Animus and Marriage Equality

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I. INTRODUCTION

For decades, attaining heightened judicial scrutiny has been the Holy Grail of equal protection advocacy. This is because there is a high correlation between a court’s decision to apply heightened scrutiny and a positive outcome for the plaintiff. Conversely, in the absence of heightened scrutiny, plaintiffs rarely prevail. Accordingly, we see that arguments in favor of heightened scrutiny are a central component to the plaintiffs’ advocacy in the marriage equality cases.¹

Equal protection plaintiffs can achieve heightened scrutiny by demonstrating that the challenged law (1) relies on a suspect or quasi-suspect classification, or (2) burdens a fundamental right. But heightened scrutiny has in some ways become a pipe dream. The United States Supreme Court has not recognized a new suspect or

¹ See William N. Eskridge, Jr., Is Political Powerless a Requirement for Heightened Equal Protection Scrutiny?, 50 Washburn L. J. 1, 1 (2010) (“advocates for marriage equality almost invariably seek a reason for judges to apply heightened scrutiny.”).
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quasi-suspect classification since 1977,\(^2\) and has expressed a general aversion to “discovering” new fundamental rights.

For this and other reasons, it is certainly conceivable that the United States Supreme Court will decline to apply heightened scrutiny to the two marriage equality cases currently before it,\(^3\) and apply deferential rational basis review instead. Indeed, a number of the lower courts have opted to apply rational basis review to the marriage equality challenges before them, creating a backdrop of factual findings and legal reasoning for this approach.\(^4\)


\(^4\) See, e.g., Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Calif. 2010) (concluding that Proposition 8 failed rational basis review); Perry, 671 F.3d at 1082 (same); Massachusetts v. U.S. Dep’t of Health and Human Services, 682 F.3d 1, 15-16 (1st Cir. 2012) (concluding that DOMA fails rational basis review).
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While application of rational basis review may be viewed as a worst case scenario by advocates of marriage equality, the plaintiffs in both the Proposition 8 and DOMA challenges (Perry and Windsor, respectively) have strong arguments under this standard—arguments that, if adopted by the Court, could invalidate bans against same-sex marriage throughout the country. These arguments are based in the underdeveloped but powerful doctrine of unconstitutional animus.

To explore this possibility, this essay first sets forth the various paths of reasoning that might lead the Court to apply rational basis review in either one or both of the pending marriage equality challenges. The essay next explains the divergent understandings of the doctrine of animus currently reflected in the Court’s precedent. Finally, the essay describes the different types of marriage regimes in the United States, and examines how different understandings of animus would play out when applied to these various scenarios.

II. PATHS TO RATIONAL BASIS REVIEW

Although there are a number of strong arguments for applying heightened scrutiny to the marriage equality cases, there are several ways the United State Supreme Court may come to apply
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rational basis review to these challenges. One of the most compelling reasons for the Court to apply rational basis review would be in keeping with the principle of constitutional avoidance.\(^5\) If the Court were ultimately to decide that Proposition 8 and/or DOMA fail rational basis review, then it could avoid deciding the weighty constitutional questions associated with applying heightened scrutiny.\(^6\) The Court could also, however, end up applying rational basis review after rejecting the plaintiffs’ arguments for heightened scrutiny.

First among the arguments for heightened scrutiny in logical coherence if not in popularity is the contention that bans against same-sex marriage are a form of sex discrimination, such that intermediate scrutiny applies. In terms of rigor, intermediate scrutiny falls short of the gold standard of strict scrutiny, but is nonetheless a form of heightened scrutiny vastly preferable to rational basis review.

\(^5\) See Clark v. Martinez, 543 U.S. 371, 381-82 (2010) (explaining constitutional avoidance as a canon of statutory construction that presumes the legislature did not mean to raise serious constitutional issues, such that courts should prefer interpretations that avoid constitutional questions).

\(^6\) Namely: whether the laws implicate a suspect class or fundamental right.
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It seems beyond argument that laws prohibiting same-sex marriage rely on—indeed, must invoke—facial sex classifications. States that define marriage as an exclusively heterosexual institution do so by defining marriage as a union between “one man and one woman.”\(^7\) By invoking these terms and making access to legal rights dependent upon them, such laws facially discriminate on the basis of sex.\(^8\)

And yet courts have nonetheless declined to recognize the facial classifications at work in these laws, instead focusing on the

\(^7\) See, e.g., Ky. Const. sec. 233A (2004) (“Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. . . ”).


A woman is denied the right to marry another woman because her would-be partner is a woman, not because one or both are lesbians. Similarly, a man is denied the right to marry another man because his would-be partner is a man, not because one or both are gay. Thus, an individual's right to marry a person of the same sex is prohibited solely on the basis of sex, not on the basis of sexual orientation. Indeed, sexual orientation does not appear as a qualification for marriage under the marriage statutes. The State makes no inquiry into the sexual practices or identities of a couple seeking a license.
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fact that the laws do not disadvantage one sex relative to the other. For example, in Jackson v. Abercrombie, the district court reasoned that Hawai‘i’s law defining marriage as an exclusively heterosexual institution “does not treat males and females differently as a class. It is gender-neutral on its face; it prohibits men and women equally from marrying a member of the same-sex.”

This reasoning is in blatant conflict with powerful precedent, most notably the Supreme Court’s decisions in Brown v. Board of Education and Loving v. Virginia. Brown did not explicitly deal with the significance of facial classifications, but did so implicitly in refuting the reasoning and outcome of Plessy v. Ferguson, the case that infamously solidified the “separate but equal” doctrine in the service of validating racial segregation. The law at issue in Plessy, which mandated that train cars be segregated on the basis of race, patently relied on facial race classifications. Indeed, the law could

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12 163 U.S. 537 (1896).
13 Id. at 540.
not serve its primary function—racial segregation—without relying on facial race classifications. Nonetheless, the Plessy Court concluded that this form of segregation did not implicate the Equal Protection Clause because the train cars, while separate, were still equal in terms of the quality of accommodations.\textsuperscript{14} In other words, the Plessy court made differential treatment \textit{above and beyond the use of facial classifications} a threshold requirement for equal protection claims.

This approach was soundly repudiated by \textit{Brown}. \textit{Brown} is most often read as standing for the proposition that separate can never be equal.\textsuperscript{15} But it can also be read as standing for the proposition that reliance on facial classifications is a harm in and of itself; no additional differential treatment need be proved.\textsuperscript{16}

\textit{Loving} is even more on point. There, the State of Virginia, in an effort to excuse its anti-miscegenation law from equal protection

\begin{itemize}
\item \textsuperscript{14} \textit{Id.} at 548-49.
\item \textsuperscript{15} \textit{Brown} v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal.").
\item \textsuperscript{16} \textit{See also} McLaughlin v. Florida, 379 U.S. 184, 191 (1964) ("Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation.").
\end{itemize}
scrutiny, contended that the Equal Protection Clause’s protections did not apply to the law at all, because the law did not enact race discrimination per se.\textsuperscript{17} Race discrimination, according to Virginia, existed only where a law subjected different races to different treatment.\textsuperscript{18} Because neither Blacks nor Whites could inter-marry under the law, and because the criminal penalties imposed on each group were the same, there was no race discrimination and therefore no equal protection claim based on race.\textsuperscript{19}

The \textit{Loving} Court rejected this argument. Because the anti-miscegenation law relied on facial race classifications, it thereby made legal rights dependent on race, and constituted actionable race discrimination under the Equal Protection Clause, to which strict scrutiny would apply.\textsuperscript{20}

In other words, facial classifications on the basis of a particular trait, which make access to legal rights dependent on that

\textsuperscript{17} Loving v. Virginia, 388 U.S. 1, 7-8 (1967).

\textsuperscript{18} \textit{Id.} at 8.

\textsuperscript{19} \textit{Id.}

\textsuperscript{20} \textit{Id.}
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trait, trigger the level of equal protection scrutiny asserted with that trait.21 Period.

Under this logic, because laws prohibiting same-sex marriage necessarily rely on facial sex classifications, they necessarily make legal rights dependent on sex, and constitute actionable sex discrimination. Nevertheless, it is apparent that courts may be willing to reject Loving’s analysis of anti-miscegenation laws as an analog for bans on same-sex marriage.

Another route to heightened scrutiny would be for the Court to determine that: (1) bans on same-sex marriage facially discriminate on the basis of sexual orientation, and (2) the Court should recognize sexual orientation as a suspect or quasi-suspect classification.

In contrast to sex, which was recognized as a quasi-suspect classification several decades ago, the Court has yet to recognize sexual orientation as a suspect or quasi-suspect classification.22 To

21 Id. at 9.

22 Perry, 671 F.3d at 1100. In the leading decision on whether sexual orientation should be considered a suspect classification, the Ninth Circuit rejected this contention, blithely concluding that sexual orientation was a matter of conduct
take this step in the context of the marriage equality cases, the Court would have to analyze sexual orientation against the backdrop of the suspect classification criteria, famously originating in *Carolene Products* footnote four.\textsuperscript{23} To “qualify” as a suspect classification, the group disfavored under that classification\textsuperscript{24} must: (1) be politically powerless; (2) have suffered a history of discrimination; (3) be defined by an immutable trait; and (4) be a discrete and insular minority.\textsuperscript{25} The Court has also looked at (5) the extent to which the trait relates to one’s ability to participate in society, such that the trait rather than status. *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990).

\textsuperscript{23} United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938) (observing that laws that reflect “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

\textsuperscript{24} The relationship between suspect *classifications* (e.g., race) and suspect *classes* (e.g., emancipated African American slaves) is confounding because courts consider factors that are at once historical and ahistorical, and factors that are at once deeply substantive and highly formalistic.

\textsuperscript{25} *Cleburne*, 473 U.S. at 440-41.
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is presumptively more or less relevant to legitimate legislative goals.26

It is unclear how the trait of sexual orientation will fare under this standard. Attorney General Eric Holder took the position early in 2011 that sexual orientation should be considered a suspect classification, such that laws relying on such classifications would be subject to strict scrutiny.27 Similarly, numerous academics have detailed compelling arguments for why sexual orientation should be considered inherently suspicious as a legislative classification.28

Separate from the question of whether the Court should recognize sexual orientation as a suspect classification is the question of whether the Court will do so, as a matter of Realpolitik. Bill Eskridge argues persuasively that the gay rights movement strongly parallels the civil rights and feminist movements before it, and that the historical pattern is for groups to receive protected status not

26 Id.


when they are, in fact, politically powerless, but when they have achieved enough political power to be reckoned with. Under this theory, the level of political power achieved by gay men and lesbians at this point in time—power that is incomplete, but not inconsequential—makes sexual orientation the perfect candidate for suspect classification recognition. On the other side of the debate, Kenji Yoshino contends that the Court will not recognize additional suspect classifications, regardless of the merits of the underlying argument, because of the palpable pluralism anxiety manifest in the Court’s contemporary equal protection jurisprudence.

If we take suspect-classification analysis at its word, there are plausible reasons the Court would decline to extend protection to sexual orientation. The best argument that sexual orientation should

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29 Eskridge, supra note __, at 18-19, see also Letter from Eric Holder, Jr. to John A. Boehner, supra, note __ (noting that “when the Court ruled that gender-based classifications were subject to heightened scrutiny, women already had won major political victories such as the Nineteenth Amendment (right to vote) and protection under Title VII (employment discrimination).”

30 See Yoshino, supra note __, at 757 (noting that the Supreme Court has not accorded heightened scrutiny to any new group based on suspect classification since 1977, and arguing that “[a]t least with respect to federal equal protection jurisprudence, this canon has closed”).
be recognized as a suspect classification is that it is a trait, like race, that is unrelated to one's ability to participate in society, and is therefore presumptively irrelevant to law-making. Indeed, Lawrence v. Texas\textsuperscript{31} goes a long way to establishing that regulation of private sexual conduct and sexual identity is beyond the scope of the valid exercise of police power.

But this factor—relevance of the trait to valid law-making interests—is but one aspect of the suspect classification analysis. The real sticking point (and the factor that Eskridge understandably focuses on) is political power. Again, this factor is inherently problematic as a basis for formulating doctrine because assessments of political power are necessarily subjective, fact-intensive, and changing over time.\textsuperscript{32} The ever-evolving status of sexual orientation in the United States exemplifies the uncertainty involved in assessing

\textsuperscript{31} 539 U.S. 558, 582-83 (2003) (holding that bare moral disapproval of homosexual conduct or identity was not a valid basis for the public laws).

\textsuperscript{32} As Justice Powell noted in another context: “The kind of variable sociological and political analysis necessary to produce such rankings [of the relative hardships borne by different social groups] simply does not lie within the judicial competence - even if they otherwise were politically feasible and socially desirable.” Regents of University of California v. Bakke, 438 U.S. 265, 297 (1978).
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political power. There is possibly no civil rights movement that has been as swift and dynamic as the LGBT rights movement in recent years.\(^{33}\) It is undeniable that members of the LGBT community have faced and continue to face horrific acts of violence and routine discrimination by both private and public actors.\(^{34}\) But it is also impossible to deny that change is afoot.\(^{35}\) Suspect classification designations are designed as a stop-gap when the democratic process is failing to sufficiently protect minority groups. But here, it appears that the democratic process is working, albeit in fits and starts.

Finally, the Court could also avoid applying heightened scrutiny on the basis of sexual orientation discrimination because the


\(^{35}\) See Election Results – Nov. 2012, MARRIAGE EQUALITY USA, http://www.marriageequality.org/election-results (last visited Feb. 16, 2013) (showing that four states changed their legal stance on marriage equality in the 2012 general election: Maine, Maryland, and Washington voted to approve same-sex marriage, while voters in Minnesota defeated an amendment to the state constitution that would have defined marriage as a union between one man and one woman).
bans on same-sex marriage do not directly mention sexual orientation on their face. While it seems obvious that limiting marriage to one man and one woman targets homosexuals, or prescribes an orthodox sexual orientation (heterosexuality), this conclusion nonetheless requires an inferential step beyond what appears on the face of the law.

Thus, it is conceivable that the Court will decide that bans against same-sex marriage do not implicate a suspect or quasi-suspect classification, eliminating another basis for subjecting such laws to heightened scrutiny.

The third route to heightened scrutiny would be for the Court to conclude that laws prohibiting same-sex marriage burden the fundamental right to marriage, such that strict scrutiny applies. Again, it seems beyond argument that such laws implicate the right to marriage. And yet, while this is surely the correct outcome, there

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are a number of plausible "outs" the Court could take, and that other courts have taken.

For example, in *Jackson*, the district court rejected the argument that bans on same-sex marriage implicate the fundamental right to marriage, beginning with the observation that courts are obligated to define asserted fundamental rights with precision.\(^{38}\) Applying this rule, the court characterized the asserted right not as the right to “marriage,” but as a right to “same-sex marriage,” something inherently different than traditional, opposite-sex marriage.\(^{39}\) In support of this characterization, the court emphasized that marriage has always been understood as the union of one man and one woman, and that the fundamental nature of the marriage right is grounded in its linkage to procreation.\(^{40}\) Having concluded that same-sex couples could not lay claim to this—the traditional, fundamental right to marry—the court then examined whether

\(^{38}\) *Jackson*, 2012 WL 3255201, at *23.

\(^{39}\) *Id.* at *24-25.

\(^{40}\) *Id.* at *24.
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history and tradition recognized a fundamental right to same-sex marriage, and unsurprisingly concluded that they did not.\footnote{Id. at *25-26. By contrast, the district court in Perry acknowledged that marriage was traditionally a heterosexual institution, but that other aspects of marriage had proven transcendent through the ages—the prescription of differentiated gender roles not being among them. See 704 F. Supp. 2d at 992 ([t]he persistent, overarching state interest in marriage was to “create[] stable households, which in turn form the basis of a stable, governable populace.”).}

This move is deeply problematic from the perspective of core equal protection values because what it does, in essence, is ask whether members of a disfavored group (in this case, same-sex couples) are entitled to the right to marriage rather than asking whether the marriage right itself is fundamental in nature, as a universal proposition. In other words, asking whether there is a fundamental right to same-sex marriage is really asking whether same-sex couples (or homosexuals) are entitled to access the fundamental right to marriage that heterosexual citizens enjoy. This is analogous to asking in the 1960s whether there was a fundamental right to interracial marriage, which is really asking whether interracial couples are entitled to access that right. The posing of the question creates its own answer, because of course historically
excluded groups will not be perceived as entitled to participation in the rights from which they have been historically excluded. Which is to say that the phrasing of the question matters.

This point—that the characterization of the asserted right matters—was made abundantly clear by the twin decision in *Bowers v. Hardwick* and *Lawrence v. Texas*, which later overturned *Bowers*. At issue in *Bowers* was a state law criminalizing all acts of sodomy. Among its other shortcomings in reasoning, the *Bowers* Court initially made the mistake of framing the controlling question thusly: “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.” This formulation incorporates and emphasizes the marginalized group in the very phrasing of the right. In addition, the Constitution does not confer rights at the level of specificity required to find a right to “sodomy.” By phrasing the question this way, the *Bowers* Court mocked the seriousness of the claim asserted in the case, and made the answer to the question a foregone conclusion.

This was, of course, recognized by Justice Blackmun in his dissent, and by the majority in *Lawrence* some seventeen years

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43 Justice Blackmun stated:
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later. As in Bowers, the issue in Lawrence was a state law criminalizing sodomy. The Court properly characterized the right at issue as a universal right to privacy in consensual sexual relations between adults, to which homosexuals and heterosexuals alike were entitled.

When courts ask whether there is a fundamental right to same-sex marriage, they commit the same analytical error as the Court did in Bowers. First, this formulation incorporates a reference to the disfavored/historically excluded group; second, it defines the right overly narrowly when it is easily and appropriately categorized

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, than Stanley v. Georgia was about a fundamental right to watch obscene movies, or Katz v. United States was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone."

Id. at 199 (Blackmun, J. dissenting) (internal citations omitted).

44 Lawrence v. Texas, 539 U.S. 558, 567 (2003) (stating that the Bowers Court’s narrow framing of the controlling question “disclose[d] the Court's own failure to appreciate the extent of the liberty at stake.”).

45 Id. at 578 (“The petitioners are entitled to respect for their private lives.”).
within the broader, yet still concrete, established fundamental right to marriage.

In short, laws prohibiting same-sex marriage should be understood as discrimination on the basis of sex and sexual orientation, and as interfering with the fundamental right of marriage, such that some form of heightened scrutiny applies. But at least some courts have concluded to the contrary and it is possible that the Supreme Court will as well.

If the Court applies rational basis review, this is where unconstitutional animus will come into play. In fact, the doctrine of animus can come into play under any level of equal protection scrutiny, but it is certainly among the strongest arguments for plaintiffs under rational basis review.

III. RATIONAL BASIS REVIEW AND THE ROLE OF UNCONSTITUTIONAL ANIMUS

Scholars have devoted quite a bit of attention to trying to understand and account for the Court’s approach to rational basis review. As a general proposition, rational basis review is an extremely deferential standard that presumes the constitutionality of legislative enactments and places a heavy burden on the plaintiff to
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overcome that presumption. Not only is the government absolved of any responsibility to present legislative history or other genuine justifications for the law; the Court will speculate as to potential bases and find the law constitutional so long as the Court can summon through its collective imagination some conceivable legitimate state interest supporting the law.\textsuperscript{46} Unsurprisingly, plaintiffs generally lose under this standard.

But on occasion rational basis review appears to be something quite different. In a handful of cases, we see plaintiffs prevailing under rational basis review, and a slightly different articulation of the standard seems to be at play in each of these instances. Gerald Gunther famously referred to this indefinite standard as “rational basis with bite.”\textsuperscript{47} Some lower courts, trying to make sense of this apparent (but unacknowledged) departure from traditional rational basis review, have postulated that courts apply a more searching form of rational basis review where the rights of unpopular minorities are at stake, following Justice O’Connor’s


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explanation to this effect in her concurrence to Lawrence. But again, the Court has never adopted this explanation.

One way of understanding this subset of rational basis review cases is that the Court in each instance found, either explicitly or implicitly, the presence of unconstitutional animus. Unconstitutional animus can be understood as essentially an expression of prejudice against a particular social group, but the concept is inherently enigmatic because the Court itself has yet to present a unified theory of animus. Rather, the Court’s precedent presents a shifting, incomplete portrait.

On one end of the animus spectrum lies the narrow understanding of animus, probably best expressed by Justice Scalia in his dissent to Romer v. Evans, where he characterized animus as a “fit of spite.” This characterization is not entirely off-base when examined in context, because the Romer majority also fell in this camp, treating animus as “a bare desire to harm a politically

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unpopular group.” Under this narrow characterization, animus is essentially reduced to a form of malicious subjective intent.

But other decisions based on different facts point to a more vigorous understanding of unconstitutional animus. First, a number of cases demonstrate that animus may be related to a variety of mindsets other than the desire to harm, including fear, stereotype, bias, or a simple desire to exclude. Further, such mindsets are better understood as providing evidence of unconstitutional animus rather than constituting animus itself. The quality that makes these laws unconstitutional is that they express, create and enforce

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50 Id. at 634 (majority opinion). See also Dept. of Agriculture v. Moreno, 413 U.S. 528, 529-30 (1973).

51 See Pollvogt, supra note __, at 924-25.

52 See Cleburne, 473 U.S. at 446-47 (asserting that a “State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”); Palmore v. Sidoti, 466 U.S. 429, 433 (1986) (holding that private biases and the possible injury they might inflict are not permissible considerations for a court when considering the propriety of removal of infant child from custody of its natural mother.); Plyler v. Doe, 457 U.S. 202, 220 (1982) (holding that there is no rational justification for imposing a discriminatory burden on the basis of a legal characteristic over which a group, such as children of undocumented immigrants, have no control.).
distinctions between social groups, tending to create a caste society of the type that is abhorrent to the core values of the Equal Protection Clause.\textsuperscript{53} Rather than focusing on the subjective intent behind a given law, this conception of animus focuses on the objective function of state action.\textsuperscript{54}

The way in which one defines animus, in turn, determines what counts as evidence of unconstitutional animus in any given case. If animus is conceived of as a form of “spite,” then one would expect courts to demand evidence of malicious intent surrounding the enactment of a law. But in fact, where a law distributes legal rights differentially among social groups, courts allow a plaintiff to prove animus through either (1) direct evidence of statements of bias, hostility, stereotype, or fear on the part of wither state or private actors,\textsuperscript{55} and (2) an inference based on the lack of an affirmative connection between the trait that defines the social group and the interests protected by the legal right at issue.\textsuperscript{56} If animus were nothing more than hostility toward an unpopular minority, then one

\textsuperscript{53} See Pollvogt, supra note __, at 914.

\textsuperscript{54} See id. at 925-26.

\textsuperscript{55} See id. at 927.

\textsuperscript{56} See id. at 927-28.
would expect to see the courts demanding evidence that such hostility was the primary if not the sole motivation behind a challenged law. But this is not, in fact, what the courts require.

Thus, while evidence of a "desire to harm" is sufficient to prove animus, it is not necessary. The overarching principle of unconstitutional animus is that animus is not a subjective mindset, but a type of impermissible function. That impermissible function is to create and enforce distinctions between social groups through the public laws. The strong policy foundation underlying this doctrine is the goal of preventing the public laws from being used to create the type of permanent class distinctions or castes abhorred by the Equal Protection Clause.\(^57\)

A final unresolved problem in the Court’s animus jurisprudence is the precise relationship between animus and rational basis review. For example, *Romer* advances a remainder theory of animus—when all purported bases for a law either fail to present a legitimate governmental interest or the classification at issue is not rationally related to those interests, what is left is an inference of animus.\(^58\) Under this theory, animus is an entirely gratuitous concept.

\(^{57}\) See id. at 928.

\(^{58}\) *Romer*, 517 U.S. at 634.
If the law fails under the rational basis standard, there is absolutely no need for a court to go on and make a finding of unconstitutional animus. Another approach sees the doctrinal function of animus as triggering a heightened version of rational basis review. Under this theory, courts first suspect the presence of animus, and then assess the sufficiency of the governmental justifications with that suspicion in mind.

A better understanding of the doctrinal function of animus that accounts for the entirety of the Court’s jurisprudence sees animus as a silver bullet. Once a plaintiff proves the presence of animus, superficially rational explanations for the law are revealed as pretext, and the law cannot stand. Indeed, it would present a deep conflict with the mandate of the Equal Protection Clause for a court to acknowledge that a law was aimed at subordinating a social group (i.e., based in animus) but to permit it to stand based on the presentation of a superficially rational basis. And, in fact, the Court has never done so. When the Court discerns the presence of animus, it finds the law unconstitutional.

While it is possible to identify a vigorous, unified theory of unconstitutional animus based in the Supreme Court’s equal protection jurisprudence, the Court has yet to take this step and there
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are currently multiple models of unconstitutional animus for lower courts to draw on. As demonstrated below, this has resulted in manifest confusion in the marriage equality cases.

One example of divergent understandings of animus is found simply by contrasting the federal district court’s decision in *Perry* with the Ninth Circuit’s decision on appeal in the same case. The district court in *Perry* first examined and then discredited the rational bases offered in support of Proposition 8, and from the absence of a rational basis inferred that the law must represent unconstitutional animus.\(^{59}\) This inference of animus, in turn, was confirmed by the objective function of the law, which was to do nothing more than enact the view that opposite-sex couples are superior to same-sex couples. Drawing on the themes if not the text of *Loving*, the court found that Proposition 8 functioned to express and enforce an ideology of heterosexual supremacy.\(^{60}\) Further confirmation of the

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\(^{59}\) *Perry*, 704 F. Supp. 2d at 1002 (“In the absence of a rational basis, what remains of proponents’ case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples are not as good as opposite-sex couples.”).

\(^{60}\) *Id.* (“[T]he evidence shows that Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to
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impermissible function of the law came from direct evidence in the legislative record (here, the record of campaign propaganda around Proposition 8), which reflected numerous negative stereotypes of homosexuals.  

Thus, the language of the district court’s decision focuses on the fact that Proposition 8 performed an improper function, this conclusion being supported by the objective structure of the law and evidence of the sentiments surrounding its enactment. In so doing, it drew on the broader jurisprudence of unconstitutional animus.

The Ninth Circuit decision, by contrast, manifested an obsessive fixation on the facts and reasoning of Romer, which is the Court’s most recent animus decision, but also its weakest. As a

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same-sex couples.”) (citing Romer, 517 U.S. at 633, Moreno, 413 U.S. at 534, and Palmore, 466 U.S. at 433).

61 Id. at 1003 (noting that the campaign relied on “negative stereotypes about gays and lesbians”).

62 The analysis in Romer is weak because the Court could not address the direct evidence of hostility toward homosexuals, and instead focused on an attenuated analysis of the structure of the law. See Romer, 517 U.S. at 633-34. Also, because the Court in Romer could not acknowledge affirmative evidence of animus, it treated animus as what was left after a failure to provide rational bases for the law. See Pollvogt, supra note __, at 911.
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result, the Ninth Circuit advanced an exceedingly narrow conception of animus based on a tight analogy to the facts of Romer.

Specifically, the factual centerpiece of the Ninth Circuit’s decision became the mechanism of rights withdrawal. What was problematic about Proposition 8, according to the court, was that it revoked rights that had previously been granted—just like Amendment 2 in Romer. The Ninth Circuit narrowed the focus even further, finding animus based not in the structure of Proposition 8 itself, but in the change in the law that it accomplished.63

The problem, of course, is that most laws prohibiting same-sex marriage do not work this way. As discussed below, the vast majority of jurisdictions have never extended marriage rights to same-sex couples; they have either denied them from the outset or possibly accommodated same-sex couples with civil unions or some other parallel rights system. As a result, the reasoning in Perry could be considered inapplicable in most jurisdictions.

After initially concluding that Proposition 8 was based in animus, the court next examined the sufficiency of the proffered state interests. In so doing, it asked whether those interests were sufficient

63 Perry, 671 F.3d at 1083.
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to justify this rights deprivation, arguably a more rigorous inquiry than traditional rational basis review, which merely asks whether the classification at issue is rationally related to a legitimate governmental interests allegedly served by the law. The court found the proffered interests lacking under this standard.

64 Id. at 1085 (asking “whether a legitimate interest exists that justifies the People of California’s action in taking away from same-sex couples the right to use the official designation and enjoy the status of ‘marriage’—a legitimate interest that suffices to overcome the ‘inevitable inference’ of animus to which Proposition 8’s discriminatory effects otherwise give rise.”). For example, the court noted that the law did function to preserve tradition (i.e., the tradition of exclusively heterosexual marriage), but emphasized that “tradition alone is not a justification for taking away a right that had already been granted.” Id. at 1092. The focus on withdrawing previously granted rights seems excessive and possibly limiting and, leaves open the question of whether tradition is sufficient to justify more straightforward denial of marriage rights. Tradition did not validate anti-miscegenation laws in Loving, despite the fact that the law in Virginia had never affirmatively conferred a right to interracial marriage and later took that right away. Similarly, preserving tradition was deemed an insufficient basis for legislation in Lawrence v. Texas, where, again, there was no reversal of rights as presented in the Perry case. The Perry decision cites both these cases. Id. at 1093.

65 See Cleburne, 473 U.S. at 446-47.
Finally, in the last few pages of the opinion, the court examined the abundant direct record evidence of unconstitutional animus surrounding the Proposition 8 campaign. The court concluded that the plaintiffs here did not need to prove that the People of California passed Proposition 8 out of a “fit of spite.” Rather, “[i]t is enough to say that Proposition 8 operates with no apparent purpose but to impose on gays and lesbians, through the public law, a majority’s private disapproval of them.”

Despite the Ninth Circuit’s clear statement that animus was not confined to “spite,” the federal district court in Jackson read the Perry decision differently. First, the court concluded that Perry was inapposite as a whole because Hawai’i’s prohibition on same-sex marriage did not function to “take away” existing rights, as Proposition 8 did. Indeed, Hawai’i had never granted marriage rights to same-sex couples, so there was nothing to take away. This

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66 Perry, 671 F.3d at 1095.
67 Id.
69 Id. at *22 (“As Defendant Fuddy explained, ‘to say that in preserving the traditional definition of marriage Hawaii – along with at least 41 other states and not to mention numerous judges and justices who have upheld such laws – has
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factual difference between the challenged laws was sufficient to make the Perry decision irrelevant. Similarly, the court determined that Romer also did not apply because, while Amendment 2 was concededly a law “of unusual character,” this could not be said of Hawai’i’s same-sex marriage ban, as such bans were widespread and typical.  

The Jackson court did not consider other aspects of the animus doctrine, or the articulation of animus in other cases. Further, the court insinuated that it would find animus only in cases where legislature or the populace acted “absurdly, ignorantly, or with bigotry”\(^7\)\(^1\)—a contention that directly conflicts with Perry’s instruction (based on the Supreme Court’s own animus jurisprudence) that animus can be grounded in much milder sentiments, including stereotype and disapproval.  

\[^7\)\(^0\] Id. (stating that “the definition of marriage as a union between a man and woman is not without precedent or unusual”).

\[^7\)\(^1\] Id.

\[^7\)\(^2\] See Perry, 671 F.3d at 1094 (noting “[t]he ‘inference’ that Proposition 8 was born of disapproval of gays and lesbians is heightened by evidence of the context
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Having rejected the animus doctrine and plaintiffs’ arguments for heightened scrutiny, the court then applied a weak version of rational basis review, rejecting the plaintiffs’ claim to a “more searching” form of review. Indeed, the court denied that such a standard existed. Unsurprisingly, the court found that real differences between same-sex and opposite-sex couples (namely, the ability to procreate “accidentally”) was sufficient justification under rational basis review.  

\[\text{in which the measure was passed}^73\] such as the district court’s finding “that ‘[t]he campaign to pass Proposition 8 relied on stereotypes to show that same-sex relationships are inferior to opposite-sex relationships.’”) (citations omitted).  

\[73\] Jackson, 2012 WL 3255201, at *39 (“Same-sex couples cannot naturally procreate. Thus, the Court agrees with [the] explanation that ‘... the undeniable facts of biology mean that encouraging opposite-sex couples to marry furthers the second reason; encouraging same-sex couples to marry does not.’”); see also id. at *40 (“The Supreme Court has held that “[u]nder rational-basis review, where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State’s decision to act on the basis of those differences does not give rise to a constitutional violation.” Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 366-67 (2001) (internal quotations omitted).”)

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By contrast, the First Circuit in *Gill* concluded that DOMA failed under rational basis review, applying a more searching version of that standard because the law subjected minorities to disparate treatment. Nonetheless, the court went on to specifically state that its holding was not based on a finding of animus, because there was no evidence of hostility towards homosexuality in the record. Thus, the court reduced animus to an expression of ill-will.

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74 *U.S. Dept. of Health and Human Services*, 682 F.3d at 9. The court determined that preservation of government resources, while generally a legitimate purpose, was insufficient to justify a law that drew a distinction “against a historically disadvantaged group.” *Id.* at 14 (citing *Plyler*, 457 U.S. at 227). Regarding the interest in “support[ing] child-rearing in the context of stable marriage,” the court could not find any indication that DOMA actually served this purpose. *Id.* at 14-15. The court emphasized that this was not merely a poor fit, but a complete lack of connection between means and ends. *Id.* at 15. The third justification—moral disapproval of homosexuality, was invalid in the wake of *Lawrence* (and consistent with the much earlier decision in *Palmore*). *Id.*

75 *Id.* at 8. The court denied applying something akin to “heightened rational basis review,” but explicitly acknowledged that it was applying “a closer than usual review” under the rational basis standard. *Id.*

76 *See id.* at 11. The court explained that the many legislators who supported the law “acted from a variety of motives,” including the “central and expressed aim being to preserve the heritage of marriage as traditionally defined over centuries of
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These cases reflect the persistent confusion regarding the doctrine of unconstitutional animus: (1) whether the doctrine of animus is concerned with hostility or a desire to harm a group, versus addressing a broader concern with stereotype, bias and/or disapproval; (2) what counts as evidence of unconstitutional animus; and (3) whether animus is an inference that is “left over” after a law fails rational basis review, something that effectively raises the level of scrutiny a court will apply in a given case, or an affirmative showing that a plaintiff may make that will discredit other purported governmental interests—that is, a doctrinal “silver bullet.”

The potential for confusion is multiplied when one examines the myriad different types of marriage regimes that may be subject to marriage equality challenges.

Western civilization.” Id. at 16. The First Circuit determined that “[p]reserving th[e] institution [of traditional marriage] is not the same as mere moral disapproval of an excluded group, and that is singularly so in this case given the range of bipartisan support for [DOMA].” Id. (citing Lawrence, 539 U.S. at 585 (O’Connor, J. concurring)).
IV. IMPLICATIONS FOR THE DIFFERENT TYPES OF MARRIAGE REGIMES

If animus is a decision point in the marriage equality cases, there is quite a bit at stake as between the weaker and more vigorous characterizations of the doctrine.

To date, the mechanism of taking away marriage rights after they have been granted is unique to California’s Proposition 8. If unconstitutional animus is limited in applicability to this type of mechanism, then the concept will generally not be relevant to other jurisdictions unless they follow the same path. But, contrary to the conclusion of the federal district court in Jackson,77 there is no reason to think that animus is properly understood this narrowly. Indeed, the Supreme Court has detected the presence of unconstitutional animus in a number of cases that did not involve withdrawal of a previously granted right. Most notably, in Loving, anti-miscegenation laws were the prevailing standard for decades in a number of states.78 But this did not prevent the Court form

77 Jackson, 2012 WL 3255201, at *20.

78 See Loving, 388 U.S. at 6.
concluding that such laws were based on and enacted “an ideology of White Supremacy”\textsuperscript{79}—a species of animus.

How might different conceptions of animus be applied to the various types of marriage regimes in the United States? The states can be divided into roughly three categories with respect to their laws regulating same-sex marriage: pure defensive jurisdictions, mixed defensive jurisdictions, and pure civil union jurisdictions.

Perhaps the easiest case for finding animus is in “pure defensive” jurisdictions. These jurisdictions—which comprise the majority of jurisdictions in the United States—have affirmatively enacted an explicitly heterosexual definition of marriage (through statute or amendment to the state constitution, or, in some cases, both) and/or a “mini-DOMA”\textsuperscript{80}—a statement of refusal to recognize same-sex marriages solemnized in other states. In addition, these jurisdictions do not have any alternative mechanism (e.g., civil

\textsuperscript{79} Id. at 7.

\textsuperscript{80} For a more in-depth analysis of the states that have adopted “mini-DOMAs,” and the implications of those adoptions, see Robert E. Rains, \textit{A Minimalist Approach to Same-Sex Divorce: Respecting States that Permit Same-Sex Marriage and States that Refuse to Recognize Them}, 2012 UT AH L. REV. 393, 412 (2012).
unions or domestic partnerships) for recognizing same-sex relationships.

By way of example, Arkansas is representative of jurisdictions with the most aggressive stances on same-sex relationships. It has statutory and constitutional provisions defining marriage as the union of one man and one woman\(^\text{81}\); statutory and constitutional provisions explicitly prohibiting marriages between people of the same sex\(^\text{82}\); a statutory prohibition against recognizing same-sex marriages from other states\(^\text{83}\); and a constitutional provision prohibiting recognition of same-sex civil unions from other states.\(^\text{84}\)

The second category can be referred to as “mixed defensive” jurisdictions. These states—currently Colorado, Delaware, Hawai’i, Illinois, Nevada, Oregon and Wisconsin—have an exclusively heterosexual definition of marriage and/or prohibition against recognizing same-sex marriages, but also maintain some alternative form of recognition for same-sex relationships (either through civil unions or domestic partnerships).


\(^{82}\) See id.


\(^{84}\) Ark. Const. Amend. 83 § 2.
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For example, Hawaii’s legal scheme, challenged in the *Jackson* decision discussed above, fall into the category of mixed defensive jurisdictions. Another of these jurisdictions—Nevada—currently has a challenge pending in federal district court.85 There, the State of Nevada first barred same-sex couples from marriage through statute and amendment to the state constitution, and then enacted a statute providing a separate legal scheme that bestowed marriage-like benefits on same-sex couples.86


86 This discriminatory same-sex marriage ban is enshrined both in Nevada’s Revised Statutes (N.R.S. § 122.020(1)), and in Art. 1, sec. 21 of the Nevada Constitution, which limits marriage solely to couples composed of “a male and female.” “After barring lesbians and gay men from civil marriage, the State created an alternative status that they are allowed to enter that, with only a few exceptions, provides “the same rights, protections and benefits” and “the same responsibilities, obligations and duties . . . as are granted to and imposed upon spouses.” Nev. Rev. Stat. § 122A.200(1)(a).” Complaint. The amendment to the constitution was achieved through popular vote in 2000 and 2002. At least some of the campaign literature invoked the idea that same-sex couples posed a threat to Nevada’s children and, absent the amendment, homosexuality would be promoted in the schools.
“Pure civil union jurisdictions” make up the third and final category of marriage regimes. This category includes those states that have enacted comprehensive civil union or domestic partnership frameworks in an effort to accommodate the interests of same-sex couples. Vermont previously fell into this category when, in 1999, the Vermont Supreme Court recognized that same-sex couples were entitled to the rights associated with marriage, but implored the legislature to enact a parallel civil union structure rather than simply ruling that same-sex couples had to be issued marriage licenses. In 2009, Vermont passed the Marriage Equality Act, which subsumed all unions of two persons under the framework for marriage.


89 See 15 V.S.A. § 8 (2009) (“Marriage is the legally recognized union of two people”).
Currently, the only jurisdictions remaining in this category are New Jersey, New Mexico and Rhode Island. New Jersey was an earlier adopter of an alternative legal framework recognizing same-sex relationships, beginning with legislatively enacted domestic partnerships in 2003, followed by civil unions in 2006. In 2012, the legislature passed a measure permitting same-sex marriage, but this was subsequently vetoed by the Governor. In 2011, Lambda Legal filed suit, alleging that New Jersey civil unions had not succeeded in providing equivalent rights and benefits to same-sex couples, as mandated by the state supreme court’s earlier decision in Lewis v.

93 NEW JERSEY STATE SENATE, N.J. S.B. 1, the Marriage Equality and Religious Exemption Act, available at http://www.njleg.state.nj.us/2012/Bills/S0500/1_I2.HTM.
94 GOVERNOR CHRISTOPHER J. CHRISTIE, Conditional veto of N.J. S.B. 1, the Marriage Equality and Religious Exemption Act, available at http://www.njleg.state.nj.us/2012/Bills/S0500/1_V1.HTM.
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Harris. The claims are being brought under both the New Jersey and United States constitutions. An interim order in this case suggests that the New Jersey trial court, while recognizing that New Jersey’s laws do not “take away” rights in the manner that Proposition 8 did, still denies important rights to same-sex couples such that the applicability of the Ninth Circuit’s decision in Perry must be considered.

Whether the Supreme Court adopts a weak or vigorous version of unconstitutional animus will make a difference when applied to the marriage regimes in different jurisdictions.

For example, the narrowest view of animus, expressed by Justice Scalia in his dissent to Romer and by the courts in Jackson and Gill, discussed above, sees animus as a “fit of spite.” Proving the presence of animus under this understanding would entail evidence of subjective, malicious intent on the part of either legislators or the public at large, in the case of laws enacted through referendum. Further, under an understanding of animus as subjective intent, it is unclear what percentage of the legislature or populace

97 Romer, 517 U.S. at 636 (Scalia, J. dissenting); Jackson, 2012 WL 3255201, at *21-22; U.S. Dept. of Health and Human Services, 682 F.3d at 10-13.
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would have to hold or express such views—would it have to be the majority? And, if so, how exactly would this be measured? What would be a sufficient quantum of spite to prove the presence of unconstitutional animus?

Even under this narrow characterization of the doctrine, many of the pure defensive jurisdictions should present sufficient evidence of animus. In particular, animus should be easily found in the case of popular referenda where campaign literature expressed ill-will toward homosexuals and/or same-sex couples. Similar, testimony in a legislative record might suffice. But there are too many cases that would be excluded under such a rule. For example, we know from precedent that stereotype, bias and fear—not just spite or malice—also stand as evidence of impermissible animus. Jurisdictions that extend some form of marriage-type benefits to same-sex couples may not offer up evidence of malice, but instead of stereotype, disapproval, or an ideology of heterosexual supremacy. These should suffice to prove the presence of animus, but would not under this narrowest of rules.

98 See, e.g., Romer, 517 U.S. at 635.
99 See Pollvogt, supra note __, at 925.
V. CONCLUSION

The rule that encompasses the totality of the Supreme Court’s animus jurisprudence and that offers a unified, principled approach to the same-sex marriage cases understands animus not as the subjective intent behind a law, but as the objective function of that law. And that problematic function that strikes at the heart of equal protection values is to enforce legal distinctions between social groups—a function which, per Brown and Loving—is necessarily wrapped up in an ideology of social group supremacy.\(^\text{100}\) The evidentiary requirement under this rule is rigorous but much more manageable than proving subjective intent. It requires plaintiffs to prove, first, that the law distributes rights or benefits along the lines of social groups—that is, along the lines of a status or identity trait, as

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\(^\text{100}\) Brown, 347 U.S. at 494 (adopting reasoning of a Kansas trial court that segregation in public education, sanctioned by law, is usually interpreted as denoting the inferiority of black people); Loving, 388 U.S. at 7 (asserting that the lower court’s acceptance as legitimate purposes for Virginia’s anti-miscegenation law ‘to preserve the racial integrity of its citizens,’ and to prevent ‘the corruption of blood,’ ‘a mongrel breed of citizens,’ and ‘the obliteration of racial pride,’ were “obviously an endorsement of the doctrine of White Supremacy.”) (citations omitted).
Second, plaintiffs can demonstrate the inherent illegitimacy of the use of the classification by showing either that bias, stereotype, fear, etc. motivated the law, or that there is no affirmative connection between the trait that defines the classification and the interests being regulated by the law.  

This standard is easily met—as it should be—in the majority of marriage regimes. That laws prohibiting same-sex marriage classify along the lines of status is beyond dispute. Further, in many of these jurisdictions, evidence of bias and stereotype abounds in the legislative record and campaign literature. These are—or should be—the easy cases.

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101 Pollvogt, supra note __, at 926.

102 Id. at 927-28.