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ANIMUS AS UNDUE BURDEN

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What explains the *Windsor*<sup>1</sup> decision?

Is it a substantive due process case, however thinly disguised, as Justice Scalia suggests?<sup>2</sup> That seems unlikely since no right is squarely identified.

Is it an equal protection case as the opinion itself suggests?<sup>3</sup> If so, what is the class affected? Is it “same-sex couples who wish[ ] to be married”<sup>4</sup> or a “subset of state-sanctioned marriages”?<sup>5</sup> Neither would seem to be particularly promising candidates for strict scrutiny since a legal status is hardly innate and immutable and New York’s marriage redefinition suggests significant political clout. The decision does not mention heightened scrutiny, perhaps recognizing how tenuous such a finding would be. Nor does rational basis analysis seem to be a good fit since, far from examining whether “any reasonably conceivable state of facts” could justify the law,<sup>6</sup> the decision “affirmatively conceal[s] from the reader the arguments that exist in justification.”<sup>7</sup>

Looking for the answer in conventional legal analyses will not yield a satisfactory answer because an adequate answer is at once more basic and more complicated.

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<sup>1</sup> *United States v. Windsor*, 570 U.S. \_\_\_, 133 S. Ct. 2675 (2013).

<sup>2</sup> *Id.* at 2706 (Scalia, J., dissenting).

<sup>3</sup> *Id.* at 2693 (majority opinion).

<sup>4</sup> *Id.* at 2692.

<sup>5</sup> *Id.* at 2694.

<sup>6</sup> *Heller v. Doe*, 509 U.S. 312, 320 (1993).

<sup>7</sup> *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting); see H.R. Rep. No. 104-664, at 12-18 (1996) (The Defense of Marriage Act, H.R. 3396, 104th Cong. (1996) advances the government’s interests in “Defending and Nurturing the Institution of Traditional, Heterosexual Marriage”; “Defending Traditional Notions of Morality”; “Protecting State Sovereignty and Democratic Self-Governance”; and “Preserving Scarce Government Resources”).

## THE ROLE OF THE COURT

The most important influence on the decision is the majority's conception of the role of the Court. Justice Scalia notes this at the outset of his dissent: "The Court's errors [on standing and legislative deference] spring forth from the same diseased root: an exalted conception of the role of this institution in America."<sup>8</sup>

It's not hard to see how this self-conception influences the Court's approach to its work and its decisions. One need not assume any malign motives. Rather, it seems to follow that if the Court has adopted the role as the grownup in national debates, it must take on the contentious cases which cannot be trusted to the political branches whose motives, the narrative goes, are likely to be less exalted.

The classic text for understanding the Court's self-conception as the adult player on the constitutional playground, intervening to stop childish squabbling, is the plurality opinion in *Planned Parenthood v. Casey*.<sup>9</sup> When the Court reconsidered its 1973 rulings<sup>10</sup> legally mandating abortion on demand in 1992, the plurality opinion characterized the *Roe* decision as an instance where "in the performance of its judicial duties" the Court had "resolve[d]" an "intensely divisive controversy."<sup>11</sup> The plurality said that its ruling involved "a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."<sup>12</sup> In plain English: "We've settled this, stop protesting."

That the *Windsor* majority, too, distrusts the political branches is clear from passages where the majority accuses Congress of having an "avowed purpose" of imposing a disadvantage on and stigmatizing same-sex couples and of "humiliat[ing]" the children in their homes.<sup>13</sup>

In some instances, the Court's own status becomes more important than other factors, even than the integrity of the law. Again from *Casey*:

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<sup>8</sup> *Windsor*, 133 S. Ct. at 2698 (Scalia, J., dissenting).

<sup>9</sup> 505 U.S. 833 (1992) (plurality opinion).

<sup>10</sup> *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

<sup>11</sup> *Casey*, 505 U.S. at 866.

<sup>12</sup> *Id.* at 867.

<sup>13</sup> *Windsor*, 133 S. Ct. at 2693-94.

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is *sufficiently plausible to be accepted by the Nation*.

The need for principled action *to be perceived as such* is implicated to some degree whenever this, or any other appellate court, overrules a prior case.<sup>14</sup>

It is not surprising that this self-conception, with its paranoia about the motives of other constitutional actors (including citizens), would make the Court sensitive to perceptions of plausibility. Like a parent, the Court's influence will depend, at least to some degree, on the credibility of its pronouncements. Thus, the self-conception at the foundation of *Windsor* explains more than just the majority's decision on standing or even its unwillingness to defer to political judgments.

An important corollary of this self-conception (that the Court is, and should be, the arbiter of all significant social controversies) is a need to create rationales to decide these knotty questions. Since the text of the Constitution is almost always silent on such matters, the Court must cast about for extra-constitutional principles even if doing so risks elevating the social attitudes of judges or the legal profession to the status of law. This is the impetus for the Court's penchant for creating "tests" or doctrines to decide an increasing range of controversies.

As Professor Robert Nagel explains, the Court must import an extra-constitutional "rationalism" into its decisions.<sup>15</sup> He notes: "[T]he rationalist prefers knowledge that is 'susceptible of formulation in rules, principles, directions, maxims—comprehensively, in propositions.'"<sup>16</sup>

#### EXAMPLE: THE UNDUE BURDEN TEST

The *Casey* plurality provides a telling example. The opinion begins by announcing: "State and federal courts as well as legislatures throughout the Union must have guidance as they seek to address this

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<sup>14</sup> *Casey*, 505 U.S. at 865-66 (emphasis added).

<sup>15</sup> Robert F. Nagel, *Rationalism in Constitutional Law*, 4 CONST. COMMENT. 9 (1987).

<sup>16</sup> *Id.* at 12.

subject in conformance with the Constitution.”<sup>17</sup> Any guesses as to who must provide the guidance?

The opinion acknowledges that Constitutional text and historical practice wouldn’t allow the Court to reaffirm the “essential holding” of the abortion cases.<sup>18</sup> The Court, then, must rely on “reasoned judgment” lest the justices “shrink from the duties of our office.”<sup>19</sup>

The Court’s discussion of precedent is particularly instructive. The Court said the abortion right is not unworkable because though “judicial assessment of state laws” related to abortion call for determinations of validity, “the required determinations fall within judicial competence.”<sup>20</sup> The opinion portrays a nation in which “people . . . have ordered their thinking and living around” a court decision.<sup>21</sup> Further, what is at stake is the “constitutional Republic” itself which requires “the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”<sup>22</sup> The Court cannot, the opinion explains, blithely overrule *Roe* for fear of “overtax[ing] the country’s belief in the Court’s good faith” since “[t]here is a limit to the amount of error that can plausibly be imputed to prior Courts” and too many reversals would threaten the “legitimacy of the Court.”<sup>23</sup>

It may seem surprising after all that to find the Court does not simply leave it at that. Instead the Court formally rejects the reasoning of *Roe* which, whatever its biological implausibility, contains somewhat distinct lines.<sup>24</sup> The opinion then substitutes an entirely novel rule: “Only where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”<sup>25</sup>

What explains this willingness to sacrifice clarity (however minimal)? This kind of ruling has some obvious advantages. It clearly protects the role of the courts. They will still be assessing the validity of state laws. Additionally, they will have more flexibility in doing so.

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<sup>17</sup> *Casey*, 505 U.S. at 845.

<sup>18</sup> *Id.* at 846-48.

<sup>19</sup> *Id.* at 849.

<sup>20</sup> *Id.* at 855.

<sup>21</sup> *Id.* at 856.

<sup>22</sup> *Id.* at 865.

<sup>23</sup> *Id.* at 866.

<sup>24</sup> *Id.* at 872-73.

<sup>25</sup> *Id.* at 874.

The result is an enhanced judicial role with little constraint on its exercise: “[A]ll sail and no anchor.”<sup>26</sup>

Professor Cass Sunstein noted something similar in the case that is probably the most significant influence on the *Windsor* decision.<sup>27</sup> Professor Sunstein points to the curious failure of the *Romer v. Evans*<sup>28</sup> majority to justify its invalidation of Colorado’s Amendment 2 by reference to the conventional tiers of scrutiny, instead ruling that the law failed rational basis review.<sup>29</sup> He explains that in the case “rationality review” serves “as a kind of magical trump card . . . hidden in the pack and used on special occasions.”<sup>30</sup> He concedes that the decision could have been “more coherent,” but as it is “imposes unusually few constraints on its own interpretation.”<sup>31</sup> Which, of course, is the point.

#### UNITED STATES V. WINDSOR

With this in mind, the *Windsor* decision and even its apparently *ad hoc* reasoning make more sense.

Like the *Romer* and *Casey* decisions, *Windsor* could have drawn on existing precedent and conventional analyses in its reasoning. After the standing analysis, for instance, the opinion follows with a six-page extended paean to the role of states in domestic relations law.

Justice Kennedy begins with a curious description of the decision of the New York Legislature to redefine marriage.<sup>32</sup> It starts with a cursory nod to the historical reality later to be casually dismissed:

For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight.<sup>33</sup>

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<sup>26</sup> Letter from Lord T.B. Macaulay to Hon. Henry S. Randall (May 23, 1857), in S. LITERARY MESSENGER (Mar. 4, 1860), available at <http://www.nytimes.com/1860/03/24/news/macaulay-democracy-curious-letter-lord-macaulay-american-institutions-prospects.html>.

<sup>27</sup> See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

<sup>28</sup> 517 U.S. 620 (1996).

<sup>29</sup> Sunstein, *supra* note 27, at 53-54.

<sup>30</sup> *Id.* at 61.

<sup>31</sup> *Id.* at 64.

<sup>32</sup> United States v. Windsor, 570 U.S. \_\_\_, 133 S. Ct. 2675 (2013).

<sup>33</sup> *Id.* at 2689.

Legislators in New York, presumably, were the possessors of the “new perspective” and “new insight.”<sup>34</sup> “Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.”<sup>35</sup> In the majority’s idealized description, “[a]fter a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood.”<sup>36</sup>

Then, the opinion repeatedly affirms the primacy of states in regulating domestic relations:

- “By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States.”<sup>37</sup>
- “The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens.”<sup>38</sup>
- “The definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the ‘[p]rotection of offspring [the majority does not grapple with this telling observation], property interests, and the enforcement of marital responsibilities.’”<sup>39</sup>
- “Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state law policy decisions with respect to domestic relations.”<sup>40</sup>
- “The significance of state responsibilities for the definition and regulation of marriage dates to the Nation’s beginning; for ‘when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.’”<sup>41</sup>

Notwithstanding the foregoing, Justice Kennedy concludes, “it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance.”<sup>42</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 2691.

<sup>39</sup> *Id.* (quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (quoting *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383–84 (1930)).

<sup>42</sup> *Id.*

So, if federalism concerns don't make the Defense of Marriage Act (DOMA) unconstitutional, what does?

The core analysis of the opinion proceeds as an extended syllogism.

First is the assertion that “the State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import.”<sup>43</sup> Thus “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.”<sup>44</sup>

Second, DOMA “departs from this history and tradition of reliance on state law to define marriage” and citing to his earlier opinion in *Romer v. Evans*, Justice Kennedy says: “[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”<sup>45</sup>

Third, the opinion says the federal government “uses this state-defined class for the opposite purpose—to impose restrictions and disabilities” since “[w]hat the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect.”<sup>46</sup>

Next, the court invokes Justice Kennedy’s opinion in the sodomy case to broach the question of constitutionality. Here is the passage in full:

The States’ interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form “but one element in a personal bond that is more enduring.” 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. It reflects both the community’s considered per-

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 2692 (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

<sup>46</sup> *Id.*

spective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.<sup>47</sup>

Notice the dramatic shift from a discussion of the importance of marriage (inarguably a public matter) to a restatement of the earlier decision to protect private sexual relationships. Justice Kennedy is saying, as near as can be determined, that when New York redefined marriage it was providing a legal status to the private relationship given constitutional protection in 2003.<sup>48</sup> Thus marriage becomes “a far-reaching legal acknowledgment of the intimate relationship between two people” and presumably this “evolv[ed] understanding of the meaning of equality” merits constitutional protection.<sup>49</sup>

In the terminology of an earlier opinion, the emanations and penumbras of the right to privacy require public recognition of a private relationship.<sup>50</sup>

All that is left is to determine that DOMA infringes on this constitutionally-protected status. This, the majority says, has happened: “DOMA seeks to injure the very class New York seeks to protect.”<sup>51</sup>

#### KENNEDY DOCTRINE

So, the opinion eschews conventional analyses in favor of a seemingly idiosyncratic approach. Although the reasoning is narrow, it is not without logic. The clue to its origin comes from the citations in the substantive portion of the opinion.

In many ways, the reasoning of the case is Justice Kennedy convincing himself. The portion of the decision addressing the constitutionality of DOMA cites to seven cases. One is the food stamps case.<sup>52</sup> Two are cases that state the principle that the equal protection guarantee of the Fourteenth Amendment applies to the federal government through the Fifth Amendment.<sup>53</sup> One is a lower court decision on

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<sup>47</sup> *Id.* at 2692-93.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 2692.

<sup>50</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>51</sup> *Windsor*, 133 S. Ct. at 2693.

<sup>52</sup> *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

<sup>53</sup> *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).



DOMA.<sup>54</sup> The other three are all decisions authored by Justice Kennedy.<sup>55</sup>

To be sure, the cases that would seem to be important—those involving federal authority in domestic relations and the right to marry cases (here, *Loving v. Virginia*<sup>56</sup>) are mentioned but are not dispositive. The line of cases essential to the holding here are the Kennedy decisions, specifically *Lawrence*, which established that same-sex sexual relations are constitutionally protected,<sup>57</sup> and *Romer*, which forbade laws motivated by animus.<sup>58</sup> *Casey* is not mentioned, but the conclusion to *Windsor* sure sounds like the “mystery of life passage” from *Casey*: “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.”<sup>59</sup> The outcome in *Windsor* relies entirely on an application of a Kennedy doctrine.

Here is the basic formulation of the doctrine: The Constitution’s invocation of liberty (having evolved in the direction of enlightenment) is meant to ensure the state even-handedly confers personhood and dignity on all individuals. The chief threat to this entitlement comes from laws that express animus because these laws stigmatize particular classes of citizens (based on status) and thus have far-ranging effects.

Put slightly differently, a law is invalid if it (1) interferes with governmental conferral (2) of personhood and dignity (3) required by evolving understandings (4) by stigmatizing through animus (5) a particular class of people, (6) thereby creating broad disabilities.

The doctrine can be primarily culled from three major Kennedy decisions: the plurality opinion in *Planned Parenthood v. Casey*, and the majority opinions in *Romer v. Evans* and *Lawrence v. Texas*. Elements are also found in his decisions about the death penalty which stress evolving notions of decency and in recurring mentions of dignity in a variety of contexts.<sup>60</sup>

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<sup>54</sup> *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012).

<sup>55</sup> *Romer v. Evans*, 517 U.S. 620 (1996); *Bond v. United States*, 131 S. Ct. 2355 (2011); *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>56</sup> 388 U.S. 1 (1967).

<sup>57</sup> See *Lawrence*, 539 U.S. at 558.

<sup>58</sup> See *Romer*, 517 U.S. at 620.

<sup>59</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion).

<sup>60</sup> See e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008); *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005).

## GOVERNMENT CONFERRAL

In *Casey*, the role of the state, specifically the Supreme Court, is essential to the holding.<sup>61</sup> The plurality describes the Court's "obligation" as "to define the liberty of all."<sup>62</sup> In fact, the opinion suggests "that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."<sup>63</sup> More striking, the opinion suggests the very character of the American people "is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals."<sup>64</sup>

In *Romer*, Justice Kennedy's majority opinion charges that the challenged amendment "prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians."<sup>65</sup> Later the Court describes the harm of Amendment 2 as "nullif[ying] specific legal protections."<sup>66</sup>

## PERSONHOOD AND DIGNITY

Justice Kennedy has invoked the concept of dignity in a variety of contexts.<sup>67</sup> In the Kennedy doctrine, it is allied to concepts of self-definition and "personhood."

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<sup>61</sup> *Casey*, 505 U.S. at 849-50.

<sup>62</sup> *Id.* at 850.

<sup>63</sup> *Id.* at 856.

<sup>64</sup> *Id.* at 868.

<sup>65</sup> *Romer v. Evans*, 517 U.S. 620, 624 (1996).

<sup>66</sup> *Id.* at 629.

<sup>67</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011); *Stenberg v. Carhart*, 530 U.S. 914, 962-63 (2000) (Kennedy, J., dissenting); *Olmstead v. L.C.*, 527 U.S. 581, 609 (1999) (Kennedy, J., concurring); *Powers v. Ohio*, 499 U.S. 400, 412 (1991); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 520 (1990); *Lawrence v. Texas*, 539 U.S. 558, 567, 575 (2003); *Rice v. Cayetano*, 528 U.S. 495, 517 (2000); *J.E.B. v. Alabama*, 511 U.S. 127, 153 (1994) (Kennedy, J. concurring); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992); *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991). See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008); Noah Feldman, *The United States of Justice Kennedy*, BLOOMBERG VIEW (May 30, 2011) <http://www.bloomberg.com/news/2011-05-30/how-it-became-the-united-states-of-justice-kennedy-noah-feldman.html>.

Perhaps the most well-known instance is in *Casey* where the plurality opinion speaks of the unenumerated rights the Court has previously recognized:

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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>68</sup>

Later, the opinion speaks of protecting a woman's "conception of her own spiritual imperatives and her place in society"<sup>69</sup> and of women's "choices that define their views of themselves and their places in society."<sup>70</sup>

The *Lawrence* decision begins with this description of the right involved: "Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."<sup>71</sup> Later, Justice Kennedy writes: "adults may choose to enter upon [a sexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."<sup>72</sup> The opinion says, speaking of the defendants, that the sodomy law "demeans their existence."<sup>73</sup>

#### EVOLUTION

Justice Kennedy's emphasis on the idea that Constitutional guarantees can be modified by evolving notions of decency has been famously employed in his criminal punishment decisions.<sup>74</sup> In *Romer*, he speaks of an "emerging tradition of statutory protections" from discrimination in public accommodations.<sup>75</sup> In *Lawrence*, the theme is prevalent. The opinion says Court decisions "show an emerging awareness that liberty gives substantial protection to adult persons in decid-

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<sup>68</sup> *Casey*, 505 U.S. at 851.

<sup>69</sup> *Id.* at 852.

<sup>70</sup> *Id.* at 856.

<sup>71</sup> *Lawrence*, 539 U.S. at 562.

<sup>72</sup> *Id.* at 567.

<sup>73</sup> *Id.* at 578.

<sup>74</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008); *Roper v. Simmons*, 543 U.S. 551, 561 (2005).

<sup>75</sup> *Romer v. Evans*, 517 U.S. 620, 628 (1996).

ing how to conduct their private lives in matters pertaining to sex.”<sup>76</sup> Later, Justice Kennedy said the right to engage in sodomy “has been accepted as an integral part of human freedom in many other countries” and that “emerging recognition” should have been understood in the earlier sodomy case.<sup>77</sup> Projecting on the Framers, the opinion said: “They knew 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. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”<sup>78</sup>

#### STIGMA AND ANIMUS

The element of animus is central to the *Romer* decision to strike down a state constitutional amendment that prevented inclusion of sexual orientation as a classification in discrimination laws.<sup>79</sup> Justice Kennedy’s opinion says that “the amendment seems inexplicable by anything but animus toward the class it affects.”<sup>80</sup> It later says “laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected” and cites to the statement from the food stamps case that “‘if 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.’”<sup>81</sup>

The *Lawrence* decision says the sodomy decision constituted “an invitation to subject homosexual persons to discrimination both in the public and in the private spheres,” “demeans the lives of homosexual persons,” and imposes “stigma.”<sup>82</sup>

#### CLASSIFICATIONS AND STATUS

The *Casey* opinion touches only slightly on the idea that rights are to be understood as inherent in a status derived from membership in a specific class: “The ability of women to participate equally in the eco-

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<sup>76</sup> *Lawrence*, 539 U.S. at 572.

<sup>77</sup> *Id.* at 577.

<sup>78</sup> *Id.* at 579.

<sup>79</sup> *Romer*, 517 at 632.

<sup>80</sup> *Id.* at 632.

<sup>81</sup> *Id.* at 634 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

<sup>82</sup> *Lawrence*, 539 U.S. at 575.

conomic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>83</sup>

The *Romer* opinion opens with an invocation of Justice Harlan’s dissent: “[T]he Constitution ‘neither knows nor tolerates classes among citizens.’”<sup>84</sup> As noted above, the Court speaks of a disability (lack of inclusion in government discrimination laws) to a “named class, a class we shall refer to as homosexual persons or gays and lesbians.”<sup>85</sup> Specifically, the Court claims “[h]omosexuals by state decree, are put in a solitary class” and refers to them as a “targeted class” and a “single named group.”<sup>86</sup> The opinion charges that the amendment “singl[es] out a certain class of citizens for disfavored legal status or general hardships”<sup>87</sup> and is “a status-based enactment” and “a classification of persons undertaken for its own sake.”<sup>88</sup>

In *Lawrence*, Justice Kennedy refers to sodomy laws as “laws targeting same-sex couples.”<sup>89</sup>

#### BROAD EFFECT

In *Romer*, Justice Kennedy said, “[t]he change Amendment 2 works in the legal status of gays and lesbians in the private sphere is far reaching.”<sup>90</sup> He said the law would remove “protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”<sup>91</sup> He also said Amendment 2 would impose “a broad and undifferentiated disability” and deny “protection across the board.”<sup>92</sup> In *Lawrence*, the majority refers to sodomy laws’ “far-reaching consequences.”<sup>93</sup>

#### THE DOCTRINE IN *WINDSOR*

The ideas of state conferral and dignity are linked at a number of points in the opinion, such as where Justice Kennedy refers to New

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<sup>83</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992) (plurality opinion).

<sup>84</sup> *Romer*, 517 U.S. at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

<sup>85</sup> *Id.* at 624.

<sup>86</sup> *Id.* at 627, 629, 632.

<sup>87</sup> *Id.* at 633.

<sup>88</sup> *Id.* at 635.

<sup>89</sup> *Lawrence v. Texas*, 539 U.S. 558, 570 (2003).

<sup>90</sup> *Romer v. Evans*, 517 U.S. 620, 627 (1996).

<sup>91</sup> *Id.* at 632.

<sup>92</sup> *Id.* at 632-33.

<sup>93</sup> *Lawrence*, 539 U.S. at 567.

York's redefinition of marriage as "the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import."<sup>94</sup> Later the opinion says with this law, "New York sought to give further protection and dignity to that bond [the relationship recognized in *Lawrence*]" 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."<sup>95</sup> "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."<sup>96</sup> Near the end of the opinion, the opinion refers to "those whom the State, by its marriage laws, sought to protect in personhood and dignity."<sup>97</sup>

The element of evolving enlightenment is also well represented. As noted above, the opinion gives a cursory nod to the historical understanding of marriage and support for it and then refers to others for whom "came the beginnings of a new perspective, a new insight."<sup>98</sup> Then the opinion says: "Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community."<sup>99</sup> In redefining marriage, Justice Kennedy says, "New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood."<sup>100</sup> Later, this decision is characterized as "the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality."<sup>101</sup>

So too, accusations of animus, linked to references of class status. DOMA, to Justice Kennedy is "designed to injure the same class the State seeks to protect."<sup>102</sup> As previously noted, the opinion quotes the food stamp case: "The Constitution's guarantee of equality 'must at the

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<sup>94</sup> United States v. Windsor, 570 U.S. \_\_, \_\_, 133 S. Ct. 2675, 2681 (2013).

<sup>95</sup> *Id.* at 2692.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 2696.

<sup>98</sup> *Id.* at 2689.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 2692-93.

<sup>102</sup> *Id.* at 2692. This is repeated almost verbatim on the next page: "DOMA seeks to injure the very class New York seeks to protect."

very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group.”<sup>103</sup> The specific conclusion is that DOMA “operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages.”<sup>104</sup> This is a problem, says Justice Kennedy, because it is “strong evidence of a law having the purpose and effect of disapproval of that class [same-sex couples]” by “impos[ing] 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.”<sup>105</sup> To bolster this conclusion, the opinion focuses on two ideas. First, it mentions only one of the interests Congress itself said would be served by DOMA, “affirmatively concealing from the reader the arguments that exist in justification.”<sup>106</sup> That interest is expressing “‘moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.’”<sup>107</sup> Second, it says DOMA treats same-sex marriages “as second-class marriages for purposes of federal law.”<sup>108</sup> This “second class” accusation really exercises the majority. Justice Kennedy accuses Congress of placing same-sex couples 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. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.<sup>109</sup>

In conclusion the majority returns to this charge of dignitary harm in language reminiscent (though it does not cite them) of *Lawrence v. Texas*, *Romer v. Evans* and the plurality opinion in *Planned Parenthood v. Casey*:

DOMA instructs all federal 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. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protec-

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<sup>103</sup> *Id.* at 2693 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 2694.

<sup>106</sup> *Id.* at 2707 (Scalia, J., dissenting).

<sup>107</sup> *Id.* at 2693 (majority opinion) (quoting H. R. Rep. No. 104-664, at 16 (1996)).

<sup>108</sup> *Id.* at 2693-94.

<sup>109</sup> *Id.* at 2695.

tion and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.<sup>110</sup>

The Court also talks at length about the “far greater reach” of DOMA than other federal laws regulating marriage because it is “applicable to over 1,000 federal statutes and the whole realm of federal regulations.”<sup>111</sup>

#### ENHANCING THE ROLE OF THE COURTS

The doctrine is an admirably clear demonstration of the importance of the Court’s self-perception to its decision making. The most obvious point is that it is both court-created and court-centered—in that it sees the Court as dispensing the goods the Constitution is meant to provide; personhood and dignity. What is immediately apparent is the mix of abstraction (personhood, dignity, evolution) and arbitrariness (animus, targeted class, broad disability). Abstraction provides the opening for the Court to involve itself in a greater range of human activities because “[i]f a value is sufficiently abstract it will necessarily seem to have broad relevance to human affairs, important or petty.”<sup>112</sup> Arbitrary tests allow the courts great latitude in determining how to apply their authority in specific cases.

Thus, in abortion cases, the courts can invoke their role as protectors of liberty, dignity, and self-creation (personhood) but are not constrained to invalidate a law unless they believe it creates an “undue burden,” an inherently subjective test.

So too with animus. Some argue that redefining marriage to include same-sex couples will inevitably lead to recognition of multiple partner “marriages.”<sup>113</sup> The logical path is easy to see—if marriage is defined solely by adult desires, then why should number, any more than sex, be a constraint. If same-sex marriage was imposed by application of conventional substantive due process, that might very well follow as a matter of course. With the animus test, who knows? It will be entirely at the discretion of the reviewing court to determine whether any marriage regulation is motivated by the ill will of the legislature or the electorate (especially as employed in *Windsor* where the Court did

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<sup>110</sup> *Id.* at 2696.

<sup>111</sup> *Id.* at 2690.

<sup>112</sup> Nagel, *supra* note 15, at 13.

<sup>113</sup> Elizabeth Larcano, A “Pink” Herring: The Prospect of Polygamy Following the Legalization of Same-Sex Marriage, 38 CONN. L. REV. 1065 (2006).



not acknowledge, much less examine, asserted government interests in the regulation).

The rule which the Court's decision applies has little application outside of a narrow range of cases involving contests related to marriage, family, and sexual morality. The Kennedy doctrine is *sui generis*, apparently having only one outside referent, the food stamps case. To Justice Scalia, Chief Justice Roberts, and Justice Alito, there is at least one other scenario which might be invoked—a challenge to state marriage laws;<sup>114</sup> but it need not if the courts decide not to affix the badge of animus to such laws.

#### WHITHER MARRIAGE?

The judicial approach exemplified by *Windsor* is not, of course, an unmixed blessing. Broad discretion, arbitrary applications, and an unlimited scope of action are all very well for the one making and applying the rules, but for those governed by them, not so much. To be sure, legislators and voters are free to propose, but the Supreme Court will ultimately dispose.

Additionally, “[t]reating social choices as a series of intellectual problems is reassuring to many in the educated classes, [but it] also tends to denigrate important values and to stunt moral and political discourse.”<sup>115</sup> Professor Nagel notes, “to the extent that constitutional rationalism forces communities to explain their decisions in terms of relatively remote relationships between policies and objectives, absurd purposes are postulated and important values are unfairly trivialized.”<sup>116</sup>

*Windsor* is again illustrative. The case is, at its core, about marriage: here, about Congress' decision to specify in the Dictionary Act a definition of marriage that tracked the understanding of that institution that had prevailed through the entire history of the United States and, indeed, the West since time immemorial.<sup>117</sup>

The virtually universal cultural recognition of a social institution uniting a husband and wife was, of course, based on a remarkable set of coincidences. First, that there are two different and complementary

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<sup>114</sup> *Windsor*, 133 S. Ct. at 2697 (Roberts, C.J., dissenting); 2710-11 (Scalia, J., dissenting); *id.* at 2719 (Alito, J., dissenting).

<sup>115</sup> Nagel, *supra* note 15, at 15.

<sup>116</sup> *Id.* at 16.

<sup>117</sup> 1 U.S.C. §7.

sexes. Second, that the sexual union of one of each of these is the one union that can create a child. Third, that every child ever born has a mother and father. Fourth, that mothers and fathers are not fungible. Fifth, that children are born dependent and experience a high degree of vulnerability. Sixth, that the parents of a child are more likely than other persons to take an interest in and be willing to sacrifice to shield that child from the consequences of his or her natural vulnerability.

In recognition of these realities, all, or nearly all, human societies have understood marriage as the union of a man and woman, the social significance of which is rooted in the potential for procreation of that type of union.

The *Windsor* majority opinion, by contrast, rests on assumptions about marriage that amount to a redefinition. To the majority, marriage is the act whereby a couple can “affirm their commitment to one another before their children, their family, their friends, and their community.”<sup>118</sup> It is the government’s conferral of “dignity” and “status.”<sup>119</sup> It is a “status” that “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.”<sup>120</sup> The Court here downgrades marriage to government endorsement of a private arrangement whose significance is limited to the personal interests of the adults involved.

How is this new institution to grapple with the realities the displaced understanding of marriage addressed? That’s easy—not at all. If the opinion were one’s only reference, one would not know children were not created asexually. For instance, when the Court says “DOMA instructs all federal 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.”<sup>121</sup> All children have a mother and father, but the majority completely elides this reality. In dramatic contrast from the displaced understanding’s focus on children, the opinion’s fleeting mentions always treat children’s interests as contingent on adult relationships. They may benefit from marriage, but only as the second-hand beneficiaries of the dignity the status bestows on the adults raising them.

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<sup>118</sup> *Windsor*, 133 S. Ct. at 2689.

<sup>119</sup> *Id.* at 2692.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 2696 (emphasis added). One might also believe that “marriage” is an honorific title bestowed by the state.

## CONCLUSION

There are interesting similarities between *Windsor's* treatment of the Constitution and its treatment of marriage.

In both instances, the power and discretion of the courts are enhanced and without any meaningful constraints. The Constitutional analysis and understanding of marriage are, in Professor Sunstein's words, "minimalist; they need have no progeny."<sup>122</sup> Nor need they have any ancestors. They are without root or branch, inorganic. They are willed into being.

They stand in stark contrast to understandings of the Constitution and marriage that are rooted in deep realities and long practice.

Which set of understandings will survive? The power of the courts is great but "deep roots are not reached by the frost."<sup>123</sup>

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<sup>122</sup> Sunstein, *supra* note 27, at 32.

<sup>123</sup> J.R.R. TOLKIEN, *THE FELLOWSHIP OF THE RING* 167 (1954).

