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ARTICLE

Unequal Protection

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Abstract. During the last thirty years, the Supreme Court has steadily diminished the vigor of the Equal Protection Clause. It has turned away people of color who protest systems such as racialized mass incarceration because their oppression does not take the form of a "racial classification." It has diluted the protections of intermediate scrutiny in gender discrimination and abortion cases. And it has turned its back on groups who once benefitted from "animus" review, including people with disabilities and poor people. Meanwhile, the only site of vitality in equal protection jurisprudence is the claims of lesbian, gay, bisexual, and transgender (LGBT) individuals. Yet the Court, writing opinions that are rarely in conversation with one another, has made no effort to justify this growing divide. I call attention to this reordered equal protection landscape, which contrasts sharply with the conventional understanding of equal protection tiers of scrutiny.

Specifically, I identify three manifestations of LGBT exceptionalism, advantages that LGBT people (especially gays and lesbians) enjoy compared to virtually every other civil rights constituency: (1) the Court has rigidly used the concept of a "classification" as a gatekeeping device, but it has ignored this requirement in sexual orientation cases; (2) LGBT people can invoke animus, a standard that emerged from cases brought by people of color, poor people, and people with disabilities but that the Court no longer recognizes in such cases; and (3) sexual orientation cases leave open important questions, including the legal standard that would apply to remedial policies based on sexual orientation—quite unlike the Court's adverse resolution of these questions in race cases. The Supreme Court's recent *Obergefell* decision unveiled a uniquely capacious conception of animus, which indicates that sexual orientation is moving even further away from race

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and gender. These findings suggest that law professors and legal scholars reconsider how they teach and write about equal protection.

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Introduction

The last week of the Supreme Court Term in June 2013 offered a dramatic juxtaposition of the trajectories of race- and sexual-orientation-based equal protection claims. The Court struck down a key provision of the Voting Rights Act[1]—a cornerstone of the African American civil rights movement—and tightened the screws of strict scrutiny in the affirmative action context.[2] At the same time, the Court gave the LGBT community two victories, a major[3] and a minor[4] note in the chorus of support for same-sex marriage. Fast-forward two years to June 2015, and the string of liberal victories might make it seem as if the Court realigned sexual orientation and race. While the Court announced that same-sex couples enjoy a fundamental right to marry,[5] it surprised many commentators by holding that the Fair Housing Act[6] forbids housing practices that disparately impact racial minorities[7] and granting liberals victories in other race-related cases.[8] It would be premature to see parity, I argue, because the Court simultaneously demonstrated a keen interest in closely monitoring race-based affirmative action by granting certiorari a second time in *Fisher v. University of Texas at Austin*.[9] And while racial justice advocates are clinging to past victories that hang by a thread, sexual orientation doctrine is sprinting past racial precedent in striking ways. For

1. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.); *see* Shelby Cty. v. Holder, 133 S. Ct. 2612, 2631 (2013).
2. *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2421 (2013) (holding that courts should not defer to universities in conducting narrow tailoring analysis); Stephen M. Rich, *Inferred Classifications*, 99 VA. L. REV. 1525, 1568 n.222, 1577-78 (2013) (delineating the shift from Grutter v. Bollinger, 539 U.S. 306 (2003), to *Fisher*).
3. United States v. Windsor, 133 S. Ct. 2675, 2695 (2013) (invalidating section 3 of Defense of Marriage Act).
4. Hollingsworth v. Perry, 133 S. Ct. 2652, 2668 (2013) (holding that proponents of Proposition 8, a California law banning same-sex marriage, did not have standing to appeal the district court's order deeming the law unconstitutional).
5. Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015).
6. Fair Housing Act of 1968, Pub. L. No. 90-284, tit. VII, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-19 (2014)).
7. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2525 (2015) (holding that plaintiffs may bring disparate impact claims under the Fair Housing Act).
8. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2246, 2253 (2015) (holding that Texas's refusal to issue a license plate including the image of the Confederate flag did not violate the First Amendment because license plate designs were government speech); Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1262-63 (2015) (reversing and remanding judgment of district court because it erred in evaluating racial gerrymandering claim); *see also* Adam Liptak, *Right Divided, a Disciplined Left Steered the Supreme Court*, N.Y. TIMES (June 30, 2015), http://nyti.ms/1HsFEpR.
9. *See* 135 S. Ct. 2888 (2015) (mem.) (granting petition for certiorari).

example, I argue below that *Obergefell v. Hodges*[10] seems to break new ground in welcoming evidence of implicit bias in sexual orientation cases, even as the Court has often ignored such evidence in race equal protection cases.[11] How do we make sense of all this? As LGBT people approach full citizenship, are black civil rights activists marching backward? These developments trouble the traditional equal protection framework—which perceives race at the top, triggering the most protective scrutiny—sex in the middle, and most other traits—including sexual orientation—subject to a relatively toothless standard.

This Article puts these discordant developments in context. During the last thirty years, the Supreme Court has steadily diminished the vigor of the Equal Protection Clause in most respects. It has turned away people of color who protest systems such as racialized mass incarceration because their oppression does not take the form of a "racial classification."[12] It has diluted the protections of intermediate scrutiny in gender discrimination[13] and abortion cases.[14] And it has turned its back on groups that once benefitted from "animus" review, namely people with disabilities and poor people.[15] Meanwhile, the only site of vitality in equal protection jurisprudence is LGBT rights. Yet the Court, writing opinions that are rarely in conversation with one another, has made no effort to justify this growing divide. I call attention to this reordered equal protection landscape, which contrasts sharply with the conventional understanding of equal protection tiers of scrutiny.

I identify three manifestations of LGBT exceptionalism—the Court has afforded LGBT claimants (usually gays and lesbians) specific doctrinal advantages that do not apply to other people invoking equal protection. Specifically, (1) the Court has rigidly used the concept of a "classification" as a gatekeeping device, but it has ignored this requirement in sexual orientation

10. 135 S. Ct. 2584 (2015).

11. For example, in *Grutter v. Bollinger*, the majority did not discuss implicit bias or other forms of present-day discrimination as a justification for race-based affirmative action, leaving the issue of implicit bias to Justice Ginsburg's concurring opinion. *See* 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring).

12. *Cf.* McCleskey v. Kemp, 481 U.S. 279, 312-15 (1987) (refusing to infer invidious discrimination from statistical evidence of bias because McCleskey's claim, "taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system").

13. *See* Nguyen v. INS, 533 U.S. 53, 64, 66 (2001) (applying a standard closer to rational basis review based on perceived "biological difference" between the sexes).

14. Gonzales v. Carhart, 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting). Because reproductive freedom and gender are closely linked, I categorize abortion cases with gender discrimination cases. The Court typically analyzes challenges to abortion restrictions as due process claims rather than equal protection claims. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992) (plurality opinion).

15. *See infra* text accompanying notes 95-97 (discussing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); and U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973)).

cases, including *Obergefell* and *United States v. Windsor*;[16] (2) LGBT people can invoke animus, or, as Ian Haney-López describes it, "contextual intent,"[17] a standard that emerged from cases brought by people of color, poor people, and people with disabilities, but that the Court no longer recognizes in such cases. Moreover, the variant of animus that the Court seemed to apply in *Obergefell* is novel in its generosity to plaintiffs asserting equality claims—which widens the disparity between sexual orientation and race and gender precedents; and (3) LGBT precedents leave open important questions, including the legal standard that would apply to remedial policies based on sexual orientation—quite unlike the Court's adverse resolution of these questions in race cases. These findings suggest that law professors and legal scholars should reconsider how they teach and write about equal protection. Finally, I suggest that the explanation for the Court's differential treatment of various claimants may turn on how their groups are represented in the broader culture and the perceived costs of granting them equality.

A close analysis of the two most recent Supreme Court sexual orientation opinions, *Windsor* and *Obergefell*, provides a case study in the Court's quiet reinvention of equal protection analysis. The Court has developed divergent frameworks: the traditional model for race and sex claims, which typically leads to people of color and women losing the most contested Supreme Court cases; a distinct "animus"/"contextual intent" model for sexual orientation cases such as *Windsor*, which has proved quite protective for gays and lesbians; and minimum rational basis review for the remainder of cases, which offers virtually no protection. Moreover, the animus model, while often thought to be a second-class form of equal protection, and perhaps a placeholder until the Court deigns to grant LGBT people the real thing,[18] actually offers several

16. Obergefell v. Hodges, 135 S. Ct. 2584, 2623 (2015) (Roberts, C.J., dissenting); United States v. Windsor, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting).

17. As I explain further below, this model entails inferring invidious intent from circumstances and history, rather than requiring "smoking gun" proof of malicious intent. This Article builds on an important recent article by Ian Haney-López. *See* Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1785 (2012). I show that the standard that Haney-López identified and named "contextual intent" in the race context also governed key sexual orientation cases such as *Windsor* and *Romer*. Dale Carpenter has recognized the connections between the animus standard in sexual orientation cases and early race cases, but he does not acknowledge that the Court no longer uses this more plaintiff-friendly test when people of color assert equal protection claims. Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 243-44. My analysis of the Court's race doctrine builds on vital work by Haney-López and Reva Siegel. *See generally* Haney-López, *supra*; Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013). Unlike Haney-López and Siegel, I identify the sexual orientation cases as central in revealing the inequity that pervades equal protection jurisprudence.

18. *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 683 (6th ed. 2009); Carpenter, *supra* note 17, at 187 ("For a Court unwilling to take the extraordinary step of invalidating all anti-gay legislation, the anti-animus doctrine offered a framework

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advantages over the traditional model. In order to lay the foundation for this argument, I must explain the basic contours of the traditional equal protection model and chart how *Obergefell*, *Windsor*, *Romer v. Evans*,[19] and *Lawrence v. Texas*[20] depart from it. After Part I provides this background, Part II compares the current constitutional status of LGBT people to other groups that once benefitted from the animus model but now receive traditional rational basis review: people with disabilities and poor people. Part III then shifts the gaze to a comparison of the sexual orientation precedents with formal heightened scrutiny cases pertaining to race and sex claims. In this Part, I juxtapose *Personnel Administrator v. Feeney*[21]—a pivotal gender case—and *Windsor*, and question the Court detecting animus only in *Windsor*.

In Part IV, I focus on the jurisprudence of Justice Kennedy, the principal architect of the sexual orientation cases and the swing vote in most equality cases. This Part develops empirical support for my claim of LGBT exceptionalism. I provide the first empirical study of Justice Kennedy's votes in cases involving constitutional claims based on race, sex,[22] and sexual orientation. This novel analysis demonstrates that Justice Kennedy's skepticism of race and sex claims does not extend to sexual orientation claims. An analysis of the nonunanimous cases demonstrates that he votes against the interests of people of color and women in the majority of such cases, but he rules in favor of sexual orientation in the vast majority of cases. Part V extends the focus on gender by examining the intersection of gender and sexual orientation. *Windsor* and *Obergefell* said very little about gender roles, even though a social commitment to preserving such roles helps to explain much of the opposition to same-sex marriage. Many people find same-sex marriage disquieting because it throws into question deeply ingrained cultural expectations that men and women play distinct roles of husband and wife and transmit them to their children.[23] I explain how the Court's elision of gender could weaken LGBT rights and make them vulnerable to the erosion that beset groundbreaking decisions in the black civil rights movement.[24] The biggest

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under which the most egregious official expressions of malice toward gays would be invalidated.").

19. 517 U.S. 620 (1996).

20. 539 U.S. 558 (2003).

21. 442 U.S. 256 (1979).

22. I use the terms "sex" and "gender" interchangeably in this Article.

23. *Cf.* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 993 (N.D. Cal.) (discussing the role of marriage in channeling men and women into "state-mandated gender roles"), *vacated sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2010).

24. For example, as important as *Brown v. Board of Education*, 349 U.S. 294 (1955), is for establishing that racial discrimination is morally wrong, the unanimous opinion is ambiguous in various respects. In the *Parents Involved* case, both Chief Justice Roberts, writing for the plurality, and Justice Thomas claimed that *Brown* supported their

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losers could very well be transgender and bisexual people because—in addition to their relative absence from the leading sexual orientation cases—they are thought to problematize the gender binary more than gay and lesbian people. Finally, I close with a juxtaposition of the Court's most recent race and sexual orientation equal protection cases, *Schuette v. Coalition to Defend Affirmative Action*[25] and *Obergefell*. Despite strong parallels between the cases and the shared authorship of Justice Kennedy, their analyses diverged in dramatic and incoherent ways.

Although the sexual orientation cases have produced profound progress for gays and lesbians, these precedents simultaneously sowed seeds of doubt. A central flaw in the animus standard, at least as the Court deploys it in sexual orientation cases, is its tendency to boil down to little more than personal intuition. The Court's opaque and truncated animus analysis provides little ground for building a body of reasoned precedent consistently governing various civil rights claimants. Moreover, these defects suggest that the animus doctrine may be limited to the Justices who happen to sit on the Court in the current moment. This shifting ground may ultimately forestall the full citizenship that LGBT people seek. That said, a plausible reading of *Obergefell* provides an opening for courts to draw on the science of implicit bias to provide a more reliable and objective anchor for understanding bias not just in sexual orientation cases, but in equal protection cases more generally. Although this is merely implied in *Obergefell*, I urge future courts and scholars to build on this opportunity.

Let me begin with a few caveats. I am a black, openly gay man. I fully support LGBT rights, including the holdings in *Obergefell* and *Windsor*. However, I find it difficult to celebrate LGBT victories insofar as the Court's legal rules would leave behind other parts of my identity, such as race.[26] I also believe that it is important to identify the vulnerabilities of victories such as *Windsor* in the hopes that Justice Kennedy and the liberal Justices[27] will forge

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decision to invalidate plans designed to promote racial integration in schools. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 743, 747-48 (2007) (plurality opinion) (asserting that *Brown* supports the axiom that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race"); *id.* at 748 (Thomas, J., concurring) (comparing Justice Breyer's analysis to "that advocated by the segregationists in *Brown*"). *But see id.* at 867 (Breyer, J., dissenting) (assailing this "cruel distortion" of *Brown*).

25. 134 S. Ct. 1623 (2014).

26. Much of the coverage on gay websites of the Court's *Windsor* decision failed even to note the setbacks that people of color and other civil rights constituencies experienced during the same week. *See, e.g.*, Lisa Keen, *Supreme Celebration: Supreme Court Strikes Down Defense of Marriage Act on Merits*, QUEERTY (June 26, 2013), http://www.queerty.com/supreme-court-strikes-down-defense-of-marriage-act-on-merits-20130626.

27. Justice Ginsburg was a pathbreaking litigator for gender equality before her ascent to the bench. As a Justice, she has written forceful opinions advancing gender equality.
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more robust and durable rationales in the future.[28] In highlighting the divergence between the Court's treatment of race and sex and its treatment of sexual orientation, my hope is that the Court will "level up" (i.e., expand equality) rather than "level down."[29] *Obergefell* and *Windsor*, viewed most optimistically, might give the Court cause to reconsider precedents that harshly confined the promise of equal protection in the race, sex, class, and disability contexts. My comparison of these identities is limited to a discrete doctrinal domain. I do not mean to suggest, for example, that the law universally privileges sexual orientation over race or that LGBT people have displaced blacks at the center of the popular civil rights imagination.[30] As I have written in a companion article, we should approach analogies between race and sexual orientation with great care.[31]

I. *Windsor* and *Obergefell*

This Part provides the basic reasoning of the *United States v. Windsor* decision.[32] *Windsor* is central to my project because it cements a shift that began in *Romer v. Evans*[33]—the emergence of a distinct and quite fertile tier of analysis for sexual orientation. *Windsor* and *Obergefell v. Hodges*[34] both blend liberty and equality in novel and ambiguous ways, and as such, they are subject to multiple scholarly interpretations. However, I read *Windsor* as expounding mainly on equality, and *Obergefell* as focusing primarily on liberty, specifically the fundamental right to marry. *Obergefell*'s equality analysis could be

See, e.g., United States v. Virginia, 518 U.S. 515, 557 (1996). Given the connections between sex and sexual orientation, *see, e.g.*, Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 36, 72 (1995), Justice Ginsburg's failure to write separately in *Windsor* is particularly disappointing. Justice Breyer has written powerful dissents on race and disability discrimination. *See, e.g.*, *Parents Involved*, 551 U.S. at 867 (Breyer, J., dissenting) (race); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 377-79 (2001) (Breyer, J., dissenting) (disability).

28. As I discuss in Part V, a key vulnerability of the Court's LGBT decisions is the invisibility of some of the most marginal members of the community, namely transgender and bisexual people.

29. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 787 (2011).

30. For example, the advantages that I identify may not extend to the lower federal courts. Arguably, lower court judges have been more hostile to LGBT rights than the Court, and even when lower court judges are receptive to LGBT rights claims, they may be afraid to blur or disregard doctrinal boundaries as Justice Kennedy does in the sexual orientation cases. My empirical analysis below is limited to Supreme Court litigation.

31. Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1015 (2014).

32. 133 S. Ct. 2675, 2706 (2013).

33. 517 U.S. 620 (1996).

34. 135 S. Ct. 2584 (2015).

dismissed as dicta,[35] whereas *Windsor* is more firmly rooted in equal protection analysis, tracking *Romer* in important respects. As such, *Windsor* plays a greater role in this Article on equal protection. In Part VI, I draw more heavily on *Obergefell* to suggest that its language on the role of intent implies a more expansive and powerful form of equal protection.

Justice Kennedy framed *Windsor* as a dispute between the federal government and New York over whether Edith Windsor was entitled to the benefits and responsibilities of marriage.[36] He explained that Windsor and her partner, Thea Spyer, were New York residents who had been together for several decades and were legally married in 2007 in Ontario, Canada. New York subsequently recognized same-sex marriages.[37] Windsor and Spyer's marriage came at the end of their relationship—Spyer died two years after their wedding. Although Spyer left her estate to Windsor, the federal government, in compliance with section 3 of the Defense of Marriage Act (DOMA),[38] refused to recognize the pair as married.[39] Section 3 of DOMA established the meaning of marriage for the numerous references to the term in the U.S. Code and provided that "the word 'marriage' means only a legal union between one man and one woman as husband and wife."[40] Based on this provision, the federal government required Windsor to pay $363,053 in estate taxes, which a male-female couple could have avoided. Windsor paid the taxes but brought suit in federal court.[41] The district court and the Second Circuit, and eventually even the Obama Administration, agreed that DOMA violated Windsor's rights.[42]

The first part of Justice Kennedy's analysis on the merits emphasized the tension between state and federal law. When Congress enacted DOMA, "many

35. The discussion reads more like an excerpt from a treatise than an application of law to fact. It lacks any doctrinal structure and does not resemble the Court's typical analysis of equal protection claims. *See Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting) ("Absent . . . is anything resembling our usual framework for deciding equal protection cases."). That said, Justice Kennedy's equality analysis in other sexual orientation cases also defies traditional structure. *See infra* text accompanying note 80 (discussing the *Obergefell* and *Windsor* majority opinions).

36. *See Windsor*, 133 S. Ct. at 2692 ("What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect."); *id.* at 2693 ("DOMA seeks to injure the very class New York seeks to protect.").

37. *Id.* at 2683.

38. Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2013)), *invalidated by Windsor*, 133 S. Ct. 2675.

39. *Windsor*, 133 S. Ct. at 2682.

40. *Id.* at 2683 (quoting 1 U.S.C. § 7).

41. *Id.*

42. *Id.* at 2684. This confluence presented a question of standing, which Justice Kennedy, writing for a five-Justice majority, resolved by concluding that there was standing. He determined that the prudential concerns against hearing the case were outweighed by countervailing factors. *Id.* at 2685-86, 2688.

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."[43] When it appeared that Hawaii might legalize same-sex marriage, "[t]hat belief, for many who long have held it, became even more urgent, more cherished."[44] By contrast, New York gradually decided that "same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons."[45] In order to resolve these competing positions, Justice Kennedy looked to "the design, purpose, and effect of DOMA."[46]

Justice Kennedy began by expounding on federalism and DOMA's "unusual" nature.[47] Historically, "the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States."[48] While Justice Kennedy recognized that the federal government had departed from relying on state marriage law in limited respects, including in a provision of immigration law and the recognition of common law marriage, he declared that DOMA was different.[49] DOMA stood out because it applied to over 1000 provisions of law, targeting "its operation . . . to a class of persons that the laws of New York . . . have sought to protect."[50] Citing *Romer v. Evans* as support, Justice Kennedy concluded: "DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage."[51]

Arriving at the core of his analysis, Justice Kennedy declared that DOMA "violates basic due process and equal protection principles applicable to the Federal Government"[52] because it rests on a "bare congressional desire to harm a politically unpopular group."[53] First, he deemed DOMA an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage."[54] This departure alone provided "strong evidence of a law having the purpose and effect of disapproval of that class."[55] Second, the

43. *Id.* at 2689.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 2691-93.

48. *Id.* at 2689-90.

49. *Id.* at 2690.

50. *Id.*

51. *Id.* at 2692.

52. *Id.* at 2693.

53. *Id.* (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

54. *Id.*; *see also id.* at 2692 ("[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." (alteration in original) (quoting Romer v. Evans, 517 U.S. 620, 633 (1996))).

55. *Id.* at 2693.

legislative history provided evidence that DOMA's essential purpose was to stigmatize same-sex relationships. For instance, Congress viewed same-sex marriage as a "truly radical proposal that would fundamentally alter the institution of marriage."[56] The House report expressed "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."[57] Further, Justice Kennedy stated, "[w]ere there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage."[58]

The effect of DOMA accordingly was to "identify a subset of state-sanctioned marriages and make them unequal."[59] And DOMA rendered unions such as Windsor's "second-class marriages" without advancing an identifiable governmental interest such as "governmental efficiency."[60] "By creating two contradictory marriage regimes within the same State," Justice Kennedy declared, "DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect."[61] This distinction "demeans the couple," "undermines" their relationship privately and publicly, and "humiliates tens of thousands of children now being raised by same-sex couples."[62] Thus, "DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."[63]

In *Obergefell v. Hodges*, the Court consolidated cases from several Midwest states that refused to grant or recognize same-sex marriages.[64] Justice Kennedy, writing for five Justices, declared that the Fourteenth Amendment requires states to license such marriages and to respect out-of-state same-sex marriages.[65] The Court relied primarily on the fundamental right to marry, which it held applies to same-sex couples. It announced four principles to support this aspect of its holding. First, the right to marry is integral to personal autonomy, and it is important to people of all sexual orientations.[66]

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

57. *Id.* (quoting H.R. REP. NO. 104-664, at 16).

58. *Id.*

59. *Id.* at 2694.

60. *Id.* at 2693-94.

61. *Id.* at 2694.

62. *Id.* For an insightful discussion on the racial implications of the claim that deeming children "illegitimate" is humiliating, see Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 413-17 (2012).

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

64. 135 S. Ct. 2584, 2593 (2015).

65. *Id.* at 2604, 2607-08.

66. *Id.* at 2599.

Second, marriage offers a unique union, which confers dignity.[67] Third, marriage is crucial in that it safeguards children and families, and the denial of marriage inflicts material and dignity costs on such people.[68] Fourth, marriage is a "keystone of [the nation's] social order."[69]

The Court next explained that liberty and equality are interwoven in important ways, and the lens of one provision can sharpen the Court's analysis of the other.[70] It briefly discussed two earlier hybrid cases.[71] Largely ignoring the question of intent in this portion of the opinion, Justice Kennedy focused on effect, declaring that the "denial to same-sex couples of the right to marry works a grave and continuing harm" and the "imposition of this disability on gays and lesbians serves to disrespect and subordinate them."[72] "These considerations," the Court stated, "lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."[73]

The most significant aspect of *Obergefell* for purposes of this Article is its conception of the intent of opponents to same-sex marriage. At the outset of his legal analysis, Justice Kennedy states that the view that marriage must consist of a man and woman "long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world."[74] At first blush, this seems to be a stunning repudiation of the language in *Windsor*, which repeatedly portrayed opponents of same-sex marriage as bigots.[75] Moreover, it offers a rare vision of the Constitution in which intent seems not to matter:

> But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.[76]

67. *Id.* at 2599-2600.

68. *Id.* at 2600.

69. *Id.* at 2601.

70. *Id.* at 2602-03.

71. *Id.* at 2603 (citing Loving v. Virginia, 388 U.S. 1, 12 (1967); and Zablocki v. Redhail, 434 U.S. 374, 383-87 (1978)).

72. *Id.* at 2604.

73. *Id.*

74. *Id.* at 2594; *see also id.* at 2602 ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.").

75. *See* United States v. Windsor, 133 S. Ct. 2675, 2695 (2013) (stating that DOMA demeaned and humiliated same-sex couples and their children).

76. *Obergefell*, 135 S. Ct. at 2602.

Justice Kennedy argues that the Constitution requires a remedy for laws that have the effect of "disparag[ing]" and "diminish[ing] [same-sex couples'] personhood" even when the laws arise from "sincere," "good faith" motives.[77] But curiously, this language regarding motive is in the Court's fundamental rights analysis, not its equal protection analysis.[78] Moreover, Justice Kennedy goes on seemingly to restate some of the animus rhetoric from *Windsor*,[79] creating considerable ambiguity. In Part VI, I return to *Obergefell* and attempt to reconcile these passages.

II. The Traditional Equal Protection Model

Windsor and *Obergefell* may be most notable for what is *not* in the opinions. Contrary to the description of equal protection in most constitutional law textbooks, Justice Kennedy never (1) identified the classification at issue; (2) inquired as to whether that class is "suspect" or "quasi-suspect"; (3) applied a recognizable level of scrutiny (strict, intermediate, or rational basis); (4) identified the asserted state interests; or (5) scrutinized the connection between the ends and the means to determine whether the state interests could sustain the statute.[80] This Part describes the traditional framework for equal protection claims, which continues to govern race and sex, and elaborates on how the sexual orientation precedents depart from it.

During the *Lochner*[81] era, the Court closely scrutinized routine socio-economic legislation, reaching inconsistent results and destabilizing the rule of law.[82] Eventually, the Court withdrew from this task and formulated two basic tracks of constitutional analysis to restrain judicial activism.[83] The Court's

77. *Id.* at 2594, 2602.

78. It may be a mistake to put too much weight on this factor since the majority opinion blends equality and liberty arguments in complex ways. As Susannah Pollvogt has written, the Court's liberty analysis asks whether gays and lesbians are similarly situated to heterosexuals (a hallmark of equal protection analysis) in order to determine whether the right to marry extends to the former group. Susannah W. Pollvogt, *Obergefell v. Hodges*: Framing Fundamental Rights 2 (June 29, 2015) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2624725.

79. *Obergefell*, 135 S. Ct. at 1602 ("It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society."); *see id.* at 2626 (Alito, J., dissenting) (arguing that the Court's "disclaimer is hard to square" with the remainder of the opinion).

80. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 718-22 (3d ed. 2009) (providing a standard framework for equal protection analysis).

81. Lochner v. New York, 198 U.S. 45, 64-65 (1905) (holding unconstitutional a state law establishing maximum working hours for bakers because it inhibited the freedom of contract), *overruled by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

82. CHEMERINSKY, *supra* note 80, at 604-06, 614.

83. *Id.* at 946.

famous footnote 4 in *United States v. Carolene Products Co.*[84] is typically understood to have announced this more disciplined approach.[85] As a general matter, the Court subjects laws to a minimum rationality test, which merely asks whether the law reasonably advances a legitimate state interest.[86] Government enjoys wide latitude in this domain, and the Court almost always upholds such laws.[87] However, when a law impinges on a specific constitutional right, such as the right to free speech; arises from an impaired political process; or strikes at a "discrete and insular minority," the Court generally applies a heightened level of review, some form of strict scrutiny or intermediate scrutiny.[88] Thus, as I teach my students in Constitutional Law, it is incredibly important to determine at the outset of the analysis whether the Court would place the case on the minimum rationality track or the heightened scrutiny track.

Years after *Carolene Products*, the Court established yet another prerequisite to receiving equal protection heightened scrutiny: the law must contain a classification targeting a "suspect" or "quasi-suspect class."[89] It is not enough that a law burdens blacks more than whites, or women more than men.[90] Rather, the law must, on its face, sort individuals by the "suspect" trait, such as race or gender.[91]

Occasionally, however, the Court has blurred this two-track system, claiming to apply the standards of track one (rational basis), while tipping into

84. 304 U.S. 144, 152 n.4 (1938).

85. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1514 n.2 (2d ed. 1988). *But see* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1644 (2014) (Scalia, J., concurring in the judgment) (deriding *Carolene Products*'s analysis as an "old saw, derived from dictum in a footnote").

86. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488-89 (1955).

87. *See, e.g.*, *id.*

88. *See Carolene Prods.*, 304 U.S. at 152 n.4.

89. *See* CHEMERINSKY, *supra* note 80, at 719-20. Rather than refer to discrete and insular minorities, the Court now speaks of "suspect" or "quasi-suspect" classes. Legislation affecting a group that does not qualify as either suspect or quasi-suspect is subject to the minimum rationality test. *See, e.g.*, Lyng v. Castillo, 477 U.S. 635, 638 (1986) (refusing to apply heightened scrutiny to a law because it did not target a "'suspect' or 'quasi-suspect' class"). Alternative routes to heightened scrutiny include liberty-based claims, such as the right to marry or right to travel. CHEMERINSKY, *supra* note 80, at 949, 1072.

90. *See* McCleskey v. Kemp, 481 U.S. 279, 292-97 (1987) (holding that litigants alleging an equal protection violation must prove a racially discriminatory purpose and that a sophisticated statistical study revealing disparate racial impact would not support an inference of racial considerations affecting a criminal defendant's sentence); Pers. Adm'r v. Feeney, 442 U.S. 256, 273, 281 (1979) (holding that, although a law providing benefits to veterans had a clear disparate impact based on sex, that mere fact was not enough to demonstrate purposeful discrimination against women because "the Fourteenth Amendment guarantees equal laws, not equal results").

91. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1139-41 (1997).

analysis that smacks of track two (heightened scrutiny). The three key cases are *U.S. Department of Agriculture v. Moreno*,[92] *City of Cleburne v. Cleburne Living Center, Inc.*,[93] and *Romer v. Evans*.[94] These cases establish that a "bare . . . desire to harm" a particular group,[95] which is also described as "animus"[96] or animosity toward a group, cannot support a law. Constitutional scholars tend to group these cases together, sometimes under the framework of "rational basis with bite," because they are the principal cases in which the Court has applied the ostensibly deferential rational basis test and nonetheless struck down state action.[97] However, I argue that constitutional scholars should understand that, although *Moreno* and *Cleburne* helped to give birth to *Romer*, the former precedents have receded while *Romer* helped to generate *Lawrence v. Texas*,[98] *Windsor*, and *Obergefell*.[99]

When read together, these precedents effectively announce that sexual orientation enjoys a tier of its own, and this tier need not reference the standards that govern race and sex, nor cohere with them.[100] The animus

92. 413 U.S. 528 (1973).

93. 473 U.S. 432 (1985).

94. 517 U.S. 620 (1996).

95. *Cleburne*, 473 U.S. at 447 (alteration in original) (quoting *Moreno*, 413 U.S. at 534) (describing "a bare . . . desire to harm a politically unpopular group" as illegitimate (alteration in original) (quoting *Moreno*, 413 U.S. at 534)); *Moreno*, 413 U.S. at 534 ("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.").

96. *Romer*, 517 U.S. at 632 ("[T]he amendment seems inexplicable by anything but animus toward the class it affects . . . ."); *id.* at 634 ("[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.").

97. *See, e.g.*, CHEMERINSKY, *supra* note 80, at 724, 741; Cass Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 62-63 (1996) (describing *Cleburne*, *Romer*, and to a lesser extent *Moreno*, as rejecting the "belief that members of the relevant group are not fully human"). *See generally* STONE ET AL., *supra* note 18, at 495-99.

98. 539 U.S. 558 (2003).

99. Dale Carpenter argues that *Windsor* represents a broader ban on laws that are based on animus. Yet his only examples of Supreme Court cases involving traits other than sexual orientation are *Moreno* and *Cleburne*. He also strains to exclude groups such as felons, sex offenders, and terrorists, who would not be protected under his conception of the anti-animus principle. *See* Carpenter, *supra* note 17, at 224-25.

100. This argument counters the view that "[t]he inability of new groups to have discrimination against them receive formal heightened scrutiny has profoundly negative effects on their equal protection claims." Yoshino, *supra* note 29, at 761. In some respects, my argument follows Katherine Franke's insight that LGBT people need to reconsider the value of the intermediate space created by *Lawrence* rather than rush headlong into the regulation that is marriage. *See, e.g.*, Katherine M. Franke, Commentary, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1414 (2004). The liminal standard of *Romer*, *Lawrence*, and *Windsor* has been more productive and protective than most scholars have recognized.

model that the Court applies to sexual orientation claims is "queer" in that it defies traditional categories and seems to evade particular constraints of the two-track approach, as I explain below. One might hope that Justice Kennedy is inclined to apply this queer standard to marginalized groups other than LGBT people, particularly given that queerness is thought to cut across identity groups and connect people at the margins.[101] But we are approaching the twentieth anniversary of *Romer*, and the Court has not applied this standard to other groups. Moreover, as I explain below, *Cleburne* and *Moreno*, the two precedents for *Romer*, have withered.

In *Cleburne*, the Court concluded that classifications concerning "mentally retarded" people do not warrant heightened scrutiny.[102] Unlike race, the Court explained, mental disabilities constitute real differences, which the law must take into account.[103] The Court further concluded that the political process could be trusted to address the needs of people with mental disabilities, who are not insular because families of every type may include such a person.[104] Nonetheless, the Court went on to hold that the city's denial of a permit to a group home for people with mental disabilities violated the Equal Protection Clause.[105] The Court determined that the permit decision was based on negative attitudes of local homeowners and fears that children from a nearby school would harass the residents of the home. Deeming such justifications illegitimate, the Court declared: "[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like."[106]

At the time, some scholars read *Cleburne* as potentially opening the door for the Court to explicitly apply heightened scrutiny to classifications based on

101. *See, e.g.*, Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ 437, 441 (1997) (making visible the "disjuncture . . . between an articulated commitment to promoting an understanding of sexuality that rejects the idea of static, monolithic, bounded categories, on the one hand, and political practices structured around binary constructions of sexuality and power, on the other hand"); *see also* Kathryn Abrams, *Elusive Coalitions: Reconsidering the Politics of Gender and Sexuality*, 57 UCLA L. REV. 1135, 1136-47 (2010) (charting missed opportunities for feminist, gay/lesbian, and queer activists to form coalitions across identity lines).

102. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 443 (1985). The Court used this term before it was widely regarded as derogatory.

103. *Id.* at 442-43.

104. *See id.* at 443-44.

105. *Id.* at 450. After scrutinizing the city's justifications for denying a permit to a home for persons with mental disabilities, the *Cleburne* Court held that the city demonstrated "irrational prejudice against the mentally retarded" and thus violated the Fourteenth Amendment. *Id.*

106. *Id.* at 448.

disability, just as *Reed v. Reed*[107] purported to apply the minimum rationality test to a sex classification five years before a Court majority openly embraced heightened scrutiny for women.[108] If the *Cleburne* majority intended an incremental progression for people with disabilities, the Rehnquist Court abruptly shut that door roughly fifteen years after *Cleburne* in *Board of Trustees of the University of Alabama v. Garrett*.[109] *Garrett* presented the question whether Congress, pursuant to its Section 5 power, could abrogate the states' sovereign immunity and require them to submit to lawsuits seeking damages under the Americans with Disabilities Act (ADA).[110] Ignoring the tension between the *Cleburne* Court's articulated standard and its actual application of that standard, Chief Justice Rehnquist recast *Cleburne* as a standard rational basis case and then used that government-friendly standard to preclude ADA lawsuits.[111] Chief Justice Rehnquist read *Cleburne* to permit the government "hardheadedly—and perhaps hardheartedly" to apply job requirements without regard to whether they harm people with disabilities.[112] "[A]dverse, disparate treatment," he stated, "often does not amount to a constitutional violation where rational-basis scrutiny applies."[113] Thus, the majority opinion, which Justice Kennedy joined, viewed the callous disregard of people with disabilities as consistent with *Cleburne*.[114] The Court paradoxically argued that "to uphold the Act's application to the States would allow Congress to rewrite the

107. 404 U.S. 71, 76 (1971) (asking whether the sex of "competing applicants for letters of administration bears a rational relationship to a state objective").

108. STONE ET AL., *supra* note 18, at 709 (suggesting a comparison between *Cleburne* and gender discrimination cases like *Reed*); *see also* Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

109. 531 U.S. 356 (2001).

110. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-213 (2014)); *see Garrett*, 531 U.S. at 361.

111. *See Garrett*, 531 U.S. at 367. Chief Justice Rehnquist described the rational basis review applied in *Cleburne* as one where "the city's purported justifications for the ordinance made no sense in light of how the city treated other groups similarly situated in relevant respects," *id.* at 366 n.4, but the paradigmatic rational basis cases allow for such underinclusiveness, without the need to treat all comparable groups similarly, *see* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488-89 (1955). *Garrett* overrode the popular view that *Cleburne* applied something more than the typical rational basis test. *See, e.g.*, *Cleburne*, 473 U.S. at 456 (Marshall, J., concurring in the judgment in part and dissenting in part) ("I cannot accept the Court's disclaimer that no 'more exacting standard' than ordinary rational-basis review is being applied . . . ."); TRIBE, *supra* note 85, at 1594 n.20, 1615.

112. *Garrett,* 531 U.S. at 367-68.

113. *Id.* at 370 (quoting *id.* at 379 (Breyer, J., dissenting)).

114. Justice Kennedy's concurring opinion deployed more compassionate language than the majority opinion but arrived at the same result. *Id.* at 374-76 (Kennedy, J., concurring).

Fourteenth Amendment law laid down by this Court in *Cleburne*"[115] even as it subtly rewrote *Cleburne*.[116] Effectively excluding people with disabilities from the Equal Protection Clause's ambit, Chief Justice Rehnquist whittled a liminal and promising opinion into an "unremarkable" reiteration of the "widely acknowledged" minimum rationality test.[117]

The other animus case that preceded *Romer* is *Moreno*, which involved a statute that denied food stamps to applicants who lived in a household that included an unrelated person.[118] The *Moreno* majority, citing testimony in the congressional record, claimed that Congress was motivated by an interest in punishing hippies and that such a "bare . . . desire to harm" could not sustain the law.[119] The Court seemed to consider implicitly the importance of food stamps for needy people and the perversity of striking at some of the neediest people simply to punish hippies.[120] Needless to say, *Moreno* did not lead to a series of cases granting rights to hippies. But the case was consistent with dicta in several earlier cases suggesting that the Court was poised to treat

115. *Id.* at 374 (majority opinion).

116. The Court has afforded some protection for people with disabilities under the Due Process Clause. *See* Tennessee v. Lane, 541 U.S. 509, 533-34 (2004) (holding that Title II of the American Disabilities Act, as applied to "cases implicating the fundamental right of access to the courts," constituted a valid exercise of Congress's enforcement power under the Fourteenth Amendment). The breadth of this protection, however, is unclear.

117. *Garrett*, 531 U.S. at 367. The *Garrett* majority read *Cleburne* as a mere expression of the rule that "state action subject to rational-basis scrutiny does not violate the Fourteenth Amendment when it 'rationally furthers the purpose identified by the State.'" *Id.* (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976) (per curiam)). This interpretation overlooks that the *Cleburne* Court did not deny that the city's permit denial rationally advanced the asserted state interests, such as overcrowding. Instead, the Court's complaint was that the City of Cleburne had not applied these concerns consistently, which suggested that the stated concerns did not actually motivate the zoning decision. This search for the actual purpose, rather than for any conceivable purpose, distinguishes *Cleburne* from traditional rational basis review. Notwithstanding *Cleburne*'s concern with animus and genuine motivation, Chief Justice Rehnquist read *Cleburne* to suggest that if a law is based on a mix of legitimate and illegitimate factors, the Court can simply set aside the illegitimate factors (such as fear and hostility) and validate the law if it advances the legitimate state interest. *See id.* at 367. This reading echoes not *Cleburne*, but rather an argument then-Justice Rehnquist had made in a plurality opinion years before. *See* Michael M. v. Superior Court, 450 U.S. 464, 470 (1981) (plurality opinion) (stating that the state's assertion that the statute was motivated by a desire to prevent teenage pregnancy was "entitled to great deference," even though "[s]ome legislators may have been concerned about . . . the loss of 'chastity,' and still others about promoting various religious and moral attitudes towards premarital sex"); *cf.* Carpenter, *supra* note 17, at 232, 243 (looking to race discrimination cases to propose that the animus test only requires finding that hostility materially influenced the outcome).

118. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 530 (1973).

119. *Id.* at 534.

120. *See* TRIBE, *supra* note 85, at 1613 n.22.

discrimination against the poor as suspect.[121] During the same Term in which the Court decided *Moreno*, however, a different majority, in *San Antonio Independent School District v. Rodriguez*, declined to recognize a substantive due process right to education.[122] In the end, *Rodriguez* was more prescient than *Moreno*. It is now considered settled that the Court does not consider poverty to give rise to a suspect classification.[123] Further, in recent years, the Court has ruled repeatedly for big business in a string of statutory cases.[124] Therefore, despite the glimmers of progress offered by *Moreno* and *Cleburne*, poor people and people with disabilities have generally been fenced out of equal protection's refuge.

These groups must fend for themselves in the political process, quite unlike LGBT people, who have repeatedly and successfully turned to the Court in recent years. When *Romer* was decided, it resembled *Cleburne* (the original, not *Garrett*'s remix) in that the Court purported to apply the minimum rationality test and yet, finding that the law was based on "animus," proceeded to strike it down.[125] *Romer* involved a challenge to a Colorado constitutional amendment that eliminated all state and local antidiscrimination protections based on sexual orientation and required a state constitutional amendment in order to reinstate any such protections.[126] Justice Kennedy viewed this measure as highly unusual and thus highly suspect. He explained: "[Amendment 2] is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence."[127] Although the state claimed that the law advanced its legitimate interests in respecting people with "personal or religious objections to homosexuality" and "conserving resources

121. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 707 (7th ed. 2013) ("In the late 1950s and 1960s, the Court repeatedly suggested that classifications based on indigence were suspect."); TRIBE, *supra* note 85, at 1625-27. Significant victories for the poor during this era included *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970), which granted due process rights to recipients of government assistance.

122. 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution.").

123. *See, e.g.*, JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 494 (4th ed. 2010).

124. *See* Erwin Chemerinsky, Opinion, *Justice for Big Business*, N.Y. TIMES (July 1, 2013), http://nyti.ms/17PKrBQ (citing various cases involving antidiscrimination law, class actions, and arbitration clauses).

125. Romer v. Evans, 517 U.S. 620, 631-32 (1996) (stating that the law "fails" and "defies" the Court's "conventional" rational basis test and was "inexplicable by anything but animus toward the class it affects").

126. *Id.* at 627.

127. *Id.* at 633.

to fight discrimination against other groups," Justice Kennedy brusquely dismissed those interests.[128]

If the law in *Romer* were truly unique and bizarre, one might have expected the case to have little continuing significance. But what happened in the fifteen years after the *Romer* decision defied *Cleburne*'s trajectory. *Romer* became the cornerstone for an arsenal of gay rights protections, reappearing in *Lawrence v. Texas* in 2003 even though the majority decided that case primarily on due process grounds.[129] And ten years later, Justice Kennedy would model his argument in *Windsor* largely on *Romer*'s analysis; once again, he found the statute "unusual" and based on "animus" toward gays and lesbians.[130]

To be clear, I am not complaining that LGBT litigants have been successful, and indeed, I commend the movement for its achievements. What troubles me, however, is that the Court has not adequately explained why it perceives animus toward LGBT people but not people with disabilities and the poor. Ultimately, I call for greater transparency and a consistent, coherent framework for explaining how the Court allocates protections among groups.[131]

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128. *See id.* at 635 ("The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them."). *Romer* thus implicitly rejected the approach that Chief Justice Rehnquist and Justice Kennedy would go on to endorse in *Garrett* with respect to people with disabilities. Justice Kennedy in *Romer* did not set aside the indicia of animus and find that the state interests in protecting religious association and conserving resources for other protected groups were sufficient to sustain the amendment. *Romer* searched for the actual motive behind the passage of Amendment 2 and used the over- and underinclusiveness of the law to discard the asserted state interests. Notably, Chief Justice Rehnquist joined Justice Scalia's dissenting opinion, arguing for applying the minimum rationality test. *See id.* at 640 (Scalia, J., dissenting).

129. *See* Lawrence v. Texas, 539 U.S. 558, 576 (2003) (noting that *Romer* eroded Bowers v. Hardwick, 478 U.S. 186 (1986), thus laying the groundwork for *Lawrence*'s holding).

130. *Compare* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (referencing *Romer*'s language about "[d]iscriminations of an unusual character" and stating that "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage" provides "strong evidence" that it is unconstitutional (alteration in original) (quoting *Romer*, 517 U.S. at 633)), *and id.* (referring to "animus" and a "bare congressional desire to harm a politically unpopular group" (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973))), *with Romer*, 517 U.S. at 632-33 (noting that "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision" (alteration in original) (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37-38 (1928))), *and id.* at 632 (concluding that the amendment "seems inexplicable by anything but animus toward the class it affects").

131. *Cf.* TRIBE, *supra* note 85, at 1614-16 (calling for explicit debate about whether a trait warrants heightened scrutiny, as opposed to *Cleburne*'s covert approach); *id.* at 1616 ("Homosexuality should thus be added—*and openly*—to the list of classifications that trigger increased judicial solicitude." (emphasis added)).

III. LGBT Exceptionalism

This Part makes manifest the disconnect between *Windsor* and the groups or traits that the Court regards as "suspect" or "quasi-suspect," focusing on race and sex. My argument challenges conventional wisdom by asserting that sexual orientation is presently in a more favorable position than race and sex. Constitutional law scholars and textbooks are often wedded to a view of the Equal Protection Clause that has increasingly become outmoded. Under the conventional story—which most law students learn during their first year—race is subject to the most rigorous constitutional protection. The Court subjects all racial classifications to strict scrutiny and "smokes out" nefarious purposes by ensuring that the law is narrowly tailored or a necessary means of accomplishing a compelling governmental interest.[132] Sex is less suspect but still subject to intermediate scrutiny, which means that the law must be supported by an "exceedingly persuasive justification," and the means must substantially relate to that justification.[133] The struggle for civil rights, we are often told, entails the efforts of stigmatized groups to reach the pinnacle of constitutional protections, which means being treated like African Americans.[134] The marriage equality movement has embraced this narrative, consistently urging the Court to apply strict scrutiny to classifications based on sexual orientation and relying on the animus standard simply as a fallback argument.[135]

In the second Subpart, I look more closely at the "animus" test in sexual orientation discrimination cases. I reveal that two versions of animus are in play in *Windsor* and *Romer*, and I argue that the Court's tendency to oscillate between a "thick" and "thin" version of animus has fostered uncertainty

132. As the Court said in one of its more recent race cases, courts "apply strict scrutiny to *all* racial classifications to 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." Johnson v. California, 543 U.S. 499, 506 (2005) (alteration in original) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)). Reva Siegel has documented how the Court has shifted over time from defending heightened scrutiny of racial classifications that burden whites, based on the need to protect whites, to "justifications emphasizing [strict scrutiny's] universal and collective benefits." *See* Siegel, *supra* note 17, at 38, 43, 46.

133. United States v. Virginia, 518 U.S. 515, 531, 533 (1996).

134. *See* Robinson, *supra* note 31, at 1062; *see also* Janet Halley, *"Like Race" Arguments*, *in* WHAT'S LEFT OF THEORY?: NEW WORK ON THE POLITICS OF LITERARY THEORY 40, 47 (Judith Butler et al. eds., 2000) (describing this model).

135. The vast majority of marriage equality briefs have sought strict scrutiny. *See* Robinson, *supra* note 31, at 1062 & n.269 (reviewing briefs). One of the few exceptions is Edith Windsor's Supreme Court brief, which called for intermediate scrutiny, rather than strict scrutiny, without explaining this choice. Brief on the Merits for Respondent Edith Schlain Windsor at 18-19, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 WL 701228. Scholars have been much more critical of the tiered structure of equal protection. *See, e.g.*, Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 482-83 (2004).

regarding the future of LGBT rights. Thus, I conclude that, to the extent that future opinions turn on the concept of animus, the Court should explicitly endorse an understanding that goes beyond condemning rank hatred (the thin version) and opposes antigay stereotyping and implicit and structural biases against LGBT sexuality and identity (the thick version). The *Obergefell* majority opinion seems to endorse this more capacious understanding of animus by suggesting that even laws passed in good faith may run afoul of the anti-animus principle.

A. Diverging Doctrinal Rules

Although the idea of extending the "strict scrutiny" standard to LGBT people may seem enlightened, like an expansion of the rights available to persecuted groups, this narrative steadfastly ignores the practical effect of strict scrutiny on racial minorities. As Ian Haney-López argues in his masterful recent article *Intentional Blindness*, strict scrutiny rarely benefits people of color because modern racial discrimination does not rely on overt racial classifications to do its dirty work.[136] The civil rights movement and modern sensibilities have largely driven racism underground.[137] As long as racial discrimination remains concealed or implicit, as it often does,[138] it will not trigger the protection of the Fourteenth Amendment because the Court requires litigants to prove the existence of a racial classification as a threshold requirement to meaningful scrutiny. Absent such an overt classification, the Court will either deny that discrimination exists or deem itself powerless to remedy it. By contrast, race-conscious policies that seek to promote diversity or remedy past discrimination are the primary site of contemporary racial classification and Supreme Court scrutiny.[139] Thus, when strict scrutiny appears in the Court's race jurisprudence today, it is almost invariably on behalf of white litigants such as Abigail Fisher, who wield it to dismantle affirmative action policies.[140] For at least the last thirty years, at least at the Supreme Court level, strict scrutiny has been the principal tool of civil rights

136. Haney-López, *supra* note 17, at 1783.

137. *See, e.g.*, Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 466-68 (2001) (explaining that overt and subtle biases have long coexisted, but the decline of overt bias has made questions of subtle and structural bias more apparent).

138. *See, e.g.*, Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1493-94 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995).

139. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 710-11 (2007); Grutter v. Bollinger, 539 U.S. 306, 343 (2003); Gratz v. Bollinger, 539 U.S. 244, 249-51 (2003).

140. *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2415 (2013).

retrenchment, protecting whites rather than blacks and Latinos.[141] In contrast to LGBT advocates who pine for strict scrutiny, this Article unearths the advantages of the ambiguous level of review that currently applies to sexual orientation claims.

Consequently, it is a mistake to think that people of color enjoy an advantage over LGBT people because only the former can invoke strict scrutiny. It is true that in the rare case where people of color are burdened by an explicit racial classification, strict scrutiny presumes the invalidity of the law.[142] But as I show below,[143] the Court also presumes the invalidity of a law when applying animus review, and it seems more dismissive of the state's interests than it does under strict scrutiny. When applying strict scrutiny, the Court closely examines the state's interests to ensure that they are genuine and that the ends are tightly connected to the means. Under animus review, the Court tends to proceed directly from detecting a whiff of animus[144] to declaring such ostensibly hate-based laws invalid, with little discernible analysis of the state's interests in between.[145] This may be because there is no compelling interest or carefully tailored law that can justify a law said to arise from hate.

Under the *Windsor* framework, LGBT litigants have three advantages over people of color and women who bring equal protection claims. First, in race and sex cases, the Court has rigidly used the concept of a "classification" as a gatekeeping device, but it has sidestepped this requirement in sexual orientation cases. Second, LGBT people can invoke animus, a standard that emerged from cases brought by people of color, poor people, and people with disabilities, but that the Court no longer recognizes in such cases. In place of a sustained engagement with context and history in order to infer bias, the

141. *See* Haney-López, *supra* note 17, at 1832 ("The colorblind claim to oppose any government use of race is misleading, for in practice colorblindness opposes race-conscience remedies and nothing more."). This is not to deny that the strict scrutiny standard might deter some governments from enacting racial classifications that would harm people of color. However, governments often perpetuate racial disparities without deploying racial classifications.

142. In *Johnson v. California*, 543 U.S. 499 (2005), a California correctional policy segregated and burdened incarcerated people of various racial backgrounds, although California's prisons are disproportionately Latino and black. *Id.* at 502. The *Johnson* majority held that strict scrutiny applied but declined to decide whether the policy could survive that level of review until a lower court decided it in the first instance. *Id.* at 507, 515. Justice Thomas and Justice Scalia, who ardently apply strict scrutiny in affirmative action cases, argued for a more lenient standard in the prison context. *See id.* at 524 (Thomas, J., dissenting).

143. *See infra* Part III.B.

144. I thank my former student Anuradha Sivaram for coming up with this metaphor.

145. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 635 (1996) (dismissing state interests in one sentence, reasoning that "[t]he breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them").

Court requires people of color and women to demonstrate malice—"smoking gun" evidence that the legislature wanted to harm the group. Third, in a long line of cases, the Court has strictly limited the state's ability to remedy racial discrimination[146] while providing more leeway regarding gender. The animus test would seem to give the state even greater flexibility in remedying bias against LGBT people. I discuss each of these distinctions in turn.

1. The suspect classification requirement

I will use *Personnel Administrator v. Feeney*,[147] a key gender case, to illustrate the first two advantages that LGBT people have over people of color and women. First, the Court has imposed the concept of a "classification" as a rigid gatekeeping device for race and sex claimants, but in a break from long-standing precedent, the *Windsor* Court did not apply it to DOMA. As a practical matter, the requirement of a racial classification effectively kills the vast majority of race claims brought by people of color. Not only has the Court invoked the classification requirement to bar claims by people of color, but also it has at times "bent the rules" by *inferring* a racial classification when laws burdened whites.[148] As I describe more fully below, the lack of a sex "classification" also bars relief in light of *Feeney* and *Geduldig v. Aiello*,[149] which narrowly construed that concept.[150] Moreover, Justice Kennedy has incapacitated intermediate scrutiny in recent cases, as I discuss below.[151] Against this backdrop, it is striking that the *Windsor* majority never establishes

146. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720-21 (2007) (refusing to recognize an interest in remedying segregation in the absence of ongoing findings of de jure segregation).

147. 442 U.S. 256 (1979).

148. Stephen Rich's recent article highlights this practice. Rich, *supra* note 2, at 1547-49, 1604. His analysis suggests that early cases decided during a more liberal era were more likely to infer a racial classification when the law burdened people of color in a unique fashion, *id.* at 1537-38, whereas the more recent and conservative Court has applied this practice when it perceives laws as burdening whites, *see id.* at 1554, 1558 ("[T]he inference of a racial classification in fact reflects a choice by the Court to exercise judicial power."); *see also* Shaw v. Reno, 509 U.S. 630, 646-47 (1993) (inferring a racial classification based on the majority's impression that a voting district's shape was bizarre). This occasional practice is consistent with Haney-López's observation that the Court has used contextual intent in interpreting laws that burden whites, such as the law at issue in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), while denying it to people of color. *See* Haney-López, *supra* note 17, at 1863-64.

149.417 U.S. 484 (1974), *superseded by statute*, Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2014)).

150. *See also* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 754 (2003) (Kennedy, J., dissenting) (lamenting "the unfortunate fact that stereotypes about women continue to be a serious and pervasive social problem" but finding a "paucity of evidence" that states relied on gender classifications to allocate family leave).

151. *See infra* text accompanying notes 320-41.

that DOMA contains a sexual-orientation-based classification. The fact that Justice Kennedy regards the statute as "unusual" is, in his view, sufficient to trigger "careful consideration,"[152] which is essentially a form of heightened scrutiny.

In *Feeney*, the Court considered a Massachusetts statute that conferred a weighty employment preference on veterans—an overwhelmingly male class—automatically moving them to the front of the line of applicants for civil service jobs.[153] "The first question," the Court explained, "is whether the statutory classification is indeed neutral in the sense that it is not gender based."[154] The Court reasoned: "[S]ignificant numbers of nonveterans are men, and all nonveterans—male as well as female—are placed at a disadvantage."[155] The Court concluded that the distinction drawn by the statute "is, as it seems to be, quite simply between veterans and nonveterans."[156] Thus, the Court found that the statute did not trigger intermediate scrutiny because it was not "overtly or covertly based upon gender."[157]

In order to reach this conclusion, the majority had to ignore not only the severely disparate impact of the veteran preference, but also a long history of state and federal government policies formally forbidding women from qualifying as veterans, which I discuss below.[158] The Court acknowledged that the preference had a "devastating impact upon the employment opportunities of women"[159]: ninety-eight percent of veterans were male, and over one-quarter of the state population were veterans.[160] But the Court accorded this almost complete exclusion of women little weight: "When the basic

152. United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)). This assertion, which mirrors one in *Romer*, is dubious in that same-sex marriage itself was unusual when Congress passed DOMA. *Cf.* Sunstein, *supra* note 97, at 65-66 (questioning the significance of the unusual nature of the law in *Romer*). *Lawrence v. Texas*, 539 U.S. 558 (2003), also casts doubt on the notion that the "unusual" nature of the law explains Justice Kennedy's "careful" scrutiny and substitutes for the requirement of a classification. Sodomy laws were well entrenched when the Court decided *Lawrence*. *Lawrence*, 539 U.S. at 568-70 (acknowledging that sodomy laws had existed since colonial times and sodomy laws that targeted same-sex sodomy had existed since the 1970s). They lacked the novelty and breadth of DOMA and Amendment 2. Nonetheless, Justice Kennedy applied analysis that resembles the scrutiny in *Romer* and *Windsor*.

153. Pers. Adm'r v. Feeney, 442 U.S. 256, 263, 269-70 (1979).

154. *Id.* at 274.

155. *Id.* at 275.

156. *Id.*

157. *Id.* at 274-75.

158. *See infra* notes 208-10 and accompanying text.

159. *See Feeney*, 442 U.S. at 260 (recounting the district court's findings).

160. *Id.* at 270.

classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern."[161]

Geduldig v. Aiello, which concerned whether a California disability insurance program violated equal protection by refusing to cover pregnancy-related disabilities,[162] represents a more startling conception of the classification requirement. If the correlation between gender and veteran status was imperfect because two percent of veterans were female, *Geduldig* offered a starker contrast. One hundred percent of the pregnant people in California were female.[163] However, the Court concluded that "California does not discriminate with respect to the persons or groups which are eligible for disability insurance protection under the program,"[164] explaining in a footnote:

> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.[165]

In short, the fact that not all women are pregnant precluded the pregnancy exclusion from constituting sex discrimination.[166]

Opponents of same-sex marriage raised analogous arguments in *Obergefell*, *Windsor*, and *Hollingsworth v. Perry*,[167] attempting to force the Court to address an issue that it sidestepped in *Lawrence v. Texas*.[168] The Texas sodomy prohibition at issue in *Lawrence* applied only to anal and oral sex between two people of the same sex; by contrast, it did not inquire into whether a person self-identified or was regarded as gay, lesbian, or bisexual.[169] On its face, the law plainly sorted people based on whether they were male or female: "A person commits an offense if he engages in deviate sexual intercourse with

161. *Id.* at 272.

162. 417 U.S. 484, 491-92 (1974).

163. In recent years, transgender men have gotten pregnant and been featured in the media. *See, e.g.*, Mike Fleeman, *Report: Pregnant Man Gives Birth Again*, PEOPLE (June 9, 2009, 5:25 PM EDT), http://www.people.com/people/article/0,,20284188,00.html (discussing Thomas Beatie, who is thought to be the first man to give birth).

164. *Geduldig*, 417 U.S. at 494.

165. *Id.* at 497 n.20.

166. Scholars have roundly criticized this reasoning. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 779 (4th ed. 2011) ("It is hard to imagine a clearer sex-based distinction.").

167. 133 S. Ct. 2652 (2013).

168. 539 U.S. 558 (2003); *see, e.g.*, Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 25 n.7, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026.

169. *See Lawrence*, 539 U.S. at 563.

another individual of the same sex."[170] A woman could have oral sex with a man, but not with a woman.[171] Yet not one of the six Justices that ruled against Texas even recognized the sex classification. Justice Kennedy evaded this question by relying on substantive due process. He noted a "tenable" equal protection claim,[172] and by citing *Romer* and speaking of the stigma faced by "homosexual persons,"[173] he indicated that the relevant classification was based on sexual orientation, *not* sex.[174] Justice O'Connor, who was a leading voice in favor of gender equality during her time on the Court, also overlooked the sex classification in her *Lawrence* concurrence.[175] She too characterized the law as sexual-orientation-based discrimination, not sex-based discrimination.[176]

Geduldig and *Feeney*, misguided though they are, suggest otherwise. While the Texas sodomy law in *Lawrence* clearly applied only when the sexual partners were of the same sex, it did not apply only when the persons identified as homosexual or bisexual.[177] As I have written elsewhere, the group of people who publicly identify as gay, lesbian, or bisexual is a mere subset of a larger group that has engaged in homosexual conduct at some point in their lives.[178] Heterosexual-identified people have sex in prison and jail.[179] Men and

170. *Id.* (quoting TEX. PENAL CODE ANN. § 21.06(a) (2003)). The statute defined "[d]eviate sexual intercourse" as: "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object." *Id.* (alteration in original) (quoting PENAL § 21.01(1)).

171. In the recent Ninth Circuit marriage case, Judge Berzon wrote a compelling concurrence making an analogous sex discrimination argument. Latta v. Otter, 771 F.3d 456, 480 (9th Cir. 2014) (Berzon, J., concurring) ("But for their gender, plaintiffs would be able to marry the partners of their choice."). Interestingly, her male colleagues, including Judge Reinhardt, declined to include this analysis in the court's opinion. *See id.* at 474 (majority opinion) (stating that in light of its decision to apply heightened scrutiny based on sexual orientation "we need not address the constitutional restraints the Supreme Court has long imposed on sex-role stereotyping").

172. *Lawrence*, 539 U.S. at 574-75 ("Equality 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.").

173. *Id.*

174. *See id.* at 575.

175. *See id.* at 579-85 (O'Connor, J., concurring in the judgment).

176. *See id.* at 581 ("The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction.").

177. *Cf.* Latta v. Otter, 771 F.3d 456, 482 (9th Cir. 2014) (Berzon, J., concurring) ("Notably, [the female plaintiffs who sought to marry] were not asked about their sexual orientation; [plaintiff] Vibe was told she was being excluded because of her gender and the gender of her partner.").

178. Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1340 (2011) [hereinafter Robinson, *Masculinity*]; Russell K.

footnote continued on next page

women of various races identify as straight but have secret sex with same-sex partners.[180] Heterosexual sex workers and porn stars engage in same-sex conduct for pay.[181] Thus, heterosexual people can and do sometimes have "gay" sex. Moreover, there are homosexual-identified people who are virgins or celibate.[182]

This would seem to compel a *Geduldig*-like conclusion that the Texas sodomy law did not, in fact, classify based on sexual orientation. Justice O'Connor curtly addressed the fact that the Texas law did not neatly overlap with our popular understanding of sexual orientation categories: "While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas's sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."[183] In my view, Justice O'Connor's argument is more persuasive than *Geduldig*'s reasoning. However, she did not acknowledge the tension between her analysis and that in *Geduldig*. Perhaps she deserves credit for at least addressing the classification issue.

Ten years after *Lawrence*, Justice Kennedy would write for the majority in *Windsor* and not even address the question whether the law created a sexual orientation classification, even though the parties contested it in the briefs.[184]

Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463, 1490-91 (2009) [hereinafter Robinson, *Racing*].

179. Robinson, *Masculinity*, *supra* note 178, at 1397.

180. Robinson, *Racing*, *supra* note 178, at 1490.

181. Robinson, *Masculinity, supra* note 178, at 1364-65; *see also* JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 27, 47 (1999) (discussing the fraught relationship between identity and conduct in the context of the military's Don't Ask, Don't Tell policy); Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of* Bowers v. Hardwick, 79 VA. L. REV. 1805, 1822-23 (1993) (analyzing the slippery construction of heterosexuality and homosexuality in Bowers v. Hardwick, 478 U.S. 186 (1986)).

182. *See, e.g.*, Abraham Tomo Jr., Opinion, *What's Wrong With Being a Gay Virgin?*, MUSED (Nov. 20, 2012), http://www.musedmagonline.com/2012/11/whats-wrong-with-being-a-gay-virgin (describing experience of being twenty-two-year-old black, gay virgin).

183. *See* Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in the judgment); *cf.* Christian Legal Soc'y v. Martinez, 561 U.S. 661, 689 (2010) ("Our decisions have declined to distinguish between status and conduct in this context.").

184. *See* Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243, 245 (2014) (noting that *Windsor* is "striking for, among other things, the conspicuous absence of the words 'homosexual,' 'lesbian,' or 'bisexual'"). The congressional group defending DOMA argued: "By its terms, DOMA does not classify based on a married couple's sexual orientation." Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, *supra* note 168, at 25 n.7. Windsor rejoined that the brief reflected a "highly implausible, unrealistic view of who marries whom." Brief on the Merits for Respondent Edith Schlain Windsor, *supra* note 135, at 19 n.2. *See generally* CHEMERINSKY, *supra* note 80, at 718

footnote continued on next page

Just one year before *Windsor*, Justice Kennedy wrote the lead opinion striking down the "self-care" provision of the Family and Medical Leave Act[185] and denying any connection between the provision and Congress's Section 5 power to prevent gender discrimination.[186] His opinion prompted a vigorous dissent by Justice Ginsburg, who called for overruling *Geduldig*.[187] As he did in *Windsor*, Justice Kennedy simply ignored *Geduldig*. Finally, in *Obergefell*, Justice Kennedy arguably held that the marriage laws before the Court violated due process and equal protection, without ever addressing the threshold question whether the law classified by sexual orientation.[188] Yet some gay or bisexual men marry women; some lesbian or bisexual women marry men.[189] Indeed, a group of "Same-Sex Attracted Men and Their Wives" filed an amicus brief to oppose marriage equality.[190] The brief consisted mainly of testimonials by men who reported experiencing attraction to men from an early age and in many respects conforming to a stereotype of gay identity, except that they chose to marry and have children with women and claimed that their marriages were loving and happy.[191] The brief argued that a ruling in favor of marriage equality would demean and disparage same-sex-attracted men who marry women by depicting them as ensnared in sham marriages.[192] Lest one think

("Equal protection analysis always must begin by identifying how the government is distinguishing among people.").

185. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601-54 (2014)).

186. Coleman v. Court of Appeals, 132 S. Ct. 1327, 1336 (2012) (plurality opinion).

187. *Id.* at 1345 (Ginsburg, J., dissenting).

188. Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015) ("These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

189. Moreover, some heterosexual-identified people marry a partner of the same sex. Perhaps the highest profile example of this is basketball star Brittney Griner's short-lived marriage to a fellow female player who maintained a heterosexual identification while married to Griner. *See* Mary K. Reinhart, *For Brittney Griner and Glory Johnson, a Complicated Match Made on the Hardwood*, N.Y. TIMES (May 11, 2015), http://nyti.ms/1PeQXY1 (describing "a marriage between a gay woman and a straight woman").

190. Brief of Amici Curiae Same-Sex Attracted Men and Their Wives in Support of Respondents & Affirmance at 25, *Obergefell*, 135 S. Ct. 2584 (No. 14-556), 2015 WL 1608211 (capitalization altered). *See generally* Russell K. Robinson, *Uncovering* Covering, 101 NW. U. L. REV. 1809, 1832-33 (2007) (book review) (discussing apparently gay men who marry women).

191. *See, e.g.*, Brief of Amici Curiae Same-Sex Attracted Men and Their Wives in Support of Respondents & Affirmance, *supra* note 190, at 18-19 (discussing narrative by a man who described being attracted to boys at a young age and being bullied by classmates). Most of the men did not deny a continuing attraction to men, nor did they assert that they had never engaged in a same-sex affair.

192. *See id.* at 4.

that such men (and women) are so bizarre as to be outliers, their brief cited a study by none other than the Williams Institute, the leading think tank on sexual orientation and the law, which estimated that among adults who identified as gay or lesbian and were raising children, eighteen percent had a different-sex spouse and four percent had a different-sex unmarried partner.[193] In short, Justice Kennedy's avoidance of the question of classification in these cases—while vigorously applying such gatekeeping rules in gender cases and other antidiscrimination cases[194]—is strong evidence that the rules that apply to sex and race do not necessarily govern sexual orientation. While a close correlation between an activity (such as homosexual conduct or same-sex marriage) and an identity (gay or lesbian) suffices for sexual orientation claims, *Geduldig* teaches that such a correlation does not suffice for gender claims—even when the connection is as obvious as that between gender and pregnancy.

2. Selective application of the "animus" test

The Court's application of the animus test presents a second distinction between traditional suspect/quasi-suspect classes, namely race and gender, and sexual orientation. The animus test is a variant of a test that the Court used to apply to race cases as well as in *Cleburne* and *Moreno*.[195] However, at present, the Court permits only LGBT people to prevail under this test. Haney-López characterizes the analysis in early race cases as "contextual intent" because it inspects the context and history behind a law to infer intent to discriminate in a fairly loose manner.[196] At least until *Obergefell*, this was basically the same thing as "animus" or "rational basis with bite."[197] Importantly, the Court has never named this as a distinct "test"; yet, the civil rights era cases reflect a "sustained focus on illicit purposes—not as a formal rule, but as a steady undercurrent through the Court's decisions dismantling Jim Crow."[198] Haney-López describes contextual intent as having two faces: one in which judges engage with context through evidence, including relevant social science; and

193. *Id.* at 25 (citing GARY J. GATES, LBG FAMILIES AND RELATIONSHIPS: ANALYSES OF THE 2013 NATIONAL HEALTH INTERVIEW SURVEY 6 (2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgb-families-nhis-sep-2014.pdf).

194. Justice Kennedy has written and joined opinions extending the logic of *Geduldig* and *Feeney*. *See* Ashcroft v. Iqbal, 556 U.S. 662, 676-77 (2009) (extending *Feeney* to discrimination claim by Muslim detainee); Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 271 (1993) (extending *Geduldig* to abortion protest context).

195. Haney-López, *supra* note 17, at 1797 (describing contextual intent in race cases as a method that "approached intent not as a question of the precise mental states of identified individuals but as a historical and sociological inquiry into the legitimacy of the challenged government action").

196. *Id.* at 1808-09.

197. *See infra* Part III.B.

198. Haney-López, *supra* note 17, at 1792-93 (referring to Loving v. Virginia, 388 U.S. 1 (1967), and Gomillion v. Lightfoot, 364 U.S. 339 (1960), as examples).

another in which they uncritically rely on their own intuitions.[199] The latter sometimes resulted in advancing justice, as when judges took judicial notice that Jim Crow amounted to racial oppression. But too often, simply relying on hunches curtailed the efficacy of contextual intent in race cases, for it allowed the judges—themselves typically from privileged groups—to rely on their own "common sense" regarding social relations, rather than pushing their assumptions and learning about how hierarchies operate in society.[200] Until the 1980s, the Court continued, at times, to deploy contextual intent to strike down laws that lacked overt racial classifications but burdened people of color.[201] The Court's decisions in *McCleskey v. Kemp*,[202] a race case, and *Feeney*,[203] a gender case, signaled the end of this era,[204] until *Romer* revived this legal standard. Later, my analysis of *Windsor* shows it to be a descendent of the more intuitive strand of contextual intent.[205]

I now return to *Feeney* to illustrate the Court's refusal to faithfully apply contextual intent/animus in gender cases, which contrasts with the robust work that standard does in sexual orientation cases. *Feeney* represents a strong case for inferring discriminatory intent from the context. Given that *Feeney* failed to persuade the Court that the veterans' preference statute contained a

199. *See* Haney-López, *supra* note 17, at 1822-23.

200. *Id.* (using Justice Marshall's and Justice Powell's opinions in Castaneda v. Partida, 430 U.S. 482 (1977), to illustrate the competing strands of contextual intent). *Compare Castaneda*, 430 U.S. at 503 (Marshall, J., concurring) ("Mr. Justice POWELL's assumptions about human nature, plausible as they may sound, fly in the face of a great deal of social science theory and research."), *with id.* at 515 (Powell, J., dissenting) (arguing that "rational inferences from the most basic facts in a democratic society render improbable respondent's claim of an intent to discriminate against him and other Mexican-Americans").

201. *See* Haney-López, *supra* note 17, at 1798.

202. 481 U.S. 279, 298 (1987) (requiring McCleskey to prove that "the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect").

203. *See* Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (stating that discriminatory intent "implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

204. *See* Haney-López, *supra* note 17, at 1835 ("Malice doctrine protected the state as a defendant by making intent almost impossible to prove."); *id.* at 1848 ("The animus test worked principally not to find but to deny discrimination, by justifying quick dismissals of contextual evidence of racial mistreatment."); Siegel, *supra* note 17, at 17 ("It was not until 1979, in the sex discrimination case of *Personnel Administrator v. Feeney*, that the Court moved decisively to restrict the ways that evidence of foreseeable impact could be used to prove unconstitutional purpose." (footnote omitted)). Although many scholars attribute the malice rule to *Washington v. Davis*, 426 U.S. 229 (1976), Haney-López shows that *Davis* continued to validate contextual intent, even as the Court saw little evidence of invidious intent in that case. Haney-López, *supra* note 17, at 1806-08.

205. *See infra* Part III.B.

facial gender classification, the Court declared, "[t]he dispositive question, then, is whether the appellee has shown that a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts veterans' preference legislation."[206] We might understand this as a gesture toward contextual intent. Even though Feeney had not convinced the Court that the veteran statute contained a gender classification, it was still willing to ask whether discriminatory purpose was otherwise evident.[207]

The Court acknowledged the key facts undergirding Feeney's claim. First, "[w]hen the first general veterans' preference statute was adopted in 1896, there were no women veterans."[208] In other words, the law formally forbade women to serve in the military. Even when the federal government admitted women to official military corps during World War II, a two percent quota limited female employment.[209] Further, for many years, the Massachusetts law had exempted certain categories of inferior jobs that were set aside by law for women.[210] Such facial set-asides and quotas would clearly trigger heightened scrutiny under the Court's modern gender jurisprudence. Although these gender classifications were no longer extant at the time of the *Feeney* litigation, they show the gendered roots of the veteran preference—channeling male veterans into the most esteemed and lucrative positions, while reserving subordinate jobs for women.[211] The Court brushed aside all this evidence, opining that "the history of discrimination against women in the military is not on trial in this case."[212] In other words, the Court deemed history

206. *Feeney*, 442 U.S. at 276. This formulation respects the fact that the legislature could have been motivated by a desire to help veterans *and* a stereotypical conception of women. Elsewhere in the opinion, the Court constructed a false binary, which is in tension with this more nuanced formulation. *See id.* at 275 (identifying key question as "whether this veteran preference excludes significant numbers of women from preferred state jobs because they are women or because they are nonveterans").

207. If contextual intent/animus is a test that is generally available to litigants in the absence of a suspect or quasi-suspect classification (which, to be clear, is not my argument), then one wonders why it is exceedingly difficult to find modern cases in which the Court, in the absence of a "classification," finds animus with respect to women, people of color, or people with disabilities. Cases such as *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005)—a death penalty case in which the Court found a *Batson* violation based on statistical and historical evidence of racial discrimination—are extremely rare. *See id.* at 267-68 (Breyer, J., concurring) (noting how hard it is for defendants to prevail on *Batson* claims). It is even more difficult to find such cases involving nonsuspect classes, other than LGBT people.

208. *Feeney*, 442 U.S. at 268.

209. *Id.* at 269 n.21.

210. *Id.* at 284-85 (Marshall, J., dissenting).

211. The Court downplayed this history and placed greater emphasis on the State's more recent attempts to define the category of veteran so as to include more women. *See id.* at 269 n.21 (majority opinion). These inclusive efforts, however, could not increase female representation beyond two percent. *See id.* at 269-70.

212. *Id.* at 278.

irrelevant. Only blinkered vision could permit the Court to conclude that Feeney had failed to show that "a gender-based discriminatory purpose ha[d], *at least in some measure*, shaped the Massachusetts veterans' preference legislation."[213] As telegraphed by the Court's statement about the military not being on trial, *Feeney* seems to rest ultimately on the Court's unwillingness to disturb a long-established bastion of male privilege. It noted that forty-one states and the federal government provided veterans' preferences and suggested that if such laws constituted gender discrimination, the Court would be compelled to strike them down entirely.[214] Faced with the daunting task of reordering the status quo in cases such as *Feeney* and *McCleskey*, the Court simply chose not to see the discrimination in front of it.[215] This Article calls for the Court to account for its blindness to sex, race, class, and disability discrimination even as the Court perceptively identifies and invalidates sexual orientation discrimination.[216] Subpart B further explores the disparate application of animus by comparing sexual orientation and disability cases.

3. Remedying discrimination

A final advantage that sexual orientation enjoys is that *Windsor*'s animus test would seem to grant the state greater leeway to remedy sexual orientation discrimination than the Court permits regarding race and gender discrimination. The Court is currently dealing with what some might call "first generation" sexual orientation discrimination.[217] As political winds shift and the most overt legal barriers fall, it remains unclear how tenacious the Court will be in rooting out subtler forms of bias and how much flexibility it will grant the government to remedy past discrimination or promote LGBT inclusion.[218] For instance, after many years of shunning LGBT people, what policies may the military adopt to restore LGBT officers who were dismissed because of their sexual orientation or people who failed to apply because of the discriminatory policy? To take another example, the Defense Department

213. *Id.* at 276 (emphasis added).

214. *Id.* at 261 n.7, 276.

215. Haney-López, *supra* note 17, at 1784 (describing the Court as "intentionally blind to racial context, including the persistence of racial discrimination against non-Whites").

216. For an interesting discussion of whether blindness can be understood as a neutral trait, see Elizabeth F. Emens, *What's Left in Her Wake: In Honor of Adrienne Asch*, 44 HASTINGS CTR. REP., Mar.-Apr. 2014, at 19, 20.

217. *Cf.* Sturm, *supra* note 137, at 468 (distinguishing between overt discrimination and subtle discrimination).

218. As Reva Siegel and others have shown, the Court has demonstrated little interest in tackling "second generation" race and sex subordination. *See, e.g.*, Siegel, *supra* note 91, at 1140-42. Rather, the Court's establishment of formal equality creates a patina of neutrality that legitimates ongoing systemic bias. Siegel calls this process "preservation-through-transformation." *Id.* at 1113 (quoting Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178 (1996)).

announced in 2013 that it would grant up to ten days leave for LGBT service members who resided in states that did not permit same-sex marriage to travel to another state to get married.[219]

A Republican Senator immediately denounced this policy as illegal "preferential treatment."[220] In addition, some colleges are beginning to consider special admissions programs for LGBT students.[221] To the extent that state schools adopt such policies, will they be subject to heightened equal protection review? Such "second generation" questions are just around the bend. Although the Court has resolved these questions in a manner that strongly disfavors race-conscious remedial policies and gives sex policies more latitude,[222] *Windsor* leaves open the standard that applies to sexual orientation. The most generous interpretation of *Windsor* would permit programs that favor LGBT people unless they constituted animus against non-LGBT people, a standard that would seem hard to meet.[223] Consider how radically different the law would be if that standard applied to race claims. What if Abigail Fisher had to establish not that Texas applied a racial classification, but that Texas

219. *Pentagon Expands Benefits for Same-Sex Military Couples*, MSNBC: THE MADDOWBLOG (Oct. 7, 2013, 6:18 PM), http://on.msnbc.com/1m2shFX.

220. *Id.* (quoting Senator James Inhofe). Opponents of racial equality have long tried to reframe policies designed to create equal access as unjust "special" treatment and "preferences." *See, e.g.*, Khiara M. Bridges, *Class-Based Affirmative Action, or The Lies that We Tell About the Insignificance of Race*, 96 B.U. L. REV. (forthcoming Jan. 2016) (on file with author); Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1140, 1199 (2008) (noting that affirmative action is widely regarded as conferring "preferences" and arguing that "anti-preference" initiatives are in fact racial preferences). The LGBT community also has been subject to this charge, although so far not as pervasively as people of color. *See, e.g.*, StraightGazette, *Gay Rights Special Rights Part 1*, YOUTUBE (July 19, 2009), https://youtu.be/XTvqla_YK5I (invoking Martin Luther King, Jr., to claim that white gays are wrongly appropriating civil rights). However, antigay forces will likely reconsolidate their attacks on LGBT rights under the rubric of "special rights."

221. Tanya Caldwell, *More College Students May Be Asked to Declare Sexual Orientation*, N.Y. TIMES: THE CHOICE (Mar. 14, 2012, 5:48 AM), http://nyti.ms/19ybx1p (stating that Elmhurst College in Illinois asks applicants to disclose their sexual orientation in admissions applications, and those who self-identify as LGBT are eligible for a diversity scholarship); *Incoming UC Students May Be Asked to Declare Their Sexual Orientation*, CBS L.A. (Mar. 9, 2012, 10:40 PM), http://losangeles.cbslocal.com/2012/03/09/incoming-uc-students-may-be-asked-to-declare-their-sexual-orientation (discussing University of California's tentative steps toward asking new students to disclose their sexual orientation).

222. Women's rights advocates have long recognized the double-edged nature of strict scrutiny and debated its pros and cons. CHEMERINSKY, *supra* note 80, at 879-80; SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 127-28 (2011).

223. A student note published before *Windsor* anticipated this issue. Note, *The Benefits of Unequal Protection*, 126 HARV. L. REV. 1348, 1365-66 (2013) (arguing that the animus standard would permit a "gross-up," an employment policy intended to compensate same-sex couples for federal tax discrimination).

harbored animus toward white people? The claim is absurd on its face. Modern students of constitutional law might be surprised to learn that as late as 1977, a majority of Justices—including no less than then-Justice Rehnquist—voted to uphold a racial classification favoring blacks because it was not based on animus toward whites.[224] This example illuminates the chasm that seemingly separates race claims from sexual orientation claims. In cases such as *Fisher*, white claimants can trigger the most demanding constitutional scrutiny simply by demonstrating that the law contains a racial classification. At that point, the question of animus or discriminatory purpose—which was dispositive in 1977—may drop out of the analysis. Even if the university acted in good faith, its race-conscious policy will fail unless it can convince the Court that it is narrowly tailored, which requires a rigorous exploration of race-neutral alternatives.[225] By contrast, *Windsor*'s animus test seems to make everything turn on the State's motive. Just as the Court in *Windsor* and *Romer* did not tarry by closely analyzing the connection between the State's asserted interests and the challenged policies once it discerned animus,[226] in a remedial sexual orientation case, the Court might simply determine whether the state acted in good faith.[227]

B. What Exactly Is Animus?

A central ambiguity concerning *Windsor*—and the future of LGBT rights—is the meaning of animus. Justice Kennedy's opinions in sexual orientation and disability cases allude to at least two competing interpretations of animus, which I will call the "thick" and "thin" constructions. This Subpart delineates the two versions of animus and explains how *Windsor* rendered LGBT rights indeterminate by failing explicitly to adopt the thicker, more powerful conception.[228] A thin version of animus forbids only active hostility toward

224. Haney-López, *supra* note 17, at 1819-20 (discussing United Jewish Orgs. v. Carey, 430 U.S. 144 (1977)).

225. *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2420 (2013).

226. *See infra* text accompanying notes 242-44.

227. Then again, good faith may not be enough, since *Obergefell* found an equal protection violation even in the face of "good faith," "reasonable" opposition to same-sex marriage. *Cf.* Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015) ("Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world."). That case's apparent loosening of the animus test, discussed below, increases uncertainty as to how animus would figure in a remedial case. For an extensive analysis of the various potential judicial frameworks for analyzing gay affirmative action, see Peter Nicolas, *Gayffirmative Action: The Constitutionality of Sexual Orientation-Based Affirmative Action Policies*, 92 WASH. U. L. REV. 733, 791 (2015).

228. Toni Massaro has astutely catalogued the various pitfalls of gay rights arguments and used a different construction of "thick" and "thin." Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 47-48, 54 (1996) ("Every litigation strategy that gay

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LGBT people. We might think of this as a sexual orientation analogue to the racism embodied in Jim Crow discrimination. A more robust antidiscrimination principle (the thick version of animus) opposes antigay stereotyping and implicit and structural biases against LGBT sexuality and identity. *Windsor* oscillates between a "thick" and "thin" version of animus, which creates uncertainty as to precisely what the Court perceives as discrimination in this context.

Although the Court has never defined animus, *Windsor* and *Romer* at times use it interchangeably with the term "bare desire to harm," which the Court borrowed from *Moreno* and *Cleburne*.[229] A construction of animus that limits it to a bare desire to harm constitutes the thin version. For instance, the *Moreno* Court opined:

> [I]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest. As a result, "[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify [the statutory provision]."[230]

Another way of thinking about thick and thin conceptions of bias might categorize entire opinions as either thick or thin. From this vantage, an opinion such as Justice Ginsburg's majority opinion in *United States v. Virginia*[231] would constitute an exemplar of the thick approach. Such opinions provide a serious engagement with the social construction of hierarchy, relying not simply on intuition, but also evidence from history and sometimes social science. By contrast, some of Justice Kennedy's sexual orientation opinions, particularly *Romer* and *Windsor*, seem more interested in announcing conclusions than making a sustained effort to explain why discrimination is morally wrong. Such thin opinions invoke the concept of a bare desire to harm, rather than acknowledging the complexity of discrimination, and rely heavily on personal intuition.

The above passage from *Moreno* suggests that a law based on naked hostility violates rational basis review, but a law based on a mix of hostile motives and legitimate state interests presents a different question. Justice Kennedy's *Windsor* opinion can be read to reflect the emerging consensus that

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advocates have deployed or might deploy leads to a double-bind or boomerang that may constrain gay people more than it liberates them.").

229. *See* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)); Romer v. Evans, 517 U.S. 620, 634-35 (1996) (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446-47 (1985)).

230. *Moreno*, 413 U.S. at 534-35 (second and third alterations in original) (quoting Moreno v. U.S. Dep't of Agric., 345 F. Supp. 310, 314 n.11 (D.D.C. 1972)).

231. 518 U.S. 515 (1996).

opposition to same-sex marriage is equivalent to hatred of LGBT people.[232] In California, for example, the opponents of Proposition 8, an initiative to ban same-sex marriage, brandished the slogan "N0H8."[233] If all opposition to same-sex marriage boils down to hatred toward LGBT people, then *Windsor* may seem like a narrow and unremarkable holding. Obviously the states can't pass laws based solely on hatred, one might argue, irrespective of the group's identity. Under this view, the Court does not privilege LGBT people as compared to people with disabilities, women, or people of color. It extends the same basic prohibition against hate-based laws to all groups.

This argument, however, requires overlooking some inconvenient facts and simplifies opposition to same-sex marriage. As recently as 2012, the vast majority of leading officials in the Democratic Party opposed same-sex marriage, including President Barack Obama, former President Bill Clinton, Secretary of State Hillary Clinton, and Senate Majority Leader Harry Reid.[234] Such leaders made strenuous efforts to support LGBT rights, including opposing Proposition 8,[235] dismantling the Don't Ask, Don't Tell military policy,[236] voting in favor of the Employment Non-Discrimination Act (ENDA),[237] and refusing to defend DOMA in court.[238] Yet they drew the line at

232. *See, e.g.*, Ben-Asher, *supra* note 184, at 268 ("If in *Bowers* the legal homosexual was the morally condemned character, in *Windsor* the morally condemned character is the one who does not support same-sex marriage."); Adam Liptak, *A Steady Path to Supreme Court as Gay Marriage Gains Momentum in States*, N.Y. TIMES (Feb. 14, 2014), http://nyti.ms/1f2Lfo4 (quoting Andrew Koppelman's comment that "[i]t is becoming increasingly clear to judges that if they rule against same-sex marriage their grandchildren will regard them as bigots").

233. NOH8 CAMPAIGN, http://www.noh8campaign.com (last visited Jan. 1, 2016) (featuring celebrities with "NOH8" facepaint).

234. *See* Robinson, *supra* note 31, at 1067-68 (discussing President Obama's evolution on same-sex marriage); Peter Baker, *Now in Defense of Gay Marriage, Bill Clinton*, N.Y. TIMES (Mar. 26, 2013), http://nyti.ms/XCGbeI; Paul Kengor, Opinion, *Hillary Clinton's Evolution on Gay Marriage: Column*, USA TODAY (Mar. 20, 2013, 5:55 PM EDT), http://www.usatoday.com/story/opinion/2013/03/20/hillary-clinton-gay-marriage/2001229 (describing Hillary Clinton's shifting positions after DOMA); Matt Canham, *Harry Reid Says He Supports Gay Marriage*, SALT LAKE TRIB. (May 10, 2012, 9:16 PM), http://www.sltrib.com/sltrib/politics/54089953-90/church-gay-lds-marriage.html.csp (noting that Senator Reid had said he agreed with the Mormon Church on same-sex marriage but changed his position after President Obama's May 2012 announcement). President Clinton signed DOMA, and then-First Lady Clinton also supported it. President Clinton endorsed same-sex marriage in 2009; Mrs. Clinton did not do so until 2013. *See* Baker, *supra*; Kengor, *supra*.

235. *See* John Wildermuth, *Obama Opposes Proposed Ban on Gay Marriage*, SFGATE (July 2, 2008, 4:00 AM), http://www.sfgate.com/news/article/Obama-opposes-proposed-ban-on-gay-marriage-3278328.php. Proposition 8 amended the California state constitution to eliminate the right of same-sex couples to marry. *See id.*

236. *See* Elisabeth Bumiller, *Obama Ends 'Don't Ask, Don't Tell' Policy*, N.Y. TIMES (July 22, 2011), http://nyti.ms/1RYrcZr.

237. *See* Jeremy W. Peters, *Senate Approves Ban on Antigay Bias in Workplace*, N.Y. TIMES (Nov. 7, 2013), http://nyti.ms/1epwBYY; Amanda Terkel, *Harry Reid Opens Up About*

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endorsing same-sex marriage.[239] Did they hate LGBT people? Most people would describe the muddle of discomfort, religious concern, and likely political calculation as something more complex than a "bare desire to harm." Likewise, many LGBT people have family members and friends who genuinely love them even as they cannot bring themselves to support same-sex marriage because of devout religious views.[240] The label of animus does not illuminate the turbulent emotions that bedevil some such people. The actual arguments made by opponents of same-sex marriage in court—although more troubling—also tended to involve a mix of arguably legitimate and illegitimate concerns and increasingly eschewed blatant hatred. For example, the backers of Proposition 8 often emphasized concern about traditional gender roles and the protection of religious liberty, rather than simply and overtly demonizing LGBT people.[241] One could of course argue that the concerns about religion and traditional conceptions of the family are a pretext for raw hatred toward LGBT people, but this would seem to beg the constitutional question.

The conventional equal protection model designates a particular group a suspect or quasi-suspect class in order to signal that judges will take a closer look at laws that formally classify based on the suspect trait to make sure that the asserted state interests are not a cover for invidious motives.[242] *Windsor* and *Romer* circumvent this analysis. The Court glides over the steps of deeming the group to be suspect and parsing the asserted state interests and cuts right to the chase, deeming the law to arise from animus. And in so doing, Justice Kennedy's opinions refuse to "bare" or reveal the very state interests that they

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Being Mormon and Supporting LGBT Rights: 'The Church Is Changing,' HUFFINGTON POST (Nov. 8, 2013, 4:45 PM EST), http://www.huffingtonpost.com/2013/11/08/harry-reid-mormon_n_4240125.html (discussing Senator Reid's leadership regarding the Senate vote in favor of ENDA and his critique of the Mormon church's support of Proposition 8). ENDA has not yet successfully become law.

238. *See* Peter Baker, *For Obama, Tricky Balancing Act in Enforcing Defense of Marriage Act*, N.Y. TIMES (Mar. 28, 2013), http://nyti.ms/ZrQul3.

239. *See* Amy Chozick, *Hillary Clinton's Gay Rights Evolution*, N.Y. TIMES (Aug. 29, 2014), http://nyti.ms/1qOutLQ (noting that in 2008, neither Obama nor Hillary Clinton supported same-sex marriage).

240. Massaro, *supra* note 228, at 107 ("Even family members—whose love for a gay or lesbian family member presumably creates far stronger bonds than those existing between any impersonal citizens—often find it difficult to tolerate, let alone accept their family member's homosexuality.").

241. Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 366-69 (2009). As I discuss further below, the Court's jurisprudence is ambivalent as to whether a state can encourage particular gender roles and whether civil marriage is a strictly secular creature. *See supra* text accompanying notes 247-48, 309.

242. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that judges should apply heightened scrutiny when laws target "discrete and insular minorities").

attempt to repudiate. They fleetingly note the existence of the asserted state interests and fail to recognize how invidious motives are often interwoven with more legitimate interests. It is telling that, although *Windsor* unleashed a tidal wave of support for same-sex marriage among lower court judges, most subsequent decisions refused to embrace its animus argument.[243] A fuller, more transparent examination of potential animus might have produced greater support among lower courts.[244]

Justice Kennedy's mobilization of the congressional record in *Windsor* failed to support the thin construction of animus, that is, the view that DOMA blatantly rested on a bare desire to harm same-sex couples, with no reference to independent justifications. The following paragraph provides the main evidence for Justice Kennedy's conclusion that DOMA "seeks to injure the very class New York seeks to protect":

> The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . . H.R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage." 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." The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.[245]

We can distill this paragraph into three propositions that are said to prove the animus conclusion: (1) Congress sought to "defend the institution of traditional heterosexual marriage," as indicated by the statute's title; (2) Congress conceived of same-sex marriage as "a truly radical proposal that would fundamentally alter the institution of marriage"; and (3) Congress intended to express moral disapproval of homosexuality, based on Judeo-Christian beliefs.

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243. *See, e.g.*, Kitchen v. Herbert, 755 F.3d 1193, 1229 (10th Cir. 2014) ("Our conclusion that plaintiffs possess a fundamental right to marry and to have their marriages recognized in no way impugns the integrity or the good-faith beliefs of those who supported Amendment 3."); *see also id.* ("We in no way endorse [the] view [that opponents of same-sex marriage are intolerant] and actively discourage any such reading of today's opinion."); Carpenter, *supra* note 17, at 184 n.3 (citing district court cases that similarly held state marriage laws "at least in part unconstitutional" and noting that "none rested squarely on animus grounds").

244. Dale Carpenter's article supplements and defends *Windsor*'s animus argument, while interpolating *Carolene Products*. *See* Carpenter, *supra* note 17, at 191 ("*Windsor* . . . adds both meaning and modest method to the more formal and even mechanical footnote 4 approach of *Carolene Products*.").

245. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (alteration in original) (citations omitted) (quoting H.R. REP. NO. 104-664, at 12-13 (1996)).

Justice Kennedy treats DOMA as if its title were the "Demean Gay Marriage Act," but the statute, on its face, valorizes traditional marriage. Although the title does not expressly refer to same-sex marriage, it does imply that same-sex marriage represents a threat to traditional marriage. Justice Kennedy should have explained how a preference for heterosexuality inevitably disadvantages homosexuals and bisexuals; such an explanation would have undermined the still-extant practice of passing laws that prohibit the promotion of homosexuality.[246] Moreover, he could have traced the adoration of traditional marriage to a legal preference for rigid gender roles, which the Court has repudiated at times in its equal protection jurisprudence.[247] Justice Kennedy's omission of any discussion of the gendered nature of marriage may reflect his own ambivalence about traditional gender roles.[248] In Part V, I demonstrate how Justice Kennedy's opinions in gender and abortion cases have increasingly rested on stereotypic assumptions.

The second and related proposition is that Congress feared that same-sex marriage would be "radical" and destabilize marriage as it has traditionally been practiced. DOMA was thought to "defend" against these deleterious outcomes. Yet neither DOMA, on its face, nor Justice Kennedy bothered to name the perceived harms of same-sex marriage. As such, one must read between the lines. Justice Kennedy should have unmasked this concern as resting on dual stereotypes, namely that LGBT people are inherent gender benders and cannot or do not adopt gendered roles in their relationships,[249] and that gay men in particular are promiscuous and thus unfit for marriage.[250]

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246. William Eskridge has written about so-called "No Promo Homo" laws. William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1329 (2000).

247. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724-25 (1982). Other cases, notably including some written by Justice Kennedy, have revived stereotypic gender roles. *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 89-90 (2001) (O'Connor, J., dissenting) ("The majority, however, rather than confronting the stereotypical notion that mothers must care for these children and fathers may ignore them, quietly condones the 'very stereotype the law condemns.'" (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 138 (1994))). *But see id.* at 68 (majority opinion) (arguing that its decision is based on biological differences rather than stereotypic gender roles).

248. *See* David S. Cohen, *Justice Kennedy's Gendered World*, 59 S.C. L. REV. 673, 688-89 (2008) (arguing that "[t]hroughout his substantive opinions and votes relating to sex discrimination is the theme that, in cases addressing the parent-child relationship, Justice Kennedy adheres to a very traditional and paternalistic notion of gender roles," but that his votes in sex cases that do not concern the parent-child relationship tend to reject gender stereotypes).

249. Hence, some opponents of same-sex marriage refer to it as "genderless marriage." *See, e.g.*, Ruth Inst., *Gay Marriage Means Genderless Marriage: Part 7 of the Libertarian Case for Man/Woman Marriage*, MARRIAGE ECOSYSTEM, http://www.marriage-ecosystem.org/genderlessmarriage.html (last visited Jan. 1, 2016).

250. *See, e.g.*, Russell K. Robinson, *Diverging Identities: Gender Differences and LGBT Rights*, *in* AFTER MARRIAGE EQUALITY: THE FUTURE OF LGBT RIGHTS 212, 213-17 (Carlos A. Ball ed., 2016) (discussing differences in sexual behavior between same-sex male and female

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Finally, in suggesting that religious opposition to same-sex marriage cannot confer a legitimate state interest, Justice Kennedy surprisingly failed to cite his own opinion in *Lawrence*, which broke new ground in declaring that moral justifications cannot justify a state's invasion of sexual liberty.[251] *Windsor* extends this principle from the criminal to the civil context and from due process to equal protection, but only implicitly.[252] Applying this principle to marriage is particularly significant because the Court itself had referred to marriage as a religious institution, conflating the civil and sacred functions of the institution.[253] However, citing *Lawrence* might have required Justice Kennedy to explain the relationship between the animus principle and *Lawrence*'s refusal to permit the state to regulate sexuality based only on moral judgment. Does the Court regard moral judgment and animus as one and the same? Certainly, many religious people would disagree with that equation. For example, one could disapprove of a person who drinks too much, but that does not mean that one hates her. Such people might genuinely feel love for a sibling whom they regard as a sinner and believe that she will be happier if she abandons the behavior that they regard as sinful. My central point here is that the congressional excerpts highlighted by Justice Kennedy fall short of "bare" antigay invective. Illegitimate purposes course through the congressional rationales, but they do not always lie at the surface. It takes some explaining to show why purportedly neutral or at least non-hateful rationales are problematic. Thus, although some language in *Windsor* is consistent with the thin construction of animus (naked hatred), Justice Kennedy condemns a broader set of motives: preferring or defending traditional marriage, religious and moral judgments that consider homosexuality and same-sex marriage sinful, and the assumption that LGBT people will disrupt marital norms. One

couples and their implications for LGBT rights); *see also* Massaro, *supra* note 228, at 102-03, 106; Robinson, *Masculinity*, *supra* note 178, at 1341-43.

251. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 571 (2003) ("Our obligation is to define the liberty of all, not to mandate our own moral code." (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992))).

252. Although the *Windsor* majority opinion speaks of liberty and equality, this appears to arise from the lack of an equal protection clause in the Fifth Amendment. Because the Fourteenth Amendment Equal Protection Clause applies only to the states, the Court has recognized an equality component of the Fifth Amendment Due Process Clause. *See* Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954). Thus, the Court's equality analysis in *Windsor* had to be grounded in the "liberty" of due process. Ultimately, given its resemblance to *Romer*, I read *Windsor* as an equal protection opinion.

253. *See infra* note 308. The *Obergefell* majority opinion also discussed marriage as serving a spiritual function for some same-sex couples and vaguely asserted that states must respect both religious liberty and same-sex marriage. Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015); *see also id.* at 2599 ("The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation.").

could thus read *Windsor* as adopting the thick version of animus, even though Justice Kennedy failed to say so clearly.[254] *Obergefell*'s equality analysis also toggles between thin and thick versions of animus. As a whole, however, it more clearly embraces a thick version of animus than *Windsor* because it counterbalances language that leans toward the thin version with a clear disavowal of the claim that opponents of same-sex marriage are bigots. Justice Kennedy even goes so far as to say that people can oppose same-sex marriage in "good faith" because of their conceptions of gender roles and their religious beliefs.[255] Moreover, he describes such people as "reasonable and sincere."[256] *Obergefell* thus breaks new ground in acknowledging that prejudice can exist even when a law is not based on hatred.

Justice Kennedy could have cited his concurring opinion in *Board of Trustees of the University of Alabama v. Garrett*,[257] a disability case, to flesh out this thick construction of animus. At the same time, a close analysis of *Garrett* reinforces my argument that the Court applies more generous standards to sexual orientation cases than disability and other equality cases. As a reminder, *Garrett* presented the question whether Congress could use its power under Section 5 of the Fourteenth Amendment to abrogate the states' sovereign immunity and subject them to damages suits under the ADA.[258] Although many scholars had read *Cleburne*, an early disability case, to apply more than minimum rationality review,[259] the *Garrett* Court recast it as a routine case declining to scrutinize government action burdening people with disabilities.[260] Justice Kennedy wrote separately to express greater concern for

254. It is puzzling that Justice Kennedy passed up more inflammatory comments in the congressional record in favor of the rather ambivalent excerpts quoted above. *See* 142 CONG. REC. 17,070 (1996) (statement of Rep. Barr) ("The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit."); Carpenter, *supra* note 17, at 262-75 (recounting additional examples of hostile rhetoric from the legislative record). Then again, in race cases, the Court has long displayed an ambivalent attitude about the centrality of intent. *See* Haney-López, *supra* note 17, at 1857 & n.354 ("The Justices who called for direct proof of malicious intent also rejected its basic method, sometimes from one paragraph to the next."); *see also id.* at 1784 ("Colorblindness denies that the state's purposes can be discerned; intent doctrine demands proof of malicious purpose."). However, Justice Kennedy's refusal to mine the record for the most hateful comments may have quite consciously gestured toward a thicker conception of animus.

255. *Obergefell*, 135 S. Ct. at 2594 ("Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.").

256. *Id.*

257. 531 U.S. 356 (2001).

258. *Id.* at 360-64.

259. *See supra* note 108.

260. *See supra* text accompanying notes 107-17.

the injuries that people with disabilities suffer. In so doing, he acknowledged that prejudice extends beyond bare hatred:

> Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves. Quite apart from any historical documentation, knowledge of our own human instincts teaches that persons who find it difficult to perform routine functions by reason of some mental or physical impairment might at first seem unsettling to us, unless we are guided by the better angels of our nature. There can be little doubt, then, that persons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will.[261]

He thus agreed with Justice Breyer, who argued in dissent that *Cleburne* "established that not only discrimination against persons with disabilities that rests upon 'a bare . . . desire to harm a politically unpopular group' violates the Fourteenth Amendment, but also discrimination that rests solely upon 'negative attitude[s],' 'fea[r],' or 'irrational prejudice' . . . is unjustified discrimination in *Cleburne*'s terms."[262] For example, Justice Breyer pointed to state agencies that refused to hire people who had recovered from cancer because of the misguided belief that "cancer is contagious."[263] Justice Kennedy nonetheless parted company with Justice Breyer and a thicker construction of disability discrimination through two moves. First, he joined the "hardhearted"[264] majority opinion, rather than merely concurring in the judgment. Chief Justice Rehnquist's majority opinion forthrightly rejected Justice Breyer's conception of disability discrimination, stating:

> Although such biases [negative attitudes and fear] may often accompany irrational (and therefore unconstitutional) discrimination, their presence alone does not a constitutional violation make. As we noted in *Cleburne*: "[M]ere negative attitudes, or fear, *unsubstantiated by factors which are properly cognizable* in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently . . . ." This language, read in context, simply states the unremarkable and widely acknowledged tenet of this Court's equal protection jurisprudence that state action subject to rational-basis scrutiny does not violate

261. *Garrett*, 531 U.S. at 374-75 (Kennedy, J., concurring).

262. *Id.* at 381 (Breyer, J., dissenting) (first, second, and third alterations in original) (citations omitted).

263. *Id.* (quoting *The Americans with Disabilities Act of 1989: Joint Hearing on H.R. 2273 Before the H. Subcomms. on Emp't Opportunities & Select Educ. of the Comm. on Educ. & Labor*, 101st Cong. (1989) (statement of Arlene B. Mayerson, Directing Attorney, Disability Rights Education and Defense Fund), *REPRINTED IN* 2 H. COMM. ON EDUC. & LABOR, 101ST CONG., LEGISLATIVE HISTORY OF PUBLIC LAW 101-336: THE AMERICANS WITH DISABILITIES ACT 1620 (Comm. Print 1990)).

264. *Id.* at 367-68 (majority opinion).

> the Fourteenth Amendment when it "rationally furthers the purpose identified by the State."[265]

The *Garrett* majority (which included Justice Kennedy) thus suggested that illegitimate motives (hatred, stereotypes, or fear) do not inevitably infect government decisionmaking; rather, under at least some circumstances, the Court may simply set aside illegitimate motives and uphold the law based on "independent" and legitimate interests.[266] *Obergefell* and *Windsor*, by contrast, never consider this possibility of mixed motives. Second, Justice Kennedy's sympathy for people with disabilities apparently met a stopping point when it intersected with state sovereignty. He refused to assume that states "embody the misconceived or malicious perceptions of some of their citizens."[267] He implicitly rejected the roughly 300 examples of evidence of disability discrimination in Justice Breyer's appendix because no court had scrutinized the evidence.[268] And he demanded significant evidence of judicial findings of disability discrimination by the states, ignoring the likelihood that most lower courts had obediently applied *Cleburne*'s command to apply the minimum rationality test.[269] Justice Kennedy thus joined the majority in announcing new procedural prerequisites for Congress to exercise its Section 5 power and then applying them retroactively to the ADA.[270] Further, one can read the creation of these procedural obstacles as reflecting a judgment on the seriousness of disability discrimination. Chief Justice Rehnquist proclaimed that states "could quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled" without violating equal protection.[271] For Justice Kennedy and the others in the majority, eradicating disability discrimination seemed to rank lower than protecting states from federal lawsuits.[272] Ultimately, *Garrett* is informative

265. *Id.* at 367 (second and third alterations in original) (citation omitted) (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976) (per curiam)).

266. This description is in tension with the articulation of the relevant standard in other equal protection cases. *See, e.g.*, Pers. Adm'r v. Feeney, 442 U.S. 256, 276 (1979).

267. *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring).

268. *See id.* at 375-76 (arguing that "confirming judicial documentation" of the states discriminating against disabled persons "does not exist").

269. *See id.*

270. *See id.* at 380 (Breyer, J., dissenting) ("[W]e have never required the sort of extensive investigation of each piece of evidence that the Court appears to contemplate.").

271. *Id.* at 367-68 (majority opinion); *see also id.* at 370 ("'[A]dverse, disparate treatment' often does not amount to a constitutional violation where rational-basis scrutiny applies.").

272. *Cf. id.* at 376 (Kennedy, J., concurring) ("That there is a new awareness, a new consciousness, a new commitment to better treatment of those disadvantaged by mental or physical impairments does not establish that an absence of state statutory correctives was a constitutional violation."). The 1993 decision in *Heller v. Doe*, 509 U.S. 312 (1993), was a harbinger of *Cleburne*'s demise. The case involved an equal protection challenge to a Kentucky statutory scheme that established different rules for civil commitment of the "mentally retarded" and the mentally ill, and Justice Kennedy

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because Justice Kennedy recognized a thicker, more nuanced understanding of disability discrimination, unlike *Windsor*'s thinner and incomplete depiction of sexual orientation discrimination. However, Justice Kennedy prohibited sexual orientation discrimination in *Windsor* and *Obergefell*, while permitting the states to discriminate in *Garrett*.

The foregoing used an analysis of doctrine to reveal competing definitions of animus and to suggest that the Court applies different conceptions to different groups, including LGBT people in *Obergefell* and *Windsor*, women in *Feeney*, and people with disabilities in *Garrett*. I want to step back to acknowledge that some readers may nonetheless instinctively consider the disparate legal tests and outcomes as legitimate and consistent with common sense. As Toni Massaro wrote not long after the Court decided *Romer*, "[j]udicial rulings on any constitutional margin . . . are driven less by internal case law logic than by the vagaries of shifting judicial composition and external forces such as, for lack of a better term, our national 'mood.'"[273] Hence, we might understand Justice Kennedy's take on equal protection as emerging from and reflecting a cultural consensus—at least among liberals and libertarians—that we have secured racial justice and entered a postracial era in which LGBT equality represents the last civil rights battle.[274] For example, a skeptic might say that "gays remain the subject of hateful attacks in mainstream America, unlike blacks" or that "gays are fighting for basic protections, such as civil rights laws that ban employment discrimination and the right to marry, which blacks have enjoyed for decades." My companion article, *Marriage Equality and Postracialism*, provides a fuller critique of this view.[275] But for present purposes, I offer a few concise responses.

First, such perceptions tend to measure inequality primarily by formal legal distinctions rather than material realities. Empirical markers of inequality, including wealth, health, and incarceration disparities, complicate the popular view that racial prejudice is waning while sexual orientation

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wrote the majority opinion upholding the scheme. *Id.* at 314. Justice Souter, in dissent, accused Justice Kennedy of diluting *Cleburne*'s protections and ignoring the law's reliance on stereotypes. *Id.* at 337, 345 n.6 (Souter, J., dissenting). The Court's recent decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), extends the theme of *Garrett* to race—creating new procedural demands and elevating the interests of the states over blacks' and Latinos' right to vote. *See Shelby Cty.*, 133 S. Ct. at 2630-31. If Congress passes ENDA, which would ban sexual orientation discrimination in employment and likely subject states to lawsuits, the Court may have to confront the tension between eradicating sexual orientation discrimination and state sovereignty. Justice Kennedy, who is at the vanguard of protecting both states and LGBT people, may very well cast the pivotal vote.

273. Massaro, *supra* note 228, at 47.

274. *See* Robinson, *supra* note 31, at 1071 (discussing views of Andrew Sullivan and Dan Savage).

275. *See id.* at 1045-58.

discrimination is still prevalent.[276] The lens of formal equality can prevent us from seeing very real patterns of inequality. Second, there are racial disparities in the awareness of racial discrimination because of a phenomenon that I have described as "perceptual segregation."[277] This concept holds that blacks and whites are differentially situated in terms of their interest in learning about racial discrimination and access to informational networks that disseminate evidence of discrimination. Thus, whites are less likely to learn about incidents in which, for example, a white teacher told a black male student "[w]e do not need another black president,"[278] students brandished nooses on college campuses,[279] whites wore blackface and embodied black stereotypes,[280] or a string of recent cases in which white people killed black people seeking help.[281] To the extent that whites learn of such incidents, they may be more likely than blacks to dismiss them as weak evidence of racism because, for example, they were not intended to harm or do not reflect the views of "mainstream" whites, who are perceived as not racist.[282] In addition, whites

276. *See* Bridges, *supra* note 220 (manuscript at 15-16); Devon W. Carbado, *The Legalization of Racial Profiling: Setting the Stage for Police Violence* 104 GEO. L.J. (forthcoming 2016) (manuscript at 4-6) (on file with author); Robinson, *supra* note 31, at 1055-56.

277. Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1098 (2008).

278. Michael D. Clark, *Ohio Teacher Suspended Indefinitely for Racist Comment*, USA TODAY (Dec. 30, 2013, 4:29 PM EST), http://www.usatoday.com/story/news/nation/2013/12/30/teacher-racism-suspension/4251775.

279. *See, e.g.*, *Nooses Found on the Campus of the University of West Florida*, J. BLACKS HIGHER EDUC. (Apr. 20, 2012), http://www.jbhe.com/2012/04/nooses-found-on-the-campus-of-the-university-of-west-florida; *Student Admits Hanging Noose in Campus Library*, CNN (Feb. 26, 2010, 11:50 PM EST), http://www.cnn.com/2010/US/02/26/california.noose.

280. *See, e.g.*, Kat Chow, *Halloween and Blackface: Same Story, Different Year*, NPR: CODE SWITCH (Oct. 31, 2013, 11:54 AM ET), http://www.npr.org/blogs/codeswitch/2013/10/31/241884986/halloween-and-blackface-same-story-different-year (recounting several incidents).

281. In Fall 2013, a police officer shot Jonathan Ferrell—a twenty-four-year-old black college student—ten times after Ferrell crashed his car and approached a nearby white homeowner for help. *See* Mitch Weiss & Jeffrey Collins, *Jonathan Ferrell, Unarmed Man Killed in North Carolina, Was Shot 10 Times by Officer: Police*, HUFFINGTON POST (Nov. 16, 2013, 5:12 AM EST), http://www.huffingtonpost.com/2013/09/16/jonathan-ferrell-shot_n_3937175.html. A few weeks later, Renisha McBride, a nineteen-year-old black woman in Detroit, also crashed her car and approached a white homeowner, who shot her in the face. *See* Jelani Cobb, *The Killing of Renisha McBride*, NEW YORKER (Nov. 16, 2013), http://www.newyorker.com/news/news-desk/the-killing-of-renisha-mcbride. These incidents followed the racially charged George Zimmerman trial, which culminated in an acquittal. Zimmerman, who is biracial (white and Latino), followed and killed Trayvon Martin, an unarmed black teen walking through his neighborhood, whom Zimmerman perceived as a criminal. During the trial, the judge encouraged the lawyers to avoid mentioning the case's racial dimensions, and they generally complied with this order. Lisa Bloom, Opinion, *Zimmerman Prosecutors Duck the Race Issue*, N.Y. TIMES (July 15, 2013), http://nyti.ms/1bi3hC5 (discussing reticence of various parties in the case to address race).

282. Robinson, *supra* note 277, at 1126-27.

who are generally skeptical of discrimination might suggest that they lack sufficient facts to conclude that a particular person, such as George Zimmerman, was motivated by racism and may feel the need to defer to grand juries in cases such as those involving Eric Garner and Michael Brown.

Third, a reflexive focus on particular measures of inequality may skew our perceptions of comparative disadvantage. For example, if we focus only on the right to marry (and adopt a formal equality perspective), we will view LGBT people as disadvantaged compared to African Americans and Latinos. If, however, we focus on the right to vote, we might view African Americans and Latinos, particularly in the wake of *Shelby County v. Holder*, as uniquely disadvantaged compared to (white) LGBT people, who lack a similar history of voting exclusion.[283] My point here is not to argue that one group or another faces a greater disadvantage in general, but rather to reveal how our impressions of comparative disadvantage often reflect uncritical assumptions about which domains of disadvantage matter most. A cultural and legal milieu that promotes postracialism and neoliberalism tends to explain enduring racial and gender disparities in terms of individual choice or cultural deficit rather than structural disadvantage.[284] Ultimately, Justice Kennedy's apparent intuition that gays and lesbians are a deserving civil rights constituency, while women and people of color are generally no longer deserving, seems to reflect these broader cultural dynamics rather than any doctrinal test for animus.[285] In the Conclusion, I suggest that cultural change likely must precede doctrinal change. Hence, the emergence of the "Black Lives Matter" movement and related political repercussions might lay the foundation for the Court to respond to such cultural shifts by revisiting legal doctrine that generally fails

283. *See* 133 S. Ct. 2612, 2630-31 (2013).

284. Although antigay groups have attempted to trap LGBT advocates with the same rhetoric that has stalled racial equality, namely the claim that LGBT people are seeking "special rights" rather than equal treatment, such arguments, at present, have not gained legal traction. *See* Romer v. Evans, 517 U.S. 620, 631 (1996) ("We find nothing special in the protections Amendment 2 withholds.").

285. In several of his opinions, Justice Kennedy has displayed a disinterest in empirical evidence and rested on his own intuitions. For example, in *Garrett*, rather than cite "any historical documentation" of disability discrimination, he reflected on "our own human instincts" regarding people with disabilities. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374-75 (2001) (Kennedy, J., concurring). In *Gonzales v. Carhart*, Justice Kennedy considered it "self-evident" that doctors were withholding information from pregnant women about the abortion procedure at issue and that some women ultimately learn grisly details of the procedure and experience profound regret. 550 U.S. 124, 159-60 (2007). Again, Justice Kennedy cited no evidence for these findings. Finally, Justice Kennedy's majority opinion in *Ashcroft v. Iqbal* explicitly invites judges to dismiss discrimination claims primarily based on their personal intuitions as to the plausibility of the claims. 556 U.S. 662, 679 (2009) (rejecting claim by Muslim detainee based on "judicial experience and common sense"). For a compelling argument that judges should consult social science evidence in discrimination cases, see Haney-López, *supra* note 17, at 1874-77.

to protect black and brown people. This discussion has sought to encourage readers to question their assumptions about the relative prevalence of race, gender, and sexual orientation discrimination and to foster awareness of the various potential biases that may influence our intuitions about discrimination.

IV. Diverging Votes

The analysis above suggests that Justice Kennedy's jurisprudence is skeptical of equal protection claims brought by women and people of color but generally supportive of sexual-orientation-based claims. This Part provides empirical evidence to support that argument. This is the first empirical study that systematically analyzes Justice Kennedy's votes regarding constitutional claims based on race, sex, and sexual orientation from the time Justice Kennedy joined the Court in 1988 to 2015.[286]

A description of the study's methodology follows. In order to define the population of relevant cases, my research assistant and I collected all of the cases in which Justice Kennedy participated through the U.S. Supreme Court Database, a frequently cited source for research on the Court.[287] For the race category of cases, we relied on the Database's list of cases that included some element of race that is frequently litigated, for example, voting rights, school desegregation, employment discrimination, and affirmative action. For the sex category, we relied on those cases that ruled on abortion, sex discrimination, and employment discrimination based on sex. The Database lacks an LGBT category, which required conducting an independent Westlaw search of Supreme Court cases with the following parameters: "gay," "lesbian," "homosexual," "bisexual," "transgender," or "sexual orientation" in the synopsis of the Court's opinions. This search turned up eleven cases.[288] A list of cases in each category appears in the Appendix.

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286. An earlier study focused only on Justice Kennedy's votes in gender cases, but treated sexual orientation as a subset of gender. *See* Cohen, *supra* note 248, at 678. This study thus failed to consider tension between Justice Kennedy's votes and opinions in gender and sexual orientation cases.

287. *The Genesis of the Database*, SUP. CT. DATABASE, http://scdb.wustl.edu/about.php (last visited Jan. 1, 2016).

288. Nine of the eleven were included in the analysis: *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Romer v. Evans*, 517 U.S. 620 (1996); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995); and *Carlucci v. Doe*, 488 U.S. 93 (1988). One search result, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), is excluded from the analysis because it ruled primarily on the First Amendment and did not affect the substantive rights of LGBT individuals. We also excluded *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), because the decision addressed only standing and did not reach the merits.

Once satisfied with the set of cases, we tracked how many times Justice Kennedy cast a liberal or conservative vote in the race, sex, and sexual orientation cases. We adopted the ideological methodology of the Database, which defines as liberal those decisions that result in an outcome that is pro-affirmative action, prochoice in abortion, pro-gay rights, and proplaintiff in a discrimination case. The cases deemed conservative are the opposite. The Database's ideological coding was generally accurate. The central concern of this project is whether Justice Kennedy voted to protect the rights of people of color, women, and LGBT people, and in a handful of cases, the Database's liberal/conservative categorization was not a good proxy for this question.[289] Accordingly, in four cases, we overrode the Database's coding to fit with this study's narrow focus.[290]

To demonstrate differences in Justice Kennedy's voting record in race, sex, and LGBT rights contexts, we calculated the rate at which Justice Kennedy cast liberal votes in each context. We further divided the data to see how often Justice Kennedy cast a liberal vote in closer cases, such as those where the Court voted nonunanimously or where the majority could summon only the five-vote minimum.

In focusing on constitutional cases,[291] we found a clear divergence between race and sex cases, on the one hand, and sexual orientation cases on the other. As depicted in the figures below, this divergence is strongest in the most contested and divisive—and likely the most important—cases. In nonunanimous cases, Justice Kennedy cast a liberal vote in 33% of race cases and 15% of sex cases. In other words, in the majority of the constitutional cases

289. Further, some cases resolved multiple issues that do not fit easily into the liberal and conservative binary.

290. Two of the four overridden cases implicate the First Amendment, where liberal or conservative determinations are understandably harder to make. In *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), which upheld a policy requiring a Christian law student organization to accept LGBT members, we recoded the case as liberal because the ruling permitted a state school to prohibit discrimination against LGBT people even if some might think it strains the First Amendment rights of some groups. Conversely, we recoded *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), as conservative because the decision restricted the right of gay groups to participate in a public demonstration. In the abortion context, the Database coded *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), as liberal even though it overruled a policy that protected women from harassment when they sought to terminate their pregnancies. Thus, we recoded *Schenck* as conservative. Finally, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Database coded the decision as liberal. Because the decision's undue burden test weakened the rights afforded to women under *Roe v. Wade*, 410 U.S. 113 (1973), and arguably removed abortion from the ambit of fundamental rights, we recoded it as conservative.

291. Since there was no LGBT equivalent of Title VII or similar federal statutes that prohibit race and sex discrimination, we ultimately excluded all of the statutory cases to provide a cleaner comparison.

involving issues of race, and the vast majority of those involving sex equality, Justice Kennedy cast conservative votes. In sexual orientation cases, by contrast, Justice Kennedy cast liberal votes 83% of the time. Focusing on a subset of nonunanimous cases, those decided by a 5-4 vote, we see even starker disparities. In this category, Justice Kennedy cast just one liberal vote out of twelve votes in the race cases (8.3%) and none in the sex cases. By contrast, in the sexual orientation cases Justice Kennedy cast liberal votes in 75% of the cases.

These findings are consistent with my effort to disrupt the conventional explanation of equal protection tiers in which race triggers the most demanding level of judicial protection, sex receives a little less protection than race, and sexual orientation receives less protection than race and sex because it warrants, at most, "rational basis with bite."[292] The key divide in equal protection law is not between those groups deemed suspect or quasi-suspect (i.e., race and sex) and those denied such status (i.e., sexual orientation and disability).[293] Rather, we might consider a revised, three-tiered model: one tier uniting race and sex (in most respects), a distinct tier for sexual orientation, and a minimum rationality track for everything else. Even this description does not suffice in that it suggests a hierarchy in which race and sex are on top.[294] As suggested by the empirical study, sexual orientation seems to be

292. *See* CHEMERINSKY, *supra* note 80, at 719-20. In my view, some textbooks err in parroting the Court's narrative of the tiers of scrutiny, which falsely asserts that the Court most vigorously roots out race discrimination. *See, e.g.*, Johnson v. California, 543 U.S. 499, 512 (2005) (referring to "our 'unceasing efforts to eradicate racial prejudice from our criminal justice system,'" and oddly citing McCleskey v. Kemp, 481 U.S. 279, 309, 319 (1987), in which the Court basically shrugged when confronted with evidence of systematic racial bias in Georgia's administration of the death penalty); *see also* CHEMERINSKY, *supra* note 80, at 720 ("[T]he Court's choice of strict scrutiny for racial classifications reflects its judgment that race is virtually never an acceptable justification for government action."). In truth, as Haney-López demonstrates, Haney-López, supra note 17, at 1783-84, the Court's deep skepticism of racial classifications is crafted merely to target so-called "reverse discrimination," that is, burdens that befall whites. Insofar as this rule occasionally ensnares a law that harms people of color, that outcome is incidental. *See Johnson*, 543 U.S. at 515 (requiring the application of strict scrutiny to a prison policy that segregated various races, including blacks, whites, and Latinos).

293. *See* CHEMERINSKY, *supra* note 80, at 721 (stating that "the levels of scrutiny are firmly established in constitutional law"). *But cf.* STONE ET AL., *supra* note 18, at 521-26 (critically examining the utility of strict scrutiny and equal protection tiers).

294. Another limitation of this stylized model is that it fails to distinguish between race claims brought by whites (which typically attack racial classifications) and race claims brought by people of color (which typically challenge policies that lack overt racial classifications). If anyone is on top of the Court's equal protection jurisprudence, cases from *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), to *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), suggest that whites are uniquely privileged. *See* Siegel, *supra* note 17, at 6 ("[T]he Court has encouraged majority claimants [whites] to make discriminatory purpose arguments about civil rights law based on inferences the Roberts Court would flatly deny if minority claimants were

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emerging as a site of greater protection than is currently available to people of color and women.

These findings are subject to limitations, of course. Our measure of pro-LGBT/pro-people of color/pro-female is necessarily crude. Some may contest whether a particular victory for an LGBT (or black or female) litigant is truly in the best interest of that group.[295] Further, the number of sexual orientation cases is admittedly small.[296] Some readers might wonder whether the disparity that I identify is statistically significant. This question is important when a study utilizes a sample of a population. In this study, however, we captured the entire population of race, sex, and sexual orientation opinions. Thus, we did not construct a sample and assume that it represents the population. Nonetheless, my claim is restricted to cases that the Court decided through Summer 2015 (October Term 2014). I do not argue that in the long term the Court will necessarily continue to privilege sexual orientation over race and sex.

There are at least two factors that will determine whether the pattern that I identify persists. First, the composition of the Court will eventually change. Justice Kennedy is seventy-nine years old. If he leaves the Court and the President replaces him with a more liberal Justice, the new Court majority may bring the race and sex cases in line with the sexual orientation precedents by "leveling up." For example, the Court might overrule *Geduldig*.[297] Further, the new majority could revise or supplement the rationales in Justice Kennedy's sexual orientation opinions. If Justice Kennedy leaves the Court during a Republican administration, the President might very well replace him with a Justice who is less empathetic for LGBT people. In that event, the new Court majority might refuse to extend cases such as *Obergefell* or recast their

bringing discriminatory purpose challenges to the criminal law."); *see also id.* at 62 ("[A] case like *Fisher* turns the reasoning of *Carolene Products* on its head."). Siegel reminds us that the Court's decisions as to which cases to hear also reflect substantive value choices, such as its focus on affirmative action, which contrasts with its disinterest in taking up racial profiling cases. *See id.* at 63 & n.310 (discussing racial profiling cases and cases in which the government relied on a witness's description of a suspect that includes racial identity that the Court declined to hear). Justice Kennedy's professed concern in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), about demeaning assumptions that all members of a racial group share particular traits, *see infra* text accompanying note 384, would seem to apply when law enforcement stops African-Americans because they are assumed to be criminal or Latinos because they are assumed to be undocumented.

295. *See infra* text accompanying notes 386-91 (discussing the divide within the LGBT community as to whether marriage equality should be a priority).

296. Among the nonunanimous cases, there are six sexual orientation cases, thirteen gender cases, and twenty-seven race cases.

297. Geduldig v. Aiello, 417 U.S. 484 (1974). At present, there are four Justices inclined to do so. *See* Coleman v. Court of Appeals, 132 S. Ct. 1327, 1344-45 (2012) (Ginsburg, J., dissenting).

rationales ("leveling down"), much as Chief Justice Rehnquist (with Justice Kennedy's vote) rewrote *Cleburne*.[298] Justice Kennedy's failure to acknowledge the unusual nature of his doctrinal moves in the sexual orientation cases and to name and situate that level of scrutiny may make them particularly vulnerable to rewriting.[299] Second, over time litigants will bring different claims, and this may influence the trend. Much depends on the content of the asserted rights that emerge from the courts of appeals and whether the Court votes to hear those cases. The next Part sheds some light on the reasons for uncertainty going forward by examining the intersection of sex and sexual orientation. I argue that Justice Kennedy's troubling rationales in sex cases could resurface in future sexual orientation cases. This is most likely to happen in cases involving transgender and bisexual people, because they are more likely to force judges to contend with the gender binary than gay and lesbian plaintiffs.

298. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 342 (1984); *see supra* text accompanying notes 116-17.

299. *See* Sunstein, *supra* note 97, at 64 ("*Romer* imposes unusually few constraints on its own interpretation."). The lower courts initially read *Romer v. Evans*, 517 U.S. 620 (1996), rather narrowly. *See, e.g.*, Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 818 (11th Cir. 2004) (treating *Romer* as an ordinary rational basis case). However, something changed in the aftermath of *United States v. Windsor*, 133 S. Ct. 2675 (2013), as dozens of lower courts avidly struck down marriage bans and some extended *Windsor* beyond marriage. *See, e.g.*, SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 480-84 (9th Cir. 2014) (relying on *Windsor* to prohibit sexual-orientation-based discrimination in selecting jurors); Adam Liptak, *Supreme Court to Decide Marriage Rights for Gay Couples Nationwide*, N.Y. TIMES (Jan. 16, 2015), http://nyti.ms/1y6B9wj (describing *Windsor*'s "powerful tailwind" and the "remarkable and largely unbroken line of more than 40 decisions" affirming same-sex marriage).

Figure 1
Kennedy's Votes in Nonunanimous Cases

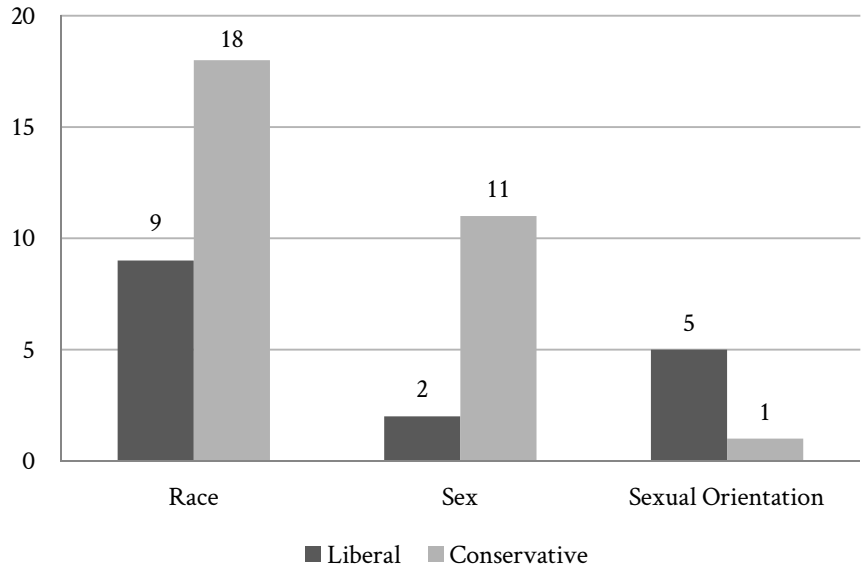

Figure 2
Kennedy's Votes in 5-4 Cases, By Group

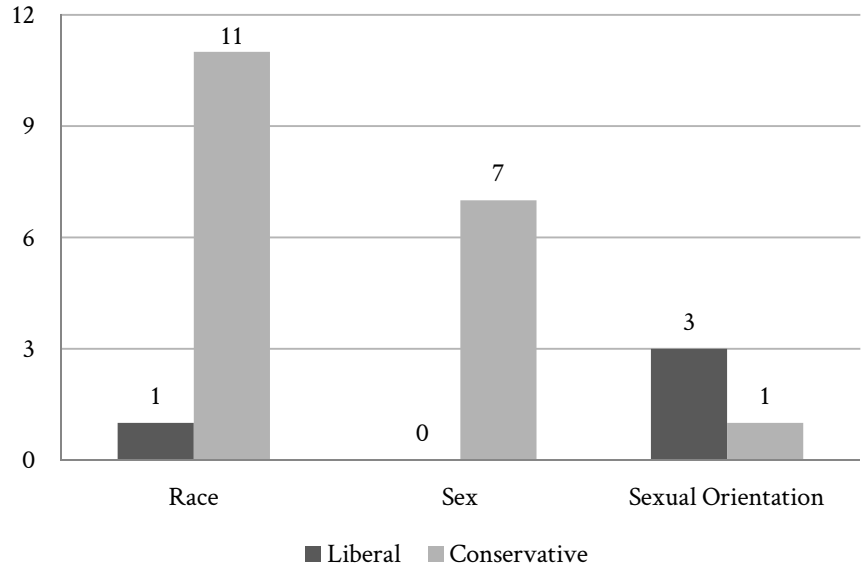

Figure 3
Share of Kennedy's Liberal Votes in Nonunanimous and 5-4 Decisions

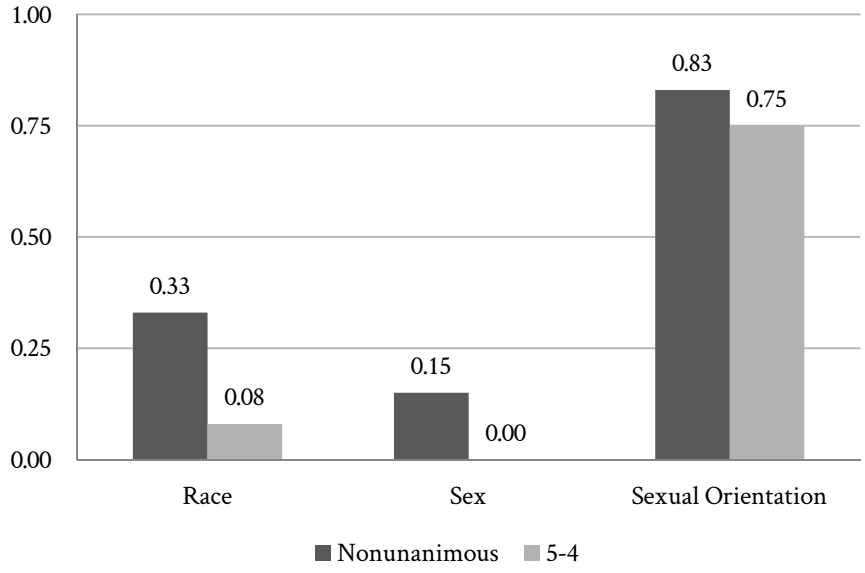

Table 1
Kennedy's Votes in Nonunanimous Decisions

	Liberal	Conservative	Total Votes	Percentage of Liberal Votes
Race	9	18	27	33.3%
Sex	2	11	13	15.4%
Sexual Orientation	5	1	6	83.3%

Table 2
Kennedy's Votes in 5-4 Decisions

	Liberal	Conservative	Total Votes	Percentage of Liberal Votes
Race	1	11	12	8.3%
Sex	0	7	7	0.0%
Sexual Orientation	3	1	4	75.0%

V. The Limits of LGBT Exceptionalism

I have just told a story in which LGBT people are evading traditional equal protection roadblocks and quietly remaking constitutional law. However, I now provide a more pessimistic potential trajectory for LGBT rights. This Part laments what *Obergefell*[300] and *Windsor*[301] omit and shows how it could be turned against LGBT rights. The gains of today might evanesce tomorrow.

A. The Inevitable Intersection of Sex and Sexual Orientation

In *Windsor*, Justice Kennedy declined to acknowledge two principal reasons why many people oppose same-sex marriage—religion and a commitment to preserving gender roles. *Obergefell* says more about religion and gender, but in a rather cursory and perhaps evasive fashion.[302] In *Windsor* and *Obergefell*'s equality analysis, Justice Kennedy failed to subject *any* state interest to sustained analysis.[303] This method follows and amplifies his approach in *Romer*. In *Romer*, Justice Kennedy at least mentioned two of the state interests in passing and then dismissed them as too narrow to support such a sweeping statute.[304] In *Windsor*, he offered even less legal analysis, preferring to repeat conclusory pronouncements. For the most part, Justice Kennedy refused even to name the state interests.[305] It is as if he was so

300. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

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

302. *Obergefell*, 135 S. Ct. at 2595-96 (discussing how marriage evolved to grant wives greater rights); *id.* at 2607 ("[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.").

303. *See generally* Brief for Respondent at 52-58, *Obergefell*, 135 S. Ct. 2584 (No. 14-556), 2015 WL 1384100 (asserting various rationales for refusing to recognize same-sex marriages, including in-state control of marriage, preservation of the democratic process, preventing evasion of the state's marriage laws, uniformity, and stability); Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, *supra* note 168, at 30-48 (asserting various rationales for DOMA, including ensuring national uniformity, preserving resources, proceeding with caution, providing a stable family structure for unintended offspring, encouraging the rearing of children by their biological parents, and promoting childrearing by both a mother and father).

304. Justice Kennedy identified Colorado's primary rationales for the antigay Amendment 2 as "respect for other citizens' freedom of association, and in particular [those] . . . who have personal or religious objections to homosexuality" as well as "its interest in conserving resources to fight discrimination against other groups." Romer v. Evans, 517 U.S. 620, 635 (1996). Given the breadth of the law, Kennedy dismissed the state justifications as "so far removed from these particular justifications that we find it impossible to credit them." *Id.*

305. He referred to potential state interests, which were never explicitly named, just twice. *See Windsor*, 133 S. Ct. at 2694 ("The principal purpose is to impose inequality, not for other reasons like governmental efficiency."); *id.* at 2696 ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure

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offended by DOMA that he declined to dignify the asserted state interests by discussing them.

Justice Kennedy's limited references to gender and religion occlude a critique of the reasons why many Americans continue to oppose same-sex marriage. To be clear, these rationales are rarely freestanding; religious and gendered defenses of traditional marriage are typically interwoven with pure homophobia, such as the notion that sex between men is disgusting.[306] Still, it is important to address these grounds because they may strike people as both distinct from rank homophobia and more defensible.[307] In *Windsor*'s aftermath, religious liberty became the rallying cry for opponents of same-sex marriage, including those seeking exemptions from generally applicable laws. *Obergefell* notes this dynamic and expresses respect for religious people, yet fails to provide any discernable principle for resolving disputes between religious liberty and LGBT rights.

Justice Kennedy's omission of gender is more striking in that the parties engaged it more extensively than religion.[308] At two different points in

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those whom the State, by its marriage laws, sought to protect in personhood and dignity.").

306. *See* MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 142-44, 148 (2010).

307. David Oppenheimer's recent empirical study demonstrates that opposition to same-sex marriage is correlated with religiosity, domestically and internationally. David B. Oppenheimer et al., *Religiosity and Same-Sex Marriage in the United States and Europe*, 32 BERKELEY J. INT'L L. 195, 196-97 (2014).

308. *See, e.g.*, Brief on the Merits for Respondent Edith Schlain Windsor, *supra* note 135, at 39-47; Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, *supra* note 168, at 44-49. In *Windsor*, Justice Kennedy indirectly mentioned the religious opposition to same-sex marriage in assessing Congress's purpose. He noted 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.'" *Windsor*, 133 S. Ct. at 2693 (quoting H.R. REP. No. 104-664, at 16 (1996)). Justice Kennedy cited this statement as proof that Congress intended to demean same-sex couples. A skeptic might counter that the Court itself has relied on the "sacred" nature of marriage in order to find a fundamental right to marry. *See* Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965)). Further, the Court has described marriage as religiously motivated. *See* Turner v. Safley, 482 U.S. 78, 96 (1987) ("[M]any religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication."). The Constitution also singles out religion as special, protecting religion through the Free Exercise and Establishment Clauses of the First Amendment. U.S. CONST. amend. I. Opponents of same-sex marriage have often expressed fears that legalizing same-sex marriage will compel religious groups to recognize same-sex unions and violate their faith. *See* Murray, *supra* note 241, at 371-72. Accordingly, several states that legalized same-sex marriage through legislation built in protections for religious adherents. *See, e.g.*, Geraldine Baum, *N.Y. Legalizes Gay Marriage*, L.A. TIMES, June 25, 2011, at AA1. *Windsor* provided Justice Kennedy an opportunity to delineate the line between civil

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Windsor, Justice Kennedy bypassed the gendered aspects of the legal arguments, which weakened his analysis. As discussed above, he chose not to address the argument that the statute contained a sex classification. Further, he avoided the principal argument now advanced by opponents of same-sex marriage, which is that marriage laws apply only to heterosexuals in order to promote responsible procreation.[309] In general, opponents of marriage equality have become savvy enough to downplay arguments that explicitly rely on gender stereotypes or overtly express animus. The last refuge of those who resist gender equality, however, is physical differences between the sexes.[310] As a result, opponents of same-sex marriage consolidated their gender anxieties under the argument for "responsible procreation."[311] This argument contends that only male-female couples create the risk of accidentally procreating.[312] Thus, they alone need marital protection as an incentive to create enduring relationships. In this parallel universe, heterosexual couples suffer from fragile, unstable relationships, while same-sex relationships flourish independent of government support. Underneath this fanciful claim lies same-sex marriage opponents' real concern—the fear that same-sex marriage destabilizes traditional gender roles. Although he supports same-sex marriage, comedian David Letterman's monologue about his confusion regarding same-sex

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marriage and religious marriage. In a religiously diverse society, clearly (one interpretation of) Christianity cannot suffice to determine the legal rights of all Americans. Instead of making this argument, Justice Kennedy basically branded religious opponents of same-sex marriage as bigots. *See Windsor*, 133 S. Ct. at 2694 (arguing that DOMA "demean[ed]" and "humiliate[d]" same-sex couples and their children). If, as he said in his *Garrett* concurrence, "the law can be a teacher," Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring), Justice Kennedy in *Windsor* fumbled a teachable moment. His blithe dismissal of DOMA as rooted in bigotry angered many on the right. *See, e.g.*, Steven D. Smith, *The Jurisprudence of Denigration* 1-4 (Univ. of San Diego Law Sch. Legal Studies Research Paper Series, Research Paper No. 14-143, 2014), http://ssrn.com/abstract=2407244. The *Obergefell* majority opinion's retreat from this accusation of bigotry appears to acknowledge *Windsor*'s failure in this regard.

309. *See, e.g.*, Latta v. Otter, 771 F.3d 456, 473 (9th Cir. 2014) (rejecting the argument that same-sex marriage "would send the message that 'men and women are interchangeable [and that a] child does not need a mother and a father'" (alteration in original)).

310. *See generally* JUDITH BUTLER, GENDER TROUBLE, at xiv-xx (rev. ed. 1999) (critiquing the normalization of gender differences as based on bodily differences between men and women); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 3, 98 (1995) ("In many cases, biology operates as the excuse or cover for social practices that hierarchize individual members of the social category 'man' over individual members of the social category 'woman.'").

311. Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, *supra* note 168, at 10-11.

312. *See, e.g.*, Kenji Yoshino, Opinion, *Too Good for Marriage*, N.Y. TIMES (July 14, 2006), http://www.nytimes.com/2006/07/14/opinion/14yoshino.html.

marriage is illustrative: "Who gets the bachelor party? Who goes downstairs in the middle of the night to check on the noise? Who forgets the anniversary? Who refuses to stop and ask for directions? And which one of you will take forever to get ready?"[313] Many people cannot comprehend the concept of a marriage that is not ordered by gender.

Melissa Murray has demonstrated how the proponents of Proposition 8 in California reframed the legalization of same-sex marriage as an attack on conventional gender roles.[314] These anxieties are perhaps most salient when it comes to children. An infamous Proposition 8 advertisement featured a pretty and feminine little girl asking her mother if she could marry a princess when she grows up.[315] The intent clearly was that the audience recoil in horror. Same-sex marriage, according to this ad and others that Murray analyzes, interferes with parents' ability to pass on conventional gender roles to their children and channel them toward heterosexuality.[316]

By examining Justice Kennedy's sex jurisprudence and using something like contextual intent, we can infer that Justice Kennedy's avoidance of gender in the same-sex marriage cases was not accidental.[317] The Court's gender cases show that Justice O'Connor's departure from the Court has instigated a retrenchment on gender equality. More often than not, Justice Kennedy votes with the four most conservative Justices (including Justice Alito, who replaced Justice O'Connor) to curtail gender equality, often invoking biology as his excuse.[318] But as with the accidental-procreation argument, this biological veneer masks the endurance of the very archaic conceptions of women and men that the Equal Protection Clause is supposed to uproot.[319] I focus on what I regard as the two most troubling Kennedy gender opinions. In both cases, Justice Kennedy's analysis transgressed doctrinal boundaries, dissolving intermediate scrutiny into something like the minimum rationality test.

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313. Tara Parker-Pope, *Gay Marriage: Same, but Different*, N.Y. TIMES: WELL COLUMN (July 1, 2013, 5:29 PM), http://nyti.ms/1cJth5u (quoting opening monologue from Letterman's late-night talk show).

314. Murray, *supra* note 241, at 359-60.

315. VoteYesonProp8, *Yes on 8 TV Ad: It's Already Happened*, YOUTUBE (Oct. 7, 2008), https://youtu.be/0PgjcgqFYP4.

316. Murray, *supra* note 241, at 382.

317. *See supra* Part IV (demonstrating that Justice Kennedy cast conservative votes in all of the 5-4 sex cases).

318. *See supra* text accompanying note 291 (finding that Justice Kennedy voted in favor of sex equality in just fifteen percent of the nonunanimous cases).

319. *See* Nguyen v. INS, 533 U.S. 53, 65 (2001) (arguing that fathers and mothers differ in that only the latter always has an "opportunity for a meaningful relationship between citizen parent and child" through "the very event of birth"); *cf. id.* at 86 (O'Connor, J., dissenting) (noting that Justice Kennedy's justification for the gender disparity in the citizenship law was predicated "only on an overbroad sex-based generalization").

In *Nguyen v. INS*, Justice Kennedy upheld a federal law determining the transmission of citizenship against an equal protection challenge.[320] The statute imposed different requirements on unmarried U.S. citizen fathers and mothers for conferring citizenship to their children born outside of the United States with a noncitizen. A mother had to show that she had U.S. citizenship at the time that she gave birth and also that she had prior physical presence in the United States for a continuous year.[321] Fathers, by contrast, had to establish a blood relationship by clear and convincing evidence, legitimate the child through a judicial procedure, and prove that they had agreed to provide financial support while the child was a minor.[322] Justice Kennedy argued that these distinctions did not violate equal protection because they were rooted in a physical difference between mothers and fathers.[323] The mother is always present at birth, he explained, and her connection to the child is established through the birth certificate. Fathers, however, may not even know that the child exists and need not be present at birth. Thus, Justice Kennedy declared, the statute distinguishes between men and women because they are differently situated regarding the opportunity to have a relationship with the child. Only the mother always has this opportunity because she is always present at birth.[324]

This argument has two main problems. First, the government never advanced this "opportunity for a relationship" argument, and Justice Kennedy gleaned no support for it from the congressional record.[325] A key tenet of intermediate scrutiny is that it demands more than the hypothesized rationales permitted under minimum rationality review.[326] The Court must search not for any conceivable state interest, but for the *actual* interest that motivated the government. Thus, in several gender cases the Court has struck down a rationale that may have been plausible on its face when close scrutiny revealed it to be a pretext for gender stereotypes.[327] Second, even if this were not a rationale that Justice Kennedy concocted, it could not sustain the full sweep of the statute's gender distinctions. As Justice O'Connor pointed out in her cogent dissent, a father could not satisfy the statute by showing that, like the mother,

320. *Id.* at 56-57, 73 (majority opinion).

321. *Id.* at 60.

322. *Id.* This last requirement was not at issue in *Nguyen* because it was not part of the law when Nguyen was born. *Id.*

323. *Id.* at 63-64.

324. *Id.* at 65-66.

325. *Id.* at 83-84 (O'Connor, J., dissenting).

326. United States v. Virginia, 518 U.S. 515, 533 (1996) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.").

327. *See, e.g., id.* at 535-36 ("Neither recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options."); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724-25 (1982).

he was present at birth.[328] The father had to go to court to establish paternity. At root, then, the statute rested on a gender stereotype that fathers must demonstrate that they will be good fathers and accept financial responsibility for their offspring in order to convey citizenship, while women are assumed to be responsible, caring nurturers.

Seven years later, this paternalistic conception of mothers would reappear in a more brazen form. *Gonzales v. Carhart*,[329] another closely divided decision, upset established law in a number of ways. Justice Kennedy was one of the three Justices who signed an unusual joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[330] Although *Casey* jettisoned *Roe v. Wade*'s[331] trimester framework and arguably stripped the abortion right of its status as a fundamental right,[332] it also reaffirmed the abortion right in the face of tremendous political backlash.[333] By the time that the Court decided *Carhart*, Justice Kennedy's partners in the *Casey* opinion had left the Court, and his commitment to the abortion right was waning. Rather than reaffirm *Casey*, he merely assumed that the *Casey* test applied.[334] He then went on to gut *Casey* and its progeny. He permitted a previability restriction on a procedure popularly known as "partial-birth abortion,"[335] eliminated the requirement of a health exception,[336] referred to the fetus as a "human life"[337] and "unborn child,"[338] and unveiled a version of the undue burden test that bordered on the minimum rationality test.[339] Perhaps more alarming than the outcome was Justice Kennedy's rationale, which turned on a conception of mothers as not just noble but also childlike and fragile:

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude

328. *See Nguyen*, 533 U.S. at 86-88 (O'Connor, J., dissenting).

329. 550 U.S. 124 (2007).

330. 505 U.S. 833 (1992).

331. 410 U.S. 113 (1973).

332. *See Casey*, 505 U.S. at 872-77 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

333. *See id.* at 845-46 (plurality opinion).

334. *Carhart*, 550 U.S. at 147 ("We assume the following principles for the purposes of this opinion.").

335. *Id.*

336. *Id.* at 164 ("The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.").

337. *See id.* at 157 ("The Act expresses respect for the dignity of human life.").

338. *Id.* at 160.

339. *See id.* at 159-60, 162-63.

> some women come to regret their choice to abort the infant life they once created and sustained.[340]

Justice Kennedy apparently could not believe that a woman would agree to undergo a late-term abortion unless her physician concealed the gruesome nature of the procedure from her. Although the law did not concern disclosure (it was a criminal prohibition on a procedure), and he plainly admitted that he had no empirical evidence for his view, Justice Kennedy imagined that the law—and by extension, his opinion upholding it—served to protect women from duplicitous doctors. This view is in serious tension with *Casey*'s insistence on women's autonomy as the core of the abortion right.[341]

This Subpart examined two of Justice Kennedy's more notable gender opinions to add some qualitative heft to the quantitative findings from Part IV. Justice Kennedy's opinions have reinforced traditional gender roles even though the Equal Protection Clause tasks the Court with dismantling legal manifestations of stereotypes. This discussion also sets up my claim in the next Subpart that transgender and bisexual people may be the most vulnerable populations under the Court's sexual orientation doctrine. Among LGBT people, they may be the most likely to trigger the gendered questions that Justice Kennedy seemed keen to avoid in *Windsor*.

B. Warning Signs

In this final Subpart, I suggest a few concrete ways in which the elisions of *Windsor* and *Obergefell* could prove perilous for LGBT rights. Applying the insights of intersectionality,[342] my work has often aimed to make visible those at the margins of racial and sexual minority communities.[343] I have argued that we should understand the concept of "LGBT community" as an aspiration, because in reality the interests of the people subject to this umbrella term often diverge.[344] *Windsor* and *Obergefell* could be just the latest examples of LGBT rights victories that do not confer their benefits equally throughout the community. The biggest losers may very well be transgender and bisexual

340. *Id.* at 159 (citation omitted).

341. As Kenji Yoshino eloquently put it, "*Carhart* . . . reinstated subordinating conceptions of women that had been retired in the equal protection context in the 1970s." Yoshino, *supra* note 29, at 799.

342. Kimberle Crenshaw coined the term intersectionality in pathbreaking articles on how identity and discrimination overlap to create distinct disadvantages. *See generally* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 [hereinafter Crenshaw, *Demarginalizing*]; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

343. *See, e.g.*, Robinson, *Masculinity*, *supra* note 178, at 1375-78; Robinson, *Racing*, *supra* note 178, at 1476-77.

344. *See* Robinson, *supra* note 190, at 1823.

people. With respect to the former, the LGBT configuration glosses an important distinction and tension. The "L," "G," and "B" refer to sexual orientations, while the "T" refers to gender identity. Many gay men and lesbians may see themselves as conventionally masculine or feminine and seek to distance themselves from transgender people, who are more likely to embrace gender identity as the core of their minority identity.[345] At the same time, some transgender people identify as heterosexual, which sets them apart from LGB-identified people.[346] Bisexuals also often face skepticism and mistrust in the LGBT community.[347] Many heterosexuals and homosexuals are troubled by the fact that bisexuals destabilize the gender binary—viewing them as sexually insatiable people who desire men and women, instead of "picking a team."[348] Thus, bisexual and transgender people more directly raise questions of gender than the largely gender-conforming (and white) gay and lesbian plaintiffs who represent the community in marriage equality cases.

We can see hints in Supreme Court opinions of a potential divide between gays and lesbians, on one side, and bisexual and transgender people, on the other. First, despite several Supreme Court victories for sexual minorities in recent years,[349] bisexual and transgender people are almost entirely absent from these opinions. These cases simply did not require the Court to think about bisexual and transgender people in an extended fashion. And this is not accidental. The plaintiffs in *Obergefell* and *Windsor* (and most marriage equality cases) strategically framed the relevant class as "gays and lesbians," even though expanding marriage rights would benefit bisexual and transgender people as well.[350] While opponents of same-sex marriage sometimes invoke bisexuals to

345. *See* Shannon Price Minter, *Do Transsexuals Dream of Gay Rights?: Getting Real About Transgender Inclusion*, 17 N.Y.L. SCH. J. HUM. RTS. 589, 600 (2000), *reprinted in* TRANSGENDER RIGHTS 141 (Paisley Currah et al. eds., 2006); *cf.* Devon W. Carbado, *Colorblind Intersectionality*, 38 SIGNS 811, 832-33 (2013) (describing the "but for" gay man as "just like other white normatively masculine men, but for the fact of his sexual orientation").

346. Nat'l Ctr. for Transgender Equality, Understanding Transgender: Frequently Asked Questions About Transgender People 6 (2009), http://transequality.org/Resources/NCTE_UnderstandingTrans.pdf.

347. *See* Robinson, *Racing*, *supra* note 178, at 1487-88; Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 399 (2000).

348. *See* Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415, 458 (2012); Yoshino, *supra* note 347, at 399, 401.

349. I count *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Christian Legal Society v. Martinez*; 561 U.S. 661 (2010) (upholding against First Amendment challenge a policy requiring a law student organization to accept LGBT members); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Romer v. Evans*, 517 U.S. 620 (1996), as significant victories for LGBT rights.

350. *See* Boucai, *supra* note 348, at 453 (discussing "'LGBT' advocates' meticulous avoidance" of bisexuality). The reasons for this erasure are complicated and extend beyond stigma. Bisexual people appear far more likely to marry a person of the opposite sex than someone of the same sex. PEW RESEARCH CTR., A SURVEY OF LGBT AMERICANS:

footnote continued on next page

question the very concept of sexual orientation as a discernable class, defenders of same-sex marriage typically refuse to even utter the word "bisexual."[351] This is congruent with Justice Kennedy's framing of the class in *Romer*. After recognizing the breadth of the class that Amendment 2 targeted, which specifically included bisexuals, Justice Kennedy opted to call the class simply "homosexual persons or gays and lesbians."[352] To be fair, semantic constraints help to explain such choices.[353] That said, it is telling that I cannot recall a single instance where a court—or any speaker—used "bisexuals" or "transgender people" as a shorthand reference for all LGBT people. White gay men in particular, as well as white lesbians, are assumed to represent the entire group, quite unlike bisexual and transgender people.[354] This raises the fear that the success of the LGBT movement at the Supreme Court in recent years may be predicated on its erasure of the most "unruly" members of the coalition, bisexual and transgender people.

This hunch is based on Justice Kennedy's "gender trouble" in abortion and equal protection sex cases. As suggested above, Justice Kennedy (and the entire Court) ignored the sex classifications in *Lawrence*, *Windsor*, and *Obergefell*, even though settled case law should have triggered intermediate scrutiny and led the Court to strike down the laws.[355] The empirical evidence from Part IV suggests that if Justice Kennedy had viewed the sodomy law in *Lawrence* and the marriage restrictions in *Windsor* and *Obergefell* as principally implicating sex (either because of the sex classifications or the "responsible reproduction" defense in the marriage cases), he likely would have ruled in favor of the States. At oral argument in *Hollingsworth v. Perry*, Justice Kennedy asked an attorney, "Do you believe [Proposition 8] can be treated as a gender-based classification?"[356] Before the attorney could reply, Justice Kennedy declared:

ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES 6, 70, 82 (2013), http://www.pewsocialtrends.org/files/2013/06/SDT_LGBT-Americans_06-2013.pdf. As a practical matter, before *Obergefell*, some transgender people could marry in some jurisdictions that banned same-sex marriage, although in many they could not. For a more detailed discussion, see Robinson, *supra* note 31, at 1061 n.267.

351. *See* Boucai, *supra* note 348, at 453.

352. Romer v. Evans, 517 U.S. 620, 624 (1996).

353. *See* Yoshino, *supra* note 347, at 460; *cf.* Carbado, *supra* note 345, at 816 (discussing the "discursive limitations to our ability to capture the complex and reiterative processes of social categorization").

354. *Cf.* Carbado, *supra* note 345, at 832-33 (discussing centrality of white gay male identity in the LGBT community); Crenshaw, *Demarginalizing*, *supra* note 342, at 150 (making related point about white women, and black women's inability to represent all blacks and all women).

355. *See supra* text accompanying notes 169-76 (discussing *Lawrence*).

356. Transcript of Oral Argument at 13, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144).

"It's a difficult question that I've been trying to wrestle with it."[357] I would argue that this comment reveals Justice Kennedy's ambivalence regarding gender. An argument that is clear and straightforward by many accounts[358] is difficult for Justice Kennedy to grasp.[359] He gets sexual orientation, but he "wrestles" with gender.

These concerns may be particularly salient when the state asserts interests that cannot be easily reduced to animus. For example, what if bisexual men challenged their exclusion from a unit in Los Angeles County Jail that is set aside for gay men and transgender women and is said to protect them from sexual assault?[360] Los Angeles justifies this exclusion by portraying bisexual men as inherently aggressive and predatory and gay men as passive victims.[361] Just as *Nguyen v. INS* seemed to adopt a stereotype that mothers are more inherently nurturing than fathers,[362] Justice Kennedy might perceive bisexuals as masculine and threatening (i.e., male) while stereotyping gay men as feminine and vulnerable (i.e., female). What if a state employer refused to let a transgender woman use the women's restroom and asserted an interest in protecting privacy and keeping (nontransgender) women safe?[363] Justice Kennedy might very well distinguish these cases from *Windsor* and *Romer*. Not only do they inevitably implicate gender, but also they involve interests that Justice Kennedy would likely view as more legitimate than animus. These examples demonstrate how a thin conception of animus might do little for those on the margins of the LGBT community. Hence, whether lower courts and ultimately the Supreme Court embrace and build upon *Obergefell*'s more capacious understanding of animus might be critical.

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357. *Id.*

358. *See, e.g.*, Latta v. Otter, 771 F.3d 456, 481 (Berzon, J., concurring) ("[T]he same-sex marriage prohibitions, if anything, classify *more* obviously on the basis of sex than they do on the basis of sexual orientation . . . ."). For leading scholarly explanations of this argument, see, for example, Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1228 (2010); and Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 209 (1994). For a competing view, which seems to turn less on the doctrinal persuasiveness of the sex argument than the social meaning of relying on the sex argument instead of a sexual orientation argument, see Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 503-04 (2001).

359. Lower courts seem to share Justice Kennedy's aversion to the sex argument. *See* Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2113-14, 2114 n.87 (2014).

360. *See* Robinson, *Masculinity*, *supra* note 178, at 1311; *cf.* Paul Butler, Opinion, *The Court Should Focus on Justice Rather than Rights*, N.Y. TIMES: ROOM FOR DEBATE (July 19, 2013, 6:41 PM), http://nyti.ms/1ulLS3r (suggesting that the Court will struggle with forms of anti-LGBT discrimination less obviously wrong than exclusion from marriage).

361. Robinson, *Masculinity*, *supra* note 178, at 1315, 1328, 1363.

362. *See* 533 U.S. 53, 64-68 (2001).

363. *See* Butler, *supra* note 360.

VI. *Obergefell* and *Schuette*

In this final Part, I juxtapose *Obergefell* with the Court's most recent race affirmative action opinion, *Schuette v. Coalition to Defend Affirmative Action*[364]—both written by Justice Kennedy—to make plain the dissonance in the Court's equal protection jurisprudence. This analysis suggests that the central divergence that this Article maps is escalating. The same penchant for doctrinal innovation that animates the sexual orientation cases and transcends traditional doctrinal rules surfaces in race cases to destabilize well-established protections for racial minorities and invite further retrenchment. Although the media tended to frame *Schuette* as an affirmative action case,[365] Justice Kennedy's expansive and—quite frankly, shocking—analysis sweeps beyond that context and threatens to swallow settled equal protection and Title VII principles concerning racial discrimination. Moreover, Justice Kennedy's analysis of the Michigan constitutional ban on affirmative action in *Schuette* stands in serious tension with his analysis of state laws and constitutions that refused to grant or recognize same-sex marriages. These disjunctions, which appear unintentional, provide further evidence that the Court is not sufficiently integrating equal protection jurisprudence across identity categories.

The dispute in *Schuette* concerned whether Michigan voters violated the Equal Protection Clause by amending the state constitution to forbid the government from engaging in race-based decisionmaking in a wide range of settings.[366] Supreme Court decisions from the 1960s to the early 1980s had suggested that such an amendment would be suspect, but a majority of the Roberts Court, led by Justice Kennedy's plurality opinion, held that the Michigan amendment neither triggered heightened scrutiny nor violated equal protection.[367] On its face, the plurality opinion seeks a more moderate course than Justice Scalia's concurring opinion.[368] Although Justice Kennedy avoids overruling any precedent, his tortuous logic, if taken seriously, could dismantle vital antidiscrimination protections for people of color. When

364. 134 S. Ct. 1623 (2014).

365. *See, e.g.*, Adam Liptak, *Court Backs Michigan on Affirmative Action*, N.Y. TIMES (Apr. 22, 2014), http://nyti.ms/1lznLIw.

366. 134 S. Ct. at 1629 (plurality opinion). Proposal 2, as it was listed on the ballot, stated that all public schools, colleges and universities "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin." *Id.*

367. *Id.* at 1631-34.

368. *Id.* at 1639 (Scalia, J., concurring) (suggesting that the Equal Protection Clause flatly prohibits race-based affirmative action and rejecting Justice Kennedy's "reinterpretation of *Seattle* and *Hunter*").

combined with some of his other race opinions, namely *Ricci v. DeStefano*,[369] we can see that Justice Kennedy and his conservative brethren are recalibrating equal protection and Title VII law to extend new protections to white plaintiffs and white defendants while simultaneously making it harder for people of color to prevail in race cases.

Justice Kennedy began his *Schuette* analysis by recounting what he regarded as the three most relevant precedents. He looked to *Reitman v. Mulkey*, a 1967 case in which the Court held that California voters violated equal protection by passing a state initiative that prevented the legislature from banning racial discrimination in housing.[370] Next, Justice Kennedy described *Hunter v. Erickson*, in which voters in Akron, Ohio repealed the city's fair housing ordinance and amended the city charter to require voter approval before another housing ordinance could become law.[371] There too the Court found a violation of equal protection.[372] Justice Kennedy emphasized that "[c]entral to the Court's reasoning in *Hunter* was that the charter amendment was enacted in circumstances where widespread racial discrimination in the sale and rental of housing led to segregated housing, forcing many to live in 'unhealthful, unsafe, unsanitary and overcrowded conditions.'"[373] The *Hunter* Court rejected the city's "flawed" rationales for the amendment, including its desire to "move slowly in the delicate area of race relations."[374] Justice Kennedy summarized *Hunter* and *Reitman* as involving "invidious discrimination" and a "demonstrated injury on the basis of race that, by reasons of state encouragement or participation, became more aggravated."[375] Although Justice Kennedy seemingly endorsed these first two precedents, he felt compelled to

369. 557 U.S. 557 (2009). For incisive critiques of *Ricci*, see Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 81 (2010) ("*Ricci* reflects a doctrinal move towards converting efforts to rectify racial inequality into white racial injury."); and Siegel, *supra* note 17, at 58 ("*Ricci* seemed to put a 'racial thumb on the scales' for certain discriminatory purpose claimants, allowing majority plaintiffs to challenge a civil rights law by standards not available to minority plaintiffs challenging the criminal law."). *Ricci* and *Schuette*, both written by Justice Kennedy, are telling. Neither case involved a conventional racial classification. Nonetheless, Justice Kennedy in *Ricci* regarded Title VII's disparate impact rule as wrongly burdening whites and rewrote precedent to lift the perceived burden. *See* Harris & West-Faulcon, *supra*, at 81-82. Yet in *Schuette*, as discussed below, he saw no racial injury to blacks and Latinos who were denied admission to college because of Amendment 2. *See Schuette*, 134 S. Ct. at 1637 (plurality opinion).

370. *Schuette*, 134 S. Ct. at 1631 (plurality opinion) (discussing Reitman v. Mulkey, 387 U.S. 369, 374-81 (1967)).

371. *Id.* at 1631-32 (plurality opinion) (discussing Hunter v. Erickson, 393 U.S. 385, 390-93 (1969)).

372. *Id.* (citing *Hunter*, 393 U.S. at 391).

373. *Id.* at 1632 (quoting *Hunter*, 393 U.S. at 391).

374. *Id.* (quoting *Hunter*, 393 U.S. at 392).

375. *Id.*

modify the third, *Washington v. Seattle School District No. 1*. In that case, Washington voters rebelled against the Seattle school board's mandatory busing program and passed an initiative that banned busing statewide.[376] Justice Kennedy opined that "*Seattle* is best understood as a case in which the state action in question . . . had the serious risk, if not purpose, of causing specific injuries on account of race, just as had been the case in *Mulkey* and *Hunter*."[377] Justice Kennedy rested this conclusion on plausible evidence that the school board had engaged in de jure segregation, and thus the busing may have been directed at remedying a constitutional violation.[378]

Although he validated the outcome in *Seattle School District*, Justice Kennedy objected to the Court's rationale, which he characterized as "new and far-reaching."[379] Specifically, he eschewed the *Seattle School District* Court's claim that "where a government policy 'inures primarily to the benefit of the minority' and 'minorities . . . consider' the policy to be 'in their interest,' then any state action that 'place[s] effective decisionmaking authority over' that policy 'at a different level of government' must be reviewed under strict scrutiny."[380] Justice Kennedy excoriated the respondents' reading of this language because it would "require the Court to determine and declare which political policies serve the 'interest' of a group defined in racial terms."[381] Such a rule would contravene "central equal protection principles," he declared.[382] Embracing this rationale, he claimed, would demand that the Court define racial groups and their interests, which might trigger "impermissible racial stereotyp[ing]" and risk "demeaning" minorities.[383]

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376. *Id.* at 1632-33 (plurality opinion) (discussing Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 470-74 (1982)).

377. *Id.* at 1633.

378. *Id.* Justice Kennedy acknowledged that the record contained no judicial finding of de jure segregation, yet remarkably he relied on Justice Breyer's dissent in a different case decided twenty-five years after *Seattle School District*, *see id.* (citing Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 807-08 (2007) (Breyer, J., dissenting)), and a complaint by the NAACP, which was settled, to conclude that one could reasonably infer a constitutional violation, *see id.* Justice Kennedy also argued that when the Court decided *Seattle School District*, the parties and the Justices assumed that a constitutional violation was not necessary to support a race-based busing plan. *Id.*

379. *Id.* at 1634.

380. *Id.* (alterations in original) (quoting *Seattle Sch. Dist.*, 458 U.S. at 472, 474).

381. *Id.*

382. *Id.*

383. *Id.* at 1634-35 (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993)). Justice Kennedy's argument has a paternalistic ring to it, not unlike his argument in *Gonzales v. Carhart*, 550 U.S. 124 (2007). In *Carhart*, he essentially claimed that women seeking late-term abortions did not know what they were getting into and would eventually regret their decisions. *See supra* notes 340-41 and accompanying text. Likewise, in *Schuette*, he told people of color seeking to preserve affirmative action in Michigan that their proposed rule would do their racial groups more harm than good. *Cf. Schuette*, 134 S. Ct. at 1635 (plurality opinion) ("Thus could . . . conflict tend to arise in the context of judicial

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Since *Schuette* was decided on the heels of *Windsor*, it is striking that Justice Kennedy failed to acknowledge several parallels between the two cases and *Schuette*'s implications for the future of same-sex marriage. First, consider Justice Kennedy's claim that "[i]t cannot be entertained as a serious proposition that all individuals of the same race think alike. Yet that proposition would be a necessary beginning point were the *Seattle* formulation to control . . . ."[384] This claim is obviously a straw man. To find that an affirmative action ban has a racial focus and imposes special burdens on racial minorities, one need not conclude that all blacks endorse affirmative action. Surveys have consistently found that a majority of African Americans support affirmative action, and the Court could have simply said that.[385] Such a descriptive finding respects the fact that a minority of African Americans do *not* support affirmative action and says nothing about the normative question as to whether blacks *should* support such policies. Thus, it is simply not true that the Court would have had to conclude that all African Americans think alike.

We can illuminate this claim further by juxtaposing it with the same-sex marriage context. Surveys indicate that a minority of LGBT people does not support same-sex marriage.[386] Some LGBT scholars have even gone so far as to speak and write publicly about their opposition to same-sex marriage. One such book is pointedly titled *Against Equality: Queer Critiques of Gay Marriage*.[387] The reasons for opposition to, or criticism of, same-sex marriage vary. Some people, especially lesbian feminists, regard marriage as patriarchal.[388] Some queer-identified people view marriage as heteronormative and an effort to tame gay sexuality.[389] Some LGBT people of color find the LGBT movement's focus on marriage to be racist or demeaning and argue that

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decisions as courts undertook to announce what particular issues of public policy should be classified as advantageous to some group defined by race.").

384. *Schuette*, 134 S. Ct. at 1634 (plurality opinion).

385. *See, e.g.*, Bruce Drake, *Public Strongly Backs Affirmative Action Programs on Campus*, PEW RES. CTR. (Apr. 22, 2014), http://www.pewresearch.org/fact-tank/2014/04/22/public-strongly-backs-affirmative-action-programs-on-campus (finding that 84% of blacks and 80% of Latinos support affirmative action); Sarah Dutton et al., *Poll: Slim Majority Backs Same-Sex Marriage*, CBS NEWS (June 6, 2013, 11:46 PM), http://www.cbsnews.com/news/poll-slim-majority-backs-same-sex-marriage ("Three-quarters of African Americans favor affirmative action programs, compared to just 46 percent of whites.").

386. *See, e.g.*, PEW RESEARCH CTR., *supra* note 350, at 3 (finding that ninety-three percent of LGBT-identified adults support permitting same-sex marriage).

387. *See generally* AGAINST EQUALITY: QUEER CRITIQUES OF GAY MARRIAGE (Ryan Conrad ed., 2010) (compiling critiques of marriage equality), *reprinted in* AGAINST EQUALITY: QUEER REVOLUTION, NOT MERE INCLUSION 15-98 (Ryan Conrad ed., 2014).

388. Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 9, *reprinted in* LESBIANS, GAY MEN, AND THE LAW 401 (William B. Rubenstein ed., 1993).

389. *See, e.g.*, MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 113 (1999).

issues such as employment discrimination and HIV/AIDS should be prioritized.[390] A recent Pew survey found that the LGBT community is evenly split between those devoted to "maintaining a distinct culture and way of life" and those who see assimilation into "mainstream culture and institutions such as marriage" as a necessary means of achieving equality.[391]

Recall that Justice Kennedy argued in *Schuette* that the respondents' proposed rule was objectionable because it would require the Court to define racial groups and their interests, which would necessarily entail "impermissible racial stereotyp[ing]."[392] An inquiry into animus or contextual intent requires the Court to undertake a close analysis of social context, and this would be impossible if one refused to think about people as members of social groups. For example, in *Brown v. Board of Education*,[393] the Court could not have reached the conclusion that segregation in schools imposed an indelible injury on black children without thinking of children as black. In *Windsor*, Justice Kennedy similarly determined the social meaning of the federal government's refusal to recognize same-sex marriage. He deemed DOMA "demean[ing]" to same-sex couples and said that it "humiliates" their children.[394] In so doing, he selected and endorsed one cultural interpretation of same-sex marriage, advanced by mainstream marriage equality forces, but invalidated or obscured competing interpretations, including queer perceptions of marriage as harmful assimilation. Similarly, in *Obergefell*, Justice Kennedy turned away the claims of "same-sex attracted men and their wives" that marrying women is a viable option for such men.[395] As it turns out, then, affirmative action is quite like marriage equality. Both policies enjoy the support of a majority of the key group, but there are vocal dissenters in each case. Although Justice Kennedy in *Schuette* was hypervigilant about the dangers of intervening in debates within racial minority communities,[396] in *Windsor* and *Obergefell*, he was oblivious to the vigorous debate roiling the LGBT

390. *See, e.g.*, Marlon M. Bailey et al., Colloquy, *Is Gay Marriage Racist?: A Conversation with Marlon M. Bailey, Priya Kandaswamy, and Mattie Udora Richardson*, *in* THAT'S REVOLTING!: QUEER STRATEGIES FOR RESISTING ASSIMILATION 87, 87-88, 91-93 (Mattilda, a.k.a. Matt Bernstein Sycamore ed., 2004); Kenyon Farrow, *Is Gay Marriage Anti Black???*, CHICKENBONES (Sept. 29, 2007), http://www.nathanielturner.com/isgaymarriageantiblack.htm.

391. PEW RESEARCH CTR., *supra* note 350, at 12-13.

392. Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1634 (2014) (plurality opinion) (quoting Reno v. Shaw, 509 U.S. 630, 647 (1993)).

393. 347 U.S. 483 (1954).

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

395. *See supra* text accompanying notes 189-90.

396. *Schuette*, 134 S. Ct. at 1635 (plurality opinion) (arguing that a legal standard that turns on group interests could spark "racial antagonisms and conflict," because courts would "announce what particular issues of public policy should be classified as advantageous to some group defined by race").

community.[397] In a similar vein, sexuality scholars and members of the LGBT community have long debated whether some people have a degree of choice in their sexual orientation.[398] A significant subset of sexual minorities argue that they experienced some choice in becoming gay, lesbian, or bisexual.[399] Justice Kennedy, however, summarily deemed sexual orientation "immutable" in *Obergefell*.[400] He was apparently unconcerned that this rigid conception of sexual orientation does not accurately reflect the experiences of a significant number of LGBT people.

Second, in *Schuette* Justice Kennedy expressed concern about basic determinations of racial identity, which he saw as a predicate for regarding an issue as having a racial focus. He stated: "[I]f it were deemed necessary to probe how some races define their own interest in political matters, still another beginning point would be to define individuals according to race."[401] This too feels like a straw man. One can conclude that an *issue* has a racial focus or impacts blacks or Latinos without designating a particular person as black or Latino. Most surveys on affirmative action rely on respondents self-identifying as a particular race. Neither the survey company, nor a judge relying on such a survey, would make an independent determination of a person's race.[402] Further, most empirical studies about LGBT people similarly

397. Some lower court judges have been more attentive to this debate. *See* Kitchen v. Herbert, 755 F.3d 1193, 1239 n.4 (10th Cir. 2014) (Kelly, J., concurring in part and dissenting in part) ("[I]t is pure speculation that every two-parent household, regardless of gender, desires marriage." (citing *Schuette*, 134 S. Ct. at 1634 (plurality opinion))).

398. *See, e.g.*, EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 1-2 (1990) (identifying competing conceptions of sexuality); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 506 (1994) (critiquing immutability argument and warning that it may divide LGBT community); Robinson, *Masculinity*, *supra* note 178, at 1356-61.

399. *See* Gregory M. Herek et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample*, 7 SEX RES. & SOC. POL'Y 176, 188 (2010) ("The vast majority of gay men (88%) and roughly two thirds of lesbians (68%) reported having had no choice at all about their sexual orientation."); *see also id.* (finding that roughly 40% of bisexuals reported "a fair amount or great deal of choice about their sexual orientation"). Young, queer-identified people seem especially wary of a fixed, essentialist conception of sexual identity. According to Verta Taylor, "[s]ome students are embracing fluid identities and calling themselves 'queer,' 'pansexual,' 'fluid,' 'bi-curious,' or simply refusing any kind of label. The old label bisexual no longer fits, because even that term implies that there are only two options: lesbian/gay or straight." Trudy Ring, *Exploring the Umbrella: Bisexuality and Fluidity*, ADVOCATE (Feb. 11, 2014, 6:00 AM EST), http://www.advocate.com/health/love-and-sex/2014/02/11/exploring-umbrella-bisexuality-and-fluidity (quoting Verta Taylor).

400. Justice Kennedy declared "sexual orientation is both a normal expression of human sexuality and immutable." Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015); *see also id.* at 2594 ("And [petitioners'] immutable nature dictates that same-sex marriage is their only real path to this profound commitment.").

401. *Schuette*, 134 S. Ct. at 1634 (plurality opinion).

402. In *Parents Involved*, Justice Kennedy introduced a distinction between policymakers thinking about race at a system-wide level, which is likely not suspect, and assigning

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rely on self-identification.[403] Thus, if categorizing individuals were a real problem here, it should also be concerning in the sexual orientation context. Justice Kennedy also characterized race as blurry and indeterminate, worrying that there are "no clear legal standards or accepted sources to guide judicial decision."[404] As suggested by Justice Kennedy's citation to a lower court opinion reviewing a San Francisco school policy that contained thirteen different racial categories,[405] this claim recalls Chief Justice Roberts's opinion in *Parents Involved*, in which he objected to a measure of race that lumped all racial minorities into one category as "nonwhite."[406] In both cases, conservative Supreme Court Justices are borrowing the left's critiques of race, such as those animating the multiracial movement, and incorporating them into conservative case law.[407]

But so far these Justices are ignoring similar left critiques of the notion of sexual identity as fixed, even though scholars and parties are raising them.[408] Justice Kennedy's reluctance to think about individuals as members of racial groups does not carry over to gender and sexual orientation. Although he claims to eschew categorical thinking in the context of race, he opines freely on differences between "gays and lesbians" and "heterosexuals" (and "men" and "women," "fathers" and "mothers") without seeing any of these categories as inherently suspicious or blurry.[409] As noted earlier, Justice Kennedy's decision to refer to a statutory classification that applied to gays, lesbians, and bisexuals

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individual students based on their race, which triggers strict scrutiny. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 788-89 (2007) (Kennedy, J., concurring in part and concurring in the judgment). Yet Justice Kennedy's *Schuette* opinion seems to collapse this vital distinction.

403. *See, e.g.*, PEW RESEARCH CTR., *supra* note 350, at 3-5.

404. *Schuette*, 134 S. Ct. at 1634-35 (plurality opinion); *see also id.* ("But in a society in which those lines are becoming more blurred, the attempt to define race-based categories also raises serious questions of its own. Government action that classifies individuals on the basis of race is inherently suspect and carries the danger of perpetuating the very racial divisions the polity seeks to transcend.").

405. *Id.* at 1635 (citing Ho v. S.F. Unified Sch. Dist., 147 F.3d 854, 858 (9th Cir. 1998)). This determination to recognize every imaginable racial group speaks to a distinctive Bay Area mindset.

406. *See* 551 U.S. at 723; *id.* at 727 (plurality opinion).

407. *See generally* RICHARD THOMPSON FORD, RACIAL CULTURE: A CRITIQUE 117-19 (2005) (discussing multiracial movement's critiques of racial categories).

408. *See, e.g.*, Halley, *supra* note 398, at 567-68 (critiquing the immutability argument and warning that it may divide LGBT community); Ring, *supra* note 399 (discussing antigay group's invocation of Lisa Diamond's research); *infra* notes 411-14 and accompanying text.

409. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (referring to "sexual practices common to a homosexual lifestyle"); Nguyen v. INS, 533 U.S. 53, 58 (2001) (discussing "the distinction between unwed fathers and mothers"); Romer v. Evans, 517 U.S. 620, 624 (1996) (defining the relevant class as "gays and lesbians").

as including simply "gays and lesbians" is a classic example of bisexual erasure and thus a polarizing act.[410]

Numerous sexuality scholars have produced empirical studies challenging the notion that all LGBT people are "born that way."[411] One of the most prominent scholars in this vein is Lisa Diamond of the University of Utah. In one of her longitudinal studies of sexual fluidity among young women, she found that over a ten-year period "67% of [female] participants had changed their identities at least once since [year one], and 36% had changed identities more than once."[412] The women in Diamond's study, who had already "come out," switched labels from "bisexual" to "heterosexual" to "lesbian" to "unlabeled" in various, nonlinear directions over a ten-year span.[413] Opponents of same-sex marriage have attempted to deploy Diamond's research in court to suggest that sexual orientation is not a coherent identity and thus does not warrant special protection.[414] If the Court truly thinks race is blurry and incoherent, one wonders how it can fairly avoid reaching the same conclusion regarding sexual orientation.[415]

Third, *Romer* and *Schuette* are notable for their contrasting attention to injury.[416] In *Schuette*, Justice Kennedy distinguished the prior race precedents

410. *See supra* text accompanying note 348.

411. *See, e.g.*, Ring, *supra* note 399 (discussing the work of several scholars, including Diamond and Savin-Williams); Ritch C. Savin-Williams, *Who's Gay? Does it Matter?*, 15 CURRENT DIRECTIONS PSYCHOL. SCI. 40, 42 (2006) (discussing competing definitions of homosexuality as characterized by biology, identity, attraction, or behavior).

412. Lisa M. Diamond, *Female Bisexuality from Adolescence to Adulthood: Results from a 10-Year Longitudinal Study*, 44 DEVELOPMENTAL PSYCHOL. 5, 9 (2008).

413. *Id.* at 9, 13.

414. The National Association for the Research and Therapy of Homosexuality, which describes itself as "a professional, scientific, organization that offers hope to those who struggle with unwanted homosexuality," Brief of Amicus Curiae, National Association for Research & Therapy of Homosexuality (NARTH), in Support of the Intervening Defendants-Appellants at 1, Perry v. Schwarzenegger, 628 F.3d 1191 (9th Cir. 2011) (No. 10-16696), 2010 WL 4075741, argued in the *Perry* case that "Dr. Diamond's research suggests an increasing number of women insist that their self-identity as lesbians is in fact a personal choice, rather than a biological constraint." *Id.* at 4-5.

415. I share the view of various scholars, including Diamond, that sexual expression should be protected regardless of whether it maps onto a stable sexual identity.

416. I turn to *Romer* rather than *Obergefell* here because, in the current moment, most readers will see the denial of marriage to gays and lesbians as an obvious injury. As recently as fifteen years ago, that might not have been the case. *Romer* thus represents a harder case in that the federal government and most states continue to lack legal protections against discrimination based on sexual orientation. *See* John Walker, *This Map Shows Just How Far LGBT Nondiscrimination Law Has Left to Go*, FUSION (Oct. 28, 2015, 7:40 AM), http://fusion.net/story/222970/lgbt-employment-discrimination-state-map (discussing report by Movement Advancement Project). The broader point is that the cultural milieu makes certain injuries visible and others harder to discern.

by finding no state-inflicted racial injury in the present case.[417] As a professor who has taught in the post-Proposition 209[418] University of California system for a decade and daily grapples with the paltry number of black and Latino students in many classes, and their attendant sense of racial isolation,[419] I find *Schuette*'s erasure of these injuries disquieting. By contrast, in *Romer*, Justice Kennedy was convinced that the Colorado amendment repealing and forbidding antidiscrimination protections that specifically mentioned gay, lesbian, or bisexual identity, status, or conduct inflicted "immediate, continuing, and real injuries."[420] In reaching this conclusion, the *Romer* opinion neither cited any empirical evidence of antigay discrimination in Colorado, nor contested the State's claim that its general antidiscrimination laws were available to all residents, including sexual minorities.[421]

Finally, Justice Kennedy took offense at the *Schuette* respondents' arguments because, in his view, they disrespected the democratic process.[422] Not only did Justice Kennedy fail to consider possible animus in the Michigan amendment campaign, but he also valorized it as a fully functional political process demanding respect. He stated:

> Michigan voters acted in concert and statewide to seek consensus and adopt a policy on a difficult subject against a historical background of race in America that has been a source of tragedy and persisting injustice. That history demands that we continue to learn, to listen, and to remain open to new approaches if we

417. Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1637 (2014) (plurality opinion) ("[W]hen hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts. . . . But those circumstances are not present here.").

418. Proposition 209 amended the California State Constitution to prohibit the state from granting "preferential treatment" based on race, sex, color, ethnicity or national origin in public employment, education, or contracting.

419. *See, e.g.*, Rhonesha Byng, *Racial Tensions Grow at UCLA Law After Black Student Receives Hate Mail*, HUFFINGTON POST (Feb. 27, 2014, 11:59 AM EST) http://www.huffingtonpost.com/2014/02/27/ucla-law-school-racism-diversity_n_4860406.html (discussing backlash against black students after they circulated a video discussing the challenges of attending a law school with just thirty-three African American students). Justice Kennedy seemed concerned by racial isolation in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring in part and concurring in the judgment), but that concern did not surface in *Schuette*. However, Justice Sotomayor's *Schuette* dissent eloquently made these injuries visible. *See* 134 S. Ct. at 1675-76 (Sotomayor, J., dissenting).

420. Romer v. Evans, 517 U.S. 620, 635 (1996).

421. In retrospect, we can see that *Romer* was a turning point in terms of race and sexual orientation. Justice Kennedy could have ruled in favor of LGB people based on the race political process precedents that were at issue in *Schuette*, but he pointedly refused to rely on that precedent. Forging a queer "animus" rationale just for sexual orientation cases enabled him to segregate race and sexual orientation case law.

422. *See* 134 S. Ct. at 1635 (plurality opinion).

> are to aspire always to a constitutional order in which all persons are treated with fairness and equal dignity.[423]

Indeed, Justice Kennedy went on to claim that removing this issue from public debate and the democratic process "would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common."[424] Under this view, blacks and Latinos lose not simply because they lack a viable equal protection claim, but because their interests are trumped by a "fundamental right" possessed by the white majority in the state. This sets up a jarring conflict with *Obergefell*. In *Obergefell*, the Court held that the democratic process and "millennia" of tradition had to yield because of the injuries experienced by same-sex couples.[425] Expressing empathy for these couples' suffering, the Court deemed such couples to enjoy a "fundamental right" to marry. But in *Schuette*, it was the white majority in Michigan that enjoyed a "fundamental right" to regulate affirmative action through the democratic process, notwithstanding the denial of educational opportunity to underrepresented racial minorities.

Some of the *Obergefell* dissents cited Justice Kennedy's *Schuette* opinion, as did the Sixth Circuit when it refused to strike down prohibitions on same-sex marriage.[426] Justice Kennedy responded that respect for the democratic process must give way when the Court discerns a constitutional violation,[427] but of course this begs the question.

Some readers might view affirmative action as significantly different than same-sex marriage in that white opposition to affirmative action cannot be reduced to animus. It is true that psychologists have debated the role of animus in generating opposition to affirmative action, and many see various factors in the mix, including forms of animus or group dominance.[428] However, as my earlier discussion of same-sex marriage sought to demonstrate, factors such as religion and gender help explain opposition to same-sex marriage and are interwoven with animus.[429] Thus, affirmative action may be more like same-sex marriage than many would like to think.

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423. *Id.* at 1637.

424. *Id.*

425. Obergefell v. Hodges, 135 S. Ct. 2584, 2594, 2604-07 (2015).

426. *Id.* at 2625 (Roberts, C.J., dissenting) ("It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." (quoting *Schuette*, 134 S. Ct. at 1637 (plurality opinion))); *id.* at 2627 n.1 (Scalia, J., dissenting); DeBoer v. Snyder, 772 F.3d 388, 409 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584 (2015).

427. *Obergefell*, 135 S. Ct. at 2605-06.

428. *See, e.g.*, Christopher M. Federico & Jim Sidanius, *Sophistication and the Antecedents of Whites' Racial Policy Attitudes: Racism, Ideology, and Affirmative Action in America*, 66 PUB. OPINION Q. 145, 169-70 (2002).

429. *See supra* notes 306-07 and accompanying text.

Moreover, Justice Kennedy's *Obergefell* analysis implies that even policies enacted in "good faith" can violate the Constitution. An acontextual reading of this language might lead one to think that the Court is inclined to eliminate entirely the requirement of discriminatory purpose in sexual orientation equal protection cases.[430] However, such a move would constitute a surprising departure from a long line of equal protection precedents that make intent important.[431] Thus, I think a more limited and plausible reading would understand the Court to require some form of bad intent, even if it looks different from animus in *Windsor* or malice in *McCleskey v. Kemp*.[432]

One theory for bridging the distance between the ostensible good intentions of the opponents of same-sex marriage and the injurious effects of laws banning marriage is the science of implicit bias. The concept of implicit bias has sparked a vast body of psychological and legal scholarship on race,[433] but relatively little regarding sexual orientation. In the words of one influential scholar, this is the phenomenon of "racism without racists."[434] That is, a person may see himself as colorblind and report egalitarian views on a survey, while holding implicit negative attitudes and stereotypes that are beyond his awareness. Whether intended or not, Justice Kennedy may have created a foothold for lawyers to argue that equal protection doctrine prohibits implicit bias. Justice Kennedy's opinion in a Fair Housing Act case appears to be his first recognition of implicit bias in the race context.[435] He noted that disparate impact liability "permits plaintiffs to counteract *unconscious prejudices* and *disguised animus* that escape easy classification as disparate treatment."[436] That is of course a statutory case and may have no implications for how the Court applies equal protection. But *Obergefell* raises the question whether the

430. For example, Carlos Ball argues: "[*Obergefell*] focused not on the intent behind the marriage bans, but on their impact on the lives, relationships, and children of sexual minorities. For the Court, the state of mind of marriage ban supporters was constitutionally irrelevant." Carlos A. Ball, *Bigotry and Same-Sex Marriage*, 84 UMKC L. REV. (forthcoming 2016) (manuscript at 22), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687267.

431. *See, e.g.*, Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054-55 (1978) (discussing the Court's tendency to require the identification of a specific perpetrator in race discrimination cases).

432. McCleskey v. Kemp, 481 U.S. 279 (1987) (requiring McCleskey to prove that "the Georgia Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect").

433. *See, e.g.*, Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1064-65 (2006).

434. EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 1-4 (4th ed. 2014).

435. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015).

436. *Id.* at 2511-12 (emphasis added).

Court can justify protecting LGBT people from implicit bias and recognize implicit racial bias in some statutory contexts, while largely ignoring it in the race equal protection context.

In sum, *Schuette*'s analysis, if taken to its logical extension, raises the prospect of far-reaching revisions to equal protection and antidiscrimination law. If paying attention to race carries a high risk of judges concluding that "all [black people] think alike," as Justice Kennedy suggested in *Schuette*,[437] how can we view *Brown* and what is left of the Voting Rights Act as legitimate?[438] And it should go without saying that Justice Kennedy's *Schuette* analysis suggests a willingness to overturn *Grutter v. Bollinger*.[439] *Grutter* permitted affirmative action based on a diversity rationale, which some regard as relying on racial stereotyping. Moreover, this discussion has sought to demonstrate that Justice Kennedy's *Schuette* logic, if applied evenhandedly, would undermine LGBT rights as well.

Conclusion

This Article demonstrates growing inequities in equal protection law. It argues that the Court, led by Justice Kennedy, has confined race, sex, class, and disability cases to the traditional equal protection model that most students learn in Constitutional Law. Simultaneously, the Court has cultivated LGBT exceptionalism, a distinct form of analysis for sexual orientation claims, which subverts certain traditional rules. This analysis has allowed certain LGBT people to rely on an animus/contextual intent standard that the Court has precluded for all other groups. Further, the classification requirement, which forecloses many race and sex claims, appears not to apply to sexual orientation claims. The sexual orientation precedents suggest that, so long as Justice Kennedy is on the Court, LGBT people may enjoy a tier of our own, although it is unlikely that all members of the community will benefit equally.[440]

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437. Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1634 (2013) (plurality opinion).

438. Much of antidiscrimination law requires judges to think about people as members of particular racial groups, such as whether a law inflicts a racial injury on black children (*Brown*) or whether a specific racial group is underrepresented in the workforce (Title VII).

439. *See* 539 U.S. 306, 333 (2003) (denying that diversity rationale for race-conscious admissions depends on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue"). Justice Kennedy dissented in *Grutter*. *Id.* at 387 (Kennedy, J., dissenting).

440. For those who live at the intersection of stigmatized identities, the sexual orientation precedents may evoke a bittersweet reaction. Justice Kennedy effectively tells us that he will grant us relief only insofar as we highlight our sexual orientation and downplay the discrimination that we face on account of our race and gender. This, of course, is antithetical to intersectionality. *See* Crenshaw, *Demarginalizing*, *supra* note 342, at 139-40.

What accounts for the discrepant treatment of sexual minorities as compared to all other civil rights constituencies? One explanation for LGBT exceptionalism arises from differences in cultural representation.[441] As Katherine Franke explains, the marriage equality movement, and the broader gay rights movement before it, gave the image of gays and lesbians a makeover.[442] Their carefully curated and airbrushed images as churchgoing, military-serving, and thoroughly desexualized model citizens overtook (but did not erase) preexisting representations of gays and lesbians as gender deviants and sex radicals, at least in the eyes of the Justices.[443] The plaintiffs in cases such as *Windsor* and *Obergefell* were depicted as, to borrow a phrase from Devon Carbado, "'but for' gay people."[444] That is, they are just like the most respected citizens, but for the irrelevant fact of whom they love. The *Windsor* and *Obergefell* plaintiffs included extremely sympathetic figures, including widows, widowers, and two mothers raising adopted children with special needs.[445] LGBT people who diverge from these "perfectly mainstream"[446] exemplars—by virtue of race, class, sexual behavior, and/or being bisexual or transgender instead of gay or lesbian—might face very different treatment by the courts. For example, many continue to view blacks and Latinos as culturally deficient "takers" who are a drain on society.

The makeover of gay and lesbian identity was facilitated by several structural factors that distinguish sexual orientation from race and gender. First, the most prominent plaintiffs in the same-sex marriage cases, such as Edith Windsor and Jim Obergefell, are predominantly white,[447] which creates cultural distance from the civil rights claims of blacks and Latinos. Second,

441. Various scholars have examined the relationship between law and culture. *See, e.g.*, Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and the Law*, 117 HARV. L. REV. 4, 8 (2003) ("[C]onstitutional law and culture are locked in a dialectical relationship so that constitutional law both arises from and in turn regulates culture.").

442. Katherine Franke, *Public Sex, Same-Sex Marriage, and the Afterlife of Homophobia*, *in* PETITE MORT: RECOLLECTIONS OF A QUEER PUBLIC 156, 157-58 (Carlos Motta & Joshua Lubin-Levy eds., 2011), http://www2.law.columbia.edu/faculty_franke/Franke_Public_Sex.pdf.

443. *See, e.g.*, Robinson, *supra* note 250, at 222-24.

444. Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1506 (2000) (arguing that the movement has favored deploying "'but for' gay people—people who, but for their sexual orientation, were perfectly mainstream").

445. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2594-95 (2015); United States v. Windsor, 133 S. Ct. 2675, 2683 (2013).

446. Carbado, *supra* note 444, at 1506.

447. *See* Ariel Levy, *The Perfect Wife*, NEW YORKER (Sept. 30, 2013), http://www.newyorker.com/magazine/2013/09/30/the-perfect-wife (explaining how marriage equality movement selected Edith Windsor's case to challenge DOMA); Michael S. Rosenwald, *How Jim Obergefell Became the Face of the Supreme Court Gay Marriage Case*, WASH. POST (Apr. 6, 2015), http://wpo.st/XO4y0 (stating that Obergefell's status as the named plaintiff meant that he was poised to "become a historic figure").

gays and lesbians are a very small portion of the public—less than two percent, according to one widely cited survey of existing studies.[448] Although a broader understanding of sexuality as based on sexual behavior or attraction could have produced a larger class, as large as twenty percent by some accounts,[449] the smaller figure likely helped persuade the Court that granting a new right would have minimal ripple effects on the broader society. Granting greater equality to blacks, Latinos, and especially women would impact many more people and have clearer ramifications for whites and men. Third, the claims of the couples in *Windsor* and *Obergefell* sounded in formal equality and thus were tailor-made for Justice Kennedy's libertarian judicial sensibilities.[450] Unlike blacks and Latinos, these plaintiffs were not asking for economic redistribution, such as the claim that students enjoy a fundamental right to a quality education.[451] (Indeed, proponents of same-sex marriage stressed that expanding marriage would boost the beleaguered economy.)[452] Nor did their request threaten massive social disruption, like the claim that the Court should closely scrutinize all criminal justice policies that have a disparate racial impact. Unlike feminists, they were not seeking to restructure fundamentally the family.[453] As Justice Kennedy noted, these plaintiffs sought to join marriage, *not* transform it.[454] In short, the marriage equality movement asked for and was granted equality on the cheap. They offered perhaps a uniquely attractive claim for equality, whereas claims by blacks, Latinos, and women are battling fiercer cultural headwinds and steeper social costs. Moreover,

448. GARY J. GATES, HOW MANY PEOPLE ARE GAY, LESBIAN, BISEXUAL, AND TRANSGENDER? 6 (2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf (estimating that 1.7% of adults in the United States identify as lesbian or gay).

449. *See* Savin-Williams, *supra* note 411, at 41.

450. *Cf.* Angela Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539 (2006) (discussing neoliberal character of mainstream gay rights claims).

451. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (expressing concern that embracing the claim that education is a fundamental right could lead to government responsibility for feeding and clothing people). An important area for future scholarship to examine is the relationship between class, race, and sexual orientation. I am developing an empirical study of LGBT people's romantic histories that will examine how identity (e.g., race, class, gender, bisexual, and/or transgender versus gay or lesbian identity) impacts interest in and access to long-term relationships, including same-sex marriage.

452. *See, e.g.*, M.V. Lee Badgett, *The Economic Benefits of Gay Marriage*, PBS NEWSHOUR: THE RUNDOWN (Mar. 30, 2013 3:22 PM EST), http://www.pbs.org/newshour/rundown/the-e.

453. *Cf.* Goldberg, *supra* note 359, at 2129-32 (arguing that judges worry that sex-based arguments could unsettle gender roles in society).

454. Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015) ("Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities.").

vindicating marriage equality may have granted the Court cover as it chisels away at the civil rights of other groups.[455] In the end, the paradox of the sexual orientation cases is that many people perceive them as minimalist applications of basic equality principles, even as the Court engaged in significant revision of or elision of basic equality doctrinal rules in reaching its desired outcomes.

If this cultural/structural analysis is correct, the lesson for civil rights claimants may be to start by transforming cultural representations and public consciousness. The string of highly publicized police killings of unarmed black men and women in the last few years, and the ensuing "Black Lives Matter" protests, have created the possibility of a shift in public attitudes about the fairness of the criminal justice system. Some conservative lawmakers are pushing for reform of sentencing laws, for example. Notably, Justice Kennedy has lectured Congress on the need to fix a system that he described as "broken."[456] My analysis of the marriage equality movement's success, however, suggests that even successful cultural transformation must grapple with structural limits. Thus, to the extent that the current moment gives birth to criminal justice reforms, they will likely be incremental, and driven by legislatures, not courts. The most successful reforms may hinge on "interest convergence"[457]—for example, the intersection of Black Lives Matter and fiscal conservatism regarding overspending on prisons. Courts may be loath to independently reconsider the fairness of criminal justice rules, given the pervasive racial disparities throughout the system and the sheer number of people—defendants and victims, police officers and prosecutors—that would be impacted. Nonetheless, I urge lawyers and scholars to press the courts to remedy the doctrinal disparities created by the sexual orientation cases by lifting unjustified restrictions on race, gender, disability, and other equal protection claims.

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455. *See* Emily Bazelon, *Marriage of Convenience*, N.Y. TIMES MAG. (Jan. 27, 2015), http://nyti.ms/1yqCuJV. Conversations with Dave Pozen and Kendall Thomas were extremely helpful in developing these thoughts.

456. Editorial, *Justice Kennedy's Plea to Congress*, N.Y. TIMES (Apr. 4, 2015), http://nyti.ms/1FuplWN (quoting Justice Kennedy).

457. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (making manifest the *Brown* decision's "value to whites, not simply those concerned about the immorality of racial inequality, but also whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation.").

Appendix

Nonunanimous Decisions Used in the Empirical Analysis

Race

Case	Issue	Decision Ideology	Kennedy Ideology	Vote
Adarand Constructors, Inc. v. Pena 515 U.S. 200 (1995)	Affirmative Action	Conservative	Conservative	5-4
Alabama Legislative Black Caucus v. Alabama 135 S. Ct. 1257 (2015)	Voting Rights	Liberal	Liberal	5-4
Board of Education v. Dowell 498 U.S. 237 (1991)	School Desegregation	Conservative	Conservative	5-3
Bush v. Vera 517 U.S. 952 (1996)	Voting Rights	Conservative	Conservative	5-4
Campbell v. Louisiana 523 U.S. 392 (1998)	Desegregation	Liberal	Liberal	7-2
City of Richmond v. J.A. Croson Co. 488 U.S. 469 (1988)	Affirmative Action	Conservative	Conservative	6-3
Easley v. Cromartie 532 U.S. 234 (2001)	Voting Rights	Liberal	Conservative	5-4
Edmonson v. Leesville Concrete Co. 500 U.S. 614 (1991)	Desegregation	Liberal	Liberal	6-3
Fisher v. University of Texas, Austin 133 S. Ct. 2411 (2013)	Affirmative Action	Conservative	Conservative	7-1
Johnson v. California 545 U.S. 162 (2005)	Desegregation	Liberal	Liberal	8-1
Johnson v. California[458] 543 U.S. 499 (2005)	Desegregation	Liberal	Liberal	6-2
Georgia v. McCollum 505 U.S. 42 (1992)	Desegregation	Liberal	Liberal	7-2
Gratz v. Bollinger 539 U.S. 244 (2003)	Affirmative Action	Conservative	Conservative	6-3

458. Justice Stevens agreed with the substance of the majority's analysis but disagreed with the majority's decision to remand for the lower court to apply strict scrutiny. *See Johnson*, 543 U.S. at 517-23 (Stevens, J., dissenting).We treat this vote as liberal and classify it with the majority.

Case	Issue	Decision Ideology	Kennedy Ideology	Vote
Grutter v. Bollinger 539 U.S. 306 (2003)	Affirmative Action	Liberal	Conservative	5-4
Hernandez v. New York 500 U.S. 352 (1991)	Desegregation	Conservative	Conservative	6-3
Metro Broadcasting, Inc. v. FCC 497 U.S. 547 (1990)	Affirmative Action	Liberal	Conservative	5-4
Miller v. Johnson 515 U.S. 900 (1995)	Voting Rights	Conservative	Conservative	5-4
Missouri. v. Jenkins 515 U.S. 70 (1995)	School Desegregation	Conservative	Conservative	5-4
Parents Involved in Community Schools v. Seattle School District No. 1 551 U.S. 701 (2007)	School Desegregation	Conservative	Conservative	5-4
Powers v. Ohio 499 U.S. 400 (1991)	Desegregation	Liberal	Liberal	7-2
Purkett v. Elem 514 U.S. 765 (1995)	Desegregation	Conservative	Conservative	7-2
Shaw v. Hunt 517 U.S. 899 (1996)	Voting Rights	Conservative	Conservative	5-4
Shaw v. Reno 509 U.S. 630 (1993)	Voting Rights	Conservative	Conservative	5-4
Shelby County v. Holder 133 S. Ct. 2612 (2013)	Voting Rights	Conservative	Conservative	5-4
Schuette v. Coalition to Defend Affirmative Action 134 S. Ct. 1623 (2014)	Affirmative Action	Conservative	Conservative	6-2
Snyder v. Louisiana 552 U.S. 472 (2008)	Desegregation	Liberal	Liberal	7-2
United States v. Fordice 505 U.S. 717 (1992)	School Desegregation	Liberal	Liberal	8-1

Sex

Case	Issue	Decision Ideology	Kennedy Ideology	Vote
Gonzales v. Carhart 550 U.S. 124 (2007)	Abortion	Conservative	Conservative	5-4
Hill v. Colorado 530 U.S. 703 (2000)	Abortion	Liberal	Conservative	6-3
Hodgson v. Minnesota 497 U.S. 417 (1990)	Abortion	Conservative	Conservative	5-4
J.E.B. v. Alabama ex rel. T.B. 511 U.S. 127 (1994)	Sex Discrimination	Liberal	Liberal	6-3
Madsen. v. Women's Health Center, Inc. 512 U.S. 753 (1994)	Abortion	Liberal	Conservative	6-3
Nguyen v. INS 533 U.S. 53 (2001)	Sex Discrimination	Conservative	Conservative	5-4
Ohio v. Akron Center for Reproductive Health 497 U.S. 502 (1990)	Abortion	Conservative	Conservative	6-3
Planned Parenthood of Southeastern Pennsylvania v. Casey 505 U.S. 833 (1992)	Abortion	Conservative	Conservative	5-4
Rust v. Sullivan 500 U.S. 173 (1991)	Abortion	Conservative	Conservative	5-4
Schenck v. Pro-Choice Network of Western New York 519 U.S. 357 (1997)	Abortion	Conservative	Conservative	6-3
Stenberg v. Carhart 530 U.S. 914 (2000)	Abortion	Liberal	Conservative	5-4
United States v. Virginia 518 U.S. 515 (1996)	Sex Discrimination	Liberal	Liberal	7-1
Webster v. Reproductive Health Services 492 U.S. 490 (1989)	Abortion	Conservative	Conservative	5-4

Sexual Orientation

Case	Issue	Decision Ideology	Kennedy Ideology	Vote
Boy Scouts of America v. Dale 530 U.S. 640 (2000)	Antidiscrim-ination Law	Conservative	Conservative	5-4
Christian Legal Society v. Martinez 561 U.S. 661 (2010)	Antidiscrim-ination Law	Liberal	Liberal	5-4
Lawrence v. Texas 539 U.S. 558 (2003)	Sexual Liberty	Liberal	Liberal	6-3
Obergefell v. Hodges 135 S. Ct. 2584 (2015)	Same-Sex Marriage	Liberal	Liberal	5-4
Romer v. Evans 517 U.S. 620 (1996)	Antidiscrim-ination Law	Liberal	Liberal	6-3
United States v. Windsor 133 S. Ct. 2675 (2010)	Same-Sex Marriage	Liberal	Liberal	5-4