WHY THE COURT CAN STRIKE DOWN MARRIAGE RESTRICTIONS UNDER RATIONAL-BASIS REVIEW†

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I.
INTRODUCTION

As the landmark cases of *Hollingsworth v. Perry*[1] and *United States v. Windsor*[2] make their way to the Supreme Court, inevitable questions arise about the standard the Court will apply in these cases. Like others, I believe the Supreme Court may well analyze state or federal restrictions on same-sex marriage under a rational-basis framework. That begs the question of which kind of rational-basis analysis it will employ. The Court has been fairly consistent in stating that rational-basis review requires governmental action be "rationally related to a legitimate governmental interest."[3] Yet, as academic commentary has observed, that formulation in fact encompasses two different standards: "ordinary" rational-basis review and rational basis "with bite."[4] Under the first, the Court would uphold governmental restrictions on same-sex marriage; under the latter, it would invalidate them. So the crucial question is which rational-basis standard the Court will apply.

II.
ORDINARY RATIONAL-BASIS REVIEW

Under "ordinary" rational-basis review, the Court gives the government enormous deference with respect to what constitutes a "legitimate governmental interest." The plaintiffs have the burden "to negative every conceivable basis

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1. Hollingsworth v. Perry, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144), *granting cert. to* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *aff'g* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

2. United States v. Windsor, 81 U.S.L.W. 3116 (U.S. Dec. 7, 2012) (No. 12-307), *granting cert to* 699 F.3d 169 (2d Cir. 2012).

3. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 326 (1980).

4. *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 759 (2011) (noting that "'rational basis review' takes two forms: ordinary rational basis review and 'rational basis with bite review'"); Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972) (presciently describing "equal protection bite without 'strict scrutiny.'").

which might support [the governmental action]."[5] In addition, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."[6] In practice, this means that the Court must cudgel its imagination for any possible rationale that might have supported the legislation rather than simply evaluating the rationales adduced by the state.

A canonical instance of this deference can be found in a case from 1955 in which an Oklahoma statute favored ophthalmologists over opticians, requiring, among other things, a prescription from the former before the latter could engage in routine tasks, like fitting frames to a person's face.[7] Rather than looking to the most obvious explanation—"a strong doctor's lobby"—the Court contemplated more public-spirited rationales, which the legislature "might have" or "may have" had. The Court upheld this particular provision by noting that the state "might have" believed that an ophthalmologist's prescription could sometimes contain "essential" directions.[8] Oklahoma and its lawyers did not produce this rationale; an obligingly imaginative Court produced it for them.

As if this did not give the government sufficient latitude, the "ordinary" rational-basis standard also accords the government great deference with respect to whether it has pursued a "rationally related" means to achieve its "legitimate" ends. The fact that legislation is over- or under-inclusive with respect to its purported end is irrelevant; the courts are "compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends."[9] The government is permitted to proceed "one step at a time" to pursue its ends.[10]

To see how lenient this standard can be, consider a 1938 case where Congress banned the shipment in interstate commerce of "filled milk" products, which combined milk with other products, like coconut oil.[11] Congress contended that it wished to avoid "adulterated" food products that would be harmful to the public.[12] This public-health concern was of course a legitimate interest. The potential problem lay in the "fit" between this rationale and the Congressional legislation; the regulation was both over- and under-inclusive. The evidence that the "filled milk" was harmful was weak; moreover, as the plaintiffs pointed out, Congress did not seek to regulate other "adulterated" dairy products, like "oleomargarine or other butter substitutes."[13]

Under a less deferential level of review, the mismatch between the stated

5. Heller v. Doe, 509 U.S. 312, 320 (1993).
6. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).
7. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).
8. *Id.* at 487–88.
9. *Heller*, 509 U.S. at 320.
10. *Williamson*, 348 U.S. at 489.
11. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).
12. *Id.* at 148–49.
13. *Id.* at 151.

purpose and the legislation might have led the Court to smoke out the real reason behind the legislation—such as the financial interests of a powerful dairy lobby. But the Court maintained that the legislature was permitted under rational-basis review to "hit at an abuse which it has found, even though it has failed to strike at another."[14] The Court upheld the legislation.

Ordinary rational-basis review, then, operates as a free pass for legislation. Any conceivable rationale will do, and there need not be a tight fit between the justification and the legislation it putatively justifies. A colleague once observed that legislation would pass muster under ordinary rational-basis review so long as it was framed in grammatically complete sentences. My only resistance to her quip was that the Court sometimes seems to waive the "grammar" requirement.

In the Court's defense, it is understandable why it would want ordinary rational-basis review to be this deferential. Even looking only at the equal protection context, one can see how untenable it would be for the Court to adopt any other stance. Almost all legislation treats classifications unequally on some basis—favoring ophthalmologists over opticians, or purveyors of unadulterated milk over purveyors of filled milk. If rational-basis review required the Court to scrutinize all classifications with any rigor, the Court's task would be untenable.

At the same time, the Court has never said that rational-basis review means no review whatsoever. Instead, it has developed a separate line of cases in which it applies rational-basis review in a much more stringent manner. This is what scholars call rational basis "with bite."

III.
RATIONAL BASIS "WITH BITE"

The Supreme Court has never formally recognized a rational-basis "with bite" standard using those terms. However, the Court has invalidated governmental action under a rational-basis standard in a series of cases concerning women;[15] unmarried individuals;[16] so-called "hippies";[17] children of illegal aliens;[18] individuals with mental retardation;[19] and lesbian, gay, and bisexual individuals.[20] Both in analysis and result, these cases cannot be squared with the application of an "ordinary" rational-basis standard.

To take one famous instance, the Court in the 1985 *Cleburne* case considered a city council's denial of a special-use permit to a group home for the

14. *Id.*

15. Reed v. Reed, 404 U.S. 71 (1971). The Court later gave women a formally heightened level of scrutiny in *Craig v. Boren*, 429 U.S. 190 (1976).

16. Eisenstadt v. Baird, 405 U.S. 438 (1972).

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

18. Plyler v. Doe, 457 U.S. 202 (1982).

19. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

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

mentally retarded.[21] Rejecting the circuit court's application of a heightened level of scrutiny to mental retardation, the Court held that only rational-basis review applied to such classifications.[22] Nonetheless, the Court's analysis with respect to both ends and means did not comport with ordinary rational-basis review.

With respect to its "ends" analysis, the Court approached the rationales adduced by the city council with skepticism. The council expressed concern that students at the junior high school across the street would subject individuals in this group home to harassment.[23] The Court rejected this view by observing that the school itself enrolled about thirty mentally retarded students.[24] But a more deferential Court could easily have pointed out that the school might have been able to offer more effective protection to its mentally retarded students than to mentally retarded residents in the neighborhood. Moreover, the Court only considered the rationales forwarded by the council. It did not posit rationales that the council "may have" or "might have" relied upon as it did in the ophthalmologist case.

With regard to its "means" analysis, the Court did not tolerate a loose fit between the council's stated ends and its denial of the permit. The council, for example, alleged that the home's location on "a five hundred year flood plain" created a safety issue.[25] The Court observed that if the council were truly concerned about effective evacuation, it would also have withheld residential permits from others, such as the elderly. The under-inclusive nature of the council's practice led the Court to discredit the ostensible rationale for the denial of the permit to the home for the mentally retarded. The council was not permitted to proceed incrementally, as Congress had been in the "filled milk" case.

While the majority opinion did not state that it was applying anything other than ordinary rational-basis review, other opinions in the case noted the anomalous nature of its approach. Writing in dissent, Justice Marshall observed that the "ordinance surely would be valid under the traditional rational-basis test," and that he therefore could not "accept the court's disclaimer that no 'more exacting standard' than ordinary rational-basis review is being applied."[26] Nor is the Cleburne case a one-off curiosity. Within the equal protection context alone, this more stringent form of the rational-basis standard has recurred in at least the five other cases mentioned above. In each of these cases, the Court used rational-basis review to invalidate the governmental action.

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21. *Cleburne*, 473 U.S. 432.
22. *Id.* at 442–47.
23. *Id.* at 449.
24. *Id.*
25. *Id.*
26. *Id.* at 456 (Marshall, J., concurring in part and dissenting in part).

IV.
THE ROLE OF ANIMUS

The distinction between "ordinary" rational basis and rational basis "with bite" raises the crucial question of when the Court uses each standard. One answer is that the Court opts for rational basis "with bite" when it discerns animus against a group. In the 1976 *Moreno* case (involving the denial of food stamps to so-called "hippies"), the Court observed that "bare Congressional desire to harm a politically unpopular group" could not justify governmental action even under rational-basis review.[27] The *Cleburne* Court extended this holding to other governmental actors by dropping the word "Congressional," noting that "some objectives such as 'a bare . . . desire to harm a politically unpopular group,' are not legitimate state interests."[28] That formulation recurred in the *Romer* case, in which the Court struck down a state constitutional amendment disadvantaging lesbian, gay, and bisexual individuals.[29] It appears from *Cleburne*, *Moreno*, and *Romer* that once the Court detects animus, it will apply rational basis "with bite."

A critic seeking to reconcile the two forms of rational basis might place emphasis on the word "bare," in the "bare . . . desire to harm" formulation of animus. Such a critic might observe that rational basis "with bite" is only triggered after every conceivable legitimate rationale has been eliminated. Yet as a matter of logic, the task of rebutting an infinite number of conceivable rationales that need only be loosely fitted to the legislation is an endless one. If the Court were truly applying "ordinary" rational basis, it is hard to see that it could ever determine that animus was the only justification left standing.

More importantly, as a matter of practice, the Court has not taken the "eliminating all conceivable rationales" approach. In the *Romer* case, Colorado justified an anti-gay state constitutional amendment by forwarding the state interests of using the governmental funds to defend other civil-rights claims and of protecting individuals with religious objections to homosexuality. Under a standard that credited "any conceivable rationale" and that permitted the government to move "one step at a time," such justifications would easily have passed muster. Nonetheless, the Court concluded that the legislation was "inexplicable by anything but animus." It did so without exercising its imagination to conjecture rationales for the state.

V.
RATIONAL BASIS AND RESTRICTIONS ON SAME-SEX MARRIAGE

Given that one person's prejudice is another person's principle, it is often difficult to predict in advance what the Court will deem to be "animus." With

27. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).
28. *Cleburne*, 473 U.S. at 447.
29. Romer v. Evans, 517 U.S. 620, 634 (1996).

respect to sexual orientation, however, the Court has deemed anti-gay views to constitute animus and applied rational basis "with bite." In the *Romer* case, the Court observed that gays and lesbians had been the victims of "animus," as described above.[30] In the 2003 case of *Lawrence v. Texas*,[31] the Court also determined (without applying formal strict scrutiny) that statutes criminalizing same-sex sodomy did not pass constitutional muster under the Due Process Clause. *Lawrence* can thus be read, at a minimum, as a due process rational-basis "with bite" case. A critic could counter that *Lawrence* was a case about sexual conduct between individuals of the same sex rather than about homosexual status. Just last Term, however, the Court rejected this conduct/status distinction in *Christian Legal Society v. Martinez*.[32] The majority opinion asserted that "[o]ur decisions have declined to distinguish between status and conduct in this context," citing *Lawrence* for the proposition that "[w]hen homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination."[33] This constellation of precedents suggests that the Court will apply rational basis "with bite" rather than ordinary rational basis to discrimination against gay people, including restrictions on same-sex marriage.

Nor will the Court have to look far to find animus motivating recent restrictions on same-sex marriage. The plaintiffs in one of the DOMA cases catalogued some of the statements in the congressional record leading up to the 1996 passage of the Act. As discussed in that memorandum, Representative Barr characterized homosexuality as "hedonism," "narcissism," and "self-centered morality." Representative Funderburk described homosexuality as "inherently wrong and harmful to individuals, families, and societies." Representative Smith referred to same-sex sexual intimacy as "unnatural and immoral."

VI.
CONCLUSION

Much debate has centered on whether sexual orientation deserves the strict or intermediate scrutiny that the Court accords to classifications such as race, national origin, alienage, non-marital parentage, and sex. While important, this debate often leaves the false impression that the plaintiffs in the marriage cases cannot prevail without acquiring either strict or intermediate scrutiny. Cases such as *Reed*, *Eisenstadt*, *Moreno*, *Plyler*, *Cleburne*, and *Romer* demonstrate otherwise.

In addition to making the best case for heightened scrutiny, plaintiffs should press the Court to apply rational basis "with bite." And the Court should clarify

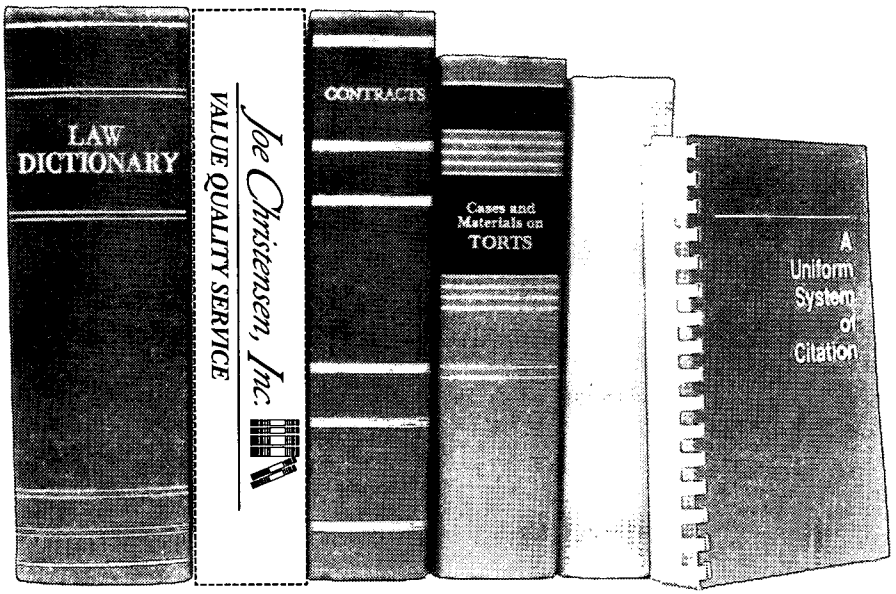
30. *Id.* at 632 ("[T]he amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests").

31. Lawrence v. Texas, 539 U.S. 558 (2003).

32. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010).

33. *Id.* at 2990.

its own practice, noting that rational basis "with bite" obtains once the Court discerns the presence of actual animus, not after the Court has proven the absence of all conjectured rationales.



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