UNCONSTITUTIONAL ANIMUS

*Susannah W. Pollvogt**

*It is well established that animus can never constitute a legitimate state interest for purposes of equal protection analysis. But neither precedent nor scholarship has stated conclusively how animus is properly defined, what counts as evidence of animus in any given case, or the precise doctrinal significance of a finding of animus. The U.S. Supreme Court has explicitly addressed the question of animus only a handful of times, and these cases do not appear to be particularly congruent with one another, at least on the surface. Further, while a number of scholars have discussed animus in terms of moral philosophy, no one has attempted to articulate a unified theory of animus as a matter of doctrine—particularly in the post-*Lawrence *era.*

This Article systematically examines Supreme Court precedent to distill a coherent standard for identifying the presence of animus in various forms of state action. What emerges is that the animus analysis the Court actually employs provides a more vigorous alternative to the thoroughly criticized "tiers-of-scrutiny" framework, which has defined and limited the scope of contemporary equal protection jurisprudence. In short, the doctrine of unconstitutional animus gives life to the strong anti-caste mandate of the federal Equal Protection Clause. The time is ripe to understand the nature of unconstitutional animus, as animus may well play a critical role in the Court's decisions on the constitutionality of different forms of prohibitions against same-sex marriage.

TABLE OF CONTENTS

* J.D., 1998, Yale Law School; B.A., 1994, Williams College. Thanks to Erwin Chemerinsky, Bill Eskridge, Jonathan Glater, Sarah Lawsky, Stephen Lee, Catherine Smith, Shauhin Talesh, Christopher Whytock, the participants in the 2011–12 UCI-Chapman Junior Forum, and the participants in the 2012 Lavender Law Junior Scholars Forum for comments and feedback on earlier drafts. Thanks also to my research assistants, Vithya Krishnakumar, Diana Palacios, Josh Schraer, and Sara Hildebrand for their excellent work.

INTRODUCTION

The purpose of this Article is to advance a comprehensive understanding of unconstitutional animus as the U.S. Supreme Court uses the concept in its federal equal protection jurisprudence. While the Article will ultimately develop a broader definition of the term, as a point of reference, it is useful to start with the Court's initial articulation of animus as "a bare . . . desire to harm a politically unpopular group."[1] The Court has held on numerous occasions that where a law is based on such animus, it will not survive even the most deferential level of scrutiny under the Equal Protection Clause.[2] In short, animus, including hostility toward a particular social group, is never a valid basis for legislation or other state action.

Thus, although the concept of unconstitutional animus rarely appears in the Court's decisions, it is powerful when it does. This is because under contemporary equal protection jurisprudence, nearly all claims are subject

1. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973). As discussed below, "a bare . . . desire to harm a politically unpopular group" is a species of animus, but does not represent animus in its entirety. *See infra* notes 76, 113, 230 and accompanying text.

2. *See* Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Palmore v. Sidoti, 466 U.S. 429 (1984); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

to deferential rational basis review. Under rational basis review, the plaintiff almost invariably loses. Proving that a law is based on unconstitutional animus is virtually the only way an equal protection plaintiff can prevail under this deferential and increasingly common standard. Further, a plaintiff can prevail by showing animus without having to prove that she is a member of a suspect or quasi-suspect class. So while the Court has discerned the presence of unconstitutional animus on only a few occasions, when animus is found, it functions as a doctrinal silver bullet.

For this and other reasons, it is not surprising that the Ninth Circuit relied on the concept of unconstitutional animus in striking down California's Proposition 8 earlier this year in *Perry v. Brown*.[3] First, the federal district court decision that the Ninth Circuit was reviewing relied on the concept of animus.[4] Second, and more significantly, the concept of unconstitutional animus cuts a short and direct path through the morass that is contemporary equal protection jurisprudence. Relying on animus allowed the Ninth Circuit to avoid difficult and unpleasant doctrinal questions.[5] Further, the underlying facts in *Perry* actually presented an easy case for identifying unconstitutional animus and striking the law on that basis—although the Ninth Circuit did not take the easy route to its conclusion. Specifically,

---

3. 671 F.3d 1052, 1080 (9th Cir. 2012), *aff'g* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *petition for cert. filed*, No. 12-144 (U.S. July 30, 2012) (noting that Proposition 8 gave rise to an inference "that the disadvantage imposed [on plaintiffs was] born of animosity toward the class of persons affected" (quoting Romer v. Evans, 517 U.S. 620, 633–34 (1996))); *see also id.* at 1096. In brief, Proposition 8 was a law enacted by popular referendum in the State of California that withdrew from same-sex couples the right to marry—a right that had previously been granted to them by virtue of the California Supreme Court's decision in *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008) (holding that marriage must be made available to both same-sex and opposite-sex couples).

4. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1002 (N.D. Cal. 2010):

> Many of the purported interests identified by proponents are nothing more than a fear or unarticulated dislike of same-sex couples. Those interests that are legitimate are unrelated to the classification drawn by Proposition 8 . . . . In the absence of a rational basis, what remains of proponents' case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples.

See also id. ("Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate.").

5. Namely, whether: (1) bans on same-sex marriage discriminate on the basis of sex; (2) bans on same-sex marriage discriminate on the basis of sexual orientation; (3) sexual orientation is a suspect or quasi-suspect classification; and/or (4) bans on same-sex marriage implicate the recognized fundamental right to marriage, such that the Court's holding in *Loving v. Virginia*, 388 U.S. 1 (1967), would control. If any of these questions were answered in the affirmative, the court would have been obligated to apply some form of heightened scrutiny to Proposition 8. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (noting that suspect classifications receive strict scrutiny); Plyler v. Doe, 457 U.S. 202, 216–17 (1982) (noting that laws implicating fundamental rights are subject to strict scrutiny).

precedent clearly demonstrates that the Supreme Court is willing to find that a law violates the Equal Protection Clause where statements surrounding the enactment of the law indicate that it was motivated by private bias against an unpopular group. Such evidence was in ample supply in *Perry*, where proponents of Proposition 8 had a lengthy record of antigay sentiments meant to stir support for the measure. But for reasons this Article will explore later, the Ninth Circuit did not make this evidence the centerpiece of its analysis.[6]

Ultimately, the Ninth Circuit reached the correct outcome in *Perry* and hung its analysis on the correct doctrinal hook: unconstitutional animus. But the court did not draw on the full history of the doctrine in reaching its conclusion. Rather, it offered a rather cabined view of animus, informed largely by the Supreme Court's 1996 decision in *Romer v. Evans*.[7] While *Romer* is the most recent of the Court's recognized animus decisions, it is also the least helpful and most compromised.

Romer is not a model of doctrinal clarity,[8] and when one looks at the other cases addressing unconstitutional animus, the picture does not necessarily become clearer.[9] Because while the Supreme Court has clearly stated that the federal Equal Protection Clause does not permit state action based on animus toward a particular social group,[10] the Court has not clearly defined the concept of animus, stated what exactly counts as evidence of animus, or identified the doctrinal significance of finding the presence of animus in any given case. Indeed, the Court has addressed the concept of animus only a handful of times, and these cases do not appear to be particularly congruent with one another—at least at first blush. This Article contends that there is a single, unifying doctrinal principle running through the Supreme Court's animus cases, but it takes some work to identify that principle.

---

6. *See infra* notes 294–95 and accompanying text.

7. 517 U.S. 620 (1996) (holding that Colorado's Amendment 2 violated the Equal Protection Clause because it lacked a rational basis independent of unconstitutional animus).

8. *See* Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL OF RTS. J 89, 90–91 (1997) (compiling various, divergent interpretations of Romer v. Evans); *see also* Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 55 (1996) (noting that one of the virtues of the Romer decision was that it left certain controversial issues undecided).

9. *See* Nan Hunter, *Animus Thick and Thin*, 64 STAN. L. REV. ONLINE 111 (2012), http://www.stanfordlawreview.org/sites/default/files/online/articles/64-SLRO-111.pdf (characterizing the concept of animus as "highly contested ground").

10. *See id.* at 632 (holding Amendment 2 unconstitutional because it "seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests"); *City of Cleburne*, 473 U.S. at 446–47 (noting that the desire to harm persons with cognitive disabilities is not a legitimate state interest); Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984) (noting that the law may not directly or indirectly give effect to personal biases); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973) (noting that the desire to harm a politically unpopular group such as hippies is not a legitimate public interest).

Further, while there was a flurry of commentary on animus immediately following the Court's decision in *Romer*, there has not been an effort to comprehensively reassess the doctrine of unconstitutional animus since the Court decided *Lawrence v. Texas*[11] in 2003. And indeed, much of the scholarly commentary on animus post-*Romer* was understandably preoccupied with the question Justice Scalia raised forcefully in his dissent: whether moral disapproval and unconstitutional animus were really the same thing.[12] But after *Lawrence*, it is clear that bare moral disapproval of homosexual conduct or homosexual identity is not a valid basis for a law.[13]

Because the doctrine of unconstitutional animus goes well beyond *Romer*, this Article seeks to set forth the full scope of the Court's animus jurisprudence in the context of claims brought under the federal Equal Protection Clause. This inquiry is timely because a full understanding of unconstitutional animus may be necessary for the Supreme Court's review of the Ninth Circuit's decision in *Perry* if the Court accepts certiorari. Further, the concept of animus may also be central to other same-sex marriage cases. As of this writing, the Court has not yet decided whether to grant certiorari review in *Perry* or any of the pending challenges to the federal Defense of Marriage Act (DOMA). If the Court issues certiorari in one or more of these cases this term, the issue of animus will be before it sooner rather than later. But the Court may well deny certiorari for now to allow further development of the law in the lower courts. In this case, the lower courts will have to grapple with the animus doctrine in the absence of further guidance from the Supreme Court, creating a more elaborate—and

---

11. 539 U.S. 558 (2003) (holding Texas anti-sodomy laws unconstitutional).

12. *See* Barbara J. Flagg, *"Animus" and Moral Disapproval: A Comment on* Romer v. Evans, 82 MINN. L. REV. 833 (1998) (asking whether moral disapproval is a constitutionally adequate state interest); Joseph S. Jackson, *Persons of Equal Worth:* Romer v. Evans *and the Politics of Equal Protection*, 45 UCLA L. REV. 453, 492–500 (1997) (describing the Supreme Court's use of animus in its analysis in *Romer*, *Moreno,* and *Cleburne*, and concluding that the underlying rationale is that laws will be invalidated if they are based on or reflective of the view that some people are intrinsically worth less than others); S.I. Strong, *Justice Scalia as a Modern Lord Devlin: Animus and Civil Burdens in* Romer v. Evans, 71 S. CAL. L. REV. 1 (1997) (examining theoretical basis for permitting moral disapproval as a basis for law); *see also* Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 90–91 (1997) (cataloging theories of animus disseminated in the wake of the *Romer* decision).

13. Indeed, Justice Scalia vigorously argued in his dissent in *Romer* that *Bowers v. Hardwick,* 478 U.S. 186 (1986), stood for precisely this proposition, that laws could and should express bare moral disapproval of otherwise innocuous conduct and bare moral disapproval of groups associated with that conduct:

> In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago . . . and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias. Whether it is or not is precisely the cultural debate that gave rise to the Colorado constitutional amendment (and to the preferential laws against which the amendment was directed).

Romer, 517 U.S. at 636 (Scalia, J., dissenting) (citing *Bowers*, 478 U.S. 186).

possibly more confusing—backdrop for the Court's ultimate resolution of the animus doctrine.

Now that *Lawrence* has resolved the doctrinal ambiguity that plagued *Romer*, and marriage equality litigation is looming on the horizon of the Supreme Court's docket, it is the right time to revisit unconstitutional animus—the conceptual linchpin of the *Romer* decision. To help further understand the doctrine of unconstitutional animus in the post-*Lawrence* world, Part I of this Article explains the significance of animus in the larger context of trends in contemporary equal protection jurisprudence. Part II closely examines decisions of the Supreme Court that rely on the concept of animus. Part III identifies the common themes running through these somewhat disparate decisions, and presents an overarching definition for unconstitutional animus, a taxonomy of the types of evidence that can be used to establish the existence of animus, and an internally consistent account of the doctrinal significance of a finding of animus. Part IV critically examines the Ninth Circuit's discussion of animus in *Perry* against the backdrop this Article develops.

I. THE DOCTRINAL SIGNIFICANCE OF ANIMUS

Animus can be considered the sleeper agent of the Court's equal protection jurisprudence: it rarely makes an appearance—but when it does, it swiftly and effectively accomplishes its mission.

One reason animus is important is because there is good reason to believe it may play a central role in the Court's decision(s) on marriage equality. But there are other reasons to be interested in the Court's understanding of animus outside of the role the doctrine may play in same-sex marriage litigation. First, demonstrating that a law is based on unconstitutional animus is virtually the only way a plaintiff is successful under deferential rational basis review. This matters, in turn, because most contemporary equal protection claims will receive rational basis review rather than any form of heightened scrutiny. Second, while animus has played its largest role in rational-basis cases, it also is relevant to cases where heightened scrutiny is applied. This is because the doctrine of unconstitutional animus expresses core values of the federal Equal Protection Clause that transcend the Court's rigid tiers-of-scrutiny framework.

A. The Tiers-of-Scrutiny Framework

The doctrinal significance of animus has everything to do with the ways in which contemporary equal protection analysis has evolved. Thus, a brief history of the Court's tiers-of-scrutiny framework for equal protection cases provides necessary context for understanding the doctrinal significance of animus. In the beginning, there was only one standard of judicial scrutiny in equal protection cases: a rule of reason. For example, the Court applied

a "reasonableness" test in the early (and since reviled) case of *Plessy v. Ferguson*.[14] In deciding whether mandatory racial segregation of passenger train cars violated the Equal Protection Clause, the Court determined that laws relying on racial classifications need only be "reasonable" regulations within the state's police power.[15] The reasonableness inquiry, in turn, was essentially backward-looking: "In determining the question of reasonableness [the legislature] is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."[16] Viewed in this light, race segregation was eminently—indeed, undeniably—"reasonable."[17]

As the *Plessy* decision aptly demonstrates, relying on a rule of reason—"with reference to the established usages, customs and traditions of the people"[18]—to assess the fairness of a particular mode of discrimination is inherently problematic. This is because a standard based on reasonableness, "common knowledge," or otherwise by reference to subjective, contemporary standards of fairness will be ineffective at rooting out contemporary prejudices, which, by definition, conform with contemporary custom and reason. While we hope that governmental decision makers, including judges, can rise above commonly held biases, there is good reason to think they cannot.[19]

But rather than developing a mechanism to carefully root out biased thinking, the Court instead developed a short cut through critical thought. In essence, the Court created categories of cases in which there was presumptive concern that unfair prejudice was afoot. In this subset of cases, the Court would apply heightened judicial scrutiny. The framework that ultimately evolved, through fits and starts, required race-based laws to survive "searching judicial scrutiny,"[20] under which the state must show that the law is narrowly tailored to serve a compelling governmental

14. 163 U.S. 537, 550 (1896), *abrogated by* Brown v. Board of Education, 347 U.S. 483 (1954) (holding racially segregated train cars constitutional under the "separate but equal" doctrine).

15. *See id.* ("[T]he case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature.").

16. *Id.*

17. *Id.* at 550–51.

18. *Id.* at 550.

19. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) ("Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism.").

20. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973) (noting that "searching judicial scrutiny" is reserved for laws involving suspect classifications).

interest.[21] This standard is famously difficult to meet, and indeed, outside of laws meant to ameliorate the effects of race discrimination,[22] one no longer sees laws relying on explicit (i.e., facial) race classifications.[23]

There are several justifications for departing from the deference and presumption of constitutionality in race-based cases. First, the explicit, historical purpose of the Equal Protection Clause was to eliminate post-slavery race discrimination.[24] While the Court determined that the provision did not empower Congress to enact broad antidiscrimination legislation,[25] it did empower the courts to patrol state laws for impermissible racial bias.[26] Thus, the default of extreme judicial deference to state legislatures based on a commitment to separation of powers was not required where the Constitution itself mandated a departure from this standard. Notably, because the Court applies strict scrutiny to all race-based classifications,[27] not just those related to American slavery, the

21. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

22. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (reviewing constitutionality of race-conscious admissions policy aimed at increasing educational diversity).

23. Instead, race-based equal protection jurisprudence has largely been displaced onto the decidedly more treacherous terrain of discriminatory impact cases. In these cases, the challenged law does not contain a facial race classification, but is claimed to have a discriminatory impact along racial lines. The discriminatory racial impact is insufficient to trigger strict scrutiny; rather, the plaintiff must prove that the law was enacted with discriminatory intent—a notoriously difficult showing. *See* Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1081–83 (2011) (noting that the limited types of evidence available to establish discriminatory intent, along with the tiers of scrutiny, leave courts severely limited in their ability to deal with racial inequalities).

24. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71, 81 (1872) (asserting that the purpose of the Equal Protection Clause was the "firm establishment of that freedom [of the black race], and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him" and declaring that the "evil to be remedied" by promulgation of the Equal Protection Clause was that evil caused by those laws "which discriminated with gross injustice and hardship against [emancipated slaves] as a class").

25. *See* The Civil Rights Cases, 109 U.S. 3, 13–14 (1883) ("[T]he legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the Amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the Amendment, they are prohibited from committing or taking.").

26. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 7–9 (1967) (noting that, even where subject matter of legislation falls within a state's police powers, the courts will still review the legislation for compliance with the Equal Protection Clause).

27. The Court in *Korematsu v. United States*, 323 U.S. 214 (1944), recognized the danger of racial antagonism underlying all racial classifications:

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that [they are] unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

justification for elevated scrutiny in such cases goes beyond its historical grounding. The application of strict scrutiny to racial classifications reflects a broader consensus that one's race is never relevant to one's ability to participate in society, such that race is almost never a valid subject of legislative action.[28]

From this initial departure, the Court eventually developed an elaborate tiers-of-scrutiny framework for determining the proper level of judicial review in any given case. The first instance where departure from rational basis review is permitted is that described above—where a law relies on a problematic classification. Race is the paradigmatic problematic classification, and has been designated by the Court—along with alienage and national origin—as a "suspect classification." The traits defining these classifications are presumptively irrelevant to lawmaking. These classifications are "suspect" in the sense that we are suspicious when a law relies on them, because they tend to represent misplaced prejudice or antipathy toward the named group rather than a basis for sound legislative judgment.[29] Therefore, laws or other state action relying on suspect classifications will be subject to strict scrutiny, to make certain that decision-makers do not unconsciously succumb to the "reasonableness" of racial prejudice.

Intermediate scrutiny applies to laws relying on the two so-called "quasi-suspect classifications": gender and illegitimacy.[30] The notion here is that while race, for example, is almost never a valid basis for legislation, gender is generally not a valid basis—but there are exceptions, due to the "real differences" between men and women.[31] Courts must be careful that gender classifications are not based on unfair prejudice, but such

---

Id. at 216.

28. *See, e.g.*, *Loving*, 388 U.S. at 11 ("[T]wo members of this Court have already stated that they 'cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense.'") (quoting McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart, J., joined by Douglas, J., concurring)). *Contra* Plessy v. Ferguson, 163 U.S. 537, 550 (1896), *abrogated by* Brown v. Board of Education, 347 U.S. 483 (1954) (determining that race was relevant to government regulation of public transportation, education, marriage, and general "preservation of the public peace and good order").

29. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) (stating that suspect classifications are "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective"). For further explanation, see Richard E. Levy, *Political Process and Individual Fairness Rationales in the U.S. Supreme Court's Suspect Classification Jurisprudence*, 50 WASHBURN L.J. 33, 38–42 (2010).

30. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–42 (1985). In conjunction with the decisions identifying suspect and quasi-suspect classifications, the Court has developed an elaborate analysis for determining whether any particular classification falls into one of these categories. Suffice it to say that the Court went through a period of expanding the number of recognized suspect and quasi-suspect classifications, but has declined to do so since 1977. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756–57 (2011).

31. United States v. Virginia, 518 U.S. 515, 533 (1996) ("Physical differences between men and women, however, are enduring . . . .").

classifications may be permissible under the right circumstances. Laws relying on quasi-suspect classifications provoke intermediate scrutiny, which places the burden on the state to prove that the law is justified by an "important" governmental interest and that the classification is "substantially related" to advancing that interest.[32]

The second instance where the Court will depart from rational basis review is where a law relies on any classifications of persons to regulate access to a fundamental right.[33] In such cases, strict scrutiny applies regardless of whether the classification at issue is suspect or not—elevated scrutiny is triggered by the nature of the right at issue rather than the nature of the classification. The idea here is that, regardless of whether the group discriminated against has been historically disadvantaged or marginalized, there are certain rights that are so important to our lives in a free society that access to these rights should not be regulated on a differential basis.

In contemporary equal protection jurisprudence, rational basis review remains as the lowest level of judicial scrutiny and is the default standard. Under this level of scrutiny, the burden is on the plaintiff to prove the absence of any legitimate governmental interest served by the law.[34] Further, the law's means need only be rationally related to accomplishing that end—the fact that a classification is over- or underinclusive is not a winning argument under rational basis review.[35] Courts apply rational basis review to a range of cases, from those involving discrimination between economic interests[36] to those involving discrimination on the basis of some trait that, in contrast to race, is seen as presumptively relevant to performance in society and is therefore a valid basis for legislation.[37]

Thus, the Court's interpretations of history, social reality, and our values as a society determine which types of discrimination are of concern and

32. *See Cleburne*, 473 U.S. at 441.

33. *See id.* at 440.

34. *See* Heller v. Doe, 509 U.S. 312, 320 (1993) (Under rational basis review, "[a] statute is presumed constitutional, and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it'" (second alteration in original) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973))).

35. *See* Sunstein, *supra* note 8, at 55 ("But this does not doom a statute under rational basis review; over-inclusive and under-inclusive legislation is perfectly acceptable, indeed quite common."); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLITICS 668–69, 721–28 (3d ed. 2006).

36. *See* Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 107 (2003) (subjecting an Iowa law to rational basis review, where the law distinguished for tax purposes among revenues obtained within the State by two enterprises conducting business in the State).

37. *See Cleburne*, 473 U.S. at 441 (noting that age has not been recognized as a suspect classification because the aged had not been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities" (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976))); *see also* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 165–67 (2011) (noting that courts consider the relevancy of a group's defining characteristic in terms of determining whether the differentiating trait bears a relation to the individual's ability to participate and contribute to society).

which are not. And these various levels of concern are then expressed in the deep structures of the equal protection doctrine.

Scholars have criticized the rigid tiers-of-scrutiny framework as a barrier rather than facilitator of antidiscrimination imperatives.[38] First, the tiers-of-scrutiny framework operates as an outcome matrix,[39] thereby short-circuiting rather than deepening substantive inquiry into the fairness of any particular form of discrimination.[40] And indeed, one sees a pattern in equal protection decisions where much time and attention is paid to determining the applicable level of judicial scrutiny; once this question is answered, the analysis proceeds succinctly and superficially. If the Court rejects arguments that the plaintiff is a member of a suspect or quasi-suspect class, or that the law interferes with a fundamental right, it will settle on rational basis review and the plaintiff will lose.[41] But if the Court is persuaded of either of these two prerequisites, it will apply heightened scrutiny and likely strike the challenged law.

The difficulty of succeeding under rational basis review is exacerbated by the fact that the vast majority of contemporary equal protection cases are assessed under this deferential standard. Access to heightened scrutiny is generally foreclosed, as the Court has expressed great reluctance to acknowledge new suspect classifications, quasi-suspect classifications, or fundamental rights.[42] Kenji Yoshino argues persuasively that this reluctance is a response to "pluralism anxiety"—the notion that if the Court takes the notion of suspect classifications seriously, it will be forced to recognize "too many groups."[43]

In addition, the Court has determined that a law having a discriminatory impact, but devoid of any facial classification, will be subject only to rational basis review, regardless of the group affected by the discrimination. The only way to achieve a higher level of scrutiny is to make the exceptionally difficult showing of discriminatory intent. Further, while the Court initially permitted plaintiffs to prove discriminatory purpose in a

38. *See, e.g.*, Barnes & Chemerinsky, *supra* note 23, at 1080 (describing manner in which structure of contemporary equal protection jurisprudence undermines rather than advances antisubordination goals); *see also* Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339, 2342–43 (2006) (describing critiques of the tiers-of-scrutiny framework).

39. *See* Barnes & Chemerinsky, *supra* note 23, at 1079 (referencing Professor Gerald Gunther's observation that strict scrutiny was "strict in theory and fatal in fact").

40. *See id.* ("These levels of scrutiny allow the Court to justify rulings in favor of the government with little analysis of the competing constitutional interests.").

41. *See id.* ("This framework creates a strong presumption in favor of rationality review: only in exceptional circumstances—if there is a fundamental right or suspect classification—does the Court apply heightened scrutiny.").

42. *See* Yoshino, *supra* note 30, at 757 (noting that the Supreme Court has not accorded heightened scrutiny to any new group based on suspect classification since 1977 and arguing that "[a]t least with respect to federal equal protection jurisprudence, this canon has closed").

43. *See id.* at 748.

number of ways,[44] the Court subsequently limited the category by ratcheting up the requirement for a showing of discriminatory purpose—requiring a showing that the decision maker chose a particular course of action at least in part because of its anticipated discriminatory impact.[45] Due to the difficulty of making this showing, an additional swath of equal protection cases has been channeled into rational basis review.[46]

Because the categories of suspect class, quasi-suspect class, and fundamental right are seemingly closed and heightened scrutiny is virtually inaccessible absent a facial classification, the vast majority of equal protection claims will be subject only to rational basis review. Combine this with the fact that rational basis review is an exceptionally deferential—some would say toothless—standard, and judicial review under the Equal Protection Clause is left gutted. This is where the doctrine of unconstitutional animus comes in. A showing of animus represents one of the few viable arrows in a plaintiff's quiver under these circumstances, which makes it an important subject of inquiry.

B. Animus and Rational Basis Review

As a matter of historical fact, proving that a law is based on unconstitutional animus is virtually the only way for a plaintiff to defeat deferential rational basis review. When the Court subjects a claim to rational basis review, it is overwhelmingly probable that the plaintiff will lose.[47] Indeed, the number of rational basis cases in which plaintiffs have prevailed is so small that these cases have become an object of study in and of themselves. Gerald Gunther famously took up this topic in his 1972 Harvard Law Review article reviewing the cases decided in the Court's 1971 term.[48] Gunther initially identified seven equal protection cases decided under rational basis review in which the plaintiff prevailed. He attributed the plaintiffs' victories in these cases to the evolution of a new, yet-unacknowledged level of scrutiny: rational basis with "bite."[49] Specifically, Gunther observed that the court appeared to have increased the rigor with which it applied the tailoring prong of rational basis review. All levels of scrutiny have a government-interest prong (does the law purport to serve a legitimate/important/compelling government interest) and a tailoring prong (is the classification employed by the law sufficiently related to advancing the purported government interest). Gunther predicted

44. *See id.* at 764.

45. Pers. Admin'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

46. *See, e.g.*, Barnes & Chemerinsky, *supra* note 23, at 1081 (discussing one such case).

47. *See id.* at 1076 (stating that under rational basis review, "the odds are overwhelming that the government will prevail"); Yoshino, *supra* note 30, at 759–60 (describing lenity of rational basis review).

48. *See* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

49. *See id.* at 21–22.

that equal protection jurisprudence would develop to involve less scrutiny of substantive legislative ends (sufficiency of the government's interest) and more scrutiny of legislative means (sufficiency of tailoring).[50]

But as subsequent commentators noted, the "rational basis with bite" standard did not have much in the way of legs.[51] A number of the cases Gunther identified as rational basis cases ended up actually being proto-heightened scrutiny cases.[52] Others appeared to be aberrations.[53] As discussed below, the remainder can be explained by an alternative theory: that the Court found that the laws in those cases were based on unconstitutional animus.[54]

Robert Farrell's 1999 survey of rational basis rulings in favor of plaintiffs found that Gunther's theory that the Court had developed a new "rational basis with bite" standard had not stood the test of time. Between 1971 and 1999, "the Court decided 110 cases in which it used minimal scrutiny," of which "plaintiffs prevailed in only ten."[55] Upon review, Farrell concluded that these cases could not be explained by a "rational basis with bite" standard, or by a number of other theories. But at least half of these—*U.S. Department of Agriculture v. Moreno*,[56] *Plyler v. Doe*,[57] *Zobel v.*

---

50. *Id.* at 20–30.

51. *See, e.g.*, Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 373–82 (1999).

52. *Id.* at 362–65.

53. *See id.* at 369–70. One of the seven cases dropped out because it was not an equal protection case. *Id.* at 361. Three additional cases were later conceptually subsumed within heightened scrutiny because they dealt with gender and illegitimacy. *Id.* at 370–72. *James v. Strange*, 407 U.S. 128 (1972)—a case that touched on the right to counsel—invoked language strikingly similar to the Court's 1996 animus-based decision in *Romer*. In particular, the *Strange* Court noted that the challenged law "strips from indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors" and emphasized the principle "that the Equal Protection Clause 'imposes a requirement of some rationality in the nature of the class *singled out*.'" *See Strange*, 407 U.S. at 135, 140 (1972) (emphasis added) (quoting Rinaldi v. Yeager, 384 U.S. 305, 308–09 (1966)). Gunther hailed *Strange* as another example of the Court focusing on means (sufficiency of tailoring) as opposed to ends (sufficiency of the governmental interest). *See* Gunther, *supra* note 48, at 33. But the *Strange* Court was concerned about the manner in which the statute set apart and disadvantaged the targeted class: "The statute before us embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law." *Strange*, 407 U.S. at 142. Thus, the linchpin to that decision could be interpreted as the presence of impermissible animus rather than application of a heightened form of rational basis review.

The final pair of Gunther's cases, involving civil commitment procedures, did indeed seem to bear the indicia of a new, more vigorous form of rational basis review: intolerance of over- and underinclusiveness; refusal to hypothesize legitimate purposes; placing the burden on the state to present evidence of an "affirmative relation between means and ends." *See* Gunther, *supra* note 48, at 47. But, as is apparent now, this standard did not become the default test for future rational basis cases.

54. *See* Gunther, *supra* note 48, at 27–30.

55. *See* Farrell, *supra* note 51, at 370.

56. 413 U.S. 528 (1973).

57. 457 U.S. 202 (1982).

Williams,[58] *City of Cleburne v. Cleburne Living Center*,[59] and *Romer*—are, as argued below, properly categorized as animus cases. This suggests, contrary to Gunther's assertion, that the real concern in many of these cases was with ends and not means—that insufficient tailoring was merely symptomatic of an improper purpose: animus.

C. Animus and Heightened Scrutiny

Animus is also relevant in cases of heightened scrutiny. For example, the Supreme Court clearly relied on animus—defined as private bias—in *Palmore v. Sidoti*,[60] a case involving race classifications that was subject to strict scrutiny review. Similarly, as discussed at length below, both *Loving v. Virginia*[61] and *Brown v. Board of Education*[62] may properly be understood as cases where the Court invalidated state action because it expressed and enforced private bias.

Because laws based on animus cannot survive rational basis review, by definition neither can they survive intermediate or strict scrutiny. As a concept that cuts across the tiers-of-scrutiny framework, the prohibition against basing laws in animus represents the broader and more universal commitments of the Equal Protection Clause—namely, a fundamental anti-caste orientation that applies with equal concern to all discrimination against social groups, regardless of whether they have been recognized as suspect classifications.

II. THE SUPREME COURT'S ANIMUS JURISPRUDENCE

Animus is crucial to equal protection jurisprudence—but what exactly is animus, what counts as evidence of animus, and how does it function doctrinally? Recognized animus cases are few in number. Only four decisions of the Supreme Court explicitly rely on language that can be traced with certainty to the concept of unconstitutional animus.[63] Nonetheless, these cases set the foundation for a coherent doctrine. In addition, the themes developed in these cases are further elaborated upon in

58. 457 U.S. 55 (1982).
59. 473 U.S. 432 (1985).
60. 466 U.S. 429 (1984).
61. 388 U.S. 1 (1967).
62. 347 U.S. 483 (1954).
63. This Article addresses animus in the context of the Supreme Court's decisions under the federal Equal Protection Clause, and does not look at animus as discussed in distinct doctrinal contexts, such as actions brought under Section 1985 of the Civil Rights Act. *See, e.g.*, Griffin v. Breckenridge, 403 U.S. 88, 100 (1971) ("'The object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the animus and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section.'" (alteration in original) (emphasis omitted) (quoting CONG. GLOBE, 42D CONG., 1ST SESS. 478 (1871))).

another set of cases that, while not explicitly referring to animus, share a conceptual heritage.

A. Recognized Animus Cases

The Court has explicitly relied on the concept of unconstitutional animus in only four cases.[64] Each of these cases presents a different facet of the doctrine.

1. Animus As Desire to Harm: *U.S. Department of Agriculture v. Moreno*

The first of the Court's recognized animus cases is the 1972 decision in *Moreno*. At issue in that case was a 1971 amendment to the Food Stamp Act of 1964, which withdrew food stamp benefits if any individual living in a household was unrelated to the other residents.[65] This was considered an equal protection problem because, by imposing this restriction, the law "create[d] two classes of persons for food stamp purposes: one . . . composed of those individuals who live in households all of whose members are related to one another, and the other [consisting] of those individuals who live in households containing one or more members who are unrelated to the rest."[66] Prior to the 1971 amendment, the Act drew no such distinction.[67] Rather, the original language specifically defined a household as "'a group of related or non-related individuals.'"[68]

While the amendment was intended to exclude a particular reviled social group—"hippies"—the plaintiffs who challenged the law were not themselves hippies, but instead represented the collateral damage resulting from the poorly drawn classification. For instance, one plaintiff was a fifty-six-year old diabetic man living with an unrelated woman and her three children in order to reduce expenses and receive medical care.[69] Another plaintiff, who lived with her three children, took in an unrelated young woman to help the young woman with her emotional difficulties.[70] Yet another pair of unrelated women lived together in order to afford a home in a neighborhood where one's deaf daughter would be able to attend a school providing special instruction for the deaf.[71]

---

64. *See* Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Palmore v. Sidoti, 466 U.S. 429 (1984); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

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

66. *Id.*

67. *See id.*

68. *Id.* at 530 (emphasis omitted) (quoting Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703, 703–09 (codified as amended at 7 U.S.C. §§ 2011–2036a (2006 & Supp. V 2011))).

69. *Id.* at 531.

70. *Id.* at 532.

71. *Id.*

Because the law involved neither a suspect class nor a fundamental right, the Court applied rational basis review.[72] As discussed above, rational basis review, like the other tiers of scrutiny, embodies a two-part test: first, the law must serve some legitimate state interest; second, the classification must be rationally related to that interest.[73] Thus, the challenged law must survive both a sufficiency-of-the-state-interest prong (is the state interest legitimate?) and a sufficiency-of-tailoring prong (is the classification rationally related to that interest?).

The *Moreno* Court determined that the goal of excluding hippies from food stamp benefits failed both prongs. Regarding the sufficiency of the state interest, the Court first assessed the narrow congressional aim in passing the amendment, which the Court determined to be explicitly based on impermissible animus.[74] Indeed, Congress did not disguise its motives. The legislative record revealed that Congress altered the definition of "household" to "prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."[75] The Court concluded that excluding hippies from food stamp benefits was not a legitimate governmental interest: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[76] A "purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment."[77]

The *Moreno* Court also concluded that the amendment failed the tailoring prong of rational basis review. The Court first considered what other legitimate state interests the amendment might serve, focusing on the government's general interest in the Food Stamp Act: "to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households."[78] Increasing food security among the poor was clearly a legitimate state interest, but the Court

72. *Id.* at 533.

73. *See supra* Part I.B.

74. *See id.* at 534–35.

75. *Moreno*, 413 U.S. at 534 (citing H.R. REP. NO. 91-1793, at 8 (1970) (Conf. Rep.); 116 CONG. REC. 44439 (1970) (statement of Sen. Holland)).

76. *Id.* (emphasis omitted).

77. *Id.* at 534–35.

78. *Id.* at 533. The Act was also geared toward strengthening the agricultural economy by better distributing agricultural products. *See id.* at 533–34 ("The Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of our agricultural abundances and will strengthen our agricultural economy, as well as result in more orderly marketing and distribution of food. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to purchase a nutritionally adequate diet through normal channels of trade." (quoting Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703, 703–09 (codified as amended at 7 U.S.C. §§ 2011–2036a (2006 & Supp. V 2011))).

concluded that "[t]he challenged statutory classification (households of related persons versus households containing one or more unrelated persons) is clearly irrelevant to the stated purposes of the Act."[79] Specifically, the relatedness or lack of relatedness between different members of a household did not affect their nutritional needs.[80] Thus, there was no affirmative connection between the trait that defined the classified group and the group's interest in the governmental benefit being distributed, or, indeed, the government's interest in offering the benefits in the first place.

The government had also offered fraud prevention as a legitimate governmental interest independent of the bare desire to discriminate against hippies.[81] But while the Court determined that this interest was also legitimate, it ultimately concluded that the relatedness classification was so poorly tailored to accomplishing the antifraud goal that the goal itself could not be credited.[82] Again, there was no affirmative reason to think that this group was more prone to commit fraud than any other.

Thus, *Moreno* set the pattern for the one-two punch of animus analysis. First, the Court discerned affirmative evidence of a "desire to harm" a specific social group.[83] This goal—discrimination for the sake of discrimination—was an impermissible function of the law.[84] Second, the Court examined the other purported state interests, requiring that the trait that defined the classification be affirmatively related to the accomplishment of those interests.[85] The second step is a heightened, means-oriented analysis of the type that Gunther described in setting forth the standard for rational basis with bite.[86] But it appears that this more

79. *Id.* at 534.

80. *Id.* ("As the District Court recognized, '[t]he relationships among persons constituting one economic unit and sharing cooking facilities have nothing to do with their abilities to stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements.'" (alteration in original) (quoting Moreno v. U.S. Dep't of Agric., 345 F. Supp. 310, 313 (D.D.C. 1972))).

81. *See id.* at 535.

82. *Id.* at 536–37 (noting that "the challenged classification simply does not operate so as rationally to further the prevention of fraud," and that "[t]he existence of [more precise antifraud] provisions necessarily casts considerable doubt upon the proposition that the 1971 amendment could rationally have been intended to prevent those very same abuses").

83. *Id.* at 534.

84. *See id.* at 534–35; *supra* note 74 and accompanying text.

85. *See id.* at 534 ("As the District Court recognized, '[t]he relationships among persons constituting one economic unit and sharing cooking facilities have nothing to do with their abilities to stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements.'" (alteration in original) (quoting Moreno v. U.S. Dep't of Agric., 345 F. Supp. 310, 313 (D.D.C. 1972))).

86. Under the traditional rational basis standard, if it was possible that at least some unrelated households were committing fraud, the fact that the classification was both under- and overinclusive (i.e., it failed to capture others who might be committing fraud and captured many who were not committing fraud—like the sympathetic plaintiffs in the case) would not defeat the law. *See* Gunther, *supra* note 48, at 21–22. Indeed, the notions of under- and overinclusiveness have no place in a rational basis review analysis, but should be

vigorous examination was prompted by the presence of affirmative evidence of animus in the legislative history. In this case, the presence of animus poisons the well, discrediting other explanations as mere pretext for unconstitutional discrimination.

On a broader level, the tailoring of the amendment was also problematic because it used status as a proxy for conduct. The *Moreno* Court considered the classification irrational because it was based on "wholly unsubstantiated assumptions concerning the differences between 'related' and 'unrelated' households."[87] That is, the law used the status of relatedness as a proxy for the conduct of fraud. The Court noted that there were other portions of the Food Stamp Act that were directly targeted at preventing fraud—unlike the challenged provision, which sought to do so indirectly by using relatedness as an extremely imprecise proxy for propensity to commit fraud.[88] The Court also noted that "[t]he existence of these [other antifraud] provisions necessarily casts considerable doubt upon the proposition that the 1971 amendment could rationally have been intended to prevent those very same abuses."[89]

Further doubt was cast on the legitimacy of the purported antifraud goal because the amendment was not congruent with the larger goals of the Act. Not only did the amendment do nothing to further the purported governmental interest in preventing fraud, it actually thwarted the primary purpose of the Act: providing food security to those in need.[90] Those who fraudulently claimed financial need could easily evade the exclusion by not cohabiting. Thus, the victims of the exclusion would be the truly destitute, who had no choice but to share living expenses with others.[91]

Thus, where the challenged law relied on a status-based classification, and where there was direct evidence of private bias toward a specific social group, the Court required an affirmative connection between the trait defining the classification (relatedness) and either the individual's need for the subject benefits (food security) or the government's interest in regulating those benefits (providing food security; preventing fraud). This is not necessarily equivalent to shifting the burden onto the government, but it does require the Court be able to identify and articulate this connection. From another perspective, it gives plaintiffs the opportunity to prove a positive—the presence of unconstitutional animus—as opposed to a negative—the lack of any conceivable rational basis for a law. If there is no

---

reserved for the close tailoring requirements of heightened scrutiny. *See* Sunstein, *supra* note 8, at 55 ("But [under- and overinclusiveness] do[] not doom a statute under rational basis review; [they are] perfectly acceptable, indeed quite common."). Thus, it is perfectly permissible for legislatures to rely on under- or overinclusive classifications; this is a far cry from the classification being irrational.

87. *Moreno*, 413 U.S. at 535.
88. *See id.* at 536.
89. *Id.* at 536–37.
90. *See id.* at 539.
91. *See id.*

articulable reason why *this group* is being selected for differential treatment, then the designation is arbitrary—the law creates a classification for the sake of a classification—and this supports an inference that the law is actually based on animus rather than a permissible governmental purpose.

The Court's structural analysis (i.e., its analysis of the means-ends connection) in *Moreno* is doctrinally significant. The Court had already noted the direct evidence of legislative ill will toward hippies. The Court's concern in analyzing the antifraud justification was different. The Court was concerned with the law's reliance on "unsubstantiated assumptions" about groups of persons based on their status (lack of family relationship) rather than their conduct (actually committing fraud or fraud-related acts).[92] Significantly, this latter analysis was not directly concerned with spite or malice toward an unpopular group; it was a concern with a particular type of imprecision in lawmaking: using a group's status as a proxy for anticipated conduct. This, in turn, points to more fundamental and universal suspicion of all class-based legislation—not just that affecting suspect or quasi-suspect classes.

Justice Rehnquist dissented, commenting that the majority was acting as super-legislature in invalidating the amendment, rather than remaining in its proper judicial role as defender of constitutional rights. Justice Rehnquist offered that "[t]he Court's opinion would make a very persuasive congressional committee report arguing against the adoption of the limitation in question."[93] This critique is on-point. Rational basis review is an easy standard for the government to meet precisely because it is meant to force judicial deference to the legislative branch, even in cases of questionable lawmaking.

And if the majority in *Moreno* had confined itself to concluding that the law was poorly tailored, Justice Rehnquist's critique would have thoroughly undermined the basis of the opinion. If animus is nothing more than a lack of fit between means and ends, then it becomes a doctrinal vehicle for second-guessing the legislature.

But the majority in *Moreno* was saying something more. It was not saying that it disagreed with the substantive policy goal of excluding hippies from food stamp assistance. Indeed, the majority did not engage the merits of this policy at all. Rather, the majority pointed to the unintended and unfair consequences of using a status-based classification to punish disfavored groups.[94] In this case, reliance on the classification had the effect of punishing many people who were not the target of Congress's anti-

92. *Id.* at 535.

93. *Id.* at 545 (Rehnquist, J., dissenting).

94. *See id.* at 538 (majority opinion) ("Thus, in practical operation, the 1971 amendment excludes from participation in the food stamp program, not those persons who are likely to abuse the program, but, rather, only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility." (emphasis omitted) (internal quotation marks omitted)).

hippie policy, as the choice of plaintiffs demonstrated. In addition, rather than questioning the anti-hippie policy or second guessing the legislative tailoring, the majority in *Moreno* emphasized that the Equal Protection Clause abhors classifications undertaken for their own sake (i.e., classifications undertaken for the sake of excluding some from benefits but not others without some affirmative justification for doing so).[95]

Justice Rehnquist correctly insisted that the fact that a law has unfortunate consequence—in *Moreno*, denying benefits to individuals who were genuinely in need—is not a basis for invalidating a law. Such decisions are within the legislature's purview. But while the plaintiffs' dilemma served as the sympathetic hook for the majority decision, it was not, in fact, the reason the law was held invalid. The law was properly invalidated because it represented arbitrary, class-based legislation of the type that is offensive to equal protection principles. The effect on the sympathetic plaintiffs was simply evidence of the negative, unintended consequences of punitive, class-based legislation.

2. Animus as Private Bias: *Palmore v. Sidoti*

The Court's next animus case, *Palmore*, departs somewhat from the model established in the Court's other animus decisions. To begin with, it is a case involving race discrimination, so strict scrutiny was available. But *Palmore* is nonetheless one of the recognized progenitors of the animus doctrine relied on in subsequent animus decisions like *Cleburne* and *Romer*. Further, it adds an important aspect to our understanding of unconstitutional animus. Specifically, while the private bias in the *Moreno* case was expressed by state actors, *Palmore* was concerned with bias originating in private actors.

The form of state action at issue in *Palmore* was a family court order taking custody of a child away from the mother and granting it instead to the father.[96] The basis for the family court's decision was the mother's marriage to a man of a different race.[97] The family court's concern was that the mother's marriage choice would subject the child to stigmatization.[98] Thus, the court's order relied on a racial classification because "the outcome [of the matter] would have been different had petitioner married a Caucasian male of similar respectability."[99] In other words, race served to determine the allocation of legal rights.

---

95. *See id.* at 534 (noting that "to be sustained, the challenged classification must rationally further some legitimate governmental interest other than those specifically stated in the congressional declaration of policy"—i.e., to prevent so-called "hippies" and "hippie communes" from participating in the food stamp program (internal quotation marks omitted)).

96. *See* Palmore v. Sidoti, 466 U.S. 429, 430–31 (1984).

97. *See id.*

98. *See id.* at 431.

99. *Id.* at 432.

Because the family court order relied on a race classification, the Supreme Court applied strict scrutiny review in assessing the constitutionality of the family court's ruling.[100] The Court assessed the state interests at stake, and had little difficulty concluding that the broader goal of "granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause."[101] Further, the Court acknowledged the reality of racial and ethnic prejudices that would affect the experience of the child, and likely in a negative way.[102] And it is beyond dispute that if racial prejudice is the problem, then reliance on a race classification is not only narrowly tailored, but perfectly tailored, to address that problem. Hostility toward mixed-race couples was pervasive, and it was only by keeping the child out of such a relationship that the child could be shielded from those negative social effects. In other words, the family court's decision arguably satisfied the strict scrutiny standard—the government had a compelling interest in preserving the best interests of the child, and taking custody away from the mother directly addressed that concern. But the superficial validity of the family court's order was poisoned by its capitulation to private bias.

On this point the Court famously stated, "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[103] Note that the Court did not question whether the underlying bias against mixed-race couples was fair or unfair (in Justice Scalia's vernacular, whether bias against mixed-race couples was just a form of legitimate "Kulturkampf"[104] for the time), but instead focused exclusively on the fact that the family court's order served to give effect to that bias.[105] This focus underscores that the problem with laws based on animus is that they function to express and enforce private bias against a particular social group, regardless of whether that bias itself is widely held or based in moral or religious considerations. In short, the criticism lodged by *Palmore* does not necessitate an inquiry into the nature or validity of the underlying bias itself. Rather, *Palmore* focuses us on the fact that (1) as a general proposition, the public laws are not to express and enforce private bias, and (2) when they do, this invalidates the law, regardless of whether there is a

100. *Id.* at 432–33. The Court in *Palmore* articulated the strict scrutiny standard as requiring that the classification "be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose." *Id.*

101. *Id.* at 433.

102. *See id.*

103. *Id.* at 433.

104. *See* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) ("The Court has mistaken a Kulturkampf for a fit of spite.").

105. Similarly, as discussed above, the Court in *Moreno* conducted no inquiry into whether bias against "hippies"—a classification that, unlike race, did not enjoy any form of protected status—was justified. *See supra* notes 72–80 and accompanying text. The doctrine of unconstitutional animus does not distinguish between "legitimate" and "illegitimate" biases; it prohibits legislation that functions to enforce any type of social-group bias. In this sense, the doctrine is formal, ahistorical, and universal.

plausible government interest being served (for example, protecting the bests interests of the child).

3. Animus As Stereotype and Fear: *City of Cleburne v. Cleburne Living Center*

The Court's next animus decision also addressed a situation where state actors were deferring to the biases of private actors. In *Cleburne*, the Court reviewed two distinct but related forms of state action. The first form of state action was enactment of a city zoning regulation that required a special use permit for the operation of certain types of group homes, including "[h]ospitals for the insane or feeble-minded."[106] The plaintiff, Cleburne Living Center (CLC), had proposed to build a group home for persons with cognitive disabilities.[107] CLC was required to obtain a special use permit under the zoning regulation, as the home was considered analogous to a hospital for the "feeble-minded." The second form of state action was the City Council's decision under the ordinance to deny the special use permit following a hearing on the request.[108] Accordingly, CLC challenged the zoning ordinance as facially invalid, and also challenged the regulation as applied, based on the denial of the request submitted pursuant to the regulation.[109] The Court took up the latter challenge.

In its initial analysis determining what level of scrutiny to apply to the equal protection claim, the Court rejected the argument that persons with cognitive disabilities should be deemed a quasi-suspect class.[110] The Court examined all of the suspect classification criteria, including immutability and political powerlessness, but focused on the fact that members of this group were, in fact, generally compromised in their ability to function in society, such that it would often be valid for legislative bodies to rely on a related classification.[111]

Although the Court determined that the CLC's claims did not merit heightened scrutiny,[112] the Court emphasized that this did not leave plaintiffs without judicial protection. Specifically, citing *Moreno*, the Court reiterated that even under deferential rational basis review, governments may not rely on classifications that are "arbitrary" or "irrational," nor may laws be based on "a bare . . . desire to harm a politically unpopular

106. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 436 (1985) (alteration in original) (quoting CLEBURNE, TEX., COMPREHENSIVE ZONING ORDINANCE, § 8 (1965)).

107. *See id.* at 435–36.

108. *See id.* at 437.

109. *See id.*

110. *See id.* at 442.

111. *See id.* at 442–44. Even though the Court determined that the trait of developmental disability was generally relevant to valid legislative purposes, the Court ultimately circled back around to ask whether the trait was relevant to the specific legislative interest behind the law in question—and concluded that it was not. *See id.* at 447–50.

112. *See id.* at 442–43.

group."[113] And, indeed, the Court concluded that it was precisely these impermissible purposes that were in play in the City Council's decision.

In support of this conclusion, the Court cited direct evidence of ill will on the part of community members as recorded in the legislative history. Specifically, in debating whether to grant the special use permit, community members came forward to express negative attitudes toward and fears of persons with cognitive disabilities.[114] They also expressed concern that students from a nearby school might harass the CLC residents.[115] Thus, the animus at issue was not "a bare . . . desire to harm" on the part of the City Council, but was rather the City Council's response to community members' fears and stereotypes. The Court rejected these views as a valid basis for legislative decision making, citing *Palmore* for the proposition that the law cannot give effect to private biases.[116] Even under deferential rational basis review, this was not a legitimate state interest.

As in *Moreno*, the Court in *Cleburne* went on to examine the other purported goals of the City Council's decision. The Court considered the structure of the challenged state action as evidence supporting an inference of animus.[117] Specifically, the Court examined the connection between the trait defining the group (cognitive disability) and the goals purportedly served by the City Council's decision.[118] Ultimately, the Court declined to apply heightened scrutiny because it concluded that persons with cognitive disabilities were, in fact, different from others in ways that were presumptively relevant to public legislation.[119]

But "this difference"—cognitive disability—was "largely irrelevant" to the particular interests advanced by the city.[120] Those interests included avoiding excessive density, crowding, fire and flood safety, and traffic congestion.[121] As the Court reasoned, "The question is whether it is rational to treat the mentally retarded differently. It is true that they suffer disability not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent."[122] The Court emphasized that these concerns would be present with any request for group housing, including apartment buildings and fraternities and sororities—types of multiple dwellings not addressed by the zoning regulation.[123] Because "[t]he City never justifie[d] its apparent view that other people can live under such 'crowded' conditions when mentally retarded persons

113. *Id.* at 446–47 (alteration in original) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).
114. *See id.* at 448.
115. *See id.* at 449.
116. *Id.* at 448 (citing Palmore v. Sidoti, 466 U.S. 429 (1984)).
117. *See id.* at 448–50.
118. *See id.*
119. *See id.* at 442–46.
120. *Id.* at 448.
121. *See id.* at 450.
122. *Id.* at 449–50.
123. *See id.*

cannot,"[124] the Court inferred that "requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded."[125]

Again, the classification at issue here was arguably rationally related to the governmental interest on a superficial level. Indeed, almost any form of group housing could pose concerns in terms of density, crowding, fire and flood safety, etc. But what the Court concerned itself with was the fact that people with developmental disabilities had been arbitrarily targeted for regulation whereas other groups had not. The targeting was arbitrary because the trait that characterized this group had no special relevance to the government's purported interests as compared to other, objectively similar groups that were not regulated. This objective, structural feature of the state action at issue supported an inference of animus. Thus, while underinclusiveness generally would not be fatal under traditional rational basis review, when that underinclusiveness approaches arbitrariness, this suggests that the law "rest[s] on an irrational prejudice" against the classified group.[126] Direct evidence indicating that the purpose of the law was to discriminate against a particular social group discredited the other purposes offered by the government and required a credible explanation of how the trait at issue related to the object of the regulation.

4. Animus and Sexual Orientation: *Romer v. Evans*

The concept of unconstitutional animus reappeared in dramatic fashion over a decade later in *Romer*. The law at issue in *Romer* was an amendment to the Colorado Constitution that had been enacted by popular referendum.[127] The purpose and function of Amendment 2 was to eliminate and prevent future adoption of any antidiscrimination protections based on homosexual, lesbian, or bisexual status.[128]

The Court declined to address whether sexual orientation was a suspect classification, or whether Amendment 2 infringed on a fundamental right, such that some form of heightened scrutiny would be required. Instead, the Court proceeded directly to rational basis review, appearing to acknowledge its deferential nature: "a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous."[129]

As discussed above, the Court had previously identified animus on two bases: (1) direct evidence that the law was based on private bias toward a

124. *Id.* at 450 (quoting Cleburne Living Ctr. v. City of Cleburne, 726 F.2d 191, 202 (5th Cir. 1984)).
125. *Id.*
126. *Id.*
127. *See* Romer v. Evans, 517 U.S. 620, 624 (1996). The amendment was referred to as "Amendment 2." *Id.* at 623.
128. *See id.* at 624.
129. *Id.* at 632.

particular social group (on the part of either state or private actors) and (2) an inference of animus based on a law's structure—specifically, the lack of an affirmative connection between the trait defining a group and the purported goal of the law or other state action.[130] Although there was a vast record of antigay sentiments (i.e., direct evidence of private bias) giving birth to the referendum that enacted Amendment 2,[131] the *Romer* Court did not rely on or even discuss such evidence in finding that the law was based on animus. Rather, the Court focused exclusively on the law's structure.

Why would the Court ignore such strong direct evidence of impermissible animus? This omission is probably best explained by the fact that the *Romer* decision was handed down in the awkward interstitial period between the Court's decisions in *Bowers v. Hardwick*[132] and *Lawrence v. Texas*. *Bowers* permitted states to criminalize homosexual sodomy, in essence making it legitimate to disfavor homosexual and bisexual orientation, as homosexual conduct closely correlates to homosexual status.[133] *Lawrence* later overturned *Bowers*, declaring that states could not criminalize private, consensual sexual conduct between adults based on bare moral disapproval of that conduct.[134] However, *Romer*, which involved a law disfavoring homosexual and bisexual orientation in a different context, was decided prior to *Lawrence*. With *Bowers* still on the books, the *Romer* Court could hardly deem homosexuals and bisexuals to be a suspect or quasi-suspect class, or question the general validity of antigay legislation.

So although the *Romer* Court could have easily relied on direct evidence of animus, it ignored this evidence and instead performed a novel structural analysis. Specifically, the *Romer* Court relied on two different characteristics of Amendment 2 to infer the presence of unconstitutional animus. The first related to what can be characterized as a radical lack of fit between the law's means and ends. Again, under traditional rational basis review, even a radical lack of fit may be acceptable. And under the traditional standard, the law likely would have been upheld—the Court would simply require that there be some possible connection between the classification relied upon by the challenged law (here, sexual orientation) and the state interests served by the law (conserving antidiscrimination enforcement resources and protecting citizens' freedom of association).

And such a connection was clearly present in *Romer*. Sexual orientation was previously a basis for antidiscrimination protection, and so sexual

130. For (1), see *supra* Part II.A.1–2. For (2), see *supra* Part II.A.3.

131. *See* Cara DeGette, *Inside the Belly of the Beast*, *in* RESISTING THE RAINBOW: RIGHT-WING RESPONSES TO LGBT GAINS, POLITICAL RESEARCH ASSOCIATES 29 (2012), http://www.publiceye.org/Reports/CO%20Case%20Study.pdf.

132. 478 U.S. 186 (1986).

133. *See* Lawrence v. Texas, 539 U.S. 558, 581–82 (2003) (O'Connor, J., concurring) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual.").

134. *See id.* at 578.

orientation was self-evidently relevant to reconfiguring the priorities of antidiscrimination law. Similarly, if a state seeks to protect citizens' right not to associate with homosexuals or bisexuals, sexual orientation is precisely the relevant classification to protect that right.

The Court avoided this difficulty by changing the terms of the means and ends analysis. The Court focused not on the precise mechanism Amendment 2 employed (i.e., the classification of sexual orientation), but on Amendment 2's impact, which it characterized as vast.[135] Indeed, the Court devoted an entire separate section of its opinion to describing the law's impact, explaining that rather than placing homosexuals and bisexuals on a level playing field with everyone else, the law actively stripped homosexuals of rights, first by repealing local antidiscrimination ordinances.[136] In addition, Amendment 2 prevented municipalities from enacting any new protective legislation in the future without first amending the state constitution to repeal Amendment 2.[137] Thus, homosexuals were left open to discrimination in the public and private spheres without any recourse. Rather than merely taking away "special rights," Amendment 2 "impose[d] a special disability upon those persons [homosexuals and bisexuals] alone."[138]

Having described the vast impact of the law, the Court then asked whether that impact was justified by the State's purported interests in the law and concluded that it was not. Amendment 2 inflicted on homosexuals "immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for [the law]."[139] With respect to both of the State's purported interests, the Court determined that "[t]he breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them."[140] Because the law's "sheer breadth is so discontinuous with the reasons offered for it . . . the amendment seems inexplicable by anything other than animus toward the class it affects."[141] Note that rational basis review typically examines the relationship between the classification employed and the law's purpose—examining whether the law's purpose justifies its impact is a fundamentally different inquiry and one that involves a largely unfettered assessment of fairness.

In so holding, the Court characterized the first purported state interest—"conserving resources to fight discrimination against other groups"[142]—as relatively trivial. And the Court reached the same conclusion, without extensive analysis, with respect to the second purported state interest:

135. *See Romer*, 517 U.S. at 632– 34.
136. *See id.* at 627, 629–31.
137. *Id.* at 627 (citing Evans v. Romer, 854 P.2d 1270 (Colo. 1993)).
138. *Id.* at 631.
139. *Id.* at 635.
140. *Id.*
141. *Id.* at 632.
142. *Id.* at 635.

protecting citizens' freedom of association.[143] This seems patently incorrect. It may be true that the law would not actually succeed in protecting anyone's freedom of association, or that by "freedom of association" the State actually meant "right to unfairly discriminate against homosexuals and bisexuals." But the Court did not critique this purported governmental interest on this level (i.e., it did not focus on whether the classification actually served to advance the State's purported goals or was valid in and of itself). Rather, the Court treated Coloradans' freedom of association as a relatively trivial interest on par with conserving antidiscrimination enforcement resources.

In this way the Court glossed over the real—and most controversial—issue in the case: whether it was legitimate for a state to protect citizens' freedom not to associate with members of unpopular groups, and to use the law to enforce that right. As a general matter, after *Moreno*, *Palmore* and *Cleburne*, the answer was clearly "no." But the Court was hamstrung in reaching this conclusion because *Bowers* was still good law at the time *Romer* was decided. And *Bowers* clearly supported the proposition that it was permissible to disapprove of homosexual conduct and orientation (as Justice Scalia emphasized in his dissent in *Romer*). Accordingly, the *Romer* majority performed a sleight of hand. It could not directly attack the validity of antigay bias, so it transformed its analysis into a structural critique.

The second basis on which the Court inferred animus also looked to the structure of the law, but from a slightly different angle. Specifically, the Court stated that the discrimination worked by Amendment 2 was "of an unusual character,"[144] which in and of itself prompted "careful consideration"[145] of the law's validity. Specifically, the law had "the peculiar property of imposing a broad and undifferentiated disability on a single named group,"[146] "identif[ying] persons by a single trait and then den[ying] them protection across the board."[147] Further, the law singled out this group—which could fairly be described as "politically unpopular"—for a significant rights deprivation.[148] The Court focused on the objective function of the law, which was to create distinctions between classes of persons where none had previously existed. Prior to Amendment 2, homosexuals and bisexuals in Colorado had equal access to antidiscrimination measures enacted by local governments. The objective function of Amendment 2 was to differentiate homosexuals and bisexuals with respect to these rights.

---

143. *See id.* at 635.
144. *Id.* at 633 (citing Louisville Gas & Elec. Co. v. Coleman, 227 U.S. 32, 37–38 (1928)).
145. *Id.* (citing Louisville Gas & Elec. Co. v. Coleman, 227 U.S. 32, 37–38 (1928)).
146. *Id.* at 632.
147. *Id.* at 633.
148. *Id.* at 634 (citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

The Court identified "this sort" of law as incompatible with our constitutional tradition[149]:

> [L]aws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.[150]

In other words, a law may not draw classifications of persons "for the purpose of disadvantaging the group burdened by the law."[151] The Court alluded to the manner in which this principle enforces the core values of the Equal Protection Clause: "[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment."[152]

The rule the Court endorsed in *Romer* is murky. The Court suggested that laws suffering from a radical lack of fit would be presumed to be based in animus, but it is unclear how this relates to the existing tailoring requirements of rational basis review. The Court also indicated that animus may be inferred where a law is "of an unusual character," but it is not clear exactly what laws would fall into this category.[153]

In his dissent, Justice Scalia directly engaged the issue that the majority avoided: whether it was permissible for the law to protect citizens' rights not to associate with those they prefer not to associate.[154] As Justice Scalia phrased it, the issue was whether Coloradans may seek "to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."[155] In support of this proposition, Justice Scalia reasonably cited to the Court's own decision in *Bowers*, which had been conspicuously ignored by the majority.[156] Justice Scalia interpreted *Bowers* as standing for the proposition that it was permissible for governments to single out homosexuality for unfavorable treatment—in essence, that it was permissible to disfavor homosexual status because it was permissible under *Bowers* to disfavor homosexual conduct.[157]

Even accepting that Justice Scalia may have been right to rely on the connection between homosexual conduct and homosexual status at the time that *Romer* was decided, he lost that ground when the Court decided *Lawrence*, which reversed the *Bowers* decision. After *Lawrence*, even if one could equate homosexual conduct with homosexual status, homosexual conduct could no longer be criminalized and the related justification for

149. *Id.* at 633.
150. *Id.*
151. *Id.*
152. *Id.* at 635 (citing The Civil Rights Cases, 109 U.S. 3, 24 (1883)).
153. *Id.* at 633.
154. *See id.* at 636 (Scalia, J., dissenting).
155. *Id.*
156. *Id.* at 636, 640 (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).
157. *Id.* at 642.

disfavoring homosexual status collapsed. After *Lawrence*, classifications based on homosexual status must be treated the same as all other classifications based on status—with presumptive disfavor and an eye toward the presence of animus.

B. Additional Cases Related to Animus

The four cases discussed above represent the official canon of cases decided on the basis of unconstitutional animus. But there are additional cases in which we can identify a similar theme: the law at issue was found unconstitutional because its primary function was to express and enforce distinctions between social classes.

1. Animus and Race Segregation: *Brown v. Board of Education* and *Loving v. Virginia*

The first of these cases is *Brown*. *Brown* is both seminal and enigmatic: it is seminal in that it is hailed as visionary and just, and enigmatic in that it is difficult to pin down exactly what Brown stands for doctrinally. As is well-known, the Court in *Brown* held that state-sponsored racial segregation in public education violated the Equal Protection Clause, regardless of whether the segregated schools were purportedly "equal" in terms of tangible resources (e.g., physical plant, books, teachers).[158] In a succinct opinion, the Court advanced two interrelated bases in support of this result. First, the Court (in)famously referred to the negative psychological effects of segregation on black children.[159] The reasoning—which is suspect on many levels[160]—was that segregation deprived black school children of equal educational opportunities because it created feelings of inferiority in them. These feelings of inferiority then interfered with their ability to learn and to reap the myriad social, economic, and civic benefits of public education.[161] Under this reasoning, segregation is not necessarily inherently problematic, but only because of its negative effects on the targeted group.

---

158. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

159. *See id.* at 494 ("To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

160. Suspect was (1) the Court's confidence in contemporary "psychological knowledge" and (2) its conclusion that segregation was damaging to black children alone, and not their white counterparts. *See, e.g.*, Kevin Brown, *The Road Not Taken in* Brown*: Recognizing the Dual Harm of Segregation*, 90 VA. L. REV. 1579, 1581–82 (2004) ("This rationale, that segregation was unconstitutional solely because of the harm it inflicted in African-Americans, created the impression that as a remedy for segregation, desegregation amounted to a social welfare program where whites were compelled to donate in-kind contributions to blacks in the form of interracial contact. In other words, if the harm occasioned by segregation was one-sided and fell only on blacks, as *Brown* indicated, integration conferred benefits only on blacks, which necessarily were paid for by whites.").

161. *See Brown*, 347 U.S. at 494.

The second rationale focused more squarely on the morality of segregation itself, regardless of documented psychological effects. The Court suggested, albeit *sotto voce*, that segregation of social groups was unconstitutional because it was not a proper function of the public laws. Specifically, the Court quoted the Kansas district court opinion to the effect that "[t]he impact [of racial segregation] is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."[162]

Thus, the second rationale for striking the separate-but-equal doctrine focused on the expressive function of state action—in *Brown*, this function was to denote the inferiority of one social group to another by requiring their separation. Stated this way, the harm of state-sponsored segregation was not that it created "feelings of inferiority,"[163] but that it stood as the government expressing a judgment that one social group is inferior to another—in this case, expressing an ideology of white supremacy. Whether the laws can eliminate privately held ideologies of this nature is one matter, but it is clear that the public laws cannot express and enforce such ideologies[164]—even where the goal of doing so is "promotion of [the people's] comfort, and the preservation of the public peace and good order."[165] Explicit segregation of social groups with respect to important public institutions is a prime example of discrimination for the sake of discrimination. It is sufficient evidence of unconstitutional animus, because such laws do not purport to serve independent purposes.

Similarly, in *Loving v. Virginia*, the Court determined that the challenged law impermissibly expressed an ideology of white supremacy through legally enforced separation of the races.[166] Like the school segregation at issue in *Brown*, the antimiscegenation statute at issue in *Loving* can be characterized as a form of separate-but-equal discrimination. Indeed, in defense of the law, Virginia argued that antimiscegenation laws of this type were not of concern to the Equal Protection Clause because they were applied to blacks and whites equally: members of neither group were permitted to marry members of the other, and the legal penalties for doing so were the same for both.[167]

The Court rejected this contention, noting that, as a historical matter, reliance on racial classifications was always of concern to the Equal Protection Clause.[168] Further, like the *Brown* Court, the *Loving* Court focused on the expressive function of the challenged law and found it

162. *Id.* at 494 (quoting Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951)).
163. *Id.*
164. This is precisely the point the Court made later in *Palmore v. Sidoti*. *See* 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").
165. Plessy v. Ferguson, 163 U.S. 537, 550 (1896), *abrogated by Brown*, 347 U.S. 483.
166. *See* Loving v. Virginia, 388 U.S. 1, 11–12 (1967).
167. *See id.* at 7.
168. *See id.* at 8.

substantively impermissible.[169] The Court discerned the content of this expression in a number of ways. First, the Court quoted the trial court's opinion sentencing the Lovings to exile from the state. In that opinion, the trial court proclaimed an explicitly racist, quasi-religious, and nominally geographical justification for the laws:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[170]

Second, in addition to the justification provided by the trial court, the Court noted the historical context of the adoption of antimiscegenation laws, emphasizing their origin in the institution of slavery and in notions of racial integrity and nativism.[171] Third, the Court rejected precedent validating the state purpose of "preserv[ing] the racial integrity of its citizens," as an "obvious[] endorsement of the doctrine of White Supremacy."[172] Finally, the Court looked closely at the structure and function of the statute, and noted that it was only white persons who were not permitted to intermarry with other races; non-whites of different races could inter-marry.[173] This revealed that the law served no "overriding purpose independent of invidious racial discrimination" and was "designed to maintain White Supremacy."[174]

Thus, one may read *Loving* as standing for the proposition that it is impermissible for laws to exist solely for the purpose of enforcing distinctions between social groups, thereby expressing the view that certain social groups are superior to others. Surely the fact that the segregation at issue in *Brown* and *Loving* was based on race created particularly weighty concerns for the Court. But the analysis in these cases only works because the Court attributed inherent meaning to the act of segregation: to segregate groups that are similarly situated with respect to the right at stake is to express an ideology that one social group is inherently inferior to another. This the law may not do. In such cases, the structure and function of the law—segregation of social groups—indicates the presence of impermissible animus.

2. Animus and Class-Based Legislation: *Plyler v. Doe* and *Zobel v. Williams*

The Court's 1982 decision in *Plyler* is a case where the plaintiffs prevailed under rational basis review, not because the law at issue expressed

169. *See id.* at 11.
170. *Id.* at 3 (quoting the trial court).
171. *See id.* at 6.
172. *Id.* at 7 (quoting Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955)).
173. *See id.* at 11–12.
174. *Id.* at 11.

hostility or ill will per se, but because the law tended to create persistent divisions between social classes.[175] *Plyler* is significant for three reasons. First, it presents a thorough exegesis on the Equal Protection Clause's concern with status-based classifications (i.e., laws that tend to produce or reinforce a caste society).[176] Second, like *Cleburne*, it reaffirms the principle announced in *Moreno* that it is impermissible to exclude members of a social group merely for the sake of excluding them.[177] Rather, there must be some affirmative reason why it is more effective to exclude this group than another (i.e., the exclusion must not be arbitrary).[178] Third, *Plyler* emphasizes that laws may not be used to punish status through the regulation of unrelated conduct.[179]

At issue in *Plyler* was a Texas law that sought to deny public education to school-age children who did not have documentation of their citizenship status.[180] The specific mechanism the State used was withholding funds from local school districts to the extent such funds would be used to educate children not legally admitted to the United States.[181]

The Court began its analysis with the emphatic claim that "[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."[182] The Court then proceeded to determine the proper level of scrutiny to apply to the challenged legislation, analyzing whether the targeted group—the children of undocumented immigrants—should be considered a suspect class.[183] The Court determined that they should not.[184] This was because entry into the class was "the product of voluntary action"—illegally entering into the country.[185] Further, it could not be argued that the distinguishing trait of the class was presumptively irrelevant to all conceivable legislative purposes.[186] Immigration status is patently relevant to legitimate goals in immigration law and policy.

But the Court nonetheless expressed an overriding concern with laws that punished individuals for circumstances beyond their control[187]—a core principle of equal protection jurisprudence. It expressed particular concern over the fact that undocumented children had little or no control over their

175. Plyler v. Doe, 457 U.S. 202, 216–17 (1982).
176. *See id.* at 210–16.
177. *See id.* at 216–18.
178. *See id.* at 217–18.
179. *See id.* at 220 ("Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.").
180. *See id.* at 205.
181. *See id.*
182. *Id.* at 213.
183. *See id.* at 216–20.
184. *Id.* at 219 n.19.
185. *Id.*
186. *See id.* at 220.
187. *See id.*

undocumented status: "Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."[188] Indeed, the undocumented status of these children was determined by a combination of the conduct of their parents and the poorly implemented immigration policies of the U.S. government.[189]

The Court focused on the role of government policies in creating an underclass of undocumented immigrants, shifting some of the blame from the immigrants themselves, and thus further shifting any conceivable blame away from their children. Indeed, the innocence of the immigrant children was a key theme in the Court's analysis:

> Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants . . . . [T]he children who are plaintiffs in these cases "can affect neither their parents' conduct nor their own status." . . . "[I]mposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[190]

This language touches on the core values originally animating the Supreme Court's suspect classification analysis, which can be framed as a status/conduct distinction: in our democracy, the law may only penalize conduct that is under the individual's control, not a status or identity that is beyond the individual's control.[191]

The Court also expressed the related principle that laws cannot differentially distribute legal benefits based on a trait (undocumented status) unrelated to the benefit at issue (primary education).[192] In asserting that the law met the first prong of rational basis review—serving a legitimate governmental interest—the State offered the goal of supporting federal immigration policy, which disapproved of the presence of undocumented immigrants in the country.[193] In assessing this interest, the Court noted that it is unquestionably legitimate and within the State's prerogative to decide

---

188. *Id.* at 216 n.14.

189. In discussing the status of undocumented aliens, the Court noted that ineffective enforcement of immigration laws had created "a substantial 'shadow population'" in the United States, raising "the specter of a permanent caste of undocumented resident aliens." *Id.* at 218–19. "The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law." *Id.* at 219.

190. *Id.* at 219–220 (fifth alteration in original) (emphasis omitted) (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977), Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

191. "[D]enial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." *Id.* at 221–22.

192. *See id.* at 224–26.

193. *See id.*

how to distribute educational resources and to prefer residents over undocumented immigrants.[194] But the Court insisted that this was not a blanket authorization to impose disabilities on the group—in particular because federal immigration policy was not concerned with educational opportunities for children.[195] Denying educational opportunities to these children was "not a rational response" to federal policy disapproving of the presence of these children in the country.[196] Imposing immigration consequences would address the problematic conduct, but imposing unrelated educational consequences was effectively punishing status.[197]

The State further argued that the law served the interest of "'preserv[ing] the state's limited resources for the education of its lawful residents.'"[198] The Court responded, "The State must do more than justify its classification with a concise expression of an intention to discriminate."[199] Further, there was no demonstrated connection between denying education to children and the State's purported interest in "protect[ing] itself from an influx of illegal immigrants."[200]

While acknowledging that it was not permitted to "reduce expenditures for education by barring [some arbitrarily chosen class of] children from its schools," the State nonetheless contended that excluding undocumented children was not "arbitrary."[201] In particular, the State argued that educating undocumented children interfered with the goal of "provid[ing] high-quality public education."[202] But in examining the record, the Court found no evidence of a connection between excluding undocumented children and educational quality.[203] Rather, the Court concluded that undocumented children were "indistinguishable" from other children in terms of the costs of educating them.[204] Thus, it would be arbitrary to single them out for rights deprivation.

Under *Plyler*, impermissible animus includes a bare desire to exclude a particular social group, and the presence of animus can be proven by the lack of an affirmative relationship between the trait defining the classification (immigration status) and the interests being regulated (public education).

This concern with laws that enforce class distinction was also at the core of the Court's decision in *Zobel*. The law at issue was an Alaska statute

194. *See id.* at 224.
195. *Id.* at 226.
196. *Id.* at 224 n.21.
197. *See id.* at 226.
198. *Id.* at 227 (quoting Brief for the Appellants at 26, Plyler v. Doe, 457 U.S. 202 (1982) (No. 80-1538), 1981 WL 389967, at *26).
199. *Id.* (citing Examining Bd. v. Flores de Otero, 426 U.S. 572, 605 (1976)).
200. *Id.* at 228.
201. *Id.* at 229.
202. *Id.*
203. *See id.*
204. *Id.*

that created a fund based on the State's oil revenue and distributed money from that fund differentially to residents based on years of residency.[205] In a move repeated years later in *Romer*, the Court declined to consider whether heightened scrutiny was required for the law, instead proceeding directly to rational basis review.[206]

The Court first noted that the State's goal—"creating a financial incentive for individuals to establish and maintain Alaska residence"—was not rationally related to the mechanism of financially disfavoring new residents.[207] Further, the Court expressed concern that "Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency."[208] This, in turn, "would permit the states to divide citizens into expanding numbers of permanent classes"[209]—a result that, according to the Court, "would be clearly impermissible."[210] The law failed, in part, because of its tendency to create permanent social classes—in essence, a caste society.

3. Animus and Moral Disapproval: *Lawrence v. Texas*

Finally, we come to *Lawrence*—the case that righted the wrongs of *Bowers* a mere seventeen years after *Bowers* was decided. While nominally a due process case, the real focus of *Lawrence* was to reject differential treatment based on sexual orientation.[211] *Lawrence* addressed whether a state could criminalize homosexual sodomy that took place in private between consenting adults.[212] There was no question that the animating spirit of the law was bare moral disapproval of homosexual conduct and identity.[213] The question was whether such disapproval was a permissible basis for legislation.[214] The Court held that it was not.[215]

In 1986, the majority in *Bowers* had framed the relevant question as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[216] Starting from this premise, the *Bowers* Court easily concluded that the Constitution conferred no such right

205. *See* Zobel v. Williams, 457 U.S. 55, 56 (1982).
206. *See id.* at 60–61; *see also* Romer v. Evans, 517 U.S. 620, 631–32 (1996).
207. *Zobel*, 457 U.S. at 61–62.
208. *Id.* at 64.
209. *Id.*
210. *Id.*
211. *See* Lawrence v. Texas, 539 U.S. 558, 574 (2003) (holding that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do," because sexual relationships are "'matters[] involving the most intimate and personal choices a person may make in a lifetime'" (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).
212. *See id.* at 563.
213. *See id.* at 568–69.
214. *See id.* at 578–79.
215. *See id.*
216. Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

and, therefore, state laws could permissibly reflect traditional and deep-seated moral disapproval of sodomy, homosexuality, and homosexuals.[217]

The majority in *Lawrence* signaled its intent to depart from *Bowers*' approach with the first words of its decision: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places."[218] Thus, the *Lawrence* Court focused on universal rights—specifically, liberty—and examined the extent to which the government could permissibly intrude on individual liberty, rather than searching the text of the Constitution for permission to engage in a particular sex act.[219] Thus, the first step in reversing the *Bowers* decision was to frame the issue in terms of broad and common interests in liberty, autonomy, and privacy.[220] The *Lawrence* majority then tied these broad concepts to the conduct at issue by analogizing to the themes of bodily, reproductive, and sexual autonomy present in *Eisenstadt v. Baird*,[221] *Griswold v. Connecticut*,[222] and *Carey v. Population Services International*.[223]

And here the submerged equal protection analysis of the *Lawrence* majority began to emerge. Everyone enjoys rights to bodily autonomy and privacy in intimate relations. Denying these rights to some but not others based on sexual orientation was class-based treatment justified by nothing more than private moral preferences. Indeed, despite disavowing an equal protection framework, the Court nonetheless asserted that "[p]ersons in a homosexual relationship may seek autonomy for these purposes [making choices about one's intimate and personal life], just as heterosexual persons do."[224]

Laws criminalizing sodomy—whether all acts of sodomy or only homosexual sodomy—can be seen as laws that give effect to purely private moral preferences, which are not properly the subject of public legislation. In this way, *Bowers* and *Lawrence* dovetail with the Court's animus cases in reaffirming the proper and improper objective function of the laws. Indeed, the *Lawrence* Court recognized that beliefs about the immorality of homosexuality were deeply and sincerely held:

> The condemnation [of homosexual conduct] has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.[225]

---

217. *Id.* at 190–96.
218. *Lawrence*, 539 U.S. at 562.
219. *Id.* at 564.
220. *Id.*
221. 405 U.S. 438 (1972).
222. 381 U.S. 479 (1965).
223. 431 U.S. 678 (1977).
224. *Lawrence*, 539 U.S. at 574.
225. *Id.* at 571.

Still, the fervor and consensus surrounding these beliefs did not make them a fit subject for public legislation: "These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the state to enforce these views on the whole society through operation of the criminal law."[226] That is, the reasonableness or correctness of the bias does not matter. "'[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.'"[227] It is of course permissible for private actors to have such morally and religiously based beliefs, and to fight for their beliefs in the realm of culture, but not to use the public laws to enforce and reify those beliefs.

Thus, *Lawrence* provides contemporary confirmation of truths established in earlier cases: that the law cannot be used to enforce private biases, and that the fact that such biases are widely, dearly, and sincerely held is irrelevant to the analysis.

In her concurrence to *Lawrence*, Justice O'Connor explicitly articulated what the majority indicated only implicitly. The real problem with the anti-sodomy law was that it targeted homosexuals alone for conduct in which heterosexuals were permitted to engage:

> The statute at issue here makes sodomy a crime only if a person "engages in deviate sexual intercourse with another individual of the same sex." Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants.[228]

The law was invalid because it "ma[de] homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction."[229] In other words, the objective of the law was "'a bare . . . desire to harm a politically unpopular group,'"[230]—an example of unconstitutional animus.

In response to the State's argument that it had a legitimate interest in promoting morality, Justice O'Connor contended (somewhat improbably),

---

226. *Id.*

227. *Id.* at 577–78 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

228. *Id.* at 581 (O'Connor, J., concurring) (citing TEX. PENAL CODE ANN. § 21.06(a) (West 2003)).

229. *Id.*

230. *Id.* at 580 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)). According to Justice O'Connor, the effect of a finding of animus was to trigger "a more searching form of rational basis review." *Id.* She further noted that, while the vast majority of laws generally survived rational basis review, the Court was most likely to strike a law under this deferential standard where the law served to "inhibit[] personal relationships." *Id.* In support of this contention, she pointed to *Moreno* and *Cleburne*, both of which analyzed laws dealing with the freedom to enter into certain living arrangements, as well as *Eisenstadt*, in which the law at issue dealt with access to contraception. *See id.*

that "*Bowers* did not hold that moral disapproval of a group is a rational basis under the Equal Protection Clause."[231] Indeed, Justice O'Connor asserted, moral disapproval of a group, "like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."[232] Justice O'Connor thereby properly placed the emphasis back on the status-conduct distinction that is necessarily implicated by the Equal Protection Clause's overarching principles. Along these lines, she rejected that State's contention that the law targeted conduct rather than status, observing that homosexual conduct "is closely correlated with being homosexual."[233] Thus, one could not escape the fact that the law was "directed toward gay persons as a class."[234]

Both the majority opinion (implicitly) and the concurrence (explicitly) in *Lawrence* recognized the principle that laws criminalizing homosexual conduct in fact criminalized homosexual identity, and that bare moral disapproval of a social group based upon identity was an impermissible purpose for legislation. This conclusion did not rest on a determination of whether the underlying bias was justified, widely held, or based in sincere religious or moral beliefs. Rather, it rested on the premise that the laws do not exist to enforce and solidify such biases.

III. TOWARD A UNIFIED THEORY OF ANIMUS

There are three open questions at this point in the Supreme Court's animus jurisprudence: (1) How does the Court define unconstitutional animus? (2) What does the Court accept as evidence of animus? (3) What doctrinal significance does the Court attach to a finding of animus? To advance the strongest theory of animus, we must answer these questions with an eye toward accounting for all of the Supreme Court's animus cases and reflecting the core principles of the Equal Protection Clause.

A. Defining Animus

Definitions of unconstitutional animus can be placed on a spectrum from understanding animus as a form of impermissible subjective intent, to understanding animus as a form of impermissible objective function. On one end of the spectrum is the understanding of animus that Justice Scalia articulated in his dissent to *Romer* and which the First Circuit recently reiterated in *Massachusetts v. United States Department of Health and Human Services*[235]: that animus is "a fit of spite."[236] While this narrow

231. *Id.* at 582.

232. *Id.* (citing Romer v. Evans, 517 U.S. 620, 634–35 (1996), U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

233. *Id.* at 583.

234. *Id.*

235. 682 F.3d 1 (1st Cir. 2012)), *aff'g* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010), *and* Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp.

understanding accounts for some of the Court's animus cases, it is refuted by the majority of them.[237] For example, the record in *Cleburne* did not suggest that the community was expressing "spite" toward those with cognitive disabilities. Rather, the discrimination in that case was based on stereotypes and unfounded fears.[238] Similarly, in *Palmore*, the animus at issue was not "spite" toward interracial couples per se, but very real and very pervasive private bias.[239] In the segregation cases—*Brown* and *Loving*—one cannot directly identify "spite"; rather, there was simply the bare purpose of separating groups of persons based on race.[240] And finally, *Plyler* and *Zobel* can be seen as instances where the government merely sought to preserve resources for a favored social group, not harm the excluded group.[241] Thus, there are many forms of subjective intent other than "spite" that fall into the category of unconstitutional animus.

A somewhat broader definition of animus still located in the subjective intent camp understands animus as the desire to harm a politically unpopular group. This understanding was first set forth in the Court's decision in *Moreno* and became the centerpiece of *Romer*. Again, however, a showing of desire to harm is sufficient to prove animus, but is not necessary. As discussed above, such intent was not explicitly present in *Palmore*, *Cleburne*, *Brown*, *Loving*, *Plyler*, or *Zobel*.

In the wake of *Romer*, Akhil Amar advanced a theory of animus that focused less on subjective intent and more on objective function, understanding the animus doctrine as a variation of the prohibition against bills of attainder.[242] This is an understanding of animus that is very much tied to *Romer*'s focus on the way in which Amendment 2 "singled out" gays and lesbians for disfavored treatment—a theme the Ninth Circuit then reiterated in *Perry*.[243] But again, looking at other animus cases, it is apparent that this is a part, but not the whole, of animus. For example, the City Council in *Cleburne* did not "single out" those with cognitive disabilities in the way that Amar describes. Rather, the council applied an

---

2d 234 (D. Mass. 2010), *petitions for cert. filed*, Nos. 12-13 (U.S. June 29, 2012), 12-15 (U.S. July 3, 2012), *and* 12-97 (U.S. July 20, 2012).

236. Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting); *Massachusetts*, 682 F.3d at 15–16 (discussing moral disapproval of homosexuality as a justification for DOMA).

237. *See supra* Part II.A.

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

239. *See* Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

240. Loving v. Virgina, 388 U.S. 1, 11 (1967); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

241. Plyler v. Doe, 457 U.S. 202, 207–08 (1982); Zobel v. Williams, 457 U.S. 55, 59 (1982).

242. *See* Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203, 203–04 (1996).

243. *See id.* at 207–08; *see also* Perry v. Brown, 671 F.3d 1052, 1076 (9th Cir. 2012), *aff'g* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *petition for cert. filed*, No. 12-144 (U.S. July 30, 2012) (excluding same-sex couples from state-sponsored marriage while allowing opposite-sex couples access to that "honored" status).

existing discretionary framework with reference to private bias.[244] The process flaw there was not the process of singling-out, but the reliance on private bias. While the "singling-out" dynamic was arguably present in *Moreno*, *Romer*, *Plyler,* and *Lawrence*, it does not adequately explain what was impermissible about the laws in *Palmore*, *Cleburne*, *Brown*, *Loving,* and *Zobel*. Taking into account all of these cases—from those in which state or private actors explicitly express hostility toward a particular group to those where a law appears to simply cordon off scarce resources on superficially reasonable grounds—what emerges is that animus is a type of impermissible objective function. Specifically, animus is present where the public laws are harnessed to create and enforce distinctions between social groups—that is, groups of persons identified by status rather than conduct.

There are strong policy considerations behind this understanding of animus. First, such laws run counter to the meritocratic principles underlying the Equal Protection Clause, the Constitution generally, and American democracy as a whole.[245] Second, per *Brown* and *Loving*, laws that perform this function always express an ideology of social group supremacy—something the Constitution does not permit.[246] Third, the effect (intended or not) of such laws is to create permanent classes, or castes, which strikes at the heart of the fundamental and ambitious purpose of the Equal Protection Clause: to eliminate all forms of class-based legislation.[247]

B. Evidence of Animus

A related but distinct question is how, given the available precedent, plaintiffs can prove that a challenged law is based in unconstitutional animus. The cases instruct that there are essentially two methods: by pointing to direct evidence of private bias in the legislative record, or by supporting an inference of animus based on the structure of a law.[248]

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

245. *See* Maxwell L. Stearns, *Direct (Anti-)Democracy*, 80 GEO. WASH. L. REV. 311, 369–83 (2012).

246. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (noting that "[t]he fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy" and striking this purpose as invidious discrimination); Brown v. Bd. of Educ., 347 U.S. 483, 490 n.5 (1954) (noting that the Fourteenth Amendment forbids laws that "imply[] inferiority in civil society" (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1879))).

247. *See* William N. Eskridge, Jr., *Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?*, 50 WASHBURN L.J. 1, 3 (2010).

248. Eric A. Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 VA. L. REV. 1091, 1117 (2006) (asserting that where a law is not facially discriminatory and there is no indication of animus in its legislative history, the democratic process has not failed).

The easy case is where the record presents direct evidence of private bias as the impetus behind adopting a law.[249] Such statements may be made by legislators or private individuals and may express any number of sentiments that shed light on the true function of the law: a mere recognition of the existence of private bias;[250] an expression of bare moral disapproval;[251] and/or statements of stereotype or fear.[252]

In terms of inferring animus based on the structure of the law, *Cleburne* provides the most compelling example. In essence, the Court in *Cleburne* performed a sort of micro-suspect classification analysis to infer the presence of animus. Traditional suspect classification analysis examines a number of factors, including whether: (1) the group targeted by the classification is politically powerless; (2) that group has suffered a history of discrimination; (3) the characteristic defining the group is immutable; and (4) the characteristic is ever a valid consideration in legislative action.[253] Based on a fact-intensive assessment of these various inherently changeable and backward-looking factors, the Court imposes a prospective presumption that laws relying on such classifications are suspect, and expresses this suspicion by applying heightened scrutiny in such cases.

The analysis performed in *Cleburne* was a "micro" suspect classification analysis in that it did not seek to declare the classification suspect for all time (indeed, the *Cleburne* Court declined to designate persons with cognitive disabilities as a suspect class, largely because the defining trait would often be relevant to valid legislative goals),[254] but instead looked at the validity of the classification in light of the interests at stake in that particular case. In *Cleburne*, there was no affirmative connection between the trait of cognitive disability and either (1) the plaintiffs' entitlement to generally available group housing, or (2) the government's interest in regulating group housing. In the absence of this type of logical connection, animus may be inferred. This kind of analysis—which focuses closely on the nature of the trait being used—expresses a general skepticism of class-based legislation, without reifying fixed "categories of concern" (suspect

249. *See supra* note 74 and accompanying text (discussing the legislative history of the law challenged in *Moreno*); *supra* notes 114–15 and accompanying text (discussing the same with respect to the law in *Cleburne*).

250. *See supra* notes 96–98, 103, 105 and accompanying text (describing the bias at issue in *Palmore* and the Supreme Court's reaction to it).

251. *See* Lawrence v. Texas, 539 U.S. 558, 571 (2003) (discussing the role that moral disapproval played in *Bowers*).

252. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) ("[M]ere 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.").

253. *See* Eskridge, *supra* note 247, at 10.

254. *See Cleburne*, 473 U.S. at 442 (concluding that cognitive disability is not a suspect classification because "it is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world").

classifications) and, by extension, categories of presumptive non-concern (non-suspect classifications).

By contrast, the Court's structural analysis of animus in *Romer* does not really hold water. The Court in essence said that Amendment 2 must be based in animus because there was a radical lack of fit between the law's means and ends—but this of course would mean that the law would fail standard rational basis review, making the Court's conclusion regarding animus doctrinally gratuitous.

As discussed above, the real story with *Romer* was that there was ample direct evidence of animus, but the Court could not invoke this evidence because *Bowers* was still good law when *Romer* was decided—and *Bowers* could certainly be read to authorize legislative disfavoring of sexual minorities. Thus, the *Romer* Court instead characterized Amendment 2 as an impermissible "sort" of law invalidated by its structure, not by virtue of the fact that it expressed disapproval of sexual minorities.[255]

Rather than provoking the Court to apply a form of heightened scrutiny, we can read the cases as providing plaintiffs with an opportunity to challenge rational basis review with affirmative evidence. Specifically, the Court allows plaintiffs to affirmatively prove the presence of unconstitutional animus through close examination of the connection between the identifying trait and the interests—both individual and governmental—implicated by the law. This understanding of unconstitutional animus and what it takes to prove its existence has several advantages from a doctrinal perspective. First, it does not require proof of subjective intent along the lines of the discriminatory intent doctrine deployed in cases of nonfacial discrimination. This is appropriate because the Equal Protection Clause demands heightened skepticism of laws containing facial classifications of persons; there is no reason to require that such classifications be invoked maliciously. Second, it does not require judges to engage in the dangerous business of making broad assessments about the relative political power of particular groups, the degree of discrimination they have suffered, etc. (i.e., the factors of suspect classification analysis). Such assessments are best avoided because they rest in the shifting sands of political and social reality and should not be cemented in precedent. They also suggest that discrimination against some (non-suspect or quasi-suspect) social groups is permissible. Further, there are serious questions about the extent to which courts are qualified to assess social reality in this fashion. Finally, this understanding of unconstitutional animus gives life to the essential anti-caste mandate of the Equal Protection Clause, but in a way that is at once more concrete—because it is grounded in limited factual findings—and more flexible—because it involves a case-

255. *See* Romer v. Evans, 517 U.S. 620, 633 (1996) ("It is not within our constitutional tradition to enact laws of this sort.").

by-case assessment of the validity of all classifications of persons on the basis of status or identity (social group classifications) versus conduct.[256]

C. The Doctrinal Significance of Animus

Finally, the Court's animus jurisprudence to date has created considerable confusion over the doctrinal significance of a finding of animus. Some cases suggest that while animus itself is not a legitimate state interest, the presence of other, credible legitimate state interests might save a law. Theorists have offered that invoking animus is nothing more than a way for the Court to treat sexual orientation as a suspect classification without admitting that this is what it is doing.[257] Perhaps the most mainstream theory of animus is that it is nothing more than a trigger for the mythical creature of "heightened rational basis review."[258] For example, in concurring with the outcome in *Lawrence*, Justice O'Connor characterized animus as "a desire to harm a politically unpopular group," and asserted that in cases where animus was present, the Court had then "applied a more searching form of rational basis review."[259] Under this theory, the real doctrinal power of animus is that it triggers a form of heightened scrutiny.

There are several problems with this approach. First, like the "fit of spite" conception, it rests on an amorphous and incomplete understanding of animus. Further, understanding animus as nothing more than a gateway to "heightened rational basis review" perpetuates the unjustified fixation on levels of scrutiny in equal protection jurisprudence. As others have noted, this fixation on levels of scrutiny actually shortcuts nuanced, substantive assessment about what sort of laws are fair or unfair, and why. In addition, the Court has never acknowledged that it applies "heightened rational basis review" in certain cases, and it is difficult to imagine the incentive for adding yet another level of scrutiny to an already dubious doctrinal taxonomy.

---

256. *Cf.* Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2428–29 (1994) (discussing the anticaste principle in relation to race and gender).

257. *See, e.g.*, Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 WM. & MARY BILL OF RTS. J. 89, 93 (1997) (asserting that gays ought to be recognized as a suspect class but that *Bowers v. Hardwick* was "the principal doctrinal obstacle to this conclusion").

258. *See Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) (asserting that the effect of a finding of animus was to trigger "a more searching form of rational basis review"); Perry v. Brown, 671 F.3d 1052, 1094 (9th Cir. 2012), *aff'g* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *petition for cert. filed*, No. 12-144 (U.S. July 30, 2012) (asserting that when legislation singles out a certain class of citizens for disfavored legal status, even when analyzing the law under rational basis review, a court insists on knowing the relation between the classification adopted and the object to be attained, so that it may determine whether the law exists to further a proper legislative end or simply to put the class at a disadvantage); Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1529 (2004).

259. *See Lawrence*, 539 U.S. at 580.

Finally, this view is problematic because it suggests that a court could find that a law was based in animus, but nevertheless conclude that the law satisfied so-called "heightened rational basis review." This would put the courts in the position of validating laws animated by purpose fundamentally at odds with the values of the Equal Protection Clause.

In reality, when the Court identifies evidence of animus, it discredits the other purported state interests, regardless of whether they are legitimate on a superficial level. Thus, animus acts as a doctrinal silver bullet. This is appropriate, because if animus is, indeed, constitutionally impermissible, no law found to be based in animus should be permitted to stand.

IV. ANIMUS GOING FORWARD

The doctrine of unconstitutional animus has lain dormant in the Supreme Court's jurisprudence since its 1996 decision in *Romer*, but it appears primed to make an appearance. In particular, animus has been discussed in a number of lower court cases dealing with the issue of same-sex marriage—most notably in the Ninth Circuit's decision in *Perry*, in which a certiorari petition is pending at the time of this writing. If the Court grants certiorari in *Perry*, the Court will have the opportunity to make a critical pronouncement on animus. If the Court denies certiorari in *Perry*, then the Ninth Circuit's interpretation of animus will likely be considered the authoritative interpretation by lower courts going forward. And this is problematic, because the Ninth Circuits characterization of animus does not represent the totality of the doctrine as explored in the Supreme Court's equal protection jurisprudence. In particular, the primary feature of the Ninth Circuit decision is that it grounds itself almost entirely in the doctrine of animus as articulated in *Romer*, which is not the most clear or the most vigorous of the Court's animus cases. As a result, *Perry* offers a rather thin understanding of animus that does not account for the larger animus tradition.

Thus, the main risk the Ninth Circuit's decision in *Perry* poses (a risk potentially exacerbated if the Supreme Court hears the case and affirms it on similar grounds) is that the *Perry* decision understands animus too narrowly, ignoring the more vigorous understanding of animus presented in the totality of the Supreme Court's animus jurisprudence.[260] The Ninth Circuit did not purport to present a comprehensive rule for animus; rather, it only sought to identify animus on the facts of the case before it. But it is possible that state courts, lower federal courts, and the Supreme Court would reject other types of animus claims in future cases by distinguishing those cases from *Perry*. And that would be wrong.

260. Indeed, a federal district court subsequently declined to apply the animus holding form *Perry* to the same-sex marriage ban before it, distinguishing *Perry* on its facts. *See* Jackson v. Abercrombie, No. 11-00734, 2012 WL 3255201, at *18–21 (D. Haw. Aug. 8, 2012).

Unfortunately, this turn of events has already taken place. A few months after *Perry* was issued, the federal district court in Hawaii issued its decision in *Jackson v. Abercrombie*.[261] That case involved a challenge to Hawaii's marriage laws, which provide reciprocal beneficiary benefits but purposefully exclude same-sex couples from the definition of marriage. Despite the Ninth Circuit's clear statement that animus was not confined to "spite," the federal district court in Hawaii read the *Perry* decision differently. First, the court concluded that *Perry* was inapposite as a whole because Hawaii's prohibition on same-sex marriage did not function to "take away" existing rights, as Proposition 8 did.[262] Indeed, Hawaii had never granted marriage rights to same-sex couples, so there was nothing to take away.[263] This factual difference between the challenged laws was sufficient to make the *Perry* decision irrelevant.

Second, the district court determined that *Romer* also did not apply because, while Amendment 2 was concededly a law "of unusual character," this could not be said of Hawaii's same-sex marriage ban, as such bans were widespread and typical:

> In Romer, the Supreme Court explained that the "disqualification of a class of persons from the right to seek specific protection from the law [was] unprecedented." The Supreme Court found the absence of precedent for Amendment 2 instructive; "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." Here, in contrast, the definition of marriage as a union between a man and woman is not without precedent or unusual. In fact, it is the historically and traditionally understood definition; while marriages between same-sex couples was first allowed by a state in 2004 and since then, only by a minority of states.[264]

The district court did not consider other aspects of the animus doctrine, or the articulation of animus in other cases. Further, the court insinuated that it would find animus only in cases where the legislature or the populace acted "absurdly, ignorantly, or with bigotry"[265]—a contention that directly conflicts with *Perry*'s instruction (based on the Supreme Court's own animus jurisprudence) that animus can be grounded in much milder sentiments, including stereotype and disapproval.[266]

---

261. *See id.* at *18–21.

262. *Id.*

263. *Id.* at *22.

264. *Id*. (citations omitted). This is a good demonstration of why the *Romer* rule is so weak. It assesses animus by reference to convention—it is not a powerful tool in identifying contemporary prejudices.

265. *Id*.

266. *See* Perry v. Brown, 671 F.3d 1052, 1094 (9th Cir. 2012), *aff'g* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *petition for cert. filed*, No. 12-144 (U.S. July 30, 2012) (noting "[t]he 'inference' that Proposition 8 was born of disapproval of gays and lesbians is heightened by evidence of the context in which the measure was passed" such as the district court's finding "that '[t]he campaign to pass Proposition 8 relied on

A. Animus and the Ninth Circuit's Decision in Perry

The Ninth Circuit repeatedly emphasized that it was addressing a narrow issue in its decision: whether the Equal Protection Clause permitted a state (here represented by the people operating through the referendum process) to enact a law the sole purpose of which was to deprive a designated group of rights that they previously possessed.[267] The court bluntly stated that it was not deciding the broader question of whether states could bar same-sex couples from marriage in other ways without running afoul of federal equal protection principles.[268]

There are good reasons why the Ninth Circuit decided *Perry* on narrow grounds.[269] First, limiting the decision to the particular facts presented in California arguably made the decision irrelevant to other jurisdictions, decreasing the chance that the United States Supreme Court would grant certiorari review. Second, by limiting the implications of the decision, the Ninth Circuit panel also may have lessened the chances of reversal were the Court to grant cert. Third, and most appropriate, confining the decision to the narrowest possible grounds was an act of judicial restraint.

But resting the decision on narrow legal and factual grounds did not necessarily require the Ninth Circuit to articulate such an excessively narrow view of the doctrine of unconstitutional animus. The court could have acknowledged that animus could be found in other types of laws, while emphasizing that the extraordinary legal mechanism before it was a clear example of such impermissible laws.

The Ninth Circuit's decision is a case study in the rhetoric of judicial constraint, which was motivated by several factors. The first form of constraint was the necessity of framing the issue before the court as narrowly as possible, in recognition of the doctrine of constitutional avoidance. The court was further constrained by the state supreme court's factual findings regarding the nature, scope, and effect of Proposition 8. In addition, the Ninth Circuit was constrained by the federal district court's findings of fact, which the appellate court could reconsider only in the case of clear error. Finally, the court was also constrained by Supreme Court precedent—most significantly, the Court's decision in *Romer*.

The Ninth Circuit's devotion to *Romer* is problematic because, as demonstrated above, *Romer* is the most compromised and unhelpful of the Court's animus cases. The *Romer* Court presumably could have relied on direct evidence of private biases, and could have invalidated Amendment 2

---

stereotypes to show that same-sex relationships are inferior to opposite-sex relationships.'") (citations omitted).

267. *See Perry*, 671 F.3d at 1064.

268. *Id.* at 1083.

269. *See* William Eskridge, *The Ninth Circuit's* Perry *Decision and the Constitutional Politics of Marriage Equality*, 64 STAN. L. REV. ONLINE 93 (2012) (crediting the Ninth Circuit's decision in Perry as conforming with ideals of judicial minimalism and respect for the democratic evolution of views on same-sex marriage).

on that basis, a la *Palmore*. But because *Bowers* emphatically stood for the proposition that stigmatizing gays was acceptable, *Romer* drew attention away from this substantive objection and instead inferred animus from a dubious structural analysis.

Thus, in mimicking *Romer*, the Ninth Circuit's first step in addressing the animus argument was to carefully describe the precise effect of the challenged law.[270] Why? Because of the various ways one might describe the Supreme Court's holding in *Romer*, it is at heart a structural analysis of unconstitutional animus. That is, the *Romer* Court looked to the structure rather than the content of the challenged law to infer that it was based on animus. Specifically, the *Romer* Court focused on the relationship between the broad rights-deprivation worked by Colorado's Amendment 2 and the relatively flimsy justifications offered for the law. And the Ninth Circuit conducted this same kind of analysis.

As discussed above, the exact scope and impact of Proposition 8 were issues that neither the Ninth Circuit nor the federal district court had to decide. This is because the California Supreme Court had authoritatively interpreted the question back in 2009. Nonetheless, when restating that holding and further characterizing the law, the Ninth Circuit chose its words carefully. Most dramatically, Proposition 8 "stripped"[271] same-sex couples of the marriage right; it "deprived,"[272] "eliminat[ed],"[273] "took . . . away,"[274] "excise[d]," [275]"den[ied]"[276] and "withdr[ew]."[277] As with Colorado's Amendment 2, the proponents of Proposition 8 contended that the law did not deprive the targeted group of rights, but merely restored the status quo. In *Perry*, as in *Romer*, showing how the law actively deprived individuals of rights they previously enjoyed was critical to contending that this rights-deprivation was not justified.

The relevant inquiry in *Romer* was not whether the state of the law after Amendment 2 was constitutional; there was no doubt that the Fourteenth Amendment did not require antidiscrimination protections to be afforded to gays and lesbians. The question, instead, was whether the change in the law that Amendment 2 effected could be justified by some legitimate purpose.[278]

In addition to demonstrating that Proposition 8 worked an affirmative and dramatic change in legal rights, the Ninth Circuit emphasized the law's focus on depriving same-sex couples of the symbolic meaning and social

270. *See id.* at 1076–82.
271. *Id.* at 1063.
272. *Id.* at 1082.
273. *Id.* at 1069 n.4.
274. *Id.* at 1077.
275. *Id.* at 1081.
276. *Id.*
277. *Id.*
278. *Id.* at 1083 (emphasis omitted).

status associated with the term "marriage."[279] The court pointed to all of the marriage-like rights that same-sex couples retained after the passage of Proposition 8—rights related to children, medical decisions, and joint property.[280] Thus, what Proposition 8 accomplished was exceedingly narrow, but not insignificant, because of the profound and unique meaning of the word and designation, "marriage."[281] By emphasizing that extremely limited scope of Proposition 8, the Ninth Circuit departed from the Supreme Court's approach in *Romer*, which emphasized the broad impact of Colorado's Amendment 2. But the Ninth Circuit explained that both modalities—deprivation of a broad swath of rights and extremely targeted denial of a highly cherished right—served to arouse suspicions that the law was "born of animosity toward the class of persons affected."[282]

Having characterized the impact of Proposition 8, the Ninth Circuit went on to discuss the *Romer* decision at some length, and then examined the similarities and differences between the laws at issue in each case. The primary similarity between the two laws is that they singled out a particular group and denied to that group rights that were broadly available to others.[283] The laws did not reflect real differences; rather, they created class distinctions by placing the targeted group "in a solitary class" with respect to important rights.[284] Further, this act of purposeful differentiation was enshrined in legal bedrock: the state constitution.

The court emphasized that it was not that states could never take away rights once granted, but that "the Equal Protection Clause requires the state to have a legitimate reason for withdrawing a right or benefit *from one group but not others*."[285] Here, the court appropriately drew an analogy to *Moreno*. Surely the "hippies" targeted in that case had no general right to demand food stamp entitlements, but once included in the scope of the legislation, the government had to give a reason for then deciding to purposefully exclude the group. The idea is that while the government need not extend certain benefits to unpopular groups in the first place, the law may not be used as a vehicle for retribution against such groups.

Having concluded that the fundamental mechanism of Proposition 8 supported an inference of animus, the Ninth Circuit next examined

> whether a legitimate interest exists that justifies the People of California's action in taking away from same-sex couples the right to use the official designation and enjoy the status of "marriage"—a legitimate interest that

279. *Id.* at 1092.
280. *Id.* at 1077.
281. *Id.*
282. *Id.* at 1080.
283. *See id.* at 1080–81.
284. *Id.* at 1081.
285. *Id.* at 1083–84.

> suffices to overcome the "inevitable inference" of animus to which Proposition 8's discriminatory effects otherwise give rise.[286]

The court found the proffered interests lacking.[287]

The court then went on to consider whether there might be other bases on which Californians had enacted the law. The court noted that the law functioned to preserve tradition (i.e., the tradition of exclusively heterosexual marriage), but that "tradition alone is not a justification for taking away a right that had already been granted."[288]

Concluding that there was no independent legitimate interest that Proposition 8 served, the court returned to "the inevitable inference that the disadvantage imposed is born of animosity toward" or even mere disapproval of the targeted group.[289] Here the court emphasized that it need not conclude that people of California operated on the basis of ill will or spite. Indeed, animus of the type discussed here really means "[p]rejudice," which "rises not from malice or hostile animus alone."[290] In a similar vein, the court noted that unconstitutional animus does not necessarily mean a "desire to harm"—"basic disapproval of a class of people" is sufficient.[291]

The court emphasized that the disapproval expressed by Proposition 8 was "of gays and lesbians as a class."[292] The court thereby drew on a status-conduct distinction: "It will not do to say that Proposition 8 was intended only to disapprove of same-sex marriage, rather than to pass judgment on same-sex couples as people."[293] In brief, private individuals are free to disapprove of classes of persons because of who they are, but they cannot use the public laws to enforce and express such disapproval.

It was not until the last few pages of the opinion that the court addressed the abundant direct record evidence of unconstitutional animus surrounding the Proposition 8 campaign. The court concluded by responding to Justice Scalia's dissent in *Romer*, ruling that the plaintiffs here did not need to prove that the People of California passed Proposition 8 out of a "fit of

---

286. *Id.* at 1085.

287. In keeping with its practice of avoiding controversial questions where possible, the Ninth Circuit declined to directly address whether "protecting religious liberty" was substantively a legitimate state interest, as opposed to just another name for impermissible private bias. The court again turned to the tailoring prong of rational basis review and concluded that there was no evidence that religious liberty was threatened before the passage of Proposition 8 or protected after its enactment. *Id.* at 1091–92.

288. *Id.* at 1092 (emphasis omitted). Again, focus on withdrawing previously granted rights seems excessive and possibly limiting. Tradition did not validate antimiscegenation laws in *Loving*, despite the fact that the law in Virginia had never affirmatively conferred a right to interracial marriage. Similarly, preserving tradition was deemed an insufficient basis for legislation in *Lawrence v. Texas*, where, again, there was no reversal of rights as presented in the *Perry* case. The *Perry* decision cites both of these cases. *See id.* at 1093.

289. *Id.* at 1080.

290. *Id.* at 1093 (citing Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring)).

291. *Id.* at 1094.

292. *Id*.

293. *Id.* at 1093.

spite."[294] Rather, "[i]t is enough to say that Proposition 8 operates with no apparent purpose but to impose on gays and lesbians, through the public law, a majority's private disapproval of them."[295]

The substantive outcome of the court's analysis was to suspect the presence of animus where a law took away rights that had previously been granted, thus focusing on (and seemingly requiring) a change in the law over time. Once this suspicion was raised, the court then demanded that the governmental interests purportedly served by the law justify not just reliance on the subject classification (the usual tailoring inquiry under rational basis review), but the rights deprivation itself.[296] This approach to the animus analysis is interesting, but it hangs other animus cases out to dry. Given that Proposition 8 (1) objectively functioned to differentially distribute legal rights among social groups, and (2) was enacted in a cloud of antigay bias, it should have been easy for the Ninth Circuit, following *Cleburne*, to identify unconstitutional animus.

B. The Next Cases

The Ninth Circuit's decision in *Perry* accords with much of the Supreme Court's animus jurisprudence, but it overanalyzes what is really a very clear-cut case of direct evidence of animus. In other words, the abundant evidence of antigay sentiment surrounding the campaign for Proposition 8 should have sufficed to prove that the law was based on unconstitutional animus (as in *Moreno*, *Palmore* and *Cleburne*).

The court arguably took this indirect route because of its excessive reliance on *Romer*, which is the most compromised and constrained animus case decided by the Supreme Court for the reasons cited above. Because *Bowers* was still good law at the time *Romer* was decided, *Romer* could not come out and say that antigay bias in particular was impermissible. Rather, *Romer* made much vaguer assertions about the impermissibility of certain types of laws, and then fit Amendment 2 into that ill-defined category. *Romer* was rightly decided, but it would have been decided through different reasoning had it been decided after *Lawrence*.

It is important to recognize the limited understanding of animus that *Perry* illustrates, because this limited understanding will not provide proper guidance in the same-sex marriage cases set in a different factual posture than *Perry*. *Perry* essentially understands animus as the granting and subsequent withdrawal of a right; and while this does seem to be evidence clearly supporting an inference of animus, this type of evidence will not necessarily be present in cases arising from other jurisdictions. However, this is not of great concern to potential litigants, because such evidence is

294. *Id.* at 1095.
295. *Id.*
296. *Id.* at 1093–94.

not required. All that is required is the type of affirmative evidence of private bias that was present in *Moreno*, *Palmore*, *Cleburne* and *Lawrence*.

CONCLUSION

Animus means not only "hostility," but also "animating spirit." We see that the Supreme Court's animus jurisprudence patrols all state action relying on status-based classifications for an impermissible animating spirit. This general suspicion of class-based legislation has been somewhat lost in the Court's tiers-of-scrutiny framework. In particular, many of the foundational cases in equal protection jurisprudence exhibit a profound suspicion of class-based legislation, especially where such classifications tend to create or enforce castes—legally sanctioned differences between social groups. But the Court's tiers-of-scrutiny framework subjects the majority of class-based legislation to the minimal scrutiny associated with rational basis review, gutting the principled and ambitious political vision of the Equal Protection Clause.

In contrast to the rigid, backward-looking suspect classification inquiry, the animus inquiry is flexible and responsive to contemporary prejudices. It provides meaningful review of laws that do not implicate established suspect and quasi-suspect classifications. Probably the best example is found in *Moreno*. The targets of congressional ill will in that case were "hippies"—a group that did not bear any of the indicia of a classic suspect classification and a group which many would argue were justifiably marginalized due to their belief system and lifestyle. This did not mean, however, that it was permissible to use the law to permanently enshrine that social marginalization. Laws that tend to create a caste society degrade our democracy and all of us.

This conception of animus is powerful because it takes us away from making tenuous social judgments about whether certain groups are sufficiently marginalized to merit special consideration under the Equal Protection Clause, or whether the marginalization of a group is justified. Instead, the animus inquiry asks whether a law impermissibly gives effect to—indeed, expresses—stereotypes or biases about a particular social group based on that group's status or associations rather than individual conduct. The question in an animus case is not whether the animus is justified; it is merely whether animus exists.