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WEATHER PERMITTING: INCREMENTALISM, ANIMUS, AND THE ART OF FORECASTING MARRIAGE EQUALITY AFTER *U.S. V. WINDSOR*

JEREMIAH A. HO*

ABSTRACT

Within LGBT rights, the law is abandoning essentialist approaches toward sexual orientation by incrementally de-regulating restrictions on identity expression of sexual minorities. Simultaneously, same-sex marriages are becoming increasingly recognized on both state and federal levels. This Article examines the Supreme Court's recent decision, *U.S. v. Windsor*, as the latest example of these parallel journeys. By overturning DOMA, *Windsor* normatively revises the previous incrementalist theory for forecasting marriage equality's progress studied by William Eskridge, Kees Waaldijk, and Yuval Merin. *Windsor* also represents a moment where the law is abandoning antigay essentialism by using animus-focused jurisprudence for lifting the discrimination against the expression of certain sexual identities.

If the law is shifting from essentialism while veering closer to marriage equality, then will these parallel journeys end by reaching a constructivist approach to sexual identity? Pure constructivism poses thorny risks for attempts to include orientation as a suspect classification for heightened scrutiny. As an example, the immutability factor is likely to resist constructivist ideas that sexual identity is a choice or a construct. *Windsor*'s use of animus-focused jurisprudence hints at a solution that allows the abandoning of essentialism to reach a middle ground because animus-focused jurisprudence moves the examination away from whether a trait is protectable under equal protection toward the animus that created the discrimination within a law itself. This Article explores *Windsor*'s animus-focused jurisprudence as the convergence of both marriage equality and incrementalism, and posits normative reasons for sustaining this jurisprudence stepping forward.

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* Assistant Professor of Law, University of Massachusetts School of Law. I would like to thank the following for their support and assistance along the way: Kali Hague, Marsha Sonner, Elizabeth Stuewe, Stephanie Randall, Bo Turney, Rome Rapier, Justin Steele, Sarah Moxon Sawyer, and Courtney Paulding-Zelaya. I am also grateful to Professor Richard Peltz-Steele for advice in writing and to the UMass School of Law for funding this research. Lastly, special thanks to Jessica Almeida, Emma Wood, Nancy Gray, Mario Nimock, Hakan Sjoo, Lance Royer, and Kurt J. Hagstrom.

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I. INTRODUCTION

In early April of 2009, the National Organization of Marriage (NOM) used the metaphor of an impending storm in its first anti-marriage equality web-video to characterize the institutional threat that it perceived the extension of marriage rights to same-sex couples would pose.¹ Unlike a mere patch of flowers in May, the effect of these torrential April showers, as the ad conveyed, would be catastrophic to the rights of non-gay citizens—more likely flood than floral. Titled “Gathering Storm,” the video’s message begins with a seemingly-random ensemble of average, everyday adults standing before a wall of storm clouds amassing together and unfolding angrily, punctuated with an occasional lightning bolt between one ominous moment and the next.² Each member of the ensemble takes turns delivering, with eyes directly into the camera, lines from the following message: “There’s a storm gathering. The clouds are dark, and the winds are strong. And I am afraid. Some who advocate for same-sex marriage have taken the issue far beyond same-sex couples. They want to bring the issue into my life. My freedom will be taken away.”³ Then after some further sermonizing, the ad climaxes toward a close-up shot on a young woman as she utters lines that echo sentiments from the preceding narrative, but this time with more dramatic urgency: “But some who advocate for same-sex marriage have not been content with same-sex couples living as they wish. Those advocates want to change the way I live. I will have no choice. The storm is coming.”⁴

¹ *National Organization for Marriage “Gathering Storm” TV Ad*, YOUTUBE (Apr. 7, 2009), http://www.youtube.com/watch?v=xGi2r-M_gQ8.

² *Id.*

³ *Id.*

⁴ *Id.*

Although NOM tries to convey that marriage equality is naturally—like a serious and encroaching storm—a threat upon the rights of all Americans, a closer reading of the advertisement reveals that what NOM asserts as natural actually exists as an ideological construct. Shortly after the advertisement had aired, critics of NOM’s ad immediately observed the thin smoke-and-mirrors that was NOM’s *sturm und drang* over the inevitability of marriage equality. Frank Rich’s *New York Times* op-ed famously blasted the message, noting that “[i]f it advances any message, it’s mainly that homophobic activism is ever more depopulated and isolated as well as brain-dead.”⁵ With those sentiments in mind, the soundness of the message’s content is called substantially into question and the artifice behind the storm reveals itself a bit more evidently. Further close reading of the ad shows that not only the substance of the message was artifice, but so are many components of the video that helped stage the delivery of that message. For instance, the message was not delivered in a more seemingly-organic narrative—perhaps as a vignette or some other situational depiction—but rather such delivery was done by speakers directly into the camera, breaking that proverbial fourth wall in a way that tries to reproduce a documentary or testimonial style. The testifying ensemble of speakers may seem like a sampling of everyday people, but in fact they were also constructed purposefully for the ad; they were carefully chosen actors.⁶ Even the storm itself—although magnificently dark and foreboding with ultra-fluorescent snaps of lightning—was a computer-generated effect that swirled indignantly when the message was somber and then cleared itself up precisely on cue.

In this way, NOM’s attempt to liken same-sex marriage as a displacement of the status quo becomes suspicious and contrived. What reveals is a construct resembling the familiar fear-mongering rhetoric that has convincingly subordinated sexual minorities in the past, in which the dominant political force has attempted to justify attitudes, policies, and laws that abridge the rights and exclude visibility of sexual minorities. By posing an us-versus-them dichotomy through lines such as, “But some who advocate for same-sex marriage have not been content with same-sex couples living as *they* wish,” NOM implies that significant enough differences exist between gays and straights and that such differences are the highlighted reasons for not permitting same-sex couples to marry while continuing to allow different-sex couples to do so otherwise.⁷

This essentialized approach to marginalizing gays is not new. Harnessing so-called principles of existence that seem objectively universal but also terribly divisive has existed as a way to justify isolating minority groups.⁸ Differences do exist naturally between gays and straights, but are such differences appropriate as justification for the categorical denial of rights to gays *versus* straights? By playing up inherent differences that then allows for a split in such treatment, NOM’s

⁵ Frank Rich, *The Bigots’ Last Hurrah*, N.Y. TIMES (Apr. 18, 2009), http://www.nytimes.com/2009/04/19/opinion/19Rich.html?_r=3&ref=opinion\&.

⁶ See Kate Pickert, *A Storm Over Gay Marriage*, TIME (Apr. 10, 2009), <http://www.time.com/time/nation/article/0,8599,1890523,00.html>.

⁷ In this Article, I use the terms “gay,” “homosexual,” and “LGBT” interchangeably.

⁸ See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 56-58 (2001).

message succeeds in showing what critical race theorists have long claimed: that essentialism can be used against a targeted minority group.⁹

NOM launched the “Gathering Storm” ad at a critical point in the recent marriage equality debate—just five months after California citizens had passed Proposition 8, redefining marriage in the state as only between a man and a woman, and within the same moment states such as Iowa, Vermont, and Maine all moved to legalize same-sex marriage within their borders.¹⁰ This juncture was crucial as restrictive attitudes toward marriage equality had started to loosen.¹¹ In this way, the NOM ad was reactionary and reaffirming—that California might have foreclosed same-sex marriage in 2008, and yet other states were not quite squelching the issue. But the failure of essentialism here and the ad’s exposure as construct left its message hollow in content and NOM paranoid at best. Numerous parodies of the NOM ad that appeared shortly on the web seem to highlight that paranoia of the “Gathering Storm” and reveal the absurdity at the crux of NOM’s sentiments against sexual minorities.¹² The only thing skillfully essentialized was animus and artifice.

And yet, the NOM message did harbor a small ray of truth with one line: “Some who advocate for same-sex marriage have taken the issue far beyond same-sex couples.”¹³ In an odd twist of irony, this particular line—whether read within the context of an anti-marriage equality ad or isolated in its entirety—might be the single, most accurate statement about the marriage equality movement in that ad. The marriage equality issue is *indeed* far beyond same-sex couples; the issue has decidedly more profound implications—implications that, as Steven Colbert’s satirical response to the NOM ad precisely underscored, “won’t be solved by clearing your web browser.”¹⁴ Yet here again, NOM obfuscates that idea and uses the line to set up the “potential storm” that leads to inequality, overlooking that the implications of marriage equality are less about some threatening intrusion of same-sex couples into the lives of heterosexuals, and much more about the fundamental visibility, inclusion, and acceptance of the gay identity within the terror of mainstream American existence.

The tension between essentialism and social constructivism has almost always lurked behind the marriage equality debate, and by extension the movement for gay rights, as traditionally the differences characterized by sexual orientation—gay or straight—has been fixed from a biological perspective in order to reach the politics of marginalization through discourse between nature versus nurture, truth versus

⁹ *Id.*

¹⁰ See Pickert, *supra* note 6; see also *Timeline: Same-Sex Marriage*, CNN: THIS JUST IN (Oct. 18, 2012, 02:33 PM EST), <http://news.blogs.cnn.com/2012/10/18/timeline-same-sex-marriage/>.

¹¹ See *Changing Attitudes on Gay Marriage*, PEW RESEARCH RELIGION & PUBLIC LIFE PROJECT (June 2013), <http://features.pewforum.org/same-sex-marriage-attitudes/>.

¹² See Japhy Grant, *The 10 Best Responses to the “Gathering Storm”*, QUEERTY (Apr. 20, 2009), <http://www.queerty.com/the-best-responses-to-the-gathering-storm-ad-20090420/>.

¹³ See *Gathering Storm*, *supra* note 1.

¹⁴ *The Colbert Report: Episode 542* (Comedy Central television broadcast Apr. 16, 2009), available at <http://www.colbertnation.com/the-colbert-report-videos/224789/april-16-2009/the-colbert-coalition-s-anti-gay-marriage-ad>.

hypothesis, biology versus choice, *us versus them*. But recently observable within the marriage equality movement, the abandonment of essentialism with respect to sexual orientation has started gaining momentum in the law. Particularly since the Supreme Court decriminalized consensual same-sex intimacy in *Lawrence v. Texas*,¹⁵ there has been a progressive undoing of essentialist approaches toward sexual minorities traceable along the specific legal path to marriage equality promulgated previously and extensively by William Eskridge,¹⁶ Yuval Merin,¹⁷ and Kees Waaldijk.¹⁸ In their earlier comparative studies of the rise of marriage equality internationally, they have acknowledged a few common legal incremental steps that most societies usually undertake in a genuine road toward marriage equality.¹⁹ Conflated together, Eskridge, Merin, and Waaldijk's theories of incrementalism have provided a substantial and workable line of decisional behavior indicative of legal and societal changes toward marriage equality successes in numerous states and countries. Since their theorizing prior to *Lawrence* and other recent triumphs for sexual minorities, the U.S. has brought their independent and collective hypotheses alive on both federal and state levels to set the stage for accomplishing the extension of marriage to same-sex couples.

This Article will explore, on the federal level, the notion that the marriage equality movement in the U.S. has progressed onto the last phase of Eskridge, Merin, and Waaldijk's incrementalism. In June 2013, *U.S. v. Windsor*,²⁰ ushered our national, social, and legal imaginations into the final stage of marriage equality's inevitability. Concurrently, the journey along this particularized incrementalism has also revealed an observable abandonment of essentialism approaches in the law toward sexual minorities. This Article examines how the incremental process toward marriage equality has facilitated that abandonment by tracing the way the law has dislodged the regulation of identity expression for sexual minorities along each step of the Eskridge-Merin-Waaldijk incrementalist approach. From there, this Article will then posit that abandonment's significance, as it reveals more clearly the development of animus-focused jurisprudence in order to further the rights of sexual minorities.

Beyond this Introduction, Part II will recapitulate the theory of incrementalism as originally proposed by Eskridge, Merin, and Waaldijk, and add to their existing legal scholarship by adjusting that path to reflect certain significant developments in the law regarding sexual minorities that have taken place since their earlier works. Part

¹⁵ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁶ WILLIAM N. ESKRIDGE JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* (2002) [hereinafter ESKRIDGE, *EQUALITY PRACTICE*].

¹⁷ YUVAL MERIN, *EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES* (2002).

¹⁸ Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW* 437, 437-68 (Robert Wintemute & Mads Andenæs eds., 2001).

¹⁹ See Waaldijk, *supra* note 18, at 439-40; ESKRIDGE, *EQUALITY PRACTICE*, *supra* note 16, at xiii-xiv; see MERIN, *supra* note 17, at 308-09.

²⁰ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

III will examine the U.S. variation to that theme of incremental change—through *Lawrence v. Texas*; the repeal of Don't Ask, Don't Tell; and *Windsor*—and determine the journey's substantial completion on the federal level. Part IV will then describe how the undoing of essentialist approaches toward sexual minorities within the U.S. variation has produced the rise of animus-focused jurisprudence and end with normative considerations on its development post-*Windsor*. As that development is achieved, marriage equality should prove less catastrophic than a storm, but no less resonant.

II. STEP-BY-STEP: THE ESKRIDGE-MERIN-WAALDIJK INCREMENTALISM REVISITED

A. *The Original Theory*

Comparative studies on the incrementalist path toward marriage equality came about roughly at the same time during the entrance and adoption of civil unions, domestic partnerships, and other “marriage-lite” relationships schemes by legislatures across Western countries and individual U.S. states in the 1990s and early new millennia. Promulgated by Kees Waaldijk in the Netherlands, and William Eskridge and Yuval Merin in the U.S., each of their separate studies observed that marriage equality movements internationally succeeded often through a specific incremental path propounded by certain sequential changes.²¹ At the time, these studies attempted to shed insight into the particular legal transformations that might eventually forecast the inevitability of same-sex marriage within a country or a state and also serve normatively as strategies—however gradual—for LGBT rights activism.²² Calling his interpretation of incrementalism a “law of small change,” Waaldijk’s study proposed a step-by-step approach to marriage equality through his substantially historical account of same-sex marriage developments in the Netherlands.²³ Eskridge named his incrementalist theory, “equality practice,”²⁴ and used it to justify favorably the enactment of civil unions, particularly in Vermont in 1999 with *Baker v. State*.²⁵ In slight contrast to Waaldijk and Eskridge, Merin’s position on incrementalism in his study was more heavily focused on its existence as an activist means to the process of achieving marriage equality, calling incrementalism a “necessary process,” which relays both descriptive and normative observations at the same time.²⁶

Although Waaldijk, Eskridge, and Merin each have slightly different takes on marriage equality incrementalism, their scholarship about marriage equality’s inevitability latch onto some common recognition of incrementalism as a vital

²¹ See Waaldijk, *supra* note 18, at 439-40; ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at xiii-xiv; MERIN, *supra* note 17, at 308-09.

²² Waaldijk, *supra* note 18, at 440; ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at xiii; MERIN, *supra* note 17, at 327.

²³ Waaldijk, *supra* note 18, at 440.

²⁴ ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at xiii.

²⁵ *Baker v. State*, 744 A.2d 864 (Vt. 1999).

²⁶ MERIN, *supra* note 17, at 327 (“The *necessary process* hypothesis is both descriptive and normative: it reflects how countries have actually moved toward the recognition of same-sex partnerships, and it prescribes what has to take place in countries and states that have yet to provide comprehensive recognition to same-sex couples, such as the United States.”).

evolutionary staircase that will guide the movement toward that end. The notion of incrementalism runs deeper than supposing that merely time will change things. That evolutionary staircase with relatively specific steps escalates to progressively recast the visibility of sexual minorities upon the wide plain of civil legal rights in a society. By consensus, Eskridge, Merin, and Waaldijk all prescribe those steps in the following sequence: (1) the decriminalization of consensual same-sex intimacy occurs first; (2) then anti-discrimination against sexual minorities is furthered; and (3) lastly, the relationships of same-sex couples are then legally recognized.²⁷ Once a state has crossed these three steps, the conditions for marriage equality will then be most evident. Subtle differences in Merin, Waaldijk, and Eskridge's individual approaches exist alongside the broader similarities each has expressed in this same, three-step trajectory. For instance, unlike Eskridge and Merin, Waaldijk emphasizes that after the first step of decriminalizing sodomy, an adjustment to the age of consent follows.²⁸ Meanwhile, Merin takes more expressly into account a possibility of a fourth step in Europe for parenting rights to flourish,²⁹ and Eskridge idiosyncratically ties equality practice to communitarian and post-modern implications.³⁰ Otherwise, all three scholars bear very similar incantations of a legal evolution toward marriage equality. Their differences might be in the variations of shape or color of the staircase steps, but not in the placement and order of the steps and in the final destination of same-sex marriage that these steps should reach. For its remainder, this Article, will refer to their strand of incrementalism interchangeably as the Eskridge-Merin-Waaldijk theory or marriage equality incrementalism.

But what is more interesting is the broad commonality that Waaldijk, Eskridge, and Merin have each noted or characterized *in between* these steps. They each have observed the positive opportunity incrementalism affords to humanize the historically unpopular identities of sexual minorities.³¹ For Waaldijk, who wrote first about the particular steps that the Netherlands took to recognizing same-sex marriage, he pegged the process behind incrementalism as not just the recognition of same-sex marriage but rather “the legal recognition of homosexuality”—even though he is less forthcoming about the connection between recognition of sexual identity and same-sex marriage as he is concerned with detailing the three steps the Netherlands took to conferring marriage rights toward same-sex couples.³² Similarly, in explaining his “necessary process,” Merin acknowledges that “the fight for gays for inclusion in the institution of marriage should not be examined as an independent claim; rather, it should be assessed in light of the status of gay men and lesbians in Western societies in general and in fields of law other than marriage.”³³

²⁷ Waaldijk, *supra* note 18, at 439-40; ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at xiii-xiv; *see* MERIN, *supra* note 17, at 308-09.

²⁸ Waaldijk, *supra* note 18, at 440.

²⁹ MERIN, *supra* note 17, at 327.

³⁰ *See generally* ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at 159-230.

³¹ *Id.* at xiii.

³² *See generally* Waaldijk, *supra* note 18, at 437-68.

³³ MERIN, *supra* note 17, at 308.

Eskridge's version appears most emotionally illustrative of this connection between incrementalism that results in marriage equality and societal acceptance of an undermined sexual identity. Within his "equality practice," Eskridge dramatizes what he believes are the effects of incrementalism toward the social recognition of sexual minorities in tandem with the more immediate goal of furthering same-sex marriage:

If you are sickened by "homosexuals," you are unlikely to support gay marriage, but you might favor sodomy decriminalization for practical reasons, such as your belief that the state is wasting its time snooping around people's bedrooms. Yet sodomy decriminalization and a lessening of public condemnation of homosexuality will embolden some of your gay friends, family members, and coworkers to come out of their closets. You may be shocked at first, and you can assimilate them as exceptions to your dislike of homosexuals, but your antigay attitudes may soften as you enter middle age. Over time, your interaction with gay people might open you up to acquiescing in antidiscrimination laws, if your experience has been that gay coworkers are okay and that antigay workers are troublemakers. You could still oppose same-sex marriage, but even this attitude might bend when your daughter partners with another woman and your spouse and other children accept her and integrate her partner into the extended family. As each step in the progression toward gay equality encourages more people to be openly gay, not only can middle-aged homophobic attitudes change, but the attitudes of new generations might start out less homophobic. These changes will support gay equality.³⁴

Although Eskridge makes large, and at times, nearly tenuous, connective leaps between the steps of incrementalism in his illustration, the account that he draws is not impossible—that with each step, both the mainstream perceptions of sexual minorities and the self-identification of gay people will renegotiate to propitiate closer to acceptance and equality.³⁵ Indeed Eskridge underlines this transformative notion by setting up the binary between what he calls, a "politics of recognition" and a "politics of preservation," in regards to the mainstream reaction to sexual minorities as they become more visible within each step of incrementalism while the larger legal mechanism moves toward same-sex marriage.³⁶ The trip made in equality practice is from, what he designates, a politics of preservation that retains the status quo of the institution of marriage to exclude same-sex couples toward a politics of recognition where sexual minorities have engaged in the process of social and legal recognition.³⁷ In their respective ways, all three scholars suggest at the transformation of society's acceptance and recognition of sexual minorities as the underlying result of incrementalism while, on the surface, incrementalism pushes onward to marriage equality.³⁸ In the U.S., this change has been manifested within

³⁴ ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at 117.

³⁵ *Id.* at 115.

³⁶ *Id.* at 112.

³⁷ *Id.*

³⁸ *See generally* Waaldijk, *supra* note 18, at 437-68; ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at 117; MERIN, *supra* note 17, at 308.

the last decade by gradual narratives that led to *Windsor* and how those narratives have altered the regulation of the identity expression of sexual minorities. Within the current U.S. narrative of marriage equality since *Lawrence*, incrementalism on the federal level has particularly involved the way that the law has handled the expression of identity for sexual minorities. Thusly, incrementalism not only provides the structural stairs for obtaining same-sex marriage, but as we will see, it also is a mechanism that has started to help strip away the marginalization of sexual minorities by pushing the law away from antigay essentialist approaches to sexual minorities. The result of de-marginalization explains why the incremental process requires certain steps to surpass before even the inevitability of marriage equality is possible.

B. Dealing with Incrementalist Imprecision

At the time of this writing, it has been more than a decade since the Eskridge-Merin-Waaldijk theory came into scholarly view. Since 2002, when Merin and Eskridge published their works on incrementalism, sexual minorities have triumphed over a myriad of significant successes and setbacks in the path to gaining equality rights. For instance, in 2002, *Lawrence* had not overruled *Bowers v. Hardwick*³⁹ and DOMA still restricted the federal definition of marriage for different-sex couples.⁴⁰ Merin and Eskridge's respective 2002 studies came out a year before Massachusetts would usher in same-sex marriage with *Goodridge v. Department of Public Health*.⁴¹ At that same time, Proposition 8 in California would have referred back to a 1982 ballot measure titled Victim's Bill of Rights that affected the state's evidentiary code rather than a ballot measure redefining marriage between a man and a woman in the state constitution.⁴² Don't Ask, Don't Tell had not yet been repealed, and no support for same-sex marriage was imminent from the White House; and in fact, before President Obama would endorse gay rights or marriage equality as goals at his inaugurations⁴³—not to mention broadcast his support for same-sex marriage on television⁴⁴—there was, in contrast, congressional support for the Federal Marriage Amendment to keep marriage as only for different-sex couples.⁴⁵ The catalysts that

³⁹ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁴⁰ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006)).

⁴¹ See generally ESKRIDGE, EQUALITY PRACTICE, *supra* note 16. MERIN, *supra* note 17; *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

⁴² See Jeff Brown, *Proposition 8: Origins and Impact—A Public Defender's Perspective*, 23 PAC. L.J. 881 (1992).

⁴³ David G. Savage, *Inauguration 2013: Obama Hints at Greater Gay Marriage Support*, L.A. TIMES (Jan. 21, 2013), <http://articles.latimes.com/2013/jan/21/news/la-pn-inauguration-2013-obama-gay-marriage-support-20130121>.

⁴⁴ Jackie Calmes & Peter Baker, *Obama Says Same-Sex Marriage Should Be Legal*, N.Y. TIMES (May 9, 2012), <http://www.nytimes.com/2012/05/10/us/politics/obama-says-same-sex-marriage-should-be-legal.html?pagewanted=all>.

⁴⁵ Jonathan Turley, *The American Gothic Amendment: Tinkering with the Constitution for the Wrong Reason*, CHI. TRIB. (May 19, 2002), http://articles.chicagotribune.com/2002-05-19/news/0205190435_1_same-sex-marriages-marriage-act-marriage-matters.

prodded the *Hollingsworth* and *Windsor* cases seemed nascent. In 2002, the Eskridge-Merin-Waaldijk theory in the U.S. was exactly what the name designates—a theory. Since then, marriage equality incrementalism has been set into motion in the U.S. and some of the events above have directly tested that theory while others have shown their importance peripherally between the incremental steps.

Critical voices have revisited the theory from time to time, mostly fixating on its tendency to generalize and also for its fit for the U.S. given our system of federalism where marriage is regulated by the states⁴⁶ and the way marriage is viewed—often religiously—by the public.⁴⁷ Indeed, post-2002, when applied to the marriage equality movement in the U.S., the Eskridge-Merin-Waaldijk theory seemed to be an imperfect theory—either not taking as much account of the nuances of the marriage equality movement through our system in which individual states regulate marriage, or appearing to focus on generalities rather than social conditions specific to the country or state that might affect the process. In light of recent acceleration in gay rights activism, the U.S. journey on the incrementalist path has some variation enough to pose revisions to the theory that account for the criticisms, but not a wholesale rejection. As discussed *infra*, such criticisms, though relevant, might have been premature because with *Windsor*, the theory's applicability has actually been proven quite strongly.

Specifically, step three of the Eskridge-Merin-Waaldijk theory—originally the legal recognition of same-sex couples through alternative relationship schemes, such as civil unions and partnerships—could now be broadened to encompass, not only those schemes, but also marriage itself, which possibly abridges the steps from three to two for some journeys. As discussed later, the Eskridge-Merin-Waaldijk theory can embrace its descriptive functions just as it has always done, but it take its normative functions less narrowly and restrictively. With that stated, the differences between the U.S. and elsewhere that had once seemed to reject the applicability of the Eskridge-Merin-Waaldijk incrementalism on American soil can be reconciled for a workable prediction of the inevitability of same-sex marriage in the U.S. In this manner, we can use incrementalism as a helpful guide to assist us in reaching marriage equality in fifty states, rather than using it as a mandated road that must be taken with exacting ritual.

C. The Spirit Versus Letter Approach

At its core, disjointed incrementalism—the broader process theory mechanism that houses the Eskridge-Merin-Waaldijk theory—assumes bounded rationality. Although it harbors long-term historical ties to Burkean notions of tradition and societal change,⁴⁸ incrementalism as a recent economic, political science and policy

⁴⁶ Erez Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. GENDER L. & POL'Y 105, 135 (2010).

⁴⁷ M. V. Lee Badgett, *Predicting Partnership Rights: Applying the European Experience in the United States*, 17 YALE J.L. & FEMINISM 71, 84-85 (2005).

⁴⁸ See Suzanne B. Goldberg, *Marriage as Monopoly: History, Tradition, Incrementalism, and the Marriage/Civil Union Distinction*, 41 CONN. L. REV. 1397, 1408 (2009) (“Still another explanation for the history and tradition proffer might be an underlying commitment to a Burkean-style incrementalism, with the view that the risks associated with sharply altering tradition may outweigh the benefits of change.” (footnote omitted)). See generally Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006).

decision-making theory is most closely linked to Yale economist, Charles Lindblom and his examinations on the process of gradual social changes that deviate minimally from status quo and how this type of transformation is more realistic than “synoptic” changes in which grand units of decision-making are accomplished in gestures that resemble “one fell swoop.”⁴⁹ Incrementalism denotes gradual changes as more realistic, noting that “[w]hen a man sets out to solve a problem, he embarks on a course of mental activity more circuitous, more complex, more subtle, and perhaps more idiosyncratic than he perceives it”⁵⁰ and that once “he is aware of some of the grosser aspects of his problem solving . . . he will often have only the feeblest insight into how his mind finds, creates, dredges up—which of these he does not know—a new idea.”⁵¹ In this way, Lindblom characterizes incrementalism as the product of bounded rationality: “Dodging in and out of the unconscious, moving back and forth from concrete to abstract, trying chance here and system there, soaring, jumping, backtracking, crawling, sometimes freezing on point like a bird dog, [the man] exploits mental process that are only slowly yielding to observation and systematic description.”⁵²

Applicable variously outside of the marriage equality movement, incrementalism has been subsequently “reframed” and summarized by other social science scholars to exhibit the following basic “stratagems”:⁵³

- a. Limitation of analysis to a few somewhat familiar policy alternatives, of which one possible form is simple incremental analysis: consideration of alternative policies differing only marginally from the status quo;
- b. Intertwining of analysis of policy goals and other values with the empirical aspects of the problem—that is, no requirement that values be specified first with means subsequently found to promote them;
- c. Greater analytical preoccupation with ills to be remedied than positive goals to be sought;
- d. A sequence of trials, errors, and revised trials;
- e. Analysis that explores only some, not all, of the important possible consequences of a considered alternative;
- f. Fragmentation of analytical work to many partisan participants in policy making, each attending to their piece of the overall problem domain.⁵⁴

⁴⁹ J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CALIF. L. REV. 59, 72 (2010); Sharon B. Jacobs, *Crises, Congress, and Cognitive Biases: A Critical Examination of Food and Drug Legislation in the United States*, 64 FOOD & DRUG L.J. 599, 625-26 (2009).

⁵⁰ DAVID BRAYBROOKE & CHARLES E. LINDBLOM, *A STRATEGY OF DECISION: POLICY EVALUATION AS A SOCIAL PROCESS* 81 (1963).

⁵¹ *Id.*

⁵² *Id.*

⁵³ Andrew Weiss & Edward Woodhouse, *Reframing Incrementalism: A Constructive Response to the Critics*, 25 POL’Y SCI. 255, 256 (1992).

⁵⁴ *Id.* In its theoretical distillation, incrementalism—as it has been studied by others in the social sciences—has been a theory that embraces imperfections. Professors James Krier and

When applied to the marriage equality movement, the particular Eskridge-Merin-Waaldijk theory of incrementalism embodies and exhibits the same kind of limitations that Lindblom's theory prescribes. Indeed, at close glance, all of those six stratagems of Lindblom's incrementalism appear in Eskridge-Merin-Waaldijk's more specified incrementalist theory for marriage equality. Without doubt, the term "incrementalism" was not misappropriated when Waaldijk, Eskridge, and Merin each used it to identify the possible steps it took for a society to achieve marriage equality.

For instance, with the first stratagem—the limitations on policy alternatives—the journey from decriminalization of consensual same-sex intimacy to initiation of antidiscrimination policies covering sexual orientation, and finally to legal recognition of same-sex couples, can be thought of as a journey comprised of limited alternative policies differing marginally from one status quo to the next. In fact, when Waaldijk refers to his incrementalist theory as a "law of small change," he fashions those small changes recognizing gay rights happening only " 'if that change is either perceived as small' " ⁵⁵ or alternatively " 'if that change is sufficiently reduced in impact by some accompanying legislative "small change" that reinforces the condemnation of homosexuality.' " ⁵⁶ Waaldijk cites examples of decriminalization of consensual same-sex intimacy in European countries where

decriminalisation of sexual activity between adult men (and women) was accompanied by the maintenance or introduction of various specifically homosexual offences, including bans on homosexual activity "in public" (United Kingdom and Romania), or leading to "public scandal" (Bulgaria, Romania and formerly Spain), as well as on "proselytism" for it (Austria, Cyprus and Romania). ⁵⁷

In describing "equality practice," Eskridge notes that incrementalism "proceeds by little steps taken in a particular order" ⁵⁸ and that one of the imperfections in the gay rights movement in the U.S. and elsewhere is that the "law cannot move unless public opinion moves, but public attitudes can be influenced by changes in the

Mark Brownstein, in writing about pollution control in environmental law, has commented that the widely-accepted Lindblom model of incrementalism considers "practical obstacles" part of the process of slow change and that "[f]ragmented institutions and segmented problem-solving simply reflect the way reality shapes institutions and procedures. The world cannot be remade to fit the ambitions of comprehensive rationality; useful decision theory has to be tailored to the ugly imperfections of the real world." James E. Krier & Mark Brownstein, *On Integrated Pollution Control*, 22 ENVTL. L. 119, 126 (1992). Lindblom himself had argued that humans are incapable of designing perfect systems because human rationality is inherently limited. See Charles E. Lindblom, *The Science of "Muddling Through"*, 19 PUB. ADMIN. REV. 79, 80 (1959). In this way, Lindblom explains that democracies "change their policies almost entirely through incremental adjustments. Policy does not move in leaps and bounds." *Id.* at 84.

⁵⁵ Waaldijk, *supra* note 18, at 440.

⁵⁶ *Id.*

⁵⁷ *Id.* at 441 n.18 (citations omitted).

⁵⁸ ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at 115.

law.”⁵⁹ As such, “[f]or gay rights, the impasse suggested by this paradox can be ameliorated if the proponents of reform move step by step along a continuum of little reforms. Step-by-step permits gradual adjustment of antigay mindsets, slowly empowers gay rights advocates, and can discredit antigay arguments.”⁶⁰ Consequentially, this path is one that prefers a slow and steady pace.

With the second stratagem that characterizes incrementalist motions as “intertwining of analysis of policy goals and other values with the empirical aspects of the problem,”⁶¹ economist Andrew Weiss and political scientist Edward J. Woodhouse, in defending Lindblom, explain further that this means there often is “no requirement that values be specified first with means subsequently found to promote them.”⁶² This stratagem could be signified by how—although the three events nearly required by the Eskridge-Merin-Waaldijk theory seek the surpassing of consensual same-sex intimacy laws, of discrimination against sexual minorities, and of legal recognition of same-sex couples—these events are not necessarily linked with the overall consequence of marriage equality in mind. Rather, each step can function—and does function—to achieve the de-marginalization of sexual minorities, but they are not informed by each other prior to each achievement. Despite the more nuanced readings of the *Lawrence v. Texas* majority (including Justice Scalia’s reading of it as expressed in his dissent) that claim that the Justice Kennedy’s opinion was a towering moment for the extension of marriage to same-sex couples,⁶³ the opinion itself in its then-present effect was narrower—only pertaining to invalidating laws that criminalized sexual minorities for engaging in consensual sodomy, and it was not facially evident that Kennedy penned the majority opinion with the goal of marriage equality; in fact, the majority demarcated the significance of its ruling by opining that the case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”⁶⁴ Instead, Kennedy wrote that “the case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”⁶⁵ Although after the ruling, in scholarly and activist dissection, *Lawrence* does bear eventual incremental significance for the marriage equality movement, *Lawrence* itself was confined to existing as a due process case that decriminalized anti-sodomy laws and handed no precedent on equality of marriage for same-sex couples.⁶⁶ This kind of self-

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Weiss & Woodhouse, *supra* note 53, at 256.

⁶² *Id.*

⁶³ See Stephen Reinhardt, *Legal & Political Perspectives on the Battle Over Same-Sex Marriage*, 16 STAN. L. & POL’Y REV. 11 (2005); *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting).

⁶⁴ *Lawrence*, 539 U.S. at 578.

⁶⁵ *Id.*

containment in the increments likely demonstrates why Eskridge-Merin-Waaldijk incrementalism embodies Lindblom's idea of incrementalism because it does not explicitly harbor a means-ends momentum each time an increment is about to be met.

The third stratagem in Lindblom's incrementalist theory shows that the process of change harbors "[g]reater analytical preoccupation with ills to be remedied than positive goals sought."⁶⁷ The Eskridge-Merin-Waaldijk incrementalism is rife with this attribute as well. For instance, in his "necessary process," Merin describes this preoccupation after framing his incrementalist theory by starting with the discriminatory subordination of sexual minorities in the U.S. and abroad, both publicly and covertly.⁶⁸ As a result, Merin articulates that the incremental process for sexual minorities to gain recognition of their relationships is an escalation towards greater tolerance that is embodied in his rendition of the three steps, couched from a remedial stance more so than an affirmative stance: "The first and basic level is to remove from the criminal code (if they exist) sanctions against homosexual and lesbian conduct; the second level is to prohibit discrimination against gay men and lesbians on the basis sexual orientation."⁶⁹ Merin describes both first and second steps from a perspective of removal and restriction: the law must take away the roadblocks that will prohibit future subordination of sexual minorities—in either steps, things must be "removed" or "prohibited" so that the marginalization is redressed. Only finally in incrementalism's step three does Merin's description seem a bit more positive when he describes that step as "affirmatively recogniz[ing] same-sex partnerships as equal to opposite-sex unions for various purposes, beginning with 'soft' rights such as various economic benefits and following that step with comprehensive recognition of same-sex partnerships."⁷⁰

The fourth stratagem involving incrementalism as "[a] sequential of trials, errors, and revised trials" could be envisioned again by Waaldijk's description that in his "law of small changes," where "each step in this standard sequence is in fact a sequence in itself."⁷¹ Again, the U.S. example of decriminalization of consensual

⁶⁶ See Anthony Michael Kreis, *Gay Gentrification: Whitewashed Fictions of LGBT Privilege and the New Interest-Convergence Dilemma*, 31 LAW & INEQ. 117, 146-47 ("While the decisions in both *Bowers* and *Lawrence* turned on the issue of a constitutional right to homosexual sodomy, it is clear from the briefs and oral argument that the Justices were much more informed (and presumably mindful) of the decision's potential impact on related matters embedded in family law. Indeed, Justice Kennedy took great care to distance *Lawrence* from the fomenting marriage equality debate." (footnotes omitted)); see also *Lawrence*, 539 U.S. at 578 (opining that the majority decision in *Lawrence* "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter").

⁶⁷ Weiss & Woodhouse, *supra* note 53, at 256.

⁶⁸ MERIN, *supra* note 17, at 308. Merin notes that "in many countries, including most U.S. states, gays do not enjoy the protection of antidiscrimination laws," and that "[n]ot only are gay men and lesbians not legally protected from discrimination, but, to varying degrees and depending on the country, the vast majority of the legal systems of the Western world still covertly discriminate against them." *Id.*

⁶⁹ *Id.* at 309.

⁷⁰ *Id.*

⁷¹ Waaldijk, *supra* note 18, at 440.

same-sex intimacy in *Lawrence* serves demonstratively. Although the Supreme Court did not invalidate anti-sodomy laws until 2003 with *Lawrence*, the entire process of decriminalization is likely to have involved *Bowers v. Hardwick*⁷² nearly two decades before, with the first Supreme Court litigation over anti-sodomy laws in Georgia. That first attempt failed to bring about decriminalization of anti-sodomy laws, and 17 years passed before the issue was again heard at the Supreme Court-level.⁷³ In the interim, the Court ruled favorably for gay rights in *Romer v. Evans*,⁷⁴ which overturned an amendment to Colorado's constitution that prohibited any governmental anti-discriminatory legislation protecting sexual minorities.⁷⁵ The Court had invalidated that amendment after an enhanced rational basis analysis found animus behind the amendment.⁷⁶ When the issue of anti-sodomy laws circled back to the Court in *Lawrence*, *Romer* was used, in conjunction with *Planned Parenthood of Southeastern Pa. v. Casey*,⁷⁷ which had also been ruled upon between *Bowers* and *Lawrence* in order to create a "serious erosion"⁷⁸ of the "foundations of *Bowers*."⁷⁹ This nearly two decade span between first and second litigations at the Supreme Court that resulted eventually with the first step in the Eskridge-Merlin-Waaldijk incrementalism did not come about through one complete gesture, rather even a quick glance reveals that this increment resulted from an evolving process of its own, that redefined the issues that finally brought forth change.⁸⁰

The fifth noted stratagem of incrementalism reflects how the process contains "analysis that explores only some, not all, of the important possible consequences of a considered alternative."⁸¹ This particular stratagem is mirrored in the way that the original Eskridge-Merlin-Waaldijk incrementalist theory all found at the time that the legal recognition of same-sex relationship—the last step—only included the possibility of same-sex couples being legally recognized in categories alternative to marriage, such as civil unions and/or partnerships. Waaldijk's version of legal recognition includes only parenting and same-sex partnerships⁸²; while Eskridge

⁷² *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁷³ See *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁷⁴ *Romer v. Evans*, 517 U.S. 620 (1996).

⁷⁵ *Id.* at 635-36.

⁷⁶ See *id.* at 632-36.

⁷⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992).

⁷⁸ *Lawrence*, 539 U.S. at 576.

⁷⁹ *Id.*

⁸⁰ Mary Anne Case, *Of "This" and "That" in Lawrence v. Texas*, 55 SUP. CT. REV. 75, 109 (2003) ("That is to say, *Romer* called into question the premise articulated in that opinion that the mere fact of majoritarian disapproval of homosexuality is a sufficient warrant for legislation disadvantaging homosexuals. Even now it seems to me that gays, lesbians, and bisexuals can more directly claim protections from adverse governmental consideration of their orientation in employment, family, and housing decisions by invoking *Romer*." (citations omitted)).

⁸¹ Weiss & Woodhouse, *supra* note 53, at 256.

⁸² Waaldijk, *supra* note 18, at 440.

mentions the same about partnerships but also overwhelmingly fits civil unions and reciprocal beneficiaries into the fray⁸³; and Merin shares broad similarities with Eskridge by describing his step three as comprising registered partnerships and civil unions.⁸⁴ At the time of their original theorizing, when the incidents of marriage equality internationally was thinner than what it is presently, and the visibility of sexual minorities and their entitlement to equality had not escalated into consciousness with the kind of acceptance today, legal recognition of same-sex couples through partnerships, civil unions, and other forms short of marriage was likely more tenable compared to the option of actual marriage itself. Though marriage was itself a possible legal recognition of same-sex couples because it existed as the ultimate legal recognition of personal relationships, it was likely not as *probable* for sexual minorities at the time Eskridge, Merin, and Waaldijk promulgated their incrementalist theory. And although the possibility of bypassing these alternative forms of legally-recognized relationships for marriage itself would be much more possible if a state had already achieved the second incrementalist step—antidiscriminatory legislation based on sexual orientation—Eskridge, Merin, and Waaldijk all chose to exclude it from the list of possible ways of legally recognizing same-sex couples in order to fulfill this third and last increment of their theory. And as we will see, such acceleration of LGBT rights and visibility since then implies changes in this list of alternatives.

Finally, the last stratagem which allows the process to break the “analytical work to many partisan participants in policy-making, each attending to their piece of the overall problem domain”⁸⁵ can be inferred by the complexity and studied in avenue of ways in which each of the increments could be resolved. For instance, decriminalization of consensual same-sex intimacy could be achieved either through a majoritarian body—which is how Waaldijk has described the way many European countries did away with their anti-sodomy laws⁸⁶—or through counter-majoritarian measures such as in *Lawrence*, where the Supreme Court overturned the Texas statute against consensual sodomy.⁸⁷ Within either situation the partisanship would exist, even thinly, as the decision to decriminalize becomes part of the decision-making. In *Lawrence*, the ruling to invalidate anti-sodomy laws was a result of a majority vote on the Court of 6-3 between liberal and conservative justices.⁸⁸ In the marriage equality struggle in California, that increment involved judicial review by the California State Supreme Court in *In Re Marriage Cases* that rendered same-sex marriage legal in 2008.⁸⁹ Then a public ballot measure, Proposition 8, followed that consequently revoked the future ability of same-sex couples to marry.⁹⁰ Further

⁸³ ESKRIDGE, EQUALITY PRACTICE, *supra* note 16, at xiv.

⁸⁴ MERIN, *supra* note 17, at 333.

⁸⁵ Weiss & Woodhouse, *supra* note 53, at 256.

⁸⁶ Waaldijk, *supra* note 18, at 440.

⁸⁷ *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

⁸⁸ See *id.*

⁸⁹ *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

⁹⁰ Dan Morain & Jessica Garrison, *Gay Marriage Timeline: Focused Beyond Marriage*, L.A. TIMES (Nov. 6, 2008), <http://www.latimes.com/news/local/la-me-timelinegaymarriage-2008nov06,0,496938.story#axzz2onYMEjD>.

resolution in the courts ensued—this time federal—with a final opinion by the Supreme Court in *Hollingsworth v. Perry*.⁹¹ Each step along the way had its own actors—from judges to voters to litigants and finally to the panel of Supreme Court Justices.

The above-demonstration shows that the Eskridge-Merlin-Waaldijk incrementalism does fit within the signature of Lindblom's classical theory of incrementalism. This analysis is not merely helpful in showing that the Eskridge-Merlin-Waaldijk theory exists as a variant of Lindblom's examined theory of change, but it rather observes what kind of studied attributes that such a theory would evidently hold. In this way, knowing these attributes—or stratagems—allows more functional critiques of the theory when the three incremental steps are applied to same-sex marriage in the U.S.—whether the movement is really filled with *small changes*, whether it gets us to *practice equality*, whether some of the steps in the process are really *necessary*. Again, because of incrementalism's implicit entanglement with bounded rationality, academic defenders of Lindblom, such as Andrew Weiss and Edward Woodhouse, have noted a general misunderstanding that arises when others study a particular transformation along an incrementalist path; they are impatient with it—perhaps by a sheer human incapability to understand the theory because they overlook bounded rationality:

[T]he misunderstandings arise partly because incrementalism runs against the grain of fundamental precepts in Western culture. Especially among students of policy making there remains an excessive faith in the possibility of conducting politics largely via systematic professional analysis, and Lindblom's debunking of this notion may have seemed to challenge noble aspirations of using government for social justice, environmental protection, and other progressive purposes.⁹²

These misunderstandings, according to Weiss and Woodhouse specifically, have often led scholars, who are both critics and supporters of the theory, astray.⁹³ The tension, as Weiss and Woodhouse seem to imply when they propose to address this problem with misunderstanding, is with normative uses of the theory, and how critics of the theory perhaps become too involved with the specific details: “A possible tack in this direction is to go back to the *spirit* rather than the *letter* of Lindblom's work, getting away from unproductive debates over secondary issues like small steps and inviting a reopening of the underlying inquiry.”⁹⁴ Weiss and Woodhouse suggest the negotiation between descriptive and normative approaches of incrementalism generally use the descriptive approach in broad strokes to inform the normative approach so that one reflects towards the underlying *spirit* rather than

⁹¹ *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

⁹² Weiss & Woodhouse, *supra* note 53, at 267.

⁹³ *Id.* at 267 (“One possibility is simply to say that the critics are wrong and let it go at that. But the fact that some very good scholars have been put off by one or more aspects of the concept as they understand it, and the original formulation of incrementalist ideas (particularly the discussion of small steps) probably contributed to the misunderstanding. As important, even the advocates are making little progress developing the incrementalist tradition.”).

⁹⁴ *Id.* (emphasis added).

letter of incrementalist movements in order to then pose questions normatively.⁹⁵ In this way, their defense about the utility of incrementalism highlights not its predictive nature of things but what incrementalism can tell us about effective strategies:

How do individuals, organizations, and societies cope with limits on human understanding, and how can they do it better as so to improve policy making? If condemned by lack of time, resources, and cognitive power to proceeding with inadequate understanding, how can we become *better* incrementalists or better strategic thinkers and actors more generally? What strategies, institutions, and processes would be helpful in promoting the improved use of strategic analysis and action through social life?⁹⁶

This kind of study can be gaze appropriately upon the incrementalism behind marriage equality. Instead of its predictive value about the inevitability of marriage equality, the normative uses of the Eskridge-Merin-Waaldijk incrementalism lies in strategy and choices to make as the incremental steps has the ability to take us closer and closer to a common goal. This approach, to look more for the broad strategies rather than the predictive nature of incrementalism, might assist those investigating the Eskridge-Merin-Waaldijk theory and importing lessons learned from comparative versions internationally into obtaining marriage equality in the U.S. Chiefly, this observation about incrementalism would seem to temper voices critical of the theory, which could place previous criticisms of the Eskridge-Merin-Waaldijk theory into question as critics have highlighted the theory's predictive nature and rejected the theory based on such over-reliance on the "letter" of the theory rather than the "spirit."⁹⁷

As Lindblom himself also notes about incrementalism in his original, exegetical work on the theory in general, the mechanisms in this type of slow change embodies a certain deceptive flexibility:

The series of analyses and evaluations that typically characterize problem solving in the field of public policy is not always a tidy series, not always explicitly identified as a series, not always recognized as a series. Sometimes frames of reference shift in the course of series, in some cases so much so that new steps take on the superficial appearance of an entirely new line of problem solving. But this appearance should not obscure the *continuity* that often exists below the level of superficial observation.⁹⁸

Lindblom seems to suggest that no matter how disjointed or obscure the particular series of transformative negotiations that embody an increment appears,

⁹⁵ *Id.* at 267.

⁹⁶ *Id.* at 267-68.

⁹⁷ See Aloni, *supra* note 46, at 160 ("More troubling is the suggestion that the process of achieving legal recognition of same-sex marriage can be definable[.]"); see also Badgett, *supra* note 47, at 75 ("Many historians of sexuality note that historical 'progress' in tolerance of homosexuality is not linear. . . . Not surprisingly, the incrementalists offer no clear idea about how long each incremental step should or will take.").

⁹⁸ BRAYBROOKE & LINDBLOM, *supra* note 50, at 100-01.

the underlying continuity inhabits a bigger, unifying picture, with unifying themes. He illustrates this idea about incrementalism with the following example:

[A] shift in congressional attention from income-tax legislation to sales-tax legislation might reflect a continuing concern and a serial attack on certain problems of income distribution. Shifts in attention from controversy over large aircraft carriers versus bombers to a missile program to public policy on basic research to federal aid to education should not obscure an underlying continuity of interest in national security—even though the consideration of federal aid to education requires attention to many issues other than national security.⁹⁹

This flexibility inextricably plays into the sequential trial-and-error stratagem illustrated by the way the Supreme Court decriminalized sodomy—notably trial-and-error first with *Bowers*, and then success later with *Lawrence*.¹⁰⁰ But flexibility is also pertinent to marriage equality incrementalism more broadly as it would possibly allow for revision of the letter—or letters—within the spirit of the Eskridge-Merin-Waaldijk theory to reflect idiosyncrasies in the U.S. version and the refinement of strategies that reflects such idiosyncrasies—not to mention, address its critics.

D. Revising Step Three

With spirit and flexibility noted, one example of using the spirit-versus-letter approach reconciles the Eskridge-Merin-Waaldijk theory with both Erez Aloni's major criticism of the theory's exclusive reliance on civil unions and marriage-like classifications for step three's legal recognition of same-sex relationships, and M.V. Lee Badgett's criticism that the three steps do not heavily account for the socio-political climate of the U.S., but promotes the path in a general, nearly all-too-universalist way.¹⁰¹ Together, however, Aloni and Badgett's observations can be conflated in a way that assists in refining marriage equality incrementalism in the U.S., and reflect the transitioning political climate and the public fervor for same-sex marriage presently.

When the Eskridge-Merin-Waaldijk theory was first observed and disseminated, the justification for marriage alternatives, such as civil unions and partnerships—these other forms of recognizing intimate relationships—was progress because it gave rights to same-sex couples that they had not received before.¹⁰² This justification was important because these types of recognition short of marriage and

⁹⁹ *Id.* at 101.

¹⁰⁰ Compare *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (“[T]o claim that a right to [sodomy] is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is at best facetious. . . . Nor are we inclined to take an expansive view of our authority to discover new fundamental rights embedded in the Due Process Clause.”), with *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

¹⁰¹ See Aloni, *supra* note 46, at 160; see also Badgett, *supra* note 47, at 84.

¹⁰² See William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853, 865-866 (2001) [hereinafter Eskridge, *Liberal Reflections*] (discussing how Vermont’s civil union laws conferred similar rights and benefits to same-sex couples).

conferring of rights and benefits previously unavailable to same-sex couples were necessary for fulfilling the kind of legal recognition of same-sex relationships that step three required to further the progression eventually toward marriage equality; as Merin notes, “[b]efore same-sex marriage becomes possible, the final step of the necessary process must be completed, namely, broad recognition in the form of registered partnership or civil union[.]”¹⁰³ At the time, part of this recognition’s importance as a pre-requisite for marriage equality depended on the changed perceptions of same-sex couples after obtaining this recognition for their relationships. Eskridge’s step-by-step approach relies partly on the paradox that the “law cannot move unless public opinion moves, but public attitudes can be influenced by changes in the law.”¹⁰⁴ From here, Eskridge’s hope with Vermont’s civil unions—and with civil unions largely—was that “[t]heories of prejudice suggest how Vermont’s newest move, same-sex unions, will contribute to the rational and tolerant society of that state in a way that anti-discrimination laws do not.”¹⁰⁵ He acknowledged that “[i]n important respects, the civil union law is inconsistent with the premises of the liberal state as applied to same-sex couples: it treats them differently from different-sex couples, and for reasons that are hard to justify without resort to arguments grounded in state denigration or even prejudices.”¹⁰⁶ However, in an underlying fashion, these alternative types of legal recognition amount to an avoidance of bigger ills, leading us to a place where “functionally, the law ameliorates, rather than ratifies, a sexuality caste system.”¹⁰⁷ Eskridge’s premise, then, held some truth because prior to these alternative types of relationships, same-sex couples did not have the legal spotlight upon them in a way that conferred rights that were closer to the neighborhood of marriage rather than the neighborhood of invisibility—or worse, the neighborhood of social and legal contempt.¹⁰⁸ With utopian flare, Eskridge noted, in respect to Vermont in 2000, that the civil union system there “is one where liberal values of rationality, mutual respect, and tolerance among gay and straight people can flourish.”¹⁰⁹

More than a decade has passed, and the question now is whether public opinion stands similarly today as when Eskridge made his observations about Vermont’s civil unions. This question shows that Aloni and Badgett are right that comparative models of marriage equality might not be as helpful for the U.S. as previously

¹⁰³ MERIN, *supra* note 17, at 333; *see also* William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641, 655 (2000) [hereinafter Eskridge, *Comparative Law*] (“Once same-sex unions are euphemistically recognized as ‘registered partnerships,’ and modest numbers of people take advantage of the new institution to formalize their well-ordered middle-class unions, it would then be, I hypothesize, a smaller step to recognize same-sex marriage.”).

¹⁰⁴ Eskridge, *Comparative Law*, *supra* note 103, at 648.

¹⁰⁵ Eskridge, *Liberal Reflections*, *supra* note 102, at 870.

¹⁰⁶ *Id.* at 854.

¹⁰⁷ *Id.* at 864.

¹⁰⁸ *See, e.g.*, Eskridge, *Liberal Reflections*, *supra* note 102, at 865-866 (“Following [*Baker v. State*], the civil unions law gives civil-unioned partners a variety of state-supported rights and benefits that they did not have before the law was adopted.”).

¹⁰⁹ *Id.* at 870.

conceived because the “letter” itself—the details—in step three could be changed to reflect the transformations on the national imagination and marriage equality movements since the early 2000s.¹¹⁰ This kind of revisionist enquiry is part of the flexibility Lindblom and his defenders conceptually prescribed. And the possible way to reconcile this attribute of incrementalism and the development and idiosyncrasies of the U.S. in marriage equality is to use them to expand what could belong in step three’s legal recognition of same-sex couples.

First, since Eskridge and Merin separately wrote about incrementalism in 2002 to the time of this writing, eighteen states (California, Connecticut, Delaware, Hawaii, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington), and the District of Columbia have extended marriage to same-sex couples.¹¹¹ As far as idiosyncrasies that distance the U.S. from other countries, our system of federalism recognizes that marriage in the U.S. is not directly regulated by the federal government, but by individual states.¹¹² Although Eskridge and Merin do both acknowledge the federal and state players when they describe the U.S. journey¹¹³ and both Aloni and Badgett’s scholarly criticisms indirectly exhibit the concept of federalism,¹¹⁴ Jane Schacter’s recent specific emphasis on the states—specifically calling it “patchwork” or “federalist” incrementalism—draws this notion out that there might be two major categorical journeys of incrementalism on American soil: one, federally, and the other, collectively through the patchwork of states, which presumably consist of 50 mini-journeys.¹¹⁵ It is not just once that the U.S. has to journey through the three steps of the Eskridge-Merin-Waaldijk theory for marriage equality, but the journey plays out on the federal level and concurrently through a patchwork of states until that patchwork is obliterated by all 50 states recognizing same-sex marriage.¹¹⁶ Since Merin’s work, which was the latest scholarship on incrementalism, the U.S. has been moving steadily toward positive notions regarding the rights of sexual minorities. The patchwork of more than one-fourth of the states in the Union recognizing same-sex marriages reflects changing attitudes in this fashion. Particularly prescient since President Obama’s support of marriage equality, the number of political figures and institutions changing views and backing same-sex couples in receiving marriage rights has grown quickly—including changes in attitude of politically conservative

¹¹⁰ See Aloni, *supra* note 46, at 160; see also Badgett, *supra* note 47, at 84.

¹¹¹ HUMAN RIGHTS CAMPAIGN, *Marriage Equality and Other Relationship Recognition Laws* (July 1, 2013), available at http://www.hrc.org/files/assets/resources/marriage_equality_laws_072013.pdf.

¹¹² See *United States v. Windsor*, 133 S. Ct. 2675, 2689-90 (2013).

¹¹³ MERIN, *supra* note 17, at 337. See generally ESKRIDGE, *EQUALITY PRACTICE*, *supra* note 16, at 1-42.

¹¹⁴ See generally Aloni, note 46, at 127-36; Badgett, *supra* note 47, at 72.

¹¹⁵ Jane S. Schacter, *Splitting the Difference: Reflections on Perry v. Brown*, 125 HARV. L. REV. F. 72, 74 (2012).

¹¹⁶ See *id.*

groups and individuals.¹¹⁷ Socially, public opinion has switched from condemning same-sex marriage to much more support in the last decade.¹¹⁸

In Lindblom's incrementalism, these changes would suggest significant impact on the "letters" of marriage equality incrementalism that should fine-tune the journey in the U.S. to ultimately capture the "spirit" of the incremental shift. In addition, the existence of same-sex marriage in the "patchwork" states, the visibility of same-sex couples in those states who are recognized under those laws, and the changing support for marriage equality could be tipping the balance in the legal recognition of same-sex relationships toward marriage equality itself directly, rather than marriage-like alternatives first and then marriage equality secondly. This notion might be even furthered if several of those patchwork states reached marriage equality from anti-discrimination laws that included sexual orientation (step two), and had bypassed legally recognizing same-sex relationship through civil unions or partnerships (step three). Indeed, such "outliers," as Iowa, Minnesota, and New York, in the patchwork—that did achieve marriage equality rights without crossing the step that required civil unions or partnerships—and would support the notion that the inevitability of marriage equality in a particular state might allow for jumping over civil unions to dash to the marriage alter itself.¹¹⁹ Just as Aloni is right that there are variations on how to get to same-sex marriage,¹²⁰ so is this phenomenon playing right into the revisionist stratagems of Lindblom's observations generally about incrementalism.

Secondly, the relevance of civil unions and partnerships have been placed into question by the potential "separate but equal" stigma of these alternative marriage-like schemes. Douglas NeJaime recently tracked the transition showing how civil unions, in particular, were once celebrated and then later vilified in the marriage equality movement.¹²¹ At first, "[a]dvocates framed civil unions, which provided same-sex couples with the state-based rights and benefits of marriage, as a measure that achieved equality."¹²² But even as early as 2003, when litigation over *Goodridge* was in full swing, NeJaime describes how pro-gay lawyers in *Baker v. State* now involved in *Goodridge* had the opportunity to "frame the Vermont experience as one

¹¹⁷ Michele Richinick, *A Year After Obama's Gay Marriage "Evolution"*, MSNBC (May 9, 2013, 03:24 PM EST), <http://tv.msnbc.com/2013/05/09/gay-marriage-progress-report-a-year-after-obamas-evolution/>.

¹¹⁸ Gary Langer, *Poll Tracks Dramatic Rise in Support for Gay Marriage*, ABC NEWS (Mar. 18, 2013, 02:00 PM EST), <http://abcnews.go.com/blogs/politics/2013/03/poll-tracks-dramatic-rise-in-support-for-gay-marriage/>.

¹¹⁹ NATIONAL CONFERENCE OF STATE LEGISLATURES, *Defining Marriage: Defense of Marriage Acts & Same-Sex Marriage Laws*, <http://test.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last visited Aug. 4, 2013).

¹²⁰ See Aloni, *supra* note 46, at 127-28 ("Generally speaking, while some states, such as Vermont and Connecticut, have followed the theory of small change, other states have followed very different paths. In fact, many states have legalized same-sex marriage without ever passing civil unions or following the path proscribed by Waaldjik." (footnotes omitted)).

¹²¹ Douglas NeJaime, *Framing (In)Equality for Same-Sex Couples*, 60 UCLA L. REV. DISC. 184 (2013).

¹²² *Id.* at 185.

that produced inequality and continued discrimination.”¹²³ Then even later in 2006, with Massachusetts as the only state with marriage equality and New Jersey about to follow Vermont by installing civil unions, “LGBT rights advocates protested,”¹²⁴ and deliberately challenged civil union’s relevance by pointing out that civil unions could easily lead to second-class citizenry.¹²⁵ NeJaime observed that the LGBT rights lawyers in Vermont and Massachusetts knew what they were doing when they advocated for civil unions first and then abandoned it when marriage equality seemed more salient.¹²⁶ Their calculating shift hinged upon the rise of marriage equality in particular over alternative types of marriage-like recognition and connotes an expiration of the functional significance of civil unions “as a temporary solution.”¹²⁷

At the same time, Elizabeth Glazer has posited the gaining complexity with civil unions in part because such legal recognition of same-sex couples do sustain that visibility that Eskridge, Merin, and Waaldijk previously urged as the important, step-three jumping-off point before marriage equality.¹²⁸ Glazer writes that civil unions present an interesting slippage that adds to the same-sex marriage debate, “highlight[ing] that it is not only the liberty interest of not being forced to assimilate that is essential for the LGBT rights movement but also the equality interest of not being treated differently from couples whose members are of different sexes.”¹²⁹ According to Zachary Kramer, “[t]he point is that the marriage equality movement needs to keep an open mind when it comes to proposed marriage reforms. Marriage is a continually evolving social practice, and marriage law evolves alongside it, sometimes as the catalyst for change, other times in response to a change in social practice.”¹³⁰ This kind of negotiation is what incrementalism can afford sequentially.

If there are some states or journeys in the incrementalist path for which marriage equality is the natural leap from anti-discrimination that includes sexual orientation and others that approach this journey more thoughtfully about civil unions and find some relevance for alternative legal recognitions of same-sex couples short of marriage, then step three in Eskridge-Merin-Waaldijk theory could be enlarged to include same-sex marriage as another option. Of course, this change would abridge step three for those states that reach for it, rather than installing an alternative scheme. Nonetheless, despite the substantial trend of states that customarily follow the Eskridge-Merin-Waaldijk path of adopting an alternative scheme first and then

¹²³ *Id.* at 192 (referencing Brief of Interested Party/Amicus Curiae Gay & Lesbian Advocates & Defenders at 4–5, *Ops. of the Justices to the Senate*, 802 N.E.2d 565 (No. 09163)).

¹²⁴ *Id.* at 185.

¹²⁵ *Id.* at 186.

¹²⁶ *Id.*

¹²⁷ *Id.* at 192 (footnote omitted).

¹²⁸ Elizabeth M. Glazer, *Civil Union Equality*, 2012 *CARDOZO L. REV. DE NOVO* 125, 131 (2012).

¹²⁹ *Id.* at 142.

¹³⁰ Zachary A. Kramer, *The Straight and Narrow*, 2012 *CARDOZO L. REV. DE NOVO* 147, 153 (referencing STEPHANIE COONTZ, *MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY, OR HOW LOVE CONQUERED MARRIAGE* (2005)).

fulfilling step three before adopting same-sex marriage, the small minority of outlier states that bypassed this step and successfully obtained marriage equality (Iowa, Minnesota, and New York) would support that option as a viable one for future pro-marriage equality states popping up within the patchwork. This shortcut might possibly be consistent with the need, relevance, and significance of alternative relationship recognition when the opinion of same-sex relationships and sexual minorities have changed since Eskridge, Merin, and Waaldijk first introduced the theory. What Eskridge and Merin might have considered a necessary increment, because of the “newness” of legally recognizing same-sex couples, has now been weakened due to the positive visibility of same-sex couples in the law since the early 2000s, or the rise of same-sex marriage in individual states since Massachusetts. Here is where Schacter’s patchwork incrementalism might also have a similar effect toward remodeling that third step in the Eskridge-Merin-Waaldijk incrementalism. If states like Iowa, Minnesota, and New York, that were at step two with some antidiscrimination laws covering sexual minorities, continue to move toward marriage equality before adopting civil unions or partnerships, adding marriage equality into step three—essentially doing away with that last step altogether—would be a tenable revision of incrementalism, created by its own progress. Here in lies flexibility.

In sum, to tease out the normative uses of the Eskridge-Merin-Waaldijk theory, the key, according to scholars who have defended Lindblom’s incrementalism is to funnel incrementalism’s general predictive worth toward anticipating what the next step will be, rather than anticipating when marriage equality will happen. Flexibility and intelligent trial-and-error exist as attributes of Lindblom’s incremental decision theory and should prompt adjustment and re-adjustment along the “spirit” of the marriage equality movement and not its “letters.” In this way, a revision to step three is suggested to include a “side-step” option for legally recognizing same-sex couples through marriage itself—thus, for some journeys, collapsing the third original step of the Eskridge-Merin-Waaldijk theory. Doing so would hopefully reconcile critical concerns over straight-jacketing the U.S. to the letter of Eskridge-Merin-Waaldijk incrementalism and not account for social and political differences that pose significance.

Lastly, the final descriptive insight that avails itself for normative strategy is related to this Article’s main premise and the focal discussion in Part III, which is that the underlying continuity beneath the marriage equality incrementalism the U.S. has taken federally has all involved de-regulating the expression of sexual identities as a reflection of how the law has destabilized the traditional use of antigay essentialism. Particularly with DOMA’s partial invalidation in *Windsor*, Part IV will then evaluate this transition normatively for its merit as a strategy posed by the U.S. variation of the Eskridge-Merin-Waaldijk theory with the rise of animus-focused jurisprudence. Such enquiry so far—and those remaining—in this Article has been conducted within the spirit of Lindblom’s incrementalism with the hopes of striving to become better incrementalists when it comes to marriage equality’s trajectory in the U.S.

III. IDENTITY EXPRESSION AND THE FEDERAL JOURNEY OF THE ESKRIDGE-MERIN-WAALDIJK INCREMENTALISM

The U.S. variation of marriage equality incrementalism, as theorized by Eskridge, Merin, and Waaldijk, has moved the law away from an antigay essentialist approach that has harmed the social visibility of sexual minorities. From *Lawrence*

to *Windsor*, Part III explores why and how the steps that animate the Eskridge-Merin-Waaldijk theory have substantially occurred federally.

A. Decriminalization of Same-Sex Intimacy in Lawrence v. Texas

By itself, *Lawrence v. Texas* imparted much momentum for sexual minorities by overruling its previous affirmation and tolerance of anti-sodomy laws in *Bowers*.¹³¹ The issue's high visibility and the Court's determination to revisit and decriminalize conduct possibly indicative of a sexual identity have been discussed at length as an immense event for sexual minorities.¹³² It was also the clearest indication of reaching step one in the Eskridge-Merin-Waaldijk theory.

However, even as step one, *Lawrence* was itself too the product of incrementalism. According to Justice Kennedy's majority opinion, what led to the Court's post-*Bowers* enquiry into anti-sodomy laws was a societal evolution of the sodomy issue toward sexual minorities after 1986, coupled with two important decisions in privacy and anti-discrimination that came forth during that same time.¹³³ Kennedy noted that "the deficiencies in *Bowers* became even more apparent in the years following its announcement"¹³⁴ and summarized the decline in the number of states who still criminalized sodomy (from 25 states to the 13 at the time) and how many of those declining states failed to execute their sodomy statutes by adopting "a pattern of nonenforcement with respect to consenting adults acting in private."¹³⁵ The two post-*Bowers* cases Kennedy mentioned were *Planned Parenthood of Southeastern Pa. v. Casey*,¹³⁶ and *Romer v. Evans*.¹³⁷ Kennedy characterized *Casey*

¹³¹ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹³² See, e.g., Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1103 (2004) ("Much like the opinion of the Court in *Romer v. Evans*, also written by Justice Kennedy, *Lawrence* is powerful and important and will have a profound impact on the law and especially on the lives of lesbian and gay Americans." (footnote omitted)); Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1895 (2004) ("For when the history of our times is written, *Lawrence* may well be remembered as the *Brown v. Board* of gay and lesbian America."); Danaya C. Wright, *The Logic and Experience of Law: Lawrence v. Texas and the Politics of Privacy*, 15 U. FLA. J.L. & PUB. POL'Y 403, 403-04 (2004) ("Looking on the events of the past few months, *Lawrence v. Texas* can be called a watershed moment in the battle for gay rights. Social pundits, politicians, and ordinary people have had their eyes opened to the discrimination that gay people face on a daily basis. Sexual orientation has justified hatred and violence against a minority that has had to fight tooth and nail simply to preserve the right to petition their government for protection." (referencing *Romer v. Evans*, 517 U.S. 620, 623 (1996))); Linda Greenhouse, *The Supreme Court: Homosexual Rights; Justices, 6-3, Legalize Gay Sexual Conduct in Sweeping Reversal of Court's '86 Ruling*, N.Y. TIMES, June 27, 2003, at A1 ("The Supreme Court issued a sweeping declaration of constitutional liberty for gay men and lesbians today, overruling a Texas sodomy law in the broadest possible terms and effectively apologizing for a contrary 1986 decision that the majority said 'demeans the lives of homosexual persons.'").

¹³³ *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003).

¹³⁴ *Id.* at 573.

¹³⁵ *Id.*

¹³⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

¹³⁷ *Romer v. Evans*, 517 U.S. 620 (1996).

as having “confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,”¹³⁸ and that *Casey*’s pronouncement here for an individual’s autonomy for making such decisions was inconsistent with *Bowers*.¹³⁹ Specifically, under *Casey* but not *Bowers*, “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”¹⁴⁰ From *Romer*, Kennedy imported the spirit of anti-discrimination from that case’s ruling on Amendment 2 to Colorado’s Constitution, which had broadly singled out homosexuals and denied them protection under the state’s laws.¹⁴¹ Kennedy in *Lawrence* was aided by how *Romer* was unsympathetic under an enhanced rationality review of a law created by animus toward a particular group.¹⁴²

Yet, the intersection between privacy and anti-discrimination was not just a facial justification for the *Lawrence* Court to raise issue with the Texas sodomy law and then decriminalize its prohibited conduct. Framing the decision within existing legal dialogue in private autonomy and anti-discrimination set the opinion up for focusing on how the criminalization of sexual conduct infringed not just upon the rights of consenting adults but also how the law restricted the way in which sexual minorities expressed their identities. This is one of the symbolic reaches of *Lawrence*.

1. *Bowers*’ Anti-Gay Essentialism

By dealing with identity expression, *Lawrence* had to comment on the antigay essentialism apparent in *Bowers*. Little difficulty now exists in seeing how *Bowers* treated homosexuality as inferior by criminalizing the way the law believed this particular identity and orientation essentially manifested: through same-sex intimacy.¹⁴³ The significance of labeling sex acts comes into focus as Justice White’s narrowing of the issue in *Bowers*—which could have focused on sodomy as a practice generally since the Georgia law did not differentiate between different-sex and same-sex partners—to “homosexual sodomy” immediately created a categorization based on biology as “homosexual sodomy” would imply a host of other sex acts not under scrutiny, including *inter alia*, “heterosexual sodomy” and, of course, heterosexual penile-vaginal intercourse.¹⁴⁴ This implication drew itself out

¹³⁸ *Lawrence*, 539 U.S. at 574 (citing *Casey*, 505 U.S. at 851).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See DAVID A.J. RICHARDS, THE CASE FOR GAY RIGHTS: FROM *BOWERS* TO *LAWRENCE* AND BEYOND 81 (2005) (“Once Justice White dismissed the idea that there could be any right to privacy reasonably enjoyed by gays and lesbians, he accorded antisodomy laws the broadest judicial deference.”).

¹⁴⁴ See Bryan M. Tallevi, Comment, *Protected Conduct and Visual Pleasure: A Discursive Analysis of Lawrence and Barnes*, 7 U. PA. J. CONST. L. 1131, 1150 (2005) (“Under the *Bowers* regime there was a clear hierarchy of sexual practices, with varying levels of regulation dependent on the moral and societal approbation attached to each act. Generally, sexual conduct within the marital framework for the purpose of procreation was deemed most worthy of protection from overzealous state regulation, followed by sexual conduct engaged in by unmarried monogamous heterosexuals. Other heterosexual acts involving a deviation

quite early in *Bowers* when Justice White examined case law dealing with privacy, marriage, and reproductive rights, and failed to recognize that the rights from such case law “bears any resemblance to the claimed constitutional right of homosexuals to engaged in acts of sodomy that is asserted in this case.”¹⁴⁵ White also found “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent.”¹⁴⁶ Biology was at the center of *Bowers*’ distancing of homosexual sodomy from other sex acts—or at least White’s nitpicking fixation on differences and his attempt to isolate, based mainly on arguing that acts between consenting same-sex parties bore no apparent likeness to acts that were mainstream or procreative, or acts that were previously the subject of the Court’s preoccupation in other cases.¹⁴⁷ That biological difference was drawn by the catalogue of criminal anti-sodomy laws and historical references that White conjured to show how “[p]roscriptions against that conduct have ancient roots,”¹⁴⁸ and bolster his characterization of that history of disapproval, and arguably animus.¹⁴⁹ From biology, differentiation, and animus, the *Bowers* majority then fashioned its position to marginalize homosexual sodomy and, in turn, upheld the Georgia to regulate sex in this way.¹⁵⁰ That reasoning also led to the reluctance of the Court later in the opinion “to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause” that would otherwise recognize homosexual sodomy.¹⁵¹

Bowers, of course, did not stop sexual minorities from engaging in consensual intimacy. Partly, the desuetude that some states exhibited in non-enforcement bolsters this assumption.¹⁵² However, *Bowers* rendered a value judgment that then justified the law to hold “homosexual sodomy”—and perhaps by extension, other same-sex acts and practices—as naturally criminal.¹⁵³ The implications for identity expression and social visibility would be that when sexual minorities would

from the heterosexual, two partner paradigm—including homosexual conduct, promiscuous conduct, pornographic acts, and fetishes—were placed far lower on the totem pole of sexualities.” (referencing Gayle Rubin, *Thinking Sex: Note for a Radical Theory of the Politics of Sexuality*, in *SEXUALITY, GENDER, AND THE LAW* 551-60 (William N. Eskridge, Jr. & Nan D. Hunter eds., 2d ed. 2004)).

¹⁴⁵ *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986).

¹⁴⁶ *Id.* at 191.

¹⁴⁷ *Id.* at 190-91.

¹⁴⁸ *Id.* at 192.

¹⁴⁹ *Id.* at 193-94 n.5-7.

¹⁵⁰ *Id.* at 196.

¹⁵¹ *Id.* at 194.

¹⁵² Anon., Note, *In Sickness and in Health, In Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages*, 109 HARV. L. REV. 2038, 2047-48 (1996) (“In those states in which anti-sodomy laws remain, they generally are unenforced. Lack of enforcement can hardly be attributed to a dearth of prohibited conduct. Rather, desuetude reflects a lack of actual concern for the private sexual behavior of consenting adults.”).

¹⁵³ *Id.* at 2047 n.51.

“practice” their orientation through sex acts, they would be rendered criminal. Figuratively, this result was the storm that gathered over sexual minorities for the next 17 years. The law, under *Bowers*, could metonymically harness the biological differences within sex acts between homosexual and heterosexual categories and then categorize one such group of acts as criminal in order to facilitate such criminal branding of sexual minorities. That metonymy was problematic as it underscored narrow assumptions about sodomy practices and sexual orientation that considered sex acts as nearly accurate indicators of orientation and excluded possibilities of sexual identity as something perhaps more fluid.¹⁵⁴ At its crux, the Court’s reliance on biology produced an antigay essentialism that attempted to capture the homosexual who practiced an act that might be indicative of orientation.

Justice Blackmun’s dissent in *Bowers* found the majority’s construal of “homosexual sodomy” too narrow and problematic.¹⁵⁵ In addition to finding that privacy law would allow sodomy practices to be constitutionally protected, Blackmun also found that the majority’s narrowing of the issue down to whether a fundamental right to homosexual sodomy existed ignored how the Georgia law could have also applied to sodomy between heterosexuals, which underlines the majority’s attempt to regulate the identity expression of sexual minorities to reflect disapproval of the group.¹⁵⁶ Blackmun’s dissent also combated some of the biological assumptions that could lead to antigay essentialist approaches and suggest more debatable fluidity within the definition of sexual identity beyond sex acts than the majority had let on.¹⁵⁷ For instance, the importance of biology was deemphasized and some semblance of construction was built over the majority’s essentialism when Blackmun wrote that “[d]espite historical views of homosexuality, it is no longer viewed by mental health professionals as a ‘disease’ or disorder [by the American Psychological Association]. But obviously, neither is it simply a matter of deliberate personal election. Homosexual orientation may well form part of the very fiber of an individual’s personality.”¹⁵⁸ Whatever that definition of sexual identity may be—biology or choice, nature versus nurture, essentialism or construct—it seemed to Blackmun that this fluidity fit centrally into why a broader view of the Georgia statute was more appropriate than what the majority utilized because that fluidity manifests in one way in which individuals define themselves, through intimacy: “The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggest, in a Nation as diverse as ours, that there may be ‘right’ ways of conducting those relationships and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.”¹⁵⁹ Blackmun opined broadly, applying this observation across orientations,

¹⁵⁴ See Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381, 450-56 (1994) (discussing “sodomy-as-fiction” stereotyping of gays).

¹⁵⁵ *Bowers*, 478 U.S. at 201 (Blackmun, J., dissenting).

¹⁵⁶ *Id.* at 201.

¹⁵⁷ *Id.* at 205.

¹⁵⁸ *Id.* at 202 n.2.

¹⁵⁹ *Id.* at 205.

focusing on commonalities and writing, not between “homosexuals” and “heterosexuals,” but writing about “individuals.”¹⁶⁰ Notably and interestingly, Blackmun challenged the majority’s essentialism by questioning the problematic criminalization of homosexual sodomy based on a heavy-handed reliance on biology that, in his view, led to a terse justification for anti-sodomy laws.¹⁶¹ Instead of biological and essentialist comparisons between homosexual and heterosexual sex, Blackmun—in a very Millian tone—would have outlawed sex acts based on those that harmed others over those that would not:

[I]t does seem to me that a court could find simple, analytically sound distinctions between certain private, consensual sexual conduct, on the one hand, and adultery and incest (the only two vaguely specific “sexual crimes” to which the majority points, *ante*, at 2846), on the other. . . . Notably, the Court makes no effort to explain why it has chosen to group private, consensual homosexual activity with adultery and incest rather than with private, consensual heterosexual activity by unmarried persons or, indeed, with oral or anal sex within marriage.¹⁶²

In this way, Blackmun found reason here that the *Bowers* majority interfered with an individual’s right to determine one’s identity by artificially (and irrationally) overemphasizing the biological differences between heterosexual and homosexual sex.¹⁶³ And carrying this reasoning with him, Blackmun concluded his dissent with a

¹⁶⁰ *See id.* at 206.

¹⁶¹ *See id.* at 200 (“[T]he Court’s almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used. Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens. . . . [Hardwick]’s claim that [the Georgia anti-sodomy law] involves an unconstitutional intrusion into his privacy and his right of intimate association does not depend in any way on his sexual orientation.” (citations omitted)); *see also id.* at 202-03 (“I believe that Hardwick has stated a cognizable claim that [the Georgia anti-sodomy law] interferes with constitutionally protected interests in privacy and freedom of intimate association. . . . The Court’s cramped reading of the issue before it makes for a short opinion, but it does little to make for a persuasive one.” (footnotes omitted)).

¹⁶² *See id.* at 209 n.4 (citations omitted). Pamela Karlan, who was the clerk that aided Justice Blackmun’s dissent in *Bowers*, has acknowledged the possible connection between Blackmun and John Stuart Mill during the writing of the dissent, through Blackmun’s defense of H.L.A. Hart’s thesis against governmental interferences with privacy. TINSLEY E. YARBROUGH, HARRY A. BLACKMUN: THE OUTSIDER JUSTICE 285 (2008).

¹⁶³ *See Bowers*, 478 U.S. at 205-06 (Blackmun, J., dissenting) (“Only the most willful blindness could obscure the fact that sexual intimacy is ‘a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.’ The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many ‘right’ ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds. . . . The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest of all individuals have in controlling the nature of their intimate associations with others.” (citations omitted)).

hope toward future change that also leveraged incrementalism. “It took but three years for the Court to see the error in its analysis in *Minersville School District v. Gobitis*,”¹⁶⁴ Blackmun wrote, conveying his “hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationship poses a far greater threat to the values most deeply rooted in our Nation’s history than tolerance of nonconformity could ever do.”¹⁶⁵ His hope would have to stretch not three years, as in *Gobitis*, but 17.

2. *Lawrence*

The facts of *Lawrence v. Texas* involved two men, John Geddes Lawrence and Tyler Gardner, who were arrested and charged in Houston, Texas after police there discovered them involved in consensual homosexual conduct that fell within the definition of “deviate sexual intercourse” under the Texas criminal code.¹⁶⁶ They were both subsequently convicted under the same statute and their convictions were affirmed on appeal.¹⁶⁷ When *Lawrence* did overturn *Bowers* in 2003, Justice Kennedy, in writing for the majority, targeted that interference with the right to determine one’s identity discussed by Blackmun.¹⁶⁸ Although the Court bypassed an equal protection analysis and foreclosed the possibility of making sexual orientation a suspect class, the Court’s analysis focused on the substantive rights that resulted in one way in which the law de-regulated sexual identity.¹⁶⁹

Curiously, *Lawrence*’s use of a liberty analysis does not mean that the opinion harbored no aspect of equality-based jurisprudence or that the issue lacked overtones of inequality. In fact, Justice Kennedy observed that “[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”¹⁷⁰ Perhaps in order to acknowledge that merit existed under equal protection, Kennedy seemed to note that the Texas statute had two layers within its offensiveness—that it both violated some protectable liberty interest in privacy and that it expressly criminalized conduct *only if* practiced by members of the same sex, which is why that law led to unequal treatment of sexual minorities: “When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”¹⁷¹ Some have observed that Kennedy’s intertwining of privacy interests here with discrimination makes the

¹⁶⁴ *Id.* at 213-14.

¹⁶⁵ *Id.*

¹⁶⁶ TEX. PENAL CODE ANN. § 21.06(a) (West 2003); *Lawrence v. Texas*, 539 U.S. 558, 562-563 (2003).

¹⁶⁷ *Lawrence*, 539 U.S. at 563.

¹⁶⁸ *Id.* at 577.

¹⁶⁹ *Id.* at 574-75.

¹⁷⁰ *Id.* at 575.

¹⁷¹ Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 300 (2011) (citing *Lawrence*, 539 U.S. at 575).

liberty claim in *Lawrence* somewhat equality-based.¹⁷² As Kim Forde-Mazrui has remarked, “[t]he majority’s expressed reason for [invalidating all anti-sodomy laws], however, was an equality-based concern over discrimination against gay and lesbian people if gender neutral anti-sodomy laws were permitted.”¹⁷³

But by focusing primarily on liberty rather than equality, *Lawrence* reached further in its scrutiny of the Texas statute because it also allowed the Court to examine not just *who* the Texas statute targeted, but also *what* the statute regulated.¹⁷⁴ Again, because if the Georgia statute at issue in *Bowers* were to be left intact but only the Texas statute in *Lawrence* invalidated, a conclusion could be drawn that sodomy could be criminalized across orientations, which would have left undisturbed the potential of criminalizing homosexuality through anti-sodomy laws that did not expressly single out the sex of those caught in the act. Due process invalidated the sodomy statute in Texas and allowed the *Lawrence* Court to more easily give a uniform comment on anti-sodomy statutes across the board and decriminalize behavior that could represent a lifestyle based on sexual identity.¹⁷⁵ Kennedy exemplified an attribute of this broader focus when he discussed the similarities of both *Bowers* and *Lawrence*, pinpointing not on the narrower technical differences between the Texas and Georgia statutes where an equal protection discussion would highlight, but noting broadly the dangers and untenable effects of both laws to sexual minorities regardless of how they facially targeted the orientation of alleged offenders:

The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.¹⁷⁶

As Kenji Yoshino has noted, the liberty analysis, as opposed to equal protection, characteristically hones in on the broad similarities amongst points of cultural pluralism as courts talk about what rights are protectable under due process in order to carve out an approach to civil rights jurisprudence.¹⁷⁷ Justice Kennedy and the majority’s use of the liberty analysis here plays well into declaring that the criminalization of homosexual conduct, whether facially or non-facially same-sex

¹⁷² *Id.* at 300.

¹⁷³ *Id.* at 301 (“To be precise, the majority in *Lawrence* relied on substantive due process grounds, invalidating all antisodomy laws, rather than the equal protection basis of Justice Sandra day O’Connor’s concurrence, which would have invalidated only antisodomy laws limited to same-sex participants.” (citations omitted)).

¹⁷⁴ *Id.* at 304-05.

¹⁷⁵ *Id.* at 301 (“To be precise, the majority in *Lawrence* relied on substantive due process grounds, invalidating all antisodomy laws, rather than the equal protection basis of Justice Sandra day O’Connor’s concurrence, which would have invalidated only antisodomy laws limited to same-sex participants.” (citations omitted)).

¹⁷⁶ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

¹⁷⁷ See generally Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 792-797 (2011).

indicative, has the potential of infringing on the private autonomous rights of sexual minorities: essentially criminalizing the private aspects of their lifestyles, and abbreviating their identities—and ability to express their identities—in that way.¹⁷⁸ *Bowers* exhibited this result indirectly when the opinion recited that Hardwick was self-identified as a “practicing homosexual,” which is why he fell within “imminent danger of arrest” under Georgia law.¹⁷⁹ Although Hardwick needed to pronounce himself as a “practicing homosexual” for standing reasons in the suit, this self-identification pointed to how the sodomy law promoted categories of “practicing” and “non-practicing” homosexuals and the demeaning consequence of criminalization for those homosexuals who “practiced” their own lifestyles and what it meant to those who felt obliged under the law to choose not to practice. Where *Bowers* refused to acknowledge this assumption, the implications in *Lawrence* drew this out.

Kennedy’s slightly-indistinct calibration between due process and equal protection in *Lawrence* has not lacked criticism. One of the most prominent assessments pinpointed Kennedy’s failure to clearly articulate whether there was a fundamental right at issue in this case involving anti-sodomy laws. For example, Laurence Tribe has argued that in *Lawrence*, “the Court gave short shrift to the notion that it was under some obligation to confine its implementation of substantive due process to the largely mechanical exercise of isolating ‘fundamental rights.’”¹⁸⁰ Instead, what the opinion focused on were protectable interests framed within either privacy or liberty claims or both that resulted in a myriad of scholarly readings.¹⁸¹ Without a more crystallized pronouncement that the arrests of Lawrence and Garner violated some sort of fundamental right, *Lawrence*’s articulation that consensual sodomy laws infringed upon adult private autonomy appeared less stable within that historical due process framework. This has led to some confusion.¹⁸²

But this muddled writing might have been deliberate to allow *Romer*, an equal protection case, to influence this opinion as *Lawrence* is replete with notions of anti-discrimination. As we will see in Part IV, though *Lawrence* is not an equal protection case, the case also borrowed from *Romer* by harnessing the outlining of animus behind the criminalization of sodomy as bolstered by *Bowers*.

Within the Eskridge-Merlin-Waaldijk theory, the imprecision of Kennedy’s majority opinion in *Lawrence*—albeit sometimes producing significantly dire

¹⁷⁸ Mark Strasser, *Lawrence, Mill, and Same-Sex Relationships: On Values, Valuing, and the Constitution*, 15 S. CAL. INTERDISC. L.J. 285, 285 (2006) (“While the full ramifications of *Lawrence* will not be clear for some time, the decision at the very least suggests that same-sex relations and relationships, like different-sex relations and relationships, have positive worth, and that states are not free to stigmatize members of the lesbian, gay, bisexual and transgender (LGBT) community.”).

¹⁷⁹ *Bowers v. Hardwick*, 478 U.S. 186, 188 (1986).

¹⁸⁰ Tribe, *supra* note 132, at 1898.

¹⁸¹ See, e.g., Hunter, *supra* note 132; see also Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140, 1140 (2004); Randy E. Barnett, *Grading Justice Kennedy: A Reply to Professor Carpenter*, 89 MINN. L. REV. 1582, 1584 (2005).

¹⁸² See Anthony Marroney Noto, *Lawrence and the Morality of “Don’t Ask, Don’t Tell” After Lofton, Witt, and Cook: The Law Before and After the Appeal*, 7 SETON HALL CIRCUIT REV. 155, 157-58 (2010).

consequences in actual lower court case law for gay litigants—lies in the scope in which the decision and its decriminalization of sodomy exists alongside subsequent moments in the gay rights movement. That shortcoming, particularly in the arguably-stunted reach of *Lawrence*'s precedent, signaled as just the first step in marriage equality incrementalism that much work still remained to be done. Despite some shortcomings, however, *Lawrence* did offer a significant advance from *Bowers* toward expanding and extending the rights of sexual minorities and recognition of same-sex relationships by targeting the antigay essentialism setup in *Bowers* and anti-sodomy laws. And marriage equality was another marker up another step that now seemed inevitable. Justice Scalia's Pandora's box reaction to the *Lawrence* majority in his dissent broadcasted this potential when he warned the public not to believe that the opinion would not end up "dismantl[ing] 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."¹⁸³ Prior to *Windsor*, several notable lower court cases after *Lawrence* arguably tamed the bite of Scalia's remarks when they distinguished themselves from the opinion in dealing with anti-sodomy laws.¹⁸⁴ But the murkiness of the *Lawrence* opinion, which led to such distancing in the post-*Lawrence* cases, highlighted that the goal toward recognizing same-sex identities was a lengthier tale—entwined between both the liberty and equality aspects of the Constitution. And Scalia, though on a problematic side of history, was actually right about *Lawrence*.

Ultimately within identity expression, the decriminalization of consensual sodomy in *Lawrence* is a commentary on sexual identity. As step one in the Eskridge-Merin-Waaldijk theory, the gesture from *Lawrence* elevated the worth of sexual minorities from being potential criminals or restricting their lives based on a private, otherwise autonomous behavior indicative of sexual orientation. What decriminalizing consensual sodomy in *Lawrence* did was recast identities for subsequent milestones in the marriage equality movement by beginning to remove the legal stigma traditionally placed upon the gay identity. As we shall see next, what *Lawrence* started was then extended by the repeal of the military's separation policies against sexual minorities in Don't Ask, Don't Tell.

B. Anti-discrimination in the Repeal of Don't Ask, Don't Tell

If, by decriminalizing consensual sodomy, *Lawrence* had recast the gay identity by not allowing certain previously-essentialized expressions of identity to trigger criminal status, then the 2011 repeal of Don't Ask, Don't Tell ("DADT")¹⁸⁵ added to

¹⁸³ *Lawrence v. Texas*, 539 U.S. 558, 604-05 (2003) (Scalia, J., dissenting).

¹⁸⁴ See, e.g., *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 809 (11th Cir. 2004) (using differences between civil and criminal law systems to distinguish *Lawrence* in adoption case); *United States v. Marcum*, 60 M.J. 198, 207-08 (Ct. App. A.F. 2004) (finding that senior-subordinate same-sex activity in the military was unlike consensual sodomy protected under *Lawrence*); *L.A.M. v. B.M.*, 906 So. 2d 942 (Ala. 2004) (finding that *Lawrence* would not protect lesbian mother from having her custody arrangement with ex-husband modified); *State v. Limon*, 83 P.3d 229, 234 (Kan. Ct. App. 2004) (distinguishing *Lawrence* in criminal case involving underage same-sex activity).

¹⁸⁵ In this Article, "Don't Ask, Don't Tell" and the accompanying acronym DADT refers in shorthand not only to the Clinton compromise of no longer permitting the military to ask affirmatively if a servicemember was a sexual minority, but as shorthand to describe the

Lawrence by not allowing sexual conduct and other expressions to become the basis for discrimination either—fulfilling the second step in Eskridge-Merlin-Waaldijk incrementalism. *Lawrence* had given efforts to repeal DADT a certain momentum. Even Antony Barone Kolenc, a critic of the repeal, has noted that

[b]y the time of the 2000 Presidential election, it seemed the battle had been fought and won for the DADT policy. Storm clouds appeared on the horizon, however, when in 2003 the Supreme Court struck down a Texas law criminalizing homosexual conduct in the landmark case *Lawrence v. Texas*. Justice Anthony Kennedy penned a decision for the Court that created uncertainty about the constitutional status of homosexuals as a protected class. Reinvigorated opponents of DADT saw the possibility for renewed challenges in the courts.¹⁸⁶

Kolenc's "storm cloud" imagery here characterizing the improvements in gay rights echoes that NOM's metaphoric portrayal of the gathering nimbus of same-sex marriage (nearly as an inciting motif for same-sex marriage opponents).¹⁸⁷ In a negative way, this comparison to a portentous storm does truthfully relay the resonance that *Lawrence* possessed.

1. DADT's Rise

On the more specific level of expressive liberty in the military, the period between *Lawrence*'s decriminalization of consensual same-sex intimacy and the repeal could be seen as a struggle between post-*Lawrence* views on sexual orientation and privacy, and the keenness of courts to defer to the military. Homosexuality and the U.S. military have always had an interesting history intertwined with identity expression and social visibility—much like anti-sodomy laws. From the early twentieth century, the military had established a longstanding policy of singling out sexual minorities, and like the anti-sodomy laws at issue in *Lawrence* and in *Bowers*, the DADT policy marginalized LGBT identities in the military through conduct—specifically via express self-referential conduct, conduct that is sexual and conduct that would otherwise tip off a likelihood of a homosexual orientation.¹⁸⁸ In fact, one contributing historical genesis that fueled the military's approach to discrimination was based on the criminalization of consensual sodomy in the military during the 1920s.¹⁸⁹ Once the military criminalized consensual

underlying legislation of separating LGBT servicemembers from the military in which the Congress enacted in 1993. See 10 U.S.C. § 654 (2006) (repealed).

¹⁸⁶ Antony Barone Kolenc, *Pretend to Defend: Executive Duty and the Demise of "Don't Ask, Don't Tell"*, 48 GONZ. L. REV. 107, 112 (2012) (footnotes omitted).

¹⁸⁷ See *Gathering Storm*, supra note 1.

¹⁸⁸ Daniel Ryan Koslosky, *Sexual Identity as Personhood: Towards an Expressive Liberty in the Military Context*, 84 N.D. L. REV. 175, 195 (2008) ("Don't Ask, Don't Tell also functionally replicates sodomy laws within the military context in that it criminalizes same-sex intimacy. Pre-*Lawrence* sodomy laws did, like Don't Ask, Don't Tell, contain a message of societal disapproval of homosexual intimacy.").

¹⁸⁹ Fred L. Borch III, *The History of "Don't Ask, Don't Tell" in the Army: How We Got to It and Why It Is What It Is*, 203 MIL. L. REV. 189, 190 (2010) ("History shows that the Army did not have much official interest in homosexuals and homosexual conduct until the 1920s, when consensual sodomy was criminalized for the first time in the AW [(Articles of War)], and the Army began administratively discharging gay Soldiers regardless of conduct." (footnotes omitted)).

sodomy, a transference took place from criminalization of conduct that could externalize the identity of sexual minorities to actual exclusion of those who were homosexual, on the basis that homosexuality was an illness.¹⁹⁰ At the time, homosexuality as pathology was a prevalent subscription, and in the military, this notion became a pretext that homosexuals were individuals who were “ill” and could not then serve in the military because that illness placed “afflicted” individuals below the mandated standards of health and well-being.¹⁹¹ Again, biology was placed behind the differentiation—with same-sex attraction now classified as a sickness. Once the American Psychological Association abandoned the notion of homosexuality as pathology in 1973, the military switched its reason for discriminating against homosexuals from illness to another essentialized heteronormative sentiment that homosexuality was just not compatible in the armed forces, specifically a threat to unit cohesion.¹⁹² But the continuation of sexual minorities serving in the military prompted the Clinton administration in 1993 to consider an executive order to lift the discrimination; before that happened, Congress passed legislation, essentially DADT, that met Clinton halfway—not banning sexual minority from service outright, just banning the openness of the perceived identity expression and existence of sexual minorities.¹⁹³ In this legislation, expressions of LGBT identities in the military would have prompted investigation and possible separation from service.¹⁹⁴ Expressions included conduct that would indicate self-identification with the gay, lesbian, bisexual, or transgendered identity—i.e. sexual behavior indicative of the lifestyle—or a self-identifying pronouncement—i.e. someone uttering the words, “I am gay.”¹⁹⁵

¹⁹⁰ *Id.* at 193 (“Shortly after the Congress criminalized consensual sodomy in the military, the Army also began using its medical regulations to bar gay men from enlisting. . . . This was a remarkable historical shift in the sense that homosexuality was now viewed—at least by the Army—as an illness rather than a sin or a crime.”) (footnotes omitted).

¹⁹¹ *Id.* (noting that “[t]he presence of gays in the Army could not be tolerated because, as a 1923 Medical Department regulation stated, homosexuality was ‘sexual psychopathy,’ and, as sexual deviants, homosexuals were unfit for military service” (footnotes omitted)).

¹⁹² *See id.* at 199-200 (“Empirical research by psychologists and psychiatrists, changing societal views on the morality of sexual behavior, and the rise of a politically active GLBT community caused the American Psychiatric Association to declassify homosexuality as a mental disorder and removed it from the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) II (2nd edition) in 1973. Some psychiatrists and psychoanalysts opposed to the declassification of homosexuality as a mental illness forced the Association’s membership to vote on the issue the following year, but their view was rejected. As a result, by the late-1970s the prevailing view in the medical community was that gays and lesbians were not sexual deviants and that there was no medical basis to exclude them from the Army. While the Army had long abandoned any claim that it was excluding gays and lesbians from its ranks for medical reasons, the lack of any credible medical support for discrimination against homosexuals in uniform meant that the Army now relied completely on good order and discipline as a rationale.” (footnotes omitted)).

¹⁹³ Mark Thompson, “*Don’t Ask, Don’t Tell*” Turns 15, *TIME* (Jan. 28, 2008), <http://www.time.com/time/nation/article/0,8599,1707545,00.html>.

¹⁹⁴ *See* 10 U.S.C. § 654 (2006) (repealed).

¹⁹⁵ *See id.* § 654(b)(2).

Once sexual minorities were allowed to serve in the military, the discriminatory effect of the policy shifted from one of excluding sexual minorities to regulating how such identities were expressed. This shift affected how identity expression became more narrowly the isolated target of military separation actions. Again, this result of regulating identity expression had antigay essentialist roots. The DADT policy, up until its repeal, hindered the expression of identity by pressuring LGBT military members to hide their identities as sexual minorities if they intended to serve in the military.¹⁹⁶ With the inclusion of these “silenced” homosexuals in the military, the continued justification to discriminate based on how sexual minorities would disrupt unit cohesion took on an even more nuanced layer as the policy now seemed to say it would not just be the homosexual who would disrupt unit cohesion, just the one who “practiced” or “flaunted” his or her homosexuality who would.¹⁹⁷ And ultimately, all of this rejection and reaction by the military was externally manifested by the regulation of conduct including the practice of consensual sodomy and sexual practices possibly indicative of LGBT identities, but difficult and problematic to link to the breaking of unit cohesion, which made the justification a pretense.

By regulating identity expression, DADT’s preference for the silent homosexual over the openly-practicing homosexual implied several important things. First, hetero-normative traits were favored over perceived “homosexual” traits, which created a “compulsory heterosexuality.”¹⁹⁸ This implication, in turn, suggested secondarily that hetero-normative traits in this sense could be “performed.”¹⁹⁹ If DADT worked within a compulsion and presumption of heterosexuality, the hidden encouragement for a LGBT servicemember would not just be to keep silent about his or her sexual identity but to play into that heterosexual presumption because doing so would decrease potential of detection. The observation that gays in the military had to pass as straight if they wanted to avoid being persecuted is not novel by

¹⁹⁶ See Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military’s Don’t Ask, Don’t Tell Policy*, 63 BROOK. L. REV. 1141, 1192-93 (1997) (“By forbidding expressions of gay identity in any form, at any time, and with any individual—including a servicemember’s family and friends—the policy compels servicemembers constantly and affirmatively to express a sexual identity of the military’s choosing. . . . Since sexual orientation was made a matter of active concern in the military while the new policy was being debated, they have suggested, servicemembers are now more anxious to proclaim their heterosexuality loudly—and to put pressure on those around them to do the same—than they were under the blanket exclusion. Whether or not this observation holds true as a general proposition, it remains the case that the Don’t Ask, Don’t Tell policy capitalizes upon the heterosexual presumption to enforce a direct regulation of the sexual identities of gay and lesbian servicemembers.” (footnotes omitted)).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1158 (“Whether gay and lesbian servicemembers must affirm a heterosexual identity in words—as, frequently, they must—or whether their enforced silence is loud enough to claim the “default characterization” of heterosexual identity that most conversations offer, the background of social relations in the military, as in most other contexts, is one of presumptive, compulsory heterosexuality.” (footnote omitted)).

¹⁹⁹ See *id.* at 1192 (“Similarly, although the Don’t Ask, Don’t Tell policy contemplates that gay people will serve among the ranks of the armed forces, it relies upon the ideological imperative of the heterosexual presumption to place its brand upon them.”).

DADT standards, nor new prior to DADT. But DADT's explicitness raised questions of performativity: that to remain safe from possible military inquiry and separation, a LGBT member must marginalize self-identification in order to perform or pass under mainstream hetero-normative scrutiny. This demand not only reflected an implication that self-expression more indicative of a LGBT identity was plainly undesirable but that hetero-normative traits are linked more closely to perceived essentialist assumptions of how a "good" soldier behaves or what characteristics a "good" soldier should embody.²⁰⁰ This discriminatory aspect becomes clearer when we see that, under DADT, only the "non-practicing," "straight-acting," and closeted LGBT servicemember would have prevailed (but of course, at great costs to his or her own identity expression) while non-gay servicemembers could talk about their relationships and romantic lives without persecution.²⁰¹ This shows how the disapproval of sexual identities other than hetero-normative ones relegated LGBT servicemembers into a position of having to play safe.

2. Challenging Essentialism and Deference

Cases challenging DADT prior to *Lawrence* were, for the most part, abysmally unsuccessful to overcoming judicial deference to the military for adhering to unit cohesion and to other reasons open homosexuality was purportedly a threat.²⁰² Post-

²⁰⁰ See Suzanna Danuta Walters, *The Few, the Proud, the Gays: Don't Ask, Don't Tell and the Trap of Tolerance*, 18 WM. & MARY J. WOMEN & L. 87, 109-10 (2011) ("The arguments against gays in the military not only claim gays will disrupt unit morale and effectiveness (by their very difference, their free-floating and unmoored desires, their effeminate or-alternately-their manly nature), but also claim they are not 'fit for service.' Underlying both these objections is an argument about performance: gays cannot perform soldiering because they are not heterosexual, because they are aberrant, because they are unmanly, because they are too manly, or because they are morally corrupt. And the 'pro' arguments generally respond in kind: gays are indeed fit for service. They may not be heterosexual but they are fighting machines-ready to die for God and country like any other normal, red-blooded American who signs up to serve. 'Pro' arguments are filled with tales of brave gay servicemembers and hetero servicemembers supporting their brethren because they have seen first-hand how very soldierly they actually are. Because the military is seen as a 'special' institution-not one open to all on a democratic basis but rather the few, the chosen, the Marines-the basic equality claims are invoked less frequently than, say, around marriage or employment rights. 'Just as long as he is a good fighter/soldier' is the dominant supportive trope in DADT repeal discourse and one that simply cannot work the same way for the marriage question. . . . Indeed, DADT hinges precisely on this status/conduct distinction: that one can 'be' gay without 'acting' (performing) gayness. But what is often ignored in this discussion is that acting 'not gay' (but being gay) requires a performance of another kind, and not simply the performance of the closet or of dissimulation. If gayness is conduct unbecoming an officer, then straightness is conduct becoming an officer, and straightness is not just marked through sexual acts but through the displacements of those acts into soldiering, into killing, into male bonding, and into brotherhood." (footnotes omitted)); see also Wolff, *supra* note 196, at 1169-70 ("The military is the primary site for the definition of manhood in American culture, and military service is the most important opportunity for citizens to attain that virtue. . . . The military's definition of masculine virtue—a definition that has played a unique role in setting standards for citizenship status in America—has repeatedly found expression in discriminatory restrictions on the qualifications for military service." (footnotes omitted)).

²⁰¹ Wolff, *supra* note 196, at 1163.

²⁰² See, e.g., *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997) (finding servicemember's discharge did not violate equal protection or First Amendment rights); *Richenberg v. Perry*, 97

Lawrence cases achieved some progress in using *Lawrence*'s incremental impact on privacy, seeing some elevation in scrutiny review standards, but judicial results were generally mixed during this period in recognizing disapproval of gays that emanated from antigay essentialism to restrictions on identity expression.²⁰³ Unlike *Lawrence*, litigants in these cases hit against a wall of judicial deference to the military trying to find the kind of animus against sexual minorities that would have otherwise established unconstitutionality.

Success came with the interesting translation of *Lawrence* into the gays in the military context through claims against the policy's infringement on free speech expression in *Log Cabin Republicans v. U.S.*,²⁰⁴ which bolstered identity expression implications. The idea that DADT had infringed on the expressive rights of gay servicemembers has existed since its 1993 adoption. Relying on the *Lawrence*'s impact on the expression of identity to diminish the usual deference to the military by seeing that *Lawrence* as "recognizing the fundamental right to 'an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,'"²⁰⁵ the District Court in *Log Cabin Republicans* finally refused to defer to the military and held that self-referential statements—such as "I am gay"—amounted not to merely evidentiary proof of actionable conduct under DADT, which is what other courts had held,²⁰⁶ but rather directly violating First Amendment free speech.²⁰⁷

The impetus for DADT's repeal, however, would not result from *Log Cabin Republicans* directly. Rather within the same year, efforts going toward the repeal would be accomplished by the Executive and Legislative branches in full swing. Eventually, in a move that bore similar sentiment to *Log Cabin Republicans*, President Obama, who had vowed to repeal DADT, and Congress moved to repeal the ban on open sexuality in the military²⁰⁸—a move that was incremental because it obtained the antidiscrimination within Eskridge-Merlin-Waaldijk theory, post-decriminalization of sodomy. Several extensive reports and surveys commissioned to study a possible repeal reflected the specific regulatory consequences of DADT on identity expression, concluding that "repeal of the Don't Ask, Don't Tell will not

F.3d 256 (8th Cir. 1996) (finding DADT's policy reasoning survived rationality); Selland v. Perry, 100 F.3d 950 (4th Cir. 1996) (finding DADT constitutional); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (upholding DADT via rationality).

²⁰³ See Witt v. Dep't of Air Force, 527 F.3d. 806, 817-22 (9th Cir. 2008) (finding that *Lawrence* provided a higher level of scrutiny than traditional rationality for plaintiff's due process claim, but not finding such elevation in review in plaintiff's equal protection claim); see also Cook v. Gates, 528 F.3d 42, 49-52, 60 (1st Cir. 2008) (finding also that *Lawrence* allowed a higher level scrutiny of than rationality but that plaintiff's challenges were unsuccessful against military deference).

²⁰⁴ *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal 2010), vacated, 658 F.3d 1162 (9th Cir. 2011).

²⁰⁵ *Log Cabin Republicans*, 716 F. Supp. 2d at 911.

²⁰⁶ See *Cook*, 528 F.3d at 62-63.

²⁰⁷ *Log Cabin Republicans*, 716 F. Supp. 2d at 926.

²⁰⁸ U.S. DEP'T OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL" 27-28 (2010) [hereinafter DOD REPORT].

have a negative impact on their ability to conduct their military mission”²⁰⁹ and that “the concern with repeal among many is with open service”²¹⁰—in other words expressive liberty.

The *Report of the Comprehensive Review of the Issues Associated with a Repeal of “Don’t Ask, Don’t Tell” (DOD Report)* elaborated on just what “open service” meant with what seemed like a subtle nod to both *Romer* and *Lawrence*:

In today’s civilian society, where there is no law that requires gay men and lesbians to conceal their sexual orientation in order to keep their job, most gay men and lesbians still tend to be discrete about their personal lives, and guarded about the people with whom they share information about their sexual orientation.²¹¹

Later in another passage, the *DOD Report* acknowledged more explicitly the influence of anti-sodomy laws in the historical regulation of sexual identities in the military: “Prior to 1993, there was no Congressional statute that expressly regulated homosexuality in the U.S. military: homosexuality in the military was regulated and restricted through a combination of sodomy prohibitions in military law and military personnel regulations.”²¹² When the *DOD Report* recited the litigation history of DADT after its enactment in 1993, it revisited the influence of anti-sodomy laws on *Bowers* on DADT cases before *Lawrence*, noting that “[t]hese early Don’t Ask, Don’t Tell cases were decided against a backdrop of the Supreme Court’s 1986 decision in *Bowers v. Hardwick*.”²¹³ However, the *DOD Report* then acknowledged the incongruity posed by the change in expressive privacy interests when *Lawrence* overruled *Bowers* and the existence of DADT in the face of *Lawrence*, and summarized *Lawrence*’s incremental impact on the case law post-2003.²¹⁴

The *DOD Report* was finally most demonstrative in rejecting the unit cohesion, effectiveness, and readiness arguments lurking at the opposing end of discriminatory arguments that litigants losing against DADT faced when courts reached to defer to the military—reasons that had previously by effect encouraged LGBT servicemembers not only to hide their sexual identities but play safe by emphasizing hetero-normative traits that aligned with how the military thought “a good soldier” might act.²¹⁵ Relying on its extensive surveying, empirical assessments, and social science research, the *DOD Report* relayed that based on servicemembers’ “actual past and present experiences in a unit with someone they believed to be gay”²¹⁶ in Marine combat units, Army combat units, and otherwise, the consensus for a positive rating on a unit’s cohesive ability to work together with individuals who were perceived to be gay or lesbian were substantially high—ranging the lowest from the 84% of Marine servicemembers in combat arms units surveyed approving, to 89% of Army servicemembers in combat arms units surveyed approving, to 92%

²⁰⁹ *Id.* at 3.

²¹⁰ *Id.* at 4.

²¹¹ *Id.* at 5.

²¹² *Id.* at 20.

²¹³ *Id.* at 26.

²¹⁴ *See id.* at 26-27.

²¹⁵ *See id.* at 119.

²¹⁶ *Id.* at 125.

of overall military servicemembers surveyed approving, which as the *DOD Report*, touted were “all very high percentages.”²¹⁷ More profoundly, the *DOD Report* surmised the hetero-normative implications of these responses—that “[t]hese survey results reveal to us a misperception that a gay man does not fit the image of a good war fighter, a misperception that is almost completely erased when a gay Servicemember is allowed to prove himself alongside fellow war fighters.”²¹⁸ As an amusing anecdote, the *DOD Report* excerpted the words of one special ops servicemember in regards to misperceptions of sexual identity: “We have a gay guy [in the unit]. He’s big. He’s mean, and he kills lots of bad guys. No one cared that he was gay.”²¹⁹ In one huge empirical gesture, the *DOD Report* refuted the prediction of negative impact by openly-LGBT servicemembers on unit cohesion and underscored how that prediction revealed the military’s preference of hetero-normative traits.

Similarly, the RAND Update to its 1993 report, *Sexual Orientation in the U.S. Military Personnel Policy*²²⁰ (*Update*) which was commissioned as part of the 2010 study on a possible DADT repeal, also heavily criticized the misperceptions and preferences of identity expression DADT reinforced, perpetuated, and regulated. The *Update* drew on comprehensive surveys as well,²²¹ and in one section detailing the presence and awareness of LGBT servicemembers in the military, the *Update* noted that of the LGBT servicemembers surveyed about their “own behavior in disclosing their orientation within their units,” an aggregate of “two-thirds of respondents reported that they either pretend to be heterosexual or hide their orientation from other unit members, and most others are selective in deciding to whom and in what circumstances they disclose their sexual orientations.”²²²

Bowing toward incrementalism, the *Update* briefly mentioned *Lawrence* and how decriminalizing same-sex intimacy ten years after DADT’s enactment had changed the context in which the previous RAND research was based, particularly in summarizing identity expression.²²³ At the midpoint of this chapter on the personnel disclosures of sexual orientation, the *Update*’s assessment subtly implicates a rudimentary assumption of sexual orientation that DADT and the historical military policies had on LGBT individuals.²²⁴ Repeatedly, the *Update* noted that sexual *orientation*—although possibly expressed through sexual behavior—and sexual *behavior*—although possibly expressive of sexual orientation—were not always mutually inclusive *nor conclusive* of one another, that self-identification of orientation, whether heterosexual or not, does not in every case necessarily lead to sexual behavior that corresponds to that identification and vice versa: “Shifts in

²¹⁷ *Id.* at 125-26.

²¹⁸ *Id.* at 126.

²¹⁹ *Id.*

²²⁰ NAT’L DEF. RESEARCH INST., SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: AN UPDATE OF RAND’S 1993 STUDY 27 (2010), available at http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG1056.pdf.

²²¹ *Id.* at 233-37, 255-56.

²²² *Id.* at 264.

²²³ *Id.* at 92.

²²⁴ See generally *id.*

orientation are particularly likely as a consequence of maturation—a process referred to as sexual-identity development.²²⁵ If read against DADT, this observation seems to point out the limits to the military’s previously-powerful, animus-driven directive to exclude gays in the military—that homosexuality is not now a pathology, as it was once historically considered; not a threat for excluding sexual minorities, as it was believed; not a basis for criminalization, but rather a seemingly non-threatening part of human maturation: “Given that enlisted personnel are typically young adults, some individuals who do not see themselves as gay or do not engage in same-sex activity before they enter the military may do so some time after enlisting.”²²⁶ Again, essentialist notions of sexual orientation had been used as a pretextual justification of a policy hindering identity expression.

In commenting on DADT’s attempt to reinforce fixed traits amongst military personnel, the *Update* showed data suggesting that many LGBT servicemembers not only “pretend[ed] to be heterosexual” but did so in ways that resulted in exhibiting traits of “good soldiers”²²⁷—traits that were stereotypically subsumed under the military’s outlook on gender characteristic preferences, traits that have been utilized in contrast to a characterized and stigmatized view of non-heterosexual identities.²²⁸ Such data point to the fluidity of sexual identity and direct the harm of DADT’s categorization of sexual identity back to an abridged personal autonomy shared by *Lawrence*.²²⁹ As discussed above, although *Lawrence* was facially concerned with the intrusion into personal privacy and autonomy that anti-sodomy laws effected, one of the broader undertow of *Lawrence* was situated within the way that states fixated upon criminalizing sodomy as a way to curtail identity expression. Similarly, regulating behavior and self-identifying speech in DADT intruded upon personal autonomy rights through suppressing expression in LGBT servicemembers, but the experience of DADT facially added upon *Lawrence* because of the way DADT invaded not only sexual behavior, but other everyday conduct that would be indicative of a LGBT identity—including identity speech.²³⁰ This spill-over into other kinds of conduct juxtaposed with the fluidity of identities and the performance of identities within the military exposed the difficulty and inconsistencies of regulating the social visibility of homosexuality. The extension from *Lawrence* of violations within personal autonomy indicate the level of struggle of LGBT individuals when confronted by this policy in the military—where perhaps as *Lawrence* had mandated that such identities could no longer be criminalized, the

²²⁵ *Id.* at 105.

²²⁶ *Id.*

²²⁷ *See id.* at 264.

²²⁸ *See* Koslosky, *supra* note 188, at 193.

²²⁹ *See* *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (“Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.”).

²³⁰ “[O]n its face, the Act discriminates based on the content of the speech being regulated. It distinguishes between speech regarding sexual orientation, and inevitably, family relationships and daily activities, by and about gay and lesbian servicemembers, which is banned, and speech on those subjects by and about heterosexual servicemembers, which is permitted.” *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 926 (C.D. Cal 2010), *vacated*, 658 F.3d 1162 (9th Cir. 2011).

sentiment did not foreclose the idea that such identities could still be selectively marginalized into inconspicuousness. In fact, the incrementalist impact of *Lawrence*'s decriminalization of same-sex intimacy and what it meant for identity expression could be noted in the acknowledgment of *Lawrence* in the 2010 congressional findings on repealing of the DADT policy.²³¹

The about-face toward the perceived threat to unit cohesion and military readiness and disapproval of LGBT identities could be partly attributed to the change in perception in the way sexual identities have been allowed expressive liberty and visibility in the social fabric since *Bowers* and even since *Lawrence*. The repeal officially took place in late September 2011.²³² The *DOD Report and Update* have suggested little or minimal impact on unit cohesion or negligible levels of interruption in operations.²³³ Studies since the repeal have continuously bolstered such conclusions.²³⁴ These commissioned studies harnessed the changing attitudes regarding the characterization of sexual minorities in the military and the burgeoning disconnect between open presence of their identities and optimum operational benefits shook the military's traditional belief that only a certain kind of sexual identity should be imprinted and preferred amongst the ranks. Once this animus dislodged the rational relationship between the DADT policy and its goals, the judicial deference that courts used in the past appeared less relevant and the discriminatory aspects of DADT were, for the most part, finally clarified and realized. What the repeal did bring was antidiscrimination for LGB servicemembers so that such identities could be asked about and told without that traditional hindrance. And that change, despite some limitations, helped propel the incrementalist journey for the next step federally: the legal recognition of same-sex couples.

C. Bond over Biology in *U.S. v. Windsor*

In late February 2013, a month before the *Hollingsworth* and *Windsor* arguments at the Supreme Court, another video about same-sex marriage descended upon the cultural airwaves. This time, however, unlike NOM's "Gathering Storm," the message was set on a lush, paradisiac beach resort rather than before a computer-generated storm.²³⁵ The scenario started simply: two young, fairly-attractive strangers of the opposite sex are each sitting in adjacent beach chairs on the grassy knoll of a beach resort, and each with a tablet in hand. Bright sunlight and the churning of waves consistently highlight the backdrop.²³⁶ The woman, trim in a

²³¹ See JODY FEDER, CONG. RESEARCH SERV., RL 40795, "DON'T ASK, DON'T TELL": A LEGAL ANALYSIS 8-14 (2013).

²³² *Repeal Day: The End of "Don't Ask, Don't Tell"*, N.Y. TIMES: AT WAR (Sept. 20, 2011, 01:50 PM EST), <http://atwar.blogs.nytimes.com/2011/09/20/repeal-day-the-end-of-dont-ask-dont-tell/>.

²³³ See DOD REPORT, *supra* note 208, at 119.

²³⁴ See, e.g., AARON BELKIN ET AL., PALM CENTER, *One Year Out: An Assessment of DADT Repeal's Impact on Military Readiness* (Sept. 20, 2012), available at http://www.palmcenter.org/files/One%20Year%20Out_0.pdf.

²³⁵ *Kindle Paperwhite: Perfect at the Beach—Amazon TV Commercial*, YOUTUBE (Feb. 20, 2013), http://www.youtube.com/watch?feature=player_embedded&v=1S3t9reE364.

²³⁶ *Id.*

black swimsuit with her hair slicked back as if she had just finished a swim, effortlessly reads off her Kindle tablet, when the man, in shorts and a beach shirt and struggling with the unavoidable glare of sunlight on his iPad, interrupts the woman and asks her about the functionality of her Kindle; she responds favorably, noting its features, and how perfect it is for the beach.²³⁷ The man then turns back to the screen of his iPad and, with much satisfaction, navigates his finger on his iPad screen to buy a Kindle as well.²³⁸ When he smilingly turns over to look at the woman and suggests, “We should celebrate,” in an ambiguous tone, friendly enough to frame his suggestion as a pick-up line, the woman rejects him: “My husband’s bringing me a drink right now.”²³⁹ What adds complexity to the scene is the man’s unexpected response, “So is *mine*,” as they both gesture over to the resort bar behind them to show each other that their husbands are, in a mirror-like image, on common ground, each fetching drinks.²⁴⁰ The man’s celebratory suggestion was not nearly as amorous as the woman (and likely the TV audience) had assumed. It was genuinely celebratory.

This advertisement—promulgated by internet retailing giant Amazon.com to promote its tablet²⁴¹—aired several months after the Obama re-election and just weeks after Obama’s presidential inaugural address had vowed to bring equal rights to sexual minorities.²⁴² The country was heating up dramatically with more fervor toward marriage equality and any possibility of a gathering storm was dissipating; and instead, momentum was surging for same-sex couples more than ever before. Although the visibility of wedded same-sex couples vacationing on sandy beach resorts alongside their different-sex counterparts remains slight, the Kindle ad, like the man gesturing toward his husband at the bar, was itself gesturing toward an ideal and a possible norm if the laws were to extend marriage rights to gay couples. Again, as the ad itself concluded with a camera pan toward a lucid blue sky—that very anti-thesis of an impending storm—the ad also conveys the message that something far beyond Kindle tablets and same-sex marriages perpetuates here. This reading is especially possible after the ad’s protagonists had motioned to their respective husbands at the bar and a moment passes where it is difficult to tell which husband at the bar belonged with which of the two speaking characters of the ad.²⁴³ The commercial emphasizes similarities to a point where the differences between the gay and straight characters seemed insignificant and slightly surprising.

As previously seen, this focus on the similarities between sexual minorities and the mainstream in areas other than marriage has not always been so forthright. States

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Glennisha Morgan, *Amazon Kindle Backs Gay Marriage with New Commercial*, HUFFINGTON POST (Feb. 21, 2013, 10:41 AM EST), http://www.huffingtonpost.com/2013/02/21/amazon-kindle-gay-marriage-commercial-_n_2732827.html.

²⁴² *Id.*; Barack Obama, U.S. President, Inaugural Address (Jan. 21, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>.

²⁴³ *Kindle Paperwhite*, *supra* note 235.

characterized biological differences within sex acts to criminalize sodomy and the military used essentialized and stereotypical traits between sexual minorities and heterosexuals to distinguish between “good” and “bad” soldiers for purposes of exclusion.²⁴⁴ These approaches thrived within the law generally and laws surrounding marriage also reiterated the antigay essentialism used to marginalize the relationships between same-sex and different-sex couples. Conventionally, in fact, essentialism, in aiding natural law and religious morality, has continuously influenced state refusal to recognize same-sex couples for the purposes of marriage—and in much the same manner to differentiate and then marginalize sexual minorities as with anti-sodomy laws and military exclusion.

1. DOMA’s Natural Teleology

The most glaring example of how antigay essentialism buttressed the marriage issue on the federal level is through the Defense of Marriage Act (DOMA) passed in 1996.²⁴⁵ In discerning how the Supreme Court’s review of the *Windsor* case fulfills our normatively revised step three of the Eskridge-Merin-Waaldijk theory of incrementalism—where same-sex marriage can be part of the legal recognition of same-sex couples—our enquiry first starts with the essentialist approach within marriage laws that has helped exclude sexual minorities. As the Court has destabilized that approach after the 2012-2013 term, we again will see with *Windsor* that the same-sex marriage debate is more than just about the concept of same-sex marriage and that it is the social visibility and the expression of sexual orientation that is ultimately at stake.

Prior to *Windsor*, Section 3 of DOMA had fixed the definition of marriage so that federally, “[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”²⁴⁶ Within the congressional thought-process leading up to DOMA’s passage, biology was again raised as the reason why marriage has traditionally been fixed as a union between different-sex individuals and why same-sex unions could not be recognized under that label.²⁴⁷ The House of Representatives report exuded heterosexism in its accounts toward “defending” marriage in an essentialist configuration when it deferred, at length, to Hadley Arkes’ testimony for authority on the subject matter:

²⁴⁴ See Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law’s Procreationist Vision of Marriage*, 64 WASH & LEE. L. REV. 393, 459 (2007) (“Marriage traditionalists routinely appeal to natural law arguments in order to justify both what the current legal regime is and what it should be. Moreover, like the nineteenth-century essentialists, they also suggest that a positive law that recognizes same-sex marriage is (or would be) fraudulent because it contravenes natural law.” (footnote omitted)); see also *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (“The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.” (referencing *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942))).

²⁴⁵ Defense of Marriage Act (DOMA), 1 U.S.C.A. § 7 (West 2011).

²⁴⁶ *Id.*

²⁴⁷ H.R. REP. NO. 104-664, at 14 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2918.

Our engendered existence, as men and women, offers the most unmistakable, natural signs of the meaning and purpose of sexuality. And that is the function and purpose of begetting. At its core, it is hard to detach marriage from what may be called the “natural teleology of the body”: namely the inescapable fact that only two people, not three, only a man and woman, can beget a child.²⁴⁸

Procreation was the proclaimed goal of marriage between different-sex couples and by consequence, the House concluded that “civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and childrearing. Simply put, government has an interest in marriage because it has an interest in children.”²⁴⁹ The permanency of this “natural teleology of the body” was assembled—if not by implying at first procreation itself and the biological tie-in to the “body”—by a quote used in the House report from the Council on Families in America that underscored that marriage exists as “our most universal social institution, found prominently in virtually every known society”²⁵⁰ because of “the irreplaceable role that marriage plays in childrearing and generational continuity.”²⁵¹ By falsely reaching toward the universal, the interest of procreation and childrearing was propped as the biological and natural reason why marriage has been exclusively for different-sex couples.

This hetero-normative tautology (or “teleology”) leads easily to an implicit dichotomy that excludes unions not biologically embodying that “natural teleology of the body” to qualify for the marriage label: ones that also exist in the world but did not historically procreate. That differentiation stands exactly for why DOMA secured the marriage label for different-sex unions but not same-sex ones; the artificial focus on biology spotlights the reproductive potential of different-sex couples as the prominent reason for keeping marriage from same-sex couples when other reasons why marriages exist are possible—reasons that could allow for including other relationship configurations within marriage. Most patent in its use of essentialism as a shield to prop up the exclusion of same-sex couples in marriage was the House’s anticipation and rejection of two possible rebuttals to its essentialist tautology, rebuttals that would quash constructionist sentiments to marriage. First, the House claimed that the fact that the law allows different-sex couples to marry without indicating their intent to have children was a negligible one because the underlying procreative policy of marriage reserves the institution for those couples who do: “[S]ociety has made the eminently sensible judgment to permit heterosexuals to marry, notwithstanding the fact that some couples cannot or simply choose not to have children.”²⁵² Similarly, the House also raised the “divorce revolution” as an argued threat to marriage that overshadowed the changes that same-sex couples might bring to the institution.²⁵³ Although the report

²⁴⁸ *Id.* at 13.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 13-14.

²⁵² *Id.* at 14.

²⁵³ *Id.*

acknowledged the disruption to childrearing that divorce brought to the traditional nuclear family—which could have been interpreted to signify that procreation likely was not the underlying teleology of the body that bodes essential for marriage—the House, nevertheless, found that because threats already existed in marriages between different-sex individuals, it would be imperative to protect marriage from other perceived threats including that of same-sex couples gathering and readying to storm across the gates of marriage to push that natural teleology off its course: “[T]he fact that marriage is embattled is surely no argument for opening a new front in the war.”²⁵⁴ The House’s rhetorical responses to both of these rebuttals revealed how essentialism was harnessed to prolong an exclusion that would never envision the hypothetical couple in the *Kindle* commercial, but align itself rather with the sentiments of NOM’s looming, tempestuously hyperbolic panic over same-sex marriage. The opponents are always seemingly spotting a brewing storm somewhere.

This kind of strategy behind DOMA for keeping marriage restricted to same-sex couples falls squarely in line with the classic paradigms of the marriage institution used to hinder legal recognition of same-sex marriages. Early litigation of marriage equality in the 1970s upheld the exclusion of marriage from same-sex couples based on the finding that historically marriage between different-sex couples was “uniquely involving the procreation and rearing of children within a family”²⁵⁵ and saw this consequence as permanent and “as old as the book of Genesis.”²⁵⁶ Often this biological difference was then intertwined with natural law and Judeo-Christian arguments to create a wall of reasoning that excluded same-sex couples based on procreation and childrearing to swallow up other existing justifications for marriage that would focus the attention toward a constructivist notion of marriage.²⁵⁷ Marta Nussbaum has criticized this focus on the biological aspect by attempting to define marriage more broadly, observing that “[t]he institution of marriage houses and supports several distinct aspects of human life: sexual relations, friendship and

²⁵⁴ *Id.* at 15.

²⁵⁵ *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

²⁵⁶ *Id.*

²⁵⁷ See Jeffrey A. Kershaw, *Towards an Establishment Theory of Gay Personhood*, 58 VAND. L. REV. 555, 556-57 (2005) (“The Catholic Church remains, like so many institutions, troubled by its inability to explain the origins of homosexuality. In the face of its confusion, the Church has justified continuing condemnation of gays, lesbians, and bisexuals as living in opposition to ‘natural law.’ It was the Church itself, led by figures such as Augustine, that popularized a natural law outlook in medieval Western society and originated the view that engaging in sexual activity is immoral unless it occurs within the confines of marriage to an opposite-sex partner and for the purpose of procreation. A significant proportion of Americans today share this ‘natural law’ stance; a majority, while eschewing a distinction between procreative and nonprocreative sex, disapprove of homosexual sex under any circumstances. Such views can be justified in part because homosexuality’s ‘genesis remains largely unexplained’ despite the fact that various disciplines, including biology, psychology, and sociology, have had more than one hundred years to wrestle with the issue. The inability to answer these questions, however, stems more from cultural assumptions and biases rooted in the United States’ Judeo-Christian tradition, which obscure genuine scientific understanding. These biases have also played a role in the development of our legal tradition, although it was not until the last century that legislators in many jurisdictions shifted their focus from general sexual immorality to the regulation of homosexual conduct. This shift corresponded with the ‘invention’ of homosexuality as a ‘distinct category of person.’” (footnotes omitted)).

companionship, love, conversation, procreation and child rearing, mutual responsibility. Marriages can exist without each of these.”²⁵⁸ By cataloging other justifications for marriage, Nussbaum raises the idea of marriage as a construct that includes essentialist goals, and sheds light on how it is a construct that has been hijacked by marriage equality opponents, such as those who have advocated successfully for the passing of DOMA and campaigned for Proposition 8 in ways that molded that construction with a false sense of fixed biology, rather than allowing marriage to be “plural in both content and meaning.”²⁵⁹

For sexual minorities specifically, a definition based on false teleology has had a regulatory effect on the identity expression. Analogous to how civil unions and domestic partnerships could be seen as laws that can classify same-sex couples as second-class citizens, the refusal to extend marriage to same-sex couples, as a result of defining marriage according to teleology, is another similar way in which the law can brand sexual minorities as the lesser. And this result arises directly from hindering the identities of sexual minorities again—like the instances noted from *Bowers* and DADT—from being expressed in any meaningful and comparable way that heterosexual identities are expressed. Scholars have noted this type of performativity for sexual orientation within the personal relationships that people cultivate that could end up as marriages.²⁶⁰ According to Douglas NeJaime recently, “[s]exual orientation by its very nature includes an active, relational component. Sexual orientation identity is linked to (both actual and contemplated) relationships with other bodies.”²⁶¹ The social, relationship (or relational) aspect of one’s life can be the tip-off—so to speak—of one’s sexual orientation. NeJaime cites and synthesizes the works of others such as Kenji Yoshino, Janet Halley, Hau-ling Lau, and Mary Anne Case, as well, to show that others have made the particular observation that in the public and social sphere one could externalize one’s sexual identity via the image of a couple.²⁶² His emphasis is on the visible “enactment” of orientation through relationships:

Conduct, in the form of same-sex relationships, enacts lesbian or gay identity. Entering, performing, and publicly showing a same-sex relationship serves as a central way of embracing and maintain one’s lesbian or gay identity. This goes beyond the idea that intimate relationships are important to selfhood and identity, instead explicitly linking a certain type of relationship to a specific identity. Same-sex relationships, in this sense, publicly enact lesbian and gay identity.²⁶³

²⁵⁸ MARTA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & CONSTITUTIONAL LAW 128 (2010).

²⁵⁹ *Id.*

²⁶⁰ See Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643 (1993) [hereinafter Case, *Couples and Coupling*]; Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169 (2012).

²⁶¹ *Id.* at 1197-98.

²⁶² *Id.* at 1196-99.

²⁶³ *Id.* at 1199.

As Mary Anne Case writes compatibly, “[t]he couple is a mediating term between status and conduct, private and public, sameness and difference, and the sexual and nonsexual aspects of gay identity. Just as ‘couple is both a noun and a verb, and in a gay couple conduct and status slip ineluctably into one another.’”²⁶⁴ An individual’s sexual orientation is observable distinctly through relationships. And as Case observes further, the visibility of relationships and coupling behavior is hard to deny since slippage between the grammatical definitions of the word also translates to how “[t]he couple can be simultaneously the situs for the most private of intimate relationships and the most public representation of it. And in a gay couple the signs of sameness and difference with respect to heterosexual pairs are both clearly visible.”²⁶⁵ Thus, in some ways similar to how skin color could express race, relationships are part of how sexual identity is expressed and how different sexual identities can be differentiated.

And within inequalities of power and social visibility, that differentiation for sexual identities has led to marginalization. From behind the bench, Judge Stephen Reinhardt, writing for the Ninth Circuit in the majority decision in *Perry v. Brown*,²⁶⁶ articulated a sentiment similar to Case’s notion of differentiation but furthers it even more in the realm of social and legal visibility when he recounted the visible performativity of orientation in the context of heterosexual coupling behavior and marriage in order to raise consciousness to the existing inequality that the law (and society) has placed on same-sex coupling behavior:

We are regularly given forms to complete that ask us whether we are “single” or “married.” Newspapers run announcements of births, deaths, and marriages. We are excited to see someone ask, “Will you marry me?”, whether on bended knee in a restaurant or in text splashed across a stadium Jumbotron. Certainly it would not have the same effect to see “Will you enter into a registered domestic partnership with me?”²⁶⁷

Reinhardt illustrates how the law restricts the expressive acts of couples and how that restriction is tied to sexual identity. Because of the restriction on relationships, none of these expressive acts of coupling has as much visibility for sexual minorities as they are commonplace for different-sex couples—although they could. Within the context of domestic partnerships, the outline of a second-class citizen connotation is clearly drawn in the subtext of Reinhardt’s illustration. Reinhardt intimates that ubiquitously different-sex couples can and do propose marriage on Jumbotrons at sports games; it is a spectacle when it happens because it celebrates and reifies marriage, and it is also likely a bit mundane since every different-sex couple more easily possess that option.²⁶⁸ Same-sex couples are precluded from having that frequent opportunity, and any proposal for an alternative to marriage exhibited on

²⁶⁴ Case, *Couples and Coupling*, *supra* note 260, at 1644.

²⁶⁵ *Id.*

²⁶⁶ *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated*, 133 S. Ct. 2652 (2013).

²⁶⁷ *Id.* at 1078.

²⁶⁸ *Id.*

Jumbotron just seem symbolically lesser.²⁶⁹ This marginalization of identity expression stems from the law and its value judgments on same-sex relationships.

If marriage is, as Nussbaum describes, a construct, and if coupling behavior, including marital status, is an expression of sexual orientation, then the marriage restriction to only opposite sex couples and not same-sex couples regulate—with much the same result as anti-sodomy laws and DADT—the identity expression of sexual minorities. Essentializing the differences between sexual orientations lies at the core of refusing to extend marriage to same-sex couples. And federally, in progressing onto the revised final step in the Eskridge-Merin-Waaldijk theory—the legal recognition of same-sex relationships, including marriage equality itself—the Supreme Court’s review of DOMA in *Windsor* unfastens that entanglement with antigay essentialism in order to surmount another transition away from essentialist approach to sexual identity.

2. *Windsor* and the Legal Recognition of Same-Sex Relationships

As if almost an acknowledgment of incrementalism, it was ten years to the day of the *Lawrence* decision when the Supreme Court released its opinion in *Windsor*.²⁷⁰ Again, Kennedy authored another gay rights decision this time; and instead of dealing with sexual conduct between consensual adults, he would find the federal definition of marriage in section 3 of DOMA unconstitutional.²⁷¹ Specifically, *Windsor*’s rejection of the definition of marriage as exclusively reserved for different-sex couples was premised on an approach that moved dramatically away from the negative essentializing of sexual orientation—but does not yet fully endorse a pro-gay constructivist approach to sexual orientation, despite focusing on marriage as a bond in *Windsor* in similar fashion to Nussbaum. *Windsor* does account for the conduct and significance behind marriage for the purposes of broadening the definition, rather than place a heavy reliance on biology. But it must be carefully noted that there was no simultaneous adoption of constructivism in any real capacity. The plaintiff, Edith Windsor, and her deceased spouse, Thea Spyer, had been a couple since 1963 and were formally domestic partners in New York City in 1993 before later marrying in 2007 in Canada.²⁷² After marriage, they continued their lives in New York City, and New York State legally recognized their Canadian marriage.²⁷³ When Spyer passed away in 2009, she left her entire estate to Windsor, but because DOMA did not recognize same-sex marriages, Windsor was not qualified for the marital exemption under federal estate taxes.²⁷⁴ After paying \$363,053 in estate taxes from the IRS, she subsequently sought a refund, but was

²⁶⁹ See *id.* (“We are excited to see someone ask, ‘Will you marry me?’, whether on bended knee in a restaurant or in text splashed across a stadium Jumbotron. Certainly it would not have the same effect to see ‘Will you enter into a registered domestic partnership with me?’”).

²⁷⁰ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

²⁷¹ *Id.*

²⁷² *Id.* at 2683.

²⁷³ *Id.*

²⁷⁴ *Id.*

denied the request.²⁷⁵ Windsor then brought the suit that would eventually invalidate Section 3 of DOMA.²⁷⁶

The Court's disapproval of DOMA was two-fold: first it offended federalism principles and secondly it discriminated against same-sex couples.²⁷⁷ Both of DOMA's harsh results were accomplished in some way via the essentialization of marriage. In illustrating the unconstitutionality of Section 3 of DOMA, *Windsor* focused on how the federal definition of marriage as between man and woman overstepped the boundaries of states' prerogatives in determining their own definitions—specifically addressing the intervention that DOMA conceived against the ability for states to participate in the process of patchwork incrementalism as Jane Schacter had observed in which states are already engaged.²⁷⁸ And what *Windsor* found was that such intervention struck at states' ability to define the marital relationship.²⁷⁹ As a result, the Court saw DOMA's intervention created "injury and indignity"²⁸⁰ in the form of "a deprivation of an essential part of the liberty protected by the Fifth Amendment"²⁸¹—especially when DOMA removed a right federally from a class of people that New York state specifically empowers: the right of same-sex individuals to have their coupling behavior be expressed as a lawful marriage, or in essence, the expression of sexual identity for sexual minorities on the state level to be consistent with the federal.²⁸² This deprivation was also on top of the other deprivations the majority noticed resided in other realms including, *inter alia*, taxes, benefits, housing, criminality, and intellectual property.²⁸³ The deprivation reflected conflicts between federal and state incrementalisms; DOMA did not deprive different-sex married couples from New York from recognition on the federal level, but did so against same-sex couples who were also married by New York law. These effects demonstrated both federalism and also discriminatory results.

In gearing up to apply an enhanced rational basis analysis to DOMA, Kennedy shed light on that injury and indignity by finding that the definition of marriage need not be predicated on biology: "In acting first to recognize and then allow same-sex marriages, New York was responding 'to the initiative of those who [sought] a voice in shaping the destiny of their own times.'"²⁸⁴ Rather than relying on the "natural teleology of the body," the Court approached the purpose of marriage as less biologically or essentially determined, underlining the constructive element of

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 2695-96.

²⁷⁸ Schacter, *supra* note 115, at 74.

²⁷⁹ See *Windsor*, 133 S. Ct. at 2692 ("DOMA, because of its reach and extent, departs from the history and tradition of reliance on state law to define marriage.").

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* at 2694.

²⁸⁴ *Id.* at 2692 (citing *Bond v. United States*, 131 S. Ct. 2355, 2359 (2011)).

marriage where the union could have the different meanings that Nussbaum has articulated, meanings tied to the person, and that perhaps the policy of regulating marriage should reflect that concept of marriage. In viewing marriage, the Court reconstructed the definition in order to see it as “a far-reaching legal acknowledgment of the intimate relationships between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages.”²⁸⁵ When the Court placed New York State’s recognition of same-sex marriages within “far-reaching,”²⁸⁶ the description, “far-reaching,” implies more than a fixed biology. And the Court did not want to disturb that “far-reaching” approach because “[i]t reflects both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.”²⁸⁷ Marriage is an institution that is not fixed in meaning but historically ever-evolving to service the social context in which it reflects, which means it can embrace cultural pluralist views about the institution.²⁸⁸ Intrinsically, the *Windsor* majority viewed marriage in a less essentialist way than those who stood behind a “natural” teleology to propagate DOMA.

The Court could have included and merely subordinated essentialist views of marriage as just *one* of the myriad of justifications within a constructivist spectrum of marriage. Yet, *Windsor* found in its enhanced rational basis analysis how essentialism was isolated and manipulated into a construction of its own that made salient and viable the natural law and religious arguments against extending marriage to same-sex couples, but also allowed enough severe approbation against sexual minorities to amount to legislative animus. Here is where animus-focused jurisprudence has its continuation from *Romer* and maturation in *Windsor* as the Court now unleashed it in the issue of same-sex marriage. Kennedy wrote that “[t]he House concluded that DOMA expresses ‘both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.’”²⁸⁹ In order to reach that moral disapproval and defend marriage, the House first had to argue for that natural teleology of the body, it had to go toward biology and use it to draw up differences between same-sex couples and different-sex couples—homosexuals and heterosexuals—that could be used to marginalize the way that identity could be expressed and ultimately regulated it in a discriminatory way.²⁹⁰ The Court mentioned, *inter alia*, “stigma,”²⁹¹ “second-class,”²⁹² and “second-tier,”²⁹³ to characterize how DOMA visualized the

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 2692–93.

²⁸⁸ See Kramer, *supra* note 130, at 153.

²⁸⁹ United States v. Windsor, 133 S. Ct. 2675 (2013) (quoting H.R. REP. NO. 104-664, at 16 (1996)).

²⁹⁰ See H.R. REP. NO. 104-664, at 12-14 (1996); see also *Windsor*, 133 S. Ct. at 2693-94 (“The Act’s demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions would be treated as second-class marriages for purposes of federal law. This raises a most serious question the Constitution’s 5th Amendment.”).

²⁹¹ *Windsor*, 133 S. Ct. at 2693.

²⁹² *Id.*

relationships of sexual minorities—and perhaps, by extension, sexual minorities themselves—on the federal level, and the result was multi-faceted; not only did the exclusion have significance within marriage itself on a general wave but it also resonated in the apparent conflict between New York and federal laws.²⁹⁴ The Court opined that “DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal” and illustrated in a conflated way just how DOMA interfered with state law and at the same time discriminated against same-sex couples. Not only that but “[b]y 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. . . . The differentiation demeans the couple[.]”²⁹⁵ The Court remarked that this marginalization had significance for children of same-sex families,²⁹⁶ which stretched the social visibility impact of DOMA even further, and echoed Kennedy’s remarks at oral arguments.²⁹⁷ Ultimately, all of this differentiation, all of this indignity, all of this moral disapproval by DOMA had a starting point: the misappropriation of essentialism to dominate a discriminatory viewpoint. In *Windsor*, the Court abandoned that old essentialist approach of viewing marriage and moved toward a commonalities approach that recognizes that the bond of marriage needs more consideration than biological differences between same-sex and different-sex relationships.²⁹⁸ This view differs from the us-versus-them dichotomy that the NOM’s “Gathering Storm” ad stressed, and situates us all getting drinks at the beach bar in the Amazon.com ad. It is a broader approach that would permit—though the Court did not declaratively endorse here—constructivist readings of marriage, and possibly, by extension, constructivist approaches to sexual identity. And as step three of Eskridge-Merin-Waaldijk theory was being met on the federal level by the review of the marriage equality issue in *Windsor*, the recognition that the past discrimination has violated the dignity of sexual minorities by subordinating and regulating their identities also ushers in another moment where an antigay essentialism was detached from this realm of sexual orientation law.

²⁹³ *Id.* at 2694.

²⁹⁴ *See id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *See* Transcript of the Oral Argument, *Windsor*, 133 S. Ct. 2675 (No. 12-307) (“We’re helping the States do—if they do what we want them to, which is—which is not consistent with the historic commitment of marriage and—and of questions of—of the rights of children to the State.”).

²⁹⁸ *Windsor*, 133 S. Ct. at 2692-93 (“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 perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.”).

3. *Windsor* and Revised Step Three in the Eskridge-Merin-Waaldijk Incrementalism

Throughout *Windsor*, the notion of incrementalism is apparent. The Court's acknowledgment "that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage,"²⁹⁹ that different-sex relationships have "no doubt had been thought of by most people as essential to the very definition of the term,"³⁰⁰ and that within the recent challenges "came the beginnings of a new perspective, a new insight,"³⁰¹ illustrates stratagems of slow, incremental negotiations in the decision-making process that has led up to the moment in *Windsor*. Likewise, the Court noted incrementalist decision-making in New York's adoption of same-sex marriage—through piecemeal steps over a period of time:

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. And so New York recognized same-sex marriages performed elsewhere; and then it later amended its own marriage laws to permit same-sex marriage.³⁰²

And it was "[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."³⁰³ In both passages, the Court drew the endgame of the incrementalist unit here with the law of New York allowing same-sex couples to express their relationships—their same-sex relationships—in the same light as possibly different-sex relationships, avoiding the previous injustices. And the process was through deliberate and gradual thought indicative of Lindblom's incrementalism.

Additionally, the acknowledgement toward incrementalism is reflected substantively in *Windsor* by Kennedy's reference to *Lawrence* during the moments where the majority weakened DOMA's authority over regulating relationships. Both instances where the Court explicitly mentioned *Lawrence*, that muddled protection over consensual same-sex intimacy was converted into the protected privacy of consenting adult relationships—including same-sex ones—that could be used to dislodge DOMA's regulatory command over same-sex couples. *Windsor* builds incrementally from the significance of *Lawrence* on privacy and relationships, but interestingly, the Court also used *Lawrence* to gesture away from essentialism. In the first quotation of *Lawrence*, the Court used *Lawrence* to focus on the commitment aspect of a relationship rather than biology: "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.'"³⁰⁴ The Court's

²⁹⁹ *Id.* at 2698.

³⁰⁰ *Id.* at 2689.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.* at 2692 (quoting *Lawrence v. Texas*, 539 U.S. 558, 576 (2003)).

second direct *Lawrence* quotation uncovered how that focus on biology created separate categories hindering identity expression in a shameful way for sexual minorities: “The differentiation [by DOMA] demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, [citations omitted], and whose relationship the State has sought to dignify.”³⁰⁵ In both references, the *Windsor* Court harnessed *Lawrence*’s potency in privacy and broadened it to highlight incrementalist and anti-essentialist aspects of the opinion. As we will explore shortly, this borrowing from *Lawrence* bears importance in animus-focused jurisprudence.

Windsor also recognizes Schacter’s patchwork or federalist incrementalism, not just by its deference to states’ rights in regulating domestic relationships of citizenry and limiting how much federal powers can interfere with states marriage definitions, but also by noticing how many states that have now moved toward marriage equality: “New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry[.]”³⁰⁶ Other such incidental references run throughout the decision, helping the Court articulate that DOMA acts “[a]gainst this background of lawful same-sex marriage in some States,”³⁰⁷ and that DOMA’s “operation is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect.”³⁰⁸ By constantly reminding the public that DOMA persisted on a stage conflicting with a small, but growing handful of states that legally recognizes the marriages of same-sex couples, the Court also perpetuated that patchwork incrementalism occurring within the prerogatives of federalism and without any unneeded interference. The patchwork incrementalist effect possessed much significance for the *Windsor* Court because it allowed the majority to exemplify the intervention that DOMA’s definition of marriage placed against states’ rights and also—in New York state’s circumstance—the discriminatory slippage between recognizing married same-sex couples on the state level, but not the federal.³⁰⁹

Finally, as with all other steps examined in the U.S. journey of the Eskridge-Merin-Waaldijk incrementalism, the arrival of this step with *Windsor* predominately, achieves incrementalism’s projected progress federally—legal recognition of same-sex marriages. But as progressive as such review of marriage equality is, the Court also retained some potential accomplishments yet unfulfilled. For instance, now that DOMA’s Section 3 definition of marriage has been invalidated, what about Section 2’s restrictions, which *Windsor* did not review? Although the federal government must now recognize a valid state-sponsored same-sex marriage under *Windsor*, that recognition does not translate from state to state. Does Section 2 violate the Full Faith and Credit Clause? Does it also hinder the patchwork incrementalism and

³⁰⁵ *Id.* at 2694 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

³⁰⁶ *Id.* at 2689.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 2690.

³⁰⁹ Incidentally, released on the same day as *Windsor*, the Supreme Court’s other marriage equality case in the 2012-2013 term, *Hollingsworth v. Perry*, is also consistent with patchwork incrementalism even though the Supreme Court’s majority opinion of that case was over-dominated by the technicalities of standing. See *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

interstate travel? These enquiries have been left untouched by *Windsor*, saved for another confrontation.

Still, tremendous potency arises in *Windsor* as the Supreme Court review that reaches legal recognition of married same-sex couples. Federally, the marriage equality debate in the U.S. has taken the last step within the Eskridge-Merino-Waaldijk teleology. In invalidating DOMA's Section 3, *Windsor* also ended a federal method of regulating the expression of sexual identity through coupling behavior and signals a moment in which antigay essentialism, which had propelled DOMA but was found as animus, was abandoned for an approach that de-emphasizes biology over the commonalities of experience between same-sex and different-sex couples. Subsequently, Part IV will examine how *Windsor*'s use of animus from *Lawrence* and *Romer* has significance for sexual minority issues going forth.

IV. THE CONVERGENCE OF INCREMENTALISM AND *WINDSOR*: ANIMUS-FOCUSED JURISPRUDENCE

From *Lawrence* to *Windsor*, the incrementalist journey has brought about an abandonment in the law of an antigay essentialist approach toward sexual orientation. The law is subordinating that approach in gay rights and recognizing that, by dealing with how identity expression was regulated by heavy reliance on a negative essentialism resulted in marginalizing sexual minorities. But what else is the product of this step-by-step transition? Does abandoning this certain kind of essentialist approach also mean the law is categorically embracing constructivism? *Windsor* does not suggest this premise. But instead, although antigay essentialism was undone, the law was working around the narrow structures that frame—for better or worse—our identity politics as it reached toward federal recognition of same-sex marriage. This warrants normative commentary. Ultimately, *Windsor* did not replace essentialism with constructivism; it has not taken any heavy sides in that murky and often explosive discourse—particularly over sexual orientation, an area where the essentialist-versus-constructivist divide has afforded no clear outcome.³¹⁰ For now, rather, the law has selected a more functional way of furthering the rights of sexual minorities to reflect social trends and legitimacy by resorting to a developing body of animus-focused jurisprudence. And its emergence, in simultaneous contrast with the abandoning of antigay essentialism, is the resonating and peculiar potential borne from the marriage between sexual orientation jurisprudence and marriage equality incrementalism. Animus-focused jurisprudence offers much in its fitness to deal with equality while keeping antigay essentialism at bay. Yet, *Windsor* has shortcomings. This Part will address both observations.

³¹⁰ See, e.g., Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833, 1849 (1993) (“All this discussion aims to show that the grand essentialism/constructivism debate is no debate at all. Rather, it represents a simple contest of descriptions where the victor turns upon the particular purpose involved. To the extent there is a constructivist controversy, it is pitched not on a single battlefield but on every particular site where sexual identity is at issue. On some sites, representing some purposes, one description will prevail; on other sites, representing other purposes, the other will; and on still other sites, like history writing, both descriptions of sexual identity are necessary. There is a grand debate only if one demands a single master description of gay identity to serve all purposes. But if that is the case, the debate has meaning but no victor. Our purposes of description are simply too various and complex for any single description to serve.”).

A. History, Background, and Suitability

Animus-focused jurisprudence had its first major Supreme Court encounter with sexual orientation in *Romer v. Evans*, when the Court found that Colorado's Amendment 2 discriminated against sexual minorities because, under rationality review, the initiative's denial of legal protection to sexual minorities could not be justified by its specific disapproval of a particular group.³¹¹ But the rational basis review used there did not altogether resemble the highly deferential rational basis review that the Court has applied in other cases, rather this specific species of rational basis in *Romer* was one in which legislative animus was the featured culprit behind the irrationality of a law, similar to that found in such cases as *Department of Agriculture v. Moreno*³¹² and *City of Cleburne v. Cleburne Living Center, Inc.*,³¹³ cases that invalidated laws that specifically targeted an individual group. Rather than entertaining the issue of discrimination against gays under a heightened review that suspect or quasi-suspect classifications would warrant, *Romer* bypassed an analysis that would have involved the Court conceptualizing orientation as a protectable identity trait under tiered scrutiny for a focus, instead, on the animus behind the legislation to invalidate Amendment 2.³¹⁴ As discussed earlier, *Lawrence*, although not an equal protection case, relied on *Romer*; subsequently, the pre-2003 DADT cases relied on *Lawrence*; and most recently, *Windsor* draws from this jurisprudence by relying on both *Romer* and *Lawrence* to find the animus behind DOMA's promulgation, rendering its definition of marriage unconstitutional.³¹⁵ *Windsor* is the third Supreme Court case in this line that has used animus in some fashion to address a legal marginalization of sexual minorities, which bears significance for both sexual orientation jurisprudence and potentially the jurisprudence resolving discriminatory practices against other potentially-marginalized identities.

In lieu of adding sexual orientation as a new suspect class, the move toward an enhanced rational basis review (one with "bite" or "teeth") that offers equal protection through a finding of animus makes functional sense. Most glaringly, animus and an enhanced rational basis allows the Court to avoid the arduous task of articulating just what about sexual orientation would classify it as suspect under the traditional tiered scrutiny of equal protection jurisprudence—a classification which some have argued has closed since the 1970s.³¹⁶ For a group to open the doors to that classification, the balancing of several factors would favor such classification, including (1) the group's political powerlessness; (2) the group's history of discrimination; (3) immutability of group's characteristic traits; (4) the connection between characteristic and discriminatory legislation.³¹⁷ Though others believe that

³¹¹ *Romer v. Evans*, 517 U.S. 620, 635-36 (1996).

³¹² *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

³¹³ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

³¹⁴ *Romer*, 517 U.S. at 634-35.

³¹⁵ *See United States v. Windsor*, 133 S. Ct. 2675, 2693-94 (2013).

³¹⁶ *See Yoshino, supra* note 177, at 757.

³¹⁷ *See* Suzannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887, 927 (2012); *see also* Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 *COLUM. L. REV.* 1753, 1755-56 (1996).

sexual orientation should deservedly be included in a class that triggers heightened scrutiny,³¹⁸ developing the case for it under those factors poses challenging hurdles.³¹⁹ For one, under the factor dealing with the political powerlessness of a group, the narrowing of history itself to only the very recent decades has shaded the argument that gays, of late, have not been as politically powerless of a group, ignoring the disproportionately large amount of oppressive time that sexual minorities have endured preceding the gay rights movement and continue, in some ways, to endure.³²⁰ But also hard to surpass is the misunderstanding between the biological and the cultural aspects of sexual orientation poses either a threat to salient arguments favoring classification or even offer convincing counterarguments that undermine the goal of classification.³²¹ As we have seen how essentialism could be harnessed to differentiate and then subjugate the power and existence of a disfavored group, so can constructivism, on the opposite end, be harnessed, without deftness, to articulate that choice that negates immutability. The immutability enquiry potentially creates a nature-versus-nurture binary that is both difficult to articulate and also easy to distort.³²² Although commentators have argued strongly

³¹⁸ See, e.g., RICHARDS, *supra* note 143, at 102; see also *In Re Marriage Cases*, 183 P.3d 384, 413 (Cal. 2008).

³¹⁹ See Toni M. Massaro, *Gay Rights Thick and Thin*, 49 STAN. L. REV. 45, 76 (1996) (“[J]udges might claim it is too difficult to pin anything so concrete as ‘suspect class’ status on this murky, contextual, and poorly charted human variation.” (footnote omitted)).

³²⁰ See, e.g., *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 (7th Cir. 1989) (rejecting suspect classification for sexual orientation based partly on finding that “[i]n these times homosexuals are proving that they are not without growing political power”).

³²¹ See Massaro, *supra* note 319, at 76 (“A third complication is the so-called ‘immutability’ question—a question which is not as easily eliminated as some commentators hope. Are people ‘born gay,’ as some tentative, emerging scientific data now suggests? Or is sexual orientation a chosen or acquired identity? If one can ‘choose’ to hinder the formation of an active gay identity or the commission of ‘gay acts,’ then legislation criminalizing or otherwise discouraging active gay identities and sexual acts may seem rational. How would the courts respond to social constructivist claims that one is not born a homosexual’ but made one by historic, economic, political, and social forces—the very forces the law transfixes through equal protection law? One judicial response might be to say that the more porous and malleable the borders of heterosexuality, the more justifiable is the official policing of those borders—at least if one accepts the (still) prevalent view that society should, if possible, eradicate homosexuality. Alternatively, a judge could more sympathetically deny gay rights by ruling that sexuality is fluid. Not only do political and social factors influence generally the formation of sexual identity, but individually, few people are exclusively, saliently or consistently ‘heterosexual’ or ‘nonheterosexual.’ Thus, judges might claim it is too difficult to pin anything so concrete as ‘suspect clas’ status on this murky, contextual, and poorly charted human variation. Even gay rights advocates recognize the dangers of concretizing and essentializing the category of nonheterosexuality and potentially denying its fluidity, variety, and contextuality. In fact, many advocates of gay rights find this to be one more unacceptable double-bind.” (footnotes omitted)).

³²² See Andrea M. Kimball, Note, *Romer v. Evans and Colorado’s Amendment 2: The Gay Movement’s Symbolic Victory in the Battle for Civil Rights*, 28 U. TOL. L. REV. 219, 239 (1997) (“Currently, the issue of immutability is much like a never-ending nature verses nurture debate which makes the equal protection immutability analysis difficult.”); see also Alafair S. R. Burke, *A Few Straight Men: Homosexuals in the Military and Equal Protection*, 6 STAN. L. & POL’Y REV. 109, 112 (1994) (“[T]he immutability requirement is the most

that the binary is simplistically false and demonstrated more lenient arguments for establishing immutability,³²³ the proverbial verdict is still out on the methods to harness this factor in determining suspect classification and, for sexual minorities, that uncertainty could pose as something either navigable or treacherous in litigation where certainty takes a premium.

Constructivism—although perhaps a more empowering approach to studying and comprehending sexual identity sociologically—adds to the difficulties in arguing for immutability because it can be manipulated into transforming ideas that deal with the cultural, social, and political aspects of one’s sexual identity to sounding as if being a sexual minority is a choice. That choice, as many would argue more precisely, is not correctly dealing with the cause of sexual orientation, which many would say is natural (thus slightly essentialist), but is attributed to how sexual orientation is expressed by the individual to reinforce that identity, whether that choice is innate or influenced externally.³²⁴ In a sense, there is something both mutable and essential about orientation.³²⁵ As Caren Dubnoff has written,

[s]exual orientation is likewise a personal attribute that goes beyond conduct. One need not hold that sexual orientation is immutable or biologically determined to see it as a personal attribute. Moreover, there is increasing evidence that supports the view that sexual orientation often involves a genetic component. Like religion, it is often a central aspect of an individual’s identity and it is more or less permanent.³²⁶

difficult hurdle to establishing sexual orientation as a quasi-suspect classification. But regardless of the outcome of this ‘nature versus nurture’ debate, it is becoming increasingly clear that one’s sexual orientation (either by environmental influences or by genetic fate) is fixed early in life and is unlikely to change.” (footnotes omitted)); Kimberly Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36 LAW & SOC’Y REV. 285, 298 (2002) (“The familiar ‘nature versus nurture’ debate is politicized by the important social and legal consequences its answers have for LGBT communities, individuals, and their families. At stake in particular are two widely significant questions: first, is homosexuality an ‘immutable trait’ that can be protected as a suspect status under equal protection doctrine and civil rights laws; and second, is homosexuality socially learned or otherwise communicable.”).

³²³ See, e.g., Samuel A. Marcossou, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 651-57 (2001).

³²⁴ See Ortiz, *supra* note 310, at 1835 (“[Constructivism] is not, as many think, a debate even partly about the causes of homosexuality but rather one about the most appropriate descriptions of gay identity.”).

³²⁵ See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 568 (1994) (“Disaggregating the various forms of essentialism and constructivism thus indicates that they are actually intertwined in all but the most extreme ends of their own ranges, and offers the possibility of finding a conceptual location from which pro-gay essentialists and pro-gay constructivists can frame legal arguments that avoid the argument from immutability while not contradicting its empirical predicate. Recent sexuality studies in history, anthropology, and cultural studies vary more or less continuously in the depth of their claim that sexual-orientation categories are socially contingent.”).

³²⁶ Caren G. Dubnoff, *Romer v. Evans: A Legal and Political Analysis*, 15 LAW & INEQ. 275, 310-11 (1997).

Dubnoff demonstrates a conceptual reality about sexual identity, analogous with race or gender.³²⁷ But this notion, which sounds plausible in sociological debates, then appear more shaky and subjective in a venue where fact-finding and truth-seeking places a premium on reaching a higher level of clarity, as truth and fact are tied inevitably to rights and remedies.³²⁸ Thus, pinning down that *something* seems like a tall order. In some ways, the current pro-gay sociological debates about sexual identity do not easily facilitate the establishment of sexual minorities as a suspect class.³²⁹

As Janet Halley, who has written extensively on the subtleties of the essentialist-versus-constructivist dichotomies in sexual orientation,³³⁰ has distinctively articulated, when arguing from a pro-gay perspective in litigation, a “middle ground” should be reached between essentialism and constructivism.³³¹ Thusly,

sexual orientation, no matter what causes it, acquires social and political meaning through the material and symbolic activities of living people. This is the arena of representation, the arena in which we signify to one another who we are, negotiate the norms attaching to that, and arrange and rearrange power along the sexual orientation hierarchy.³³²

Within tiered scrutiny and establishing suspect classification, this articulation bears worth. Despite robust reliance by courts, academic critics have observed tiered scrutiny’s frailties.³³³ The criticisms deal mostly with tiered scrutiny’s ability to be workable with “real world” issues of diversity that may not be captured by the levels of classifications,³³⁴ with tiered scrutiny’s adherence to “big picture” generalizations

³²⁷ *Id.* See generally Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467 (2000); Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519 (2001).

³²⁸ See Halley, *supra* note 325, at 528 (“Pro-gay litigation has a number of important objectives. It seeks concrete remedies for plaintiffs who have been materially harmed by anti-gay discrimination. . . . More broadly, it seeks to establish rules of law that will benefit gay men, lesbians, and bisexuals (and, it is to be hoped, other subordinated groups as well), either in subsequent litigation or through the gradual and mysterious processes by which legal rules shape public and private norms.”).

³²⁹ Corrine Blacklock, Comment, *Hollingsworth v. Perry: Expressive Harm and the Stakes of “Marriage”*, 8 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 217, 237 (2013) (“Part of the reason the [Supreme] Court has never explicitly announced a heightened standard may be that gays and lesbians do not fit neatly within the equal protection ‘suspect class’ criteria.” (footnote omitted)).

³³⁰ Halley, *supra* note 325.

³³¹ *Id.* at 568.

³³² *Id.* at 506.

³³³ See e.g., Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Protection*, 74 FORDHAM L. REV. 2339, 2342-45 (2006).

³³⁴ See Pollvogt, *supra* note 317, at 897 (“[T]he tiers-of-scrutiny framework operates as an outcome matrix, thereby short-circuiting rather than deepening substantive inquiry into the fairness of any particular form of discrimination. And indeed, one sees a pattern in equal protection decisions where much time and attention is paid to determining the applicable level

that create rigid incongruences when issues are examined more subtly,³³⁵ and with tiered scrutiny's adequate fulfillment of the goals of equal protection.³³⁶ If those problems do precisely plague the tiered scrutiny setup, then perhaps arguing specificity too readily from one end of the binary—whether nature or nurture, essentialist or constructivist—ventures against such problems and creates an artificial hurdle to achieving equality for sexual minorities. In this fashion, extending Halley's view, perhaps the answer for sexual minorities lies not within identity politics and theory, but within middle grounds and commonalities of human experiences as well. As Halley puts it, “[I]t is thus not only the right thing to do—it is also more likely to work.”³³⁷

In contrast to heightened scrutiny, the animus-focused, enhanced rational basis alternative that the Supreme Court has used to deal with legal issues involving sexual orientation—e.g., discrimination, privacy, marriage equality—has focused, without getting to the essentialist-versus-constructivist debate over sexual orientation, on commonalities of human experience and the violation of that commonality for a group through biases that formulate discrimination. Finding animus is helpful in this way because the judicial investigation focuses less on sociological debates about identity and reaches more toward the invidious reasons behind a piece of legislation. In theorizing the origins of animus-focused jurisprudence used in *Romer*, Akhil Amar has made its connection, not to any doctrine that raises identity politics, but instead to the Attainder Clause³³⁸ and argues that *Romer*'s use of animus allowed the issue to be rephrased not to read “whether sexual orientation can be treated differently (from, say, race); but whether gays and bis can be treated differently (from straights).”³³⁹ Suzanne Pollvogt similarly observes this doctrinal focus of animus by remarking that “the doctrine of unconstitutional animus expresses core values of the federal Equal Protection Clause that transcend the Court's rigid tiers-of-scrutiny framework.”³⁴⁰ This emphasis is facially and particularly noticeable in Kennedy's framing of these issues in *Romer* in terms of the protection that Amendment 2 denied sexual minorities and particularly how Amendment 2 stands incompatible to our broad principles of access to justice:

of judicial scrutiny; once this question is answered, the analysis proceeds succinctly and superficially. If the Court rejects arguments that the plaintiff is a member of a suspect or quasi-suspect class, or that the law interferes with a fundamental right, it will settle on rational basis review and the plaintiff will lose. But if the Court is persuaded of either of these two prerequisites, it will apply heightened scrutiny and likely strike the challenged law.” (footnotes omitted)).

³³⁵ See Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 204–05 (1996) (noticing the Supreme Court makes the distinction that sex discrimination triggers intermediate scrutiny but race receives strict scrutiny).

³³⁶ Siegel, *supra* note 333, at 2344–45 (“Finally, and I would argue most importantly, critics of tiered scrutiny have argued that the doctrine fails to adequately capture the normative content of the Equal Protection Clause.” (footnote omitted)).

³³⁷ See Halley, *supra* note 325, at 567.

³³⁸ See generally Amar, *supra* note 335, at 203.

³³⁹ *Id.* at 224.

³⁴⁰ Pollvogt, *supra* note 317, at 892.

“It is not within our constitutional tradition to enact laws of this sort. Central to both 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 and impartial to all who seek its assistance.”³⁴¹ In *Romer*, animus-focused rationality review allowed the Court to bypass the task of suspect classification of gays in a trade-off that permitted the Court to reach more directly and readily for the focus on what lies behind legislative discrimination that hindered “respect for other citizens’ freedom of association”³⁴²—in other words, a protectable commonality of experience. Animus-focused jurisprudence can “embody a move to a more objective approach to meaning, and thus one closer to social meaning”³⁴³ that brings about common ground and makes this kind of review more functional for litigating discrimination against sexual minorities in light of the difficulties of suspect classification. For if Richard Posner is correct that “[s]exuality is the multidisciplinary subject par excellence,”³⁴⁴ then a jurisprudence that stares directly toward the invidiousness threatening the dignity of sexual minorities suggests a more functional way of reparation than trying to explaining why sexual orientation, with all of its complexities, should be afforded heightened scrutiny before applying that review.

B. Windsor’s Appeal

In restricting DOMA from “diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect”³⁴⁵—another commonality of human experience—*Windsor*, as the latest incrementalist step, had the ability to solidify animus-focused jurisprudence for sexual minorities more effectively than its predecessor cases, *Romer* and *Lawrence*, and other recent significant steps for LGBT equality, such as the DADT repeal. *Windsor* bodes much for the development of animus-focused jurisprudence in gay rights litigation, because in contrast to *Romer* and *Lawrence*, the 2013 decision had the least encumbrance in applying such review. *Windsor* is both the last step federally in the marriage equality incrementalism theorized by Eskridge, Merin, and Waaldijk, while being a major Supreme Court case to review marriage equality using animus. The confluence between incrementalism and marriage equality has brought about a case that utilizes legislative animus to overcome sexual minority inequality in a more prominent and unfettered way than other preceding moments.

With *Romer*, Pollvogt has mentioned in her study on animus that although the 1996 Supreme Court decision was the first in the line of cases to use animus-focused rationality to specifically address discrimination against sexual minorities, *Romer* also had to co-exist with Supreme Court precedent in *Bowers*.³⁴⁶ At the time, it was debatable whether *Romer* overturned *Bowers*.³⁴⁷ And in light of that legal

³⁴¹ *Romer v. Evans*, 517 U.S. 620, 633 (1996).

³⁴² *Id.*

³⁴³ Blacklock, *supra* note 329, at 244.

³⁴⁴ RICHARD A. POSNER, *SEX AND REASON* 36 (1992).

³⁴⁵ *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

³⁴⁶ See Pollvogt, *supra* note 317, at 911.

³⁴⁷ *Id.*

uncertainty until *Lawrence*, the reach of animus-focused jurisprudence in *Romer* had to be reconciled with *Bowers*, or at least that precedent stood in more of a state of limbo until *Lawrence* and now *Windsor*.³⁴⁸

Similarly, animus was part of *Lawrence*'s rationale in finding just how "wrong" the *Bowers* decision was in validating anti-sodomy laws in 1986.³⁴⁹ *Lawrence*'s doctrinal focus on animus was not an act culled from a vacuum, but had extended from *Romer*'s influence.³⁵⁰ Although not distinctly an equal protection case, but carrying with it some overtones of equality, *Lawrence* utilized animus in its due process analysis to show how conduct—sodomy—was used to criminalize consenting same-sex adults engaging in sex that could, but not always, indicate sexual orientation.³⁵¹ Pollvogt has noted that

the real focus of *Lawrence* was to reject differential treatment based on sexual orientation. *Lawrence* addressed whether a state could criminalize homosexual sodomy that took place in private between consenting adults. There was no question that the animating spirit of the law was bare moral disapproval of homosexual conduct and identity. The question was whether such disapproval was a permissible basis for legislation. The Court held that it was not.³⁵²

In a specific passage of *Lawrence*, Kennedy implicitly characterized that disapproval behind anti-sodomy laws by calling into question much of *Bowers*' historical recitation over how traditional and how fixed anti-sodomy laws stood for singling out sexual minorities:

Despite the absence of prosecutions, there may have been periods in which there was public criticism of homosexuals as such and an insistence that the criminal laws be enforced to discourage their practices. But far from possessing 'ancient roots,' American laws targeting same-sex couples did not develop until the last third of the 20th century.³⁵³

Rather than approbation for gays, Kennedy relayed that such laws actually represented efforts to curb non-procreative sex generally.³⁵⁴ Kennedy's correction of *Bowers* here would suggest that the moral approbation toward sexual minorities that the *Bowers* majority had assembled falsely to justify anti-sodomy laws was, in fact, a kind of irrational animus.

After finding such animus, Kennedy enquired "whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our

³⁴⁸ See *id.* at 891.

³⁴⁹ See *Lawrence v. Texas*, 539 U.S. 558, 574-75 (2003) (finding that the Texas anti-sodomy law was based on animus in overruling *Bowers*).

³⁵⁰ *Id.* at 574 (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)).

³⁵¹ See Anthony Michael Kreis, *Lawrence Meets Libel: Squaring Constitutional Norms with Sexual-Orientation Defamation*, 122 YALE L.J. ONLINE 125, 137 (2012), <http://yalelawjournal.org/2012/11/12/kreis.html>.

³⁵² Pollvogt, *supra* note 317, at 921 (footnotes omitted).

³⁵³ *Lawrence*, 539 U.S. at 570 (citations omitted).

³⁵⁴ *Id.*

own moral code.’³⁵⁵ Kennedy saw that the animus behind the criminalization of conduct that might be particularized against sexual minorities was both by a private majority and veiled behind public laws.³⁵⁶ Without mentioning it, Kennedy seemed to invoke an animus-focused reasoning to overturn *Bowers* because he found that the purpose of denying commonality of human experience led to violating personal dignity. He reached for that commonality explicitly in *Lawrence* through *Romer* and posited that “*Romer* invalidated an amendment to Colorado’s Constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by ‘orientation, conduct, practices or relationships,’ and deprived them of protection under state antidiscrimination laws.”³⁵⁷ He articulated that specifically “[w]e concluded that the provision [in *Romer*] was ‘born of animosity toward the class of persons affected’ and further that it had no rational relation to a legitimate governmental purpose.”³⁵⁸ Likewise then, in *Lawrence*, Kennedy similarly remarked that anti-sodomy laws borne out of animosity toward sexual minorities “demeans the lives of homosexual persons”³⁵⁹ and deprived rights that led to a loss of personal dignity with universal application.³⁶⁰

However, *Lawrence*’s muted use of animus makes it hard to place it on par with *Windsor*’s direct application of animus in an equal protection case. Even in its muddled state between due process and equal protection, *Lawrence* has less direct bearing as an alternative for classifying sexual minorities as suspect for heightened scrutiny in equal protection.³⁶¹ But the majority’s use of animus in a due process case such as *Lawrence* does demonstrate the versatility of animus not only for laws that discriminate based on traits but also for laws against conduct—as the difference in analysis between an equal protection and a due process review in *Lawrence* amounted to the difference between evaluating the anti-sodomy laws based on how it regulated sodomy by identity (equal protection) or by conduct (due process).³⁶²

³⁵⁵ *Id.* at 571 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

³⁵⁶ *Id.* at 569-70.

³⁵⁷ *Id.* at 574.

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *See id.* at 578.

³⁶¹ *See generally id.* at 562-79. Even though the majority opinion does recount one of the issues on appeal as “[w]hether petitioners’ criminal convictions under the Texas ‘Homosexual Conduct’ law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of the laws,” *id.* at 564, *Lawrence*’s resolution does not address equal protection or suspect classification issues. In fact, Justice Kennedy alludes to the avoidance of equal protection jurisprudence when he claims that the majority ruling *Lawrence* “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” *Id.* at 578.

³⁶² *See, e.g., id.* (Justice Kennedy concurs with Justice Stevens’ dissent in *Bowers v. Hardwick*, particularly with the passage that references animus in the way that “‘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 prohibiting the practice,’” *id.* (citing *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)), before Justice Kennedy reiterates his resolution of *Lawrence* under due process by stating that *Lawrence* does not

Animus-focused jurisprudence would address discrimination of laws that burden protectable conduct as a pretext to marginalizing a certain group. These were the larger implications for animus existing nascent in *Lawrence*. *Windsor*, as an equal protection case couched within Fifth Amendment jurisprudence, stands bookended with *Romer* but it also builds on *Lawrence*'s use of animus to extend that notion of a protected commonality. Citing *Lawrence*, Kennedy used protected consensual sexual intimacy to establish “a personal bond that is more enduring.”³⁶³ Kennedy moved on to depict that bond as something that the state of New York was justified in recognizing legalizing same-sex marriages,³⁶⁴ and that DOMA took this recognition away based on moral disapproval.³⁶⁵

Windsor is also superior for the rearing of animus-focused jurisprudence than its sister event of incrementalism, the repeal of DADT. For creating case law, the congressional repeal lacked such direct opportunity. Additionally, the doctrinal uncertainty after *Lawrence* did not successfully influence post-*Lawrence*, pre-DADT repeal cases from uniformly applying animus-focused jurisprudence. Those cases were scattered. Although *Cook* and *Witt* both distilled from *Lawrence* a higher standard of review than traditional rationality, the cases were not able to apply animus-focused jurisprudence effectively in the face of military deference.³⁶⁶ This ceiling for animus is a shortcoming, but only so in the confines of litigation against military deference—an exceptional situation outside the usual realms of civilian American life and experience.³⁶⁷ *Log Cabin Republicans* later used a heightened scrutiny to reach its conclusion that DADT was unconstitutional.³⁶⁸ Although Robert

involve status or “formal recognition of any relationship that homosexual persons seek to enter,” *id.*, but rather conduct or “sexual practices common to a homosexual lifestyle,” *id.*, that the Due Process Clause protects).

³⁶³ United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) (quoting *Lawrence*, 539 U.S. at 567).

³⁶⁴ *Id.* at 2693.

³⁶⁵ *Id.* “The House concluded that DOMA expresses ‘both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.’” *Id.* (quoting H.R. Rep. No. 104-664 at 16). “The differentiation demeans the couple, whose moral and sexual choices the Constitution protects.” *Id.* (citing generally *Lawrence*, 539 U.S. 558).

³⁶⁶ *Cook v. Gates*, 528 F.3d 42, 56 (1st Cir. 2008) (finding that “*Lawrence* is, in our view, another in this line of Supreme Court authority that identifies a protected liberty interest and then applies a standard of review that lies between strict scrutiny and rational basis” before applying it to plaintiff’s facial constitutional challenges to DADT); *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 816 (9th Cir. 2008) (“We cannot reconcile what the Supreme Court did in *Lawrence* with the minimal protections afforded by traditional rational basis review.”).

³⁶⁷ See Ellen Oberwetter, *Rethinking Military Deference: Male-Only Draft Registration and the Intersection of Military Need with Civilian Rights*, 78 TEX. L. REV. 173, 181 (1999) (“The varying rationales for upholding Congress’s authority to implement military policies in tension with constitutional rights include the arguments that (1) Congress’s military authority is plenary and not subject to review, (2) the Court lacks the competence to review complex military matters, and (3) *the military is a separate society, the regulation of which is without analogy in the civilian sector.*” (emphasis added) (footnotes omitted)).

³⁶⁸ *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 911 (C.D. Cal 2010), vacated, 658 F.3d 1162 (9th Cir. 2011).

Correales believes that DADT litigants can now theoretically rely on animus-focused jurisprudence in cases seeking remedial reparation for harm suffered as a result of DADT discrimination,³⁶⁹ at the time before the repeal, his thoughts on animus-focused jurisprudence remained much more theoretical as *Lawrence*'s use of animus successfully addressed the decriminalization of consensual same-sex intimacy was conversely difficult for courts to interpret and apply.

Henceforth, the arrival of *Windsor* as yet another gay rights case applying animus-focused, rationality review but this time as the last step within marriage equality incrementalism rears this jurisprudence for sexual minorities from infancy to pre-adolescence. First, as marriage equality cases have proceeded in lower state and federal courts in the interim between *Lawrence* and *Windsor*, several notable lower court decisions that have applied animus-focused jurisprudence successfully for legal recognition of marriage to same-sex couples, setting the stage for Supreme Court weigh-in.³⁷⁰ Most prominently a few challenges to Section 3 of DOMA in federal courts viewed the definition unconstitutional under rationality approach,³⁷¹ but also other cases challenging traditional marriages such as *Goodridge* relied on rationality and so did *Perry v. Schwarzenegger*.³⁷² In fact, it could be that the Supreme Court's use of animus and rational basis review will exist quite definitively in the marriage equality arena for some time, as the adopted standard could clarify challenges in state and federal courts. Certainly, a status that officially triggers heightened scrutiny would be ideal because of its traditional protections. Nevertheless, in that possible interim toward suspect or quasi-suspect, an enhanced rational basis review with its teeth on animus could suffice.

Windsor also harnessed animus-focused jurisprudence in an era much less antagonistic toward sexual minorities. Unlike *Lawrence* and *Romer*, the Supreme Court applied animus-focused jurisprudence in a more favorable social climate for sexual minorities.³⁷³ Part of this transformation is marriage equality incrementalism; the necessary steps have begun to draw favor upon sexual minorities gradually, with each ascending moment adding upon the next. But it has partly also been attributed to the visibility of sexual minorities in present culture and also the changing public attitudes toward LGBT rights—particularly with younger constituencies.³⁷⁴ The

³⁶⁹ See Robert I. Correales, *Unfinished Business: A Discussion of Remedies for Victims of Involuntary Dismissal Under Don't Ask, Don't Tell and Its Predecessor, Toward A True Reconciliation*, 22 S. CAL. REV. L. & SOC. JUST. 1, 22 (2012) (referencing Robert I. Correales, *Don't Ask, Don't Tell: A Dying Policy*, 44 CAL. W. L. REV. 413, 415 (2008)).

³⁷⁰ See, e.g., *Massachusetts v. U.S. Dep't of Health & Human Servs.* 682 F.3d 1, 10 (1st Cir. 2012); *Pedersen v. Office of Personnel Mgmt.*, 881 F. Supp. 2d 294, 335-40 (D. Conn. 2012); *Dragovich v. U.S. Dep't of the Treasury*, 872 F. Supp. 2d 944, 959 (N.D. Cal. 2012); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

³⁷¹ See, e.g., *U.S. Dep't of Health & Human Servs.*, 682 F.3d at 10; *Pedersen*, 881 F. Supp. 2d at 335-40; *Dragovich*, 872 F. Supp. 2d at 959.

³⁷² See generally *Perry*, 704 F. Supp. 2d 921; *Goodridge*, 798 N.E.2d 941.

³⁷³ See *Gay Marriage: Key Data Points from Pew Research*, PEW RESEARCH CENTER (June 11, 2013), <http://www.pewresearch.org/key-data-points/gay-marriage-key-data-points-from-pew-research>.

³⁷⁴ See *Changing Attitudes on Gay Marriage*, *supra* note 11.

positioning of animus-focused jurisprudence in *Windsor* amidst the backdrop of rising social approval might prove interesting contrast for spotlighting that much more dramatically and effectively the historical hatred and moral disapproval toward sexual minorities.

And third, through animus-focused enquiry, *Windsor*, reinforced the significant rights dealing with commonalities of human experience that were set up earlier in *Romer* and *Lawrence*, creating a more concrete case law in this area. Like *Romer*, *Windsor* bypassed suspect classification by reaching toward animus to spot the irrational deprivation of equal protection of laws against sexual minorities.³⁷⁵ *Romer* found that “[r]espect for this principle explains why laws singling out a certain class of citizens for disfavored legal state or general hardships are rare”³⁷⁶ and that “laws of this kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affect.”³⁷⁷ *Windsor* copied this review by finding that “DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal”³⁷⁸ and that the basis for this is the animus when “[t]he House concluded that DOMA expresses ‘both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.’”³⁷⁹ It also reaffirmed a bit of the mystery in litigating and reaching the finding of animus as *Windsor* relied on *Romer*’s technique of inferring animus from Colorado’s Amendment 2: “In determining whether a law is motivated by an improper animus or purpose, “[d]iscriminations of an unusual character” especially require careful consideration.”³⁸⁰ *Romer* started with these unusual discriminations in Amendment 2—that deprived sexual minorities legal protection in Colorado—and found it created the irrationality that up-ended Amendment 2 constitutionally.³⁸¹ According to Pollvogt, this type of inference is both different from the enquiry used in *Cleburne* and was a product of *Romer*’s muted reconciliation with *Bowers*’ existence at the time.³⁸² *Cleburne* used, what Pollovogt described, as inferring animus from examining “the structure of the law” in question and seeking whether there was a “logical connection” between the trait that those arguing discrimination inhabited and any governmental interest in that legislation.”³⁸³ *Romer*, conversely, found that “Amendment 2 must be based in animus because there was a radical lack of fit between the laws means and ends.”³⁸⁴ Interestingly, the easiest way to infer animus

³⁷⁵ United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).

³⁷⁶ Romer v. Evans, 517 U.S. 620, 633 (1996).

³⁷⁷ *Id.* at 634.

³⁷⁸ *Windsor*, 133 S. Ct. at 2694.

³⁷⁹ *Id.* at 2693 (quoting H.R. REP. NO. 104-664, 12-13 (1996)).

³⁸⁰ *Id.* at 2692 (quoting *Romer*, 517 U.S. at 633 (citations omitted)).

³⁸¹ *Romer*, 517 U.S. at 633 (“It is not within our constitutional tradition to enact laws of this sort.”).

³⁸² Pollvogt, *supra* note 317, at 927-28.

³⁸³ *Id.* at 927.

³⁸⁴ *Id.* at 928.

would be to look textually at “the direct evidence of private bias as the impetus behind adopting a law”³⁸⁵ which include “[s]uch statements may be made by legislators or private individuals and may express any number of sentiments that shed light on the true function of the law: a mere recognition of the existence of private bias; an expression of bare moral disapproval; and/or statements of stereotype or fear.”³⁸⁶ This method would have been most readily available based on the ample legislative record. But Kennedy decided to save that as his second line of enquiry, as if nearing the means and ends analysis of the Section 3 through its discrimination toward same-sex couples would substantiate the more textual analysis behind DOMA. He proceeded first by making that means and ends inference of animus:

DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. *This is strong evidence of a law having the purpose and effect of disapproval of that class.* 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.³⁸⁷

Only after this enquiry, did Kennedy then draw animus separately from looking at how “[t]he history of DOMA’s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages”³⁸⁸ and examine the House report for moral disapproval.³⁸⁹ Kennedy’s arrangement here highlights this more liberal method of inferring animus based on discriminations of unusual character posed against unifying constitutional principles of equal protection rather than *Cleburne*’s method which focuses the investigation back onto classifications.

But *Windsor*’s adoption of *Romer* for inferring animus gets us only half-way. We must also examine how its application reaches a focus on commonality rather than distinctions that reflect social and cultural pluralism. The finding of animus is inversely connected with deprivations that lead to violating human dignity, and this is where *Lawrence* enters, as both *Windsor* and *Lawrence* are Supreme Court decisions heavily framed in dignity rights.³⁹⁰ By finding that anti-sodomy laws violated some kind of protectable privacy right, Kennedy’s majority opinion in *Lawrence* then draws the link between violation of privacy to infringement of human dignity.³⁹¹ *Bowers* and its validation of anti-sodomy laws “as precedent demeans the

³⁸⁵ *Id.* (footnotes omitted).

³⁸⁶ *Id.* (footnotes omitted).

³⁸⁷ *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (emphasis added).

³⁸⁸ *Id.* at 927.

³⁸⁹ *Id.*

³⁹⁰ *See id.*; accord *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (“The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.”).

³⁹¹ *Lawrence*, 539 U.S. at 575 (“If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is

lives of homosexual persons.”³⁹² Beyond the misdemeanor triggered by violating the statute in Texas,³⁹³ the stigma of the statute resonates toward an encroachment upon what Kennedy believed the Fourteenth Amendment of the Constitution afforded.³⁹⁴ According to Glensy, *Lawrence* could have “focus[ed] on a possibly narrower ruling by linking the violation to an intrusion on one’s privacy,”³⁹⁵ but instead the majority “opted for a broader statement, by declaring that the accused statute infringed upon a liberty interest that involved ‘the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,’ which are key to the protections afforded by the Fourteenth Amendment.”³⁹⁶ Kennedy was not ready to just let go of the opinion on narrower grounds but connected the criminal stigma of the Texas anti-sodomy law to an “offense with all that imports of the dignity of the persons charged.”³⁹⁷ A decade later, it helped that Kennedy penned the *Windsor* majority because it seems as if with DOMA, he picked up where he had figuratively left off in *Lawrence*. Again, with the rights of sexual minorities, Kennedy has moved toward a jurisprudence that seemingly shifts away from the categories that outline traditional tiered-scrutiny, and with the help of inferring animus, he magnified the inequality of Section 3 to common, but universal conditions. He did this by again, as in *Lawrence*, calling out that the result of DOMA, like the Texas sodomy statute, “demeans the couple, whose moral and sexual choices the Constitution protects [citing *Lawrence*] and whose relationship the State has sought to dignify.”³⁹⁸ From this vantage point, the difference is subtle as DOMA was decided partially on federalism grounds and Kennedy couched the infringement caused as an unconstitutional interference upon the right of New York “to acknowledge a status the State finds to dignified and proper[.]”³⁹⁹ *Windsor*, like *Lawrence*, are cases where the majority facilitated the links between the experiences of sexual orientation to commonalities of human experience by inversely targeting the animus lurking with the law and blocking full access to that commonality and distorted personal dignity. From there, we arrive at uncovering discrimination without singling out sexual minorities for qualifying under tiered scrutiny.⁴⁰⁰ This developing jurisprudence bears potential for sexual minorities federally.

made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”).

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.* at 574 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

³⁹⁵ Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 91 (2011).

³⁹⁶ *Id.* at 90 (quoting *Lawrence*, 539 U.S. at 574).

³⁹⁷ *Lawrence*, 539 U.S. at 575.

³⁹⁸ *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

³⁹⁹ *Id.* at 2696.

⁴⁰⁰ *See id.*

C. Stepping Forth from Windsor's Shortcomings

As far as full gratification is concerned, however, *Windsor* is also decidedly deceptive. Alas, so far the conceit of Part IV has been to highlight the dynamic potential in *Windsor's* furtherance of animus-focused jurisprudence. But there are serious boundaries that limit *Windsor's* step toward a fuller sense of common ground and equality for sexual minorities, leaving *Windsor's* doctrinal reach with animus-jurisprudence this time not as far as it could have been.

In *Windsor*, the Court did seem to endorse that abandonment of antigay essentialism as its interpretation of the House report and its finding upon the reasons behind DOMA—in particular, disapproval of gays—echoed that of *Lawrence* and *Romer*. But the inverse is not as bold. The focus on the bond of marriage, rather than biology, did not appear as personally tied to the Court when one places *Windsor's* recognition of same-sex marriage in a tautology encased in the federalism aspects of the case—that DOMA intruded upon New York state's regulation of marriage within its borders and upon the equal protection that the Fifth Amendment has been interpreted to hold.⁴⁰¹ *Windsor*, in its broadest sense with DOMA, is about congressional intrusion into state sovereignty. So in order to find that New York State's ability to regulate marriage was violated by federal law, the Court had to rationalize how that occurred by drawing up New York's recognition of same-sex marriage, which seemed to resonate with a broader sense of marriage than what DOMA had essentialized in 1996.⁴⁰² It appears then that the Court's recognition of same-sex relationships in marriage was ultimately through the lens of New York law and through not its own.

In overturning DOMA based on federalism principles, the *Windsor* Court condoned the prerogatives of the state—any state in fact—that would have done what New York did, which was to recognize the bond and commonalities of experience that same-sex couples deserved within the legal protections of state-regulated marriage, and that the antigay essentialism that Congress harnessed to draft and pass DOMA was the animus that resulted in Section 3's inference with New York's prerogatives—thus, making Section 3 irrational.⁴⁰³ The Court stood behind federalism and the Fifth Amendment to make that positive assessment of same-sex marriage and commonality, of bond over biology. And likely, as Chief Justice Roberts' dissent contended, *Windsor* would also honor a state's refusal to recognize same-sex couples in marriage.⁴⁰⁴ Although animus-jurisprudence has the ability to spotlight commonalities of human experience as it feeds into a more robust and modern view of marriage, the Court did not use it directly to express its own views of marriage in *Windsor*, rather the majority expressed justification for New York

⁴⁰¹ *Id.* at 2692.

⁴⁰² *Id.*

⁴⁰³ *Id.* at 2695 (“What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”).

⁴⁰⁴ *Id.* at 2696.

State to construct marriage the way it does without federal intervention.⁴⁰⁵ If this was an endorsement of same-sex marriage, it was a subtle one.

Perhaps this is incrementalism at play here—small steps again. With all the potential that could be harnessed by animus-focused jurisprudence, the law maintains gradual baby steps toward that goal. If that is the case and if the underlying normative response is that sexual identity is important enough for constitutional legal protection and recognition, then the question regards how the law should retain and recapitulate animus-focused jurisprudence for that purpose going forth. In the immediate aftermath of *Windsor*, two areas unresolved by the opinion, more or less on state levels, might help strengthen animus-jurisprudence for fully recognizing marriage equality and issues surrounding sexual orientation in the future.

First, even if the Court was shielded behind the Fifth Amendment in *Windsor*, its use of animus-focused jurisprudence has unleashed a rudimentary blueprint for sexual minorities with desire to combat the 36 mini-DOMAs that exist across the states defining marriage as different-sex.⁴⁰⁶ To extend this idea, where constitutionally permitted, litigants should use animus-focused rationality and emulate, from *Windsor*'s lead, similar types of antigay essentialism that reveal biases toward a group that could deem a discriminatory law irrational. Although Roberts in his dissent in *Windsor* believed that “those statute-specific considerations [of animus in DOMA] will, of course, be irrelevant in future cases about different statutes,”⁴⁰⁷ future cases should rely on *Windsor*, at least, for a path for finding animus perhaps in other state-enacted DOMAs. Justice Scalia's strikingly reactive tone toward the majority's opinion seemed to reflect a less tempered view than Roberts'. Both Justices vary in their degrees of urgency toward the majority's delineation of New York's marriage laws—favorable to same-sex couples—in overturning DOMA. Roberts tried emphatically to remind the public that *Windsor* was ruled on the narrower grounds of federalism,⁴⁰⁸ while Scalia attempted with several examples to illustrate “[h]ow easy, indeed how inevitable, to reach the [majority's] same conclusion with regard to state laws denying same-sex couples marital status.”⁴⁰⁹ With *Lawrence*, Scalia's dissenting forecast that decriminalized sodomy would lead to aid expansion of marriage for same-sex couples was realized in *Windsor*.⁴¹⁰ Adam Liptak has characterized it as “Justice Scalia's sky-is-falling approach,”⁴¹¹ and

⁴⁰⁵ See e.g., *id.* at 2692 (“[T]he States 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.”).

⁴⁰⁶ See HUMAN RIGHTS CAMPAIGN, STATE MARRIAGE LAWS AND BANS (2012), available at http://www.hrc.org/files/assets/resources/StateMarriageLaws_Bans.pdf.

⁴⁰⁷ *Windsor*, 133 S. Ct. at 2697 (Roberts, C.J., dissenting).

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ ADAM LIPTAK, TO HAVE AND UPHOLD: THE SUPREME COURT AND THE BATTLE FOR SAME-SEX MARRIAGE (Kindle ed. 2013).

similarly here, Scalia might be correct in sensing that a *Windsor* strategy bears potential here for a gathering litigation storm over mini-DOMA's, while Roberts' downplaying might be a strategy in it of itself of acknowledging the same. The animus-focused jurisprudence in *Windsor* could help lead those charges on the state level.

This potential testing of animus-focused jurisprudence would veritably utilize patchwork incrementalism to fulfill a strengthening of the doctrine. If state litigants do progress down this path, then it would be wise to stick to using *Windsor* and *Romer*-type enquiry, but also add to the doctrine by what Pollvogt found in *Cleburne* was a focus on the structure of the discriminatory law to infer animus.⁴¹² The focus would be, again, urged upon discrimination—inferring animus through perhaps other examples of antigay essentialism or otherwise—building out this particular doctrine in the realm of sexual orientation. In addition, the focus on animus should also uncover infringement of normatively-protected commonalities of human experiences as well to weaken a federalism approach from *Windsor* that states might use to uphold refusal to recognize same-sex marriage. This connection might be guided particularly by *Lawrence* and *Windsor*'s venture into dignity and the rights, as couched by Kennedy, that follow accordingly from the Constitution. As a strategy, this focus would also oppose the “stabilizing prudence” arguments that Scalia tries to reinforce as a way to de-emphasize any sort of legislative animus,⁴¹³ and instead ease into inferring animus more readily. An example from *Windsor* would be how DOMA's federal exclusion of marriage shamed not only married same-sex couples in New York but also their children.⁴¹⁴

Secondly, the other litigation where animus-focused jurisprudence might arise is within Section 2 of DOMA—an issue that Scalia conspicuously raises was amiss in *Windsor*⁴¹⁵—which allow states to not recognize same-sex marriages from other states. According to Steve Sanders,

like DOMA's Section 3, the discrimination legitimized by Section 2 and practiced by the majority of states is of an 'unusual character.' All states currently recognize the vast majority of marriages celebrated in other states, not as a constitutional requirement (the conventional wisdom is that the Full Faith and Credit Clause doesn't apply here) but as a matter of comity and common sense. Accordingly individual states have long recognized marriages—common-law, first-cousin, even uncle-niece—that they themselves would not have created.⁴¹⁶

If litigants do not press for equal recognition, this continued practice of Section 2 would again segregate different-sex and same-sex marriages for disproportionate significance, leading to a lowered status in the eyes of the law if same-sex marriages

⁴¹² See *id.*; see also Pollvogt, *supra* note 317, at 927-28.

⁴¹³ *Windsor*, 133 S. Ct. at 2708 (Scalia, J., dissenting).

⁴¹⁴ *Id.* at 2694 (majority opinion).

⁴¹⁵ *Id.* at 2708 (Scalia, J., dissenting).

⁴¹⁶ Steve Sanders, *Next on the Agenda for Marriage Equality Litigators...*, SCOTUSBLOG (June 26, 2013, 05:40 PM EST), <http://www.scotusblog.com/2013/06/next-on-the-agenda-for-marriage-equality-litigators/>.

that are valid in one state are not so in another. Litigants could rely on animus-focused jurisprudence in future Supreme Court confrontations—especially if litigants can characterize, as Sanders does, the discrimination in Section 2 as that of an “unusual character,” which for Kennedy in both *Windsor* and *Romer* trigger reliance on enhanced rationality review.⁴¹⁷

With opportunity, distinct determination, and careful litigation, animus-focused jurisprudence, if strengthened, could have an effective longevity for equality rights in the sexual orientation arena. Although muted in application by the Fifth Amendment, *Windsor* affords a sketch of the further possibilities of this type of doctrine forged from previous gay rights cases at the Supreme Court. *Windsor*'s use of animus-focused jurisprudence creates an important endorsement of this type of review because further implications and possibilities could lie in the rearing of animus-focused jurisprudence into substantial doctrinal maturity with more discriminatory issues litigated thusly. In drawing this Article's normative response to *Windsor* to an end, three larger future end-result possibilities could be fulfilled by animus-focused jurisprudence that warrants its positive legal development. First, animus-focused jurisprudence could be subsumed into traditional tiered scrutiny by affirming notions of a sliding scale approach to tiered scrutiny that have been advocated by previous Supreme Court cases.⁴¹⁸ Perhaps doing so might have potential to create heightened review especially for sexual orientation discrimination cases. Although narrow, this result would be desirable as an alternative to quasi-suspect or suspect classifications without the trappings of officially proving them up. This result would reflect again the functionality of animus-focused jurisprudence. But the danger here is that what is not officially a suspect class may never be accorded similar regard. So even more appropriately as a second possibility, animus-focused jurisprudence might finally allow articulation of sexual orientation to become a quasi-suspect or suspect classification in traditional tiered scrutiny itself. An abundance of enhanced rationality review cases for sexual orientation discrimination in the future might assert a call for clarity or revisiting of classifications that officially trigger heightened scrutiny, instead of having a “putative” classification reserved for sexual orientation. This result would bring consistency—though it would be consistency in a system of review profoundly unsuited against present-world expectations of pluralism.

And thirdly, stretching that sentiment regarding tiered scrutiny further, animus-focused jurisprudence could reform tiered scrutiny in the long run, if such cases in the aggregate reveal the rigidity of a more formalist tiered scrutiny within an age where the discourse on identity politics in fields outside of law seem distant to the review the Supreme Court has relied on since the middle of the last century over the same subject matter. The current era is embracing a more postmodern sensibility of identity with an approach toward cultural distinction and pluralism that does not necessarily comport with the existing legal framework created after the era of *U.S. v. Carolene Products, Co.*⁴¹⁹ and the Civil Rights movement of the 1960s and 1970s.

⁴¹⁷ *Windsor*, 133 S. Ct. at 2692 (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

⁴¹⁸ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 231 (1982) (Marshall, J., concurring); *Craig v. Boren*, 429 U.S. 190, 212 (1976) (Stevens, J., concurring); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 109-110 (1973) (Marshall, J., dissenting).

⁴¹⁹ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

As examined above, some have argued this shift has awakened cultural sensitivities more profoundly and relegated the venerable but entrenched approach to equal protection jurisprudence into an anachronistic quandary. With this result, where animus-focused jurisprudence might eventually take equality rights cases into a realm previously unseen, the dynamics are less predictively defined for now. Likely, it would, again, take steps, but the promise of making discrimination and bias against a particular group more vividly in the law, and examining its invidiousness toward commonalities of experience and dignity, in order to eradicate its propensity, should be stressed continually.

V. CONCLUSION

The NOM video was absolutely correct to proclaim that something in the debate exists far beyond marriage equality advocacy. Its approach, however, was wrong. With *Windsor*, the marriage of incrementalism and sexual orientation jurisprudence has reared the development of an alternative line of review for discrimination based on the animus, and not on traits that may or may not render recipients of discrimination any favorable scrutiny. This development of animus-focused jurisprudence for identity—starting with sexual identity—should figure in the next steps forth in the incrementalism that has brought about the federal recognition of married same-sex couples. As we have seen, this development itself—although favorable so far for sexual minorities—is larger and bigger than same-sex marriage. Animus-focused jurisprudence could, if carefully harnessed going forth for future litigation over sexuality, transform the discourse and doctrine covering identity politics in the climate of American legal consciousness.

With this positive advance then, how can any thoughts turn to stormy weather? Where is the tempest that is gathering? Where did it go? The storm clouds seem to have dissipated; the lightning ceased. And the voices that underlined NOM's message appear much less relevant.

Likewise, is the sky as lucid, with the sun so illuminating that the only problem that seems pertinent is a glare on an electronic tablet? No. No beaches stand before us, not just yet, and no celebratory drinks are being poured from the bar—just the idea of common ground made more vividly by *Windsor*, incrementalism, animus-focused jurisprudence, and hopefully the future that stems from all of this.

As far as their rights are concerned, sexual minorities are no longer enduring that storm of historical persecution, but are somewhere in between downpour and clarity. It is possible that they may never reach that beach, to really sit on those lounge chairs and have full freedom to enjoy personal dignity and autonomy. But that is not what the beach in the Amazon commercial really signifies. Instead, that beach is an aspiration, a good mirage of sorts, a kind of idealistic paradise in which the closer we approach, the further off it remains as an *eidos* of sexual identity politics. Our recognition of that goal is favorable; our steps to reaching that goal are even more laudable. The motion that propels us closer inch-by-inch covers exudes significance and takes us far beyond same-sex marriage.

With the steps accomplished so far on this incremental journey, the march to marriage equality has finally brought forth an examination of personal dignity and commonality that concerned the expressive regulations of sexual minorities; each shift away from regulations restricting identity expression throughout the incrementalist journey federally has been a moment where antigay essentialism was abandoned, and in its place the law moved steps closer to the center of enquiry where, as far as gay rights is concerned, that essentialism is being eviscerated by

animus-focused jurisprudence that poses significance in constitutional jurisprudence. The federal government now leaves same-sex marriages alone. The law is beginning to expose the traditional animus that has oppressed sexual minorities. These developments have come a long way, and they must unfold positively for the expression of sexual identities. Though the question will always seek what the next development is, there are two things for certain: first, progress will be incremental; and secondly, the implications, of course, will be huge.