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THE TWO VERSIONS OF RATIONAL-BASIS REVIEW AND SAME-SEX RELATIONSHIPS

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Abstract: Although it purports to be a single standard, equal protection's rational-basis review has two faces that use different methods and produce conflicting results. The United States Supreme Court employs both versions but does not acknowledge that a conflict exists between them. Without an explicit acknowledgment of the contradictory nature of the two rationality reviews, it follows that the Court has made no effort to explain in what context one version should be used and in what context the other is appropriate. As a result, it is very difficult to predict with accuracy the outcome of arguments based on equal protection's rational-basis review in the lower courts because no matter which side a court picks, it can find U.S. Supreme Court precedents to support the result. In recent years, this problem of unpredictability has been particularly acute in cases challenging laws that disadvantage persons involved in same-sex relationships. Because rational-basis review is ordinarily deferential to legislative judgment, these challenges usually fail. There is, however, a core of successful rational-basis claims that involve a more demanding scrutiny and seem to contradict the results in the more typical cases. This creates unpredictability. This Article examines this duality in three factual settings: (1) state laws that define marriage as limited to a man and a woman, (2) the United States military's policy of excluding gays and lesbians from military service, and (3) the federal Defense of Marriage Act, which limits federal recognition of marriage to opposite-sex couples.

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INTRODUCTION

Equal protection's rational-basis review is like a tale of two cities, or perhaps like the story of Dr. Jekyll and Mr. Hyde, or even like the two-faced Roman god Janus, who simultaneously looked out in opposite directions. Although rationality review purports to be one standard, it has two faces that use different methods and produce conflicting results. The United States Supreme Court employs both versions but does not acknowledge that a conflict exists between them. Without an explicit acknowledgment of the contradictory nature of the two rationality reviews, it follows that the Court has made no effort to explain in what context one version should be used and in what context the other is appropriate. As a result, it is very difficult to predict the outcome of arguments based on equal protection's rational-basis review in the lower federal courts because, regardless of which basis is chosen, a lower court can find U.S. Supreme Court precedents to support the result.

In recent years, this problem of unpredictability has been particularly acute in cases challenging laws that disadvantage persons engaged in same-sex relationships. Because rational-basis review is ordinarily deferential to legislative judgment, these challenges usually fail. There is, however, a core of successful rational-basis claims that involve a more demanding scrutiny and seem to contradict the results in more typical cases. This creates unpredictability. This Article examines this issue in three factual settings: (1) state laws that define marriage as limited to a man and a woman, (2) the U.S. military's policy of excluding gays and lesbians from military service,[1] and (3) the federal Defense of Marriage Act (DOMA), which limits federal recognition of marriage to opposite-sex couples.

Challenges to laws that disadvantage gays and lesbians are generally based on one of three different legal arguments: (1) that they infringe on a fundamental liberty identified in *Lawrence v. Texas*[2] and are thus

1. Congress ended this longstanding military policy in December 2010. *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. 111-321, 124 Stat. 3515; *see also infra* notes 233–34 and accompanying text.

2. 539 U.S. 558 (2003).

subject to heightened judicial review; (2) that they discriminate against a suspect or quasi-suspect class and are thus, once again, subject to heightened judicial review; or (3) that they do not even survive rational-basis review under the Equal Protection Clause. This Article examines the rational-basis argument and explores the two-fold and contradictory nature of rational-basis review.

Part I of this Article identifies the basic elements of equal protection's rationality standard, including the differing techniques that lead to the two different versions of the doctrine. Part II examines the leading U.S. Supreme Court cases on each side of the rationality divide. Part III considers these two versions of rationality review in a particular factual setting—equal protection challenges to laws that disadvantage gays and lesbians.

I. EQUAL PROTECTION'S RATIONAL-BASIS REVIEW

A. Creating the Rational-Basis Standard

The command of equality is essentially comparative. It requires a comparison of one entity with another entity.[3] Since Aristotle, the idea of equality has been understood to involve the comparative command that those similarly situated should be treated similarly.[4] Most equal-protection cases involve a comparison of two different classes.[5] To classify is to identify a trait that makes a person a member of a class (all those over age fifty, for example) and then to ascribe a certain treatment (such as forced retirement) for those who, having the trait, are members of the class.[6] The typical equality challenge to this kind of classification compares one class of persons (those who have the trait) with a second

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3. *See, e.g.*, Griffin Indus. Inc. v. Irvin, 496 F.3d. 1189, 1205 (11th Cir. 2007) ("Adjudging equality necessarily requires comparison . . . ."); Buckles v. Columbus Mun. Airport Auth., No. CS-00-986, 2002 WL 193853, at *13 (S.D. Ohio Jan. 14, 2002) ("An equal protection claim simply cannot exist absent an allegation that, *compared to others*, the plaintiff was treated less favorably." (emphasis in original)).

4. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 543 (1982) (quoting ARISTOTLE, ETHICA NICOMACHEA V.3.1131a–.1131b (W. Ross, trans., 1925)).

5. Though equality arguments require at least two entities to compare, they do not require any more than two entities. Thus, it is not necessary to compare groups of people in order to make equality arguments. *See, e.g.*,Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (recognizing a "class of one" claim). But the more common kind of equality argument, particularly in the legal sphere, is the one that compares two classes of persons. *See infra* Part II.B.

6. The classic treatment of the process of classification and its place in the making of equal protection arguments is Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

class of persons (those without the trait) and argues that, because the two classes are similarly situated, the members of both classes should be treated similarly.[7]

The difficulty in applying this similarly-situated standard is the critical determination of who is similar to whom and therefore entitled to similar treatment. This question of similarity is unanswerable in the abstract. On the one hand, all human beings are similar to all other human beings in having, for example, a human genome, and are therefore arguably entitled to similar treatment. At the same time, all human beings are unique—entities with their own genes and life experience—and thus different from everyone else and entitled or subject to different treatment. The difficulty in solving this conundrum is substantial. Peter Westen has called it an impossible task—one that makes the idea of equality an empty thing.[8]

Courts applying the Equal Protection Clause have addressed the problem of identifying who is similar to whom by referring to an external criterion—the purpose for which the classification was made. Thus, for example, all persons over the age of fifty share a trait that makes them members of a class. Are they similarly situated to individuals in a class made up of people younger than fifty? It depends on whether this age classification is relevant to its purpose. If the purpose of the classification is to identify individuals who still have sufficient vigor to perform a physically demanding job like police work, then the two classes might be considered differently situated, as fitness declines with age.[9] If, however, the purpose of the classification is to determine who is eligible to vote, then the two classes appear to be similarly situated, because physical vigor bears little relation to voting ability. It is on this understanding—that there must be some correlation between classification and purpose—that the U.S. Supreme Court has developed equal protection's rational-basis standard.[10]

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7. *See generally id.* at 344–47.

8. *See* Westen, *supra* note 4, at 560 (asserting that stating one's conclusion in terms of "'equals' or 'unequals' is entirely superfluous").

9. The example here of the classification that requires police officers to retire at age fifty is based on the facts of *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).

10. On equal protection's rational-basis test, see generally Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357 (1999); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004); Leslie Friedman Goldstein, *Between the Tiers: The New[est] Equal Protection and* Bush v. Gore, 4 U. PA. J. CONST. L. 372 (2002); Stephen E. Gottlieb, *Tears for Tiers on the Rehnquist Court*, 4 U. PA. J. CONST. L. 350 (2002); R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225 (2002); Clark Neily, *No Such Thing:*

The standard is easy to state—a classification must be rationally related to a legitimate governmental interest or purpose[11]— but has been difficult to apply consistently. In order to apply the standard, a court must (1) identify the classification, (2) identify the purpose, and (3) determine whether or not the classification is adequately correlated with that purpose. When the Court considers whether or not a classification is rationally related to a permissible interest, it follows either one of two very different lines of analysis. The first is a deferential standard that frequently amounts to no review at all, and the second is a more demanding version that carefully weighs evidence of the correlation between a classification and the actual purpose of a law. Part II of this Article examines the two different versions of what it means for a classification to be rationally related to a permissible purpose.

B. Identifying the Classification

The first element of the analysis—identifying the classification—is usually the simplest and least likely to create conflict between the different versions of rational-basis review. Most commonly, the classification in a statute or regulation is explicit. For example, a statute that requires all state police officers to retire at age fifty[12] is an explicit age classification; a statute that prohibits the sale of milk in plastic containers[13] is a classification of milk container makers; and a regulation that forbids the hiring of anyone using narcotics[14] is a classification of narcotics users.

Rarely do the parties in actual litigated cases dispute the nature of the classification. On occasion, however, the nature of the classification is hidden.[15] Thus, for example, a state provision that freezes property tax

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Litigating Under the Rational Basis Test, 1 N.Y.U. J.L. & LIBERTY 898 (2005); Huong Thien Nguyen, Note, *Irrational Prejudice: The Military's Exclusion of Gay, Lesbian, and Bisexual Service Members After* Romer v. Evans, 28 HASTINGS CONST. L.Q. 461 (2001); Note, *The Irrational Application of Rational Basis:* Kimel, Garrett, *and Congressional Power to Abrogate State Sovereign Immunity*, 114 HARV. L. REV. 2146 (2001); Neelum J. Wadhwani, Note, *Rational Reviews, Irrational Results*, 84 TEX. L. REV. 801 (2006).

11. *E.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

12. *E.g.*, *Murgia*, 427 U.S. at 311.

13. *E.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

14. *E.g.*, N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568 (1979).

15. For example, in cases where a facially neutral statute or ordinance has a disproportionate racial impact, it constitutes a racial classification only if it can be proven that it was adopted for a racially discriminatory purpose. Washington v. Davis, 426 U.S. 229, 239–40 (1976). Similarly, a

assessments at the time of purchase could be viewed as a disguised classification distinguishing between newcomers and established residents;[16] and a statute that caps the benefits that the state will provide to families in its welfare program could be viewed as a wealth classification.[17] Notwithstanding these last two examples, however, the identification of the classification is, in general, the most straightforward and least controversial element of a rational-basis argument.

C. Identifying the Purpose of the Law

The second element, identifying the purpose of a law, is more difficult to explain. As a starting point, there is not even agreement on the meaning of "the purpose of the law." At one extreme, it is urged that the very idea of a law's having a purpose is incoherent, because (1) a legislature does not have a mind that could form a purpose,[18] (2) a multi-member body cannot have a single intent,[19] (3) the alleged purpose of a law varies significantly depending on the generality with which the purpose is expressed,[20] and (4) laws frequently serve more than one purpose.[21] To the extent that these arguments about the incoherence of legislative purpose prevail, the rational-basis standard, which requires a certain relationship between the classification in a law and the law's purpose, is itself incoherent.

The courts, however, generally have not been persuaded that the idea of legislative purpose is incoherent. The courts have adopted a more

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facially neutral statute that disproportionately affects women constitutes a gender classification only if it was enacted with the purpose of disadvantaging women. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

16. *E.g.*, Nordlinger v. Hahn, 505 U.S. 1, 12 (1992) (discussing different treatment of new owners and old owners).

17. *E.g.*, Dandridge v. Williams, 397 U.S. 471, 485 (1970) ("The administration of public welfare assistance, by contrast, involves the most basic needs of impoverished human beings.").

18. Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049, 1071 (1979) ("The concept of 'purpose,' even more than that of rationality, presumes individual intelligence."); Gerald C. MacCallum, Jr., *Legislative Intent*, 75 YALE L.J. 754, 764 (1966) ("Legislation is a group activity and it is impossible to conceive a group mind or [group] cerebration." (quoting ALBERT KOCOUREK, AN INTRODUCTION TO THE SCIENCE OF LAW 201 (1930))).

19. *See, e.g.*, Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 142 (1972) ("How is a court to determine which consequences a majority of the legislators had in mind when each legislator might have had several motivations and no majority had the same set of motivations?").

20. *See* Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 15–17 (1992).

21. *Id.* at 17–20.

objective, pragmatic understanding of the concept of "the purpose of a law." In this understanding, the purpose of a law does not depend on a legislature's having a mind or on complete unanimity of the legislators who voted for the law. The purpose of a law is the end at which a law is directed.[22] This end may be stated negatively as "the elimination of a public 'mischief,'" or affirmatively as "the achievement of some positive public good."[23]

This understanding of legislative purpose, while not requiring a legislative mind or legislative unanimity, does assume that there is some distinction between the classification created by a law and the purpose on account of which the law was enacted. We cannot derive the purpose of a law solely from its operative effect. Thus, for example, we might ask, "What is the purpose of a law that requires state police officers to retire at age fifty?" It would not be useful to say the purpose of that law is to assure that state police officers retire at age fifty. By collapsing the difference between classification and purpose and thus "presuming purpose from result," the analysis is "reduce[d] . . . to tautology."[24] Rational-basis review assumes that a law has a purpose independent of its effect. Thus, it is likely that the purpose of a law that requires police officers to retire at age fifty is to promote public safety by assuring that officers are physically fit.[25] The rational-basis question would then be whether or not the classification (police officers over fifty) is adequately correlated with the purpose of the law (eliminating unfit police officers).

Even, however, where there is no great dispute in the courts about the concept of legislative purpose, there is substantial disagreement under equal protection's rational-basis standard on how a court should identify what that purpose is. Here, the differences between the two versions of rational-basis review begin to become apparent.

Courts applying the traditional, deferential version of rational-basis review do not attempt to discern the actual purpose of a statute. Courts in such cases have no interest in evidence as to the actual purpose of the law.[26] Rather, these courts are quite willing to hypothesize the purpose of a law or to accept the post-hoc rationalizations of government attorneys as to what is the purpose of the law.[27]

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22. *Id.* at 3.

23. Tussman & tenBroek, *supra* note 6, at 346.

24. *See* U.S.R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 187 (1980) (Brennan, J., dissenting).

25. *See, e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976).

26. *See, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

27. *See Fritz*, 449 U.S. at 186–87 (Brennan, J., dissenting).

Where courts follow this practice and are willing to hypothesize purpose or accept post-hoc assertions of purpose by government lawyers, rational-basis review becomes so deferential as to amount to virtually no review at all.[28] Even the most egregiously unfair laws could survive this kind of scrutiny. Consider, for example, a regulation that excludes narcotics users from all jobs with the public transit authority. Even if the regulation had in fact been adopted for the purpose of excluding racial minorities from the transit authority—an impermissible purpose—it could be upheld if a court were willing to hypothesize that the law's purpose is to promote safety.[29] Where a law has been enacted to protect the vested pension benefits of a particular class, but does not accomplish its stated purpose, the law can be upheld if a court hypothesizes, even without evidence, that the law's real purpose is to protect "career railroaders."[30] A law that on its face appears to give a naked and impermissible preference to long-term residents over newcomers might be upheld if a court is willing to hypothesize, again without evidence, that the law's purpose is to promote neighborhood stability and to protect reliance interests.[31] This willingness of courts to hypothesize governmental purposes is a cornerstone of the deferential version of rational-basis review.

On the other hand, when a court is applying the more demanding version of rationality review, it looks to the record in the case for evidence of the actual purpose of a law. For evidence of actual purpose, a court might look at (1) a statement of purpose within the statute itself,[32] (2) legislative history, including committee reports and the statements of individual legislators that make up the record of debate on the legislative floor,[33] (3) the effects of a law, if they are sufficiently

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28. *See Beach Commc'ns*, 508 U.S. at 316 ("This necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable since the legislature must be allowed leeway to approach a perceived problem incrementally.").

29. *E.g.*, N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568 (1979) (upholding regulation as a safety rule with the dissent suggesting that it was designed to keep out minorities).

30. *See infra* notes 48–61 and accompanying text.

31. *E.g.*, Nordlinger v. Hahn, 505 U.S. 1, 21 (1992) (upholding state constitutional amendment as designed to promote neighborhood stability and to protect reliance interests). The dissent in *Nordlinger* viewed the amendment as enacted to benefit those it benefits. *Id.* at 39 (Stevens, J., dissenting).

32. *E.g.*, Zobel v. Williams, 457 U.S. 55, 61 n.7 (1982) (citing purposes of Alaska statute as enumerated in the statute itself).

33. *E.g.*, Lyng v. Int'l Union, UAW, 485 U.S. 360, 371 (1988) (citing Senate Committee Report as evidence of statutory purpose); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (citing statement of Senator Holland in Congressional Record as evidence of statutory purpose).

stark as to provide no alternate explanation for the law,[34] (4) the historical background leading up to the adoption of a law,[35] or (5) the specific sequence of events that led to the adoption of a statute.[36]

Once a court applying the more demanding version of rationality review identifies the actual purpose of a law, it then examines that purpose to see whether it is impermissible. Although the U.S. Supreme Court has not formalized a test for determining what constitutes an impermissible purpose, it has found that the following are all impermissible purposes: naked antagonism toward a particular group,[37] a mere desire to harm a particular group,[38] prejudice against a particular group,[39] the public endorsement of private bias,[40] disadvantaging a particular group based on animus or animosity toward the group,[41] and giving effect to stereotypical views about the roles of a particular class.[42]

Justice Stevens has further explained this concept of impermissible purpose: "The term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class."[43] Stevens has also explained that if "the adverse impact on the disfavored class is an apparent aim of the

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34. *E.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 340–42 (1960) (holding that a statute altering the shape of Tuskegee from a square to an "irregular" twenty-eight-sided figure that removes almost all black residents but no white residents was evidence of racial discrimination).

35. *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977).

36. *Id.*

37. *E.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944) ("Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.").

38. *E.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (emphasis in original)).

39. *E.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) ("The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . . .").

40. *E.g.*, Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

41. *E.g.*, Romer v. Evans, 517 U.S. 620, 632, 634 (1996) ("[T]he amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests . . . . [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.").

42. *E.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982) ("Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.").

43. *City of Cleburne*, 473 U.S. at 452 (Stevens, J., concurring).

legislature, its impartiality would be suspect. If, however, the adverse impact may reasonably be viewed as an acceptable cost of achieving a larger goal, an impartial lawmaker could rationally decide that that cost should be incurred."[44] Thus, for example, a general sales tax enacted as a revenue raising device is acceptable even though it has the unintended effect of falling more harshly on the poor than the rich, but a tax adopted with the purpose of harming the poor would not be acceptable.

D. Determining the Required Correlation Between Classification and Purpose

Once the purpose of a law has been determined (by whatever method a court uses), rational-basis review requires a court to determine whether the classification is rationally related to that purpose. Here again, the two different versions of rationality review apply two very different techniques. Under the traditional, deferential version, the classification at issue need not be correlated in fact, even in relation to an assumed purpose for which there need not be any evidence. It is enough if a legislature could reasonably have assumed that there was such a correlation, even if the legislature was wrong.[45]

On the other hand, in those rationality cases where the U.S. Supreme Court has applied a more demanding standard, it will typically search the record for evidence of a correlation between classification and purpose, and it will also insist that there actually be such a correlation.[46] In these cases, the Court searches for "evidence" in the "record" to assure that there is an actual correlation between classification and purpose; that is, to assure that the state in fact "got it right." This is obviously a quite different standard than the Court follows in deferential rationality cases.

II. THE LEADING U.S. SUPREME COURT CASES ON BOTH SIDES OF THE RATIONAL-BASIS DIVIDE

A. The Deferential Version

There is no shortage of U.S. Supreme Court cases illustrating the deferential version of rationality review; in fact, the deferential version is the established version used in a very high percentage of rationality

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44. U.S.R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 181 (1980) (Stevens, J., concurring).

45. *E.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981).

46. *E.g.*, *City of Cleburne*, 473 U.S. at 448; *see infra* notes 112–18 and accompanying text.

decisions.[47] This section examines a small selection of those cases that are particularly good examples of how accommodating this version can be.

U.S. Railroad Retirement Board v. Fritz[48] is an outstanding example of the Court's willingness to hypothesize legislative purpose, not only without any evidence of actual purpose, but even in the face of contrary evidence of actual purpose. In *Fritz*, the Court considered a federal statute promoting the fiscal soundness of the Railroad Retirement System by limiting railroad workers' ability to qualify for dual benefits under both the Railroad Retirement and the Social Security systems.[49] If the Court had been interested in the actual purpose of the statute, it might have looked at the House and Senate Reports that accompanied the bill.[50] Those reports contained sections entitled, "Principal Purpose of the Bill."[51] These sections included the declaration: "Persons who already have vested rights under both the Railroad Retirement and the Social Security systems will in the future be permitted to receive benefits computed under both systems just as is true under existing law."[52] As the dissenting Justices in *Fritz* pointed out, this legislative history made it clear that preserving vested benefits was one of the principal purposes of the Act.[53] However, the Act as actually passed divided workers with vested benefits into two classes and preserved those vested benefits only for a portion of those vested workers who met at least one of three additional tests.[54] In relation to a purpose of protecting vested benefits, this distinction made no sense, because all workers whose benefits were vested were similarly situated in relation to a purpose to preserve vested benefits.

The majority in *Fritz*, however, was not bothered by the absence of a rationale for the distinction drawn by the statute. Instead, the majority

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47. One study reported that during the period from 1971 through 1996, the U.S. Supreme Court decided 110 rationality cases and the plaintiffs prevailed in only ten cases, a success rate of only nine percent. *See* Farrell, *supra* note 10, at 370.

48. 449 U.S. 166 (1980).

49. *Id.* at 168–73.

50. *See generally* H.R. REP. NO. 93-1345 (1974); S. REP. NO. 93-1163 (1974); 1974 U.S.C.C.A.N. 5702.

51. H.R. REP. NO. 93-1345, at 1; S. REP. NO. 93-1163, at 1.

52. H.R. REP. NO. 93-1345, at 2; S. REP. NO. 93-1163, at 2.

53. *Fritz*, 449 U.S. at 185–86 (Brennan, J., dissenting).

54. In order to retain the additional benefit, those who were vested in both systems also had to meet one of the following tests: "(1) performed some railroad service in 1974 or (2) had a 'current connection' with the railroad industry as of December 31, 1974, or (3) completed 25 years of railroad service as of December 31, 1974." *Fritz*, 449 U.S. at 171–72 (footnote omitted).

identified a different statutory purpose—protecting career railroad employees.[55] The majority then found that the statutory distinctions were correlated with that purpose because those workers whose benefits were vested and who also met one of the three additional tests were more likely to have had careers in the railroad.[56] But where did this statutory purpose—to protect career railroaders—come from? The Court cited no evidence from the statute, the legislative history, the problem that had precipitated the passage of the Act, or anything else. The purpose of protecting career railroaders was suggested by the appellant during the course of litigation.[57] The absence of evidence of this purpose was irrelevant: "Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute."[58]

The dissenters in *Fritz* critiqued the majority's reasoning on the grounds that "the rational-basis standard 'is not a toothless one,' and will not be satisfied by flimsy or implausible justifications for the legislative classification, proffered after the fact by Government attorneys."[59] Further, according to the dissenters, "the actual purposes of Congress, rather than the *post hoc* justifications offered by Government attorneys, must be the primary basis for analysis under the rational-basis test."[60] Finally, according to the dissent, the majority had disregarded "the actual stated purpose of Congress in favor of a justification which was never suggested by any Representative or Senator, and which in fact conflicts with the stated congressional purpose."[61] Of course, none of that mattered, for under the majority's deferential version of rationality review, the actual purpose of a statute is irrelevant.

Nordlinger v. Hahn[62] is another good example of the Court's willingness to hypothesize the purpose of a law, even where there is no evidence to support that hypothesis. *Nordlinger* involved a challenge to

55. *Id.* at 177–79.

56. *Id.* at 178.

57. *Id.* at 177 ("The classification here is not arbitrary, says appellant, because it is an attempt to protect the relative equities of employees and to provide benefits to career railroad employees.").

58. *Id.* at 179 (citation omitted).

59. *See id.* at 184 (Brennan, J., dissenting) (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976)).

60. *Id.* at 187 (Brennan, J., dissenting).

61. *Id.* at 186 (Brennan, J., dissenting).

62. 505 U.S. 1 (1992).

Proposition 13, an amendment to the California State Constitution that adopted an acquisition value assessment scheme for the calculation of property taxes.[63] The long-term effect of such a system was a substantial financial preference for long-time homeowners over newcomers.[64] Because the amendment was adopted as a referendum, there was no legislative history to explain the purpose of the law. In his dissenting opinion, Justice Stevens viewed the law as advancing an impermissible naked preference for long-time owners.[65] As Justice Stevens explained, a benefit for earlier purchasers cannot be justified on the ground that it benefits earlier purchasers.[66]

For the majority, however, the absence of any identified, permissible purpose for the law was not a problem. According to the Court:

> In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.[67]

Such a plausible policy reason, the Court further clarified, may be *inferred*: "To be sure, the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification."[68]

Following this "no evidence required" standard, the Court had no difficulty in plucking out of thin air "two rational considerations of difference or policy" that would justify the different treatment of longtime and newer homeowners: (1) "neighborhood preservation, continuity, and stability," and (2) protecting the reliance interests of longtime homeowners.[69]

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63. *Id.* at 4–5.

64. *Id.* at 6.

65. *Id.* at 30 (Stevens, J., dissenting) ("To my mind, the rationale for such disparity is not merely 'negligible,' it is nonexistent. Such a law establishes a privilege of a medieval character: Two families with equal needs and equal resources are treated differently solely because of their different heritage.").

66. *Id.*

67. *Id.* at 11 (citations omitted).

68. *Id.* at 15 (citations omitted) (citing McDonald v. Bd. of Election Comm'rs of Chi., 394 U.S. 802, 809 (1969) (stating, as summarized by the *Nordlinger* majority: "legitimate state purpose may be ascertained even when the legislative or administrative history is silent")).

69. *Id.* at 12–13.

In addition to the Court's willingness to hypothesize the purpose of a law, the other hallmark of deferential rationality is the Court's willingness to accept conceivable rather than actual connections between the challenged classification and the purpose of the law, even if there is in fact *no* such connection. *Minnesota v. Clover Leaf Creamery Co.*[70] is a good example of this kind of reasoning. In that case, the Minnesota Legislature had enacted a law that prohibited the sale of milk in plastic containers.[71] The statutory language indicated that its purpose was to protect the environment.[72] Opponents of the law, however, had introduced evidence at trial that the ban on plastic milk containers was actually harmful to the environment and the Minnesota Supreme Court had upheld that finding.[73] That evidence turned out not to matter. The United States Supreme Court explained:

> States are not required to convince the courts of the correctness of their legislative judgments. Rather, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."
>
> Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, they cannot prevail so long as "it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable." Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.[74]

This meant that all of the evidence introduced in the trial court, which showed that the alternative paperboard containers were more harmful to the environment than the banned plastic containers, was irrelevant.

These two pillars of deference—hypothesizing purpose and not insisting on an actual connection between classification and purpose—taken together produce a standard under which virtually any classification can survive rational-basis review. Two U.S. Supreme Court cases from the early 1990s are powerful illustrations of this point.

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70. 449 U.S. 456 (1981).

71. *Id.* at 458.

72. *Id.* at 458–59.

73. *Id.* at 460.

74. *Id.* at 464 (alteration in original) (citations omitted).

In *FCC v. Beach Communications, Inc.*,[75] the Court considered a challenge to a Federal Communication Commission (FCC) regulation that exempted from regulation certain cable systems that served one or more buildings under common ownership or management and that did not use any public right of way.[76] Opponents of the FCC rule argued successfully in the lower court that there were no real differences between the regulated and unregulated cable systems.[77] It was, of course, quite clear that this equal protection claim would not be successful because it had been more than thirty-five years since the Court last invalidated a purely business regulation on equal protection grounds,[78] and that one case was later overruled.[79]

What was surprising was the breadth of the Court's opinion, its expansive discussion of how difficult it is to mount a successful rational-basis challenge, and the fact that eight of the nine Justices joined in the opinion. According to *Beach Communications*:

> On rational-basis review, a classification in a statute such as the Cable Act comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it." Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of "'legislative facts'" explaining the distinction "[o]n the record," has no significance in rational-basis analysis." See *Nordlinger v. Hahn*, 505 U.S. 1, 15 (equal protection "does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification"). In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.[80]

The Court then explained that the necessity of drawing lines in a regulatory system "inevitably requires that some persons who have an

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75. 508 U.S. 307 (1993).

76. *Id.* at 309.

77. *Id.* at 311–12.

78. Morey v. Doud, 354 U.S. 457 (1957).

79. City of New Orleans v. Dukes, 427 U.S. 297, 306 (1976).

80. *Beach Commc'ns*, 508 U.S. at 314–15 (citations omitted).

almost equally strong claim to favored treatment be placed on different sides of the line . . . . This necessity renders the precise coordinates of the resulting legislative judgment *virtually unreviewable* . . . ."[81] The Court then found that a regulatory efficiency model, under which government would not regulate those systems for which the costs of regulation would outweigh the benefits to consumers, "provide[d] a conceivable basis for the common-ownership exemption."[82] This was so because "[a] legislator might rationally assume that systems serving only commonly owned or managed buildings without crossing public rights-of-way would typically be limited in size . . . ."[83] In response to the argument that Congress had not in fact intended common ownership "to be a surrogate for small size,"[84] the Court stated: "Whether the posited reason for the challenged distinction actually motivated Congress is 'constitutionally irrelevant . . . .'"[85] The Court further explained that Congress might have had reasons other than the crossing of a public right of way to justify its exemption of certain cable systems:

> As we have indicated, however, there are plausible rationales unrelated to the use of public rights-of-way for regulating cable facilities serving separately owned and managed buildings. The assumptions underlying these rationales may be erroneous, but the very fact that they are "arguable" is sufficient, on rational-basis review, to "immuniz[e]" the congressional choice from constitutional challenge.[86]

Three weeks after *Beach Communications*, the Court reiterated the extraordinarily deferential standard in an unexpected context. In *Heller v. Doe*,[87] the Court considered a challenge to a Kentucky statute concerning procedures for involuntary civil commitment.[88] Under the statute, it was easier to commit a mentally disabled person than it was to commit a person who was mentally ill.[89] Notwithstanding earlier

81. *Id.* at 315–16 (emphasis added) (internal quotation marks omitted).

82. *Id.* at 317–18.

83. *Id.* at 318.

84. *Id.*

85. *Id.* (citation omitted).

86. *Id.* at 320 (alteration in original).

87. 509 U.S. 312 (1993).

88. *Id.* at 314.

89. It was easier for two reasons. First, the burden of proof for involuntary commitment based on mental disability was "clear and convincing evidence" compared to "beyond a reasonable doubt" for mental illness. *Id.* at 317. Second, in commitment proceedings for mental disability, but not for mental illness, guardians and immediate family members were allowed to participate as parties. *Id.* at 316–17.

precedent suggesting that the U.S. Supreme Court would look closely at classifications disadvantaging the mentally disabled,[90] the *Heller* Court not only upheld Kentucky's procedural distinctions, but did so with an extremely broad statement on the limits of its review. According to the Court, rational-basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."[91] Classifications not involving fundamental rights or suspect lines are "accorded a strong presumption of validity" and will be upheld "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."[92] The legislature "need not 'actually articulate at any time the purpose or rationale supporting its classification,'" which "'must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'"[93] Furthermore, a state is under "no obligation to produce evidence to sustain the rationality of a statutory classification." The classification "may be based on rational speculation unsupported by evidence or empirical data."[94] Rather, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."[95]

Applying this deferential version of rational-basis review, the Court had no difficulty in upholding the distinctions created by the statute. According to the Court: (1) there was a "reasonably conceivable state of facts from which Kentucky could conclude that [danger to self or others] is established more easily, as a general rule, in the case of the mentally retarded";[96] (2) the "ease of diagnosis . . . [was] not 'wholly irrelevant' to the achievement of Kentucky's objective";[97] (3) "it would have been plausible for the Kentucky Legislature to believe that most mentally retarded individuals who are committed receive treatment that is different from . . . that to which the mentally ill are subjected";[98] and (4) "the question is at least debatable."[99] Nowhere in the opinion did the

90. *See infra* notes 112–18 and accompanying text (discussing heightened scrutiny applied by the Court in *City of Cleburne v. Cleburne Living Ctr., Inc*, 473 U.S. 432 (1985)).

91. *Heller*, 509 U.S. at 319 (citations omitted) (internal quotation marks omitted).

92. *Id.* at 320 (citations omitted).

93. *Id.* (citations omitted).

94. *Id.* (citations and internal quotation marks omitted).

95. *Id.* (citation and internal quotation marks omitted).

96. *Id.* at 323 (citation and internal quotation marks omitted).

97. *Id.* at 324.

98. *Id.* at 326.

99. *Id.* (citations and internal quotation marks omitted).

Court search the record for evidence to support Kentucky's choices on commitment procedures. The *Heller* Court's entire discussion of civil commitment took place on a hypothetical plane where the Court did not consider whether there was an appropriate commitment process for the mentally disabled in Kentucky but instead whether there was any conceivable justification for the procedures that Kentucky had in fact adopted. As the Court had declared in *Beach Communications*, the legislative judgment is "*virtually unreviewable*."[100]

B. The More Demanding Version of Rationality Review

On the other hand, in a small minority of cases, the U.S. Supreme Court sometimes applies the rational-basis standard in a more demanding fashion. When it does, it frequently invalidates the challenged governmental action. From the smaller group of cases that apply a more demanding version of rationality, three—*United States Department of Agriculture v. Moreno*,[101] *City of Cleburne v. Cleburne Living Center, Inc.*,[102] and *Romer v. Evans*[103]—are particularly good examples of the techniques of heightened rationality. In these three cases, the Court: (1) looked for evidence of actual purpose and, having identified that purpose, ruled it out as impermissible; or (2) examined whether the classification actually advanced the law's stated purpose.

In the first of these cases, *Moreno*, the Court reviewed an amendment to the Food Stamp Act that redefined the term "household" to exclude any household that contained unrelated individuals.[104] The government, defending the "unrelated individual" rule, argued that "Congress might rationally have thought . . . that households with one or more unrelated members are more likely than 'fully related' households to contain individuals who abuse the program by fraudulently failing to report sources of income or by voluntarily remaining poor."[105] The Court, characterizing these assertions as "unsubstantiated assumptions concerning the differences between 'related' and 'unrelated' households,"[106] determined that the "unrelated individual" rule was not a

100. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 316 (1993) (emphasis added).

101. 413 U.S. 528 (1973).

102. 473 U.S. 432 (1985).

103. 517 U.S. 620 (1996).

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

105. *Id.* at 535.

106. *Id.*

rational effort to deal with concerns about fraud.[107] Rather, the Court explained that the "*practical effect*" of the challenged classification "simply does not operate so as rationally to further the prevention of fraud," and that "*in practical operation*, the . . . amendment excludes from participation in the food stamp program, *not* those persons who are 'likely to abuse the program,' but rather only those who . . . cannot even afford to alter their living arrangements so as to retain their eligibility."[108] The majority did not even respond to Justice Rehnquist's dissenting argument that "[t]he limitation which Congress enacted could, in the judgment of reasonable men, conceivably deny food stamps to members of households which have been formed solely for the purpose of taking advantage of the food stamp program."[109] Thus, for the majority, the test was whether the classification actually achieved its purpose. In contrast, the dissent used the traditional deferential mode of analysis and viewed the test as whether a reasonable person might have conceived that there was a correlation between classification and purpose.

After the Court rejected as inadequate the correlation between the "unrelated household" classification and the alleged purpose of deterring fraud, the Court then determined that deterring fraud was not the actual purpose of the amendment after all. Although there was very little legislative history that would have identified the purpose of the amendment, the Court decided that the actual purpose was "to prevent [so-called] 'hippies' and 'hippie communes' from participating in the food stamp program."[110] That purpose, the Court explained in words that would be much cited, was not permissible:

> For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest. As a result, "[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the . . . amendment."[111]

The *Moreno* case is significant because the majority opinion followed a methodology for rational-basis review that was clearly more

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107. *Id.* at 535–36.

108. *Id.* at 537–38 (first emphasis added) (second emphasis in original).

109. *Id.* at 547 (Rehnquist, J., dissenting).

110. *Id.* at 534 (citation omitted).

111. *Id.* at 534–35 (alterations and emphasis in original) (citation omitted).

demanding than that traditionally required. In doing so, the majority rejected the dissent's quite persuasive argument that the amendment would have survived the traditional version of rationality because it conceivably could have been viewed as an anti-fraud device.

The second of the bedrock heightened rationality cases is *City of Cleburne v. Cleburne Living Center, Inc*. In that case, the city denied a special-use permit for the operation of a group home for the mentally disabled, and the Court concluded that the city's action did not satisfy rational-basis review.[112] In explaining why not, the Court did not hypothesize a permissible purpose nor did it imagine a conceivable connection between the classification and such a hypothesized purpose. Instead, the Court insisted on an actual correlation between the classification and the alleged purposes, and then it searched the record for evidence of such a correlation. The Court twice referred to the absence of any evidence in "the record" that would explain why, in relation to the legitimate concern with the size of a home and the number of occupants, the city treated this one group home (made up of the mentally disabled) differently from other group homes (such as those used as boarding houses, nursing homes, family dwellings, fraternity houses, or dormitories).[113] The Court was demanding evidence in the record that the city was in fact "right" that the mentally disabled were different in relation to the purpose. Nowhere in the opinion does the Court ask whether there is any conceivable set of facts under which it might be appropriate to treat the mentally disabled differently from those who occupied other group homes.

The *Cleburne* Court rejected a number of hypothetical permissible purposes as implausible, because the mentally disabled were no different from any of the other, non-regulated groups in relation to those purposes.[114] The Court then assessed the city's actual purpose in denying the permit: "The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded."[115] This, as the Court made clear, was not a permissible

112. City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 431, 431, 446–50.

113. *Id.* at 448 ("Because in our view *the record* does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case." (emphasis added)); *id*. at 450 ("At least *this record* does not clarify how, in this connection, the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes." (emphasis added)).

114. *Id.* at 448–50.

115. *Id.* at 450.

purpose, for some "objectives—such as 'a bare . . . desire to harm a politically unpopular group,'— are not legitimate state interests."[116] That is, "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like,"[117] and "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[118]

The last of the trio of paradigmatic heightened rationality cases is *Romer v. Evans*. In *Romer*, the Court considered an amendment to the Colorado Constitution that prohibited state and local governments from enacting statutes or ordinances that prohibited discrimination on the basis of homosexuality.[119] As the majority opinion in *Romer* explained, "[t]he amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."[120]

The State asserted that the amendment served three state interests—"that it put gays and lesbians in the same position as all other persons";[121] that it respected freedom of association, particularly "the liberties of landlords or employers who have personal or religious objections to homosexuality . . ."; and that it conserved resources "to fight discrimination against other groups."[122] The Court was unwilling to accept the State's assertions that these were the purposes of the amendment, calling them "implausible"[123] and "impossible to credit."[124] Nor did the Court make any attempt to hypothesize a permissible purpose. Instead, focusing on the "sheer breadth"[125] of the amendment (in terms of the substantial number of statutes, ordinances, and state regulations and practices it affected) along with the fact that the amendment directed its adverse consequences at a very specific group, the Court found that the amendment was "inexplicable by anything but

116. *Id.* at 446–47 (citation omitted) (quoting *Moreno*, 413 U.S. at 534).

117. *Id.* at 448.

118. *Id.* (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

119. Romer v. Evans, 517 U.S. 620, 624 (1996).

120. *Id.* at 627.

121. *Id.* at 626.

122. *Id.* at 635.

123. *Id.* at 626.

124. *Id.* at 635.

125. *Id.* at 632.

animus toward the class it affects."[126] In addition, the amendment raised "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected,"[127]and it classified gay persons "not to further a proper legislative end but to make them unequal to everyone else"[128] and "stranger[s] to its laws."[129] The Court explained equal protection's basic limit on governmental purpose—"that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."[130] Instead, laws must be justified "by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons."[131]

Although heightened rationality is the exception rather than the rule, there are certainly other examples beyond the three just mentioned. In *Zobel v. Williams*,[132] the Court used rational-basis review to invalidate an Alaska statute that would have provided for the distribution of income from the state's oil fund on the basis of years of residency in Alaska.[133] The Court first found that the years-of-residency classification was not in fact adequately correlated with the permissible purposes of the statute.[134] The Court never asked whether a reasonable legislator might have believed that there was an adequate correlation between classification and purpose. Further, the Court found that the state's third asserted purpose—rewarding citizens for past contributions—was not a legitimate state purpose.[135] The Court concluded that "[t]he only apparent justification for the retrospective aspect of the program, 'favoring established residents over new residents,' is constitutionally unacceptable."[136]

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126. *Id.*

127. *Id.* at 634.

128. *Id.* at 635.

129. *Id.*

130. *Id.* at 633 (citation omitted).

131. *Id.* at 635.

132. 457 U.S. 55 (1982).

133. *Id.* at 57.

134. The first two purposes identified by the statute were (1) creating a financial incentive for individuals to establish and maintain Alaska residence; and (2) assuring prudent management of the Permanent Fund. The Court assumed that these were permissible, but concluded that the "years of residency" classification, with retroactive credit for years lived in Alaska before the statute was enacted, could not in fact rationally advance the stated purposes. *Id.* at 61–63.

135. *Id.* at 63.

136. *Id.* at 65 (citation omitted).

Eisenstadt v. Baird[137] is another example. There, the Court invalidated a statute that prohibited the sale of contraceptives to unmarried persons.[138] The Court looked carefully for evidence of the actual purpose of the law and found that the purposes identified by the courts below were implausible.[139] The Court then considered whether the statute's purpose could be identified as equivalent to its effect—preventing the use of contraceptives.[140]

Assuming that prohibiting the use of contraceptives was both a permissible purpose and the actual purpose of the statute, the Court determined that the statutory classification that prohibited only unmarried persons from using contraceptives was not adequately correlated with that purpose. The Court explained that married and unmarried persons were similarly situated in relation to that purpose.[141] For the Court, this problem of under-inclusion was decisive because the

137. 405 U.S. 438 (1972).

138. *Id.* at 440–41. This case, involving a challenge to a statute that prohibited the sale of contraceptives to unmarried persons could have been decided under a strict-scrutiny standard, as the law appeared to infringe on the fundamental right to privacy protected under the Fourteenth Amendment's Due Process Clause. The Court, however, deciding the case after *Griswold v. Connecticut*, 381 U.S. 479 (1965), but before *Roe v. Wade*, 410 U.S. 113 (1973), did not consider it necessary to address the statute's validity under the compelling-interest test because the statute "fail[ed] to satisfy even the more lenient [rational basis] equal protection standard." *Eisenstadt*, 405 U.S. at 447 n.7.

139. A state court had found that the purpose of the law was to prevent premarital sex. *Eisenstadt*, 405 U.S. at 448 (citing Sturgis v. Att'y Gen., 260 N.E.2d 687 (1970)). The U.S. Supreme Court responded by insisting that "we cannot agree that the deterrence of premarital sex may reasonably be regarded as the purpose of the Massachusetts law." *Id.* This could not be the purpose, explained the Court, first, because "[i]t would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and birth of an unwanted child as punishment for fornication," and second, because the statute was so riddled with exceptions—contraceptives were not regulated when used for the prevention of disease, and the statute made no attempt to deter married persons from engaging in sexual relations with unmarried persons—that "deterrence of premarital sex cannot reasonably be regarded as its aim." *Id.* at 449. A second proffered justification for the ban on contraceptives was that it advanced certain state health objectives. *Id* at 450. Once again, the Court closely scrutinized this alleged purpose and found the argument in its favor to be illogical because it was overbroad and discriminatory. The alleged health purpose was overbroad in that some contraceptives were not hazardous to health. *Id*. at 451. It was discriminatory in that, if health concerns were in fact the underlying purpose, then it was not rational that the statute allowed physicians to prescribe contraceptives to married but not unmarried persons, because health concerns would be the same for married and unmarried persons. *Id.* at 450–51. As a result of this failure in logic, the Court concluded that health could not reasonably be regarded as the purpose of the statute.

140. *Id.* at 452–53.

141. *Id.* at 453–54 (citations omitted).

guaranty of equal protection means "that the principles of law which officials would impose upon a minority must be imposed generally."[142]

The *Eisenstadt* opinion, although it claimed to be applying rational-basis review, in fact applied a standard much more demanding than that of traditional deferential rationality. With regard to the identification of purpose, the Court refused to accept the first two purposes identified by state officials, but instead carefully examined the logic associated with the argument for the first two purposes and found that logic wanting.[143] With regard to the third purpose, the Court did not ask whether the state might conceivably have thought that there was a connection between a person's marital status and the prohibition of contraception, but instead found that underinclusion was a fatal flaw in the statute and insisted that the state treat all persons the same in relation to the prohibition of contraceptives.[144] The Court in *Eisenstadt* never attempted to hypothesize additional permissible purposes or ask whether the Massachusetts Legislature might conceivably have believed that banning contraceptives might diminish premarital sex and promote health objectives. These are the questions that the Court would have asked if it had been applying traditional deferential rationality.

The cases discussed illustrate the Court's use of the demanding version of rational-basis review. Although such cases are the exception rather than the norm, they are sufficiently frequent to have drawn notice and study over a long period of time.[145]

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142. *Id.* at 454 (quoting Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring)).

143. *See supra* note 139.

144. *See supra* notes 141–42 and accompanying text.

145. Gerald Gunther, in an influential law review article published in 1972, identified seven cases from the U.S. Supreme Court's 1971 term in which equal protection arguments were successful even though the Court appeared to be applying a minimal-scrutiny standard. Gerald Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Newer Model for Equal Protection*, 86 HARV. L. REV. 1 (1972). A subsequent study reported that during the period beginning after the publication of the Gunther article and ending with the Court's 1996 decision in *Romer v. Evans*, the Court decided 110 equal protection rational-basis cases and plaintiffs prevailed in ten. Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357 (1999). In 2000, the U.S. Supreme Court created the "class of one" equal protection claim, a kind of rational-basis claim that was successful in its first application. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). Further, even in those hoary old days during the first three decades of the twentieth century, a time during which Justice Holmes characterized equal protection claims as "the usual last resort of constitutional arguments," *Buck v. Bell*, 274 U.S. 200, 208 (1927), the Court decided at least three successful rational-basis cases. *See* Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32 (1928); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902).

C. How Does the Court Decide Which Version of Rationality Review to Use?

Given the two different versions of rationality review, it would enhance predictability if the U.S. Supreme Court would explain when the deferential version is appropriate and when the more demanding version should be used. However, the Court has provided no such guidance, in word or deed. The most obvious explanation for heightened rationality is that the heightened standard is appropriate where the classification involves a class that is closely analogous to those classes which the Court has found to be suspect or quasi-suspect.[146] This is an appealing explanation, but it does not work. First, the Court itself has rejected this explanation. In *Cleburne*, the Court explicitly rejected the idea that the mentally disabled should be entitled to heightened scrutiny,[147] and in *Romer*, the Court completely ignored the idea that gays might be a suspect class. Further, if quasi-suspect status were the explanation for the Court's use of heightened scrutiny, there would be the problem of consistency. Why, for example, did the Court apply a heightened rationality to the mentally disabled in *Cleburne* but not to the mentally disabled in *Heller*? Why did the Court apply heightened rationality to gays in *Romer* but let stand lower court decisions that applied a deferential standard to laws disadvantaging gays?[148]

An alternative explanation would suggest that heightened rationality is appropriate when the government benefit sought is significant. This would explain why the Court used heightened rationality in *Moreno*, a case that involved food stamps, and *Plyler v. Doe*,[149] a case that involved a claim to basic education. Once again, however, the problem of consistency remains. How would one then explain why the Court applied a very deferential version of rationality in other cases involving food stamps,[150] welfare benefits,[151] and education?[152] There does not

146. The Court, for example, considers race a suspect classification and thus applies strict scrutiny to racial classifications. *See, e.g.*, Palmore v. Sidoti, 446 U.S. 429, 432–33 (1984). It also considers gender a quasi-suspect classification and applies intermediate scrutiny to gender classifications. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

147. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985).

148. *E.g.*, Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996), *cert. denied*, 519 U.S. 948 (1996); Richenberg. v. Perry, 97 F.3d 256 (8th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), c*ert. denied*, 452 U.S. 905 (1981).

149. 457 U.S. 202 (1982).

150. Lyng v. Castillo, 477 U.S. 635 (1986).

151. Dandridge v. Williams, 397 U.S. 471 (1970).

152. San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

seem to be any consistent principle that explains why the U.S. Supreme Court chooses one version of rationality in one case but not in another case with a very similar factual setting.

III. SAME-SEX RELATIONSHIPS AND THE TWO VERSIONS OF RATIONALITY REVIEW

The conflict between the two competing versions of rationality review has in recent years been most clearly evident in cases challenging longstanding government policies disadvantaging gays and lesbians. These cases principally involve three factual settings: state laws defining marriage as limited to a man and a woman, the U.S. military's policy of excluding gays and lesbians from military service, and DOMA, which limits federal recognition of marriage to opposite-sex couples. In each of these contexts, the result of a constitutional challenge is typically determined by which version of rational-basis review a court employs. This Part examines the two versions of rational-basis review in these three settings.

A. State Laws that Define Marriage as Being Limited to a Man and a Woman

While no state has recognized same-sex marriage under its traditional marriage laws,[153] in recent years state constitutions have been amended to make the affirmative assertion that only marriage between a man and a woman will be recognized.[154] This section examines federal equal protection challenges to two of those state constitutional amendments. In the first case, the court used the traditional deferential version and in the second case, the more demanding version.

In *Citizens for Equal Protection v. Bruning*,[155] the Eighth Circuit considered an amendment to the Nebraska State Constitution that provided that "[o]nly marriage between a man and a woman shall be valid or recognized in Nebraska."[156] The court cited *Heller* and *Beach Communications* for the propositions that "a statutory classification that neither proceeds along suspect lines nor infringes fundamental

153. In 2006, "[t]he vast majority of states—forty-five to be exact—preserve[d] the traditional definition of marriage (as between a man and a woman) and/or prohibit[ed] same-sex marriage by statute." J. Harvey Wilkinson III, *Gay Rights And American Constitutionalism: What's A Constitution For?*, 56 DUKE L.J. 545, 568 (2006).

154. *See, e.g.*, *infra* notes 156, 165.

155. 455 F.3d 859 (8th Cir. 2006).

156. *Id.* at 863 (quoting NEB. CONST., art. I, § 29).

constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational-basis for the classification,"[157]and that the classification was to be afforded "a strong presumption of validity."[158] The State, defending the provision, argued that the government interest that supported this provision was "steering procreation into marriage."[159] Because the provision was enacted by referendum, there was no formal legislative history that could indicate the purpose of the law. The court cited no evidence as to the purpose of the enactment but simply accepted the post-hoc rationalization put forward by the State in defending the case. The court explained the connection between the classification and this purpose:

> By affording legal recognition and a basket of rights and benefits to married heterosexual couples, such laws "encourage procreation to take place within the socially recognized unit that is best situated for raising children." The State and its supporting amici cite a host of judicial decisions and secondary authorities recognizing and upholding this rationale. The argument is based in part on the traditional notion that two committed heterosexuals are the optimal partnership for raising children, which modern-day homosexual parents understandably decry. But it is also based on a "responsible procreation" theory that justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot.[160]

This may seem like an odd justification for heterosexual marriage—that a heterosexual couple can produce children "by accident." But it was enough given the deference accorded to the government by the court in this case.

The challengers to the law, on the other hand, questioned whether the amendment as written actually advanced the State's purpose of steering procreation into marriage. As of matter of logic, they argued, keeping gay people out of marriage was not likely to steer heterosexual persons

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157. *Id.* at 867 (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993)) (internal quotation marks omitted).

158. *Id.* at 867 (quoting Heller v. Doe, 509 U.S. 312, 319 (1993)) (internal quotation marks omitted).

159. *Id.* (internal quotation marks omitted).

160. *Id.* (internal quotation marks omitted).

into procreative marriages.[161] The court, however, restated the purpose of traditional marriage laws: "to encourage *heterosexual* couples to bear and raise children in committed marriage relationships."[162] In response to the argument that this last justification seemed to be based on prejudice against same-sex couples, the court explained that the amendment only "limits the class of people who may validly enter into marriage" and thus is *not* "'inexplicable by anything but animus' towards same-sex couples."[163]

The *Bruning* court's decision is a classic version of deferential rationality. The court was not concerned with evidence of the actual purpose of the statute, it was not concerned with whether the statutory classification actually advanced a statutory purpose, and it easily rejected the argument that the enactment of the statute was motivated by prejudice against same-sex couples.

On the other hand, in *Perry v. Schwarzenegger*,[164] a district court in California considered a similar amendment to the California Constitution and used the more demanding version of rational-basis review, invalidating the amendment. In California, the voters approved Proposition 8, which amended the state constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California."[165] The *Perry* decision was based on two grounds. The first was that Proposition 8 infringed on the implied fundamental right to marry and that the state could not justify that infringement under the strict-scrutiny standard.[166] The second ground was that Proposition 8 could not even satisfy equal protection's deferential rational-basis standard.[167] This section examines the rational basis portion of the *Perry* decision.

In its discussion of that rational-basis standard, the *Perry* court cited the three U.S. Supreme Court precedents that would most strongly support invalidation of Proposition 8—(1) *United States Department of*

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161. *Id.* at 868.

162. *Id.* (emphasis added).

163. *Id.* (quoting Romer v. Evans, 517 U.S. 620, 632 (1996)).

164. 704 F. Supp. 2d 921 (N.D. Cal. 2010), *appeal docketed*, No. 10-16696 (9th Cir. Aug. 8, 2010).

165. CAL. CONST. art. I, § 7.5. This constitutional amendment was added by an initiative measure known as "Proposition 8." This constitutional amendment effectively reversed an earlier decision of the Supreme Court of California, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), that had found that the California Constitution's equal protection clause required the state to recognize same-sex marriage.

166. *Perry*, 704 F. Supp. 2d at 991–96.

167. *Id.* at 996–1003.

Agriculture v. Moreno, for the proposition that "a law must do more than disadvantage or otherwise harm a particular group,"[168] (2) *City of Cleburne v. Cleburne Living Center*, for the proposition that "[l]egislation singling out a class of human beings for differential treatment hinges upon a demonstration of 'real and undeniable differences' between the class and others,"[169] and (3) *Romer v. Evans*, for the proposition that the search for a rational basis "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."[170] In addition, the *Perry* court cited *Plyler v. Doe* for the proposition that "[t]he court may look to evidence to determine whether the basis for the underlying debate is rational."[171]

The *Perry* court also cited as purported supporting precedents (1) *Heller v. Doe*, for the general proposition that "the court presumes the law is valid and will uphold it as long as it is rationally related to some legitimate governmental interest";[172] (2) *Minnesota v. Clover Leaf Creamery Co.*, for the proposition that "[t]he court defers to the legislative . . . judgment if there is at least a debatable question whether the underlying basis for classification is rational";[173] and (3) *Massachusetts Board of Retirement v. Murgia*,[174] as support for the assertion that "gays and lesbians are the type of minority strict scrutiny was designed to protect."[175]

Nowhere in the *Perry* opinion is there any recognition that these last three U.S. Supreme Court cases, far from supporting the *Perry* holding, directly undermine it and need to be distinguished or otherwise avoided. In *Heller*, the Court had insisted that the plaintiff's rational-basis burden in attacking the legislative judgment was "to negative every conceivable basis which might support it."[176] Further, under the *Heller* standard, the legislature "need not 'actually articulate at any time the purpose or rationale supporting its classification'" which "must be upheld . . . if

168. *Id.* at 996.

169. *Id.* at 997.

170. *Id.* at 995 (alteration in original) (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)) (internal quotation marks omitted).

171. *Id.* (citing Plyler v. Doe, 457 U.S. 202, 228 (1982) ("[T]he available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc.")).

172. *Id.* (citing Heller v. Doe, 509 U.S. 312, 319–20 (1993)).

173. *Id.* (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981)).

174. 427 U.S. 307 (1976).

175. *Perry*, 704 F. Supp. 2d at 997 (citing *Murgia*, 427 U.S. at 313).

176. *Heller*, 509 U.S. at 320 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)) (internal quotation marks omitted).

there is any reasonably conceivable set of facts that could provide a rational basis for the classification."[177] Furthermore, a state is under "no obligation to produce evidence to sustain the rationality of a statutory classification," which "may be based on rational speculation unsupported by evidence or empirical data."[178] Nor did the *Perry* court acknowledge the precedential problems of *Clover Leaf*, which had declared that "[w]here there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken."[179] Nor did the *Perry* court acknowledge that, under *Murgia*, the adverse and unfair impact of a law on an individual person is not of constitutional weight so long there was a rational basis for the generalization embodied in the classification.[180]

Instead of addressing these problematic cases head on, the *Perry* court ignored their admonishments and, in contravention of their holdings, closely examined the evidence in the record, looking for the purpose and the relation between classification and purpose. The court evaluated each of the six purposes set forth by the proponents of Proposition 8. The first interest asserted was the preservation of the traditional institution of marriage as the union of a man and a woman.[181] The *Perry* court rejected this interest on the ground that "[t]radition alone . . . cannot form a rational basis for a law," and that "[t]he 'ancient lineage' of a classification does not make it rational."[182] In its disparagement of tradition as a proper justification, the court noted how another marriage tradition—the tradition of assigning legally mandated gender roles to husband and wife—also enjoyed longstanding support.[183] Those traditional roles, however, have since been rejected by the courts as unconstitutional, "nothing more than an artifact of a forgone notion that men and women fulfill different roles in civic life."[184] The court also

177. *Id.* at 320 (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993)) (internal quotation marks omitted).

178. *Id.* (quoting *Beach Commc'ns*, 508 U.S. at 315) (internal quotation marks omitted).

179. *Clover Leaf*, 449 U.S. at 464.

180. *Murgia*, 427 U.S. at 311, 314 (upholding as rational an age classification that required a police officer to retire at age fifty even though he himself was fit and capable of performing the duties of a police officer).

181. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 998 (N.D. Cal. 2010), *appeal docketed*, No. 10-16696 (9th Cir. Aug. 8, 2010).

182. *Id.* (citing *Heller*, 509 U.S. at 327).

183. *Id.* at 958–59, 998.

184. *Id.* at 998.

noted that the asserted interests in tradition are "nothing more than tautologies and do not to amount rational bases for Proposition 8."[185]

The comment about tautologies is substantially correct, at least if one frames the nature of the tradition narrowly. That would mean that the purpose of an amendment that limits marriage to a man and a woman is to limit marriage to a man and a woman. There is, however, a broader statement of the argument to tradition that is not tautological and has been given greater weight in other U.S. Supreme Court decisions. This argument sees tradition as respect for the customary ways things have been done because the survival of a particular practice over a long period of time suggests that there is real value in that practice.

In the U.S. Supreme Court, the appeal to tradition as a significant value that can justify legislation has far more support than the *Perry* court suggests. The appeal to tradition is strongest in the Court's substantive due process cases where one of the tests for determining whether or not an implied right is fundamental is whether the practice is "deeply rooted in this Nation's history and tradition."[186] Although the Justices on the U.S. Supreme Court disagree on the application of the history and traditions test and on the level of generality at which it is to be applied,[187] there is substantial agreement that history and tradition are at least an important starting point for determining what rights are fundamental.[188] As Justice Scalia explained, the protection of traditionally protected interests is important in order "to prevent future generations from lightly casting aside important traditional values."[189] In *Washington v. Glucksberg*,[190] a case in which the Court considered the claim that a statute banning assisted suicide violated the Due Process Clause, Chief Justice Rehnquist, writing for the Court, said, "We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices."[191] According to Chief Justice Rehnquist, the history and traditions method reins in subjective elements of judicial

185. *Id.*

186. Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).

187. *See* Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203, 225–35 (2007).

188. Lawrence v. Texas, 539 U.S. 558, 572 (2003) ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." (alteration in original) (citation and internal quotation marks omitted)).

189. Michael H. v. Gerald D., 491 U.S. 110, 123 n.2 (1989).

190. 521 U.S. 702 (1997).

191. *Id.* at 710.

review because it is "carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition."[192]

Even apart from the substantive due process cases, the Court has emphasized the value of tradition in rational basis equal protection cases as well. Thus, in *City of New Orleans v. Dukes*,[193] the Court considered the validity of a local ordinance that banned pushcart vendors from the French Quarter section of the city but exempted pushcarts that had been operating for eight or more years.[194] The court of appeals had invalidated the ordinance on the ground that the grandfather clause did not ensure that the favored vendors would in fact preserve the traditions of the Quarter.[195] In doing so, the court assumed that preserving that tradition was in fact a valid interest. The U.S. Supreme Court upheld the ordinance as rationally related to the valid purpose of "preserv[ing] the appearance and custom valued by the Quarter's residents and attractive to tourists. The legitimacy of that objective is obvious."[196] Further, in *Nordlinger v. Hahn*, the U.S. Supreme Court in a rational-basis case identified "local neighborhood preservation, continuity, and stability,"[197] as permissible purposes that would justify a taxing scheme that gave a substantial preference to long-term homeowners over newcomers. Thus, the *Perry* court's quick and complete rejection of tradition as a justification for Proposition 8 was inconsistent both with the U.S. Supreme Court's deferential rational-basis cases and also with its cases that pay accolades to the value of tradition.

The proponents of Proposition 8 next asserted that the amendment was related to the state's interest in "[a]cting incrementally and with caution when considering a radical transformation to the fundamental nature of a bedrock social institution."[198] The court rejected this interest on the ground that "evidence at the trial" rebutted the claim that marriage amounted to a sweeping social change, and that the contrary evidence of proponents was neither credible nor reliable.[199] The court concluded that "[b]ecause the evidence shows that same-sex marriage

192. *Id.* at 722.

193. 427 U.S. 297 (1976).

194. *Id.* at 298.

195. *Id.* at 300.

196. *Id.* at 304 (citation and internal quotation marks omitted).

197. Nordlinger v. Hahn, 505 U.S. 1, 12 (1992) (citing Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).

198. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 998–99 (N.D. Cal. 2010), *appeal docketed*, No. 10-16696 (9th Cir. Aug. 8, 2010) (alteration in original) (internal quotation marks omitted).

199. *Id.* at 999.

has and will have no adverse effects on society or the institution of marriage, California has no interest in waiting and no practical need to wait to grant marriage licenses to same-sex couples."[200] In drawing this conclusion, the court ignored two foundations of traditional deferential rational-basis review. First, the court's emphasis on what "the evidence" showed is misplaced. In traditional rational-basis cases, the state need not produce any evidence either of the purpose of a law or of any actual connection between the law's classification and its purpose.[201] The evidence is irrelevant.

Second, the argument in favor of gradualism, incrementalism, and caution has substantial support in the U.S. Supreme Court's rational-basis precedents. In *Williamson v. Lee Optical*,[202] for example, the Court, considering an equal protection challenge to law that advantaged ophthalmologists and optometrists over opticians, explained:

> Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.[203]

This one-step-at-a-time standard is very deferential because, once a court has upheld a piece of legislation on that basis, a court does not follow up to ensure that the state ever takes a second step to address the problem.[204] Thus, the effect of the Court's approval of step-at-a-time action is that a state is always free to address only a part of a problem. This is what the proponents of Proposition 8 argued the state was doing because it had adopted a domestic partnership law that allowed same-sex couples to receive many of the rights and benefits accorded to married couples.[205]

City of New Orleans v. Dukes provides further support for the policy of gradualism. When explaining why, consistent with the Equal Protection Clause, the city could exclude some pushcart vendors from

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200. *Id.*

201. *See supra* Part II.A.

202. 348 U.S. 483 (1955).

203. *Id.* at 489 (citations omitted).

204. *See* Note, *Reforming the One Step at a Time Justification in Equal Protection Cases*, 90 YALE L.J. 1777, 1779–80 (1981).

205. *Perry*, 704 F. Supp. 2d at 994.

the French Quarter while allowing others to stay, the Court said: "We are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' that a legislature need not 'strike at all evils at the same time.'"[206] It is thus clear that, under rational-basis review, it is permissible for the state to proceed gradually and perhaps cautiously. A court applying the deferential version of rational-basis review would likely have found this to be a valid interest.

The proponents of Proposition 8 next asserted a third interest: the promotion of "stability and responsibility in naturally procreative relationships."[207] The court rejected this interest because "the evidence" was inconsistent with this purpose in that "same-sex parents and opposite-sex parents are of equal quality."[208] Further, Proposition 8 "does not make it more likely that opposite-sex couples will marry and raise off-spring biologically related to both parents."[209]

The court's analysis here is inconsistent with the U.S. Supreme Court's deferential rational-basis precedents in two ways. Again, the trial court's stress on weighing "the evidence" conflicts with the U.S. Supreme Court's insistence, in its deferential rational-basis cases, that the evidence does not matter at all.[210] Further, the Court in *Nordlinger* explicitly identified stability as a valid purpose for a state to pursue.[211] Given that purpose, all that matters is that the proponents of Proposition 8 might conceivably have believed that there is a connection between traditional marriage rules and stability and procreation. To the extent that the district court cited "the evidence" that Proposition 8 would in fact discourage a norm that "sexual activity occur within a marriage to ensure that reproduction occur within stable households,"[212] and was thus was not related to the purpose of the law, that finding is not relevant to traditional deferential rational-basis review. All that is required is that proponents of the law could reasonably have believed that there is some connection between opposite-sex couples and procreation in marriage and that opposite-sex couples might have more stable marriages than

206. City of New Orleans v. Dukes, 427 U.S. 297, 305 (1976) (citations omitted) (quoting Katzenbach v. Morgan, 384 U.S. 641, 657 (1966)) (internal quotation marks omitted).

207. *Perry*, 704 F. Supp. 2d at 999 (internal quotation marks omitted).

208. *Id.*

209. *Id.* at 999–1000.

210. *See supra* notes 75–100 and accompanying text.

211. Nordlinger v. Hahn, 505 U.S. 1, 12–13 (1992).

212. *Perry*, 704 F. Supp. 2d at 1000.

same-sex couples. Under traditional deferential review, this would be an adequate justification for the law, even if it is not true.

The *Perry* court quickly rejected the proponents' fourth asserted purpose—protecting the religious freedom of those who oppose marriage for same-sex couples, because the amendment did "not affect any First Amendment right or the responsibility of parents to educate their children."[213] The court moved from the alleged religious objection to the statute to an evaluation of the statute's asserted fifth purpose—treating same-sex couples differently from opposite-sex couples.[214] The court found that "[t]he evidence shows conclusively that moral and religious beliefs form the only basis for a belief that same-sex couples are different from opposite sex couples," but the court went on to write that "[t]he evidence fatally undermines any purported state interest in treating couples differently."[215] The court's rejection of religious belief as a proper motivation of Proposition 8 is certainly correct in that, under the First Amendment, the state is required to advance only secular purposes. The court's rejection of the moral attitudes, however, is much more problematic.

The U.S. Supreme Court's opinion in *Lawrence v. Texas* is the starting point for a discussion of morality as a legitimate interest that can justify classifications. In that case, the majority quoted approvingly from Justice Stevens's dissenting opinion in *Bowers v. Hardwick*:[216] "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[217] The *Lawrence* majority then declared that "[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'"[218] Some courts have interpreted this language in *Lawrence* as meaning that the promotion of morality can never constitute a legitimate purpose to justify a governmental classification.[219]

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213. *Id.*

214. *Id.* at 1001.

215. *Id.*

216. 478 U.S. 186 (1986).

217. Lawrence v. Texas, 539 U.S. 558, 577 (2003) (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

218. *Id.* at 583 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).

219. *E.g.*, Reliable Consultants v. Earle, 517 F.3d 738 (5th Cir. 2008). In this case, the Fifth Circuit reviewed a statute that prohibited the sale of sexual devices and concluded that it violated the constitutional right "to engage in private intimate conduct in the home without government

Other courts read that language more narrowly so that the promotion of morality through legislation, a longstanding practice, remains an appropriate state interest in certain contexts. In terms of the longstanding nature of the practice, a number of U.S. Supreme Court cases upheld obscenity statutes,[220] reasoning that protecting "the social interest in order and morality" was a legitimate state interest justifying these statutes.[221] In *Williams v. Morgan*,[222] the Eleventh Circuit upheld a state statute that prohibited the commercial distribution of certain sexual devices. In the court's final opinion in that case, the only question remaining was "whether public morality remains a sufficient rational basis for the challenged statute" after *Lawrence*.[223] The court distinguished *Lawrence* as follows:

> However, while the statute at issue in *Lawrence* criminalized *private* sexual conduct, the statute at issue in this case forbids *public, commercial* activity. To the extent *Lawrence* rejects public morality as a legitimate government interest, it invalidates only those laws that target conduct that is *both* private *and* non-commercial.[224]

The court upheld the challenged statute because it "target[ed] *commerce* in sexual devices, an inherently public activity."[225] The court explained further that it did not read *Lawrence* as having "rendered public morality altogether illegitimate as a rational basis."[226] Other federal courts have

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intrusion." *Id.* at 743. The state's primary justifications for the statute were "morality based." *Id.* at 745. The court rejected those justifications:

> These interests in "public morality" cannot constitutionally sustain the statute after *Lawrence*. To uphold the statute would be to ignore the holding in *Lawrence* and allow the government to burden consensual private intimate conduct simply by deeming it morally offensive. In *Lawrence*, Texas's only argument was that the anti-sodomy law reflected the moral judgment of the legislature. The Court expressly rejected the State's rationale by adopting Justice Stevens' view in *Bowers* as "controlling" and quoting Justice Stevens' statement that "'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is *Lawrence* not a sufficient reason for upholding a law prohibiting the practice.'" Thus, if in *Lawrence* public morality was an insufficient justification for a law that restricted "adult consensual intimacy in the home," then public morality also cannot serve as a rational basis for Texas's statute, which also regulates private sexual intimacy.

Id. (footnotes omitted).

220. Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Roth v. United States, 354 U.S. 476 (1957).

221. *Roth*, 354 U.S. at 485 (emphasis omitted) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).

222. 478 F.3d 1316 (11th Cir. 2007).

223. *Id.* at 1318.

224. *Id.* at 1322 (emphasis in original) (citing Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

225. *Id.*

226. *Id.* at 1323 (emphasis in original).

agreed that the promotion of morality is still a sufficient justification for the state to regulate public conduct.[227]

Thus, even after *Lawrence*, the promotion of morality can be a legitimate state interest, at least in the proper context. Is Proposition 8 such a proper context? Although *Lawrence* makes clear that public morality does not justify state intrusion on private conduct, Proposition 8 makes no attempt to regulate private sexual conduct. It simply withholds public recognition and public endorsement of same-sex relationships by denying the right to a publicly recognized marriage. Public morality is arguably a legitimate state interest to justify that denial.

The *Perry* court briefly referred to and rejected the sixth asserted interest supporting Proposition 8—"the catchall interest."[228] In the very last portion of its rational-basis discussion, the court finally arrived at the argument that most broadly supports its invalidation of Proposition 8—that its actual purpose is to discriminate against gay persons.[229] This focus on the actual purpose of a statute is certainly not part of the methodology of deferential rational-basis review but is an essential part of heightened rationality.[230] However, the *Perry* court, following the United States Supreme Court, made no mention of this distinction. The court did note that:

> In the absence of a rational basis, what remains of proponents' case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples. Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a

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227. *See, e.g.*, United States v. Stagliano, 693 F. Supp. 2d 25 (D.D.C. 2010). In *Stagliano*, the court declared:

> Furthermore, to the extent that *Lawrence* rejects public morality as a legitimate governmental interest, it does so only in the narrow context *of private* conduct that has no potential to harm others . . . . The *Lawrence* Court made clear that its holding did not extend to cases that "involve public conduct" . . . . The obscenity statutes, unlike the statute invalidated in *Lawrence*, do not target purely private activity. To the contrary, they target the public dissemination or the possession for sale of obscene materials. Although public morality may be an insufficient justification for regulating private conduct in some cases, it is certainly a sufficient justification for regulating the sort of public conduct at issue here. Indeed, the Supreme Court has repeatedly upheld obscenity statutes on the basis that the government can "legitimately act . . . to protect 'the social interest in order and morality.'"

Id. at 38 (citations omitted).

228. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1001–02 (N.D. Cal. 2010), *appeal docketed*, No. 10-16696 (9th Cir. Aug. 8, 2010). The court identified the "catchall interest" as "[a]ny other conceivable legitimate interests identified by the parties, amici, or the court at any stage of the proceedings." *Id.* at 1001.

229. *Id.* at 1002.

230. *See supra* Parts II.A–B.

> relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate.[231]

The court went on to note that Proposition 8 was based on "a desire to advance the belief that opposite-sex couples are morally superior to same-sex couples" and on "negative stereotypes about gays and lesbians."[232]

This final, eloquent argument against Proposition 8 is a classic example of heightened rationality, with its rejection of the government's asserted purposes as implausible and its focus on the actual purpose of the law, including a willingness to rule out animus or prejudice as permissible purposes. The *Perry* case will be upheld on appeal if the reviewing courts are willing to adopt this version of rational-basis review. The *Perry* opinion, however, in line with the U.S. Supreme Court's own practice in this area, ignored rather than confronted the deferential version of rationality review. The U.S. Supreme Court decisions adopting the deferential version cannot readily be distinguished away and thus the result on appeal will depend on which set of precedents the reviewing court decides to apply.

B. Gays in the Military

In December 2010, Congress ended the longstanding policy of the United States military that prohibited gays and lesbians from serving in the military on the same terms as heterosexual persons.[233] This statutory change effectively ended many years of litigation over the constitutionality of a changing series of military policies that excluded openly gay persons from service. Even though the cases decided under the old policies are now effectively moot, they still provide a good example of how courts grapple with the two versions of the rational-basis standard.

The United States military's longstanding policy of excluding gay persons from military service has changed over time,[234] but the military

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231. *Id.*

232. *Id.* at 1002–03 (citing Romer v. Evans, 517 U.S. 620, 634 (1996) ("[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.")).

233. *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

234. An early version provided that one "who solicits, attempts or engages in homosexual acts shall normally be separated from the naval service," but discharge was not invariably mandatory. *See* Dronenburg v. Zech, 741 F.2d 1388, 1389 (D.C. Cir. 1984). A subsequent version excluded "a person who has committed homosexual acts or is an admitted homosexual but as to whom there is

consistently refused to allow gays to serve openly in the military. Constitutional challenges that sought heightened scrutiny on the ground that the policy either violated substantive due process by infringing on a fundamental right or violated the Equal Protection Clause by discriminating against a suspect class, have been, until recently, unsuccessful.[235]

Given this background, it is not surprising that challenges to the military's exclusion of gays on the basis of equal protection's *rational-basis* test have not been successful either. The lower federal courts that have considered this issue have applied a deferential version of rational-basis review,[236] with its very generous willingness to accept the government's version of the regulation's purpose and little examination of whether the exclusion of gays actually serves the military's alleged purposes. When federal courts considered the rationality of excluding gays from the military, not only were challenges to the policy unsuccessful, they were not even considered to be serious. Judge Bork's opinion in *Dronenburg v. Zech*[237] is a good illustration of the courts' resistance to the arguments of same-sex military claimants. Addressing the question of whether the exclusion of gays from the military was a rational means of advancing a legitimate interest, Judge Bork explained:

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no evidence that they have engaged in homosexual acts." *See* Watkins v. U.S. Army, 847 F.2d 1329, 1336 (9th Cir. 1988) (citing Army Regulation 601-280), *opinion withdrawn on reh'g*, 875 F.2d 699 (9th Cir. 1989). The most recent version of the rule, commonly known as the "Don't Ask, Don't Tell" policy, provided that a member of the armed forces will be discharged if any one of the following findings is made: (1) "That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts . . ."; (2) "That the member has stated that he or she is a homosexual . . . unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts"; or (3) "That the member has married or attempted to marry a person known to be of the same biological sex." 10 U.S.C. § 654(b) (2006).

235. With regard to substantive due process, the federal cases decided before *Lawrence v. Texas* uniformly rejected substantive due process challenges to the military's regulations because no protected conduct was implicated by the military regulations and thus the regulations satisfied a minimal scrutiny standard. *See, e.g.*, Richenberg v. Perry, 97 F.3d 256, 260–62 (8th Cir. 1996); Thomasson v. Perry, 80 F.3d 915, 934 (4th Cir. 1996); Dronenburg v. Zech, 741 F.2d 1388, 1397–98 (D.C. Cir. 1984); Beller v. Middendorf, 632 F.2d 788, 812 (9th Cir. 1980). An alternative argument for heightened scrutiny of the military's policy—that gays are a suspect class—has, with one exception, been uniformly rejected in the federal courts. Even that one exception itself was short-lived. A three-judge panel for the Ninth Circuit concluded that gays were a suspect class and invalidated the military regulations that exclude gays using a strict-scrutiny standard. Watkins v. U.S. Army, 847 F.2d 1329 (9th Cir. 1988). This holding, however, was the law of the circuit for only fifteen months, at the end of which the circuit judges sitting en banc withdrew the decision of the three-judge panel. Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989).

236. *See, e.g.*, *Richenberg*, 97 F.3d at 261–62; *Thomasson*, 80 F.3d at 927–31; *Dronenburg*, 741 F.2d at 1397–98; *Beller*, 632 F.2d at 808–09 n.20.

237. 741 F.2d 1388 (D.C. Cir. 1984).

> To ask the question is to answer it. The effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline. The Navy is not required to produce social science data or the results of controlled experiments to prove what common sense and common experience demonstrate.[238]

Judge Bork accepted without question the Navy's assertion that the purpose of the challenged regulation was to promote morale. By Judge Bork's own admission, he believed that same-sex relationships within the military would likely "generate dislike and disapproval among many who find homosexuality morally offensive."[239] Judge Bork, however, did not think that it was necessary to determine whether dislike and disapproval were the actual motivation for the policy or whether there was any evidence that same-sex relationships were in fact harmful to morale.

Recently, in light of the U.S. Supreme Court's holding in *Lawrence* that the Due Process Clause provides some measure of protection for the private, consensual sexual acts of adults, several federal courts have applied heightened scrutiny to the military's exclusion of gays.[240] The level of scrutiny applied in these cases was somewhere between deferential rationality and strict scrutiny. Two of these cases[241] adopted a standard that the U.S. Supreme Court used in *Sell v. United States*,[242] a due process case about the forcible administration of medication. Under *Sell*'s standard, the challenged government action must *significantly further* and be *necessary* to an *important* governmental interest.[243] This is obviously a more demanding standard even than heightened rationality, but it does mimic some of the heightened rationality standard, particularly in its insistence on a very real and clear correlation between classification and purpose.

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238. *Id.* at 1398.

239. *Id.*

240. *See, e.g.*, Cook v. Gates, 528 F.3d 42 (1st Cir. 2008); Witt v. Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008); Log Cabin Republicans v. United States, 716 F. Supp. 2d 884 (C.D. Cal. 2010).

241. *Witt*, 527 F.3d at 818–19; *Log Cabin Republicans*, 716 F. Supp. 2d at 911 (citing *Witt*, 527 F.3d at 819–21, for the three-part test adopted by the U.S. Supreme Court in *Sell v. United States*, 539 U.S. 166 (2002)).

242. 539 U.S. 166 (2003).

243. *See Witt*, 527 F.3d at 818–19 (discussing heightened scrutiny under *Sell*).

Recently, in *Log Cabin Republicans v. United States*,[244] a district court in California applied this heightened-scrutiny standard to the military's "Don't Ask, Don't Tell" policy and concluded that the policy was unconstitutional. The court, following the language of the current statute, identified the purpose of the law as maintaining "morale, good order, and discipline and unit cohesion."[245] The court appeared to concede without discussion that these concerns constituted an important governmental purpose and thus satisfied the last prong of the *Sell* test.[246] The court went on to find, however, that the exclusion of gays from the military did not *significantly further* these interests.[247] Specifically, the court found that results of the policy included (1) the discharge of qualified service members despite troop shortages, (2) the discharge of service members with critically needed skills and training, (3) a hindrance to military recruiting, and (4) the admission of lesser-qualified enlistees.[248] Further, the exclusion of gays was not *necessary* to protect unit cohesion and privacy.[249]

Even though it is a substantive due process case, *Log Cabin Republicans* stands as a template for a heightened-rationality challenge under the Equal Protection Clause. The court's insistence that there in fact be a correlation between the classification and the purpose, rather than just some conceivable relationship between the two, is a hallmark of heightened rationality.[250] Thus, a court applying equal protection's heightened rationality could similarly find that the exclusion of gays from the military does not in fact advance the goals of morale and unit cohesion. This demand for evidence of an actual connection between sexual orientation and morale is in marked contrast to the decisions of previous federal courts that gave the impression that they had no choice but to accept the assertions of generals that "the presence of open homosexuality would have an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of the armed forces,"[251] and

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244. 716 F. Supp. 2d 884 (C.D. Cal. 2010), *appeal docketed*, No. 10-56634 (9th Cir. Oct. 15, 2010).

245. *Id.* at 910 (citing 10 U.S.C. § 654(a) (2006)).

246. *Id.* at 922 (assuming for argument's sake that military readiness and unit cohesion are "important").

247. *See id.* at 911–19.

248. *See id.* at 919.

249. *See id.* at 919–23.

250. *See supra* Part II.B.

251. Cook v. Rumsfeld, 429 F. Supp. 2d 385, 399 n.20 (D. Mass. 2006) (quoting statement of Gen. Colin Powell, S. Rep. No. 103-112, at 275, 278 (1993)).

that "the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war."[252]

Because Congress has now repealed "Don't Ask, Don't Tell,"[253] arguments that the policy violates equal protection are now moot. Nevertheless, one part of the argument remains important because of its bearing on other laws that disadvantage same-sex couples. This is the argument that the policy rests not on legitimate public concerns but on illegitimate animosity toward a particular group. With regard to the exclusion of gays from the military, there was plain evidence that the policy had in fact been adopted out of hostility toward gay men and women. According to a litigation affidavit from the Assistant Chief of Naval Personnel, "Tensions and hostilities would certainly exist between known homosexuals and the great majority of naval personnel who *despise/detest* homosexuality, especially in the unique close living conditions aboard ships."[254]

As a federal appeals court explained in *Beller v. Middendorf*:[255]

> [T]he Navy could conclude that a substantial number of naval personnel have feelings regarding homosexuality, based upon moral precepts recognized by many in our society as legitimate, which would create tensions and hostilities, and that these feelings might undermine the ability of a homosexual to command the respect necessary to perform supervisory duties.[256]

To the extent that a court, applying the heightened version of rationality, was willing to conclude that the actual purpose of excluding gays from the military was to give effect to the prejudice of military personnel (who "despise/detest homosexuality"), then that purpose is impermissible.[257] The "tensions and hostilities" argument, which purports to be about maintaining morale and unit cohesion, is instead

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252. Thomasson v. Perry, 80 F.3d 915, 929 (4th Cir. 1996) (quoting statement of Gen. H. Norman Schwarzkopf, S. REP. NO. 112, at 280)).

253. *See supra* note 233.

254. Beller v. Middendorf, 632 F.2d 788, 811 n.22 (9th Cir. 1980) (emphasis added) (citation omitted).

255. 632 F.2d 788 (9th Cir. 1980).

256. *Id.* at 811–12.

257. *See* Romer v. Evans, 517 U.S. 620, 633 (1996) (noting that classifications are not to be drawn for the purpose of disadvantaging the group burdened by the law); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985) (holding that irrational prejudice against the mentally disabled is not a permissible purpose); Palmore v. Sidoti, 466 U.S. 429, 433 (1984). ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

likely to be evidence of hostility toward a particular group. As one district court[258] explained, gays are no different from many other groups in terms of creating "tensions and hostilities." The court declared:

> But the particulars specified could in each case be grounds for excluding other persons as well. Thus, "tensions and hostilities" could justify exclusion of members of minorities or other persons who also may be "despised" by some; disruptive emotional relationships could exist between male and female Navy personnel justifying exclusion of women; parents may become concerned over their children associating with Navy personnel who may gamble, use alcohol or drugs or engage in illicit heterosexual relations; persons other than homosexuals may engage in disruptive physical aggression; and fear of criminal prosecution, social stigma and divorce and the danger of undue influence is a risk created by any form of illegal or antisocial conduct, not confined to homosexuality.[259]

So, if the Navy can exclude gays because of its fear of tensions and hostilities, then by extension it should be able to exclude minorities, women, gamblers, alcoholics, drug users, those in engaged in extramarital sex, those who are physically aggressive, and so on, without end. So if the government wants to minimize tensions and hostilities, it needs to explain why one particular group was singled out to bear the brunt of that decision. At the end of World War II, "both the Army chief of staff and the Secretary of the Navy justified racial segregation in the ranks as necessary to maintain efficiency, discipline, and morale."[260] Yet, it would be "unthinkable"[261] that the judiciary today would defer to the military's "'professional' judgment that black and white soldiers had to be segregated to avoid interracial tensions."[262] Similarly, heightened rationality would make it unthinkable for courts to defer to the judgment of some in the military that gay persons cannot serve.

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258. Saal v. Middendorf, 427 F. Supp. 192 (N.D. Cal. 1977), *rev'd sub nom.* Beller v. Middendorf, 632 F.2d 788, 812 (9th Cir. 1980).

259. *Saal*, 427 F. Supp. at 201.

260. Watkins v. U.S. Army, 847 F.2d 1329, 1350 (9th Cir. 1988), *opinion withdrawn on reh'g*, 875 F.2d 699, 729 (9th Cir. 1989).

261. *Id.*

262. *Id.*

C. The Defense of Marriage Act

DOMA[263] is a federal statute that provides, inter alia, that for federal purposes "the word 'marriage' means only a legal union between one man and one woman as husband and wife."[264] Federal courts have considered the question of whether or not this statute satisfies the rational-basis test of the equal protection component of the Fifth Amendment's Due Process Clause. Predictably, the courts have reached inconsistent results, once again depending on whether the court applies the deferential or more demanding version of rationality.[265]

In re Kandu[266] is an example of the deferential version. In that case, two women who had been legally married in Canada filed a joint bankruptcy petition.[267] The bankruptcy court did not allow the joint filing because the marriage was not recognized under DOMA.[268] The debtors then argued that DOMA was a violation of equal protection.[269] The court, citing both *Heller* and *Beach Communications*, held that the challenger's burden is to "'negative every conceivable basis which might support [the statute],' whether or not the basis has a foundation in the record."[270] The bankruptcy trustee, defending DOMA, argued that DOMA satisfied the rational-basis test because it "further[ed] the legitimate government interest in encouraging the development of relationships optimal for procreating and raising children."[271] The court cited no evidence that these were the purposes of the statute other than the assertion of the trustee. This is the classic "*post hoc* rationalization of

263. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

264. *See id.* § 3(a), 110 Stat. at 2419 (amending chapter 1 of title 1, United States Code, to add this definition of marriage).

265. On February 23, 2011, the Attorney General of the United States announced that the Justice Department would no longer defend section 3 of DOMA in those circuits where a heightened level of scrutiny would apply. Press Release, U.S. Dep't of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-222.html (last visited Mar. 22, 2011). However, the statement also indicated that reasonable arguments can be made that section 3 satisfies rational-basis review. *Id.* Furthermore, the statement indicated that section 3 of DOMA would remain in effect unless Congress repeals it or there is a final judicial finding that strikes it down, and that the executive branch would continue to enforce the law. *Id.* Thus, the question of the rationality of DOMA is still to be determined.

266. 315 B.R. 123 (Bankr. W.D. Wash. 2004).

267. *Id.* at 130.

268. *Id.* at 130, 133–34.

269. *See id.* at 141.

270. *Id.* at 144 (citations omitted).

271. *Id.* at 145.

government attorneys" that is an acceptable source of purpose under the deferential version of rational-basis review.[272] The debtors, who had the burden of demonstrating that the statute was not rational, pointed out that the same-sex classification was not well correlated with these purposes. They argued that there were two problems with the procreation and child-rearing justifications: on the one hand, "federal recognition of marriage has never been limited to couples willing or able to conceive and raise children,"[273] and on the other hand, "same-sex couples can reproduce with outside assistance."[274] Thus, the statute recognized marriages of couples who could not or would not procreate yet refused to recognize marriages of couples who could and would procreate.

The court responded, "Authority exists that the promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional concern."[275] The court cited favorably the argument that "the presence of both male and female authority figures in the home is critical to optimal childhood development."[276] With regard to the fact that heterosexual couples could marry without any intention of having children and the fact that same-sex couples do raise children, the court saw that as a simple problem of over- and under-inclusion,[277] something that courts find permissible under the deferential rational-basis review. With regard to the assumption imbedded in the statute that opposite-sex couples are better at rearing children than are same-sex couples, the court explained that the trustee need not produce any "evidence to sustain the rationality of a statutory classification"[278] and that "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."[279] The court further found that "the lack of 'scientifically valid studies tending to establish a negative impact on the adjustment of children raised by an intact same-

272. *See supra* notes 59–60 and accompanying text.

273. *Kandu*, 315 B.R. at 145.

274. *Id.*

275. *Id.* at 146.

276. *Id.* (citations omitted).

277. *See id.* at 146–47.

278. *Id.* at 144 (citing Heller v. Doe, 509 U.S. 312, 320 (1993)).

279. *Id.* at 146 n.9 (citing FCC v. Beach Commc'ns, 508 U.S. 307, 315 (1993)).

sex couple'"[280] is not a problem in that "it is not incumbent on the government to produce any evidence for the record."[281]

The *Kandu* court distinguished *Romer* on the grounds that it involved an enactment "inexplicable by anything but animus toward the class it affects."[282] DOMA, on the other hand, "simply codified that definition of marriage historically understood by society."[283] Finally, because the bankruptcy trustee did not rely on four additional justifications for DOMA that were contained in a House Report,[284] the court did not consider them, but instead explained that "the government has a 'conceivable' legitimate interest."[285]

In contrast to the very deferential version of rational-basis review in *Kandu*, a district court in Massachusetts applied the more demanding version of rational-basis review to DOMA in *Gill v. Office of Personnel Management*.[286] Unlike the court in *Kandu*, the *Gill* court looked to the actual purposes of the law as identified in the legislative history and insisted that there be an actual connection between the same-sex classification and those purposes. The court noted that the government defendant in *Gill* had "disavowed Congress's stated justifications for the statute" but that those identified purposes were still not "utterly irrelevant."[287] The first legislative purpose identified in the House Report was encouraging responsible procreation and child-bearing.[288] The court determined that there was no rational connection between the same-sex classification and this purpose, because "a consensus has developed . . . that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents."[289] Even if Congress had been concerned with a *biological* connection between parent and child, denying marriage to same-sex couples "does nothing to promote stability in heterosexual parenting."[290] Further, because the ability to procreate has never been a precondition that would exclude heterosexuals from marriage, the interest in encouraging

280. *Id.*

281. *Id.*

282. *Id.* at 147 (citing Romer v. Evans, 517 U.S. 620, 632 (1996)).

283. *Id.* at 148.

284. *See id.* (citing H.R. REP. No. 104-664, at 12 (1996)).

285. *Id.*

286. 699 F. Supp. 2d 374 (D. Mass. 2010).

287. *Id.* at 388.

288. *See id.*

289. *Id.*

290. *See id.* at 388–89.

procreation cannot justify the exclusion of same-sex couples from marriage.[291]

With regard to the government's second asserted interest—defending and nurturing the institution of traditional heterosexual marriage—the *Gill* court found that this interest was "not 'grounded in sufficient factual context,'"[292] for the court could not see how denying marriage to same-sex couples was likely either to encourage gay persons to marry persons of the opposite sex or to make heterosexual marriages more secure.[293] Because the exclusion of same-sex couples did not in fact nurture traditional marriage, the court determined that "what remains" is a congressional desire "to make heterosexual marriage appear more valuable or desirable."[294] That, however, was not a proper goal because, under *Moreno*, a bare to desire to harm is not a permissible interest.

With regard to the third Congressional goal—defending traditional notions of morality—the court concluded that this objective was prohibited by *Lawrence*.[295] With regard to Congress's fourth and last goal, preserving scarce resources, there needed to be some neutral explanation of why this particular group was singled out to preserve resources, but the court found no such reason, finding only "a desire to express its disapprobation of same-sex marriage."[296]

The *Gill* court then moved on from the purposes identified in the legislative history to the purposes introduced for the first time in the course of the litigation. The first of these purposes was the desire to preserve the status quo "pending the resolution of a socially contentious debate taking place in the states over whether to sanction same-sex marriage."[297] The court found two flaws in this argument. First, assuming that preserving the status quo is a permissible purpose, DOMA disrupted that status. Before DOMA, the federal government had recognized any marriage declared valid under state law, because domestic relations had always been considered the "exclusive province of the states."[298] DOMA had in fact departed from the status quo by requiring the federal government to select which state-sanctioned marriages it would recognize. In addition, the court raised the question

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291. *See id.* at 389.

292. *Id.* (citing Romer v. Evans, 517 U.S. 620, 632–33 (1996)).

293. *See id.*

294. *Id.*

295. *See id.* at 389–90.

296. *Id.* at 390.

297. *Id.*

298. *Id.* at 391.

of whether preserving the status quo is by itself a legitimate governmental interest, because preserving the status quo is something of a tautology, doing "nothing more than describ[ing] what DOMA does."[299]

The Government also argued that DOMA served the interests of consistency in the distribution of federal marriage benefits and of minimizing the administrative burden presented by a changing patchwork of state marriage laws.[300] Here again, the court found that these interests were not credible as the real justification for a law that in fact singled out same-sex couples alone to pay the price of consistency and efficiency.

Finally, having weighed all the Government's alleged purposes and the alleged connection that same-sex relationships had to those purposes, the *Gill* court concluded:

> In sum, this court is soundly convinced, based on the foregoing analysis, that the government's proffered rationales, past and current, are without "footing in the realities of the subject addressed by [DOMA]." And "when the proffered rationales for a law are clearly and manifestly implausible, a reviewing court may infer that animus is the only explicable basis. [Because] animus alone cannot constitute a legitimate government interest," this court finds that DOMA lacks a rational basis to support it.[301]

CONCLUSION

This Article presented the two versions of rational-basis review, one deferential and one demanding, and then demonstrated in a particular context that the existence of two versions of the same rule produces inconsistency and unpredictability. Do laws that treat gay persons worse than heterosexuals violate the Equal Protection Clause? It depends on which version of rational-basis review a court uses. A law that gives effect to prejudice or stereotype should be deemed to violate the Equal Protection Clause, but under the deferential version of rational-basis review, it is not likely that a court, hypothesizing permissible purposes, will ever consider the evidence that prejudice or stereotype is the actual

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299. *Id.* at 393. Of course, the assertion that DOMA preserves the status quo is correct only if one assumes that one particular version of the status quo (where the federal government recognizes only opposite-sex marriage) is correct, rather than an alternative version of the status quo (where the federal government recognizes all state-sanctioned marriages).

300. *Id.* at 394–95.

301. *Id.* at 396.

purpose of a law. Deferential rational-basis review purports to give effect to the will of the majority and to limit the power of unelected judges to impose their views on the other branches of government. The more demanding version of rational-basis review, on the other hand, recognizes that the U.S. Constitution takes certain decisions away from the majority to protect individual interests. The fact that there are two versions of what purports to be a single standard means that lower federal and state courts will continue to produce conflicting precedents.