS ASS’N, http://www.americanpetproducts.org/press_industrytrends.asp [<https://perma.cc/XQN2-U7Q6>].

⁹⁷ *Id.*

⁹⁸ Subaru, *2016 Subaru Impreza—Subaru Commercial—Dream Weekend* (July 1, 2015), YOUTUBE, <https://www.youtube.com/watch?v=aerv5xYhz2k>.

⁹⁹ See generally *Vanatar v. Vill. of S. Point*, 717 F. Supp. 1236 (S.D. Ohio 1989); *Colo. Dog Fanciers v. City of Denver*, 820 P.2d 644 (Colo. 1991).

¹⁰⁰ See generally *Colo. Dog Fanciers*, 820 P.2d 644.

¹⁰¹ See *Vanatar*, 717 F. Supp. 1236; *Colo. Dog Fanciers*, 820 P.2d 644.

¹⁰² See *Vanatar*, 717 F. Supp. at 1241–42 (opining that *Sentell* stands for a virtually unlimited police power over dogs); *Colo. Dog Fanciers*, 820 P.2d at 653 (holding that the ruling in *Sentell*, that dogs are proper subjects of the police power, justifies breed-specific laws).

¹⁰³ REHABILITATING LOCHNER, *supra* note 43, at 14 (noting that during the late nineteenth century, courts began to “use [] both the Due Process and the Equal Protection clauses as textual hooks” to review class legislation and enforce natural rights).

¹⁰⁴ *Sentell v. New Orleans & Carrollton R.R.*, 166 U.S. 698, 706 (1897).

¹⁰⁵ *Id.*

than the ones discussed in the case? *Sentell* absolutely stands for the proposition that dogs are properly regulated under the police power, but it does not support unreasonable or irrational laws.¹⁰⁶

Most importantly, the opinion in *Sentell* implicitly acknowledges that dog law is a viable subject for Fourteenth Amendment inquiry.¹⁰⁷ While many courts have parroted quotes from *Sentell* to support breed-specific laws,¹⁰⁸ in context, the whole of the opinion is not a straightforward endorsement of such laws and, in fact, provides support for an opposing view.¹⁰⁹ Now that it is clear that the primary Supreme Court authority on dog law under the Fourteenth Amendment does not provide blanket support for breed-specific laws,¹¹⁰ we can turn our attention to considering why courts can and should overturn such laws under the Constitution. The next Part will begin with the Founding, and explore the idea that judicial review of legislative acts has long been a principle of United States government, even before the ratification of the Fourteenth Amendment.

II. THE FOUNDING, THE POLICE POWER, AND THE ROLE OF JUDICIAL REVIEW

Judicial review of legislative acts is not a new phenomenon.¹¹¹ The tension between robust legislative power and a strong judiciary has existed in the United States since the Founding.¹¹² Through the Constitution, the United States uniquely limits governmental power through Constitutional mechanisms.¹¹³ Like the governmental form of “rock-paper-scissors-lizard-Spock,”¹¹⁴ the division of governmental

¹⁰⁶ *Id.* at 704, 706.

¹⁰⁷ *Id.* at 705.

¹⁰⁸ *Vanatar v. Vill. of S. Point*, 717 F. Supp. 1236, 1242 (S.D. Ohio 1989) (quoting *Sentell* for the proposition that dog regulation falls under the police power); *State v. Peters*, 534 So. 2d 760, 765 (Fla. Dist. Ct. App. 1988) (quoting *Sentell* to validate a pit bull restriction).

¹⁰⁹ *Sentell*, 166 U.S. at 706.

¹¹⁰ *Id.*

¹¹¹ *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (espousing the concept of judicial review for the first time in a Supreme Court opinion).

¹¹² *Id.* at 152 (noting that Justices “conceive themselves to be duly appointed justices of the peace, and they believe it to be their duty to maintain the rights of their office, and not to suffer them to be violated by the hand of power”).

¹¹³ THE FEDERALIST NO. 51, at 222 (James Madison) (Thompson & Homans eds., 1831).

To what expedient then shall we finally resort for maintaining in practice the necessary partition of power among the several departments, as laid down in the constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.

Id.

¹¹⁴ Rock-paper-scissors is a decision-making game, defined as a method of selecting, for example, which of two people perform a task: each person simultaneously makes one of three hand gestures

power among three branches and two levels of government prevents any one person or group from wielding too much power.¹¹⁵ The Constitution limits the powers available to the national government,¹¹⁶ then splits the ability to make, enforce, and interpret law amongst three separate branches.¹¹⁷ While prevailing wisdom claims that the Founders saw the judicial branch as the weakest of the three,¹¹⁸ it is certain that at least some of the Federalists believed the judiciary would have a role in reviewing laws for their constitutionality and acting as a valid check on unwise populist sentiment which sometimes arises from legislatures.¹¹⁹

The Founders innately understood the problem of legislatures left completely unchecked.¹²⁰ Specifically, in Federalist Paper 78, Alexander Hamilton charged the judiciary of the new nation:

[T]o guard the constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection,

representing a rock, a sheet of paper, and a pair of scissors respectively. Each gesture defeats one and is defeated by one of the other two: rock defeats scissors but is defeated by paper; paper defeats rock but is defeated by scissors. The person whose gesture defeats the other is selected.

Rock-Paper-Scissors, COLLINSDICTIONARY.COM, <http://www.collinsdictionary.com/dictionary/english/rock-paper-scissors> [https://perma.cc/QB9F-ETYG]. *Rock-paper-scissors-lizard-Spock* is a new expansion of the traditional decision-making game, invented by Sam Kass and Karen Bryla, that adds two additional options in an effort to reduce the likelihood of ties. *Rock Paper Scissors Spock Lizard*, SAMKASS.COM, <http://www.samkass.com/theories/RPSSL.html> [https://perma.cc/6H8Q-KYPB]. The second game compares favorably with the limitation of government through separation of powers and federalism, dividing governmental power between three branches and two levels, thus five different sources of power, each, at times, trumping another and being trumped themselves.

¹¹⁵ THE FEDERALIST NO. 51, *supra* note 113, at 224 (James Madison).

In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.

Id.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See W. Lawrence Church, *History and the Constitutional Role of Courts*, 1990 WIS. L. REV. 1071, 1090 (1990).

¹¹⁹ See THE FEDERALIST NO. 78, at 336 (Alexander Hamilton) (Thompson & Homans eds., 1831).

¹²⁰ *Id.*

have a tendency in the meantime to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.¹²¹

He further reasoned that “no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day.”¹²² Hamilton wisely anticipated one of the fundamental problems with democratic (or republican) government—tyranny of the majority.¹²³

The single governmental power most prone to abuse via tyranny of the majority is the broadest and most all-encompassing, and yet is also the least restricted and equally least understood of all governmental powers—the legislative power, also called the police power.¹²⁴ Under American jurisprudence, the police power has provided the basis to uphold such varied laws as regulations of flammable materials, nuisance ordinances, liquor control regulations, and vaccination laws.¹²⁵ It is the power which allows governments, in the most general sense, to manage its citizens,¹²⁶ but it is also the power which most readily provides governments with the vehicle to abuse and subjugate its citizens.¹²⁷ Both state and federal courts have rationalized and accepted abhorrent human rights violations encompassed in eugenics laws¹²⁸ and “Jim Crow” laws¹²⁹ under the guise of police power.¹³⁰ Historically, state and local governments have used the police power as a crowbar to pry open the front doors and bedroom doors of citizens,¹³¹

¹²¹ *Id.*

¹²² *Id.*

¹²³ *See id.* For more on the concept of the “tyranny of the majority,” see ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 248–52 (Henry Reeve trans., 1965) (1835).

¹²⁴ *See* CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES § 1 (F.H. Thomas Law Book Co., 1886). The term ‘police power’ is used more frequently in older case law, while ‘legislative power’ is the more modern term. This Article will employ both terms, interchangeably.

¹²⁵ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (holding the requirement of vaccinations for smallpox, a deadly disease, to be within the purview of the police power); *Mugler v. Kansas*, 123 U.S. 623 (1887) (holding that the regulation of liquor is within the traditional police power); *see Patterson v. Kentucky*, 97 U.S. 501, 504 (1878) (“By the settled doctrines of this court the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights.”).

¹²⁶ *See* TIEDEMAN, *supra* note 124, at 2.

¹²⁷ *See* THE FEDERALIST NO. 78, *supra* note 119, at 336 (Alexander Hamilton).

¹²⁸ *See Buck v. Bell*, 274 U.S. 200 (1927) (holding that mandatory sterilization for intellectually disabled was acceptable under state police power).

¹²⁹ *See Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding a law requiring separate railroad cars for whites and non-whites as valid under the police power). *But see Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overturning “separate but equal” doctrine established in *Plessy* as a violation of Fourteenth Amendment).

¹³⁰ *See Plessy*, 163 U.S. at 545.

¹³¹ *See* Joshua D. Hawley, *The Intellectual Origins of (Modern) Substantive Due Process*,

outlaw family planning practices,¹³² prohibit various forms of sexual expression,¹³³ and even restrict cohabitation of unrelated individuals.¹³⁴

Chief Justice Roger Taney's definition of the police power exemplifies the broad scope historically granted to this power, even in a society of "limited" government.¹³⁵ Taney argued that the police powers are:

nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates¹³⁶

Such a broad definition points to the primary reason why the police power is so vulnerable to abuse.¹³⁷ Whoever holds the police power, in a particular society where such power is broadly defined, ultimately holds the power to rule and govern anyone and anything within the bounds of that society.¹³⁸ Ostensibly such power to rule and govern could have no limit.

The origins of the police power have been traced back to the very foundations of Western political thought—the Greek city-states and Roman law.¹³⁹ In the Western world, perhaps the power hit its high watermark in feudal Europe when the king

93 TEX. L. REV. 275 (2014) (discussing the interplay of the police power with the evolving theories of personal liberty that developed in the mid-twentieth century).

¹³² *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship”).

¹³³ *See Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding a criminal law against sodomy based on principle of the police power), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding the Texas law criminalizing same-sex sexual intimacy to be a violation of substantive due process under the Fourteenth Amendment).

¹³⁴ *See Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (upholding a zoning ordinance restricting dwelling occupancy to traditional families and stating, “[t]he police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”).

¹³⁵ *Thurlow v. Massachusetts (License Cases)*, 46 U.S. (7 How.) 504, 583 (1847).

¹³⁶ *Id.*

¹³⁷ *See id.*

¹³⁸ *See* TIEDEMAN, *supra* note 124, at 2.

¹³⁹ Markus Dirk Dubber, “The Power to Govern Men and Things”: Patriarchal Origins of the Police Power in American Law, 52 BUFF. L. REV. 1277, 1281 (2004).

owned everything and all power to govern ultimately came from him, which he then delegated among his lords, but which the king could take back at any time for any reason.¹⁴⁰ Ultimately, however, the origins of the police power may most closely align with the origins of society itself, for it cannot be denied that the police power is the source of any government's ability to govern its people and the things within its borders.¹⁴¹

For instance, the social contract philosophers, including John Locke, Thomas Hobbes, and Jean-Jacques Rousseau, agreed¹⁴² that in entering the "social contract"¹⁴³ individuals gave up certain freedoms and rights to govern themselves in the state of nature in order to have the benefits and protections associated with living in a community.¹⁴⁴ One key difference in their theories revolved around the question of whether all individual rights must be forfeited to the government under the social contract.¹⁴⁵ Hobbes believed that an individual gives up most rights and power in order to benefit from the protection of the commonwealth, the society.¹⁴⁶

John Locke, however, arguably the social contract philosopher whose ideas wielded the most influence on the founding of the United States, insisted that the police power had limits and that some freedoms and powers cannot be taken from the individual, including life, liberty, and property.¹⁴⁷ The American system of

¹⁴⁰ *Id.*

¹⁴¹ TIEDEMAN, *supra* note 124, at 2.

¹⁴² *See, e.g.*, Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1 (1999) (discussing the general views of Locke, Hobbes, and Rousseau, and the applications of those views in American jurisprudence).

¹⁴³ "Social contract" is defined as "an actual or hypothetical agreement among individuals forming an organized society or between the community and the ruler that defines and limits the rights and duties of each." *Social Contract Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/social%20contract> [<https://perma.cc/F5M6-7KWH>].

¹⁴⁴ Sharon A. Lloyd & Susanne Sreedhar, *Hobbes's Political and Moral Philosophy*, STAN. ENCYCLOPEDIA PHIL. (Feb. 25, 2014), <http://plato.stanford.edu/entries/hobbes-moral/> [<https://perma.cc/H2JV-BLMC>].

¹⁴⁵ Allen, *supra* note 142, at 8.

¹⁴⁶ *See* THOMAS HOBBS, *LEVIATHAN*, ch. XVII (E.P. Dutton & Co. 1950) (1651). Hobbes, in describing the source of the power of the sovereign notes the following:

For by this [a]uthorit[y], given him by every particular man in the Commonwealth, he hath the use of so much [p]ower and [s]trength conferred on him, that by terror thereof, he is [e]nabled to forme the wills of them all, to [p]eace at home, and mutual[] a[i]d against their enemies abroad. And in him consisteth the [e]ssence of the Commonwealth; which (to define it,) is [o]ne [p]erson, of whose [a]cts a great [m]ultitude, by mutual [c]ovenants one with another, have made themselves every one the [a]uthor, to the end he may use the strength and means of them all, as he shall think expedient, for their [p]eace and [c]ommon [d]efen[s]e.

Id. at 143–44.

¹⁴⁷ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 162–67 (1690).

government, so radical in its nascence, recognized similar unalienable rights which no government may take.¹⁴⁸

“[A]y, there’s the rub.”¹⁴⁹ If it is agreed, that all governments, to be effective, must hold “the power to govern men and things,”¹⁵⁰ and such power, generally called the police power, is by its origins and its historical application nearly limitless,¹⁵¹ how can a government like the United States, founded on limited governmental power, be truly limited and yet hold this “limitless” police power? Contrarily, to be an effective government, how can it not?¹⁵² The answer lies in the limits placed on the legislature by the Constitution coupled with the charge of the judiciary to protect the rights of the individuals and minorities against the excesses which sometimes take over a legislature.¹⁵³ Hamilton, at least, and likely other Founders, were well aware of the tendency of a majority to become a tyrant to the rights of the minority in any given instance.¹⁵⁴ Essentially, it is the court’s duty to provide a “check” on the police power exercised by the legislature to ensure the legislature does not overrun individual rights.¹⁵⁵

Similarly, Thomas Jefferson did not trust a representative government to protect the vague guarantees of personal liberty in the original Constitution,¹⁵⁶ and insisted upon the addendum of the Bill of Rights to protect the rights of individuals and

¹⁴⁸ See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Id.

¹⁴⁹ WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1.

¹⁵⁰ *Thurlow v. Massachusetts (License Cases)*, 46 U.S. (7 How.) 504, 583 (1847).

¹⁵¹ See *TIEDEMAN*, *supra* note 124, at 2.

¹⁵² See *License Cases*, 46 U.S. at 583.

¹⁵³ THE FEDERALIST No. 78, *supra* note 119, at 336–37 (Alexander Hamilton).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), https://www.gwu.edu/~ffcp/exhibit/p7/p7_1text.html [<https://perma.cc/8TFW-JL8F>].

There is a remarkable [sic] difference between the characters of the [i]nconveniencies [sic] which attend a Declaration of rights, & those which attend the want of it. The inconveniences of the Declaration are that it may cramp government in it’s [sic] useful exertions. But the evil of this is short[-]lived, moderate, & reparable. The inconveniencies of the want of a Declaration are permanent, afflicting & irreparable: they are in constant progression from bad to worse.

Id.

states from the tyranny of the federal government.¹⁵⁷ Indeed, he based the Bill of Rights on a similar Virginia constitutional document which protected Virginians from their own legislature.¹⁵⁸ The role of the courts to limit police power is the characteristic that makes the United States government unique and truly limited.¹⁵⁹ Both federal and state courts, to varying degrees, exercise their power of judicial review.¹⁶⁰

Neither the understanding of police power, nor the exercise of judicial review have remained static in United States law.¹⁶¹ Necessarily, when one grows stronger the other weakens.¹⁶² The beginning of the twentieth century, with the rise of the Progressive movement, saw one of the most fundamental changes and developments in the concept of police power,¹⁶³ followed soon after by a reactive strengthening of judicial review.¹⁶⁴ Over the past one hundred plus years, courts have continued to struggle with how best to strike the balance between police power and judicial review.¹⁶⁵

Police power at its essence is the ability of a government to regulate people and things.¹⁶⁶ It is the power to legislate, and without it, the government could not function effectively.¹⁶⁷ Prior to the twentieth century, the philosophy behind this power (as exercised in the United States) was summed up in the Latin phrase *sic utere tuo ut alienum non laedas*¹⁶⁸ which, at its core, restricts regulation of persons and things to laws which prevent concrete and specific harms.¹⁶⁹ Essentially the role of police power regulation was to ensure that one person's enjoyment of his or her property should not interfere with another's enjoyment of his property.¹⁷⁰ General nuisance laws are an excellent example of this.¹⁷¹ Examples of laws which comport with the *sic*

¹⁵⁷ *Id.*

¹⁵⁸ *Virginia Declaration of Rights*, U.S. ARCHIVES, http://www.archives.gov/exhibits/char- ters/virginia_declaration_of_rights.html [https://perma.cc/N8U9-ZK4Y].

¹⁵⁹ Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 HASTINGS CONST. L.Q. 511, 516–17 (2000).

¹⁶⁰ Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 921 (2003) (“Courts of that era were simply understood to enjoy the power of judicial review over written constitutions. And, just as important, the Constitution was made supreme over unconstitutional federal statutes.”).

¹⁶¹ See Stephen R. Miller, *Community Rights and the Municipal Police Power*, 55 SANTA CLARA L. REV. 675, 681–82 (2015) (proposing five distinct eras of police power from the Enlightenment to today).

¹⁶² See Reynolds & Kopel, *supra* note 159, at 513.

¹⁶³ *Id.*

¹⁶⁴ See *Lochner v. New York*, 198 U.S. 45 (1905) (employing judicial review to overturn state statute limiting the work hours of bakers as beyond the scope of the police power).

¹⁶⁵ See Miller, *supra* note 161.

¹⁶⁶ TIEDEMAN, *supra* note 124, at 4.

¹⁶⁷ Dubber, *supra* note 139, at 1278.

¹⁶⁸ See Reynolds & Kopel, *supra* note 159, at 511.

¹⁶⁹ *Id.*

¹⁷⁰ TIEDEMAN, *supra* note 124, at 4.

¹⁷¹ David E. Bernstein, *Lochner Era Revisionism Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 46 (2003) [hereinafter *Lochner Era*].

utere philosophy in canine regulation are such things as leash laws, noise ordinances, and mandatory rabies vaccinations, which are exemplified in the *Sentell* decision.¹⁷²

However, in the late nineteenth and early twentieth centuries, a shift in philosophy occurred.¹⁷³ The restrained use of police power recognized in the common law principle of *sic utere*,¹⁷⁴ gave way to the newer principle of *salus populi est suprema lex*,¹⁷⁵ which allowed almost any regulation so long as it could be traced to some improvement of public health or welfare.¹⁷⁶ While *sic utere* might compare to the line from Robert Frost's poem, *Mending Wall*, that "[g]ood fences make good neighbors,"¹⁷⁷ *salus populi* provides for more government involvement in the lives of citizens to prevent anticipated problems.¹⁷⁸ Under *salus populi*, legislatures could protect and even promote health, safety, morals, and welfare leading to a much broader definition of what is governable under the police power.¹⁷⁹ Now, instead of preventing concrete and specific known harms, the goal of legislation is to predict danger which may or may not occur.¹⁸⁰ Almost any law could be at least nominally justified by stating that it promotes health, safety, morals, or welfare.¹⁸¹

The progressives of the early twentieth century relied heavily on the evolving concept of police power in the United States, resulting in passage of laws regulating business and the economic systems based on the goals of protecting health, safety, and morals.¹⁸² As we will see in Part III, this expanded exercise of police power did not always go unchallenged.¹⁸³ The ratification of the Fourteenth Amendment provided federal courts with a tool to review legislative acts of the states and defend against the exponentially expanding police power.¹⁸⁴ The first question the Court had to answer, however, was whether the Fourteenth Amendment provided the Supreme Court the right to invalidate state laws, and, if so, under what circumstances.¹⁸⁵

Revisionism] (noting the purview of traditional police power included such things as nuisance laws, laws banning lotteries, laws requiring vaccinations, and Sunday laws).

¹⁷² *Sentell v. New Orleans & Carrollton R.R.*, 166 U.S. 698, 703 (1897). This case is discussed in more depth in Part I, *supra*. The regulations upheld in the case are ones designed to protect against immediate concrete harms, rather than imagined future harms. *Id.*

¹⁷³ See generally Miller, *supra* note 161.

¹⁷⁴ See TIEDEMAN, *supra* note 124, at 4.

¹⁷⁵ See Reynolds & Kopel, *supra* note 159, at 511.

¹⁷⁶ *Id.*

¹⁷⁷ Robert Frost, *Mending Wall*, POETRY FOUND., <http://www.poetryfoundation.org/poem/173530> [<https://perma.cc/94S5-BUP9>].

¹⁷⁸ See Reynolds & Kopel, *supra* note 159, at 512.

¹⁷⁹ *Id.* at 511.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 512–13.

¹⁸² *Id.* at 512.

¹⁸³ See *infra* Part III.

¹⁸⁴ See Reynolds & Kopel, *supra* note 159, at 533.

¹⁸⁵ See *Slaughter-House Cases*, 83 U.S. 36 (1872).

III. THE FOURTEENTH AMENDMENT AS A TOOL OF JUDICIAL REVIEW

A. *A Tentative Beginning to Fourteenth Amendment Analysis*

Since its ratification subsequent to the Civil War, the Fourteenth Amendment¹⁸⁶ has arguably become one of the most important developments in American law, paving the way for advancement of civil rights and liberties well beyond anything its authors could have imagined.¹⁸⁷ While its place as a powerful legal catalyst for change was perhaps obvious from the beginning, how the Fourteenth Amendment would be interpreted and utilized took decades to develop.¹⁸⁸

At first, lawyers arguing for employment of the Fourteenth Amendment latched on to the Privileges or Immunities Clause to advocate for the protection of individual liberties at the hands of the legislative power of states.¹⁸⁹ The *Slaughter-House Cases*, decided in 1872, illustrated this interpretation of the first clause of the Amendment.¹⁹⁰ Petitioners in the *Slaughter-House Cases*, a group of Louisiana butchers, challenged the constitutionality of a state law that purported to protect the health and safety of New Orleans citizens by requiring all livestock to be slaughtered south of the city of New Orleans.¹⁹¹ More particularly, the law granted exclusive privileges to maintain livestock landing and slaughter facilities to the Crescent City Live-Stock Landing and Slaughter-House Company.¹⁹² Petitioners argued that the first clause of the Fourteenth Amendment which states that: “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”¹⁹³ prohibited the Louisiana legislature from granting a monopoly to one company and precluding them from earning a living in their chosen profession.¹⁹⁴ Petitioners thus read the Privileges or Immunities Clause as a check on state legislative police power.¹⁹⁵

¹⁸⁶ U.S. CONST. amend. XIV, § 1.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

¹⁸⁷ Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 999 (2012) (noting the discrepancy between the original intent of the Fourteenth Amendment and its value in today’s world).

¹⁸⁸ *Id.* at 980 (noting that the Fourteenth Amendment was ineffective as originally drafted).

¹⁸⁹ Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 63, 67 (1989).

¹⁹⁰ *Slaughter-House Cases*, 83 U.S. at 37.

¹⁹¹ *Id.* at 43.

¹⁹² *Id.* at 36, 64.

¹⁹³ U.S. CONST. amend. XIV, § 1.

¹⁹⁴ *Slaughter-House Cases*, 83 U.S. at 43.

¹⁹⁵ *Id.* at 53.

The Supreme Court, however, rejected this interpretation that the clause protected citizens of a state from their own legislature, insisting, instead, that the clause only prevented state legislatures from denying citizens of other states the same privileges or immunities it grants to its own people.¹⁹⁶ Specifically, the Court held of the Privileges or Immunities Clause that:

Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.¹⁹⁷

From this moment forward the Privileges or Immunities Clause was rendered impotent in protecting individual liberties from encroaching on state governments.¹⁹⁸

In its opinion, the majority focused on the main purpose of the Thirteenth, Fourteenth, and Fifteenth Amendments as securing freedom, citizenship, and protection from oppression for former slaves.¹⁹⁹ While the Court did not preclude application of the amendments beyond protection of the particular group they were ratified to protect,²⁰⁰ it is very clear that the Court attempted to limit their scope, largely, it seems, to prevent further erosion of the power of the individual states in favor of a stronger national government.²⁰¹

Specifically, the majority pointed out that, at the Founding, the ratification of the first eleven amendments illustrated fear of too powerful a central government, while the more recent conflict (the Civil War) had illustrated the dangers that individual states can inflict.²⁰² The Court expressed concerns that the petitioners' interpretation of the Privileges or Immunities Clause would destroy the balance of power within the federal system.²⁰³ In so doing, the majority in the *Slaughter-House*

¹⁹⁶ *Id.* at 73.

¹⁹⁷ *Id.* at 77.

¹⁹⁸ *See id.*

¹⁹⁹ *Id.* at 71–72.

But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

Id. at 72.

²⁰⁰ *Id.* at 54.

²⁰¹ *Id.* at 78.

²⁰² *Id.* at 82.

²⁰³ *Id.* at 78. Specifically, the Court determined that broad interpretations of the Privileges or Immunities Clause:

Cases lays out the central conflict which continues, to this day, to haunt the application of the Fourteenth Amendment—the balance of power.²⁰⁴ The Fourteenth Amendment threatens the balance of power between states and the federal government, as well as between legislatures and courts.²⁰⁵

While the majority in the *Slaughter-House Cases* laid out the argument for protecting state legislative powers,²⁰⁶ the three Justices dissenting focused instead on protecting the rights of individual citizens.²⁰⁷ Justice Field calls out the Louisiana statute as, at least partially, a pretext for giving special privileges to a particular company, observing that while “[t]he health of the city might require the removal from its limits and suburbs of all buildings for keeping and slaughtering cattle . . . no such object could possibly justify legislation removing such buildings from a large part of the State for the benefit of a single corporation.”²⁰⁸ Unlike the majority, the dissenting Justices opined that the Fourteenth Amendment was intended to protect citizens from the “deprivation of their common rights by State legislation.”²⁰⁹

Writing separately, Justice Swayne suggested the Thirteenth, Fourteenth, and Fifteenth Amendments “rise to the dignity of a new Magna Charta.”²¹⁰ And that such could never have happened where the states have all the power.²¹¹ Specifically, Justice Swayne warned that the limitations placed on the clause by the majority defeat the intention of those who drafted, voted and ratified it to provide protection from the oppression by the states, and he feared the “far-reaching” consequences likely to

fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.

Id.

²⁰⁴ David N. Mayer, *The Myth of “Laissez-Faire Constitutionalism”: Liberty of Contract During the Lochner Era*, 36 HASTINGS CONST. L.Q. 217, 234 n.73 (2009).

²⁰⁵ *Slaughter-House Cases*, 83 U.S. at 82.

²⁰⁶ *Id.* at 73–75, 77–78.

²⁰⁷ *Id.* at 87 (Field, J., dissenting) (“With this power of the State and its legitimate exercise I shall not differ from the majority of the court. But under the pretence [sic] of prescribing a police regulation the State cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgment.”).

²⁰⁸ *Id.* at 87–88.

²⁰⁹ *Id.* at 89.

²¹⁰ *Id.* at 125 (Swayne, J., dissenting).

²¹¹ *Id.*

follow.²¹² Swayne and his fellow members of the minority had the right to fear the consequences of the case. To this day the Privileges or Immunities Clause is largely irrelevant to protection of individual rights.²¹³

With the Privileges or Immunities Clause now rendered powerless, the advocates of individual rights moved to the Due Process and Equal Protection Clauses in their efforts to advocate for individual rights and checks on state action.²¹⁴ The first major case to reach the Supreme Court to consider these clauses was *Plessy v. Ferguson*.²¹⁵ *Plessy*, which challenged the constitutionality of a Louisiana law that prohibited blacks and whites from mingling in the same railroad cars, continued the narrow interpretation of the Fourteenth Amendment begun in the *Slaughter-House Cases*, ushering in the era of “separate but equal” segregation that would not be abolished for another fifty-eight years.²¹⁶ Once again the Supreme Court found in favor of a state’s legislative power over the rights of individuals, leaving the relevance of the Fourteenth Amendment in question:

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.²¹⁷

While the majority in *Plessy* acknowledged, at least superficially, that “exercise of the police power must be reasonable” and should not be used to pursue oppression of any group,²¹⁸ the question of what was reasonable was determined by looking at customs, tradition, and what action would most likely promote comfort and maintain order in

²¹² *Id.* at 129–30.

²¹³ David S. Bogen, *Slaughter-House Five: Views of the Case*, 55 HASTINGS L.J. 333, 333 (2003) (“Since that decision, the Supreme Court has made it clear that the privileges or immunities clause of the Fourteenth Amendment is not itself the source of any rights, and has turned to the due process and equal protection clauses of the Fourteenth Amendment for protection of ‘fundamental rights’ . . .”).

²¹⁴ *See id.* at n.4 (citing to many cases decided under the due process and equal protection clauses after the decision in the *Slaughter-House Cases*).

²¹⁵ 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²¹⁶ *Id.* at 551–52.

²¹⁷ *Id.* at 544.

²¹⁸ *Id.* at 550.

society.²¹⁹ The majority remained silent on the question of what type of law may be an unreasonable exercise of police power.²²⁰

In his dissent, Justice Harlan prophetically opined that the judgment in *Plessy* “will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*.”²²¹ Ultimately, Justice Harlan was correct, a short list of the most vilified Supreme Court cases in history certainly includes *Plessy*.²²² Soon after the *Plessy* decision, the Fourteenth Amendment finally gained traction as a means of invalidating state legislation.²²³

B. From *Lochner* to Legal Realism

Following *Plessy*, the next major development in the interpretation of the Fourteenth Amendment began with *Allgeyer v. Louisiana*,²²⁴ the first Supreme Court case to invalidate state economic legislation on the basis of the Fourteenth Amendment.²²⁵ While *Allgeyer* was the first case, the most prominent (and most criticized) of this string of “liberty to contract” cases was *Lochner v. New York*.²²⁶ The period from 1897 to 1937 is most often referred to as the *Lochner* Era.²²⁷ It marks the period of time when the Progressive movement gained power in the state legislatures, resulting in an explosion of regulatory statutes aimed at promoting advancement of

²¹⁹ *Id.*

²²⁰ *See id.* at 550–51.

²²¹ *Id.* at 559 (Harlan, J., dissenting).

²²² *See, e.g.*, Dr. Hans J. Hacker & William D. Blake, *The Neutrality Principle: The Hidden Yet Powerful Legal Axiom at Work in Brown versus Board of Education*, 8 BERKELEY J. AFR.-AM. L. & POL’Y 5, 5 (2006) (footnotes omitted) (“Perhaps the question most animating debate among constitutional historians involves two vilified Supreme Court decisions—*Plessy v. Ferguson* and *Lochner v. New York*.”).

²²³ Note, here, the historical context to the Supreme Court decision in *Sentell*, discussed above. *See supra* Part I. The seminal Supreme Court case discussing the applicability of the Fourteenth Amendment to protect the property rights of dog owners was decided in 1897, a year after *Plessy*, and the same year as *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (the case that is generally believed to initiate the *Lochner* Era). This time period marks the transition between the height of judicial deference to state police powers related to individual rights, and the emergence of the Fourteenth Amendment as a tool to invalidate progressive legislation. The era of meaningful review of state statutes under due process or equal protection analysis was yet to come.

²²⁴ 165 U.S. 578, 593 (1897) (holding the state law which prohibited citizens from contracting with an out-of-state insurance company unconstitutional).

²²⁵ *See* Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court’s Environmental Law Decisions*, 42 VAND. L. REV. 343, 351 n.27 (1989) (citations omitted) (“While the era is sometimes dated from *Lochner* . . . the first case in which the Court invoked the due process clause to strike down economic legislation was *Allgeyer v. Louisiana* . . .”).

²²⁶ 198 U.S. 45, 64 (1905).

²²⁷ *See* Levy & Glicksman, *supra* note 225, at 351 (describing the *Lochner* Era as a period when “the Court pursued a doctrine of ‘economic substantive due process’ that constitutionalized *laissez-faire* economic policy . . .”).

health, safety, and welfare.²²⁸ Such laws ranged from work hour limitations for women, to child labor laws, to eugenics laws.²²⁹ While progressives found power in the legislatures, many conservatives remained on the courts, leading to sharp conflict in the courts over the proper scope of the police power.²³⁰

The *Lochner* Era was characterized by tensions between the progressives and conservatives.²³¹ Generally progressives promoted increased government regulation of the economy and business, supporting labor movements, while the conservatives preferred traditional capitalist *laissez-faire* economics, including protection of liberty and property rights in the face of sweeping legislative reforms.²³² In *Lochner v. New York*, the constitutionality of a state law prohibiting bakers to work more than ten hours per day was challenged.²³³ The state relied upon its police power as the source of authority to pass the law, but the Supreme Court, led by its conservative majority,

²²⁸ See Richard Epstein, *Lest We Forget: Buchanan v. Warley and Constitutional Jurisprudence of the "Progressive Era,"* 51 VAND. L. REV. 787, 790 (1998) ("During the Progressive era, a sharp and continuous battle raged over both the respect to be accorded to property rights, and the deference that the Congress, and particularly state legislatures, should receive under the police power.").

²²⁹ See, e.g., *Buck v. Bell*, 274 U.S. 200 (1927) (upholding a Virginia law requiring forced sterilization); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (finding that a law restricting child labor under the commerce clause transcended federal authority); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding a regulation imposing a limit on hours worked by women in a factory or laundry). Hindsight shows positives and negatives that grew from the Progressive movement, and while the evolving concept of police power under the *salus populi* principle allowed for a more active legislature, there is also a cautionary tale supporting the need for judicial oversight when a legislature oversteps its bounds.

²³⁰ Commenting on the role jurists played in the Progressive Era during the battle over the breadth of the police power, Professor David Mayer notes:

At most, what judges did in protecting liberty of contract was to apply something like a general presumption in favor of liberty, a presumption that could be rebutted by sufficient showing of reasonableness to justify a given governmental regulation. Moreover, judges applied this presumption quite inconsistently, in large part because the definition of "reasonable" government regulation, and the definition of the proper scope of government's police power on which it turned, was undergoing significant changes in the early decades of the twentieth century. Rather than limiting it to protection of public health, safety, or order, some scholars redefined the police power in terms of the amorphous concept of "general welfare" to justify the activist regulatory agenda of the Progressive movement.

Mayer, *supra* note 204, at 224.

²³¹ See *id.* at 275 (highlighting the contrast between "*Lochner*-era jurisprudence and the increasingly influential Progressive movement that was challenging it in the early twentieth century").

²³² See REHABILITATING *LOCHNER*, *supra* note 43, at 39 ("[P]ost-*Lochner* Progressive jurists consistently supported regulation for the purported public good at the expense of judicial protection of constitutional rights, and preferred centralized government control over many aspects of American life to liberal 'individualism.'").

²³³ 198 U.S. 45, 52 (1905).

found that “[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment”²³⁴ and “[t]he right to purchase or to sell labor is part of the liberty protected” by the Due Process Clause.²³⁵ In its opinion, the *Lochner* Court implicitly recognized the tension between a strong police power and the rights of the individual, insisting that the police power must necessarily be limited, or else all legislation would be valid no matter how irrational.²³⁶ The invalidation of the law was largely based on the notion that there was no more than a tenuous connection between a limitation on bakers’ working hours and public health, safety and welfare, and the purview of the police power.²³⁷

While *Lochner* has been criticized on many fronts,²³⁸ some probably more justified than others,²³⁹ it is one of the first strong articulations that the Fourteenth

²³⁴ *Id.* at 53.

²³⁵ *Id.*

²³⁶ *Id.* at 56.

²³⁷ *Id.* at 57 (“It is a question of which of two powers or rights shall prevail—the power of the state to legislate or right of the individual to liberty of person and freedom to contract. The mere assertion that [a law] relates though but in a remote degree to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid . . .”). The words of the Court here are very similar to the language later adopted as the rational basis test, in *Carolene Products*, that a law must be rationally related to a legitimate government interest in order to be a valid exercise of legislative power where an individual right is at stake. *United States v. Carolene Products Co.*, 304 U.S. 144, 152–64 (1938).

²³⁸ *Lochner* has long been criticized for relying on principles of legal formalism. In recent years, however, some scholars contend that the decision in *Lochner* was largely due, not to judicial formalism, but to the majority’s reliance on the empirical and sociological evidence provided in Appellant Joseph Lochner’s brief that detailed why there was no legitimate connection between the work-hours legislation and the legislative goal of “health.” See REHABILITATING *LOCHNER*, *supra* note 43, at 32 (“The most interesting (and likely influential) part of the brief was the appendix, which provided statistics about the health of bakers. According to . . . mortality figures from England, bakers had a mortality rate somewhat below the average for all occupations. The appendix next cited articles from various medical journals that recommended sanitary and ventilation reforms . . . but did not advocate shorter hours.”); see also Noga Morag-Levine, *Facts, Formalism, and the Brandeis Brief: The Origins of a Myth*, 2013 U. ILL. L. REV. 59, 87 (2013):

If the Court gave short shrift to the health claim, it was not because it approached the issue through deductive reasoning or abstract conceptions, but because it refused to defer to the judgment of the legislature and insisted on its own evaluation of the underlying facts.

. . . The lack of scientific or other factual justification for the ten-hour limit in Mayer’s brief for the State of New York sharply contrasted with the approach that Frank Harvey Field and Henry Weismann, the attorneys who represented Joseph Lochner in his challenge to the law, chose by offering medical and statistical reports aimed at showing that ‘the baker’s trade is fully up to the average healthfulness of all trades . . .’

²³⁹ The *Lochner* decision has also been criticized both for its partisanship and its willful ignorance of the relative bargaining power of employer and employee. See Cass R. Sunstein,

Amendment provides limitations on state legislative police power.²⁴⁰ It also acknowledged that it is within the Court's function to answer the question of whether a particular statute is a valid exercise of police power.²⁴¹

The *Lochner* Court emphasized that mere pretext of connection between a statute and public health, safety, and morals is insufficient to survive Fourteenth Amendment scrutiny if individual rights are at stake.²⁴² In this discussion, the majority harkened back to the minority Justices in the *Slaughter-House Cases* who believed the purpose of the Fourteenth Amendment was to place limits on the state police power.²⁴³ It also struck a similar note to Harlan's dissent in *Plessy*, at least implicitly, in arguing that a state law could and should be held unconstitutional for violating individual rights guaranteed by the Constitution.²⁴⁴

Lochner's Legacy, 87 COLUM. L. REV. 873, 878 (1987) ("Above all, the Court's concern was that maximum hour legislation was partisan rather than neutral—selfish rather than public-regarding."); see also *id.* at 880 ("In the *Lochner* era itself . . . the police power could not be used to help those unable to protect themselves in the marketplace.").

²⁴⁰ *Lochner*, 198 U.S. at 56 ("It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be.").

²⁴¹ *Id.* at 56–57.

²⁴² *Id.* at 60.

²⁴³ See *Slaughter-House Cases*, 83 U.S. 36, 121–22 (1872) (Bradley, J., dissenting).

²⁴⁴ See *Plessy v. Ferguson*, 163 U.S. 537, 554–55 (1896) (Harlan, J., dissenting) (noting that the Civil War amendments erase racial lines nationally and at the state level), *overruled* by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Harlan, however, also dissents in *Lochner*, showing his willingness to invalidate laws in the context of racial segregation but not economic rights. *Lochner*, 198 U.S. at 66–75 (Harlan, J., dissenting). In fact, of the five common justices in *Plessy* and *Lochner*, four adopted opposing views on invalidation of the state laws. Majority Justices Peckham, Brown, and Fuller refused to strike the racial segregation law in *Plessy*, 163 U.S. at 548–49, but did strike the limitation on bakers' work hours, *Lochner*, 198 U.S. at 64. Contrarily, Justice Harlan supported the exact opposite opinions. *Id.* at 66–75 (Harlan, J., dissenting). Only Justice White remained seemingly consistent in his vote to uphold both laws as valid exercises of police power. *Id.* at 66 (joining Justice Harlan's dissent); *Plessy*, 163 U.S. at 537 (joining the majority opinion). Whether right or wrong in the context of these cases, what is most interesting for purposes of this Article is that four of the five justices opining recognized that courts had some power and responsibility to protect the rights of individuals against the state.

Scholars continue to debate connections between *Plessy* and *Lochner*, two of the most vilified opinions in constitutional law history, decided within ten years of one another and by Courts with five common members, but which display clear contradictions in reasoning. Conventional wisdom argued both majority opinions grew from the *laissez-faire* philosophies that promoted a "hands-off" approach by the government, allowing market forces to work to correct inequities. This view neglects the clear fact that the law upheld in *Plessy* amounted

The *Lochner* opinion was vehemently decried by progressive reformers and labor unions.²⁴⁵ While the opinion has long been vilified as an extreme example of judicial activism and overreach,²⁴⁶ more recent scholarly attention has been kinder.²⁴⁷ As David Bernstein notes in *Rehabilitating Lochner*, one of the most crucial results of *Lochner* was that it required the progressives to support their public health and safety legislation with, statistics, facts, and sociological evidence, rather than mere pretext.²⁴⁸

As the saying goes, “winners write the history books,” and the same is true in the history of law. Eventually, progressives gained power on the courts, including the Supreme Court, and the *Lochner* Era came to a close with the decision in *West Coast Hotel v. Parrish*²⁴⁹ in 1937. Justice Holmes’s dissent in *Lochner*, which characterized the majority opinion as a vote to advance a particular economic theory and a usurpation of legislative authority, rather than a protection of individual rights, soon became the prevailing sentiment regarding the opinions of the *Lochner* Era.²⁵⁰

Even today, *Lochner* is viewed by many as a symbol of the most egregious abuses of activist courts,²⁵¹ and is still invoked to criticize judicial majorities that are seen as overstepping that fine line between protecting individuals and interfering in the legislative right to govern.²⁵² In recent years, however, Bernstein and others have brought about a re-evaluation of the *Lochner* opinion and noted that it was the *Lochner* Court’s refusal to bow to the pretext of public health and welfare that pushed Louis Brandeis to the legal realism strategy of employing sociological evidence in his brief in *Muller v. Oregon*²⁵³ supporting limits on hours worked by

to government interference and not a “hands-off” approach, and that the overreaching state law in *Plessy* arose from the expansive police power that the *Lochner* court explicitly rejects. See Epstein, *supra* note 228, at 791–92; see also David E. Bernstein, *Plessy versus Lochner: The Berea College Case*, 25 J. SUP. CT. HIST. 93, 93 (2000) [hereinafter *Plessy versus Lochner*] (pointing to the varied scholarly views comparing *Plessy* and *Lochner*).

²⁴⁵ See *Lochner Era Revisionism*, *supra* note 171, at 1–5.

²⁴⁶ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2618–19 (2015) (Roberts, C.J., dissenting) (arguing the majority’s “aggressive application of substantive due process breaks sharply with decades of precedent and returns the Court to the unprincipled approach of *Lochner*”).

²⁴⁷ See REHABILITATING *LOCHNER*, *supra* note 43, at 7 (“The history of the liberty of contract doctrine should be assessed more objectively and in line with modern sensibilities, and *Lochner* should be removed from the anticanon and treated like a normal, albeit controversial, case.”).

²⁴⁸ *Id.* at 60.

²⁴⁹ 300 U.S. 379 (1937).

²⁵⁰ *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

²⁵¹ See, e.g., Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 529–30 (2015) (“But for many decades now, orthodoxy in mainstream conservative legal thought has held that *Lochner* exemplifies a discredited and unacceptable form of judicial activism.”).

²⁵² See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (Roberts, C.J., dissenting).

²⁵³ 208 U.S. 412 (1908).

women.²⁵⁴ The Brandeis brief, as it has become known, drew on empirical and sociological evidence to forward its goal.²⁵⁵ Progressives believed legislative measures should be presumed valid, thus, supporting the connection between means and ends with empirical data was not so much a progressive idea as it was a response to results in *Lochner*.²⁵⁶

While advocates in *Lochner*, and even cases before, employed empirical and sociological evidence to support arguments,²⁵⁷ Louis Brandeis's brief in *Muller v. Oregon* continues to be celebrated as the beginning of the triumph of legal realism in Supreme Court jurisprudence.²⁵⁸ Legal realism is a pragmatic approach to legal reasoning that incorporates advancements in science, sociology, behavioral psychology, and other disciplines to inform lawmaking and jurisprudence.²⁵⁹ In his 113-page brief filed on behalf of the state of Oregon, Brandeis spent well over 100 pages compiling scientific and sociological evidence to link the statute to the goal of protecting public health, safety, and welfare.²⁶⁰ The brief cited medical studies, bureau of labor statistics, historical texts, and sociological research, from the United States and abroad, all pointing to the fact that women could and should not work more than ten hours a day in a factory or laundry.²⁶¹ Critics of the brief today will surely point out it is rife with sexism and paternalism,²⁶² but regardless of its faults,

²⁵⁴ See REHABILITATING *LOCHNER*, *supra* note 43, at 60–61.

²⁵⁵ See *id.* at 60.

²⁵⁶ See Morag-Levine, *supra* note 238, at 87–88:

The incentives for including empirical evidence in the briefs differed substantially between the opposing sides in the case. . . . [F]or the state, there was little reason to re-open the question regarding the law's justification once that had been settled in its favor. . . . *Lochner*'s attorneys, by contrast, needed to refute the New York court's finding that the bakery law could reasonably be viewed as a health law if they were to overturn the lower court. Their success in this respect forced progressive defenders of labor laws to return to the briefing strategy that was reluctantly initiated in *Ritchie* and prematurely abandoned after *Holden*.

²⁵⁷ *Id.* at 77–81 (noting the use of similar briefs in cases concerning labor law prior to *Lochner*).

²⁵⁸ Michael P. Ambrosio, *Legal Realism*, 205 N.J. LAW. MAG., Oct. 2000, at 30, 31 (“Inspired by the pragmatic philosophy . . . legal realists considered knowledge the product of inquiry and the pursuit of solutions to practical social problems.”).

²⁵⁹ *Id.* at 34 (“The realist perspective is first and foremost descriptive, as it provides explanations of what actually happens in a given legal system in light of the insights of the social sciences, such as economics, sociology, psychology and anthropology. However, it is also normative. It stresses the extent to which the *moral ought to be* influences practical decision-making.”).

²⁶⁰ Brief for the State of Oregon, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605.

²⁶¹ *Id.*

²⁶² See, e.g., *id.* at 19. For example, Brandeis, in the *Muller v. Oregon* brief, quoted the *Report of the Maine Bureau of Industrial and Labor Statistics*, 1888, which stated the following:

Woman is badly constructed for the purposes of standing eight or ten hours upon her feet. I do not intend to bring into evidence the peculiar

it (along with other less celebrated briefs, including the appellant's brief in *Lochner*) changed the game on how to support (or refute) the connection between the means employed by a statute and the goal of public health, safety, and welfare.²⁶³

The Supreme Court in its opinion in *Muller v. Oregon* tacitly accepted Brandeis's technique, acknowledging that while constitutional issues are not determined by a "consensus of present public opinion,"²⁶⁴ where such information provides insight into facts that may affect the constitutional question, the Court could rightly "take judicial cognizance of all matters of general knowledge."²⁶⁵

Not only did the Court accept Brandeis's technique, the evidence he provided clearly influenced the Court, which in upholding the restriction on working hours for women noted:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.²⁶⁶

From that moment forward, the Supreme Court would accept sociological and scientific evidence to support facts and policy impacting constitutional questions.²⁶⁷ Today,

position and nature of the organs contained in the pelvis, but to call attention to the peculiar construction of the knee and the shallowness of the pelvis, and the delicate nature of the foot as part of a sustaining column. The knee joint of woman is a sexual characteristic. Viewed in front and extended, the joint in but a slight degree interrupts the gradual taper of the thigh into the leg. Viewed in a semi-flexed position, the joint forms a smooth ovate spheroid. The reason of this lies in the smallness of the patella in front, and the narrowness of the articular surfaces of the tibia and femur, and which in man form the lateral prominences, and thus is much more perfect as a sustaining column than that of a woman.

Id. at 19.

²⁶³ See Brief for the State of Oregon, at *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605.

²⁶⁴ *Muller v. Oregon*, 208 U.S. 412, 420 (1908).

²⁶⁵ *Id.* at 421.

²⁶⁶ *Id.*

²⁶⁷ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954) (citing seven studies and articles on the effect of segregation on the psychological health of minorities). Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority:

almost any question before the Supreme Court will, at the very least, be supported by amicus briefs that call upon sociological or scientific evidence to make the case.²⁶⁸ Policy is now a legitimate, pervasive, and important part of judicial review.²⁶⁹

In addition to the Brandeis brief, legal realism philosophy also informed the development of the current test for evaluating the constitutionality of a statute in conflict with individual rights, the rational basis test.²⁷⁰ First articulated in *United States v. Carolene Products Co.*,²⁷¹ the rational basis test requires an evaluation that the means employed by a statute bear a legitimate connection to the end or goal intended to be served by the statute.²⁷² The rational basis test is wholly pragmatic and steeped in legal realism principles.²⁷³ It remains the primary test of the constitutionality for a state law under the Fourteenth Amendment, or a federal law under the Fifth Amendment.²⁷⁴

In *Carolene Products*, the Supreme Court considered the constitutionality of the Filled-Milk Act, an act of Congress that prohibited the sale, in interstate commerce, of milk compounded with other fats or oils.²⁷⁵ The congressional act was premised on evidence of filled milk as unhealthy and a fraud upon citizens who believe they

In *Brown*, the Court supported its conclusion that segregation generates a feeling of inferiority among African-Americans by citing several social science publications. And in *Roe*, the Court relied on several medical, religious, and scholarly sources while discussing the safety of abortions at different stages of pregnancy, fetal viability, and religious and medical beliefs regarding the beginning of life.

Hon. Mary Murphy Schroeder, *The Brandeis Legacy*, 37 SAN DIEGO L. REV. 711, 722 (2000).

²⁶⁸ See Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILL. L. REV. 305, 305 (2003) (footnote omitted) (“Starting about 1910, legal realism—or policy analysis—entered legal reasoning, to the point that today it would be unusual to find a judicial opinion or brief that fails to explore the policy implications of an interpretation of the law.”).

²⁶⁹ *Id.* at 316 (footnotes omitted).

Legal realism, also called policy analysis, or practical reasoning, emerged from the British school of utilitarianism and the American philosophy of pragmatism. It is an ends-means analysis that entails a judicial balancing of the costs and benefits of a legal outcome. Legal realism is a method of legal reasoning that determines what the law is, not by invoking categorical legal principles, but rather by considering the law’s probable *consequences*.

Id.

²⁷⁰ See *id.* at 316–17.

²⁷¹ 304 U.S. 144 (1938)

²⁷² *Id.* at 152–54.

²⁷³ Huhn, *supra* note 268, at 316–17.

²⁷⁴ See Saphire, *supra* note 32, at 602–03 (noting that the “vast majority of legislation operates in an area” subjected to rational basis review).

²⁷⁵ *Carolene Prods.*, 304 U.S. at 145–46.

are buying whole milk.²⁷⁶ In upholding the Act under the rational basis test, the Court acknowledged that facts and evidence may be provided either to show a statute is rationally related to a legitimate government purpose, or to show absence of such relation,²⁷⁷ thus recognizing the realist approach to analysis under the test.²⁷⁸

In addition to establishing the rational basis test, the Court in *Carolene Products* also suggested in a footnote that a more “searching judicial inquiry” than rational basis may be used to address statutes that affect discrete and insular minorities.²⁷⁹ From this footnote grew the current method of tiered scrutiny.²⁸⁰ Under tiered scrutiny, most statutes are evaluated under the rational basis test.²⁸¹ Those that, as the footnote suggests, impede fundamental rights or impose upon “discrete and insular minorities”²⁸² are given “more searching judicial inquiry”²⁸³ in the form of strict or intermediate scrutiny.²⁸⁴ From the decision in *Carolene Products* forward, the rational basis test was generally applied as progressives envisioned it, with extreme deference to the legislature.²⁸⁵

²⁷⁶ *Id.* at 148–49.

²⁷⁷ *Id.* at 152.

²⁷⁸ *See id.* at 153 (citations omitted).

Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.

Id. (citation omitted). This shows, thirty years after *Muller v. Oregon*, the widespread acceptance of the technique of the Brandeis brief both for supporting and refuting the connection between the ends and means of a statute.

²⁷⁹ *Id.* at 152 n.4.

²⁸⁰ There is no shortage of scholarly opinions on the interpretation of footnote 4. *See, e.g.*, Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 179–82 (2004) (noting a variety of scholarly opinions on the footnote’s meaning and interpretation).

²⁸¹ *See Saphire, supra* note 32, at 602–03.

²⁸² *Carolene Prods.*, 304 U.S. at 152–53 n.4.

²⁸³ *Id.*

²⁸⁴ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–41 (1985) (explaining tiered scrutiny); *see, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating a law prohibiting interracial marriage under strict scrutiny).

²⁸⁵ Progressives of the early twentieth century were not great defenders of individual liberty or civil rights at all. *See* David E. Bernstein, *From Progressivism to Modern Liberalism: Louis D. Brandeis as a Transitional Figure in Constitutional Law*, 89 NOTRE DAME L. REV. 2029, 2030 (2014) (“Even those Progressives who were more favorably inclined to the Constitution typically loathed judicial review. Progressives thought that judicial review was undemocratic and that it put too much power over public policy in the hands of non-expert judges.”). But some of their groundwork in free speech led to development, with the Warren Court, of civil liberties.

Because of the extreme deference provided to the legislature under the rational basis test, in the mid-to-latter part of the twentieth century, Fourteenth Amendment jurisprudence centered on arguing that particular rights were fundamental or groups were suspect classes.²⁸⁶ Unless the challenger to a statute could achieve heightened or strict scrutiny, the chances of successfully overturning a statute were effectively zero.²⁸⁷ As the mid-twentieth century approached, the Warren Court pursued protection of civil rights and liberties via the Fourteenth Amendment.²⁸⁸ However, by extending Fourteenth Amendment protections narrowly, the Court was able to give the Fourteenth Amendment power without falling back into the dreaded *Lochner* rationale.²⁸⁹

IV. MODERN APPLICATION OF RATIONAL BASIS TEST AND LEGAL REALISM

For over three decades following the decision in *Carolene Products*, the application of the rational basis test by the Supreme Court became tantamount to a free pass for a statute—if rational basis was applied, the statute would be upheld.²⁹⁰ The means/ends test became a mere rubber stamp for legislative action.²⁹¹ Only statutes reviewed under strict scrutiny or heightened scrutiny had a chance of being declared unconstitutional,²⁹² and for a time, through the middle of the twentieth century until it named its last quasi-suspect classes in 1977, the Court seemed to favor creating new suspect classes and recognizing new fundamental rights rather than giving rational basis any teeth.²⁹³

The impotence of the rational basis test subsided slightly, beginning in 1973 with the decision in *U.S. Department of Agriculture v. Moreno*.²⁹⁴ The case involved a legislative amendment passed in 1971 by Congress that precluded households with one or more unrelated persons to qualify for food stamp benefits.²⁹⁵ Under equal protection, petitioners in *Moreno* challenged this classification treating poor people living in single family households differently from the poor who may pool resources with unrelated families and individuals.²⁹⁶ No suspect class or fundamental right was at issue, thus the statute was analyzed according to the rational basis test.²⁹⁷

²⁸⁶ Cf. Saphire, *supra* note 32 (comparing the various levels of scrutiny).

²⁸⁷ See *id.* at 602–03 (noting that “most legislation is entitled to a strong presumption of constitutionality” and thus “judicial invalidation” is an “exceptional event”).

²⁸⁸ See Jim Chen, *Come Back to the Nickel and Five: Tracing the Warren Court’s Pursuit of Equal Justice Under Law*, 59 WASH. & LEE L. REV. 1203 (2002) (highlighting the Warren Court’s Fourteenth Amendment jurisprudence).

²⁸⁹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

²⁹⁰ See Colby & Smith, *supra* note 251, at 544–46 (explaining the role of judicial deference in the years after *Carolene Products*).

²⁹¹ See Saphire, *supra* note 32, at 602–03.

²⁹² See *id.*

²⁹³ See Emily K. Baxter, *Rationalizing Away Political Powerlessness: Equal Protection Analysis of Laws Classifying Gays and Lesbians*, 72 MO. L. REV. 891, 894 (2007).

²⁹⁴ 413 U.S. 528 (1973).

²⁹⁵ *Id.* at 529.

²⁹⁶ *Id.* at 531–33.

²⁹⁷ *Id.* at 533–34.

Evidence existed in the legislative history suggesting that the amendment “was intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.”²⁹⁸ In its opinion, the Supreme Court acknowledged this legislative history and unequivocally opined that such a purpose for the law, on its face, would be unconstitutional because “‘equal protection of the laws’ . . . must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”²⁹⁹ This particular statement by the Court would become important in subsequent opinions where other statutes were comprehensively analyzed under equal protection using a rational basis test.³⁰⁰

Ultimately, the government argued that the statute should be upheld because it was rationally related to a legitimate government interest, that being reduction of fraud in the food stamp program.³⁰¹ Specifically, the government asserted that unrelated people living in the same household are more likely to engage in practices intended to defraud the program, and the instability of such households makes the fraud more difficult to detect.³⁰² Instead of rubber-stamping these justifications, the Court called them “wholly unsubstantiated assumptions” and struck down the statute because it did not constitute a rational means of achieving minimization of fraud.³⁰³ While the Court acknowledged that classifications need not be drawn with “precise mathematical nicety,”³⁰⁴ to be upheld, such classifications cannot be “wholly without any rational basis.”³⁰⁵ The Court, relying on sociological evidence, concluded that the statute only targeted the most needy citizens who were so destitute they could not change their living circumstances to stay eligible for food stamps,³⁰⁶ and the statute did nothing to actually reduce fraud in any way, since those persons engaged in fraud would simply move to maintain eligibility.³⁰⁷

What is most unique about this opinion is the Court’s willingness to meaningfully analyze a statute under the rational basis test and not simply accept legislative reasoning without a showing that the means were rationally related to the ends.³⁰⁸ However, *Moreno*, a seven-to-two decision, was not without its controversy.³⁰⁹

²⁹⁸ *Id.* at 534; *see also* H.R. REP. NO. 91-1793, at 8–9 (1970) (Conf. Rep.).

²⁹⁹ *Moreno*, 413 U.S. at 534.

³⁰⁰ *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (employing rational basis review to strike down an amendment to the Colorado Constitution that prohibited any state action intended to protect homosexuals from discrimination).

³⁰¹ *Moreno*, 413 U.S. at 535.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.* at 538 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *See id.* at 535–37 (pointing to other provisions in the Food Stamp Act that already address the government’s asserted interests).

³⁰⁹ *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 59–64 (1996) (describing the confusion created by the animus standard used by the Court in *Moreno*).

Chief Justice Burger and Justice Rehnquist dissented, favoring a more deferential posture toward the legislature, as had become common prior to *Moreno*.³¹⁰ Further, Justice Douglas, who concurred with the majority result of overturning the statute, favored implication of a fundamental right—freedom of association—rather than overturn the statute based on a rational basis test.³¹¹ As such, *Moreno* illustrated the ongoing controversy of due process and equal protection jurisprudence: should the rational basis test be applied as seemingly intended, to judge whether the means is rationally related to the ends? Or should it remain a toothless test requiring courts to imply violations of fundamental rights or implications of suspect classes before a statute could be called unconstitutional?³¹²

A decade later, in *City of Cleburne v. Cleburne Living Center*, the Supreme Court would once again consider these questions, further solidifying the approach in *Moreno* that, at least under certain circumstances, the rational basis test should be more than a rubber stamp for legislative action.³¹³ In *Cleburne*, the Court opined on the constitutionality of a city ordinance that required a zoning permit prior to locating a group home for the persons with intellectual and developmental disabilities³¹⁴ within the city.³¹⁵ Petitioners had applied for such a permit, been turned down, and subsequently filed a lawsuit claiming the ordinance violated equal protection by discriminating against the intellectually disabled.³¹⁶

The federal district court found that the City had a legitimate interest in ensuring the “legal responsibility” of the organization running the home, and the residents living there, as well as interests in protecting the “safety” and allaying the “fears of residents in the adjoining neighborhood”³¹⁷ and controlling “the number of people to be housed in the home.”³¹⁸ Further, the district court found such interests were rationally served by a special use permit.³¹⁹ The U.S. Court of Appeals for the Fifth Circuit overturned the lower court, finding that the intellectually disabled residents were members of a quasi-suspect class, the statute was subject to intermediate scrutiny, it failed the test, and was held unconstitutional because it violated the Equal Protection Clause

³¹⁰ *Moreno*, 413 U.S. at 545–46 (Rehnquist, J., dissenting).

³¹¹ *Id.* at 543 (Douglas, J., concurring).

³¹² Compare *id.* at 537–38 (majority opinion analysis using rational basis test), with *id.* at 542–43 (Douglas, J., concurring) (implicating a violation of a fundamental right).

³¹³ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).

³¹⁴ The term “mentally retarded” which was used by the Court in this case, is now outdated, at best, and, more likely, pejorative. Today, it is generally replaced by “intellectually disabled.” At the time *Cleburne* was decided it was an acceptable term and was used by both parties, the lawyers, and the Justices. The term was even used by ARC (Association of Retarded Citizens) and other advocate organizations. However, because the term is now considered to be offensive to many, I have changed it in my discussion of this case to the term “intellectually disabled.”

³¹⁵ *Id.* at 435.

³¹⁶ *Id.* at 437.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

of the Fourteenth Amendment.³²⁰ The City then further appealed to the U.S. Supreme Court.³²¹

In its opinion, the Supreme Court quickly and emphatically determined that the intellectually disabled would not be given suspect or quasi-suspect class status, and that application of the rational basis test was proper.³²² Although this usually would have been a sign that the ordinance was about to be upheld, the Court invoked the rationale of *Moreno* from a decade before.³²³ While acknowledging the general rule “that legislation is presumed to be valid” and will be upheld if it is rationally related to a “legitimate state interest” under the test,³²⁴ the Court noted that the relationship between the interest and the ordinance creating the classification cannot be “so attenuated as to render the distinction arbitrary or irrational.”³²⁵ Thus, there must actually exist a rational relationship between the ends and the means, and the Court accepted a role in determining the rationality of the relationship.³²⁶

The Court, then, systematically considered each of the purported interests of the City and determined that none of them justified special classification of the intellectually disabled.³²⁷ First and foremost, the majority stressed that unsubstantiated fears and negative attitudes of neighbors concerning the residents of the home were an insufficient basis upon which to draw a classification.³²⁸ The Court continually pointed out that the City allowed boarding houses, hospitals, fraternity houses, apartments, and other multiple dwellings without requiring a special use permit.³²⁹ Though never claiming that a resident of the Cleburne Living Center could not become a danger to the neighborhood, the majority noted that the potential for such dangers are also present when boarding houses, hospitals, and similar uses are allowed.³³⁰ Thus, there was no rational basis to draw the line of risk only around the intellectually disabled.³³¹

Similarly, the Court found that the City’s interests in “avoiding concentration of population,” “lessening congestion of the streets,” avoiding “fire hazards,” and maintaining “serenity in the neighborhood”³³² while laudable, were not rationally related to a law discriminating against a group home for the intellectually disabled when apartment houses, fraternity houses, sorority houses, hospitals, and boarding

³²⁰ *Id.* at 437–38.

³²¹ *Id.* at 439.

³²² *Id.* at 446.

³²³ *Id.* at 446–47.

³²⁴ *Id.* at 440.

³²⁵ *Id.* at 446.

³²⁶ *See id.*

³²⁷ *Id.* at 448–50.

³²⁸ *Id.* at 448.

³²⁹ *Id.* at 448–50.

³³⁰ *Id.* at 450.

³³¹ *See id.*

³³² *Id.*

houses were all able to locate in the neighborhood without a permit.³³³ Ultimately, the ordinance was found to be based on irrational prejudice rather than a legitimate interest, and was therefore unconstitutional.³³⁴

In a concurring opinion, Justice Stevens (who was joined by Justice Rehnquist) took the opportunity to question the logic of the tiered approach to equal protection analysis, favoring instead a single consistent rational basis approach.³³⁵ Stevens noted:

In my own approach to these cases, I have always asked myself whether I could find a “rational basis” for the classification at issue. The term “rational,” of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word “rational”—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign’s duty to govern impartially.³³⁶

Justice Marshall, with whom Justices Blackmun and Brennan joined concurring in the result, wrote separately, disagreeing with the majority’s decision to apply the rational basis test.³³⁷ According to Justice Marshall, the majority did not provide enough guidance for lawmakers on avoiding prejudicial legislation, nor did it provide sufficient protection for the intellectually disabled in future similar situations.³³⁸ These three Justices expressed a preference to affirm the Court of Appeals decision which found a quasi-suspect class.³³⁹ *Cleburne*, building on *Moreno*, carefully considered whether the means were rationally related to legitimate ends.³⁴⁰ While the result of *Cleburne* was unanimous, the concurrences show that the debate over the role of the rational basis test and the tiered approach to equal protection was far from over.³⁴¹

In the years since *Cleburne*, the Court’s approach to reviewing laws concerning the rights of gays and lesbians seems to provide further evidence of the Court’s reticence to find new fundamental rights and suspect classes, as well as its willingness

³³³ *See id.*

³³⁴ *Id.*

³³⁵ *Id.* at 452 (Stevens, J., concurring).

³³⁶ *Id.*

³³⁷ *Id.* at 456 (Marshall, J., concurring in part and dissenting in part). Marshall calls the rational basis test “freewheeling” and “potentially dangerous.” *Id.* at 478. Very clearly these three Justices prefer the tiered approach. *See id.*

³³⁸ *Id.* at 460.

³³⁹ *Id.* at 478. In supporting his call for application of heightened scrutiny, Justice Marshall noted, “[t]he right to ‘establish a home’ has long been cherished as one of the fundamental liberties embraced by the Due Process Clause.” *Id.* at 461.

³⁴⁰ *See id.* at 446 (majority opinion).

³⁴¹ *See supra* notes 335–39 and accompanying text.

to engage in more meaningful rational basis review, at least under certain circumstances.³⁴² In 1986, the very year after the decision in *Cleburne*, the Supreme Court in *Bowers v. Hardwick*³⁴³ took up a challenge to a Georgia statute that criminalized certain sexual acts, including sodomy.³⁴⁴ Even though the petitioners who challenged the law encouraged the Court to extend the fundamental right of privacy granted to decisions concerning procreative acts in *Griswold v. Connecticut*³⁴⁵ and *Eisenstadt v. Baird*,³⁴⁶ to same-sex sexual acts, the Court refused.³⁴⁷ Additionally the Court declined meaningful analysis of the statute under rational basis, finding “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable” was a sufficient rational basis for the law.³⁴⁸

A decade later, however, the Court changed course on the issue in a string of cases beginning with *Romer v. Evans* in 1996, followed by *Lawrence v. Texas* in 2003, *United States v. Windsor* in 2013, and most recently, *Obergefell v. Hodges* in 2015. Justice Kennedy, writing for the majority in each, authored opinions determining a number of statutes that treated gays and lesbians different from heterosexuals violated the Fifth and Fourteenth Amendments,³⁴⁹ culminating in the extension of the right to marriage to same-sex couples in *Obergefell*.³⁵⁰

In *Romer*, the Court struck down a Colorado constitutional amendment, passed by referendum, that prohibited local governments from passing laws and ordinances protecting persons from discrimination based on sexual orientation.³⁵¹ Justice Kennedy, writing for a majority of six Justices, opined that the amendment violated equal protection, but would not grant suspect or quasi-suspect class status to gays and lesbians.³⁵² Instead, the Court, harkening back to the *Moreno* opinion, employing a rational basis analysis, found the amendment “so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects”³⁵³ As in *Moreno* and *Cleburne*, the Court drew on sociological evidence, including evidence of historical prejudice based on sexual orientation to prove the animus behind the law.³⁵⁴ Justice Scalia’s dissenting opinion, with whom

³⁴² See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 195–96 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

³⁴³ 478 U.S. 186 (1986).

³⁴⁴ *Id.* at 188.

³⁴⁵ 381 U.S. 479, 485–86 (1965).

³⁴⁶ 405 U.S. 438, 454–55 (1972).

³⁴⁷ *Bowers*, 478 U.S. at 191.

³⁴⁸ *Id.* at 196.

³⁴⁹ *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. at 620 (1996).

³⁵⁰ See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

³⁵¹ *Romer*, 517 U.S. at 632.

³⁵² See *id.* at 631–32.

³⁵³ *Id.* at 632.

³⁵⁴ See, e.g., Brief Amicus Curiae of the American Psychological Ass’n, the American Psychiatric Ass’n, the National Ass’n of Social Workers, Inc., and the Colorado Psychological

Justices Rehnquist and Thomas joined, argued that the majority failed to properly apply the deferential rational basis test, and that preservation of traditional sexual mores was a sufficient governmental end to justify the means of the amendment.³⁵⁵

Seven years after *Romer*, the Court directly overturned *Bowers* in *Lawrence v. Texas*, when it struck down a Texas law criminalizing sexual conduct by two persons of the same sex.³⁵⁶ Again, Justice Kennedy wrote for the majority, reasoning that an individual's "liberty" interest in making decisions related to personal choices of marriage, family, procreation, and intimate conduct included protection for gays and lesbians from criminal prosecution for intimate associations in the privacy of their home.³⁵⁷ Kennedy called upon the long line of substantive due process cases including *Griswold v. Connecticut*, *Eisenstadt v. Baird*, *Roe v. Wade*,³⁵⁸ and *Planned Parenthood v. Casey*³⁵⁹ to support the notion of a "liberty" interest protecting intimate relations.³⁶⁰ While this opinion seems, on its face, to extend the fundamental right of privacy to private consensual sexual relations no matter the sex of the parties, it is interesting to note that Kennedy, toward the end of the opinion, wrote "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."³⁶¹ This language is that of the rational basis test, not that of the strict scrutiny standard generally applied to infringement upon fundamental rights under due process.³⁶² Justice O'Connor, who concurred in the result,³⁶³ based her decision on equal protection grounds rather than due process, invoking opinions in *Moreno*, *Cleburne*, and *Romer* to support her rationale that the Texas statute had no rational basis.³⁶⁴

Ass'n in Support of Respondents at 19–22, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 17008445, at *8 (providing scientific and sociological research on the nature of sexual orientation and discussion of "the literature on prejudice and discrimination against gay people").

³⁵⁵ *Romer*, 517 U.S. at 642 (Scalia, J., dissenting).

³⁵⁶ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). The law in Texas differed from the Georgia statute discussed in *Bowers*, in that the Georgia statute applied to all acts of sodomy, including between opposite sex couples. *Id.* at 566. The Texas statute only applied to same-sex couples. *Id.* Because of this difference, Justice O'Connor in her concurrence in *Lawrence*, refused to join in overturning *Bowers*, and rather reasoned to strike down the Texas statutes on equal protection grounds rather than due process. *See id.* at 582, 585 (O'Connor, J., concurring).

³⁵⁷ *See id.* at 574 (majority opinion).

³⁵⁸ 410 U.S. 113 (1973).

³⁵⁹ 505 U.S. 833 (1992).

³⁶⁰ *Lawrence*, 539 U.S. at 564–65, 573–74.

³⁶¹ *Id.* at 578.

³⁶² *See, e.g., Roe*, 410 U.S. at 155.

³⁶³ *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring).

³⁶⁴ *Id.* at 579–80. In explaining her rationale for employing equal protection grounds to strike down the Texas law, Justice O'Connor quoted Justice Jackson's concurrence in *Railway Express Agency, Inc. v. New York*:

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law

In his dissent in *Lawrence*, Justice Scalia, criticizing the majority, points to a few oddities of the opinion worth noting.³⁶⁵ First, while the majority discusses “fundamental propositions” and “fundamental decisions,” nowhere does the majority opinion clearly invoke a fundamental right.³⁶⁶ At first glance, this may seem a mere oversight, because the string of cases Justice Kennedy uses to support the decision supports a fundamental right to privacy that certainly could ostensibly include consensual same-sex intimacy,³⁶⁷ but the second observation suggests this omission may be more than oversight.³⁶⁸ The majority opinion never discusses the strict scrutiny test which would apply to laws infringing upon a fundamental right, choosing, instead, the language of rational basis in overturning the statute.³⁶⁹

Ten years after the Court’s decision in *Lawrence*, Justice Kennedy’s movement furthered away from tiered scrutiny, and emphasized the intertwining of due process and equal protection concepts in *United States v. Windsor*.³⁷⁰ This case, the third in line of gay rights cases, considered the constitutionality of the federal government’s Defense of Marriage Act (DOMA).³⁷¹ DOMA defined marriage as an institution existing only between one man and one woman.³⁷² Once individual states began to recognize same-sex marriages, DOMA effectively created marriages that would be enforced and valid under state law, but which did not “exist” under federal law.³⁷³ Of course, numerous difficulties arose for married same-sex couples who were treated differently with respect to common actions such as filing taxes or obtaining health and social security benefits.³⁷⁴

In a contentious 5–4 decision, the Court struck down DOMA as unconstitutional.³⁷⁵ *Windsor* is a long opinion, and though a great portion of it considers the issue of standing, only a small section develops the Court’s reasoning for striking

which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Id. at 585 (quoting *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring)).

³⁶⁵ *Id.* at 586 (Scalia, J., dissenting).

³⁶⁶ *Id.*

³⁶⁷ *See supra* notes 356–60 and accompanying text.

³⁶⁸ *See Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

³⁶⁹ *See id.* (“Instead the Court simply describes petitioners’ conduct as ‘an exercise of their liberty’—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case.”).

³⁷⁰ *See* 133 S. Ct. 2675, 2693–95 (2013).

³⁷¹ *Id.* at 2682.

³⁷² *Id.* at 2683.

³⁷³ *See id.* at 2682–83.

³⁷⁴ *See id.* at 2694.

³⁷⁵ *Id.* at 2695.

down the law.³⁷⁶ Specifically, the Court found that DOMA “violate[d] basic due process and equal protection principles applicable to the Federal Government”³⁷⁷ and was an “unconstitutional . . . deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”³⁷⁸

Calling upon this guarantee of “liberty” protected by the Due Process Clause of the Fifth Amendment, the Court was careful to note that the clause incorporated principles of equal protection as recognized previously in *Bolling v. Sharpe*.³⁷⁹ Additionally, the majority bolstered the equal protection guarantee of the Fifth Amendment by invoking Fourteenth Amendment jurisprudence on the subject,³⁸⁰ suggesting that “the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.”³⁸¹ In fact, the Court primarily relied upon the rationale of *Moreno* and *Romer* to support its holding, as both equal protection cases employed rational basis analysis.³⁸² What is most interesting about this opinion is that the lower court, the United States Court of Appeals for the Second Circuit, had also struck the law, but employed heightened scrutiny to do so.³⁸³ In *Windsor*, Justice Kennedy never mentioned employment of tiered scrutiny.³⁸⁴

Finally, in 2015, the same-sex marriage debate culminated in the decision of *Obergefell v. Hodges*, striking down state laws prohibiting same-sex marriage and extending the fundamental right to marriage to same-sex couples.³⁸⁵ Calling upon concepts of “liberty” and “equality,” Justice Kennedy again twinned the language of due process and equal protection analysis.³⁸⁶ While the opinion does not specifically apply a rational basis analysis, it also does not employ traditional tiered scrutiny, either.³⁸⁷ For example, the opinion drew a broad line around the “right to marriage”

³⁷⁶ *Id.* at 2684–89, 2693–96.

³⁷⁷ *Id.* at 2693.

³⁷⁸ *Id.* at 2695.

³⁷⁹ *Id.* (citing *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)). In *Bolling*, the Supreme Court considered the issue of racial segregation in District of Columbia schools, governed by the Fifth Amendment rather than the Fourteenth. In that opinion, the Court acknowledged that:

the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The ‘equal protection of the laws’ is a more explicit safeguard of prohibited unfairness than ‘due process of law,’ and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Bolling, 347 U.S. at 499.

³⁸⁰ *See Windsor*, 133 S. Ct. at 2695.

³⁸¹ *Id.*

³⁸² *Id.* at 2693.

³⁸³ *Id.* at 2684.

³⁸⁴ *See id.* at 2695–96.

³⁸⁵ 135 S. Ct. 2584, 2604–05 (2015).

³⁸⁶ *Id.* at 2602–03.

³⁸⁷ *See id.* at 2590, 2604.

rather than narrowly defining the fundamental right as called for in traditional strict scrutiny cases.³⁸⁸ In an even more obvious critique of tiered scrutiny, Kennedy specifically eschews development of the law by “formula,” focusing instead on the lofty goals of “liberty” and “equality.”³⁸⁹ Simultaneously praised for its “judicial minimalism” and criticized for its lack of clarity,³⁹⁰ *Obergefell* provides further evidence that we may be moving away from tiered scrutiny, generally.³⁹¹

In each of these four gay rights opinions, Justice Kennedy called upon concepts of “liberty” and “equality” as symbiotic legal principles.³⁹² The opinions do not find new fundamental rights for gays and lesbians—though they extend rights of privacy and marriage.³⁹³ Nor do the opinions declare gays and lesbians to be part of a new suspect or quasi-suspect class.³⁹⁴ In many ways Kennedy seems to focus these opinions in the language of rational basis review, even when fundamental rights are involved.³⁹⁵ Some scholars believe the opinions show the result of judicial politics, the need to write an opinion which can appease a majority of unique legal thinkers or accomplish particular political goals.³⁹⁶ Some consider these opinions great examples of judicial minimalism.³⁹⁷ Still others see a more conscious step away from tiered scrutiny.³⁹⁸ Whether they have any direct precedential value outside of

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 2604.

³⁹⁰ See *infra* note 398 and accompanying text.

³⁹¹ See *infra* note 399 and accompanying text.

³⁹² *Obergefell*, 135 S. Ct. at 2603 (“Each concept—liberty and equal protection—leads to a stronger understanding of the other.”); see also Robert C. Farrell, *Justice Kennedy’s Idiosyncratic Understanding of Equal Protection and Due Process, and Its Costs*, 32 QUINNIPIAC L. REV. 439, 439 (2014) (“Although Kennedy based his opinions on the Equal Protection and Due Process Clauses of the United States Constitution, he ignored the longstanding framework of analysis that the Court has established for those clauses. Instead, he created his own idiosyncratic view of equal protection and due process, a view that combined the language of liberty and equality.”).

³⁹³ *Obergefell*, 135 S. Ct. at 2604 (“These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).

³⁹⁴ See *id.* at 2590, 2604.

³⁹⁵ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”).

³⁹⁶ See Tom Watts, *From Windsor to Obergefell: The Struggle for Marriage Equality Continued*, 9 HARV. L. & POL’Y REV. S52, S58 (2015) (suggesting Justice Kennedy wrote the *Windsor* opinion unclearly to initiate a circuit split that would eventually lead to another gay marriage case reaching the courts in short order).

³⁹⁷ Farrell, *supra* note 392, at 440.

³⁹⁸ Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 530 (2014) (suggesting Justice Kennedy’s opinions in the gay rights cases “might be taken to signal broader shifts in the Court’s equal protection doctrine generally:

the realm of gay rights is yet unknown. But, the cases do signal that *Moreno* and *Cleburne* were not stand-alone opinions, and that rational basis is not always applied as a rubber stamp to legislative action.³⁹⁹ If the Court continues to avoid recognition of fundamental rights and suspect classes as it has for the past forty years, meaningful rational basis review of *Moreno*, *Cleburne*, *Romer*, and *Windsor* may become even more important in protecting individual rights from tyranny of the majority.

Despite application of meaningful rational basis review in *Moreno*, *Cleburne*, *Romer*, and *Windsor*, the Court has been careful to avoid opening a floodgate of litigation by remaining generally true to the rubber-stamp version of the rational basis test.⁴⁰⁰ What then, made these particular cases special? And what characteristics will have to be present in future cases to convince the Court to apply meaningful rational basis? Upon closer review, *Moreno*, *Cleburne*, *Romer*, and *Windsor* present a pattern which may be indicative of success under rational basis.⁴⁰¹ First, all four cases are equal protection cases, but they also implicate some general form of a fundamental right.⁴⁰² *Moreno* seems to implicate freedom of association, one of the basic First Amendment rights.⁴⁰³ In his concurring opinion, Justice Douglas calls out this right as the proper basis for invalidating the statute.⁴⁰⁴ Similarly, in his concurrence in *Cleburne*, Justice Marshall, joined by Justices Brennan and Blackmun, noted that the freedom to make a home, a right related to freedoms of association and privacy, is a fundamental right.⁴⁰⁵ *Romer* implicated the right to political participation.⁴⁰⁶ In fact, the Supreme Court of Colorado struck down Amendment 2 under Fourteenth Amendment analysis because “it infringed the fundamental right of gays and lesbians to participate in the

from a rigidly tiered and compartmentalized approach to a more flexible and (for those groups not currently deemed “suspect” or “quasi-suspect”) robust review. Ultimately, and potentially quite soon, it seems likely that the Supreme Court will face pressures to choose between these competing formulations, as the lower courts increasingly show themselves willing to deploy *Romer*, *Lawrence*, and *Windsor* in support of diverse constitutional claims”).

³⁹⁹ See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (relying on *Moreno* and *Romer*’s holding in the context of rational basis review in equal protection cases to invalidate laws).

⁴⁰⁰ See Schiavone, *supra* note 26, at 33 (noting that it is still unknown if these cases “provide direct precedential value outside the realm of gay rights”).

⁴⁰¹ *Id.*

⁴⁰² See *infra* notes 403–08 and accompanying text.

⁴⁰³ See *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 543 (1973) (Douglas, J., concurring) (“We deal here, however, with the right of association, protected by the First Amendment.”).

⁴⁰⁴ *Id.* at 541 (“This case involves desperately poor people with acute problems who, though unrelated, come together for mutual help and assistance. The choice of one’s associates for social, political, race, or religious purposes is basic in our constitutional scheme.”).

⁴⁰⁵ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 461 (1985) (Marshall, J., concurring) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)) (“The right to ‘establish a home’ has long been cherished as one of the fundamental liberties embraced by the Due Process Clause.”).

⁴⁰⁶ *Romer v. Evans*, 517 U.S. 620, 625 (1996).

political process.”⁴⁰⁷ Lastly, *Windsor* implicated a right to marry, which less than two years later would be extended specifically to same-sex couples.⁴⁰⁸ Although the majorities in all four of these cases were unwilling to expand or reinterpret currently protected fundamental rights to include the specific rights discussed above, these rights did seem to provide, at the very least, justification for treating the issue seriously.⁴⁰⁹

Second, opponents of the statutes in these four cases showed that the laws were, at least in part, based on the animus of the community.⁴¹⁰ At times, the animus was clearly stated in the record, but more often than not, the Court implied animus based on surrounding circumstances.⁴¹¹ *Moreno* had clear legislative history showing the law was proposed to prevent fraud by “hippies.”⁴¹² While the Court in *Cleburne* did not point to direct evidence of animus, it was easily implied because the law only impacted the intellectually disabled and not other groups and residents whose presence had the same likelihood of negatively impacting the neighborhood.⁴¹³ In *Romer*, the Court again recognized the implied animus behind the law, reasoning that the extreme breadth of the law could support no other purpose than animus.⁴¹⁴

⁴⁰⁷ *Id.* The Colorado Supreme Court relied on voters’ rights cases and cases striking down discriminatory restructuring of governmental decision making to support its position. *Id.*

⁴⁰⁸ See *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (“By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.”). While the majority carefully avoided discussing the potential fundamental right to marriage in this opinion, the subtext of much of the language of the opinion points to it. Two years later, the right was recognized. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (“[T]he Court has long held the right to marry is protected by the Constitution.”).

⁴⁰⁹ See *supra* notes 403–08 and accompanying text.

⁴¹⁰ *Moreno* exemplifies animus in the form of a “bare desire to discriminate.” Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887, 903 (2012). The animus in *Cleburne* was characterized as “negative attitudes toward and fears” of persons with intellectual disabilities. *Id.* at 909. And the Court in *Romer* “suggested that laws suffering from a radical lack of fit would be presumed to be based in animus . . .” *Id.* at 914. Animus has been proven both by the legislative history or by inference because of the severe misalignment between means and ends. *Id.* at 927.

⁴¹¹ See *id.* at 903, 909, 914, 927.

⁴¹² *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973).

⁴¹³ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

The District Court found that the City Council’s insistence on the permit rested on several factors. First, the Council was concerned with the negative attitude of the majority of property owners located within 200 feet of the Featherston facility, as well as with the fears of elderly residents of the neighborhood. But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like.

Id.

⁴¹⁴ See *Romer v. Evans*, 517 U.S. 620, 632 (1996). Of Amendment 2, the Court noted: “its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems

Finally, in *Windsor*, the majority similarly noted that the purpose of the DOMA was “to disparage and to injure” and therefore no other legitimate purpose could overcome the illegitimate one.⁴¹⁵

Lastly, following the legal realism tradition, opponents of the statutes successful in meaningful rational basis cases draw attention to sociological, scientific, and/or empirical data to sever the rational relationship between the goals of the statute and the means used to achieve them.⁴¹⁶ Advocates use evidence in two ways: (1) to prove the statute does not rationally achieve the government’s purported goals, and/or (2) to prove the statute’s real purpose is animus, in the form of a desire to harm a politically unpopular group, or at least displays irrational fear and prejudice.⁴¹⁷ For example, in *Moreno*, the Court opinion drew upon evidence from the California Director of Social Welfare on what types of persons would be most affected by the legislation.⁴¹⁸ The *Moreno* Court had clear proof of animus in the legislative record, so the Court needed no further empirical evidence.⁴¹⁹ In *Cleburne*, the Court relied on sociological evidence to prove both that the presence of the intellectually disabled in a community was not a threat to health, safety, and welfare, and that the challenged zoning ordinance was an example of the disadvantages the intellectually disabled regularly experience due to irrational fear and prejudice.⁴²⁰

inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.” *Id.*

⁴¹⁵ United States v. Windsor, 133 S. Ct. 2675, 2696 (2013).

The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.

Id.

⁴¹⁶ See, e.g., *Moreno*, 413 U.S. at 537–38 (using testimony from the California Director of Social Welfare to show the regulations were aimed at “hippies” rather than people committing fraud); see *infra* notes 418–22 and accompanying text.

⁴¹⁷ See *id.*

⁴¹⁸ See *id.* California Director of Social Welfare has explained:

The “related household” limitations will eliminate many households from eligibility in the Food Stamp Program. It is my understanding that the Congressional intent of the new regulations are specifically aimed at the “hippies” and “hippie communes.” Most people in this category can and will alter their living arrangements in order to remain eligible for food stamps. However, the AFDC mothers who try to raise their standard of living by sharing housing will be affected. They will not be able to utilize the altered living patterns in order to continue to be eligible without giving up their advantage of shared housing costs.

Id.

⁴¹⁹ See *id.*

⁴²⁰ See generally, e.g., Motion and Brief Amici Curiae for Ass’n for Retarded Citizens et al., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (No. 84-468), 1985 WL

In *Romer*, opponents of Amendment 2 illustrated through empirical evidence the following: (1) that sexual orientation is different from sexual conduct, and thus moral approbation is not rationally connected to orientation, and (2) persons of alternative sexual orientations are victims of pervasive animus.⁴²¹ Finally in *Windsor*, opponents of DOMA used sociological evidence to show sexual orientation is an immutable,⁴²² biologically based characteristic, and that children of same-sex couples were not psychologically or developmentally disadvantaged by their parents' sexual orientation.⁴²³

Advocates seeking to invalidate a law under the rational basis test will likely have a better chance of convincing the Court to apply meaningful rational basis if these three factors are present: implication of a fundamental right, presence of animus at the core of the challenged statute, and sociological or scientific evidence that severs the relationship between the ends and the means of the statute. The next section will consider why breed-specific laws meet these three factors and should be held invalid under meaningful rational basis.

V. BREED-SPECIFIC LAWS VIOLATE EQUAL PROTECTION UNDER A MEANINGFUL RATIONAL BASIS ANALYSIS

Breed-specific laws implicate all three common factors noted in other meaningful rational basis cases.⁴²⁴ First, these laws impinge upon not only one, but two fundamental rights: property and privacy.⁴²⁵ Secondly, there is ample evidence that many of these laws are passed as a result of animus, not only animus against the dogs themselves, but more importantly for our purposes, animus against their human owners.⁴²⁶ These laws often arise to exclude or control certain traditionally disenfranchised groups, including racial minorities and socioeconomically disadvantaged persons, who

669791 (citing historical, sociological, and scientific evidence concerning intellectual disabilities, eugenics, and prejudice against the intellectually and developmentally disabled).

⁴²¹ See generally, e.g., Brief Amici Curiae American Psychological Ass'n et al., in Support of Respondents, *Romer v. Evans*, 517 U.S. 620 (1995) (No. 94-1039), 1995 WL 17008445 (providing scientific and sociological research on the nature of sexual orientation and discussion of "the literature on prejudice and discrimination against gay people").

⁴²² See generally, e.g., Brief of Amici Curiae for GLMA: Health Professionals Advancing LGBT Equality (Gay and Lesbian Medical Association) Concerning the Immutability of Sexual Orientation in Support of Affirmance on the Merits, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (Nos. 12-307, 12-307), 2013 WL 860299 (providing evidence that sexual orientation is a biological characteristic that is immutable).

⁴²³ See, e.g., Brief for Am. Sociological Ass'n in Support of Respondent Kristin M. Perry & Respondent Edith Schlain Windsor as Amicus Curiae, *U.S. v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-144), 2013 WL 4737188 (including significant reference to sociological evidence supporting same-sex parenting).

⁴²⁴ See *supra* notes 33–36 and accompanying text.

⁴²⁵ See *supra* note 44 and accompanying text.

⁴²⁶ See *supra* note 35 and accompanying text.

are the stereotypical owners of targeted breeds.⁴²⁷ Third, and finally, emerging empirical data and evidence severs the connection between breed-specific laws and any justifiable governmental goal.⁴²⁸ This evidence proves there is no rational relationship between the goal of the statute and the means employed to accomplish it.⁴²⁹

Breed-specific laws involve classification of a group of people, those who own banned or restricted breeds of canines. Such laws burden that one group over others similarly situated by preventing the enjoyment of property, and in some cases seizing and destroying such property.⁴³⁰ While the Court in *Sentell* held that owners' property rights in their dogs were "imperfect," the case also acknowledged the existence of the rights.⁴³¹ Additionally, many of the United States Circuit Courts of Appeal have agreed that dogs are proper subjects of Fourth Amendment protections.⁴³² Seizure and destruction of a person's canine implicates property rights.⁴³³

Additionally, breed-specific laws may also implicate "the right to be let alone."⁴³⁴ This right which, in modern times, has been called the "right to privacy"

⁴²⁷ See, e.g., Hillary Twining, Arnold Arluke & Gary Patronek, *Managing the Stigma of Outlaw Breeds: A Case Study of Pit Bull Owners*, 8 SOC'Y & ANIMALS J. HUM.-ANIMAL STUD., 25–26 (2000) (arguing the media portrays pit bull owners as racial minorities, drug dealers, "poor urban blacks," etc.).

⁴²⁸ See *supra* note 36 and accompanying text.

⁴²⁹ See *supra* notes 424–28 and accompanying text.

⁴³⁰ There are legitimate arguments that the legal system should not treat animals as property, but this Article works within the current legal framework to analyze the issue of breed-specific laws. This Article should not be taken as an endorsement of animals as property, but rather an acknowledgment of their current status in the law.

⁴³¹ See *Sentell v. New Orleans & Carrollton R.R. Co.*, 166 U.S. 698, 701–02 (1897).

⁴³² A number of U.S. Circuits have agreed that people have property rights in their dogs that are subject to Fourth Amendment protections. Generally, 42 U.S.C. § 1983 claims are available against persons acting under the color of law that cause the death of a person's dog. See, e.g., *Carroll v. Cty. of Monroe*, 712 F.3d 649 (2d Cir. 2013) (finding the killing of a companion animal to be an unconstitutional seizure of property under the Fourth Amendment); *Andrews v. City of West Branch*, 454 F.3d 914 (8th Cir. 2006) (holding that shooting a dog within an enclosed, fenced-in yard on private property violated the Fourth Amendment); *Altman v. City of Highpoint*, 330 F.3d 194 (4th Cir. 2003) (ruling that dogs are personal effects, and that their destruction by a law enforcement officer is a seizure protected by the Fourth Amendment); *Brown v. Muhlenberg Twp.*, 269 F.3d 205 (3d Cir. 2001) (opining that an officer's shooting and killing of a pet dog, even when off the owner's property, can be an unconstitutional seizure, when the dog shows no signs of aggression and its owner is in close proximity to the dog).

⁴³³ See *supra* note 432 and accompanying text.

⁴³⁴ See *Olmstead v. United States*, 277 U.S. 438, 478–79 (1928) (Brandeis, J., dissenting)

The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred,

does not just apply to matters of intimacy and family planning; it applies to one's ability to live secure in the knowledge the government will not interfere in those matters which most define who we are as people.⁴³⁵ The human-canine bond is at least 15,000 years old.⁴³⁶ Dogs, some scientists contend, contributed to the evolutionary development of modern humans as much as we contributed to the dogs' evolution from wolves.⁴³⁷ Nearly sixty-five percent of pet owners consider their pet a "family member[]." ⁴³⁸ Where a statute calls for the confiscation and destruction of a dog that has posed no safety risk, a dog that never showed the slightest sign of aggression, a dog identified as a member of a banned group only by sight when a government agent enters a person's private home, as occurred in *Toledo v. Tellings*,⁴³⁹ the right to privacy, as well as the right to property, is implicated.

Breed-specific laws are also, arguably, the product of animus. Certainly there is animus against particular dog breeds endemic in the laws,⁴⁴⁰ but more importantly, for purposes of equal protection, these laws are the product of animus against the owners of such breeds, or at least the stereotypical owners.⁴⁴¹ The war on pit bulls, in particular, is characterized by elements of moral panic against the persons who

as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Id.

⁴³⁵ The *Olmstead* dissent became a central building block of the right to privacy. See *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965) (all citing to Brandeis's dissent in *Olmstead* to support a right to privacy).

⁴³⁶ See Greger Larson et al., *Rethinking Dog Domestication by Integrating Genetics, Archeology, and Biogeography*, 109 PNAS 8878, 8882 (2012) (finding clear signs of the dog domestication process visible at least 15,000 years ago).

⁴³⁷ Brian Hare & Vanessa Woods, *We Didn't Domesticate Dogs. They Domesticated Us.*, NAT'L GEOGRAPHIC NEWS (Mar. 3, 2013), <http://news.nationalgeographic.com/news/2013/03/130302-dog-domestic-evolution-science-wolf-wolves-human/> [<https://perma.cc/HW5K-4Y2N>].

⁴³⁸ *U.S. Pet Ownership & Demographics Sourcebook*, AM. VETERINARY MED. ASS'N (2012), <https://www.avma.org/KB/Resources/Statistics/Pages/Market-research-statistics-US-Pet-Ownership-Demographics-Sourcebook.aspx> [<https://perma.cc/8U46-AWWC>].

⁴³⁹ *Toledo v. Tellings (Tellings I)*, No. L-04-1224, 2006 WL 513946, at *5 (Ohio Ct. App. Mar. 3, 2006).

⁴⁴⁰ See, e.g., *id.* at *7–8 (arguing the statute bore "no real and substantial relationship to a legitimate state interest" and arbitrarily classified pit bulls as "dangerous").

⁴⁴¹ See Ann L. Schiavone, *Barking Up the Wrong Tree: Regulating Fear, Not Risk*, 22 ANIMAL L. 9, 69–70 (2016).

have so long been associated with these dogs—“gang members,” “drug dealers,” and “urban youth,” groups that all point back to fear of racial and ethnic minorities.⁴⁴² Moral panics are the building blocks of laws based on animus,⁴⁴³ and the Court in *Cleburne* has already established that irrational fear and prejudices that characterize an unfounded moral panic are also illegitimate animus.⁴⁴⁴

Owners of many banned breeds, are perceived as members of “counterculture.”⁴⁴⁵ When members of a community do not identify with the owners of these dogs, it becomes easier to strip away rights and privileges.⁴⁴⁶ When society views the typical owners of pit bulls or Rottweilers (or other breeds) as morally corrupt, one easy way to eliminate those persons from the community is to ban the breed of dog they prefer.⁴⁴⁷ There is no worry that an individual property or privacy right is at stake because the person affected is not “like” the rest of the community.⁴⁴⁸ The mass media attention to pit bulls as the dog of drug dealers, gang members, “lowlifes,” and “inner city teenagers”⁴⁴⁹ likely contributed to the exponential growth of breed-specific laws.⁴⁵⁰ Owners of pit bulls even display behavior of typical disenfranchised groups, attempting to

⁴⁴² In *Barking Up the Wrong Tree: Regulating Fear, Not Risk*, I discuss how behavioral psychology describes a ‘moral panic’ as an event where a portion of society becomes irrationally fearful of a perceived moral threat that threatens to undermine societal values. *Id.* at 69–71. As I noted in the article, breed-specific laws exhibit many of the characteristics of other moral panics, including wide-spread media coverage, fear that outstrips actual risk, and connection between the thing feared and perceived damage to the moral fabric of the society. *See id.* at 66–67.

⁴⁴³ *See supra* note 442 and accompanying text.

⁴⁴⁴ *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).

⁴⁴⁵ *Counterculture Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/counterculture> [<https://perma.cc/2WMM-ZCEX>].

⁴⁴⁶ *See, e.g.*, Jaclyn E. Barnes et al., *Ownership of High-Risk (“Vicious”) Dogs as a Marker for Deviant Behaviors*, 21 J. INTERPERSONAL VIOLENCE 1616 *passim* (2006). The authors of this study attempted to link socially deviant behavior of people with owning “high-risk” or “vicious” dogs. *Id.* Pit bulls and other breeds typically covered under breed-specific laws were defined by the authors as “high-risk” or “vicious.” *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ Twining, Arluke & Patronek, *supra* note 427, at 25.

Feeding this negative portrayal of pit bulls have been depictions of their ‘owners’ that threaten mainstream America. Media reports of attacks by these dogs were invariably accompanied by value[-]laden descriptions of their owners as people whom ‘average citizens’ might find dangerous. . . . [T]hese reports often described pit bull owners as white thugs or poor urban blacks and Latinos who kept their dogs in dope dens and fed them raw meat to make them as mean as possible.

Id.

⁴⁴⁹ *See* David Brand, *Time Bomb on Legs*, TIME, July 27, 1987, at 60, 60; Michelle Green, *An Instinct for the Kill*, PEOPLE MAG. (July 6, 1987, 12:00 PM), <http://people.com/archive/an-instinct-for-the-kill-vol-28-no-1/> [<https://perma.cc/R32P-3YDU>].

⁴⁵⁰ Twining, Arluke & Patronek, *supra* note 427, at 26.

“pass” or “cover” as non-pit bull owners.⁴⁵¹ Further, animus against pit bulls has been directly linked to racism and ethnic prejudice against the people who own them.⁴⁵² Ultimately, race, ethnicity, and socioeconomic status play a role in furthering the inherent animus.⁴⁵³ We must be wary of policies arising from irrational fears that are disguised as safety measures, not only because they are often ineffective, but because they tend to strip liberties from identified groups with little or no detriment to the majority of people.⁴⁵⁴

Animus against owners of banned breeds is also observable in the decisions of courts themselves, not just legislatures.⁴⁵⁵ In *Toledo v. Tellings*, when the Ohio Supreme Court upheld a pit bull ban, it did so in part on the government’s argument that “the pit bull has been used extensively for dog fighting and by ‘criminal elements of the population, such as drug dealers, dog fighters, and urban gang members.’”⁴⁵⁶ The Court also noted that police officers shot their guns more frequently at pit bulls than at other dogs or people combined.⁴⁵⁷

The opinions in *Cleburne*, *Romer*, and *Windsor* show that motivation of animus can be implied without a “smoking gun” in the legislative history through sociological or other empirical evidence.⁴⁵⁸ At times, however, the “smoking gun” reveals itself as it did in *Moreno*, proving the legislature was motivated by particular animus without further inquiry.⁴⁵⁹ As noted above, the animus (resulting from irrational fears and moral panics) inherent in breed-specific ordinances can consistently be proven through articles, studies, and news media commentary.⁴⁶⁰ But, on occasion, there is also

⁴⁵¹ *Id.* at 33 (noting that individuals from stigmatized groups will attempt to “pass” as not part of the group, or otherwise deflect the irrational fear and prejudice they regularly face). “Individuals from stigmatized, disenfranchised groups sometimes attempt to hide their identity and to represent themselves as authentic members of the dominant culture. [Pit bull owners] also used passing as a tactic to fit in with mainstream culture . . .” *Id.*

⁴⁵² Erin Tarver, *The Dangerous Individual(s) Dog: Race, Criminality and the ‘Pit Bull,’* 55 CULTURE, THEORY, AND CRITIQUE 273, 273 (2013) (“The concomitant revulsion toward both dogfighting and ‘pit bulls’ suggests an expression of fear of a perceived threat to normative whiteness, insofar as these ‘dangerous’ dogs are figured as carriers of the contagion of racial abnormality.”).

⁴⁵³ See Schiavone, *supra* note 441, at 75.

⁴⁵⁴ *Id.*

⁴⁵⁵ See, e.g., *Toledo v. Tellings (Tellings I)*, No. L-04-1224, 2006 WL 513946, at *4 (Ohio Ct. App. Mar. 3, 2006); *Tellings II*, 871 N.E.2d 1152 (Ohio 2007), *cert. denied*, 2008 U.S. LEXIS 2006 (Feb. 19, 2008).

⁴⁵⁶ *Tellings I*, 2006 WL 513946, at *5.

⁴⁵⁷ *Tellings II*, 871 N.E.2d at 1157. This “evidence” that pit bulls were more dangerous than other dogs seems circular. Are the police shooting at pit bulls because they actually are dangerous, or because officers have been conditioned to believe they are more dangerous?

⁴⁵⁸ See, e.g., *supra* note 354 and accompanying text.

⁴⁵⁹ *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

⁴⁶⁰ See *supra* notes 440–44.

damning legislative history.⁴⁶¹ For example, during debate over enactment of breed-specific laws, a councilwoman from Aurora, Colorado provided direct evidence of animus when she openly pledged support for a pit bull ban because she did not want “those people” moving to Aurora.⁴⁶² Such a statement needs no further explanation.

Lastly, in accordance with the third factor necessary to achieve rational basis review, opponents of breed-specific laws can point to large amounts of sociological and empirical evidence that breaks the connection between the means and ends of such laws.⁴⁶³ Numerous empirical studies have been published in the last ten years considering the link between breed and dangerousness.⁴⁶⁴ The large majority of empirical studies done, to date, reinforce the findings that breed-specific laws are ineffective at reducing dog bites.⁴⁶⁵ The methodology employed differs from study to study, but almost universally, the results indicate little to no connection between breed and aggression.⁴⁶⁶ Many of the studies point to other factors involved in the human-canine relationship that signal potential for aggression, factors which could and perhaps should be the focus of public policy measures to reduce dog bites, but which require a more thoughtful and complex policy solution than what breed-specific measures provide.⁴⁶⁷

⁴⁶¹ See, e.g., Opening Brief of Appellant Florence Vianzon at 14–23, *Vianzon v. City of Aurora*, 377 Fed. App'x 805 (10th Cir. 2010) (No. 09-1434), 2009 WL 5069092 (C.A.10).

⁴⁶² See *id.*

⁴⁶³ For a more comprehensive discussion of recent scientific studies bearing on the breed-specific question, see Schiavone, *supra* note 441, at 37–43.

⁴⁶⁴ For a description of some empirical studies, see generally Stephen Collier, *Breed-Specific Legislation and the Pit Bull Terrier: Are the Laws Justified?*, 1 J. VETERINARY BEHAV. 17 (2006).

⁴⁶⁵ See, e.g., *id.* at 21 (finding breed-specific laws did not reduce rate of dog bites in the jurisdiction); Karen L. Overall, *Breed Specific Legislation: How Data Can Spare Breeds and Reduce Dog Bites*, 186 VETERINARY J. 277, 278 (2010) (finding breed-specific laws do not reduce rates of dog bites); Belén Rosado et al., *Spanish Dangerous Animals Act: Effect on the Epidemiology of Dog Bites*, 2 J. VETERINARY BEHAV. 166, 169–70 (2007) (concluding breed-specific laws had no effect on dog bite rates).

⁴⁶⁶ See, e.g., Rachel Casey et al., *Human Directed Aggression in Domestic Dogs (Canis Familiaris): Occurrence in Different Contexts and Risk Factors*, 152 J. APPLIED ANIMAL BEHAV. SCI. 52 (2013) (discussing the “relatively small amount of variance” of general risk factors (including breed) between aggressive and nonaggressive dogs, suggesting individual factors “specific to the experience of individual dogs” are more important); Deborah Duffy et al., *Breed Differences in Canine Aggression*, 114 J. APPLIED ANIMAL BEHAV. SCI. 441, 451–52 (2008) (finding “[d]ifferences between lines of distinct breeding stock indicate that the propensity toward aggressive behavior is at least partially rooted in genetics, although substantial within-breed variation suggests that other factors (developmental, environmental) play a major part in determining whether aggressive behavior is expressed in the phenotype”); Yuying Hsu & Liching Sun, *Factors Associated with Aggressive Responses in Pet Dogs*, 123 J. APPLIED ANIMAL BEHAV. SCI. 108, 109 (2010) (finding aggression correlated with variables in environmental factors, such as “dog and owner characteristics, living environments and owner-dog interactions”).

⁴⁶⁷ See, e.g., Gary J. Patronek et al., *Co-Occurrence of Potentially Preventable Factors in 256 Dog Bite-Related Fatalities in the United States (2000–2009)*, 243 J. AM. VETERINARY MED.

Beyond bite statistics, persons challenging a breed-specific law can point to studies focused on canine behavior conducted to discover links between breed and aggression.⁴⁶⁸ A pair of studies from a German research team conducted an observation of canine temperament, placing nearly 500 dog-and-owner teams in a variety of settings designed to potentially induce aggressive responses in the dogs.⁴⁶⁹ The researchers noted no significant difference between breeds with regard to inappropriate aggression during the test.⁴⁷⁰ All told, between ninety-five percent and ninety-eight percent of the dogs in the studies reacted appropriately to each given situation.⁴⁷¹ Based on these findings, researchers concluded breed-based classifications were not justified.⁴⁷²

Several epidemiological-based studies, conducted both in the United States and abroad, have attempted to uncover and document the factors common to dog-bite incidences.⁴⁷³ A survey study conducted in the Netherlands and published in 2010 surveyed 40,000 Dutch households about their experiences with dog bites.⁴⁷⁴ Survey results implicated eighty-six different breeds in dog-bite incidents, and noted a wide variety of circumstances and factors contributing to each bite, leading to the conclusion that removing breeds from the population would not accomplish desired goals of bite reduction.⁴⁷⁵ In another epidemiological study, a United States research team focused on discovering the commonalities observable in the worst of dog-bite-related incidents—fatalities.⁴⁷⁶ Studying 256 dog-bite-related fatalities in the United States, the team found that a number of key preventable factors play a significant role in such deaths, and noted the singular focus on breed has led to a failure to address the most important risk factors.⁴⁷⁷ The team noted common factors in dog-bite fatalities such

ASS'N 1726, 1727 (2013) (finding co-occurrence of multiple factors make dog-bite-related fatalities more likely).

⁴⁶⁸ See, e.g., Esther Schalke et al., *Is Breed-Specific Legislation Justified? Study of the Results of the Temperament Test of Lower Saxony*, 3 J. VETERINARY BEHAV. 97, 99–102 (2008).

⁴⁶⁹ Stefanie A. Ott et al., *Is There a Difference? Comparison of Golden Retrievers and Dogs Affected by Breed-Specific Legislation Regarding Aggressive Behavior*, 3 J. VETERINARY BEHAV. 134 *passim* (2008) (finding temperament test results of golden retrievers was essentially the same as other breeds, including those frequently targeted by breed-specific laws, as a result, Lower Saxony, Germany repealed its breed-specific law); Schalke et al., *supra* note 468, at 99–102 (finding no statistically significant difference in temperament testing results between typically banned breeds and other breeds).

⁴⁷⁰ Schalke et al., *supra* note 468, at 101; Ott et al., *supra* note 469, at 139–40.

⁴⁷¹ Schalke et al., *supra* note 468, at 102; Ott et al., *supra* note 469, at 134.

⁴⁷² See Ott et al., *supra* note 469, at 140.

⁴⁷³ See, e.g., Jessica M.R. Cornelissen & Hans Hopster, *Dog Bites in the Netherlands: A Study of Victims, Injuries, Circumstances and Aggressors to Support Evaluation of Breed-Specific Legislation*, 186 VETERINARY J. 292 (2009) (evaluating Dutch breed-specific legislation using internet surveys of dog bite victims and dog owners).

⁴⁷⁴ *Id.* (finding multiple factors contribute to dog bite incidents, and many different breeds can and do bite).

⁴⁷⁵ *Id.* at 294, 297.

⁴⁷⁶ Patronek et al., *supra* note 467, at 1726.

⁴⁷⁷ *Id.*

as: incapacitation of the victim, the dog and victim being unfamiliar with one another, the absence of the owner at the time of the attack, the owner's neglect or abuse of the dog, the owner's failure to neuter (and to a lesser extent spay) the dog, and the treatment of the dog as "resident" of the home rather than a family dog.⁴⁷⁸ Researchers noted that a great majority of fatalities involved a co-occurrence of the identified factors.⁴⁷⁹ In over eighty percent of the fatalities studied, at least four different identified factors were present at the time of the fatality,⁴⁸⁰ and in over sixty percent at least five factors were present.⁴⁸¹

While not specifically addressing breed-specific laws at all, another group of studies on canine brain chemistry provide additional argument against these laws.⁴⁸² Like humans, canines seem to show certain brain chemistry markers that predict likelihood of aggression.⁴⁸³ Particularly, dogs with an increased dopamine level combined with a decreased serotonin level exhibit aggression with significantly greater frequency than other dogs.⁴⁸⁴ This is a factor not unique to any breed, nor prominent or even common in any particular breed.⁴⁸⁵ It is uncommon, just as inappropriate canine aggression is uncommon.⁴⁸⁶ Like violent humans, only a very small portion of canines exhibit inappropriate aggression.⁴⁸⁷

In addition to empirical studies disavowing the connection between breed and aggression, two other recent studies, one published in the *American Journal of Sociological Research*, and the other in the *Veterinary Journal*, found that humans cannot accurately identify dog breed based on sight.⁴⁸⁸ This is even true for persons who work in canine-related fields.⁴⁸⁹ Prior to the mapping of the canine genome,⁴⁹⁰ breed determination relied upon visual identification, unless registration papers were

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.* at 1732 fig.1.

⁴⁸² Marta Amat et al., *Differences in Serotonin Serum Concentration Between Aggressive English Cocker Spaniels and Aggressive Dogs of Other Breeds*, 8 J. VETERINARY BEHAV. 19, 19 (2013); J. Våge et al., *Association of Dopamine- and Serotonin-Related Genes with Canine Aggression*, 9 GENES BRAIN & BEHAV. 372, 373–76 (2010).

⁴⁸³ *See* Amat et al., *supra* note 482.

⁴⁸⁴ Increased dopamine levels combined with decreased serotonin levels also cause aggression in humans. *See* Våge et al., *supra* note 482, at 372.

⁴⁸⁵ *See id.*

⁴⁸⁶ *See supra* notes 469–70 and accompanying text (testing aggressive behavior in multiple breeds revealed most only showed aggression when exposed to certain aggression-inducing stimuli).

⁴⁸⁷ *See* Schalke et al., *supra* note 468, at 101 (ninety-five percent of dogs acted appropriately at all times).

⁴⁸⁸ Olson et al., *supra* note 93, at 197; Voith et al., *supra* note 93, at 17.

⁴⁸⁹ *Id.*

⁴⁹⁰ Kerstin Lindblad-Toh et al., *Genome Sequence, Comparative Analysis and Haplotype Structure of the Domestic Dog*, 438 NATURE 803 *passim* (2005).

available.⁴⁹¹ The potential biases or predispositions of the identifier were rarely called into question.⁴⁹² Whether a mixed-breed dog is identified as a member of a restricted or outlawed breed depends entirely on the perception of the enforcer or other observer or witness.⁴⁹³

In a 2013 study, 923 participants, all who worked in canine-related fields, were asked to view videos of twenty mixed-breed dogs, and then identify the predominant breed or breeds.⁴⁹⁴ Of the twenty dogs in the study, only four had a predominant breed correctly and consistently identified by more than fifty percent of the participants through visual identification.⁴⁹⁵

In a more recent study by the University of Florida, researchers asked shelter staff, including veterinarians, to identify the breed of 120 dogs entering the shelter.⁴⁹⁶ This

⁴⁹¹ In some relatively rare cases, breed identification could be based upon registration by the AKC, UKC, or other similar canine organizations. *Breed Standards*, UNITED KENNEL CLUB, <http://www.ukcdogs.com/Web.nsf/Webpages/Registration/BreedStandards> [<https://perma.cc/EBX5-8XZ8>] (advising that the standards be used by responsible breeders who are familiar with breeds and by UKC judges, but not by the typical dog owner due to the likelihood of misidentification). See generally *Dog Breeds*, AM. KENNEL CLUB, <http://www.akc.org/about/departments/> [<https://perma.cc/2YAP-K7Z4>] (stating that there are many factors the Board must consider in breed identification, including accuracy of records and proof of true breeding for generations of the particular breed in question).

⁴⁹² See, e.g., Voith et al., *supra* note 93, at 24 (mentioning the possibility of identifier bias in one sentence only, then undercutting that argument in the next sentence).

⁴⁹³ During debate over passage of Ontario's breed-specific ordinance, Ontario Attorney General Michael Bryant illustrated the flawed thinking of many government officials when he responded to the argument of misidentification of breed by stating:

Those who disagree with the ban will say that there will be identification problems. I don't doubt there will be some issues on the margins, but, by and large, I think most people know what a pit bull is. . . . I've said before and I will say again, if it walks like a pit bull, if it barks and bites like a pit bull, wags its tail like a pit bull, it's a pit bull. That is going to apply, I'm sure, to the vast majority of identification cases. That's number one.

Number two, everybody knows what kind of dog they own. Who doesn't know what kind of dog they own? If you own a pit bull, you know you own a pit bull. If you know you don't own a pit bull, then surely will you have the papers to say, 'This isn't a pit bull,' it's a whatever, it's something else. Everybody knows what their dog is. So if they think they've got a pit bull, then they probably have a pit bull. If they know they have a pit bull, they definitely have a pit bull. If they have papers saying it's not a pit bull but an English bull terrier, then they don't have a pit bull.

Public Safety Related to Dogs Statute Law Amendment Act: Debate on Bill 132, LEGISLATIVE ASSEMBLY ONTARIO (Nov. 4, 2004) (statement of Hon. Att'y Gen. Michael Bryant), http://www.ontla.on.ca/house-proceedings/transcripts/files_html/2004-11-04_L084.htm#PARA711 [<http://perma.cc/L96P-UWVG>].

⁴⁹⁴ Voith et al., *supra* note 93, at 17, 21.

⁴⁹⁵ *Id.* at 17.

⁴⁹⁶ Olson et al., *supra* note 93, at 199.

study, too, showed only a moderate level of agreement on breed among participants viewing the same dog at the same time.⁴⁹⁷ Significantly, a full one-third of the dogs that shelter staff labeled pit bull–type dogs lacked any DNA associated with pit bull breeds, and an additional fifty percent of dogs that had pit bull heritage were not identified as such.⁴⁹⁸

If the law cannot be enforced accurately or consistently based on visual breed identification, is the law legitimate? Is the community concerned about a particular breed, or a particular “look” of a dog?⁴⁹⁹ If it is the former, just enforcement is impossible without mandatory DNA testing of all dogs.⁵⁰⁰ If it is the latter, then breed-specific legislation can never accomplish that goal.⁵⁰¹ Ultimately, these studies call into question the basis of nearly every eyewitness breed identification related to an attack due to the identifier’s subjective opinion of the look of the dog. Such evidence is inherently unreliable.⁵⁰²

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*

⁴⁹⁹ In his testimony before the trial court in *Toledo v. Tellings*, Toledo Dog Warden Tom Skeldon testified that he was more interested in the “look” of a dog, rather than its actual breed identification. Specifically, he testified that:

even if a dog was 50 per cent pit bull, if it did not “look like a pit bull,” the owner would not be charged. On the other hand, if a dog did “look like a pit bull,” it would be classified as a pit bull and the owner would be subject to the “vicious dog” laws.

Toledo v. Tellings (Tellings I), No. L-04-1224, 2006 WL 513946, at *5 (Ohio Ct. App. Mar. 3, 2006).

⁵⁰⁰ See *supra* notes 494–98 and accompanying text (arguing breeds cannot be determined with accuracy based solely on visual observation, even by trained professionals).

⁵⁰¹ See Olson et al., *supra* note 93, at 202 (“The marked lack of agreement observed among shelter staff members in categorizing the breeds of shelter dogs illustrates that reliable inclusion or exclusion of dogs as ‘pit bulls’ is not possible, even by experts.”); Voith et al., *supra* note 93, at 24. The lack of agreement among participants in both the Voith study and the Olson study indicate a fatal flaw in the law. Had participants been wrong about breed identification, but generally agreed on that inaccurate identification, we could at least see that laws based on visual identification alone or the “look” of the dog (while not actually “breed bans”) may be enforced consistently, if not accurately, such that all dogs that “looked” a certain way would be identified as included or excluded from a particular group. But significant lack of agreement among participants in both studies illustrate that even inaccurate consistency is implausible.

⁵⁰² Many of the same problems that cause unreliability of human identification by eyewitnesses likely cause problems in canine identification. In discussing the limits of facial recognition, professors Deborah Davis and Elizabeth F. Loftus note that

[humans’] fragile abilities are easily disrupted and contaminated through a variety of internal and external forces: such as one’s expectations and beliefs; the simple desire to help apprehend a perpetrator; the mere passage of time; or suggestion from police, co-witnesses, media, and other sources. Once contaminated, memories cannot be purified and restored to their original state through purportedly curative, non-suggestive procedures.

Advocates of breed-specific laws would also have some evidentiary support to bring to the table. One study concerning the severity of dog bites by pit bulls is often cited to support the laws.⁵⁰³ Published in the *Annals of Surgery*, this study describes the injuries associated with pit bull attacks observed in a level I trauma unit over a fifteen-year period.⁵⁰⁴ After evaluating medical records at the facility, the authors of the article were able to make a breed identification on approximately thirty-six percent of the dog bite cases entering the center.⁵⁰⁵ Researchers concluded that injuries sustained in attacks by pit bulls were generally more severe than those by non-pit bulls.⁵⁰⁶

In a traditional rubber-stamp rational basis analysis, any evidence supporting the law, no matter how slight, results in the court upholding the statute.⁵⁰⁷ However, under meaningful rational basis review, courts have still found laws lacked rational basis even where proponents could provide some support for their positions.⁵⁰⁸ For instance, in *Windsor*, amicus briefs were put forth supporting DOMA with evidence that children were psychologically and developmentally better off in dual-gender marriages.⁵⁰⁹ But the Court found the presence of animus in this case trumped any legitimate purpose.⁵¹⁰ Therefore, where animus is particularly strong, it could preempt otherwise legitimate legislative purposes.

CONCLUSION

Under a meaningful rational basis test, employing the principles of legal realism, the court's job is to weigh the evidence to determine if there is a rational link between

Deborah Davis & Elizabeth F. Loftus, *The Dangers of Eyewitnesses for the Innocent: Learning from the Past and Projecting into the Age of Social Media*, 46 NEW ENG. L. REV. 769, 773–74 (2012). With regard to canine identification, all of these forces may contribute to breed misidentification, but certainly the media hype, discussed in detail in other sections of this Article, necessarily contaminates identifications of dog breeds.

⁵⁰³ See John K. Bini et al., *Mortality, Mauling, and Maiming by Vicious Dogs*, 253 ANNALS SURGERY 791 (2011).

⁵⁰⁴ See *id.* at 791–96. Records of persons admitted from January 1, 1994, through April 30, 2009 were reviewed for the article. *Id.* at 791.

⁵⁰⁵ Authors do not explain how the breeds were identified. Most likely, it was through visual identification of a victim, a witness, law enforcement, or an owner. The accuracy of those identifications could be debatable based on the above mentioned research. *Id.* at 791–94.

⁵⁰⁶ *Id.* at 796.

⁵⁰⁷ See *supra* note 17 and accompanying text.

⁵⁰⁸ See *supra* note 18 and accompanying text.

⁵⁰⁹ See, e.g., Amici Curiae Brief of Social Science Professors in Support of Hollingsworth and Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal at 5–13, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), *United States v. Windsor*, 133 S. Ct. 2675 (2013) (Nos. 12-144, 12-307), 2013 WL 457383, at *5–13 (providing sociological evidence to support importance of dual gender parenting).

⁵¹⁰ *Windsor*, 133 S. Ct. at 2696.

means and ends. The instances in which the courts employed meaningful rational basis concerning breed-specific laws, courts struck down breed-specific provisions.⁵¹¹ To date, the empirical evidence generally supports the argument that breed-specific laws do not accomplish their goal of reducing dog bites, nor is focus on breed rationally related to that goal.⁵¹² Additionally, these laws are implicitly based on illegitimate prejudice and irrational fear against the people who own pit bulls.⁵¹³ Specifically, this animus is connected to race, ethnicity, and socioeconomic status of stereotypical pit bull owners.⁵¹⁴ If given the opportunity for meaningful rational basis review, opponents of breed-specific laws would have significant evidence at hand, in the equivalent of a Brandeis brief, to support a finding that such laws are unconstitutional under a rational basis test.

⁵¹¹ See, e.g., *Toledo v. Tellings (Tellings I)*, No. L-04-1224, 2006 WL 513946, at *5 (Ohio Ct. App. Mar. 3, 2006).

⁵¹² See *supra* Part V.

⁵¹³ See *supra* note 427 and accompanying text.

⁵¹⁴ See *id.*