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WINDSOR, ANIMUS, AND THE FUTURE OF MARRIAGE EQUALITY

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INTRODUCTION

By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition.¹

Justice Scalia is certain that the reasoning of the majority opinion in *United States v. Windsor*² will govern the outcome of future state-level marriage equality litigation (despite protestations to the contrary by fellow dissenter Chief Justice Roberts³ and the author of the majority

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¹ *United States v. Windsor*, 133 S. Ct. 2675, 2710 (2013) (Scalia, J., dissenting). It is certainly possible that Justice Scalia was being facetious or erecting a straw man with this claim.

² In *Windsor*, plaintiff Edith Windsor alleged that section 3 of the Defense of Marriage Act (DOMA) violated her equal protection rights by failing to recognize her lawful union to her same-sex spouse, Thea Spyer, for the purposes of awarding federal benefits. *Id.* at 2682–83 (majority opinion). Section 3(a) provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, 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 a wife.

Defense of Marriage Act (DOMA) § 3(a), Pub. L. No. 104-199, 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2012)), invalidated by *Windsor*, 133 S. Ct. 2675.

³ See *Windsor*, 133 S. Ct. at 2696–97 (Roberts, C.J., dissenting) (“The Court does not have before it, and . . . does not decide . . . whether the States . . . may continue to utilize the traditional definition of marriage.” (citation omitted)).

opinion, Justice Kennedy⁴). Justice Scalia's certainty is misplaced. It is true that the reasoning in *Windsor* could be deployed in state-level marriage equality challenges,⁵ but—as Justice Scalia himself observed—there is not just one line of reasoning in *Windsor*.⁶ Thus, the impact of *Windsor* on future marriage equality litigation will depend very much on what other courts take the case to stand for.⁷

For example, *Windsor* could be seen as a case primarily about federalism and the states' traditional prerogative to regulate the meaning of marriage.⁸ It could be seen as a case attempting to revive a form of substantive due process based in individual dignity.⁹ Or it could be seen as a case that turns on the doctrine of unconstitutional animus. This Essay will concern itself with this last interpretation—that *Windsor* is a case about animus.¹⁰ But even within the confines of this single issue, there is much to argue over.

Before *Windsor*, there were three unanswered questions about the doctrine of unconstitutional animus: (1) how the Court defined animus; (2) what the Court accepted as evidence of animus; and (3) what the Court understood the relationship between animus and rational basis review to be.¹¹ After *Windsor*, these three questions remain unanswered.

⁴ See *id.* at 2696 (majority opinion) (declining to extend holding to states that have not legalized same-sex marriage).

⁵ In his dissent, Justice Scalia mapped out precisely what this transfer of reasoning would look like. *Id.* at 2709–10 (Scalia, J., dissenting) (transposing majority argument to hypothetical opinion holding state law ban on same-sex marriage unconstitutional).

⁶ Regarding the merits, Justice Scalia found the justifications offered by the majority opinion to be “rootless and shifting.” *Id.* at 2705.

⁷ See, e.g., *DeBoer v. Snyder*, No. 12-cv-10285, 2013 WL 3466719, at *1–*2 (E.D. Mich. July 1, 2013) (denying motion to dismiss in equal protection challenge to state constitutional prohibition of same-sex marriage and noting different ways *Windsor* could be interpreted).

⁸ *Windsor*, 133 S. Ct. at 2689–90 (“By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States.”).

⁹ See *id.* at 2714–15 (Alito, J., dissenting) (arguing majority used substantive due process reasoning in attempt to recognize “new right” to same-sex marriage).

¹⁰ The Court has yet to articulate a unified theory of animus. It can broadly be understood as “a bare . . . desire to harm a politically unpopular group.” *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). Laws based in animus are deemed unconstitutional. See *id.* (“For if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”). And, indeed, while Justice Scalia recognized that the majority opinion in *Windsor* flirted with issues of federalism and substantive due process, it was the majority’s treatment of animus that caused him concern—specifically that the Court’s reasoning regarding animus would be dispositive in all future marriage equality litigation. *Windsor*, 133 S. Ct. at 2709–11 (Scalia, J., dissenting).

¹¹ Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *Fordham L. Rev.* 887, 924 (2012) [hereinafter *Pollvogt, Animus*] (identifying unresolved questions related to doctrine of unconstitutional animus).

Indeed, these precise questions were the subject of heated—and ultimately unresolved—debate between the majority and dissenting opinions in the case.

Thus, with *Windsor*, the Court declared that animus remains a relevant concept in the Court's equal protection jurisprudence and confirmed that proving the presence of animus is a viable strategy for winning a marriage equality challenge. And yet the Court failed to clarify the contours of the concept, leaving advocates, as well as lower federal and state courts, without guidance on how to articulate and apply the doctrine. Depending on how one answers the three questions posed above, it is possible to assemble several models of animus. Combine this with the variation in the structure and history of state law marriage regimes, and it is easy to imagine multiple, disparate outcomes in future marriage equality litigation—quite to the contrary of Justice Scalia's prediction.

To elaborate on this problem, Part I will explain the role of animus in the Court's equal protection jurisprudence, with an emphasis on the persistent uncertainty surrounding the doctrine's precise contours. Part II will identify the manner in which *Windsor* perpetuated rather than alleviated this doctrinal uncertainty. Part III will examine the consequences of applying different models of animus to different types of state-level marriage regimes. The Essay concludes that the future of state-level marriage equality litigation is very much an open question due to the uncertainty surrounding the doctrine of unconstitutional animus.

I. THE ROLE OF UNCONSTITUTIONAL ANIMUS IN THE COURT'S EQUAL PROTECTION JURISPRUDENCE

The defining characteristic of contemporary equal protection jurisprudence is the tiers of scrutiny framework.¹² Under this framework, some cases are subject to minimal judicial scrutiny (rational basis review) while others are subject to more searching judicial scrutiny (heightened scrutiny, which includes strict scrutiny and intermediate scrutiny).¹³ One of the primary critiques of this framework is that it operates as an outcome matrix.¹⁴ That is, the fate of a plaintiff's equal protection claim is determined by the level of scrutiny the Court chooses to apply.

¹² See, e.g., Andrew M. Siegel, Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation, 74 *Fordham L. Rev.* 2339, 2342–43 (2006) (describing prominence of tiers of scrutiny framework).

¹³ See, e.g., Pollvogt, *Animus*, supra note 11, at 895–96 (describing triggers for various levels of scrutiny).

¹⁴ See Mario L. Barnes & Erwin Chemerinsky, The Once and Future Equal Protection Doctrine?, 43 *Conn. L. Rev.* 1059, 1079 (2011) (“These levels of scrutiny allow the Court to justify rulings in favor of the government with little analysis of the competing constitutional interests.”).

Plaintiffs generally win if the Court subjects a law to strict scrutiny; they generally lose if the Court applies rational basis review.

A further critique of the tiers of scrutiny framework is that the only route to victory for equal protection plaintiffs—application of heightened scrutiny by the Court—is no longer accessible. The two paths to heightened scrutiny require a showing that (1) the plaintiff belongs to a suspect or quasi-suspect class¹⁵ or (2) the right implicated by the discriminatory classification is fundamental in nature.¹⁶ For a number of reasons, these options are essentially foreclosed to contemporary equal protection plaintiffs,¹⁷ which means that their claims will be subjected to rational basis review, in turn meaning that they will, in all likelihood, lose.

As traditionally understood, rational basis review has been devastating to equal protection plaintiffs because it is an extremely deferential standard that presumes the constitutionality of legislative enactments and places a heavy burden on the plaintiff to overcome that presumption. Not only is the government absolved of any responsibility to present legislative history or other genuine justifications for the law, but the Court is also free to speculate as to potential justifications and may find the law constitutional so long as the Court can summon through its collective imagination some conceivable legitimate state interest supporting the law.¹⁸

But on occasion, rational basis review appears to be something quite different.¹⁹ In a handful of cases, one sees equal protection plaintiffs

15. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.”); see also *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (“At the outset, appellants contend that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree” (footnotes omitted)).

16. See *Roe v. Wade*, 410 U.S. 113, 155 (1973) (“Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest,’ and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.” (citations omitted)).

17. See *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (“Nor are we inclined to . . . discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in . . . the Constitution.”), overruled on other grounds by *Lawrence v. Texas*, 539 U.S. 558 (2003); Kenji Yoshino, *The New Equal Protection*, 124 *Harv. L. Rev.* 747, 757 (2011) (noting Supreme Court has not accorded heightened scrutiny to any new group since 1977 and arguing “[a]t least with respect to federal equal protection jurisprudence, this canon has closed”).

18. See *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314–15 (1993) (describing plaintiff’s burden under rational basis review to disprove all conceivable justifications for statute, even if those justifications were not actually relied on by legislature).

19. See, e.g., Suzanne B. Goldberg, *Equality Without Tiers*, 77 *S. Cal. L. Rev.* 481, 482 (2004) (noting application of rational basis standard has “waver[ed] between its typical

prevailing under rational basis review, and a slightly different articulation of the standard seems to be at play in each of these instances.²⁰ Gerald Gunther famously referred to this indefinite standard as rational basis with “bite.”²¹ Some lower courts, trying to make sense of this apparent (but unacknowledged) departure from traditional rational basis review, have postulated that a more searching form of rational basis review is appropriate where the rights of unpopular minorities are at stake, following Justice O’Connor’s explanation to this effect in her concurrence in *Lawrence*.²² But the Court itself has never explicitly adopted this explanation for the application of a more searching form of rational basis review.²³

One way of understanding this subset of rational basis review cases is that the Court in each instance identified, either explicitly or implicitly, the presence of unconstitutional animus and invalidated the law on that basis.²⁴ Unconstitutional animus can essentially be understood as an expression of prejudice against a particular social group, but the concept is inherently enigmatic, as the Court itself has yet to present a unified theory of animus. Rather, the Court’s precedent presents a shifting, incomplete portrait.

The first point of uncertainty is precisely how the Court defines animus. On one end of the spectrum lies a very narrow understanding of animus, probably best expressed by Justice Scalia in his dissent to *Romer v. Evans*, where he characterized animus as a “fit of spite.”²⁵ This characterization is not entirely off base when examined in context, because the *Romer* majority similarly characterized animus as “a bare . . .

deference to government decisionmaking and the occasional insistence on meaningful review” (footnote omitted)); 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, 20–22 (1972) (describing difference between traditional rational basis review and newer, strengthened rationality scrutiny).

²⁰ See *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring in the judgment) (“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.”); see also *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 10 (1st Cir. 2012) (“Without relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications.”), cert. denied sub nom. *Dep’t of Health and Human Servs. v. Massachusetts*, 133 S. Ct. 2887 (2013).

²¹ Gunther, *supra* note 19, at 21–22.

²² *Lawrence*, 539 U.S. at 582 (O’Connor, J., concurring in the judgment) (“Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”).

²³ E.g., Pollvogt, *Animus*, *supra* note 11, at 929.

²⁴ See, e.g., *id.* at 924 (recognizing *Lawrence* opinions invalidated law, either implicitly or explicitly, because of animus).

²⁵ *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

desire to harm a politically unpopular group.”²⁶ Under this narrow characterization, animus is essentially reduced to a form of malicious, subjective intent.²⁷

But other decisions of the Court point to a more vigorous understanding of unconstitutional animus. First, a number of cases demonstrate that animus may be related to a variety of mindsets other than hostility or the desire to harm, including fear, stereotype, bias, or a simple desire to exclude.²⁸ Further, such mindsets are better understood as providing evidence of unconstitutional animus rather than constituting animus itself. The quality that makes these laws unconstitutional is that they express, create, and enforce distinctions between social groups, tending to create a caste society of the type that is abhorrent to the core values of the Equal Protection Clause.²⁹ Rather than focusing on the subjective intent behind a given law, this conception of animus focuses on the objective function of state action.³⁰

The second open question is what the Court accepts as evidence of animus. If animus is conceived of as a form of “spite,” then one would expect courts to demand evidence of malicious intent surrounding the enactment of a law. But while the Court will sometimes look to direct evidence of statements of bias, hostility, stereotype, or fear on the part of either governmental or private actors,³¹ at other times the Court infers animus from the structure and function of a law or from the apparent lack of a credible legitimating interest.³² If animus were nothing more

²⁶ Id. at 634 (majority opinion) (alteration in *Romer*) (quoting U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (invalidating amendment to Food Stamp Act aimed at denying benefits to “hippies” and “hippy communes”)) (internal quotation marks omitted).

²⁷ See Pollvogt, *Animus*, supra note 11, at 924–25 (discussing cases characterizing animus as “fit of spite”).

²⁸ E.g., *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (disallowing states from considering private biases and injury possibly inflicted when determining whether to remove child from natural mother); see also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (“The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”); *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (finding no rational justification for imposition of discriminatory burdens based on legal characteristics over which groups such as children of undocumented immigrants have no control).

²⁹ See Pollvogt, *Animus*, supra note 11, at 917–21 (discussing precedents indicating Equal Protection Clause is prohibition against caste legislation).

³⁰ Id. at 925–26 (“[A]nimus is present where the public laws are harnessed to create and enforce distinctions between social groups . . .”).

³¹ Id. at 927; see, e.g., *Cleburne*, 473 U.S. at 448–50 (citing expressed negative attitudes toward cognitively disabled individuals in legislative history as rationale for striking down zoning classification); *Palmore*, 466 U.S. at 431 (overturning family court order explicitly basing custody decision on potential racial prejudices of private actors); *Moreno*, 413 U.S. at 534–35 (striking down classification when legislative history indicated congressional intent was to prevent “hippies” from participating in program).

³² Pollvogt, *Animus*, supra 11, at 927–28 (citing *Cleburne* as “most compelling example”).

than hostility toward an unpopular minority, then one would expect to see the Court demanding evidence that such hostility was the primary, if not the sole, motivation behind a challenged law. But this is not, in fact, what the Court requires.³³

The third unresolved question in the Court's animus jurisprudence is the precise relationship between animus and rational basis review. One view sees animus as just one example of an illegitimate justification for a law—but the law can be saved by the presentation of other legitimate interests. Another view sees animus as a silver bullet: Once the presence of animus is detected, the law is deemed invalid, and no other purportedly legitimate justifications can save it. Finally, the Court has at times indicated that animus is something to be inferred where all other purported justifications fail; that is, animus is inferred from the absence of a rational basis.³⁴ Under this theory, animus is an entirely gratuitous concept. If a law is not justified by a legitimate state interest, then it simply fails rational basis review, and there is no need for a court to make a finding regarding unconstitutional animus. And yet the Court has done precisely this on occasion.³⁵

Given the persistent confusion over what exactly animus is and how it functions, it is surprising that it can function as an operative doctrine at all. But, as the Court's decision in *Windsor* demonstrates, animus is alive and well and is poised to increase in importance in the pantheon of equal protection arguments.

II. WINDSOR ON ANIMUS

As indicated above, there were three unanswered questions about animus prior to the *Windsor* decision, and these questions remain unanswered after *Windsor*, despite the fact that *Windsor* purported to rely on the doctrine of animus. Indeed, the very open questions identified above were points of conflict between the majority and dissenting opinions in the case.

Regarding the question of how to define animus, the Justices explored a number of options. At times, Justice Kennedy described the exclusion of same-sex couples from marriage as a mere artifact of a less enlightened time, which took on a more negative cast only in comparison to evolving notions of justice.³⁶ In so doing, Justice Kennedy

³³ See *Cleburne*, 473 U.S. at 448 (striking down government action based on community fears of and negative attitudes toward individuals with cognitive disabilities rather than hostility).

³⁴ See *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (invalidating “status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests”).

³⁵ *Id.*

³⁶ As Kennedy wrote in *Windsor*, “It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex

characterized animus as something akin to unconscious bias as opposed to malicious intent.

By contrast, Chief Justice Roberts, writing in dissent, characterized animus more severely as a “sinister motive” and “bigotry.”³⁷ And at the furthest end of the spectrum was Justice Scalia’s characterization of animus as the mindset of “unhinged members of a wild-eyed lynch mob.”³⁸ Justices Roberts and Scalia were asserting that animus was properly understood as an extreme, hateful mindset, so that when Justice Kennedy characterized DOMA as being based in animus, he was accusing members of Congress of acting with “hateful hearts.”³⁹

The politics of these different definitions of animus are apparent. If animus is tantamount to “bigotry”⁴⁰ or a “hateful heart,”⁴¹ courts should be loath to accuse the other branches of government—much less the people themselves—of possessing such motives, and animus should be found only on rare occasions. If, on the other hand, animus is a reflection of biases that have historically been widely held, there is room to root out laws based in animus without “tar[ring]” the proponents of the law “with the brush of bigotry.”⁴²

Similarly, there was open conflict between the members of the Court on the question of what should be considered adequate evidence of animus. Relying on the language of his 1996 majority opinion in *Romer*

might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage.” *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013). But as individuals developed new beliefs about the meaning of justice in the context of marriage, this new perspective was reflected on the level of state marriage law regimes: “The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.” *Id.* The notion of animus as unconscious bias was also raised at the oral argument in *Hollingsworth v. Perry*. Transcript of Oral Argument at 13, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144a.pdf (on file with the *Columbia Law Review*) (transcribing petitioner’s skepticism of respondent’s argument that “traditional definition of marriage insofar as . . . it is a gender definition is irrational and can only be explained . . . as a result of anti-gay malice and a bare desire to harm”).

^{37.} *Windsor*, 133 S. Ct. at 2696 (Roberts, C.J., dissenting) (“The majority sees a more sinister motive At least without some more convincing evidence that the Act’s principal purpose was to codify malice, and that it furthered *no* legitimate government interests, I would not tar the political branches with the brush of bigotry.”).

^{38.} *Id.* at 2707–08 (Scalia, J., dissenting) (“I imagine that this is because it is harder to maintain the illusion of the Act’s supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as *they* see them.”).

^{39.} *Id.* at 2707 (characterizing majority opinion as holding “only those with hateful hearts could have voted ‘aye’ on” DOMA).

^{40.} See *supra* note 37 and accompanying text (discussing Chief Justice Roberts’s characterization of animus in *Windsor*).

^{41.} See *supra* note 39 and accompanying text (discussing Justice Scalia’s characterization of animus in *Windsor*).

^{42.} *Windsor*, 133 S. Ct. at 2696 (Roberts, C.J., dissenting).

v. Evans, Justice Kennedy focused on the idea that DOMA enacted discrimination “of an unusual character.”⁴³ Specifically, Justice Kennedy considered DOMA’s deviation from the tradition of state regulation of marriage to represent just such an “unusual” discrimination.⁴⁴ This feature, combined with the fact that DOMA deprived an entire class of persons of substantial rights, as well as the dignity associated with those rights,⁴⁵ constituted “strong evidence of a law having the purpose and effect of disapproval of that class,”⁴⁶ that is, strong evidence of animus. Kennedy thereby placed more emphasis on the improper function of DOMA (deprivation of rights and dignity) than on the direct evidence of improper motive. This evidence was discussed only later.⁴⁷

By contrast, Justice Roberts considered this to be scant evidence of animus, and certainly an insufficient evidentiary basis for hurling accusations of bigotry:

That the Federal Government treated this fundamental question [whether to recognize state-sanctioned same-sex marriages] differently than it treated variations over consanguinity or minimum age is hardly surprising—and hardly enough to support a conclusion that the “principal purpose” of the 342 Representatives and 85 Senators who voted for it, and the President who signed it, was a bare desire to harm. Nor do the snippets of legislative history and the banal title of the Act to which the majority points suffice to make such

⁴³ Id. at 2692 (majority opinion) (“[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.” (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996))).

⁴⁴ Id. at 2691–93 (“Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next.”).

⁴⁵ See id. at 2694–95 (describing myriad federal rights denied to married same-sex couples and their children).

⁴⁶ Id. at 2693.

⁴⁷ See id. (noting House Report proclaimed DOMA expresses “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality” (quoting H.R. Rep. No. 104-664, at 16 (1996))). Justice Kennedy’s focus on the law’s effect versus direct evidence of antigay sentiments may well be an unnecessary homage to *Romer*. In that case, there was abundant direct evidence that Colorado’s Amendment 2 was enacted based on open hostility toward homosexuals. Cf. *Romer*, 517 U.S. at 634 (“[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”). But, for various historical and precedential reasons, the Court could not rely on this direct evidence. See Susannah W. Pollvogt, Forgetting *Romer*, 65 Stan. L. Rev. Online 86, 89 (2013), http://www.stanfordlawreview.org/sites/default/files/online/articles/65_SLRO_86.pdf (on file with the *Columbia Law Review*) (“Because *Bowers* stood for the proposition that naked antigay bias . . . was a permissible basis for a law, the *Romer* Court could not point to the strongest evidence of unconstitutional animus available in that case—the ample direct evidence of antigay bias in Amendment 2 campaign literature.”). But the circumstances of *Romer* have passed, in that there was no need for such timidity in *Windsor*.

a showing. At least without some more convincing evidence that the Act's principal purpose was to codify malice, and that it furthered *no* legitimate government interests, I would not tar the political branches with the brush of bigotry.⁴⁸

Justice Scalia expressed similar sentiments, equating a finding of animus with moral condemnation of one's opponents that should rest on a strong evidentiary foundation: "Laying such a charge against [Congress and the Presidency] should require the most extraordinary evidence, and I would have thought that every attempt would be made to indulge a more anodyne explanation for the statute."⁴⁹

Finally, the Justices expressed different views of the relationship between animus and rational basis review. Justice Kennedy treated the presence of animus more or less as a doctrinal silver bullet. Once animus was detected, its presence discredited any purported justifications for the law such that those justifications did not even merit discussion.⁵⁰ In other words, once a court determines that a law is based in animus, the law necessarily fails rational basis review, and further inquiry into the law's justifications is not merited. Chief Justice Roberts, by contrast, expressed the view that plaintiffs were required to prove not only the presence of animus, but the absence of any other justifications as well.⁵¹ Under this view, animus is but one illegitimate state interest, but the challenged law may be saved by other justifications. For his part, Justice Scalia reiterated the familiar formulation of rational basis review: that under this standard, a "classification 'must be upheld . . . if there is *any* reasonably conceivable state of facts' that could justify it."⁵² Scalia noted that "there are many perfectly valid—indeed, downright boring—justifying rationales for this legislation."⁵³

Furthermore, according to Justice Scalia, the existence of non-animus-based, legitimate rationales itself defeated any assertion that the sole purpose of DOMA was impermissible animus.⁵⁴ That is, if there were some legitimate purpose, this would undermine any assertion that the proponents of the law acted out of a desire to harm. But, even if

⁴⁸ *Windsor*, 133 S. Ct. at 2696 (Roberts, C.J., dissenting) (citation omitted) (quoting *id.* at 2695 (majority opinion)).

⁴⁹ *Id.* at 2707 (Scalia, J., dissenting).

⁵⁰ See *id.* at 2696 (majority opinion) ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.").

⁵¹ *Id.* (Roberts, C.J., dissenting) ("[W]ithout some more convincing evidence that the Act's principal purpose was to codify malice, and that it furthered *no* legitimate government interests, I would not tar the political branches with the brush of bigotry.").

⁵² *Id.* at 2706 (Scalia, J., dissenting) (alteration in *Windsor*) (emphases added) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)); see *id.* ("But the Court certainly does not *apply* anything that resembles that deferential framework.").

⁵³ *Id.* at 2707.

⁵⁴ *Id.* (asserting existence of valid justifications for DOMA "ought to be the end of this case[,] [f]or they give the lie to the Court's conclusion that only those with hateful hearts could have voted 'aye' on this Act").

antihomosexual animus were *one* of the motivations for the law, this in and of itself was insufficient to defeat it: “It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.”⁵⁵ Apparently this principle is more familiar to some than to others. In the context of unconstitutional animus, this principle remains unsettled and contested.

III. DIFFERENT MODELS OF ANIMUS AND THEIR IMPLICATIONS FOR DIFFERENT TYPES OF MARRIAGE REGIMES

In sum, that Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the “personhood and dignity” which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures’ irrational and hateful failure to acknowledge that “personhood and dignity” in the first place.⁵⁶

Dissenting in *Windsor*, Justice Scalia characterized the majority’s understanding of animus as a *per se* rule that excluding same-sex couples from the institution of marriage deprived those couples of dignity and therefore necessarily violated the Equal Protection Clause. According to Scalia, the majority had declared laws based in animus to be unconstitutional, and had further declared that any law depriving same-sex couples of “personhood and dignity” would be deemed to be based in animus. As such, Scalia predicted that the outcome in state-level marriage equality challenges would necessarily be the same as the outcome in *Windsor*.⁵⁷

But this prediction underestimates the variation that exists in the available models of animus and the effect that the choice between these models will have on the outcome of any given case.

For example, one model of animus—the model Justice Scalia fears will be uniformly adopted—sees animus as an unjustified deprivation of liberty. Under this model, animus is defined broadly as an impermissible objective function: It sees evidence of animus in the bare fact that a law deprives a group of important rights available to others, and the presence of animus defeats the challenged law regardless of whether other, purportedly neutral justifications for it are offered. We can refer to this as the “deprivation of dignity” model, and it appears to be a creation of the majority opinion in *Windsor*.⁵⁸

⁵⁵ Id. (quoting *United States v. O’Brien*, 391 U.S. 367, 383 (1968)).

⁵⁶ Id. at 2710 (quoting *id.* at 2696 (majority opinion)).

⁵⁷ Id. at 2709–10.

⁵⁸ Justice Kennedy’s refusal to evaluate the justifications offered for DOMA was a departure even from his approach in *Romer*. While the *Romer* decision ultimately discredited the justifications for Colorado’s Amendment 2, it at least assessed them. *Romer v. Evans*, 517 U.S. 620, 635–36 (1996).

Another model of animus based on the understanding forwarded by Justices Roberts and Scalia sees animus as equivalent to bigotry. This model defines animus as a severe, impermissible subjective mindset; it sees evidence of animus in only the most extreme, explicit statements of hateful prejudice; and yet even in the presence of such animus, such a law would survive rational basis review if other justifications for the law were present. This model was evident in Justice Scalia's dissent in *Romer*,⁵⁹ and was reiterated in the dissents of Justices Roberts⁶⁰ and Scalia⁶¹ in *Windsor*. In homage to the language of Scalia's *Romer* dissent,⁶² we can refer to this as the "fit of spite" model.

A third model sees animus as a simple desire to exclude a social group from certain benefits and protections. Under this model, animus is again defined as an impermissible subjective mindset, but this time of a less severe and more common variety; it takes as evidence of animus explicit statements indicating a desire to exclude a group; and a finding of animus "ratchets up" rational basis review, requiring a tighter fit between means and ends and simultaneously casting doubt on the credibility of government justifications. This was arguably the model employed in the *Cleburne* decision.⁶³ We can refer to it as the "exclusion" model.

A fourth and final model sees animus only where a law functions to take away rights from a group that was previously granted access to those rights. Under this model, animus is defined as an impermissible objective function—but a very narrow and rare one. Clear evidence of animus exists where a law serves to withdraw rights in this manner; by all accounts, the appearance of animus under this level ratchets up rational basis review. This model, most clearly presented by Judge Reinhardt in the Ninth Circuit's decision in *Perry v. Brown*, can be referred to as the "rights withdrawal" model. Judge Reinhardt struck down Proposition 8 on this basis,⁶⁴ and retrofitted *Romer* to fit this model.⁶⁵ It is possible to read a similar theme into *Windsor*, as Justice Kennedy repeatedly emphasized that DOMA deprived affected same-sex couples of a dignity

⁵⁹ Id. at 640–42 (Scalia, J., dissenting).

⁶⁰ *Windsor*, 133 S. Ct. at 2696 (Roberts, C.J., dissenting).

⁶¹ Id. at 2707–09 (Scalia, J., dissenting).

⁶² *Romer*, 517 U.S. at 636.

⁶³ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985).

⁶⁴ Reinhardt noted that California had, for a brief period of time, granted the marriage right to same-sex couples under the auspices of the state constitution, only to take it away via Proposition 8, which amended the constitution to that effect. *Perry v. Brown*, 671 F.3d 1052, 1092–93 (9th Cir. 2012), vacated and remanded sub nom. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

⁶⁵ Id. at 1080. While the *Romer* decision itself did not emphasize the concept of "taking away" a previously granted right, Amendment 2 can be interpreted as operating this way, as it struck antidiscrimination protections that had been established by local governments in Colorado. *Romer*, 517 U.S. at 628–30 (majority opinion).

and status *that had already been conferred on them* by their home state's recognition of their marriage.⁶⁶

TABLE 1: SOME AVAILABLE MODELS OF ANIMUS

Model	Definition	Evidence	Relationship to Rational Basis Review ("RBR")
Animus as "deprivation of dignity"	Animus is a broad type of impermissible objective function.	Animus is present where a law functions to deprive a group of rights and dignity.	Laws based in animus are per se unconstitutional.
Animus as "fit of spite"	Animus is a severe impermissible subjective mindset.	Animus is present where there are explicit statements of bigotry toward the targeted group surrounding the enactment of the law.	Impermissible motive alone cannot defeat a law; the law may survive RBR if other justifications exist.
Animus as "exclusion"	Animus is a moderate impermissible subjective mindset.	Animus is present where there are explicit statements indicating a desire to exclude the targeted group surrounding the enactment of the law.	The presence of animus triggers a heightened version of RBR.
Animus as "rights withdrawal"	Animus is a very narrow type of impermissible objective function.	Animus is present where a law <i>takes away</i> from a group rights that were previously granted to it.	The presence of animus triggers a heightened version of RBR.

⁶⁶ *Windsor*, 133 S. Ct. at 2690 (majority opinion) (emphasizing DOMA's "operation is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect").

It is possible to imagine other models, but these are the most prominent currently in circulation. The consequences of selecting any one of these models becomes apparent when they are considered against the backdrop of the various types of state-level marriage regimes.

As of this writing, fifteen states plus the District of Columbia recognize full marriage equality.⁶⁷ These jurisdictions extend the institution of marriage to opposite-sex and same-sex couples alike. The remaining, nonequality marriage regimes can be divided into three broad categories. Again, for purposes of analysis, it is convenient to assign each a moniker.

First are “pure civil union” jurisdictions. These jurisdictions do not permit same-sex couples to marry, but they have enacted some alternative form of relationship recognition (such as civil unions or domestic partnerships). A significant feature of these jurisdictions is that, while they do not allow same-sex couples to marry, they do not have laws in place that affirmatively forbid recognition of same-sex marriage. Currently, only New Mexico⁶⁸ falls into this category. Vermont previously fell into this category when, in 1999, the Vermont Supreme Court recognized that same-sex couples were entitled to the rights associated with marriage but implored the legislature to enact a parallel civil union structure rather than simply ruling that same-sex couples had to be issued marriage licenses.⁶⁹ In 2009, Vermont passed the Marriage Equality Act, which subsumed all unions of two persons under the framework for marriage.⁷⁰

New Jersey was an earlier adopter of an alternative legal framework recognizing same-sex relationships, beginning with legislatively enacted domestic partnerships in 2004 and followed by civil unions in 2006.⁷¹ In 2012, the legislature passed a measure permitting same-sex marriage,⁷² but this was subsequently vetoed by the governor.⁷³ In 2011, Lambda

⁶⁷ Ned Flaherty, State-Level Marriage Equality, Marriage Equal. USA (Nov. 25, 2013), <http://marriageequality.org/sites/default/files/National%20Map%20%2315%20%2818-Octo-2013%29.pdf> (on file with the *Columbia Law Review*).

⁶⁸ As of this writing, the marriage regime of New Mexico is in flux. E.g., State-by-State Laws, Marriage Equal. USA, <http://marriageequality.org/by-state> (on file with the *Columbia Law Review*) (last updated Nov. 13, 2013) (noting unique situation in New Mexico).

⁶⁹ *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

⁷⁰ See Vt. Stat. Ann. tit. 15, § 8 (2009) (“Marriage is the legally recognized union of two people.”).

⁷¹ Domestic Partnership Act, N.J. Stat. Ann. § 26:8A-1 (West 2004); Civil Union Act, N.J. Stat. Ann. § 37:1-28.

⁷² Marriage Equality and Religious Exemption Act, S.B. 1, 215th Leg., Reg. Sess. (N.J. 2012) available at http://www.njleg.state.nj.us/2012/Bills/S0500/1_I2.HTM (on file with the *Columbia Law Review*).

⁷³ Letter from Chris Christie, Governor, to N.J. Senate on Senate Bill No. 1 (2012), available at http://www.njleg.state.nj.us/2012/Bills/S0500/1_V1.HTM (on file with the *Columbia Law Review*).

Legal filed suit,⁷⁴ alleging that New Jersey civil unions had not succeeded in providing equivalent rights and benefits to same-sex couples, as mandated by the state supreme court's earlier decision in *Lewis v. Harris*.⁷⁵ The claims alleged violations of both the New Jersey and United States Constitutions. The New Jersey Superior Court recently granted the plaintiffs' motion for summary judgment, concluding that the state constitution did not permit the unequal treatment imposed by maintaining the separate institutions of marriage and civil unions.⁷⁶

The second category of marriage regimes includes "mixed defensive civil union" jurisdictions. These jurisdictions extend some form of relationship recognition to same-sex couples but at the same time "defend" the institution of traditional marriage in that they have enacted an exclusively heterosexual definition of marriage and/or have enacted a prohibition against recognizing same-sex marriages. Currently in this category are Colorado, Hawai'i, Illinois, Nevada, Oregon, and Wisconsin.

For example, Hawai'i's legal scheme, challenged in *Jackson v. Abercrombie*,⁷⁷ falls into the category of "mixed defensive" jurisdictions. In another of these jurisdictions—Nevada—the federal district court decided (prior to the Supreme Court's decision in *Windsor*) that its two-track relationship recognition scheme⁷⁸ did not evince animus and did not violate equal protection.⁷⁹ The district court quoted the *Jackson* decision at length and emphasized that, because Nevada had never extended marriage benefits to same-sex couples, there was no rights withdrawal and no basis for finding animus.

Third are the "pure defensive" jurisdictions. These jurisdictions comprise the majority of jurisdictions in the United States. These jurisdictions have (1) affirmatively enacted an explicitly heterosexual definition of marriage (through statute or amendment to the state

⁷⁴ *Garden State Equal. v. Dow*, No. L-1729-11, 2013 WL 5397372, at *24–*26 (N.J. Super. Ct. Law Div. Sept. 27, 2013).

⁷⁵ 908 A.2d 196, 220–21 (N.J. 2006).

⁷⁶ *Garden State Equal.*, 2013 WL 5397372, at *23–*24.

⁷⁷ 884 F. Supp. 2d 1065 (D. Haw. 2012).

⁷⁸ This discriminatory same-sex marriage ban is enshrined both in Nevada's Revised Statutes, Nev. Rev. Stat. Ann. § 122.020(a) (LexisNexis 2010), and in article I, section 21 of the Nevada Constitution, which limits marriage solely to couples composed of "a male and female." Nev. Const. art. I, § 21. "After barring lesbians and gay men from civil marriage, the State created an alternative status that they are allowed to enter that, with only a few exceptions, provides 'the same rights, protections and benefits' and 'the same responsibilities, obligations and duties . . . as are granted to and imposed upon spouses.'" Complaint for Declaratory and Injunctive Relief at 3, *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012) (No. 2:12-cv-00578-RCJ-PAL), 2012 WL 1190622 (alteration in complaint) (quoting Nev. Rev. Stat. Ann. § 122A.200(a)). The amendment to the constitution was achieved through popular vote in 2000 and 2002. At least some of the campaign literature invoked the ideas that same-sex couples posed a threat to Nevada's children and, absent the amendment, homosexuality would be promoted in the schools.

⁷⁹ *Sevcik*, 911 F. Supp. 2d at 1017–20.

constitution, or, in some cases, both); and/or (2) have enacted a “mini-DOMA”⁸⁰—a statement of refusal to recognize same-sex marriages solemnized in other states; and (3) do not have any mechanism for recognizing same-sex relationships.

By way of example, Arkansas is representative of jurisdictions with the most aggressive stances on same-sex relationships. It has statutory and constitutional provisions defining marriage as the union of one man and one woman,⁸¹ a statutory prohibition against recognizing same-sex marriages from other states;⁸² and a constitutional provision prohibiting recognition of same-sex civil unions from other states.⁸³

The outcome of animus-based marriage equality litigation in these different types of jurisdictions will depend on the model of animus the court adopts. Justice Scalia is correct that if a broad “dignity deprivation” model of animus prevails—that is, if lower courts interpret Justice Kennedy’s opinion in *Windsor* as establishing a per se rule—then the issue of marriage equality has effectively been decided.⁸⁴ But there are clear political costs to lower state and federal courts to deciding this issue across the board based on the poorly articulated dignity concerns of *Windsor*.

Further, it bears mentioning that in *Windsor*, as in *Romer*, Justice Kennedy determined the presence of animus in part because the law at issue enacted discrimination of “an unusual character.”⁸⁵ This is all well and good when one is discussing DOMA, which was a bit of an oddball in its broad interference with the states’ traditional prerogative of regulating marriage. Defining marriage is not within the federal government’s normal course of business, and it was unusual for DOMA to go to such lengths to impose a definition of marriage that ultimately conflicted with that of many states. But as Justice Kennedy himself emphasized, defining marriage is squarely within the wheelhouse of the states, thus raising the question: How could state laws enacting a traditional definition of marriage be considered “unusual”?⁸⁶

⁸⁰ For a more in-depth analysis of the states that have adopted “mini-DOMAs” and the implications of those adoptions, see Robert E. Rains, A Minimalist Approach to Same-Sex Divorce: Respecting States That Permit Same-Sex Marriage and States that Refuse to Recognize Them, 2012 Utah L. Rev. 393, 412.

⁸¹ Ark. Const. amend. 83, § 1; Ark. Code Ann. § 9-11-109 (2009).

⁸² Ark. Code Ann. § 9-11-107.

⁸³ Ark. Const. amend. 83, § 2.

⁸⁴ *United States v. Windsor*, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting) (explaining that “view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today’s opinion”).

⁸⁵ *Romer v. Evans*, 517 U.S. 620, 633 (1996).

⁸⁶ *Windsor*, 133 S. Ct. at 2691 (majority opinion) (“The significance of state responsibilities for the definition and regulation of marriage dates to the Nation’s beginning . . .”).

Indeed, the *Jackson* court made precisely this point as well, reasoning that the “discrimination of an unusual character” rule did not apply to Hawai‘i because bans against same-sex marriage were widespread and typical.⁸⁷ Thus, even under the broad “dignity deprivation” model, no particular outcome is guaranteed. Rather, the outcome of state-level, marriage-equality challenges may be different depending on the significance given to Justice Kennedy’s “unusual character” language.

Alternatively, if the views of Justices Roberts and Scalia carry the day in the lower courts, and animus is conceived of more narrowly under the “fit of spite” model, there will be quite a bit of uncertainty indeed. First, under this model, animus would likely only be found in jurisdictions with some defensive features to their marriage regime (for example, laws affirmatively excluding same-sex couples from marriage or declining to recognize same-sex marriages from other states), because it is presumably in the context of adopting these defensive laws that evidence of “spite” would arise. Accordingly, under this scenario, “pure civil union” jurisdictions might be permitted to continue to exclude same-sex couples from marriage due to the absence of a record of antigay hostility.

Further, no one on the Court, in dissent or otherwise, has established a standard for precisely what counts as sufficient evidence of “spite.” What qualities must such statements possess? In what quantity must such statements appear? And, even if a single standard could be discerned, there will inevitably be variation with regard to the scope and content of the legislative record among those jurisdictions that have the most aggressive defensive measures.⁸⁸

Consider the scenario where you have two “pure defensive” jurisdictions, equally hostile to same-sex relationships and with identical marriage laws on the books. In State *A*, the marriage laws were enacted in a cascade of antigay rhetoric, resulting in the laws being struck down as motivated by animus. In State *B*, which benefited from State *A*’s example, the same legal framework was enacted sotto voce. Despite having the same structure, text, and effect, the laws of State *A* would be held unconstitutional while the laws of State *B* might well survive constitutional scrutiny. Under the “fit of spite” model of animus, no particular outcome is assured.

⁸⁷ *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1093 (D. Haw. 2012) (stating “definition of marriage as a union between a man and woman is not without precedent or unusual”).

⁸⁸ Chief Justice Roberts, who expressed the view that the majority opinion in *Windsor* would not dictate the outcome of state-level marriage equality claims, emphasized the role of distinct legislative histories in determining the presence of animus. *Windsor*, 133 S. Ct. at 2697 (Roberts, C.J., dissenting) (“[T]he majority focuses on the legislative history and title of this particular Act . . . ; those statute-specific considerations will, of course, be irrelevant in future cases about different statutes.” (citation omitted)).

A somewhat broader, but still cramped, understanding of animus sees it as a desire to exclude a group, which is evidenced by statements indicating such a desire either in the legislative record or in the campaign literature surrounding a popularly enacted law.⁸⁹ It would seem at first blush that such an approach would capture the types of discrimination with which animus doctrine is concerned. But this understanding of animus, like the “fit of spite” model, continues to perceive animus as an impermissible subjective intent, and raises the same evidentiary questions: What percentage of the legislature or populace would have to hold or express such views for the law to be found unconstitutional? And how exactly would the quantum of impermissible intent be measured and judged? Again, the outcome of an animus-based marriage equality challenge would depend in large part on the content of the legislative record and a court’s resolution of these open questions.

Finally, the “rights withdrawal” model detects the presence of animus only where a law takes away from a group rights that were previously granted. To date, the mechanism of taking away marriage rights after they have been granted is unique to California’s Proposition 8 and, arguably, to DOMA. If courts adopt this model of animus, the result for future marriage equality litigation could be devastating, because the marriage laws of other states are easily distinguished from Proposition 8 and DOMA. Under this model of animus, animus would not be found in any of the different types of jurisdictions described above.

Indeed, at least one court has already made precisely this move. The federal district court for Hawai‘i rejected the animus argument, concluding that the entire animus analysis in the Ninth Circuit’s decision in *Perry* was inapposite because Hawai‘i’s prohibition on same-sex marriage did not function to “take away” existing rights, as Proposition 8 did.⁹⁰ Hawai‘i had never granted marriage rights to same-sex couples, so there was nothing to take away.⁹¹ This factual difference between the challenged laws was sufficient to make the Ninth Circuit’s *Perry* decision and its theory of animus irrelevant. If this becomes the prevailing model of animus, the outcome of future marriage equality litigation will be the opposite of what Justice Scalia predicted.

⁸⁹ See supra note 31 and accompanying text (discussing rationale for striking down government action based on negative community attitudes toward individuals with cognitive disabilities in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985)).

⁹⁰ *Jackson*, 884 F. Supp. 2d at 1088–93.

⁹¹ *Id.* at 1087 (“Hawaii’s civil unions law did not take away any rights from same-sex couples. Rather, it extended rights that they had never previously possessed.”).

But, contrary to the conclusion of the federal district court in *Jackson*,⁹² there is no reason to think that animus is properly understood this narrowly. Indeed, the Supreme Court has detected the presence of unconstitutional animus in a number of cases that did not involve withdrawal of a previously granted right. Most notably, in *Loving v. Virginia*, antimiscegenation laws were the prevailing standard for decades in a number of states.⁹³ But this did not prevent the Court from concluding that such laws were based on “the doctrine of White Supremacy”—a species of animus.⁹⁴

The oral argument in *Hollingsworth v. Perry* raised another possible result of applying this model of animus that is as intriguing as it is counterintuitive.⁹⁵ Consider that a state “takes away” a right previously granted not only when it grants and then withdraws marriage (as California did), but also when it grants substantial marriage-like rights but denies the full title marriage (as pure civil union “mixed defensive” jurisdictions do). Under this understanding, the states that have provided no protection for same-sex couples (“pure defensive” jurisdictions) would not be obligated to extend the marriage right to same-sex couples, while the most generous jurisdictions would be so compelled.

The wildly inconsistent results possible under the different available models of animus point to a doctrine in need of rationalization.

CONCLUSION

Justice Scalia sees *Windsor* as mandating victory for plaintiffs in state-level marriage equality challenges. But to the contrary, *Windsor* could be very bad for state-level marriage equality challenges. As demonstrated above, depending on how *Windsor* is interpreted, the result of future marriage equality litigation could be quite the opposite of what Justice Scalia predicts.

Further, the manner in which *Windsor* is interpreted could have larger consequences for the Court’s equal protection jurisprudence as a whole. Because the Court appears increasingly disinclined to apply heightened scrutiny to new groups, it is more important than ever for equal protection plaintiffs to have winning arguments under rational basis review—including arguments based in the doctrine of unconstitutional animus. But before such claims can be confidently

⁹² See *id.* at 1105 (“The Court has already concluded, however, that Hawaii’s marriage laws are not based on a bare desire to harm homosexuals and thus this case is not controlled by [*Romer*, *Cleburne*, and *Moreno*].”).

⁹³ 388 U.S. 1, 6 (1967) (describing status and history of antimiscegenation laws in fifty states).

⁹⁴ *Id.* at 7.

⁹⁵ See *supra* note 36 (noting petitioner argued tradition definition of marriage was itself reflective of bare desire to harm).

advanced, the Court must first articulate a coherent theory of the concept.

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