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A Rational Approach to California's Proposition 8

Jennifer Sirrine, Pepperdine University
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* Bachelor of Arts 2008, University of North Carolina, Chapel Hill; Juris Doctor Candidate 2012, Pepperdine University School of Law.
I. INTRODUCTION

In 2000, a former astronaut turned state senator, William Knight, introduced a change to the California Family Code.1 Proposition 22 reads “Only marriage between a man and a woman is valid or recognized in California.”2 After Proposition 22 was introduced, Mr. Knight’s son came out.3 Four years later, Mr. Knight died, without ever reconciling with his son.4

Proposition 22 was the precursor to Proposition 8, and the debate continues to present a very thorny, emotionally charged issue. On one hand there is the cry for equality, for the right to be able to choose whom to marry. Gay advocates relate stories of friends and family members who are prevented from engaging in a revered, loving practice every heterosexual American takes for granted. They argue equal rights are a fundamental trait of American society, and that this amendment flies in the face of that ideal. Proponents respond with the importance of adhering to history, and traditional family values. They raise the issue of religious freedom, of not being forced to demean the idea of traditional marriage—which is, and always has been, an institution solely between a man and a woman. On November 4, 2008, fifty two percent of California voters declared that the concept of traditional marriage prevailed.5

The legal challenge to Proposition 8’s constitutionality, however, has yet to be resolved. Though struck down in the district court on both due process and equal protection


2 Id.

3 Id.

4 Id.

grounds, it remains to be seen whether the amendment will be upheld in the higher courts. Because the Supreme Court has declined to clearly define a level of review that should be employed when dealing with statutes targeting homosexuals, lower courts—including those in the Ninth Circuit—have struggled with whether to utilize a stricter standard or adhere to the traditional rational basis test. While the district court in *Perry v. Schwarzenegger* employed almost every level of review to strike down Proposition 8, if the case reaches the Supreme Court, it is unlikely the Court will follow this reasoning, let alone affirm the holding.

The more searching rational basis test, however, might be the brush that untangles this knotty issue. While it maintains the same form as the traditional rational basis test, it is applied in a much more meaningful manner. Additionally, its application to Proposition 8 would finally establish a clear standard when reviewing classifications based on homosexuality. It would also provide a level of judicial review that gives meaningful examination to the issues surrounding statutes targeting homosexuals. But most importantly, the Court would have to decide whether or not to uphold Proposition 8 on its merits, rather than blindly adhering to the government’s proffered reasons for the amendment’s existence.

Part II of this comment examines Proposition 8 itself: the factual and legal history, as well as the arguments for and against it. The next section addresses the opinion in *Perry v. Schwarzenegger*. Part III then explores the rational basis test. This comment first examines the traditional rational basis test, its origin, and practical application. Part III then explores

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7 *See infra* notes 178–84 and accompanying text.

8 *See infra* Part II.

9 *See infra* Part III.
Department of Agriculture v. Moreno, Plyler v. Doe, and City of Cleburne v. Cleburne Living Center, to trace how the more searching rational basis test applies generally. The next section analyzes Romer v. Evans and Lawrence v. Texas, in order to apply the more searching rational basis test to statutes targeting homosexuals. Part IV analyzes the cases and determines when the more searching rational basis test should be applied, and attempts to precisely define the test. It further examines the more searching rational basis test’s applicability to Proposition 8. Finally, the comment concludes that the more searching rational basis test is the most logical, practical test for classifications based on sexual preference, and should be employed when reviewing this type of legislation. Ultimately this comment suggests that, regardless of whether or not Proposition 8 is upheld, it is imperative that the Court finally establish a clear standard that lower courts can implement when reviewing statutes targeting homosexuals.

II. THE CALIFORNIA MARRIAGE PROTECTION ACT

A. The History of Proposition 8

The California Marriage Protection Act, better known as Proposition 8, was a ballot initiative and a constitutional amendment. It was passed in the November 2008 state elections, and provides that: “Only marriage between a man and a woman is valid or recognized in California.” Once passed, it added a new section to Article I of the California Constitution.


13 Id. Section 7.5 was added once Proposition 8 was passed. Id.
The creation of Proposition 8 was a legislative response to the California Supreme Court’s ruling in the *In re Marriage Cases*, which held that statutes restricting homosexual marriages violated the California Constitution.\(^{14}\) Although it legalized homosexual marriage, Proposition 8 did not affect domestic partnerships or those marriages performed between May 15, 2008, and November 5, 2008.\(^{15}\)

In 2010, opponents challenged Proposition 8 in the Northern District of California on due process and equal protection grounds, and Chief Judge Vaughn Walker struck it down as violating both clauses.\(^{16}\) On appeal, the Ninth Circuit ordered a stay of execution pending the circuit court’s ruling on the merits.\(^{17}\) On January 4, 2011, the Ninth Circuit certified a question to the California Supreme Court in order to determine if the parties possessed standing.\(^{18}\) If the California Supreme Court holds the parties do not lack standing, then a panel in the Ninth Circuit will issue a decision on the merits of the case.\(^{19}\)

**B. The Arguments for and Against Proposition 8**

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\(^{14}\) Robert Greene, *California’s Propositions*, L.A. TIMES (Sept. 21, 2008), http://www.latimes.com/news/opinion/commentary/la-oe-greene21-2008sep21,0,4857946,full.story; *in re Marriage Cases*, 183 P.3d 384 (Cal. 2008). The *In re Marriage Cases* struck down Proposition 22, which contained the same wording as Proposition 8, but was enacted as a statute. *In re Marriage Cases*, 183 P.3d at 403, 453.

\(^{15}\) These are the marriages that took place after Proposition 22 was struck down and before Proposition 8 was enacted. PROPOSITION 8 ONLINE COURTROOM, http://www.prop8case.com/ee.php/primary/case_background/ (last visited March 17, 2011).


\(^{17}\) Perry v. Schwarzenegger, No. 10-16696 (9th Cir. Aug. 16, 2010) (order of stay pending appeal).

\(^{18}\) Perry v. Schwarzenegger, No. 10-16696 (9th Cir. Jan. 4, 2011) (order certifying a question to the Supreme Court of California).

The proponents of Proposition 8 argue that the new constitutional amendment protects traditional marriage by restoring the historical definition of marriage: an institution that is solely between a man and a woman.\textsuperscript{20} Further, enacting the amendment shields children from being taught that homosexual marriage is the same as traditional marriage, as well as the notion that homosexual marriage is acceptable.\textsuperscript{21} Proponents also claim that it is not an attack on the gay lifestyle, and that in fact Proposition 8 takes away little if no actual rights of gay and lesbian couples.\textsuperscript{22} Additionally, Proposition 8 contains the same wording that was previously passed by California voters in Proposition 22, and it simply reinstates an initiative on which the California citizens already voted.\textsuperscript{23} Some legal scholars claim that four activist judges do not have the right to judicially repeal a voter–enacted law, so Proposition 8 merely restores what California residents originally decided.\textsuperscript{24}

\textsuperscript{20} PROTECTMARRIAGE.COM, http://protectmarriage.com/about/ballot-arguments (last visited Jan. 5, 2011). Proponents further argue that protecting the idea of marriage as an institution solely between a man and a woman has important sociological and psychological ramifications. See Monte Neil Stewart, Marriage Facts, 31 HARV. J.L. & PUB. POL’Y 313 (2008) (also arguing that there is no constitutional basis for upholding homosexual marriage).

\textsuperscript{21} PROTECTMARRIAGE.COM, http://protectmarriage.com/about/ballot-arguments (last visited Jan. 5, 2011). This was a very large part of the “Vote Yes” campaign, and after Proposition 8 was enacted, proponents declared that “Voting YES protected our children.” Id. A central part of the campaign was the idea that what children learn should be governed by their parents, and forcing another person’s view on them was an un–American practice. Id. However it could be argued that these proponents are doing exactly what they claim they do not want to be done to them—forcing their viewpoint on those who believe homosexual marriage should be allowed.

\textsuperscript{22} Id. This is due to California’s extremely broad and permissive domestic partnership laws. Id.

\textsuperscript{23} Id.

\textsuperscript{24} Id.
Opponents of Proposition 8 counter with the argument that the California Constitution guarantees the same freedoms to everyone, including the right to marry.\(^{25}\) No one group should be singled out to be treated differently, and that is what Proposition 8 does—it defines a discrete group and denies those people a right.\(^{26}\) This is an illegal practice under both federal and state law.\(^{27}\) Additionally, the government should not be involved in dictating who can and cannot marry.\(^{28}\) Along this line, opponents draw a parallel to the anti-miscegenation statutes that existed in early American history.\(^{29}\)

**C. The Opinion in Perry v. Schwarzenegger**

When opponents of Proposition 8 brought a challenge to the amendment in federal court, the court struck it down on both equal protection and due process grounds.\(^{30}\) After much


\(^{26}\) *Id.* However, it could be argued that there is not much of a right involved. As the proponents of Proposition 8 pointed out, the amendment does not take away any domestic partnership rights, which in California are extremely broad. *See CAL. FAM. CODE § 297.5* (“[D]omestic partners shall have the same rights, protections, and benefits . . . as are granted to and imposed upon spouses.”). Neither does naming the partnership between homosexual couples a “marriage” actually convey any additional rights—the Defense of Marriage Act grants to the federal government and other states the ability to refuse to recognize homosexual marriages performed in other states, and therefore the federal government can deny those couples federal tax and social security benefits. *Defense of Marriage Act*, 1 U.S.C. § 7 (2006) (“the word ‘marriage’ means only a legal union between one man and one woman . . . .”). Thus, no further benefits are actually granted by calling a union between a same–sex couple a marriage, and this debate nearly boils down to a name. But, as the court in *Perry v. Schwarzenegger* noted, there are still differences in the societal perception of domestic partners versus married spouses, beyond simply the legal ramifications. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 994 (N.D. Cal. 2010).

\(^{27}\) *Official Voter Information Guide, CALIFORNIA GENERAL ELECTION* (Nov. 04, 2008), http://www.voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt8.htm. Note that this comment is not coming to any legal conclusions on this particular issue, but is merely reiterating the arguments from both sides.

\(^{28}\) *Id.*

\(^{29}\) *Id.*

expert testimony, the court held that a domestic partnership was not the same as a marriage, and therefore, homosexual couples were severely disadvantaged by Proposition 8. Additionally, “a primary purpose of Proposition 8 was to ensure that California confer a policy preference for opposite–sex couples over same–sex couples based on a belief that same-sex pairings are immoral . . . .”

After establishing these findings of fact, the court addressed both due process and equal protection concerns. Within the due process section, the opinion cited Zablocki v. Redhai and stated that the fundamental right to marry was involved. Therefore, the claim was subject to strict scrutiny. However, the state could not carry the burden of showing that there was a compelling state interest, let alone that the amendment was sufficiently narrowly tailored. Thus the district court struck down the amendment on due process grounds.

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31 Id. at 994.

32 Id. at 936. This particular fact is telling, as it echoes the precedent which held, “a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973). This language also opened the door to the use of the more searching rational basis test, because, by declaring that the motivation behind Proposition 8 was a belief that homosexual practices are immoral, the court implied prejudice motivated the amendment’s creation. Thus, the more searching rational basis test could be employed. See infra notes 90–121 and accompanying text.

33 Zablocki v. Redhai, 434 U.S. 374 (1978) (the right to marry is fundamental, and if this right is impeded by unnecessary and irrational restraints, the statute receives the compelling state interest test).

34 Perry, 704 F. Supp. 2d at 994.

35 Id.

36 Id. at 995. The opinion noted that because the stated governmental interests could not even survive rational basis review, Proposition 8 could in no way survive a more stringent test. Id.

37 Id.
The opinion also ruled Proposition 8 unconstitutional under the Equal Protection Clause. Proposition 8 not only classifies people based on their sexual orientation, but on their gender as well—a woman cannot marry another woman simply based on the fact she is a woman. While declining to determine which particular level of review was required, the district court declared that because Proposition 8 could not survive the rational basis test, it did not matter if the classification was subject to a higher standard of review.

Under rational basis review, the court held that Proposition 8 was not rationally related to a legitimate state interest. The opinion examined each purported purpose of the amendment: (1) protecting the traditional view of marriage as between a man and a woman; (2) proceeding with caution when implementing social change; (3) promoting opposite-sex parenting over same-sex parenting; (4) protecting the freedom of those who do not wish to see same-sex

38 Id. at 1003.

39 Id. at 996. This holding would potentially subject Proposition 8 to intermediate scrutiny, based on the gender classification. See Craig v. Boren, 429 U.S. 190 (1976) (statutes involving classifications based on sex receive intermediate scrutiny). However, subjecting the claim to this heightened form of scrutiny has been predominately rejected by other circuits. See infra notes 177–83 and accompanying text.

40 Id. at 997. Judge Walker did point out, however, that classifications based on sexual orientation should be subject to strict scrutiny, as it is a classification against which the compelling state interest test was designed to protect. Id.

41 Id. Though the opinion cites many of the more searching rational basis cases, it explicitly states that the traditional, deferential rational basis standard is being implemented to strike down Proposition 8. Id. at 995. However, it is interesting to note that the burden seems to be on the state to put forth reasons as to why the amendment is legitimate, and then the opinion examines the actual findings of fact to determine if they are, in fact, legitimate. Id. at 998–1002 (“Proponents’ purported rationales are nothing more than post-hoc justifications. While the Equal Protection Clause does not prohibit post-hoc rationales, they must connect to the classification drawn.”). This is, in actuality, not traditional rational basis review, but instead parallels the more searching rational basis test. See infra Parts III–IV.

42 Perry, 704 F. Supp. 2d at 998.

43 Id. at 999.

44 Id. at 1000.
couples marry because of their personal and religious beliefs;\textsuperscript{45} and (5) treating opposite–sex couples differently from same–sex couples by calling their various partnerships different names.\textsuperscript{46} The opinion dismissed each of these arguments, as none could establish a legitimate state interest.\textsuperscript{47} The strongest and most widely accepted argument, that of protecting the idea of traditional marriage, was not held to be a legitimate interest because antiquated notions are not a valid reason to promote discrimination based on sexual orientation.\textsuperscript{48}

Additionally, Judge Walker pointed out that private disapproval of same sex marriage can never constitute a legitimate state interest.\textsuperscript{49} After dismissing all the other justifications supporting Proposition 8, this was the only rationale remaining.\textsuperscript{50} Thus, Proposition 8 could not survive under the Fourteenth Amendment challenges that were brought forth.

III. THE HISTORICAL DEVELOPMENT OF THE RATIONAL BASIS TEST

\textsuperscript{45} \textit{Id.} at 1001.

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} \textit{Id.} at 998.

\textsuperscript{49} \textit{Id.} at 1002.

\textsuperscript{50} \textit{Id.} (“Moral disapproval alone is an improper basis on which to deny rights to gay men and lesbians.”).
As Judge Walker noted, the rational basis test can be applied to both the Equal Protection Clause and the Due Process Clause, and it is essentially the same test in each context.\(^5^1\) However, because the analysis for Proposition 8 is clearer in the context of the Equal Protection Clause, this comment primarily examines the rational basis test as it arises under equal protection review.\(^5^2\)

A. The Traditional Rational Basis Test

The seeds of the rational basis test began early in United States jurisprudence, when Justice Marshall declared in *McCulloch v. Maryland* that the Bank of the United States was a “means to an authorized end.”\(^5^3\) But it was 1938 when the Court in *United States v. Carolene Products Co.* created what is known today as the traditional rational basis test, where the means must bear a rational relationship to a legitimate end.\(^5^4\) This evolved into a two-part test: the goal of the statute must be legitimate, and the means of effectuating the law must bear a rational relation to that end.\(^5^5\) Additionally, the government does not have to assert the legislative purpose

\(^5^1\) *Id.* at 995–96; see also D. Don Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67, 72 (1993) (the same rational basis test analysis applies to both the Equal Protection and Due Process Clauses).

\(^5^2\) Additionally, the more searching rational basis test only appears in cases involving the Equal Protection Clause. See infra notes 59–89 and accompanying text. Thus it is more logical to focus on equal protection review.

\(^5^3\) *McCulloch v. Maryland*, 17 U.S. 316, 324 (1819).

\(^5^4\) *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938). This case involved a law that prohibited the interstate transportation of imitation skim milk. *Id.* at 144. Applying the newly created rational basis test, the Court held that the ban on the transportation of imitation milk was rationally related to the conceivable legislative goal of preventing potential fraud, and thus did not violate the Equal Protection Clause. *Id.* at 148.

behind the statute, or make any sort of factual findings as to whether there actually is a rational basis for the legislation.\textsuperscript{56}

The Court continued this permissive level of review in cases such as \textit{Williamson v. Lee Optical of Oklahoma}\textsuperscript{57} and \textit{Harris v. McRae}.\textsuperscript{58} Applying the rational basis test in all of its permissive scrutiny, the Court invariably upheld the legislation.\textsuperscript{59} The actual purpose of the legislature, or even the true goal of the legislation, did not matter, because the Court speculated as

\textsuperscript{56} See \textit{infra} notes 48–51 and accompanying text.

\textsuperscript{57} Williamson v. Lee Optical of Okla., 348 U.S. 483 (1955). The Court employed the rational basis test to uphold an Oklahoma statute prohibiting non–medical eyeglass repair shops from repairing broken lenses without first having a prescription on file. \textit{Id.} at 485. The Court noted that, even though “[t]he Oklahoma law may exact a needless, wasteful requirement in many cases . . . . [I]t is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.” \textit{Id.} at 487. This was also the case that refined the \textit{Carolone Products’}s test, establishing the modern two–prong rational basis test. See Richard B. Saphire, \textit{Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center}, Inc., 88 Ky. L.J. 591, 598 (2000).

\textsuperscript{58} Harris v. McRae, 448 U.S. 297 (1980). The Court upheld the Hyde Amendment, which limited federal funds from reimbursing Medicaid–funded abortions. \textit{Id.} at 297, 326. It labeled the amendment a funding decision, which received only the rational basis test. \textit{Id.} at 318. Arguably, \textit{Harris} involved a more important right than a mere economic interest, because the funds were related to abortion clinics. \textit{Id.} at 297. Because abortion falls under the penumbra of privacy rights, it could be considered an important right, more so than those bare economic interests in the more traditional rational basis cases. Nonetheless, the Court labeled this a funding decision, i.e. an economic interest, and so the Court could apply the traditional rational basis test. \textit{Id} at 318. Additionally, the statute in \textit{Harris} was challenged under substantive due process, and as such, the distinction between the different rights involved is slightly less important when undertaking the more searching rational basis test analysis as it arises under the Equal Protection Clause. See \textit{infra} notes 59–92 and accompanying text.

\textsuperscript{59} \textit{Lee Optical}, 348 U.S. at 487; \textit{Harris}, 448 U.S. at 318. The rational basis test has received a great deal of criticism, due to the fact that it is judicial review in theory, but not in fact. See Saphire, \textit{supra} note 47, at 606–07 (noting various judicial and scholarly criticisms of the rational basis test’s extremely permissive level of review); Wadhwanii, \textit{supra} note 45, at 806–07 (not only is the rational basis test unevenly applied, it lacks any coherent form of judicial review). Considering it is an established level of review, though, a critique seems to be a pointless endeavor. Thus this comment does not seek to evaluate the test itself. Rather, it simply notes the differences between the traditional test and the more searching rational basis test.
to what the legislature *might* have been thinking at the time it enacted the statute.\(^{60}\) As the Court itself noted in *FCC v. Beach Communications*:

> [T]hose attacking [the statute’s] rationality have the burden to negate every conceivable basis that might support it. Since a legislature need not articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the legislature was actually motivated by the conceived reason for the challenged distinction.\(^{61}\)

The purpose behind the rational basis test’s creation, however, is the most important aspect of the test. It was designed to be an extremely deferential level of judicial review, devised so the Court could more or less rubber–stamp every piece of legislation Congress passed.\(^{62}\) The historical and political framework surrounding the cases that established the rational basis test supports this conclusion. *Carolene Products* was decided in 1938,\(^{63}\) a year after the “switch in time that saved nine.”\(^{64}\) Because of this political context which existed during the New Deal, the Court was committed to authorizing all federal legislation, and creating tests that would invariably uphold federal statutes.\(^{65}\) These cases also involved economic regulations that were

\(^{60}\) See Saphire, *supra* note 47, at 606.


\(^{62}\) See *Welch* *supra* note 41, at 73.


\(^{64}\) In 1937, after President Roosevelt threatened to pack the court until there were enough Justices who would uphold federal legislation, Justice Owen Roberts decided it was in the best interest of the Court to switch from his previous, conservative position, to a more liberal stance that would uphold federal regulations. *See Michael Ariens*, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 629–30 (1995). Hence the phrase “switch in time that saved nine,” because the switch saved the traditional nine justice Court. *Id.* Thus the Court obtained a five to four majority that consistently upheld federal legislation. *Id.* at 630.


> [I]n 1937, the Court suddenly abandoned a century-and-a-half of case law imposing limits on Congress and instead interpreted Article I as conferring virtually
passed under the Commerce Clause, which the Court was particularly devoted to upholding.\textsuperscript{66} Hence, the Court created the rational basis test. Problems came about, however, when the Court was faced with discriminatory laws that did not involve economic regulations. As the Court was confronted with those issues, fundamental rights and more stringent tests arose.\textsuperscript{67} And yet another problem occurred when the legislation targeted neither a fundamental right, nor involved strictly economic interests, because the Court was forced to use its extremely permissive rational basis review. It was this vacuum which led to the creation of the more searching rational basis test.\textsuperscript{68}

\textsuperscript{66} Grant S. Nelson & Robert J. Pushaw, Jr., \textit{Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues}, 85 IOWA L. REV. 1, 4 ("[F]rom 1937 to 1994, the Supreme Court upheld every federal statute challenged under the Commerce Clause.").

\textsuperscript{67} See James M. McGoldrick, Jr., \textit{Separation of Powers Doctrine: Straining out Gnats, Swallowing Camels}, 18 PEPP. L. REV. 95, 112 (1991). Professor McGoldrick notes that “[t]he rational basis test left a power vacuum” the Court filled with more stringent tests, such as compelling state interest and irrebuttable presumptions. \textit{Id.} at n.85–86. In other words, because of the rational basis test’s permissive nature, once the Court was confronted with discriminatory legislation, it needed other tests that possessed a more exacting level of review. The differences between the cases involving the higher tiers of scrutiny versus the rational basis test were the classifications involved: statutes containing racial and gender classifications versus statutes that were predominately economic in nature, respectively. \textit{Compare} Loving v. Virginia, 388 U.S. 1 (1967) and Craig v. Boren, 429 U.S. 190 (1976) \textit{with} United States v. Carolene Prods. Co., 304 U.S. 144 (1938) and Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955).

\textsuperscript{68} See \textit{infra} Part IV.
B. The Development of the More Searching Rational Basis Test

Beginning with United States Department of Agriculture v. Moreno, the Court began to turn away from this extremely permissive level of review. In Moreno, the Court employed the rational basis test, and in a rare show of force, struck down the challenged statute. The law itself, known as the “anti-hippie” statute, allocated food stamps on a household basis. As the legislative history demonstrated, the law was designed primarily to prevent radical activists who lived in communes from utilizing the federal welfare and food stamp program. The Court examined the actual legislative history of the statute, and rejected the government’s claim that the purpose of the statute was to prevent welfare fraud. Most importantly, it held that “a bare . . .

69 U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528 (1973). However, it could be argued that Moreno was not actually the first case to employ the more searching rational basis test, that it was, in fact, Eisenstadt v. Baird, 405 U.S. 438 (1972) (establishing the right of unmarried people to obtain contraceptives in the same manner as married couples). See Lofton v. Sec’y of the Dep’t of Children & Family Servs., 377 F.3d 1275, 1291–1303 (arguing that Eisenstadt was the first case to establish a heightened form of rational basis review) (Barkett, J., dissenting). The more widely accepted viewpoint on Eisenstadt, though, is that it is part of the right to privacy line of cases. See Megan Backer, Giving Lawrence its Due: How the Eleventh Circuit Underestimated the Due Process Implications of Lawrence v. Texas in Lofton v. Secretary of the Department of Children and Family Services, 90 MINN. L. REV. 745, 748–49 (2006). Neither did the Court actually cite the rational basis test as the level of review it used to strike down the statute. Eisenstadt, 405 U.S. at 454–55 (“We hold that by providing dissimilar treatment for married and unmarried persons who are similarly situated . . . violate[s] the Equal Protection Clause.”) Additionally, many scholars have hypothesized that Moreno was the case that created a new test distinct from the traditional rational basis test. See Saphire, supra note 47, at 608. This “new” test has been termed the rational basis with bite, Steven P. Wieland, Gambling, Greyhounds, and Gay Marriage: How the Iowa Supreme Court can use the Rational Basis Test to Address Varnum v. Brien, 94 IOWA L. REV. 413, 418 (2009), the more searching rational basis, Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O’Conner, J., concurring), and the bare animosity standard, Daniel A. Crane, Faith, Reason, and Bare Animosity, 21 CAMPBELL L. REV. 125, 128 (1999). This comment will use the “more searching” terminology to refer to this particular test.

70 Moreno, 413 U.S. at 538.

71 Id. at 529–30.

72 Id. at 534–35.

73 Id.
desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” Therefore, the Court held that the statute was “wholly without any rational basis,” and, as such, violated the Equal Protection Clause of the Fifth Amendment.

The following year in Jimenez v. Weinberger, the Court struck down a statute that prevented illegitimate children from receiving their father’s disability benefits if they were born after the onset of the father’s disability. The government claimed the statute’s purpose was to prevent spurious disability claims and protect the federal Social Security fund. The Court, however, declared that simply limiting the scope of who could receive the funds did not actually further this governmental goal, as the purpose of the statutory scheme as a whole was to provide support for a wage earner’s dependents when he could no longer earn a living. Thus, simply

74 Id. at 534.
75 Id. at 538. This case involved a federal statute, which was subject to review under the equal protection component implicit in the Due Process Clause of the Fifth Amendment. See Ruth Coker, The Section Five Quagmire, 47 U.C.L.A. L. REV. 653, 678 (2000) (federal claims receive equal protection analysis as it arises under the Due Process Clause of the Fifth Amendment). However, equal protection review under the Fourteenth Amendment is fundamentally the same, with the only difference being the Fourteenth Amendment applies to state laws. Id. at 678–79. Because there is no difference when analyzing state or federal laws under the Equal Protection Clause of either the Fourteenth or Fifth Amendment, respectively, the analysis of Proposition 8 does not change due to the fact it is an amendment to a state constitution.
76 Jimenez v. Weinberger, 417 U.S. 628, 631, 637 (1974). Technically this case is not an example of the more searching rational basis test. Instead, classifications involving illegitimacy get a somewhat heightened standard of review, compared to the traditional rational basis test: the statute must reasonably—as opposed to rationally—relate to a legitimate governmental interest. See Emily K. Baxter, Rationalizing Away Political Powerlessness: Equal Protection Analysis of Laws Classifying Gays and Lesbians, 72 MO. L. REV. 891, 893–94 (2007) (classifications involving legitimacy receive a more exacting form of rational basis scrutiny). However this case is still a good example of when the rational basis test is employed to strike down a statute: the end must actually be legitimate, and the Court will undertake a meaningful inquiry into the purpose of the legislation. See infra notes 135–50 and accompanying text.
77 Jimenez, 417 U.S. at 634.
78 Id.
excluding illegitimate children from receiving critical funds “is [not] reasonably related to the prevention of spurious claims.” 79

_Plyler v. Doe_ was another case that employed the more searching rational basis test. 80 A Texas statute virtually banned children who were illegal immigrants from going to public school, refusing state reimbursement to the schools that allowed these children to attend. 81 The Court granted the children injunctive relief, holding that the statute violated the Equal Protection Clause. 82 The Court noted that the legislative intent behind the statute was an attempt to control the actions of illegal aliens, but instead of regulating the adults’ acts, the statute sought to control them through their children. 83 Given the importance of education in American culture, the Court declared: “In light of these countervailing costs, the discrimination contained in [the Texas statute] can hardly be considered rational unless it furthers some substantial goal of the state.” 84

In _City of Cleburne v. Cleburne Living Center_, another Texas ordinance required that a home for the mentally retarded receive a special kind of building permit. 85 When the plaintiff

79 Id. at 636.


81 Plyler, 457 U.S. at 205.

82 Id. at 230.

83 Id. at 224–25.

84 Id. at 224.

85 City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). Professor Saphire argues that the _Cleburne_ test as a heightened form of judicial scrutiny has not affected the Court’s jurisprudence, or, in other words, a heightened form of the rational basis test does not exist as a separate level of review.
applied for the permit, the City of Cleburne refused to grant it.\textsuperscript{86} The Court examined the true purpose behind the statute, and held that this differing treatment of the mentally retarded was due to the ill will and fear of the neighborhood.\textsuperscript{87} Thus, it violated the Equal Protection Clause, and the Court struck it down as having no rational relationship to a legitimate governmental purpose.\textsuperscript{88} Justice Marshall’s dissent further noted the Court’s departure from the traditional rational basis test:

\begin{quote}
[T]he Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called “second order” rational-basis review rather than “heightened scrutiny.” But however labeled, the rational basis test invoked today is most assuredly not the rational-basis test of \textit{Williamson v. Lee Optical of Oklahoma} . . . \textsuperscript{89}
\end{quote}

The same year in \textit{Metropolitan Life Insurance Co. v. Ward}, the Court, claiming to use the rational basis test, struck down an Alabama statute that required higher taxes for out of state insurance companies due to the law’s “purely and completely discriminatory” nature.\textsuperscript{90}

Saphire, \textit{supra} note 47, at 622. Professor Saphire reaches his conclusion based on the Court’s decision in \textit{Heller v. Doe}, 509 U.S. 312 (1993) (using the rational basis test to uphold a statute that created a different burden of proof in civil commitment proceedings for the mentally disabled versus the mentally ill). \textit{Id}. However, this comment takes a difference stance, arguing that there is, in fact, a more searching rational basis test, and that \textit{Heller} does not render \textit{Cleburne Living Center} moot. The statute in \textit{Heller} has an actual purpose, beyond the fabricated reasons usually given for federal statutes—it actually does require more proof and stronger evidence to show someone is mentally ill than mentally retarded, due to the nature of mental illness. Thus, even if the Court were to implement the more searching rational basis test, the statute could be upheld, due to its logical basis. Additionally, as evidenced by its use in \textit{Romer} and \textit{Lawrence}, as well as various lower court decisions, the more searching rational basis test is not precluded from the Court’s jurisprudence. \textit{See infra} notes 81–86 and accompanying text.

\textsuperscript{86} \textit{Cleburne Living Center}, 473 U.S. at 436–37.

\textsuperscript{87} \textit{Id.} at 448.

\textsuperscript{88} \textit{Id.} at 450.

\textsuperscript{89} \textit{Id.} at 458 (Marshall, J., dissenting).

\textsuperscript{90} Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 869 (1985). Though seemingly a case that employed the more searching rational basis test, this comment argues that because the case involved a primarily
C. The More Searching Rational Basis Test as Applied to Homosexual Rights

The first case to apply the more searching rational basis test to homosexual rights was *Romer v. Evans*, which struck down an amendment to the Colorado Constitution that would have prohibited gay people from claiming equal protection or due process rights based solely on their sexuality.°° The Court noted that “[t]he amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination.”°° Because the amendment singled out a discrete group of people, specifically denying them constitutional rights, “the economic issue, this is not in fact an example of the more searching rational basis test. Were the Court not precluded from striking down the statute by the McCarran–Ferguson Act, it would have most likely struck the legislation down on Commerce Clause grounds. *Id.* at 871; see also William Cohen, *Federalism in Equality Clothing: A Comment on Metropolitan Life Insurance Co. v. Ward*, 38 STAN. L. REV. 1, 4–5, 10, 16 (noting that the law violates the Court’s Commerce Clause’s jurisprudence and there was little rationality behind striking down the statute on equal protection grounds, save for the fact the Court could not use the Commerce Clause). It has also been hypothesized that this case falls into a different classification of rational basis review, instead of the more searching rational basis test cases; it is an example of a state’s naked preference for one group over another when allocating scarce resources. *See* Crane, *supra* note 59, at 140; JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73–104 (1980). Thus, because it primarily deals with economic issues, *Ward* has little applicability to this comment’s analysis, and it is not discussed in more depth.

°° *Romer v. Evans*, 517 U.S. 620, 624, 635 (1996). This has been a widely criticized decision, due to its lack of logic and coherence. *See generally* Nan D. Hunter, *Proportional Equality: Readings of Romer*, 89 KY. L.J. 885 (2001). But other scholars have considered *Romer* to be a boon for gay advocates, claiming it developed a more stringent test than that which has previously been employed when reviewing classifications based on sexual orientation. *See* Kevin H. Lewis, *Equal Protection After Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 179, 189–96, 223 (1997) (*Romer* stands for the idea that legislation targeting homosexuals must have a rational basis, and because most laws that classify based on sexual preference are motivated by animus, they should be struck down under *Romer*); Gary Alan Collis, *Romer v. Evans: Gay Americans Find Shelter After Stormy Legal Odyssey*, 24 PEPP. L. REV. 991 (1997) (homosexuals now have the ability to receive the protection of a higher standard of review when bringing equal protection claims). This decision has also been said to illustrate the pariah principle that exists in the equal protection doctrine, which “forbids the government from designating any societal group as untouchable, regardless of whether the group in question is generally entitled to some special degree of judicial protection . . . .” Daniel Farber & Susanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 258 (1996). Regardless of these various interpretations, for this comment’s purpose it is enough to note that the Court employed the rational basis test, examined the actual purpose behind the amendment, and struck it down. *Romer*, 517 U.S. at 624, 635; see infra Part IV.

°°°° *Romer*, 517 U.S. at 620–21.
amendment seems [motivated] by . . . animus . . . “93 As such, even employing the extremely
deferential rational basis test, the Court declared that the amendment “lacks a rational relationship
to legitimate state interests.”94

Seven years later in Lawrence v. Texas, the Court applied the rational basis test and
struck down another Texas statute on due process grounds.95 This particular law made it a crime
for males to engage in sodomy.96 The opinion did not discuss the rational basis test itself, but
focused instead on the statute’s unjustified intrusion into the home and personal matters.97 The
Court concluded that “[t]he Texas statute furthers no legitimate state interest which can justify its
intrusion into the personal and private life of the individual.”98 Justice O’Connor’s concurrence is
also illustrative of another standard that could be employed to strike down the statute:

When a law exhibits such a desire to harm a politically unpopular group, we
have applied a more searching form of rational basis review to strike down

93 Id. at 632.
94 Id.
95 Lawrence v. Texas, 539 U.S. 558, 578 (2003). The Court declined to analyze the statute on equal
protection grounds, claiming that, though it is a valid argument due to the Romer precedent, “[w]ere we to
hold the statute invalid under the Equal Protection Clause some might question whether a prohibition
would be valid if drawn differently, say, to prohibit the conduct both between same–sex and different–sex
participants.” Id. at 574–75. Whereas, in contrast, Justice O’Connor’s concurrence claims the Equal
Protection Clause is the appropriate constitutional doctrine to strike down the statute. Id. at 582
(O’Connor, J., concurring). Regardless, the same rational basis test was employed—there is no difference
between the test as implemented under the due process analysis versus the equal protection doctrine. See
Welch, supra note 41, at 74. While this comment primarily examines the rational basis test as it arises
under equal protection review, this case is still important due to its use of the rational basis test to strike
down a statute depriving homosexuals of important rights. Even though Justice O’Connor’s concurrence
is dicta, it is a helpful illustration of the standard the more searching rational basis test employs.

96 Lawrence, 539 U.S. at 562.
97 Id. at 560. Regardless of whether the rational basis test was discussed, it is important to note the test
was nonetheless used to strike down the statute. Id.
98 Id.
such laws under the Equal Protection Clause. We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships . . . . Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review . . . .

99

D. The Conclusion to Draw From These Cases

The historical background and the long line of cases concerning the Carolene Products type of rational basis test indicate its purpose was to be a virtual rubber stamp on legislation—the Court employing judicial review in theory, but not in actuality.100 However, cases such as Moreno, Cleburne Living Center, Romer, and Lawrence addressed more than simply economic rights, as well as patently discriminatory statutes that singled out a discrete group of people.101 But because the cases did not involve fundamental rights, the Court was forced to use the rational basis test. Thus, the more searching rational basis test came about, a level of review that could actually be employed to strike down a statute. The Court left unclear, though, when the test should be applied, and of what, exactly, it consists.102

IV. Analysis of the More Searching Rational Basis Test

Various legal scholars and lower courts claim there is no elevated level of rational basis review, and that, rather, the rational basis test exists in the same form as that articulated in

99 Id. at 580, 582 (O’Connor, J., concurring).

100 See supra notes 41–57 and accompanying text.

101 See supra notes 59–80 and accompanying text.

102 That is, in fact, the primary goal of this comment—to articulate what the more searching rational basis test is, when it should be applied, and whether it has any applicability to Proposition 8. See infra Part IV.
Carolene Products. This comment, however, takes the opposite stance. The differences between the cases employing the traditional rational basis test and those using the more searching rational basis test are stark. If the Court employs the traditional rational basis test, the government’s burden of proof is more or less nonexistent. The Court will create a legitimate state interest, even if there is none, in order to uphold the legislation. In contrast, if the more searching rational basis test is used, the statute will most likely be struck down. The difference in not only the result, but the logic used to reach the result, leads to the conclusion that the more searching rational basis test is distinct from the traditional rational basis test.

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103 See Saphire, supra note 47, at 635–39 (concluding that a more elevated rational basis test has not affected the Court’s jurisprudence); Hunter, supra note 81 (Romer did not establish another level of review, but rather “proportional equality”); Cook v. Rumsfeld, 429 F. Supp. 2d 385, 404 (D. Mass. 2006) (“[I]t is far from clear that the cases [allegedly employing the more searching rational basis test] applied anything other than the traditional rational-basis test . . . .”); Imprisoned Citizens Union v. Shapp, 11 F. Supp. 2d 586, 603 (E.D. Pa. 1998) (“[This court] does not believe that the Supreme Court established a new standard, for it found that the only purpose of the statute at issue in [Romer] was animus toward homosexuals, which is simply not legitimate.”) Before Plyler, Cleburne Living Center, Romer, and Lawrence, the Court itself declined to specifically adopt an elevated rational basis test: [In Moreno] we upheld an equal protection challenge to a provision of the Food Stamp Act and concluded that “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” This statement is merely an application of the usual rational-basis test: if a statute is not rationally related to any legitimate governmental objective, it cannot be saved from constitutional challenge by a defense that relates it to an illegitimate governmental interest. Accordingly, in Moreno itself we examined the challenged provision under the rational-basis standard of review.


104 See supra notes 43–58 and accompanying text.

105 Id.

106 See supra notes 59–80 and accompanying text.

107 It is also pertinent to note that various courts have also observed the existence of the more searching rational basis test. Justice O’Connor has done so in her concurrence in Lawrence. See supra note 84 and accompanying text. Justice Marshall has done so as well, in his dissent in Cleburne Living Center. See supra note 74. Another way to view this problem though, and respond to the point that the Supreme Court has not actually articulated a different, distinct test, is to look at what the Court does, rather than what it specifically states. As Judge Posner observed:
Additionally, the historical background of the traditional test is telling. Originally created to uphold federal statutes that dealt primarily with economic rights, its inherent design was extremely permissive.\textsuperscript{108} Therefore, elevated levels of review were applied to more important rights—strict scrutiny for racial classifications, or the intermediate test for gender discrimination.\textsuperscript{109} But if there was a classification of any other kind, the only level of review left was the rational basis test.\textsuperscript{110} When the statute bluntly discriminated by singling out a particular group, though, the Court did not wish to uphold it. It was therefore forced to use the rational basis test to strike the statute down.\textsuperscript{111} However, more meaningful review was necessary in order to do so, beyond the deference of the \textit{Carolene Products} rational basis test. Thus, the more searching rational basis test evolved as a distinct test from traditional rational basis review.\textsuperscript{112}

We should follow what the Supreme Court does and not just what it says it is doing. The Court rejects a “sliding scale” approach to equal protection in words but occasionally accepts it in deeds. \textit{Cleburne} instantiates though it does not articulate the proposition that discrimination against sensitive uses is to be given more careful, realistic, skeptical scrutiny by the courts than discrimination against purely commercial activities. Civil Liberties for Urban Believers v. Chicago, 342 F.3d 752, 769 (7th Cir. 2003) (Posner, J., dissenting). In other words, the more searching rational basis test contains the same structure as the traditional rational basis test, but when there is an important right involved beyond a simple economic interest, it is no longer such a deferential standard.

\textsuperscript{108} \textit{See supra} Part III.


\textsuperscript{110} \textit{Id}.

\textsuperscript{111} \textit{See supra} notes 59–89 and accompanying text.

\textsuperscript{112} It is an interesting scenario, because the more searching rational basis test contains the exact same structure as the traditional test. Where it differs is how, and when, it is employed. \textit{See infra} notes 103–138 and accompanying text. So while it may seem this comment is proposing that the more searching rational basis test is another tier of scrutiny, it cannot be considered to be another level due to the fact the two tests contain the exact same structure. Additionally, this situation is distinct from when the Court created the strict and intermediate tiers of scrutiny, because the more searching rational basis test, rather
A. The Test to Draw From the Precedent

Though a more elevated standard of rational basis review exists, the Court has not articulated when it should be employed, or of what exactly the test consists. This section attempts to define precisely when the more searching rational basis test should be employed, by examining the Court’s precedent. It then articulates the test itself.

1. When to Employ the More Searching Rational Basis Test

   i. A Discrete, Politically Powerless Group is Denied an Important Right

   In order for the Court to utilize the more searching rational basis test, there is a threshold requirement: the statute involved must withhold an important right, beyond a bare economic interest. If no important right is implicated, then the Court does not have the requisite motivation to employ a more elevated level of review. As such, the permissive, traditional rational basis test will be used and the statute invariably upheld.

   113 In Moreno it was receiving food stamps; in Plyler it was the ability to attend school; in Cleburne Living Center it was the ability to build a home for the mentally retarded; in Romer it was the ability to bring due process and equal protection claims; and in Lawrence the statute invaded privacy. See supra notes 59–89 and accompanying text; Lofton v. Sec'y of the Dep’t of Children & Family Servs., 377 F.3d 1275, 1292–93 (“[I]n each case [employing the more searching rational basis test], the Court invalidated a law that had the effect of inhibiting personal relationships of one sort or another . . . .”).

   114 This harkens back to the creation of the traditional rational basis test, where the Court was committed to upholding federal statutes, particularly when they involved economic rights and the Commerce Clause. See supra notes 40–43 and accompanying text. Based on the historical background and its own precedent, the Court does not have nearly the same commitment to upholding discriminatory legislation as it does to upholding statutes concerning economic interests. See supra notes 38–84 and accompanying text; compare Williamson v. Lee Optical of Okla., 348 U.S. 483 (1955) with U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528 (1973) and Plyler v. Doe, 457 U.S. 202 (1982) and Lawrence v. Texas, 539 U.S. 558 (2003).
Once this threshold requirement is triggered—that is, when a law withholds an important right—the statute must, in addition, define a discrete group of people and deny them a significant right. This distinct group must also be a politically powerless, unpopular minority. The strongest evidence for this conclusion comes from Justice O’Connor’s concurrence in Lawrence, where she stated that, “When a law exhibits . . . a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review . . . .”

Previous precedent also provides substantial evidence for this conclusion. Both Romer v. Evans and Lawrence v. Texas involved denying homosexuals, as a discrete group, important rights. In Department of Agriculture v. Moreno, the statute targeted liberal protesters living in communes, a very politically unpopular group at the time. The Court itself noted the statute was designed “to harm a politically unpopular group . . . .” Plyler v. Doe involved a statute that targeted children of illegal aliens—a small, politically powerless minority.

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115 A group, however, does not have to be entirely politically powerless. This conclusion follows from the Court’s observation in City of Cleburne: “[T]he legislative response . . . negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers.” City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985). This particular quotation pertained to the status of the mentally retarded as a suspect class. Id. It follows, then, that in order to use the more searching rational basis test, political powerlessness does not have to rise to the level of determining the class to be suspect or quasi-suspect. It is just as important that it is a singled out, unpopular minority.

116 Lawrence, 539 U.S. at 582 (O’Connor, J., concurring) (emphasis added).

117 Romer, 517 U.S. 620 (denying homosexuals equal protection and due process claims based on their homosexuality); Lawrence, 539 U.S. 558 (criminalizing sodomy for homosexuals alone).


119 Id.

120 Plyler v. Doe, 457 U.S. 202, 230 (1982) (“If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.”).
Furthermore, City of Cleburne’s challenged statute required the mentally retarded, and only the mentally retarded, to apply for permits to build a group home.\(^\text{121}\) Thus the totality of the precedent indicates that, in order to trigger the use of the more searching rational basis test, the statute must define a discrete group of people, who are a politically powerless, unpopular minority, and deny them an important right.\(^\text{122}\)

ii. The Existence of Animus

Some lower court opinions, as well as many scholars, claim that in order to use the more searching rational basis test, the legislation’s creation must be motivated by animus.\(^\text{123}\)


\(^{122}\) See also Coburn ex rel. Coburn v. Agustin, 627 F. Supp. 983, 991 (D. Kan. 1985) (“In circumstances where a right is particularly important or a class is particularly in need of protection, heightened scrutiny under the rational basis test appears to be required.”).

\(^{123}\) The Court itself has not specifically stated that the more searching rational basis test requires a showing of animus; rather, it has held that animus does not constitute a legitimate state interest. See U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (“[A] bare desire . . . to harm a politically unpopular group cannot constitute a legitimate governmental interest.”); Romer v. Evans, 517 U.S. 620, 632 (1996) (“[T]he amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”). Scholars and some lower courts, however, have declared that in order to use the more searching rational basis test, a showing of animus is an essential component. As Professor Crane has noted:

[T]he Supreme Court has invalidated legislative classifications that the Court has perceived to be motivated by nothing but naked animosity toward a particular group of people . . . . In each of the bare animosity cases . . . the Court has refrained . . . from making the relevant class suspect or quasi-suspect, relying instead on the proposition that regardless of the nature of the class, the state behaves irrationally when it singles out a group of people for adverse treatment simply because it doesn’t like them.

Crane, supra note 59, at 140–41. See also Silberman v. Biderman, 735 F. Supp. 1138, 1145 (E.D.N.Y. 1990) (“Taken as a whole, the recent case law demonstrates that while the rational basis standard continues to be a fairly deferential one, nevertheless it has been used to invalidate statutes which reasonably appear to be motivated by invidious or prejudicial intent.”); Steven P. Wieland, Gambling, Greyhounds, and Gay Marriage: How the Iowa Supreme Court can use the Rational Basis Test to Address Varnum v. Brien, 94 IOWA L. REV. 413, 433–34 (2009) (the Court has held that legislation singling out homosexuals as a class is motivated by animus and thus cannot constitute a legitimate state interest). But the basic problem with this theory is that it is nearly impossible to prove that legislation was motivated by prejudice—there can always be some other reason for the statute’s creation, even if that reason is fabricated. This is also an extremely vague standard. More importantly, though, if a showing of animus is
However, this comment proposes a different theory. While the existence of animus definitely triggers the more searching rational basis test, it is not an absolute requirement that there be an *actual* showing that prejudice motivated the statute’s creation.

In nearly every opinion where the Court has utilized the more searching rational basis test, it has mentioned the existence of animus. *Moreno*, the first case employing the elevated rational basis review, possessed actual House records indicating the statute was motivated by discrimination: “The legislative history that does exist . . . indicates that that amendment was intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.”124 In *Cleburne Living Center* the Court concluded that denying the permit to build a home for the mentally retarded was motivated by ill will and fear of the neighborhood, rather than any legitimate state interest.125 Furthermore, *Romer* stated that the Colorado amendment’s “sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects . . . .”126 And as O’Connor noted in *Lawrence*: “Moral disapproval of this group, like a bare desire to harm the indeed necessary, then the more searching rational basis test is rendered moot. In other words, it could only be employed on the rare occasion a plaintiff has the ability to offer proof of invidious motivation.

124 *Moreno*, 413 U.S. at 534. This was a unique case where there was actual evidence that the statute was motivated by animus. *Id.* Additionally, it was the first case to employ the more searching rational basis test. *See supra* note 59. As such, it is logical for many to conclude that a showing of animus is necessary in order to use the more searching rational basis test. However, the problem still exists, apart from this one case, that it is nearly impossible to make a showing of actual prejudice. Even so, animus remains an extrinsic part of the more searching rational basis test.

125 City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) (“[The district court found] the Council was concerned with the negative attitude of the majority of property owners . . . as well as with the fears of elderly residents of the neighborhood. But mere negative attitudes, or fear, unsubstantiated by [other] factors . . . are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like.”). *See also* Saphire, *supra* note 47, at 611 (noting that the Court held the legislation was motivated by animus, due to the district court’s finding of fact).

126 *Romer*, 517 U.S. at 632.
group, is an interest that is insufficient to satisfy the rational basis review under the Equal Protection Clause.”127 Thus it is clear that animus is a significant component of this test.

What is important to note, however, was that the majority of these cases did not require an actual showing of animus in order to use the more searching rational basis test. Rather, the Court assumed, because there was no other plausible or legitimate justification for the statute’s existence, that it was motivated by animus.128 Then the more searching rational basis test was employed. The Eleventh Circuit echoes this conclusion: “[W]hen all the proffered rationales for a law are clearly and manifestly implausible, a reviewing court may infer that animus is the only explicable basis. And animus alone cannot constitute a legitimate government interest.”129


128 This can be inferred from the fact that in all of the cases except Moreno and City of Cleburne, the plaintiffs never proffered actual evidence demonstrating that the legislation was motivated by animus, nor did the district courts make any findings of fact to that effect. See supra notes 70–89 and accompanying text. And in City of Cleburne, it was the district court’s finding of fact on which the Court relied. See supra note 115 and accompanying text. In Romer the Court inferred the existence of animus, due to the amendment’s sweeping denial of rights. Romer, 517 U.S. at 634 (“[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”). Additionally, the Court in Plyler never mentioned animus or prejudice, simply that a general dislike of illegal immigrants could not justify denying their children an education. See Plyler v. Doe, 457 U.S. 202, 216–40 (1982). Neither did the majority opinion in Lawrence mention animus, and Justice O’Connor’s concurrence merely assumed its existence. Some lower courts have come to the same conclusion as this comment. As the Seventh Circuit has observed:

If a law is challenged as a denial of equal protection, and all that the government can come up with in defense of the law is that the people who are hurt by it happen to be irrationally hated or irrationally feared by a majority of voters, it is difficult to argue that the law is rational if “rational” in this setting is to mean anything more than democratic preference. And it must mean something more if the concept of equal protection is to operate, in accordance with its modern interpretations, as a check on majoritarianism. This at any rate seems to be the basis of the City of Cleburne and Romer cases . . . .

Milner v. Apfel, 148 F.3d 812, 817 (7th Cir. 1998).

129 Lofton v. Sec’y of the Dep’t of Children & Family Servs., 377 F.3d 1275, 1280 (11th Cir. 2004). When discussing Romer, the Eleventh Circuit also noted that “the fatal defect in Amendment 2 was not that the Court determined that actual animus motivated passage of the Amendment . . . . Instead, the Court found
Thus, taking the totality of various scholarly and lower court opinions, there seem to be two possibilities. The first is that, in order to use the more searching rational basis test, there are two requirements: the legislation denies a discrete, politically unpopular group an important right, and the statute was motivated by animus. However, considering the precedent, it seems more likely the Court does not require an actual of showing of animus in order to trigger the use of the test. Alternatively, if the statute is discriminatory in nature, the Court can assume the existence of animus. But if there is a successful showing of prejudice, then there is no question that the more searching rational basis test can be employed. The difference between the two theories is that in the latter, there is no absolute requirement that the plaintiff prove animus motivated the statute’s creation.

2. The More Searching Rational Basis Test Itself

Once the above requirements are met and the more searching rational basis test can be employed, it is distinct from the traditional test. The structure is the same: the means of accomplishing the statute’s purpose must bear a rational relationship to a legitimate state

the proffered rationales so implausible that the Court inferred that animus was the only conceivable (as opposed to actual) rationale.” Id. at 1279.

130 This conclusion would align with the various scholars’ and lower courts’ claim that the statute must be motivated by animus in order to employ the more searching rational basis test. See supra note 113 and accompanying text.

131 This interpretation differs from the first in that it is an either/or standard, as in, the statute denies a discrete, politically unpopular minority an important right, or said statute was motivated by animus. If the first requirement is satisfied, then the more searching rational basis test can be employed. If, after examining the motivations behind the statute’s creation, the Court finds there are no other legitimate justifications for the statute’s existence, then the Court can assume the existence of animus. The first interpretation, however, requires both elements to be present before the more searching rational basis test can be employed. This comment’s theory, though, eliminates the difficulty in showing that prejudice alone motivated the statute’s creation. In contrast, if a showing of animus is required, the more searching rational basis test’s existence is rendered moot. See supra note 113.
interest.\textsuperscript{132} However, the more searching rational basis test is not nearly as deferential in its application.

When there is an important right at stake, and where an unpopular minority is being singled out, the Court is much more willing to apply stricter tests. As Justice Kennedy noted in Romer, “even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained.”\textsuperscript{133} As the majority stated in Plyler:

In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose. But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification.\textsuperscript{134}

Thus, when an important right is at stake or there is a discriminatory classification, the Court will apply a test with considerably more teeth.

Compared to its more deferential cousin,\textsuperscript{135} the more searching rational basis test applies its prongs in a meaningful manner. First, there must be a genuine, legitimate reason for the statute’s existence.\textsuperscript{136} Second, in the relationship prong, the effect of the statute must actually advance the state’s purpose.\textsuperscript{137}

\textsuperscript{132} See supra notes 44–51 and accompanying text. The form of the two prongs remains exactly the same: the state’s intended goal must be legitimate, and the means must bear a rational relation to that legitimate objective. Id.

\textsuperscript{133} Romer v. Evans, 517 U.S. 620, 632 (1996).


\textsuperscript{135} See supra notes 43–58 and accompanying text.

\textsuperscript{136} See infra notes 138–45 and accompanying text.

\textsuperscript{137} See infra notes 146–49 and accompanying text.
The first prong is the most important. Instead of the Court hypothesizing why the statute exists, the government must make an actual showing of a legitimate purpose. Then the Court will undertake a meaningful examination of these proffered reasons. The various cases provide evidence for this conclusion. In Moreno, the Court examined the actual legislative history behind the statute to determine its purpose, and found that the history indicated the statute’s function was discriminatory in nature. Additionally, “[t]he challenged statutory classification . . . [was] clearly irrelevant to the stated purposes of the Act.” The Court in Plyler likewise required the government to proffer a legitimate goal, and examined the actual purpose behind the statute. Further, the Court noted that the Texas statute was “directed against children, and impose[d] its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States.”

138 In other words, the burden shifts to the state, which must make a showing of the statute’s legitimate purpose. See High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) (employing an “active” rational basis test and requiring the government to make an actual showing on the record that there was a legitimate reason to deny homosexuals a higher security clearance); Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1992) (though using the rational basis test, the court required the Army to offer proof as to why they discharged a lesbian Captain when there had been no allegations of misconduct, sexual or otherwise).

139 See Coburne ex rel. Coburne v. Agustin, 627 F. Supp. 983, 990 (D. Kan. 1985) (“Under the Cleburne formulation of the rational basis test, there is no place for judicial imagination or hypothesizing about possible legislative purposes . . . . [A] court’s genuine inquiry may test the rationality of the classification.”).

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

141 Id.


143 Id. at 220.
Additionally, in *City of Cleburne*, the Court noted the importance of inquiring into the actual reasons behind the statute: “We inquire . . . whether requiring a special use permit for the . . . home [for the mentally retarded] in the circumstances here deprives respondents of the equal protection of the laws.”

144 *Romer*, when examining the actual purpose behind the Colorado amendment, also held that it was “a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests . . . .” Therefore, when employing the more searching rational basis test, the Court requires that there must be an actual legitimate purpose, and that the state must make that showing.

The second prong is also more substantial: the government must show that the means of accomplishing the legitimate interest bears a rational relationship to that end. For example, in *Moreno* the Court stated:

> [E]ven if we were to accept as rational the Government’s wholly unsubstantiated assumptions concerning the differences between ‘related’ and ‘unrelated’ households we still could not agree with the Government’s conclusion that the denial of essential federal food assistance to all otherwise eligible households containing unrelated members constitutes a rational effort to deal with these concerns.

145 *Romer v. Evans*, 517 U.S. 620, 635 (1996). *See also* Wadhwani, *supra* note 45, at 811 (“[T]he majority examined Colorado’s stated reasons for the law . . . . Once again, the Court shifted the conventional burden from the plaintiffs to the State without announcing the shift.”); Lewis, *supra* note 81, at 205 (“Under *Romer*’s rational basis test, the legislation must be motivated by more than ‘animus’ and have a legitimate purpose.”).

146 *Moreno*, 413 U.S. at 535–36. This is an important difference from the traditional rational basis test, as under the original level of review, if the government proffered a reason for the statute’s existence, the Court would assume the statute rationally related to that end. *See supra* notes 43–58 and accompanying text. In the more searching rational basis test, however, there must actually be a connection, and the government must make this showing. Additionally, though *Jimenez v. Weinberger* involved a
In *City of Cleburne* the Court further noted the importance of establishing a connection between the legitimate end and the means: “The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”

*Plyler* also required that the state’s interest must bear a rational connection to the means employed.

The Court held that there was no relationship between the government’s proffered reason—trying to control the actions of illegal aliens—and the method the statute used. In other words, there was no rational connection to denying children an education because of their parents’ illegal status.

The totality of this precedent indicates that the more searching rational basis test requires both prongs of the rational basis test to be stronger. The government must not only show that there is an actual, legitimate purpose, but the means of effectuating that goal must also be rationally, and practically, related to the state’s objective. Additionally, the Court no longer

classification based on legitimacy, it is a good example of a more stringent rational basis test being utilized, and one whose application parallels the more searching rational basis test. *Jimenez v. Weinberger*, 417 U.S. 628 (1974); see also *supra* note 66. There the Court noted that “the prevention of spurious claims is a legitimate governmental interest . . . . It does not follow, however, that the blanket and conclusive exclusion of appellants’ subclass of illegitimates is reasonably related to the prevention of spurious claims.” *Jimenez*, 417 U.S. at 637. The more searching rational basis test echoes this meaningful examination of the statute’s purpose, and the means with which it accomplishes that goal. It follows, then, that the more searching rational basis test, whose application is likewise more stringent, commits the Court to undertaking a meaningful examination of the reasons behind the legislation. *Jimenez* is also another good illustration that the Court can and will give the rational basis test teeth when faced with discriminatory and irrational statutes.

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147 *City of Cleburne*, 473 U.S. at 446.

148 *Plyler*, 457 U.S. at 220.

149 *Id.*

150 *Id.*
simply accepts these reasons without question. Instead, it undertakes a substantive inquiry into the government’s claims.

B. The Applicability to Proposition 8

The question remains, however, whether the Supreme Court will find that Proposition 8 should receive the more searching rational basis test. The threshold requirement when determining if the test applies, of course, is ascertaining whether there is a discrete, politically unpopular group who is deprived of an important right. Proposition 8 clearly targets homosexuals, considering its wording excludes same-sex couples from being regarded as “married.” Thus the amendment singles out a discrete set of people. Additionally, as Romer indicated, homosexuals could be considered a politically unpopular group. O’Connor’s concurrence in Lawrence suggested as much as well. While homosexuals are not entirely politically powerless, they are still a minority. There are also statistics that show those who

151 See supra notes 103–12 and accompanying text.

152 “Only marriage between a man and a woman is valid or recognized in California.” CAL. CONST. art. I, § 7.5.

153 The Court did not specifically state that the more searching rational basis test should be applied, but it nonetheless employed the test to strike down the statute. See Romer v. Evans, 517 U.S. 620 (1996). This fact indicates laws targeting homosexuals as a group could fall under the test’s purview.

154 This conclusion can be inferred from O’Connor’s insistence on applying the more searching rational basis test to the facts in Lawrence, as well as her terminology when referring to homosexuals. See Lawrence, 539 U.S. at 580 (noting that homosexuals are a “politically unpopular group”) (O’Connor, J., concurring).

155 The conclusion that gays are not entirely politically powerless is indicated by the fact that forty seven percent of California residents voted against Proposition 8. Proposition 8—Eliminates the Right of Same Sex Couples to Marry, CALIFORNIA SECRETARY OF STATE (November 4, 2008), http://www.sos.ca.gov/elections/sov/2008_general/maps/returns/props/prop-8.htm. But note the group does not have to be completely politically powerless to satisfy this test. See supra note 105. Nonetheless, gays are still a minority in this country: the homosexual population of the United States is estimated at 8.8 million people, which is only ten percent of the total population. Gary J. Gates, Same Sex Couples and the
support homosexuals and gay marriage are fewer in number than those who disapprove of the lifestyle.\textsuperscript{156} Finally, marriage is often considered a significant privilege.\textsuperscript{157} Therefore, Proposition 8 withholds an important right from a discrete, politically unpopular group. As such, the more searching rational basis test could be employed to review the amendment.

However, if a showing of animus is also required in order for the Court to employ more searching rational basis review,\textsuperscript{158} then plaintiffs will have a much more difficult time claiming the Court should utilize this test. There are two main barriers. The first is proving that animosity motivated Proposition 8’s creation—it is extremely challenging, if not impossible, to do so. Though the district court claimed that no legitimate reason existed for Proposition 8’s creation other than moral disapproval of homosexuals,\textsuperscript{159} to make an actual showing of animus


\textsuperscript{156} Statistics show that forty one percent of Americans support gay marriage. \textit{Latest Gay Marriage Polls, THE GAY LAW REPORT (Oct. 11, 2010), http://www.gaylawreport.com/gay-marriage-poll/.} That statistic, however, may be misleading, considering that thirty-one states have put the issue of gay marriage to a vote, and there are only five states that allow it. \textit{Statistics and Reasoning to Allow Gay Marriage, ASSOCIATED CONTENT (Nov. 17, 2009), http://www.associatedcontent.com/article/2387966/statistics_and_reasoning_to_allow_gay_pg2.html?cat=17.}

\textsuperscript{157} Marriage has been held to fall under the penumbra of privacy rights. \textit{See Zablocki v. Redhail, 434 U.S. 374 (1978) (unreasonable and unnecessary restrictions on marriage receive strict scrutiny).} But even disregarding the legal aspect, it is an extremely valued and respected institution in society as a whole. History alone, as well as the impassioned debate surrounding the issue of homosexual marriage, demonstrates how central it is to the American lifestyle. Statistics also show the importance of marriage, considering almost half of the households in the United States consist of married couples, and most adults marry at some point in their lives. Sam Roberts, \textit{To be Married Means to be Outnumbered, NEW YORK TIMES (Oct. 15, 2006), http://www.nytimes.com/2006/10/15/us/15census.html?pagewanted=print.}

\textsuperscript{158} If the Court required this showing, it would be in line with the various scholarly and lower court opinions that require animus be demonstrated in order to employ the more searching rational basis test. \textit{See supra note 113.} However, due to its vague standard and the fact it is nearly impossible to prove, in theory, the Court should not require the plaintiffs to make this showing in order for it to employ the more searching rational basis test. \textit{Id.}

\textsuperscript{159} Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1002 (N.D. Cal. 2010). Though the district court declared there was no other purpose behind Proposition 8 other than prejudice, it declined to make a
would require proof that the plaintiffs would be unable to provide—the standard is simply too
too vague. Additionally, the practical implications of gathering proof to show that legislation was
motivated by ill will are staggering. No one is likely to say they voted for Proposition 8 because
they do not like homosexuals, so it is unrealistic to require this type of proof. Thus, if the Court
requires plaintiffs to demonstrate animus motivated Proposition 8’s creation, it would take the
amendment outside the purview of the more searching rational basis test.

The second reason that animus would be difficult to show is that there are multiple
motivations, other than prejudice, to support this amendment. First and foremost, there is the
protection of the idea of traditional marriage.160 This rationale is the cornerstone of proponents’
argument, and it is often considered a legitimate reason, in every sense of the word.161 Supporters
further claim that this amendment is not an attack on the gay lifestyle, that it is more a debate
over religious freedom.162 Finally, to support Proposition 8 does not necessarily require prejudice
against homosexuals.163 Thus, the state could point to any of these reasons to negate the
accusation of animus. As such, if the Court does indeed require a showing of animus, then it is
unlikely the more searching rational basis test will be utilized.

finding of fact along those lines. Id. Thus, the Court will not be able to rely on the district court’s findings
in order to hold that Proposition 8 was motivated by animus, as it did in City of Cleburne. See supra note
118 and accompanying text.


161 See infra notes 157–162 and accompanying text.


163 Id. For example, instead of being prejudiced, supporters could simply be trying to maintain the idea of
traditional marriage.
If the Court declines to implement the more searching rational basis test and instead employs its traditional cousin, there is little question Proposition 8 will be upheld. However, it is entirely possible that the more searching rational basis test will be applied. If that is the case, the burden shifts to the state to demonstrate Proposition 8’s legitimate purpose, as well as its rational relation to that objective. Then the Court will undertake a substantive examination of both the state’s proffered reasons, as well as whether the means rationally relate to the amendment’s goal.

California would likely offer the same justifications for Proposition 8 as it did in the district court. The first, and traditionally strongest, argument is that the amendment protects the idea of conventional marriage. Even under the more searching rational basis test, though, this could be considered a legitimate purpose. While Judge Walker stated that antiquated ideas of

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164 This of course is due to the permissive nature of the Carolene Products rational basis test: if the state does not proffer a legitimate reason for Proposition 8’s existence, then the Court will create one of its own accord, and Proposition 8 will invariably be upheld. Though Judge Walker claimed that Proposition 8 could not survive rational basis review, it was clear the district court did not actually employ the traditional test. *Perry*, 704 F. Supp. 2d at 997; see also *supra* note 36. By undertaking a meaningful examination of the state’s proffered reasons, Judge Walker actually applied the more searching rational basis test. *Perry*, 704 F. Supp. 2d at 997. Thus, if the higher courts do employ the traditional rational basis test, it is unlikely they will follow the district court’s reasoning, and will most likely hold that the protection of traditional marriage is a legitimate governmental interest.

165 The reason this comment uses “burdens” terminology is that the more searching rational basis test requires the state to make an actual showing of a legitimate reason, as opposed to the plaintiff’s burden of negating every conceivable legislative justification in the traditional test. See Wadhwani, *supra* note 45, at 811; *supra* note 126.

166 *See supra* notes 43–58 and accompanying text.

167 This comment now undertakes a hypothetical analysis, which (hopefully) would parallel the Court’s reasoning if it employed the more searching rational basis test. Each of these reasons are analyzed in turn.

168 This conclusion will most likely depend on what political stance the Court decides to take. *See infra* notes 161–62, 184 and accompanying text.
marriage did not justify denying homosexuals the right to marry,\textsuperscript{169} there has been dicta in the Court that suggests it could be considered legally sufficient. As Justice O’Connor noted in \textit{Lawrence v. Texas}:

\begin{quote}
That [the Texas anti-sodomy law] as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations . . . other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.\textsuperscript{170}
\end{quote}

There is clearly disagreement, then, as to whether protecting traditional marriage is a legally legitimate goal.\textsuperscript{171} Whether it is considered legitimate, though, seems to center around one’s political persuasion.\textsuperscript{172} Given the Court’s current political leanings,\textsuperscript{173} even employing the more

\textsuperscript{169} Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 998 (N.D. Cal. 2010). A district court in Massachusetts also recently held that there was no legitimate governmental interest in denying homosexual couples the same financial benefits as heterosexual married partners, claiming that protecting traditional marriage was not legitimate. Gill v. Office of Pers. Mgmt., 669 F. Supp. 2d 374, 393–94 (D. Mass. 2010) (striking down the Defense of Marriage Act as violating the Equal Protection Clause). As an interesting side note, the Obama administration has declared the Defense of Marriage Act to be unconstitutional, and thus the United States will no longer be defending it in court. \textit{NPR Staff & Wires}, NPR (Feb. 23, 2011), http://www.npr.org/2011/02/23/133996797/u-s-will-no-longer-defend-anti-gay-marriage-law. For this declaration’s impact on Proposition 8, see infra note 178.

\textsuperscript{170} Lawrence v. Texas, 539 U.S. 558, 585 (2003) (O’Connor, J., concurring). However, Justice O’Connor did not mention what, exactly, those reasons are for promoting the institution of traditional marriage. Furthermore, Justice Scalia in his dissent predicted dire consequences for the state of marriage, as well as social upheaval, after the Court overruled \textit{Bowers v. Hardwick}. \textit{Id.} at 590–602 (Scalia, J., dissenting).

\textsuperscript{171} Compare \textit{Citizens for Equal Prot. v. Bruning}, 455 F.3d 859 (8th Cir. 2006) (upholding a constitutional amendment stating only marriage between a man and a woman is recognized in Nebraska, and employing the traditional rational basis test to find the protection of traditional marriage was a legitimate state interest) \textit{and} Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (holding that the Defense of Marriage Act was rationally related to the legitimate governmental interest of protecting traditional marriage) \textit{with} Dragovich v. U.S. Dep’t of Treasury, 2011 WL 175502 (C.D. Cal. January 18, 2011) (holding that the Defense of Marriage Act violates the Equal Protection Clause because encouraging heterosexual marriage over homosexual relationships is not a legitimate state interest).

\textsuperscript{172} This conclusion is evidenced by the fact that the traditionally conservative judges hold that it is not a legitimate reason, whereas the more liberal courts consider it irrational. To illustrate, Judge Loken, who wrote the majority opinion in \textit{Citizens for Equal Protection v. Bruning}, is a republican. \textit{FEDERAL
searching rational basis test, it is entirely possible that the Court will hold protecting traditional marriage is a legitimate governmental interest.

There are also other, less persuasive justifications for the amendment. As the state noted, those are: (1) proceeding with caution when implementing social change; (2) promoting opposite-sex parenting over same-sex parenting; (3) protecting the First Amendment freedoms of those who do not wish to see same-sex couples marry because of their personal and religious beliefs; and (4) treating opposite-sex couples differently from same-sex couples by calling their various partnerships different names.\textsuperscript{174}

The social change rationale would most likely not be considered legitimate. Though reluctant to inspire wholesale change, the Court has still instigated its share of political transformations, when it deems that change is necessary.\textsuperscript{175} And as Judge Walker noted, allowing homosexuals to marry hardly constitutes tremendous social alteration, given the current rights of domestic partners and the number of openly gay couples.\textsuperscript{176}

\textsuperscript{173} There is currently a five to four ratio of conservative to liberal Justices. Justices Roberts, Scalia, Thomas, Kennedy, and Alito were appointed by Republican Presidents, whereas Justices Kagan, Sotomayor, Breyer, and Ginsburg were appointed by Democratic Presidents.


\textsuperscript{175} For example, there is the penumbra of privacy rights the Court created, and decisions like \textit{Brown v. Board of Education}, 347 U.S. 483 (1954), and \textit{Roe v. Wade}, 410 U.S. 113 (1973).

\textsuperscript{176} \textit{Perry}, 704 F. Supp. 2d at 999.
Promoting opposite-sex parenting over same-sex parenting, however, could be considered legitimate, depending on what statistical studies are reviewed. The district court found that plaintiffs adequately demonstrated there was no difference between same sex and opposite sex parenting. Though studies conflict, a reviewing court will most likely be limited to the lower court’s finding. But whether or not this is a legitimate reason, preventing homosexual couples from marrying does not necessarily preclude them from adopting. In fact, it just gives less rights to one parent than the other. Thus, even if considered legitimate, the amendment might not rationally relate to that particular goal.

The fourth reason the state offered, protecting the personal and religious freedom guaranteed by the First Amendment of those who do not wish to see same–sex couples marry, is also a rather weak rationale. First, the hypocrisy of this claim is staggering. Denying one group of people rights because another group feels uncomfortable, or participates in a religion that condemns the practice, is not actually protecting freedom or equality. And as Judge Walker

177 There are conflicting scholarly viewpoints. Some statistical studies show that same sex parents negatively impact a child’s life, whereas other studies conclude that a child’s well-being depends more on the stability of the home life, rather than the sexual orientation of the child’s parents. See Judith Stacey & Timothy J. Biblarz, (How) Does the Sexual Orientation of Parents Matter?, 66 AM. SOCIOLOGICAL REV. 159 (2001) (maintaining that while some studies have skewed statistics showing that children are negatively impacted by homosexual parents, the reality is that these children are not developmentally impaired).

178 Perry, 704 F. Supp. 2d at 999–1000.

179 Holding that plaintiffs made an adequate showing that there was no disparate impact on children was a clever move on the district court’s part, considering that an appellate court cannot make findings of fact. Fed. R. Civ. P. 52(a)(6) (appellate courts are bound by a district court’s finding of fact unless clearly erroneous). Now any reviewing court is limited to this holding, absent clear error.

180 It is simply making some people more free to practice their beliefs than others. Those who do not believe homosexuals should marry are entirely free to have this belief, and to practice their religion in a manner that does not condone the practice. But to completely deny a right to a group of people just because a majority group does not believe in it, echoes the anti-miscegenation statutes of the early
pointed out, this claim is not legally sound.\textsuperscript{181} Proposition 8 in no way interferes with any First Amendment rights to practice a religious belief, or teach one’s children certain moral values.\textsuperscript{182} The amendment simply denies homosexuals the right to marry, but does not affect the freedoms of other groups.\textsuperscript{183}

Finally, calling both types of partnerships different names, so as to streamline the administrative process and maintain the distinctions between the two types of couples, is also a somewhat tenuous argument. While it makes a certain amount of intuitive sense to classify different institutions with different names, it does not necessarily render the administrative process more efficient. As Judge Walker pointed out, under California law same–sex and opposite–sex couples are treated the same, so creating separate regulations in order to keep the names different in fact makes the process even more burdensome.\textsuperscript{184} While under the traditional rational basis test this reason might suffice, when examined in a practical manner under the more searching rational basis test, it does not seem quite as legitimate. Judge Walker further noted that the evidence presented at trial demonstrated that both types of couples are fundamentally the same, and thus their partnerships do not need distinct categories.\textsuperscript{185}

\textsuperscript{181} \textit{Perry}, 704 F. Supp. 2d at 1000–01.

\textsuperscript{182} \textit{Id.} at 1001.

\textsuperscript{183} \textit{Id.}

\textsuperscript{184} \textit{Id.} at 1001–02.

\textsuperscript{185} \textit{Id.} at 1002. Again, this factual finding would limit the reviewing courts. \textit{See supra} note 168.
Once the first prong of the test is examined, the Court must then inquire if the means are rationally related to the amendment’s proffered goal. This analysis most likely turns on whether the Court finds that the protection of marriage is a legitimate state interest. If the Court holds that this reason is not legitimate, then the test is not satisfied and no further analysis is necessary. If it is found to be legitimate, though, a ban on same sex marriage would most likely rationally relate to that goal. One does not have to pull reasons out of thin air in order to conclude that Proposition 8 logically, rationally relates to protecting heterosexual marriage. If homosexuals cannot marry, only heterosexuals can, and thus, the idea of traditional marriage is preserved. As such, Proposition 8 would rationally relate to a legitimate state interest.

To conclude, Proposition 8 is a solid candidate for the more searching rational basis test. A discrete, politically unpopular group is singled out, and denied an important right. However, if the Court requires a showing of animus, then the traditional rational basis test must be employed. If the Court does not require that showing, though, then whether or not Proposition 8 will be upheld most likely rests on whether the Court will find that protecting traditional marriage is a legitimate state interest. If so, then it rationally relates to its goal, given that homosexuals are denied the right to marry. As such, the amendment will most likely be upheld, even under the more exacting level of scrutiny.

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186 This is the second prong of the more searching rational basis test. See supra notes 43–58 and accompanying text.

187 This is what the district court held, that Proposition 8 did not support any legitimate state interests, and thus, no further analysis was necessary. Perry, 704 F. Supp. 2d at 1003.

188 As allowed by the traditional rational basis test. See supra notes 46–51 and accompanying text.
C. The Test to Employ for Classifications Involving Homosexuality in General

If Perry v. Schwarzenegger reaches the Supreme Court, the Court will be forced to establish a level of review within the Equal Protection Clause that deals with classifications involving sexual preference. It is currently unclear what test should be employed when reviewing this type of legislation. Many courts have held that homosexuals are not a suspect class, and thus do not receive a form of heightened scrutiny. Therefore, it is doubtful that this claim

189 In Bowers v. Hardwick the Court specifically ruled that when challenged under substantive due process claims homosexuality should receive a rational basis review. Bowers v. Hardwick, 478 U.S. 186, 194–96 (1986) (overruled by Lawrence v. Texas, 539 U.S. 558 (2003)). But Bowers has been overruled by Lawrence, and Lawrence itself has created a different set of problems. The opinion left unclear what test should be used when analyzing statutes that deny homosexuals particular rights. See Toni M. Massaro, Gay Rights, Thick and Thin, 49 STAN. L. REV. 45 (1997) (what level of review to employ when gay rights are involved is convoluted at best; this comment advocates the use of the rational basis test). Judge Walker in Perry v. Schwarzenegger expressly declared that strict scrutiny should be applied. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010). But the majority opinions in Lawrence and Romer articulated a rough rational basis test. See supra notes 81–89 and accompanying text. Following such precedent, this comment proposes that the more searching rational basis test should be employed. However, when declaring the Defense of Marriage Act unconstitutional, “the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny.” Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, THE UNITED STATES DEPARTMENT OF JUSTICE (Feb. 23, 2011), http://www.justice.gov/opa/pr/2011/February/11-agg-222.html. Presumably, this means that the rational basis test, or any form thereof, should no longer be employed. However, the judicial branch is not bound by any opinion arising from the executive branch on issues concerning a statute’s constitutionality. U.S. CONST. art. III. Given the President’s opinion, though, in combination with existing precedent, the more searching rational basis test would offer a reasonable compromise. The test is not nearly as permissive as the traditional rational basis test, but it does not rise to the level of intermediate or strict scrutiny, which the Court has been hesitant to apply to classifications involving homosexuality. See infra notes 190–92 and accompanying text.

190 See Jantz v. Muci, 976 F.2d 623, 630 n.3 (10th Cir. 1992) (employing the rational basis test when confronted with a statute classifying homosexuals); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) (declining to hold that gays are a suspect class); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989) (same); Lofton v. Kearney, 157 F. Supp. 2d 1372, 1382 (S.D. Fla. 2001) (“[S]everal other circuits which have examined whether homosexuals should be granted this heightened level of scrutiny . . . have declined to do so. These circuits have clearly declared that while homosexuals are protected by the Equal Protection Clause, government action classifying individuals on the basis of homosexuality or homosexual conduct must be analyzed under the rational basis test.”).
would succeed if brought before the Supreme Court.\textsuperscript{191} Even claims that homosexuality is a quasi-suspect class, like gender, have been predominately rejected.\textsuperscript{192} Thus, the rational basis test seems to be the only level of review available, as well as the one most widely accepted by the courts.\textsuperscript{193}

However, the traditional \textit{Carolene Products} type of rational basis review would not be appropriate—it is far too deferential a standard, and would offer no protection from blatantly discriminatory statutes, like those in \textit{Romer} and \textit{Lawrence}. The more searching rational basis test would be far more applicable.\textsuperscript{194} The Court would not have to find homosexuals a suspect or quasi-suspect class, but it would not have to rubber stamp every piece of potentially discriminatory legislation. Requiring an actual showing of the legitimate purpose behind a

\textsuperscript{191} See Massaro, supra note 178, at 74–78 (those advocating the use of the rational basis test as articulated in \textit{Romer} and \textit{Lawrence} have the best chance of succeeding when fighting statutes involving classifications of homosexuals, because claims maintaining that gay people should receive a heightened form of scrutiny have predominately failed).

\textsuperscript{192} \textit{Id.} at 81–83; see also Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997) (declining to utilize any heightened form of scrutiny to review statutes involving homosexuals); Thomason v. Perry, 80 F.2d 915 (4th Cir. 1996) (statutes targeting homosexuality do not receive intermediate scrutiny). Hawai‘i, though, has ruled that classifications based on sexual preference do receive heightened scrutiny, based on the Hawai‘i Constitution. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (striking down a ban on homosexual marriage because it violated the Equal Protection Clause of the Hawai‘i Constitution). However, that is one of the few courts that have done so. Even states that have invalidated same–sex marriage bans have utilized a rational basis level of review. See Goodridge v. Dep’t of Public Health, 798 N.E.2d 941 (Mass. 2003) (holding the ban on homosexual marriage lacked a rational basis, and thus did not survive the equal protection challenge under the Massachusetts Constitution).

\textsuperscript{193} See supra notes 178–81.

\textsuperscript{194} A parallel can also be drawn between classifications based on illegitimacy, as seen in \textit{Jimenez} v. \textit{Weinberger}, and classifications based on sexual preference. In \textit{Jimenez} the Court used a rational basis test, but a stricter one than that found in \textit{Carolene Products}. See supra note 66 and accompanying text. So it is entirely possible the Court could employ the more searching rational basis test when reviewing classifications involving homosexuality. If there is a legitimate reason for the classification, it can be upheld. But the Court must still employ a form of judicial review, so there is a possibility the statute could be struck down if it is too invidious.
statute, rather than the Court hypothesizing one, would hinder statutes created out of prejudice.\textsuperscript{195} Additionally, compelling the government to show that the purpose of the statute is \textit{actually} rationally related to its legitimate interest would help prevent overbroad legislation. Thus, this test would preserve the integrity of the Equal Protection Clause, while at the same time maintain deference to the legislature and the voters.

If the more searching rational basis test is indeed applied to Proposition 8, not only would there be a clear standard, it would be an important victory for gay rights advocates. Considering classifications involving homosexuality commonly receive rational basis review,\textsuperscript{196} advocates would finally be able to substantively challenge discriminatory legislation. Additionally, various similar bans on gay marriage would be challenged in other states, and the United States could very well see a sweeping change in marriage laws.

\textbf{V. CONCLUSION}

Proposition 8 is clearly a difficult issue. There are impassioned arguments on both sides, and what little legal precedent exists is unclear, at best. But the question still remains whether Proposition 8 will survive a constitutional challenge in the higher courts. Though the district court in \textit{Perry} struck down the amendment on both equal protection and due process grounds, if the case reaches the Supreme Court, it is doubtful the Court will follow Judge Walker’s logic. When reviewing classifications based on sexual orientation, a higher standard of scrutiny beyond the rational basis test seems unlikely to be employed. Additionally, the district court reviewed Proposition 8 under the more searching rational basis test, by examining the actual purpose and logic behind the amendment. If the Court does utilize the traditional rational basis

\textsuperscript{195} This would be a protection against those statutes that are similar to the legislation invalidated in \textit{Romer} and \textit{Lawrence}.

\textsuperscript{196} See supra notes 190–92 and accompanying text.
test, it will blindly accede to the state’s reasoning, rather than undergoing a purposeful evaluation of the proffered logic.

However, Proposition 8 is a strong candidate for the more searching rational basis test. It defines a discrete, politically powerless group of people—homosexuals—and denies them the right to marry. If the Court does not feel the need to require a showing of animus, then the more searching rational basis test should be employed. California’s logic will then undergo a meaningful evaluation by the Court: it will examine the purpose behind Proposition 8, as well as whether the amendment is rationally related to its stated goal. Then the main issue becomes whether the protection of traditional marriage will be considered a legitimate state interest. If not, then the amendment will be struck down and no further analysis is necessary. If it is, then Proposition 8 is almost certainly rationally related to that objective, and the legislation will most likely be upheld. But determining whether the protection of traditional marriage is a legitimate goal tends to depend on one’s political and religious persuasion. Those who support gay rights claim it is not, whereas the conservative right wing claims it is. Thus, what the Court decides will most likely be based on the surrounding political climate.¹⁹⁷

If the Court employs the more searching rational basis test and strikes down Proposition 8, there will be a few effects. The first is that homosexuals will have an established test to employ when challenging classifications based on sexual preference. This will give the

¹⁹⁷ Given the five to four majority of conservatives to liberals, this comment’s prediction is that the protection of traditional marriage will be considered a legitimate interest. Additionally, “this particular Supreme Court is not known for its judicial activism in expanding rights under the Equal Protection Clause . . . .” Lewis, supra note 81, at 201. It might even be considered a legitimate interest in the Ninth Circuit (given the precedent in the other circuits), although considering that circuit’s more progressive leanings, it is less certain.
lower courts a clear standard to use when confronted with statutes targeting homosexuals. The second and broader effect is that many states with statutes similar to Proposition 8 will most likely face constitutional challenges to their legislation. It would be a decisive victory for gay rights advocates.

But whether or not Proposition 8 is upheld, it is important for the Court to establish once and for all a clear level of review for classifications based on sexual preference. And the more searching rational basis test is not only the most logical, it is the most reasonable test for the Court to employ. This test forces the state to have actual reasons for the statute’s existence, and the Court must undertake a meaningful review. However, because it is a much softer standard than, for instance, intermediate review, the Court is still able to maintain deference to the legislature. The equities, then, are balanced in everyone’s favor. If there is a discriminatory statute, then it can be struck down. But where the Court feels it must adhere to the legislative branch, it can do so with an easy conscience. And, most importantly, it will finally be clear what level of review statutes involving homosexuals should receive.

198 But if the more searching rational basis test is employed, even if the Court does not actually strike down Proposition 8, there will finally be a defined level of review for statutes targeting homosexuals. Legally speaking, this would be the most important result. In fact, this would be a good opportunity for the Court to once and for all establish the existence of the more searching rational basis test, rather than hinting at it and leaving scholars and lower courts in the dark as to whether or not there is a “stronger” rational basis test.