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DALE CARPENTER

WINDSOR PRODUCTS: EQUAL PROTECTION FROM ANIMUS

Across four decades, the concept of animus has emerged from equal protection doctrine as an independent constitutional force. In four decisions—an animus quadrilogy—the Supreme Court has struck down state and federal acts that it concluded were driven by animus toward a group of people.[1] The roots of anti-animus doctrine go

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[1] *United States v Windsor*, 133 S Ct 2675 (2013) (striking down a federal law defining marriage as the union of one man and one woman); *Romer v Evans*, 517 US 620 (1996) (striking down a state constitutional amendment barring specific legal protection from anti-gay discrimination); *City of Cleburne v Cleburne Living Center*, 473 US 432 (1985) (striking down a city's denial of a special zoning permit for housing the cognitively disabled); *Department of Agriculture v Moreno*, 413 US 528 (1973) (striking down a federal law denying food stamps to unrelated persons living in a household). This article deals with the anti-animus principle as it has developed in equal protection jurisprudence. The underlying constitutional concern about animus can also be found in other parts of the

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even deeper, reaching back to political-process concerns famously articulated more than seventy years ago in *United States v Carolene Products* about how "prejudice against *discrete and insular minorities* . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[2] As a matter of constitutional law, a legislative process impelled by animus is a poisoned and poisonous one.

Nevertheless, the constitutional anti-animus principle remains an unappreciated one. There is little consensus about what animus is; about whether, why, and when it is constitutionally problematic; or about what the appropriate role of courts, if any, should be in policing it. The decisions of lower courts have been wary of relying on animus.[3] Scholars have tended to discount the doctrine.[4] Beyond

Constitution, like the First Amendment's protection of religious freedom, *Locke v Davey*, 540 US 712, 725 (2004) ("animus" against religion would be grounds to invalidate a law under the First Amendment's Free Exercise Clause), and the Constitution's clauses forbidding federal and state Bills of Attainder, see US Const, Art I, § 9, and US Const, Art I, § 10, which prevent legislatures from declaring a person guilty of a crime and stripping him of all procedural rights.

[2] *United States v Carolene Products Co.*, 304 US 144, 152–53 n 4 (1938) (emphasis added). See also John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 76 (Harvard, 1980) (the Court should "concern itself with what majorities do to minorities").

[3] The first district court post-*Windsor* to invalidate a state ban on same-sex marriage declined to rely on the anti-animus principle because, the judge determined, "the Supreme Court has not yet delineated the contours of such an approach." *Kitchen v Herbert*, 2013 WL 6697874, *21 (D Utah). In all, within eight months after *Windsor* came down, seven district courts held that state marriage laws were at least in part unconstitutional, but none rested squarely on animus grounds. See *De Leon v Perry*, 2014 WL 715741, *1 (WD Tex) (state law denied same-sex couples their fundamental right to marry and equal protection); *Lee v Orr*, 2014 WL 683680, *1 (ND Ill) (holding based on fundamental right to marry and equal protection); *Bourke v Beshear*, 2014 WL 556729, *7 (WD Ky) ("Absent a clear showing of animus, however, the Court must still search for any rational relation to a legitimate government purpose," and then striking down state's nonrecognition of valid same-sex marriages from out of state as lacking a rational basis); *Bostic v Rainey*, 2014 WL 561978, *1, *21 (ED Va) (asserting that bans on same-sex marriage were "rooted in unlawful prejudice" but concluding that the laws lacked a rational basis); *Bishop v United States*, 2014 WL 116013, *21–23, *33 (ND Okla) (state marriage law was enacted for the purpose of excluding same-sex couples and failed rational-basis test); *Kitchen v Herbert*, 2013 WL 6697874 (D Utah) (rational-basis review); and *Obergefell v Wymyslo*, 2013 WL 7869139, *20–21 (SD Ohio). The district court decision in *Obergefell* came closest to relying upon animus. "A review of the historical background and legislative history of the Ohio laws at issue," said the court, "leads to the [] conclusion . . . that in refusing to recognize a particular type of legal out-of-state marriages *for the first time in its history*, Ohio is engaging in 'discrimination[] of an unusual character' without a rational basis for doing so." Id at *19.

[4] For scholarly treatments of the concept of animus in constitutional law, see Steven Douglas Smith, *The Jurisprudence of Denigration*, UC Davis L Rev (forthcoming, 2014); Andrew M. Koppelman, *Why Scalia Should Have Voted to Overturn DOMA* (Northwestern University Law Review Colloquy, Nov 12, 2013), available online at http://colloquy.law.northwestern.edu/main/2013/11/why-scalia-should-have-voted-to-overturn-doma.html;

uncertainty, there is strong criticism. One critique is that the doctrine is analytically empty, a conclusion clothed in argument. Another is that it calls for the kind of unprincipled judgment about subjective legislative motivation that has long been discredited in jurisprudence. A third holds that slapping the animus label on a law is an attempt to hush debate about deeply contested moral and legal controversies. On this view, it insults those who differ from the Court's majority, dismissing them as bigots—a form of constitutional name-calling. Perhaps animus doctrine is animus based.

Yet consider the simple idea that it is wrong for one person to treat another person malevolently. This sentiment so suffuses our moral and legal tradition that hardly anyone would deny it. "Of course it is our moral heritage that one should not hate any human being or class of human beings," wrote Justice Antonin Scalia in his dissent in *Romer v Evans*.[5] Animus doctrine constitutionalizes this basic precept. It asserts that just as *individuals* have a moral and sometimes legal duty not to act maliciously toward others, the *group* of people elected as representatives (or acting in some other official governmental capacity) in a liberal democracy has a moral and sometimes constitutional duty not to act maliciously toward a person or group of people.[6]

Under the anti-animus principle, the Constitution's Equal Protection guarantee is understood to "guard one part of the society

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Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 Ind L J 27 (Winter 2014); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 Fordham L Rev 887 (2012); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements of Constitutional Law in the Twentieth Century*, 100 Mich L Rev 2062 (2002); Elizabeth S. Anderson and Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U Pa L Rev 1503 (2000); Barbara J. Flagg, *"Animus" and Moral Disapproval: A Comment on Romer v. Evans*, 82 Minn L Rev 833 (1998); J. M. Balkin, *The Constitution of Status*, 106 Yale L J 2313 (1997); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 Cal L Rev 297 (1997); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv L Rev 4 (1996).

[5] 517 US 620, 644 (1996) (Scalia, J, dissenting). Justice Scalia went on to suggest a distinction between hatred of a person and disapproval of his conduct: "But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even 'animus' toward such conduct. Surely that is the only sort of 'animus' at issue here: moral disapproval of homosexual conduct. . . ." Id. Whatever remained of the status-conduct distinction in reference to homosexuality collapsed in *Lawrence v Texas*, in which, as Justice Scalia put it, the Court held that "the promotion of majoritarian sexual morality is not even a *legitimate* state interest." 539 US 558, 599 (2003) (Scalia, J, dissenting). This holding was confirmed in *Christian Legal Society v Martinez*, in which the Court declared that it would not distinguish between homosexual status and conduct—the one is intimately linked to the other. 130 S Ct 2971, 2990 (2010).

[6] Ely, *Democracy and Distrust* at 157 (cited in note 2) ("To disadvantage a group essentially out of dislike is surely to deny its members equal concern and respect, specifically by valuing their welfare negatively.").

against the injustice of the other part"[7] by checking the tendency of legislative majorities to be vindictive. The anti-animus doctrine addresses this systemic problem by scrutinizing the reasons for government action. The government acts on animus when, to a material degree, it aims *"to disparage and to injure" a person or group of people.*[8] The injury may be tangible, as in the denial of benefits and protections a group would have in the absence of animus against them. Or the injury may be intangible, as in the affront to their dignity and to the respect they deserve as equal citizens, which may be caused by their exclusion from a status they would have absent animus against them. The desire simply to reward and encourage socially beneficial behavior by one group is not by itself animus toward another group.[9] But the simple desire to harm (in a tangible and/or intangible way) one group of people is unconstitutional animus. If animus was present, moreover, it taints the law. The act is unconstitutional even if legitimate reasons might now be offered to justify it.[10]

Carolene Products would correctly predict that the targets of animus will almost always be politically unpopular minorities. Yet the anti-animus doctrine does not specify, as would formal heightened scrutiny, certain classifications that are subjected to special judicial scrutiny. It doesn't favor certain vulnerable classes. All citizens are protected from animus-based government action.[11] That is their minimal entitlement as citizens of a liberal democracy dedicated to the equal protection of the laws.

In constitutional law, the concern about animus was born in a

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[7] Federalist 51 (Madison) in Jacob E. Cooke, ed, *The Federalist Papers* 347 (Wesleyan, 1961).

[8] *Windsor*, 133 S Ct at 2696.

[9] Whether animus is what actually drove government decision making when the government claims the benign purpose simply to encourage good conduct depends on consideration of a variety of objective factors outlined below in the introduction and in Section III.A.

[10] This raises the prospect, dreaded by some, that a law enacted for an impermissible animus-based purpose might later be reenacted for a legitimate purpose and subsequently upheld. For a response to this criticism of purpose inquiry in constitutional law, see Section II.C.3.

[11] A similar idea is described as the "pariah principle" by Dan Farber and Suzanna Sherry: "This principle, in a nutshell, forbids the government from designating any societal group as untouchable, regardless of whether the group in question is generally entitled to some special degree of judicial protection, like blacks, or to no special protection, like left-handers (or, under current doctrine, homosexuals)." Daniel Farber and Suzanna Sherry, *The Pariah Principle*, 13 Const Comm 257, 258 (1996).

time when government often acted for the purpose of harming racial minorities. The law reacted by subjecting all racial classifications to special judicial scrutiny, regardless of what motive the government might actually have had. But anti-animus principles have been sharpened and crystallized in response to the law's almost unrelenting hostility toward gay men and lesbians. For most of American history, public policy toward homosexuals was marked by fear and disgust. Homosexuals were seen as dirty, diseased, and dangerous. As a result of the long-standing mistreatment of this small minority, the Supreme Court has been schooled on the many ways that a legislative body might target a group of people for insult or injury and be literally thoughtless about their interests. For a Court unwilling to take the extraordinary step of invalidating all anti-gay legislation, the anti-animus doctrine offered a framework under which the most egregious official expressions of malice toward gays would be invalidated.

The animus quadrilogy overlaps a gay-rights trilogy that has charted the remarkable rise of respect for the dignity and rights of homosexuals. On May 20, 1996, just as Congress was beginning the process of passing the Defense of Marriage Act (DOMA) to ban any federal recognition of then-nonexistent same-sex marriages,[12] Justice Scalia cut to the heart of the question of homosexuality and the Constitution in his dissent in *Romer*. He asked, incredulously: is "the perceived social harm of homosexuality" no longer a "legitimate concern of government"?[13] Striking down a state constitutional amendment barring specific protections from anti-gay discrimination, the Court answered "yes" by concluding that Amendment 2 reflected impermissible animus against homosexuals.[14] In 2003 the Court confirmed the answer in *Lawrence v Texas*,[15] striking down a state "Homosexual Conduct" law because the state cannot "demean [the] existence" of homosexuals. It rejected the state interest in expressing moral disapproval of homosexuality.[16] Then came *United States v Windsor*,[17] striking down DOMA because

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[12] Pub L No 104-199, 110 Stat 2419 (1996).

[13] *Romer*, 517 US at 651 (Scalia, J, dissenting).

[14] Id at 635–36.

[15] 539 US 558 (2003).

[16] Id at 564, 578 (2003).

[17] 133 S Ct 2675, 2693 (2013). When I refer in this article to "DOMA" I mean that as shorthand only for Section 3 of DOMA, the federal definition of marriage. I do not

the Court thought that by denying any federal recognition to otherwise valid same-sex marriages Congress exhibited animus against the targeted couples and their children.

These three momentous decisions involving gay rights cumulatively make it clear that the perceived social harm of homosexuality, along with simple moral disapproval of it, is no longer a proper basis on which to carve out gay people from legal protection. It is unconstitutional animus for the government to target homosexuals simply because it morally disapproves of homosexuality.[18] There must be some reasoned public-policy purpose beyond moral disapproval if state-imposed restrictions on gays are to survive anti-animus review.[19]

Windsor refined and enlarged the concept of unconstitutional animus. The decision contains three conclusions of significance for constitutional law generally and for the rights of gay men and lesbians specifically. First, in what we might call the conclusion of *principle* in *Windsor*, the opinion confirmed that legislation driven

mean to refer to Section 2, which purported to allow the states to disregard otherwise valid same-sex marriages from outside the state. The constitutional analysis of Section 2 would involve different considerations and justifications, like a claimed desire to prevent the "nationalization" of same-sex marriage after a single state like Hawaii recognized it. Whether Section 2 might also be unconstitutional on animus (or other constitutional) grounds is beyond the scope of the article.

[18] "[T]he desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose, [and] a state action based on that animus alone violates the Equal Protection Clause." *Davis v Prison Health Services*, 679 F3d 433, 438 (6th Cir 2012), quoting *Stemler v City of Florence*, 126 F3d 856, 873–74 (6th Cir 1997). In *Davis* a state employee claimed that "the public-works officers supervising his work crew treated him differently than other inmates, ridiculed and belittled him, and 'ma[d]e a spectacle' of him when they brought him back to the correctional facility after a public-works assignment because of his sexual orientation." Id at 436. He also claimed that "these officers did not want to strip search him because he was homosexual and would make 'under the breath' remarks when selected to do so." Id. The Sixth Circuit noted that, if true, the allegations were sufficient to find "that the officers' actions toward him were motivated by an anti-gay animus." Id at 438.

[19] The anti-animus principle is not solely concerned with protecting gay men and lesbians from malice. As discussed below, see Section II, it has also been used to strike down specific instances of discrimination against the cognitively disabled, see *Cleburne*, 473 US at 450, and "hippies," see *Moreno*, 413 US at 537, even though neither classification merited formal heightened scrutiny. As the Sixth Circuit noted in a case involving the selective arrest and prosecution of a lesbian for driving under the influence, the anti-animus principle is broader than a concern with sexual orientation. "[T]he principle would be the same if Stemler had been arrested discriminatorily based on her hair color, her college bumper sticker (perhaps supporting an out-of-state rival) or her affiliation with a disfavored sorority or company." *Stemler*, 126 F3d at 874. In this article, I will focus on the anti-animus principle as applied in the context of sexual orientation, but that should not be taken to mean that the animus doctrine is limited to a concern for anti-gay action by government. On the other hand, as discussed below in Section III.B.2.b, state action aimed at homosexuals has historically been unusually likely to reflect animus.

by animus denies the equal protection of the law guaranteed by the Constitution to every person. This constitutional principle is uncontroversial. Chief Justice Roberts, in dissent, implicitly agreed that it is unconstitutional to "codify malice," though he thought there needed to be "more convincing evidence" of that than the Court presented.[20] Nor did Justice Scalia or Justice Alito, in their separate dissents, challenge the basic premise that animus is an impermissible basis for legislation.[21] Scalia, like Roberts, simply thought a finding of animus should require "the most extraordinary evidence," which he did not think could be found in DOMA.[22] If for no other reason than that the Court has repeatedly endorsed the anti-animus principle in important decisions, it can no longer be ignored.

Second, the *institutional* conclusion of *Windsor* is that courts are competent to police unconstitutional animus. This means they must discern when legislation impermissibly arises from animus.[23] That prospect might be very troubling. To begin with, decision makers often have mixed motives and purposes, which calls for a judgment about when animus is sufficiently present in the mix of motives to justify striking down their action.[24] Further, if ferreting out animus means that courts are now self-appointed sleuths searching for the subjective motives of legislators, it is a very dubious mission.

In fact, considering the animus quadrilogy as a whole, the Court's decisions suggest that the inquiry into legislative motive—or more often, purpose—is not a subjective one. Determining whether animus materially influenced the government's act rests on a variety

[20] *Windsor*, 133 S Ct at 2696 (Roberts, CJ, dissenting).

[21] Id at 2697–711 (Scalia, J, dissenting); id at 2711–20 (Alito, J, dissenting). Justices Scalia and Alito also didn't explicitly *endorse* the anti-animus principle. For his part, Justice Scalia denounced the Court for suggesting that Congress and the President had "hateful hearts" in supporting DOMA. "Laying such a charge against them," he declared, "should require the most extraordinary evidence." Id at 2707 (Scalia, J, dissenting).

[22] Id at 2707 (Scalia, J, dissenting). For a discussion of the indicia supporting the animus holding, see Section III.B. Justice Alito criticized the Court for "cast[ing] all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools." Id at 2718 (Alito, J, dissenting). For a discussion of the objection that *Windsor* is constitutional name-calling, see Section II.C.4.

[23] See Ely, *Democracy and Distrust* at 103 (cited in note 2) (Judges are "in a position objectively to assess claims—though no one could suppose the evaluation won't be full of judgment calls—that . . . by acting as accessories to majority tyranny, our elected representatives are not representing the interests of those whom the system presupposes they are.").

[24] I propose that legislation reflects a constitutionally impermissible degree of animus only when it "materially influences" passage. See Section III.C.3.

of considerations that are objective in the sense that they do not depend on discovering subjective legislative intent. These include, if applicable, considerations of statutory text, context, process, impact, and the persuasiveness of any non-animus-based justifications. Animus is not merely an illegitimate purpose; it taints the government's action. The sometimes far-fetched and hypothesized rationalizations that suffice to sustain a law in ordinary rational-basis cases don't suffice once animus is detected.

The third conclusion from *Windsor*, the *substantive* one, is the most infuriating to critics. It is that DOMA itself was the product of animus. Rather than thinking of *Windsor* as a federalism opinion protecting the states' traditional authority over family relations, or as a substantive liberty decision protecting individuals from government encroachment on their marital freedom, the decision is mainly about how these two related concerns help show that DOMA maliciously targeted a small subset of married people.

This third conclusion has been the most criticized. It is the only one of the three to which the dissenting Justices explicitly objected. For them, there simply was not enough evidence of animus in DOMA. While constitutional law professors overwhelmingly believed DOMA was unconstitutional,[25] they have not overwhelmingly endorsed *Windsor*. The decision has its prominent defenders,[26] but few if any have defended its animus holding. Harsh judgments have come from those who think the Court was wrong on the merits, from those who think the Court reached the right result for the wrong reason,[27] and from those who think the decision is an indecipherable constitutional hieroglyph.[28] The most unsettling por-

[25] According to a 2012 survey of 485 constitutional law professors, 69 percent thought DOMA was unconstitutional. Dale Carpenter, *Constitutional Law Professors: 87% Support Same-Sex Marriage, but Only 54% Believe It Is Constitutionally Mandated*, The Volokh Conspiracy (Sept 7, 2012), online at http://www.volokh.com/2012/09/07/constitutional-law-professors-87-support-same-sex-marriage-but-only-54-believe-it-is-constitutionally-mandated.

[26] Ernest A. Young and Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, Cato S Ct Rev 117, 119 (2012–13) (praising the opinion as "brilliant"); Ernest A. Young, *United States v. Windsor and the Role of State Law in Defining Rights Claims*, 99 Va L Rev Online 39, 40 (2013) (the opinion is not "muddled" or "vague"); Randy Barnett, *Federalism Marries Liberty in the DOMA Decision*, SCOTUSblog (June 26, 2013), online at http://www.scotusblog.com/2013/06/federalism-marries-liberty-in-the-doma-decision/.

[27] See Koppelman, *Why Scalia Should Have Voted to Overturn DOMA* (cited in note 4).

[28] Conkle, 89 Ind L J 27 (cited in note 4); Neomi Rao, *The Trouble with Dignity and Rights of Recognition*, 99 Va L Rev Online 29, 31 (2013) (criticizing the decision as "muddled" and as ungrounded in constitutional text, history, and precedent); Sandy Levinson, *A Brief Comment on Justice Kennedy's Opinion in Windsor*, Balkinization (June 26, 2013),

tion of the decision for many of its critics, especially those who oppose same-sex marriage and resent insult from the Court, is the conclusion that DOMA arose from unconstitutional animus.[29] "Kennedy's suggestion that DOMA was based on the view that gays and lesbians are inferior human beings is tendentious in the extreme," writes one critic of *Windsor*, "and demeaning to all those who for a host of non-bigoted reasons uphold the traditional understanding of marriage as an essentially heterosexual institution."[30] And that denunciation of the decision came from a *supporter* of the constitutional claim for same-sex marriage.

These criticisms are overwrought. What we have in Justice Kennedy's opinion is *Windsor* Products—an outpouring of decades of constitutional development whose fountainhead is *Carolene Products* and whose tributaries are the gay-rights and federalism streams. I will argue here that each of *Windsor*'s three central conclusions—the existence of a constitutional anti-animus principle, the assertion of institutional capacity to decide in clear cases when it is present, and the substantive holding that it was present in DOMA—was correct. Its reasoning is neither incoherent nor unprecedented. *Windsor* Products adds both meaning and modest method to the more formal and even mechanical footnote 4 approach of *Carolene Products*.

Despite what critics have said, *Windsor* did not label as bigots all supporters of opposite-sex-only marriage or reject as homophobic all reasons for hesitation on same-sex marriage. Among other possible non-animus-based rationales for limiting marriage to opposite-sex couples, policy makers might want to move slowly and incre-

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online at http://balkin.blogspot.com/2013/06/a-brief-comment-on-justice-kennedys.html (noting "the intellectual awkwardness of [Kennedy's] opinion" and comparing it to "a camel (i.e., a horse designed by a committee)"); and Jeffrey Rosen and Michael McConnell, *Debating the Court's Gay Marriage Decisions*, New Republic (June 26, 2013), at http://www.newrepublic.com/article/113646/supreme-court-strikes-down-doma-dismisses-prop-8-debate ("[T]he DOMA decision is a logical mish-mash, portending more litigation and more instability.").

[29] See, for example, Richard W. Garnett, *Worth Worrying About?: Same-Sex Marriage & Religious Freedom*, Commonweal (Commonweal Magazine, Aug 5, 2013), online at https://www.commonwealmagazine.org/worth-worrying-about) (arguing that *Windsor* concluded that gay-marriage opponents are "backward and bigoted, unworthy of respect"); Michael J. Perry, *Right Result, Wrong Reason: Same-Sex Marriage & The Supreme Court*, Commonweal (Commonweal Magazine, Aug 5, 2013), available online at https://www.commonwealmagazine.org/right-decision-wrong-reason (calling the decision "tendentious in the extreme").

[30] Perry, *Right Result, Wrong Reason* (cited in note 29).

mentally in making important changes to social policy.[31] Finally, *Windsor* should be seen as probably the least aggressive route the Court could have taken in striking down DOMA.

Section I summarizes the legislative and judicial developments that brought the case to the Court. It discusses why *Windsor* should not be seen as a federalism decision, a substantive-liberty decision, or a *sub silentio* heightened-scrutiny case.

Section II presents the constitutional animus principle as it has developed over the last four decades, including what constitutes animus, why it offends the Constitution, and how the Supreme Court determines it is present. This section both supports the conclusion that animus offends the egalitarian principle in the Constitution and defends the limited institutional role of the Court in helping to enforce it.

Section III discusses why the Court was justified in concluding that DOMA arose from animus by looking at the textual, contextual, procedural, effectual, and pretextual factors that explain the law's passage. These considerations show why the posited non-animus-based justifications for DOMA—like a desire to boost "responsible procreation," to save federal money on benefits, or to move slowly and incrementally on matters of social policy—could not actually sustain the law. Even if such hypothesized justifications could save a marriage limitation from invalidation under ordinary rational-basis review, they cannot save it when the limitation arises from ill will. Indeed, the flimsiness of these justifications reinforces the conclusion that the law was infected with animus.

I. Windsor and Its Misinterpretations

For many readers, simply understanding what *Windsor* held has been a challenge. The decision is peripatetic. It heads down a path toward federalism, but suddenly veers off in the direction of "liberty," looking back over its shoulder toward states' authority. Then it pivots toward equal protection, with darts toward dignity, before finally settling on animus as a destination. When we arrive—"The judgment of the Court of Appeals for the Second Circuit is

[31] As we shall see, the go-slow rationale does not really explain the passage of DOMA. See Section III.B.5.c. Even if a go-slow rationale might more convincingly support a state marriage law under anti-animus attack, laws excluding gay couples from marriage may have other constitutional defects.

affirmed"[32]—we may ask ourselves, "Well, how did [we] get here?"[33]

This section first summarizes the legislative steps that led to the passage of DOMA. A more detailed consideration of the legislative proceedings and how they connect to concerns about animus awaits the reader in Section III. Next, it chronicles the judicial developments that brought the case to the Supreme Court in 2013. Finally, it argues that *Windsor* should not be seen as a federalism decision, a substantive-liberty decision, or a heightened-scrutiny decision.

A. THE ACT

In the summer of 1996, responding to the possibility that the Hawaii Supreme Court might order that state to recognize same-sex marriages, Congress placed DOMA on a fast track to passage. Section 2 declared that no state could be required to recognize any other state's same-sex marriages:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.[34]

This permission slip to disregard marriages validly recognized in sister states was probably redundant of states' conflict-of-laws powers to reject out-of-state marriages violating their own public policy. It was also unprecedented. Congress had never before decreed, using its "effects" power under the Full Faith and Credit Clause,[35] that a state's laws and even its judicial judgments could be categorically ignored by the other forty-nine states.

Section 3, which was challenged in *Windsor*, dealt with the problem of how the federal government should treat marriages validly recognized in a state. It limited marriage for all federal purposes to the union of one man and one woman:

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[32] *United States v Windsor*, 133 S Ct 2675, 2696 (2013).

[33] Apologies to David Byrne, Talking Heads, *Once in a Lifetime* (lyrics) (Sire Records, 1981).

[34] Defense of Marriage Act, Pub L No 104-199, 110 Stat 2419 (1996), codified at 28 USC § 1738C.

[35] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." US Const, Art IV, § 1.

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[36]

These sixty-five words abruptly, summarily, and comprehensively ended two centuries of federal deference to state choices about the definition and recognition of marital status.

On July 12, the House of Representatives voted for DOMA with an overwhelming and strongly bipartisan majority, 342–67.[37] With a presidential election just months away and public opinion running strongly against gay marriage, President Clinton backed the law before it was even introduced in the Senate. But his own press spokesperson labeled it election-year "gay baiting" on the very day it passed the House.[38] The Senate passed it on September 10 by a vote of 85–14, again with strong bipartisan support.[39] The president sheepishly signed it just after midnight on September 21, releasing an unusual statement urging that the law "should not, despite the fierce and at times divisive rhetoric surrounding it, be understood to provide an excuse for discrimination, violence or intimidation against any person on the basis of sexual orientation."[40]

DOMA, it was hoped, would provide a double vaccination against the spread of same-sex marriages. In 1993, the Hawaii Supreme Court announced that heightened judicial scrutiny should apply to a ban on same-sex marriage because the denial constituted sex discrimination under the state constitution.[41] It then remanded the case, originally brought by same-sex couples in 1990, back to the state trial court for a trial on the merits under the appropriate level of scrutiny. The trial court was set to take up the case again in September 1996, and the common expectation

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[36] Defense of Marriage Act, Pub L No 104-199, 110 Stat 2419 (1996), codified at 1 USC § 7.

[37] See *Windsor*, 133 S Ct at 2696 (Roberts, CJ, dissenting).

[38] Jerry Gray, *House Passes Bar to U.S. Sanction of Gay Marriage*, NY Times A1 (July 13, 1996).

[39] See id.

[40] Chris Geidner, *Becoming Law*, Metroweekly (Sept 29, 2011), online at http://www.metroweekly.com/feature/?ak=6613.

[41] *Baehr v Lewin*, 852 P2d 44, 65 (Hawaii 1993).

was that the state's refusal to allow same-sex marriages would be struck down because the state could not show that denying marriage licenses to gay couples was closely related to any compelling state interest. On appeal, it was expected that the Hawaii Supreme Court would eventually declare the marriage law unconstitutional.

Thus, at some point in the future, there would be gay marriage in one state. DOMA would solve two perceived problems arising from that fact. First, Section 2 prevented couples around the country from traveling to Hawaii, getting married, and then demanding marital recognition in their home states. Second, Section 3 ensured that the federal government would not have to recognize even one such marriage from any state.

B. THE CHALLENGE

As it happened, DOMA had no immediate effect as there would not be a state-recognized same-sex marriage anywhere in the United States until 2004, when Massachusetts became the first state to legalize it.[42] Ironically, the very litigation that had propelled DOMA reached a dead end before the state Supreme Court could rule, when the people of Hawaii voted to strip state courts of any power to change the definition of marriage.[43]

As the number of states recognizing same-sex marriage grew, so did the number of couples denied federal benefits and legal protections to which they would otherwise have been eligible. Lawsuits challenging DOMA on constitutional grounds began to sprout. In 2009, two challenges arose from Massachusetts. *Gill v Office of Personnel Management*,[44] filed by Gay & Lesbian Advocates & Defenders (GLAD), argued that Section 3 violated equal protection principles. The second case, *Massachusetts v Department of Health and Human Services*,[45] filed by Massachusetts, claimed that Section 3 intruded on the power and sovereignty of the states and codified animus against gay people. The district court concluded

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[42] Massachusetts began to issue marriage licenses to same-sex couples in May 2004, six months after a ruling for gay marriage by the state supreme court in *Goodridge v Department of Public Health*, 798 NE2d 941 (Mass 2003).

[43] See Hawaii Const, Art I, § 23.

[44] 682 F3d 1 (1st Cir 2012).

[45] Id.

that DOMA was indeed unconstitutional,[46] and the First Circuit agreed on equal protection grounds.[47]

The year that *Gill* and *Massachusetts* were filed was also the year that Edith Windsor's spouse, Thea Spyer, died. While the two had been married in Canada in 2007, at a time when New York did not yet permit same-sex marriages, their union was recognized in New York under state conflict-of-law principles. But where New York saw a married couple, under DOMA, the federal government saw only legal strangers. That meant Windsor had to pay the federal estate tax for her inheritance from Spyer, a tax from which a surviving opposite-sex spouse is exempt.[48]

Windsor paid $363,053 in estate tax and sued the government for a refund in the Southern District of New York. Her lawyers at the American Civil Liberties Union argued that DOMA's Section 3 violated the Fifth Amendment Due Process Clause guaranty of equal protection.[49]

The district court decided that DOMA failed the rational-basis test.[50] In October 2012, the Second Circuit applied heightened scrutiny to classifications based on sexual orientation and likewise concluded that DOMA was unconstitutional.[51] Within two months, the Supreme Court granted certiorari on the equal protection issue. The parties and their numerous amici thus directed their arguments at the equal protection question, rather than at the issue of whether there is a fundamental right of same-sex couples to marry.

C. THREE COMMON MISREADINGS OF WINDSOR

Justice Kennedy's opinion is an amalgam of federalism, liberty, and equality, and thus expresses corresponding structural, substantive, and process-based concerns. Within each of these types of concerns, moreover, there are numerous possible approaches suggested by the opinion. Below I outline some possible reasons

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[46] *Massachusetts v United States Department of Health and Human Services*, 698 F Supp 2d 234, 253 (D Mass 2010).

[47] *Massachusetts*, 682 F3d at 9–13.

[48] *Windsor*, 133 S Ct at 2682.

[49] *Windsor v United States*, 699 F3d 169, 188 (2d Cir 2012).

[50] *Windsor v United States*, 833 F Supp 2d 394, 406 (SDNY 2012).

[51] Id at 185.

for DOMA's invalidation, all of which find some support in the decision but are ultimately unsatisfying.

Let's start with three propositions that *Windsor* might be thought to stand for:

1. The federal government's decision not to recognize state-sanctioned marriages of same-sex couples was an unconstitutional intrusion on federalism (a structural claim);
2. The federal government's decision not to recognize state-sanctioned marriages of same-sex couples was an unconstitutional infringement of a substantive right, for example, the right to marry (a liberty claim); or
3. The federal government's decision not to recognize state-sanctioned marriages of same-sex couples denied the equal protection of the law because discrimination based on sexual orientation draws heightened judicial scrutiny, and the federal government cannot satisfy that inquiry (an equal protection claim).

There are as many readings of *Windsor* as there are constitutional law scholars; in fact, there are probably many more.[52] These three are among the many plausible interpretations, but some explanations are more plausible than others. None of these adequately explains the decision.

1. *The federalism reading of Windsor.* The argument that DOMA failed as a matter of federalism, applied through the lens of equal protection, was suggested in an amicus brief that I signed with several other academics.[53] Our view, as expressed in the brief, was that Section 3 failed equal protection review for a reason quite distinct from the standard approaches relying on heightened scrutiny. We argued that whatever else may be its constitutional defects, Section 3 was not an exercise of any enumerated federal

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[52] Will Baude has noted the openness of the opinion to a variety of interpretations. See William Baude, *Interstate Recognition of Same-Sex Marriage After Windsor*, 8 NYU J L & Lib 150 (2013).

[53] Brief of Federalism Scholars as Amici Curiae in Support of Respondent Windsor, *United States v Windsor*, No 12-307 (filed March 2013). The argument was largely the brainchild of Professor Ernest Young, who led the drafting effort, along with the superb attorneys Roy Englert, Carina Cuellar, and Erin Blondel at Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP. In addition to Professor Young and me, the other signers were Professors Jonathan Adler, Lynn Baker, Randy Barnett, and Ilya Somin. For an alternative approach to DOMA that also blends federalism and equality principles, see Mae Kuykendall, *Equality Federalism: A Solution to the Marriage Wars*, 15 U Pa J Const L 377 (2012).

power. It was also not a "necessary and proper" measure to carry into execution any of Congress's enumerated powers. Instead, it was an unprecedented expansion of federal authority into a domain traditionally controlled by the states. The federal government claimed a hitherto unknown and sweeping power to determine marital and family status.

While Congress had not prohibited states from recognizing same-sex marriages, we argued that DOMA greatly complicated and burdened their police power to do so. We acknowledged that Congress has authority to limit access to specific federal benefits otherwise available to validly married people. But Section 3, as an across-the-board enactment untethered to any specific power, was not plainly adapted to serve any "legitimate" interest of the federal government.

We asserted that the federal government can have no legitimate interest in regulating beyond its enumerated (and necessarily and properly implied) powers. And if Section 3 of DOMA did not serve any legitimate interest—indeed, if a sweeping federal determination of marital status is constitutionally prohibited—then Section 3 could not be justified under any level of scrutiny that might apply under equal protection principles.

While sounding in federalism, the argument was ultimately aimed at the equal protection analysis the Court agreed to review. It was an argument that there is, in fact, a federalism component in the equal protection principles made applicable to the federal government through the Fifth Amendment's Due Process Clause. It was thus different from the Tenth Amendment decision by the Massachusetts District Court in a similar case challenging DOMA.[54] The federalism argument did not rely on the Tenth Amendment, but on the limits on federal power that exist even without that amendment.

On the eve of oral argument in *Windsor*, Michael McConnell also endorsed federalism as a basis to hold DOMA unconstitutional:

> The leading argument *against* DOMA all along has been that the federal government lacks authority under the Constitution to create and enforce a definition of marriage different from that of the state in which a couple resides. It is hard to think of an issue more clearly reserved

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[54] *Massachusetts*, 698 F Supp 2d at 249.

to state law under constitutional tradition than the definition of marriage.[55]

Thus, the federalism argument did not lack supporters. It was obvious in the *Windsor* oral argument that these concerns were shared by several Justices. But how did the argument fare in the actual decision?

Justice Kennedy's opinion on the merits of Section 3 opened with a discussion of how states have gradually considered and approved the extension of marriage to same-sex couples. Those states, he observed, had concluded that "[t]he limitation of lawful marriage to heterosexual couples" is "an unjust exclusion."[56] Though Congress may enact "limited federal laws that regulate the meaning of marriage in order to further federal policy" related to discrete areas like immigration and income-based criteria for Social Security, DOMA is "applicable to over 1,000 federal statutes and the whole realm of federal regulations."[57]

Justice Kennedy declared that a consideration of DOMA's intrusion on an area of traditional state authority is essential to the analysis of its constitutionality. "In order to assess the validity of that intervention," he wrote, "it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition."[58] His discussion of state authority set up the argument that DOMA was a significant intrusion on the "dignity and status" that comes with being married *in the same way as everyone else in the state*. Marriage had always been "uniform for all married couples within each state," but DOMA rejected that tradition. This was important, in turn, not because it violated federalism but because "discriminations of an unusual character especially suggest careful consideration . . . ."[59] That was one

[55] See Michael McConnell, *The Constitution and Same-Sex Marriage*, Wall Street Journal (May 21, 2013), available online at http://online.wsj.com/article/SB10001424127887324281004578354300151597848.html. See also George F. Will, *DOMA Is an Abuse of Federalism*, Washington Post (March 20, 2013), online at http://www.washingtonpost.com/opinions/george-f-will-doma-infringes-on-states-rights/2013/03/20/fa845348-90bb-11e2-bdea-e32ad90da239_story.html; James Taranto, *Maybe Scalia Was Wrong*, Wall Street Journal (March 28, 2013), online at http://online.wsj.com/news/articles/SB10001424127887324685104578388490905521114.

[56] *Windsor*, 133 S Ct at 2689.

[57] Id at 2690.

[58] Id at 2691.

[59] Id at 2692, quoting *Romer v Evans*, 517 US 620, 633 (1996).

important factor in the animus analysis (it explained the context[60]). The next two pages of the opinion were devoted to citations affirming state primacy over the field of family relations, the deference Congress had traditionally showed to state law, and the historical pedigree of this division of state and federal authority.[61] The Chief Justice, in dissent, had considerable justification for saying that federalism was the "dominant theme" of the majority opinion. But Chief Justice Roberts went one step further in characterizing the Court's holding: "[I]t is undeniable that its judgment is based on federalism."[62]

That was an overstatement. After discussing the interests of the states in controlling family law, Justice Kennedy expressly stated that the Court was *not* relying strictly on federalism. "Despite these considerations," he wrote, "it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance."[63]

Surely a statement in a decision declaring what it means should have some bearing on what it means. The Chief Justice, in dissent, thought federalism was nevertheless critical to the result and would help to distinguish the case from one that involved a claimed constitutional right to state recognition of same-sex marriages. He might be right about that. But the Chief Justice's explanation may have been more a hope about the limited consequences of an alternative and more aggressive *Windsor* than it was a reading of the actual *Windsor*. Either that or, as Justice Scalia would have it, Chief Justice Roberts was "fool[ed] . . . into thinking that this is a federalism opinion."[64]

2. *The substantive-liberty reading of Windsor.* As for the second proposition, that the Court upheld a substantive-liberty claim, the Court certainly mentioned liberty several times. And the context was one in which the plaintiffs claimed that "liberty" protected a right to have their marriages fully recognized by government. The Court set for itself the task of deciding "whether the resulting injury and indignity is a deprivation of . . . the liberty protected

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[60] See discussion of the federalism context in Section III.B.1.

[61] *Windsor*, 133 S Ct at 2692–93.

[62] Id at 2697 (Roberts, CJ, dissenting).

[63] Id at 2692.

[64] Id at 2705.

by the Fifth Amendment."[65] It concluded that Congress "cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment."[66]

But my sense is that reliance on the word "liberty" here was more a doctrinal formality than a substantive holding. *Windsor* was rooted in the Equal Protection component of the Fifth Amendment's Due Process Clause, which protects "liberty" against certain deprivations but makes no mention of "equal protection." "Liberty" in the Fifth Amendment has been understood to protect individuals from federal government action that denies them equal protection.[67]

Windsor arose only because the states themselves decided to recognize a substantive liberty to marry, not because the federal government had an independent constitutional obligation to recognize a fundamental right to marry.[68] If the states themselves did not recognize same-sex marriages, the federal government would not be required by *Windsor* to issue federal marriage licenses to same-sex couples. Marital recognition starts in the states, and it's hard to argue that *Windsor* held otherwise, though one could say that some liberty principle in *Windsor* (perhaps "dignity") is available for future litigation to force state recognition of such marriages.[69]

3. *The heightened-scrutiny reading of Windsor.* In *SmithKline Beecham Corporation v Abbott Laboratories*,[70] an otherwise unremarkable antitrust and unfair-trade-practices case, the Ninth Circuit concluded that heightened scrutiny should apply to classifications based on sexual orientation because *Windsor* "requires" it.[71] For that reason, the panel held that a potential juror could not be

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[65] *Windsor*, 133 S Ct at 2692.

[66] Id at 2695.

[67] *Bolling v Sharpe*, 347 US 497, 499–500 (1954).

[68] "In *Windsor*, the Supreme Court did not clearly state that the non-recognition of marriages under Section 3 of DOMA implicated a fundamental right, much less significantly interfered with one." *Bourke v Beshear*, 2014 WL 556729, *5 (WD Ky).

[69] But see Douglas NeJaime, *Windsor's Right to Marry*, 123 Yale L J Online 219, 237–47 (2013) (arguing that principles advanced by gay-marriage advocates for a fundamental right to marry influenced the Court's decision, and may eventually lead to a successful equal protection claim against the exclusion of same-sex couples from state marriage laws).

[70] *SmithKline Beecham Corporation v Abbott Laboratories*, No 11-17357 & 11-17373, slip op (Jan 21, 2014), online at http://cdn.ca9.uscourts.gov/datastore/opinions/2014/01/24/11-17357.pdf).

[71] Id at 20.

excluded based solely on sexual orientation. Judge Stephen Reinhardt acknowledged that *Windsor* "did not expressly announce the level of scrutiny it applied to the equal protection claim" against DOMA.[72] That, of course, was precisely what Windsor's lawyers and the Justice Department had urged the Court to do: treat anti-gay discrimination as presumptively unconstitutional, requiring a particularly strong justification and closely tailored means. But reading between the lines in *Windsor*, the Ninth Circuit determined that the Court had indeed applied heightened scrutiny. Among other reasons for that interpretation of *Windsor*, the panel noted that the Court had not hypothesized possible rational bases for DOMA, as it would do in most rational-basis cases. Instead, the Court had evaluated only Congress's actual justifications.[73] Reinhardt also described *Windsor* as having required Congress to justify its unequal treatment of gays rather than indulging in the usual presumption of constitutionality for congressional acts.[74]

This is an aggressive and incomplete reading of *Windsor*. Justice Kennedy's opinion didn't specify any level of scrutiny. There was no requirement that the government's objective be "important" or "compelling," the hallmarks of the kinds of interests required to satisfy intermediate or strict scrutiny. There was no requirement that the means be "closely" or "necessarily" tailored to the objective, either.

More tellingly, the *Windsor* Court did not discuss why heightened scrutiny should be applied to sexual-orientation discrimination, a minimal analytical expectation if the Court is really about to start down that road. There was no mention in *Windsor* of the factors commonly associated with a heightened-scrutiny approach, like immutability, the irrelevance of the trait to merit, or political powerlessness.[75] The Court's decision to apply heightened scrutiny would be a break from almost every circuit court that has considered the issue, a watershed that would ordinarily be shouted rather than whispered, made explicit rather than implied.

In fact, the *Windsor* court did not even characterize DOMA as

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[72] Id at 17.

[73] Id at 20.

[74] *SmithKline Beecham Corp.*, No 11-17357 & 11-17373, slip op at 20.

[75] See factors considered in *City of Cleburne v Cleburne Living Center*, 473 US 432, 440–42 (1985), in which the Court rejected heightened equal protection scrutiny for classifications based on cognitive disability.

discriminating on the basis of sexual orientation—the critical issue in *SmithKline Beecham Corporation*. It did not say that homosexuals per se had been disadvantaged by the exclusion from federal recognition of same-sex marriages. Instead, the Court identified the burdened class as same-sex couples who were validly married under state law.[76] It was relevant to the animus determination that these couples were gay couples, as we shall see. But the Court did not take the next logical step of declaring all anti-gay discrimination unconstitutional.[77]

It might well be that *Windsor* is a precursor to heightened scrutiny of sexual-orientation classifications, just as *Reed v Reed*[78] was a first step toward intermediate scrutiny of sex-based discrimination. But we have seen this movie before: the same prediction was made when the Court decided *Romer v Evans* using an unusually skeptical form of rational-basis review.[79] And the same speculation about heightened scrutiny arose after *Lawrence*. After two false starts, it makes sense to start looking elsewhere for an answer.

As argued in Section II below, *Windsor* stands outside the conventional tiers-of-scrutiny analysis. In cases where the Court has found animus, it does not engage in the usual equal protection review. A specialized form of review peculiar to animus cases applies. That's what ties *Windsor* to *Lawrence* and *Romer*, as well as to older cases like *Moreno*, *Cleburne*, and to *Carolene Products* itself. Like many courts and commentators, the Ninth Circuit in *SmithKline Beecham Corporation* failed to attribute any independent weight to the animus analysis. That is an error that can no longer be justified.

II. Animus and Its Agonistes

Instead of seeing *Windsor* as a substantive liberty or conventional equal protection decision, we should see it primarily as an animus case. That is justified by a plain reading of the decision,

[76] *Windsor*, 133 S Ct at 2695 ("The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State.").

[77] "In *Windsor*, no clear majority of Justices stated that sexual orientation was a suspect category." *Bourke v Beshear*, 2014 WL 556729, *5 (WD Ky).

[78] 404 US 71 (1971).

[79] Farber and Sherry, 13 Const Comm at 257 (cited in note 11).

which concludes with an entire section on animus, and by the way the Court itself characterized its holding. It's also justified by the failure of other prominent readings to account for the result.

For now at least, *Windsor* is controversial. But while the federalism analysis in *Windsor* has drawn disagreement and bafflement, the animus portion of the decision has elicited outrage. Whether DOMA reflected animus is at the heart of the dispute about the result. But leaving DOMA aside for a moment, what about the antecedent question: is animus itself an unconstitutional basis for legislation? I argue below that the answer is yes, and that answer should not be controversial. The concept is a familiar one in constitutional law. It follows from the Court's precedents, from constitutional history, and from some basic constitutional-democratic theory about permissible legislative enactments.

This section explains why *Windsor* should be seen primarily as an animus decision, why that rationale for striking down legislation is justified as a matter of equal protection, and why critics of the anti-animus principle are wrong. Explaining how the Court got to its animus determination in the DOMA case first requires an examination of the Court's animus decisions in *Moreno*, *Cleburne*, and *Romer*, along with its due process holding in *Lawrence*.

A. THE ANIMUS PRECEDENTS: MORENO, CLEBURNE, AND ROMER (PLUS LAWRENCE)

Long before *Windsor*, Cass Sunstein referred to the Court's animus decisions as a trilogy.[80] It was an apt description since the Court's animus jurisprudence has been a work in progress. To these three decisions, we might add *Lawrence v Texas*, which indicated the Court's low regard for laws aimed at homosexuals and declined to accept a moral justification for a criminal sodomy law. If these cases, together with *Windsor*, are to be regarded as anything more than what Sunstein memorably called "a kind of magical trump card, a joker, hidden in the pack and used on special occasions"[81] they must be more fully linked and theorized. Each

[80] Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 146 (Harvard, 2001). See also Kenji Yoshino, *The New Equal Protection*, 124 Harv L Rev 747 (2011) (discussing heightened rational-basis scrutiny present in *Moreno*, *Cleburne*, and *Romer*).

[81] Sunstein, *One Case at a Time* at 148 (cited in note 80). With *Windsor*, it's now a quadrilogy.

decision added something distinctive to anti-animus methodology.

1. *United States Department of Agriculture v Moreno.* In *Moreno*, the Court invalidated a federal law denying food stamps to any household containing one or more people unrelated by blood or marriage to others in the household. In a "declaration of policy" accompanying the Food Stamp Act, Congress asserted two reasons for creating the program: ensuring adequate levels of nutrition among low-income households and strengthening the market for agriculture.[82] But these stated purposes were "irrelevant" to excluding households of unrelated people, concluded the Court, since such people had nutritional needs and since food purchases by them would equally benefit domestic agriculture.[83] Thus, even under rational-basis review, the stated justifications were insufficient.

So what was the real reason for the exclusion? The Court noted that there was little legislative history to explain the amendment, which was inserted without any committee consideration. "The legislative history that does exist," the Court noted, "indicates that that amendment was intended to prevent 'hippies' and 'hippie communes' from participating in the food stamp program."[84] Here was the heart of the problem:

> The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.[85]

The "purpose to discriminate against hippies cannot, in and of itself and without reference to (some independent) considerations in the public interest," justify the exclusion.[86] To be constitutional under equal protection principles, an enactment must have a public-regarding reason other than to disadvantage a group.

Every classification can be characterized negatively as "discrimination" against the group it disadvantages. Every classification can also be recast affirmatively as serving at least the good of

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[82] *United States Department of Agriculture v Moreno*, 413 US 528, 533 (1973).

[83] Id at 534.

[84] Id.

[85] Id.

[86] Id at 534–35, quoting *Moreno v United States Department of Agriculture*, 354 F Supp 310, 314 n 11 (DDC 1972).

codifying the principle that the classification serves. In light of direct evidence in the legislative history of animus against "hippies" and "hippie communes," however, the Court refused to defer to hypothetical alternative justifications or to entertain more friendly restatements of Congress's evident animus.

Even if it were true that the exclusion bore no relationship to the stated congressional purposes of providing nutrition or spurring agricultural purchases, it might be rationally related to other hypothetical congressional purposes. The government argued early on in the litigation that excluding households of unrelated persons from the program would foster "morality,"[87] presumably by discouraging opposite-sex cohabitation. Being "pro-morality" might simply be a nicer way to say "anti-hippie." In his dissent, Justice Rehnquist asserted that Congress could decide to fund only "the family as we know it."[88] The strategy, like Justice Scalia's in *Romer*, was not to reject the animus analysis completely, but to recast the "bare desire to harm" as an effort to promote a traditional moral commitment.[89] But the district court had rejected this argument because the exclusion applied regardless of the sexes of the unrelated persons. The government subsequently abandoned the contention.[90]

Another hypothetical purpose, advanced by the government and by the dissent, was that the exclusion helped prevent fraud by "conceivably deny[ing] food stamps to members of households which have been formed solely for the purpose of taking advantage of the food stamp program."[91] Yet anti-fraud purposes did not explain why Congress needed to exclude *all* households containing unmarried persons, especially when other anti-fraud provisions in the Food Stamp Act dealt with the "voluntarily poor" who didn't want to work.[92] In an ordinary rational-basis case, the fact that the exclusion would at least minimally prevent fraud surely would have been good enough. As Justice Rehnquist noted, the fact that it would have "unfortunate and perhaps unintended consequences

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[87] Id at 535 n 7.

[88] Id at 546 (Rehnquist, J, dissenting).

[89] Sunstein, *One Case at a Time* at 147 (cited in note 80).

[90] *Moreno*, 413 US at 535 n 7.

[91] Id at 547 (Rehnquist dissenting).

[92] Id at 535–37.

beyond [preventing fraud] does not make it unconstitutional."[93]

Yet the Court noted that the only people severed from the program as part of this "anti-fraud" rationale were those "who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility" for food stamps.[94] The Court seemed to be saying that harm to a class could not be dismissed as merely incidental to the law where the means were so weakly related to purpose and where evidence of animus was otherwise present. On the slimmest justification, Congress had imposed a significant burden on a group of people.

Finally, the government speculated that perhaps anti-fraud concerns with households of unrelated persons were heightened because "such households are 'relatively unstable,' thereby increasing the difficulty of detecting such abuses." The Court noted that this rationale relied on "wholly unsubstantiated assumptions concerning the differences between 'related' and 'unrelated' households."[95]

Moreno laid the groundwork for a self-conscious anti-animus jurisprudence, ruling out a bare desire to harm a class as a permissible legislative purpose. The decision bore the political-process concerns laid down in *Carolene Products* by highlighting the fact that the affected class was "politically unpopular," and thus one for which resort to the political process was unlikely to work. It established that in such circumstances the Court was willing to examine whether the actual justifications for legislation were plausibly related to the exclusion of the class. It signaled that the Court would look into the legislative process, including the legislative history, to determine whether animus was present. Having found such evidence, the Court would then skeptically scrutinize hypothesized justifications, departing from ordinarily deferential rational-basis review. It would not accept "wholly unsubstantiated" claims about the excluded group. It would consider the harm inflicted on them by the exclusion. And it would not accept at face value that any harm done to them was excusably "incidental" to the exclusion. There are echoes of all of these themes in *Windsor*.

2. *City of Cleburne v Cleburne Living Center.* The Court next addressed animus in an Equal Protection case twelve years later

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[93] Id at 547 (Rehnquist, J, dissenting).

[94] Id at 538.

[95] Id at 535.

in *Cleburne*, unanimously concluding that the city had unconstitutionally denied a special zoning permit to a proposed group home for the cognitively disabled.[96] The Court first rejected the idea that classifications aimed at the cognitively disabled should formally be subjected to heightened scrutiny even though there had been a long history of legal discrimination against, and social antipathy toward, the group. This sorry history had included eugenic marriage and sterilization laws, lifelong institutionalization, and exclusion from public schools.[97] Among other reasons for rejecting heightened scrutiny, the Court noted that "lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."[98] But in particular cases the Court observed that discrimination against the group would indeed be "invidious," justifying "judicial correction under constitutional norms."[99] Quoting *Moreno*, the Court held that "some objectives—such as 'a bare . . . desire to harm a politically unpopular group'—are not legitimate state interests."[100]

Why did the denial of a special zoning permit for a group home constitute animus? Certainly the city of Cleburne did not concede that it had acted simply out of desire to harm cognitively disabled people. Instead, the city said it was responding to the "negative attitudes of the majority of property owners" nearby and to the "fears of elderly residents of the neighborhood."[101] "But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding," the Court responded, did not justify treating a home for the cognitively disabled differently from proposed apartments or other multiple-unit dwellings.[102] The same fate awaited the city's worry that the home would be located near a junior high school, whose students might harass people living in the home. These "vague, undifferentiated fears" by the community could not "validate what would otherwise be

[96] *City of Cleburne v Cleburne Living Center*, 473 US 432 (1985).

[97] Id at 461–63 (Marshall, J, concurring in part and dissenting in part).

[98] Id at 443.

[99] Id at 446.

[100] Id at 446–47 (citation omitted).

[101] Id at 448.

[102] Id.

an equal protection violation" if state officials themselves harbored such attitudes.[103]

Other asserted reasons for denying the special use permit—the fact that the home would sit on a 500-year-floodplain, doubts about who would be legally responsible if a resident caused damage, concerns about neighborhood density—did not rationally explain why the city would have allowed homes for other groups, like fraternities, nursing homes, boarding houses, or dormitories.[104] All of the city's justifications appeared to be strained efforts to allow it to act on prejudice and fears of the cognitively disabled. "The short of it," Justice White's opinion concluded, "is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded."[105]

This analysis suggests that a different fate would have befallen an oil company's complaint that a city denied a special permit to construct a gas station in the neighborhood. While we can speculate that city officials might indeed feel "animus" toward big oil companies, and nearby residents might oppose the construction of a station, a decision to deny such a permit would be plausibly explicable on safety grounds, on the desire to preserve a noncommercial zone for private residents, or even on aesthetic criteria. Such considerations would be common in a zoning decision, not out of the ordinary. The decision would be rationally related to avoiding real harm to the neighborhood quite apart from any general dislike of oil companies. Finally, the aggrieved oil company would not be the kind of politically unpopular minority that is unlikely to get its interests taken seriously in the halls of government.

Cleburne added to the animus doctrine in several respects. It clarified that even though a classification might not generally warrant heightened scrutiny, some actions taken against a class might nevertheless reflect impermissible bias. To be rational, a law must serve a "legitimate" end, and antipathy can never be a legitimate end. *Cleburne* pointed out that a departure from the usual substantive considerations governing a decision may itself raise suspicion that the decision was born of animus. An analogous concern

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[103] Id at 449.

[104] Id at 449–50.

[105] Id at 450.

about discriminations of an unusual character arose in *Windsor*, where the government departed from its usual respect for state determinations of marital status. The Court also held that acting to assuage the animosity of constituents toward a politically unpopular class was as impermissible as acting on government officials' own personal animosity toward that class. Private citizens may carry irrational fear and hatred of a group, but government may not effectuate those feelings by discriminating against the group. Similarly, in *Windsor*, the Court noted that DOMA arose from disapproval of homosexuality itself.

3. *Romer v Evans.* Eleven years later, just as DOMA was introduced, Justice Kennedy wrote the 6–3 opinion in *Romer.*[106] In that decision, the Court struck down Colorado's Amendment 2, a broad state constitutional amendment that wiped away all existing antidiscrimination protection that specifically protected gay men and lesbians at every level and in every department of state government. Amendment 2 also forbade cities, counties, departments, and even the state legislature to pass such protections in the future. The state did this to no other identity-based group that had long been subject to invidious public and private discrimination. Amendment 2 was a backlash against the limited success of gay-rights activists in securing modest antidiscrimination protection in a few areas.[107]

The Court was concerned that Amendment 2 was almost unlimited in scope and significantly injured gay people. On the first point regarding its scope, the Court noted that Amendment 2 was "[s]weeping and comprehensive" and "far reaching" in altering the legal status of homosexuals, placing them "in a solitary class." The amendment withdrew "from homosexuals, but no others, specific legal protection from the injuries caused by discrimination."[108] It applied to "all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment."[109] It repealed and forbade existing protection from discrimination in state government employment and at state universities, among other areas of law.[110]

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[106] *Romer v Evans*, 517 US 620 (1996).

[107] Id at 623–25.

[108] Id at 627.

[109] Id at 629.

[110] Id at 629–30.

On the real harm this extensive enactment visited on gay people alone, the Court observed that for homosexuals, antidiscrimination protections are not mere "special rights." This put gay people in a different position from people who do not need specific protection (like blue-eyed people or lawyers) or already have such protection (like women, people of color, and religious minorities). Far from privileging gay men and lesbians, Justice Kennedy noted, antidiscrimination laws put them on an equal footing in "an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[111]

The Court discerned equal protection violations in two respects. The first was that the law was "at once too narrow and too broad": it withdrew civil rights protections across the board for homosexuals alone.[112] The second was that by "imposing a broad and undifferentiated disability on a single named group" it was "inexplicable by anything but animus toward the class it affects." Importantly, the Court cited previous rational-basis cases in which it had upheld laws that simply "work[ed] to the disadvantage of a particular group."[113] But those cases, involving matters like the regulation of optometry, reviewed laws in which both the justification and the burden were limited. Those contexts allow the Court to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."[114] Amendment 2 was "unprecedented" in its sweep, observed the Court, which was itself "instructive" because "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."[115]

The too-broad-and-too-narrow structure of Amendment 2 "raise[s] the inevitable inference that the disadvantage imposed is

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[111] Id at 631.

[112] Id at 633.

[113] Id at 632, citing *New Orleans v Dukes*, 427 US 297 (1976) (law favored certain pushcart vendors); *Williamson v Lee Optical of Okla, Inc.*, 348 US 483 (1955) (law favored optometrist over opticians); *Railway Express Agency, Inc. v New York*, 336 US 106 (law favored vehicles displaying ads of owner's products); and *Kotch v Board of River Pilot Commissioners for Port of New Orleans*, 330 US 552 (1947) (law favored persons related to current river boat pilots).

[114] Id at 633, citing *Railroad Retirement Board v Fritz*, 449 US 166, 181 (1980) (Stevens, J, concurring) ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.").

[115] *Romer*, 517 US at 633, quoting *Louisville Gas and Electric Co. v Coleman*, 277 US 32, 37–38 (1928).

born of animosity toward the class of persons affected."[116] It's not that broad laws are invariably unconstitutional. They are constitutional if they "can be explained by reference to legitimate public policies which justify the *incidental* disadvantages they impose on certain persons."[117]

But the "immediate, continuing, and real injuries" inflicted by Amendment 2 were not simply incidental to the law, concluded the Court. How did the majority know that? It did not cite any of the statements made by Amendment 2 supporters during the campaign to pass it, though a plethora of false anti-gay claims could have been cited. It did not cite opinion polls showing that Coloradans disapproved homosexuals or homosexuality. Instead, it cited the objective fact that in justifying such a sweeping measure, the official rationales for Amendment 2 were very narrow: protecting the liberties of landlords and employers who object to homosexuality and conserving state government resources for fighting other kinds of discrimination. Animus was *inferred* from the unprecedented gap between an all-encompassing law and its claimed narrow purposes.

Romer introduced several themes that were further developed in *Windsor*. First, animus analysis is especially alert to laws of a broad character aimed at a particular class. Such laws inflict broad injury on a single group, raising *Carolene Products*–type concerns since the affected group will often lack allies in the political process. Second, while it's true that a law is not unconstitutional simply because it incidentally harms the interests of a class, such harm cannot be the aim of the law. Third, the Court need not have direct evidence of animus or inquire into the subjective motivations of legislators or voters. An assessment of the real aim of the law can be gleaned from objective considerations of scope and justification. Fourth, the Court will not simply accept anything the state says by way of justifying its laws. If the stated aims don't really explain the enactment, the remaining explanation is animus.

Romer left open a major question in animus doctrine. To render the law unconstitutional, must animus be the only real purpose? Is it sufficient if animus is simply the primary reason for the law, the dominant purpose among several others? Moving along the

[116] Id at 634.

[117] Id at 635 (emphasis added).

spectrum, is the law unconstitutional if animus is a but-for explanation, nonprimary but nonetheless necessary for its passage? Or can the law be invalidated if animus explains any part of the purpose of the law?

Whichever it was, *Romer*, handed down on May 20, 1996, foretold the death of DOMA even at the moment of the law's birth. Some members of Congress who supported DOMA realized the new scrutiny the Court was giving to anti-gay legislation and stressed that the legislation was not an effort to hurt gay people.[118] But during floor "debate"—as the prepared speeches that members of Congress deliver is called—numerous supporters made clear that they saw DOMA as a way to express disdain for homosexuals.[119]

4. *A brief detour: Lawrence v Texas.* Lurking behind the *Romer* opinion was the Court's dawning realization that gay men and lesbians are a class that might "need" the special protection of the law. This was a first in the Court's jurisprudence. While not an "animus" decision in a formal doctrinal sense, *Lawrence* nonetheless confirmed the Court's conclusion that gays were often a target for class legislation insulting their dignity. The Texas sodomy law was, after all, actually a "Homosexual Conduct" law that forbade anal and oral sex only if committed by two people of the same sex. Yet the moral interests it was said to serve came from a tradition that disfavored all nonprocreative, nonmarital sex. In a sense then, it was the mirror opposite of *Romer*. It had a much broader justification (broadly applicable moral sentiments) but a much narrower focus (selecting only the immoral activity of one group for disfavor).

Yet the harm done by the Texas law to this particular group was itself extensive. Justice Kennedy's opinion, his second in a major gay-rights case, emphasized how the Texas statute affected more than specified sexual conduct. Indeed, it "demeans the claim" of gay people to say that only sexual acts were at issue. Sodomy laws, in fact, had far-reaching "penalties and purposes" that invaded private adult sexual autonomy and did so in the most private space, the home. For those subject to the law, the Texas statute amounted to an attack on "their dignity as free persons."[120]

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[118] See, for example, Section III.C.3.

[119] Id.

[120] *Lawrence v Texas*, 539 US 558, 567 (2003).

Under the Equal Protection Clause citizens are entitled to demand respect for constitutionally protected conduct. Sodomy laws imposed "stigma" on gay people. This stigma had a real-world effect. "When homosexual conduct is made criminal by law of the state," concluded the Court, "that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[121] Sodomy laws thus attacked gays' standing in their own community. *Bowers v Hardwick*, which had upheld a general anti-sodomy law applicable both to heterosexuals and homosexuals with language that made it seem appropriate for the law to target only homosexuals, had to be overruled because "[i]ts continuance as precedent demeans the lives of homosexual persons."[122] There was no justification offered by the state, including its claimed purpose to defend traditional morality, that could justify the burden imposed by the law. Then the Court summed up the problem with the Texas Homosexual Conduct law in language that could well have fit in its animus cases: "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[123]

In *Lawrence*, the Court ruled that the state could not impose a majoritarian moral code on homosexuals. It could not "demean their existence or control their destiny" by driving them away from relationships. Homosexuals, the Court observed, enter relationships for the same reasons heterosexuals do: to share intimacy with a partner, to show affection and obligation, to have and raise children, to establish a place they call home and people they call family.

Lawrence was a Due Process Clause case involving a substantive-liberty claim, not an Equal Protection Clause decision demanding equal treatment for classes of citizens. But the Court noted that the equal protection argument against anti-gay laws like the Texas statute was "tenable" and that the principles are "linked." The Court wanted to be sure that neither Texas nor any other state could reenact a sodomy law applying facially to heterosexuals and homosexuals under the guise of "equality," for such a law would continue to impose stigma on homosexuals.[124]

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[121] Id at 575.

[122] Id.

[123] Id at 578.

[124] Id at 575.

The Court's concerns about the "dignity" of gay people and their right to be respected by their government are the type of concerns at the heart of animus jurisprudence. That the law "demeaned" and stigmatized them through collateral injury without a legitimate justification is a close cousin of the concerns expressed in the animus principle. If the Court had followed the equal protection route,[125] *Lawrence* could very easily have been among the most prominent anti-animus decisions.

B. THE WINDSOR INSTALLMENT

All of this formed the jurisprudential backdrop for the demise of the Defense of Marriage Act. Forty years of case law developing a constitutional bulwark against legislative animus and a generation of greater constitutional protection for the rights of gay men and lesbians caught DOMA in a double pincers.

Windsor is primarily an equal protection decision heavily influenced by concerns about structural federalism as an important guarantor of liberty. After all, what was the "liberty" at stake under the Fifth Amendment? The Court pointed out that the government treated as "unlike" what New York treated as "alike" in a federal law that was "designed to injure" the class.[126] At least since *Bolling v Sharpe*, the liberty in the Fifth Amendment's Due Process Clause "contains within it the prohibition against denying to any person the equal protection of the laws."[127]

In *Windsor*, the Court held that dignity was denied insofar as DOMA denied equal federal recognition of same-sex and opposite-sex marriages. The Court held that "by seek[ing] to injure" married same-sex couples DOMA "violates basic due process and equal protection principles applicable to the Federal Government."[128] The very purpose of DOMA was to ensure that same-sex marriages would be treated as "second-class," said the Court, which is what raised "a most serious question under the Consti-

[125] In a concurring opinion, Justice O'Connor did rely on equal protection to strike down the Texas law. Id at 579 (O'Connor, J, concurring). At the same time, she suggested that traditional morality might justify a law limiting marriage to opposite-sex couples. Id at 585 (O'Connor, J, concurring).

[126] *United States v Windsor*, 133 S Ct 2675, 2692 (2013).

[127] Id at 2695, citing *Bolling v Sharpe*, 347 US 497, 499–500 (1954).

[128] Id at 2693.

tution's Fifth Amendment."[129] The effect was to "identify a subset of state-sanctioned marriages and make them unequal."[130]

The final substantive section of Justice Kennedy's opinion, Section IV, directly addressed the animus issue.[131] Quoting *Moreno*, the Court stated the basic anti-animus principle: "The 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."[132] The opinion devoted the next four pages to explaining why the majority believed animus was present in DOMA. The Court concluded with this statement of its holding:

> [T]he principal purpose and necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.[133]

As the Court had just spent four pages explaining, a purpose to "demean" a class is a purpose to inflict a dignitary injury on them, even apart from any more concrete injury. The problem with such a purpose is that it is a species of animus. It was, for reasons the Court had just adumbrated, the principal congressional purpose driving the passage of DOMA. The equal protection principle incorporated in the Fifth Amendment's liberty guaranty, like the Fourteenth Amendment's own Equal Protection Clause, forbids such a purpose. Therefore, DOMA was unconstitutional. This was as close to a plain statement of the Court's holding in *Windsor* as can be found in the opinion. It leaves room for future development in constitutional doctrine in any number of directions, but for now its clearest import is that DOMA was found unconstitutional because it reflected impermissible animus. Justice Scalia, in dissent, agreed that "the real rationale of [the *Windsor* opinion] is that DOMA is motivated by 'bare . . . desire to harm' couples in same-

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[129] Id at 2693–94.

[130] Id at 2694.

[131] Id at 2693–95.

[132] Id at 2694, quoting *Moreno*, 413 US at 528.

[133] Id at 2695.

sex marriages."[134] Lower courts have also read *Windsor* as based on a finding of unconstitutional animus.[135]

That's the comparatively easy part of understanding *Windsor*. The harder task is discovering why the Court concluded that DOMA reflected animus. Since Congress did not issue a statement of its "desires" when it passed the act, much less admit a bare desire to harm certain people, this conclusion must rest on something other than what Congress directly said about why it has passed the law. There must be circumstances where, no matter how Congress or its lawyers formulate the legislative purpose, the Court will see some purposes as malign where Congress says they are benign or as pretextual where malicious purposes are evident. When might that be?

Section IV of *Windsor* suggests several indicia of animus. The first, drawn from *Romer*, is that "'discriminations of an unusual character' especially require careful consideration."[136] A departure from the usual substantive approach toward an issue that targets a politically unpopular group "is strong evidence of a law having the purpose and effect of disapproval of that class."[137] Here is where the usual federalism-based approach to marital status played a crucial role. Against the backdrop of federal deference to state choice in family relations, DOMA was suspicious. An extraordinary and unprecedented act requires an extraordinary and unprecedented justification apart from the self-justifying desire to demean or injure a stigmatized class of people. Yet since states, not the federal government, were historically entrusted with the "defense of marriage" the desire of the federal government to "defend" it against the states' choices was anomalous.

Linked to the abandonment of deference to state marital determinations was Congress's acknowledged desire to discourage state experimentation in a field where states in fact had long been laboratories of experimentation on everything from the legal obligations of spouses to the dominance of males over females to

[134] Id at 2709 (Scalia, J, dissenting). Justice Scalia warned that the animus rationale would inevitably lead to the invalidation of state laws excluding same-sex couples from marriage. Id. The Federal District Court in Virginia drew upon Justice Scalia's conclusion in holding that the state marriage laws reflected "prejudice" against gay people. *Bostic v Rainey*, 2014 WL 561978, *17, *21 (ED Va).

[135] *Bishop v United States*, 2014 WL 116013, *18 (ND Okla).

[136] *Windsor*, 133 S Ct at 2693, quoting *Romer*, 517 US at 633.

[137] Id.

divorce. In none of these other profound changes in marriage had Congress acted to defend the traditional understanding of the institution. The Court approvingly quoted from the federalism-based decision by the First Circuit, which concluded that the federal goal was "to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws."[138] That is, Congress was not concerned with simply defining the limits of federal programs touching marriage but acted with the "purpose to influence or interfere with state sovereign choices about who may be married."[139] In this, Congress was partly successful, as post-*Windsor* developments have shown. Three states—New Jersey, Illinois, and Hawaii—that granted civil unions to same-sex couples but resisted marriage before *Windsor* quickly moved toward marriage in part because of persuasive arguments that civil unions had no federal status, were entitled to no federal benefits, and thus could not grant full equality.[140] None of this interference with state choice could be written off as merely the "incidental effect" of an otherwise valid law.

Second, the Court argued that the legislative history and text of DOMA demonstrated the congressional desire to interfere with the "equal dignity of same-sex marriages" conferred by the states. It then pointed to sections of the House Report that explicitly laid out the congressional purpose "to defend the institution of traditional heterosexual marriage," to prevent the "radical" redefinition of marriage to include "homosexual couples," to "express moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality," and to emphasize "traditional moral teachings reflected in heterosexual-only marriage laws." This purpose to interfere with state choice in a matter reflecting the dignity of same-sex marriages was, the Court determined, evident in the very title of the act.[141]

Third, the Court noted that in *practice* and in principal *effect*

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[138] Id at 2693, quoting *Massachusetts v United States Department of Health and Human Services*, 682 F3d 1, 12–13 (1st Cir 2012).

[139] Id.

[140] See Hawaii Marriage Equality Act of 2013, 2d Special Sess, 2013 Hawaii Sess Laws 1; Religious Freedom and Marriage Fairness Act, Ill Public Acts 098-0597; *Garden State Equality v Dow*, 82 A3d 336 (Superior Ct of NJ 2013).

[141] *Windsor*, 133 S Ct at 2693, citing HR Rep No 104-664, 104th Cong, 2d Sess 12–13, 16 (1996).

the act reflected animus because of its *Romer*-like scope. It was "a system-wide enactment with no identified connection to any particular area of federal law." It injected "inequality into the entire United States Code," simultaneously excluding a particular class of married couples from more than one thousand regulations and statutes governing estate taxes, Social Security, housing, criminal sanctions, copyright, veterans' benefits, access to health care, and bankruptcy protection. This broad effect, the Court concluded, could not be seen as designed to promote a non-animus-based purpose like "governmental efficiency" in the administration of federal programs.[142] Congress can enact discrete statutes that affect marital rights in order to serve limited purposes like preventing sham marriages intended to evade immigration laws.[143] But the effect of DOMA was cradle-to-grave: from increasing the cost of health care for families raising children to prohibiting couples from being buried together in veterans' cemeteries.

Fourth, there was no legitimate congressional purpose that "overcomes the purpose and effect [of DOMA] to disparage and to injure" married same-sex couples "whom the State, by its marriage laws, sought to protect in personhood and dignity."[144] That is, whatever legitimate purpose might be hypothesized for DOMA could not really explain its passage. Given the considerations the Court cited, including the devastating impact of DOMA on gay families, the best way to understand the law was as an expression of animus.

These considerations led the Court to conclude that DOMA was an assault on the dignity and social status of married same-sex couples. "The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States," the Court asserted.[145]

> By this dynamic DOMA undermines both the public and private significance of state-sanctioned marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable po-

[142] Id at 2690, 2694.

[143] Id at 2690.

[144] Id at 2697.

[145] Id at 2693.

> sition of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, and whose relationship the State has sought to dignify.[146]

Then, in perhaps the most striking passage in the entire opinion, Justice Kennedy invoked the interests of children being raised by same-sex couples:

> And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.[147]

In 1986, in *Bowers v Hardwick*, the Court had declared that there was no connection between homosexuality and family life. *Lawrence* declared that moral condemnation of homosexuality was no longer a legitimate state interest. In *Windsor*, the Court recognized explicitly for the first time that same-sex couples were raising children and that their families shared values and interests (a "concord") with more traditional families.

The use of the word "humiliates" to describe DOMA's injury to children whose families had been excluded from the protection of federal law was unusual and especially poignant. The humiliation passage calls to mind the words from *Brown v Board of Education* about the effect of public-school segregation on children: "To separate [black schoolchildren] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[148] Indeed, it is hard to find a decision apart from the racial discrimination cases in which the Court has used such strong language to denounce a law.

It is safe to assume—in fact the record shows—that Congress gave absolutely no weight to the needs of gay couples or their children when it passed DOMA. Until recently, the Court remarked, "many citizens had not even considered the possibility"

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[146] Id at 2694 (citations omitted).

[147] Id.

[148] *Brown v Board of Education*, 347 US 483, 494 (1954). The analogy to racial discrimination becomes even clearer given the Court's conclusion that DOMA created "second-class" or "second-tier marriages" (memorably termed "skim-milk marriages" by Justice Ginsberg at oral argument).

that same-sex couples might want to be married.[149] But when states did begin seriously to consider the idea, they saw "the urgency of this issue for same-sex couples." Slowly at first and then more rapidly states realized that excluding same-sex couples from marriage was "an injustice that they had not earlier known or understood."[150] Recognizing same-sex marriages thus "reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality."[151] In contrast to Congress's blunderbuss action directed at an unpopular minority, states' recognition of these marriages reflected a considered and thoughtful decision-making process.

Windsor thus further elaborated upon the anti-animus doctrine. It laid out the twin concerns of that doctrine to protect both practical and dignitary interests. It announced a series of factors that should go into the determination of whether the legislature has acted with malice toward a class, including deviations from usual substantive considerations governing a decision, the legislative history and language of a statute, the practical effect of the statute, and the comparative explanatory weakness of non-animus-based justifications for the act. An animus-based law, the Court suggested, is likely to be a product of a legislature that is hostile to the interests of a class. A more deliberative and conscientious process, one not blinded by fear and loathing, is more likely to yield new insights and increased understanding of them.

C. ANIMUS AND DEMOCRATIC-CONSTITUTIONAL THEORY

Animus is inconsistent with the premises of a well-functioning representative democracy, and violates the basic constitutional precept that every person is entitled to equal protection of the laws. Animus disserves the liberal and democratic values that undergird our constitutional system. But to accept this liberal and democratic principle is not to determine how it should be enforced. That requires some additional discussion of the appropriately limited role of courts in enforcing it. A response is also needed to critics who complain that the anti-animus doctrine disrespects those who

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[149] *Windsor*, 133 S Ct at 2689.

[150] Id.

[151] Id at 2692–93.

believe deeply in traditional marriage without malice toward gay people.

1. *The anti-animus doctrine in principle.* The Constitution does not simply preratify all majoritarian decision making by setting up a representative process for passing legislation. Otherwise, there would be no need for provisions beyond the structural ones of democratic representation in a House and Senate and the procedural ones of bicameralism and presentment. In numerous provisions, the Constitution bounds governmental decision making by principle. Certain choices are impermissible, completely taken off the table, even if Congress thinks the reason for making that choice is compelling and even if the choice is overwhelmingly supported by the public.

The Constitution presumes that "even improvident decisions" will eventually be corrected by the democratic process.[152] But that is only a presumption. There are decisions arrived at democratically for which the opposite presumption should be indulged: the political process is not self-correcting in some kinds of cases, or at least should not be expected to be self-correcting. The mechanisms of democracy do not always work in a way that accounts for all relevant interests.[153] This is most clearly seen in cases involving race.

Legislative classifications based on race (or alienage or national origin) are presumptively unconstitutional because they are rarely relevant to legitimate (i.e., non-animus-based and nonracist) public interests. They "are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others."[154] Such discrimination is "unlikely to be soon rectified by legislative means" precisely because the prejudice behind the classification blocks any self-correction. The very antipathy that gave birth to the classification helps to sustain it and to inhibit meaningful reexamination. The legislature is unlikely to revisit the issue because its members do not see a problem in the classification, or perhaps regard its animus-based vices as virtues.

Equal protection cases often involve legislative denials of equal dignity. In *Brown v Board of Education*,[155] the demeaning nature of

[152] *Cleburne*, 473 US at 440.

[153] *United States v Carolene Products Co.*, 304 US 144, 152–53 n 4 (1938).

[154] *Cleburne*, 473 US at 440.

[155] *Brown v Board of Education*, 347 US 483 (1954).

racial segregation in education informed the Court's understanding of why equal protection was important, of what was at stake in the denial. It is central to equal protection jurisprudence that the government cannot create castes of citizens because creating a second-class status is itself a harm to their dignitary interests. It would have been no answer in *Loving v Virginia* to say that the state was required to recognize a separate civil-union status for interracial couples with all the rights, but not the status, of marriage. That's because the separate recognition itself would be an unconstitutional insult to them. At the very least, the affront to their dignity more completely informed what harm they suffered in being denied equality. That harm cannot be a material purpose of the government.

A law that purposefully inflicts injury on its targets out of sheer disdain for them is the classic case of malice. Under the constitutional conception of equal protection, a deliberative democracy should restrict the reasons for which legislators pass laws to those reasons that are consistent with the recognition of other citizens as equals.[156] "To disadvantage a group essentially out of dislike is surely to deny its members equal concern and respect, specifically by valuing their welfare negatively," argued John Hart Ely.[157] As Judge Posner concluded:

> If a law is challenged as a denial of equal protection, and all that the government can come up with in defense of the law is that the people who are hurt by it happen to be irrationally hated or irrationally feared by a majority of voters, it is difficult to argue that the law is rational if "rational" in this setting is to mean anything more than democratic preference. And it must mean something more if the concept of equal protection is to operate, in accordance with its modern interpretations, as a check on majoritarianism.[158]

One might argue that legislatures pass laws out of this type of animus all the time. It is naive to suppose that it can be entirely cleansed from the legislative process. Consider some examples of

[156] John Rawls, *Political Liberalism* 430–31 (Columbia, 1993).

[157] Ely, *Democracy and Distrust* at 157 (cited in note 2).

[158] *Milner v Apfel*, 148 F3d 812, 817 (7th Cir 1998). To the extent Judge Posner suggested that hatred must be the sole justification in order to strike down a law based on animus, he erred. In no case has a city, state, or federal government entity conceded that animus was the sole motivation, and yet the Supreme Court has now found impermissible animus in four constitutional decisions. My suggestion, see below at Section III.C.3, is that courts should ask whether animus materially influenced the decision.

government action that might be thought to reflect animus. We create punitive sex-offender registries—perhaps because we're irrationally disturbed by sex offenders. We adopt policies that permit harsh treatment of terrorist suspects—perhaps because we hate terrorists. Partisan legislatures redistrict to disempower the other side—perhaps out of malice toward the other political party. A majority of the state legislature might pass a regulation that punishes a business that made campaign contributions to the minority—perhaps to express ill will. Yet courts do not say that these laws are unconstitutional on animus grounds. Why not?

There are several responses to this kind of objection to the anti-animus principle. Some of the acts just mentioned may transgress limits imposed by other constitutional doctrines, like the First Amendment, the Eighth Amendment, or the Due Process Clause of the Fifth or Fourteenth Amendments. In the abstract, a legislature might plausibly be thought to have acted based on animus against those targeted by a law (for example, convicted sex offenders or suspected terrorists). But whether a court should invalidate the law on that ground would depend on consideration of the objective factors laid out in Section III.A. These deal with text, context, process, effects, and pretext. Something that simply has a whiff of animus should not on that basis be invalidated. Courts can no more eradicate all spiteful and vindictive motives from legislators' minds than we can cleanse a human heart of lust or jealousy. Analysis of the objective factors is a necessary check on judicial adventurism. The constitutional anti-animus principle is actually a lot narrower than just a general prohibition on animus.

Further, some of these examples may well be defended by reasoned, public-interest justifications that do not rest principally on animus. Considering the objective factors for invalidating animus-based action, a court would need to ask whether there was a reasoned, public-regarding basis (a basis apart from blind fear, rage, or hatred) for the government's act. In most cases, there will be such a basis even though we might suspect that animus played a role. The equality tradition does not mean that everyone must always be treated the same. Felons, including sex offenders and terrorists, are an unpopular and even hated group, but they are justifiably treated differently from others. Suspected terrorists may represent an ongoing threat to life and national security. Acting

to deter and punish crime is not in itself an expression of impermissible animus.[159]

But the equality tradition does mean at least three things, even when it comes to the way we treat reviled people. First, the state must have non-animus-based reasons to support its measures against the group. The broader the disability the less trustworthy the state's asserted purpose. Second, reasons once thought to express a permissible moral judgment may, by the advance of positive knowledge about the group, be justifiably recast as impermissible animus. Third, exclusion of a group from common legal benefits and protections cannot be permitted to present a threat to the very idea of political community embodied in the precepts that undergird a liberal democracy.

Applying these principles to the example of felons, the state has ample justifications aside from simple spite to take measures that disadvantage the group. The advance of positive knowledge about felons has not exposed disapprobation of them as mere animus. Finally, punishment of felons does not undermine the basis for political community; such punishment defends the community from actions by felons that would undermine it (through violence and theft, for example).

But we cannot legitimately punish people who commit crimes in an effort simply to injure them because we dislike them or harbor untutored prejudices about them. Inflicting injury on a group of people cannot be a material objective of the law. The fact that they are hated and feared does not mean that we can do anything we want to them. When the severity of the punishment cannot plausibly be justified by rational penal concerns, a court might well find a violation of equal protection (or of the Eighth Amendment). For example, a law prohibiting sex offenders who have paid their debt to society from ever holding a job or marrying would seem to fit this description. These are very broad disabilities that would be poorly connected to reasoned, public-regarding rationales. They seem based on disgust. We are grossed out by some people. We loathe them and want to lash out against them. Such laws would seem to violate the anti-animus doctrine, which is rooted in the idea that the state may not deny equal protection of the law to *any person* and instructs us that hating others, no

[159] *Inmates of Suffolk County Jail v Rouse*, 129 F3d 649, 660–61 (1st Cir 1997).

matter how badly they've behaved, is not a legitimate reason by itself to legislate against them.

The loathing of persons that concerns the anti-animus principal is different in kind and degree from the political and business interests often at play in politics. Legislative districting, for example, is notoriously complex and is characterized by a give-and-take among many competing political interests and concerns. Courts are hesitant to enter that thicket for good institutional reasons. But even redistricting is not immune from judicial review and is unconstitutional if it is the product of impermissible purposes under the Equal Protection Clause.[160]

Animus doctrine addresses the deeply problematic potential of a democratic republic to consistently oppress a politically unpopular minority, a concern articulated in *Carolene Products*. As Ely wrote, the political process "is undeserving of trust" when "representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest."[161] There are limits on what we can do to people that can be found in substantive constitutional doctrines and that, under the anti-animus principle, can be found in the very idea of equal protection.[162]

2. *The anti-animus doctrine in constitutional framing.* The anti-animus doctrine has roots in the views of the Framers, as well as in the text and history of the Fourteenth Amendment's guarantee of the "equal protection of the laws."[163] In *The Federalist*, James Madison warned against measures that limit a group's ability to

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[160] See generally *Miller v Johnson*, 515 US 900 (1995); Shaw *v Reno*, 509 US 630 (1993).

[161] Ely, *Democracy and Distrust* at 103 (cited in note 2).

[162] Aside from malice, a second form of animus might be called "malign neglect"—a total disregard for the interests of a group of people where harm to them may not be the object of the law, but significant injury to them is the heedless by-product of the law. Such disregard fails to treat members of the group with the concern and respect that is due all citizens as equals. "[T]he duty of representation that lies at the core of our system requires more than a voice and a vote," wrote Ely. "No matter how open the process, those with most of the votes are in a position to vote themselves advantages at the expense of others, or otherwise to *refuse to take their interests into account*." Id at 135 (emphasis added). A violation of equal protection principles sometimes involves "the unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one's own group." Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv L Rev 1, 7–8 (1976), quoted in Koppelman, *Why Scalia Should Have Voted to Overturn DOMA* (cited in note 4). The idea of malign neglect as a species of animus is interesting, but ultimately beyond the scope of this article.

[163] For a fuller discussion of this idea, see Dale Carpenter, *A Conservative Defense of Romer v. Evans*, 76 Ind L J 403 (2001).

bring about change through ordinary political processes.[164] Madison worried about the development of "factions" animated by hostility.[165] Consider his comments in The Federalist No. 10:

> By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united or actuated by some common *impulse of passion*, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.[166]

The Constitution was intended to correct an intolerable situation that had arisen under the Articles of Confederation, Madison contended. "[M]easures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."[167] He continued: "To secure the public good and private rights against . . . such a [majority] faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed."[168] The object of the Constitution was, in Madison's view, to render the majority "unable to concert and carry into effect schemes of oppression."[169]

On one level, Madison's definition of faction might be thought to encompass virtually all democratic decision making, since every decision is necessarily the product of a legislative (or voting) majority motivated sufficiently to act in some fashion. Often, the democratic result will be detrimental to the interests of an identifiable group within the polity.

But ordinary democratic decision making cannot have been Madison's principal concern since the Framers wanted to make self-government possible and lasting. Rather, Madison focused on the idea that the faction is driven by a "passion," or an "impulse," to such an extent that it becomes "overbearing" and seeks to enforce "schemes of oppression." Madison was concerned about nondeliberative decision making, a characteristic of animus-based leg-

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[164] Federalist 51 (Madison) in Roy P. Fairfield, ed, *The Federalist Papers* 161–62 (2d ed 1966).

[165] Federalist 10 (Madison) in Roy P. Fairfield, ed, *The Federalist Papers* 16–20 (2d ed 1966).

[166] Id at 17 (emphasis added).

[167] Id at 16.

[168] Id at 19–20.

[169] Id at 20.

islation. That is, he was concerned with decisions that result from a pure desire to oppress, an unreasoned backlash against a group, produced not by any studied weighing of alternatives and interests but by demagoguery and invective.

Madison's views were echoed across the Atlantic in the work of Edmund Burke. Burke, writing roughly contemporaneously with the Framers, also warned of the dangers of majoritarian power in a democracy. "Of this I am certain," he wrote, "that in a democracy the majority of the citizens is capable of exercising the most cruel oppressions upon the minority whenever strong divisions prevail in that kind of polity, as they often must. . . ."[170] Minorities so targeted by a majority "are deprived of all external consolation," he observed.[171] "They seem deserted by mankind, overpowered by a conspiracy of their whole species."[172]

Like Madison, Burke believed that representative government was not merely the exercise of raw power. It was also not simply the expression of popular will. Rather, he saw representative government as a matter requiring the interaction of the popular will and the legislators' own independent judgment. As he explained to his Bristol constituents in his acceptance speech upon election to Parliament in October 1774: "If government were a matter of will upon any side, yours, without question, ought to be superior. But government and legislation are matters of reason and judgment, and not of inclination. . . ."[173] Further, Burke posited the existence of a general welfare upon which representatives had a duty to act. He therefore shared Madison's disdain for faction-dominated politics.[174] In his acceptance speech, Burke characterized his vision of the deliberative role of government in a fashion that Madison would have understood and approved:

> Parliament is not a congress of ambassadors from different and hostile

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[170] Edmund Burke, *Reflections on the Revolution in France* 143–44 (ed Thomas H. D. Mahoney) (Bobbs-Merrill Educational Publishing, 1981).

[171] Id at 144.

[172] Id.

[173] *Letter from Edmund Burke to John Farr and John Harris, Esqrs. Sheriffs of the City of Bristol on the Affairs of America* at 187 ("*Letter to the Sheriffs*") (April 3, 1777), in *Edmund Burke: Selected Writings and Speeches* 186, 205 (ed Peter J. Stanlis 1963).

[174] Madison and Burke would likely have disagreed on how to discourage unreasoned factionalism. Burke was an early advocate of political parties, which Madison distrusted. For his part, Burke would have been dubious of Madison's mechanistic system of checks and balances. I am indebted to Ernest Young for pointing out these differences.

> interests, which interests each must maintain, as an agent and advocate, against other agents and advocates; but Parliament is a deliberative assembly of one nation, with one interest, that of the whole—where not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole.[175]

Burke objected most vehemently to Parliament's partial suspension of the Habeas Corpus Act because it operated only against some citizens, those who had been out of the realm for a prescribed time, rather than against all. Presaging the rationale for the structural protections of minorities built into the Fourteenth Amendment, Burke wrote:

> [I]t is never the faction of the predominant power that is in danger: for no tyranny chastises its own instruments. It is the obnoxious and suspected who want the protection of the law; and there is nothing to bridle the partial violence of state factions but this—"that, whenever an act is made for a cessation of law and justice, the whole people should be universally subjected to the same suspension of their franchises."[176]

The problem, as Burke saw it, was that under the selective provisions of the act "the lawful magistrate may see particular men with a malignant eye."[177]

By the middle of the nineteenth century it was clear that the original constitutional design had failed to prevent the majority from effecting "schemes of oppression" against minorities, especially the enslaved black population in the South. The Civil War, and the constitutional amendments that followed it, arose partly from a desire to correct this abuse of power.

Addressing the concerns of Madison and others about the abuse of power by aroused majorities, the Fourteenth Amendment explicitly forbade states to "deny to any person . . . the equal protection of the laws."[178] In a proposed joint resolution for the Fourteenth Amendment, Charles Sumner argued that the amendment would abolish "oligarchy, aristocracy, caste, or monopoly with particular privileges and powers."[179] Senator Howard (R-MI), floor

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[175] Edmund Burke, *Speech to the Electors of Bristol* (Nov 3, 1774), online at http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html.

[176] Burke, *Letter to the Sheriffs* at 191 (cited in note 173).

[177] Id.

[178] US Const, Amend XIV, § 1.

[179] Balkin, 106 Yale L J at 2313, 2348 (cited in note 4), quoting Cong Globe, 39th Cong, 1st Sess 674 (1866).

manager of the Fourteenth Amendment, argued that it would "abolis[h] all class legislation . . . . and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another."[180]

The men who wrote and ratified the Fourteenth Amendment could not have anticipated that their work would one day be used to invalidate legislation excluding same-sex couples from marriage. But the text they wrote and adopted expresses a broad protection of "any person" and impliedly incorporates a norm of respect for all individuals in government decision making. To respect that norm, legislation must have some substantial justification beyond "we don't like you," "we couldn't care less about you," or "we just want it that way."

3. *Limited judicial role.* One could accept the anti-animus principle as a good rule for legislatures and other governmental decision makers without accepting that courts should have any role in enforcing it. Indeed, under anti-animus doctrine, courts have only a limited role in policing legislative actions.

Animus has been the minimalist alternative to more substantive decisions in each of the Supreme Court cases in which it has been found. It does not rely on adventurous theories of constitutional substance, like the existence of some hitherto undeclared fundamental right or special scrutiny of judicially selected classifications. These substantive approaches assume a great deal more constitutional certainty about the ultimate ends of law than is often warranted by the facts of given cases. Anti-animus doctrine is more concerned with legislative process than with legislative results. It allows the legislature more freedom to pursue chosen ends in ways that it deems appropriate, but seeks to ensure that democratic bodies choose those ends and means in a way that seriously and nonmaliciously accounts for relevant interests.

Consider that *Moreno* did not declare a fundamental right to food stamps, or protect a right of unrelated people to live together, or expand the nebulous unconstitutional conditions doctrine, or recognize a new category of besieged minorities (hippies) for whom special judicial solicitude is always required. It just said that Congress cannot do whatever it wants to do to them in order to

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[180] Id, quoting Cong Globe, 39th Cong, 1st Sess 2766 (1866). For a more complete discussion of the history of the Fourteenth Amendment, see Andrew Kull, *The Color-Blind Constitution* 74–75 (Harvard, 1992).

hurt them. *Cleburne*, similarly, was limited in its reach. It did not elevate judicial scrutiny of classifications based on cognitive disability, an alternative holding that would have led to judicial supervision of virtually all mental health laws and restrictions. It simply said that a city must have better reasons to single out cognitively disabled people than the mere fact that others in the community fear and dislike them. *Romer* did not mandate that states and cities must protect gay men and lesbians from discrimination or declare that classifications based on sexual orientation always warrant heightened scrutiny, a holding that would immediately have called into question all marriage laws and the ban on military service by openly gay people codified under "Don't Ask, Don't Tell."[181]

Windsor, too, should be seen as comparatively minimalist. It was perhaps the least aggressive or theoretically ambitious route the Court could have taken in striking down DOMA. The other main contending arguments for the Court's attention—heightened scrutiny under equal protection doctrine or under fundamental-rights analysis, or the kind of rational-basis-with-bite review employed by several district courts post-*Windsor*[182]—would have left the Court no principled choice but to invalidate the laws of thirty-seven states that had failed to recognize same-sex marriages. That is not to say these alternative arguments for a constitutional resolution are groundless. It is only to say that if there is any room left for democratic evolution on the issue of same-sex marriage, an animus holding offers a better chance of that than any of the leading alternatives would have.

The doctrine is not concerned as much with the legislature's substantive conclusion (limiting marriage to one man and one woman) as it is with the kinds of considerations (desire to harm the disadvantaged group) that materially influenced the outcome. Even evidence that some legislators harbored and acted upon animus in supporting or sponsoring legislation would not, by itself, be enough to invalidate the law. It is likely that any legislative body, and certainly an electorate the size of California's, would act with a multitude of purposes in mind. Some of these might involve animus, but others might not. It is also possible that a

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[181] Don't Ask, Don't Tell, 10 USC § 654, repealed by Don't Ask, Don't Tell Repeal Act of 2010, Pub L 111-321, 124 Stat 3515, 3516, 3517.

[182] See, for example, *Kitchen v Herbert*, 2013 WL 6697874 (D Utah).

marriage law might be defended as rationally advancing some minimally legitimate purpose. These questions remain after *Windsor.*

The mere fact that a group has repeatedly lost in the political arena would not be enough to show that it was the target of hateful purposes in a particular challenge. The anti-animus principle should be used sparingly, and only in extraordinary cases, where analysis of the objective factors leaves little doubt that the outcome reached by the democratic decision maker (for example, a zoning board, a legislature, or voters) was the product of animus.

There remains the question, which the Court has not squarely addressed, of the degree to which animus must be found to have played a role before governmental action should be invalidated. The Court's rhetoric has at times suggested that it will strike down an act where expressing animus was the government's sole purpose ("a bare . . . desire to harm . . . .").[183] At other times, as in *Windsor*, it has suggested that animus need only be the principal (primary) reason for the act ("the principal purpose and the necessary effect of this law are to demean . . . .").[184] At yet other moments, the Court has suggested that a weighing of purposes should be performed ("no legitimate purpose *overcomes* the purpose and effect to disparage and to injure.").[185]

A quantitative approach is not practical. If the equal protection interests in recognizing individual worth and in ensuring that governmental acts have some substantial justification grounded in reason explain why we have an anti-animus principle, it should be enough to show that animus materially influenced the outcome.[186] That means that an impermissible degree of animus would be found when it was a substantial factor in passage, rather than the sole factor. But it must also be more than simply one of the things that might have motivated some members of the legislature or other governmental actor.

Even with these limitations, three objections against judicial oversight of legislative animus might still arise. One would note

[183] *Moreno*, 413 US at 534.

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

[185] Id at 2696 (emphasis added).

[186] The "material influence" standard is suggested by John Hart Ely. Ely, *Democracy and Distrust* at 138 (cited in note 2). Under this standard, animus does not have to be the sole or primary purpose of the law to violate the anti-animus principle. It's enough that animus was a substantial factor in the outcome.

that the kind of multifactored inquiry called for by anti-animus doctrine is prone to judicial abuse, is difficult to apply even when not abused, and is indeterminate even when faithfully applied. These are substantial concerns. But judgments of the kind called for by the doctrine are also endemic to constitutional law, neither more nor less beyond the capacity of federal courts than deciding whether a case is justiciable,[187] whether a regulation constitutes a taking of private property, whether particular commercial speech can be regulated, and indeed, in equal protection jurisprudence, whether a classification should be subject to strict scrutiny requiring that the means be sufficiently "narrowly tailored" to achieve "compelling" ends. What are these if not hybrids of legal and policy determinations, indeterminate but not unbounded? Commentators who need certainty are in a Sisyphean struggle against all of constitutional law. Constitutional law is painting a picture, not doing a sum.[188]

A second concern would object to any judicial inquiry into legislative purpose. Criticism of purposive approaches to statutory and constitutional law is common,[189] and justifies caution by courts. But it's untrue that the Court never considers, or ought never to consider, legislative purpose in constitutional cases. In fact, it has repeatedly done so, especially in equal protection cases, where the government's decision to select people for deprivations is based on race, religion, or even simply dislike.[190] If—based on

[187] Indeed, difficult justiciability questions of standing and genuine adverseness were raised in the two same-sex marriage cases the Court decided the same day, with results that were not obviously consistent. Compare *Windsor*, 133 S Ct at 2688–89 (controversy over DOMA is justiciable even though the parties agreed on the merits and on the remedy), with *Hollingsworth v Perry*, 133 S Ct 2652, 2667–68 (2013) (controversy over state constitutional amendment is not justiciable where the parties agreed on the merits and on the remedy).

[188] "Life is painting a picture, not doing a sum." Oliver Wendell Holmes, Jr., *Address to the Harvard Alumni Association to the Class of '61*, in Oliver Wendell Holmes, *Speeches* 96 (1913).

[189] *Palmer v Thompson*, 403 US 217, 224–25 (1971) (asserting the difficulty and "futility" of judicial inquiry into legislative motive).

[190] Ely, *Democracy and Distrust* at 137 (cited in note 2); Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Supreme Court Review 95 (answering criticisms of difficulty, futility, and impropriety in judicial inquiry into governmental motive). Equal protection cases authorizing judicial inquiry into legislative purpose or motive include *Personnel Administrator of Mass v Feeney*, 442 US 256 (1979) (decision maker cannot choose course of action because of, rather than despite, adverse discriminatory impact); *Village of Arlington Heights v Metropolitan Housing Corp.*, 429 US 252, 266–67 (1977) (listing factors for determining presence of a racially discriminatory purpose); *Washington v Davis*, 426 US 229 (1976) (racially discriminatory

textual, contextual, procedural, and effectual considerations—animus appears materially to have influenced the government's act, the purpose is an unconstitutional one. Add to that the absence of a plausible alternative explanation (as opposed to a pretextual one), and the animus motivation is both obvious and constitutionally fatal.

A third concern about judicial inquiry into possible animus-based purposes is that it is ineffective. The Court has occasionally noted a seeming oddity in purpose-based constitutional analysis.

> [T]here is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.[191]

Despite this criticism, the Court continues to inquire into governmental purpose in a host of constitutional fields. The objection to purpose-based constitutional analysis is not unique to the animus doctrine.

The fact that the government might subsequently act for a constitutionally permissible purpose after having acted for an impermissible one is not a decisive objection to purpose analysis. It's possible that a legislature, after being told that it acted for an impermissible purpose, will refuse to vote for reenactment. If a law is invalidated by a court, the legislature will often fail even to

purpose would invalidate facially neutral law); *Yick Wo v Hopkins*, 118 US 356 (1886) (stark racially disparate effect showed racially discriminatory purpose). In the Establishment Clause context, the Court has held that a law passed to promote fundamentalist Christianity was unconstitutional, *Epperson v Arkansas*, 393 US 97, 107–09 (1968) (invalidating a state law that forbade teaching evolution in public schools), that a law requiring "equal time" for the teaching of creation science and evolution in public schools had an improper purpose to advance religion, *Edwards v Aguillard*, 482 US 578, 588 n 7 (1987), and that legislative history could be reviewed to find an unconstitutional preferentialist purpose in a case involving a "religious gerrymander" targeting practitioners of the Santeria faith, *Church of the Lukumi Babalu Aye v City of Hialeah*, 508 US 520, 535 (1993). Under the Dormant Commerce Clause, the Court has held that states may not act with a protectionist purpose in regulating businesses, see, for example, *Bacchus Imports Ltd. v Dias*, 468 US 263, 276–77 (1984) (invalidating state tax law on imports that had a protectionist purpose). A facially neutral law is unconstitutional if the Court nevertheless discerns a protectionist purpose—one that discriminates against out-of-state interests. Indeed, even a law that could be reenacted today for a permissible purpose has been held unconstitutional because it was originally motivated by an unconstitutional purpose. *Hunter v Underwood*, 471 US 222, 233 (1985) (invalidating 1901 state constitutional provision disenfranchising felons that had been motivated by a desire to disenfranchise blacks, even though felons could be denied the right to vote for some other purpose today).

[191] *Palmer v Thompson*, 403 US 217 (1971).

consider the issue again. The passage of time, by itself, may allow the legislature to consider new evidence or to reevaluate what it previously did in haste. In fact, "judicial action on the basis of motive results in an effective, not a futile, invalidation."[192] So let the legislature find a reason other than disempowering black voters for drawing a city's boundaries as a twenty-eight-sided figure.[193] Let the school board close down all of its schools again for some purpose other than separating black and white schoolchildren.[194] For that matter, let the zoning commission find some reason other than animus against the cognitively disabled for uniquely denying them a home. Let the Congress cleanse the legislative record of vindictiveness against nontraditional families in order to deny them assistance to buy food.

In many cases, there simply won't be an alternative legitimate explanation for the challenged action.[195] The reasons that led a court to conclude that the initial action was based on animus will "rightly make it somewhat skeptical of claims of a subsequent change of heart."[196] The existence of a legitimate justification will also likely have been considered in the initial judicial review. The fact that animus was nevertheless found will make it less likely that the non-animus-based justification might save it after reenactment. The more plausible objection to purpose inquiry is not that it is futile, but that it may be far too censorious and thus far too *effective* as a tool for invalidating government action.

Beyond the practical concern about futility, there is nothing unusual or wrong *in principle* about declaring that an act properly done for one reason may be impermissible if done for another reason. Ely observes:

> [S]uppose from time to time an action previously invalidated for unconstitutional motivation is retaken and upheld: so what? We don't regard the system as having failed when a person whose conviction was reversed because the jury was biased is reconvicted by a jury on remand: indeed we regard it as vindicated.[197]

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[192] Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 NYU L Rev 36, 116 (1977).

[193] *Gomillion v Lightfoot*, 364 US 339, 340 (1960).

[194] *Griffin v County School Board of Prince Edward County*, 377 US 218 (1964).

[195] Ely, *Democracy and Distrust* at 138 (cited in note 2).

[196] Id.

[197] Id at 139.

When it comes to fears of excessive judicial intrusion, the upshot is that very few litigants will successfully use the animus doctrine. Most laws can plausibly be explained as reasonably related to legitimate objectives, with little or no indication that spite materially produced the act. The Eighth Circuit, for example, appropriately rejected an animus attack on a city ordinance prohibiting outdoor smoking on public property.[198] The public-regarding health justifications for such an ordinance were plausible even if not a slam dunk; the law was not the product of a bare desire to harm smokers. The Sixth Circuit was right to reject an animus challenge to a Kentucky law that accelerated the date at which the issuers of travelers' checks were required to remit unclaimed funds to the state.[199] The Eleventh Circuit correctly held that Congress's decision to deny food stamps and supplemental security income benefits to some classes of aliens, but not others, could plausibly be explained by factors other than animus: the need to save money, the desire to reward aliens who had been working for a long time in the United States, the need to assist those who were particularly vulnerable to poverty (like the blind and disabled), and the desire to help refugees seeking to escape catastrophic political and economic conditions.[200] Judge Posner, writing for a panel of the Seventh Circuit, justifiably rejected an animus attack on a federal law that denied social security disability benefits to persons who had been confined to mental health facilities after being acquitted of a crime by reason of insanity.[201] They did not need the money and were already "subsisting at the state's expense," he reasoned.[202] None of these cases implicated the basic concern of the anti-animus principle that a governmental decision maker should have reasoned justifications, and should not act based on ill will toward a group of people.

4. *Animus and the morality of homosexuality.* Numerous academic and nonacademic critics, especially, but not only, opponents of same-sex marriage, have excoriated the Court for allegedly insulting those who supported DOMA. These critics have protested

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[198] *Gallagher v City of Clayton*, 699 F3d 1013, 1020–21 (8th Cir 2012).

[199] *American Express Travel Related Services Co. v Kentucky*, 641 F3d 685, 691–92 (6th Cir 2011).

[200] *Rodriguez v United States*, 169 F3d 1342, 1351–53 (11th Cir 1999).

[201] *Milner v Apfel*, 148 F3d 812, 816–17 (7th Cir 1998).

[202] Id at 817.

that they are not anti-gay bigots and that a moral belief in marriage as an opposite-sex-only institution should not be equated with hatred of homosexuals. These criticisms miss the mark when it comes to *Windsor*, which is more complicated on the subject of morality-as-animus than they suggest.

a) Windsor as insult. After *Windsor*, Professor Hadley Arkes described the opinion as "hate speech" in the *National Review*. For Justice Kennedy, Arkes wrote, "the defense of marriage was simply another way of disparaging and 'denigrating' gays and lesbians, and denying dignity to their 'relationships.'" Plausible justifications for marriage as the union of one man and one woman were to be viewed as "so much cover for malice and blind hatred."[203] Echoing Chief Justice Roberts's dissent, Professor John Yoo lamented in the *National Review* that the Court had damned 342 members of the House, 85 Senators, and President Bill Clinton as "all guilty of antigay bias in 1996, when DOMA was enacted."[204]

Writing in *Commonweal*, Professor Richard Garnett warned that the animus rationale threatened religious freedom:

> We should be concerned that the characterization by the majority in *Windsor* of DOMA's purpose and of the motives of the overwhelming and bipartisan majority of legislators that supported it reflects a view that those states—and religious communities—that reject the redefinition of marriage are best regarded as backward and bigoted, unworthy of respect. Such a view is not likely to generate compromise or accommodation and so it poses a serious challenge to religious freedom.[205]

Professor Patrick Lee wrote that "[the] strident campaign to redefine marriage will only become more intense in the next few years.

[203] Hadley Arkes, *Worse Than It Sounds, and It Cannot Be Cabined*, Bench Memos (National Review Online, June 26, 2013), online at http://www.nationalreview.com/bench-memos/352114/worse-it-sounds-and-it-cannot-be-cabined-hadley-arkes. Longtime anti-gay activist Robert Knight agreed that "[b]y accusing backers of traditional marriage of being motivated only by animus against homosexuals, the U.S. Supreme Court has become the most prominent hate group in the country." Robert Knight, *The High Court Gleefully Defamed Christians*, GOPUSA (Washington Times (DC), July 2, 2013), online at http://www.gopusa.com/freshink/2013/07/02/the-high-court-gleefully-defamed-christians/.

[204] John Yoo, *Windsor: Tarring "the Political Branches with Bigotry,"* The Corner (National Review Online, June 26, 2013), online at http://www.nationalreview.com/corner/352098/windsor-tarring-political-branches-bigotry-john-yoo. Justices Scalia and Alito first sounded this alarm about *Windsor* in their respective dissenting opinions. *Windsor*, 133 S Ct at 2707 (Scalia, J, dissenting); id at 2718 (Alito, J, dissenting).

[205] Garnett, *Worth Worrying About?* (cited in note 29).

Catholics will be increasingly labeled as bigots and hate mongers."[206] From now on, warned Rod Dreher in *The American Conservative*, "the Court has declared open season on religious and social conservatives and their institutions." The decision should "put fear into the hearts of anyone who does not share the belief that homosexuality is morally neutral, or morally good. The Supreme Court says we are haters, full stop."[207]

Similar criticisms could have been leveled at the Court for using the anti-animus rationale to strike down food-stamp limitations in *Moreno*. That law, too, was defended as reinforcing the normative value of traditional families. The denial of a permit for a home for the cognitively disabled in *Cleburne* was based on neighbors' fears. For that matter, the prohibition on all civil rights protections for homosexuals in *Romer* was defended as a measure to stave off the piecemeal deterioration of traditional sexual morality.

Windsor does not actually label DOMA supporters bigots. It does not even claim that any particular legislator harbored animus against gays, although malice toward homosexuals was a significant driver. Can this be? Professor Michael Greve, calling *Windsor* "transparently absurd," scoffed at the idea that DOMA was "a product of an 'animus' that no one may have had but that, like a devilish spirit, worked behind the legislators' backs to produce DOMA[]."[208] That leads to a consideration of the relationship of morality and animus.

b) Morality and animus. It is true that *Windsor* declared, for the third time in seventeen years, that moral disapproval of homosexuality is an illegitimate basis for legislation fencing out homosexuals. Supporters of DOMA claimed that morals legislation is good for people, that homosexual acts are immoral, and that nobody is better off when people engage in homosexual acts. That is not a bare desire to harm anyone, they say; it is a desire to make

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[206] Patrick Lee, *Is Marriage Bigoted and Discriminatory?*, The Catholic World Report (July 20, 2013), online at http://www.catholicworldreport.com/Item/2431/is_marriage_bigoted_and_discriminatory.aspx.

[207] Rod Dreher, *Scalia: "Open Season on Marriage Traditionalists,"* The American Conservative (June 26, 2013), online at http://www.theamericanconservative.com/dreher/scalia-doma-open-season/. Another commentator opined that "Christians who speak out and stand up for traditional marriage are more likely than ever to be persecuted and even prosecuted for it." Paul Strand, *Open Season on Christians after Pro-Gay Rulings*, CBN News (July 30, 2013), online at http://www.cbn.com/cbnnews/us/2013/July/Open-Season-on-Christians-after-Pro-Gay-Rulings/.

[208] Michael S. Greve, *Windsor: A Dia-Tribe*, Library of Law and Liberty (June 27, 2013), online at http://www.libertylawsite.org/2013/06/27/windsor-a-dia-tribe/.

men moral,[209] which makes them good, which helps them. A sodomy law criminalizing homosexual acts might even be good *for homosexuals*, on this account.

This argument has not fared well in the animus decisions. Colorado defended Amendment 2 on moral grounds. Texas defended its Homosexual Conduct Law on moral grounds. Congress defended DOMA on moral grounds. Yet all three laws were held unconstitutional. One's views enforced in law do not get a constitutional pass simply because one affixes a "morals" or "natural law" tag on the product. Decorating it further with one's interpretation of biblical passages cannot save it from review. To conclude otherwise is to say that a law is constitutional as long as a majority wants it that way and expresses its desire as based on morality.

It's also the case that animus doctrine, like much of constitutional law, has a normative component. It expresses the normative principle, implicit in equal protection and in the postulates of a liberal democracy, that every individual has dignity and is worthy of respect. It offers the observation that unreasoning prejudice against persons expressed in law is inconsistent with the commitment to the equal protection of the law. Government must not act maliciously to injure or disparage them and must not act as if their interests are unworthy of any consideration.

What we call morality is guided by experience. Morals reflect human learning and history. They evolve. They adjust. They are critiqued and revised. Experience and empirical learning about murderers have not taught that we should not condemn murder or fear the murderer's potential for future harm. Moral judgments often arise from an unstated and complicated calculation about harm. Not every law prohibiting or limiting some activity for what are said to be moral reasons reflects animus against the people who engage in it. One might condemn as immoral the possession of guns, or running a casino, or using marijuana. That doesn't make every effort to ban guns, to prohibit gambling, or to criminalize drug usage a product of animus against gun owners, gamblers, or drug users. Each of these enactments would have a plausible connection to concern about harm independent of ill will toward the people who engage in these acts. None of these pro-

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[209] See generally Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Clarendon, 1995).

hibitions would run a serious risk that they were simply expressions of spite against the people who engage in the prohibited behavior.

When experience and empirical learning demonstrate that the feared harm undergirding a "moral" view is baseless, a continued moral condemnation expressed in law is likely to be an animus-based act. It is a *prejudice*, an unthinking and anachronistic hold-over from an earlier time. Such unfounded negative prejudgments cannot be a permissible basis for government action if we really mean what we say about respecting individual worth and dignity. To take a person's citizenship seriously entails a willingness to learn about him, to adapt our attitudes, and to modify our treatment of him as we learn.

The moral condemnation of homosexuality has typically rested on hysterical claims about homosexuality—claims rife in the congressional debate over DOMA—that have turned out to be baseless. Experience and empirical learning have demonstrated that hoary myths about homosexuals as sick, maladjusted, contagious, subhuman, dangerous, and predatory were baseless. Same-sex couples have the same capacities and desires for love, affection, and commitment as opposite-sex couples. At the same time, laws aimed at homosexual "conduct"—whether that conduct is intimate sexual activity or the formation of relationships—are inseparable from laws aimed at homosexual status.[210] The same can't be said of laws that prohibit, on moral grounds, the conduct of gun possession, gambling, and drug usage. To condemn homosexual conduct *is to condemn homosexual people* in a way that, say, prohibiting slot machines is not a condemnation of people who overestimate their chances of winning a game designed to profit from their gullibility.

To say that the *moral* condemnation of homosexuality enacted in a broad and unprecedented law like DOMA is impermissible animus is not the same as saying that *all* reasons for rejecting same-sex marriage are animus-based. A legislature may decline to pass same-sex marriage legislation in circumstances that genuinely demonstrate no ill will toward gay people, but that instead reflect uncertainty about the consequences of change to a social and legal practice as important as marriage. The legislature may prefer to take things slowly. A general preference for incremental change,

[210] *Christian Legal Society v Martinez*, 130 S Ct 2971, 2990 (2010); see generally Dale Carpenter, *Flagrant Conduct: The Story of Lawrence v. Texas* ch 8 (W. W. Norton, 2012).

when other indicia of animus are not present,[211] is surely not animus. The converse is also true: merely reciting a preference for slow change (or morality) when other indicia of animus are present can't exempt a law from constitutional attack.

To say that DOMA reflected animus is also not to say that those who hew closely to the traditional religious understanding of marriage in their own lives and within their own faith traditions are themselves hateful. Good people can do bad things for what they think are good reasons. The focus of animus doctrine is not on the bad nature of the person who supports legislation. The focus is on the inadmissibility of the reasons offered for supporting the legislation in a republic committed to the concept of equal protection for every citizen. The issue in *Windsor* is not whether a belief in marriage as only the union of one man and one woman is bigoted. It is whether, in context, the affirmative decision by Congress in 1996 to select one class of potential future marriages for second-class status reflected animus against the persons entering those marriages.

This characterization of the *Windsor* holding may not ease the hurt feelings or quiet the indignation of traditional-marriage supporters, of course. The insult to them, if an insult at all, is not unique to an animus holding, however. An alternative holding based on heightened scrutiny of sexual-orientation classifications would have informed them that traditional sexual morality is akin to race-based discrimination. A rational-basis holding resting on the irrelevance of the means (denying federal recognition to married same-sex couples) to the stated ends (inter alia, encouraging responsible procreation) would have suggested that they suffered a serious cognitive failure verging on insanity when they urged passage of DOMA. There is no nice way to tell people that policies they have fervently supported are unconstitutional. Nor would these alternative routes to eliminating DOMA be more solicitous of religious beliefs.

The animus portion of Justice Kennedy's opinion in *Windsor* played into a calculated strategy by gay-marriage opponents to claim the status of victims in the debate over the issue. The leading anti-gay-marriage advocacy group, the National Organization for Marriage, has even urged that gay-marriage supporters be baited

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[211] See Section III.

into calling opponents "bigots" in order to split the coalition of gays and blacks who work together on other causes.

> The strategic goal of this project is to drive a wedge between gays and blacks—two key Democratic constituencies. Find, equip, energize and connect African-American spokespeople for marriage, develop a media campaign around their objections to gay marriage as a civil right, provoke the gay marriage base into responding by denouncing these spokesmen and women as bigots. No politician wants to take up and push an issue that splits the base of the party.[212]

It should be no surprise, then, that the immediate reaction of DOMA supporters to *Windsor* was to claim that they had been unfairly called bigots by the Court. Supporters of Colorado's Amendment 2 similarly cried foul when the Court in *Romer* struck down that patently anti-gay enactment because it reflected animus. They were simply "tolerant Coloradans" who didn't hate gay people but wanted to halt the "piecemeal deterioration" of traditional sexual morality, protested Justice Scalia.[213] The Court held otherwise. The fact is that opponents of the Court's decision in *Windsor* would have objected strenuously to *any* basis for striking down DOMA. Their real complaint about *Windsor* lies in its substantive conclusion, not in its supposed disrespect toward Congress, President Clinton, and the millions of Americans who backed the law. It is to that substantive conclusion that we now turn.

III. DOMA and Its Animus

Critics of *Windsor* have charged that the Court found animus in DOMA "without any evidence on the matter."[214] The criticism seems to be that Justice Kennedy magically divined animus in the decision to pass DOMA. Or perhaps he simply believed that there was no conceivable rational basis to define marriage solely as the union of a man and a woman, and thus "found" animus as the only remaining explanation for why the law passed. At first glance, only bald assertion rather than reasoned analysis or "evidence" is used to reach the result.

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[212] Kevin Nix, *Breaking: Previously Confidential Documents Shed Light on NOM Strategy*, Human Rights Campaign (March 26, 2012), online at http://www.hrc.org/nomexposed/entry/must-read#.UvUeyPldWSo.

[213] *Romer*, 517 US at 636, 653 (Scalia, J, dissenting).

[214] Sven Wilson, *We're All Haters Now*, Pileus (June 27, 2013), online at http://pileus-blog.wordpress.com/2013/06/27/were-all-haters-now/.

But as a close reading of *Windsor* and its predecessor animus decisions indicates, a variety of objective factors should be considered to determine whether animus infected governmental decision making. These include considerations of text, context, legislative procedure and history, actual effects, and pretext.

This section lays out the basic components of the Court's methodology in animus cases. It then applies that methodology to the Defense of Marriage Act, concluding that the Court correctly held that DOMA reflected animus.

A. ANIMUS METHODOLOGY

In equal protection cases, the Court has teased out impermissible purposes where governmental decision makers (including legislatures) have claimed permissible ones. In race cases, the impermissible purpose is the purpose to discriminate on the basis of race. In animus cases, the impermissible purpose is the purpose to inflict injury or indignity. While the Court hasn't systematically laid out its methodology, based on the racial-purpose cases and the animus quadrilogy we can discern an approach for determining when an unconstitutional purpose has materially driven governmental decision making despite the government's argument that it hasn't.

Consider the Court's equal protection methodology in racial discrimination cases. "Necessarily," the Court has held, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."[215] A law's disproportionate racial effect is relevant, but usually not sufficient, to show a racially discriminatory purpose. There is no requirement that the discriminatory purpose be the only conceivable one. "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."[216] The racial purpose need only be "a motivating factor in the decision" to support the conclusion that the action is unconstitutional.[217]

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[215] *Washington v Davis*, 426 US 229, 242 (1976).

[216] *Arlington Heights v Metropolitan Housing Corp.*, 429 US 252, 265 (1977).

[217] Id at 266.

Whether an invidious purpose was "a motivating factor" can be inferred from "such circumstantial and direct evidence of intent as may be available."[218] This indirect evidence may include consideration of the "impact" of the official action, the historical background of the decision, the "specific sequence of events leading up to the challenged decision," departure from normal procedures for making a decision, departures from substantive considerations that would usually drive the result, and "the legislative or administrative history," including "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."[219] Once there is a threshold showing of an impermissible purpose, the burden shifts to the government to "establish[] that the same decision would have resulted even had the impermissible purpose not been considered."[220]

The Court has repeatedly struck down laws that were facially neutral on the grounds that they reflected a racially discriminatory purpose. It invalidated a state law redrawing the boundaries of a city by altering the shape "from a square to an uncouth twenty-eight sided figure," removing all but five black voters from the city's election rolls while keeping all white voters within city boundaries.[221] A decision by a school board to close all of the public schools was struck down on the grounds that the purpose of the closure was to prevent blacks and whites from going to school together, even though the district might have been able to close the schools for other reasons.[222] It struck down an at-large election system that had effectively prevented any blacks from being elected in a Georgia county where 53.6 percent of the population was black.[223] It also struck down a facially neutral law that disenfranchised all persons convicted of crimes involving moral turpitude.[224] Under this law, adopted as part of the Alabama Constitution in 1901, ten times more blacks than whites had lost the right to vote. The constitutional convention had purposefully "selected such crimes as vagrancy, living in adultery, and wife beating

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[218] Id.

[219] Id at 267–68.

[220] Id at 270 n 21.

[221] *Gomillion v Lightfoot*, 364 US 339, 340 (1960).

[222] *Griffin v County School Board of Prince Edward County*, 377 US 218 (1964).

[223] *Rogers v Lodge*, 458 US 613 (1982).

[224] *Hunter v Underwood*, 471 US 222, 233 (1985).

that were thought to be more commonly committed by blacks."[225] None of these laws created classifications based on race, but all were unconstitutional because of their impermissible racial purposes.

In the past four decades, an analogous methodology has gradually developed in animus cases. In these cases, the invidious and unconstitutional purpose is not racial, but animus-based. Animus is a desire to disparage and to injure a person or group of people. As in the race cases, the government rarely concedes that it acted because of animus against a person or group of people—indeed, such a purpose is disclaimed. Instead, the government often characterizes the harm done to one class as merely an effort to benefit a different class. Or the government justifies the harm inflicted as an effort to encourage socially optimal behavior while not encouraging, or perhaps even discouraging, suboptimal or harmful behavior. In a given case, which characterization of the government's purpose, the government's own benign characterization or the challenger's malign one, should the Court credit?

Under the anti-animus doctrine, the Court need not accept either characterization as the sole or dominant explanation for the government's act. It is possible that the government's act could be characterized accurately as involving both benign and malign purposes. But that mix does not save it from unconstitutionality. As in the race cases, the impermissible animus-based purpose need not be the "sole" or "dominant" one. It need only be a "motivating factor," or as I propose, a "material influence" in the decision. As in the race cases, the impermissible purpose may be gleaned from circumstantial and direct evidence.

The inference that animus was a material influence in the government's decision is drawn from a totality of the evidence rather than from a mechanical rule. A number of factors should be considered in making this inference. The animus decisions, especially *Windsor*, taken together with the racial-purpose decisions, suggest that these factors include consideration of:

1. the statutory text (textual);[226]
2. the political and legal context of passage, including a historical background demonstrating past discriminatory acts, and a de-

[225] Id at 232.

[226] See *Romer*, 517 US at 624; *Windsor*, 133 S Ct at 2693.

parture from the usual substantive considerations governing the decision, especially if the considerations usually relied upon by the decision maker strongly favor a decision contrary to the one reached (contextual);[227]
3. the legislative proceedings, including evidence of animus that can be gleaned from the sequence of events that led to passage, the legislative procedure, and the legislative history accompanying passage (procedural);[228]
4. the law's harsh real-world impact or effects, including injury to the tangible or dignitary interests of the disadvantaged group (effectual);[229] and
5. the utter failure of alternative explanations to offer legitimate ends along with means that really advance those ends (pretextual).[230]

From a consideration of these factors, an animus-based purpose may be inferred even where it is not admitted. The Court's animus cases show that no single one of these factors must be present in order to make the inference. The factors may be used to evaluate decisions made by a legislature,[231] by a popular vote,[232] by an ad-

[227] See *Moreno*, 413 US at 537–38; *Cleburne*, 473 US at 448; *Romer*, 517 US at 623–24; *Windsor*, 133 S Ct at 2693–94; see also *Arlington Heights*, 429 US at 257–59.

[228] See *Moreno*, 413 US at 536–57; *Windsor*, 133 S Ct at 2694–95. Citing *Windsor* and the other animus decisions, a Michigan district court relied on legislative history to conclude that the state's denial of benefits to same-sex domestic partners was rooted in animus. *Bassett v Snyder*, 951 F Supp 2d 939, 968 (ED Mich 2013) ("The historical background and legislative history of the Act demonstrate that it was motivated by animus against gay men and lesbians."). See also *Arlington Heights*, 429 US at 268 (inquiring into legislative history to find racial purpose).

[229] See *Romer*, 517 US at 627–28; *Windsor*, 133 S Ct at 2693–95. See also *Washington*, 426 US at 242 (consideration of law's disparate impact). The Court has not explained why a law's harmful impact is a sign that animus motivated its passage. It may be that the Court believes the Congress is likely to have intended the tangible and dignitary damage the law actually inflicted. This may or may not be true in a given case. Congress might not have foreseen or given any thought to the negative impact. But in the case of DOMA, which purposefully affected thousands of provisions in the United States Code, the idea that Congress couldn't have foreseen any consequences is hard to credit. Congress at the very least had constructive knowledge of the consequences. In the case of DOMA, evidence of impact is thus the kind of evidence from which an inference about purpose and motivation can be drawn.

[230] See *Moreno*, 413 US at 537; *Cleburne*, 473 US at 449–50; *Romer*, 517 US at 635; *Windsor*, 133 S Ct at 2693–94. Concern about using pretext to justify an unconstitutional act is as old as *McCulloch v Maryland*, 17 US 316, 423 (1819) (Congress may not accomplish an unconstitutional objective under the pretext of using its constitutional powers).

[231] *Moreno*, 413 US at 529 (evaluating a federal statute); *Windsor*, 113 S Ct 2682 (evaluating a federal statute).

[232] *Romer*, 517 US 620 (evaluating a statewide referendum).

ministrative body,[233] or by any other governmental official or entity.[234] The animus-based purpose may be found in government acts that are very broad[235] or very narrow.[236]

The fifth factor—consideration of the government's non-animus-based justification for the act—deserves special attention. In the race cases, the fifth factor comes into play as a burden-shifting exercise: when a prima facie case of impermissible racial purpose is made the burden shifts to the government to explain its decision on nonracial grounds.[237] In the animus cases, this factor has played out somewhat differently: consideration of the strength of the government's non-animus-based justification is a part of what goes into the ultimate determination of whether animus was a materially motivating purpose behind the government's act.

When other indicia of animus are present, the fifth factor is more demanding and operates differently than traditional rational-basis review. If a mere "rational" relationship to a "legitimate" purpose were all that was required in animus cases, each of the four animus decisions would have come out the other way because the government's act in each could be justified on some far-fetched and hypothetical ground. In *Moreno*, the desire to save money could have rationally explained the denial of food stamps to hippies. In *Cleburne*, concerns about 500-year floods could have justified the denial of a zoning variance for a home for the cognitively disabled. In *Romer*, an attempt to conserve state resources for combatting other forms of discrimination could have saved Amendment 2. And in *Windsor*, Congress's asserted preference for moving slowly on social change or its efforts to control its own spending programs would have prevailed in a challenge to DOMA. But they didn't.

Ordinarily, a poor fit between means and ends could be explained by many things other than animus: bad information, stupidity, or excessive caution. But it's obvious that the Court is not

[233] *Cleburne*, 473 US 436–37 (evaluating the decision of a city zoning board).

[234] *Davis v Prison Health Services*, 679 F3d 433, 438 (6th Cir 2012) (government acting as employer); *Stemler v City of Florence*, 126 F3d 856, 873–74 (6th Cir 1997) (government as prosecutor).

[235] *Romer*, 517 US at 624 (denial of all civil rights protections); *Windsor*, 113 S Ct at 2682–83 (exclusion from status and all benefits of marriage under federal law).

[236] *Moreno*, 413 US at 529 (denial of food stamps); *Cleburne*, 473 US at 435 (denial of special use permit for housing).

[237] *Washington*, 426 US at 241; *Arlington Heights*, 429 US at 270 n 21.

always willing to indulge the presumption that Congress was merely incompetent rather than hateful. And it's not willing to tolerate wildly over- or underinclusive laws once animus is detected. That's because, for the Court, the presence of animus has what we might call a tainting effect. In animus cases, the Court does not simply declare that a discovered malicious purpose is "illegitimate" and that Congress must find an alternative "legitimate" one. It does not just take one proffered justification off the table and then ask the government, "What else have you got?" The discovery of animus is instead an affirmative reason to invalidate an otherwise constitutional law.

By the time the Court reaches consideration of possible pretext—the relationship between the asserted (non-animus-based) objective and the means used to serve that objective—it has already been alerted to the strong possibility that the permissible explanation is makeweight or pretextual. The fact that proffered innocuous rationales in the animus quadrilogy failed suggests that the usual presumption of constitutionality was no longer operative. *Windsor* Products thus draws from *Carolene Products*, in which the Court concluded that the presumption of constitutionality should not apply where the political process could not be trusted to deal fairly with unpopular minorities.

B. INDICIA OF ANIMUS IN DOMA

We come at last to the application of anti-animus doctrine and methodology to DOMA. Each of the factors the Court has considered in its decisions, when applied to DOMA, indicate that animus materially influenced Congress's act. The Court's decision in *Windsor* did not fully flesh out the arguments that might have been made to support its conclusion, but the skeleton of the argument is there.

1. *Text.* The text of a given statute is a starting point for identifying its objective purpose or purposes. *Windsor* concluded that the very text of DOMA indicated animus,[238] though it is a bit puzzling why the text alone should be thought to indicate that. Perhaps it was the breezy combination of breadth and brevity in the act that suggested a congressional inattention to serious class interests or any consideration of narrower means for achieving

[238] *Windsor*, 133 S Ct at 2693.

non-animus-based congressional objectives, like cost savings or discouraging judicial activism.

The text of the act did lay bare its scope and purpose. Though not challenged in the *Windsor* litigation, Section 2 of the act might get the suspicion of animus started. Section 2 dealt with the possibility that married same-sex couples might some day in the future demand interstate recognition. It declared that no state could be required to recognize any other state's same-sex marriages.[239] It was the first time Congress had ever made such a declaration about the effect of one state's laws in the other states, which itself represents a departure from the usual substantive approach governing full faith and credit practices. Why the exception to recognition for the first time here?

Section 3, which was challenged, declared that Congress would not recognize otherwise valid same-sex marriages. It limited marriage for all federal purposes to the union of one man and one woman.[240] It brushed away any possible morsel of federal recognition or regard for any future marriage validly entered between two men or two women under state law.

Beyond the sweeping text, the title of the law, the "Defense of Marriage Act," immediately raises three questions. First, against what or whom is the law a "defense"? What is the threat and how has it been generated? Second, assuming there is a hypothetical future invader armed with weaponry capable of bringing down the entire institution of marriage, why must the "defense" be a Great Wall running up and down the continent rather than a moat around a specific and vulnerable fortification? Third, since when is the Congress charged with "defending" marriage? That has been the states' responsibility, with Congress acting only interstitially or at the margins. The text cannot answer these questions, but it at least introduces the problem.

Under this analysis, the suspicion of animus would grow as the text of the law itself broadens and as it points away from usual areas of congressional concern. A law defining marriage as the union of one man and one woman for a much more limited purpose identifiable in the text, like determining household eligibility

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[239] Defense of Marriage Act, Pub L No 104-199, 110 Stat 2419 (1996), codified at 28 USC § 1738C.

[240] Defense of Marriage Act, Pub L No 104-199, 110 Stat 2419 (1996), codified at 1 USC § 7.

for food stamps, would not generate quite the same degree of concern that a shotgun law like DOMA generated.

A similar lesson might be applicable to state limits on marriage. For example, state constitutional amendments regarding marriage that have been passed since the late 1990s lie along a spectrum from (1) enactments empowering the legislature to decide the definition of marriage without intrusion by state courts,[241] to (2) bans on the status of marriage for same-sex couples but that leave open the possibility of benefits and rights for same-sex couples through an alternative status like civil union or domestic partnership,[242] to (3) bans on any status "identical" to or even "similar to" marriage for same-sex couples, denying them any marriage-like benefits.[243] The text of some state marriage amendments, like the one in Virginia, even suggest the possibility that private contracts and benefits conferring rights on same-sex couples might be unenforceable.[244] Not coincidentally, the broader the textual sweep of the marriage limitation, the more burdensome the law is likely to be in effect.

2. *Context.* The political and legal context in which the government acts may suggest an animus-based purpose. DOMA was both a departure from the nation's substantive adherence to federalism and the latest in a series of governmental acts discriminating against gay men and lesbians. It departed from the usual presumption of federalism that allows states to control basic family relations, including the recognition of marital status. It also departed from historic practice under which the federal government plays a minimal, distinctly secondary, and derivative role in family policy. Departures from the usual substantive considerations in decision making indicate possible animus, especially when the usual substantive considerations would likely have produced a different result. *Windsor* reaffirmed what is now a venerable principle of constitutional law by emphasizing that discrimination of an

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[241] See Hawaii Const, Art I, § 23. Note that the Hawaii state legislature had denied marriage to same-sex couples in 1994, see Section 3 of Act 217, Reg Sess, 1994 Hawaii Sess Laws 531, but later decided to extend marriage to same-sex couples. See Hawaii Marriage Equality Act of 2013, 2d Special Sess, 2013 Hawaii Sess Laws 1.

[242] See, for example, Ariz Const, Art XXX, § 1; Miss Const, Art XIV, § 263-A; Mo Const, Art I, § 33.

[243] See, for example, Neb Const, Art I, § 29; Okla Const, Art II, § 35; Tex Const, Art 1, § 32; Utah Const, Art I, § 29.

[244] Va Const, Art I, § 15-A.

unusual sort raises judicial suspicion that some impermissible purpose was afoot.[245]

But DOMA was also the perpetuation of a different and largely discredited historical practice: the tradition of treating gay people, and in this case specifically gay relationships, as at best unworthy of serious consideration and, at worst, as a threat from which the country and its institutions must be "defended."

a) Departure from usual substantive considerations: federalism. The *Windsor* decision placed heavy emphasis on the fact that DOMA was a departure from the usual practice of federalism in family law, and especially in the recognition of marital status.[246] The classic statement of federalism in family law, quoted many times since by the Court, came in 1890: "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States."[247] It's not that Congress has never legislated on the subject of family law. It has done so in numerous ways, including the more than one thousand rights and benefits that were denied in DOMA.[248] And it's true that Congress did require states like Utah to reject polygamy as a condition for entry into the union in the late nineteenth century.[249] But the authority of the states to define marriage, and to have this definition respected and relied upon by the federal government even in the provision of federal rights and benefits, is unquestioned. There had never before DOMA been a single, across-the-board federal definition of marriage. Even the nineteenth-century polygamy restriction did not purport to con-

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[245] *Windsor*, 133 S Ct at 2693; *Romer v Evans*, 517 US 620, 633 (1996).

[246] *Windsor*, 133 S Ct at 2692. For a discussion of *Windsor*'s use of federalism, see Courtney G. Joslin, *Windsor, Federalism, and Family Equality*, Columbia Law Review Sidebar (Colum L Rev, Oct 2013), online at http://columbialawreview.org/windsor-federalism-and-family-equality/. States may similarly enact legislation or enforce policies that suspiciously depart from the usual substantive rules. After *Windsor*, a district court invalidated Ohio's refusal to recognize the plaintiffs' Maryland same-sex marriage for purposes of issuing a state death certificate, noting that Ohio had never before refused to recognize a valid marriage from a sister state. *Obergefell v Wymyslo*, 2013 WL 6726688, *2, *23 (SD Ohio). This reflected a substantive departure from the state's own historic practice of recognizing valid foreign marriages even if those marriages could not have been entered in Ohio, suggesting the possibility of animus.

[247] *In re Burrus*, 136 US 586, 593–94 (1890), quoted with approval in *Ankenbrandt v Richards*, 504 US 689, 703 (1992).

[248] For a detailed discussion of family law and federalism, see Jill Elaine Hasday, *Family Law Reimagined* ch 1 (forthcoming 2014).

[249] See Federal Enabling Act, Pub L No 112, 28 Stat 107 (1894).

strain the states already admitted to the union. As discussed in Section II.B above, DOMA's sharp departure from this substantive tradition was a major consideration in the Court's analysis of whether there was animus behind the law. It is now accepted in constitutional law that departures from substantive principles ordinarily guiding decision makers indicate a possible impermissible purpose.[250]

Two points are worth emphasizing here. The Court did not declare that unconstitutional animus will be found anytime Congress departs from traditional federalism. Unless the legislation is beyond Congress's enumerated and necessarily implied powers,[251] or otherwise invades some core aspect of state sovereignty,[252] or violates some other provision like those protecting individual rights,[253] the limits on its powers to legislate are political rather than constitutional.

While the Court acknowledged the existence of substantial federalism concerns in *Windsor*, its holding did not squarely rest on that ground.[254] The anti-animus principle is not another source of support for state power against federal intrusion. Rather, the departure from the usual respect for federalism engendered suspicion about why Congress acted as it did. It was another indicator, but not a proof, of animus.

The second and related point is that the departure was from the usual posture of deference by the *federal* government to the states. Though other factors might point toward animus in a *state* ban on same-sex marriages, this particular consideration would not. It is the states, after all, that have historically exercised the power to define marriage.

b) Historical background indicating past discrimination: anti-gay public policy. To identify an invidious purpose in government action, the Court has looked at historical practices in-

[250] See *Windsor*, 133 S Ct at 2697 (Roberts, CJ, dissenting); *Arlington Heights*, 429 US at 267.

[251] See, for example, *United States v Morrison*, 529 US 598, 607 (2000); *United States v Lopez*, 514 US 549, 567 (1995).

[252] See, for example, *Printz v United States*, 521 US 898, 932 (1997); *New York v United States*, 505 US 144, 177, 188 (1992).

[253] See, for example, *District of Columbia v Heller*, 554 US 570, 622 (2008).

[254] See discussion in Section I.

dicating discrimination against the group.[255] The sorry history of this country's legalized discrimination against homosexuals is striking for the absence of reasoned justifications, for arbitrary lines between conduct allowed and conduct forbidden, and for a tendency to use the asserted immorality of homosexual acts to justify widespread opprobrium of homosexual persons. That history suggests an unreasoning prejudice or aversion that lies beneath the surface of laws shutting out gay people. Even if the Court has not yet recognized that such a history justifies formal heightened scrutiny of all classifications based on sexual orientation, at least it raises a yellow flag alerting the Court to the increased risk of animus.

Through the nineteenth and into the twentieth centuries, every state had laws prohibiting anal sex, often called in state statutes "crimes against nature," "sodomy," or "buggery."[256] In the late nineteenth and early twentieth century, states also began specifically prohibiting oral sex. Prior to the late 1960s, sodomy laws applied regardless of the sex of the participants in the act and regardless of whether the couple was married. A husband and wife who engaged in oral sex were potentially as guilty as two men who had anal sex. However, there was little enforcement of the laws against private sex between consenting adults; and what occasional enforcement there was fell most harshly on homosexuals.

After the Civil War, cities and states began more aggressively regulating sexuality.[257] Some of the laws enacted during the early to mid-twentieth century were especially draconian. A 1911 Massachusetts law allowed the state to incarcerate "degenerates" (including homosexuals) and other "mental defectives" for indefinite periods of time in state mental institutions. More commonly, state laws called for sterilization or castration of moral degenerates and sexual perverts, usually for homosexual behavior. In an effort to "treat" homosexuals, hospitals performed prefrontal lobotomies,

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[255] Much of the discussion in the section is drawn from Carpenter, *Flagrant Conduct* chs 1–2 (cited in note 210). Other sources for a review of the history of anti-gay laws and social stigma are William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 328–37 (Harvard, 1999); Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (Oxford, 2012); and Andrew Koppelman, *The Gay Rights Question in Contemporary American Law* (Chicago, 2002).

[256] Eskridge, *Gaylaw* at 328–37 (cited in note 255) (App. A1: listing dates of first sodomy laws for each state, starting in 1610).

[257] Id at 27–34.

injected massive doses of male hormones, and administered electric shock and other aversion therapy.[258]

Federal authorities also suppressed homosexuality. They seized and destroyed obscene publications, excluded immigrants convicted of sexual crimes, and barred military service by "degenerates,"[259] a ban not completely lifted until 2010. U.S. Customs censored or seized novels depicting homosexuality in a positive way, including the 1886 edition of *The Arabian Nights*. Authorities censored homosexual content from films.[260]

Immediately following World War II, American society and government became increasingly alarmed by the spread of Communism, which was linked in the public mind to deviant sexuality. Between 1946 and 1961 alone, when arrests for violation of sodomy laws reached historic highs, the state "imposed criminal punishments on as many as a million lesbians and gay men engaged in consensual adult intercourse, dancing, kissing, or holding hands."[261] Officials often worried that homosexuals, like Communists, were infiltrating and undermining government agencies. Senator Joseph McCarthy (R-WI) was on the lookout for government officials who tolerated "flagrant homosexuals."[262] The "sexual perverts," warned one politico, were "just as dangerous as the actual Communists." In the space of seven months in 1950, President Harry Truman's administration investigated the alleged sexual perversion of 382 civil servants, most of whom subsequently resigned. A government report warned that "[o]ne homosexual can pollute an entire office." In fact, more State Department employees were fired for homosexuality than for alleged Communist sympathies in 1951 and 1952, the height of McCarthy-era red-hunting.[263]

At the same time, states were also cracking down on homosexuals. State and municipal laws were enforced to suppress homosexual association, including groups formed to advocate liberalization of sex regulations. States also used professional licensing

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[258] Id at 42.

[259] Id at 34–37 (cited in note 255).

[260] Id at 47–48.

[261] Id at 60.

[262] David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* 26 (Chicago, 2004).

[263] Eskridge, *Gaylaw* at 69 (cited in note 255).

laws to prevent homosexuals from becoming doctors, dentists, pharmacists, embalmers, guardians, lawyers, teachers, and other professionals.[264]

State authorities used both direct and indirect methods to shut down gay bars. Liquor license laws requiring holders to be of "good character" were used both to prevent gay bars from opening and to shut them down when they slipped through the system. States and municipalities closed gay bars through business and liquor license schemes. A 1954 Miami ordinance, for example, made it illegal for a bar owner "to knowingly allow two or more persons who are homosexuals, lesbians or perverts to congregate or remain in his place of business." This one-homo-per-bar rule resulted in the closing of all of Miami's gay bars by the late 1950s.[265] New York's State Liquor Authority, among others, prohibited bars from serving prostitutes and homosexuals.

Law enforcement authorities aggressively used police stakeouts at suspected gay bars, decoy operations, and police raids to arrest large numbers of socializing homosexuals. For example, a 1960 raid on a San Francisco bar resulted in the disorderly conduct arrests of 103 people for same-sex dancing. Remarkably, when a serial killer targeted homosexuals in Santa Monica in 1956, police used details of the killer's confession to start an anti-gay cleanup of the city.[266]

Gays reacted to this crusade in part by attempting to organize politically. Two fledgling gay-rights groups, the Mattachine Society (mostly men) and the Daughters of Bilitis (women), formed in the 1950s. Mattachine emerged in Los Angeles in 1950; DOB, in San Francisco in 1955.[267] The FBI closely monitored their activities, beginning an internal security investigation of Mattachine in 1953 and of DOB in 1959. Neither group, of course, represented a credible national security threat. "Nonetheless," William Eskridge writes, "FBI agents infiltrated both organizations, archived their declarations and publications, reported their meetings and activities, recruited informants, compiled lists of members

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[264] Id at 72–74.

[265] Id at 78–80.

[266] Id at 63–65.

[267] John D'Emilio, *Gay Politics and Community in San Francisco Since World War II*, in Martin Duberman, Martha Vicinus, and George Chauncey, Jr., eds, *Hidden From History: Reclaiming the Gay & Lesbian Past* 460 (Meridian, 1990).

whom they could identify, and speculated on the organizations' influence and future activities." Agents interviewed the staff of the Mattachine's publication, *One*, and notified their employers. Group members met in secret and resorted to using pseudonyms to protect their identity. Similar monitoring and harassment of gay groups by state and federal authorities occurred throughout the country. Police harassment and spying on gay organizations continued into the 1970s.[268] Police raids on gay bars and other forms of harassment of homosexuals continued well into the 1990s in some places, including the Lone Star State of Texas.

The case of Texas is illustrative. The state banned gay sex in 1973 in a so-called "homosexual conduct" law, but in the very same year it legalized heterosexual sodomy, adultery, and even bestiality. This was nonsense to one Texas appeals court judge, a Republican and self-described "country lawyer," who had no familiarity with gay-rights causes. In an interview about the *Lawrence* case, he reported that when the litigation reached his court he wondered how the state could justify a surgically precise ban on gay sex. "I kept thinking that if they decriminalized all those things that one would normally say are immoral, then why did they leave this one in? There had to be a reason," he recalled thinking, obviously still baffled. "And nobody could explain to me why."[269]

The Court seemed to acknowledge the history of anti-gay laws in *Romer*, when it suggested that homosexuals "needed" the protection of specific antidiscrimination laws and for that reason concluded that such laws did not extend "special rights" to gays.[270] Laws forbidding anti-gay discrimination guaranteed equal rights. In *Windsor* itself, Justice Kennedy noted that most Americans had never given a thought to the possibility of marriage between two people of the same sex—a literal thoughtlessness, the lack of thought, about the needs of a class of people.[271]

DOMA was adopted at a time when gay sex was still illegal in more than a dozen states, when gays and lesbians were barred from serving openly in the military, when federal law and all but a handful of states permitted gays to be fired or denied housing because of sexual orientation, when a solid majority of Americans

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[268] Eskridge, *Gaylaw* at 75–76, 114 (cited in note 255).

[269] Carpenter, *Flagrant Conduct* at 167 (cited in note 210).

[270] *Romer v Evans*, 517 US 620, 631 (1996).

[271] *Windsor*, 133 S Ct at 2689.

believed homosexual relations were immoral, and when there were—despite the "defense" asserted in the title of the act—no homosexual marriages or even civil unions to defend against. While significant progress toward equality under the law had been made by 1996, that progress was subject to constant and strident backlash, like the voters' decision to bar all civil rights protections for gays in Colorado's Amendment 2.

These considerations alone support the view that gays and lesbians have historically been the target of systemic and legalized discrimination at the state and federal levels. No federal appeals court has denied that fact, even though most appeals courts have refused to treat sexual-orientation discrimination as suspect. Any legislative or electoral act excluding gays from benefits and protections available to others comes to the courts with at least this indicator that animus might be afoot. The fact of such discrimination is not enough by itself to invalidate the exclusion under the anti-animus doctrine, for that would turn the doctrine into simply a stand-in for heightened scrutiny. But it does mean that every enactment excluding gays faces additional scrutiny because it carries a large risk that it was materially driven by animus.

DOMA, as a law intentionally excluding gay couples from common benefits and protections, came to the Court with at least this factor leaning against it. This is true even before examining the other factors that, taken together, decisively show animus in DOMA's passage. This factor would also weigh against a state constitutional amendment banning same-sex marriages.

3. *Procedure.* The process by which legislation is adopted can also offer clues about whether its adoption was driven by animus. Evidence of animus in DOMA can be found in the sequence of events that led to passage, the legislative procedure Congress used to pass it, and the legislative history accompanying its passage. It helps answer the question whether decision makers were lashing out at an unpopular group. It reveals that legislators gave no serious consideration to a more limited imposition on the affected class. And evidence from the legislative history, including numerous statements by members of Congress, exposes the deeply malevolent attitudes upon which legislators acted against gay couples. These considerations support the conclusion that DOMA arose from unconstitutional animus.

a) Expedited passage. From introduction to final passage,

DOMA was pending for just four months, and much of that abbreviated period was consumed by congressional vacation time. It was moved into committee hearings with just thirty legislative days left before the 104th Congress adjourned for the fall campaign.[272] Why the haste? No state or nation had yet recognized gay marriage. There was no impending federal court decision mandating nationwide recognition of gay marriage. No federal suit had even been filed, which should not be surprising: *Bowers v Hardwick* was still good law, allowing homosexual acts to be criminalized. Only the Hawaii litigation had even been filed. The trial court had not begun hearing testimony when DOMA was introduced. A final decision from the Hawaii Supreme Court was probably at least two years away.[273] The rush to block same-sex couples from the altar cannot be explained by an actual rush of same-sex couples to the altar.

There was one impending event for which the hasty passage of DOMA was exquisitely timed: the election of 1996. This fact was noted frequently in press reports and during the congressional debate by Democrats.[274] Republicans denied any such political motivation, but did so in a way that hinted at their desire not even to think about the issue. "Political? I wish I'd never heard of this issue. This is a miserable, uncomfortable, queasy issue. There's no political gain, but there is a moral issue. . . . [S]ome of us think same-sex unions legitimated by the Government trivialize marriage and condone public immorality, and the politics of that are miserable."[275]

The unusual speed of Congress's action on DOMA, and its refusal to study the law's effects or possible alternatives to it, might

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[272] *Defense of Marriage Act, Hearing Before the Subcommittee on the Constitution of the House Judiciary Committee*, 104th Cong, 2d Sess 37 (1996) (statement of Representative Conyers) ("*May 15, 1996 Hearing*").

[273] This point was made repeatedly by opponents of DOMA, see, for example, Defense of Marriage Act, 104th Cong, 2d Sess, in 142 Cong Rec H7491 (July 12, 1996) (statement of Representative Skaggs) ("*July 12, 1996 Debate*"), and was not refuted by supporters.

[274] See, for example, id at H7482 (statement of Representative Frank); *Defense of Marriage Act*, 104th Cong, 2d Sess, in 142 Cong Rec S10101 (Sept 10, 1996) (statement of Senator Kennedy) ("*Sept 10, 1996 Debate*"). Another large round of marriage bans, this time at the state level, came during the election season of 2004. See Sarah Kershaw, *Gay Marriage Bans Gain Wide Support in 10 States*, NY Times (Nov 3, 2004), online at http://www.nytimes.com/2004/11/03/politics/campaign/03gay.html.

[275] *Markup Session on H.R. 3396, The Defense of Marriage Act, Subcommittee on the Constitution of the House Judiciary Committee*, 104th Cong, 2d Sess 53–54 (May 30, 1996) (statement of Representative Hyde) ("*Markup Session*").

be defended as a show of unusual efficiency rather than unseemly purpose. Nobody wants Congress to plod along where it need not do so. But DOMA's reach was so broad and its implications for the targeted group so momentous that a more thoughtful and thorough consideration was called for.

b) Rejection of proposals for study and more limited application. It's not that leaders in Congress were not presented with ideas for further study, or for some substantive limit on the reach of DOMA. Some supporters claimed that DOMA was needed to limit federal payments to spouses.[276] "We have enough problems financing our Social Security trust funds," claimed DOMA sponsor Jim Sensenbrenner. If DOMA was not enacted, he warned, "there will be a huge expansion of the number of people eligible to receive Medicare survivor benefits."[277] Another House member said that failure to pass DOMA would "take money out of the pockets of working families across America" and use that money to support same-sex marriages, ignoring that same-sex couples were also part of working families.[278] All Americans would be "paying for benefits for homosexual marriages."[279] Yet another wondered whether same-sex marriage might "have an enormous financial impact on our country."[280]

But nobody had any idea how much federal recognition of same-sex marriage would cost, or even whether recognition might save the federal government money in the long run because more spouses would be providing care to each other rather than relying on government services.[281] The cost of providing benefits to mar-

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[276] *Providing for Consideration of H.R. 3396, Defense of Marriage Act*, 104th Cong, 2d Sess, in 142 Cong Rec H7276 (July 11, 1996) (statement of Representative Largent) ("*July 11, 1996 Debate I*").

[277] *July 12, 1996 Debate*, 142 Cong Rec at H7484 (cited in note 273) (statement of Representative Sensenbrenner).

[278] Id at H7493 (statement of Representative Weldon).

[279] Id at H7495 (statement of Representative Lipinski).

[280] *Sept 10, 1996 Debate*, 142 Cong Rec at S10116 (cited in note 274) (statement of Senator Burns).

[281] In fact, in 2004 the Congressional Budget Office estimated that federal recognition of same-sex marriage would *save* the federal government a modest amount of money: in some cases, recognizing same-sex marriages would increase outlays and revenues; in other cases, it would have the opposite effect. The Congressional Budget Office (CBO) estimates that on net, those impacts would improve the budget's bottom line to a small extent: by less than $1 billion in each of the next 10 years (CBO's usual estimating period). That result assumed that same-sex marriages were legalized in all 50 states and recognized by the federal government. Letter and Report from Douglas Holtz-Eakin, Director, Con-

ried same-sex couples was repeatedly cited in the congressional debate as a justification for DOMA, but that cost was never examined, verified, or even estimated. Supporters acknowledged that they simply did not know what the recognition of same-sex marriage in one or more states might cost the federal government in benefits to spouses, but they assumed the worst.[282] Senator Phil Gramm speculated that there might be "hundreds of thousands" of beneficiaries created under federal and state law if same-sex marriage were permitted, but "no one knows what the number would be."[283] No one knew what *any* of the numbers would be. Senator Byrd asked the relevant questions, but had no answers:

> I urge my colleagues to think of the potential cost involved here. How much is it going to cost the Federal Government if the definition of "spouse" is changed? . . . What is the added cost in Medicare and Medicaid benefits if a new meaning is suddenly given to these terms? I know I do not have any reliable estimates of what such a change would mean, but then, I do not know of anyone who does. That is the point—nobody knows for sure.[284]

In other words, Byrd's colleagues were to think about something in the absence of any knowledge or study of it.

One proposal was that, before it was voted upon, DOMA's costs and benefits should be reviewed and studied in the regular committee process.[285] This proposal was summarily dismissed. It seems that the mere possibility that same-sex relationships might draw to some extent from public funds at some date in the future was enough to justify denying them more than one thousand public benefits—even ones that cost nothing. The interests of same-sex couples simply did not merit any consideration by Congress.

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gressional Budget Office, to Honorable Steve Chabot, Chairman, Subcomm on the Constitution, Comm on the Judiciary 2 (June 21, 2004), online at http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5559/06-21-samesexmarriage.pdf.

[282] *July 11, 1996 Debate I*, 142 Cong Rec at H7274 (cited in note 276) (statement of Representative McInnis).

[283] *Sept 10, 1996 Debate*, 142 Cong Rec at S10106 (cited in note 274) (statement of Senator Gramm).

[284] Id at S10111 (statement of Senator Byrd). He then speculated about the cost: "I do not think, though, that it is inconceivable that the costs associated with such a change could amount to hundreds of millions of dollars, if not billions—if not billions—of Federal taxpayer dollars." Id. The closest anyone came to an estimate of added cost was Senator Bob Kerrey (D-NE), who calculated that nationwide recognition of same-sex marriage would add at most 2 percent to the number of marriages in the country. Id at S10124 (statement of Senator Kerrey).

[285] *July 11, 1996 Debate I*, 142 Cong Rec at H7272 (cited in note 276) (statement of Representative Moakley).

An undecided House Republican offered to vote for DOMA if it were amended to require that the Government Accountability Office study the ability of same-sex couples to provide for their families and protect their relationships. The study was to be completed by October 1997 and would provide some empirical grounding for possible further legislative action. While the idea was initially embraced by DOMA sponsor Representative Henry Hyde (R-IL), it was rejected in the House Rules Committee and never made it to the floor. The Congress that gave the nation DOMA had no interest in studying the real-world hardships faced by gay families.[286]

Another idea was that, to the extent the concern was judicial activism, DOMA could be limited to contexts in which a state court (rather than the state legislature or the people through a referendum) had ordered the state to recognize gay marriages.[287] Yet congressional leaders were undeterred, revealing that concerns about judicial overreaching were largely makeweight arguments for something else.

Even as DOMA was justified by a stated desire to defend "traditional marriage," other proposals to protect lifelong monogamous marriage were summarily rejected. Representative Patricia Schroeder (D-CO), for example, proposed that the federal definition of marriage should exclude any subsequent marriage unless the first marriage was terminated on fault grounds.[288] This would have seriously eroded the no-fault divorce revolution that marriage traditionalists had long said was undermining the institution. It might also save the federal government a lot of money in benefits payments. But several sponsors of DOMA were living in their second or third marriages.[289] They would have lost federal recognition under the proposal. Large numbers of their heterosexual constituents, too, would have lost their own benefits. The idea was dismissed as a "diversion."[290] Sponsors of DOMA were es-

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[286] *July 12, 1996 Debate*, 142 Cong Rec at H7492–93 (cited in note 273) (statement of Representative Gunderson).

[287] Id at H7487 (statement of Representative Frank).

[288] See *July 11, 1996 Debate I*, 142 Cong Rec at H7272 (cited in note 276) (statement of Representative Moakley); id at H7273 (statement of Representative Schroeder).

[289] Id at H7274 (statement of Representative Abercrombie) ("Because I understand some of the people sponsoring this bill are on their second or third marriages. I wonder which one they are defending.").

[290] Id at H7273 (statement of Representative McInnis).

sentially saying to gay couples: "Traditional marriage restrictions for thee, but not for me."

c) Legislative history. The Court has been willing to consult evidence from legislative history to determine whether a law arose from unconstitutional animus. It did so in *Moreno*, observing that members of Congress had openly targeted "hippies" and "hippie communes" for exclusion from the food stamp program. In his opinion for the Court in *Windsor*, Justice Kennedy famously cited evidence from the legislative history of DOMA to show that it reflected impermissible animus.[291] This history, he wrote, showed that denying the "equal dignity" of same-sex marriages was "more than an incidental effect of DOMA." It was the "essence" of DOMA, its core purpose.

> The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . . H.R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage." H.R. Rep. No. 104-664, pp. 12–13 (1996). The House concluded that DOMA expresses "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality. *Id.*, at 16 (footnote deleted). The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." *Ibid.*[292]

In *Windsor*, the House Report was the smoking gun of animus. Former Solicitor General Paul Clement, representing the Bipartisan Legal Advisory Group, did not try to defend the conclusions or statements in the committee report, but suggested that such evidence should not be enough for the Court to strike down a statute.[293]

But the fact is that the House Report only scratched the surface of a large mass of similar, and even more hysterical, denunciations

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[291] Following *Windsor*, one district court struck down a denial of benefits to same-sex domestic partners, relying in part on the legislative history of the Michigan law being challenged. *Bassett v Snyder*, 951 F Supp 2d 939, 968–69 (E D Mich 2013). Among other scholarly treatments of animus in the legislative history of DOMA, see Mark Strasser, *DOMA, the Constitution, and the Promotion of Good Public Policy*, 5 Albany Gov't L Rev 613, 617–19 (2012).

[292] *Windsor*, 133 S Ct at 2693.

[293] Oral Argument Transcript, *United States v Windsor*, No 12-307, *74 (March 27, 2013), at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-307_jnt1.pdf.

of homosexuals and homosexuality in the proceedings to pass DOMA in the House and Senate. It was the tip of an animus iceberg. The legislative history leading to passage of DOMA indicated both that many members of Congress were motivated by deep hostility toward homosexuality and that many others were completely unconcerned about their interests.[294]

One can, of course, glean many purposes from the legislative record. Supporters of DOMA, mindful of the need to argue that it was not an act of malice against homosexuals, have often conjured a sanitized version of the congressional purposes behind the law. In this narrative, DOMA was not the result of hatred, but of a prudent caution toward important social change; not a disparagement of gay relationships, but a reaffirmation of the superiority of moms and dads; not a condemnation of gays at all, but a mild expression of traditional religious views about sexuality and marriage. Does this happy tale hold up?

According to the legislative record, DOMA's exclusion in 1996 of all married same-sex couples from all federal marital protections and obligations was intended to:

1. "defend[] and nurtur[e] the institution of traditional, heterosexual marriage,"
2. "promot[e] heterosexuality,"
3. "encourag[e] responsible procreation and child-rearing,"
4. "protect[] . . . democratic self-governance,"
5. "preserve scarce government resources" by preventing marital benefits from "hav[ing] to be made available to homosexual couples and surviving spouses of homosexual marriages," and
6. express "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."[295]

Of these, the first, second, and sixth were more or less explicit condemnations of homosexuality. ("Promoting heterosexuality" is only a nicer way of condemning homosexuality.) These will be discussed in more detail immediately below. The third was not

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[294] For catalogs of some of this legislative history, see generally Mae Kuykendall, *Essay: On Defined Terms and Cultural Consensus*, 13 J L & Pol 199 (1997); and Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 Harv L Rev 2684, 2701–04 (2004).

[295] *Defense of Marriage Act*, HR Rep No 104-664, 104th Cong, 2d Sess 12–13, 15, 17–18 (1996).

necessarily anti-gay, but was so flimsily served by DOMA that it is fairly understood as a pretext for underlying hostility. It will be discussed in Section III.B.5.b below. The fourth was not homophobic but could have been served by a much narrower and less burdensome law like the proposed alternative, discussed above in Section III.B.2, denying federal recognition only from states where same-sex marriage was judicially imposed. The fifth was not homophobic, but as noted in Section III.B.2, was unstudied by Congress and was unsupported in any empirical evidence. The failure to consider any alternative to DOMA that might be less injurious to married gay couples, or to study the law's actual budgetary effects, strongly suggests that these avowed congressional purposes were makeweight arguments.

Knowing that the Court had just decided *Romer*, one of the primary authors of DOMA tried to inoculate it against constitutional challenge.

> [S]aying that marriage means today what it has meant through our entire history is certainly not a novel idea. . . . [T]here are very clear legitimate government interests in this legislation. It is not motivated by animus, but rather a reaction to deliberate efforts by opponents of heterosexual marriages, being the legal basis for the building block of our society . . . .[296]

This was in fact the very defense offered against animus claims in the *Windsor* litigation. But pro forma statements in Congress could not mask the reality of what happened as the congressional debate heated up. What follows is a very incomplete catalogue of some examples of this hostility.

i) *Active malice:* From the time of its introduction in the House of Representatives on May 7, 1996, the defense of the Defense of Marriage Act was characterized by inflammatory rhetoric directed at gay people and their relationships. Numerous statements by members of Congress during committee hearings and floor debates evidenced deep hostility.

Many DOMA supporters, in both floor speeches and legislative hearings, described the effects of same-sex marriage in apocalyptic and paranoid terms. Allowing same-sex marriage would be a "disastrous policy," warned the chairman of the House Subcommittee

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[296] *Markup Session*, 104th Cong, 2d Sess at 41 (cited in note 275) (statement of Representative Bob Barr).

on the Constitution.[297] Admitting "my bias" for "traditional heterosexual marriage," a sponsor asserted without explanation that same-sex marriage would "derogate it."[298] Same-sex marriage was an attempt to eliminate the distinction between "what is right and wrong."[299] It was a "frontal attack on the institution of marriage."[300] It would "abolish thousands of years of legal tradition" and "destroy every other State's laws regulating marriage."[301] The country "cannot survive" the "destruction of the family unit" that gay marriage would cause.[302] It was nothing less than an "assault on America's families and the sacred institution of marriage."[303] It would "destroy thousands of years of tradition."[304] These denunciations exploited unsubstantiated fears and stereotypes of gay people as immoral, subversive, and disproportionately influential enemies of the country's history and its institutions.

Supporters of DOMA repeatedly condemned homosexual relationships. In many speeches this condemnation was expressed as an affirmation of "nature," morality, and tradition. "What is at stake in this controversy?" asked DOMA sponsor Representative Charles Canady (R-FL) as debate on the House floor opened. "Nothing less than our collective moral understanding—as expressed in the law—of the essential nature of the family—the fundamental building block of society."[305] Only opposite-sex marriage "comports with nature and our Judeo-Christian moral heritage." At other times the condemnation of gay relationships was more explicit. Law "should not treat homosexual relationships as the moral equivalent of heterosexual relationships on which the family is based. That is why we are here today."[306] Same-sex marriages

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[297] *May 15, 1996 Hearing*, 104th Cong, 2d Sess at 2 (cited in note 272) (statement of Representative Canady).

[298] Id at 32–33 (statement of Representative Sensenbrenner).

[299] Id at 36 (statement of Representative Inglis).

[300] Id at 37 (statement of Representative Barr).

[301] Id at 75 (statement of Representative Whyman).

[302] *Defense of Marriage Act*, 104th Cong, 2d Sess, in 142 Cong Rec H7442 (July 11, 1996) (statement of Representative Hutchinson) ("*July 11, 1996 Debate II*").

[303] Id at H7449 (statement of Representative Packard).

[304] *July 12, 1996 Debate*, 142 Cong Rec at H7495 (cited in note 273) (statement of Representative Lipinski).

[305] *July 11, 1996 Debate II*, 142 Cong Rec at H7411 (cited in note 302) (statement of Representative Canady).

[306] Id.

would "demean" and "trivialize" everyone else's marriages.[307] Gay marriage threatened "the moral fiber that keeps this Nation together" and "the future of families."[308] It would be "the final straw."[309] Such condemnations of homosexuals and homosexuality, once understood as a profound and positive moral commitment, are now constitutionally illegitimate as justifications for excluding gay people from rights and recognition freely given to others.

A debate formally about federal recognition of same-sex marriages easily slipped into open expression of a general disgust toward homosexuality itself, reflecting the underlying animus. Gay people were described as sick, perverted, and dangerous. "Homosexuality has been discouraged in all cultures because it is inherently wrong and harmful to individuals, families, and societies," declared a House member.[310] Same-sex marriages not only demeaned marriage, another argued, but "[t]hey legitimize unnatural and immoral behavior."[311] Senator Jesse Helms (R-NC) thundered that gays "seek to force their agenda upon the vast majority of the American people who reject the homosexual lifestyle."[312] DOMA, in Helms's view, was needed to protect marriage and families against "those who seek to destroy them and who are willing to tear apart America's moral fabric in the process."[313] Members rejected the idea that tolerance should play a role in the debate. "Tolerance does not require us to say that all lifestyles are morally equal. It doesn't require us to weaken our social ideals. . . . And it should not require special recognition for those who have rejected that standard."[314]

One representative seized on the argument that homosexual orientation is not consciously chosen as an admission that "it is

[307] *Markup Session*, 104th Cong, 2d Sess at 53–54 (cited in note 275) (statement of Representative Hyde).

[308] *July 12, 1996 Debate*, 142 Cong Rec at H7488 (cited in note 273) (statement of Representative Stearns).

[309] Id at H7495 (statement of Representative Lipinski).

[310] Id at H7487 (statement of Representative Funderburk).

[311] Id at H7494 (statement of Representative Smith).

[312] *The Defense of Marriage Act*, 104th Cong, 2d Sess, in 142 Cong Rec S10068 (Sept 9, 1996) (statement of Senator Helms) ("*Helms's Remarks*").

[313] Id.

[314] *Sept 10, 1996 Debate*, 142 Cong Rec at S10114 (cited in note 274) (statement of Senator Coats).

not a desirable lifestyle, and there's something wrong with it."[315] He wanted gays to be "rescued" and "returned to where they can have a happy lifestyle, because I think it's inherently destructive."[316] Supporters read into the Congressional Record an especially odd denunciation of acceptance for homosexuals: "Overcome by miasmic gases of diversity and inclusion wafting from the Nineties swamp, we have turned into the Punchdrunk kid, a twitching lummox with cauliflower ears who mumbles 'Sure, Jake, sure' to everybody."[317]

Senator Nickles (R-OK) invoked stereotypes of gay couples as sex-obsessed, threatening traditional families by their presence in polite society so much that landlords should be able to deny them housing.

> [I]f you are saying if a person had 10 apartment complexes and he or she had rented those out to—I'm going to say traditional families, and you had a couple of vacancies and you had two homosexual couples come in with T-shirts that said, "I'm gay and proud of it. Let's make love," would I want that person to be able to deny renting those two units? Yes, I think they should have the right to do that. . . .[318]

Representative Tom Coburn (R-OK) took the gloves off, making it clear that the real objective was to condemn homosexuality:

> We have heard a lot tonight. We heard a lot in the debate on the rule about discrimination. We just heard about family values. I do not think it is about any of those things. *The real debate is about homosexuality and whether or not we sanction homosexuality in this country.*[319]

Representative Canady, a chief sponsor, agreed. "That is what is at stake here: Should the law express its neutrality between heterosexual and homosexual relationships? Should the law elevate homosexual unions to the same status as the heterosexual relationships on which the traditional family is based? . . ."[320] Citing

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[315] *May 15, 1996 Hearing*, 104th Cong, 2d Sess at 236 (cited in note 272) (statement of Representative Inglis).

[316] Id at 236–27 (statement of Representative Inglis).

[317] *July 12, 1996 Debate*, 142 Cong Rec at H7494 (cited in note 273) (reprinting of Florence King, *The Misanthrope's Corner*, National Review, June 3, 1996).

[318] *The Defense of Marriage Act: Hearing Before the Committee on the Judiciary on S 1740*, 104th Cong, 2d Sess 12–13 (1996) (statement of Senator Nickles) ("*July 11, 1996 Hearing*").

[319] *July 11, 1996 Debate II*, 142 Cong Rec at H7444 (cited in note 302) (statement of Representative Coburn) (emphasis added).

[320] Id at H7447 (statement of Representative Canady).

the work of the Family Research Council, one House member asserted that all cultures discourage homosexuality "because it is inherently wrong and harmful to individuals, families, and societies."[321] Another said that same-sex marriage would "legitimize unnatural and immoral behavior."[322] "[T]wo men loving each other does not hurt anybody else's marriage," said Representative Hyde, "but it demeans, it lowers the concept of marriage by making it something that it should not be and is not, celebrating conduct that is not approved by the majority of the people."[323]

Representative Coburn reported his constituents' views on homosexuality, which he said derived from biblical sources:

> I come from a district in Oklahoma who [*sic*] has very profound beliefs that homosexuality is wrong. I represent that district. They base that belief on what they believe God says about homosexuality. . . . What they believe is, is that homosexuality is based on perversion, that it is based on lust . . . it is discrimination towards the [homosexual] act, not toward the [homosexual] individuals.[324]

As *Cleburne* made clear, the government cannot act to satisfy constituents' animosity toward a group. Their irrational fears, stereotypes, and unsubstantiated assertions are no more permissible grounds for inflicting injury on a group than is legislators' own personal malice toward the group.

The distinction between the "act" and the "individual" cited by DOMA supporters is a common refrain in condemnations of homosexuality, and was echoed in Justice Scalia's dissent in *Romer*. But the distinction fuels general condemnations of homosexual persons, just as *Lawrence* recognized that a homosexual conduct law stimulates prejudice in the public and private spheres toward homosexual persons. Coburn alluded to "studies" that he said found that 43 percent of all homosexuals had more than 500 sexual partners during their lives. Yet the studies reporting hyper-prom-

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[321] *July 12, 1996 Debate*, 142 Cong Rec at H7487 (cited in note 273) (statement of Representative Funderburk).

[322] Id at H7494 (statement of Representative Smith).

[323] Id at H7501 (statement of Representative Hyde).

[324] *July 11, 1996 Debate II*, 142 Cong Rec at H7444 (cited in note 302) (statement of Representative Coburn).

iscuity among gay men have been debunked as junk science,[325] and at any rate do not even purport to make claims about the sexual practices of lesbians.

In a debate ostensibly about federal recognition of marriage, homosexual sex was never far from the congressional mind. "The homosexual movement has been very successful in intimidating the psychiatric profession. Now people who object to sodomy, to two men penetrating each other are homophobic," said Representative Hyde. "They have the phobia, not the people doing this act. That is a magnificent accomplishment for public relations."[326]

Members openly and cavalierly disparaged gay parents and their families. Gay couples were not good parents, many members suggested, and "do not make strong families. . . . No society has ever granted same-sex unions the same kind of official recognition granted to marriages, and for good reason."[327] "If same-sex marriage is accepted," said Senator Robert Byrd (D-WV), "America will have said that children do not need a mother and a father, two mothers or two fathers will be just as good. This would be a catastrophe."[328] Not content to be the Senate's self-appointed historian, Byrd also took on the mantle of Senate sociologist by asserting that in gay relationships "emotional bonding oftentimes does not take place."[329] There was absolutely no basis for this bald assertion and insult to same-sex couples. Nor did Byrd even attempt to offer one. Senator Trent Lott (R-MI) suggested that gay relationships were not valuable to society, but were merely "a living arrangement of two persons of the same sex."[330] This unfounded characterization demeaned the committed relationships of same-

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[325] Eugene Volokh, *The Myth of the Median Hyper-Promiscuous Gay Male*, The Volokh Conspiracy (May 22, 2003), online at http://www.volokh.com/2003_05_18_volokh_archive.html#200329250. Even if the myth were fact, it's not clear why gay-male promiscuity would be relevant to whether same-sex marriages should be permitted, especially for lesbian couples. See Dale Carpenter, *The Traditionalist Case: The Contagious-Promiscuity Argument*, The Volokh Conspiracy (Nov 2, 2005), available online at http://www.volokh.com/posts/1130971386.shtml.

[326] *July 12, 1996 Debate*, 142 Cong Rec at H7501 (cited in note 273) (statement of Representative Hyde).

[327] *Sept 10, 1996 Debate*, 142 Cong Rec at S10117 (cited in note 274) (statement of Senator Faircloth).

[328] Id at S10111 (statement of Senator Byrd).

[329] Id at S10108 (statement of Senator Byrd).

[330] Id at S10101 (statement of Senator Lott).

sex couples. Reliance on unsubstantiated fears and stereotypes is evidence of animus.

Members of Congress all but claimed that God himself demanded the passage of DOMA because they said the Bible condemned homosexuality.[331] "Permit me to be theological and philosophical, for a moment," said one. "I believe that as a people, as a people [*sic*], as a God-fearing people, at times, that there are what are viewed, what I believe are called depraved judgments by people in our society," he observed. "They come in all forms of sin." Momentarily lapsing into King James English, he intoned that "God breatheth light into the face of chaos" and "shineth the light into our face." He continued:

> We as legislators and leaders for the country are in the midst of a chaos, an attack upon God's principles. God laid down that one man and one woman is a legal union. That is marriage, known for thousands of years. That God-given principle is under attack. It is under attack. There are those in our society that try to shift us away from a society based on religious principles to humanistic principles; that the human being can do whatever they want, as long as it feels good and does not hurt others.[332]

Representatives repeated the baseless historical claim that homosexuality had destroyed any society that tolerated it:

> We hear about diversity, but we do not hear about perversity, and I think that we should not be afraid to talk about the very issues that are at the core of this. . . . The fact is, no society that has lived through the transition to homosexuality and the perversion which it lives and what it brought forth.[333]

Another representative concurred that "no culture that has ever embraced homosexuality has ever survived."[334] Representative Bob Barr (R-GA) was especially florid in his depiction of modern-day America as a place where "Rome burned, Nero fiddled":

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[331] "Let us defend the oldest institution, the institution of marriage between male and female, as set forth in the Holy Bible." *Sept 10, 1996 Debate*, 142 Cong Rec at S10111 (cited in note 274) (statement of Senator Byrd). Whether sentiments of this kind might in some circumstances offend Establishment Clause principles is beyond the scope of this article.

[332] *July 12, 1996 Debate*, 142 Cong Rec at H7486 (cited in note 273) (statement of Representative Buyer).

[333] *July 11, 1996 Debate II*, 142 Cong Rec at H7444 (cited in note 302) (statement of Representative Coburn).

[334] *July 11, 1996 Debate I*, 142 Cong Rec at H7278 (cited in note 276) (statement of Representative Largent).

> The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit. . . . What more does it take, my colleagues, to wake up and see that this is an issue being shouted at us by extremists intent, bent on forcing a tortured view of morality on the rest of the country?[335]

Senator Byrd drew similar lessons from ancient Greece and Rome, which he said were societies that declined because they had "waxed casual" about the uniqueness and importance of marriage.[336] He then chronicled the same-sex loves of the ancients, including Achilles and Patroclus, Catiline and his male lover, Julius Caesar and King Nicomedes, Nero and Sporus. Nero took Sporus to resorts in Greece and Italy, he remarked, "many a time, sweetly kissing him."[337] All of this was to note that same-sex marriage "make[s] a mockery" of marriage.[338]

Demonizing a group of people is a classic indication of animus against them. Gay-marriage advocates were condemned as "homosexual extremists" forming "[e]xtremist homosexual groups" and pushing "bizarre social experimentation upon unwilling participants."[339] Gay marriage was the product of "a radical element, a homosexual agenda that wants to redefine what marriage is," said Representative Steve Largent (R-OK).[340] Advocates' desire to formalize their love and commitment to each other was dismissed: "To them marriage means just two people living together alone. Is that not sweet? In other words, it means absolutely nothing."[341] Senator Helms claimed that "inch by inch, little by little, the homosexual lobby has chipped away at the moral stamina of some of America's courts and some legislators."[342] Senator Byrd agreed. "The drive for same-sex marriage is, in effect, an effort to make a sneak attack on society by encoding this aberrant behavior in

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[335] *July 12, 1996 Debate*, 142 Cong Rec at H7482 (cited in note 273) (statement of Representative Barr).

[336] *Sept 10, 1996 Debate*, 142 Cong Rec at S10109 (cited in note 274) (statement of Senator Byrd).

[337] Id.

[338] Id at S10110.

[339] *May 15, 1996 Hearing*, 104th Cong, 2d Sess at 74–75 (cited in note 272) (statement of Representative Whyman).

[340] *July 11, 1996 Debate II*, 142 Cong Rec at H7443 (cited in note 302) (statement of Representative Largent).

[341] Id at H7445 (statement of Representative Barr).

[342] *Helms's Remarks*, 142 Cong Rec at S10068 (cited in note 312).

legal form before society itself has decided it should be legal," he warned.[343]

Overblown assertions about wealthy and privileged homosexuals also infected the debate. The efforts of gays for equal rights could not be compared to black civil rights struggles, one representative averred, because "homosexuals, by most studies that I'm aware of, have a higher standard of living than heterosexuals."[344] He did not mention what "studies" he had in mind. Without support, he also asserted that "it is obviously a choice to be homosexual."[345]

A particular fear of DOMA supporters was the effect that recognition might have on children and what they are taught in schools. The subtext was the blood libel of anti-gay rhetoric that homosexuals molest and "recruit" children. "I can't even imagine all the ramifications that that would have," said one state representative from Colorado. "What about the education of our children? What about health education? What about Madison Avenue? What about advertising?" she continued, as if gay advocates were going to convert children through slick marketing campaigns.[346] Representative Canady wondered whether children should be taught that it doesn't matter whether "they establish families with a partner of the opposite sex or cohabit with someone of the same sex," that "there is no moral difference between homosexual relationships and heterosexual relationships," and that "the parties to a homosexual union" are entitled to equal "rights and benefits and privileges"?[347] The implication was that, given a slight nudge, children might decide to be homosexual.[348]

Relatedly, another representative claimed that the same activists supporting gay marriage were also suing the Boy Scouts for discrimination under laws granting homosexuals "special rights." They wanted to "place young boys under homosexual men on

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[343] *Sept 10, 1996 Debate*, 142 Cong Rec at S10110 (cited in note 274) (statement of Senator Byrd).

[344] *May 15, 1996 Hearing*, 104th Cong, 2d Sess at 236 (cited in note 272) (statement of Representative Inglis).

[345] Id.

[346] Id at 61 (statement of Representative Musgrave).

[347] *July 11, 1996 Debate II*, 142 Cong Rec at H7447 (cited in note 302) (statement of Representative Canady).

[348] For a discussion of the constitutional implications of these fears, particularly in the context of DOMA, see Clifford J. Rosky, *Fear of a Queer Child*, 61 Buff L Rev 607, 608 (2013); and Clifford J. Rosky, *No Promo Hetero: Children's Right to Be Queer*, 35 Cardozo L Rev 425, 448 (2013).

camping trips."[349] The image was a dog whistle evoking the outrageous and baseless stereotype of gay men as child predators.

Slippery-slope arguments were deployed to warn that the legal recognition of same-sex relationships would lead to legalizing incest and bestiality, among other things. The effect was dehumanizing. The redefinition of marriage "does not even have to be limited to human beings, by the way. I mean it could be anything."[350] "How could we stop" at the recognition of same-sex marriages "and say it should not also include two men and one woman, or three men, four men, or an adult and a child?"[351] Representative Bob Dornan (R-CA) was incredulous that "we would ever be discussing homosexuals have the same rights as the sacrament of holy matrimony." He predicted that "within 3 or 4 years we are going to be discussing pedophilia only for males."[352]

ii) Passive malice: Beyond the numerous expressions of active malice, there was evidence of what might be called passive malice in the debate over DOMA. Congress failed even to consider the interests of future married gay couples when it passed DOMA. It conducted no study of these effects. No supporter of DOMA even mentioned a possible impact on gay couples. As Koppelman notes: "Congress was not thinking about solving a policy problem at all, and it certainly was not thinking about the actual human beings whom this law was going to injure. It lashed out at gay people for the sake of pure political posturing."[353] DOMA "reflects the fantasy, unfortunately quite common, that gay people can be wished out of existence."[354] The failure to consider the needs of a group burdened by the law was a serious failure of the political process that should have been expected given the subject matter—marriage and homosexuality.

It's not that *nobody* in Congress saw the extensive denial of rights

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[349] *July 12, 1996 Debate,* 142 Cong Rec at H7487 (cited in note 273) (statement of Representative Funderburk).

[350] *July 11, 1996 Debate II,* 142 Cong Rec at H7443 (cited in note 302) (statement of Representative Largent).

[351] *July 11, 1996 Debate I,* 142 Cong Rec at H7276 (cited in note 276) (statement of Representative Largent).

[352] *July 12, 1996 Debate,* 142 Cong Rec at H7489 (cited in note 273) (statement of Representative Dornan).

[353] Koppelman, *Why Scalia Should Have Voted to Overturn DOMA* at 143 (cited in note 4).

[354] Id at 145.

and benefits that would be denied validly married couples. Opponents of DOMA noted that gay couples would lose

> Federal retirement benefits, health benefits under Federal programs, Federal housing benefits, burial rights, privilege against testifying against [a] partner in Federal trials, visitation rights at hospitals by partners, rights to family and medical leave to care for a partner, and many more programs which allow special rights to spouses.[355]

Representative Steve Gunderson (R-WI) cited letters from constituents who, among other deprivations and indignities, had been denied access to their partners dying in federally funded hospitals. He recounted the story of a friend who had recently lost his partner of sixteen years to AIDS. While the hospital allowed him to visit the dying partner, the funeral home refused to allow him to sign the formal documents or make funeral arrangements. "The debate fails to recognize the painful reality thrown on many innocent people who happen to be in long-term relationships outside of marriage," Representative Gunderson said.[356] Others cited similar practical problems faced by same-sex couples.[357] Nobody responded.

In fact, the striking thing about the entire congressional debate is that supporters of DOMA did not respond at all to these concerns. It's as if the concerns did not register as real human needs. To the extent legislators mentioned federal rights and benefits at all, it was only to complain that married gay couples were going to cost the government some unspecified and unstudied amount of money.[358] One representative remarked that his constituents were "outraged that their tax money could be spent paying veteran's benefits or Social Security based on the recognition of same-sex marriages."[359] A House co-sponsor said it would be irresponsible "to throw open the doors of the U.S. Treasury to be raided by the homosexual movement."[360]

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[355] *July 12, 1996 Debate*, 142 Cong Rec at H7481 (cited in note 273) (statement of Representative Mink).

[356] Id at H7492 (statement of Representative Gunderson).

[357] *July 11, 1996 Hearing*, 104th Cong, 2d Sess at 11 (cited in note 318) (statement of Senator Simon).

[358] *July 12, 1996 Debate*, 142 Cong Rec at H7484 (cited in note 273) (statement of Representative Sensenbrenner).

[359] Id at H7487 (statement of Representative Funderburk).

[360] Id at H7488 (statement of Representative Barr).

Some members seemed annoyed at even having to consider the issue. "It is amazing to me . . . and disturbing that this debate should even be necessary,"[361] said Senator Coats. Right before the vote, Senator Nickles declared it was "almost absurd" that Congress would have to act.[362] He was even perturbed that gay spouses might be entitled to take time off to care for each other under the Family and Medical Leave Act of 1993.[363] The best course, sponsors said, was to legislate now and study the problem later. "It seems to me that the wise and prudent thing to do . . . is to keep the law the way it is now, and if there are any changes that are necessary . . . let the Congress deal with it legislatively, after hearings, where we know what we're doing and we know the financial impact it will have."[364] Congress was advised it should act before it knew what it was doing. Like the Queen of Hearts in *Alice in Wonderland*, Congress would have the "sentence first, verdict afterwards."

The House rejection of any attempt to study or consider the needs of gay families led Representative Gunderson to the following conclusion:

> Unfortunately, this action exposes those who advance this legislation for their real goals. There is no sincere attempt to simply reaffirm marriage. There is certainly no attempt to respond to legitimate and real issues facing many Americans in 1996. There is, unfortunately, every attempt to pursue a mean, political-wedge issue at the expense of the gay and lesbian community in this country.[365]

iii) Other motives: Not all of the stated aims of DOMA sounded in animus against gay couples. Indeed, the vast majority of members who spoke in committees and on the floor of the House and Senate cited several reasons for supporting DOMA. Some sponsors of the bill, for example, saw Section 2 of DOMA as a defense of states' rights to determine their own marriage policy—that is,

[361] *Sept 10, 1996 Debate*, 142 Cong Rec at S10114 (cited in note 274) (statement of Senator Coats).

[362] *Defense of Marriage Act—Rollcall Vote No 280 Leg*, 104th Cong, 2d Sess, in 142 Cong Rec S10129 (1996) (statement of Senator Nickles).

[363] *Sept 10, 1996 Debate*, 142 Cong Rec at S10103 (cited in note 274) (statement of Senator Nickles).

[364] *Markup Session*, 104th Cong, 2d Sess at 40 (cited in note 275) (statement of Representative Sensenbrenner).

[365] *July 12, 1996 Debate*, 142 Cong Rec at H7493 (cited in note 273) (statement of Representative Gunderson).

to prevent the "nationalization" of same-sex marriage.[366] But others asserted that while states should have their own power over marriage, "[t]he larger issue" was protecting "traditional family values."[367] Appeals to "tradition" were common,[368] as were condemnations of judicial activism. Many members celebrated the superior skills of opposite-sex parents. "Children do best in a family with a mom and a dad," asserted Representative Tom DeLay (R-TX),[369] although neither he nor others offered a plausible account of how federal recognition of valid same-sex marriages would make opposite-sex parents less successful.

It is far from clear that *every* legislator who voted for DOMA did so as a way to injure gay couples, or that every legislator was unconcerned that such injury would be the necessary by-product of the law. Senator Nancy Kassebaum (R-KS), who supported DOMA mainly as a way to protect states' power to decide the issue for themselves, was a notable exception to the rule of malignity. Her speech on the Senate floor was pained and humane:

> [N]o purpose is served by abandoning civility and a respect for differing viewpoints in the process. Nor should we forget that at the heart of the debate over homosexuality are individual Americans. An abstract subject takes on different dimensions when given the face of a friend, a family member, a coworker. The things we all hold dear—family, friendships, a job, a home—present a unique set of challenges for the gay community. It should come as little surprise that, like anyone else, gay men and women would like to live their lives without being defined only by their sexual orientation.[370]

She seemed implicitly to rebuke her colleagues for their strident tone:

> Congress is not the ideal forum for the resolution of these issues, nor will any piece of legislation settle them. However, the tone we set in our deliberations is one which will be echoed around kitchen tables and worksites throughout the Nation. Let that tone be one which hon-

[366] *May 15, 1996 Hearing*, 104th Cong, 2d Sess at 32 (cited in note 272) (statement of Representative Sensenbrenner).

[367] *July 11, 1996 Debate II*, 142 Cong Rec at H7449 (cited in note 302) (statement of Representative Packard).

[368] *July 12, 1996 Debate*, 142 Cong Rec at H7485 (cited in note 273) (statement of Representative Seastrand).

[369] Id at H7487 (statement of Representative DeLay).

[370] *Sept 10, 1996 Debate*, 142 Cong Rec at S10119 (cited in note 274) (statement of Senator Kassebaum).

> ors our democratic traditions of reasoned debate, responsible decision-making, and respect for all individuals.[371]

Senator Bill Bradley (D-NJ), who voted for DOMA, expressed anguish. "I wish I did not have to deal with this issue," he said. "It makes me feel uncomfortable. I feel I'm on ground full of quicksand."[372] He explained that he supported civil rights for gay people in housing and employment, and that he did not believe homosexual orientation was chosen. But given that marriage was so heavily intertwined with religious belief, he advised "we need to proceed cautiously." He believed there should be some way to accommodate the legitimate needs of gay couples, but marriage should not be redefined "at this time."[373] Perhaps Senator Bradley and others who wanted a "go slow" approach were overly cautious, and DOMA was a massive overreaction even if caution was warranted, but caution alone is not malice.

In fact, as usual, most legislators said nothing in hearings or on the floor. No doubt many of them sat glumly, assenting silently to passage of DOMA not out of anti-gay bias but because they feared a "no" vote would imperil their political careers. In fact, the evidence suggests that some legislators privately opposed DOMA but voted for it anyway for fear of the political consequences.[374] This may be cowardice, but cowardice is not animus.

Yet the anti-animus doctrine does not permit legislators to hide behind the prejudices of constituents. They may not be able to control private prejudices but neither may they give them effect.[375] That much was made explicit in *Cleburne*, which denied the power of a zoning commission to decide variances based on the unreasoning fears and prejudices of a neighborhood.[376]

It is not the case that every legislator who backed DOMA did so for essentially bigoted reasons, much less that every pro-DOMA

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[371] Id.

[372] Id at S10124 (statement of Senator Bradley).

[373] Id at S10125.

[374] Senator Chuck Robb (D-VA) revealed that some of his colleagues had told him they were uncomfortable with DOMA but voted for it because "the political consequences are too great to oppose it." *Sept 10, 1996 Debate*, 142 Cong Rec at S10122 (cited in note 274). Others, he added, had told him "that they intend to discriminate, but they believe that discrimination here is acceptable" because they believe "homosexuality is morally wrong." Id.

[375] *Palmore v Sidoti*, 466 US 429, 433 (1984).

[376] See Section II.A.2.

legislator was an anti-gay bigot. But unanimity of malicious purpose is not, and cannot be, the standard for finding unconstitutional animus. It is enough that animus materially influenced the result. Enough has been said to demonstrate that animus—in both its active and more passive forms—materially influenced the passage of this major legislative reform.

Investigating legislative history is a hazardous business. It's possible simply to cherry-pick the evidence that supports one's conclusion (in this case, the conclusion that animus was a material influence in passage of the law) and ignore or downplay the rest. The mere presence of fear or "negative attitudes" among some legislators is not reason enough to strike down a law, the Court has held.[377] As Judge Posner has written, "scattered comments of a vindictive nature in a legislative history" do not prove animus.[378]

But the expressions of outrage and hysterical fear that accompanied Congress's consideration of DOMA were not isolated utterances. They dominated the debate. At the very least, they demonstrate that animus (as the Court defines it) materially influenced the passage of DOMA. Finding this evidence is not picking out thorns in a field of strawberries. On DOMA, the Congressional Record is a field of thorns. No wonder President Clinton, at the very moment he signed DOMA, urged citizens not to use it as a justification for violence and discrimination against gay people.[379] In the view of DOMA's supporters, gay marriage was a hedonistic, self-centered, Sybaritic indulgence. In their view, it was championed by the depraved, dangerous to innocent children, damned by God, and causing chaos in the land. It served no worthwhile purpose. It had nothing to do with love, commitment, or responsibility. It was not a response to human needs for understanding and family. It destroyed nations, ancient institutions, and whole moral codes.

Caroline Products recognized that prejudice toward a group of people tends to deform the political process that can ordinarily be relied upon to protect their interests and rights. It inhibits rational thought and deliberation. As the campaign to pass DOMA

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[377] *Board of Trustees of the University of Alabama v Garrett*, 531 US 356, 357 (2001).

[378] *Milner v Apfel*, 148 F3d 812, 817 (7th Cir 1998).

[379] Geidner, *Becoming Law* (cited in note 40).

amply demonstrated, gay couples were sinners in the hands of an angry legislature.

4. *Effects.* If all that we had as evidence of animus was statements by intemperate members of Congress aroused by the passions of a passing moment, the Court should resist invalidating legislation on the grounds that it reflected impermissible animus. Anti-animus doctrine is a not a rule of good manners and decorum for congressional debate. It does not police politeness. The Court has been clear that evidence of animus must also be found in the actual injury (tangible or dignitary) inflicted on the targets of malice. In the case of DOMA, that evidence is abundant. Indeed, no knowledgeable observer can deny the massive effects of the law. Like Amendment 2 in *Romer*, the consequences of DOMA were far-reaching. To supporters of both measures, that effect was the very point.

Congress's failure to consider the interests of married same-sex couples is especially glaring in light of the broad impact the law threatened. As noted, DOMA imposed cradle-to-grave harm on gay families: from humiliating the children of married gay couples to the denial of shared cemetery plots. The broad scope of the law was not denied by anyone on either side of the debate. Supporters of DOMA acknowledged that the word "marriage" appeared approximately 800 times in the United States Code and that the word "spouse" appeared more than three thousand times.[380] Andrew Koppelman summarized some of the major effects of DOMA on married same-sex couples:

> Same-sex spouses could not file joint tax returns. Pretax dollars could not be used to pay for health insurance or healthcare expenses for a same-sex spouse or that spouse's dependent children. Same-sex spouses' debts incurred under divorce decrees or separation agreements were dischargeable in bankruptcy. Same-sex spouses of federal employees were excluded from the Federal Employees Health Benefits Program, the Federal Employees' Group Life Insurance Program, and the Federal Employees' Compensation Act, which compensates the widow or widower of an employee killed in the performance of duty. Same-sex spouses were the only surviving widows and widowers who would not have automatic ownership rights in a copyrighted work after the author's death. Same-sex spouses were denied preferential treatment under immigration law and, therefore, were the only legally married

[380] *May 15, 1996 Hearing*, 104th Cong, 2d Sess at 32 (cited in note 272) (statement of Representative Sensenbrenner).

> spouses of American citizens who faced deportation. It is a federal crime to assault, kidnap, or kill a member of the immediate family of a federal official in order to influence or retaliate against that official—but it was not if you did that to a same-sex spouse. With the end of the exclusion of gay people from the military, DOMA made it official policy to withhold any survivor's benefits from the surviving spouse of a soldier killed in the line of duty.[381]

Even this list does not begin to exhaust the over one thousand disabilities placed on valid same-sex marriages.[382] The impact was so massive and inescapable that injury to married same-sex couples was not merely incidental to DOMA; it was the object of the law. The fact that the injury was not merely incidental is another indicator that animus was present.

It should be noted that in some ways DOMA actually benefited married same-sex couples in comparison to their married opposite-sex friends. Marriage imposes legal responsibilities in addition to conferring benefits and protections. Under DOMA, married gay couples could evade the federal "marriage penalty" under which some of them would have had to pay higher income taxes. Their income tax burden was actually lower than similarly situated opposite-sex couples. Federal employees could also avoid ethics rules dealing with spousal financial interests and gifts to a spouse. They could qualify for more federal student aid because a spouse's income would not count toward eligibility. The Court itself noted some of these unanticipated consequences of DOMA.[383]

It's clear that Congress was not trying to help gay couples in any way. And the net effect, in both practical and dignitary terms, was overwhelmingly to hurt gay families united in marriage. But Congress did alleviate some of the responsibilities that same-sex couples "would be honored to accept were DOMA not in force."[384] In its blind effort to strike at gay couples, Congress actually disfavored opposite-sex marriages in some ways and impaired federal interests. The expressive animus in DOMA overwhelmed practical

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[381] Koppelman, *Why Scalia Should Have Voted to Overturn DOMA* at 139 (cited in note 4).

[382] In the animus section of its opinion, the Court offered its own partial list of the disadvantages that DOMA imposed on same-sex marriages. *Windsor*, 133 S Ct at 2694–95 (listing Social Security, housing, taxes, criminal sanctions, copyright, veterans' benefits, healthcare, and bankruptcy). From this, it concluded that the "principal purpose was to impose inequality, not for other reasons like governmental efficiency." Id at 2694.

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

[384] Id.

considerations. That, too, suggests a legislative process driven substantially by animus.[385]

5. *Pretext.* Even extraordinary and far-reaching laws can be justified by the ultimate objectives they serve. But a law that poorly serves its stated objectives, or that is wildly over- or underinclusive in relation to that objective, is open to the suspicion that claimed objectives are a mere pretext for animus against those injured by the law. That was the case in *Moreno*, where Congress's purposes in the Food Stamp Act were not at all served by the exclusion of nontraditional family-living arrangements. It was true in *Cleburne*, where claimed concern about legal liability, parking, the possibility of a 500-year flood, and so on, were not sufficient reasons for rejecting a home for the cognitively disabled while allowing multiunit dwellings for nursing homes, fraternities, and sororities. Given the stated concerns of the zoning board, the discrimination against the group was underinclusive. And it was true in *Romer*, where solicitude for the liberties of individual landlords and small businesses could not justify a sweeping denial of antidiscrimination protection for homosexuals in every facet of life. Given the state's claimed interests, the discrimination against gay people was overinclusive.

DOMA suffered all three defects: it did not appear to serve some of Congress's stated objectives at all; it was overinclusive by denying married gay couples all benefits rather than those that could be tied to a specific legitimate purpose; and it was underinclusive because it treated married gay couples differently from others who could not or would not meet the traditional expectations of procreation, child-rearing, and lifelong marriage. These defects were in addition to the constitutionally impermissible objective of condemning homosexuality on moral grounds,[386] which was either express or implied in several stated aims of DOMA.

The flimsiness of Congress's justifications for Section 3 of DOMA have been reviewed repeatedly and at length elsewhere and won't be repeated here.[387] Three examples should suffice to

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[385] I am grateful to Mary Anne Case for making this observation.

[386] *Windsor*, 133 S Ct at 2694; *Lawrence v Texas*, 539 US 558, 583 (2003).

[387] For a consideration of DOMA's means-ends defects, see Note, 117 Harv L Rev at 2696–2700 (cited in note 294); Jon-Peter Kelly, *Act of Infidelity: Why the Defense of Marriage Act Is Unfaithful to the Constitution*, 7 Cornell J L & Pub Policy 203, 247–49 (1997); Kevin H. Lewis, Note, *Equal Protection After Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws*, 49 Hastings L J 175, 204–14 (1997).

show how mightily Congress and later the lawyers for BLAG strove to create the appearance of constitutionally permissible purposes.

a) Fiscal impact. First, as we have seen,[388] there was no empirical basis for concern about the fiscal impact of failing to prohibit federal recognition of same-sex marriages recognized by the states. Such marriages might even have produced a small financial benefit for the federal government.[389] But since Congress refused to review the potential costs and benefits, it is hard to know what the fiscal impact would have been. This was makeweight material.

b) Responsible procreation. A second justification for DOMA—encouraging "responsible procreation"—had no basis in reason, experience, or evidence. While legislators like Senator Byrd invoked the biblical injunction to "be fruitful and multiply,"[390] nobody explained why it should be thought that federal recognition of already valid same-sex marriages would affect fertility among heterosexual couples. Nor could anyone begin to explain why the denial of most of the rights associated with marriage—like burial next to a spouse in a veterans' cemetery—would have any relationship at all to heterosexuals' willingness to procreate.

Perhaps the emphasis should be placed on "responsible" in "responsible procreation." Perhaps legislators thought that if the federal understanding of marriage encompassed same-sex marriages validated in the states, heterosexuals might take marriage less seriously, be less likely to marry, and might begin to procreate even more than they do now outside of marriage. Illegitimacy rates might rise, with harmful consequences for children. Married homosexual couples might spoil marriage for everyone else. They might contaminate it. As Representative Barney Frank (D-MA) put it during the DOMA debate: "Is there some emanation that is given off [from gay marriage] that ruins it for you? Gee, Hawaii is pretty far away. Will not the ocean stop it?"[391]

To believe that the federal recognition of same-sex marriages

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[388] See Section III.B.3.b.

[389] See *Letter and Report from Douglas Holtz-Eakin* (cited in note 281).

[390] *Sept 10, 1996 Debate*, 142 Cong Rec at S10109 (cited in note 274) (statement of Senator Byrd).

[391] *July 12, 1996 Debate*, 142 Cong Rec at H7482 (cited in note 273) (statement of Representative Frank).

(which the federal government was not banning) would destroy the institution of marriage was to believe that homosexuals had a superhuman corrosive power. It was a power far beyond their paltry numbers. It was to indulge stereotypes that gay men and lesbians ruin everything they touch or might be allowed to participate in, whether it was federal employment, the military, the church, or marriage. The fear was so far-fetched, so baseless, and ultimately so hysterical, that it was in fact another expression of malice.

c) Cautious and incremental reform. A third reason for enacting DOMA might be that society should move slowly and incrementally in accepting a change in the understanding of something as important as marriage. Perhaps we should await evidence of the effects of allowing same-sex couples to wed before fully endorsing the change. Congress did not stop states from experimenting with marriage, it simply applied the brakes to national acceptance of it. In general, a preference for slow and incremental reform is not animus-based. It is a matter of prudence.

Nevertheless, the asserted go-slow purpose does not save DOMA from invalidation. To begin with, in our federal system, it is not traditionally Congress's role to decide whether and at what pace to experiment with marital-status determinations. DOMA did not, and Congress could not, stop the states from moving at whatever pace they deemed appropriate for recognizing same-sex marriages. To the extent that Congress was trying to apply the brakes to *state* determinations of marital status, its action departed from the tradition of federalism in family law. To the extent Congress was trying to slow down *federal* acceptance of same-sex marriage, it must be asked why it decided to move slowly on this change in marriage rather than on one of the many other fundamental changes to marriage enacted by the states over the past century. This was a selectively cautious Congress.

Also, Congress did not allow for incremental, partial, or cautious changes in federal recognition of same-sex marriages. It denied all federal recognition for all purposes, without any consideration of a special need to move slowly in specific contexts. Whatever else may be said of the process that produced DOMA in the summer of 1996, caution and careful deliberation were not evident.

Finally, even if a preference for moving cautiously on marital reform was genuinely one purpose behind DOMA, that does not

preclude a determination that animus was also a purpose behind the law. Given the many indicia of animus in DOMA, a desire to injure and disparage married same-sex couples materially influenced passage regardless of whether prudence might also have been a motivation.

If legislators had to advert to justifications about financial savings, responsible procreation, and "caution," they were scrounging for reasons that might make DOMA sound benevolent.

IV. Conclusion

Animus analysis is successfully doing the work that arguments for heightened scrutiny have failed to do in equal protection cases challenging anti-gay discrimination. Historical experience, and now two major Supreme Court decisions, support the inference that anti-gay discrimination will often be animus-based. But the Court's decision does not necessarily condemn all laws limiting marriage to opposite-sex couples. The animus holding in *Windsor* is so closely tied to federalism concerns that it is not obvious the Court would come to the same conclusion about a *state* law defining marriage as one man and one woman.[392]

As the Court argued in the important concluding section of the opinion, there was unconstitutional "animus" behind DOMA, which itself is an impermissible legislative purpose and a breach of the government's duty to treat every individual as though he possessed some worth represented by the word "dignity." The government failed even to consider the interests of future married gay couples when it passed DOMA; to the extent it did so, it acted to disparage and injure their marriages. And federalism principles, by assisting the states in protecting the substantive liberties of their own citizens, by limiting the reach and substance of federal legislation frustrating the implementation of state policy on family relations, and by confirming a historical practice from which DOMA dramatically and suspiciously departed, supported the conclusion that equal protection was denied. As Justice Jackson once wrote, equality structurally protects liberty because it means

[392] The district court in *Kitchen v Herbert*, 2013 WL 6697874, *24, *30 (D Utah), holding the Utah ban on same-sex marriage unconstitutional, expressly declined to rely on animus. In *Jackson v Abercrombie*, 884 F Supp 2d 1065, 1092 (D Hawaii 2012), the district court held that Hawaii's marriage law could be justified as a way to protect tradition, which is not the same as animus.

that the majority can't impose on some what it would not impose upon itself.[393] *Windsor Products* is what happened when *Carolene Products*, the advance of gay rights, and the federalism revolution converged.

Rather than relying on formal tiers of scrutiny, verbal formulations that measure the strength of state interests and narrowness of means, and tests for what constitutes a discrete and insular minority, *Windsor* Products is a guide to the underlying constitutional legitimacy of governmental decision making. It is agnostic about who might next benefit from judicial policing of animus-based action. There is no single, predetermined list of groups that benefit from its judicial vigilance. The beneficiaries of judicial protection have been food-stamp users, disabled persons, gay men and lesbians, and married couples.

Our constitutional tradition holds that we're better off in a republic where there are some things a majority can't do to a person, including treat the person maliciously, and where the government knows there will be someone occasionally enforcing the idea that there are some things it cannot do to a person. Under *Windsor* Products, this salutary possibility of correction extends as much to a decision-making process driven by animus as it does to substantive outcomes denying constitutional rights.

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[393] *Railway Express Agency v New York*, 336 US 106, 466–67 (Jackson, J, concurring).