

**RATIONAL BASIS LOSES ITS BITE: JUSTICE
KENNEDY’S RETIREMENT REMOVES THE MOST
LETHAL QUILL FROM LGBT ADVOCATES’ EQUAL
PROTECTION QUIVER**

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INTRODUCTION

Justice Anthony M. Kennedy did not just strike down laws that targeted sexual orientation; he did violence to them.¹

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1. See, e.g., Jeremiah A. Ho, *Once We’re Done Honeymooning: Obergefell v. Hodges, Incrementalism, and Advances for Sexual Orientation Anti-Discrimination*, 104 KY. L.J. 207,

In the standard equal protection case, government lawyers ask a court to apply a deferential level of review called rational basis: if the government's law or policy is a sane way to achieve any conceivable legitimate interest, the law passes constitutional muster.² Lawyers challenging the law ask the court to apply a more exacting standard: some kind of heightened scrutiny under which a law is only valid if it does a good (in some cases, nearly perfect) job of achieving an important or compelling interest.³

Although a law is more likely to be struck down under heightened scrutiny, somewhat paradoxically, it is worse for the government if its law is struck down under rational basis review.⁴ Under strict scrutiny, a law is struck if it is not quite carefully tailored enough or if the goal it seeks to vindicate is not quite compelling enough.⁵ So for the Supreme Court to say that one state law—of a class of such laws throughout the country—is invalid under strict scrutiny is to say nothing of other similar laws (say, laws that ban same-sex intimate conduct) that might have been more carefully drafted.⁶ On the other hand, when the Supreme Court finds that a law is wholly without any rational justification, all laws like it throughout the United States are upended.⁷ It is the difference between telling your teenage child, “You need to work on your parallel parking,” and taking away the keys—for good.

In recent years, Justice Kennedy, with a majority on the United States Supreme Court in tow, has laid waste to dozens of anti-LGBT laws throughout the United States without so much as a whiff of heightened (that is to say, strict or intermediate) scrutiny.⁸ By striking individual laws

222 (2015–16).

2. See generally, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (holding that a state law is constitutional where some rational relation to a legitimate state objective exists).

3. See, e.g., *United States v. Virginia*, 518 U.S. 515, 555–56 (1996) (first citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994); and then citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 715, 724 (1982)); *Loving v. Virginia*, 388 U.S. 1, 9 (1967); *Korematsu v. United States*, 323 U.S. 214, 216 (1944), *overruled by Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

4. See 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, 233 (2002).

5. See Doug Linder, *Levels of Scrutiny Under the Equal Protection Clause*, Exploring Const. Conflicts, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/epcsscrutiny.htm> (last visited Oct. 3, 2018).

6. See, e.g., *Loving*, 388 U.S. at 9; cf. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598–99, 2607–08 (2015).

7. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

8. See, e.g., *Ho*, *supra* note 1.

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on rationality review as lacking any legitimate—let alone important or compelling—interest, Justice Kennedy has wiped out a whole species of animus-based anti-LGBT legislation.⁹

Justice Kennedy’s LGBT rights and same-sex marriage opinions also raised anew a question that has befuddled lawyers and scholars for decades in a number of different contexts: when the Court explicitly or implicitly applies rational basis review, why, in some of those cases, does it fail to show *any* deference to the authority of governments to effectuate certain laws or policies?¹⁰

Courts and scholars alike have been sloppy in their attempts to discern what machinations have been at work in these cases. We are told that there is some slippery species of rational basis review that is “more searching”¹¹ or that has “teeth”¹² and therefore, unlike the deferential brand of rational basis review, can wind up administering “a bite.”¹³

As to what was really going on in these cases, and as will be explained more fully below, when the Court has found that a government’s act was based on nothing more than majoritarian hostility toward or fear of a certain group, it has indulged a *burden-shifting* exercise that is—again, somewhat paradoxically—even more perilous for the government than strict scrutiny (even though it is still referred to, somewhat misleadingly, as mere rationality review).¹⁴ This often fatal type of rationality review, wielded from Justice Kennedy’s inkwell, dealt the deathblows to state laws criminalizing homosexual sodomy,¹⁵ a federal law barring the recognition of same-sex marriages,¹⁶ and finally all state laws denying the right of marriage to same-sex couples.¹⁷

But alas, with Justice Kennedy off the Court and replaced by a social conservative more likely of a mind with Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch,¹⁸ this device—a powerful and lethal quill—will likely be removed from LGBT

9. *Id.*

10. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 633 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 450 (1985), *superseded by statute*, Fair Housing Act of 1988, Pub. Law 100-430, 102 Stat. 1622; *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

11. *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring).

12. *Bishop v. Smith*, 760 F.3d 1070, 1099 (2014) (quoting Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 540 (2014)).

13. *United States v. Wilde*, 74 F. Supp. 3d 1092, 1096 (N.D. Cal. 2014) (quoting *Dairy v. Bonham*, No. C-13-1518 EMC, 2013 U.S. Dist. LEXIS 103033, at *5 n.4 (N.D. Cal. 2013)).

14. *See, e.g.*, *Cleburne*, 473 U.S. at 448; Kelso, *supra* note 4.

15. *Lawrence*, 539 U.S. at 578.

16. *United States v. Windsor*, 570 U.S. 744, 775 (2013).

17. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

18. *See* Brendan Beery, *How to Argue Liberty Cases in a Post-Kennedy World: It’s Not*

rights advocates' quiver, leaving LGBT Americans adrift on a sea of constitutional uncertainty and, for now at least, largely hamstrung in their continuing fight for legal equality.

Part I of this Article discusses the levels of review among which courts choose in constitutional cases and focuses on the application of traditional, deferential rational basis review. Part II surveys equal protection cases in which the Supreme Court purported to apply rational basis review but did not defer to the government (the cases where it applied so-called "rational basis with a bite").¹⁹ Although most law professors teach that there are three levels of equal protection review,²⁰ Part II posits that there are four. When the government targets a suspect class, strict scrutiny applies and the government bears the burden of persuasion.²¹ When the government targets a quasi-suspect class, intermediate scrutiny applies and the government bears the burden of persuasion.²² When the government targets a *non-suspect* class that is nonetheless the target of majoritarian hostility or fear, rational basis review applies, *but the government still bears the burden of persuasion* (this is the standard that is rarely clearly articulated or accurately taught).²³ Finally, when the government targets a class that is neither suspect nor the target of majoritarian hostility or fear, rational basis review applies and the burden rests with the government's challenger.²⁴

I call the non-deferential iteration of rational basis review, the one with "a bite," *incursive* rational basis review;²⁵ it involves a species of

About Individual Rights, But State Power and the Social Compact, 75 NAT'L LAW. GUILD REV. 1, 1 (2018).

19. *United States v. Wilde*, 74 F. Supp. 3d 1092, 1096 (N.D. Cal. 2014) (quoting *Dairy v. Bonham*, No. C-13-1518 EMC, 2013 U.S. Dist. LEXIS 103033, at *5 n.4 (N.D. Cal. 2013)).

20. *See, e.g., Linder, supra* note 5 (discussing equal protection analysis and the levels of scrutiny under a three-tiered approach). *But see Kelso, supra* note 4, at 226 (suggesting the existence of no less than seven standards of review).

21. *See Loving v. Virginia*, 388 U.S. 1, 9 (1967); *Korematsu v. United States*, 323 U.S. 214, 216 (1944), *overruled by Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

22. *See United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

23. *See, e.g., Romer v. Evans*, 517 U.S. 620, 631 (1996); *Heller v. Doe*, 509 U.S. 312, 319–20 (1993) (first citing *FCC v. Beach Commc'ns*, 508 U.S. 307, 314–15 (1993); and then citing *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)); *see also infra* Part II and accompanying notes.

24. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489–91 (1955).

25. Some courts have suggested the existence of "active" rational basis review. *See United States v. Wilde*, 74 F. Supp. 3d 1092, 1096 (N.D. Cal. 2014) (citing *Allegheny Pittsburgh Coal Co. v. Cty. Comm'r*, 488 U.S. 336, 344–45 (1989)); *see also United States v. Pickard*, 100 F. Supp. 3d 981, 1005 (E.D. Cal. 2015) (citing *Wilde*, 74 F. Supp. 3d at 1096)). While this characterization makes sense, it does not do justice to just how dangerous this kind of review can be for a government attorney defending against it.

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scrutiny that is more invasive, more skeptical, and more probing in that it *shifts the burden of persuasion* to the government (a shift that is discernible but rarely explicitly described) and then dares the government to proffer a legitimate interest—after a court has already concluded that the government’s goal (its interest) was to target an unpopular minority for sport.²⁶ To contrast this new level of review (at least new in name), with its less exacting cousin, I call traditional rational basis review (the kind where the burden rests with the challenger of the government’s authority) *passive* rational basis review.²⁷

In equal protection cases, to decide what groups or classes are suspect or quasi-suspect, courts ask whether a group has historically been “politically powerless”—usually meaning the majority has persistently and successfully targeted the group through the operation of laws.²⁸ Rational basis review “with a bite,” on the other hand, is applied not when a group is *historically* politically powerless, but when it is *currently* “politically unpopular.”²⁹ Part III of this Article explores the difference between *powerless* and *unpopular* and explains why those two standards are distinct—and why the distinction is an important one.

Part IV of this Article explains why the new Supreme Court majority will almost certainly not characterize LGBT Americans as historically politically powerless or as currently politically unpopular. I will borrow heavily from the writings of the late Justice Antonin Scalia here; his conclusion, which will undoubtedly inform the new majority, was that far from being politically powerless, LGBT Americans form a dangerous and aggressive minority, much more powerful than its numbers would presage, bent on imposing a “homosexual agenda” that would corrupt the sexual and social mores prevailing in more traditional times.³⁰

This Article ultimately concludes that, since the Court will consider LGBT Americans neither politically powerless (and thus will not apply heightened scrutiny) nor politically unpopular (and thus will not indulge any rational basis burden-shifting), advocates for LGBT rights will need to find a new approach to litigating under the Equal Protection Clause.

I. THE OLD TIERS OF REVIEW, AND HOW TRADITIONAL, DEFERENTIAL

26. See Kelso, *supra* note 4.

27. See *id.* at 230, 233.

28. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445–46 (1985), *superseded by statute*, Fair Housing Act of 1988, Pub. Law 100-430, 102 Stat. 1622.

29. See *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

30. See *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

(PASSIVE) RATIONAL BASIS REVIEW IS SUPPOSED TO WORK

A. The Tiers of Review

Generally speaking, courts have interpreted the Fourteenth Amendment as a shield to be hoisted not by an individual whose conduct runs afoul of the law, but by an individual who is targeted by dint of his or her *membership in a class* of persons that is disfavored under the law.³¹ That is to say, in an equal protection context, a litigant should generally allege that the government is targeting that person because of something *about* that person—like ethnic heritage, gender, or sexual orientation.³²

One must concede that not any group or classification seems a suitable benefactor of elevated equal protection scrutiny. For example, it would be absurd to argue that a police officer may not ticket a person for speeding because that person belongs to a group called speeders. A court should not invalidate tax laws on the ground that such laws target income earners or laws criminalizing murder on the ground that such laws unfairly target serial killers. So courts have had to ask, with regard to the application of the Equal Protection Clause, which groups are protected—and, just as importantly, what about those groups puts them under the aegis of the Equal Protection Clause.³³

As a historical matter, the Equal Protection Clause obviously was intended to protect former slaves and African Americans.³⁴ But critically, that is not what the clause *says*.³⁵ What it says is that the government may not “deny to any *person* within its jurisdiction the equal protection of the laws.”³⁶ Certainly, the drafters of the Fourteenth Amendment knew how to name ethnic groups or to reference ethnicity generally, but they chose not to. Instead, they drafted a clause that any person may invoke (albeit generally as a member of some class), and not some pre-selected subset of persons, like former slaves or African Americans.³⁷ Since the drafters did not see fit to preclude the invocation of the clause by many and varying groups, courts (despite the objections of selective originalists like

31. See *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 594 (2008). Courts have recognized that, in rare cases, it is possible to be a “class of one.” See *id.* at 601 (citing *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

32. See *id.* (citing *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

33. See *id.* (quoting *McGowen v. Maryland*, 366 U.S. 420, 425 (1961)) (citing *Feeney*, 442 U.S. at 279).

34. Brendan Beery, *When Originalism Attacks: How Justice Scalia’s Resort to Original Expected Application in Crawford v. Washington Came Back to Bite Him in Michigan v. Bryant*, 59 *DRAKE L. REV.* 1047, 1064 (2011).

35. *Id.* at 1067.

36. U.S. CONST. amend. XIV, § 1 (emphasis added).

37. See Beery, *supra* note 34, at 1066.

Justice Scalia) have applied the clause in many different contexts.³⁸

Fundamentally, though, courts have sought to identify protected groups or classifications with some precision and with attention to the underlying principles that animated the drafting of the Fourteenth Amendment.³⁹ Courts have looked to one group that is obviously protected—African Americans—and asked, what is so depraved about discriminating against African Americans that the Constitution should be amended to scrub its stain from our laws?⁴⁰ If we are able to identify what it is about racial discrimination that is so offensive, we might see those same indicia in other choices to discriminate against other groups of people.⁴¹

So why is ethnicity-based discrimination so offensive? For one thing, ethnicity (or “race,” as some would have it) is an immutable characteristic.⁴² It is innate, inborn, and unchangeable.⁴³ If, as Justice Robert Jackson put it in his *Korematsu* dissent, one’s ethnic group is a group “from which there is no way to resign,” then it cannot be a proxy for the kind of decision-making that marks bad character.⁴⁴ As Justice Jackson also put it, “Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable.”⁴⁵ One cannot be guilty of something that one did not in any sense *do*.

Furthermore, African Americans have been the target of majoritarian hostility and abuse—including as the subjects of oppressive and dehumanizing laws—throughout our nation’s history.⁴⁶ And as a minority of the population, they have been unable to protect themselves from the majority’s hostility and abuse;⁴⁷ if they were to be afforded equal legal protection at all, it would have to be by courts—the ostensibly non-political branch.⁴⁸ Thus, courts have concluded that a group that suffers a history of political powerlessness is more likely a suspect class.⁴⁹

38. *See id.* at 1068.

39. *See id.* at 1066.

40. *See id.* at 1070.

41. *See id.* at 1071.

42. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); Beery, *supra* note 34, at 1071.

43. *See Frontiero*, 411 U.S. at 686; Beery, *supra* note 34, at 1071.

44. *Korematsu v. United States*, 323 U.S. 214, 243 (Jackson, J., dissenting), *overruled by Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

45. *Id.*

46. *See Beery, supra* note 34, at 1066–67; *see also* Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 163, 178–79 (2010).

47. *See id.*

48. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 292 (1977).

49. *See Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

Finally, there is nothing about ethnicity that renders one unable to contribute to and participate in society and its institutions in a full, competent, and meaningful way.⁵⁰ It is one thing to say that a group of tax evaders or reckless drivers is unfit to participate in society in certain ways: being a tax evader or a reckless driver may be the marker of bad character, bad behavior, and bad decision-making. The same cannot be said about a person based merely on his or her ethnicity, or any other trait that is irrelevant to good citizenship. So the Supreme Court, in considering whether a certain classification should trigger heightened scrutiny, considers whether that classification “bears [any] relation to ability to perform or contribute to society” in some way.⁵¹

To summarize, courts generally consider three factors in determining whether a classification deserves special protection under the Fourteenth Amendment: 1) whether the characteristic that marks the classification is immutable; 2) whether the class of persons at issue has suffered a history of political powerlessness; and 3) whether the characteristic that marks the class has any bearing on one’s ability to contribute to and participate in society and its institutions.⁵²

In any equal protection case, regardless whether the classification at issue is suspect, some form of a means-ends test will be applied by a court to determine whether the government has improperly targeted some group.⁵³ The use of means-ends analyses in the equal protection context makes sense; means-ends tests are used to “smoke out” improper purposes.⁵⁴ Most parents have applied means-ends tests to their children, even if they didn’t know they were doing so. When a parent comes upon a child who has emptied all the ingredients of a dinner recipe (including the egg whites) onto the kitchen counter, claiming, “I was just trying to help,” that parent is likely to reply, “Well if you were just trying to help, this was not the way to do it.” What the parent would really be saying, of course, is that the reason proffered by the child is bogus; the means employed don’t match up with the stated goal, and we’ve smoked out what was really going on here: it is called mischief.

What kind of means-ends test applies in an equal protection case depends on whether the targeted group is deemed to be suspect—based

50. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

51. *Id.*

52. *See Murgia*, 427 U.S. at 313 (quoting *Rodriguez*, 411 U.S. at 28); *Frontiero*, 411 U.S. at 686; Beery, *supra* note 34, at 1070–71.

53. *See Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

54. *Id.*

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on the three factors noted above.⁵⁵ Unfortunately, those factors tend not to be formally realizable (easily applied).⁵⁶ Most classifications, as one might expect, are non-suspect; laws targeting non-suspect groups—like age, income level, health, or, for that matter, criminal disposition—are upheld unless the *challenger* can show either that the government has no legitimate purpose underlying its law or that the means the government has employed do not rationally relate to achieving its proffered interest.⁵⁷

The Court has concluded that race, ethnicity, and alienage are suspect classifications.⁵⁸ Governmental discrimination against these classes is therefore subject to strict judicial scrutiny; the challenged law will be struck down unless the *government* can show that it was aiming to vindicate a compelling interest (like preserving life or health) and that the means the government chose were narrowly tailored to achieving the interest.⁵⁹

The Court has struggled with some classifications, chief among them gender and “illegitimacy,” two groups the Court has deemed to be “quasi-suspect.”⁶⁰ The Court provided scant rationale for its in-between treatment of gender, prompting Justice William Rehnquist to observe, accurately enough, that the Court’s new, middle-tier standard had come “out of thin air.”⁶¹ As to “illegitimacy,” the Court’s equal protection analysis seemed to short circuit when the Justices noticed that, unlike a person’s ethnicity and gender, which tend to be discernible in most human interactions, there is no “obvious badge” to mark someone whose parents were not married when he or she was born.⁶² In any event, the Court relegated these two groups to a middle tier—somewhere between suspect classes and non-suspect classes.⁶³ A middle tier of classifications requires a middle-tier standard of review. Thus was born “intermediate scrutiny,”

55. *See Murgia*, 427 U.S. at 313 (quoting *Rodriguez*, 411 U.S. at 28); *Frontiero*, 411 U.S. at 686; Beery, *supra* note 34, at 1070–71.

56. *Richmond*, 488 U.S. at 493.

57. *See, e.g., N.Y. Transit Auth. v. Beazer*, 440 U.S. 568, 587–88 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

58. *See Nyquist v. Mauclet*, 432 U.S. 1, 17 (1977) (Rehnquist, J., dissenting) (citing *Graham v. Richardson*, 403 U.S. 365, 372 (1971)).

59. *See Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995)); *Richmond*, 488 U.S. at 521 (citing *Lee v. Washington*, 390 U.S. 333, 333 (1968)).

60. *Mitchell v. Comm’r of the SSA*, 182 F.3d 272, 274 (4th Cir. 1999) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985)).

61. *Craig v. Boren*, 429 U.S. 190, 211, 220 (1976) (Rehnquist, J., dissenting).

62. *Mathews v. Lucas*, 427 U.S. 495, 506 (1976) (citing *Frontiero v. Richardson*, 411 U.S. 677, 684–86 (1973)).

63. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723–24 (1982)).

under which a government law or policy will give way unless the *government* can show that the means it has employed are substantially related (though not necessarily narrowly tailored) to achieving an important (though not necessarily compelling) interest.⁶⁴

B. How Rational Basis Review Is Supposed to Work

In the equal protection context, rational basis review is applied when there is nothing inherently suspicious about a governmental law or policy because the law or policy does not target a suspect—or protected—class that has historically been targeted based on some immutable characteristic.⁶⁵ So it makes sense that rational basis review is highly deferential to the government.⁶⁶ That is why, in a typical rational basis case, the burden is on the challenger and not the government.⁶⁷ In *Williamson v. Lee Optical*, the Supreme Court put on a veritable fireworks display of passive acquiescence.⁶⁸ At issue was an Oklahoma law that forbade anyone not a licensed optometrist or ophthalmologist to fit spectacle lenses to a frame without a prescription.⁶⁹ The law was challenged on both due process and equal protection grounds.⁷⁰ In its search for a rational basis underlying the law, the Supreme Court noted:

[T]he legislature *might* have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses. Likewise, when it is necessary to duplicate a lens, a written prescription may or may not be necessary. But the legislature *might* have concluded that one was needed often enough to require one in every case. Or the legislature *may* have concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert.⁷¹

Under passive, deferential rationality review, then, not only does the challenger have the burden of persuasion; the challenger must negate every conceivable justification for the challenged law or policy, and a court will happily speculate as to what any of those justifications *might*

64. *See id.*

65. *See* Linder, *supra* note 5.

66. *See* Aaron Belzer, *Putting the “Review” Back in Rational Basis Review*, W. ST. U. L. REV. 339, 345 n.20 (2014).

67. *Id.* at 340.

68. *See generally* 348 U.S. 483 (1955) (holding that the responsibility of balancing the advantages and disadvantages of state law lies with the legislature and not the courts).

69. *Id.* at 485.

70. *Id.* at 486, 488.

71. *Id.* at 487 (emphasis added).

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have been.⁷²

With this in mind, and for ease of reference, here are the three equal protection tiers of review generally taught today in constitutional law courses throughout the United States⁷³:

<i>Classification</i>	<i>Level of Review</i>	<i>Standard</i>	<i>Party with Burden</i>
Suspect (includes, race, ethnicity, alienage)	STRICT SCRUTINY	Compelling interest and narrowly tailored means	Government (must show that it meets the standard)
Quasi-suspect (includes gender and illegitimacy)	INTERMEDIATE SCRUTINY	Important (or exceedingly persuasive) interest and means substantially related to achieving the interest	Government (must show that it meets the standard)
Non-suspect	RATIONAL BASIS REVIEW	Legitimate interest and means rationally related to achieving the interest	Challenger (must show that the government cannot meet the standard)

II. RATIONAL BASIS “WITH A BITE” IN EQUAL PROTECTION CASES

Under the standard elaboration of rational basis review articulated in *Lee Optical*, the government almost always wins—because no court applying this level of review ever peeks under the proverbial bed to see what monsters might lurk.⁷⁴ So the tell that a court is applying something other than this level of review (regardless whether it acknowledges as

72. Belzer, *supra* note 66, at 340.

73. Linder, *supra* note 5.

74. See 348 U.S. at 487–89; see also Belzer, *supra* note 66, at 340.

much) is that it starts poking around and asking questions—peeking under the bed.

A. What Incurive Rational Basis Review Means

In *U.S. Department of Agriculture v. Moreno*, the Supreme Court considered an equal protection challenge to a law that barred food stamp eligibility for people cohabitating with unrelated persons.⁷⁵ Had the Court applied the *Lee Optical* species of rational basis review, it would have upheld the law.⁷⁶ Since people who cohabit with unrelated persons do not constitute a suspect class, one would expect maximum deference to Congress, which enacted the law.⁷⁷ Obviously, any limit on eligibility for public welfare benefits serves the purpose of saving money.⁷⁸ Is that an important or compelling interest? It may not be, but it is certainly *legitimate*. The only remaining question—again, if we are applying the *Lee Optical* standard—is whether the law is rationally related to achieving the interest.⁷⁹ Sure it is: *maybe* Congress wanted to promote good nutrition for families rather than other collectives; Congress *might* have wished to discourage overcrowded housing; or Congress *might* have found that no familial cohabitation is sometimes evidence of some kind of fraud, or that it *might* result in some kind of windfall. In any event, to repeat, curtailing eligibility for a public welfare program is clearly a rational way to save taxpayer dollars.⁸⁰

Instead of taking that route, though, the Court stated,

Regrettably, there is little legislative history to illuminate the purposes of the [law]. The legislative history that does exist, however, indicates that that [law] was intended to prevent so-called “hippies” and “hippie communes” from participating in the food stamp program. The challenged classification clearly cannot be sustained by reference to this congressional purpose. 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.⁸¹

But why was the Court even looking at the legislative record? Why

75. 413 U.S. 528, 529 (1973) (citing 7 U.S.C. § 2012(e) (1970) (amended 1971)).

76. *See* 348 U.S. at 487–89.

77. *Moreno*, 413 U.S. at 529–30.

78. *See id.* at 535.

79. *See* 348 U.S. at 491.

80. *See Moreno*, 413 U.S. at 535.

81. *Id.* at 534 (first citing H.R. REP. NO. 91-1793, at 8 (1970) (Conf. Rep.); and then citing 116 CONG. REC. 44439 (1970) (statement of Sen. Holland)).

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was it poking around for *actual* reasons to justify the law when it should have been inventing *hypothetical* reasons? One clue emerges from the Court's curious exposition of the rationality standard in its analysis: "Thus, if it is to be sustained, the challenged classification must rationally further some legitimate governmental interest" ⁸² This construction is not compatible with a burden of persuasion that 1) rests with the challenger, and 2) defers to any conceivable governmental justification. ⁸³ The Court did not say that the *challenger* must show that Congress's interest was not legitimate or that its means were wholly irrational; it said that the *government's classification* must be rationally related to achieving some legitimate aim. ⁸⁴ That, of course, invites second-guessing, and second-guessing is the stuff of heightened scrutiny, ⁸⁵ not *Lee Optical* rationality review. ⁸⁶

In *City of Cleburne v. Cleburne Living Center*, it happened again. ⁸⁷ The issue was whether a zoning ordinance targeting facilities for "the feeble-minded," and its application to a proposed home for cognitively impaired adults, violated the Equal Protection Clause by discriminating against the "mentally retarded." ⁸⁸ The Court went to great lengths to explain that "mental retardation" did not implicate heightened scrutiny because it implicated no suspect classification. ⁸⁹

So once again, one would have expected maximum deference, and one might conjure justifications for the ordinance and its application without much travail. *Maybe*, for example, the city wanted to protect property values—a legitimate interest for a zoning board, to be sure. And if it did want to do that, there seems little doubt that excluding a home for up to thirteen adults suffering from cognitive challenges, and who might require round-the-clock supervision, would help to achieve that interest. ⁹⁰

82. *Id.*

83. *See Lee Optical*, 348 U.S. at 487; Kelso, *supra* note 4, at 230.

84. *Moreno*, 413 U.S. at 535–36.

85. *Id.* at 544–45 (Douglas, J., concurring) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

86. *See* 348 U.S. at 491.

87. *See* 473 U.S. 432, 435–37 (1985), *superseded by statute*, Fair Housing Act of 1988, Pub. Law 100-430, 102 Stat. 1622.

88. *Id.*

89. *Id.* at 437.

90. *Id.* at 435. This is so because of the unfortunate reality of a phenomenon called "sanism." *See* Brendan Beery, *My Doctor Made Me Crazy: Can a Medical Malpractice Plaintiff Allege Psychological Damages Without Making Credibility the Issue?*, 27 T.M. COOLEY L. REV. 321, 342 (2010).

Our experience tells us, generally, that people who see things that are not real cannot

And the city *might* have been concerned about the availability of adequate personnel to help maintain and staff a quasi-medical facility; or it *might* have been concerned about the potential for noise or increased traffic. Certainly, if we work hard enough, we can come up with *something*.

But instead of undertaking that deferential exercise, the Court noted that the city “was concerned with the negative attitude of the majority of property owners located within 200 feet of the . . . facility, as well as with the fears of elderly residents of the neighborhood.”⁹¹ The Court continued, “But 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.”⁹²

Why was the Court searching the record for nefarious motives when it should have been dreaming up any conceivable proper purpose? Once again, the Court leaned on the word *must*: “To withstand equal protection review, legislation that distinguishes between the mentally retarded and others *must* be rationally related to a legitimate governmental purpose.”⁹³

The clearest signal of this burden-shifting came in *Romer v. Evans*.⁹⁴ In *Romer*, the Supreme Court considered a Colorado constitutional amendment that stopped municipalities from including homosexuals, lesbians, or bisexuals among classes of persons who could not be discriminated against in matters such as housing, employment, or public accommodations.⁹⁵ The issue was whether the amendment violated the Equal

be counted on to behave rationally or to recount real events with any degree of accuracy. Furthermore, there exists the risk that a juror might harbor predispositions about someone who has or has had a mental disability. “From the beginning of recorded history, mental illness has been inextricably linked to sin, evil, God’s punishment, crime, and demons.” “Although ‘isms’ such as racism, sexism, and anti-Semitism have . . . been officially repudiated, the distorted categorizations still frequently dominate our thought processes and decision making. These same distorted thought processes and socially-approved prejudices still dominate our discourse when the subject deals with mental disability.”

Id. (footnotes omitted).

91. *Cleburne*, 473 U.S. at 448.

92. *Id.*

93. *Id.* at 446 (emphasis added).

94. *See* 517 U.S. 620, 634 (1996).

95. *See id.* at 629. The amendment provided, in full:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority

Protection Clause.⁹⁶ The Court never suggested that sexual orientation implicated a suspect classification and explicitly stated that it was applying rational basis review: “[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”⁹⁷ Nonetheless, the Court, per Justice Kennedy, stated,

[E]ven in the ordinary equal protection case calling for the most deferential of standards, we *insist on knowing* the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority.⁹⁸

This statement was, of course, tenuous if not disingenuous. In *Lee Optical* (as in many other “ordinary equal protection case[s]”), the Court did not “insist on knowing” anything; it speculated and hypothesized its way to a conclusion without ever eyeballing counsel for the state, let alone insisting that counsel explain the “relation between the classification adopted and the object to be attained.”⁹⁹ So once again, in *Romer*, the Court purported to apply passive rational basis review but actually applied an incursive species of the test.¹⁰⁰ But this time, the Court was far more explicit about who had the burden; the words “we insist on knowing,” as applied to the *state’s* argument, were baldly inconsistent with a burden of persuasion that rests with the *challenger*.¹⁰¹ There was something about the facts in *Romer* that had the Court shifting its focus from the challenger to the state, and once that burden had shifted, the state was in a hopeless situation.¹⁰² That is because, as will be discussed more thoroughly below, the Court does not shift the burden in a rational basis case (moving from passive to incursive) unless it has already concluded that

status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. art. II, § 30B (emphasis added).

96. See *Romer*, 517 U.S. at 623.

97. *Id.* at 631 (citing *Heller v. Doe*, 509 U.S. 312, 319–20 (1993)).

98. *Id.* at 632 (emphasis added).

99. Compare *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955), with *Romer*, 517 U.S. at 632.

100. See 517 U.S. at 635 (citing *Kadrmas v. Dickinson Pub. Sch.* 487 U.S. 450, 461–62 (1988)).

101. *Id.*

102. See *id.*

the government has acted with an improper purpose: animus.¹⁰³

Indeed, in *Romer*, the Court savaged Colorado’s anti-LGBT state constitutional amendment, stating that it “fails, indeed defies, even this conventional [rational basis] inquiry”¹⁰⁴:

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. The absence of precedent for Amendment 2 is itself instructive; “discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”

It is not within our constitutional tradition to enact laws of this sort.¹⁰⁵

And, predictably, the Court cited *Moreno*: “If the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”¹⁰⁶

So the Supreme Court has applied passive rational basis review in some cases and incursive rational basis review in others.¹⁰⁷ At least one scholar has noted the burden-shifting phenomenon in some nominally rational basis analyses, but he noted the phenomenon only with regard to cases about dormant commerce principles or the Takings Clause.¹⁰⁸ I propose that this burden-shifting happens also in equal protection cases.

Before proceeding further, for ease of reference, here are the four tiers of review that the Court *actually* applies (and which should be taught) in equal protection cases:

<i>Classification</i>	<i>Level of Review</i>	<i>Standard</i>	<i>Party with</i>
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103. See *id.* at 631–32 (first citing *Heller v. Doe*, 509 U.S. 312, 319–20 (1993); and then citing *New Orleans v. Duke*, 427 U.S. 297, 298 (1976)); see also Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 183 (2013).

104. 517 U.S. at 632.

105. *Id.* at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37–38 (1928)).

106. *Id.* at 634 (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (emphasis added).

107. See generally *Romer*, 517 U.S. 620 (applying incursive rational basis review); *Moreno*, 413 U.S. 528 (applying incursive rational basis review); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (applying passive rational basis review).

108. See *Kelso*, *supra* note 4, at 233, 233 n.35.

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			<i>Burden</i>
Suspect (includes race, ethnicity, alienage)	STRICT SCRUTINY	Compelling interest and narrowly tailored means	Government (must show that it meets the standard)
Quasi-suspect (includes gender and illegitimacy)	INTERMEDIATE SCRUTINY	Important (or exceedingly persuasive) interest and means substantially related to achieving the interest	Government (must show that it meets the standard)
Non-suspect but politically unpopular (to date, includes “hippies,” LGBT, intellectually disabled)	INCURSIVE RATIONAL BASIS REVIEW	Legitimate interest and means rationally related to achieving the interest	Government (must show that it meets the standard)
Non-suspect (all other)	PASSIVE RATIONAL BASIS REVIEW	Legitimate interest and means rationally related to achieving the interest	Challenger (must show that the government cannot meet the standard)

B. Why Incurive Rational Basis Review Is Usually Fatal

Courts do not apply incurive rational basis review unless they have already ferreted out what they call animus,¹⁰⁹ which, as we have seen, means either a) a bare desire to harm a politically unpopular group, or b) irrational majoritarian fear.¹¹⁰ This leads to a strange cart-and-horse phenomenon that is even more hazardous for the government than the dreaded strict scrutiny.

109. See Carpenter, *supra* note 103, at 190 (providing a good discussion of the term animus, the confusion around it, and criticism of its use in equal protection cases).

110. See *id.* at 207, 223 (quoting Milner v. Apfel, 148 F.3d 812, 817 (7th Cir. 1998)).

Romer, *Cleburne*, and *Moreno* are often described as cases where the Court applied a more searching analysis *before* unearthing an improper state purpose (or interest)—it has been suggested that the Court, *after* applying a test that has some teeth, got to the bottom of it: the government’s real interest—an interest that cannot be legitimate—was animus.¹¹¹ But that was not the way of it. In each of these three cases, the Court shifted the burden to the government *after* unearthing an improper state purpose (or interest); the Court, *before* applying a test with some teeth, got to the bottom of it: the government’s real interest—again, an interest that cannot be legitimate—was animus.¹¹²

In *Moreno*, the Court discerned something inherently suspicious about a law that would target a nutrition program for poor people, and it was already aware, because it had reviewed the record, that the law was intended to target “hippies.”¹¹³ With all that behind it, the Court then shifted the burden to the state—after already unearthing an improper purpose.¹¹⁴ In *Cleburne*, the Court was inherently suspicious about a zoning ordinance and decision that would harm people who were cognitively impaired, and it refused to pretend not to know what it did know: that in our society, people are afraid of those who suffer from any kind of mental or psychological illness.¹¹⁵ With all that behind it, the Court then shifted the burden to the state—again, after already unearthing an improper purpose.¹¹⁶ In *Romer*, the Court was inherently suspicious about a law that would harm people based on their sexual orientation,¹¹⁷ and Justice Kennedy had already concluded that the Colorado amendment existed “for its own sake”—in other words, that the state was targeting an unpopular group just for sport.¹¹⁸ And one more time: with all that behind it, the Court then shifted the burden to the state—after already unearthing an improper purpose.¹¹⁹

This is why incursive rational basis review is more dangerous than

111. See *Romer*, 517 U.S. at 632; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–47 (1985) (quoting *Moreno*, 413 U.S. at 534) (citing *Zobel v. Williams*, 457 U.S. 55, 63 (1982)), *superseded by statute*, Fair Housing Act of 1988, Pub. Law 100-430, 102 Stat. 1622; *Moreno*, 413 U.S. at 534.

112. See *Romer*, 517 U.S. at 632–35; *Cleburne*, 473 U.S. at 448–50; *Moreno*, 413 U.S. at 534–37.

113. See 413 U.S. at 534 (first citing H.R. REP. NO. 91-1793, at 8 (1970) (Conf. Rep.); and then citing 116 CONG. REC. 44439 (1970) (statement of Sen. Holland)).

114. See *id.* at 534–36.

115. See 473 U.S. at 448, 450.

116. See *id.*

117. See 517 U.S. at 627.

118. See *id.* at 635.

119. See *id.* at 632 (citing *New Orleans v. Dukes*, 427 U.S. 297, 306 (1975)).

strict scrutiny; a court applies strict scrutiny to smoke out any improper purpose.¹²⁰ A court applies incursive rational basis review when it has *already found* an improper purpose: animus.¹²¹ So whereas under strict scrutiny there is at least the chance for the government to explain what it was up to, under incursive rational basis review, the question what the government was up to has already been answered. Under incursive rational basis review, when a court asks the government to proffer some legitimate interest, the game is already over; the chance to provide an acceptable answer is illusory; the court will already know that any proffered justification will be pretextual—a sham.

How many parents, after saying to a child, “I know what you were up to,” will follow up by asking, “Now, what were you up to?” In a sense, then, incursive rational basis review is not just a burden-shifting exercise, but a presumption of impropriety (and unconstitutionality) that, if it can be rebutted at all, is very nearly conclusive.

And this is the standard the Court, again per Justice Kennedy, used to strike down the Defense of Marriage Act (DOMA) in *United States v. Windsor*¹²² and all state laws prohibiting same-sex marriage in *Obergefell v. Hodges*.¹²³ In both instances, Justice Kennedy relied on *Romer*, in which he had already concluded that anti-LGBT lawmaking is a manifestation of majoritarian hostility and fear, and found—without even considering governmental arguments to the contrary—that no government had proffered any legitimate interest for any anti-LGBT law.¹²⁴

So the legal weapon the Court made available to LGBT legal advocates, the poison quill those advocates have used to fell countless anti-LGBT laws (incursive rational basis review) is what the Court is almost certain to remove now from those advocates’ quiver. It should go without saying that this will be a devastating blow to LGBT rights. Gays, lesbians, bisexuals, transgender Americans—a group that had achieved a near presumption of illegality as to state efforts to oppress them—will now be

120. See Kelso, *supra* note 4, at 228–29.

121. See Carpenter, *supra* note 103, at 207.

122. See 570 U.S. 744, 749–52 (2013).

123. See 135 S. Ct. 2584, 2593, 2608 (2015).

124. See *Windsor*, 570 U.S. at 770, 776 (Roberts, C.J., dissenting) (quoting *Romer*, 517 U.S. at 633); *Obergefell*, 576 U.S. at 2596, 2599, 2618–19 (Roberts, C.J., dissenting) (citing *Romer*, 517 U.S. at 635–36). The Court stated, in response to the majority’s implicit invocation of rational basis review, “In any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States’ ‘legitimate state interest’ in ‘preserving the traditional institution of marriage.’” *Obergefell*, 135 S. Ct. at 2623 (quoting *Lawrence v. Texas*, 539 U.S. 558, 585 (2003)).

saddled with *Lee Optical* rational basis review.¹²⁵ In a legal and constitutional sense, that is as big a demotion as could be imagined.

III. WHY THE COURT NEEDS INCURSIVE RATIONAL BASIS: WHAT HAPPENS WHEN STATES ATTACK POLITICALLY *UNPOPULAR* GROUPS RATHER THAN HISTORICALLY POLITICALLY *POWERLESS* GROUPS?

A. *The Rules of the Playground*

Consider again *Moreno*—that case about “hippies.”¹²⁶ If the Supreme Court was serious about the “politically powerless” factor it applies in its suspect classification analysis, which looks to a *history* of majoritarian hostility toward a discrete and insular minority, then it could not very well have called hippies a suspect class.¹²⁷ After all, hippies did not exist until the 1960’s,¹²⁸ and *Moreno* was decided in 1973.¹²⁹

As to gays and lesbians, they have *some* history of being targeted, but as Justice Kennedy noted in *Lawrence v. Texas*, laws expressly targeting homosexual conduct did not come into vogue until the 1970’s.¹³⁰ As many commentators have pointed out, anti-LGBT campaigns did not achieve fever pitch until 2004, when conservatives used anti-LGBT ballot initiatives across the nation to drive voters to the polls, likely contributing to the reelection victory of then President George W. Bush.¹³¹ So maybe the Court has not been ready to deal with the historical targeting question as to LGBT Americans quite yet.

I often liken the Equal Protection Clause, particularly in light of the Court’s tendency to lean on history as to a group’s political powerlessness, to the rules of the playground. Unelected judges, the supervising grownups, may watch with seeming disinterest while the cool kids pick on an unpopular outcast—maybe hoping that the problem will resolve

125. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955).

126. See generally *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973) (holding that the unrelated household classification was invalid because it was irrelevant to the stated purpose of the Food Stamp Act and was not rationally related to furthering any legitimate government purpose).

127. See *id.* at 534–35 (quoting *Moreno v. U.S. Dep’t of Agric.*, 345 F. Supp. 310, 314 n.11 (D.D.C. 1972)).

128. See *Hippie*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/hippie> (last visited Oct. 5, 2018).

129. See generally *Moreno*, 413 U.S. 528.

130. See 539 U.S. 558, 570 (2003).

131. See James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES (Nov. 4, 2004), <https://www.nytimes.com/2004/11/04/politics/campaign/samesex-marriage-issue-key-to-some-gop-races>; Janet Hook, *Initiatives to Ban Gay Marriage Could Help Bush in Key States*, L.A. TIMES (July 12, 2004), <http://articles.latimes.com/2004/jul/12/nation/nagaymarry12>.

itself, and maybe hoping that the unpopular outcast will be able to defend his own self. But a responsible adult will only watch this for so long without intervening. At some point, that adult will begin to keep a close eye on the unpopular outcast and react swiftly to any suspicious behaviors that appear to target him. One might say that the playground monitor will begin to strictly scrutinize such behaviors once the monitor has observed a history of gratuitous and arbitrary targeting.

That, it seems, is the Supreme Court's approach under the Equal Protection Clause.¹³² But then, if the Court is to wait until a *history* of targeting has developed before elevating (or one might reasonably say relegating) some group to the status of suspect class, what does it do when the majority, for no good reason, causes palpable harm to a group that, although not *historically* the subject of hostile lawmaking, is *now* being targeted for sport—appointed “The Other” du jour—because it has taken its turn as the latest bogeyman in our long national parade of politically unpopular minorities?

Back to the playground: although the supervising adult might generally wait to see what dynamic develops before intervening on behalf of an unpopular mark as a matter of course, surely that adult will not stand idly by while a great majority of the children start throwing stones at the new kid—the one who just arrived from some other school district because his parents had to move; the one who is, although *new* on the scene, an outsider and an alien to the tribe.

So too with the Supreme Court. Although a group being flogged for just a quarter century or so might not be a suspect class quite yet, a bare desire to abuse the group—any group, really—cannot be abided in a country where every person is the beneficiary of the promise of equal protection.¹³³

So incursive rational basis review is a necessary and useful gap filler; it stands between the majority and an unpopular minority even if that unpopular minority is not politically powerless in the *historical* sense; it protects the *unpopular* even if history has not yet shown them to be *powerless*—if, in other words, the history of discrimination has yet to be written or is still being written at present.¹³⁴ And it—incursive review—has been used to defend LGBT Americans against majoritarian

132. See U.S. CONST. amend. XIV, § 1.

133. See *id.*

134. See, e.g., *Romer v. Evans*, 517 U.S. 620, 634, 636 (1996) (Scalia, J., dissenting) (quoting *Moreno*, 413 U.S. at 534).

sniping even though the Supreme Court has never tagged sexual orientation or identity as a suspect class.¹³⁵

B. Equal Protection as a Two-Track Paradigm

One might conceptualize equal protection cases as running on two separate tracks: the traditional track called suspect classification analysis and a second track that we might call suspect motive analysis. When the government targets a suspect class, we need to ascertain whether the motive was improper, so we apply heightened scrutiny to smoke out any mischief that might be afoot.¹³⁶ On the other hand, when a group, even if it is not suspect, seems the kind that might generate animosity or irrational fear—when it is manifestly a whipping post for majoritarian political point-scoring or the subject of deep-seated anxieties; when it is the natural target for laws that exist for their own sake—then a court need not smoke out an already apparent motive to injure, and it therefore applies an incursive species of rational basis review that is invariably fatal for the government.¹³⁷ Under this approach, if there is any evidence that animus was in play, the burden shifts to the government to do the impossible: proffer some legitimate purpose that overcomes a presumption of unconstitutional animus.¹³⁸

But this resort to incursive rationality review in defense of LGBT equality is about to end, because conservatives on the Court do not see gay people as politically unpopular, and they certainly do not see gay people as politically powerless.¹³⁹ So incursive rational basis review will not apply to anti-LGBT discrimination, and neither will strict scrutiny. In equal protection terms, this leaves LGBT Americans in the proverbial desert, or set adrift on a perilous sea, if you prefer. As I have argued elsewhere,¹⁴⁰ the time might have arrived when advocates for LGBT rights must focus on restraining the jurisdiction of the state over matters unconcerned with the public good rather than elucidating, as Justice Kennedy often did, the dignity and worth of the LGBT individual in his or her plea for equality.¹⁴¹

135. *See id.* at 633, 635–36; *see also* Carpenter, *supra* note 103, at 257.

136. *See* Linder, *supra* note 5.

137. *See Romer*, 517 U.S. at 635 (quoting *United States v. Stanley*, 109 U.S. 3, 24 (1883)).

138. *See id.* (quoting *Stanley*, 109 U.S. at 24); *see also* Kelso, *supra* note 4, at 233.

139. *See infra* Part IV and accompanying notes.

140. *See generally* Beery, *supra* note 18 (stating that advocates should argue for heightened scrutiny when the state appears to regulate citizen life rather than provide a public good).

141. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015); Beery, *supra* note 18, at 19.

No union is more profound than marriage, for it embodies the highest ideals of love,

IV. THE NEW COURT MAJORITY WILL REGARD LGBT AMERICANS AS
NEITHER POWERLESS NOR UNPOPULAR

Recall that, to succeed in an equal protection challenge, LGBT Americans would likely have to be deemed politically powerless (which the Supreme Court has never said) or politically unpopular (which the Supreme Court has said—repeatedly).¹⁴² There is little chance that a post-Kennedy conservative Court, under a new majority in the mold of the late Justice Scalia,¹⁴³ will call LGBT Americans politically powerless when the Court has never said as much before.¹⁴⁴ Furthermore, the new Court majority will likely hold that LGBT Americans are not politically unpopular, either.¹⁴⁵

The reader should be mindful, as we dive more deeply into this thinking, of the historical implications of anti-minority rhetoric that suggests not just the inferiority of a group that should be oppressed or the strangeness of a group that should be excluded, but rather the dangerousness of a group that must somehow be dealt with. The trope is a familiar one: “they” take over certain communities, control the money, use the media and academia to do their bidding, and seek ultimately to overwhelm the better traditions of the body politic to which they attach themselves.¹⁴⁶

fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

Obergefell, 135 S. Ct. at 2608.

142. See, e.g., *United States v. Windsor*, 570 U.S. 744, 811 (2013) (Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., dissenting); *Romer*, 517 U.S. at 652 (Scalia, J., dissenting) (citing Application to Petition for Certiorari at C-18, *Romer v. Evans*, 513 U.S. 1146 (1995) (No. 94-1039)); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445, 446–47 (1985) (quoting U.S. Dep’t of Agric. v. *Moreno*, 413 U.S. 528, 534 (1973)) (citing *Zobel v. Williams*, 457 U.S. 55, 63 (1982)), *superseded by statute*, Fair Housing Act of 1988, Pub. Law 100-430, 102 Stat. 1622; *Carpenter*, *supra* note 103, at 202.

143. See *Beery*, *supra* note 18.

144. See, e.g., *Windsor*, 570 U.S. at 811; *Romer*, 517 U.S. at 652 (Scalia, J., dissenting) (citing Application to Petition for Certiorari, *supra* note 142); *Carpenter*, *supra* note 103, at 202.

145. See, e.g., *Beery*, *supra* note 18.

146. See *Romer*, 517 U.S. at 645–46 (Scalia, J., dissenting) (citing Andrew M. Jacobs, *The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969–1991*, 72 NEB. L. REV. 723, 724 (1993)).

A. The New Majority Will Find that LGBT Americans Are Not Politically Powerless

Social conservatives on the Supreme Court see political powerlessness not just as a matter of historical targeting, but also as a matter of influence, and so they will characterize the persistent targeting of LGBT Americans, even if it has been going on long enough now to make it a “history,” as nothing more than majoritarian pushback against the provocations of a small but dangerous and powerful minority.¹⁴⁷

There is no need to guess about this. Justice Scalia, whose thinking will obviously inform the Court’s approach in future cases, wrote this in his *Romer* dissent:

The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.

By the time Coloradans were asked to vote on Amendment 2, their exposure to homosexuals’ quest for social endorsement was not limited to newspaper accounts of happenings in places such as New York, Los Angeles, San Francisco, and Key West. Three Colorado cities—Aspen, Boulder, and Denver—had enacted ordinances that listed “sexual orientation” as an impermissible ground for discrimination, equating the moral disapproval of homosexual conduct with racial and religious bigotry. The phenomenon had even appeared statewide: The Governor of Colorado had signed an executive order pronouncing that “in the State of Colorado we recognize the diversity in our pluralistic society and strive to bring an end to discrimination in any form,” and directing state agency heads to “ensure non-discrimination” in hiring and promotion based on, among other things, “sexual orientation.” I do not mean to be critical of these legislative successes; homosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as is the rest of society. But they are subject to being countered by lawful, democratic counter-measures as well.

That is where Amendment 2 came in. It sought to counter both the ge-

147. *See id.* at 645–47.

ographic concentration and the disproportionate political power of homosexuals by (1) resolving the controversy at the statewide level, and (2) making the election a single-issue contest for both sides. It put directly, to all the citizens of the State, the question: Should homosexuality be given special protection? They answered no. The Court today asserts that this most democratic of procedures is unconstitutional. Lacking any cases to establish that facially absurd proposition, it simply asserts that it *must* be unconstitutional, because it has never happened before.¹⁴⁸

It did not require yeoman's work to unearth the extra textual seed of Justice Scalia's dissent. The first sentence of his dissent is, "The Court has mistaken a Kulturkampf for a fit of spite."¹⁴⁹ One of the law review articles cited in Petitioner's Brief begins, "It has become almost a cliché to observe that contemporary America is in the middle of a kulturkampf."¹⁵⁰ That article, written by Professor Richard F. Duncan, seemingly provides much insight into conservative thinking about the power of LGBT Americans, and I will therefore liberally cite it.¹⁵¹

Justice Scalia's note about gays "resid[ing] in disproportionate numbers in certain communities" has unclear origins.¹⁵² He referenced only an "Exhibit MMM" of the record, the contents of which are unavailable to this author.¹⁵³ Justice Scalia seems to suggest that because gays "concentrate" in certain communities, they are a majority in certain neighborhoods and thus have control over political power in the cities where they reside.¹⁵⁴ That is why Justice Scalia ultimately opined that Colorado's amendment was a rational way "to counter *both the geographic concentration* and the disproportionate political power of homosexuals"¹⁵⁵

148. *Id.* (quoting Colo. Exec. Order No. D0035 (Dec. 10, 1990)) (first citing Transcript of Record at Exhibit MMM, *Romer*, 517 U.S. 620 (No. 94-1039) [hereinafter Exhibit MMM]; then citing Transcript of Record at 254 Appendix, Affidavit of Professor James Hunter, *Romer*, 517 U.S. 620 (No. 94-1039) [hereinafter Hunter Affidavit]; then citing Jacobs, *supra* note 146; then citing ASPEN MUNICIPAL CODE § 13-98 (1977); then citing BOULDER REV. MUNICIPAL CODE §§ 12-1-1 to 12-1-11 (1987); and then citing DENVER REV. MUNICIPAL CODE art. IV, §§ 28-91 to 28-116 (1991)).

149. *Id.* at 636.

150. Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 393 (1994); see Brief for Petitioner, *Romer*, 517 U.S. 620 (No. 94-1039).

151. See generally Duncan, *supra* note 150 (discussing homosexual rights legislation, public policy, and religious freedom from a conservative point of view).

152. See *Romer*, 517 U.S. at 645 (Scalia, J., dissenting) (citing Exhibit MMM, *supra* note 148).

153. See *id.* (citing Exhibit MMM, *supra* note 148).

154. *Id.* at 645–46, 648 (citing Exhibit MMM, *supra* note 148).

155. *Id.* at 647 (emphasis added).

Justice Scalia went beyond listing certain cities (where gays presumably had concentrated in numbers for the purpose of seeking social endorsement)—Aspen, Boulder, and Denver—to note that the “phenomenon” of gay influence had spread statewide.¹⁵⁶

It is difficult to see how Justice Scalia’s allusion to “disposable income” has anything to do with the Equal Protection Clause, especially since those who have injected the matter of income into equal protection jurisprudence purport to be textualists and originalists.¹⁵⁷ Professor Duncan proffered the novel idea that, far from having anything to do with morality, humanity, or even religious convictions, “[t]he *primary purpose* of our Nation’s civil rights laws prohibiting racial discrimination was to remedy the severe *economic* deprivation caused by pervasive discrimination against blacks and other racial minorities.”¹⁵⁸

Note here that Professor Duncan failed to cite the Fourteenth Amendment (which is the issue in equal protection cases); instead he cited civil rights laws passed in the mid-twentieth century.¹⁵⁹ Those laws, unlike the Constitution’s Equal Protection Clause, were enacted under Congress’s commerce power, so they say nothing of the purpose underlying the Fourteenth Amendment.¹⁶⁰ Professor Duncan also ignores that the Civil Rights Act of 1964 was Congress’s second stab at enacting civil rights legislation; Congress only concerned itself with economic issues under the Commerce Clause after the Supreme Court had already struck down a version of those laws that Congress had enacted under Section Five of the Fourteenth Amendment.¹⁶¹ Congress’s original try was based on the equality principle embodied in the Fourteenth Amendment, not any concern about the effects of racism on interstate commerce.¹⁶² Of course, Professor Duncan did not want to straddle constitutional text or history too closely since no scholar has ever pretended that the drafters

156. *See id.* at 646 (first citing ASPEN MUNICIPAL CODE § 13-98 (1977); then citing BOULDER REV. MUNICIPAL CODE §§ 12-1-1 to 12-1-11 (1987); and then citing DENVER REV. MUNICIPAL CODE art. IV, §§ 28-91 to 28-116 (1991)).

157. *See Romer*, 517 U.S. at 645 (Scalia, J., dissenting) (first citing Exhibit MMM, *supra* note 148; and then citing Hunter Affidavit, *supra* note 148).

158. Duncan, *supra* note 150, at 406 (emphasis added).

159. *See id.* at 406–07.

160. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 252, 261 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 297, 305 (1964).

161. *See Civil Rights Act of 1964*, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–aa (2012)); *Heart of Atlanta Motel*, 379 U.S. at 252; *Katzenbach*, 379 U.S. at 305; *United States v. Stanley*, 109 U.S. 3, 18, 25 (1883) (holding the Civil Rights Act of 1875 as invalid); Duncan, *supra* note 150, at 406–07.

162. *See Stanley*, 109 U.S. at 10.

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of the Equal Protection Clause were concerned only with fiscal matters.¹⁶³ But to raise the alleged economic superiority of gays, Professor Duncan had to cite something.

Then Professor Duncan (with Justice Scalia seemingly in tow) provided some statistics about gays:

Not only have they failed to prove that homosexuals have been impoverished by discrimination, but the data support the opposite conclusion—homosexuals are an economically advantaged group in our society.

According to Jeffrey J. Vitale, president of a marketing and consulting firm that specializes in market research on homosexuals, “[a]ffluence is the rule for gay households.” Another marketing expert, Michael Kaminer, calls homosexuals “the market of the decade.”

According to the 1990 U.S. Census, male homosexual households ranked at the top in terms of average annual household income. The average household income for male homosexual couples (\$56,863) significantly exceeds that for married heterosexual households (\$47,012). Market surveys support these findings. For example, a 1991 study conducted by Overlooked Opinions, a marketing and consulting firm that specializes in the homosexual market, reported the following findings:

	<i>Gay Men</i>	<i>Lesbians</i>	<i>Nat'l Average</i>
Average Household Income	\$51,325	\$45,927	\$36,520

The same study revealed that fifteen percent of male homosexual households have incomes exceeding \$100,000 (compared to only four percent of all households), and that homosexuals are more likely to have a college degree and a professional or managerial career than heterosexuals.¹⁶⁴

Moving beyond mere economic concerns, Professor Duncan wrote, “We have divided into camps and are locked in what James D. Hunter calls a ‘struggle to define America’ and its culture.”¹⁶⁵ If his allusion to

163. *See generally* Duncan, *supra* note 150 (suggesting the purpose of the Equal Protection Clause is to establish economic equality).

164. Duncan, *supra* note 150, 407–09 (alteration in original) (footnotes omitted).

165. *Id.* at 393 (quoting JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 1 (1991)).

“kulturkampf” was not enough to show that he agreed, Justice Scalia said about overruling *Bowers v. Hardwick*¹⁶⁶ and thus permitting gays to engage in sexual relations with one another, “What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails.”¹⁶⁷ With regard to the anti-sodomy law at issue in *Lawrence*, Justice Scalia said, “The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are ‘immoral and unacceptable,’—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity.”¹⁶⁸ The Texas law, then, was on the right side in the cultural divide. In *Romer*, suggesting that Colorado’s tolerance of homosexual sodomy should not be taken as evidence that Colorado had abandoned the right side in the culture war, Justice Scalia wrote, “But the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful; often, abolition simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the intimate lives of citizens.”¹⁶⁹

Here too Justice Scalia seemed on the same page as Professor Duncan, who, in turn, seems an enthusiastic culture warrior:

The culture war is a battle over symbols and social institutions and, perhaps, rages most intensely when advocates of the sexual revolution lock horns with the forces of orthodox Christianity. The conflict between sexual revolutionists and the Church typically is a philosophical and theological dispute. However, when legislation codifying the values of the sexual revolution is enacted in the form of laws prohibiting discrimination on the basis of sexual orientation or practice, the dispute becomes a legal one. Should government enact antidiscrimination laws protecting sexual behavior? Should such laws then be enforced against religious institutions and individuals who hold conflicting religious beliefs?¹⁷⁰

Professor Duncan continues,

The homosexual rights movement has become “a political force to be reckoned with” in recent years and “gay rights” legislation seems to be on top of the homosexual agenda. Interestingly, advocates of the homosexual cause seem more concerned about the symbolic consequences of

166. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

167. *Lawrence*, 539 U.S. at 591 (Scalia, J., dissenting).

168. *Id.* at 599 (quoting *Bowers*, 478 U.S. at 196).

169. *Romer v. Evans*, 517 U.S. 620, 645 (1996) (Scalia, J., dissenting).

170. Duncan, *supra* note 150, at 393–94 (footnotes omitted).

these laws than the practical gains in terms of employment and housing opportunities. One proponent of homosexual rights, writing in a national homosexual newsmagazine, clearly and forcefully stated that “cultural acceptability” is the real goal of the homosexual movement:

[P]romoting homosexuality is exactly what the gay movement is all about. This doesn’t mean promoting homosexuality in the Anita Bryant sense of recruiting young children at playgrounds. It means promoting homosexuality as an acceptable and viable means of expression, on a par with and equal to heterosexuality. Achieving this cultural acceptability is why a gay movement exists

Viewed through this prism, gay rights legislation is the vehicle for enlisting the state and its monopoly of force on one side of the struggle for cultural legitimacy. When a legislature acts to protect homosexual behavior under antidiscrimination laws, it elevates homosexual practices to the status of protected activities while at the same time branding many mainstream religious institutions and individuals as outlaws engaged in antisocial and immoral behavior. Symbolically, gay rights legislation declares homosexual behavior good (i.e., protected) and religiously motivated discrimination evil (i.e., prohibited). These are stakes worth fighting for . . .

Dennis Altman, in his book on the “homosexualization” of America, makes an important point that is critical to understanding the political dynamics of gay rights legislation: “The greatest single victory of the gay movement over the past decade has been to shift the debate from behavior to identity, thus forcing opponents into a position where they can be seen as attacking the civil rights of homosexual citizens rather than attacking specific . . . antisocial behavior.” Thus, homosexual activists have attempted to define themselves as a legitimate minority group “comparable to other minorities and deserving of the same rights, legal and civil.”¹⁷¹

Professor Duncan asks,

What, then, is the goal of proponents of homosexual rights legislation? If not economic equality, exactly what end is being pursued by gay activists?

As gay journalist and activist Randy Shilts observed recently, the gay political agenda is “essentially a battle for social legitimacy.” Frank Kameny, an early leader of the homosexual rights movement, made the point forcefully in a 1964 speech to the New York Mattachine Society:

171. *Id.* at 397–98 (alteration in original) (footnotes omitted).

I take the stand that not only is homosexuality . . . not immoral, but that homosexual acts engaged in by consenting adults are moral, in a positive and real sense, and are right, good, and desirable, both for the individual participants and for the society in which they live.

According to Marshall Kirk and Hunter Madsen, authors of a widely read book that bills itself as a “gay manifesto for the 1990’s,” the gay political agenda involves a large scale campaign designed to gain social acceptance for the homosexual lifestyle. In what has become the principal textbook for homosexual activism, Kirk and Madsen frankly admit that the strategy they recommend amounts to a very sophisticated “propaganda” campaign designed to “transform society’s antigay attitudes” and to vilify and even silence those who oppose their agenda.

Since homosexuals have already achieved economic equality with the general population, the primary purpose served by extending anti-discrimination laws to protect sexual inclinations and behavior is symbolic. When government passes homosexual rights legislation it sends a message to society that the homosexual lifestyle is legitimate, perhaps on a par with marriage and family life, and that the government is so committed to this value that it will bring force to bear against those who wish to manage their businesses in accordance with a different code of ethics. Persons who believe the homosexual lifestyle is sinful, immoral, or destructive of traditional family values are given a Hobson’s choice under homosexual rights laws—either reject these deep personal beliefs as a code of business ethics, or get out of business.

Viewed from this perspective, homosexual rights legislation constitutes one prong of a large scale campaign designed to transform the way society views homosexuality. Other prongs in this sophisticated campaign include manipulation of the media and of public school curricula to promote a positive view of the homosexual lifestyle and a negative view of “homophobia” and “religious intolerance.”

Of course, proponents of the homosexual agenda have every right to wage a propaganda campaign to promote social acceptance of the gay lifestyle and even to vilify traditional religion. However, policy makers should be aware of this campaign and should recognize that they stand at a crossroads when they consider extending antidiscrimination laws to human sexuality. They need to understand that the issue is not similar to race and gender, nor is it about eliminating economic disparity and injustice.¹⁷²

172. *Id.* at 412–15 (footnotes omitted).

It is interesting here how Professor Duncan concerns himself with what he assumes to be a well-organized campaign to homosexualize America.¹⁷³ Perhaps the most intellectually troubling tactic he employs is the notation about Kirk and Madsen's "widely read book that bills itself as a 'gay manifesto for the 1990's.'"¹⁷⁴ The implication, of course, is that literature that bills itself as seminal work therefore is a seminal work. Duncan's focus on the writings of gay activists,¹⁷⁵ and his assumption that those writings represent the thinking of a whole group of people,¹⁷⁶ is intellectually unsound and, as one would expect, reflects an age-old tactic of anti-minority propagandists.

Another such tactic is the demonization of academics and elites, and the law profession in particular. In his dissent in *Lawrence*, Justice Scalia targeted law schools and the law profession for allegedly acceding to the "homosexual agenda":

Today's opinion is the product of a Court, which is the product of a law profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.¹⁷⁷

Similarly, in *Romer*, Justice Scalia castigated law schools and the "lawyer class" for their connections to homosexuality: "When the Court takes sides in the culture wars, it tends to be with the knights rather than the villians [sic]—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn."¹⁷⁸

As difficult as it might seem at first blush to fathom what any of these extra-judicial rants has to do with the law, it becomes clear when one understands the importance of political powerlessness in equal protection cases. How can a group be politically powerless when it controls large swaths of geographical territory and financial resources and dominates law schools and the lawyer class?

And there is no end in sight to this thinking on the Court. Even Chief

173. *See id.* at 397.

174. *Id.* at 413; *see* MARSHALL KIRK & HUNTER MADSEN, *AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE '90s* 161 (1989).

175. *See* Duncan, *supra* note 150, at 397.

176. *See id.* at 401.

177. *See* *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

178. *See* *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting).

Justice Roberts, now widely regarded as the new “swing vote” on a far more dogmatically conservative Court, has bought into it.¹⁷⁹ During oral argument in the *Windsor* case about DOMA,¹⁸⁰ the Chief Justice said to the lawyer representing the challenger, “I suppose the sea change has a lot to do with the political force and effectiveness of people representing, supporting your side of the case?”¹⁸¹ When the attorney representing Windsor said he did not agree with that characterization, Chief Justice Roberts said, “You don’t doubt that the lobby supporting the enactment of same sex-marriage laws in different States is politically powerful, do you?”¹⁸² When the attorney again disagreed, Chief Justice Roberts persisted: “As far as I can tell, political figures are falling over themselves to endorse your side of the case.”¹⁸³

Unsurprisingly, when it came time to rule on the case, Chief Justice Roberts expressly sided with Justice Scalia when he dissented from the majority’s holding that DOMA violated equal protection principles. The Chief Justice wrote,

The majority sees a more sinister motive, pointing out that the Federal Government has generally (though not uniformly) deferred to state definitions of marriage in the past. That is true, of course, but none of those prior state-by-state variations had involved differences over something—as the majority puts it—“thought of by most people as essential to the very definition of [marriage] and to its role and function throughout the history of civilization.” That the Federal Government treated this fundamental question differently than it treated variations over consanguinity or minimum age is hardly surprising—and hardly enough to support a conclusion that the “principal purpose,” of the 342 Representatives and 85 Senators who voted for it, and the President who signed it, was a bare desire to harm. Nor do the snippets of legislative history and the banal title of the Act to which the majority points suffice to make such a showing. At least without some more convincing evidence that the Act’s principal purpose was to codify malice, and that it furthered no legitimate government interests, I would not tar the political branches with the brush of bigotry.¹⁸⁴

179. Jonathan Nash, *Chief Justice Roberts Will Be the New ‘Swing’ Vote*, HILL (June 30, 2018, 5:00 PM), <http://thehill.com/opinion/judiciary/394940-chief-justice-roberts-will-be-the-new-swing-vote>.

180. Transcript of Oral Argument at 105, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307).

181. *Id.* at 107.

182. *Id.* at 108.

183. *Id.*

184. *Windsor*, 570 U.S. at 775–76 (2013) (Roberts, C.J., dissenting) (alteration in original) (quoting *id.* at 763, 772 (majority opinion)).

Since Justice Kennedy never addressed whether LGBT Americans should be deemed a suspect class (presumably while at least four colleagues—Justices Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor—would have been inclined to agree that LGBT Americans were a suspect class), the chance that the Court will ever say as much has almost certainly passed.¹⁸⁵

B. The New Majority Will Also Find that LGBT Americans Are Not Politically Unpopular

In his *Romer* dissent, Justice Scalia also stated, “It is also nothing short of preposterous to call ‘politically unpopular’ a group which enjoys enormous influence in American media and politics, and which, as the trial court here noted, though composing no more than 4% of the population had the support of 46% of the voters on Amendment 2”¹⁸⁶

One sees here that Justice Scalia not just rejected the notion that gays are historically politically *powerless* for purposes of making LGBT Americans a suspect class, he also rejected the idea that they are politically *unpopular* for purposes of applying the animus principle under in-cursive rationality review.¹⁸⁷ What Justice Scalia meant by “enormous influence” or “the media” or “politics” is anybody’s guess.¹⁸⁸ It is also a mystery what he meant to suggest with his assertion that LGBT Americans “though composing no more than 4% of the population had the support of 46% of the voters on Amendment 2.”¹⁸⁹ How do the votes of Coloradans not to target gays establish that gays are politically popular (or too powerful, for that matter)? Are we to infer that any vote against discrimination was purchased with gay money? Are African Americans unacceptably politically powerful because most Caucasians would vote not to discriminate against them? It is puzzling.

Justice Scalia’s dissents in *Romer* and *Lawrence*, taken together, lay out five observations about gays: 1) they concentrate in certain geographical areas; 2) they have high disposable incomes; 3) they are popular with the media and in the arts; 4) they use academia to spread their influence;

185. *See id.* at 811 (Alito, J., dissenting).

186. *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) (citing Application to Petition for Certiorari, *supra* note 142).

187. *See id.* (quoting U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (citing Application to Petition for Certiorari, *supra* note 142)).

188. *Id.* (citing Application to Petition for Certiorari, *supra* note 142).

189. *Id.* (citing Application to Petition for Certiorari, *supra* note 142).

and 5) they spread values at odds with traditional American values.¹⁹⁰ Justice Scalia concluded, on the basis of these five observations, that the majority is entitled to enact laws countering the disproportionate power of gays.¹⁹¹

The historical antecedents of this kind of rhetorical broadside are obvious and chilling. Be that as it may, a Court beholden to this kind of thinking will leave the plight of LGBT Americans to the whims of the political majority. This is territory LGBT Americans have not occupied since the mid-1990's, when Justice Kennedy began his audacious march toward an incursive solution to anti-LGBT legislation.¹⁹² By failing to ever hold that sexual orientation or identity implicate suspect classifications, however, despite what good he has done for LGBT equality, Justice Kennedy left LGBT Americans vulnerable to the oncoming setback: it is one thing for the Court simply to say it sees nothing hostile about majoritarian pushback against gays and lesbians and transgender Americans; it would have been far more difficult to call them a non-suspect class had the Court ever declared them to be a suspect class.

This is certainly not to say that incursive rational basis review will become extinct. With a shift of sympathies on the bench away from disfavored minorities and in favor of traditionally favored groups, we may simply see it applied in new ways. The Court has already signaled its suspicion that socially conservative Christians are the victims of governmental hostility and animus.¹⁹³ Perhaps the Court will say the same about other more traditional forces as well, as a sort of backlash to the backlash against anti-LGBT discrimination.

CONCLUSION

This article elucidates the scope and breadth of the legal difficulties to come for LGBT Americans and their advocates in equal protection cases. LGBT Americans will not be deemed a suspect class for purposes of applying heightened scrutiny to laws that disfavor them, either facially

190. *See id.* at 645, 652 (first citing Exhibit MMM, *supra* note 148; then citing Hunter Affidavit, *supra* note 148; then citing Jacobs, *supra* note 148; then citing Application to Petition for Certiorari, *supra* note 142; then citing Bylaws of the Association of American Law Schools, Inc. § 6-4(b), <https://www.aals.org/about/handbook/bylaws/> (current version at § 6-3(b)) (last visited Oct. 7, 2018); and then citing Executive Committee Regulations of the Association of American Law Schools, Inc. § 6.19, <https://www.aals.org/about/handbook/executive-committee-regulations/> (current version at § 6-3.1) (last visited Oct. 7, 2018)); *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

191. *See Romer*, 517 U.S. at 653 (Scalia, J., dissenting).

192. *See id.* at 635–36 (majority opinion).

193. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n.*, 138 S. Ct. 1719, 1732 (2018).

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or as applied. Furthermore, the Court will likely desist from characterizing LGBT Americans as politically unpopular, removing from the LGBT legal toolbox a weapon even more potent than strict-scrutiny: incursive rational basis review.

The article does not, unfortunately, prescribe a cure after delivering the diagnosis. That is for another day—and will require a great deal of novelty, creativity, and intellectual heft.