PUSHING THE BOUNDARIES?: EQUAL PROTECTION, RATIONAL BASIS, AND RATIONAL DECISION MAKING BY DISTRICT COURTS IN CASES CHALLENGING LEGISLATIVE CLASSIFICATIONS ON THE BASIS OF SEXUAL ORIENTATION

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I. INTRODUCTION

It is uncontested—except by the Supreme Court itself—that the rational basis standard of review for equal protection challenges is in a state of flux.[1] Using language that signifies extreme judicial deference to legislative decision making, the Supreme Court since 1973 has upheld more than one hundred legislative classifications under the rational basis standard of review.[2] However, during this same time period, the Court has invalidated almost a dozen legislative classifications under equal protection challenges because of the lack of an adequate rational basis.[3] These relatively few invalidations have been enough to cause a "stir in

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1. Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 490 (2004) ("Against the backdrop of the Court's respect for government's need to distinguish between constituents and the related commitment not to intrude on most government decisionmaking [sic], this set of rational basis invalidations has challenged scholars—as well as the Court—to identify some unifying theory. Yet, while the Court regularly explains its approach to rational basis review, it has not offered a theory for making collective sense of its variable lot of decisions.").

2. *Id.* at 489.

3. *Id.*

constitutional circles."[4] In cases where the Supreme Court has struck down laws using rational basis review, the Court has tempered its deferential language and has performed what Justice O'Connor once described as a "more searching form of review."[5] The Court has further muddied the waters by characterizing the rational basis analysis in its invalidating opinions as entirely consistent with its rational basis jurisprudence.[6] Furthermore, the Court does not appear to be open to explicitly adjusting its analysis and abolishing its framework of scrutiny,[7] despite "the widely acknowledged problems with rational basis review."[8] Thus, judges in the lower federal courts are left to navigate their way through the seemingly conflicting precedent, which loosely establishes the boundaries of rational basis review. Judges, therefore, have had to develop approaches and sub-rules within the existing rational basis jurisprudence in order to engage in meaningful review. This problem will persist in all cases that do not clearly

4. Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 KY. L.J. 591, 608 (2000) ("the cases that appear to have deviated from the rationality paradigm have arisen frequently enough to cause a stir in constitutional circles").

5. Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

6. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) ("Justice Breyer suggests that *Cleburne* stands for the broad proposition that state decisionmaking reflecting 'negative attitudes' or 'fear' necessarily runs afoul of the Fourteenth Amendment. Although such biases may often accompany irrational (and therefore unconstitutional) discrimination, their presence alone does not a constitutional violation make. As we noted in *Cleburne*: '[M]ere 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 . . . .' This language, read in context, simply states the unremarkable and widely acknowledged tenet of this Court's equal protection jurisprudence that state action subject to rational-basis scrutiny does not violate the Fourteenth Amendment when it 'rationally furthers the purpose identified by the State.'" (internal citations omitted)); Heller v. Doe, 509 U.S. 312, 321 (1993) ("We have applied rational-basis review in previous cases involving the mentally retarded and the mentally ill. . . . In neither case did we purport to apply a different standard of rational-basis review from that just described." (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985))); Schweiker v. Wilson, 450 U.S. 221, 237 (1981).

7. Saphire, *supra* note 4, at 596–97 ("[B]ecause most of the Justices have been reasonably satisfied with the framework, or perhaps because they simply have been unable to agree on an alternate framework to take its place, there have been few signs that it is likely to be abandoned.").

8. Goldberg, *supra* note 1, at 524.

merit a heightened standard of review until the Court acknowledges and resolves the problematic existence of at least two variants of rational basis review.

In particular, the Supreme Court has not addressed whether a classification on the basis of sexual orientation should be analyzed under a heightened standard of scrutiny.[9] Rather, in *Romer v. Evans*—the seminal case in which the Supreme Court assessed a sexual-orientation classification challenge on equal protection grounds—the Court invalidated the state constitutional amendment at issue for failing even rational basis review.[10] As a result, the Court did not find it necessary to address whether a heightened standard need apply.[11] Thus, at this point in time, no Supreme Court precedent explicitly mandates any more rigorous scrutiny than rational basis review in a case challenging a sexual-orientation classification on equal protection grounds.[12]

This Note will explore the analysis employed by three district courts cases decided in 2010. In each case, the courts used rational basis review to invalidate, on equal protection grounds, a legislative classification based on sexual orientation. I argue that while some of the approaches taken by these courts stretch the bounds of rational basis scrutiny, their reasoning ultimately comports with the rationale of the standard of review. While two of the cases are making their way through the appellate process, and while I

9. Eric H. Holder, Jr., *Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act* (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html ("The Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual orientation.").

10. Romer v. Evans, 517 U.S. 620, 631–32 (1996) ("[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. Amendment 2 fails, indeed defies, even this conventional inquiry.") (internal citation omitted).

11. *Id.*

12. While it is technically possible to argue that a classification other than those currently classified as suspect or quasi-suspect should be subject to a heightened standard of scrutiny, the Supreme Court has not shown itself to be receptive to those arguments. *See, e.g.*, *Id.*; City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). This, however, has not stopped plaintiffs from arguing for a higher standard of scrutiny. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (agreeing claim should be reviewed under strict scrutiny); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 386–87 (D. Mass. 2010). *See also* Eric H. Holder, Jr., Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

argue the approaches taken by the district courts are appropriate, what is ultimately needed is the Supreme Court's affirmation of the way these district courts have applied the rational basis review framework.

Part II lays out the current state of the rational basis standard for equal protection challenges, identifying both language of extreme judicial deference and deviations from that norm. Part III identifies the unusual, and perhaps non-canonical analyses by the district court judges in *Collins v. Brewer*, *Perry v. Schwarzenegger*,[13] and *Gill v. Office of Personnel Management*. Note that in Part III.A.5 I briefly discuss the Ninth Circuit's affirmation of *Perry*[14] and in Part III.B.5 I briefly discuss the Ninth Circuit's affirmation of *Collins.*[15] However, the focus of this Note is discussion of the district court cases in *Collins, Perry, and Gill*. Part IV discusses whether the district courts' unusual analyses are reconcilable with existing rational basis jurisprudence, and whether they are normatively justifiable.

II. THE RATIONAL BASIS STANDARD

A. THE EQUAL PROTECTION CLAUSE

The Fifth and Fourteenth Amendments to the United States Constitution guarantee that the federal government and state governments, respectively, will deny no citizen within their jurisdictions "equal protection of the laws."[16] The Supreme Court has made it clear that "equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."[17] As the analyses are the same, I use "Equal Protection Clause" interchangeably to refer inclusively to both the Fifth and Fourteenth Amendments.

The Equal Protection clause is understood to state and enforce a "commitment to the law's neutrality where the rights of persons are at

13. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, No. 10-16696, No. 11-16577, 2012 U.S. App. LEXIS 2328 (9th Cir. Feb. 7, 2012).

14. Perry v. Brown, No. 10-16696, No. 11-16577, 2012 U.S. App. LEXIS 2328 (9th Cir. Feb. 7, 2012).

15. Diaz v. Brewer, 656 F.3d 1008 (9th Cir. 2011).

16. U.S. CONST. amends. V; XIV, §1.

17. Buckley v. Valeo, 424 U.S. 1, 93 (1976) (per curiam).

stake."[18] The Supreme Court has declared "class legislation" to be the antithesis of this principle: class legislation is "'a classification of persons undertaken for its own sake,' 'a status-based enactment divorced from any factual context from which [one] could discern a relationship to legitimate state interests,' and a subjection of 'one class of persons to a code not applicable to another.'"[19] In contrast, equal protection jurisprudence emphasizes a "baseline commitment to ensuring the existence of a plausible, contextual, and nonbiased explanation for a classification and, relatedly, to preventing the enforcement of class legislation."[20]

B. TIERS OF SCRUTINY

Courts analyze laws that are challenged on equal protection grounds using a three-tier structure of scrutiny.[21] First, laws that create classifications on a suspect basis such as race or national origin, or that impact a fundamental right—such as a First Amendment, voting, or travel right—are reviewed under "strict scrutiny."[22] Courts find these classifications "deeply suspicious"[23] and therefore require the government to "bear a heavy burden of proof"[24] that demonstrates that the challenged classification serves a compelling state interest and is necessary to serve that interest.[25] Second, laws that classify on the basis of gender or illegitimacy are considered quasi-suspect and are analyzed under "intermediate scrutiny."[26] Intermediate scrutiny requires the government to show that the classification serves an important state interest and that the chosen classification is substantially related to that interest.[27] Third, courts

18. Goldberg, *supra* note 1, at 528–29.
19. *Id.* at 531.
20. *Id.* at 582.
21. *See* Doug Linder, *Levels of Scrutiny Under the Equal Protection Clause*, EXPLORING CONSTITUTIONAL CONFLICTS, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/epcscrutiny.htm (last visited Jan. 3, 2011).
22. *Id.*
23. Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 949 (2004) ("Classifications by race or national origin are deeply suspicious . . . . Classifications that materially infringe on fundamental constitutional liberties . . . are also presumed to be void . . .").
24. *In re* Griffiths, 413 U.S. 717, 721 (1973) (citing McLaughlin v. Florida, 379 U.S. 184, 196 (1964)).
25. Linder, *supra* note 21.
26. *See* Massey, *supra* note 23, at 950.
27. *Id.*

analyze any other classification that is neither suspect nor quasi-suspect under the "rational basis" standard.[28] Here, the government must simply "show that the challenged classification is rationally related to serving a legitimate state interest."[29] When evaluating the constitutionality of the legislature's classification choice under this standard, a court gives the government every beneficial presumption.[30]

C. PRECEDENTIAL AMBIGUITY

The rational basis standard is unlike the other tiers in equal protection analysis because it provides lawmakers with a baseline rationality requirement that all legislative classifications must satisfy.[31] As it stands, the rational basis standard is extremely deferential, yet it still technically requires a court to "evaluat[e] the link between a permissible goal and the government's challenged action."[32]

Courts deviate from the usual practice of deferring to legislatures and reject the legislative classifications where they find that a classification causing differential treatment either "lacked a legitimate and specific explanation or gave effect to stereotypic assumptions or hostility toward a class."[33] A legislative classification is illegitimate where the resulting discrimination indicates that "the law is not a result of 'legislative rationality in pursuit of some legitimate objective,' but rather a reflection of 'deep-seated prejudice.'"[34] For example, the Supreme Court in *Romer v.*

28. Linder, *supra* note 21.

29. *Id.*

30. Goldberg, *supra* note 1, at 489 ("So long as a classification is neither suspect nor quasi-suspect, the Court promises that it will give every beneficial presumption to the government when assessing the validity of differential treatment.").

31. Saphire, *supra* note 4, at 597 (citing Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1068 (1979) ("Satisfaction of this 'rational relationship' requirement is a necessary condition of constitutionality under equal protection: no classification failing to satisfy the requirement is constitutional.")).

32. Goldberg, *supra* note 1, at 490, 536 (using as an example the Supreme Court's explanation in Romer v. Evans, 517 U.S. at 620 631–33 (1996), of rational basis review's insistence on a rational connection between a legitimate government interest and the government's actions).

33. *Id.* at 489 (citing Williams v. Vermont, 472 U.S. 14, 17 (1985); Zobel v. Williams, 457 U.S. 55, 65 (1982); O'Brien v. Skinner, 414 U.S. 524, 530–31 (1974)).

34. Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based*

Evans saw through and rejected the government's asserted interest in "discouraging political factionalism, and prioritizing discrimination claims,"[35] and instead concluded that an amendment to Colorado's constitution—one prohibiting gay and lesbian citizens from ever being recognized as a protected class under the law—was unconstitutional because the "desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[36]

1. Language of Extreme Deference

Supreme Court precedent is replete with strong language suggesting that it is almost entirely impossible for a plaintiff to prevail on equal protection grounds under the rational basis standard.[37] Moreover, the ubiquity of this language is not dicta, but rather iterations of the rational basis legal standard by the Supreme Court: that a party challenging a non-suspect legislative classification on equal protection grounds must "negat[e] every conceivable basis which might support it."[38] The use of the phrase "every conceivable basis" is not mere hyperbole; in fact, it is "entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."[39] Thus, the rational basis review begins with a strong presumption that the classification under attack is constitutional, and places the burden upon the

on Sexual Orientation, 73 FORDHAM L. REV. 2769, 2775 (2005) (quoting Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982)).

35. *Id.* at 2782 (citing Tobias Barrington Wolff, Case Note, *Principled Silence*, 106 YALE L.J. 247, 250–52 (1996)).

36. Romer v. Evans, 517 U.S. 620, 652 (1996) (quoting U.S. Dep't of Agric, v. Moreno, 413 U.S. 528, 534 (1973)).

37. *See* Saphire, *supra* note 4, at 606–07 ("Scholars have also commented on [the rational basis standard's] softness. In one of the most influential discussions of modern equal protection, Professor Gunther observed that the '"mere rationality" requirement symbolized virtual judicial abdication.' Writing in the same forum, Professor Fallon opined that 'judicial scrutiny under rational basis review is typically so deferential as to amount to a virtual rubber stamp.'") (citing Richard H. Fallon, Jr., *The Supreme Court, 1996 Term-Foreword: Implementing the Constitution*, HARV. L. REV. 56, 79 (1997); 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, 19 (1972)).

38. FCC v. Beach Commc'n, Inc., 508 U.S. 307, 315 (1993).

39. *Id.*

challenger to prove that the distinction is unconstitutional.[40] It is this presumption of constitutionality that leads courts to approach review with the assumption that there exists a legitimate legislative purpose[41] and "that the legislature *might have* concluded that the classification bears some relationship to the accomplishment of that purpose."[42]

As molded by the Supreme Court, the contour of rational basis review extends beyond simply deferring to the legislative classification on the assumption that it furthers some underlying legitimate interest. The courts are apparently intended to or allowed to engage in a hypothetical exercise to conceive of any possible purpose for the challenged classification that is not invidious discrimination. In *Williamson v. Lee Optical*, the Supreme Court concluded that "the prohibition of the Equal Protection Clause goes no further than the invidious discrimination."[43] In that case, the Court concluded that the classification at issue was not motivated by a desire to cause invidious discrimination; rather, the Court noted three justifications "the legislature *might have* concluded"[44] made the legislation necessary.[45] Based on this precedent, at its most deferential, rational basis review has been described as satisfied by asking:

> Given the information that was actually before the legislature, or information that might have been available to the legislature, or information which the legislature reasonably might have thought existed, or information of which the court can take judicial notice, could the legislature conceivably have believed (not did it actually believe) that this statute would or might, even if only in the most remote or tenuous way, further or promote a legitimate actual or hypothetical goal? If the answer is yes, the statute stands.[46]

Although *Williamson v. Lee Optical* was decided in 1955, its influence remains prevalent, as evidenced by later opinions, such as the 1993 cases

40. Saphire, *supra* note 4, at 612 ("[I]t is important to recall that true rational basis review entails a strong presumption of constitutionality and places a heavy burden on the challenger to demonstrate the 'irrationality' of the classification.").

41. *Id.*

42. *Id.* (emphasis added).

43. Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

44. *Id.* at 487.

45. *Id.*

46. Saphire, *supra* note 4, at 606.

Heller v. Doe[47] and *FCC v. Beach Communications, Inc.*[48] In *Heller*, the Supreme Court reemphasized that the role of the court employing rational basis review is to declare constitutional a legislative classification "against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[49] In particular, the Court stressed that a state "has no obligation to produce evidence to sustain the rationality of a statutory classification."[50] Thus, in defending a legislative classification, the state does not have to establish that a rational relationship between a legitimate government interest and the resulting classification actually motivated the law: "[L]egislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data."[51]It is therefore not surprising that courts continue to interpret this as requiring them to "go so far as to hypothesize about potential motivations of the legislature, in order to find a legitimate government interest."[52]

Finally, even when it is clear that an illegitimate purpose underlies certain legislation, a court's search for a legitimate purpose does not end. Nan D. Hunter, Professor of Law at Georgetown University, contends, for instance, that *Board of Trustees v. Garrett* demonstrates that "the mere presence of biases as partial motivation for state decisionmaking 'does not a constitutional violation make.'"[53] Therefore, the presence of irrational bias changes little in the rational basis analysis because so long as there is any "reasonably conceivable state of facts that could provide a rational basis for the classification,"[54] a legislative classification will be upheld.[55]

47. Heller v. Doe, 509 U.S. 312 (1993).

48. FCC v. Beach Commc'ns, Inc., 508 U.S. 307 (1993).

49. *Heller*, 509 U.S. at 319 (internal citation omitted).

50. Saphire, *supra* note 4, at 613 (quoting *Heller*, 509 U.S. at 320).

51. *Beach Commc'ns*, 508 U.S. at 315.

52. Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 387 (D. Mass. 2010) (internal quotation omitted).

53. Nan D. Hunter, *Proportional Equality: Readings of* Romer, 89 KY. L.J. 885, 888 (2001) (quoting Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001)).

54. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

55. Hunter, *supra* note 53 ("In light of the Court's subsequent decision in *Board of Trustees v. Garrett*, this principle [that a classification cannot be solely 'for the purpose of disadvantaging the group burdened by the law'] appears to be limited to findings that hostility was the only or perhaps the dominant purpose of the law.").

2. Language Tempering Extreme Deference

The Supreme Court cases striking down legislative classifications using the rational basis standard create an opportunity for necessarily rigorous analysis of the constitutionality of challenged legislation in certain instances. The language in these cases describe rational basis in a manner that goes beyond the extreme deference exhibited above. Suzanne B. Goldberg, Herbert and Doris Wechsler Clinical Professor of Law at Columbia University, contends that the Court engages in meaningful review that emphasizes a "contextual focus."[56] Thus, to be constitutional, Goldberg concludes, a challenged classification must both serve a legitimate governmental purpose and the choice of the classification reasonably believable as effecting that legitimate purpose.[57] The basic boundary of the Equal Protection Clause, invidious discrimination, is exceeded if there is no "meaningful relationship . . . between the group singled out and the government's legitimate goals."[58] To ensure that boundary remains inviolate, it is therefore deemed necessary and appropriate for a court to temper judicial deference to a certain limited extent. The Supreme Court has gone so far as to assert that: "[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 obtained."[59] When employed in the process of judicial review this requirement targets the fundamental function and the role of a court to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."[60] The lack of a rational relationship indicates that "the only plausible way to characterize the challenged statute [is] as an effort to disadvantage a group because of prejudice towards its members."[61] Without a rational relationship between

56. Goldberg, *supra* note 1, at 516.

57. *Id.* at 516 n.132 (quoting W. & S. Life Ins. Co. v. Bd. of Equalization, 451 U.S. 648, 668 (1981) ("In determining whether a challenged classification is rationally related to achievement of a legitimate state purpose, we must answer two questions: (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?")).

58. *Id.* at 515 (citing F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 416 (1920)).

59. *Id.* at 515–16 (quoting Romer v. Evans, 517 U.S. 620, 632 (1996)).

60. *Id.* at 516 (quoting *Romer*, 517 U.S. at 633 (internal citation omitted)).

61. *See* Saphire, *supra* note 4, at 608 (citing United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("[W]here the Court struck down the so-called "anti-hippie"

the chosen classification and the legitimate governmental purpose, the classification can only be "a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests."[62]

The fundamental concern of courts that engage in a less deferential form of rational basis review is that "the classified trait's effect on an individual's ability to participate on the same basis as others in the regulated arena."[63] For example, in *Romer*, the Court struck down the challenged Colorado constitutional amendment, which was designed to regulate access to the State's protection from discrimination on the basis of an individual's sexuality.[64] In that case the Supreme Court was less deferential, and demanded that the State offer "a genuine, reasonable connection between the classification and the government's goals."[65] In cases when such a demand is not met, the Court consequently finds that the legislative purposes are illegitimate for drawing the classification because it "lacks any meaningful connection to the justifications proffered."[66] Moreover, although later cases such as *Romer* and *City of Cleburne v. Cleburne Living Center*[67] have not relied solely on such evidence, Goldberg contends that it is clear from *U.S. Department of Agriculture v. Moreno*,[68] that an illegitimate "purpose may also be discerned from the legislative history or the context of a measure's passage."[69] So in all cases the key question remains: "[W]hy the government chose to achieve [a] goal by burdening the affected class."[70]

amendment to the federal food stamp program, and where it announced the principle 'that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest.'")).

62. Goldberg, *supra* note 1, at 535 (quoting *Romer*, 517 U.S. at 635).

63. *Id.* at 534.

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

65. *Id.*; Goldberg, *supra* note 1, at 536 (quoting *Romer*, 517 U.S. at 620).

66. Goldberg, *supra* note 1, at 546.

67. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

68. United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

69. Goldberg, *supra* note 1, at 546 ("The Court also had explicit evidence that the food stamp provision at issue in U.S. Dep't of Agriculture v. Moreno was aimed to keep "hippies" from participating in the food stamp program.").

70. *Id.* at 563.

III. WHAT ARE THE ANALYSES BEING EMPLOYED UNDER THE RATIONAL BASIS STANDARD TODAY?

Federal district court judges face the task of engaging in meaningful rational basis review in cases alleging equal protection violations that do not affect a suspect class, quasi-suspect class, or fundamental right. In 2010, three federal judges in districts across the country invalidated legislative classifications on equal protection grounds under rational basis review. In each of these cases, the legislative classification was based on sexual orientation. Given the deferential nature of rational basis review, this section discusses in-depth the portions of the courts' analyses that appear to be unconventional.

A. *PERRY V. SCHWARZENEGGER*

1. Facts and Procedural History

Of the three cases analyzed in this Note, *Perry v. Schwarzenegger* is the only case that endured a full trial and resulted in a final judgment. Plaintiffs challenged the constitutionality of Proposition 8, a voter initiative that amends the California Constitution to state: "Only marriage between a man and a woman is valid or recognized in California."[71] In November 2008, Proposition 8 was passed by capturing 52.3% of votes cast in the state general election.[72] The plaintiffs, two couples seeking to marry their same-sex partners, were denied marriage licenses on the basis of Proposition 8.[73] Before the passage of Proposition 8, California had issued approximately 18,000 marriage licenses to same-sex couples.[74] Applying rational basis review, the district court held that Proposition 8 violates the Fourteenth Amendment's Equal Protection clause because it "disadvantages gays and lesbians without any rational justification."[75]

71. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, No. 10-16696, No. 11-16577, 2012 U.S. App. LEXIS 2328 (9th Cir. Feb. 7, 2012).

72. CALIFORNIA SECRETARY OF STATE DEBRA BOWEN, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION (2008), *available at* http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf.

73. *Perry*, 704 F. Supp. 2d at 927.

74. *Id*. at 928.

75. *Id.* at 1003.

Because then Governor Arnold Schwarzenegger refused to defend Proposition 8, the ballot initiative's proponents ("Proponents") intervened to defend it, and as the defendants in *Perry*, they asserted six government interests in defense of the rational bases for Proposition 8:

> (1) [R]eserving marriage as a union between a man and a woman and excluding any other relationship from marriage; (2) proceeding with caution when implementing social changes; (3) promoting opposite-sex parenting over same-sex parenting; (4) protecting the freedom of those who oppose marriage for same-sex couples; (5) treating same-sex couples differently from opposite-sex couples; and (6) any other conceivable interest.[76]

I focus on the court's analysis of the first enumerated interest.

2. District Court's Analysis

The first interest advanced by the defendants as a rational basis for the classification in Proposition 8 was "reserving marriage as a union between a man and a woman and excluding any other relationship." Within this interest, the court identified a subset of three interests, including preservation of: "(1) the traditional institution of marriage as the union of a man and a woman; (2) the traditional social and legal purposes, functions, and structure of marriage; and (3) the traditional meaning of marriage as it has always been defined in the English language."[77] The court then defined these sub-interests as "relate[d] to maintaining the definition of marriage as the union of man and a woman for its own sake."[78]

However, each identified sub-interest was only an interest in preservation of the definition of marriage. None of the asserted sub-interests provided a rationale for the why the preservation of that definition was sufficient to provide a legitimate state interest in the current definition of marriage and a rational basis for Proposition 8.[79]

Further, the court found as fact that the tradition of gender restrictions in regards to marriage was a product of the "foregone notion that men and women fulfill different roles in civic life."[80] This practice of the legal enforcement of gender inequalities had otherwise been removed from the

76. *Id*. at 998.
77. *Id.*
78. *Id*.
79. *Id*.
80. *Id*. (citing FF 26–27).

laws in California with the exception of the restriction of the option of civil marriage to heterosexual couples. In fact, the tradition of restricting civil marriage to opposite-sex couples exists as a continuing harm to California's interest in equality because it mandates men and women be treated differently when applying for a marriage license depending on the gender of the two parties relative to one another.[81] Further, the plaintiffs produced evidence that showed conclusively, and the court found as fact, that "the State has no interest in preferring opposite-sex couples to same-sex couples or in preferring heterosexuality to homosexuality."[82] Without more than simply an interest in preserving the traditional definition of marriage, the court found that the Proponents failed to advance a legitimate "end" for which Proposition 8 could be the "means." The court concluded, "the state advances nothing when it adheres to the tradition of excluding same-sex couples from marriage."[83] An interest in preserving tradition for its own sake is just a "tautology[y] and do[es] not amount to rational bases for Proposition 8."[84]

3. Holding

The court rejected all proffered justifications and held that Proposition 8 could not survive rational basis scrutiny because it did not and could not advance a legitimate state interest. The only plausible inference the court could draw was that "Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples."[85] Accordingly, the court held that Proposition 8 violated the Fourteenth Amendment's Equal Protection clause because it was only enacted to codify private beliefs in the inferiority of same-sex relationships and, accordingly, it "disadvantages gays and lesbians without any rational justification."[86]

4. Unusual Analysis Employed by the Perry Court

The court in *Perry v. Schwarzenegger* refused to validate the asserted government interest in preserving tradition, which the Proponents

81. *Id*. (citing FF 32, 57).
82. *Id.* (citing FF 48–50).
83. *Id*.
84. *Id.*
85. *Id.* at 1002.
86. *Id.* at 1003.

enumerated as: "(1) 'the traditional institution of marriage as the union of a man and a woman'; (2) 'the traditional social and legal purposes, functions, and structure of marriage'; and (3) 'the traditional meaning of marriage as it has always been defined in the English language.'"[87]

The *Perry* decision is unusual for a number of reasons. First, commentators have noted that in cases decided under rational basis review, even where the plaintiff "sufficiently demonstrated that he or she has suffered intentional and purposeful discrimination,"[88] if the government proffers an interest for the discrimination, there will likely be no finding of an equal protection violation.[89] As discussed above, in almost all rational basis cases, once the government has claimed an interest, unless that interest is solely a bare desire to harm the disadvantaged group, the court's focus shifts to whether there is a rational relationship between the asserted interest and the classification.[90]

In *Perry*, the Proponents did not assert a particularly novel state interest. Supreme Court Justice O'Connor had identified "preserving the traditional institution of marriage"[91] as a legitimate state interest in her Equal Protection-based concurrence in *Lawrence v. Texas*.[92] Preservation of the tradition of heterosexual marriage is an interest that has been advanced repeatedly in state court cases challenging bans on same-sex marriage,[93] advanced by legal scholars as a legitimate government purpose on which to base bans on same-sex marriage,[94] and it appears repeatedly in

87. *Id.* at 998.

88. Smith, *supra* note 34, at 2786 n.142.

89. *Id.* at 2786.

90. *See* Hunter, *supra* note 53, at 888 ("In *Garrett*, the Court held that the mere presence of biases as partial motivations for state decisionmaking 'does not a constitutional violation make'.").

91. Lawrence v. Texas, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring).

92. *Id.* at 585 ("Texas cannot assert any legitimate state interest here such as . . . preserving the traditional institution of marriage.").

93. *See* Kim Forde-Mazrui, *Tradition as Justification: The Case of Different-Sex Marriage*, 78 U. CHI. L. REV. 281, 282 (2011) (citing Varnum v. Brien, 763 N.W.2d 862, 873, 875 (Iowa 2009); In re Marriage Cases, 183 P.3d 384, 451 (Cal. 2008); Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971); De Santo v. Barnsley, 476 A.2d 952, 954–55 (Pa. Super. Ct. 1984); Baker v. Nelson, 191 N.W.2d 185, 186–87 (Minn. 1971)).

94. Forde-Mazrui, *supra* note 93, at 284 (citing William C. Duncan, *Constitutions and Marriage*, 6 WHITTIER J. CHILD & FAM. ADVOC. 331, 338 (2007); Steven W. Fitschen, *Marriage Matters: A Case For A Get-The-Job-Done-Right Federal Marriage Amendment*,

popular discourse on the subject of bans on same-sex marriage.[95] It is at least arguable that the preservation of tradition and particularly the preservation of the tradition of heterosexual marriage is a legitimate government interest sufficient to provide a rational basis for a same-sex marriage ban.[96]

The *Perry* court cited *Williams v. Illinois*[97] to support its contention that tradition alone was not a legitimate government interest.[98] In *Williams*, the Supreme Court invalidated a state statute that permitted indigent prisoners to be held longer than the mandatory sentence for their crime so that those prisoners could "work off" unpaid court costs and fines.[99] The Court stated that "[w]hile neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack, these factors should be weighed in the balance."[100] In support of that proposition the *Williams* Court drew from its opinion in *Walz* v. *Tax Commission*.[101] In *Walz*, Justice Holmes stated, "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . ."[102] While the *Willams* and *Walz* cases authoritatively state that the tradition of a law does not make it per se constitutional, they do not seem to

83 N.D. L. REV. 1301 passim (2007); Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 225, 231–33 (2004). *See also* Symposium, *Same-Sex Marriage Symposium Issue*, 1 8 BYU J. PUB. L. 273 (2004); Symposium, *Moral Realism and the Renaissance of Traditional Marriage*, 17 REGENT U. L. REV. 185 (2005)).

95. *See, e.g.*, Senator Bill Frist, *We Must Preserve Traditional Marriage*, HUMAN EVENTS: POWERFUL CONSERVATIVE VOICES (June 2, 2006), http://www.humanevents.com/article.php?id=15312; Carson Holloway, *Same-Sex Marriage and the Death of Tradition*, FIRST THINGS (June 10, 2009), http://www.firstthings.com/onthesquare/2009/06/same-sex-marriage-and-the-deat; R.J. Snell, *Marriage and the Law of Tradition*, THE WITHERSPOON INSTITUTE (Oct. 18, 2010), http://www.thepublicdiscourse.com/2010/10/1814.

96. *See supra* notes 92–93. *See also* Orin Kerr, *Rational Basis and Constitutional Line Drawing in the Same-Sex Marriage Debate*, THE VOLOKH CONSPIRACY (Sept. 16, 2009, 12:33 AM), http://volokh.com/posts/1251839249.shtml.

97. Williams v. Illinois, 399 U.S. 235 (1970).

98. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 998 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, No. 10-16696, No. 11-16577, 2012 U.S. App. LEXIS 2328 (9th Cir. Feb. 7, 2012) ("Tradition alone, however, cannot form a rational basis for a law.").

99. *Williams*, 399 U.S. 235 (1970).

100. *Id.*

101. Walz v. Tax Comm'n, 387 U.S. 664 (1970).

102. Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922).

state that tradition can never be enough to make a law constitutional. In fact, they do not appear to directly answer the question of whether tradition can be asserted as a legitimate government interest.

Moreover, the State in *Williams* did not assert that keeping a defendant in prison to compensate for unpaid court costs and fees was a custom or tradition supporting the statute at issue in the case. Instead, the *Williams* Court raised the legacy of the statute sua sponte, perhaps to explain that it understood the far-reaching effects of the ruling (at the time it was decided most states and the federal government had similar statutes in place).[103]

For additional support, the *Perry* court quoted *Heller v. Doe*[104]: "the 'ancient lineage' of a classification does not make it rational."[105] This is undoubtedly true; however, in *Heller* the Supreme Court was evaluating a state's decision to require different standards of proof in proceedings for the involuntary commitment of "mentally retarded" and mentally ill persons, respectively.[106] Unlike the Proponents of Proposition 8 in *Perry*, the State in *Heller* did not argue that preserving the "ancient lineage" of differentiating between mentally ill and mentally retarded persons was a legitimate government interest.[107] In fact, in *Heller* Court recognized and emphasized that the longtime treatment of these two classes as distinct under the law suggests a "commonsense distinction between the mentally retarded and the mentally ill."[108]

In neither *Williams* nor *Heller*, did the Court explicitly state that tradition could never be a legitimate government interest. Yet the district

103. *Williams*, 399 U.S. at 239 ("At the present time almost all States and the Federal Government have statutes authorizing incarceration under such circumstances.").

104. Heller v. Doe, 509 U.S. at 312, 314–19 (1993).

105. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 998 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, No. 10-16696, No. 11-16577, 2012 U.S. App. LEXIS 2328 (9th Cir. Feb. 7, 2012) (quoting *Heller*, 509 U.S. at 327.)

106. *Heller*, 509 U.S. at 314–19.

107. *Id.* at 328–29 ("Kentucky's burden of proof scheme, then, can be explained by differences in the ease of diagnosis and the accuracy of the prediction of future dangerousness and by the nature of the treatment received after commitment. Each of these rationales, standing on its own, would suffice to establish a rational basis for the distinction in question . . . Kentucky may have concluded that participation as parties by relatives and guardians of the mentally ill would not in most cases have been of sufficient help to the trier of fact to justify the additional burden and complications of granting party status.").

108. *Id.* at 326–27.

court in *Perry* relied on these two cases, citing and quoting them as authority for the position that, "the state must have an interest apart from the fact of the tradition itself."[109]

Before *Perry*, same-sex marriage bans had been challenged only in state courts and for violations of state constitutions.[110] Thus, *Perry* was the first time the federal judiciary confronted the argument that the preservation of tradition is a legitimate state interest in the context of an equal protection challenge to a same-sex marriage ban, and the court rejected it firmly.[111]

5. *Perry* on appeal: *Perry v. Brown*

On February 7, 2012, the Ninth Circuit Court of Appeals affirmed the *Perry* opinion in *Perry v. Brown*.[112] While lengthy, Judge Reinhardt's opinion in *Brown* essentially agrees with the district court's reasoning that the law at issue has no legitimate reason behind it—it has no rational connection to its purported interests, for example "childrearing or responsible procreation" or religious freedom—thus, the only reasoning supporting Proposition 8 is illegitimate.[113] Namely, all that the proposition actually accomplished was to discriminate against an unpopular group.

Judge Reinhardt appears to substantially agree with the reasoning of the district court, including what this Note has identified as unusual—the treatment of the traditional definition of marriage as a legitimate state

109. *Perry*, 704 F. Supp. 2d at 998.

110. Maura Dolan & Carol J. Williams, *Ban on Gay Marriage Overturned*, L.A. TIMES, Aug. 5, 2010, at A1 ("The ruling was the first in the country to strike down a marriage ban on federal constitutional grounds. Previous cases have cited state constitutions.").

111. One prior case has dealt with the same question in the context of a criminal prosecution where the defense raised the Equal Protection violation as a defense to criminal charges. In *People v. Greenleaf*, 780 N.Y.S.2d 899 (N.Y. Just. Ct. 2004), a New York court dismissed charges against ministers who solemnized same-sex marriages in violation of a New York criminal statute that required ministers to solemnize only couples with a valid marriage license. *Id.* The ministers challenged the constitutionality of the charges on the grounds that the same-sex couples whose marriages they had solemnized were unconstitutionally denied marriage licenses. *Id.* On equal protection grounds, under rational basis analysis, the court dismissed tradition as a legitimate government interest for the denial of marriage licenses to same-sex couples. *Id.*

112. Perry v. Brown, No. 10-16696, No. 11-16577, 2012 U.S. App. LEXIS 2328 (9th Cir. Feb. 7, 2012).

113. *Id.* at *16–*17.

interest.[114] While acknowledging that Proposition 8 was successful at restoring the traditional definition of marriage, the court plainly stated that while "[t]radition is a legitimate consideration in policymaking . . . it cannot be an end unto itself."[115] Additionally, Judge Reinhardt refines the analysis of the *Perry* court, explaining that "tradition alone is not a justification for *taking away* a right that had been granted, even though that grant was in derogation of tradition."[116] Thus, the problem with Proposition 8 was that it took away a granted right, and tradition, while a legitimate state interest, is not a sufficient reason to strip away given rights without something more.[117] Thus, this circuit court opinion adds nuance to the contours of rational basis, when tradition is being employed as the legitimate state interest.

B. *COLLINS V. BREWER*

1. Facts and Procedural History

The State of Arizona provides subsidized health care benefits to employees and their dependents as part of the State's personnel compensation package.[118] The Arizona Administrative Code previously defined "eligible dependents" as "an employee-member's spouse as provided by law or domestic partner,"[119] and "each child,"[120] as a "natural child, adopted child or stepchild of the employee-member . . . or domestic partner."[121] A "domestic partner," meanwhile, is a "person of the same or opposite gender" who meets a number of specific requirements that include a shared residence, being in an exclusive domestic partnership with the employee-member, and being financially interdependent with the employee-member in at least three enumerated ways.[122] Under this definition, the gay or lesbian partner of an employee-member is eligible for the same coverage and benefits available to the partner married to a

114. *See id.* at *103–*05.
115. *Id.* at *103–*04.
116. *Id.*
117. *Id.* at *104–*05.
118. Collins v. Brewer, 727 F. Supp. 2d 797, 799 (D. Ct. Ariz. 2010), *aff'd sub nom.* Diaz v. Brewer, 656 F.3d 1008 (9th Cir. 2011).
119. *Id.* (citing ARIZ. ADMIN CODE § R2-5-416(C) (2011)).
120. *Id.*
121. *Id.* (citing§ R2-5-101(10)).
122. *Id.* (citing § R2-5-101(22)).

heterosexual employee-member.[123] These benefits are valued quite highly, at "between one-fifth and one-third of total employment compensation,"[124] and thus represent a large portion of an employee's real compensation. The court noted that at the time of the case, the State provided these benefits to close to 140,000 eligible people, and of those, about 800 people were also receiving benefits for their domestic partner.[125] Of those 800 employees, only a "small fraction" of them had same sex domestic partners.[126]

In 2010, Arizona revised this compensation and benefits scheme by adding "Section O,"[127] which redefines "dependent" as "a spouse under the laws of this state, a child who is under nineteen years of age or a child who is under twenty-three years of age and who is a full-time student."[128] The *Collins* court found that this new definition makes ineligible for coverage all "non-spouse domestic partners" and their children.[129] Heterosexual domestic partners may obtain coverage by getting married to their employee-member partner; however, the same option is not available to same-sex couples because Arizona's constitution prohibits them from marrying and the State from recognizing such marriages even if performed and valid in a different jurisdiction.[130]

In response, Arizona state employees with same-sex domestic partners filed suit to preliminarily enjoin Section O, alleging that Section O denied "equal compensation for equal work" and that the exclusion of same-sex domestic partners from health benefits was a violation of the Fourteenth Amendment's Equal Protection clause.[131] The plaintiffs also alleged that Section O violated the Substantive Due Process clause of the Fourteenth Amendment on the grounds that it violated their fundamental right to autonomy over their familial relationships.[132] While the court dismissed the plaintiffs' Substantive Due Process claim, it granted their request for a

123. *Id.* (citing § R2-5-101).
124. *Id.* (quoting Doc. 19 at p. 7.).
125. *Id.* (referencing Docket No. 19, at 33).
126. *Id.* (referencing Docket No. 19, at 31).
127. ARIZ. REV. STAT. ANN. § 38-651(O) (2011).
128. *Collins*, 727 F. Supp. 2d at 800–01 (quoting § 38-651(O)).
129. *Id.* at 801.
130. *Id.*
131. *Id.* (quoting Pls.' Am. Compl.).
132. *Id.* at 808.

preliminary injunction on Equal Protection grounds.[133] The court held that although the State had asserted legitimate government interests in "cost savings, administrative efficiency and promotion of marriage," these interests were not rationally related to the "absolute denial of benefits to employees with same-sex domestic partners."[134]

The State advanced five rationales for the redefinition of "dependent" in Section O:

> (1) the statute 'will save the State millions of dollars per year'; (2) the statute will be 'much easier to administer'; (3) 'scarce funds for employee benefits are better spent on employees and dependents as defined in the new statute'; (4) 'this benefit would be most valuable to married persons who are more likely to have dependent children'; and, (5) the new statute 'would further the rational, long-standing and well-recognized government interest in favoring marriage.'[135]

I will focus on the first of these interests—"saving the State millions of dollars per year."

2. District Court's Analysis

In granting the preliminary injunction, the court agreed with the state employees that Supreme Court precedent required it to hold that "although a State has a valid interest in preserving the fiscal integrity of its programs" the state still may not try to "limit its expenditures . . . by invidious distinctions between classes of its citizens."[136] Here, the State's cost-saving justification for Section O's definition of dependent was insufficient to satisfy rational basis scrutiny because the court determined that Section O's definition of dependent rested on "an invidious distinction between heterosexual and homosexual State employees who are similarly situated."[137] The court scrutinized and then dismissed the State's cost-saving rationale as the true motivation behind Section O's definition.

The court identified three ways in which the State's purported goal of saving money appeared disingenuous, suggesting that invidious

133. *Id.* at 815.
134. *Id.* at 807.
135. *Id.* at 804–05 (quoting Docket No. 22, at 8–10).
136. *Id.* at 805 (quoting Graham v. Richardson, 403 U.S. 365, 374 (1971) (quoting Shapiro v. Thompson, 394 U.S. 618, 633 (1969))).
137. *Id.* (quoting Eisenstadt v. Baird, 405 U.S. 438, 454 (1972)).

discrimination was the real purpose of Section O's definition of dependent. First, providing benefits to "the small pool of lesbian and gay State employees"[138] with domestic partners creates "only negligible costs for the state."[139] Specifically, the cost is "far less than the half-of-one-percent-of-health-costs figure . . . attributable to unmarried domestic partners generally."[140]

Second, the court held that the costs of providing benefits to same-sex domestic partners of employee-members are counterbalanced by reduction in the use of the Arizona Health Care Cost Containment System ("AHCCCS") or Arizona's Medicaid program. On average, it costs the State more to provide individual benefits through AHCCCS than paying for portions of the family coverage premium.

Finally, the State's asserted interest in saving money seemed to be undermined by its other asserted interest in promoting traditional marriage; should the spousal definition and limitation of Section O actually convince more people to enter heterosexual marriages, the state would then have to provide benefits to more people, which could increase the state's expenditures.[141]

3. Holding

Because the court could not identify any governmental interest that could possibly be served by the legislative classification denying these benefits to the dependents of homosexual employees, the court denied the motion to dismiss the plaintiff's Equal Protection claim and preliminarily enjoined Section O from taking effect.[142]

4. Unusual Analysis Employed By the *Collins* Court

In essence, the court in *Collins v. Brewer* accepted the following argument: the State's cost-saving justification for a statute is insufficient to satisfy rational basis review when the statute does not in fact save money. Instead these circumstances suggest that the statute's real purpose was to draw an "invidious distinction" between two groups of citizens. Here, those

138. *Id.* (quoting Docket No. 19, at 31).
139. *Id.* (quoting Docket No. 19, at 31).
140. *Id.* (quoting Docket No. 19, at 31).
141. *Id.*
142. *Id.* at 807.

groups were the "heterosexual and homosexual state employees who are similarly situated" in domestic partnerships.[143] Because the denial of benefits to same-sex domestic partners did not appear to "save the State millions of dollars per year" or provide any cost-savings to the State at all, that denial was not rationally related to the purported rationale of cost-saving.[144]

Given the $750 million in health benefits the State spends (annually) on health benefits for its employees,[145] the $3.75 million the State was spending on the 800 employees receiving domestic partner benefits was just a small part of State expenditure on health care.[146] Furthermore, the "negligible" amount attributable to benefits provided to same-sex domestic partners is offset by the reduced use of the State's Medicaid coverage.

This analysis appears to be built backwards: what the court implies is that a legislative classification without a rational basis allows a court to infer animus and a legislative classification based on animus is assuredly "invidious." Thus, because no savings would result from denying benefits to same-sex domestic partners, cost saving provides no rational basis for that denial. And without any other valid justification, the court infers animus as the only justification for the classification.

In other words, for the State to claim a cost-saving rationale by targeting a tiny group of its citizens for the denial of benefits (fewer than 800 out of 140,000) implies the cost-savings rationale may be no more than an excuse for the State to impermissibly discriminate between its otherwise similarly situated citizens. This approach is almost a mirror image of the approach taken by the Supreme Court in *Romer*.

In *Romer*, the Court invalidated a state constitutional amendment, Amendment 2, that "[forbade] all levels of state and local government from adopting any statute, ordinance, or policy designed to protect" homosexuals against discrimination.[147] The "broad and undifferentiated disability" imposed by the amendment as well as its "sheer breadth so discontinuous

143. *Id.* at 805.
144. *Id.*
145. *Id.*
146. $750,000,000 x .005 = $3,750,000.
147. Richard F. Duncan, Symposium: Romer v. Evans, *the Narrow and Shallow Bite of* Romer *and the Eminent Rationality of Dual-Gender Marriage: a (Partial) Response to Professor Koppelman*, 6 WM. & MARY BILL OF RTS. J. 147, 149 (1997).

with the reasons offered for it"[148] were two reasons cited by the *Romer* Court for holding that the amendment lacked a rational basis.[149] With this emphasis on the *breadth* of the Amendment's reach and effect, commentators and lower federal courts were able to argue that the Supreme Court held that "Amendment 2 failed the rational basis test because no legitimate state interest came close to justifying the Amendment's infinitely broad girth."[150]

Scholars have continued to dispute the "meaning and import" of the *Romer v. Evans* decision.[151] There are those who argue that *Romer* stands for the "broader proposition that anti-gay bias cannot be a legitimate motivation for legislation. [T]hat is, legislation cannot be motivated by pure 'animosity.'"[152] Others argue for a more expansive meaning, namely that *Romer* stands as a moral proposition that legislatures are enjoined from relegating a group to "second-class citizenship," a position that has been termed the "anti-caste" or "pariah" principle.[153] However, there are also those who limit the holding in *Romer* to the proposition that it was "the sheer breadth of Amendment 2 that [made] it constitutionally suspect."[154]

As one commentator has noted, "while the sweeping scope of Amendment 2 gave the Supreme Court a relatively easy way to invalidate Amendment 2, it has also provided lower courts with an easy out."[155] By focusing on the "breadth" argument, it was possible to discount the *Romer* Court's emphasis on animus as a per se impermissible basis for a

148. Romer v. Evans, 517 U.S. 620, 632 (1996).

149. Duncan, *supra* note 94, at 151.

150. *Id.* at 150.

151. Hunter, *supra* note 53, at 891.

152. Kevin H. Lewis, Note, *Equal Protection after* Romer v. Evans*: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175, 190–91 (1997).

153. *Id.* at 192 (citing Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257 (1996)).

154. *See* Duncan, supra note 94, at 151 n.24 ("Rick Hills, one of the attorneys who represented the respondents in *Romer*, agrees that it was "the sheer breadth of Amendment 2 that [made] it constitutionally suspect.") (quoting Roderick M. Hills, Jr., *Is Amendment 2 Really A Bill of Attainder? Some Questions About Professor Amar's Analysis of* Romer, 95 MICH. L. REV. 236, 238 (1996)).

155. Robert D. Dodson, *Homosexual Discrimination and Gender: Was* Romer v. Evans *Really a Victory for Gay Rights?*, 35 CAL. W. L. REV. 271, 292 (1991).

legislative classification under the Equal Protection clause.[156] Courts such as the Sixth Circuit have since used this interpretation to "continu[e] to validate laws which discriminate against gays, lesbians, and bisexuals even after *Romer v. Evans*."[157]

By emphasizing the Supreme Court's focus on the breadth of the amendment at issue in *Romer*, it was possible to successfully argue that more narrowly circumscribed legislation would pass constitutional muster after *Romer*. This is exactly what happened in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, a case in which the Supreme Court granted certiorari and then remanded to the Sixth Circuit following the Supreme Court's decision in *Romer*.[158] At issue in *Equality Foundation* was an amendment to the City of Cincinnati's charter the effect of which was much the same as Amendment 2; in effect, it "denied gays, lesbians, and bisexuals the political victories they had already achieved and likely prevented them from achieving future legislation."[159]

However, the Sixth Circuit held that because the Cincinnati amendment did not go as far as Amendment 2, it "fell outside the scope of the Court's decision in *Romer v. Evans*."[160] The scope of the Cincinnati amendment was less sweeping than that of Colorado's Amendment 2 because the Cincinnati amendment would only "repeal existing legislation and prevent future legislation favoring homosexuals"[161] in Cincinnati, rather than deny homosexuals general protection of all state-level laws.[162] Moreover, the Sixth Circuit characterized the *Romer* analysis as "extra-conventional," and because the Cincinnati amendment did not "undertake the monumental political task of procuring an amendment to the Ohio Constitution" the case was beyond the scope of *Romer*.[163] As some

156. *See generally* Duncan, *supra* note 94.

157. Dodson, *supra* note 155, at 292.

158. Matthew P. Allen, Note, *Hairsplitting in the Sixth Circuit:* Equality Foundation v. City of Cincinnati *After* Romer v. Evans, 46 WAYNE L. REV. 391, 409 (2000).

159. Dodson, *supra* note 155, at 292 (citing Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 296 (6th Cir. 1997)).

160. *Id.* (citing *Equal. Found. of Greater Cincinnati*, 128 F.3d at 297).

161. *Id.* at 291 (citing *Equal. Found. of Greater Cincinnati*, 128 F.3d at 296–96).

162. Dodson, *supra* note 155, at 291–92.

163. Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 297 (6th Cir. 1997).

commentators note, in essence, the Sixth Circuit "narrowed its focus to the analysis in *Romer* of the sweeping scope of Amendment 2."[164]

According to the Sixth Circuit, the Cincinnati Charter Amendment did not have the same "sweeping and conscience-shocking effect" as Amendment 2 in *Romer*.[165] First, the court distinguished the Cincinnati amendment on the basis of its geographic application and its place within the hierarchy of state governance. Unlike Amendment 2, which applied across the state and to all state laws, the Cincinnati amendment "applied only at the lowest (municipal) level of government and thus could not dispossess gay Cincinnatians of any rights derived from any higher level of state law and enforced by a superior apparatus of state government . . . ."[166] Second, the court compared the language used with Amendment 2 and found that the language of the Cincinnati amendment was crafted in more "narrow, restrictive language."[167] Where the constitutional amendment in *Romer* had denied homosexuals any claim to "minority status, quota preferences, protected status or claim of discrimination[,]"[168] the Cincinnati amendment merely denied homosexuals "any claim of minority or protected status, quota preference or other preferential treatment."[169] As the Sixth Circuit read it, the Cincinnati amendment "could not be construed to deprive homosexuals of all legal protections even under municipal law, but instead eliminated only 'special class status' and 'preferential treatment' for gays as gays under Cincinnati ordinances and policies . . . ."[170] This restriction was assumed to leave to homosexuals all general rights they had previously been accorded as municipal citizens.[171] Ultimately, it was the focus on the scope of both geographic reach and effect of the Cincinnati amendment that allowed the Sixth Circuit to distinguish it from the constitutional amendment in *Romer* and hold that it withstands rational basis scrutiny.[172]

164. Dodson, *supra* note 155, at 292.
165. *Equal. Found. of Greater Cincinnati*, 128 F.3d at 296.
166. *Id.* at 296–97.
167. *Id.* at 297.
168. *Id.* at 296 (quoting Romer v. Evans, 517 U.S. 620, 623 (1996)).
169. *Id.*
170. *Id.*
171. *Id.* ("[L]eaving untouched the application to gay citizen of any and all legal rights generally accorded by the municipal government to all persons as persons").
172. Dodson, *supra* note 155, at 292.

The Sixth Circuit analysis however, is not anomalous, as many federal courts have construed *Romer* narrowly.[173] Because of the atypical nature of Amendment 2 in *Romer*, courts have found it easily distinguishable and continue to validate laws which discriminate on the basis of sexual orientation.[174]

Thus, what is unusual and noteworthy in *Collins* is that the district court invalidated a statute in part because the reach of the contested statute was so narrow that it could not possibly be rationally related to a legitimate state interest in cost savings. This approach appears to circumvent the limit of the *Romer* analysis, which up until *Collins* allowed parties defending discriminatory laws to argue that a classification survives rational basis scrutiny so long as it is narrower than the Colorado constitutional amendment in *Romer*.

5. *Collins* on Appeal: *Diaz v. Brewer*

In September 2011, the Ninth Circuit Court of Appeals affirmed the *Collins* opinion in *Diaz v. Brewer*.[175] The Ninth Circuit agreed with the finding of the district court, that the "principle justification for the statute" of "cost savings" was unsupported by the evidence presented.[176] Thus, this court also agreed with the district court that even under the deferential standards of rational basis, the statute could not survive such review: simply put, the statute did not rationally relate to the furtherance of its stated interest.[177] Additionally, the only justification for the statute appeared to arise out of a "bare desire to harm a politically unpopular group," a desire that cannot be a legitimate state interest.[178] In sum, the *Diaz* court seems to have had no problem accepting the reasoning and outcome prescribed by the *Collins* court, even the analyses which this Note has identified as unusual. Essentially, this higher court seems to have provided no additional guidance in handling rational basis review beyond the findings of the district court.

173. *Id.*
174. *Id.* at 292.
175. *See generally* Diaz v. Brewer, 656 F.3d 1008 (9th Cir. 2011).
176. *Id.* at 1013.
177. *Id.* at 1014–15.
178. *Id.*

C. *GILL V. OFFICE OF PERSONNEL MANAGEMENT*

1. Facts and Procedural History

Section 3 of the Federal Defense of Marriage Act ("DOMA") defines the terms "marriage" and "spouse" for the purposes of federal law: "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife."[179] The definition has far-ranging application; according to a 2004 Government Accountability Office study, "1138 federal laws tied benefits, protections, rights, or responsibilities to marital status."[180] The plaintiffs in this case were married same-sex couples who applied for and were denied federal benefits by agencies that sought refuge under the auspices of DOMA.[181] These benefits included certain health benefits based on federal employment, social security benefits, and social security survivor benefits, and "married filing jointly" status under the Internal Revenue Code.[182]

In *Gill v. Office of Personnel Management*, the District Court for the District of Massachusetts, on a motion for summary judgment, concluded that only irrational prejudice was motivating the classification enacted by DOMA.[183] With only animus to explain its enactment, the *Gill* court held that "Section 3 of DOMA as applied to Plaintiffs violates the equal protection principles embodied in the Fifth Amendment to the Constitution."[184]

2. District Court's Analysis

In its analysis, the *Gill* court addressed both the original congressional justifications, which had been disavowed by the current government defendants, as well as the newly asserted government justifications in order to hold that "there exists no fairly conceivable set of facts that could ground a rational relationship between DOMA and a legitimate government objective."[185]

179. Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 377 (D.Mass. 2010).
180. *Id.* at 379.
181. *Id.*
182. *See id*. at 379–83 (describing federal benefits).
183. *Id.* at 396.
184. *Id.* at 397.
185. *Id.* at 387 (quoting Medeiros v. Vincent, 431 F.3d 25, 29 (1st Cir. 2005)).

a. Congressional Justifications

Although the defendants had chosen to disavow Congress's previously asserted interests supporting DOMA, the *Gill* court chose to address those rationales in its analysis. The interests asserted previously by Congress were: "(1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality, and (4) preserving scarce resources."[186] I will focus on "defending and nurturing the institution of traditional heterosexual marriage."

The *Gill* court held that the "interest in defending and nurturing the institution of traditional heterosexual marriage is not 'grounded in sufficient factual context [for this court] to ascertain some relation'" between it and the classification created by DOMA.[187] The factual context of DOMA is that it affects same-sex couples who are already married under state law. It was quite plain to the court that DOMA's impact on currently married same-sex couples could not possibly be to encourage them to marry members of the opposite sex. Furthermore, DOMA advanced nothing in the cause of "defending" heterosexual marriage; the denial of federal marriage benefits to same-sex couples in no way makes "heterosexual marriages more secure," because heterosexual couples remain eligible for marriage benefits whether or not same-sex couples are equally eligible. [188] Finally, if the purpose of DOMA was to "nurture" heterosexual marriage by making it "more attractive, valuable, or desirable" relative to same-sex marriage, it was achieved "*only* by punishing same-sex couples who exercise their rights under state law."[189] Crafting legislation—in this case, DOMA—to punish same-sex couples is an unconstitutional legislative enactment specifically designed to harm a "politically unpopular group."[190]

Additionally, the *Gill* court addressed and rejected the asserted Congressional "interest in the preservation of scarce government

186. *Id.*

187. *Id.* at 389 (quoting Romer v. Evans, 517 U.S. 620, 632–33 (1996)).

188. *Id.* (accord *In re* Brad Levenson, 560 F.3d 1145, 1150 (9th Cir. Jud. Council 2009) (Reinhardt, J.)).

189. *Id.* (accord *In re Brad Levenson*, 560 F.3d at 1150).

190. *Id.* (quoting U.S. Dep't of Agric. v. Moreno, 413, U.S. 528, 534 (1973)).

resources."[191] Despite recognizing that the "preservation of scarce government resources" is a legitimate government interest, the *Gill* court was unable to find any reason for why Congress had chosen to save money specifically at the expense of married same-sex couples other than for the aforementioned desire to harm.[192] Basing the decision to save money at the expense of married same-sex couples for no reason other than to express "disapprobation of same-sex marriage"[193] made illegitimate the interest in preserving scarce resources as a basis on which to classify the plaintiffs. [194]

Finally, in a footnote, the *Gill* court went so far as to describe Congress as paying "lip service to the preservation of resources as a rationale for DOMA."[195] The court considered stating such an interest to be disingenuous by noting that those "considerations did not actually motivate the law."[196] It cited to the Congressional Record to show fiscal concerns could not have been a motivation for DOMA because "the House rejected a proposed amendment to DOMA that would have required a budgetary analysis of DOMA's impact, and in 2004 the Congressional Budget Office concluded that federal recognition of same-sex marriages by all fifty states would actually result in a net *increase* in federal revenue."[197]

b. Current Government Justifications

The government, having disavowed the Congressional justifications for DOMA, offered two new objectives to justify DOMA once it came under legal challenge. These objectives were: "(1) to ensure consistency in the distribution of federal marriage-based benefits" by preserving the "status quo" until the "contentious debate taking place in the states over whether to sanction same-sex marriage" was resolved, and (2) creating a

191. *Id.* at 390.
192. *Id.*
193. *Id.*
194. *Id.* (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985)).
195. *Id.* at 390 n.116.
196. *Id.*
197. *Id.* at 390 n.116 ("In fact, the House rejected a proposed amendment to DOMA that would have required a budgetary analysis prior to passage."). *See also* Letter from Douglas Holtz-Eakin, Dir., U.S. Cong. Budget Office, to Steve Cabot, Chairman Subcommittee on the Constitution (June 21, 2004), available at http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5559/06-21-samesexmarriage.pdf.

constitutionally valid "incremental response to a new social problem"[198] resulting from a "changing socio-political landscape."[199] I will focus on the *Gill* court's analysis of the proffered objective of enacting DOMA as a "means" to preserve the "status quo" in order to "ensure consistency in the distribution of federal marriage-based benefits."

The government expressed an interest in maintaining the "status quo" as it existed in 1996, when DOMA was enacted.[200] However, according to the court, "the status quo *at the federal level* in 1996 was to recognize, for federal purposes, any marriage declared valid according to state law."[201] At the time of DOMA's enactment, no state permitted same-sex marriage. What DOMA actually did was to enshrine in federal law the marriage laws in the fifty states at the time of its enactment, and in doing so it abandoned the previous federal status quo, which was to accept all variations in the marriage laws of the states.[202] It is also unclear whether asserting maintenance of the status quo is a legitimate government interest.[203] The maintenance of the status quo is the means to an end, but to support a legislative classification there must be a legitimate end that stands independent of the means.[204]

The *Gill* court then reviewed the "end" to which DOMA was intended to be a "means": the elimination of "state-to-state inconsistencies in the distribution of federal marriage-based benefits."[205] However, the court found DOMA does not create nationwide consistency in this regard.[206] Instead, DOMA creates inconsistency at the federal level by providing federal marriage benefits to some but not all couples who are validly married under state law.[207] Therefore, the classification effected by DOMA does not bear any rational relationship to the government's stated interest in consistency.[208] Furthermore, DOMA does not create consistency among the

198. Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 390 (D.Mass. 2010).
199. *Id.*
200. *Id.* at 393.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* at 394.
206. *Id.*
207. *Id.*
208. *Id.*

varied eligibility requirements for heterosexual marriages between the states.[209]

3. Holding

The *Gill* court announced that it found the "government's proffered rationales, past and current, are without 'footing in the realities of the subject addressed by [DOMA].'"[210] Without a plausible rationale on which to base the law, the court "may infer that animus is the only explicable basis."[211] The *Gill* court could not conjure up any rational relationship between a classification based on the sexual orientation of the married couple and the distribution of federal benefits. Moreover, the court had no "reason to believe that the disadvantaged class is different, in *relevant* respects"[212] from the similarly situated class of heterosexual married couples. Accordingly, it was permissible for the court to conclude, as it did, that irrational prejudice was the only motivation for the classification enacted in DOMA.[213] With only animus to explain the rationale for its enactment, the *Gill* court held that "Section 3 of DOMA as applied to Plaintiffs violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution."[214]

4. Unusual Analysis Employed By the *Gill* Court

The *Gill* court refused to accept "preservation of scarce government resources" as a legitimate government interest for DOMA.[215] First, the court addressed all of Congress's four asserted interests at the time of enactment.[216] Then, after dismissing those interests, the court found that what remained was the possibility that Congress "sought to deny recognition to same-sex marriages in order to make heterosexual marriage

209. *Id.* at 395.

210. *Id.* at 397 (quoting Heller v. Doe, 509 U.S. 312, 321 (1993)).

211. *Id.* at 396 (quoting Lofton v. Sec'y of the Dep't of Children & Family Servs., 377 F.3d 1275, 1280 (11th Cir. 2004) (Birch, J., concurring in the denial of rehearing en banc) (interpreting the mandate of Romer v. Evans, 517 U.S. 620 (1996))).

212. *Id.* at 397 (interpreting the mandate of City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985) (quoting *Lofton*, 377 F.3d at 1280)) (emphasis added).

213. *Id.*

214. *Id.*

215. *Id.* at 390.

216. *Id. at* 388–89.

appear more valuable or desirable."[217] With all of the other asserted rationales reduced to the forbidden "desire to harm a politically unpopular group," the court was similarly unable to "discern [a] principled reason to cut government expenditures at the particular expense of Plaintiffs," other than a legislative desire to harm the plaintiffs.[218]

What is interesting is that while the court recognized "conserving the public fisc can be a legitimate government interest," no such fiscal considerations influenced the law, and this was evident during the process of drafting DOMA, as discussed above, because the House chose not to require analysis of DOMA's impact on the budget.[219] Footnote 116 of the *Gill* opinion suggests that although the preservation of scarce government resources is a legitimate government interest, where no other asserted interest can withstand judicial scrutiny, this interest cannot stand alone if the government has actively removed the budgetary impact from its consideration.[220]

Under the iteration of rational basis review employed by the *Gill* court, a stronger showing is required to establish that the legitimate interest for a classification that inflicts a disadvantage on a group historically disfavored by the government is to preserve scarce government resources, especially after every other rationale offered is whittled down to animus. This application of the rational basis standard is similar to one of "willful blindness,"[221] a common law doctrine used most often in the criminal context that "states that a judge can attribute constructive knowledge of a fact to a defendant, if the defendant almost knew and suspected the fact but chose not to obtain final confirmation."[222] The court in *Gill* viewed Congress's rejection of a budgetary analysis as evidence of the "willful blindness" of Congress. This "deliberate ignorance"[223] convinced the *Gill*

217. *Id.* at 389.

218. *Id.* at 390.

219. *Id.* at 390 n.116 (citing 142 Cong. Rec. H7503-05 (daily ed. July 12, 1996)).

220. *See id.* at 390 n.116.

221. *See* Sverker K. Hogberg, Note, *The Search for Intent-Based Doctrines of Secondary Liability in Copyright Law*, 106 COLUM. L. REV. 909, 958 n.171 (2006) (discussing the origination of the doctrine of willful blindness).

222. Adam L. Alter et. al., *Morality Influences How People Apply the Ignorance of the Law Defense*, 41 LAW & SOC'Y REV. 819 (2007).

223. Hogberg, supra note 221, at 958 n.174 (2006) (quoting Barbara Kolsun & Jonathan Bayer, *Indirect Infringement and Counterfeiting: Remedies Available Against*

court that financial considerations did not actually motivate the law, but instead were used simply to shield the "bare congressional desire to harm"[224] a disadvantaged group.

The *Gill* court applied a similar standard when addressing the current governmental justification for DOMA—the interest in "preserv[ing] the 'status quo,' pending the resolution of a socially contentious debate taking place in the states over whether to sanction same-sex marriage" in order to "ensure consistency in the distribution of federal marriage-based benefits."[225] The *Gill* court found no rational relationship between the classification drawn by DOMA and the interest in maintaining consistency particularly because DOMA does not create "nationwide consistency in the distribution of federal benefits among married couples."[226] At the time DOMA was enacted, eligibility criteria for heterosexual marriage varied by state.[227] Therefore, the court appears to argue that at the time DOMA was enacted, Congress could not have thought rationally that it would have the effect of creating consistency in the distribution of federal marriage-based benefits, unless it willfully ignored the state of marriage requirements in the fifty states. Furthermore, Congress could not have thought rationally that DOMA would have created even more consistency in the distribution of federal marriage-based benefits because at the time that it was enacted, no state allowed same-sex marriage.

Gill is currently up on appeal at the First Circuit Court of Appeals, with a decision forthcoming.[228] There is speculation that the losing side will appeal to the Supreme Court,[229] which could potentially provide the guidance for lower federal courts that this Note has identified is currently lacking.

Those Who Knowingly Rent to Counterfeiters, 16 CARDOZO ARTS & ENT. L.J. 383, 389 n.40 (1998)).

224. Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 389 (D.Mass. 2010).

225. *Id.* at 390.

226. *Id.* at 394

227. *Id.* ("[E]ligibility requirements for heterosexual marriage vary by state, but the federal government nonetheless recognizes any heterosexual marriage, which a couple has validly entered pursuant to the laws of the state that issued the license.").

228. David G. Savage, *U.S. Appeals Court Weighs Defense of Marriage Act*, L.A. TIMES, Apr. 5, 2012, at A7.

229. *Gill*, 699 F. Supp. 2d at 389.

IV. ARE THESE ANALYSES WITHIN THE BOUNDARIES OF THE RATIONAL BASIS STANDARD? SHOULD THEY BE?

There are three unusual steps that the district courts seem to have taken in these cases. First, *Collins* flipped the *Romer* rationale to invalidate a statute that was particularly narrow in its effect. Second, *Perry* rejected the rationale that the preservation of tradition can provide a rational basis for a legislative classification. Finally, *Gill* refused to countenance an asserted interest in cost savings as legitimate where the government actively refused an opportunity to study the cost effects of the law and it was later revealed no cost savings resulted. The court in *Gill* also refused to accept that Congress enacted DOMA in the interest of maintaining the status quo for the purpose of maintaining "consistency in the distribution of federal marriage benefits,"[230] because no consistency existed prior to the enactment of DOMA and the statute did not create such consistency.

A. TRADITION AS AN ILLEGITIMATE GOVERNMENT INTEREST

1. Is This Reconcilable with the Current Rational Basis Standard?

The *Perry* court's analysis arguably is not reconcilable with the current rational basis standard. There are persuasive arguments to be made that tradition itself is inherently worth preserving, and would thus be a legitimate government interest.[231] Moreover, the court's statement that "tradition alone . . . cannot form a rational basis for a law" can be considered dicta.[232] Although the court flatly states that tradition cannot be a legitimate government interest by itself, it went on to analyze why the particular tradition asserted could not be a legitimate government interest.[233] By taking it that step farther, the *Perry* court deviated from the more customary rational basis review. In rational basis review the ultimate question is whether the legislative classification is rationally related to a *legitimate* government interest.[234] By analyzing the legitimacy of the government interest in preserving the tradition of heterosexual marriage the

230. *Id.* at 390.

231. *See supra* notes 94–96 and accompanying text.

232. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 998 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, No. 10-16696, No. 11-16577, 2012 U.S. App. LEXIS 2328 (9th Cir. Feb. 7, 2012).

233. *Id.*

234. *See supra* Part II and accompanying text.

court weakens its own statement of law that "tradition by itself" is never a legitimate government interest.

2. Should It be Part of the Rational Basis Standard?

Some argue that allowing the government to assert "preservation of a tradition" as a government interest can be a legitimate rational basis for a legislative classification.[235] A court faced with this asserted interest should analyze what the tradition seeks to preserve in order to determine whether the stated interest is legitimate. However, the court should not dismiss out of hand an asserted government interest in the preservation of tradition. Rational basis requires a court to go only so far as to hypothesize a rational basis for a challenged legislative classification.[236] Thus, a court faced with an assertion of the "preservation of tradition" by itself as a legitimate government interest would be required to hypothesize or analyze what the tradition seeks to preserve and whether the government has a legitimate interest in preserving the stated interest.

B. NARROWNESS OF A LAW'S EFFECT

1. Is This Reconcilable with the Current Rational Basis Standard?

The *Collins* court's analysis is arguably reconcilable with the current rational basis standard, if one accepts, and the Supreme Court has never stated otherwise, that *Romer* applied the ordinary rational basis standard. If, as the Supreme Court held in *Romer*, the breadth of a law can be evidence of animus towards the group of persons the law is designed to affect, by its extremity disassociating it from the stated purpose of the law, then it also follows that the narrowness of a law can be evidence of animus towards the group of persons the law is designed to affect, again by its extremity disassociating it from the stated purpose of the law. If the law is so far disassociated from its stated purpose it cannot be rationally related to that purpose and thus would fail the rational basis standard of review.

2. Should It be Part of the Rational Basis Standard?

A court should be able to analyze a law based on the breadth of its effect and find animus at both extremes, extremely narrow and extremely broad. This seals the "out" left to courts by *Romer*'s emphasis on the

235. *See supra* notes 94–96.
236. *See supra* Part II and accompanying text.

unprecedented breadth of Amendment 2 as an indicator of animus and a factor that divorced the amendment from its stated purpose. Instead of *Romer* standing at the very border of the permissible scope of laws that classify on the basis of sexual orientation, *Collins* creates a continuum along which classifications on the basis of sexual orientation should lie. A law too narrowly tailored to effectuate the asserted legislative interest suggests animus. Likewise, a law too broadly tailored when it can be narrowed to still effectuate the same legislative interest suggests animus as well. This continuum provides more guidance to courts analyzing challenges to laws under the rational basis scrutiny. Further, such analyses would also coincide with the principle in *Garrett* that only laws solely motivated by animus are impermissible.[237] Thus, where a court finds or hypothesizes other rationales or legitimate government interests that are served by the challenged law, no equal protection violation will be found.

C. WILLFUL IGNORANCE AS AN INDICATION OF ANIMUS

1. Is This Reconcilable with the Current Rational Basis Standard?

The *Gill* court's refusal to countenance asserted government interests where it appears that the government willfully ignored facts that were or should have been known when the legislative classification was enacted is reconcilable with the current rational basis standard. Although the preservation of scarce government resources is a legitimate government interest, if no other interest has withstood judicial scrutiny, it cannot stand alone after the government actively removed the resource impact from its considerations before enacting the legislation, and if it is later revealed that the legislation in fact did not preserve scarce government resources.

This has fairly narrow implications. The court first analyzed all of the other asserted interests and found them to be either improper or illegitimate. A rationale of the preservation of cost savings could not have been the motivation behind DOMA because Congress refused to amend it to require a budgetary analysis. Therefore, Congress's "willful blindness" indicates that cost saving was not a motivation or government interest underlying DOMA. Moreover, it fails as a post-hoc rationale because

237. *See* Hunter, *supra* note 53 ("In light of the Court's subsequent decision in *Board of Trustees v. Garrett*, this principle [that a classification cannot be solely "for the purpose of disadvantaging the group burdened by the law"] appears to be limited to findings that hostility was the only or perhaps the dominant purpose of the law.").

"while the Equal Protection Clause does not prohibit post-hoc rationales, they must connect to the classification drawn."[238] Given the Congressional Budget Office report concluding that same-sex marriages being federally recognized would increase the federal reserve,"[239] DOMA's classifications are not connected to an interest in the preservation of scarce resources.

Similarly, regarding the asserted government interested in "preservation of the status quo" for the "purpose of assuring the nationwide consistency in distribution of federal marriage benefits," the court found that facts existed at the time that Congress passed DOMA such that it should have known DOMA would not have that intended effect. Prior to the enactment of DOMA, there was no consistency in the marriage eligibility requirements between the states. Thus, there was no nationwide consistency in the distribution of federal marriage benefits. Further, DOMA has no provisions that would correct the already existing inconsistencies. Combined with the fact that when DOMA was passed, no state allowed same-sex marriage, DOMA could not be seen to have the effect of increasing nationwide consistency in the distribution of federal marriage benefits.

2. Should it be Part of the Rational Basis Standard?

The rational basis standard should include a refusal to countenance the "willful blindness" of the legislature to facts in existence at the time a law was passed, and where subsequently discovered facts disprove post-hoc justifications, courts should not allow them. The Equal Protection clause should not encourage the legislature to turn a blind eye to facts that were in existence or it should have known at the time a law was passed. Again, the rational basis standard allows a court to hypothesize a rational basis for a legislative classification. So only where a court conclusively finds the challenged law to have the exact opposite of its intended effect, and all other rationales have been rejected as either improper or illegitimate, the law should not survive an equal protection challenge.

238. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1002 (N.D. Cal. 2010).

239. Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d. 374, 390 n.116 (D. Mass 2010). *See also* Letter from Douglas Holtz-Eakin, *supra* note 197; M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 DRAKE L. REV. 1081 (2010); *Study: Gay Marriage Good for the Economy*, CBS NEWS, Jan. 27, 2010, available at http://www.cbsnews.com/stories/2008/06/09/national/main4167209.shtml?source=RSSattr=U.S._4167209.

V. CONCLUSION

With the exception of the Ninth Circuit, and potentially the First Circuit, federal district courts around the nation have been left to cope with a standard of rational basis review in Equal Protection jurisprudence defined by seemingly contradictory precedent lacking specific boundaries. In the three cases analyzed in this Note, the federal district court judges all took seemingly non-canonical steps in their analyses of the equal protection challenges regarding legislative classifications based on sexual orientation. While the approaches in *Perry* and *Brewer* were ultimately affirmed by the Ninth Circuit, the method by these courts seem to extend beyond the current boundaries of the rational basis standard, while others have involved an analysis that can still be reconciled with the current rational basis standard. As these cases continue to work their way through the federal appellate process, they will, at the very least, provide the remaining federal districts around the country with some guidance on where the boundaries of the rational basis standard lie. But as it stands, these courts have begun by providing a platform to explore what exactly federal district court judges can and what they should be doing to provide a meaningful standard of review even in cases requiring the more deferential rational basis scrutiny.