

Deeply Rooted Principles of Equal Liberty, Not “Argle Barge”: The Inevitability of Marriage Equality After *Windsor*

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DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution [which] contains within it the prohibition against denying to any person the equal protection of the laws. While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

United States v. Windsor (majority opinion)¹

[T]he real rationale of today’s opinion, whatever disappearing trail of its legalistic argle barge one chooses to follow, is that DOMA is motivated by “bare . . . desire to harm” couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.

United States v. Windsor (Scalia, J., dissenting)²

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1. 133 S. Ct. 2675, 2695-96 (2013).
2. *Id.* at 2709 (Scalia, J., dissenting) (citation omitted).

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I. INTRODUCTION

The same-sex marriage debate of the past two decades has been fraught with tension over competing understandings of “marriage,” but in recent years, the trajectory has steadfastly persisted toward the inevitable protection of marriage equality for same-sex couples across the country. The number of states with same-sex marriage and marriage-like protections has increased significantly in recent years,³ and the foundation for marriage equality nationwide has been set by United States Supreme Court decisions affirming the constitutional rights of lesbian, gay, bisexual, and transgender (LGBT) individuals and same-sex couples. The most recent decision, *United States v. Windsor*, struck down as unconstitutional section 3 of the Defense of Marriage Act (DOMA),⁴ which had defined “marriage” to exclude same-sex lawfully married couples from federal rights, privileges, and responsibilities

3. At the time *Windsor* was decided, only a dozen states and the District of Columbia had legalized same-sex marriage. *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013). By August 1, 2013, just over one month after the *Windsor* decision, the number of jurisdictions in the United States recognizing same-sex marriages, civil unions, or broad domestic partnerships had risen to twenty-one: California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Washington. *See Same Sex Marriage Fast Facts*, CNN, <http://www.cnn.com/2013/05/28/US?same-sex-marriage-fast-facts> (last updated Feb. 22, 2014, 6:05 PM), *archived at* <http://perma.cc/V6ZF-D523>. In contrast, two decades prior, when DOMA was enacted, no state had yet granted same-sex marriage rights. *See Windsor*, 133 S. Ct. at 2682.

4. 1 U.S.C. § 7 (1996).

accorded to opposite-sex lawfully married couples through over a thousand federal laws and regulations.⁵

Although Justice Scalia's dissent in *Windsor* dismisses the majority opinion, authored by Justice Kennedy, as "legalistic argle barge,"⁶ this Article explains that the *Windsor* majority opinion is, rather, a principled decision reflecting an evolved understanding of fundamental constitutional values. Describing the historic roots of constitutional "equal liberty" principles, I propose that *Windsor* is, at its core, an "equal liberty" case. This is revealed through its emphasis on equal dignity, autonomy, and freedom from government-imposed stigma and subjugation. *Windsor* merges equal liberty themes from past Supreme Court cases that affirmed freedom from discrimination in public and private contexts, most pertinently the LGBT rights cases *Romer v. Evans*⁷ and *Lawrence v. Texas*.⁸ The equal libertarian principles and protections embraced by *Windsor* give the decision an impact far beyond striking down an isolated federal statute. The broader substantive significance of *Windsor* is that it firmly establishes the final precedential building block for a Fourteenth Amendment decision affirming marriage equality for same-sex couples, and one that may do so through a union of interrelated equal protection and substantive due process principles. While *Windsor* also helps set the stage for the Court to accord a heightened form of scrutiny to discrimination against LGBT individuals, same-sex marriage bans are ultimately doomed to fail under any level of scrutiny. The stigmatizing, second-class status imposed on same-sex couples through marriage inequality, based on a discriminatory motive rather than rational basis, is a per se violation of fundamental equal liberty principles under the United States Constitution.

The change in the lives of LGBT citizens brought about by *Windsor* has been dramatic and immediate. Within hours of the *Windsor* decision, federal administrative bodies issued statements ensuring the provision of administrative benefits and protections to legally married same-sex couples.⁹ Within weeks of the decision, courts¹⁰ and administrative

5. *Id.*; see also *Windsor*, 133 S. Ct. at 2682-83 (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004)).

6. *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting).

7. 517 U.S. 620 (1996).

8. 538 U.S. 558 (2003).

9. See, e.g., Gautam Raghavan, *Obama Administration Statements on the Supreme Court's DOMA Ruling*, WHITE HOUSE BLOG (June 27, 2013, 5:00 PM), <http://www.whitehouse.gov/blog/2013/06/27/obama-administration-statements-supreme-court-s-doma-ruling>, archived at <http://perma.cc/RA67-95YU>; Press Release, Dep't of Def., Statement by Secretary Hagel on DOMA Ruling (June 26, 2013), <http://www.defense.gov/releases/release.aspx?releaseid=16119>, archived at <http://perma.cc/J6KJ-48NE>; U.S. Dep't of Health & Human Servs., Statement by

agencies¹¹ across the country began applying *Windsor's* precedent to recognize and grant increased protections for same-sex couples; in the meantime, new judicial challenges to marriage inequality sprouted across the country.¹² At the congressional level, the Respect for Marriage Act, repealing DOMA in its entirety, was reintroduced on June 26, 2013, with 161 Sponsors in the House of Representatives and 41 sponsors in the

HHS Secretary Kathleen Sebelius on Supreme Court Ruling on Defense of Marriage Act (June 26, 2013), <http://www.hhs.gov/news/press/2013pres/06/20130626b.html>, *archived at* <http://perma.cc/4RZ4-9UQ3>; Press Release, U.S. Dep't of Homeland Sec., Statement by Secretary of Homeland Security Janet Napolitano on the Supreme Court Ruling on the Defense of Marriage Act (June 26, 2013), <http://www.dhs.gov/news/2013/06/26/statement-secretary-homeland-security-janet-napolitano-supreme-court-ruling-defense>, *archived at* <http://perma.cc/3QMD-F9YR>; Press Release, U.S. Office of Pers. Mgmt., Statement by Acting Director Elaine Kaplan on the Supreme Court Decision in *United States v. Windsor* (June 26, 2013), <http://www.opm.gov/news/releases/2013/06/statement-by-acting-director-elaine-kaplan-on-the-supreme-court-decision-in-united-states-v-windsor>, *archived at* <http://perma.cc/GH29-B2TA>.

10. See *Golinski v. U.S. Office of Pers. Mgmt.*, 724 F.3d 1048, 1048-50 (9th Cir. 2013) (dismissing a case challenging DOMA-based denial of lesbian spouse's enrollment application under Federal Employees Health Benefits program); *Cozen O'Connor, P.C. v. Tobits*, No. CIV.A. 11-0045, 2013 WL 3878688, at *1 (E.D. Pa. July 29, 2013) (“[T]he United States Supreme Court’s decision in *United States v. Windsor*, declaring Section 3 of the Defense of Marriage Act unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment, requires recognition of a valid Canadian same-sex marriage for purposes of benefits distribution pursuant to ERISA, a federal statute.”); *Obergefell v. Kasich*, No. 1:13-CV-501, 2013 WL 3814262, at *1 (S.D. Ohio July 22, 2013) (granting a temporary restraining order requiring the Ohio Registrar to accept the death certificate for a terminally ill man upon his death only if it records his husband, to whom he was lawfully wed in Maryland, as the surviving spouse), *permanent injunction subsequently granted*, No. 1:13-CV-501, 2013 WL 6726688 (Dec. 23, 2013); *Bassett v. Snyder*, No. 12-10038, 2013 WL 3285111, at *26 (E.D. Mich. June 28, 2013) (holding that plaintiffs were likely to succeed in equal protection challenge to state law denying health benefits to public employees’ same-sex partners).

11. See *Zeleniak v. Polajenko*, 26 I.&N. Dec. 158, 159 (Bd. of Immigration Appeals 2013) (concluding that after *Windsor*, petitioners in same-sex marriages may satisfy Immigration and Nationality Act requirements of establishing that a legally valid marriage exists and that the beneficiary qualifies as a spouse under the Act); VT. DEP’T OF FIN. REGULATION, VT. INS. BULLETIN NO. 177, GUIDANCE REGARDING PROHIBITED DISCRIMINATION IN HEALTH INSURANCE COVERAGE UNDER ACT 35 OF 2013 (July 1, 2013), *available at* 2013 WL 3359269 (“[A]s of July 1, 2013, any entity that provides health insurance coverage to a Vermont resident who works for an employer domiciled outside of Vermont cannot distinguish a marriage or civil union in a way that conflicts with Vermont law. As with all other general Vermont laws of broad applicability, this pertains to all health insurance coverage, including, but not limited to, self-funded insurance provided by an employer pursuant to the Employee Retirement Income Security Act of 1974, or ERISA.”).

12. See, e.g., *Obergefell*, 2013 WL 3814262, at *1; Complaint at 1-2, *Harris v. McDonnell*, No. 5:13-CV-00077 (W.D. Va. Aug. 1, 2013); Complaint at 2, *Bourke v. Breshear*, No. 3:13-CV-00750-JGH (W.D. Ky. July 26, 2013); Amended Complaint, *Fisher-Borne v. Smith*, No. 1:12-CV-00589 (M.D.N.C. July 19, 2013); Complaint at 2-3, *Whitewood v. Corbett*, No. 1:13-CV-01861 (M.D. Pa. July 9, 2013); see also Lisa Keen, *Post DOMA Litigation Deluge*, BETWEEN LINES, Aug. 1, 2013, at 6, *available at* <http://www.pridesource.com/article.html?article=61548>, *archived at* <http://perma.cc/CG4V-9VEG>.

Senate.¹³ Moreover, the number of states extending marriage protections to same-sex couples nearly doubled in the month following *Windsor*.¹⁴

From this immediate and sweeping implementation of *Windsor*'s holding across the country, it is apparent that the import of the decision cannot be overstated. However, before addressing in more doctrinal depth what the significance of *Windsor* is, it is necessary to address what *Windsor* is *not*.

First and foremost, *Windsor* should not be read as a federalism-based decision that leaves it up to individual states whether to recognize same-sex marriage. Contrary to some misperceptions,¹⁵ including the misleading statement in Chief Justice Roberts' dissent that the majority opinion was "undeniabl[y] . . . based on federalism,"¹⁶ *Windsor* is not, properly read, a federalist decision.

This is the case for two reasons. First, rather than being the doctrinal basis of its holding, *Windsor*'s federalism discussion was a tangential, if detailed, explication of the federal government's deviation from federalist principles as evidence of animus in enacting DOMA. The Court discussed federalist principles in the context of inferring discriminatory intent from the federal government's unusual intervention in an area of law generally left to the states.¹⁷ This is evident in the Court's explanation:

[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. "[D]iscriminations of an unusual character

13. H.R. 2523, 113th Cong. (2013); S. 1236, 113th Cong. (2013).

14. See sources cited *supra* note 3.

15. See, e.g., Editorial, *From the High Court, a Victory for Federalism*, KEY W. CITIZEN, July 1, 2013, at 4A; Scott Lauck & Heather Cole, *Future of Marriage in Missouri No Clearer After Supreme Court Ruling*, MO. LAW. WKLY., June 28, 2013, available at 2013 WLNR 16319428.

16. *United States v. Windsor*, 133 S. Ct. 2675, 2697 (2013) (Roberts, C.J., dissenting).

17. *Id.* at 2691-92 (majority opinion).

especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”¹⁸

Thus, while describing a deviation from usual federalist deference as evidencing “discrimination[] of an unusual character,”¹⁹ the *Windsor* majority did not establish federalism as the basis of its individual-rights-focused holding.

Second, although the Court describes marriage as being within the purview of state rather than federal legislation, the Court did not place state marriage laws outside of the scope of federal *judicial* review. To the contrary, the majority opinion pointedly prefaces its federalism discussion with a reminder that, although states may have more legislative authority over marriage than the federal government, individual constitutional rights can trump that state power. Specifically, the majority cautions:

[I]t is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition. State laws defining and regulating marriage, of course, must respect the constitutional rights of persons . . . but, subject to those guarantees, “regulation of domestic relations” is “an area that has long been regarded as a virtually exclusive province of the States.”²⁰

Thus, as with *Loving v. Virginia*, which held that state miscegenation bans violate the constitutional right of those in interracial relationships to marry the person of their choice,²¹ the *Windsor* decision was ultimately an affirmation not of the powers reserved to states, but of the rights reserved to individuals. The Court’s citation to *Loving* signals that the federalism discussion that follows should not be read to grant states the unbridled authority to define marriage in a discriminatory manner. In a future decision, the Court should specify the extent to which laws limiting marriage rights based on the sex of one’s intended spouse are analogous to laws that limited marriage rights based on the race of one’s intended spouse. *Loving* will ultimately be a difficult case for same-sex marriage opponents to distinguish. Regardless of the ultimate outcome of a future challenge to state same-sex marriage bans, *Windsor*’s citation of *Loving* emphasizes the primacy of fundamental individual marriage rights over discriminatory state and federal laws, setting the stage for a future marriage equality determination.

18. *Id.* at 2692 (emphasis added) (citing *Romer*, 517 U.S. at 633) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

19. *Windsor*, 133 S. Ct. at 2692.

20. *Id.* at 2691 (emphasis added) (citations omitted).

21. 388 U.S. 1, 12 (1967).

An additional thing that *Windsor* is not is a case limited in focus to plaintiffs of the common marrying age, unlike the typical plaintiffs in marriage rights cases. Challenges to laws denying marriage equality have historically been brought by individuals at a point in their lives when they are seeking to wed the person of their choice.²² *Windsor*, in contrast, has a broader focus, extending its analysis to the impact of marriage rights denials on both the very old and the very young for whom marriage itself is out of reach, but who are nonetheless harmed by the denial of marriage equality. The role of children in the consideration of marriage equality issues is central to *Windsor* in ways that will be explored in more depth in this Article. As for the elderly, the main characters in *Windsor*, Edie Windsor and the late Dr. Thea Spyer, were a sympathetic, life-long, lesbian couple whose love story spanned forty-four years.²³ Unlike plaintiffs of past marriage cases, Edie did not go to court to try to marry her partner; the two had already married in Canada and had their marriage subsequently recognized as valid by their state of residence, New York.²⁴ Instead, the cause of action arose after Thea's death.

The bond between the couple was so strong that after her wife's death, Edie, grief-stricken, had a severe heart attack and was diagnosed with stress cardiomyopathy, or "broken heart syndrome."²⁵ Adding insult, indignity, and a monstrous tax bill to injury was the \$363,053 federal estate tax bill Edie received for the spousal estate, a bill she would not have received had she been widowed from a man rather than a woman.²⁶ Although the State of New York had recognized their marriage as valid, the IRS would not do the same, citing section 3 of the Defense of Marriage Act (DOMA) in its statement accompanying the tax bill.²⁷ The relief Edie sought in court was, consequently, not the right to get married

22. For example, *Loving* was brought by members of a married interracial couple who were Virginia residents lawfully wed in D.C. in 1958 but then criminally convicted under Virginia's miscegenation ban. *Loving v. Virginia*, 388 U.S. 1, 2-4 (1967). *Zablocki v. Redhail*, 434 U.S. 374 (1978), a successful challenge to a state law prohibiting noncustodial parents who are delinquent in child support payments from marrying, was brought by such an individual after he was denied a marriage license on the basis of back child support. *Id.* at 375-76. And in *Turner v. Safley*, 482 U.S. 78 (1987), a class of inmates hoping to marry successfully challenged a regulation prohibiting inmates from marrying other inmates or civilians without an official determination from a prison superintendent that there were compelling reasons to allow the marriage. *Id.* at 81-82.

23. Brief for Respondent at 1-2, *Windsor*, 133 S. Ct. 2675 (No. 12-307).

24. *Id.* at 3-5.

25. *Id.* at 4.

26. *Id.* at 4-5.

27. *Id.* at 5.

in the first place, but rather the right to survivor benefits after her spouse died.²⁸

Finally, rather than being a narrow opinion, *Windsor* has broad precedential value. The *Windsor* holding extends not just to the plaintiffs in that case, but also to other same-sex couples legally married across the country. The injustice remedied by *Windsor* was that of DOMA's sweeping deprivation of federal rights for legally married same-sex couples and their families. In that respect, the case serves to illustrate the vast reach (even beyond the grave, in Thea's case) of same-sex marriage restrictions and the harms emanating from them. Although its effects do not yet make whole those couples harmed by state laws that continue to deny equal marriage recognition, this Article explores how *Windsor's* doctrinal underpinnings ensure its inevitable application in a more sweeping equal marriage decision that will finally eliminate state-imposed injustices.

This Article ultimately reveals how *Windsor's* equal liberty emphasis portends that, in the future, members of same-sex couples will be accorded equal status, dignity, and protections for their unions, securing the Constitution's promises of equal protection for fundamental liberty interests. Although the Court could apply a heightened form of scrutiny in such a case, it is poised to rule that states lack even a rational basis to enact same-sex marriage bans denying basic protections and respect to same-sex couples and their families. For all of the recent jurisprudential evolutions in this area, the Constitution's equal liberty principles will inevitably serve as the bedrock for the equal protection of same-sex marriage rights. The precedent of *Windsor*—along with the two previous Supreme Court decisions protecting equal liberty for LGBT individuals, *Romer* and *Lawrence*—paves the path for full marriage equality.

28. A final commentary about what *Windsor* is not: *Windsor* is not just about the substantive constitutional issues at play but is also largely a procedural decision, pertaining in part to whether members of Congress could intervene after the Obama administration declared its intent not to defend the statute. The Court ruled, in short, that it had jurisdiction to grant certiorari and hear “the capable defense of the law by BLAG” (the congressional group) because “the prudential and Article III requirements are met here; and, as a consequence, the Court need not decide whether BLAG would have standing to challenge the District Court’s ruling and its affirmance in the Court of Appeals on BLAG’s own authority.” *Windsor*, 133 S. Ct. at 2688. This Article is not, however, about that jurisdictional holding of *Windsor*. Further, this Article does not address, other than in passing, the companion case to *Windsor*, *Hollingsworth v. Perry*, which vacated the court of appeals’ ruling due to lack of standing, leaving in place the district court’s decision striking down California’s Proposition 8, which had banned same-sex marriage in that state. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

II. THE MARRIAGE OF LIBERTY AND EQUAL PROTECTION (AND SAME-SEX COUPLES) IN *UNITED STATES V. WINDSOR*

A. *Understanding Windsor as an “Equal Liberty” Opinion*

For all that *Windsor* is not—a decision founded on federalist principles, a broad decision that explicitly affirms the constitutional right of all LGBT American citizens to marry the person of their choice, or a decision too narrow to lead to a future affirmation of same-sex marriage equality—the decision is remarkable for all that it is.

As a doctrinal matter, a significant part of *Windsor*’s precedential strength and import turns on the “equal liberty” underpinnings of the court’s analysis and holding. Although *Windsor* does not recite the precise phrase “equal liberty,” the case unifies principles of equal protection and liberty, and it contains critical discussions of the symbiotic relationship between the two interrelated sources of constitutional protections. *Windsor*’s treatment of equal liberty principles commences with its explanation that state powers are not absolute or superior to individual rights, but are restrained by the Constitution’s promises of individual liberties, including the equal protection guarantees of the Fifth Amendment’s Due Process Clause.²⁹

The Court’s adoption of an equal liberty framework as the foundation for its analysis in *Windsor* is most immediately evident in its statement, “The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.”³⁰ Elaborating on how equal protection is subsumed by the Due Process Clause, *Windsor* continues, “While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.”³¹ Further elucidating the symbiotic relationship between liberty and equality, the Court held that by injuring the very class of persons whose rights and interests a state had sought to protect through same-sex marriage, DOMA “violates basic due process and equal protection principles applicable to the Federal Government.”³²

29. *Windsor*, 133 S. Ct. at 2695.

30. *Id.* (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217-218 (1995); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954)).

31. *Id.*

32. *Id.* at 2693.

Following past decisions admonishing that “[t]he Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group,”³³ *Windsor* concludes that “DOMA cannot survive under these principles,” because of how DOMA singles out same-sex couples for disapproval and the deprivation of benefits and responsibilities, evidencing unconstitutional animus-driven intent.³⁴ “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 explained, which unconstitutionally interferes with the “equal dignity of same-sex marriages.”³⁵ As further evidence of the unconstitutionally discriminatory purpose of DOMA, the Court quoted a number of passages from the House Report accompanying Congress’s DOMA debate, including a damning statement explicitly setting forth the animus-driven intent underlying DOMA: “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.’”³⁶ The Court elaborated that “the title and dynamics” of DOMA indicate that the statute was intended “to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law.”³⁷ Such second-class subjugation “raises a most serious question under the Constitution’s Fifth Amendment,” implicating both equal protection and liberty deprivations.³⁸

Rebuking DOMA’s violation of equal protection and liberty in the strongest of terms, the Court condemned DOMA’s subjugation of married same-sex couples, explaining, “DOMA writes inequality into the entire United States Code” and its “principal effect is to identify a subset of state-sanctioned marriages and make them unequal.”³⁹ Eloquently and empathetically acknowledging the profound impact of liberty deprivations on personal autonomy, the Court continued:

33. *Id.* (citing *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973)).

34. *Id.*

35. *Id.*

36. *Id.* (citing H.R. REP. No. 104-664, pp. 15-16 (1996)).

37. *Id.* at 2693-94.

38. *Id.* at 2694.

39. *Id.*

Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex 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 position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify.⁴⁰

Based on its finding “that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage,” the Court concluded that DOMA is invalid, with no legitimate purpose outweighing DOMA’s illegitimate intent and effect of disparaging and injuring same-sex couples “whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.”⁴¹

With its underlying themes of equal dignity, respect, and freedom from stigmatizing second-tier status, *Windsor* affirms powerful protections for same-sex married couples in this country. Moreover, it is a case with tremendous precedential promise, due to the powerfully framed recognitions of these broader principles throughout the opinion.

For generations to come, same-sex couples will certainly invoke *Windsor*’s rigorous substantive assurances that the Constitution’s equal protection of personal liberties extends to respect for intimate same-sex unions. The *Windsor* decision creates a bridge between past cases that embraced equal liberty principles and future equal liberty cases for which it provides additional precedential support.

At least one federal court identifies *Windsor* as an “equal liberty” case and has followed its precedent to extend federal benefits previously denied to same-sex couples. In *Cozen O’Connor, P.C. v. Tobits*, the United States District Court for the Eastern District of Pennsylvania

40. *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558, 558 (2003)).

41. *Id.* at 2695-96.

explained that the issue in that case was whether the Court's decision in *Windsor*, "declaring Section 3 of the Defense of Marriage Act unconstitutional *as a deprivation of the equal liberty* of persons that is protected by the Fifth Amendment, requires recognition of a valid Canadian same-sex marriage for purposes of benefits distribution pursuant to ERISA, a federal statute."⁴² The district court answered that question in the affirmative.⁴³

Tobits' description of *Windsor* as an "equal liberty" opinion is fitting, even though the majority opinion of *Windsor* does not itself contain the phrase "equal liberty." Perhaps it is the case that Justice Kennedy intentionally avoided using the same "equal liberty" nomenclature that has been articulated as the doctrinal basis for only one other recent Supreme Court decision, *Stenberg v. Carhart*, in which the Court struck down a so-called partial-birth abortion ban, with Justice Kennedy dissenting.⁴⁴ Regardless of why the Court in *Windsor* did not similarly employ the exact "equal liberty" nomenclature, it was through the employment of equal liberty principles that the Court recognized the due process liberty interests in that case as subsuming equal protection of the laws, resulting in a fundamental right with both liberty and equality components. Furthermore, as will be explained in Part III.A, equal liberty, although relatively new in judicial nomenclature, is a unifying doctrine central to a number of personal liberty and equal citizenship cases and a well-established underlying constitutional principle deeply rooted in the nation's history and traditions.

42. No. CIV.A. 11-0045, 2013 WL 3878688, at *1 (E.D. Pa. July 29, 2013) (emphasis added).

43. *Id.* at *5.

44. 530 U.S. 914, 920-21 (2000) ("We again consider the right to an abortion. We understand the controversial nature of the problem. Millions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child; they recoil at the thought of a law that would permit it. Other millions fear that a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of *equal liberty* and leading those with least resources to undergo illegal abortions with the attendant risks of death and suffering. Taking account of these virtually irreconcilable points of view, aware that constitutional law must govern a society whose different members sincerely hold directly opposing views, and considering the matter in light of the Constitution's guarantees of fundamental individual liberty, this Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose." (emphasis added) (citations omitted)).

B. Evolving Tiers of Scrutiny

1. Heightened Scrutiny for Sexual Orientation?

Windsor is also significant for its continuation of a trend toward evolving and collapsing tiers of scrutiny in Fourteenth Amendment cases. Although the Court did not end up resolving the issue of whether sexual orientation should be accorded heightened scrutiny, the question was raised in *Windsor* by the Department of Justice’s unprecedented 28 U.S.C. § 530D⁴⁵ letter expressing both its decision not to defend DOMA’s constitutionality and the Department’s position that legislative classifications based on sexual orientation should be accorded heightened scrutiny.⁴⁶ Citing cases including *Lawrence*, *Romer*, and *City of Cleburne v. Cleburne Living Center*,⁴⁷ the Department of Justice stated that heightened scrutiny should apply to sexual orientation classifications because, considering the four factors that generally apply in determining whether heightened scrutiny should be accorded, (1) there is “a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today”; (2) there is a growing consensus within the scientific community that sexual orientation is an immutable characteristic; (3) LGBT individuals have “limited political power,” as evidenced by a number of discriminatory

45. 28 U.S.C. § 530D provides in relevant part:

(a) Report.—

(1) In general.—The Attorney General shall submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice—

....

(ii) refrain[s] (on the grounds that the provision is unconstitutional) from defending or asserting, in any judicial, administrative, or other proceeding, the constitutionality of any provision of any Federal statute, rule, regulation, program, policy, or other law, or not to appeal or request review of any judicial, administrative, or other determination adversely affecting the constitutionality of any such provision

....

(d) Declaration.—In the case of a determination described in subsection (a)(1)(B), the representative of the United States participating in the proceeding shall make a clear declaration in the proceeding that any position expressed as to the constitutionality of the provision involved is the position of the executive branch of the Federal Government (or, as applicable, of the President or of any executive agency or military department).

46. Letter from Eric Holder, Att’y Gen., to Congress Regarding Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>, archived at <http://perma.cc/G8RN-KZFH>.

47. 473 U.S. 432 (1985).

laws; and (4) “there is a growing acknowledgment that sexual orientation ‘bears no relation to ability to perform or contribute to society.’”⁴⁸ The letter continued, “[T]he President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny.”⁴⁹

This momentous statement by the executive branch helped support the United States Court of Appeals for the Second Circuit’s conclusion in *Windsor*, which held that “homosexuals compose a class that is subject to heightened scrutiny” and “that the class is quasi-suspect.”⁵⁰

The recognition that classifications based on sexual orientation should be subject to heightened scrutiny is historically significant. This position is taken by the Second Circuit and the Department of Justice and is in accord with a number of recent court decisions across the country. Other courts that have similarly applied heightened scrutiny to discrimination against same-sex couples or LGBT individuals, primarily in equal protection cases, have included the United States District Court for the District of Connecticut, the United States District Court for the Northern District of California, the Connecticut Supreme Court, and the Supreme Court of Hawaii.⁵¹ These decisions recognizing the applicability of heightened scrutiny to sexual orientation indicate an evolution in standards of scrutiny that contrasts with previous cases in which courts declined to accord heightened scrutiny to sexual orientation.⁵²

48. Letter from Eric Holder, Att’y Gen., to Congress, *supra* note 46 (citations omitted).

49. *Id.*

50. *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *aff’d*, 133 S. Ct. 2675 (2013).

51. See *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 333 (D. Conn. 2012) (“Having considered all four factors, this Court finds that homosexuals display all the traditional indicia of suspectness and therefore statutory classifications based on sexual orientation are entitled to a heightened form of judicial scrutiny.”); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 989 (N.D. Cal. 2012) (“[H]aving analyzed the factors, the Court holds that the appropriate level of scrutiny to use when reviewing statutory classifications based on sexual orientation is heightened scrutiny.”); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (“[G]ays and lesbians are the type of minority strict scrutiny was designed to protect.”); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (declaring laws limiting civil marriage to opposite-sex couples unconstitutional and ruling that sexual orientation should be deemed a quasi-suspect class); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

52. See, e.g., *Hernandez v. Robles*, 805 N.Y.S.2d 354, 361 (App. Div. 1st Dep’t 2005), *aff’d*, 855 N.E.2d 1, 34 (2006) (“Sexual orientation is not subject to one of the stricter equal protection analyses.”) (citations omitted); *Andersen v. King County*, 138 P.3d 963, 976 (Wash. 2006) (“In light of the lack of a sufficient showing of immutability and the overwhelming

The application of heightened scrutiny to laws targeting LGBT citizens honors the reality that, historically, LGBT individuals, like other suspect and quasi-suspect classes, have faced discrimination while lacking the power to protect themselves. As a matter of equal citizenship, the Constitution prohibits the denigration of entire classes of people to second-class status on the basis of disfavored traits.⁵³ The application of a heightened degree of scrutiny in review of such laws can go a long way toward remedying the injustices and the debilitating effects of societal prejudice.

Despite the stage having been set by these developments, the Supreme Court ultimately punted on the issue of whether sexual orientation should be accorded heightened scrutiny, not directly addressing the substance of that argument in *Windsor*. However, the issue is now squarely on the table, ripe for determination in a future case.⁵⁴

authority finding that gay and lesbian persons are not a suspect class for purposes of the equal protection clause, we decline to conclude that gay and lesbian persons constitute an inherently suspect class for purposes of article I, section 12.”).

53. See Kenneth Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 8 (1977).

54. Another issue not addressed in *Windsor* is whether sexual orientation discrimination can be treated as a form of sex discrimination, another additional way of triggering heightened scrutiny. As a bisexual person, it always frustrates me when this argument is not made or considered, as it seems clear to me that the denial of marriage rights is, as recognized in the historic *Baehr v. Lewin* Hawaii Supreme Court decision and in other decisions since, a form of sex discrimination. One of the clearest illustrations of why the denial of marriage equality is a form of sex discrimination is this: if I were to apply for a marriage license in my state, Indiana, which prohibits same-sex marriage, and if, in the process, I announced to the clerk issuing marriage licenses that I am bisexual and want to marry a man, my state would allow me to do so. If, on the other hand, I were to approach the clerk with the statement that I am bisexual and want to marry a woman, I would be refused a marriage license. The only thing that would have changed is the sex of the person I want to marry, and not my sexual orientation, which was bisexual all along. Thus, the denial of marriage equality for same-sex couples is a form of sex discrimination, based on the sex of those in the partnership, and not, necessarily, on sexual orientation. It is my hope that the Court will engage in an analysis of this issue in a future decision. As Professor David Cruz has pointed out to me, Justice Kennedy did indicate receptiveness toward the sexual orientation-as-gender discrimination approach in his questioning during the *Hollingsworth v. Perry* oral argument when he asked, “Do you believe this can be treated as a gender-based classification? . . . It’s a difficult question that I’ve been trying to wrestle with it.” Transcript of Oral Argument at 13, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144a.pdf, archived at <http://perma.cc/C662-FXNG>.

2. Rational Basis Bites Back: Freedom from Government Animus-Driven Subordination and Indignity⁵⁵

While declining to definitively resolve whether sexual orientation should be treated as a suspect or quasi-suspect class, the Supreme Court in *Windsor* arguably applied a form of heightened scrutiny, or at least a more searching form of scrutiny, than the traditionally deferential rational basis review. At a minimum, the Court laid a foundation for a more explicit affirmation of heightened scrutiny's applicability to sexual orientation discrimination in the future.

In its *Windsor* decision, ultimately affirmed by the Supreme Court, the district court explained that two distinct forms of rational basis review have emerged in recent cases:

The Supreme Court's equal protection decisions have increasingly distinguished between "[l]aws such as economic or tax legislation that are scrutinized under rational basis review[, which] normally pass constitutional muster," and "law[s that] exhibit[] . . . a desire to harm a politically unpopular group," which receive "a more searching form of rational basis review . . . under the Equal Protection Clause. . . ." It is difficult to ignore this pattern, which suggests that the rational basis analysis can vary by context.⁵⁶

This description mirrors the language in the Department of Justice's § 530D letter (citing *Lawrence*, *Romer*, and *Cleburne*) and quotes language from Justice O'Connor's concurrence in the last LGBT rights case to be decided by the Supreme Court.⁵⁷ In *Lawrence v. Texas*, Justice O'Connor distinguished between (1) cases entitled only to the traditionally deferential rational basis standard of review and (2) cases including *Lawrence*, *Romer*, *Moreno*, and *Cleburne*.⁵⁸ Closely tracking the analysis in an amicus brief submitted by constitutional law professors in *Lawrence*, O'Connor identified the latter group of cases as calling for "a more searching form of rational basis" due to the illegitimate

55. This Part on the evolving "rational basis with bite" standard is a further development of the more detailed discussion of the issue in a previous article. See Nancy C. Marcus, *Beyond Romer and Lawrence: The Right to Privacy Comes out of the Closet*, 15 COLUM. J. GENDER & L. 355, 378-82 (2006) ("Changing Standards of Review: Rational Basis Bites Back").

56. *Windsor v. United States*, 833 F. Supp. 2d 394, 402 (S.D.N.Y. 2012) (citations omitted) (quoting *Lawrence v. Texas*, 539 U.S. 579-80 (2003) (O'Connor, J., concurring)), *aff'd*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013) (emphasis added).

57. *Lawrence*, 539 U.S. at 579-80.

58. *Id.*

government objectives involved and the personal nature of the relationships being targeted in those cases.⁵⁹

Although the majority in *Windsor* failed to specify exactly which standard of scrutiny it was applying, it can reasonably be concluded that it was at least applying the type of “more searching form” of scrutiny recognized by the district court in *Windsor* and by Justice O’Connor in her *Lawrence* concurrence. While this higher level of scrutiny has not yet been fully defined by the Court, it has been the subject of substantial attention and speculation, with lower courts and other Supreme Court watchers often dubbing it “rational basis with bite.”⁶⁰

To better understand how this new “searching” form of rational basis with bite has evolved, it is helpful to step back and look at the history of tiered, classification-based review in Fourteenth Amendment cases. As I have previously described, the three-tiered model of the late twentieth century was derived from an older two-tiered model, under which courts applied “strict scrutiny” review to only those claims involving “suspect classifications” or fundamental rights and “rational basis” to all other cases; Professor Gerald Gunther famously denounced this system as an overly rigid two-tiered system resulting in scrutiny that was either “‘strict’ in theory and fatal in fact,” or deferential to an

59. *Id.* at 580 (internal quotation marks omitted); see Brief of Constitutional Law Professors Bruce A. Ackerman et al. as Amici Curiae Supporting Petitioners, at 4, 18-26, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), archived at <http://perma.cc/BTW2-WWQX>.

60. See, e.g., *Am. Exp. Travel Related Servs. Co., Inc. v. Kentucky*, 641 F.3d 685, 692 (6th Cir. 2011) (describing *Cleburne*, *Moreno*, and *Romer* as “rational basis with a bite” decisions); *Powers v. Harris*, 379 F.3d 1208, 1223 n.21 (10th Cir. 2004) (describing “higher-order rational-basis review”); *Dairy v. Bonham*, No. C-13-1518 EMC, 2013 WL 3829268, at *7 n.4 (N.D. Cal. July 23, 2013) (describing *Romer* and *Cleburne* as cases involving “rational basis with a bite”); *Gallagher v. City of Clayton*, No. 4:11-CV-392 CAS, 2011 WL 6140905 (E.D. Mo. Dec. 9, 2011), *aff’d*, 699 F.3d 1013 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 2354 (2013) (describing how plaintiffs interpret Supreme Court precedent to establish a more stringent form of rational basis review and assuming the existence of rational basis with bite to be true in that case); *Walmart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 1023, 1038 n.6 (E.D. Cal. 2007) (recognizing the approach of *Cleburne* and *Romer* as “rational basis with bite”); *Conaway v. Deane*, 932 A.2d 571, 604-05 (Md. App. 2007) (describing other cases involving the Supreme Court’s evolving application of “rational basis with bite” to certain classifications); ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 673-80 (3d ed. 2006) (“The claim is that in some cases where the Court says that it is using rational basis review, it is actually employing a test with more ‘bite’ than the customarily very deferential rational basis review The claim is that there is not a singular rational basis test but one that varies between complete deference and substantial rigor.”); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 759-60 (2011) (“[A]pplications [of rational basis in *Moreno*, *Cleburne*, and *Romer*] depart from the usual deference associated with rational basis review. For this reason, commentators have correctly discerned a new rational basis with bite standard in such cases.”).

extreme, “with minimal scrutiny in theory and virtually none in fact.”⁶¹ Gunther predicted that the Court’s equal protection standards would evolve beyond a “traditionally toothless minimal scrutiny standard.”⁶² The evolution Gunther predicted subsequently began with the Court’s development of intermediate scrutiny for quasi-suspect classes such as gender, but was more fully manifested through the *Moreno* and *Cleburne* line of cases, including the *Romer* and *Lawrence* decisions, which collectively revealed a new type of rational basis with bite in place of the traditionally deferential and comparatively toothless rational basis standard.⁶³

The common link between *Moreno*, *Cleburne*, *Romer*, and *Lawrence*, resulting in each being a successful rational basis challenge even absent suspect or quasi-suspect class designation is, in part, the highly suspect government objective involved in each combined with the personal relationships being targeted. As Justice O’Connor recognized in her *Lawrence* concurrence:

We have consistently held, however, that some objectives, such as “a bare . . . desire to harm a politically unpopular group,” are not legitimate state interests. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.

We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships. In *Department of Agriculture v. Moreno*, for example, we held that a law preventing those households containing an individual unrelated to any other member of the household from receiving food stamps violated equal protection because the purpose of the law was to “discriminate against hippies.” . . . Likewise, in *Cleburne v. Cleburne Living Center*, we held that it was irrational for a State to require a home for the mentally disabled to obtain a special use permit when other residences—like fraternity houses and apartment buildings—did not have to obtain such a permit. And in *Romer v. Evans*, we disallowed a state statute that “impos[ed] a broad and undifferentiated disability on a single named group”—specifically, homosexuals.⁶⁴

61. Marcus, *supra* note 55, at 379 (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8, 18-19 (1972)).

62. *Id.* (internal quotation marks removed).

63. *See id.*

64. *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring) (citations omitted) (quoting *Moreno*, 413 U.S. at 534-38; *Cleburne*, 473 U.S. at 446-47; *Romer*, 517 U.S. at 632).

In *Romer*, the Court had similarly declined to bestow deference upon animus-driven legislation, instead striking down the antigay state constitutional amendment in that case and ruling that “[i]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest,” even under a rational basis level of scrutiny.⁶⁵ The Court in *Romer* consequently concluded that the amendment, which targeted gay citizens for the denial of all civil rights protections in the state of Colorado, raised an inference of animus-motivated legislation because a “State cannot so deem a class of persons a stranger to its laws.”⁶⁶ The Court in *Romer* engaged in a less deferential form of rational basis review due to the sweeping deprivation of rights in that case coupled with the government’s suspect motive in singling out LGBT citizens.⁶⁷ In applying a more potent form of rational basis review, *Romer* brought together a line of cases, including *Cleburne* and *Moreno*, that similarly struck down discriminatory laws, even under the traditionally deferential rational basis review.⁶⁸

Likewise, in *Lawrence*, addressing the unconstitutionality of a sodomy statute targeting gays for criminal prosecution, the Court did not confine itself to the traditional tiers of scrutiny; rather, as I have previously described, “[T]he Court focused on the substance of the claims, treating with little deference anti-gay legislation that would deny equal citizenship rights to those stigmatized by such laws.”⁶⁹ In cases following *Lawrence*, some courts have similarly concluded that *Lawrence* applied a searching or heightened form of scrutiny.⁷⁰ In *United States v. Marcum*, for example, the United States Court of Appeals for the Armed Forces recognized that “the Supreme Court placed *Lawrence* within its liberty line of cases resting on the *Griswold* [*v. Connecticut*]⁷¹ foundation. These cases treated aspects of liberty and privacy as fundamental rights, thereby . . . subjecting them to the compelling interest analysis.”⁷²

65. *Romer v. Evans*, 517 U.S. 620, 634 (1996) (quoting *Moreno*, 413 U.S. at 534).

66. *Id.* at 635.

67. See Marcus, *supra* note 55, at 380-81.

68. *Id.* at 380.

69. See *id.* at 381.

70. See *Witt v. Dep’t of Air Force*, 527 F.3d 806, 816 (9th Cir. 2008); *United States v. Marcum*, 60 M.J. 198, 205 (C.A.A.F. 2004).

71. 381 U.S. 479 (1965).

72. *Marcum*, 60 M.J. at 204 (citations omitted). For additional discussion of both the *Griswold* line of liberty cases and cases that continue to impose a more deferential form of rational basis review, see Marcus, *supra* note 55, at 373-78, 409-10.

Although *Lawrence* is a substantive due process rather than equal protection case, unlike *Cleburne*, *Moreno*, and *Romer*, the decision nonetheless underscores the synergistic relationship between equal protection and liberty, applying stronger scrutiny to LGBT-focused liberty deprivations in a manner that parallels the application of more searching forms of rational basis review in equal protection cases. Professor Kenneth Karst has explained:

A prominent theme in the commentary on *Lawrence* is the Court's refusal to stick closely to categorical distinctions among strict or intermediate or mere rationality judicial scrutiny of laws invading rights or liberties. Some of the commentators see *Lawrence* as part of a recent trend away from such categories in the contexts of both equal protection and substantive due process.⁷³

This pattern of evolving levels of scrutiny and the corresponding collapsing of traditional tiers of review has continued in *Windsor*. As in *Lawrence*, the Court in *Windsor* did not explicitly name the level of scrutiny it was applying. However, the Court's refusal to defer to federal legislation that it concluded was driven by discriminatory intent contains echoes of past cases in which the Court applied rational basis with bite. At a minimum, the Court in *Windsor* was clear that whatever type of searching scrutiny to which it subjected DOMA was the same type of scrutiny employed in *Romer*; that is, one that requires "careful consideration."⁷⁴ "The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import," and the denial of that right by federal statute constitutes, as in *Romer v. Evans*, the type of "[d]iscrimination[] of an unusual character [that] especially suggest[s] careful consideration to determine whether [it is] obnoxious to the constitutional provision."⁷⁵

So what triggered this more "careful consideration," this more "searching" form of scrutiny with teeth, that was employed in *Windsor*, *Romer*, and *Lawrence* alike? Each of these cases pertaining to the treatment of LGBT individuals emphasized the importance of dignity

73. Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 137-38 (2007); see also Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 511 n.117 (2004) (focusing on O'Connor's concurrence in *Lawrence*).

74. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013).

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

and freedom from animus-driven subjugation. Echoing the themes of equal status before the law from *Romer* as well as equal dignity in one's intimate relationships as affirmed in *Lawrence*, the Court in *Windsor* wrote:

DOMA undermines both the public and private significance of state sanctioned same-sex 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 position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects and whose relationship the State has sought to dignify.⁷⁶

A related recurring theme throughout the three cases is the relationship between equal dignity or status—a protected liberty interest in the context of intimate life choices and partners—and the unconstitutionality of government-imposed class-based indignity or stigma.⁷⁷ “Just as *Romer* prohibits state-imposed animus or stigma toward gays and bisexuals,” I have previously explained, “*Lawrence* establishes the right of gay and bisexual people to be affirmatively accorded respect and dignity.”⁷⁸

Ten years to the date after *Lawrence*, the reciprocal roles of dignity and indignity central to *Romer* and *Lawrence* reemerged in *Windsor*'s description of the “injury and indignity” created by DOMA, which the Court understood to be “a deprivation of an essential part of the liberty protected by the Fifth Amendment.”⁷⁹ Citing the *Lawrence*, *Romer*, and *Moreno* line of cases, the Court explained:

By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. . . .

DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. 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

76. *Id.* at 2694 (citation omitted).

77. Marcus, *supra* note 55, at 357.

78. *Id.*

79. *Windsor*, 133 S. Ct. at 2692.

that group. In determining whether a law is motivated by an improper animus or purpose, “[d]iscriminations of an unusual character” especially require careful consideration. DOMA cannot survive under these principles. . . . 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.⁸⁰

Building upon such foundations solidified through continued affirmation of equal dignity and citizenship, the Court strongly condemned the animus-driven DOMA, reminiscent of its strong rebukes of Amendment 2 in *Romer* and antigay sodomy laws in *Lawrence*. After examining a legislative history that the Court viewed as intending to accomplish “interference with the equal dignity of same-sex marriages,” the Court decried DOMA’s purpose of imposing inequality and ensuring that same-sex marriages are subjugated as second-class marriages.⁸¹

Comparing this imposition of unequal protection of the laws under DOMA to the per se equal protection violation created by the constitutional amendment in *Romer*, one should recognize that equally at play in *Windsor* are the principles underlying the Court’s adamant statement in *Romer* that “[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”⁸²

Regardless of the label given to the level of scrutiny accorded DOMA in *Windsor*, the Court unreservedly expressed condemnation for DOMA, as it has for past discriminatory laws with primary purposes and effects of singling out classes of persons and imposing upon them a second-class status. The Court has established that under any standard of review, such discrimination by the government is not entitled to deference under the Constitution. This final point, that even under the most traditionally deferential standard of rational basis review, proponents of same-sex marriage bans have failed to articulate any rational type of basis at all, will be fleshed out more in the following section.

80. *Id.* at 2693 (citations omitted).

81. *Id.*

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

III. FROM FIFTH AMENDMENT LIBERTY PROTECTIONS TO FOURTEENTH AMENDMENT PROTECTIONS

As the Supreme Court's first affirmation of same-sex marriage rights under the Constitution, *Windsor* is certain to provide the primary foundation for a future marriage equality challenge brought under the Fourteenth Amendment. When that Fourteenth Amendment same-sex marriage case finally arrives at the Court's marble steps, it will likely be framed as an equal protection claim, building upon the equal protection analyses and holdings of *Windsor* and *Romer*.

A future marriage equality case may also include, however, a substantive due process claim under the Fourteenth Amendment, following *Lawrence* and past decisions affirming the right to marry the person of one's choice as a fundamental right. *Windsor* will provide particularly potent precedential power if both its equality and liberty components are incorporated into a future Fourteenth Amendment claim, which should translate into a case with both equal protection and substantive due process claims.⁸³ Whereas the doctrinal foundation of the *Romer* decision was equal protection and the doctrinal basis of *Lawrence* was more liberty-focused, the *Windsor* opinion weaved the two threads together into a more comprehensive tapestry of Fifth Amendment protections, thereby strengthening the single strands of each into a sturdy braid of justice-based equal liberty.

The equality piece transfers smoothly enough between *Windsor*—a Fifth Amendment case that explicitly applies an equal protection analysis—and the Fourteenth Amendment cases that preceded and will follow it. For example, the Court in *Windsor* concluded that because DOMA has “the principal purpose and the necessary effect” of singling out members of same-sex marriages for the demeaning deprivation of numerous federal protections for marriage, the statute “is unconstitutional as a deprivation of the liberty of the person protected by

83. Substantive due process remains the most well-established doctrinal locus for substantive liberty protections under the Fourteenth Amendment, despite some having questioned its value. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (“Substantive due process has at times been a treacherous field for this Court.”); CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* 3, 100-01 (1997) (“This paradoxical, even oxymoronic phrase—‘substantive due process’—has been inflated into a patched and leaky tire on which precariously rides the load of some substantive human rights not named in the Constitution . . . this non-concept rests on insufficient commitment, and has too little firm meaning (if it has any at all) to beget the kind of confidence, in judges or in others, that ought to underlie the regime of human rights.”); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1020 (1984).

the Fifth Amendment of the Constitution.”⁸⁴ This statement parallels Justice Kennedy’s previous statement in *Romer*:

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. “Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.” Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.⁸⁵

Thus, in a future marriage equality case, the Court could apply a similar equal protection analysis to strike down state same-sex marriage bans and hold that because the bans have the “principal purpose and the necessary effect”⁸⁶ of singling out members of same-sex couples for the demeaning deprivation of numerous federal and state marriage protections, making it more difficult for LGBT citizens than for all others to seek those rights and benefits, such bans amount to “a denial of equal protection of the laws in the most literal sense.”⁸⁷

While the parallel equal protection analyses between *Windsor* and past cases are clear, *Windsor* does not apply a substantive due process analysis that clearly parallels past substantive due process cases. Instead, *Windsor* speaks in general terms about liberty interests, touching upon substantive due process themes without applying a formal, or even nominal, substantive due process analysis. That said, the rest of this Part will examine how *Windsor*’s equal liberty analysis could nonetheless

84. *Windsor*, 133 S. Ct. at 2695.

85. *Romer*, 517 U.S. at 633-34 (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950); *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).

86. *Windsor*, 133 S. Ct. at 2695.

87. *Romer*, 517 U.S. at 633. Justice Scalia’s *Romer* dissent pointed out a logical disconnect between this holding of *Romer* and the then still-binding precedent of *Bowers*, which allowed for the de facto criminalization of homosexuality, quoting the D.C. Circuit Court of Appeals:

If the Court [in *Bowers*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open . . . to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.

Romer, 517 U.S. at 641 (Scalia, J., dissenting) (quoting *Padula v. Webster*, 822 F.2d 97, 103 (1987)). However, this logical incongruence was remedied when the court overruled *Bowers* in *Lawrence*.

translate into a successful substantive due process claim, with the fundamental rights and liberty interests at issue triggering strict scrutiny review by the Court. This Part further concludes with a description of how *Windsor* alternatively provides the foundation to strike down marriage equality bans under any level of scrutiny.

A. *Equal Liberty as a “Deeply Rooted” Principle for Substantive Due Process Purposes*

Although the Court did not employ explicit “fundamental rights” or “substantive due process” nomenclature in *Windsor*, its analysis of liberty protections parallels that in past substantive due process cases. For example, one can see similarities between *Windsor*’s strong language honoring the integrity of same-sex marriages⁸⁸ and *Lawrence*’s powerful and empathetic affirmation that due process liberty protections include “freedom of thought, belief, expression, and certain intimate conduct” and that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”⁸⁹ In this respect, Justice Scalia’s prediction in his dissent to *Lawrence* that the same principles upon which the majority opinion of that case rested would reemerge in a future case affirming the recognition of same-sex marital unions did come to fruition:

[T]he Court says that the present case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court’s opinion, which notes the constitutional protections afforded to “personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education,” and then declares that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.” Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct; and if, as the Court coos (casting aside all pretense of neutrality), “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,” what justification could there possibly be for denying the benefits of marriage to

88. See *Windsor*, 133 S. Ct. at 2692-93.

89. *Lawrence v. Texas*, 539 U.S. 558, 562, 574 (2003) (internal quotation marks omitted).

homosexual couples exercising “[t]he liberty protected by the Constitution?” Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case “does not involve” the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.⁹⁰

Indeed, while not affirming marriage rights in that opinion,⁹¹ the Court in *Lawrence* nonetheless spoke in terms of the right of LGBT individuals and members of same-sex couples “to *demand* respect for conduct protected by the substantive guarantee.”⁹² This passage emphasizes the same type of respect for intimate relationships affirmed in *Windsor*,⁹³ indicating the Court’s likely inclination toward eventual universal marriage equality affirmation.⁹⁴ This affirmative respect that the Constitution demands for the type of intimate relationships protected in *Lawrence* could certainly be interpreted as including a right to respect through state-sanctioned marriage, and as demanding no less than equal marriage across the board for same-sex couples in the states, rather than the type of second-tier (or watered-down “skim milk”)⁹⁵ status and stigma decried by the Court as unconstitutional in both *Romer* and *Windsor*.

It is even more likely that the equal liberty principles of *Windsor* will translate to a substantive due process-based affirmation of same-sex marriage rights if the Court applies a heightened form of scrutiny in a substantive due process analysis. Even if the Court does not apply intermediate or strict scrutiny under the Fourteenth Amendment’s Equal Protection Clause in a future marriage equality case, the Court could

90. *Id.* at 604-05 (Scalia, J., dissenting) (citation omitted).

91. *But cf. Lawrence*, 539 U.S. at 578, 585. The majority opinion added the explicit disclaimer that that case did “not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter,” *id.* at 578, and Justice O’Connor’s concurrence more explicitly stated that, in her opinion, *Lawrence* did not necessarily lead to the full affirmation of marriage equality because “other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.” *Id.* at 585 (O’Connor, J., concurring).

92. *Lawrence*, 539 U.S. at 575 (emphasis added).

93. *See Windsor*, 133 S. Ct. at 2692 (“[Same-sex marriage] is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages.”).

94. *Lawrence*, 539 U.S. at 605.

95. During oral argument, Justice Ginsburg compared the watered-down version of partnership rights offered by states denying full marriage equality to skim milk: “It’s—it’s—as Justice Kennedy said, 1,100 statutes, and it affects every area of life. And so he was really diminishing what the State has said is marriage. You’re saying, no, State said two kinds of marriage; the full marriage, and then this sort of skim milk marriage.” Oral Argument at 70:35, *Windsor*, 133 U.S. 2675 (No. 12-307).

apply strict scrutiny under the Due Process Clause if it concludes that same-sex marriage bans implicate a fundamental right or liberty issue.

In *Washington v. Glucksberg*, the Court defined those fundamental rights or liberties protected under the strict scrutiny standard in substantive due process cases as carefully described fundamental liberty interests “‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”⁹⁶ In a case cited in *Glucksberg*, *Moore v. City of East Cleveland*, a plurality of the Court described the need in substantive due process cases to take stock of “the traditions from which [history] developed as well as the traditions from which it broke. That tradition is a living thing.”⁹⁷

While the institution of marriage has evolved over time, for the past half century courts have often identified the right to marry the person of one’s choice as a fundamental right entitled to strict scrutiny, with the roots of that recognition reaching back even further.⁹⁸ It has thus been consistent with traditional constitutional principles of autonomy and personal liberty that marriage protections have been extended to more categories of persons over time, with previous inequities associated with patriarchal and racially limited family structures diminishing as society has grown more enlightened.⁹⁹

In contrast with defining marriage in terms of these constant overarching principles honoring libertarian self-definition and freedom from government-sanctioned subordination, same-sex marriage opponents will, at times, frame the right to marry in isolation and more narrowly, for example, as whether the right of *homosexuals* to marry is deeply rooted in history, rather than in terms of the broader right to marry the person of one’s choice.¹⁰⁰ Such a narrow, classification-

96. 521 U.S. 702, 721 (1997) (citations omitted) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977)).

97. *Moore v. City of East Cleveland*, 431 U.S. 494, 501 (1977) (citing *Poe v. Ullman*, 367 U.S. 497, 542-43 (Harlan, J., dissenting)); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848-49 (1992) (plurality).

98. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 958 (Mass. 2003) (discussing the protection of the traditional principles of autonomy in affirming marriage rights in cases including *Loving v. Virginia*, and concluding that “the right to marry means little if it does not include the right to marry the person of one’s choice”).

99. See *supra* note 22 and accompanying text.

100. See, for example, the description by the Washington Superior Court of the party briefs in the same-sex marriage case *Andersen v. King County*, 04-2-04964-4-SEA, 2004 WL 1738447, at *5 (Wash. Super. Aug. 4, 2004), *rev’d*, 158 Wash. 2d 1, 138 P.3d 963 (2006): “There is a fundamental difference in the parties’ approach to identifying the putative fundamental right upon which this analysis should focus. Should the Court focus on the broad right to marry or should it, instead, focus on the more narrowly drawn right to marry someone of the same sex?”

specific articulation of rights is a flawed and inflammatory way to frame the issue, in the same way that the Court in *Lawrence* recognized that the overly narrow and condescending articulation of the right at issue in *Bowers* as a right of homosexuals to engage in sodomy was fundamentally flawed. Such narrow act- and class-focused articulations of broad rights trivialize the rights at issue and are counter to the Fourteenth Amendment's promise of equal protection of laws regardless of class.¹⁰¹ Additionally, such articulations embody a manipulative type of circular thinking. Specifically, the circular rationalization that a fundamental right that has historically been denied to a specific group may continue to be denied for no other reason than because it always *has* been is a substantively empty formulation. It fails to further the legitimate inquiry of the nature of the right at stake and whether a particular group may constitutionally be deprived of that right.

Courts have recognized the doctrinal mistake of defining fundamental rights in their narrowest terms since long before *Bowers*. The longstanding (that is, deeply rooted) methodology for identifying which unenumerated rights are accorded special protections has rejected an approach of defining rights in terms of specific actions. For example, in an 1823 case addressing whether states must allow citizens from others states to fish for shellfish in their own waters, a federal court dismissed an articulation of the right at stake as a right to fish for shellfish, redesignating the inquiry in terms of the Constitution's guarantee of fundamental citizenship rights involving trade and travel.¹⁰² Similarly, in his famous *Poe v. Ullman* dissent, Justice Harlan admonished:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on.¹⁰³

Rather, in a passage later quoted approvingly by a majority of the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v.*

101. See Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 140 (2007); Marcus, *supra* note 55, at 395-98 ("The Dangers of Act-Specific Fundamental Rights Nomenclature").

102. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1825); see also Marcus, *supra* note 55, at 395-98.

103. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (rejecting dismissal on jurisdictional grounds).

Casey, Harlan continued, “It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes . . . that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.”¹⁰⁴

Consequently, one of the grounds for the Court overturning *Bowers v. Hardwick* in *Lawrence* was the impermissibly narrow manner in which the Court in *Bowers* had identified the right at issue. The Court in *Lawrence* decried the *Bowers* majority’s formulation of the issue as whether there was a fundamental right of homosexuals to engage in sodomy, which evidenced the *Bowers* majority’s “failure to appreciate the extent of the liberty at stake.”¹⁰⁵ The Court further explained, “To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”¹⁰⁶

By extension, to say that the meaning of marriage is primarily dictated by the sex or sexual orientation of spouses is to demean the profound intimacy of couples who seek to wed and the deeper meaning of marriage and to misapprehend the full liberty interest at issue. As I have described in a previous article, there is substantial Supreme Court precedent establishing that marriage encompasses not just a right to be left alone, but a more positive and affirmative liberty interest demanding respect and recognition.¹⁰⁷

Thus, echoing similar themes in *Romer* and *Lawrence*, *Windsor* represents the continued evolution of the liberty interest in intimate life choices “from a negative right to be left alone [right to privacy] to a more comprehensive affirmative liberty interest in self-determination, autonomy, and respect.”¹⁰⁸

Looking more closely at the common libertarian themes among the LGBT rights Supreme Court decisions, *Lawrence* helped create the

104. *Id.* (citing *Allgeyer v. State of Louisiana*, 165 U.S. 578 (1897); *Holden v. Hardy*, 169 U.S. 366 (1898); *Booth v. People of State of Illinois*, 184 U.S. 425 (1898); *Nebbia v. People of State of New York*, 291 U.S. 502 (1934); *Skinner v. State of Oklahoma*, 316 U.S. 535, 544 (1942) (concurring opinion); *Schwartz v. Bd. of Bar Exam’rs*, 353 U.S. 232 (1957)); *see also* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848-49 (1992) (quoting *Poe*, 367 U.S. at 543). The *Casey* majority went on to explain that the Court had adopted this position by Justice Harlan in *Griswold v. Connecticut*. *Id.* at 849.

105. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986)).

106. *Id.*

107. Marcus, *supra* note 55, at 418.

108. *Id.* at 357.

framework for a future substantive due process affirmation of same-sex marriage rights by describing the liberty interests of LGBT individuals in their intimate relationships as part of a broader liberty interest with historic roots. For example, the Court, in overruling *Bowers*, expressly endorsed Justice Stevens' *Bowers* dissent,¹⁰⁹ which, in turn, stated:

[Choices about intimate relationships implicate] the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating "basic values," as being "fundamental," and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases.¹¹⁰

The theme of the right to autonomy in forming intimate relationships and determining one's own destiny with dignity similarly appears in *Lawrence*'s quotation of *Casey*, in which a plurality, including Justice Kennedy, wrote:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.¹¹¹

The fundamental liberty interest in personal autonomy described in *Lawrence* is substantially the same as the equal liberty described in *Windsor*, with both encompassing the right to self-definition and dignity in the formation of intimate relationships as well as the right to respect from the government for those relationships. This same liberty interest should ultimately be interpreted as encompassing equal marriage rights for same-sex couples across the country.

For substantive due process purposes, not only is the right to marry the person of one's choice a "deeply rooted" tradition in this country,¹¹² but the broader "equal liberty" interest that encompasses that right also

109. *Lawrence*, 539 U.S. at 578-79.

110. *Bowers*, 478 U.S. at 217 (Stevens, J., dissenting) (quoting *Fitzgerald v. Porter Mem'l Hosp.*, 523 F.2d 716, 719-20 (7th Cir. 1975), *overruled by Lawrence*, 539 U.S. 558).

111. *Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851).

112. See *Turner v. Safely*, 482 U.S. 78, 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

should be considered “deeply rooted” in the nation’s history and traditions. For example, the three other opinions in which the Supreme Court has recited the phrase “equal liberty” date back over a hundred years (one being from 1901, one from the nineteenth century, and the third from the eighteenth).¹¹³ Although the phrase was used only in passing by the Court to draw on general historic principles, the Court’s early use of the phrase and its citation to even earlier uses of the phrase in the nation’s founding demonstrate the longstanding nature of equal liberty as a deep-rooted principle in American history, although described over time in varying terms and contexts.

The deep roots of equal liberty in the traditions of our nation can be traced through other writings and historical documents. Long before the Pledge of Allegiance was altered to add the words “under God,” this nation’s original Pledge of Allegiance, as originally drafted in 1892, included language honoring principles of equal liberty and justice, reading: “I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all.”¹⁴

Equal liberty’s ancient roots have been traced back even farther by Professor Kenneth Karst, who has documented the historic tradition of equal liberty as follows:

[T]he various opinions in the tragic cases of *Hirabayashi v. United States* and *Korematsu v. United States* . . . reflected a tradition of equal liberty dating to ancient days.

And I do mean ancient. Aristotle not only specified both liberty and equality as necessary components of a democracy; he also referred to

113. See *City of Boerne v. Flores*, 521 U.S. 507, 552-56 (1997) (holding the Religious Freedom Restoration Act of 1993 unconstitutional after tracing the history of free exercise of religion). *Boerne* includes a description of James Madison’s proposed language for Virginia’s Declaration of Rights that “all men are equally entitled to the full and free exercise of [religion], according to the dictates of conscience; and therefore that no man or class of men ought on account of religion to be invested with peculiar emoluments or privileges, nor subjected to any penalties or disabilities, unless under color of religion the preservation of equal liberty, and the existence of the State be manifestly endangered.” *Id.* (citing Gaillard Hunt, *James Madison and Religious Liberty*, in 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION, H.R. DOC. No. 702, at 163, 166-167 (1901) (emphasis added)); see also *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 533 (1819) (quoting a 1769 letter from King George the Third to the trustees of Dartmouth College that mentioned, in passing, the “free and equal liberty and advantage of education” of students of all religious denominations); *Chisholm v. Georgia*, 2 U.S. 419, 472-73 (1793) (“In this land of equal liberty, shall forty odd thousand in one place be compellable to do justice, and yet fifty odd thousand in another place be privileged to do justice only as they may think proper? Such objections would not correspond with the equal rights we claim; with the equality we profess to admire and maintain, and with that popular sovereignty in which every citizen partakes.”).

114. See *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1031 (9th Cir. 2010) (citing *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004)).

equality as “one note of liberty which all democrats affirm to be the principle of their state.” This linkage has had strong staying power. Fast forward to 1215 and Magna Carta, which is widely seen as the source of the idea of due process of law as “the law of the land,” and also seen as contributing to the egalitarian strain in the American legal tradition. Then, consider the American colonial era: The Mayflower Compact promised “just and equall lawes . . . for the general good of the Colonie.” Jean Jacques Rousseau, in *The Social Contract*, echoed Aristotle’s dictum about equal enjoyment of the same rights. In the era of Rousseau, just before the American Revolution, one common complaint of the colonists was the refusal of the Crown and Parliament to afford Americans equal liberties—that is, “the rights of Englishmen.” Next, consider the founding of the Nation: When the Declaration of Independence celebrated equality, it was referring to equality of right. As George Fletcher puts it, the Declaration meant that all people “are equal among themselves precisely in that they possess inalienable rights—the same inalienable rights to ‘life, liberty, and the pursuit of happiness’ possessed by everyone else.”¹¹⁵

Considering the long history of this complementary relationship between equality and liberty, it is apt that equal protection and substantive due process have often graduated from mere coexistence to providing a unified front of constitutional protections in Fourteenth Amendment cases. As Professor Laurence Tribe has written, “[D]ue process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix.”¹¹⁶

Not only have equal liberty cases (that is, those with intertwined equal protection and liberty/substantive due process analyses) frequently graced the annals of constitutional law, but in the context of LGBT rights cases specifically, *Windsor* is only the most recent LGBT rights Supreme Court case to implement equal liberty protections, with *Romer* and *Lawrence* being built upon the same doctrinal foundation. In a pre-*Windsor* article, I identified *Romer* and *Lawrence* as equal liberty

115. Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 103-04 (2007) (footnotes omitted) (quoting ARISTOTLE, *THE POLITICS* (Benjamin Jowett trans., Clarendon Press 1885), reprinted in FRANCIS WILLIAM COKER, *READINGS IN POLITICAL PHILOSOPHY* 87 (rev. ed. 1938); FRANK R. STRONG, *AMERICAN CONSTITUTIONAL LAW* 43-49 (1950); EDWARD S. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* 65 (Cornell Univ. Press 1955); GEORGE P. FLETCHER, *OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY* 46 (2001)).

116. Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004). *But cf. id.* at 1916 n.78 (describing a different approach advocated by Cass Sunstein, arguing that equal protection is better suited than substantive due process for an “attack on traditions”) (citing Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 3 (1994)).

cases,¹¹⁷ guided in part by the constitutional analyses of Professor Karst, whose influential scholarship emphasizes the themes of equal citizenship and liberty as bedrock principles of constitutional democracy.¹¹⁸

The Court itself described the intertwined nature of equality and liberty in *Lawrence*, stating, “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee are linked in important respects, and a decision on the latter point advances both interests.”¹¹⁹

Professor Jane Schacter has identified *Lawrence* in particular as an opinion reflecting the “equal liberty” principles of John Rawls, whose *Theory of Justice* initially identifies “equal liberty” as a primary principle of justice:

The Kennedy [*Lawrence*] opinion . . . has Rawlsian resonance beyond its emphasis on respect. Rawls’ [sic] also stressed the centrality of “equal liberty” as a critical structuring principle for the polity. In *Theory of Justice*, Rawls made equal liberty his first principle of justice, saying that “[e]ach person is to have an equal right to the most extensive basic liberty compatible with similar liberty for others.” The very idea of marrying equality and liberty in this way distinguishes it from conventional libertarian accounts of autonomy, and supplies an ethos that seems to pervade not only the majority opinion, but also Justice O’Connor’s concurrence in *Lawrence*. Indeed, this ethos is even more apparent in the O’Connor opinion, which is quite literally about equal liberties: if heterosexuals are to be given the liberty to engage in sodomy, she reasoned, then so must homosexuals.¹²⁰

Schacter further acknowledges Karstian “equal citizenship” overtones in the equal liberty analysis of *Lawrence*. Describing *Lawrence* as reflecting both a justice-based concept of Rawlsian democracy and Karstian “equal citizenship” values of constitutional democracy (as contrasted with the pure “majority will” approach to democracy favored by Justice Scalia), Schacter explains that “both the majority and the concurring opinions in *Lawrence* use the broad Fourteenth Amendment norms of equality and liberty as principles of democracy . . . by focusing

117. Marcus, *supra* note 55, at 356 (“The Court’s recognition of the right to self-determination in *Romer* and *Lawrence* is founded upon principles of both privacy rights and equal liberty in the public realm.”).

118. See, e.g., Ruth Bader Ginsburg, *In Celebration of Kenneth L. Karst*, 47 UCLA L. REV. 1179 (2000); Gerald Gunther, *A Tribute to “The Sweetest Man in the World”—and a Great Scholar and Teacher to Boot*, 47 UCLA L. REV. 1369 (2000).

119. *Lawrence*, 539 U.S. at 575.

120. Jane S. Schacter, *Lawrence v. Texas and the Fourteenth Amendment’s Democratic Aspirations*, 13 TEMP. POL. & CIV. RTS. L. REV. 733, 749 (2004) (footnotes omitted).

on the centrality to our organized collective life of equal liberty, mutual respect, and the absence of corrosive social stigma.”¹²¹

While acknowledging that O’Connor’s *Lawrence* concurrence more explicitly invoked “equal liberty” than the majority opinion, Schacter describes the majority opinion of *Lawrence* as founded upon both substantive due process liberty grounds and equal protection grounds, due to the decision “expressly invoking the problem of discrimination, and more generally . . . offering an egalitarian version of liberty.”¹²²

Similarly, Kim Shayo Buchanan has described *Lawrence* as explicitly affirming a constitutional principle of “equal sexuality liberty.”¹²³ Finally, Professor Karst also described *Lawrence* in terms of “equal liberties,” with roots evident throughout constitutional history, describing *Windsor*’s predecessor case in terms of “[t]he Fourteenth Amendment’s guarantee of equal citizenship includ[ing] a generous measure of equal liberties,”¹²⁴ and embracing “egalitarian values [that] have advanced the development of substantive due process from its beginning a century ago. The theme of equal liberties is visible in the *Lochner* era, in the incorporation of the Bill of Rights in the Fourteenth Amendment, and in the modern expansion of personal constitutional freedoms.”¹²⁵ Documenting the realization of equal citizenship principles through both equal protection and due process, Karst notes that *Lawrence* encompasses both, emphasizing freedom from class stigma and subordination, an equal protection concept, through a due process analysis.¹²⁶ Comparing *Lawrence* with other decisions that united equal protection and due process concepts in embracing “equal citizenship’s ant子subordination values,”¹²⁷ Karst concluded, “Whatever interpretations were given to the constitutional guarantee of liberty in the late nineteenth century, today it is seen to imply equal liberties. As Justice Stevens has

121. *Id.* at 749-53.

122. *Id.* For a contrasting view on the application of Rawls’ justice principles, see Andrew Koppelman, *The Limits of Constructivism: Can Rawls Condemn Female Genital Mutilation?*, 71 REV. POL. 459, 463-66 (2009) (“Since [under Rawls’ approach,] sexuality is not necessary to the exercise of the moral powers, it is not a matter of constitutional essentials. The legislature could, then, ban same-sex marriage, or even private consensual homosexual sex, on the basis of its comprehensive views. Rawls’s theory offers no basis for regarding gay rights as a matter of basic justice.”).

123. See Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women’s Sexuality*, 56 EMORY L.J. 1235, 1294 (2007) (“*Lawrence* affirms for the first time that the *Griswold-Eisenstadt-Roe-Carey-Casey* line of cases had established a due process right to freedom from state coercion in sexual decision making (which the Court in *Bowers* had wrongly denied).”).

124. Karst, *supra* note 115, at 99.

125. *Id.*

126. *Id.*

127. *Id.* at 102.

stated, “[o]ne of the elements of liberty is the right to be respected as a human being.”¹²⁸ *Lawrence*, Karst offers,

stands at the pinnacle of a huge doctrinal edifice, built over the course of a century, in which concerns about group subordination have contributed to a notable development in the law of substantive due process. Today, the results of that development are plainly visible in a principle of equal liberties.¹²⁹

What these legal scholars have recognized as true of *Lawrence*'s equal liberty overtones could just as well be said of *Windsor*, with its parallel discussion of respect and freedom from group subordination. Not only does *Windsor* cite *Lawrence* in its affirmation of those principles, but it also relies upon the precedent of *Bolling v. Sharpe*, the companion case to *Brown v. Board of Education*,¹³⁰ quoting *Bolling*'s statement that “[t]he liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.”¹³¹ Six years prior to the *Windsor* decision, Professor Karst similarly linked *Bolling* to *Lawrence* as parallel equal liberty cases, observing that *Bolling*'s holding that the Fifth Amendment’s Due Process Clause precludes government discrimination as to a significant liberty mirrors the same principle upheld in a Fourteenth Amendment context in *Lawrence*.¹³² Confirming Karst’s theory that the cases fall under the same “equal liberty” umbrella in modern constitutional jurisprudence, *Windsor*'s treatment of these precedents constitutes a robust affirmation of equal liberty principles.

Since the doctrinal advent of substantive due process and beyond, equal liberty has repeatedly emerged as a strong constitutional principle according potent protections for individual autonomy, respect, dignity, and citizenship. As such, to frame equal marriage rights in terms of equal liberty in a future same-sex marriage case would be to appeal to a longstanding constitutional principle with deep roots worthy of the highest degree of protection.

128. *Id.* (quoting John Paul Stevens, *The Third Branch of Liberty*, 41 U. MIAMI L. REV. 277, 284 (1986) (alteration in original)).

129. Karst, *supra* note 115, at 142.

130. 347 U.S. 483 (1954).

131. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217-218 (1995); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954)).

132. Karst, *supra* note 115, at 102-03.

B. But Think of the Children! (and Other Irrational Rationalizations)

Through this point in my reflections on *Windsor*, I have focused on various ways in which *Windsor*, as an equal liberty case, has set the stage for the recognition of stronger protections for same-sex couples and a heightened degree of scrutiny accorded to marriage equality denials under either substantive due process or equal protection review.

Another possibility in a future marriage case, however, is that the Court will, as some state and federal courts have done,¹³³ rule that under even traditional rational basis scrutiny, states have failed to offer any legitimate reason for denying same-sex couples equal marriage rights, benefits, and responsibilities. The Court could thereby save for another day the final formulation of its evolving tiers of heightened “rational basis with bite” scrutiny, or an explanation of which level of scrutiny should be accorded to cases involving LGBT individuals and same-sex couples. Instead, the Court could stop at the irrationality of marriage equality bans and declare such bans unconstitutional under any standard of review.

Without going into detail about each rationalization that has been offered for same-sex marriage bans over the years,¹³⁴ this Part will illuminate how *Windsor* helps cast doubt on the future of three common rationalizations that have been offered in the lower courts: (1) that tradition alone is a rational basis for denying same-sex marriage rights, (2) that states may prohibit same-sex marriage if a majority of people consider it immoral, and (3) that denying marriage protections to same-sex couples and their families is justified in the name of protecting children.

First, as to the tradition argument, by explaining how both the right to marry the person of one’s choice, specifically, and equal liberty, more broadly, are constitutional principles deeply rooted in this nation’s traditions, this Article has already set forth the shortcomings of a tradition-based argument that fails to acknowledge the deep-rooted tradition of protecting autonomy in intimate life choices. Whether tradition is invoked in the context of a defense against equal protection or

133. See, e.g., *De Leon v. Perry*, No. 5A-13-CA-00982-026, 2014 WL 715741, at *15 (W.D. Tex. Feb. 26, 2014); *Bishop v. U.S. ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013, at *28 (N.D. Okla. Jan. 14, 2014); *Kitchen v. Hebert*, No. 2:13-CV-217, 2013 WL 6697874, at *25 (D. Utah Dec. 20, 2013); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

134. See Marcus, *supra* note 55, at 416-27, for a more detailed discussion of the flaws of commonly articulated justifications for marriage bans.

substantive due process claim, the argument that marriage should be between one man and one woman simply because it has “always been that way” is a circular and stagnant rationalization for denying an entire class of persons a fundamental liberty interest.¹³⁵

Even under substantive due process, in which tradition plays a key role in identifying the applicable standard of review, the Court has cautioned that “[h]istory and tradition are the starting point but not in all cases the ending point” of that inquiry.¹³⁶ Indeed, one would hope that today’s courts would be loath to condone past oppressive models of marriage under which interracial marriages were banned and women were treated as property.¹³⁷ As Justice Frankfurter long ago recognized, “Great concepts like . . . ‘liberty’ . . . were purposely left to gather meaning from experience,” for the Nation’s founders “knew too well that only a stagnant society remains unchanged.”¹³⁸ In *Lawrence*, the Court recognized that such evolving enlightenment is appropriate, and even requisite, for the Court’s treatment of LGBT rights issues, describing the drafters of the Fifth and Fourteenth Amendments as knowing even then that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”¹³⁹ *Lawrence* affirmed, as *Windsor* did a decade later, that “[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom,” a freedom with stronger protections than ever in the case of LGBT individuals.¹⁴⁰

This comparatively enlightened and more principle-based understanding of tradition reappeared briefly in *Windsor*’s description of the tensions between, on the one hand, traditional understandings of marriage as necessarily limited to opposite-sex couples, and on the other hand, more recent justice-based approaches in New York and other states that extend marriage rights to couples “who wish to define themselves by

135. For a thorough discussion of the Court’s growing distrust of tradition-based defenses in equal protection cases, most pertinently in the context of marriage equality denials, with the Court in *Loving*, for example, rejecting the tradition-based argument highlighting historic restrictions of interracial marriage, embracing instead “an alternative tradition—liberty of marriage—as something to protect because of its deep historic roots,” see Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 296-97 (2011).

136. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1997) (Kennedy, J., concurring)).

137. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 966-67 (Mass. 2003).

138. *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

139. *Lawrence*, 539 U.S. at 579.

140. *Id.*

their commitment to each other.”¹⁴¹ The *Windsor* opinion, importantly, makes a point of describing the equal status some states have bestowed upon same-sex marriage as reflecting not only an “evolving understanding of the meaning of equality” but also “the community’s considered perspective on the historical roots of the institution of marriage.”¹⁴² The Court’s crediting those same-sex marriage states with having clearly considered both equality principles *and* concerns related to history and tradition could well foreshadow a future case in which the Court rejects a state’s claim that those who would extend equal marriage rights to same-sex couples are disrespecting the value of tradition. These passages indicate an embrace of a more enlightened view rejecting an approach to tradition that is stagnant and inflexible, particularly in the case of historic, unjust discrimination against same-sex couples and LGBT individuals.

The stage has been set for a future marriage equality case in which the Court recognizes the traditions and histories of this country which favor equal liberty, as set forth in Part III.A of this Article. The application of traditional equal liberty principles to protect same-sex couples now has a solid history in Supreme Court jurisprudence, starting with Justice Stevens’ dissent in *Bowers*, which has been adopted in *Lawrence* and beyond, honoring “the individual’s right to make certain unusually important decisions that will affect his own, or his family’s, destiny. The Court has referred to such decisions as implicating ‘basic values,’ as being ‘fundamental,’ and as being dignified by history and tradition.”¹⁴³

Second, as to the “morality” rationalization for anti-LGBT laws, *Windsor* echoes the warnings of *Lawrence*, which ruled on this point that the moral prejudices of a majority do not create a constitutional basis for discriminatory treatment, because the Court’s “obligation is to define the liberty of all, not to mandate [its] own moral code.”¹⁴⁴ In *Lawrence*, the Court rejected traditional moral disapproval as a rational basis for a law,¹⁴⁵ and endorsed Justice Stevens’ *Bowers* dissent, which provided:

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law

141. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

142. *Id.* at 2692-93.

143. *Bowers v. Hardwick*, 478 U.S. 186, 217 (1986) (quoting *Fitzgerald v. Porter Mem’l Hosp.*, 523 F.2d 716, 719-20 (7th Cir. 1975)).

144. *Lawrence*, 539 U.S. at 571 (quoting *Casey*, 505 U.S. at 850).

145. *Id.* at 582-83.

prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of “liberty” protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.¹⁴⁶

The Court in *Windsor* reinforced this constitutional prohibition on moral majority will trumping individual autonomy regarding intimate relationships. The Court held that the government’s stated purpose in enacting DOMA, to “protect[] the traditional moral teachings reflected in heterosexual-only marriage laws,” did not survive constitutional scrutiny, while also concluding that the Constitution *does* protect the personal moral and sexual choices of same-sex married couples.¹⁴⁷

If moral disapproval reemerges in a future case as the justification for a state’s same-sex marriage ban, the Court is likely to again reject such moral prejudices as illegitimate bases for discrimination under any level of scrutiny. In such a case, the Court would be guided again by the rule that “[t]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”¹⁴⁸

Windsor has also laid the foundation for a future rejection of another common rationalization given to justify same-sex marriage bans: the argument that, somehow, banning same-sex marriage protects children. Although this particular rationalization was not at issue in *Windsor*, the Court did address the issue of child protection, dramatically flipping the script on those who have been arguing for decades that same-sex marriage somehow endangers children. With language empathetic toward families headed by same-sex couples, the Court recognized the harmful effect of DOMA on “many aspects of married and family life, from the mundane to the profound.”¹⁴⁹ The Court emphatically condemned the denial of federal recognition of same-sex marriages for “humiliat[ing] tens of thousands of children now being raised by same-sex couples.”¹⁵⁰ Recognizing the dangers posed to children of same-sex couples by the denial of marriage rights to their parents, as contrasted with the lack of any established danger to these children stemming from

146. *Id.* at 577-78 (Stevens, J., dissenting) (footnotes omitted) (citations omitted) (quoting with approval *Bowers*, 478 U.S. at 216).

147. *Windsor*, 133 S. Ct. at 2693-94 (citing *Lawrence*, 539 U.S. at 558).

148. See Schacter, *supra* note 120, at 740.

149. *Windsor*, 133 S. Ct. at 2694.

150. *Id.*

granting marriage rights and protections to their families, the Court drove a nail into the coffin of future arguments citing prevention of harm to children as the basis for denying legal protections to those very children and their families. The Court explained that DOMA “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.”¹⁵¹

Finally, the Court detailed DOMA’s numerous harms specific to the children of same-sex couples denied full marriage protections, including financial harms and the broader disability imposed by the statute instructing both officials “and indeed all persons with whom same-sex couples interact, *including their own children*, that their marriage is less worthy than the marriages of others.”¹⁵²

This passage from Justice Kennedy’s majority opinion in *Windsor* echoes his even more explicit recognition of such harms made during the *Hollingsworth v. Perry* oral argument:

[T]here is an immediate legal injury or legal—what could be a legal injury, and that’s the voice of these children. There are some 40,000 children in California . . . that live with same-sex parents, and they want their parents to have full recognition and full status. The voice of those children is important in this case, don’t you think?¹⁵³

Marriage equality opponents would be hard-pressed to distinguish such analyses recognizing the real and stigmatizing harms to children caused by DOMA as inapplicable to state bans on marriage in future cases. In *Windsor*, as described above, the Court found that the denial of equal marriage recognition by the federal government serves to stigmatize families headed by same-sex couples, imposing harmful humiliation upon children in those families. By what logic could the Court in a future case turn around and say, “Oh, but this demoralizing, crippling stigma, as well as myriad of more tangible harms, all disappear when it is a state law imposing the second-class stigma”? Particularly when Justice Kennedy has already called out the parallel harms at the state level, it is difficult to imagine how the Court in a future case would be inclined to distinguish a state-imposed ban. As a matter of general constitutional jurisprudence, the Constitution does not permit states to impose second-tier status stigmatizations upon disfavored groups any more than it

151. *Id.*

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

153. Oral Argument at 21:9-16, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), http://www.oyez.org/cases/2010-2019/2012/2012_12_144, archived at <http://perma.cc/QP9T-U7KQ>.

permits the federal government to do so. A majority of the Supreme Court has indicated willingness to extend these principles of equal respect and dignity to same-sex couples injured by laws singling them out for second-class status, whether federal or state in legislative origin.

IV. CONCLUSION: THE COURT IS *HUNGRY* AND THE TABLE IS SET

Supreme Court Justice Antonin Scalia is famous for his passionate and at times vitriolic dissenting opinions, particularly in cases involving issues he has identified as being at the center of the “culture wars”: abortion and LGBT rights.¹⁵⁴ In his dissent to the historic *Windsor* decision, Justice Scalia’s despair at the actions of his colleagues seems at its most emotionally polemic, with Scalia taking the Lord’s name in vain, crying out, “Lord, an opinion with such scatter-shot rationales as this one (federalism noises among them) can be distinguished in many ways.”¹⁵⁵

While attempting to distinguish *Windsor* even before the next marriage equality case arrives at the Court, Scalia concedes the inevitability of same-sex marriage after the Court’s affirmation of strong liberty protections for same-sex couples in *Windsor*. Scalia predicts in foreboding tones, reminiscent of his dire warnings in his *Lawrence* dissent to the same effect,¹⁵⁶ that the majority had engaged in the awful act of setting the stage for a future decision affirming same-sex marriage: “My guess is that the majority . . . needs some rhetorical basis to support its pretense that today’s prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term). But I am only guessing.”¹⁵⁷

After crying out to the Lord and predicting the end of (opposite-sex-couples-only marriage) days as soon as next term, Scalia accuses the majority of being “*hungry*”¹⁵⁸ to reach the merits of the marriage equality issue, and then sophomorically dismisses the majority’s analysis as a

154. See, e.g., Nina Totenberg, *Even Scalia’s Dissenting Opinions Get Major Scrutiny*, NPR (July 6, 2012), <http://www.npr.org/2012/07/16/156852889/even-scalia-s-dissenting-opinions-get-major-scrutiny>; Eric Fuchs, *Scalia’s Anti-Gay Comments Are Nothing Compared to this Hateful Opinion on Sodomy Laws*, BUS. INSIDER (Oct. 4, 2012), <http://www.businessinsider.com/scalia-lawrence-v-texas-dissent-2012-10#ixzz2gmFZIFFM>, archived at <http://perma.cc/SY94-NPCA>; Garance Franke-Rutadec, *Can We Stop Being Surprised at Scalia’s Remarks on Gays Now?*, ATLANTIC (Dec. 13, 2012), <http://www.theatlantic.com/politics/archive/2012/12/can-we-stop-being-surprised-at-scalias-remarks-on-gays-now/266142/>, archived at <http://perma.cc/9CJN-PALT>.

155. *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting).

156. See *Lawrence v. Texas*, 539 U.S. 558, 604-05 (2003) (Scalia, J., dissenting).

157. *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting).

158. *Id.* at 2698.

bunch of “legalistic argle-bargle”¹⁵⁹—not exactly a phrase demonstrating an adherence to the tradition of high decorum and civility among members of the Supreme Court.

The kicker is that Scalia is right about one thing: the inevitability of a future marriage opinion recognizing the equal rights of same-sex couples. The first signal in *Windsor* of the Court’s readiness to confront the issue head-on and ultimately affirm equal marriage rights for all same-sex couples is the opinion’s early reference to *Loving* in emphasizing that even those powers traditionally left to the states may nonetheless be limited by individual rights. Of all the cases the Court could have chosen to cite for the basic constitutional principle that state powers are limited by fundamental individual rights, it may bode well for a future marriage equality decision that the Court chose *Loving*.

Indeed, the Court’s willingness to look at same-sex marriage in the same light as interracial marriage is but one of many indications that the Court is poised to formally recognize equal marriage protections across the board for same-sex couples and their children. With *Windsor* viewed alongside the other equal liberty cases the Court has decided over time, and understood as part of a larger constitutional jurisprudence that takes seriously the equal citizenship and liberty rights of all citizens as autonomous agents equally entitled to respect and dignity, it is inevitable that the Court will ultimately recognize same-sex marriage as entitled to equal recognition under the Constitution, as it did interracial marriage in the previous century.

At the time *Windsor* was decided, only a dozen states, along with the District of Columbia, had legalized same-sex marriage.¹⁶⁰ Since then, the trajectory toward full marriage equality has continued unwaveringly, with equal marriage recognition occurring in more and more corners of the country and globe every day, with courts less inclined by the day to twist themselves into irrational rationalizations to justify continued forced inequality. With the doctrinal building blocks set firmly in place by *Windsor*, the inevitability of marriage equality can no longer be denied.

In the aftermath of *Windsor*, piecemeal protections for same-sex couples and their families are still playing out legislatively, state by state, a scattered and often confusing process rife with conflict of law problems¹⁶¹ that could fill many a law school exam bluebook. Ideally,

159. *Id.* at 2709.

160. *See Windsor*, 133 S. Ct. at 2689.

161. *See generally* Alexander V. Mauerer, *The Missing Ingredient: How Oft-Overlooked Modern Conflict of Laws Principles Will Dictate the Reach of Same-Sex Marriage in America*,

however, the next chapter of equal rights for same-sex couples should not be determined by majority will on a state-by-state basis, making it likely that those states hostile to same-sex couples will never grant full equality, but rather by a strong and sweeping constitutional ruling by the Supreme Court, the United States Constitution being the supreme law of the land and central to the protection of equal justice and liberty. Although *Windsor*'s holding on its face is limited to same-sex couples in marriages "made lawful by the State,"¹⁶² the decision provides a firm foundation for a broader marriage opinion in the future, one that will explicitly affirm the constitutional right of all individuals to marry the person of their choice, regardless of sexual orientation or the gender of their partner.

The Court's careful description of the constitutional right at stake in *Windsor* as one that encompasses both liberty and equal protection signals its receptivity to follow a similar approach in a future marriage case, which will likely arise as a Fourteenth Amendment challenge to a state ban on, or refusal to recognize, same-sex marriage. After *Windsor*, future plaintiffs should feel assured that the Court is prepared to treat the deprivation of equal marriage rights as implicating both equal protection and substantive due process liberty interests, which, together, are protected under the Constitution's deeply rooted principles of equal liberty protections for all.

Viewed collectively, the theoretical threads woven throughout the three Supreme Court opinions affirming substantive protections for LGBT citizens—*Romer*, *Lawrence*, and *Windsor*—reveal each case to be an integral part of a larger tapestry of equal liberty protections, with common themes of equal status and dignity and respect, and the unconstitutionality of government-imposed stigma. The firm foundation of freedom established by these cases should facilitate a future holding by the Supreme Court striking down same-sex marriage bans as universally as *Loving* struck down interracial marriage bans, with the Fourteenth Amendment's Equal Protection and Substantive Due Process Clauses united to provide equal liberty guarantees for same-sex couples and their families.

30 ST. LOUIS U. PUB. L. REV. 325 (2011); Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998); Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 QUINNIPIAC L. REV. 61 (1996).

162. *Windsor*, 133 S. Ct. at 2695.