2018

State Action That Penalizes Children as Evidence of a Desire to Harm Politically Unpopular Parents

Catherine E. Smith

State Action That Penalizes Children as Evidence of a Desire to Harm Politically Unpopular Parents

Catherine E. Smith*

I. INTRODUCTION

A child should not be punished for the "sins" of his father.[1] This maxim is consonant with the Fourteenth Amendment's core tenet that it is unfair to discriminate against an individual or group of people because of an immutable trait or characteristic present at birth.[2] Despite this central principle, there are times when children bear the brunt of the government's moral judgment of their parents' conduct or status.[3] Such government action has been a consistent pattern with respect to children of unmarried and immigrant parents, and more recently, children of same-sex parents.[4] On the rare occasion that courts have

---

* Professor of Law, University of Denver Sturm College of Law. J.D. & M.P.A., University of South Carolina. This Article is dedicated to my mother, Sippie Smith Johnson, and daughter, Zoe Jane Smith-Holladay. Special thanks to the *Suffolk University Law Review* for inviting me to give the Donahue Lecture. Thanks to Bryston Gallegos for excellent research assistance and Frank Rudy Cooper and Nancy Ehrenreich for their edits, feedback, and invaluable support.

1. *Ezekiel* 18:20 ("The child will not share the guilt of the parent, nor will the parent share the guilt of the child.").

2. *See* U.S. CONST. amend. XIV (requiring due process); Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973) (including sex within category of immutable characteristic). This Article does not endorse the view that immutability is a required condition for heightened review. *See Frontiero*, 411 U.S. at 686. Discrimination based on immutable characteristics is surely an injustice. As the Court noted:

> [S]ince sex, like race and national origin, 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 individual responsibility.'

Id. (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972)). The notion that "legal burdens should bear some relationship to individual responsibility," is one consideration or factor in the Court's decision to impose the higher standard of review in cases involving discrimination based on immutable characteristics. *Id.*

3. Mathews v. Lucas, 427 U.S. 495, 505 (1976) (according nonmarital children status akin to "race or national origin"). Like race or national origin, the status of nonmarital children is "a characteristic determined by causes not within the control of the illegitimate individual." *Id.*

4. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (stating "visiting . . . condemnation on the head of an infant is illogical and unjust"). In *Plyler v. Doe*, the Court explained that "[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."

directly addressed the equal protection rights of children who are denied basic rights because of the moral judgments of their parents, children have been the sole focus of the courts' inquiry.[5] This child-centered focus, however, fails to recognize that the legislation in question may also be driven by government hostility towards the parents.[6]

Take the historical treatment of children of unmarried parents: Once viewed as the "child[ren] of no one," children born to unmarried parents were considered "non-persons" and denied the social and legal benefits enjoyed by children of married parents.[7] They were socially ostracized, denied inheritance and social security, and refused parental support because the state exacted the price for its moral judgment of their parents from them.[8] In a series of cases from the early 1970s to the late 1980s, the Supreme Court struck down such laws as driven by invidious animus and violative of the equal protection rights of children of unmarried parents, eventually extending heightened scrutiny to such classifications.[9] The nonmarital status cases established important equal protection principles protecting the rights of children; however, they failed to fully acknowledge why the children in question were treated unfairly—because of the government's disdain and hostility for their parents.[10] The children of

---

Plyler v. Doe, 457 U.S. 202, 220 (1982); Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589, 1608 (2013) (explaining how government exclusion of children of same-sex couples is the "modern-day equivalent" of the exclusion of nonmarital children); Tanya Washington, *In* Windsor*'s Wake: Section 2 of DOMA's Defense of Marriage at the Expense of Children*, 48 IND. L. REV. 1, 49-63 (2014) (describing adverse impact of state marriage bans and non-recognition laws on children of same-sex couples).

5. *See Weber*, 406 U.S. at 175; *see also Plyler*, 457 U.S. at 220. It was rare for children of LGBT parents to file suit against government action that treated them unequally as compared to their different-sex parented peers. *See* Smith, *supra* note 4, at 1589. "To date, no state or federal court has directly addressed what level of scrutiny applies to children who face discrimination because of their same-sex parents' relationships." *Id.*

6. This Article does not endorse the view that government action against parents, whether driven by moral judgment, bias, or discrimination, is legitimate or justified. This Article makes the overarching point that state action that targets the children of these parents may reflect animus-based decisionmaking that stems from the state's hostility toward the parents.

7. 1 WILLIAM BLACKSTONE, COMMENTARIES *459 (discussing legal rights in England of children of unmarried parents). William Blackstone described the legal rights of unmarried children as follows: "rights [of a nonmarital child] are very few, being only such as he can acquire; for he can *inherit* nothing, being looked upon as the son of nobody." *See id.*; *see also* Gareth W. Cook, *Bastards: Denial of Recovery for Wrongful Death Based Solely on the Illegitimacy of Either Claimant or Decedent Is a Violation of Equal Protection of the Laws*, 47 TEX. L. REV. 326, 327 (1969) (observing children of unmarried parents traditionally disfavored by law); Benjamin G. Ledsham, *Means to Legitimate Ends: Same-Sex Marriage Through the Lens of Illegitimacy-Based Discrimination*, 28 CARDOZO L. REV. 2373, 2373 (2007) (noting children of unmarried parents have faced legal disfavor since Abraham's illegitimate son Ishmael); Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 350 (2011) (describing lack of rights afforded to *filius nullis*, "the child of no one").

8. *See* Ledsham, *supra* note 7, at 2373 (explaining children of unmarried parents denied rights).

9. *See infra* Part III (discussing nonmarital children cases).

10. *See* Smith, *supra* note 4, at 1608-1621.

unmarried parents were not legally ostracized separate and apart from their parents' conduct; the law burdened them *because of* whose child they were.

Many people believe that punishing children based on the disdain for their parents is an immoral failing of the past, yet such practices persist.[11] As this Article goes to print, the national headlines reflect outrage over the United States' explicit policy of separating children from their parents at our borders.[12]

This Article is the first to advance the position that when the government takes the extreme step of denying children basic rights and benefits because of their parents, such state action should be recognized *not just* as evidence of animus against the children, but also as evidence of "a bare desire to harm" their "politically unpopular" parents.[13] Identifying this type of government motivation and calling it what it is—animus toward parents—is just as important as condemning animus against the children themselves. Anti-parent animus that motivates harmful government behavior towards children should be prohibited as an impermissible means to accomplish an end and viewed as antithetical to our equal protection values.

Today, recent developments in equal protection law offer an important avenue for redress for this type of anti-parent animus. This short Article is simply a starting point for a discussion about the use of the animus doctrine to chill state action that unfairly harms children and parents. It also seeks to highlight that discrimination against parents inflicts more than atomistic or individualized harms to the parents themselves; it can also create relational injuries to children and families (and vice-versa).[14]

---

11. *See* Maldonado, *supra* note 7, at 356-64 (explaining continued disparities between marital and nonmarital children); Udi Ofer, *Protecting* Plyler*: New Challenges to the Rights of Immigrant Children to Access a Public School Education*, 1 COLUM. J. RACE & L. 187, 222-26 (2012) (explaining challenges of children of undocumented parents); Smith, *supra* note 4, at 1608 (explaining the disparities between children of different-sex and same-sex couples); *see also* Bettina Elias Siege, *New Mexico Outlaws School 'Lunch Shaming'*, N.Y. TIMES (Apr. 7, 2017), https://www.nytimes.com/2017/04/07/well/family/new-mexico-outlaws-school-lunch-shaming.html (labeling New Mexico as first state to pass laws outlawing school practices shaming students whose parents fail to pay for lunch or who receive free or reduced price lunch).

12. *See* Michael D. Shear et al., *Trump Retreats on Separating Families, but Thousands May Remain Apart*, N.Y. TIMES (June 20, 2018), https://www.nytimes.com/2018/06/20/us/politics/trump-immigration-children-executive-order.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=a-lede-package-region&region=top-news&WT.nav=top-news.

13. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1972) (striking down law targeting hippies due to animus). In previous articles on the subject of legislation targeting children, I have reviewed a number of cases and concluded that legislation could target children "because of the political unpopularity of their parents and that unpopularity could stem from a number of things—behavior viewed as immoral, racial or ethnic identity, immigration status, sexual orientation, and other reasons." Catherine Smith, Obergefell*'s Missed Opportunity*, LAW & CONTEMP. PROBS., 2016, no. 3, at 223, 230 n.58 (2016) (discussing motivations for laws targeting children).

14. For an explanation of how discrimination against LGBT parents leads to associational or relational impacts on their children, see Brief of Amici Curiae Scholars of the Constitutional Rights and Interests of Children in Support of Respondents at 10-18, Masterpiece Cakeshop, LTD v. Colorado Civil Rights Commission, No. 16-111 (U.S. October 26, 2017), 2017 WL 6997161, at *10-18 (arguing discrimination against LGBT parents leads to detrimental impact on children). "An underdeveloped area of sexual orientation

Part II discusses the emergence of the animus doctrine in equal protection law and notes how it offers an end-run around the classic tiers of scrutiny. To illustrate the latter point, this Article then summarizes four Supreme Court cases that struck down state laws making distinctions among groups based on "non-suspect" classifications because the laws were driven by impermissible animus. Part III argues that an inference can be drawn from state action that penalizes children for their parents' conduct or status: Such governmental conduct may serve as sufficient evidence of a bare desire to harm the children's politically unpopular parents. Part IV concludes that the animus doctrine may provide another legal avenue to curb state action that singles out children for punishment due to the government's contempt for their parents.

II. EQUAL PROTECTION AND THE ANIMUS DOCTRINE

In four cases over the last forty years, the Supreme Court has resorted to the animus doctrine to strike down government practices that target politically unpopular groups.[15] In the Court's own words, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest."[16] Once the court finds animus, the government loses.[17]

The emergence of the animus doctrine has raised many questions about its relationship to the traditional equal protection framework, and has become a "recurring and unresolved question in equal protection law."[18]

---

and gender identity scholarship is the legal rights and remedies of those who face discrimination because of their relation to or association with gays and lesbians, including children [in] same-sex families." Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion—Legitimacy, Dual-Gender Parenting, and Biology*, 28 LAW & INEQ. 307, 309 (2010).

15. *See* United States v. Windsor, 570 U.S. 744, 770 (2013); Romer v. Evans, 517 U.S. 620, 632 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446-47 (1985); *Moreno*, 413 U.S. at 534; *see also* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 888 n.2 (2012) (explaining Supreme Court's use of animus doctrine in equal protection jurisprudence); *see also* Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2071-72 (2015).

16. *Moreno*, 413 U.S. at 534.

17. Smith, *supra* note 4, at 1611; *see* Pollvogt, *supra* note 15, at 889, 898, 930 (noting identification of animus discredits potentially legitimate state interests).

> "To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called "second order" rational-basis review rather than "heightened scrutiny." But however labeled, the rational basis test invoked today is most assuredly not the rational basis test of *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S. Ct. 461, 99 L.Ed. 563 (1955), *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S. Ct. 437, 3 L.Ed.2d 480 (1959), and their progeny.

Cleburne, 473 U.S. at 458 (Marshall, J., concurring in part and dissenting in part).

18. Nan D. Hunter, *Animus Thick and Thin: The Broader Impact of the Ninth Circuit Decision in* Perry v. Brown, 64 STAN. L. REV. ONLINE 111, 112 (2012).

A. Classic Tiers of Scrutiny

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[19] In determining whether a particular law is violative of the Fourteenth Amendment, different levels of scrutiny apply to different types of classifications.[20] In order to succeed in the traditional framework, a plaintiff must prove differential treatment on the basis of a suspect or quasi-suspect classification, such as race or gender, or the violation of a fundamental right.[21] Once a plaintiff's claim of discrimination is sorted into one of these categories, it is worthy of a heightened level of review. In cases of heightened review, the government almost always loses.[22]

On the other hand, rational basis review applies to classifications other than those designated as suspect or quasi-suspect.[23] Rational basis is extremely deferential to the government's stated interests, and courts presume most legislation subject to this review—even legislation making distinctions among groups—to be valid.[24] Such laws are upheld as long as the classification is rationally related to a legitimate state interest.[25] Historically, plaintiffs have been unsuccessful when challenging legislative action that is reviewed under a rational basis test.[26] This means that plaintiffs challenging classifications based

19. U.S. CONST. amend. XIV, § 1. The Equal Protection Clause is binding on the federal government via the Fifth Amendment's Due Process Clause. *See* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954); *see also* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) (explaining Court's application of Equal Protection Clause). The Court has always treated "Fifth Amendment Equal Protection claims . . . precisely the same as . . . equal protection claims under the Fourteenth Amendment." *Weinberger*, 420 U.S. at 638 n. 2.

20. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (describing tiers of scrutiny applied in Equal Protection Clause cases).

21. *See Cleburne*, 473 U.S. at 440 (discussing tiers of scrutiny); *see also* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (concluding heightened scrutiny triggered because fundamental right to procreation infringed).

22. *See* 1 LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW §16-6, at 1000-01 (1st ed. 1978). *Korematsu v. United States* is the only case where the Court found a racial classification burdening minorities survived strict scrutiny. *See* Korematsu v. United States, 323 U.S. 214, 216, 223-24 (1944) (holding military necessity sufficient to justify exclusion and detention of U.S. citizens based on ancestry).

23. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976) (determining age classifications do not trigger heightened scrutiny); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18 (1973) (holding wealth classifications do not trigger heightened scrutiny).

24. *See* Heller v. Doe, 509 U.S. 312, 320-22 (1993) (upholding application of rational basis to law distinguishing among persons with mental disabilities).

25. *See id.* at 320-21 (describing rational review test). The means chosen to achieve these interests need only be reasonable, even to the extent that "legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 320 (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993)).

26. *See* Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 402 (2016) (indicating rational basis review difficult to overcome for equal protection plaintiffs). Rational basis review is incredibly deferential to the government's stated interests and is only rarely used to invalidate legislation. *See id.* Between 1971 and 2014, the Supreme Court has heard over a hundred equal protection challenges under rational basis review, but the Court has only invalidated legislation under this standard seventeen of those times. Holoszyc-Pimentel, *supra* note 15, at 2071-72.

on class, age, disability, or sexual orientation face an almost insurmountable hurdle to defeating the law. That said, this classic equal protection framework seems to be in flux. [27]

B. Animus Against Politically Unpopular Groups

The Supreme Court's four "animus" cases have recognized an end-run around the tiers of scrutiny and extended constitutional protections to groups with a past record of limited success under the classic equal protection framework.[28] In each of these cases, the Supreme Court examined the motivation behind the law, determined that animus was present when it was enacted, and overturned it.[29] As Professor Susannah Pollvogt puts it, "when animus is found, it functions as a doctrinal silver bullet."[30]

The first recognized animus case, *United States Department of Agriculture v. Moreno*,[31] captures the significance of the Supreme Court's departure from the traditionally more rigid constitutional approach of according deference to state decisions that rely on non-suspect classifications. In *Moreno*, the Court struck down a law because it was driven by animus against "hippies."[32]

1. United States Department of Agriculture v. Moreno*: Hippies*

In 1964, Congress enacted the Federal Food Stamp Act to alleviate hunger and malnutrition among low-income people.[33] At the time of the Act's passage, eligibility for the program was determined based on household need and there were no distinctions between related and unrelated individuals within a household.[34] In 1971, however, Congress amended the law to exclude "any household containing an individual who is unrelated to any other member of the household."[35] Under the new law, individuals who met the statute's

27. *See* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 514-17 (2004) (exploring inconsistencies in Court's application of equal protection jurisprudence).

28. *See supra* note 15 (identifying Court's four "animus" cases). *Compare Heller*, 509 U.S. at 333 (analyzing claims of mentally ill individuals under traditional rational basis scrutiny and upholding statute), *with* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440, 447, 450 (1985) (relying upon rational basis for claims of mentally impaired individuals, but striking down law as irrational). These four animus cases have led scholars such as Dale Carpenter to conclude that "the concept of animus has emerged from equal protection doctrine as an independent constitutional force." Dale Carpenter, Windsor *Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 183 (2013).

29. *See* Pollvogt, *supra* note 15, at 899-906 (explaining debate over cases establishing foundation of animus doctrine).

30. *Id.* at 889.

31. 413 U.S. 528 (1973).

32. *Id.* at 529 (striking down a law driven by animus against hippies).

33. *Id.* at 529-30 (discussing reasons for enactment of food stamp program).

34. *Id.* at 530 (tracing history of Food Stamp Act).

35. *Moreno*, 413 U.S. at 529.

eligibility requirements and lived in a household with relatives could obtain food stamps, while individuals who lived with unrelated persons could not.[36]

The members of three households facing expulsion from the program filed a class action challenging the amended Food Stamp Act as a violation of the equal protection component of the Fifth Amendment Due Process Clause.[37] In the first household, Jacinta Moreno, a fifty-six year old diabetic, lived with Ermina Sanchez and her three children.[38] They shared living expenses and Sanchez helped care for Moreno.[39] Moreno and Sanchez were unrelated.[40] In a second household, Victoria Keppler resided in a neighborhood she could not afford so that her child could attend a school for the deaf.[41] Keppler made ends meet by living with an unrelated woman who was also on public assistance.[42] A third family, the Hejnys, provided housing, financial, and emotional support for an unrelated young woman.[43]

Surprisingly, the plaintiffs prevailed.[44] In a stark deviation from its traditional role in cases concerning social and economic legislation, the Supreme Court engaged in a rare second-guessing of the government's rationales for the Act. The Court held that the statutory classifications—households of related persons versus households of unrelated persons—were irrelevant to the stated purpose of the Act: to raise levels of nutrition among low-income households.[45] In response to the government's argument that the exclusion minimized fraud in the administration of the food stamp program, the Court pointed out that the program contained separate provisions to root out fraud and that there was no link between preventing fraud and excluding households with unrelated persons.[46] Individuals with financial means could simply alter their living arrangements to comply with the law, while the people most in need of the program's benefits could not.[47]

---

36. *Id.* (contrasting classifications for food stamps set up by amendment to Food Stamp Act).

37. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 531-33 (1973). Although the text of the Fifth Amendment does not contain an equal protection clause such as that found in the Fourteenth Amendment, it "does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Id.* at 533 n.5 (quoting Schneider v. Rusk, 377 U.S. 163, 168 (1964)).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Moreno*, 413 U.S. at 532.

42. *Id.*

43. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 532 (1973).

44. *Id.* at 538.

45. *Id.* at 533-34. The Court explained that the "relationships among persons constituting one economic unit and sharing cooking facilities have nothing to do with their abilities to stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements." *Id.* at 534 (citation omitted).

46. *See id.* at 535-37 (opining fraud addressed by other provisions and no connection between non-familial relationships and fraud).

47. *See Moreno*, 413 U.S. at 537-38 (explaining hippies could alter living arrangements to qualify for food stamps). Poor individuals, on the other hand, would be unable to rearrange their living situations and would no longer be able to receive food stamps. *See id.*

The Court then looked to the thin legislative history and found that Congress had amended the Act to "prevent 'hippies' and 'hippie communes' from participating in the food stamp program."[48] This language from the legislative history doomed the related-persons requirement in the statute. The Court explained that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[49] In other words, Congress's desire to discriminate against hippies could not justify the Act's exclusion of unrelated persons from federal food stamp assistance.[50] Thus, the Court in *Moreno* first introduced the idea that a legislative enactment motivated by animus toward a non-suspect class may result in the legislation's demise.

The Court's analytical route to striking down the Food Stamp Act at issue in *Moreno* can be viewed as both a cause for concern and optimism. On one hand, it raises a concern as to whether the Supreme Court is willing to develop new legal doctrines that recognize and curb state practices that detrimentally impact marginalized groups on the basis of race, gender, class, or disability. Despite the diverse demographics of the *Moreno* plaintiffs, the Court developed an emerging constitutional doctrine without reference to traditionally marginalized groups, finding animus against hippies—a group that is characterized by most people as able-bodied and white.[51] On the other hand, from the optimistic view, the animus doctrine offers groups who usually face a difficult hurdle under traditional equal protection jurisprudence a legal remedy.

The three subsequent cases that rely on *Moreno* and the animus doctrine similarly addressed classifications that would normally warrant only rational basis review: persons with mental disabilities and LGBT individuals.[52]

2. City of Cleburne v. Cleburne Living Center: *Persons with Mental Disabilities*

In *City of Cleburne v. Cleburne Living Center, Inc.*,[53] the Cleburne Living Center (CLC), sought to establish a group home for the mentally disabled in a residential neighborhood.[54] After a public hearing, the City of Cleburne denied CLC's request for a required special use permit to open a "hospital for the feebleminded."[55] CLC filed a federal suit against the city alleging that the

48. *Id.* at 534 (citation omitted).
49. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).
50. *See id.*
51. *See id.* at 533-34.
52. The Supreme Court has not yet applied animus principles to a bisexual or transgender classification.
53. 473 U.S. 432 (1985).
54. *Id.* at 435.
55. *Id.* at 436-37.

zoning ordinance violated the guarantee of equal protection for mentally disabled individuals.[56]

The courts below arrived at different conclusions. The district court did not find a violation of a fundamental right to privacy, or that the mentally disabled qualified as a quasi-suspect or suspect class.[57] Consequently, the court under traditional rational basis review, upheld the ordinance as rationally related to the City's legislative interests.[58] The Fifth Circuit Court of Appeals reversed the lower court, holding that the mentally disabled, as a class, warranted intermediate scrutiny and the ordinance failed to substantially further an important governmental interest.[59]

The Supreme Court chose an altogether different path. The Court reversed the Fifth Circuit's decision to elevate mental disability to a quasi-suspect classification, but nevertheless invalidated the ordinance because the special use permit requirement relied on "an irrational prejudice against the mentally retarded."[60] For the second time, the Supreme Court struck down a law under rational basis review for being unrelated to the government's asserted goals and rooted in "a bare . . . desire to harm a politically unpopular group."[61] The Court rejected the City's argument that there was a connection between any

---

56. *Id.* at 437.

57. *Cleburne*, 473 U.S. at 437.

58. *Id.*

59. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 437-38 (1985) (noting Fifth Circuit's reversal of district court's decision regarding suspect classification). The Fifth Circuit emphasized that application of strict scrutiny to mentally disabled individuals was not suitable; instead, intermediate scrutiny was applicable:

> Because mental retardation was in fact relevant to many legislative actions, strict scrutiny was not appropriate. But in light of the history of "unfair and often grotesque mistreatment" of the retarded, discrimination against them was "likely to reflect deep-seated prejudice." In addition, the mentally retarded lacked political power, and their condition was immutable.

Id. at 438 (quoting Cleburne Living Center, Inc. v. City of Cleburne, 726 F.2d 191, 197 (5th Cir. 1984)).

60. *See id.* at 442, 446-50. In determining what level of scrutiny applies to classifications based on mental disability, the Court examined four factors: (1) the "reduced ability to cope with and function in the everyday world"; (2) the "continuing antipathy or prejudice" which characterized legislation concerning the mentally disabled; (3) the "ability to attract the attention of the lawmakers"; and (4) the Court's inability to distinguish the "large and amorphous class" of the mentally disabled from "other groups who have perhaps immutable disabilities setting them off from others" and who are similarly marginalized in society. *Id.* at 442-46. As to the quasi-suspect status of the mentally retarded, the Court noted that the mentally disabled undeniably "have a reduced ability to cope with and function in the everyday world," but that they are not "cut from the same pattern," as there are different degrees of mental disability, ranging from mild to severe. *Id.* at 442. As such, assessing how to interact with and serve this group can be complex and technical—a task not for the judiciary, but for legislators who are informed by professionals with expertise. *Id.* at 446. The Court then assessed the political power of the mentally disabled, concluding that they are not without political power "in the sense that they have no ability to attract the attention of the lawmakers." *Id.* at 445. In reaching this conclusion, the plurality delineated a list of federal and state laws designed to address the unique needs of the mentally disabled. *Id.* at 444-45.

61. *Cleburne*, 473 U.S. at 446-47 (quoting U.S. Dep't. of Agric. v. Moreno, 413 U.S. 528, 535 (1975)).

legitimate state interest and the City's requirements to obtain a special use permit for group homes for persons with mental disabilities.[62] The Court honed in on the City of Cleburne's reliance on stereotypes and "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding."[63] While the Food Stamp Act amendment in *Moreno* was struck down based on direct evidence of animus against hippies, *Cleburne* inferred animus from the pernicious stereotypes about persons with mental disabilities and concluded that the zoning decision was driven by a desire to harm a politically unpopular group.

3. Romer v. Evans *and* United States v. Windsor*: LGBT Persons*

The next two animus cases, *Romer v. Evans*[64] and *United States v. Windsor*,[65] struck down laws that discriminated against LGBT individuals.[66]

Romer is significant as the first Supreme Court case to invalidate discrimination based on sexual orientation.[67] In 1992, the citizens of Colorado adopted a constitutional amendment by state referendum, known as "Amendment 2."[68] Amendment 2 repealed local government ordinances protecting LGBT individuals in housing, employment, and education, and also prohibited all legislative, executive, or judicial action designed to protect LGBT persons from discrimination.[69]

In a six to three decision, the Supreme Court held that Amendment 2 violated the Equal Protection Clause.[70] The Court did not find a fundamental right to be implicated, and assumed, without analysis, that sexual orientation was not a suspect or quasi-suspect class.[71] Instead, the Court held that the

62. *Id.* at 447-50 (concluding City's "five hundred year flood plain" objection insufficient to overcome animus).

63. *Id.* at 448.

64. 517 U.S. 620 (1996).

65. 570 U.S. 744 (2013).

66. *See Windsor*, 570 U.S. at 775 (holding federal statute restricting same-sex marriage unconstitutional under Fifth Amendment); *Romer*, 517 U.S. at 634-35 (striking law because animus toward affected class not legitimate state interest); *see also* Lawrence v. Texas, 539 U.S. 558, 578-79 (2003) (striking down legislation prohibiting private consensual sexual activity). In *Lawrence*, the Court, on the basis of due process, struck down a state law prohibiting private consensual same-sex activity. *See Lawrence*, 539 U.S. at 578-79. Justice O'Connor, concurring in the judgment, disagreed with the majority's decision to invalidate the law as violating a fundamental right to privacy. *See id.* at 579 (O'Connor, J., concurring). Instead, Justice O'Connor argued that the Texas statute violated equal protection because of the animus toward same-sex couples. *Id.* at 579-80.

67. *See Romer*, 517 U.S. at 635 (holding classification did not further a proper legislative purpose).

68. *Id.* at 623-24.

69. *Id.* at 624. Amendment 2 did not simply repeal existing laws as Justice Kennedy stated, but placed homosexuals "in a solitary class with respect to transactions and relations in both the private and government spheres. The amendment withdraws from homosexuals, but no others, specific legal protections from the injuries caused by discrimination and forbids reinstatement of these law and policies." *Id.* at 627.

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

71. *See id.* at 631. In contrast, the Colorado Supreme Court previously "held that Amendment 2 was subject to strict scrutiny under the Fourteenth Amendment because it infringed the fundamental right of gays and lesbians to participate in the political process." *Id.* at 625.

law's unusually broad structure was designed to harm a politically unpopular group.[72] Once again, in a rare deviation from the normally deferential outcomes of rational basis review, the Court declared Colorado's Amendment 2 unconstitutional because it was not rationally related to any legitimate state interest, and was impermissibly motivated by animosity toward LGBT people.[73]

Seventeen years after *Romer*, *United States v. Windsor* invoked the animus doctrine again—this time, in the context of same-sex marriage.[74] In 2007, Edith Windsor and Thea Spyer, a couple for forty-four years, married in Canada.[75] In 2009, Spyer died and left her assets to Windsor in New York, a state that recognized their Canadian same-sex marriage.[76] Nevertheless, the Federal Defense of Marriage Act (DOMA), which codified the definition of marriage as "a legal union between one man and one woman," prohibited Edith from claiming a federal estate tax exemption for widows, requiring her to pay $363,053.[77] Windsor challenged DOMA's exclusion of same-sex married couples as an equal protection violation.[78]

In a five to four decision, the Supreme Court struck down DOMA as unconstitutional on due process and equal protection grounds, primarily because the law was motivated by a "bare congressional desire to harm" same-sex married couples.[79] Justice Kennedy's majority opinion explained that history and tradition placed the definition of marriage within the province of the states.[80] Contrary to this history, DOMA "enact[ed] a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations," and was directed against a class of persons that New York's laws sought to protect.[81] This federal incursion by Congress into the province of the states was evidence of a constitutional violation because the departure smacked of "discriminations of an unusual character."[82] The deviation from the tradition of recognizing state definitions of marriage offered evidence of:

> [A] law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law ... in question [was] to impose a

72. *Id.* at 635.

73. *See id.*

74. United States v. Windsor, 570 U.S. 744, 753 (2013).

75. *Id.*

76. *Id.*

77. Defense of Marriage Act, 1 U.S.C. § 7 (2012), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013); *see Windsor*, 570 U.S. at 752; *see also* 28 U.S.C. § 1738C (2012) (allowing states to refuse to recognize other states' definitions of marriage).

78. *See Windsor*, 570 U.S. at 753.

79. *Id.* at 769-70 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534-35 (1973)).

80. United States v. Windsor, 570 U.S. 744, 764 (2013).

81. *Id.* at 765.

82. *Id.* (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).

> disadvantage, a separate status, and a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.[83]

The effect was to render same-sex unions as second-class or second-tier marriages for purposes of federal law.[84] Citing *Moreno*'s language from forty years earlier, the *Windsor* Court held that DOMA violated basic due process and equal protection principles because "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group."[85]

Thus, the decisions in *Romer* and *Windsor* established that, at a minimum, when government actors single out LGBT people as its only purpose, the law cannot stand. The animus doctrine, as applied in *Romer* and *Windsor*, played a critical role in expanding the rights of LGBT people and in the legal recognition of same-sex marriage nationwide.

The impact of the animus doctrine developed in *Moreno*, *Cleburne*, *Romer* and *Windsor*, cannot yet be fully understood.[86] It is clear, however, that the doctrine has expanded the reach of the Equal Protection Clause to protect politically unpopular groups that fall outside of the traditional quasi-suspect or suspect classifications. This Article argues that politically unpopular parents should be included among those groups warranting protection under the animus doctrine.

III. STATE ACTION PENALIZING CHILDREN AS EVIDENCE OF ANIMUS

State action that penalizes children should serve as evidence of animus against their politically unpopular parents. As Professor Pollvogt states, "the [Supreme] Court has not clearly defined the concept of animus, stated what exactly counts as evidence of animus, or identified the doctrinal significance of finding the presence of animus in any given case."[87] Scholars, lawyers, and jurists have attempted to make sense of it; most seem to agree on two things.[88] First, the most extreme motive—hostility, spite, or ill will against a group—satisfies the definition of impermissible animus.[89] And second, once the Court identifies animus, the law fails.[90]

---

83. *Id.* at 770.

84. *Windsor*, 570 U.S. at 771.

85. *Id.* at 769-770 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534-35 (1973)).

86. Additionally, in *Lawrence v. Texas*, Justice O'Connor, in her concurrence, argued that Texas' sodomy law that subjected same-sex sodomy to criminal sanction but not opposite-sex sodomy, was unconstitutional because it was motivated by "a bare desire to harm [a politically unpopular] group." Lawrence v. Texas, 539 U.S. 558, 581-82 (2003) (O'Connor, J., concurring).

87. Pollvogt, *supra* note 15, at 890.

88. *See id.* at 924-29 (reconciling open questions surrounding animus doctrine).

89. *See id.* at 888 (arguing "hostility toward . . . particular social group" insufficient basis for government action). The four cases described above support a range of interpretations that proof of animus may be satisfied by hostility, spite, or ill will against a group, by use of stereotypes, or by state action based on moral

State action that penalizes children because of their parents' status or conduct should serve as proof of the most stringent level of animus toward those parents: hostility or ill will.[91] Several Supreme Court cases have recognized that state action that treats children unequally because of disapproval of their parents violates the equal protection rights of those children.[92] The reasoning of these cases, coupled with the emergence of the animus doctrine, accommodates the idea that state action treating children unequally due to their parents' status supports a finding of impermissible animus against the parents—a politically unpopular group.

A. State Action Singling Out a Group of Children for Unequal Treatment as Evidence of a Desire to Harm Parents

First, *Romer v. Evans* established that animus is present when a legislative enactment imposes a "broad and undifferentiated disability on a single named group."[93] This Article argues that when the government singles out an entire class of children and proceeds to treat them unequally because of the moral disdain for their parents' conduct, the state's decision to do so is not only driven by animus against the children, it is also based in hostility against the parents. The children are not targeted by the state in the abstract; they are singled out because of their relationship to their politically unpopular parents. Courts should interpret the state decision to impose a "broad and undifferentiated disability" on children as creating an inference of animus against their politically unpopular parents.[94]

---

disapproval. *See supra* Part II (outlining cases striking down government action due to presence of disdain toward unpopular social groups); *see also* Pollvogt, *supra* note 15, at 924-926 (providing various animus definitions).

> In the interest of analytical precision, it is important to clarify exactly what types of legislative motive may be equated with animus. Those motives could be viewed as falling somewhere on a continuum of hostility toward a particular group.
>
> On the weaker end of the continuum, a legislative motive may be to simply exclude a group from one's community for no reason other than an "irrational prejudice" harbored against a group. . . . On the more extreme end of the continuum, the legislative motive that implicates the animus doctrine may manifest itself in a more aggressive form—specifically, a "*desire to harm* a politically unpopular group."

Bishop v Smith, 760 F.3d 1070, 1100 (10th Cir. 2014) (Holmes, J., concurring) (footnotes omitted) (citations omitted) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1972)).

90. Pollvogt, *supra* note 15, at 930 (arguing presence of animus is outcome determinative); *see Bishop*, 760 F.3d at 1103 (Holmes, J., concurring) (claiming if animus found then "law[s] fall[]").

91. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1972).

92. *See infra* Sections III.A-B (analyzing cases punishing children for status of parents).

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

94. *See id.*

Weber v. Aetna Casualty & Surety Co.,[95] an early case on the rights of children of unmarried parents, provides a useful example.[96] In *Weber*, Henry Clyde Stokes died from work-related injuries.[97] At the time of his death, Stokes lived in the same household as his marital and nonmarital children.[98] Under Louisiana workers' compensation law, however, unacknowledged nonmarital children could not recover if surviving dependents with first priority to the benefits exhausted the proceeds.[99] As expected, the four marital children were awarded the maximum allowable benefit amount, denying the two nonmarital children any recovery.[100] In striking down the law, the Supreme Court explained that "[t]he status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust."[101] Although the *Weber* Court focused its inquiry on the violation of the children's equal protection guarantee, the Court's analysis applies with equal, if not greater, force to demonstrate the government's hostility toward the children's parents. Similarly, in *Levy v. Louisiana*, an earlier case, the Louisiana Court of Appeals upheld a law denying illegitimate children benefits from their fathers because "morals and general welfare . . . discourage[d] bringing children into the world out of wedlock."[102] The morals (and conduct) that motivated the state's decision were the acts of the parent, not the child. Louisiana's willingness to redirect its ire to the children of unmarried parents—who have no role in their parents' marital status—reflects a level of unbridled animus toward the parents and a desire to harm them.[103] To impose a discriminatory burden on children and parents in this manner, "reflect[s] deep-seated prejudice rather than legislative rationality in pursuit of some legislative objective."[104] That deep-seated prejudice stems, in large part, from disdain for the parents.[105] We can draw important lessons from the history of these

95. 406 U.S. 164 (1972).

96. *See id.* at 175-76 (striking down law making distinctions based on birth status).

97. *Id.* at 165.

98. *Id.*

99. *Weber*, 406 U.S. at 167-68.

100. *See id.* at 166-67.

101. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (describing Court's rationale for invalidating Louisiana law).

102. Levy v. Louisiana, 391 U.S. 68, 70 (1968) (quoting Levy v. Louisiana, 192 So. 2d 193, 195 (La. Ct. App. 1967)); John C. Gray, Jr. & David Rudovsky, *The Court Acknowledges the Illegitimate:* Levy v. Louisiana *and* Glona v. American Guarantee & Liability Insurance Co., 118 PENN. L REV. 1, 3 (1969) (noting Louisiana court claimed law "properly" rested on "morals and general welfare").

103. *See Weber*, 406 U.S. at 169, 175-76. For example, the *Weber* Court noted that "[a]n unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate child later acknowledged." *Id.* at 169.

104. Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) (explaining rationale for application of strict scrutiny to suspect classes).

105. *Cf.* Romer v. Evans, 517 U.S. 620, 634-35 (1996) (claiming government actions evidencing bare desire to harm "politically unpopular groups" cannot constitute legitimate interests); Barbara J. Flagg,

nonmarital status cases. When the state goes after the children of politically unpopular parents, to do so shows that the state is driven by animus against the parents.

B. State Action Punishing Children Because of Birth Status as Evidence of a Desire to Harm Parents

Second, when state action penalizes children based on their birth status, in violation of well-established equal protection law, it should be viewed as evidence of animus against the parents. The Supreme Court has recognized that laws penalizing children because of their parents' conduct or status are contrary to equal protection values because they relegate an entire class of people to second class citizenship based on their birth status.[106] The Court has expressly compared discrimination against children of unmarried parents to discrimination on the basis of race and national origin because the children are targeted for "a characteristic determined by causes not within the control of the . . . individual, [which] bears no relation to the individual's ability to participate or contribute to society."[107] Yet legislatures continue to penalize children because of who their parents are.

For example, ten years after the decisions in *Levy* and *Weber*, the Texas legislature chose to penalize children of undocumented parents. In *Plyler v. Doe*,[108] school-aged children of Mexican origin challenged the constitutionality of a Texas statute withholding state funds from local school districts that chose to enroll and educate children not "legally admitted" to the United States.[109] The Supreme Court held that excluding children from a public education because of their undocumented status violated their equal protection rights.[110] Relying on *Weber*, the Court made a clear distinction between adults and children, explaining that the state may "withhold its beneficence" from those who are in the country unlawfully because of their own conduct, but children are a different matter.[111] Children "can affect neither their parents' conduct nor their own status."[112] Accordingly, the Court determined that the Texas statute

---

"Animus" and Moral Disapproval: A Comment on Romer v. Evans, 82 MINN. L. REV. 833, 834 (1998) (claiming *Romer* Court refused to recognize arguably "legitimate" moral justification for Amendment 2).

106. *See, e.g.*, *Weber*, 406 U.S. at 175.

107. Mathews v. Lucas, 427 U.S. 495, 505 (1976) (holding discrimination impermissible without relying on heightened scrutiny, even though illegitimacy resembles suspect class).

108. 457 U.S. 202 (1982).

109. *Id.* at 205.

110. *See id.* at 230. The Court first found that undocumented individuals are "persons" within the meaning of the Fourteenth Amendment. *Id.* at 210. The Court explained that "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Id.*

111. *Id.* at 219-20.

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

was "directed against children, and impose[d] its discriminatory burden on the basis of a legal characteristic over which children can have little control."[113]

Once again, while the Court's focus in *Plyler* centered (appropriately) on the children's equal protection claims, its reasoning can be extended to the parents as well: The legislative decision to target children signaled that the government harbored a high level of hostility against the parents.[114] To punish a group of people (children) because of their birth status in direct contravention of well-established equal protection law, in order to control or punish another group (parents) is not rational decisionmaking; it is unbridled anger, ill will, or spite. This Article does not endorse the government's moral judgment or purported justifications for immigration policies that apply to adults (or other laws seeking to regulate behavior or status). Instead, this Article makes the narrow point that state action penalizing children to control or punish adults is an illegitimate means to achieve an end, and when the government does so, it rings of anti-parent animus. [115]

C. State Action Penalizing Children as "Discrimination of an Unusual Character"

Finally, when the government penalizes children because of their parents' conduct or status, the government's conduct should be considered "discrimination of an unusual character."[116]

In both *Romer* and *Windsor*, the Court turned to the lack of any precedent tending to justify Colorado's Amendment 2 or DOMA, respectively.[117] Such rare governmental actions can be instructive; particularly where "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."[118]

---

113. *Id.*

114. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (stating laws targeting children of unmarried parents express disdain for parents' conduct). The reason may be that in our individual rights framework, courts fail to consider the ways in which discrimination operates collectively or relationally.

115. This parental animus approach would also protect children who are often placed in the center of a *Kulturkampf*. *See* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting). A "Kulturkampf" is a clash of cultures or value systems. *See Kulturkampf*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/Kulturkampf [https://perma.cc/N9MX-54J6]. If states were put on notice that their attempts to use children to control adults could be used as evidence of a constitutional violation, perhaps, they would proceed with greater caution when enacting legislation.

116. *Cf.* United States v. Windsor, 570 U.S. 744, 768 (2013) (citing Romer v. Evans, 517 U.S. 620, 633 (1996)) (suggesting "discriminations of . . . unusual character" deserve "careful consideration" in assessing constitutionality).

117. *See Romer*, 517 U.S. at 633 (claiming lack of precedent for Amendment 2 "instructive"); *see also Windsor*, 570 U.S. at 768 (relying on DOMA's departure from "history and tradition of reliance on state law to define marriage").

118. *Romer*, 517 U.S. at 633 (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37-38 (1928)).

State practices that treat children unequally because of their parents' status or conduct should be considered an unusual form of discrimination (even if state actors do it on occasion) because it is contrary to our basic social and legal principles for the government to withhold important rights and benefits from a class of people (children) simply by virtue of their relationship to another class of people (parents). The long-term impact on children places them at an extreme disadvantage and contravenes the goal of abolishing "governmental barriers presenting unreasonable obstacles to the advancement on the basis of individual merit."[119] This practice also places parents in an untenable position with respect to their children. As the Supreme Court emphatically stated in *Romer v. Evans*, "[i]t is not within our constitutional tradition to enact laws of this sort."[120]

There is far more to explore with respect to each of these points; this Article simply raises them for future consideration.

IV. CONCLUSION

The Supreme Court cases that have directly addressed discrimination against children penalized because of their parents' conduct or status have identified impermissible animus with respect to the children. This Article argues that the same state action also presents evidence of animus against the children's politically unpopular parents. Both forms of animus—against the child and the parent—may exist, and they are not mutually exclusive. In a democratic system, the mere fact that the government is willing to harness its resources to penalize children because of their parents over whom the children have no control, "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," including parents.[121]

It would be an oversight if this Article failed to note that years before the Supreme Court decided *Levy* and *Weber*, civil rights advocates sought to remedy the plight of children of unmarried parents by filing race, gender, and class claims to strike down nonmarital status laws.[122] These attempts were unsuccessful, and so litigants eventually shifted focus and filed claims on behalf of the children themselves.[123] Today, with the development of the animus doctrine, parents may have another legal avenue to curb state action

119. Plyler v. Doe, 457 U.S. 202, 222 (1982).

120. *Romer*, 517 U.S. at 633.

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

122. *See Smith*, *supra* note 4, at 1608-10 (recognizing early cases attempting to challenge nonmarital children laws).

123. *See* Clark v. Jeter, 486 U.S. 456, 465 (1988) (declaring state law requiring nonmarital children establish paternity for child support unconstitutional under intermediate scrutiny). From 1968 to 1988, the Supreme Court heard more than a dozen cases before designating nonmarital children a quasi-suspect class in *Clark*. Smith, *supra* note 4, at 1641 (tracing timeline of nonmarital children cases); *see Clark*, 486 U.S. at 461-65 (relying upon "heightened" scrutiny to strike down Pennsylvania law).

that singles out their children for reprisals because of the government's disdain for the parents as members of a politically unpopular group.