

Making It Up: Lessons for Equal Protection Doctrine from the Use and Abuse of Hypothesized Purposes in the Marriage Equality Litigation

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To survive rational basis scrutiny under the Equal Protection Clause, a law must serve a governmental purpose which is at least legitimate. It is well established that legitimate purposes can sometimes be found through speculation and conjecture—that is, they may be hypothesized—in order to avoid the difficulties of identifying actual purpose or the specter of courts second-guessing legislative judgments. But hypothesized purposes can be abused, and such abuse was rampant in the states’ defenses of their bans on same-sex marriage, bans which were ultimately invalidated in Obergefell v. Hodges.¹

This Article draws on the federal marriage litigation as a lens for thinking critically about hypothesized purposes. It suggests several lessons about hypothesized purposes that should guide courts in the future. In particular, I discuss (1) the differences between hypothesized purposes, which are grounded in facts and concerns that were conceivably before a legislature, and post-hoc rationalizations, which I define as pretexts that have been manufactured to satisfy rational basis scrutiny but which could not plausibly have been a legislative purpose; (2) how courts should approach hypothesized purposes when there is evidence that a law was impelled by animus; and (3) why hypothesized purposes are inappropriate and should receive skeptical scrutiny when they are offered in support of measures enacted through direct democracy.

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1. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

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INTRODUCTION

Hypothesized purposes are a familiar feature of Equal Protection Clause doctrine, but their use has never been without criticism,² and

2. For criticisms of the permissibility of hypothesized purposes, see, for example, CLARK M. NEELY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION’S PROMISE OF LIMITED GOVERNMENT 49–63 (2013); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 187 (1980) (Brennan, J., dissenting)

federal courts continue to wrestle with defining the boundaries of their appropriate use. In the ordinary case under rational basis review, a court is supposed to determine whether a classification is “rationally related to a *legitimate governmental purpose*.”³ But the Supreme Court has often said that, rather than attempting to determine the actual purpose for which a law was enacted, a court applying rational basis review may rely on speculation and conjecture about the legislature’s aims. This approach to judicial review under rational basis stems from the principle of judicial deference to legislative decisionmaking and supports the “presumption of constitutionality” that applies to most laws.⁴

The principle that hypothesized purposes are typically acceptable under rational basis review explains why *Williamson v. Lee Optical of Oklahoma, Inc.*, an otherwise mundane case about the manner in which a state regulated opticians,⁵ remains a fixture in constitutional law casebooks. In *Williamson*, a Supreme Court still haunted by criticism of the aggressive judicial interventionism of the *Lochner* era⁶ conjured up speculative legitimate purposes for a legislative classification with no pretense of examining an actual legislative record. “It is enough that there is an evil at hand for correction,” the Court explained, “and that it *might* be thought that the particular legislative measure was a rational way to correct it.”⁷ To this day, the Court continues to state as doctrine that, other than in cases involving a fundamental right or a suspect or quasi-suspect class, a law will be upheld if “there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”⁸

Hypothesized purposes are not inherently illegitimate. Accepting hypothesized purposes prevents courts from engaging in unnecessary examination or second guessing of the legislative process. And oftentimes, a hypothesized purpose may simply represent a court’s best effort to infer the actual purpose of a law from a spotty or nonexistent legislative record. On the other hand, for advocates of what has come to be called “judicial engagement,” the easy acceptance of sometimes far-fetched or implausible hypothesized purposes, going hand-in-hand with the minimalist version of rational basis review that most lower courts believe

(“[T]he actual purposes of Congress, rather than the *post hoc* justifications offered by Government attorneys, must be the primary basis for analysis under the rational-basis test.”).

3. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (emphasis added).

4. *See infra* Part I.A.

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

6. *See id.* at 488 (“The day is gone when this Court uses . . . the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”).

7. *Id.* (emphasis added).

8. *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (quoting *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993)).

they are supposed to apply, too often represents an abdication of courts' responsibility to enforce the Constitution.⁹

Even if it is settled that hypothesized purposes have a proper role to play in rational basis review it is necessary to recognize that they can be abused. Experience demonstrates that the use of hypothesized purposes can go far beyond deference to ordinary lawmaking and become (to paraphrase the late constitutional theorist Charles Black) a ritually sanctioned way to prevent a court, as a court, from permissibly learning what is obvious to everyone else, including the judge.¹⁰ This phenomenon becomes an especially serious problem where there is good reason to believe that the *actual* reasons for a law are based on animus or other constitutionally improper purposes.

This Article explores the use and abuse of hypothesized purposes, utilizing the recently concluded federal marriage equality litigation as its lens. The proper role of hypothesized purposes in equal protection analysis is a subject that has escaped adequate recent attention by commentators¹¹ or serious examination by the Court. This Article seeks to demonstrate why, in the wake of the marriage litigation, the question deserves a place at the center of our thinking about constitutional equal protection.

The marriage litigation, which culminated when the Supreme Court struck down the remaining state bans on same-sex marriage in *Obergefell v. Hodges*,¹² provides a rich source of material for considering the role of hypothesized purposes. In the years leading up to *Obergefell*, countless pages of briefing and lower court opinions were devoted to advancing, refuting, and evaluating the states' hypothesized purposes for their marriage bans (which this Article also refers to interchangeably as "mini-DOMAs"), most notably the hypothesis that bans on same-sex marriage were rationally related to the government's interest in promoting "responsible procreation" among heterosexuals.¹³ Indeed, from their

9. See, e.g., NEILY III, *supra* note 2, at 50.

10. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960).

11. For previous scholarly discussion of hypothesized purposes, see, for example, Pamela S. Karlan, *Old Reasons, New Reasons, No Reasons*, 27 GA. ST. U. L. REV. 873 (2011) (describing and critiquing the use of hypothesized purposes in several cases dealing with family, gender roles, and sexuality); Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 22–25 (1992) (describing the general doctrine of hypothesized purposes); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 222, 233–35 (1976) (arguing that post hoc government justification should be permitted given the nature of the lawmaking process); Gerald Gunther, Foreword, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20–21, 44–48 (1972) (proposing a model for equal protection review that would foreclose judicial hypothesizing of justifications for classifications).

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

13. See *infra* Part II. In brief, "responsible procreation" is the idea that because only opposite-sex sexual relationships have the inherent possibility to produce children, marriage exists primarily to provide a legal structure for such procreation and for the regulation of resulting family relationships. See *infra* notes 84–87.

briefs to the Supreme Court and the overall history of the federal marriage litigation, one could reasonably conclude that the theory of responsible procreation was the primary legal scaffolding on which the state marriage bans rested. The central role that hypothesized purposes played in the marriage litigation—the sheer scale of their use and, arguably, abuse—presents an opportunity to think critically about this undertheorized area of equal protection doctrine.

The majority in *Obergefell* devoted only a few sentences to responsible procreation. The theory flopped in an anticlimactic fashion, summarily dismissed by the Court as “counterintuitive”¹⁴ and “wholly illogical.”¹⁵ But this cursory treatment hardly seemed to do justice to an argument that had played such an outsized role throughout the marriage litigation. One commentator called it “truly shocking” that both the majority and dissenting opinions “barely even allude to the states’ asserted interests and whether they are sufficient to satisfy rational-basis review!”¹⁶

One reason the Court did not give more attention to hypothesized purposes such as responsible procreation may have been because it decided *Obergefell* primarily as a question of the fundamental right to marry under the substantive component of the Due Process Clause,¹⁷ rather than engaging in a traditional equal protection analysis. The Court did not evaluate whether the marriage bans were rationally related to some legitimate government purpose. In taking the fundamental rights approach, the Court avoided the difficult work of attempting to understand why states had banned same-sex marriage and whether those bans served purposes that were constitutionally proper or improper.

The implications of the *Obergefell* Court’s approach go well beyond the now-settled question of marriage equality. Purpose analysis generally under equal protection has long occupied a contested space.¹⁸ What is more, rational basis review is the most common form of equal protection review applied by lower courts day in and day out, and under rational basis review, hypothesized purposes allow government defendants to avoid having courts examine the *real* reasons for why laws were enacted or actions were taken.¹⁹ The acceptability of hypothesized purposes plays a major role in explaining why rational basis review is fatal for most equal protection claims.

14. *Obergefell*, 135 S. Ct. at 2607.

15. *Id.* (quoting *Kitchen v. Herbert*, 755 F.3d 1193, 1223 (10th Cir. 2014)).

16. Marty Lederman, *The Remarkable Disappearance of State Justifications in Obergefell*, BALKINIZATION (July 3, 2015), <https://balkin.blogspot.com/2015/07/the-remarkable-disappearance-of-state.html>.

17. *Obergefell*, 135 S. Ct. at 2598–99.

18. *See infra* Part I.B.

19. *See NEILY III*, *supra* note 2, at 49.

The misuse of hypothesized purposes in the marriage litigation deserves serious attention and provides an opportunity to consider some lessons for the future. For example, the states confused hypothesized purposes, which are supposed to be grounded in the “knowledge and experience of . . . legislators,”²⁰ with post hoc rationalizations that are made up out of whole cloth by government lawyers.²¹ They suggested that hypothesized purposes could rescue laws that were infected by animus; in fact, as I will explain, that idea conflicts with the principles and methodology of the Court’s animus cases.²² States also suggested that hypothesized purposes were appropriate for constitutional amendments enacted under direct democracy—a proposition which, as I will also explain, is both normatively objectionable and doctrinally unsupported.²³

At the outset, let me be clear about what arguments this Article does *not* make. The goal is not to argue against all use of hypothesized purposes. I accept them as a settled feature of equal protection law that the Supreme Court is unlikely to abandon. There will often be a blurry line between hypothesizing a purpose in the absence of facts and inferring a purpose from an incomplete factual record, and so bright-line rules are not practical. Instead, the goal of this Article is to explain why, even accepting the Court’s generally deferential approach to rational basis review, hypothesized purposes *in certain forms or contexts* are undesirable as a matter of policy and unsupported as a matter of doctrine.

This Article proceeds in six parts. Part I discusses the arguments for and against hypothesized purposes and provides a brief overview of purpose analysis under equal protection. Part II describes the states’ use of hypothesized purposes in the marriage litigation, particularly the theory of responsible procreation. Part III suggests that, considering their actual history, context, and effects, the state mini-DOMAs could have been struck down for improper purpose—that is, as the products of a lawmaking process impelled by animus against gays and lesbians and their relationships (based on their history and context) and as official government expressions of animus (based on their effects). This candid appraisal of the laws’ actual purposes puts us in a better position to understand why states chose to defend them by using hypothesized purposes and to assess whether the use of such justifications was appropriate.

Part VI argues that a proper equal protection analysis requires a court to focus not just on the discrimination the plaintiff is alleging, but also on the classification that the government has imposed to cause the discrimination. There is a difference between inherited understandings

20. *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012).

21. *See infra* Part IV.B.

22. *See infra* Part V.

23. *See infra* Part VI.

that have the incidental effect of creating disadvantage for a group (such as the longstanding tradition of heterosexual marriage), and recent enactments that intentionally classify against the interests of that group (such as the express bans against same-sex marriage), but this distinction was lost in *Obergefell*. Failure to focus on the intentional classification makes it easier for the government to invent entire new purposes for laws by resorting to post hoc rationalizations, which are nothing more than pretexts that have been reverse-engineered to satisfy rational basis review. Part V discusses how courts should handle hypothesized purposes when there is evidence that the actual purpose of a classification is improper, and argues that hypothesized purposes cannot be used to rescue a law that has been infected by animus. Part VI argues that while hypothesized purposes may be acceptable in the context of ordinary legislative lawmaking, they should be skeptically examined whenever a court is evaluating a referendum or ballot initiative, especially something more fundamental and unusual like a state constitutional amendment.

I. HYPOTHESIZED PURPOSES AND JUDICIAL REVIEW

A. ARGUMENTS FOR AND AGAINST HYPOTHESIZED PURPOSES

Equal protection addresses classifications of persons by the government. The appropriate role of hypothesized purposes is one facet of a larger and ongoing dialogue about what equal protection's rational basis review is or should be.²⁴ Under rational basis review, a classification "must be rationally related to a legitimate government purpose."²⁵ In other words, the analysis considers two things: (1) the *purpose* of a law (that is, its "legitimacy"), and (2) the *ends/means connection* (the rationality of the relationship) between the purpose and the classification. This Article focuses primarily on the purpose prong of equal protection analysis.

In ordinary lawmaking situations that do not involve a fundamental right, a suspect classification (such as race), or quasi-suspect classification (such as gender), actual legislative purpose rarely has any constitutional

24. See, e.g., Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401 (2016); Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 534 (2014) (arguing that the meaning of rational basis under equal protection doctrine stands at a "transitional moment"); Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships*, 86 WASH. L. REV. 281, 282 (2011) (criticizing rational basis review as unpredictable because the Supreme Court has used both deferential and more aggressive forms, "but does not acknowledge that a conflict exists between them"); Gunther, *supra* note 11, at 20–24 (arguing for a more aggressive form of rational basis review that "would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends," and that "[p]utting consistent new bite into the old equal protection would mean that the Court would be less willing to supply justifying rationales by exercising its imagination.").

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

significance.²⁶ Most laws, if challenged, are subject only to rational basis review, and the Supreme Court has called rational basis review “a paradigm of judicial restraint.”²⁷ As a general rule, the Court has instructed lower courts to give a broad presumption of constitutionality to ordinary lawmaking, and to apply a generous understanding of what makes a classification “rational.”²⁸ “The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process,” the Court has said, “and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.”²⁹

The arguments in favor of hypothesized purposes are grounded in judicial deference. The Court has reasoned that the acceptability of hypothesized purposes under rational basis serves the constitutional separation of powers by preventing courts from engaging in unnecessary inquiries into the legislative process and thus second guessing the judgments of a co-equal branch of government.³⁰ While heightened scrutiny for suspect or quasi-suspect classifications “limits the realm of justification to demonstrable reality,” rational basis “permits a court to hypothesize interests that might support legislative distinctions.”³¹ “It is enough that there is an evil at hand for correction,” the Court explained in *Williamson*, “and that it *might* be thought that the particular legislative measure was a rational way to correct it.”³² “Because we never require a legislature to articulate its reasons for enacting a statute,” the Court elaborated in *F.C.C. v. Beach Communications*,³³ “it is entirely irrelevant for constitutional purposes whether the conceived reason”—that is, the hypothesized purpose—“for the challenged distinction actually motivated the legislature.”³⁴

26. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (“[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”); *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (“The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.”); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“[I]t is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.”).

27. *Beach Commc'ns, Inc.*, 508 U.S. at 314.

28. See *supra* note 26 and cases discussed therein.

29. *Vance*, 440 U.S. at 97.

30. See *supra* note 26 and cases discussed therein.

31. *Nguyen v. I.N.S.*, 533 U.S. 53, 77 (2001) (O'Connor, J., dissenting).

32. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (emphasis added).

33. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993).

34. *Id.*

The arguments against hypothesized purposes arise from the principle that judicial review for constitutionality should be meaningful, even where a law does not affect a fundamental right, a suspect class, or a quasi-suspect class. Resorting to hypothesized purposes, and thus avoiding the search for a law's actual purpose, risks devaluing constitutional protections for forms of discrimination that receive only rational basis review. *All* actions of the political branches are subject to constitutional limitations, and the "presumption of constitutionality" and its accompanying relaxed form of judicial review do not mean that constitutional limitations do not exist outside of fundamental rights or suspect/quasi-suspect classes. They simply mean that the Court chooses to assume that legislative bodies acting through regular legislative processes usually can be trusted not to violate these limitations.

But judicial trust should not mean judicial abdication. As Justice John Paul Stevens observed, where a court can rationalize a justification for a law under virtually any "conceivable set of facts," the review is too often "tantamount to no review at all."³⁵ Professor Erwin Chemerinsky has argued that it is possible to support the deference of rational basis review while standing by the principle that *any* "discrimination or denial of liberty or property should be justified by some legitimate purpose," not a made-up one.³⁶ Another commentator observes that "[t]he Constitution constrains not merely *how* the government acts, but also, and more sig[n]ificantly, *what* the government may seek to do."³⁷ In recent years, libertarian proponents of "judicial engagement," who favor a more meaningful form of rational basis review, have been especially bitter critics of hypothesized purposes, arguing that they devalue the role of facts in litigation and allow open dishonesty by government attorneys. "While such conduct might well be sanctionable in other court proceedings," one such advocate has written, "in rational basis cases it is simply business as usual."³⁸

B. CAN COURTS IDENTIFY A LAW'S ACTUAL "PURPOSE"?

Another argument for accepting hypothesized purposes is that it may be difficult for a Court to identify the actual purpose a law was intended to serve. But where constitutional rights are at stake, even under rational basis review, the simple fact that purpose analysis can be difficult should not be a reason to forego it altogether.

35. *Id.* at 323 n.3 (Stevens, J., concurring); see *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 187 (1980) (Brennan, J., dissenting) ("[T]he actual purposes of Congress, rather than the *post hoc* justifications offered by Government attorneys, must be the primary basis for analysis under the rational-basis test.").

36. Chemerinsky, *supra* note 24, at 413.

37. Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 309 (1997).

38. Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 897, 906 (2005).

At the outset, it is useful to distinguish between the *purpose* of a law and the *motives* of legislators or voters who enact a law. As the term will be used throughout this Article, “purpose” refers to the governmental “object to be attained”;³⁹ it answers the question: “At what end was the law directed?”⁴⁰ Given that a law must, at minimum, serve a “legitimate governmental purpose,”⁴¹ it is a premise of equal protection law that the purpose of a law may be objectively determined in judicial review. After all, all laws are proposed and enacted to address specific problems, or with the expectation that, by legislating in favor of some public value or against some public evil, lawmakers will create conditions that allow members of a polity to realize their collective social goals.

By contrast, the term *motive* refers to the reasons why an individual legislator or citizen voted for a law. Motives are personal and subjective.⁴² The term is properly restricted to those considerations that cause an individual legislator or voter to support or oppose a law. Because they are personal, seeking to use motives in the analysis of whether an enactment violates the Constitution is problematic and disfavored. Difficult as it may be, it is part of the judicial role to seek to untangle personal motives from a law’s instantiation of an official government purpose. For example, one commentator on *Brown v. Board of Education* has observed that while a legislator may have voted in favor of school segregation for motives ranging from beliefs about racial inferiority to fears of miscegenation to concern for preserving white jobs, the segregation laws had a judicially cognizable purpose as a matter of government policy: at the most basic level, “to assure racial separation,” and at a “more sophisticated level, . . . to isolate Negroes in order to preserve for whites superior status while simultaneously maintaining for Negroes a position of inferior status”⁴³

Purpose and motive are frequently confused, and courts and commentators are often not scrupulous about distinguishing between them.⁴⁴ The Supreme Court has sometimes observed that purpose analysis can be difficult;⁴⁵ the search for purpose can be “elusive.”⁴⁶ Some commentators express doubt about judges’ ability to determine a law’s

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

40. Farrell, *supra* note 11, at 8.

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

42. Farrell, *supra* note 11, at 5 (“The term ‘motive’ is saved for the subjective motivations of individual legislators.”).

43. Ira Michael Heyman, *The Chief Justice, Racial Segregation, and the Friendly Critics*, 49 CALIF. L. REV. 104, 115–16 (1961).

44. Farrell, *supra* note 11, at 8–9 (“[W]orthwhile distinctions [between legislative purpose and legislative motive] are lost mainly due to the courts’ use of the terms interchangeably.”).

45. *E.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the ‘dominant’ or ‘primary’ one.”).

46. *McGinnis v. Royster*, 410 U.S. 263, 276 (1973).

actual purpose,⁴⁷ while others have found a distinction between motive and purpose unworkable.⁴⁸ Determining a law's purpose may be especially difficult where little or no legislative history exists, or where a measure is a last-minute addition to an unrelated enactment.

Notwithstanding these problems, though, the Court has never said purpose analysis is impossible. Indeed, if it were impossible, there could, by definition, be no equal protection analysis, because there would be no government interest or public value against which to measure the classification so that a court could evaluate the rationality of the relationship between the two. A court's ability to understand a law's purpose—or at least its ability to ferret out *improper* purpose—is necessary if equal protection review is to have any meaning.⁴⁹ Unlike individual motives, the purpose of a law is a matter of public concern, and thus a proper subject for judicial review. Even Justice Antonin Scalia, who was noted for his criticisms of the indeterminacy of the use of things like legislative floor speeches in attempting to understand why a legislature had passed a law,⁵⁰ acknowledged the distinction between motive and purpose: Although “discerning the subjective motivation of those enacting [a] statute is . . . almost always an impossible task[.]” he observed, “it *is* possible to discern the objective ‘purpose’ of a statute (*i.e.*, the public good at which its provisions appear to be directed)[.]”⁵¹ And as Erwin Chemerinsky has noted, courts are expected to focus on actual purpose when they apply intermediate or strict scrutiny.⁵²

47. *E.g.*, David A. Strauss, Response Essay, *The Name Game*, CATO UNBOUND (Sept. 14, 2016), <https://www.cato-unbound.org/2016/09/14/david-strauss/name-game> (“[J]udges might . . . misapprehend ‘the government’s true ends. They might be mistaken about what rights the Constitution actually protects[.]’” or “[t]hey might be wrong about what the constitutionally proper objectives of government are.”).

48. *E.g.*, John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1217–21 (1970).

49. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 632 (1996) (“[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause[.]”); *Schweiker v. Wilson*, 450 U.S. 221, 244 n.6 (1981) (Powell, J., dissenting) (“Ascertainment of actual purpose to the extent feasible, however, remains an essential step in equal protection.”); Farrell, *supra* note 11, at 21 (“Although the difficulties with the idea of legislative purpose are substantial, it is clear that it is relevant to constitutional adjudication.”).

50. *See, e.g.*, Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 217–20 (discussing Justice Scalia’s criticisms of legislative history).

51. *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) (emphasis added).

52. Chemerinsky, *supra* note 24, at 410.

[T]he difficulty of knowing actual purpose or the fact that the same law could be both constitutional and unconstitutional depending on the articulated purpose might be a reason *never* to inquire into actual purpose; they are not reasons why rational basis review alone does not merit an inquiry into the actual purpose of the law.⁵³

In fact, despite its difficulty, for better or worse courts routinely engage in a large amount of purpose analysis. In a wide-ranging historical analysis of the history of judicial review of legislative purpose, Caleb Nelson documents that, especially since the 1970s, analysis of purpose has become a routine and accepted feature of constitutional law, and “judicial inquiries into legislators’ true goals are now . . . widely accepted.”⁵⁴ Thus, “[i]n modern practice, one of the main reasons to hold a statute invalid ‘on its face’ is that the statute was enacted for an unconstitutional purpose, which taints all of its possible applications.”⁵⁵ Purpose analysis is not only relevant to Fourteenth Amendment law. Writing in 1996, then-Professor Elena Kagan similarly argued that “First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives.”⁵⁶

C. IMPROPER PURPOSES

Given the general principle of deference to legislators, under rational basis review the primary objective of purpose analysis is to detect *improper* purpose. In rational basis review, “improper purpose” most often is synonymous with *animus*. It refers to a law which “appears to rest on an irrational prejudice against” the group it affects,⁵⁷ manifests a “bare . . . desire to harm” the group,⁵⁸ or that it is the product of “a legislative process impelled by animus” against the group.⁵⁹ The key cases that illustrate this form of improper purpose—a group of decisions that Dale Carpenter has labeled an “animus quadrilogy,”⁶⁰ and which will be referred

53. *Id.*

54. Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1789 (2008). For another wide ranging discussion, see Calvin Massey, *The Role of Governmental Purpose in Constitutional Judicial Review*, 59 S.C. L. REV. 1, 2–6 (2007).

55. Nelson, *supra* note 54, at 1795; see Bhagwat, *supra* note 37, at 337 (“[T]he [Supreme] Court has demonstrated both a willingness and an ability to identify and assess the legitimacy of the purposes underlying a variety of governmental actions.”).

56. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996). Although Kagan uses the term “governmental motives,” this Article interprets that as referring to government purpose, not the personal motives of individual legislators.

57. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).

58. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

59. Dale Carpenter, *Windsor Products: Equal Protection from Animus*, in *THE SUPREME COURT REVIEW*, 2013 183, 184 (Dennis J. Hutchinson et al. eds., 2014); see *Romer v. Evans*, 517 U.S. 620, 634 (1996) (holding that a classification violates equal protection where “the disadvantage imposed is born of animosity toward the class of persons affected.”).

60. Carpenter, *supra* note 59, at 187.

to at various points in this Article—include *United States v. Windsor*,⁶¹ *Romer v. Evans*,⁶² *City of Cleburne v. Cleburne Living Center*,⁶³ and *U.S. Department of Agriculture v. Moreno*.⁶⁴

While a legislature, not a court, may be in the best position to determine how best to regulate various sectors of, for example, the telecommunications industry, even if the effect of that regulation is to advantage one sector and disadvantage another,⁶⁵ that sort of quotidian legislative line-drawing is qualitatively and morally different from government policies that emerge from “a legislative process impelled by animus”⁶⁶ or which are made with “an evil eye and an unequal hand.”⁶⁷ Accordingly, the Supreme Court has said that the usual presumption of constitutionality reflected in rational basis review does not apply where a classification “proceeds along suspect lines”⁶⁸ or where there is “some reason to infer antipathy.”⁶⁹ The government purposes behind a law must at least be “legitimate and nonillusory.”⁷⁰ In *Williamson*, the Court indicated that deference to hypothesized purposes reaches its limit where a law involves “invidious discrimination.”⁷¹ What makes the Court’s animus cases distinctive in rational basis doctrine are their skepticism toward hypothesized purposes⁷² and their willingness to engage in more rigorous assessment of the rationality between a law’s ends and means.⁷³

While animus accounts for most of the situations where laws fail rational basis review,⁷⁴ courts on rare occasions have found others as well. In a property tax case, the Court held that equal protection was violated when assessment practices, without any apparent legitimate purpose, “systematically produced dramatic differences in valuation between

61. *United States v. Windsor*, 133 S. Ct. 2675, 2675–76 (2013) (striking down a federal law defining marriage as the union of one man and one woman).

62. *Romer*, 517 U.S. at 620 (striking down a state constitutional amendment barring specific legal protection from anti-gay discrimination).

63. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 432 (1985) (striking down a city’s denial of a special zoning permit for housing the cognitively disabled).

64. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 528 (1973) (striking down a federal law denying food stamps to unrelated persons living in a household).

65. *See F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993).

66. *Carpenter*, *supra* note 59, at 184.

67. *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).

68. *Beach Commc’ns, Inc.*, 508 U.S. at 313.

69. *Id.* at 314.

70. *McGinnis v. Royster*, 410 U.S. 263, 276 (1973).

71. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

72. *Carpenter*, *supra* note 59, at 190 (“The sometimes far-fetched and hypothesized rationalizations that suffice to sustain a law in ordinary rational-basis cases don’t suffice once animus is detected.”).

73. *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring) (observing that “[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review . . .”).

74. Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887, 889 (2012) (“[W]hen animus is found, it functions as a doctrinal silver bullet.”).

petitioners' recently transferred property and otherwise comparable surrounding land."⁷⁵ In recent years, several federal circuit courts have held that sheer governmental favoritism or protectionism for one business or economic group over another is not a constitutionally proper purpose, though it is not fatal if it advances some independent legitimate purpose such as public health or safety.⁷⁶

With this brief background on purpose analysis, we are ready to turn to same-sex marriage, responsible procreation, and what the confrontation between the two should teach us about hypothesized purposes.

II. HYPOTHESIZING RESPONSIBLE PROCREATION

States defending their same-sex marriage bans in the Supreme Court, as well as in lower federal court litigation that preceded *Obergefell*, took pains not to argue that the bans were justified because gays and lesbians were immoral or in some way unfit for marriage. They did not argue that same-sex marriage posed any sort of social evil that their state lawmaking processes were entitled to address. For example, the State of Michigan told the Sixth Circuit in one of the cases that would later be consolidated into *Obergefell* that “[b]y reaffirming the definition of marriage that has always existed in Michigan, Michigan’s voters did not disparage other relationships or deny the obvious point that same-sex couples can provide loving homes.”⁷⁷

Of course, the states could hardly have argued otherwise. The Supreme Court’s previous gay-rights decisions—*Romer v. Evans*,⁷⁸ *Lawrence v. Texas*,⁷⁹ and *United States v. Windsor*⁸⁰—have collectively come to stand for the principle that official government expressions of moral disapproval toward homosexuality or same-sex relationships are not proper government purposes.⁸¹ Yet state officials undoubtedly must have recognized that it would be difficult to defend their bans based on the laws’ actual history, context, and effects, which will be described in

75. *Allegheny Pittsburgh Coal Co. v. Cty. Comm’n of Webster Cty.*, 488 U.S. 336, 341 (1989).

76. *E.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013) (explaining that “protecting or favoring a particular intrastate industry”—in this case, the funeral industry—is not a legitimate government purpose if it cannot “be linked to advancement of the public interest or general welfare”); *Craigsmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (reaching the same conclusion as *St. Joseph Abbey*). *But see* *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 286 (2d Cir. 2015) (disagreeing in dicta with cases like *St. Joseph Abbey* and *Craigsmiles* because “the Supreme Court has long permitted state economic favoritism of all sorts, so long as that favoritism does not violate specific constitutional provisions or federal statutes.”).

77. Brief for Mich. Defendants-Appellants at 4, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (No. 14-1341).

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

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

80. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

81. *See, e.g.*, *Carpenter*, *supra* note 59, at 188 (“These three momentous decisions involving gay rights cumulatively make it clear that the perceived social harm of homosexuality, along with simple moral disapproval of it, is no longer a proper basis on which to carve out gay people from legal protection.”).

Part III. The evidence pointed to the sort of official government animus that could be fatal to the laws even under rational basis review. Thus, if laws excluding same-sex couples from marriage were to survive judicial scrutiny, it would be necessary for states to deny that there was any animus involved,⁸² then to argue that the classifications were rationally related to some legitimate government interest.

The states relied primarily on the hypothesized purpose of responsible procreation. Under the Supreme Court's rational basis cases, the states argued, such a hypothesized purpose must be accepted even if there is no specific evidence for it in the legislative and public discourse at the time the bans were adopted. "It matters not," Ohio's brief told the Supreme Court, "if the reasons offered in court are [actually] the reasons why lawmakers (or voters) approved the law."⁸³

According to the states, using marriage law to promote "responsible procreation" meant taming the wayward behavior of some heterosexuals, not disparaging homosexuals. Michigan's brief to the Court encapsulated the responsible procreation argument:

[M]arriage as a public institution—separate from other relationships that have an emotional connection—springs from a feature of opposite-sex relationships that is biologically different than all other relationships (including opposite-sex platonic friendships and same-sex relationships): the sexual union of a man and a woman produces something more than just an emotional relationship between two people—it produces, without the involvement of third parties or even a conscious decision, the possibility of creating a new life. Michigan's marriage definition is designed to stabilize such relationships, to promote procreation within them, and to be the expected standard for opposite-sex couples engaged in sexual relations.⁸⁴

Similarly, Kentucky told the Court that "[e]ncouraging, promoting, and supporting the formation of relationships that have the natural ability to procreate furthers the Commonwealth's fundamental interest in ensuring humanity's continued existence."⁸⁵ Tennessee said that "marriage cannot be divorced from its procreative purpose,"⁸⁶ and that under rational basis review, "[a]ny charge that the State's traditional definition of marriage does not do enough, or even that it does too much, to further the State's interest must be disregarded in the constitutional analysis."⁸⁷

82. See, e.g., Brief for the Respondents at 11, *DeBoer*, 135 S. Ct. 1040 (No. 14-571) ("Responding to the reality that a man and a woman are generally able to create new life neither discriminates nor entails animus at all.").

83. Brief for Respondent at 52, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556) (citing U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980)).

84. *Id.* at 32.

85. Brief for Respondent at 29–30, *Bourke v. Beshear*, 135 S. Ct. 1732 (2015) (No. 14-574).

86. Brief for Respondents at 39, *Tanco v. Haslam*, 135 S. Ct. 1732 (2015) (No. 14-562).

87. *Id.* at 40.

Responsible procreation was a hypothesized purpose, because the states made no effort to argue that taking action to address irresponsible heterosexual procreation was in fact on the minds of legislators or voters who had approved the anti-gay marriage laws. Rather, in *Obergefell* and other marriage cases, courts were presented with what one state called a “theory” of marriage that was centered on procreation,⁸⁸ together with an argument that it was not improper discrimination to exclude from marriage a group that was not capable of natural procreation. Even if allowing homosexuals to marry did not directly promote responsible procreation among heterosexuals, the states were never able to coherently explain why they found it necessary to categorically *exclude* gays and lesbians from marriage, while still allowing elderly or sterile heterosexuals to marry. But according to the states, rational basis review must be tolerant of such illogic. Michigan’s brief argued that lawmaking on a matter like marriage was entitled to “the benefit of every doubt.”⁸⁹

In the lower court marriage cases, countless pages of briefing and opinions were devoted to advancing, refuting, and evaluating the responsible procreation argument, and from this litigation history, one could reasonably conclude that “responsible procreation” was the primary legal scaffolding on which the state marriage bans rested.⁹⁰ In defense of their marriage bans states also offered various arguments about federalism,⁹¹ the democratic process,⁹² or the merits of moving slowly on a controversial question of social change.⁹³ But these arguments mostly amounted to calls for judicial abstention or attempts to distinguish the Court’s earlier pro-gay marriage decision in *Windsor*, not government purposes that could be examined under equal protection methodology. As the purported purpose behind the marriage bans, one form or

88. Reply Brief for the Appellants at 17–18, *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (Nos. 14-2386, 14-2387, 14-2388) (“With the State’s theory, we know what marriage means (recognition and regulation of the preferred mode of begetting and raising children) and have thousands of years of experience to support it and define its limits.”).

89. Brief for the Respondents, *supra* note 83, at 30.

90. See Julie A. Nice, *The Descent of Responsible Procreation: A Genealogy of An Ideology*, 45 *LOY. L.A. L. REV.* 781, 788 (2012) (calling responsible procreation “the last defense standing” for the marriage bans); Jeffrey Rosen, *The Laughable Argument Against Gay Marriage*, *NEW REPUBLIC* (Mar. 26, 2013), <https://newrepublic.com/article/112778/supreme-court-gay-marriage-case-2013-laughable-argument> (“Because the real reasons that motivated California voters to oppose gay marriage have been ruled out of bounds by the Court, [defenders of the state’s ban] . . . have been forced to rest their entire case on the state’s interest in promoting ‘responsible procreation.’”).

91. *E.g.*, Brief for Respondent, *supra* note 83, at 16–17 (arguing that a federal constitutional rule requiring Ohio to recognize out of state same-sex marriages would undermine federalism).

92. *E.g., id.* at 21 (“Each State’s people, through representatives or referenda, retain authority to decide most policy questions.”).

93. *E.g.*, Brief for Mich. Defendants-Appellants, *supra* note 77, at 41 (“A rational voter might worry about the law of unintended consequences, and might conclude that there is some risk that changing the definition of marriage to remove its inherent connection to procreation might undermine the value of marriage in the long term . . .”).

another of the “responsible procreation” argument was almost always at the center.

The pedigree of the responsible procreation argument suggests that it was developed at least in part as a way of diverting attention away from the negative legislative and public attitudes that had marked the discourse over gay marriage (and gay rights generally) in the 1990s but which could not be defended under the Court’s more recent cases.⁹⁴ Responsible procreation added substance to the inherently circular argument that, because marriage has long been defined in Western culture as exclusively heterosexual, it should therefore continue to be defined that way.⁹⁵ According to one account, the basis for the responsible procreation argument in defense of the marriage bans “first surfaced in the 1990s in law review articles and presentations” by two legal academics associated with social conservative causes and litigation, Lynn Wardle and Teresa Collett.⁹⁶

For many of their opponents, the same-sex marriage bans seemed to be based on little more than anti-gay animus. But the states may have calculated that federal courts, including the Supreme Court, would be reluctant to strike down the laws on that basis because doing so might be perceived as attributing bigotry to millions of voters and legislators (even though indicia that a law represents official government animus do not depend on the subjective motives of individual voters or legislators).⁹⁷ And so, the central role of responsible procreation in the marriage litigation suggests a gamble by states that, so long as nothing more stringent than rational basis review was held to apply, courts were unlikely to strike down marriage bans based on a finding of improper purpose standing alone, and that one or more elaborately developed hypothesized purposes would survive the deferential form of ends/means analysis the states argued must apply in these cases. After all, a few judges, especially in early state court marriage cases, readily embraced the “responsible procreation” argument and deemed it sufficient grounds for dismissing suits brought by gay and lesbian couples seeking to marry.⁹⁸

But this strategy proved risky, and lower federal courts often balked at the flimsiness and illogic of the responsible procreation argument. In his Seventh Circuit opinion striking down Indiana’s gay marriage ban,

94. See Carpenter, *supra* note 59, at 187.

95. See Nice, *supra* note 90, at 787–88.

96. Rosen, *supra* note 90.

97. See Carpenter, *supra* note 59, at 243 (describing animus analysis as relying on objective factors such as “considerations of text, context, legislative procedure and history, actual effects, and pretext.”).

98. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 3 (N.Y. 2006) (plurality opinion) (“The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more.”); *Morrison v. Sadler*, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005).

Judge Richard Posner provided an especially tart critique of the argument that banning gay marriage was necessary to promote responsible heterosexual procreation:

Indiana's government thinks that straight couples tend to be sexually irresponsible, producing unwanted children by the carload, and so must be pressured (in the form of governmental encouragement of marriage through a combination of sticks and carrots) to marry, but that gay couples, unable as they are to produce children wanted or unwanted, are model parents—model citizens really—so have no need for marriage. Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure.⁹⁹

In *Obergefell*, the Supreme Court rejected the “responsible procreation” theory in one paragraph, calling it “wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples,”¹⁰⁰ and saying the theory “rests on a counterintuitive view of opposite-sex couple’s decisionmaking processes regarding marriage and parenthood.”¹⁰¹ Although the Court did not evaluate the responsible procreation theory under the methodology of equal protection, we can infer that the Court would not have found the theory to survive even rational basis review.

But this passage from *Obergefell* feels like something of a cheat. It states a conclusion, not an analysis. The Court did not seriously engage with the outsized role that hypothesized purposes had played in the states’ defense of their marriage bans, and it thus missed an opportunity to consider how hypothesized purposes can be abused and how to impose some discipline on their use.

III. COULD THE COURT HAVE ANALYZED THE SAME-SEX MARRIAGE BANS FOR ANIMUS?

State officials defending their mini-DOMAs frequently pointed to what they characterized as a robust and admirable public debate over same-sex marriage.¹⁰² Yet despite these encomia to the democratic process, the defendants’ briefs were typically devoid of almost any discussion about the specifics of the debate over same-sex marriage that

99. *Baskin v. Bogan*, 766 F.3d 648, 662 (7th Cir. 2014).

100. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (quoting *Kitchen v. Herbert*, 755 F.3d 1193, 1223 (10th Cir. 2014)).

101. *Id.*

102. See, e.g., Brief for Mich. Respondents at 10, *DeBoer v. Snyder*, 135 S. Ct. 1040 (2015) (No. 14-571) (“The liberty to engage in self-government is the fundamental right at stake in this case The issue of how to define marriage has been subject to a vigorous debate that is still ongoing. . . . [and] should continue without judicial interference.”).

had occurred in their states. For example, while Michigan's brief to the Supreme Court in *Obergefell* repeatedly invoked the right of voters to participate in a democratic process of deciding their state's marriage laws, the closest it came to connecting this process with actual reasons for why voters banned gay marriage in 2004 was when it asserted, without citation to any evidence, that voters had "recognized that what makes marriage unique is the capacity to create children."¹⁰³

Such reticence raises suspicion. After all, the issue of marriage equality has had a very high profile in American politics and law since the 1990s, and the history and circumstances of the state marriage bans were familiar to virtually everyone who participated in the litigation over their constitutionality. As the Supreme Court would observe in *Obergefell*, same-sex marriage had been the subject of "referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings."¹⁰⁴ Indeed, Michigan's brief said the "vigorous debate" over gay marriage was "still ongoing."¹⁰⁵ Yet the briefs of the states in the Supreme Court revealed virtually nothing about the substance of this debate. Reading these briefs, one might have concluded that the public record was almost entirely devoid of explanations for why legislators and voters had decided to ban same-sex marriage.

In fact, the state defendants had good reasons to avoid discussing the history, context, and effects of the marriage bans, because such an inquiry would have yielded considerable evidence from which animus could be inferred. Some of that evidence is relevant to this Part because, before proceeding to assess the use of hypothesized purposes as a doctrinal question, it is useful to briefly consider how and why the marriage bans actually came to be. A full-blown equal protection analysis—the sort that a stronger opinion in *Obergefell* could have provided—is beyond the scope of this Article. But even a quick appraisal of the actual purposes of the marriage bans will put us in a better position to understand why states were forced to make such aggressive use of hypothesized purposes and to assess whether the use of such justifications was appropriate. The discussion in this Part paves the way for points made in later Parts regarding the framing of discriminatory classifications,¹⁰⁶ the difference between hypothesized purposes and post hoc rationalizations,¹⁰⁷ the relationship between hypothesized purposes

103. *Id.* at 4.

104. *Obergefell*, 135 S. Ct. at 2605.

105. Brief for Mich. Respondents, *supra* note 102, at 10.

106. *See infra* Part IV.A.

107. *See infra* Part IV.B.

and animus analysis,¹⁰⁸ and about the relationship between hypothesized purposes and direct democracy.¹⁰⁹

In assessing the marriage bans for animus, the following arguments draw on the framework suggested by Professor Carpenter, the leading expositor of the Court's animus cases. Government action is animus "when, to a material degree, it aims 'to disparage and to injure'" or reflects "the simple desire to harm (in a tangible and/or intangible way) [a] group of people."¹¹⁰ Carpenter explains, "[t]he inference that animus was a material influence in the government's decision is drawn from a totality of the evidence rather than from a mechanical rule."¹¹¹ The relevant factors include:

- statutory text;
- "the political and legal context of passage, including a historical background demonstrating past discriminatory acts, and a departure from the usual substantive considerations governing the decision";
- "the legislative proceedings, including evidence of animus that can be gleaned from the sequence of events that led to passage, the legislative procedure, and the legislative history accompanying passage";
- "the law's harsh real-world impact or effects, including injury to the tangible or dignitary interests of the disadvantaged group"; and
- "the utter failure of alternative explanations to offer legitimate ends along with means that really advance those ends."¹¹²

I focus on history, context, and effects. First, then, consider some history and the context in which the state bans on same-sex marriage were enacted.

A. THE REACTIVE NATURE OF THE SAME-SEX MARRIAGE BANS

The contemporary controversy over same-sex marriage shows a pattern: The statutory and constitutional bans on gay marriage that began in the 1970s and accelerated in the 1990s and 2000s were enacted in reaction to advancements gays and lesbians were making in state courts, legislatures, and American culture.¹¹³ Laws underscoring the traditional definition of marriage were enacted in response to a concrete social phenomenon: Gays and lesbians had begun seeking—and, in some states, would eventually begin winning—marriage rights.

Although opposite-sex marriage had always been assumed in all states, no state expressly defined marriage as a union between a man and

108. See *infra* Part V.

109. See *infra* Part VI.

110. Carpenter, *supra* note 59, at 186.

111. *Id.* at 245.

112. *Id.* at 245–46.

113. For treatment of this history, see generally MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2013) (documenting the history of the marriage equality movement).

a woman before Maryland did so in 1973 “in an apparent response to attempts by same-sex couples to obtain marriage licenses.”¹¹⁴ Two decades later, in 1993, a decision of the Hawaii Supreme Court in *Baehr v. Lewin*¹¹⁵ looked as though it might make Hawaii the first state to allow legal same-sex marriage. Same-sex marriage was not ultimately legalized in Hawaii due to a constitutional amendment approved by the state’s voters.¹¹⁶ But *Baehr* set off a rapid series of “backlash measures” that became a “mainstay of the [same-sex marriage] controversy.”¹¹⁷ “Objecting that ‘some radical judges in Hawaii may get to dictate the moral code for the entire nation,’ conservative groups provided like-minded legislators in every state with draft bills to deny recognition to gay marriages lawfully performed elsewhere.”¹¹⁸ In the Spring of 1996, “Republicans introduced so-called defense-of-marriage bills in thirty-four state legislatures.”¹¹⁹ Between 1995 and 2003—a period when same-sex marriage was not yet legal in any state—thirty-seven states “passed measures restricting marriage for same-sex couples in one way or another, and the measures generally passed by wide margins.”¹²⁰

Republicans in Congress also introduced and secured passage of the federal Defense of Marriage Act (“DOMA”), which denied recognition by the federal government to any same-sex marriage and also purported to authorize states to do so.¹²¹ The congressional debate over DOMA helped set the tone that would dominate later state legislative and referendum debates over marriage equality. As legal historian Michael Klarman has written:

Although the debate over DOMA was ostensibly about gay marriage, it quickly devolved into a general attack on homosexuality. Many Republican lawmakers declared that homosexuality was morally wrong and that the state should not endorse it. Some speakers went further, denouncing homosexuality as a perversion and comparing it with polygamy and pedophilia.¹²²

114. Kevin Rector, *Md. Attorney General Says Supreme Court Must Overturn Same-Sex Marriage Bans Nationwide*, BALT. SUN (Mar. 9, 2015, 4:00 PM), <http://www.baltimoresun.com/features/gay-in-maryland/gay-matters/bs-gm-attorney-general-issues-report-calling-samesex-marriage-bans-20150309-story.html>.

115. See *Baehr v. Lewin*, 74 Haw. 645 (1993).

116. WILLIAM B. RUBENSTEIN ET AL., *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 612 (3d ed. 2008).

117. Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1154 (2009).

118. KLARMAN, *supra* note 113, at 59.

119. *Id.*

120. Schacter, *supra* note 117, at 1185.

121. *United States v. Windsor*, 133 S. Ct. 2675, 2682–83 (2013).

122. KLARMAN, *supra* note 113, at 61.

The public reaction against same-sex marriage intensified after a 2003 ruling by the Massachusetts Supreme Judicial Court brought legal marriage equality to the first American state.¹²³

Court decisions not only made gay marriage salient but also made people aware of how much change had recently occurred on other gay rights issues. Other legal reforms—such as state laws forbidding discrimination based on sexual orientation, court decisions permitting gays to adopt children, and local government ordinances providing partnership benefits to gay couples—did not attract the same media attention as did judicial decisions on gay marriage. For many religious conservatives, therefore, *Goodridge* served as a slap in the face, forcing them to acknowledge the dramatic changes in attitudes and legal practices regarding sexual orientation that had occurred in recent decades.¹²⁴

The fact that the state gay marriage bans were the results of backlash does not, in itself, condemn them as products of governmental animus. No doubt many people who supported the bans did so out of reasonable and good faith convictions about proper public policy regarding marriage. But the rapid and successful enactment of the bans in response to incipient social change on gay and lesbian rights casts doubt on the idea that these laws were the result of a fair and thoughtful public dialogue. The opposition of individual legislators and voters to same-sex marriage, which in itself is entitled to respect under the Constitution, fueled a larger political project to inscribe official malice toward homosexuality into law.

B. WEDGE-ISSUE POLITICS

Beginning in the mid-1990s and accelerating during the 2000s, the Republican Party exploited same-sex marriage as a political wedge issue, one that “divided Democrats, united Republicans, and pushed most independents to the right.”¹²⁵ “For Republicans,” legal historian Klarman has written, “gay marriage was a dream issue: it both mobilized their base of religious conservatives and aligned them with most swing voters.”¹²⁶ The party recognized that “[a]nti-gay posturing was an easy way for Republican candidates to demonstrate support for religious conservatives[.]” while at the same time, “[n]o sizable openly gay constituency existed within the party to induce Republican candidates to modulate their positions.”¹²⁷

Republican senators and President George W. Bush publicly campaigned for an amendment to the federal Constitution that would

123. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (2003).

124. KLARMAN, *supra* note 113, at 165–66.

125. William Saletan, *The Marriage Trap*, SLATE (May 15, 2012, 9:22 AM), http://www.slate.com/articles/news_and_politics/politics/2012/05/gay_marriage_divides_republicans_as_polls_shift_the_gop_calls_it_divisive.html.

126. KLARMAN, *supra* note 113, at 59.

127. *Id.* at 60.

have banned gay marriage altogether.¹²⁸ Bush used his bully pulpit as president to disparage gay and lesbian relationships, declaring that “changing the definition of marriage would undermine the family structure.”¹²⁹ One news account at the time noted, “[m]any Republicans support the measure because they say traditional marriage strengthens society; others don’t but concede the reality of election-year politics.”¹³⁰ Such an amendment would have preempted constitutions and family law in every state to impose a federal definition of marriage as “only of the union of a man and a woman.”¹³¹

The fact that such an idea was endorsed by a sitting president, embraced by a major political party, and seriously discussed in both the Senate and the House of Representatives (before ultimately failing in both chambers) is evidence that the controversy over gay marriage has not been merely a debate about deferring to the democratic process in each state. The debate was about whether same-sex marriage was an evil that government should take extraordinary measures to attack.

C. NEGATIVE PUBLIC ATTITUDES TOWARD GAYS AND LESBIANS

While motives of individual voters or legislators cannot be assessed, it is possible to consider how public attitudes in the aggregate helped drive enactment of the same-sex marriage bans. For most of the period when the state bans were enacted, public attitudes were hostile toward homosexuality and same-sex relationships. As three sociologists concluded based on their study of public opinion data, “at the public level, opposition to same-sex marriage is strongly—very much so—linked to moral and religious disapproval, or animus.”¹³²

Americans who oppose same-sex marriage typically do not count same-sex couples as a family. Three-fourths (75%) of those who strongly oppose same-sex marriage exclude all same-sex couples from the definition of family, while an additional one-sixth (17%) include same-sex couples only if they have children. In contrast, respondents who support same-sex marriage are much more likely to include same-sex couples in their definitions of family. These patterns belie the claim that animus is not implicated in opposition to same-sex marriage. Instead, opposition to same-sex marriage appears rooted in a disapproval of homosexuality, or at least the belief that same-sex relationships are less legitimate (i.e., “inferior” or “of lesser worth”) than other family forms.¹³³

128. Saletan, *supra* note 125.

129. ASSOC. PRESS, *Bush Urges Federal Marriage Amendment*, NBC NEWS (June 5, 2006, 8:22 PM), <http://www.nbcnews.com/id/11442710/ns/politics/t/bush-urges-federal-marriage-amendment/#.VtDWhaULhU>.

130. *Id.*

131. S.J. Res. 40, 108th Cong., 2d Sess. (2004).

132. Brian Powell et al., *Public Opinion, the Courts, and Same-Sex Marriage: Four Lessons Learned*, 2 SOC. CURRENTS 3, 7 (2015).

133. *Id.* at 5–6.

Of course, voters are perfectly entitled to disapprove of gay individuals and their relationships on moral or religious grounds. But if such attitudes are aggregated and translated into official policy that can fairly be imputed to the government, then the Constitution properly comes into play. To survive constitutional review, a law must have some valid purpose other than expressing the *government's* moral or religious disapproval.

D. THE TONE OF THE CAMPAIGNS

The campaigns for voter-approved mini-DOMAs often played on pejorative attitudes and stereotypes about gays and lesbians. Constitutional conclusions cannot be drawn solely from political rhetoric, but the tone of the debate, where it consistently reflects a desire to disparage and subordinate the affected group, should be one element that informs constitutional analysis.

For example, in the “Official Argument or Explanation” for Ohio’s mini-DOMA in 2004, voters were instructed to “[v]ote YES . . . to preserve in Ohio law the universal, historic institution of marriage as the union of one man and one woman, and to protect marriage against those who would alter and undermine it.”¹³⁴ Ohio voters were also told the measure would “restrict[] governmental bodies in Ohio from using your tax dollars to give official status, recognition and benefits to homosexual and other deviant relationships that seek to imitate marriage.”¹³⁵

In 2008, California voters approved an amendment to their state constitution, Proposition 8, which banned gay marriage. A 2010 federal district court decision striking down Proposition 8 made findings of fact, drawn from trial evidence, that included the following: “The Proposition 8 campaign relied on fears that children exposed to the concept of same-sex marriage may become gay or lesbian[]” and that “parents should dread having a gay or lesbian child”;¹³⁶ and “[t]he campaign to pass Proposition 8 relied on stereotypes to show that same-sex relationships are inferior to opposite-sex relationships.”¹³⁷

History and context like that just described can shed light on whether a law manifests or was impelled by animus, but so can a law’s harsh or unusual effects. Here, too, the mini-DOMAs should have raised judicial suspicion.

134. Amicus Brief of the Cleveland Choral Arts Ass’n Inc. at 3–4, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574) (citing “Argument and Explanation in Support of the Marriage Protection Amendment (Issue 1)” (emphasis added)).

135. *Id.* at 4.

136. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 988 (N.D. Cal. 2010).

137. *Id.* at 990.

E. CHANGING ORDINARY RULES OF INTERSTATE MARRIAGE RECOGNITION

An underappreciated aspect of the mini-DOMAs was that they not only prohibited the creation of new same-sex marriages, in most cases they were also understood to nullify—that is, to deny any legal recognition to—existing same-sex marriages among a state’s citizens, even marriages that had migrated from other states and had not been procured evasively.¹³⁸ These nonrecognition provisions created a selective exception to the longstanding rule in every state that “[o]rdinarily, marriages that are valid where they are celebrated are valid everywhere, for all purposes.”¹³⁹

The human impact of these nonrecognition provisions was significant. By the time of the 2010 Census, when most of the mini-DOMAs were in place, more than 130,000 same-sex couples in the United States reported being married.¹⁴⁰ As a result of the mini-DOMAs, married same-sex couples moving from one state to another “face[d] the prospect of wrenching disruption in their lives, loss of parental and property rights, and an array of other problems and indignities, large and small, that a rational legal regime should not tolerate.”¹⁴¹

A law banning same-sex marriage may be a means for government to express a preference for heterosexual marriage. But going further to nullify existing marriages seems gratuitously cruel, especially for couples who did not evade their own state’s marriage laws but who had simply married in a former domicile where it was legal to do so. As a matter of objective purpose, imposing such an unusual hardship on same-sex couples indicated that legislators and voters must have regarded same-sex marriage as odious and worthy of official governmental condemnation, a grave danger that required extraordinary departures from a long-settled rule of interstate comity.

F. ALTERING THE POLITICAL PROCESS

The criteria for marriage are typically governed by ordinary family law statutes. Yet most prohibitions on same-sex marriage came in the form of state constitutional amendments. Opponents of gay marriage resorted to state constitutional amendments for two reasons: (1) to overturn or foreclose pro-marriage equality decisions by state courts applying

138. Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1423 (2012) (“The vast majority of mini-DOMAs not only forbid the *creation* of same-sex marriages but their statutory or constitutional language would also void or deny recognition to the perfectly valid same-sex marriages of couples who migrate from states where such marriages are legal.”).

139. Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 922 (1998).

140. Press Release, U.S. Census Bureau, Census Bureau Releases Estimates of Same-Sex Married Couples (Sept. 27, 2011), <http://2010.census.gov/news/releases/operations/cb11-cn181.html>.

141. Sanders, *supra* note 138, at 1425.

state constitutional law, and (2) to make it more difficult for the bans to be revisited at a later time through the ordinary legislative political process.

Objectively, it was a purpose of the mini-DOMAs to impose this unusual political process burden. Even if they could be justified as attempts by voters to assert control of their own state constitutional law, the effect of these amendments was to distort the ordinary legislative lawmaking process to the disadvantage of gays and lesbians. Under the normal political process, supporters of same-sex marriage would need to persuade a simple majority of their elected lawmakers. But after a constitutional mini-DOMA, supporters of same-sex marriage would need to muster the extraordinary effort and resources to re-amend their state constitution. Thus, there was a note of disingenuousness in arguments that marriage equality proponents should use ordinary democratic methods of politics and persuasion, not courts, to achieve their goals. As I have argued elsewhere:

Collectively, the state constitutional mini-DOMAs were not merely benign initiatives to assert majoritarian democratic control over the definition of marriage. The central political process problem of the mini-DOMAs is that they were not intended simply to *enact* marriage discrimination, but rather to *freeze it in place indefinitely*; to permanently disadvantage the group seeking to marry; to effectively shut down the legislative and legal debate over marriage equality just as it was getting off the ground; and to insulate the question from future legislative reconsideration or state judicial review.¹⁴²

G. IMPOSING UNUSUAL LEGAL DISADVANTAGES ON SAME-SEX COUPLES

Most of the state constitutional mini-DOMAs went beyond defining marriage to also prohibit other forms of legal relationship recognition for same-sex couples, such as civil unions or domestic partnership benefits.¹⁴³ Three of the four states whose bans were at issue in *Obergefell* followed this pattern. Kentucky's amendment provided that "[a] legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."¹⁴⁴ Michigan's amendment specified "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."¹⁴⁵ And Ohio's amendment stated that the "state and its political

142. Steve Sanders, *Mini-DOMAs as Political Process Failures: The Case for Heightened Scrutiny of State Anti-Gay Marriage Amendments*, 109 NW. U. L. REV. ONLINE 12, 19 (2014). Opponents of gay rights had long employed ballot initiatives and other forms of direct democracy. As one journalist noted in 2012, "[o]f the 33 times states have voted on gay marriage ballot measures since 1998, opponents of gay marriage have won 32 times." Charles Mahtesian, *The Map of Gay Marriage*, POLITICO (May 4, 2012, 10:50 PM), <http://www.politico.com/blogs/charlie-mahtesian/2012/05/the-map-of-gay-marriage-122535>.

143. See *The Difference Between Super-DOMAs and Mini-DOMAs*, DANPINELLO.COM, <http://www.danpinello.com/SuperDOMAs.htm> (last visited Mar. 11, 2017).

144. KY. CONST. pt. II, § 233A.

145. MICH. CONST. art. I, § 25.

subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.”¹⁴⁶

From the breadth of these amendments, one could infer that voters were not merely concerned with maintaining the traditional definition of marriage; they also believed it was necessary for their state governments to prevent gays and lesbians from achieving *any* form of legal recognition of their relationships. It is unnecessary to examine subjective questions about voters’ motives in order to conclude that an objective purpose of these mini-DOMAs was to impose a harsh and unusual legal disadvantage on gays and lesbians.

To sum up Parts III.A through III.G, from the evidence presented above, the Supreme Court, had it engaged in a traditional equal protection analysis in *Obergefell*, could have concluded that the state bans on gay marriage were the products of a lawmaking process impelled by animus (based on their history and context) and constituted official government expressions of animus (based on their effects). The mere possibility of legal gay marriage was seen as a crisis that demanded a response. This response did not emerge organically in each state, but swept the country in an atmosphere of hostility toward homosexuality, one that was often driven by partisan politics. The effects of the mini-DOMAs—nullifying existing marriages, distorting the ordinary political process, and banning legal relationships other than marriage—support the conclusion that these measures were not merely meant to preserve a traditional definition of marriage, but to inflict harm arising from irrational prejudice.

This Article so far has focused not on the subjective motives of individual lawmakers and voters, but rather, on how and why the mini-DOMAs were adopted and what they actually accomplished as an objective matter of government purpose. The goal in this Part has not been to write the definitive account of what *Obergefell* should have said,¹⁴⁷ or even to provide a comprehensive animus analysis. Some might well disagree with my points of emphasis or have a more sympathetic interpretation of the evidence.¹⁴⁸ But that does not undermine the point sought to be made in this Part: The factual basis for the purposes of bans on same-sex marriage was readily available for judicial review, and thus hypothesized purposes were unnecessary to understand them.

146. OHIO CONST. art. XV, § 11.

147. Other scholars have been actively engaged on that question. *See, e.g.*, Douglas NeJaime & Reva Siegel, *What Obergefell v. Hodges Should Have Said, Concurring Opinion* (Jack Balkin ed. forthcoming 2017).

148. *E.g.*, Eric Berger, *Same-Sex Marriage, Heightened Scrutiny and the Problem of “Animus,”* JURIST (Mar. 21, 2015, 4:43 PM), <http://jurist.org/academic/2015/03/eric-berger-samesex-marriages.php>.

IV. HYPOTHESIS VS. FANTASY

The preceding Parts of this Article sought to describe some of the actual, non-hypothesized history, context, and effects of the mini-DOMAs, as well as how the hypothesized purpose of responsible procreation was developed. We can now turn to what the experience of the federal marriage litigation teaches for equal protection's rational basis doctrine—specifically, what lessons can be drawn from the state government defendants' use and abuse of hypothesized purposes.

The first lesson should be that a proper equal protection analysis requires a court to focus not just on the discrimination the plaintiff is alleging, but also on the action that the government has deliberately taken to cause the discrimination. Failure to focus on the timing and circumstances of the classification makes it easier for the government to explain away discrimination by resorting to post hoc rationalizations (such as the invented purpose of promoting responsible procreation). As the term is used in this Article, a post hoc rationalization is a particularly extreme form of hypothesized purpose. It does not involve hypothesis and speculation about what a legislature or voters actually might have been aiming to achieve when they enacted a law. Rather, a post hoc rationalization is a purpose that has been entirely fabricated for use in litigation to attempt to save a law that might otherwise be found unconstitutional.

A. ACCURATELY FRAMING THE CLASSIFICATION

The first step in an equal protection analysis should be to identify the exact form or nature of the classification at issue.¹⁴⁹ And so we should ask: What exactly were the plaintiffs in the marriage cases challenging?

Were they challenging the longstanding, traditional understanding of marriage as a union between one man and one woman, an understanding that was reflected in state common law and whose purpose had a wide range of possible biological, cultural, religious, and economic explanations? Or, were they challenging the more recent, deliberate, affirmative exclusions of gays and lesbians from marriage that states wrote into their statutes and constitutions?

The question is a crucial one, because it goes to the nature of the discrimination at issue and the legitimacy of courts stepping in to address it. If the marriage plaintiffs were challenging the traditional understanding of marriage that had been broadly accepted in American law and culture for more than 200 years and in the common law for even longer, then their cases should have been more difficult. The long-assumed understanding of marriage as solely a union between a man and woman

149. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 718 (3d ed. 2009) ("Equal protection analysis always must begin by identifying how the government is distinguishing among people.").

could be understood as, in effect, a rule that had evolved over time and which served a variety of legitimate governmental purposes, such as “ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship.”¹⁵⁰ Seen this way, the exclusion of same-sex couples from marriage would be an *incidental effect* of the marriage definition, but not its actual purpose. It would be a matter not of intentional discrimination, but disparate impact, and the difference between those two things is central to modern equal protection analysis. In equal protection doctrine, discriminatory impact is of no consequence as long as it results from a law that serves some valid purpose.¹⁵¹ Where a law serves a neutral, legitimate purpose and its discriminatory effects are unintended, equal protection challenges are effectively dead on arrival. Only when laws intentionally discriminate do they become a proper subject for equal protection analysis. Of course, under rational basis review, even most intentional discrimination gets a pass if it serves a valid public purpose and does not represent an official governmental expression of animus. But in cases of intentional discrimination, courts are entitled to “insist on knowing the relation between the classification adopted and the object to be attained.”¹⁵²

Notwithstanding the actual history of the mini-DOMAs, the states in *Obergefell* and other marriage cases maintained that their bans on gay marriage should be understood not as intentional anti-gay discrimination but as a neutral rule reflecting the traditional understanding of marriage. The negative impact on gays and lesbians was merely incidental, they claimed, and thus did not present an equal protection problem.¹⁵³

This distinction—between inherited understandings that have the *incidental effect* of creating disadvantage for a group, and recent enactments that *intentionally classify*—has escaped attention in case law and scholarship.¹⁵⁴ But the distinction is a critical one for equal protection analysis.

A form of discrimination can be made to appear less invidious when it is characterized as arising passively from a broad and diffuse backdrop

150. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2613 (2015) (Roberts, C.J., dissenting).

151. *E.g.*, *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273–74 (1979) (“[T]he Fourteenth Amendment guarantees equal laws, not equal results.”).

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

153. *See, e.g.*, Brief for Respondents at 11, *DeBoer v. Snyder*, 135 S. Ct. 1040 (6th Cir. 2014) (No. 14-1341) (“Responding to the reality that a man and a woman are generally able to create new life neither discriminates nor entails animus at all.”); Brief and Required Short Appendix of Appellants at 25, *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (Nos. 14-2386, 14-2387, 14-2388) (“While traditional marriage laws *impact* heterosexuals and homosexuals differently, they do not create classifications based on sexuality, particularly considering the benign history of traditional marriage laws generally.”).

154. The matter seems related to similar problems in substantive due process where the meaning of, and therefore the constitutional protection given to, a right can depend on how it is characterized or the level of abstraction at which it is viewed. *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

of history. But where an inherited understanding is translated into a deliberate, contemporary classification, there is no sound reason for a court not to focus on the most recent legislative action. The Supreme Court has said that “equal protection analysis puts its emphasis on the permissibility of an *enactment’s classifications*.”¹⁵⁵ In assessing a law under equal protection, a court “must consider the facts and circumstances behind the law,” in addition to “the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.”¹⁵⁶ But a candid and thorough analysis of such facts, circumstances, and interests is not possible if a court does not focus on the actual timing and circumstances of the classificatory act that the plaintiff is challenging.

The point here is not to suggest that longstanding, inherited forms of discrimination—such as, for example, the stereotypes about women’s roles that were once deeply embedded in law—cannot be constitutionally attacked; obviously they can and should be. Rather, the point is that where a social consensus is still emerging about whether a particular form of discrimination is wrongful, the long history or common law roots of a social or legal practice may be part of the government’s explanation for why the discrimination it produces continues to be tolerable. But if the plaintiff is challenging a more recent classificatory enactment, then the two should not be confused. The government should be required to explain why a classification was thought necessary *at the time the classification was enacted*. Doing so does not preclude the use of hypothesized purposes to justify a law. But a court may well view hypothesized purposes as less necessary and acceptable when it is examining a recent legislative action rather than a practice that emerges from the mists of history.

The clarity and rigor with which a classification is identified, then analyzed, has important implications for the legitimacy of courts adjudicating constitutional claims. By deciding *Obergefell* primarily as a matter of substantive due process, rather than equal protection, Justice Kennedy’s majority opinion did not focus on the circumstances under which the mini-DOMAs had been enacted. The Court said the marriage bans “demean[ed]” gays and lesbians and imposed “stigma and injury of the kind prohibited by our basic charter.”¹⁵⁷ But the Court provided no examination of the circumstances under which the bans arose, much less a search for purpose within those circumstances. Consequently, it is all too easy to dismiss the Court’s statements about insult and stigma as little more than subjective and contestable conclusions about social meaning.

155. *Vieth v. Jubelirer*, 541 U.S. 267, 315 (2004) (emphasis added).

156. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (emphasis added).

157. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

The majority's failure to frame the gay marriage bans as intentional classifications that the states should be required to justify left it vulnerable to the meme that, as the dissent by Chief Justice Roberts put it, "[f]ive lawyers have closed the debate" over gay marriage, "relegat[ed] ages of human experience with marriage to a paragraph or two," and "enacted their own vision of marriage as a matter of constitutional law."¹⁵⁸ As he saw the matter, the understanding of marriage as limited to heterosexuals "arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship."¹⁵⁹ It was validated by "ages of human experience."¹⁶⁰ A definition of "marriage that has persisted in every culture throughout human history," he said, "can hardly be called irrational."¹⁶¹ Justice Scalia argued along the same lines, insisting that the Court had "no basis for striking down a practice . . . that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the [Fourteenth] Amendment's ratification."¹⁶² Similarly, in the Sixth Circuit, Judge Jeffrey Sutton said the cases before him represented a challenge to a "tradition . . . measured in millennia" that "until recently had been adopted by all governments and major religions of the world."¹⁶³ These characterizations implicitly but unmistakably imputed to the mini-DOMA challenges an audaciousness that was intended to trivialize them.

But such characterizations were factually and logically misleading. In the cases that were consolidated into *Obergefell*, the plaintiffs did not challenge the abstract concept of a long tradition or a settled understanding about the nature of marriage. Rather, they challenged specific, recently enacted positive laws—state constitutional amendments in Kentucky, Michigan, Ohio, and Tennessee. The four amendments at issue in *Obergefell* were all recently adopted, either in 2004 (Kentucky, Michigan, and Ohio) or 2006 (Tennessee).¹⁶⁴ Indeed, the history of the earlier lower court federal marriage litigation similarly leaves no mistake about what laws the plaintiffs were challenging. The first federal case challenging a state gay marriage ban, *Citizens for Equal Protection v. Bruning*,¹⁶⁵ specifically targeted the Nebraska constitutional mini-DOMA that the state's voters adopted in 2000.¹⁶⁶ The next federal case, in

158. *Id.* at 2612 (Roberts, C.J., dissenting).

159. *Id.* at 2613.

160. *Id.* at 2612.

161. *Id.* at 2611.

162. *Id.* at 2628 (Scalia, J., dissenting).

163. *DeBoer v. Snyder*, 772 F.3d 388, 396 (6th Cir. 2014).

164. Information about the history of each state's ban is available at *Winning in the States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/winning-in-the-states> (last visited Mar. 11, 2017).

165. *Citizens for Equal Protection Inc. v. Bruning*, 368 F. Supp. 2d 980, 985 (D. Neb. 2005).

166. *Id.*

Oklahoma, specifically argued that the U.S. Constitution was violated by a state constitutional marriage ban that state's voters had adopted in 2004.¹⁶⁷ And the high-profile California case of *Perry v. Schwarzenegger*¹⁶⁸ came after the state constitutional gay marriage ban Proposition 8 that California voters adopted in 2008.¹⁶⁹

Government defendants have an incentive to blur the distinction between disparate treatment arising from a longstanding social or legal practice, on the one hand, and an intentionally discriminatory enactment, on the other, because doing so can make hypothesized purposes like “responsible procreation” seem more necessary and acceptable. But conflating the longstanding pedigree of a social or legal practice with a recent political decision to enact a classification that reifies that practice is a rhetorical sleight of hand, not analysis. Even if the common understanding of marriage for generations *did* promote responsible procreation, the states' burden should have been to explain how banning gay marriage in 1996 or 2004 logically advanced that purpose without producing an excessive amount of unjustified discrimination.

In the Sixth Circuit opinion that was overturned by *Obergefell*, Judge Sutton said the mini-DOMAs represented a decision by voters to “adhere[] to the traditional definition of marriage.”¹⁷⁰ The problem with this characterization is that traditional marriage did not have a sunset provision that required voters to periodically decide whether or not to reaffirm it. In the years preceding *Obergefell*, whether or not to retain the traditional definition of marriage was not a question that legislators and voters were asked in the abstract. Rather, the issue arose only after gays and lesbians began seeking—and, in some places, winning—the right to marry or other forms of legal relationship recognition. The mini-DOMAs represented backlash, an affirmative rejection of gay marriage.¹⁷¹ For example, in the “Official Argument or Explanation” for Ohio's mini-DOMA in 2004, voters were instructed to “Vote YES . . . to preserve in Ohio law the universal, historic institution of marriage as the union of one man and one woman, *and to protect marriage against those who would alter and undermine it.*”¹⁷²

A preference for traditional marriage over same-sex marriage could have been a *motive* for a vote in favor of one of these measures. But characterizing the marriage bans as merely representing a decision to “adhere[] to the traditional definition of marriage”¹⁷³ avoids consideration

167. *Bishop v. Okla. ex rel. Edmondson*, 447 F. Supp. 2d 1239, 1244 (N.D. Okla. 2006).

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

169. *Id.* at 927.

170. *DeBoer v. Snyder*, 772 F.3d 388, 396 (6th Cir. 2014).

171. *See supra* notes 113–131 and accompanying text.

172. Amicus Brief of the Cleveland Choral Arts Ass'n Inc., *supra* note 134, at 3–4 (emphasis added).

173. *DeBoer*, 772 F.3d at 396.

of the political dynamics (such as those previously discussed in Part III) that caused the question to be placed in front of legislators and voters and which ultimately drove the making of official government policy to exclude gays and lesbians from civil marriage. Without considering such political dynamics, it is not possible to assess an enactment for improper purpose or to determine whether it was the product of “a legislative process impelled by animus.”¹⁷⁴

A proper focus on the nature and history of the law being challenged was of central relevance in another of the Court’s gay-rights cases, *Lawrence*, the 2003 decision that struck down remaining state criminal laws against sodomy.¹⁷⁵ Prohibitions on sodomy—both homosexual and heterosexual—had existed since colonial times, derived from English criminal laws going back to the sixteenth century.¹⁷⁶ These laws “were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally.”¹⁷⁷ The laws began to fall away in the late 1960s thanks in part to the Model Penal Code.¹⁷⁸ New laws singling out *only* homosexual sodomy for criminal punishment did not appear until the late 1970s,¹⁷⁹ a time of nascent gay visibility and political activism. In Texas, the state where *Lawrence* arose, sodomy prohibitions for heterosexuals had been repealed in 1973,¹⁸⁰ and the former sodomy law was redefined and renamed to apply only to “homosexual conduct.”¹⁸¹

The *Lawrence* Court understood well that it was the 1973 anti-gay classification, not the ancient common law proscriptions against nonprocreative sex that the petitioners were challenging. The Court did not deny that “for centuries there have been powerful voices to condemn homosexual conduct as immoral,” a view that had been “shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.”¹⁸² Those considerations, the Court said, “do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views . . . through operation of the criminal law.”¹⁸³

The point is not that discrimination is necessarily more easily justified under the Constitution if it arises from a longstanding tradition. Rather, the point is that a more recent, deliberate classificatory action

174. Carpenter, *supra* note 59, at 184.

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

176. *Id.* at 568.

177. *Id.*

178. *Id.* at 572.

179. *Id.* at 570.

180. TEX. GEN. LAWS § 1.03 (1973).

181. *Id.* § 21.06.

182. *Lawrence*, 539 U.S. at 571.

183. *Id.*

should be more readily susceptible to judicial scrutiny. Statutes and constitutional amendments do not appear out of nowhere; they are enacted to address some perceived social or governmental need or problem. Indeed, a legislative action might, in some cases, save an otherwise unconstitutional practice by demonstrating a considered and deliberate legitimate government purpose behind the discrimination.¹⁸⁴ If the timing and context of a classification are not properly perceived and framed by a court, however, then a disciplined analysis of its history, context, and effects is more difficult. When government defendants are not required to focus on the facts surrounding an actual classificatory act, they may be more likely to rely on hypothesized purposes to explain discrimination. And when the government actually wants to cover up the true purpose of discrimination, it may require a more extreme form of hypothesized purpose—the post hoc rationalization—to create the illusion that the discrimination advances some legitimate government purpose.

B. POST HOC RATIONALIZATIONS

Hypothesizing the purpose for a law implies an exercise of figuratively going back in time and speculating about what was going through the minds of legislators when they enacted the law. It is generally a process of inference. A hypothesized purpose need not be the actual cause of a legislative classification. But common sense indicates that any purpose should be capable of explaining what theoretically and plausibly *could have caused* the classification *under the conditions prevailing, and as a problem could have been perceived*, at the time of enactment. While the government may not be required to “actually articulate . . . the purpose or rationale supporting its classification,” judicial review “does require that a purpose may conceivably or may reasonably have been the purpose and policy of the relevant governmental decisionmaker.”¹⁸⁵

There is, however, another form of hypothesized purpose that is better characterized as a post hoc rationalization. The purpose of a post hoc rationalization is not to suggest known facts or considerations that could have caused a legislative body to enact a classification. Rather, a post hoc rationalization represents a new, supposedly benign purpose for a classification, one invented by government lawyers at the time of litigation and advanced in an attempt to save the classification from being found unconstitutional. A post hoc rationalization might be

184. *E.g.*, *Nordlinger v. Hahn*, 505 U.S. 1, 15, 13–16 (1992) (explaining that a local government tax assessment practice had been enacted “to achieve the benefits of an acquisition-value system,” thus giving it a legitimate purpose that was missing in a similar assessment scheme the Court had found unconstitutional in an earlier case).

185. *Id.* at 15.

consistent with a classification, but it is something that could not plausibly have *caused* the legislature to create the classification.

“Responsible procreation” is a good example of a post hoc rationalization. Looking at the matter as of the time of the litigation rather than the time of the approval of the gay marriage bans, states engaged in a process of reverse-engineering in an effort to save their laws from being held unconstitutional. States did not seriously claim that legislators or voters might have been responding to an epidemic of irresponsible, out-of-wedlock procreation at the time they voted to ban gay marriage. Rather, the states argued that, in the judgment of the executive branch charged with defending the laws, promoting responsible procreation was a valid government purpose in the abstract (while, of course, eliding the question of how limiting marriage to opposite-sex couples actually served this purpose). For example, in the Sixth Circuit, Michigan called its arguments about responsible procreation “modest claims,” a theory about a purpose of marriage that “[m]ost people in this country would probably agree with . . . or at least think [was] within the realm of reasonable debate.”¹⁸⁶ “It matters not,” Ohio’s *Obergefell* brief stated, “if the reasons offered in court are [actually] the reasons why lawmakers (or voters) approved the law.”¹⁸⁷

The case of Indiana, whose marriage ban was statutory but was never added to the state constitution,¹⁸⁸ provides a useful study of the difference between a hypothesized purpose and a post hoc rationalization. Both houses of the state’s legislature approved the ban as an “emergency” measure on April 25, 1997.¹⁸⁹ As with similar laws approved by other states around this time, the ban was adopted amid concern that same-sex couples from Indiana might obtain marriages in Hawaii—whose state courts were at the time considering whether such marriages should be authorized¹⁹⁰—then return to Indiana expecting the marriages to be recognized. According to a news report on the act’s passage, “[t]he controversial issue arose in Indiana after a judge in Hawaii ruled in December [1996] that Hawaii may not forbid same-sex marriages.”¹⁹¹ A scholarly history of Indiana domestic relations law explains that legislators enacted the law “in an attempt to ensure that homosexual

186. Brief for Mich. Defendants-Appellants, *supra* note 77, at 44.

187. Brief for Respondent, *supra* note 83, at 52 (citing U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980)).

188. Part IV argues that hypothesized purposes are inappropriate for actions taken through direct democracy such as state constitutional amendments.

189. 1997 Ind. Acts (specifying that in § 2 “[a]n emergency is declared for this act.”).

190. See generally Baehr v. Lewin, 74 Haw. 645 (1993).

191. Stuart A. Hirsch, *Ban on Gay Marriages to Go to Governor*, INDIANAPOLIS STAR, Apr. 26, 1997, at B2; accord Barb Albert, *Same-sex Marriage Takes Hit in Senate*, INDIANAPOLIS STAR, Feb. 11, 1997, at B2 (noting that State Senator Richard Bray “argued that Congress recently decided to allow states to choose whether to recognize same-sex marriages sanctioned in other locales.”).

Hoosiers could not wed,” and that the concern at the time was that “if any same-sex couple could go to Hawaii to be married, and return to their home state to live, then Hawaii was strong-arming the other states, setting marriage policy for the nation.”¹⁹² In other words, the purpose of the law was perfectly clear: to deny recognition to same-sex marriages.

Defending its anti-gay marriage law in the Seventh Circuit U.S. Court of Appeals in 2014, Indiana did not hypothesize that its legislature was responding to an epidemic of irresponsible procreation among heterosexuals. Indeed, the state offered *no* explanation for what had caused the legislature to enact the ban. Instead, the state offered what it called a “theory” of marriage.¹⁹³ Marriage, it said, “arises from the need to protect the only procreative sexual relationship that exists and to make it more likely that unintended children, among the weakest members of society, will be cared for.”¹⁹⁴ Since homosexuals cannot naturally bear “unintended children,” they are by definition, the state said, outside the purposes of marriage. “With the State’s theory,” Indiana told the Seventh Circuit, “we know what marriage means (recognition and regulation of the preferred mode of begetting and raising children) and have thousands of years of experience to support it and define its limits.”¹⁹⁵

In other words, the state did not attempt to explain or even hypothesize why legislators had banned gay marriage. It simply sought to rationalize the state’s marriage ban post hoc as being consistent with the relationship between heterosexual marriage and procreation. The state focused on the historic definition of marriage rather than the more recent classificatory act. I explained in the preceding Subpart why such a move distorts equal protection analysis.

The basic question about post hoc rationalizations is whether they stretch the rationale for hypothesized purposes too far. Should an explanation be allowed to *justify* a classification if it could not, even *in theory*, have *caused* the classification? To be sure, the Supreme Court has not formally distinguished between hypothesized purposes and post hoc rationalizations, and the difference between the two may not always be clear. The Court sometimes has been imaginative when it wants to save a classification against an equal protection challenge.¹⁹⁶ But even where the Court has seemed to be reaching, it has usually involved the justices purporting to fill in gaps in a legislative record, not entirely reimagining the basic purpose of a statute.

192. Michael Grossberg & Amy Elson, *Family Law in Indiana: A Domestic Relations Crossroads*, in *THE HISTORY OF INDIANA LAW 80* (David J. Bodenhamer & Randall T. Shepard eds., 2006).

193. Brief and Required Short Appendix of Appellants, *supra* note 153, at 33.

194. *Id.*

195. Reply Brief for Appellants, *supra* note 88, at 17–18.

196. Karlan, *supra* note 10, at 873.

For example, in *McGowan v. Maryland*,¹⁹⁷ the Court engaged in speculation while seeking to explain seemingly arbitrary exemptions from a state's Sunday closing law. "It would seem that a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary," the Court said, "either for the health of the populace or for the enhancement of the recreational atmosphere of the day—that a family which takes a Sunday ride into the country will need gasoline for the automobile and may find pleasant a soft drink or fresh fruit"¹⁹⁸ In *Nguyen v. INS*, the Court upheld against an equal protection challenge a federal naturalization statute that treated unmarried fathers differently than unmarried mothers for purposes of a child's U.S. citizenship.¹⁹⁹ The Court speculated that Congress could have believed that due to the sexual irresponsibility of some males, there was more likely to be a meaningful, ongoing bond between a foreign-born child and its mother than between such a child and its father, even though the facts of the case did not support such an assumption.²⁰⁰

Even if the Court has not always hewed to hypothesized purposes that were entirely plausible, post hoc rationalizations are at odds with how the Court has actually described rational basis review in its statements of doctrine. A law is not unconstitutional unless "it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."²⁰¹ A classification must be reasonable based on "*considerations presented to [the legislature]*" and "*evidence before the legislature reasonably supporting the classification.*"²⁰² A hypothesized purpose must have "footing in the realities of the subject addressed by the legislation."²⁰³ The Court has said its "inquiry is at an end" where "there are plausible reasons for [a legislative body's] action."²⁰⁴ What matters is whether the legislative action "was a rational way to correct" the "evil at hand for correction."²⁰⁵ These descriptions lend support to the principle that, if the requirement of "plausibility" has any meaning, there should at least be the theoretical possibility of a causal link between a legislature's action, and the "considerations" and "evidence" that were "before the legislature," or the

197. *McGowan v. Maryland*, 366 U.S. 420 (1961).

198. *Id.* at 426.

199. *Nguyen v. INS*, 533 U.S. 53 (2001).

200. *Id.* at 64–66.

201. *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938)).

202. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (quoting *Carolene Prods. Co.*, 304 U.S. at 154 (alteration in original) (emphasis added)).

203. *Heller v. Doe*, 509 U.S. 312, 321 (1993).

204. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993) (quoting *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (emphasis added)).

205. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1995).

actual “evil at hand for correction.” Even a hypothesized purpose must “conceivably” or “reasonably have been the purpose and policy of the relevant governmental decisionmaker.”²⁰⁶

Responsible procreation cannot be squared with these doctrinal principles. Indeed, in *Obergefell* the Court dismissed the responsible procreation argument as “counterintuitive”²⁰⁷ and “wholly illogical.”²⁰⁸ No attorney for a mini-DOMA state could have asserted with a straight face that the problem of irresponsible heterosexual procreation was on the radar screens of legislators or voters—that is, “an evil at hand for correction”—at the time they enacted the same-sex marriage bans. The fact that marriage and procreation have long been associated does not suffice to explain the gay marriage bans if the problem of irresponsible procreation was not plausibly on legislators’ or the voters’ minds at the time.

Post hoc rationalizations are especially a problem in cases involving animus. As illustrated by this Article’s discussion of the federal marriage litigation, their implausibility should make a court suspicious that the real reasons for the discrimination are improper. But there are arguments that post hoc rationalizations should be identified as such and skeptically examined by courts in all rational basis cases. The reasons are as follows.

First, post hoc rationalizations are inconsistent with the Court’s explanations of the work a hypothesized purpose should do in equal protection analysis. The presumption of constitutionality, a cornerstone of modern equal protection review, does not mean that where rational basis review applies a court must seek to uphold a law at all costs. Rather, the presumption of constitutionality is about judicial deference to the work of legislatures and not second guessing the policy judgments of legislators. Judicial deference is owed to legislative policy judgments, not made-up stories.

Second, hypothesized purposes are meant to fill gaps in a court’s ability to understand the history and context of why a law was adopted. But, if a legitimate purpose cannot plausibly be hypothesized from actual facts and circumstances, it becomes more likely that the law was actually meant to advance some *improper* purpose. As Judge Patrick Higgenbotham observed in a recent Fifth Circuit case holding that Louisiana lacked a rational basis for granting funeral homes the exclusive right to sell caskets (a case about economic favoritism, not animus), “a hypothetical rationale, even post hoc, cannot be fantasy,” and while government

206. *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528–29 (1959)).

207. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

208. *Id.* (quoting *Kitchen v. Herbert*, 755 F.3d 1193, 1223 (10th Cir. 2014)).

purposes may be hypothesized, the analysis cannot incorporate “post hoc hypothesized facts.”²⁰⁹

Third, lawyer-invented post hoc rationalizations raise a separation of powers issue. The executive branch usually is charged with defending laws enacted by the legislative branch, not with making new laws. Plausible hypothesized purposes can be helpful to courts (which sometimes make up their own hypothesized purposes)²¹⁰ in seeking to vindicate the presumption of constitutionality and avoid striking down a law. But when post hoc rationalizations have no plausible causal link to a classification created by the legislature, the executive branch is empowered to become, in effect, the law’s maker—or at least its co-maker. Allowing government lawyers to fabricate purposes for a law that lack grounding in facts and circumstances that actually were before the legislature at the time of the law’s enactment allows the executive to usurp functions that are inherently legislative. Doing so diminishes legislative accountability to voters. The same argument could be made about judges—hypothesizing may be necessary, but the requirement of plausibility imposes limits. Just as new wine does not belong in old bottles,²¹¹ laws passed by a legislature should not become the vessels for entirely new purposes created by the executive’s—or the judiciary’s—imagination.

Fourth, post hoc rationalizations can help government defendants avoid a court’s focus on the actual classificatory act under review, the importance of which was discussed in the previous Subpart. Superficially attractive post hoc rationalizations might distract a court from assessing what the government has actually done, how it actually has classified.

V. HYPOTHESIZED PURPOSES VS. IMPROPER PURPOSES

In *Obergefell*, the Supreme Court was presented with an opportunity to consider what role hypothesized purposes should play when the real explanation for a classification is alleged to be improper. The Sixth Circuit had relied heavily on the post hoc rationalization of responsible procreation as the justification for banning gay marriage²¹² while it summarily rejected in two short paragraphs the plaintiffs’ arguments that

209. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) (emphasis added).

210. Professor Dana Berliner argues, however, that this is rare; that the “Supreme Court has never decided a case involving a government purpose invented by the courts”; and thus that “judicially-invented purposes provide a less than secure footing for law.” Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 GEO. J.L. & PUB. POL’Y 373, 387–88 (2016).

211. *Luke* 5:37 (New Int’l Version) (“And no one pours new wine into old wineskins. Otherwise, the new wine will burst the skins; the wine will run out and the wineskins will be ruined.”).

212. *DeBoer v. Snyder*, 772 F.3d 388, 404–05 (6th Cir. 2014) (“Once one accepts a need to . . . create stable family units for the planned and unplanned creation of children, one can well appreciate why the citizenry would think that a reasonable first concern of any society is the need to regulate male-female relationships and the unique procreative possibilities of them.”).

the gay marriage bans in their states had been impelled by animus.²¹³ Throughout the federal marriage litigation, charges of animus were as central to the arguments of plaintiffs as responsible procreation was to the arguments of state government defendants. Thus, it seems rather remarkable that the Supreme Court entirely avoided engaging with this conflict. This Part offers some principles for the appropriate analysis when hypothesized purposes are in tension with alleged improper purposes.

A. ANIMUS SCRUTINY IN THE FACE OF HYPOTHESIZED PURPOSES

Because “rational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices,”²¹⁴ the Supreme Court has said that we must tolerate possible harm to a plaintiff when government lawyers tell a court, in effect: We cannot determine exactly why the legislature drew this classification, but here are some legitimate purposes we can hypothesize.

But what if the plaintiff can produce evidence that “the disadvantage imposed is born of animosity toward the class of persons affected”²¹⁵ or “irrational prejudice”?²¹⁶ Are courts expected to ignore such animus as long as the law can be saved by resting on some hypothesized purpose? Some of the Court’s rhetoric might suggest as much. Under rational basis review, courts are obligated to uphold a classification if the government offers “plausible reasons,”²¹⁷ even reasons “unsupported by evidence or empirical data.”²¹⁸ If these statements are taken at face value, then can hypothesized purposes be enlisted into what is, in effect, a cover-up to prevent a court from considering actual purposes? That is exactly what the states suggested in *Obergefell*.²¹⁹

But in fact, hypothesized purposes cannot rescue a law that has been corrupted by animus. The Court made this clear in *Windsor*, turning aside the U.S. House of Representatives’ argument that the federally enacted DOMA could be saved with post hoc rationalizations.²²⁰ Moreover, the inability of a hypothesized purpose to adequately explain the discrimination caused by a law can be one factor that leads a court to conclude that animus was at work.

The hallmark of the animus cases has been the Supreme Court’s skepticism toward hypothesized purposes and its willingness to give certain

213. *Id.* at 408.

214. *Heller v. Doe*, 509 U.S. 312, 319 (1993) (internal citation omitted).

215. *Romer v. Evans*, 517 U.S. 620, 634 (1996).

216. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).

217. *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313–14 (1993).

218. *Id.* at 315.

219. *See supra* notes 82–89 and accompanying discussion in text.

220. *See infra* notes 249–261 and accompanying discussion in text.

classifications closer, more skeptical examination.²²¹ In animus cases, “the Court has teased out impermissible purposes where governmental decision makers (including legislatures) have claimed permissible ones.”²²² Moreover, “[a]nimus is not merely an illegitimate purpose,” but also “taints the government’s action. The sometimes far-fetched and hypothesized rationalizations that suffice to sustain a law in ordinary rational-basis cases don’t suffice once animus is detected.”²²³ Justice Sandra Day O’Connor, concurring in the judgment in *Lawrence*, observed that “[w]hen a law exhibits . . . 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.”²²⁴ Indeed, the Court has said that highly deferential rational basis review does not apply where a classification “proceeds along suspect lines,”²²⁵ or where a court has been given “some reason to infer antipathy.”²²⁶ Where constitutionally improper discrimination is alleged, “the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.”²²⁷

In response to Justice O’Connor, Justice Scalia’s dissent in *Lawrence* disapprovingly noted that the “more searching form of rational basis review” O’Connor posited seems to mean “that laws exhibiting ‘a desire to harm a politically unpopular group’ are invalid *even though* there may be a conceivable rational basis to support them.”²²⁸ That is true—Justice Scalia’s statement accurately captures the doctrine based on what the Court has actually said and done. To survive scrutiny, the Court has said, a law must be both “rationally based *and* free from invidious discrimination.”²²⁹

The Supreme Court has never prescribed a precise methodology for the analysis of animus, though several commentators have provided

221. See *supra* notes 72–73 and accompanying text.

222. Carpenter, *supra* note 59, at 243.

223. *Id.* at 190.

224. *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring) (discussing *Moreno*, *Cleburne*, and *Romer*). If a more searching form of rational basis review is essentially synonymous with intermediate scrutiny, which some commentators have asserted, then this suggests that in such situations there should be something close to a per se rule against accepting hypothesized purposes. See Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 (1987) (“[R]ational basis with bite is simply intermediate scrutiny without an articulation of the factors that triggered it . . .”). Where intermediate scrutiny applies, “[t]he justification” for a challenged law “must be genuine, not hypothesized or invented *post hoc* in response to litigation.” *Unites States v. Virginia*, 518 U.S. 515, 533 (1996).

225. *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993).

226. *Id.* at 314.

227. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975).

228. *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (internal citation omitted).

229. *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (emphasis added).

useful, in-depth explorations of animus doctrine.²³⁰ From caselaw and academic commentary, it is possible to sketch the basic outlines of animus analysis and its relationship to hypothesized purposes.

Government action is animus “when, to a material degree, it aims ‘to disparage and to injure’” or reflects “the simple desire to harm (in a tangible and/or intangible way) [a] group of people.”²³¹ Although review under rational basis “places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality,”²³² such as evidence that the purpose of a law was to project an official government expression of animus toward a group, or that the process of adopting the law was impelled by animus. The government can then offer its purposes for the law, real or hypothesized. At the summary judgment stage, the court can decide whether the plaintiff’s animus allegations raise a material question of fact.

At this stage, a court may decide that a law so obviously serves a legitimate government purpose that further analysis is unnecessary. The Supreme Court has indicated that the anti-animus doctrine primarily protects groups that have been historically targeted for unjustified discrimination and subordination,²³³ and courts have demonstrated that they are perfectly capable of dispatching insubstantial or frivolous allegations of animus.²³⁴ For example, because commonplace laws against things like burglary or smoking plainly serve legitimate government interests, it would take an extremely unusual factual record to persuade a court that such legislation was unconstitutional because it betrayed animus toward burglars or smokers. If the matter cannot be resolved on summary judgment, the court may conduct a trial.²³⁵

If the court ultimately rejects allegations of animus, then any legitimate government purpose, even a hypothesized one, allows the law to stand. But if the court confirms that animus was a “material” influence or “substantial factor”²³⁶ in the government’s decision to adopt the law, then the law fails as unconstitutional. And at that point, a benign-sounding hypothesized purpose may not be interposed to save it.²³⁷ Both commentary and caselaw suggest that once a government purpose to

230. See, e.g., Pollvogt, *supra* note 74; Carpenter, *supra* note 59.

231. Carpenter, *supra* note 59, at 186.

232. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) (citing *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314–15 (1993)).

233. See *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring) (discussing *Moreno*, *Cleburne*, and *Romer*).

234. See, e.g., *Loesel v. City of Frankenmuth*, 692 F.3d 452, 466–67 (6th Cir. 2012) (rejecting landowner’s claim that local zoning ordinance was enacted out of animus to the landowner).

235. See *infra* Part V.B.

236. Carpenter, *supra* note 59, at 232.

237. See *infra* notes 249–261 and accompanying text.

intentionally disadvantage a group for no legitimate reason is unmasked, its tainting effect may override even legitimate government purposes.²³⁸

What counts as evidence of animus? The conclusion that animus was a material or substantial influence behind a law, Professor Dale Carpenter explains must be “drawn from a totality of the evidence rather than from a mechanical rule.”²³⁹ The factors include consideration of: statutory text; “the political and legal context of passage, including a historical background demonstrating past discriminatory acts, and a departure from the usual substantive considerations governing the decision”; “the legislative proceedings, including evidence of animus that can be gleaned from the sequence of events that led to passage, the legislative procedure, and the legislative history accompanying passage”; “the law’s harsh real-world impact or effects, including injury to the tangible or dignitary interests of the disadvantaged group”; and “the utter failure of alternative explanations to offer legitimate ends along with means that really advance those ends.”²⁴⁰

Sometimes a court can readily find animus in a law’s purpose from the basic facts of its text, effects, or legislative history, as the Supreme Court did in *Windsor* with the federal Defense of Marriage Act.²⁴¹ Other times, substantial allegations of animus lead a court to apply a more demanding version of ends/means analysis—that is, the rationality of the relationship between the government’s purported legitimate purpose (hypothesized or not) and the law’s actual effects. Because of this more demanding version of ends/means analysis, animus cases are often characterized as “rational basis with bite.”²⁴²

The Court’s animus cases illustrate these principles. In *Romer*, as Professor Andrew Koppelman has explained, there was ample basis for the Court to understand that the Colorado state anti-gay constitutional amendment at issue in that case (which repealed existing anti-discrimination protections for gays and lesbians and prohibited their reinstatement at any level of government), had been impelled by anti-gay animus, even if the Court’s opinion did not expressly highlight evidence of invidious intent.²⁴³ Accordingly, the Court gave only the most perfunctory

238. Carpenter, *supra* note 59, at 186 (“If animus [is] present...it taints the law. The act is unconstitutional even if legitimate reasons might now be offered to justify it.” (internal footnote omitted)); see *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 277 (1979) (“Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not.”).

239. Carpenter, *supra* note 59, at 245.

240. *Id.* at 245–46.

241. See *infra* notes 249–262 and accompanying text.

242. See Pettinga, *supra* note 224, at 780.

243. Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. (SYMPOSIUM ISSUE) 89, 93 (1997) (“*Romer* is a case about impermissible purpose... [M]issing pages can easily be filled in by the reader, who need only take note of the hatred and stereotyping of gays that has been ubiquitous in American culture for a long time.”).

attention to the state's defenses of the measure: that its purposes were to safeguard "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality" and to "conserv[e] resources to fight discrimination against other groups."²⁴⁴ Appropriately regarding these defenses as merely post hoc rationalizations for anti-gay discrimination, the Court stated, "[t]he breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them."²⁴⁵ Thus, the measure "lack[ed] a rational relationship to legitimate state interests."²⁴⁶

Similarly, in *Moreno*, having found evidence that a particular provision of federal food stamp law was intended to express hostility toward persons in unconventional living arrangements—"a bare congressional desire to harm a politically unpopular group"²⁴⁷—the Court gave only brief and skeptical consideration to the government's hypothesized purposes about preventing fraud before dismissing them.²⁴⁸

In *Windsor*, which struck down the federal Defense of Marriage Act, the Court ignored hypothesized purposes altogether because the official purposes Congress had set forth for DOMA were rife with unconcealed animus. For example, the official House of Representatives report on DOMA said the legislation was intended to express "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."²⁴⁹ The report put the word "marriage" in demeaning scarce quotes when referring to same-sex couples.²⁵⁰ It referred to the political and legal movement in support of marriage equality as an "assault against traditional heterosexual marriage laws,"²⁵¹ and referred to same-sex marriage as "a truly radical proposal that would fundamentally alter the institution of marriage."²⁵²

In the *Windsor* litigation, the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") stepped in to defend DOMA when the Obama administration declined to. BLAG effectively disavowed the actual purposes Congress had set forth.²⁵³ Instead, BLAG devoted most of its merits brief in the Supreme Court to setting forth a

244. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

245. *Id.*

246. *Id.* at 632.

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

248. *Id.* at 536-37.

249. H.R. REP. NO. 104-664, at 16 (1996) (internal footnote omitted).

250. *Id.* at 2.

251. *Id.* at 4.

252. *Id.* at 12.

253. For a discussion on disavowed or repudiated government purposes in litigation, see Karlan, *supra* note 10, at 883-86.

detailed list of reasonable and benign sounding purposes it said supported the law, such as “ensuring that similarly-situated couples will have the same federal benefits regardless of the state in which they happen to reside”²⁵⁴ and “avoid[ing] uncertain and unpredictable (but presumed negative) effects on the federal fisc.”²⁵⁵ Because most of these hypothesized purposes played no evident role in the actual congressional findings or debate about DOMA, they are properly characterized as post hoc rationalizations—a distinction previously discussed in Part IV.B. BLAG argued that even if the record behind DOMA manifested animus, BLAG’s post hoc rationalizations could still save the law.²⁵⁶

In striking down DOMA, the Court completely ignored BLAG’s hypothesized purposes.²⁵⁷ Instead, the Court focused on the purposes Congress had actually set out in the record. The Court condemned DOMA for doing what Congress had intended it to do: to express “moral disapproval of homosexuality.”²⁵⁸ “The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma,” the Court concluded.²⁵⁹ “The history of DOMA’s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, . . . was more than an incidental effect of the federal statute. It was its essence.”²⁶⁰ DOMA was principally intended “to impose inequality,” deliberately “demean[ing]” same-sex couples, “burden[ing]” their lives, and “humiliat[ing]” their children.²⁶¹

It is important to remember that *Windsor* is apparently a rational basis case. The Court did not apply formal heightened scrutiny, because it did not find gays and lesbians to be a suspect or quasi-suspect class. The Court said “no *legitimate* purpose”—the terminology of rational basis review—“overcomes [DOMA’s] purpose and effect to disparage and to injure” married same-sex couples.²⁶² *Windsor* thus demonstrates the tainting effect of animus. “In animus cases, the Court . . . does not just take one proffered justification off the table and then ask the government, ‘What else have you got?’”²⁶³ Even under rational basis review, “[t]he

254. Brief on the Merits for Respondent the Bipartisan Legal Advisory Grp. of the U.S. House of Representatives at 33, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

255. *Id.* at 38.

256. Reply Brief on the Merits for Respondent the Bipartisan Legal Advisory Grp. of the U.S. House of Representatives at 16, *Windsor*, 133 S. Ct. 2675 (No. 12-307) (“Animus is . . . a conclusion drawn from the unsuccessful search for rational bases, not a separate inquiry. Since the House has identified numerous rational bases for DOMA, the inquiry ends there.”).

257. *See Windsor*, 133 S. Ct. at 2693–95.

258. H.R. REP. NO. 104-664, at 16 (1996).

259. *Windsor*, 133 S. Ct. at 2693.

260. *Id.*

261. *Id.* at 2694.

262. *Id.* at 2696 (emphasis added).

263. Carpenter, *supra* note 59, at 248 (emphasis omitted).

discovery of animus is instead an affirmative reason to invalidate an otherwise constitutional law.”²⁶⁴

By declining to entertain hypothesized purposes and focusing on obvious improper purposes, *Windsor* made an important contribution to equal protection doctrine. *Windsor* was the rare rational basis case where the Court flunked a law based purely on improper purpose, without even bothering to consider or comment on the fit between the classification and the purposes offered by the government, as it did in *Moreno* and *Romer*. Improper purpose was found in DOMA’s “history of . . . enactment and its own text,”²⁶⁵ its “operation in practice,”²⁶⁶ and its “effect.”²⁶⁷ *Windsor* demonstrates that hypothesized purposes should fail when a court knows, or can reasonably infer from the totality of the evidence, that the actual reason for a law can only be explained by animus. Such a law cannot be rescued by neutral and benign purposes that have been hypothesized after the fact.

B. EVALUATING ANIMUS AT TRIAL

Under rational basis review, the Supreme Court has said that “a legislative choice is not subject to courtroom factfinding.”²⁶⁸ That principle makes sense in the context of ordinary legislative decisions and line drawing. But in light of the foregoing discussion, it should not apply in situations where a plaintiff has made substantial allegations of animus. Sometimes a trial will be necessary to determine the role of alleged animus. And sometimes animus will be confirmed by the failure of hypothesized purposes, properly tested in a fact finding proceeding, to account for a classification.²⁶⁹ At the summary judgment stage, the government should not prevail based on a hypothesized purpose where a material question of fact exists about animus.

Most of the lower court marriage equality cases preceding *Obergefell* were resolved on questions of law without a trial. But two district courts did hold trials to help determine whether the state bans being challenged were unconstitutional.

In the Northern District of California, Judge Vaughn Walker said a trial was necessary to determine, among other things, whether Proposition 8, the California constitutional amendment prohibiting same-sex marriage,

264. *Id.*

265. *Windsor*, 133 S. Ct. at 2693.

266. *Id.* at 2694.

267. *Id.*

268. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993).

269. *See supra* notes 243–248 and accompanying discussion in text (describing the Supreme Court’s ends/means analysis in *Romer* and *Moreno*); Carpenter, *supra* note 59, at 246 (explaining that pretext can be demonstrated by “the utter failure of alternative explanations to offer legitimate ends along with means that really advance those ends”).

“was passed with discriminatory intent.”²⁷⁰ Based on the trial, Judge Walker made detailed and carefully documented findings of fact that included that: “Proposition 8 perpetuates the stereotype that gays and lesbians are incapable of forming long-term loving relationships and that gays and lesbians are not good parents[]”;²⁷¹ “[t]he Proposition 8 campaign relied on fears that children exposed to the concept of same-sex marriage may become gay or lesbian[]” and that “parents should dread having a gay or lesbian child”;²⁷² and that “[t]he campaign to pass Proposition 8 relied on stereotypes to show that same-sex relationships are inferior to opposite-sex relationships.”²⁷³ After the state declined to defend Proposition 8 and the Supreme Court determined that the amendment’s proponents lacked standing to do so,²⁷⁴ Judge Walker’s ruling restored legal same-sex marriage to California.

In the Eastern District of Michigan, Judge Bernard Friedman also held a trial in the litigation over Michigan’s state constitutional gay marriage ban. The plaintiffs alleged animus,²⁷⁵ and the district court ultimately held after trial that the ban did not satisfy rational basis review.²⁷⁶ In overturning Judge Friedman’s decision, the Sixth Circuit noted the trial but did not say that the district court had erred in holding one.²⁷⁷ The Michigan case was one of the four cases before the Supreme Court in *Obergefell*, which overturned the Sixth Circuit. None of the opinions in *Obergefell*, including the dissents, expressed disapproval that a trial had been held to adjudicate an equal protection question where only rational basis review applied.

These trials were appropriate. In order to engage in “searching” review of a classification that comes to the court bearing suspicion of improper purpose,²⁷⁸ a court may need to go beyond the summary judgment papers and evaluate disputed questions of material fact about the law’s history, context, and effects. In such circumstances, hypothesized purposes should be evaluated through ordinary fact finding. Even before *Windsor*,²⁷⁹ the Supreme Court had never instructed lower courts to ignore colorable allegations that improper purpose was lurking behind a law that superficially appeared—or could be made to appear—to pursue neutral, legitimate purposes. To say that a legislature is not required to

270. Bob Egelko, *Judge Refuses to Toss Suit Challenging Prop. 8*, SFGATE (Oct. 15, 2009, 4:00 AM) <http://www.sfgate.com/news/article/Judge-refuses-to-toss-suit-challenging-Prop-8-3213322.php>.

271. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 979 (N.D. Cal. 2010).

272. *Id.* at 988.

273. *Id.* at 990.

274. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

275. *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 773 (E.D. Mich. 2014).

276. *Id.* at 770–75.

277. *See DeBoer v. Snyder*, 772 F.3d 388, 397 (6th Cir. 2014).

278. *See supra* notes 224–229 and accompanying discussion in text.

279. *See supra* notes 249–261 and accompanying discussion in text.

“articulate its reasons for enacting a statute”²⁸⁰ is not the same thing as saying that, in the proper case, judges are forbidden from trying to figure them out.

The admonition that “a legislative choice is not subject to courtroom factfinding”²⁸¹ is best understood as a warning that courts should not purport to factually test the wisdom of legislative policy choices—for example, how the government should regulate a particular industry.²⁸² But where there is “some reason to infer antipathy,”²⁸³ this deferential form of rational basis does not apply.²⁸⁴

VI. HYPOTHESIZED PURPOSES AND DIRECT DEMOCRACY

The Supreme Court has always discussed the rationale for hypothesized purposes in the context of an ordinary legislative lawmaking process. Acceptance of hypothesized purposes is bound up with notions of separation of powers and judicial deference to legislative processes and legislators’ policy judgments.

Most of the state gay marriage bans that were challenged in federal courts that had been defended with hypothesized purposes—including those from all four states in *Obergefell*—were not statutory. They were state constitutional amendments—enactments of fundamental law, not statutes—that had been adopted after vigorous public debate through voter referenda. In *Obergefell*, the Supreme Court ignored an intriguing question: Do the rationales for hypothesized purposes properly extend to laws enacted through direct democracy?

The better answer is “no.” However much they have become an accepted feature of rational basis review, hypothesized purposes still represent a compromise of the principle that courts exist to enforce constitutional rights and limitations on government. That compromise—the “presumption of constitutionality”—is justified out of trust that a co-equal branch, the legislature, will take care not to violate constitutional rights.²⁸⁵ But there is no basis for a similar level of trust when laws are made through direct democracy. Thus, hypothesized purposes should be carefully and skeptically examined by courts in judicial review of referenda and ballot initiatives because direct democracy lacks the setting and characteristics of an ordinary lawmaking process which is what justifies court’s acceptance of hypothesized purposes in the first place. Courts should be especially dubious of hypothesized purposes when a referendum or ballot initiative concerns a matter on which there

280. *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993).

281. *Id.*

282. *See id.* at 317–20 (discussing congressional regulation of the telecommunications industry).

283. *Id.* at 314.

284. *See supra* notes 65–73 (contrasting the two approaches).

285. *See supra* notes 26–34 and accompanying text.

has been vigorous, open, high-profile public debate, because the debate should help make clear the actual purpose the referendum or ballot initiative is intended to accomplish.

A. DEFERENCE TO LEGISLATURES, NOT PLEBISCITES

The Supreme Court has never expressly limited hypothesized purposes to statutes enacted through an ordinary legislative process. Yet that is the context in which all of the Court's statements of rationale for hypothesized purposes have arisen. The Court has never spoken of measures enacted through direct democracy in the same way.

The rationale for a high level of judicial deference to legislative decisionmaking—and, accordingly, the rationale for the acceptability of hypothesized purposes—has always been grounded in the nature of the legislative function. The job of legislators is to take cognizance of social needs and problems, gather facts, consider the preferences of constituents, and then make choices among (sometimes competing) policy options. In a democracy, these functions are outside the role and competencies of courts. “[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of” particular policy choices, the Court explained in *Williamson*,²⁸⁶ the foundational case for hypothesized purposes. “It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”²⁸⁷

Furthermore, the legislative process is inherently incremental. Courts refrain from reviewing the merits of legislative decisions “because legislators and administrators are properly concerned with balancing numerous competing considerations.”²⁸⁸ Judicial review ordinarily should be limited and deferential “where the legislature must necessarily engage in a process of line-drawing[.]”²⁸⁹ because “the legislature must be allowed leeway to approach a perceived problem incrementally.”²⁹⁰

286. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955).

287. *Id.* at 488.

288. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

289. *F.C.C. v. Beach Commc'ns*, 508 U.S. 307, 315 (1993) (quoting *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

290. *Id.* at 316; see *Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970) (“[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.”).

The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.²⁹¹

The Court has repeated this same basic guidance a number of times, and it has invariably been in the context of ordinary statutory lawmaking by elected representatives. “[E]qual protection,” the Court has said, “is not a license for courts to judge the wisdom, fairness, or logic of *legislative choices*” concerning a “*statutory classification*.”²⁹² “A *statutory* discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.”²⁹³ A “*legislative choice*” does not undergo “courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.”²⁹⁴ This deference is necessary “to preserve to the *legislative branch* its rightful independence and its ability to function.”²⁹⁵

It is these legislative process considerations that justify hypothesized purposes. Because “a *classification in a statute*” comes to the Court “bearing a strong presumption of validity,” a legislature is not required “to articulate its reasons for enacting” the classification, and “it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction”—that is, the hypothesized purpose—“actually motivated the legislature.”²⁹⁶

It is important, too, that legislators are accountable to the public for their votes when they stand for reelection. The Court has often repeated, “[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.”²⁹⁷

The Court has never provided “a coherent or even internally consistent analysis of how courts ought to go about reviewing direct democracy measures affecting minority interests and rights,”²⁹⁸ but it has also never said that classifications enacted through direct democracy deserved a high level of deference for the same reasons as matters enacted through the normal legislative process. In civil rights decisions over the years, the Court has made clear that “insisting . . . that the

291. *Williamson*, 348 U.S. at 489 (internal citations omitted).

292. *Beach Commc'ns*, 508 U.S. at 313 (emphasis added).

293. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) (emphasis added).

294. *Beach Commc'ns*, 508 U.S. at 315 (emphasis added).

295. *Id.* (emphasis added) (internal citations omitted).

296. *Id.* at 314, 315.

297. *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

298. Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 405 (1999).

people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment.²⁹⁹ Implementation of a classification through a “popular referendum” does not “immunize it” from scrutiny.³⁰⁰ “The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.”³⁰¹ Indeed, a substantial literature on direct democracy documents that it is frequently harmful to minority rights.³⁰² As Julian Eule has argued in a major article on the subject, “judicial review of direct democracy frequently calls for *less* rather than more restraint” by the judiciary.³⁰³ Hypothesized purposes seem especially problematic where a referendum or ballot initiative involves an enactment of fundamental law like a state constitutional amendment, even in states where an amendment requires both legislative action and a voter referendum. A constitutional amendment is, by definition, an extraordinary exercise of a state’s lawmaking power, not an exercise in routine legislative line-drawing or part of an ongoing legislative process where competing interests may be considered and balanced. Constitutional provisions express fundamental law. Because constitutions trump ordinary statutes, a constitutional provision disables a legislature from revisiting the same question at a later time in light of new facts, data, or circumstances. Constitutional amendments do not represent incrementalism, balancing of competing interests, or moving “one step at a time.” Other questions of judicial review for constitutional amendments are beyond the scope of this Article, but it seems a minimal expectation that courts should seek to understand the actual government purpose that is served by a fundamental law.

One might argue that if hypothesized purposes are to be rigorously examined in judicial review of direct democracy, it should only be on matters affecting the rights of minority groups, because that is where the danger of hidden animus is highest. Certainly that is the setting where the argument for skeptical review of hypothesized purposes is strongest. But a premise of this Article is that the acceptance of hypothesized purposes represents a compromise of constitutional values, a compromise that should be justified. Principles of separation of powers and deference to the legislative process provide this justification in cases of ordinary

299. *Hunter v. Erickson*, 393 U.S. 385, 392 (1969).

300. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 476 (1982).

301. *Hunter*, 393 U.S. at 392.

302. See, e.g., Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245 (1997); Hans A. Linde, *When Initiative Lawmaking Is Not “Republican Government”*: *The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990); Derrick A. Bell, Jr., Lecture Series, *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978).

303. Eule, *supra* note 302, at 1507.

legislation. But such justification is lacking in the context of direct democracy. It is not the role of courts to superintend direct democracy, but it is the role of judicial review to identify and remedy injuries to legally protected interests. Ballot measures dealing with public resources, business regulation, taxation, and other matters can work concrete economic or social harms beyond just the interests of minority groups.³⁰⁴ Undoubtedly the vast majority of such measures reflect legitimate policy choices that voters should be allowed to make, and their purposes will be clear either on their face or from their immediate effects. But if a measure is challenged as causing constitutional harm, a court should deal as much as possible with ascertainable facts. If a challenge to a matter enacted through direct democracy fails, it should be on the merits, not because the government had the advantage of being able to substitute unexamined hypothesized purposes for real ones.

B. GIVING DUE REGARD TO THE PUBLIC DEBATE

Hypothesized purposes should also be disfavored and closely examined in the context of measures adopted through direct democracy because there is no good reason why courts should ignore the substance and consequences of a public debate. Even though legislators are ultimately accountable to the voters for their policy judgments, sometimes legislative decisionmaking is a black box. Deals are brokered behind the scenes. Votes might be cast with little floor debate. States might not maintain transcripts of floor speeches or other formal legislative history. These messy realities of the legislative process help explain why plausible hypothesized purposes may be acceptable in the context of ordinary lawmaking.³⁰⁵

Referenda and ballot initiatives concerning obscure or noncontroversial matters might present some of the same difficulties for judicial review. But it seems odd to suggest that measures adopted after a robust and wide-open public debate—such as the state constitutional amendments banning gay marriage—suffer from the same inscrutability. For example, according to Judge Sutton’s opinion for the Sixth Circuit, voters engaged in a “deliberative process” and “profound policy debate” that allowed them “to discuss and weigh arguments for and against same-

304. *E.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223–27 (5th Cir. 2013) (rejecting the government’s argument that a measure intended to benefit funeral directors by giving them a monopoly on the sale of caskets could be upheld as a consumer protection or health and safety regulation, because those arguments were unsupported by evidence); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (reaching the same conclusion as *St. Joseph Abbey*). These were cases about legislation, not ballot initiatives, but they illustrate how some courts have been willing to seriously examine hypothesized purposes for plausibility even outside the context of animus.

305. *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993) (“[W]e never require a legislature to articulate its reasons for enacting a statute . . .”).

sex marriage.”³⁰⁶ Justice Scalia called the public debate over same-sex marriage an example of “American democracy at its best.”³⁰⁷ If these statements are to be taken seriously as more than just puffery, then there was no warrant for courts to entertain hypothesized purposes for the marriage bans. Doing so disregarded, and thus disrespected, the democratic process that voters engaged in. Michigan’s brief told the Court, “[i]t is ‘demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.’”³⁰⁸ But it is also demeaning to the democratic process for a state’s lawyers to insist, in effect, that courts must avert their gaze or pretend that the process was without any actual substance. And it is demeaning to the democratic process for a state’s executive officials to paper over that process and substitute their own post hoc rationalizations instead.³⁰⁹

It is sometimes assumed that evaluating a direct democracy enactment for animus or other improper purposes requires the impossible task of getting inside the heads of voters. For example, the Sixth Circuit refused to seriously consider the plaintiffs’ arguments about animus by observing, in essence, that some people voted for the mini-DOMAs, some voted against them, and that is all we can ever know: “If assessing the motives of multimember legislatures is difficult, assessing the motives of” millions of voters in four state referenda “strains judicial competence.”³¹⁰ In the end, Judge Sutton threw up his hands and, in effect, asked, Who am I to judge?

It is true, of course, that the motives of an individual citizen for casting a vote cannot be known or assessed by judges. But as discussed at the outset of this Article, motive should not be confused with purpose.³¹¹ As demonstrated in Part III, it is possible to assess the history, context, and effects of the mini-DOMAs as an objective matter without inquiring about the subjective motives of individual voters. The evidence pointed toward holding the mini-DOMAs unconstitutional because they were the products of a process infected by animus. Others might consider the same evidence and reach a different conclusion. The point is that the history, context, and effects of the mini-DOMA campaigns were susceptible to judicial evaluation. Hypothesized purposes were not necessary.

306. *DeBoer v. Snyder*, 772 F.3d 388, 408 (6th Cir. 2014).

307. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting).

308. Brief for Mich. Defendants-Appellants, *supra* note 77, at 2 (quoting *Schuetz v. Coal. to Defend*, 134 S. Ct. 1623, 1637 (2014) (plurality opinion)).

309. *See supra* Part IV.B.

310. *DeBoer*, 772 F.3d at 409.

311. *See supra* notes 40–53 and accompanying discussion in text.

CONCLUSION

Hypothesized purposes have been an accepted feature of equal protection's rational basis review for more than half a century. They represent a compromise, trading away some of the judiciary's authority to enforce constitutional limitations based on the principle that the legislative branch generally should be trusted not to violate constitutional rights.

The recent federal marriage litigation provides examples of how hypothesized purposes can be abused. From that experience it is possible to extract some lessons. Classifications must be properly defined. Hypothesis should not mean the creation of new facts and purposes out of whole cloth, divorced from any plausible legislative considerations, through post hoc rationalization. Hypothesized purposes cannot be used as fig leaves to cover up animus. And the justifications for hypothesized purposes, grounded in judicial deference to the ordinary processes of legislative lawmaking, do not support their use in judicial review of direct democracy.

In *Obergefell*, the Supreme Court missed an opportunity to clarify doctrine on the question of hypothesized purposes. But perhaps lower courts will apply some of these lessons in future cases nonetheless. After all, this Article does not argue for changes to the Court's doctrine. Rather, it argues that courts should do their duty under judicial review when government defendants venture beyond what current doctrine reasonably allows.