RECONCILING RATIONAL-BASIS REVIEW: WHEN DOES RATIONAL BASIS BITE?

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Traditionally, rational-basis scrutiny is extremely deferential and rarely invalidates legislation under the Equal Protection Clause. However, a small number of Supreme Court cases, while purporting to apply rational-basis review, have held laws unconstitutional under a higher standard often termed "rational basis with bite." This Note analyzes every rational-basis-with-bite case from the 1971 through 2014 Terms and nine factors that appear to recur throughout these cases. This Note argues that rational basis with bite is most strongly correlated with laws that classify on the basis of an immutable characteristic or burden a significant right. These two factors are particularly likely to be present in rational-basis-with-bite cases, which can be explained on both doctrinal and prudential grounds. This conclusion upends the conventional wisdom that animus is the critical factor in rational basis with bite and reveals that other routes to rational basis with bite exist. Finally, this Note observes that applying at least rational basis with bite to discrimination against gay, lesbian, bisexual, and transgender individuals is consistent with the pattern of cases implicating immutability and significant rights.

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> "The most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles."[1]

INTRODUCTION

Rational-basis review, the most deferential form of scrutiny under the Equal Protection Clause, rarely invalidates legislation. Between the 1971 and 2014 Terms, the Supreme Court has held laws violative of equal protection under rational-basis scrutiny only seventeen times,[2] out of over one hundred challenges analyzed under

[1] U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 176 n.10 (1980) (referring to eleven Supreme Court cases purporting to apply rational-basis scrutiny).

[2] United States v. Windsor, 133 S. Ct. 2675 (2013); Romer v. Evans, 517 U.S. 620 (1996); Quinn v. Millsap, 491 U.S. 95 (1989); Allegheny Pittsburgh Coal Co. v. Cty. Comm'n, 488 U.S. 336 (1989); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612 (1985); Williams v. Vermont, 472 U.S. 14 (1985); Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985); Plyler v. Doe, 457 U.S. 202 (1982); Zobel v. Williams, 457 U.S. 55 (1982); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973); James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438

rational-basis scrutiny.[3] In these rare cases, the Court appears to be employing a higher standard that scholars have sometimes referred to as "rational basis with bite."[4]

What accounts for the Court's application of rational basis with bite? In an attempt to answer this question, I have reviewed every Supreme Court case decided between the 1971 and 2014 Terms that has held that a law violated the Equal Protection Clause under rational-basis scrutiny.[5] I have identified nine factors that appear to recur throughout these cases: history of discrimination, political powerlessness, capacity to contribute to society, immutability, burdening a significant right, animus, federalism concerns, discrimination of an unusual character, and inhibiting personal relationships.[6] Of these factors, I conclude that two are particularly likely to be present when the Court applies rational basis with bite: immutability and burdening a significant right.[7]

To be sure, neither of these factors is present in every rational-basis-with-bite case,[8] other cases that implicate these factors employ deferential rational-basis review,[9] and the Supreme Court has never explicitly acknowledged the existence of a rational-basis-with-bite

(1972); Lindsey v. Normet, 405 U.S. 56 (1972); Reed v. Reed, 404 U.S. 71 (1971). I have added an eighteenth case, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), to this list, as six Justices found the challenged statute to fail rational-basis scrutiny, although the conclusion did not enter the majority opinion. *See infra* notes 254–55 and accompanying text (discussing the two separate opinions). For an explanation of how I collected these cases, see *infra* notes 32–34 and accompanying text.

3 Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 370 (1999).

4 The term "rational basis with bite" derives from a seminal article by Professor Gerald Gunther, who noted that these cases "found bite in the equal protection clause after explicitly voicing the traditionally toothless minimal scrutiny standard." Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–19 (1972). *See generally* Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987) (tracing the development of this jurisprudence).

5 For an explanation of why I limited my analysis to these years, see *infra* note 32 and accompanying text.

6 For an explanation of the selection of these factors and how I determined whether a factor was present in a case, see *infra* notes 35–37 and accompanying text.

7 This conclusion is chiefly descriptive. I draw this conclusion from the presence and treatment of these factors in the Supreme Court's post–1971 Term cases. Whether these factors present an ideal trigger for heightened review is open to debate. *See, e.g.*, *infra* notes 78, 93, 124 (discussing criticisms of immutability and significant rights).

8 For example, *Metropolitan Life* and *Allegheny Pittsburgh* do not appear to involve either immutability or the burdening of an especially significant right. Other cases implicate one factor but not the other. *See infra* Part III.G (listing the factors present in each case).

9 *See, e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314–16 (1976) (per curiam) (upholding a classification based on age even though age is an immutable characteristic); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54–55 (1973) (upholding unequal

standard in a controlling opinion.[10] However, at the very least, the Court may be more likely to closely scrutinize the legislative aims of a statute and the means employed to that end when immutability or significant rights are implicated.[11]

This conclusion upends the conventional wisdom holding that animus is the critical factor that triggers rational basis with bite.[12] The focus on animus may be misplaced, as animus is not the most prevalent factor in the rational-basis-with-bite cases, appearing in only four of eighteen cases.[13] A broad review of the cases since the 1971 Term indicates that other factors may provide a route to rational basis with bite, particularly immutability and burdening significant rights.

The question of what triggers rational basis with bite is crucial because rational basis with bite holds the key to successful equal-protection challenges brought by groups that do not receive heightened scrutiny. While a group receiving heightened scrutiny is very likely to invalidate a challenged law,[14] the Supreme Court has been reluctant to explicitly confer heightened scrutiny on any new groups,

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expenditures in a school financing system even though education may be a significant right).

[10] The task of reconciling the Supreme Court's rational-basis cases may even be quixotic. *See* Farrell, *supra* note 3, at 415 ("Th[e] search for an underlying principle that would explain the results in the heightened rationality cases appears to be unsuccessful. . . . Is it too much to ask that the Court decide cases consistently and predictably? Apparently the answer to this question is yes."). However, Professor Miranda Oshige McGowan has argued that rational basis with bite is triggered when a group is the target of discrimination. Miranda Oshige McGowan, *Lifting the Veil on Rigorous Rational Basis Scrutiny*, 96 Marq. L. Rev. 377, 399 (2012). Professor McGowan argues that "group" should be defined as a "structural group[ ]," or "'a collection of persons who are similarly positioned in interactive and institutional relations that condition their opportunities and life prospects' in mutually reinforcing ways," and who are "bound together by their shared 'attempt[ ] to politicize and protest structural inequalities that they perceive unfairly . . . oppress' them." *Id.* at 425–27 (second alteration in original) (quoting Iris Marion Young, Inclusion and Democracy 92, 97 (Will Kymlicka et al. eds., 2000)). In contrast, I argue that groups subject to rational-basis-with-bite scrutiny tend to be groups defined by immutable characteristics or whose exercise of a significant right has been burdened. *Infra* Part IV.A.

[11] *See infra* notes 93, 124 and accompanying text (explaining this limited conclusion).

[12] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in judgment) (stating that animus warrants "a more searching form of rational basis review"); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 Fordham L. Rev. 887, 929 (2012) ("Perhaps the most mainstream theory of animus is that it is . . . a trigger for the mythical creature of 'heightened rational basis review.'"); Kenji Yoshino, *Why the Court Can Strike Down Marriage Restrictions Under Rational-Basis Review*, 37 N.Y.U. Rev. L. & Soc. Change 331, 335 (2013) ("[O]nce the Court detects animus, it will apply rational basis 'with bite.'").

[13] *See infra* Part III.C (reviewing the rational-basis-with-bite cases where animus was present).

[14] *See, e.g.*, Gunther, *supra* note 4, at 8 (describing heightened scrutiny as "'strict' in theory and fatal in fact").

as the last time the Court did so was in 1988.[15] On the other hand, a group that is relegated to ordinary rational-basis review faces an enormously uphill battle.[16] Thus, new groups litigating on rational-basis grounds must argue that they should receive rational basis with bite.[17]

This Note proceeds in four Parts. Part I provides a brief overview of traditional rational-basis review and contrasts it with rational basis with bite. Part II discusses the methodology of this Note, the dataset, and its limits. Part III analyzes each of the identified factors, their propensity to appear in rational-basis-with-bite cases, and their explanatory power. At the end of Part III is a chart of each rational-basis-with-bite case and the relevant factors, with a short description of each affected group. Part IV takes stock of this analysis, suggests groups that fit the pattern of rational-basis-with-bite cases, and proposes possibilities for future research. The Appendix provides a summary of each rational-basis-with-bite case.

I
Rational Basis and Its Bite

Traditionally, rational-basis review is extremely deferential to legislatures' enactments. A statutory classification comports with the Equal Protection Clause if it is "rationally related to a legitimate state interest."[18] The challenger bears the burden of proving the irrationality of the challenged statute.[19] The legislature is given tremendous flexibility in the ends it seeks to achieve. The challenger not only must prove that the purposes that actually motivated the enactment were irrational, but must "negative every conceivable basis which might support it."[20] So long as the legislature "*could rationally have decided* that [the classification] *might* foster" a legitimate state pur-

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[15] *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (recognizing that discrimination against nonmarital children is subject to intermediate scrutiny).

[16] *See, e.g.*, Gunther, *supra* note 4, at 8 (describing ordinary rational-basis review as "minimal scrutiny in theory and virtually none in fact"); *see also infra* notes 18–24 and accompanying text (discussing the ordinary rational-basis test).

[17] *See* Susannah W. Pollvogt, Windsor*, Animus, and the Future of Marriage Equality*, 113 Colum. L. Rev. Sidebar 204, 222 (2013), http://www.columbialawreview.org/wp-content/uploads/2013/12/Pollvogt-113-Colum.-L.-Rev.-Sidebar-204.pdf ("Because the Court appears increasingly disinclined to apply heightened scrutiny to new groups, it is more important than ever for equal protection plaintiffs to have winning arguments under rational basis review . . . .").

[18] City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam).

[19] *See id.* (noting that the Court "presume[s] the constitutionality of the statutory discriminations").

[20] Madden v. Kentucky, 309 U.S. 83, 88 (1940).

pose, the statute will be upheld.[21] Moreover, the legislature is afforded wide latitude in the means used to achieve that end. The legislature may act "step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations."[22] The classification can be under- or overinclusive of its target, as courts "accept a legislature's generalizations even when there is an imperfect fit between means and ends."[23] And if there was some "evidence before the legislature reasonably supporting the classification," the legislation is valid even if the evidence may have been incorrect.[24]

The cases that invalidate legislation under rational-basis review frequently stray from these principles. First, these cases may shift the burden to the State to prove the enactment's rationality.[25] With respect to ends, they may deem the purpose of the legislation to be an illegitimate state interest.[26] With respect to means, they may weigh the benefits and harms of the challenged statute.[27] They may engage with the record and demand persuasive evidence.[28] They may reject a statute that furthers a state interest by burdening one group while ignoring other groups.[29]

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[21] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981) (second emphasis added).

[22] *Dukes*, 427 U.S. at 303 (citation omitted).

[23] Heller v. Doe, 509 U.S. 312, 321 (1993).

[24] *Clover Leaf Creamery*, 449 U.S. at 464.

[25] *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 224 n.21 (1982) (noting that the State must "overcom[e] the presumption that [the classification] is not a rational response to legitimate state concerns").

[26] *See, e.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("[A] bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.").

[27] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 635 (1996) ("[The enactment] . . . inflicts . . . immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it."); *Plyler*, 457 U.S. at 223–24 ("In determining the rationality of [the statute], we may appropriately take into account its costs to the Nation and to . . . its victims.").

[28] *See, e.g.*, *Plyler*, 457 U.S. at 228–29, 228 n.24 (explaining that "the record in no way supports the [State's] claim," noting that "the State failed to offer any credible supporting evidence," and citing evidence that the challenged statute was "ineffective[ ]" (internal quotation marks omitted)).

[29] For example, in *City of Cleburne v. Cleburne Living Center, Inc.*, Justice Marshall discussed the Court's inconsistency:

> The Court . . . concludes that legitimate concerns for fire hazards or the serenity of the neighborhood do not justify singling out respondents to bear the burdens of these concerns, for analogous permitted uses appear to pose similar threats. Yet under the traditional and most minimal version of the rational-basis test, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."

473 U.S. 432, 458 (1985) (Marshall, J., concurring in judgment in part and dissenting in part) (quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955)).

These cases purport to apply the rational-basis test, but it is "most assuredly not the rational-basis test" as traditionally understood.[30] It is more akin to "intermediate scrutiny without articulating the factors that triggered it."[31] This Note aims to identify and assess those factors.

II
This Note's Methodology

I chose the 1971 Term as the starting point for my analysis, because that Term saw the application of rational basis with bite six times, marking "a surprising new development" in the doctrine.[32] I reviewed every Supreme Court case with an equal-protection violation under rational-basis scrutiny between then and the 2014 Term, which concluded in the year of this Note's publication. Drawing on the work of other scholars,[33] I identified eighteen such cases.[34]

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30 *Id.*

31 Pettinga, *supra* note 4, at 801. *See generally* Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge [under intermediate scrutiny], . . . classifications . . . must serve important governmental objectives and must be substantially related to achievement of those objectives.").

32 Gunther, *supra* note 4, at 12. Like Professor Gunther, I have omitted from my analysis *Stanley v. Illinois*, 405 U.S. 645 (1972), because *Stanley* did not mention the rational-basis standard, instead focusing on procedural due process and rendering *Stanley* "only marginally an equal protection case." Gunther, *supra* note 4, at 25–26. I have also omitted *Humphrey v. Cady*, 405 U.S. 504 (1972), as that case similarly did not reference rational-basis review, and instead remanded for the possibility that the challenged statute might violate equal protection. *Id.* at 517. I have included *Lindsey v. Normet*, 405 U.S. 56 (1972), which upheld one part of a statute and struck down another part under rational-basis scrutiny. *Id.* at 74, 79; *see* Farrell, *supra* note 3, at 367 n.97 (suggesting the inclusion of this case in the rational-basis-with-bite category). The 1971 Term saw five other rational-basis-with-bite cases: *James v. Strange*, 407 U.S. 128 (1972); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and *Reed v. Reed*, 404 U.S. 71 (1971). *See* Gunther, *supra* note 4, at 18 n.88 (collecting these cases).

33 In the Supreme Court's 1971 Term, the Court struck down laws under rational-basis scrutiny six times. *See supra* note 32 (tallying these cases). From 1972 to 1996, the Court invalidated legislation under the rational-basis standard only ten times, out of 110 such challenges. Farrell, *supra* note 3, at 370, app. at 416–19 (collecting cases). Since then, the Court has arguably employed rational-basis review in this manner once more in *United States v. Windsor*, 133 S. Ct. 2675 (2013). *See infra* note 321 and accompanying text (discussing the level of scrutiny in *Windsor*). *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), might also be added to this list, as six Justices found the challenged statute to fail rational-basis scrutiny, although the conclusion did not enter the majority opinion. *See infra* notes 254–55 and accompanying text (discussing the two separate opinions in *Logan*); *see also* Pettinga, *supra* note 4, at 784 n.52 (citing *Logan*, 455 U.S. 422). I have not included in this tally *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam), because *Olech* only recognized that irrational discrimination against a "class of one" could state an equal-protection claim, and did not actually decide whether the alleged discrimination violated equal protection. *Id.* at 564–65.

34 United States v. Windsor, 133 S. Ct. 2675 (2013); Romer v. Evans, 517 U.S. 620 (1996); Quinn v. Millsap, 491 U.S. 95 (1989); Allegheny Pittsburgh Coal Co. v. Cty.

I selected nine factors that appear to recur in these cases based on a review of the cases and scholarly commentary: history of discrimination, political powerlessness, capacity to contribute to society, immutability, burdening a significant right, animus, federalism concerns, discrimination of an unusual character, and inhibiting personal relationships. As will be explained in more detail in Part III, some factors have more doctrinal and scholarly support than others.

I consider a factor to be present in a case if a majority of the Supreme Court cites the factor either in that case or in another case attributing the factor to the same or a similar group.[35] I also consider a factor to be present, albeit with somewhat less weight, if a plurality, concurrence, or another court (such as the court below) cites the factor. In addition, I consider a factor to be present, with less weight, if the factor's presence can be readily inferred from the factual circumstances.[36] If a majority of the Supreme Court expressly denies the presence of a factor, either in that case or in another case involving the same or a similar group,[37] I take this as evidence against the

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Comm'n, 488 U.S. 336 (1989); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612 (1985); Williams v. Vermont, 472 U.S. 14 (1985); Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985); Plyler v. Doe, 457 U.S. 202 (1982); Zobel v. Williams, 457 U.S. 55 (1982); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973); James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Lindsey v. Normet, 405 U.S. 56 (1972); Reed v. Reed, 404 U.S. 71 (1971).

[35] For example, *Reed* did not directly discuss the history of discrimination against women in its analysis of a gender classification. However, because the Court has acknowledged this history in a subsequent gender-discrimination case, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994), this factor may be considered present in *Reed*. Similarly, *Weber* did not directly address nonmarital children's capacity to contribute to society, but the Court affirmed their capacity in a subsequent case concerning discrimination against nonmarital children, *Mathews v. Lucas*, 427 U.S. 495, 505 (1976). Likewise, *Romer* and *Windsor* did not discuss the history of discrimination against gays and lesbians or the immutability of sexual orientation, but the Court addressed these issues when it ruled on same-sex couples' fundamental right to marry in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

[36] For example, the "fixed, permanent distinctions" in *Zobel*, 457 U.S. at 59, and *Hooper*, 472 U.S. at 623, can be considered immutable and beyond an individual's control. Other straightforward inferences are discussed as they arise in the analysis.

[37] For example, *Lindsey*, *James*, and *Moreno* all concerned impoverished groups. *See Moreno*, 413 U.S. at 529, 538 (food-stamp recipients who live with unrelated individuals); *James*, 407 U.S. at 128 (indigent defendants); *Lindsey*, 405 U.S. at 79 (low-income renters who cannot afford a double bond to maintain an appeal). *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), held that a similar group, defined by low geographical wealth, was neither subject to a history of discrimination nor politically powerless. *Id.* at 28. Similarly, *Jackson* concerned an intellectually disabled criminal defendant, 406 U.S. at 717, and *Cleburne* held that the intellectually disabled were not politically powerless, 473 U.S. at 445. To be sure, the classification in *Jackson* was directed at pretrial criminal defendants, by treating them differently from other individuals subject

factor's explanatory power, since the Court applied rational basis with bite and ruled out that the factor was at play. From this evidence, I draw conclusions about which factors are likely to be present when the Court employs rational basis with bite.

To be sure, this analysis cannot show that any particular factor is necessary or sufficient to trigger rational basis with bite. Indeed, the doctrine is frequently inconsistent: For each potentially significant factor, there are counterexamples where the factor failed to produce rational basis with bite or was absent in other rational-basis-with-bite cases.[38] However, the analysis does reveal which factors are most frequently at play in rational basis with bite and suggests possible routes to this heightened level of review.

III
Reconciling Rational-Basis Review

As the cases surveyed indicate, the Supreme Court has not always been consistent or clear in its application of the rational-basis test. In an attempt to find a unifying theme, this section analyzes nine factors that recur in the Court's rational-basis-with-bite cases. As this Note argues, two factors are particularly likely to be present and may be triggers for rational basis with bite: immutability and burdening a significant right.

A. Quasi-suspect Class

In *Frontiero v. Richardson*,[39] a plurality of the Supreme Court identified four factors that may warrant the application of heightened scrutiny: history of discrimination, political powerlessness, capacity to contribute to society, and immutability.[40] Courts use these factors to assess whether a group is a suspect or quasi-suspect class meriting strict or intermediate scrutiny.[41]

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to commitment. However, the statute, by its terms, targeted a class that included the intellectually disabled. *See Jackson*, 406 U.S. at 720 & n.2 (explaining the commitment of defendants who did not have "comprehension sufficient to understand the proceedings and make [their] defense"). Thus, the group in *Jackson* overlaps with the group in *Cleburne*.

[38] *See supra* notes 8–10 and accompanying text (suggesting counterarguments and providing examples).

[39] 411 U.S. 677 (1973).

[40] *Id.* at 684–88 (plurality opinion). The immutability factor is sometimes interpreted to include "high[ly] visib[le]," *id.* at 686, "obvious, . . . or distinguishing characteristics," Lyng v. Castillo, 477 U.S. 635, 638 (1986). I have focused my analysis on immutability rather than visibility because of the higher propensity of the former to appear in the rational-basis-with-bite cases. *See infra* Part III.A.4 (analyzing ten cases involving immutability).

[41] *See, e.g.*, Windsor v. United States, 699 F.3d 169, 181–85 (2d Cir. 2012) (concluding that gays and lesbians compose a quasi-suspect class subject to intermediate scrutiny), *aff'd on other grounds*, 133 S. Ct. 2675 (2013); Watkins v. U.S. Army, 875 F.2d 699, 724–28 (9th

If a challenger has some of the characteristics of a suspect or quasi-suspect class, the Supreme Court may be more inclined to strike down a law discriminating against that class, yet decline to impose heightened scrutiny.[42] By relying on rational-basis review, the Court can invalidate a single invidious law, yet avoid establishing a new suspect class with potentially far-reaching consequences.[43]

This heightened review may be motivated by the policy concerns underlying the suspect-class factors, even if they are not sufficiently implicated to warrant creating a new suspect class. For example, the Court may want to protect the politically powerless from certain acts of the political majority, may insist that characteristics used in classifications be reasonably relevant to society and government, or may question legal burdens that are tied to immutable characteristics for which one cannot be responsible. Each of these factors and the extent to which they appear in rational-basis-with-bite cases are assessed in turn.

1. *History of Discrimination*

Groups that have experienced a history of discrimination were involved in eight cases, but a majority of the Court has acknowledged the history of discrimination against the groups in only four of those cases. The Court has also expressly denied the history of discrimination against the groups in three cases, yet these groups received rational basis with bite anyway.

The Court has expressly acknowledged the history of discrimination against women, nonmarital children, and gays and lesbians when reviewing laws that discriminate against them. While *Reed* did not explicitly discuss the history of discrimination against women, the Court has acknowledged this history in subsequent opinions concerning gender-based classifications.[44] In *Weber*, the Court directly

Cir. 1989) (en banc) (Norris, J., concurring in judgment) (concluding that gays and lesbians constitute a suspect class subject to strict scrutiny).

[42] *See* Farrell, *supra* note 3, at 411 ("It would be plausible to assume that the groups disadvantaged [in the rational-basis-with-bite cases] would be similar to the 'discrete and insular minorities' excluded from the majoritarian political process to whom the Court has already accorded a special status." (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938))).

[43] *See* Gunther, *supra* note 4, at 29–30 (discussing the Court's "avoidance" of determining whether gender was a suspect classification in *Reed*); *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 459 n.4 (1985) (Marshall, J., concurring in judgment in part and dissenting in part) (describing rational-basis-with-bite cases as "intermediate review decisions masquerading in rational-basis language").

[44] *See Frontiero*, 411 U.S. at 684 (plurality opinion) ("[O]ur Nation has had a long and unfortunate history of sex discrimination."); *see also* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136 (1994) (same).

addressed the history of discrimination against nonmarital children.[45] Although *Romer* and *Windsor* did not directly address the history of discrimination against gays and lesbians, the Court discussed this history in *Obergefell v. Hodges*[46] when it ruled on same-sex couples' fundamental right to marry.[47]

A majority of the Court has not cited a history of discrimination in other rational-basis-with-bite cases. However, Justices' separate opinions and other courts have discussed the history of discrimination against undocumented immigrant children in *Plyler*,[48] the intellectually disabled in *Cleburne* and *Jackson*,[49] and nonlandowners in *Quinn*.[50]

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[45] *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175–76 (1972) (discussing the expression "through the ages [of] society's condemnation of irresponsible liaisons beyond the bonds of marriage" and "the social opprobrium suffered by these hapless children").

[46] 135 S. Ct. 2584 (2015).

[47] *See id.* at 2596 ("Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. . . . Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate."); *see also* Windsor v. United States, 699 F.3d 169, 182 (2d Cir. 2012) ("It is easy to conclude that homosexuals have suffered a history of discrimination. . . . [W]e think it is not much in debate."), *aff'd*, 133 S. Ct. 2675 (2013).

[48] *See* Doe v. Plyler, 628 F.2d 448, 458 (5th Cir. 1980) (noting that undocumented immigrant children are "saddled with . . . disabilities[ ] [and] subjected to . . . a history of purposeful unequal treatment" (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973))), *aff'd*, 457 U.S. 202 (1982). Indeed, federal law requires certain types of discrimination against undocumented immigrants, such as in employment. *See, e.g.*, 8 U.S.C. § 1324a (2012) (prohibiting the employment of undocumented aliens). Such discrimination may be justified by the fact that undocumented immigrants have illegally entered the country in violation of federal law. However, "[t]hese arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants." Plyler v. Doe, 457 U.S. 202, 219–20 (1982); *see infra* notes 81–82 and accompanying text (discussing the immutability of undocumented immigrant children).

[49] In *Cleburne*, both Justice Marshall and Justice Stevens discussed the "grotesque" history of discrimination against the intellectually disabled. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 454 (1985) (Stevens, J., concurring) (observing that the intellectually disabled "have been subjected to a history of unfair and often grotesque mistreatment" (quoting Cleburne Living Ctr., Inc. v. City of Cleburne, 726 F.2d 191, 197 (5th Cir. 1984), *aff'd in part, vacated in part*, 473 U.S. 432 (1985))); *id.* at 461–64 (Marshall, J., concurring in judgment in part and dissenting in part) (explaining that the intellectually disabled "have been subject to a 'lengthy and tragic history' of segregation and discrimination that can only be called grotesque" (citation omitted) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 303 (1978) (opinion of Powell, J.))). However, the *Cleburne* majority suggested that this history may have come to an end, noting that recent advancements in the legislative arena "belie[d] a continuing antipathy or prejudice" against the intellectually disabled. *Id.* at 443 (majority opinion). In *Jackson*, the Court did not cite this history when reviewing the procedures for commitment due to incompetence to stand trial, but it seems likely that the Court was at least aware of it. Justice Blackmun, who authored the opinion in *Jackson v. Indiana*, 406 U.S. 715, 717 (1972), acknowledged this history when he joined Justice Marshall's opinion in *Cleburne*, 473 U.S. at 455, 461–64

One could argue that the impoverished groups affected in *Lindsey*, *James*, and *Moreno*[51] have been subject to a history of discrimination.[52] However, in *San Antonio Independent School District v. Rodriguez*,[53] a majority of the Court rejected the argument that discrimination on the basis of low wealth implicates this suspect-class factor.[54]

The juxtaposition of *Lindsey*, *James*, and *Moreno* with *Rodriguez* suggests that a history of discrimination may not have much explanatory power in triggering rational basis with bite. *Lindsey*, *James*, and *Moreno* invalidated laws affecting low-income individuals. Yet *Rodriguez* expressly disavowed the constitutional significance of their history of discrimination. The fact that *Lindsey*, *James*, and *Moreno* applied rational basis with bite anyway suggests that a history of discrimination is not a critical factor. Moreover, the Court has rarely directly cited the presence of this factor in rational-basis-with-bite cases.

2. *Political Powerlessness*

Enhanced judicial protection of the politically powerless is often traced to the famous fourth footnote in *United States v. Carolene Products Co.*[55] This theory posits that certain groups that lack political

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(Marshall, J., concurring in judgment in part and dissenting in part). The Supreme Court itself sanctioned this discrimination when it upheld the forced sterilization of the intellectually disabled in *Buck v. Bell*, 274 U.S. 200 (1927).

[50] This history is undeniable and has been noted by Justices in prior opinions. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 675 (1966) (Black, J., dissenting) ("Property qualifications existed in the Colonies and were continued by many States after the Constitution was adopted."); *id.* at 684 (Harlan, J., dissenting) ("Property qualifications . . . have been a traditional part of our political structure. . . . Most of the early Colonies had them; many of the States have had them during much of their histories. . . .").

[51] *See supra* note 37 (defining these groups).

[52] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 121–22 (1973) (Marshall, J., dissenting) ("Personal poverty may entail much the same social stigma as historically attached to certain racial or ethnic groups. . . . [T]he 'poor' have frequently been a legally disadvantaged group . . . ."); *see also Harper*, 383 U.S. at 684 (Harlan, J., dissenting) (discussing the history of restricting the right to vote to those who could pay a poll tax).

[53] 411 U.S. 1.

[54] *See id.* at 28 (holding that a class defined by low geographical wealth "is not saddled with such disabilities[ ] or subjected to such a history of purposeful unequal treatment . . . as to command extraordinary protection from the majoritarian political process"); *see also* Maher v. Roe, 432 U.S. 464, 471 (1977) ("[T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis."). The Court in *Rodriguez* proceeded to uphold the wealth classification under rational-basis scrutiny. 411 U.S. at 54–55.

[55] 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."). This theory can be traced even farther

power deserve greater judicial protection because they are unable to protect themselves through the ordinary political processes. Thus, this theory suggests that political powerlessness may provide a justification for rational basis with bite. [56] Six cases involved groups that lack political power, but the Court has never explicitly acknowledged that a group receiving rational basis with bite is politically powerless. Additionally, the Court has expressly denied that the groups in five cases lack political power, although they received rational basis with bite anyway.

A plurality of the Supreme Court or the courts below have discussed the diminished political power of women implicated in *Reed*,[57] undocumented immigrant children in *Plyler*,[58] and gays and lesbians in *Romer* and *Windsor*.[59] The Court may also have acted to protect the out-of-state constituencies affected by the laws in *Metropolitan*

back to *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), which struck down a state tax on a federal bank. The entire nation, which bore the cost of the tax, was not represented in the state legislature and thus lacked recourse through the ordinary political processes.

[56] *See* Farrell, *supra* note 3, at 411 ("It would be plausible to assume that the groups disadvantaged [in the rational-basis-with-bite cases] would be similar to the 'discrete and insular minorities' excluded from the majoritarian political process to whom the Court has already accorded a special status." (quoting *Carolene Prods.*, 304 U.S. at 153 n.4)).

[57] *See* Frontiero v. Richardson, 411 U.S. 677, 686 & n.17 (1973) (plurality opinion) ("[W]omen are vastly underrepresented in this Nation's decisionmaking councils. . . . [T]his underrepresentation is present throughout all levels of our State and Federal Government.").

[58] *See* Doe v. Plyler, 628 F.2d 448, 458 (5th Cir. 1980) (noting that undocumented immigrant children are "saddled with . . . disabilities . . . [and] relegated to . . . a position of political powerlessness" (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973))), *aff'd*, 457 U.S. 202 (1982). Indeed, undocumented immigrant children acutely lack political power because they can be denied the right to vote on account of their status both as aliens, *see, e.g.*, 18 U.S.C. § 611 (2012) (prohibiting voting by aliens in federal elections), and as minors, *see* U.S. Const. amend. XXVI, § 1 (lowering the voting age to eighteen).

[59] The court below in *Windsor* concluded that gays and lesbians "are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public." Windsor v. United States, 699 F.3d 169, 185 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013). Professor Bruce Ackerman has also argued that gays and lesbians lack political power relative to their numbers and should be incorporated into the *Carolene Products* paradigm. *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713, 742 (1985) (arguing that groups that are frequently anonymous, such as gays and lesbians, lack proportionate political power). However, interestingly, the Court in *Obergefell* noted that "[i]t is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process," suggesting that political power has minimal significance, at least within the fundamental-rights context. Obergefell v. Hodges, 135 S. Ct. 2584, 2606 (2015).

Life[60] and *Williams*,[61] as they lacked political power by virtue of their lack of representation in the state legislature.[62]

While the groups in *Cleburne*, *Jackson*, *Lindsey*, *James*, and *Moreno* can arguably be viewed as lacking political power, the Supreme Court has explicitly rejected such contentions. The court below in *Cleburne* concluded that the intellectually disabled lack political power and "may well be a paradigmatic example of a discrete and insular minority for whom the judiciary should exercise special solicitude."[63] This characteristic may also be applicable to the intellectually disabled challenger in *Jackson*, although the Court did not discuss this factor. However, the Supreme Court in *Cleburne* expressly rejected the argument that the intellectually disabled are politically powerless, citing legislative achievements on behalf of the intellectually disabled as evidence of their political power.[64] Similarly, one could also argue that the impoverished groups in *Lindsey*, *James*, and *Moreno*[65] are politically powerless.[66] But *Rodriguez* rejected this contention when it decided that wealth discrimination does not implicate this suspect-class factor.[67]

Although there is a historical and theoretical basis for heightened scrutiny when a group is politically powerless, this factor may not have much explanatory power in the rational-basis-with-bite context. These cases rarely cite the political-powerlessness factor, and when they do, they reject that it even applies. For example, the Court expressly denied that the groups in *Cleburne*, *Lindsey*, *James*, and *Moreno* were politically powerless, yet these cases applied rational basis with bite

[60] *See infra* notes 271–73 and accompanying text (discussing the law imposing higher taxes on out-of-state insurance companies in *Metropolitan Life*).

[61] *See infra* notes 278–81 and accompanying text (discussing the law denying a tax credit to out-of-state car buyers in *Williams*).

[62] *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (invalidating a state tax on a federal constituency, which was not adequately represented in the state legislature).

[63] Cleburne Living Ctr., Inc. v. City of Cleburne, 726 F.2d 191, 197–98 (5th Cir. 1984) (quoting Romeo v. Youngberg, 644 F.2d 147, 163 n.35 (3d Cir. 1980) (en banc), *vacated*, 457 U.S. 307 (1982)), *aff'd in part, vacated in part*, 473 U.S. 432 (1985).

[64] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 445 (1985).

[65] *See supra* note 37 (defining these groups).

[66] For example, Professor Ackerman famously argued that judges should "protect . . . groups that are 'anonymous and diffuse' rather than 'discrete and insular,'" because "these groups . . . are systematically disadvantaged in a pluralist democracy." Ackerman, *supra* note 59, at 724. Professor Ackerman cited victims of poverty as a group that is both anonymous and diffuse. *Id.* at 742.

[67] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (holding that a class defined by low geographical wealth "is not saddled with such disabilities . . . or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"); *see also* Maher v. Roe, 432 U.S. 464, 471 (1977) ("[T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.").

anyway. This suggests that political powerlessness is not driving rational basis with bite.

3. *Capacity to Contribute to Society*

Frontiero stated that characteristics that "frequently bear[ ] no relation to ability to perform or contribute to society" may be viewed as a suspect basis for classification.[68] If the characteristic is generally irrelevant to public interests, closer scrutiny of its relevance may be warranted. Five cases involved such characteristics, but the Court has addressed this point with respect to a group in only one of those cases.

Although *Weber* did not directly discuss the capacity of nonmarital children to contribute to society, the Court later expressly affirmed this capacity in *Mathews v. Lucas*,[69] making *Weber* the only case involving a group which the Court has explicitly recognized as possessing this factor. A plurality addressed this factor with respect to gender not in *Reed* but in *Frontiero*,[70] and a court below stated that it was "easy to decide" that sexual orientation in *Romer* and *Windsor* "has nothing to do with aptitude or performance."[71] *Quinn* alluded to the capacity of nonlandowners to contribute to society, although the Court confined its discussion to their capacity to contribute through membership on a governmental board, rather than their capacity in general.[72]

Because the capacity to contribute to society has rarely been cited in rational-basis-with-bite cases, it appears to lack significant explanatory power.[73]

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68 Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion).

69 427 U.S. 495, 505 (1976) ("[T]he legal status of illegitimacy . . . bears no relation to the individual's ability to participate in and contribute to society.").

70 *See Frontiero*, 411 U.S. at 686–87 (plurality opinion) ("[T]he sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." (footnote omitted)).

71 Windsor v. United States, 699 F.3d 169, 182–83 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013).

72 *See* Quinn v. Millsap, 491 U.S. 95, 108 (1989) ("[A]n ability to understand the issues concerning one's community does not depend on ownership of real property. . . . [P]ersons can be attached to their community without owning real property."). *Quinn* can be viewed as rejecting the notion of property ownership as a proxy for civic competence and discarding this "relic of an earlier, more socially stratified age." Farrell, *supra* note 3, at 406.

73 I do not mean to suggest that other groups in these cases are lacking in their capacity to contribute to society. I only suggest that the Court has tended to not expressly acknowledge these groups' capacities in its reasoning. In fact, certain older cases suggested that wealth classifications might warrant heightened scrutiny, in part due to a lack of a relationship between wealth and one's capacity to contribute to society. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966) ("Wealth . . . is not germane to one's ability to

4. *Immutability*

The concept of immutability can be defined in a number of ways. For example, *Merriam-Webster's Collegiate Dictionary* defines an immutable characteristic as one that is "not capable of or susceptible to change."[74] However, this definition does not adequately describe the suspect and quasi-suspect classes that are considered to have immutable traits.[75] Judge Norris explained why this definition of immutability is too constricted:

> It is clear that by "immutability" the Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. People can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed. People can frequently hide their national origin by changing their customs, their names, or their associations. Lighter skinned blacks can sometimes "pass" for white, as can Latinos for Anglos, and some people can even change their racial appearance with pigment injections. At a minimum, then, the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity.[76]

I conclude that a robust definition of an immutable characteristic is a characteristic that one tends to be unable to control. This definition includes the characteristics that are very difficult to change as noted by Judge Norris. It also comports with how the Court has framed the constitutional significance of immutability. *Frontiero* explained that imposing disabilities on the basis of an immutable characteristic "would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'"[77] By citing *Weber* for this proposition, *Frontiero* indicated

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participate intelligently in the electoral process. Lines drawn on the basis of wealth or property . . . are traditionally disfavored."). But the Court appeared to abandon this line of reasoning when it refused to confer heightened scrutiny on wealth classifications. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (holding that a wealth classification "ha[d] none of the traditional indicia of suspectness"); *see also id.* at 121–22 (Marshall, J., dissenting) ("[P]ersonal wealth may not necessarily share the general irrelevance as a basis for legislative action that race or nationality is recognized to have. . . . [S]ocial legislation must frequently take cognizance of the economic status of our citizens.").

[74] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 622 (11th ed. 2003).

[75] *See* Parham v. Hughes, 441 U.S. 347, 351 (1979) (plurality opinion) (describing race, national origin, alienage, nonmarital parentage, and gender as immutable characteristics).

[76] Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring in judgment) (citation omitted).

[77] Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion) (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

that the key factor is that the trait is beyond the individual's control, since *Weber* involved nonmarital children who cannot control their status (although their status may conceivably be changed by their parents). This conceptualization of immutability comports with deeply rooted principles of individual responsibility, the unjustness of penalizing someone for something that is beyond his or her control, and the purpose of equal protection of the law. As the Court stated in *Plyler*, "Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."[78] Moreover, as will be explained below, this definition of immutability is applicable to many equal-protection cases and may be predictive of rational basis with bite. Under this definition, ten cases involved immutability, and seven of those cases involved groups that the Court has expressly stated are defined by immutable characteristics.

As just explained, this conception of immutability was directly cited in *Weber*[79] and in the plurality's discussion of gender in *Frontiero*.[80] Its explanatory power was affirmed in *Plyler* when the

[78] Plyler v. Doe, 457 U.S. 202, 217 n.14 (1982). On the other hand, the immutability factor has been criticized on a number of grounds. *See, e.g.*, Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (contending that immutability arguments should be abandoned in gay-rights litigation); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 490–91, 490 nn.14–15, 500–19 (1998) (collecting criticisms of the immutability factor and urging its retirement). One criticism is that immutability provides no protection for mutable conduct that is associated with an immutable status. Halley, *supra*, at 520. However, a robust conception of immutability may even encompass conduct that is "constitutive," Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 873 (2002), or a "core expression[ ]," Samuel A. Marcosson, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 674 (2001), of an immutable status, at least where stifling that conduct would wreak a "traumatic change of identity," *Watkins*, 875 F.2d at 726 (Norris, J., concurring in judgment). Another criticism is that immutability may not protect particular members of a class that experience heightened levels of control over the characteristic that defines the class. Halley, *supra*, at 528. However, under my definition, so long as the characteristic "tends" to be beyond one's control, these individuals should be able to claim protection. A further criticism is that immutability arguments fail to negate beliefs that the immutable characteristic is "bad or harmful." *Id.* at 523. Although immutability arguments may avoid value judgments, I do not mean to downplay the importance of making normative arguments in tandem with the argument from immutability. For a response to an additional criticism of the immutability factor, see *infra* note 93.

[79] *See Weber*, 406 U.S. at 175 ("Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.").

[80] *See Frontiero*, 411 U.S. at 686 (plurality opinion) ("[S]ince sex . . . is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to

Court discussed undocumented children who entered the United States with their parents. The Court explained that these "children . . . 'can affect neither their parents' conduct nor their own status'" and "legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[81] Crystallizing the importance of this factor to the rational-basis analysis, the Court stated that it was "difficult to conceive of a rational justification for penalizing these children" "on the basis of a legal characteristic over which children can have little control."[82] Using the same reasoning, Justice Powell was even more direct: "Our review in a case such as these is properly heightened."[83]

Cases involving the intellectually disabled also implicate immutability, which was noted in both *Cleburne* and *Jackson*.[84] Although neither *Romer* nor *Windsor* directly addressed the immutability of sexual orientation, the Court in *Obergefell* recognized the growing scientific, social, and legal consensus that sexual orientation is immutable and generally beyond the individual's control.[85]

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individual responsibility.'" (quoting *Weber*, 406 U.S. at 175)). By implication, immutability can be deemed present in the earlier gender-discrimination case, *Reed*.

[81] *Plyler*, 457 U.S. at 220 (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977)).

[82] *Id.*

[83] *Id.* at 238 (Powell, J., concurring).

[84] In *Cleburne*, the Court acknowledged that the intellectually disabled are "different, immutably so." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985). *Cleburne* did not elaborate on the inability of the intellectually disabled to control their disability. Because a stricter definition of immutability (incapability of being changed) is a subset of my definition of immutability (tendency of the characteristic to be beyond the individual's control), *Cleburne* fits into the latter category no matter which definition the Court used. Granted, the Court signaled that the State may sometimes legitimately classify on the basis of an immutable intellectual disability. *Id.* at 442 & n.10. Nonetheless, the Court expressly noted this immutability when striking down a classification that strained rationality. In *Jackson*, the Court noted that there was "nothing in the record that even points to any possibility that Jackson's present condition can be remedied at any future time" and that the prognosis for his improvement was "rather dim." Jackson v. Indiana, 406 U.S. 715, 725–26 (1972). To be sure, this discussion did not directly address the rationality of the classification. Instead, it refuted the State's argument that Jackson's commitment was not indefinite. A related objection could be that the classification was actually directed at pretrial criminal defendants. However, the statute, by its terms, targeted a class that included the intellectually disabled. *See supra* note 37 (discussing the language of the statute). The quoted discussion indicates the Court's awareness of the immutability of many who were targeted by the statute, including Jackson. Moreover, the Court expressly acknowledged the immutability of intellectually disabled people such as Jackson in *Cleburne*, 473 U.S. at 442.

[85] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015) (citing Brief of the Am. Psychological Ass'n et al. as Amici Curiae in Support of Petitioners at 7–17, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574)) ("[P]sychiatrists and others [have] recognized that sexual orientation is . . . immutable."); *see also* Baskin v. Bogan, 766 F.3d 648, 657 (7th Cir.) (citing AM. PSYCHOLOGICAL ASS'N, ANSWERS TO YOUR QUESTIONS: FOR A BETTER UNDERSTANDING OF SEXUAL ORIENTATION & HOMOSEXUALITY 2 (2008),

Logan can also be viewed as involving immutability. In *Logan*, an employee's claim was terminated because a state commission failed to convene a hearing within a statutorily prescribed timeframe.[86] His claim's defective status was thus "beyond [his] control."[87] Justice Powell explained: "As claimants possessed no power to convene hearings, it is unfair and irrational to punish them for the Commission's failure to do so."[88] Because the employee could not control whether his claim would be defective, that defect was an immutable characteristic.

While not explicitly stating so, *Zobel* and *Hooper* can be interpreted as cases involving immutability as well. These cases struck down "permanent classes" that were impossible to enter.[89] In *Zobel*, the State enacted a plan that annually distributed an amount of dividends to residents based on their length of residency.[90] Newer residents could never "catch up" to older residents whose amounts continued to increase each year. Newness was thus an immutable characteristic, because residents were unable to shed their newness and enter the most desirable classes. In *Hooper*, the State enacted a tax exemption that required the taxpayer to be a resident prior to a specified cutoff date, which had passed long before the statute's enactment.[91] Consequently, residents who arrived after that date could never claim the tax exemption, rendering their newness immutable. These statutes created "fixed, permanent distinctions" based on immutable characteristics.[92]

As explained above, ten out of the eighteen rational-basis-with-bite cases can be explained through my proposed immutability paradigm, that is, the tendency of the characteristic to be beyond the individual's control. Because this paradigm comports with Supreme Court

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http://www.apa.org/topics/lgbt/orientation.pdf; Gregory M. Herek et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample*, 7 SEXUALITY RES. & SOC. POL'Y 176, 188 (2010)) ("[T]here is little doubt that sexual orientation . . . is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice."), *cert. denied*, 135 S. Ct. 316 (2014); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 966 (N.D. Cal. 2010) ("Individuals do not generally choose their sexual orientation. No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation.").

[86] *See infra* notes 248–51 and accompanying text (summarizing the facts of *Logan*).

[87] Logan v. Zimmerman Brush Co., 455 U.S. 422, 424 (1982).

[88] *Id.* at 444 (Powell, J., concurring in judgment).

[89] Zobel v. Williams, 457 U.S. 55, 64 (1982).

[90] *See infra* notes 256–58 and accompanying text (summarizing the facts of *Zobel*).

[91] *See infra* notes 285–87 and accompanying text (summarizing the facts of *Hooper*).

[92] Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612, 623 (1985) (quoting *Zobel*, 457 U.S. at 59).

doctrine and principles of individual responsibility and fairness, it may be a strong predictor of when laws will fail rational-basis review.[93]

B. Burdening a Significant Right

Rational basis with bite also appears to be strongly correlated with laws that burden what might be called a "significant right." By using this term, I mean to refer to two related concepts: a law that burdens an interest that is very important or "quasi-fundamental" but is not a recognized fundamental right, and a law that implicates or "quasi-burdens" a fundamental right but is not necessarily an actual infringement of the right.[94]

Under these circumstances, the burdened interest may be substantial enough to warrant careful review of the law's rationality, even if strict scrutiny is not triggered.[95] Invalidating the law under rational-basis review also permits the Court to avoid establishing or enlarging a fundamental right with potentially far-reaching consequences.[96] Indeed, in a number of rational-basis-with-bite cases, the Court has explicitly declined to address fundamental-rights questions.[97] Significant rights were implicated in fourteen cases, and the Court expressly acknowledged that an important right was at stake in ten of those cases. These numbers render significant rights the most prevalent factor in the rational-basis-with-bite cases.

Eisenstadt presented the question whether the fundamental right to privacy established in *Griswold*[98] extended to unmarried persons'

[93] I do not mean to suggest that laws may never classify on the basis of immutable characteristics. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 n.10 (1985) (citing John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 150, 154–55 (1980)) (noting that some immutable characteristics are relevant to legitimate state purposes). I only suggest that when laws do classify on the basis of immutable characteristics, courts may be justified in applying rational basis with bite and demanding a persuasive rationale for the classification.

[94] *See* Farrell, *supra* note 3, at 412–13 ("[O]ne could identify some similarities between the government benefits denied in the[ ] [rational-basis-with-bite] cases and fundamental rights that the Court has explicitly recognized."). *See generally* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (stating that infringements of fundamental rights are subject to strict scrutiny).

[95] *See* Plyler v. Doe, 457 U.S. 202, 223–24 (1982) (stating that a law that imposes severe burdens on its victims "can hardly be considered rational unless it furthers some substantial goal of the State").

[96] *See* Gunther, *supra* note 4, at 21–22 (discussing the Court's "avoidance" of fundamental-rights issues).

[97] *See* Quinn v. Millsap, 491 U.S. 95, 107 n.10 (1989) (ballot access); *Hooper*, 472 U.S. at 618 (interstate travel); Williams v. Vermont, 472 U.S. 14, 27 (1985) (interstate travel); *Zobel*, 457 U.S. at 60–61 (1982) (interstate travel); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (privacy).

[98] Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (holding that the right to privacy protects married persons' use of contraceptives).

access to contraceptives. The Court declined to address whether *Griswold* protected access to contraceptives,[99] but it suggested the significance of the question: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[100] *James* similarly raised the question whether the right to counsel established in *Gideon*[101] was impermissibly burdened by a statute that allowed the State to recover from indigent criminal defendants the costs of providing them with counsel,[102] but the Court also declined to answer that question.[103]

Zobel, *Williams*, and *Hooper* all raised the possibility that the challenged statutes burdened the fundamental right to interstate travel by restricting newcomers' eligibility for benefits.[104] Each case declined to answer that question and instead ruled on rational-basis grounds,[105] but some of the concurring Justices opined that the statutes did infringe the right to travel.[106] The challengers in *Quinn*

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[99] The Court instead held that the law irrationally discriminated between married and unmarried persons. *Eisenstadt*, 405 U.S. at 454–55. The Court did find that restrictions on contraceptive distribution burden the right to use contraceptives in *Carey v. Population Services International*, 431 U.S. 678, 689–90 (1977).

[100] *Eisenstadt*, 405 U.S. at 453 (emphasis omitted). Justice White concluded that the law burdened the right of married persons to use contraceptives, but concurred in the judgment because the record did not establish that the recipient of the contraceptive was unmarried. *Id.* at 463–65 (White, J., concurring in judgment). In addition, Justice Douglas found that the First Amendment protected handing out the contraceptive as a teaching aid in an educational lecture. *Id.* at 460 (Douglas, J., concurring).

[101] Gideon v. Wainwright, 372 U.S. 335, 339–40, 342 (1963) (holding that States must provide counsel to indigent criminal defendants).

[102] This was the ground of decision of the lower court, which concluded that the statute was an unconstitutional burden on the *Gideon* right. Strange v. James, 323 F. Supp. 1230 (D. Kan. 1971), *aff'd on other grounds*, 407 U.S. 128 (1972).

[103] James v. Strange, 407 U.S. 128, 134 (1972). The Court instead held that the statute's removal of protective exemptions for indebted defendants was irrational. *Id.* at 140–41. The Court later held that the *Gideon* right was not infringed by a statute that allowed for recoupment from convicted defendants who later became able to pay for their counsel without manifest hardship. Fuller v. Oregon, 417 U.S. 40, 52–54 (1974).

[104] *See generally* Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (holding that durational-residency requirements for eligibility for benefits burden the fundamental right to interstate travel), *disapproved on other grounds by* Edelman v. Jordan, 415 U.S. 651, 671 (1974).

[105] Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612, 618–19, 621–22, 624 (1985); Williams v. Vermont, 472 U.S. 14, 23–27 (1985); Zobel v. Williams, 457 U.S. 55, 60–61, 65 (1982).

[106] *See Zobel*, 457 U.S. at 66–68 (Brennan, J., concurring) (concluding that the statute threatened the right to travel and "the mobility so essential to the economic progress of our Nation, and so commonly accepted as a fundamental aspect of our social order"); *see also Hooper*, 472 U.S. at 624 (Brennan, J., concurring) (same); *Williams*, 472 U.S. at 28 (Brennan, J., concurring) (same); *Zobel*, 457 U.S. at 76–78 (O'Connor, J., concurring in

argued that the fundamental right to vote was burdened by the board's land-ownership requirement because nonlandowners would not have a say on the plan that the board placed on the ballot.[107] The Court similarly declined to reach this issue.[108]

Windsor may have been partially grounded in a right of "individual dignity" as "a form of substantive due process."[109] When the Court held that the Defense of Marriage Act (DOMA) was an unconstitutional "deprivation of the liberty of the person,"[110] the Court may have been referring to aspects of the liberty protected by *Lawrence*, which affirmed the right of gays and lesbians to engage in consensual, private, sexual conduct.[111] Indeed, the Court found that DOMA "demean[ed] [same-sex] couple[s], whose moral and sexual choices the Constitution protects," suggesting an unconstitutional attack on the dignity of gays and lesbians.[112] *Lawrence* was not yet on the books at the time of *Romer*, but *Romer* foreshadowed the recognition that laws discriminating against gays and lesbians pose a threat to dignity and liberty.[113]

Plyler acknowledged that education is not a fundamental right, but the Court recognized the importance of the interest at stake.[114] The Court stated that education "has a fundamental role in maintaining the fabric of our society" and "inculcat[es] fundamental values," and described education as a "matter[ ] of supreme importance" and "a most vital civic institution."[115] The complete denial of education may have infringed a possible fundamental right to "a minimally adequate education," a question *Plyler* did not definitively settle.[116] Justice Blackmun concluded that "[g]iven the extraordinary nature of the interest involved," "the State must offer something more

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judgment) (concluding that the statute infringed the fundamental right to travel protected by the Privileges and Immunities Clause).

[107] Brief for the Appellants at 29–35, Quinn v. Millsap, 491 U.S. 95 (1989) (No. 88-1048). *See generally* Lubin v. Panish, 415 U.S. 709, 718 (1974) (invalidating unreasonable restrictions on ballot access as a burden on the right to vote).

[108] *Quinn*, 491 U.S. at 107 n.10.

[109] Pollvogt, *supra* note 17, at 205; *see* United States v. Windsor, 133 S. Ct. 2675, 2714 (2013) (Alito, J., dissenting) ("[S]ubstantive due process may partially underlie the Court's decision today.").

[110] *Windsor*, 133 S. Ct. at 2695.

[111] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[112] *Windsor*, 133 S. Ct. at 2694 (citing *Lawrence*, 539 U.S. 558).

[113] In addition, the court below found that the challenged amendment infringed gays' and lesbians' fundamental right to participate in the political process, because the amendment closed off avenues of seeking protection from the government against discrimination. Evans v. Romer, 854 P.2d 1270, 1285–86 (Colo. 1993) (en banc).

[114] Plyler v. Doe, 457 U.S. 202, 221 (1982).

[115] *Id.*

[116] Papasan v. Allain, 478 U.S. 265, 285 (1986).

than a rational basis for its classification."[117] "[C]ertain interests," such as significant rights, "though not constitutionally guaranteed, must be accorded a special place in equal protection analysis."[118]

Jackson and *Logan* found actual violations of the right to due process, aside from any equal-protection issues. The rights at stake were perhaps more basic than a significant or quasi-fundamental right. *Jackson* concerned the involuntary commitment of criminal defendants before trial.[119] *Logan* involved the destruction of a property interest in a claim without due process of a hearing.[120]

Lindsey, *Cleburne*, and *Moreno* concerned statutes that affected important personal interests pertaining to the home and association, though the majority opinions in these cases did not explicitly discuss the rights at stake. Justice Douglas found that the onerous eviction appeal in *Lindsey* burdened "the fundamental interest of the tenant" in the home, which he described as a "sanctuary" and "the very heart of privacy."[121] In *Cleburne*, Justice Marshall concluded that the intellectually disabled had a "substantial" interest in establishing group homes "to form bonds and take part in the life of a community," and noted that the right to "establish a home" was a "fundamental libert[y]."[122] In *Moreno*, Justice Douglas stated that the fundamental right to associate was infringed by impeding unrelated individuals from "[b]anding together" in households to cope with poverty.[123]

All these cases indicate that rational basis with bite is particularly likely to involve significant rights.[124] The challenged law may appear less rational when it burdens a significant interest without a persuasive

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117 *Plyler*, 457 U.S. at 235–36 (Blackmun, J., concurring).

118 *Id.* at 233.

119 Jackson v. Indiana, 406 U.S. 715, 738 (1972).

120 Logan v. Zimmerman Brush Co., 455 U.S. 422, 434–37 (1982).

121 Lindsey v. Normet, 405 U.S. 56, 82 (1972) (Douglas, J., dissenting in part).

122 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 461 (1985) (Marshall, J., concurring in judgment in part and dissenting in part) (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

123 U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 544–45 (1973) (Douglas, J., concurring) (citing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460–61 (1958)).

124 To be sure, the presence of a significant right is not sufficient to invalidate a classification. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54–55 (1973) (upholding unequal expenditures in a school financing system even though education may be a significant right). However, the Court may be more likely to demand a persuasive rationale for the classification under rational basis with bite when the classification burdens a significant right. On the other hand, there is substantial difficulty in determining which rights are significant or how persuasive the rationale must be. *See, e.g.*, ELY, *supra* note 93, at 43–72, 101–02 (arguing that judicially identifying fundamental values is problematic and inconsistent with representative democracy).

justification.[125] Alternatively, without explicitly saying so, the Court may be "varying [the] level[ ] of scrutiny depending upon 'the constitutional and societal importance of the interest adversely affected.'"[126]

C. Animus

In her concurrence in *Lawrence v. Texas*,[127] Justice O'Connor suggested that a purpose of animus warrants "a more searching form of rational basis review."[128] This theory derives from *Moreno*, which invalidated a law motivated by "a bare . . . desire to harm a politically unpopular group,"[129] and *Romer*, which struck down a law "born of animosity" while citing *Moreno*.[130] Animus can be understood as the impermissible purpose of "harnessing the public laws to reflect and enforce private bias," as opposed to a legitimate public purpose.[131] The Court has established the presence of animus in two ways: through "direct evidence of private bias in the legislative record," and through "an inference of animus based on the structure of a law."[132] Animus was present in four cases, with the Court openly citing animus in each of them.

Moreno and *Windsor* cited direct evidence of hostile, private bias in the legislative record when the Court struck down the challenged laws.[133] *Cleburne* cited direct evidence of another kind of private bias:

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[125] *See* Plyler v. Doe, 457 U.S. 202, 223–24 (1982) (stating that a law that imposes severe burdens on its victims "can hardly be considered rational unless it furthers some substantial goal of the State").

[126] *Id.* at 231 (Marshall, J., concurring) (quoting *Rodriguez*, 411 U.S. at 99 (Marshall, J., dissenting)).

[127] 539 U.S. 558 (2003).

[128] *Id.* at 580 (O'Connor, J., concurring in judgment); *see* Pollvogt, *supra* note 12, at 929 ("Perhaps the most mainstream theory of animus is that it is . . . a trigger for the mythical creature of 'heightened rational basis review.'"); Yoshino, *supra* note 12, at 335 ("[O]nce the Court detects animus, it will apply rational basis 'with bite.'").

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

[130] Romer v. Evans, 517 U.S. 620, 634 (1996).

[131] Brief of Amicus Curiae Susannah W. Pollvogt, Scholar of the Law of Unconstitutional Animus, in Support of Plaintiffs-Appellees at 6, DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014) (No. 14-3464) (citing Palmore v. Sidoti, 466 U.S. 429, 433 (1984)), *rev'd sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556); *see also id.* at 5 (suggesting that animus may be premised on private bias, hostility, moral disapproval, fear, or mere negative attitudes). To be sure, the Court has never clearly defined animus, and there remains much confusion in the doctrine. *See* Pollvogt, *supra* note 17, at 210 ("Given the persistent confusion over what exactly animus is and how it functions, it is surprising that it can function as an operative doctrine at all.").

[132] Pollvogt, *supra* note 12, at 926.

[133] *See id.* at 927 & n.249 (discussing direct evidence of animus in *Moreno*); Pollvogt, *supra* note 17, at 212 & n.47 (discussing direct evidence of animus in *Windsor*). *Moreno* reviewed legislative history revealing that the purpose of the law was "to prevent so-called

fear.[134] The Court noted the State's purpose of placating the "negative attitude" and "fears" of property owners and residents in the neighborhood of the group home.[135]

Romer took a somewhat different approach by inferring the presence of animus.[136] The Court found that "[t]he breadth of the amendment [wa]s so far removed from [its proffered] justifications that [it was] impossible to credit them," and concluded that "the amendment seem[ed] inexplicable by anything but animus."[137] *Cleburne* and *Windsor* also relied on the inference approach in part.[138] After rejecting the plausibility of several proffered purposes, *Cleburne* inferred that the State's purpose "appear[ed] . . . to rest on an irrational prejudice."[139] In *Windsor*, the Court noted DOMA's "unusual deviation from . . . tradition . . . to deprive same-sex couples of . . . federal recognition" and inferred "strong evidence of [the] law having the purpose and effect of disapproval of that class."[140]

'hippies' and 'hippie communes' from participating in the food stamp program." 413 U.S. at 534 (citing H.R. Rep. No. 91-1793, at 8 (1970) (Conf. Rep.); 116 Cong. Rec. 44,439 (1970) (statement of Sen. Holland)). *Windsor* cited legislative history showing that the purpose of DOMA was to express "moral disapproval of homosexuality," "protect[ ] . . . traditional moral teachings," and stop what Congress perceived to be a "truly radical" effort to permit same-sex marriages. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (quoting H.R. Rep. No. 104-664, at 12–13, 16 (1996)). The Court noted that DOMA's improper purpose was confirmed by its title: the Defense of Marriage Act. *Id.*

134 *See* Pollvogt, *supra* note 12, at 927 & nn.249 & 252 (discussing direct evidence of animus in *Cleburne*). Justice Kennedy has described this kind of prejudice as resulting "from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). Justice Kennedy explained that "persons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will." *Id.* at 375.

135 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985). These "mere negative attitudes, or fear," led the Court to conclude that the State's purpose was "irrational prejudice" against the intellectually disabled. *Id.* at 448, 450.

136 *See* Pollvogt, *supra* note 12, at 911–14 (explaining *Romer*'s analysis). Curiously, the Court did not rely on direct evidence of antigay animus even though such evidence was available. *Id.* at 911. Professor Susannah Pollvogt attributes this to *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003), which had upheld a statute criminalizing "sodomy" and had not yet been overruled. "With *Bowers* still on the books, the *Romer* Court could hardly . . . question the general validity of antigay legislation." Pollvogt, *supra* note 12, at 911.

137 Romer v. Evans, 517 U.S. 620, 632, 635 (1996). In other words, the amendment "must [have] be[en] based in animus because there was a radical lack of fit between the law's means and ends." Pollvogt, *supra* note 12, at 928.

138 *See* Pollvogt, *supra* note 12, at 909–10 (discussing the inference of animus in *Cleburne*); Pollvogt, *supra* note 17, at 212 (discussing the inference of animus in *Windsor*).

139 *Cleburne*, 473 U.S. at 450.

140 United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).

There is some appeal to demanding closer scrutiny of a law that appears to have been materially influenced by animus,[141] and the Supreme Court's recent reliance on animus in *Windsor* suggests that the doctrine is not going away anytime soon.[142] However, because animus has been invoked in only a few rational-basis-with-bite cases[143] and the doctrine remains largely unsettled, animus may not be the best predictor of rational basis with bite.

D. Federalism Concerns

When a case presents issues of federalism, closer scrutiny may be warranted to protect the federal-state balance.[144] *Windsor* indicated that a law should be carefully scrutinized if it has the "unusual character" of departing from traditional federal and state roles.[145] Invalidating a law using rational-basis scrutiny under the Equal Protection Clause also allows the Court to avoid deciding the federalism

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141 *See* Ely, *supra* note 93, at 137–38 & 243 n.10 (citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (arguing that "select[ing] people for unusual deprivation . . . simply because the official doing the choosing doesn't like them" is "inconsistent with constitutional norms" and denies "due process of lawmaking," because it violates the official's "duty to accord the entirety of his or her constituency equal concern and respect"). To be sure, the presence of animus is not necessarily fatal to the classification. "[F]or example, burglars are certainly a group toward which there is widespread societal hostility," but laws criminalizing burglary survive because the substantial goal of protecting our homes allays "whatever suspicion such a classification might . . . engender." *Id.* at 154. Nonetheless, where "an unconstitutional motivation appears materially to have influenced the choice," rational basis with bite might be warranted, and the standard could be satisfied by a persuasive permissible purpose. *Id.* at 138.

142 *See* Pollvogt, *supra* note 17, at 210 ("[A]s the Court's decision in *Windsor* demonstrates, animus is alive and well and is poised to increase in importance in the pantheon of equal protection arguments.").

143 Professor Pollvogt has suggested identifying *Plyler* and *Zobel* as animus cases. Pollvogt, *supra* note 12, at 917–21. However, neither case cited *Moreno*, from which the animus doctrine derives. One district court in *Plyler* did recite *Moreno*'s "bare . . . desire to harm" formulation, but it did not draw any conclusions about whether such a desire was present in that case. Doe v. Plyler, 458 F. Supp. 569, 586 (E.D. Tex. 1978) (quoting *Moreno*, 413 U.S. at 534), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *aff'd*, 457 U.S. 202 (1982). For these reasons, I have not included these cases in my analysis of animus.

144 *See* Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 532 (1959) (Brennan, J., concurring) ("[T]he Equal Protection Clause, among its other roles, operates to maintain . . . principle[s] of federalism."); William Cohen, *Federalism in Equality Clothing: A Comment on* Metropolitan Life Insurance Company v. Ward, 38 Stan. L. Rev. 1, 17–18 (1985) ("*Ward*'s prohibition of discrimination in favor of local interests can stem only from federalism concerns.").

145 *Windsor*, 133 S. Ct. at 2692 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)); *see also* Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 8 (1st Cir. 2012) ("[E]qual protection and federalism . . . combine . . . to require a closer than usual review . . . ."). Unusual deviations from the traditional federal-state balance may also implicate "discrimination of an unusual character," discussed in Part III.E.

issue under other constitutional provisions.[146] Federalism concerns were present in six cases, with the Court expressly acknowledging the federalism issue in four of them.

A large part of *Windsor*'s reasoning rested on federalism concerns and DOMA's "unusual deviation" from federal deference to state definitions of marriage.[147] In *Plyler*, the Court invalidated discrimination on the basis of undocumented status where the discrimination did not comport with federal policy. Noting that alien status is "rarely . . . relevant to legislation by a State," the Court rejected the classification because it "d[id] not operate harmoniously within the federal program."[148]

Zobel, *Williams*, and *Hooper* all concerned the right to interstate travel, which implicates federal interests.[149] Justice Brennan explained that the right to travel is rooted in "the *national* interest in a fluid system of interstate movement" because "mobility [is] essential to the economic progress of our Nation."[150] Justice O'Connor noted that the federal system and its "laboratories of democracy" rely on the ability of "individual[s] to settle in the State offering those programs best tailored to [their] tastes."[151]

Metropolitan Life and *Williams* also raised federalism concerns arising from the Dormant Commerce Clause.[152] *Metropolitan Life* noted that the higher tax on out-of-state insurance companies "plac[ed] a burden on interstate commerce," although the Court did

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[146] *See Windsor*, 133 S. Ct. at 2675 ("[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance."); *cf.* Gunther, *supra* note 4, at 21–22 (discussing the Court's "avoidance" of questions of fundamental rights and the Due Process Clause).

[147] *Windsor*, 133 S. Ct. at 2693. The Court explained that "there is no federal law of domestic relations," "the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations," and "DOMA . . . depart[ed] from this history and tradition." *Id.* at 2691–92 (quoting De Sylva v. Ballentine, 351 U.S. 570, 580 (1956)).

[148] Plyler v. Doe, 457 U.S. 202, 225–26 (1982). Justice Powell also noted that the State may have been preempted from regulating its schools on the basis of alien status because "there is no . . . federal guidance in the area of education" with respect to aliens. *Id.* at 240 n.6 (Powell, J., concurring).

[149] *See supra* notes 104–06 and accompanying text (discussing the possibility that the fundamental right to interstate travel was burdened in *Zobel*, *Williams*, and *Hooper*).

[150] Zobel v. Williams, 457 U.S. 55, 66 & n.1, 68 (1982) (Brennan, J., concurring); *accord* Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612, 624 (1985) (Brennan, J., concurring); Williams v. Vermont, 472 U.S. 14, 28 (1985) (Brennan, J., concurring).

[151] *Zobel*, 457 U.S. at 77 & n.7 (O'Connor, J., concurring in judgment) (citing New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

[152] *See generally* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986) (discussing the limits on States' ability to burden interstate commerce and engage in economic protectionism under the Dormant Commerce Clause).

not actually decide whether that burden violated the Dormant Commerce Clause.[153] *Williams* also acknowledged but declined to answer the question whether denying the tax credit to out-of-state car buyers impermissibly burdened interstate commerce.[154]

Although the *Windsor* Court openly suggested that careful scrutiny may be warranted when the classification raises federalism concerns, the Court has applied this principle on only a few occasions. Therefore, federalism may not be a driving force behind rational basis with bite.

E. Discrimination of an Unusual Character

Romer and *Windsor* stated that "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."[155] This language comes from *Louisville Gas & Electric Co. v. Coleman*,[156] a *Lochner*-era[157] decision which struck down a tax imposed on debts that matured after a particular period of time.[158] *Romer* and *Windsor* indicated that laws that are unprecedented or depart from legal traditions may be subject to more rigorous scrutiny.[159] This factor was present in four cases, but the Court has recognized this factor in only *Romer* and *Windsor*.

In *Romer*, the Court discussed the "unusual" and "unprecedented" nature of denying a class of people the ability to seek protection from the law.[160] *Windsor* scrutinized DOMA's "un-

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153 Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 881 (1985). Despite the State's protests, the Court may have applied "Commerce Clause rhetoric in equal protection clothing." *Id.* at 880 (quoting Brief for Appellee W.G. Ward, Jr. at 22, *Metro. Life*, 470 U.S. 869 (No. 83-1274)); *see also* Cohen, *supra* note 144 (discussing the federalism principles at play in *Metropolitan Life*).

154 *Williams*, 472 U.S. at 23 n.7.

155 Romer v. Evans, 517 U.S. 620, 633 (1996) (alteration in original) (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37–38 (1928)); *accord* United States v. Windsor, 133 S. Ct. 2675, 2692–93 (2013) (quoting *Romer*, 517 U.S. at 633).

156 277 U.S. at 37–38.

157 *See generally* Lochner v. New York, 198 U.S. 45 (1905) (marking the Court's hostility to economic regulations), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

158 *Louisville Gas*, 277 U.S. at 38–39.

159 *Windsor*, 133 S. Ct. at 2692–93; *Romer*, 517 U.S. at 633; *see* Susannah W. Pollvogt, *Marriage Equality,* United States v. Windsor*, and the Crisis in Equal Protection Jurisprudence*, 42 Hofstra L. Rev. 1045, 1046 (2014) (explaining that "[d]iscriminations of an unusual character" provide a route to the doctrines of animus and heightened rational-basis review (alteration in original) (quoting *Windsor*, 133 S. Ct. at 2692)).

160 *Romer*, 517 U.S. at 633. The Court concluded that "[i]t is not within our constitutional tradition to enact laws of this sort." *Id.*

usual deviation" from the tradition of federal deference to state definitions of marriage.[161]

Plyler did not cite the language from *Louisville Gas*, but the Court did suggest that state regulation of education on the basis of alien status was unusual. The Court noted that alien status is "rarely . . . relevant to legislation by a State."[162] *Allegheny Pittsburgh* also did not cite *Louisville Gas*, but the Court indicated that the disparate tax treatment of recently acquired property was unusual. The Court was troubled by the assessor's "aberrational enforcement policy," which appeared to be unauthorized by state law and actually "contrary to . . . the guide published by the West Virginia Tax Commission."[163]

Because both *Romer* and *Windsor* relied on the unusual character of the discriminations, this reasoning will likely continue to have force in equal-protection doctrine. However, because none of the other rational-basis-with-bite cases directly cite this reasoning, it does not explain most of the cases.

F. Inhibiting Personal Relationships

In *Lawrence*, Justice O'Connor suggested that the Court "ha[s] been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where . . . the challenged legislation inhibits personal relationships."[164] In support of this proposition, Justice O'Connor cited the invalidated classifications in four cases: those in *Eisenstadt*, which prevented unmarried persons from obtaining contraceptives; *Moreno*, which inhibited cohabitation by unrelated individuals; *Cleburne*, which prevented the establishment of a group home for the intellectually disabled; and *Romer*, which denied protections to gays and lesbians.[165] *Windsor* can be added to this list, as it struck down a law denying federal recognition to married gays and lesbians.[166]

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161 *Windsor*, 133 S. Ct. at 2693. The Court held that DOMA could not survive in light of its unusual nature and animus toward persons in same-sex marriages. *Id.*

162 Plyler v. Doe, 457 U.S. 202, 225 (1982).

163 Allegheny Pittsburgh Coal Co. v. Cty. Comm'n, 488 U.S. 336, 344–45, 344 n.4 (1989). The significance of the "aberrational enforcement policy" was highlighted in *Nordlinger v. Hahn*, 505 U.S. 1 (1992), which upheld a similar acquisition-value taxation scheme that was authorized by constitutional amendment. The Court distinguished *Allegheny Pittsburgh* on the grounds that acquisition-value policies could not have been rational bases in *Allegheny Pittsburgh* because they were incompatible with state law. *Id.* at 14–15.

164 Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in judgment).

165 *Id.*

166 *See Windsor*, 133 S. Ct. at 2694 ("The differentiation demeans the couple, . . . whose relationship the State has sought to dignify." (citation omitted)).

However, inhibiting personal relationships can be understood as one species of burdening significant rights. The interests at stake in the above cases may be significant or quasi-fundamental.[167] Because burdening significant rights encompasses these and other cases, it is a more robust predictor of rational basis with bite.

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[167] *See supra* notes 98–100 and accompanying text (discussing the significant right at stake in *Eisenstadt*); *supra* notes 109–12 and accompanying text (*Windsor*); *supra* note 113 and accompanying text (*Romer*); *supra* note 122 and accompanying text (*Cleburne*); *supra* note 123 and accompanying text (*Moreno*).

G. *Table of Cases*

	Quasi-suspect Class								
	History of Discrimination	Political Powerlessness	Capacity to Contribute to Society	Immutability	Burdening a Significant Right	Animus	Federalism Concerns	Discrimination of an Unusual Character	Inhibiting Personal Relationships
Reed[a]	X	x	x	x					
Lindsey[b]	o	o			x				
Eisenstadt[c]					X				x
Weber[d]	X		X	X					
Jackson[e]	x	o		X	X				
James[f]	o	o			X				
Moreno[g]	o	o			x	X			x
Logan[h]				X	X				
Zobel[i]				x	X		x		
Plyler[j]	x	x		X	X		X	x	
Metro. Life[k]		x					X		
Williams[l]		x			X		X		
Hooper[m]				x	X		x		
Cleburne[n]	x	o		X	x	X			x
Allegheny[o]								x	
Quinn[p]	x		x		X				
Romer[q]	X	x	x	X	x	X		X	x
Windsor[r]	X	x	x	X	X	X	X	X	X
Totals:									
Direct cites	4	0	1	7	10	4	4	2	1
Other cites	4	6	4	3	4	0	2	2	4
Total cites	8	6	5	10	14	4	6	4	5
Rejected	(3)	(5)	(0)	(0)	(0)	(0)	(0)	(0)	(0)

Legend[s]**:**

X = cited by a majority of the Supreme Court in that case or another case involving a similar group

x = cited by other authorities or inferred

o = rejected by a majority of the Supreme Court in that case or another case involving a similar group

[a] Reed v. Reed, 404 U.S. 71 (1971) (women).
[b] Lindsey v. Normet, 405 U.S. 56 (1972) (low-income renters).
[c] Eisenstadt v. Baird, 405 U.S. 438 (1972) (unmarried persons).
[d] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (nonmarital children).
[e] Jackson v. Indiana, 406 U.S. 715 (1972) (criminal defendants deemed incompetent to stand trial).
[f] James v. Strange, 407 U.S. 128 (1972) (indigent criminal defendants).
[g] U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (unrelated cohabiting food-stamp recipients, hippies).
[h] Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (victims of governmental error, per six Justices).
[i] Zobel v. Williams, 457 U.S. 55 (1982) (recent transplants).
[j] Plyler v. Doe, 457 U.S. 202 (1982) (undocumented immigrant children).
[k] Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (out-of-state insurance companies).
[l] Williams v. Vermont, 472 U.S. 14 (1985) (out-of-state car buyers).
[m] Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612 (1985) (recent transplants).
[n] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (intellectually disabled).
[o] Allegheny Pittsburgh Coal Co. v. Cty. Comm'n, 488 U.S. 336 (1989) (recent land purchasers).
[p] Quinn v. Millsap, 491 U.S. 95 (1989) (nonlandowners).
[q] Romer v. Evans, 517 U.S. 620 (1996) (gays, lesbians, and bisexuals).
[r] United States v. Windsor, 133 S. Ct. 2675 (2013) (same-sex couples).
[s] For further explanation of when the factors are deemed to be implicated, see *supra* notes 35–37 and accompanying text.

IV
Toward a Coherent Rational Basis with Bite

A. The Import of Immutability and Significant Rights

As the above analysis demonstrates, immutability and burdens on significant rights are particularly likely to be present in rational-basis-with-bite cases.[168] Groups were discriminated against on the basis of immutable characteristics in ten out of eighteen cases.[169] Significant rights were at stake in fourteen cases.[170]

Classifications based on immutable characteristics warrant close scrutiny because they are in tension with deeply rooted principles of individual responsibility, fairness, and equal protection. These classifications run "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[171] There is a heightened risk of injustice in penalizing someone for something beyond his or her control. "Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."[172]

When significant rights are at stake, close scrutiny may be warranted because imposing severe costs on a group should be justified by a strong showing of public benefits.[173] Invalidating a law under rational-basis review also allows for avoidance of establishing or enlarging a fundamental right.[174] Of course, there is substantial difficulty in determining which rights are significant or how much justification is required.[175]

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168 I do not suggest that laws may never classify on the basis of immutable characteristics or burden significant rights. I argue that such laws may warrant the higher standard of rational basis with bite, which could be satisfied by a persuasive rationale for the classification. *See supra* notes 93, 124 (discussing when classifications may be permissible even though they are based on immutable characteristics or burden significant rights).

169 *See supra* Part III.A.4 (collecting cases).

170 *See supra* Part III.B (collecting cases).

171 Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

172 Plyler v. Doe, 457 U.S. 202, 217 n.14 (1982). For responses to criticisms of the immutability factor, see *supra* notes 78, 93.

173 *See Plyler*, 457 U.S. at 223–24 (stating that a law that imposes severe burdens on its victims "can hardly be considered rational unless it furthers some substantial goal of the State").

174 *See* Gunther, *supra* note 4, at 21–22 (discussing the Court's "avoidance" of fundamental-rights issues).

175 *See, e.g.*, Ely, *supra* note 93, at 43–72, 101–02 (arguing that judicially identifying fundamental values is problematic and inconsistent with representative democracy).

The conventional wisdom has focused on animus as the key to rational basis with bite.[176] This paradigm explains the closer scrutiny in cases concerning prejudice against the intellectually disabled[177] and gays and lesbians.[178] But a comprehensive review of the rational-basis-with-bite cases shows that a broad definition of immutability (the tendency of the characteristic to be beyond the individual's control)[179] can explain these[180] and other cases, including those concerning gender,[181] nonmarital children,[182] undocumented immigrant children,[183] permanent classifications for government benefits,[184] and governmental error.[185] And the burdening of significant rights can explain most of these cases as well as others.[186] These findings illustrate routes to rational basis with bite other than animus.

Justice Marshall believed that the Equal Protection Clause requires a "spectrum of standards" in reviewing discriminatory laws.[187] This spectrum "vari[es] in the degree of care with which the Court will scrutinize particular classifications, depending . . . on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[188] Under this theory, the Court's treatment of significant rights reflects their importance, and the rational-basis-with-bite cases indicate that invidiousness is largely a function of immutability. Rational basis with bite may be a distinct band on Justice Marshall's spectrum.

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[176] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in judgment) (stating that animus warrants "a more searching form of rational basis review"); Pollvogt, *supra* note 12, at 929 ("Perhaps the most mainstream theory of animus is that it is . . . a trigger for the mythical creature of 'heightened rational basis review.'"); Yoshino, *supra* note 12, at 335 ("[O]nce the Court detects animus, it will apply rational basis 'with bite.'").

[177] *Supra* notes 134–35, 138–39 and accompanying text (*Cleburne*).

[178] *Supra* notes 133, 136–38, 140 and accompanying text (*Romer*, *Windsor*).

[179] *Supra* notes 76–78 and accompanying text.

[180] *Supra* note 84 and accompanying text (*Cleburne*, plus *Jackson*); *supra* note 85 and accompanying text (*Romer*, *Windsor*).

[181] *Supra* note 80 and accompanying text (*Reed*).

[182] *Supra* note 79 and accompanying text (*Weber*).

[183] *Supra* notes 81–83 and accompanying text (*Plyler*).

[184] *Supra* notes 89–92 and accompanying text (*Zobel*, *Hooper*).

[185] *Supra* notes 86–88 and accompanying text (*Logan*).

[186] *Supra* Part III.B (*Eisenstadt*, *James*, *Zobel*, *Williams*, *Hooper*, *Quinn*, *Windsor*, *Romer*, *Plyler*, *Jackson*, *Logan*, *Lindsey*, *Cleburne*, *Moreno*).

[187] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting).

[188] *Id.* at 99.

B. Groups That Have Bite

The above analysis indicates that the Court's two most recent applications of rational basis with bite—to laws discriminating against gays, lesbians, and bisexuals in *Romer* and *Windsor*—are entirely consistent with what the Court has done in the past.[189] Such laws discriminate on the basis of an immutable characteristic[190] and burden significant rights.[191] These laws also implicate the other suspect-class factors,[192] may be motivated by animus,[193] and inhibit personal relationships;[194] and *Romer* and *Windsor* happened to involve discriminations of an unusual character.[195]

A question for future research is what other groups implicate these factors, particularly immutability and significant rights, and thus may merit rational basis with bite. Applying rational basis with bite to discrimination against transgender individuals would appear to be consistent with the Court's history.[196] Gender identity (one's inner sense of gender) is likely an immutable characteristic.[197] Moreover,

[189] Like other classifications that have received rational basis with bite, *see infra* notes 202–03 and accompanying text (gender); *infra* note 226 and accompanying text (nonmarital parentage), classifications based on sexual orientation may also be subject to intermediate scrutiny, *see* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 483 (9th Cir. 2014) ("[H]eightened scrutiny applies to classifications based on sexual orientation."); Windsor v. United States, 699 F.3d 169, 185 (2d Cir. 2012) ("[H]omosexuals compose a class that is subject to heightened scrutiny."), *aff'd on other grounds*, 133 S. Ct. 2675 (2013).

[190] *Supra* note 85 and accompanying text.

[191] *Supra* notes 109–13 and accompanying text (discussing gays' and lesbians' right to dignity).

[192] *Supra* note 47 and accompanying text (history of discrimination); *supra* note 59 and accompanying text (political powerlessness); *supra* note 71 and accompanying text (capacity to contribute to society).

[193] *Supra* notes 133, 136–38, 140 and accompanying text.

[194] *Supra* notes 165–66 and accompanying text.

[195] *Supra* notes 160–61 and accompanying text.

[196] Discrimination against transgender individuals may also be subject to intermediate scrutiny as a form of gender discrimination. *See* Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011) (citing Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004)) ("[D]iscrimination against a transgender individual because of his or her gender non-conformity is gender stereotyping prohibited by . . . the Equal Protection Clause."); Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) ("[D]iscrimination against transgender individuals is a form of gender-based discrimination subject to intermediate scrutiny."). Gender classifications have also merited rational basis with bite in the past. *Infra* notes 202–03 and accompanying text.

[197] *See, e.g.*, *Norsworthy*, 87 F. Supp. 3d at 1119 n.8 ("[T]ransgender people['s] . . . identity is . . . immutable . . . ."); Doe v. McConn, 489 F. Supp. 76, 78 (S.D. Tex. 1980) ("[T]he transsexual has not made a choice to be as he is, but rather . . . the choice has been made for him through many causes preceding and beyond his control."); George R. Brown, *Gender Dysphoria and Transsexualism*, MERCK MANUAL: PROF. VERSION, http://www.merckmanuals.com/professional/psychiatric-disorders/sexuality-gender-dysphoria-and-paraphilias/gender-dysphoria-and-transsexualism (last updated June 2015)

there may be a significant or quasi-fundamental right to externally express one's gender identity. Burdening the ability to express one's gender identity threatens "values of privacy, self-identity, autonomy, and personal integrity that . . . the Constitution was designed to protect."[198] It is perhaps unsurprising, then, that at least one law discriminating against transgender persons failed rational-basis scrutiny.[199]

Conclusion

Traditionally, rational-basis review is extremely deferential and rarely invalidates legislation under the Equal Protection Clause. However, a small number of Supreme Court cases have held laws unconstitutional under the higher standard of rational basis with bite. The Court's application of rational basis with bite appears to be most strongly correlated with laws that classify on the basis of an immutable characteristic or burden a significant right. This conclusion reveals that animus is not the sole or even the most prevalent factor in rational basis with bite. This Note aims to provide some clarity and coherence to an inconsistent doctrine and illuminate when rational basis shows its teeth.

("Attempts at altering gender identity in adults have not proved effective and are now considered unethical."). In addition, "transgender people['s] . . . identity is . . . irrelevant to their ability to contribute to society, and [transgender people] have experienced . . . societal discrimination and marginalization." *Norsworthy*, 87 F. Supp. 3d at 1119 n.8.

[198] City of Chicago v. Wilson, 389 N.E.2d 522, 524–25 (Ill. 1978) (quoting Kelley v. Johnson, 425 U.S. 238, 251 (1976) (Marshall, J., dissenting)) (holding that prohibiting transgender persons from wearing clothing of the opposite sex violated the U.S. Constitution); *accord McConn*, 489 F. Supp. at 80–81 (same).

[199] *See McConn*, 489 F. Supp. at 81 (holding that an ordinance prohibiting transgender persons from dressing as the opposite sex "fail[ed] to pass even a minimal degree of scrutiny").

Appendix

This section summarizes the eighteen rational-basis-with-bite cases addressed in this Note in chronological order. This list includes any Supreme Court case that found an equal-protection violation under rational-basis scrutiny between the 1971 and 2014 Terms.

A. *Reed v. Reed*

Reed v. Reed[200] involved a challenge to a statute that provided that men would be chosen over equally qualified women to administer the estate of persons who die intestate.[201] Under current doctrine, such a gender classification would be subject to intermediate scrutiny under *Craig v. Boren*.[202] But in 1971, *Craig v. Boren* had not yet been decided, and the Court reviewed the statute under the rational-basis test.[203] The Court held that the statute made an "arbitrary legislative choice forbidden by the Equal Protection Clause," because the statute "provid[ed] dissimilar treatment for men and women who are . . . similarly situated."[204]

B. *Lindsey v. Normet*

In *Lindsey v. Normet*,[205] tenants challenged the judicial procedures for eviction after nonpayment of rent.[206] The challenged statute provided that to appeal an eviction action, the tenant had to post a bond worth twice the rental value of the premises, and if the tenant lost the appeal, the landlord could recover twice the rent accrued during the appeal.[207] This procedure stood in contrast to the procedures for ordinary civil actions, thereby permitting the tenants

200 404 U.S. 71 (1971).

201 *Id.* at 71–73.

202 *See* 429 U.S. 190, 197 (1976) (establishing that classifications by gender are subject to intermediate scrutiny).

203 *See Reed*, 404 U.S. at 76 ("The question presented by this case . . . is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of [the statutes]."). Although *Reed*, and *Weber* with respect to nonmarital children, have sometimes been reimagined as early intermediate-scrutiny cases, it is important to "remember[ ] the Court's cases accurately—as they were decided, rather than as they can be reimagined"—to more fully understand and "retain [the] equality-protective possibilities of" rational-basis review. Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 533–36 (2014).

204 *Reed*, 404 U.S. at 76–77.

205 405 U.S. 56 (1972).

206 *Id.* at 58.

207 *Id.* at 75–76.

appealing their evictions to frame their claim as one of discrimination.[208]

The Court held that the discrimination against eviction appellants was "arbitrary and irrational, and the double-bond requirement . . . violate[d] the Equal Protection Clause."[209] The Court explained that "[w]hen an appeal is afforded, . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others," and noted that for poor tenants who could not afford the double bond, "as a practical matter, appeal is foreclosed."[210]

C. *Eisenstadt v. Baird*

Eisenstadt v. Baird[211] concerned a statute that prohibited the distribution of contraceptives to unmarried persons.[212] Seven years earlier, the Court held in *Griswold v. Connecticut*[213] that prohibition on the use of contraceptives by married couples violates the fundamental right of privacy.[214] The question in *Eisenstadt* was whether the State could rationally prohibit access to contraceptives for unmarried but not married persons.[215]

The Court held that the statute violated the Equal Protection Clause.[216] The Court explained that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike."[217]

D. *Weber v. Aetna Casualty & Surety Co.*

Weber v. Aetna Casualty & Surety Co.[218] involved a challenge to a workers' compensation scheme that conferred lower priority to unacknowledged nonmarital children in the disbursement of benefits to dependents.[219] The Court did not explicitly state what level of scrutiny applied.[220] The Court explained that "at a minimum, . . . a statu-

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208 *See id.* at 74–76 (contrasting the procedures for civil actions and eviction actions).

209 *Id.* at 79. In contrast, the Court held that another part of the eviction statute, governing the timing of trial and the cognizable issues, was rationally related to the prompt and peaceful resolution of disputes. *Id.* at 69–74.

210 *Id.* at 77, 79.

211 405 U.S. 438 (1972).

212 *Id.* at 440–42.

213 381 U.S. 479 (1965).

214 *Id.* at 485–86.

215 *Eisenstadt*, 405 U.S. at 447.

216 *Id.* at 454–55.

217 *Id.* at 453.

218 406 U.S. 164 (1972).

219 *Id.* at 165–68.

220 *See* Gunther, *supra* note 4, at 31 (explaining that *Weber* did not "voic[e] clearly either a strict or minimal scrutiny standard").

tory classification [must] bear some rational relationship to a legitimate state purpose."[221] The Court went on to find that the classification bore "no significant relationship" to the proffered purposes of the statute.[222] The Court finally concluded that the classification violated the Equal Protection Clause because it was justified by "no legitimate state interest, compelling or otherwise."[223]

While the standard of review was unclear, *Weber* may be treated as a rational-basis-with-bite case in part due to its reliance on *Levy v. Louisiana*[224] and *Glona v. American Guarantee & Liability Insurance Co.*,[225] which articulated the rational-basis standard with slightly more clarity.[226] Moreover, the Court in *Weber* found that any relationship between the statute and one of its proffered purposes had "no possible rational basis."[227]

E. Jackson v. Indiana

Jackson v. Indiana[228] involved a challenge to the procedures for pretrial commitment of criminal defendants deemed incompetent to stand trial.[229] These procedures differed from the commitment procedures that were generally applicable to all other citizens, such as in the standards for commitment and for release.[230] Thus, the challenger, an intellectually disabled criminal defendant, attacked the pretrial commitment procedures on equal-protection grounds.[231]

The Court did not explicitly state what level of scrutiny applied. However, the Court relied heavily on *Baxstrom v. Herold*,[232] which held that there was "no conceivable basis"[233] or "semblance of ration-

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[221] *Weber*, 406 U.S. at 172.

[222] *Id.* at 175.

[223] *Id.* at 176.

[224] 391 U.S. 68 (1968), *cited in Weber*, 406 U.S. 164.

[225] 391 U.S. 73 (1968), *cited in Weber*, 406 U.S. 164.

[226] *See Levy*, 391 U.S. at 71 (defining the question as "whether the line drawn is a rational one"); *Glona*, 391 U.S. at 75 (finding "no possible rational basis" in a relationship between the discrimination and out-of-wedlock procreation). The Court formally recognized that discrimination against nonmarital children is subject to intermediate scrutiny in *Clark v. Jeter*, 486 U.S. 456, 461 (1988), but *Weber* should nonetheless be understood as it was actually decided. *See supra* note 203 (citing Eyer, *supra* note 203, at 533–36) (explaining that historical accuracy allows for a more robust understanding of rational-basis review).

[227] *Weber*, 406 U.S. at 173 (quoting *Glona*, 391 U.S. at 75).

[228] 406 U.S. 715 (1972).

[229] *Id.* at 717.

[230] *See id.* at 720–23 (contrasting the commitment procedures for pretrial criminal defendants and the general population).

[231] *Id.* at 717, 723.

[232] 383 U.S. 107 (1966).

[233] *Id.* at 111–12, *quoted in Jackson*, 406 U.S. at 724.

ality"[234] for using special procedures for the commitment of inmates at the end of a prison sentence. Therefore, *Jackson* may appropriately be considered a rational-basis-with-bite case. The Court held that the pretrial commitment procedures violated the Equal Protection Clause, because they unjustifiably subjected the criminal defendant "to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses," and "thus condemn[ed] him in effect to permanent institutionalization."[235]

F. James v. Strange

James v. Strange[236] concerned a challenge to a statute whereby the State could recoup the costs of providing counsel or other legal services to indigent criminal defendants.[237] Nearly a decade earlier, the Court held in *Gideon v. Wainwright*[238] that States were constitutionally required to provide counsel to indigent criminal defendants.[239] The statute in *James* provided that a judgment could issue against a defendant who failed to pay for these legal costs, and disallowed the defendant from claiming almost all of the protective exemptions available to other judgment debtors.[240] The Court held that "impos[ing] these harsh conditions on a class of debtors who were provided counsel as required by the Constitution" failed to meet the requirement of rationality under the Equal Protection Clause.[241]

G. U.S. Department of Agriculture v. Moreno

U.S. Department of Agriculture v. Moreno[242] concerned an amendment to the federal food-stamp program that made households containing any unrelated individuals ineligible for food stamps, with limited exceptions. [243] The question presented was whether this classification violated equal protection.[244]

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[234] *Id.* at 115.

[235] *Jackson*, 406 U.S. at 730. The Court also held that the indefinite commitment of the defendant solely on account of his incompetence to stand trial violated due process. *Id.* at 731, 738.

[236] 407 U.S. 128 (1972).

[237] *Id.* at 128.

[238] 372 U.S. 335 (1963).

[239] *Id.* at 339–40, 342.

[240] *James*, 407 U.S. at 129–31.

[241] *Id.* at 140–41.

[242] 413 U.S. 528 (1973).

[243] *Id.* at 529–30.

[244] Specifically, the question was whether the classification violated the equal-protection component of the Fifth Amendment's Due Process Clause. *Id.* at 532–33. *See generally* Bolling v. Sharpe, 347 U.S. 497 (1954) (incorporating the Fourteenth Amendment's Equal

The Court held that the classification was "wholly without any rational basis" and violated equal protection.[245] The Court reviewed legislative history indicating that the purpose of the amendment was "to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."[246] The Court held that "a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[247]

H. Logan v. Zimmerman Brush Co.

In *Logan v. Zimmerman Brush Co.*,[248] an employee filed a complaint with a state employment commission alleging that he was unlawfully terminated due to his disability.[249] State law required that the commission hold a fact-finding conference within 120 days of the complaint, but the commission inadvertently scheduled the conference for five days too late.[250] The state court below held that this error deprived the commission of jurisdiction to consider the employee's complaint.[251]

The Supreme Court reversed on due-process grounds.[252] The employee also raised an equal-protection argument that the State unlawfully discriminated between two groups: complainants whose claims were processed within 120 days and afforded review, and complainants whose claims were processed after 120 days and thus terminated.[253] Six Justices, in two separate opinions, found an equal-protection violation under rational-basis scrutiny, although the conclusion did not enter the majority opinion. Justice Blackmun (joined by Justices Brennan, Marshall, and O'Connor) concluded that the "random[ ]" termination of claims, simply because the State processed them too slowly, constituted "the very essence of arbitrary state action."[254] Justice Powell (joined by then-Justice Rehnquist) likewise concluded that it was "unfair and irrational to punish [claimants] for the Commission's failure" to timely convene a conference, although

Protection Clause against the federal government through the Fifth Amendment's Due Process Clause).

[245] *Moreno*, 413 U.S. at 538.

[246] *Id.* at 534.

[247] *Id.*

[248] 455 U.S. 422 (1982).

[249] *Id.* at 426.

[250] *Id.*

[251] *Id.* at 427.

[252] *Id.* at 437–38.

[253] *Id.* at 438–39 (opinion of Blackmun, J.).

[254] *Id.* at 442.

he disagreed with the breadth of the language in Justice Blackmun's opinion.[255]

Because six Justices found the claim's termination to be irrational, I have included *Logan* in my analysis because it may shed light on what warrants rational basis with bite.

I. *Zobel v. Williams*

Zobel v. Williams[256] concerned a challenge to a statutory scheme by which Alaska distributed dividends from oil revenues to its residents.[257] Under the plan, every year each adult citizen received an amount of dividends determined by the number of years he or she had been a resident of Alaska since its statehood.[258]

The challengers argued that the scheme burdened the fundamental right to interstate travel and should be subject to strict scrutiny, but the Court declined to decide whether strict scrutiny was warranted, instead holding that the scheme could not satisfy even the rational-basis test.[259] The Court held that the State's goal of "reward[ing] citizens for past contributions" was not a legitimate state interest.[260] The Court further held that the State's interest in incentivizing individuals to establish and maintain residency in Alaska was not rationally related to the scheme because the statute operated retroactively, granting greater dividends to those who were already residents prior to its enactment.[261] The scheme thereby created "fixed, permanent distinctions" based on length of residency and violated equal protection.[262]

J. *Plyler v. Doe*

Plyler v. Doe[263] involved a challenge to a state statute that withheld funding for the education of children who were not legally admitted into the United States and authorized public schools to deny

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[255] *Id.* at 443–44 (Powell, J., concurring in judgment).

[256] 457 U.S. 55 (1982).

[257] *Id.* at 56–57.

[258] *Id.*

[259] *Id.* at 60–61, 60 n.6, 65. *See generally* Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (holding that durational-residency requirements for eligibility for benefits burden the fundamental right to interstate travel and are subject to strict scrutiny), *disapproved on other grounds by* Edelman v. Jordan, 415 U.S. 651, 671 (1974).

[260] *Zobel*, 457 U.S. at 63.

[261] *Id.* at 61–62. The Court found that the State's interest in prudent, long-term management of the dividend fund was not rationally related to the scheme for similar reasons. *Id.* at 62–63.

[262] *Id.* at 59, 64–65.

[263] 457 U.S. 202 (1982).

enrollment to these children.[264] The question presented was whether, consistent with the Equal Protection Clause, the State "may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens."[265]

The Court rejected arguments that undocumented immigrants were a suspect class or that public education was a fundamental right, either of which would have triggered heightened scrutiny.[266] Instead, giving teeth to the rational-basis test, the Court demanded that the statute "further[ ] some substantial goal of the State," in light of the drastic human costs of the measure.[267] At the outset, the Court noted that it was "difficult to conceive of a rational justification for penalizing . . . children" for "a legal characteristic over which [they] can have little control."[268] The Court then rejected the State's interest in the "preservation of the state's limited resources for the education of its lawful residents," in light of the lack of any national policy that might condone denying education to undocumented immigrants.[269] The Court further explained that the evidentiary record did not support the contention that the statute furthered other proffered interests.[270]

K. Metropolitan Life Insurance Co. v. Ward

Metropolitan Life Insurance Co. v. Ward[271] involved a challenge to an Alabama tax statute that taxed out-of-state insurance companies at a higher rate than in-state insurance companies.[272] Under the statute, out-of-state companies could reduce their tax burden by investing in certain Alabama assets and securities, but not to the level paid by in-state companies.[273]

Due to the procedural posture of the case, the Court technically did not rule on whether the statute violated the Equal Protection Clause, but only on whether two of the proffered purposes of the

264 *Id.* at 205.

265 *Id.*

266 *Id.* at 223 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28–39 (1973)).

267 *Id.* at 223–24.

268 *Id.* at 220.

269 *Id.* at 226–27 (quoting Brief for Appellants at 26, *Plyler*, 457 U.S. 202 (Nos. 80-1538, 80-1934)).

270 *Id.* at 228–30.

271 470 U.S. 869 (1985).

272 *Id.* at 871.

273 *Id.* at 872.

statute were legitimate.[274] However, in light of the Court's willingness to reject those purposes, this case may appropriately be placed in the rational-basis-with-bite category.

The Court declared that the two proffered purposes were illegitimate[275] when accomplished through an impermissible means.[276] The Court characterized both purposes as discriminatory and illegitimate: "promotion of domestic business by discriminating against nonresident competitors," and "encouraging investment in Alabama assets and securities in this plainly discriminatory manner."[277]

L. *Williams v. Vermont*

Williams v. Vermont[278] involved a challenge to Vermont's method of taxing cars.[279] Under Vermont law, to register a car that was purchased out of state, the registrant had to pay a use tax, which could be reduced by the amount of sales or use tax paid to the other state.[280] However, this credit was available only to registrants who were Vermont residents at the time of acquiring the vehicle, not to registrants who bought their cars before becoming Vermont residents.[281]

The Court held that the distinction violated the Equal Protection Clause.[282] The Court found "no rational reason to spare Vermont residents an equal burden" of funding road maintenance and improvement, and declared that Vermont "cannot extend that benefit to old residents and deny it to new ones."[283] The Court declined to consider arguments based on the right to interstate travel, the Privileges and Immunities Clause, and the Commerce Clause.[284]

M. *Hooper v. Bernalillo County Assessor*

Hooper v. Bernalillo County Assessor[285] involved a tax exemption that New Mexico granted to veterans of the Vietnam War who resided in New Mexico prior to a specified date, which was shortly

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[274] *Id.* at 875 & n.5.

[275] *Id.* at 883.

[276] *See id.* at 898 (O'Connor, J., dissenting) (complaining that the Court "collaps[ed] the two prongs of the rational basis test into one" by "declar[ing] that the [State's] ends . . . *when accomplished through the means of discriminatory taxation* are not legitimate state purposes").

[277] *Id.* at 882–83 (majority opinion).

[278] 472 U.S. 14 (1985).

[279] *Id.* at 15–16.

[280] *Id.*

[281] *Id.*

[282] *Id.* at 27.

[283] *Id.* at 26–27.

[284] *Id.* at 27.

[285] 472 U.S. 612 (1985).

after the end of that conflict and before the exemption's enactment.[286] The exemption was unavailable to Vietnam veterans who moved to New Mexico after that date.[287]

As in *Zobel*, the challengers argued that the tax exemption should be subject to strict scrutiny for burdening the fundamental right to interstate travel.[288] Again, the Court declined to decide that question, instead holding that the statute could not pass even the rational-basis test.[289] The Court explained that the exemption's retroactive operation created "fixed, permanent distinctions" that violated equal protection.[290]

N. *City of Cleburne v. Cleburne Living Center, Inc.*

In *City of Cleburne v. Cleburne Living Center, Inc.*,[291] a group home for the intellectually disabled attacked a zoning ordinance that required a special-use permit to operate the home, which was denied by the city council.[292] The ordinance permitted various other uses but required a permit to operate a facility for the intellectually disabled.[293]

The Court first rejected the argument that the intellectually disabled were a quasi-suspect class warranting heightened scrutiny.[294] The Court went on to hold that the ordinance was invalid as applied to the group home, because requiring a permit lacked a rational basis and instead rested on "irrational prejudice" against the intellectually disabled.[295] The Court held that "mere negative attitudes, or fear," were not permissible bases for state action.[296]

O. *Allegheny Pittsburgh Coal Co. v. County Commission*

In *Allegheny Pittsburgh Coal Co. v. County Commission*,[297] property owners challenged a tax assessor's policy of valuing property by its most recent purchase price, with only minor adjustments over time.[298] As land values increased, recently sold property was valued

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[286] *Id.* at 614, 617 n.5.
[287] *Id.* at 615.
[288] *Id.* at 618 & n.6.
[289] *Id.* at 618–19, 621–22, 624.
[290] *Id.* at 623 (quoting Zobel v. Williams, 457 U.S. 55, 59 (1982)).
[291] 473 U.S. 432 (1985).
[292] *Id.* at 435–37.
[293] *Id.* at 436–37, 436 n.3.
[294] *Id.* at 442.
[295] *Id.* at 450.
[296] *Id.* at 448.
[297] 488 U.S. 336 (1989).
[298] *Id.* at 338.

and taxed at a much higher rate (up to thirty-five times higher) than comparable property that had not been recently sold.[299]

The Court held that the assessor's "relative undervaluation of comparable property . . . over time . . . denie[d] petitioners the equal protection of the law."[300] The Court did not question that the State could rationally divide property into classes and assign different tax burdens to each.[301] But the State "ha[d] not drawn such a distinction" between properties recently sold and those not recently sold.[302] On the contrary, state law required uniform taxation according to estimated market value.[303] The assessor, "on her own initiative," conducted an "aberrational enforcement policy" that violated equal protection.[304]

P. *Quinn v. Millsap*

Quinn v. Millsap[305] involved a challenge to a requirement that one must own real property to be eligible to sit on a governmental board.[306] The purpose of the board was to draft a plan to reorganize the local government, to be approved by the city and county voters.[307]

The Court held that the real-property requirement was irrational and violated equal protection.[308] The Court rejected arguments that landowners were more knowledgeable about community issues or more attached to the community, or that they were particularly suited to consider the board's mandate. [309]

Q. *Romer v. Evans*

Romer v. Evans[310] concerned a challenge to a state constitutional amendment adopted by referendum.[311] The amendment prohibited all

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299 *Id.* at 341.
300 *Id.* at 346.
301 *Id.* at 344.
302 *Id.* at 345.
303 *Id.*
304 *Id.* at 344–45, 344 n.4.
305 491 U.S. 95 (1989). *Quinn* relied on *Turner v. Fouche*, 396 U.S. 346 (1970), which struck down a land-ownership requirement under rational-basis scrutiny, *id.* at 362–64, and *Chappelle v. Greater Baton Rouge Airport District*, 431 U.S. 159 (1977) (mem.) (per curiam), a summary reversal citing *Turner*. I have omitted *Chappelle* from my analysis of post–1971 Term cases because of its summary nature and its substantial overlap with the issues presented in *Quinn*.
306 *Quinn*, 491 U.S. at 96.
307 *Id.*
308 *Id.* at 107, 109.
309 *Id.* at 107–09.
310 517 U.S. 620 (1996).
311 *Id.* at 623.

legislative, executive, or judicial action designed to prevent discrimination against gays, lesbians, or bisexuals.[312]

The Court held that the amendment "fail[ed], indeed defie[d], even th[e] conventional [rational-basis] inquiry."[313] First, the Court held that "imposing a broad and undifferentiated disability on a single named group," by impeding that group from seeking aid from the government, was "a denial of equal protection of the laws in the most literal sense."[314] Second, the Court explained that the amendment's "sheer breadth [wa]s so discontinuous with the reasons offered for it that the amendment seem[ed] inexplicable by anything but animus," or "a bare . . . desire to harm."[315] The Court rejected the State's proffered purposes of the law, because "[t]he breadth of the amendment [wa]s so far removed from these particular justifications that [it was] impossible to credit them."[316]

R. *United States v. Windsor*

United States v. Windsor[317] involved a challenge to DOMA,[318] which excluded same-sex partners and unions from the definition of "spouse" and "marriage" for purposes of all federal statutes and other regulations or directives.[319] Because federal law did not recognize the challenger's same-sex marriage, even though it was valid under state law, she was ineligible for the marital exemption from the federal estate tax after her spouse passed away.[320]

The Court did not explicitly state what level of scrutiny it applied in reviewing DOMA. However, the Court's "opinion d[id] not apply strict scrutiny, and its central propositions [we]re taken from rational-basis cases" such as *Moreno* and *Romer*.[321] Therefore, *Windsor* fits within the tradition of rational basis with bite.

The Court held that DOMA violated the Fifth Amendment right to liberty and equal protection.[322] The Court began by examining

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312 *Id.* at 624.
313 *Id.* at 632.
314 *Id.* at 632–33.
315 *Id.* at 632, 634 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).
316 *Id.* at 635.
317 133 S. Ct. 2675 (2013).
318 Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).
319 *Windsor*, 133 S. Ct. at 2682–83.
320 *Id.* at 2683.
321 *Id.* at 2706 (Scalia, J., dissenting); *see id.* at 2693 (majority opinion) (citing Romer v. Evans, 517 U.S. 620, 633 (1996); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973)). *But see* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 480–81 (9th Cir. 2014) (concluding that *Windsor* applied a standard that is "unquestionably higher than rational basis review").
322 *Windsor*, 133 S. Ct. at 2695–96.

DOMA's "unusual" "depart[ure] from th[e] history and tradition of reliance on state law to define marriage."[323] The Court then found "strong evidence of [DOMA] having the purpose and effect of disapproval of" or animus toward same-sex couples.[324] The Court concluded that "no legitimate purpose overc[ame] the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[325]

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323 *Id.* at 2692 (quoting *Romer*, 517 U.S. at 633).
324 *Id.* at 2693.
325 *Id.* at 2696.