Forgetting Romer

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What are the implications of the Court’s decision to accept certiorari in Hollingsworth v. Perry? Advocates of marriage equality may worry that the Court accepted certiorari to overturn the decision. But they should also worry that the Court accepted certiorari to affirm the decision on the same, narrow legal and factual grounds relied upon by the Ninth Circuit. Because while the Ninth Circuit’s reasoning was good for marriage equality in California, it could be devastating to marriage equality efforts in other jurisdictions.

Why? The Ninth Circuit interpreted a key doctrine—the doctrine of unconstitutional animus—in a way that strips the concept of much of its justice-forcing power. It did so by (1) attaching the concept of unconstitutional animus to a narrow and unique set of facts, and (2) relying excessively on the Court’s most compromised animus decision, Romer v. Evans. To get marriage equality right, the Supreme Court will have to look past the unusual factual circumstances of Proposition 8, and the Court will have to put Romer in its proper place with respect to the Court’s broader animus jurisprudence. Ultimately, because Romer is irretrievably compromised by the historical moment at which it was decided, the Court must forget Romer.

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Judge Reinhardt’s opinion in Perry was rightly hailed as a stunning victory for marriage equality. Not only did he reach the “right” outcome from the perspective of marriage equality advocates, he did so in a thorough and carefully reasoned opinion that—unsurprisingly—manifested a sophisticated awareness of the dynamics of judicial review. In particular, Judge Reinhardt relied almost exclusively on non-controversial, so-called “adjudicative facts” found by the federal district court, setting aside the more controversial findings of “legislative facts.” Further, he emphasized that a substantial portion of these facts were binding interpretations of the California Constitution by the state’s highest court, and thus beyond the scrutiny of the federal courts. In addition, he confined the court’s holding to the specific mechanism of California’s Proposition 8, not opining on the broader right to marriage. All of these maneuvers were presumably

1 Cf. Nan Hunter, Animus Thick and Thin, 64 Stan. L. Rev. Online 111, 112 (March 19, 2012) (asserting that the Ninth Circuit’s decision’s “elaboration of the role of animus in judicial review is an important contribution to equal protection doctrine”).
3 See Perry v. Brown, 671 F.3d 1052, 1075 (9th Cir. 2012).
4 See id. at 1079.
designed to make the Perry decision thoroughly defensible when subjected to Supreme Court review, if not cert-proof altogether.

But Judge Reinhardt’s cautious approach is problematic for marriage equality in other jurisdictions for two, related reasons. First, by maintaining a narrow factual focus, the opinion suggests that unconstitutional animus is present only where a state grants rights to a group and then later takes those rights away. Judge Reinhardt likely took this tack for a number of reasons. As Bill Eskridge has pointed out, deciding cases on the narrowest grounds possible is an appropriate exercise of judicial restraint. In addition, it is the apex of legal reasoning to draw a tight factual analogy to existing precedent. The law at issue in Romer (Colorado’s Amendment 2) could also be characterized as one that withdrew previously available rights, offering a strong parallel to the mechanics of Proposition 8.

But the downside of this approach is that Judge Reinhardt essentially invited other courts to distinguish Perry on its facts, thereby severely limiting the precedential impact of the decision. And, indeed, this is precisely what happened. Just a few months after Perry was handed down, the federal district court in Hawaii concluded that Perry was inapposite to the marriage equality challenge in that state because Hawaii had never previously granted marriage rights to same-sex couples, and thus the legal regime was distinguishable from California’s Proposition 8. Indeed, having noted this factual distinction, the Hawaii district court did not even go on to examine whether a broader understanding of animus might be relevant to the challenge before it.

In addition to suggesting this overly narrow factual prerequisite for a finding of animus, Judge Reinhardt presented a cabined legal view of animus because he relied excessively on the framework set forth in Romer. By lashing Perry to the mast of Romer, Judge Reinhardt minimized the grounds for reversing his decision, and appealed to the sensibilities of Justice Kennedy, who authored Romer and who still sits on the Court. But in the process, Judge Reinhardt also reiterated Romer’s incomplete and ultimately incoherent understanding of the doctrine of unconstitutional animus.

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7 See id. The court further found that Romer was inapposite, reading Romer as standing for the proposition that animus is inferred only from “unusual” laws, and observing that bans on same-sex marriage were quite common, not unusual.
8 See, e.g., Richard L. Hasen, Initial Thoughts on 9th Circuit Prop. 8 Decision (Feb 7, 2012) (“Judge Reinhardt wrote his opinion for an audience of one: Justice Kennedy.”).
In a sense, *Romer’s* incoherence is not its fault. The decision was stuck between a rock and a hard place, the rock being the Court’s contemptible 1986 ruling in *Bowers v. Hardwick* and the hard place being the seven years that would have to pass post-*Romer* before the Court overturned *Bowers* in *Lawrence v. Texas*. In short, because *Bowers* essentially held that it was permissible for states to criminalize not only homosexual conduct, but also homosexual identity, the *Romer* Court had to perform analytical gymnastics to reach a pro-gay-rights outcome.

At issue in *Romer* was Colorado’s Amendment 2, which had been enacted by popular referendum and functioned to (1) repeal at every level within the state all existing antidiscrimination protections based on sexual orientation and (2) prohibit any such protections from being enacted in the future. In examining the constitutionality of the law, the Court did not address whether sexual orientation was a suspect classification or whether Amendment 2 implicated a fundamental right (a positive answer to either of these questions would have required the Court to apply some form of heightened scrutiny). Instead, the Court proceeded directly to rational basis review and concluded that the law could not survive under even this deferential standard.

Because *Bowers* stood for the proposition that naked anti-gay bias was a permissible basis for a law, the *Romer* Court could not point to the strongest evidence of unconstitutional animus available in that case—the ample direct evidence of anti-gay bias in Amendment 2 campaign literature. Instead, the Court invoked the more generic concept of “animus,” and created a novel structural analysis for identifying the presence of animus that amounted to little more than an untethered assessment of the overall fairness of the law. This analysis had three steps. First, the Court took quite some time to describe the impact of Amendment 2, and characterized the impact as vast. Second, it weighed that impact against the purported goals of the law—conserving governmental resources and protecting Coloradans’ freedom of association—and characterized both as relatively trivial. Finally, from this lack of fit between the law’s impact and its goals, the Court inferred the presence of unconstitutional animus, which it described as “the bare . . . desire to harm a politically unpopular group.”

*Romer’s* understanding of unconstitutional animus is both incomplete and misleading. First, although “the bare . . . desire to harm a politically unpopular group” is one form of animus, it is not the only form. Indeed, nowhere does the Supreme Court’s animus jurisprudence require a plaintiff to prove either that the challenged law was motivated by a “desire to harm” or that the plaintiff is a member of a “politically unpopular” group. Rather, the animus inquiry ultimately does not focus on the subjective intent motivating a law, but on whether the law
functions to enforce private bias. Thus, laws reflecting fear of, negative attitudes toward, or stereotypes of a particular social group may be struck on this basis.\(^9\)

Second, the tortured reasoning in *Romer* strongly implies that direct evidence of social-group bias is insufficient or perhaps even irrelevant to proving the presence of unconstitutional animus. But, again, when one examines the Court’s broader animus jurisprudence, this is clearly not the case. Rather, in cases where there is direct evidence of private bias motivating the enactment of a law, the Court has easily found the presence of animus and struck the law.\(^10\)

Third, the *Romer* analysis leaves unanswered the critical question of the relationship between animus and rational basis review. The cases are clear that animus can never constitute a legitimate state interest sufficient to survive rational basis review. But what if there are other rational bases for a law independent of impermissible animus? The *Romer* decision suggests that the absence of a rational basis is itself evidence of animus—a framework that renders a finding of animus doctrinally gratuitous. Some commentators, and at least one Justice on the Supreme Court, have concluded that evidence of animus triggers “heightened rational basis review,” such that laws that normally would survive rational basis review may be struck when animus is afoot. In other words, the presence of animus requires the state to provide a more persuasive justification for the law. But this begs the question of whether any justification would ever be sufficient to save a law when direct evidence of animus is present. As a historical matter, the Court has never found the presence of animus and then gone on to uphold the challenged law, suggesting that animus is a doctrinal silver bullet.\(^11\)

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A correct understanding of animus matters for future marriage equality litigation because, in the majority of jurisdictions, there will be ample direct evidence of private bias against gays and lesbians being the primary motivating force behind same-sex marriage bans. This evidence, in turn, strongly suggests that the function of those laws is merely to enforce that private bias—something the public laws may not do.

By contrast, if animus is understood narrowly as existing only where a law withdraws previously granted rights, the majority of same-sex marriage bans will

\(^9\) See Susannah W. Pollvoigt, *Unconstitutional Animus*, 81 Fordham L. Rev. 887, 924-26 (2012) (citing case support for proposition that animus is present not only where there is a “desire to harm” a particular social group, but anytime a law functions to create and enforce distinctions between social-group).

\(^10\) See id. at 926-29 (discussing types of evidence the Supreme Court has traditionally accepted as proving the presence of animus).

\(^11\) See id. at 930.
be upheld, despite the presence of blatant anti-gay propaganda surrounding enactment of these measures.

What is important to recognize about the Ninth Circuit’s decision in *Perry* is that it did not purport to provide a comprehensive account of the doctrine of unconstitutional animus, and it should not be interpreted as doing so. But the marriage equality cases, including *Perry*, provide the Court with an opportunity to rationalize the doctrine of unconstitutional animus and articulate a clear, consistent, and principled standard for courts to apply going forward.