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Artem M. Joukov

A SECOND OPINION: CAN *WINDSOR V. UNITED STATES* SURVIVE PRESIDENT TRUMP'S SUPREME COURT?

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This Article examines President Donald Trump's recent re-composition of the United States Supreme Court and the potential effects on Windsor v. United States *and its progeny. The Article considers whether the shifting balance of the Court may lead to reconsideration of* Windsor*, particularly via attempted exploits of the weaknesses in the standard of review applied to reach the decision. The Article will conclude that while revolutionary,* Windsor *lacked the doctrinal clarity of its offspring,* Obergefell v. Hodges, *and therefore may be at greatest risk of reversal by the increasingly conservative Court. In particular, the Court may rely on the conflict between* Windsor *and preceding jurisprudence regarding the rational basis review standard to draw the conclusion that* Windsor *should have been decided differently under the state of the law in 2013.*

INTRODUCTION

Obergefell v. Hodges[1] will likely go down in American legal history as the seminal case on same-sex marriage. But there is another case, far less definitive and far more nuanced, that provided

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[*] Artem M. Joukov received his *Juris Doctor*, *cum laude*, from the University of Alabama School of Law (now the Hugh F. Culverhouse Jr. School of Law) in 2014. He earned a Master of Business Administration with a Specialization in Finance from Florida State University in 2018 and a Bachelor of Science in Mathematics and History, *magna cum laude*, with a minor in Philosophy, from Birmingham-Southern College in 2012. After serving as a prosecutor and an arbitrator for the State of Florida, he returned to academia to pursue a Ph.D.

[1] *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

its legal foundation.[2] In *Windsor v. United States*, a divided Supreme Court struck down the federal definition of marriage without openly declaring any fundamental Due Process right to same-sex marriage.[3] Relying rather on the Equal Protection component of the Fifth Amendment's Due Process Clause, the Court declared that federal law distinguishing between heterosexual and homosexual couples treated homosexual couples unequally without any legitimate justification.[4] Two years later, the Court in *Obergefell* relied on *Windsor* to strike down state bans on same-sex marriage, declaring marriage between same-sex couples to be a fundamental right.[5]

However, the *Windsor* decision may be reexamined by President Trump's Supreme Court appointments.[6] Moreover, it is possible that some deficiencies in *Windsor* may lead the Court to once again reverse its position, particularly if *Obergefell* is also reversed (or otherwise inapplicable) and can offer *Windsor* no support. This Article explores this possibility and concludes that the Court may be able to find arguments that are essentially procedural in nature to justify overturning *Windsor* by arguing that *Windsor* materially altered the rational basis review standard in a way that Constitutional law cannot support.[7]

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[2] *Compare* United States v. Windsor, 570 U.S. 744, 774 (2013) (holding that the Defense of Marriage Act ("DOMA") definition of "marriage" and "spouse" as limited to opposite-sex couples was unconstitutional), *with Obergefell*, 135 S. Ct. at 2585 (responding to the groundwork laid by *Windsor* by establishing the fundamental right to same-sex marriage).

[3] *Windsor*, 570 U.S. at 744.

[4] *Id.* at 769–75.

[5] *See Obergefell*, 135 S. Ct. 2584 (citing *Windsor* eighteen (18) times in Court's opinion).

[6] *See generally* Ariane de Vogue & Dan Berman, *Neil Gorsuch Confirmed to the Supreme Court*, CNN POLITICS (Apr. 7, 2017), https://www.cnn.com/2017/04/07/politics/neil-gorsuch-senate-vote/index.html (detailing the confirmation of conservative Justice Neil Gorsuch); Kevin Breuninger & Mike Calia, *Brett Kavanaugh Confirmed by Senate in 50-48 Vote, Ascends to Supreme Court*, CNBC (Oct. 6, 2018), https://www.cnbc.com/2018/10/06/brett-kavanaugh-confirmed-by-senate-in-50-48-vote.html (noting how President Trump nominated Justice Neil Gorsuch and Justice Brett Kavanaugh to the Supreme Court in the past two years).

[7] This Article takes no position with respect to the morality or political and social implications of same-sex marriage. Enough presidents, law professors, lawyers, authors, philosophers, activists, scientists, doctors, psychologists,

This Article will evaluate *Windsor*'s holding that the United States Constitution does not permit the federal government to limit the definition of "marriage" as a legally recognizable bond between people of the opposite sex.[8] Part I of this Article will review the facts and the procedural history of *Windsor* and discuss the majority opinion, as well as the dissenting opinions of Chief Justice Roberts, Justice Scalia, and Justice Alito. Part II will examine the arguments made by various lawyers and law professors favoring and opposing homosexual marriage prior to *Windsor* to establish the legal atmosphere preceding the decision. Part III will analyze the strengths and weaknesses of the Court's reasoning in *Windsor*, demonstrating that a majority of the current Court could argue that once the *Windsor* Court reached the merits of the case, it should have upheld § 3 of the federal Defense of Marriage Act ("DOMA").[9] Finally, this Article concludes by examining how the Court may find the *Windsor* decision troubling not only because it struck down a technically valid federal law under rational basis review, but also because it set a precedent for striking down similar state laws. Thus, if the Court, with its new membership, reconsiders *Windsor* in future cases, *Windsor* might not survive without the support of its offspring: *Obergefell*. Conversely, if *Obergefell* is challenged, it likely cannot lean on *Windsor* for support.

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religious figures, senators, representatives, and even judges have commented on the moral implications of such unions already, to the point that it has become more of a political question than a legal one. This Article does not intend to enter that debate, but rather focuses on the narrower procedural, legal issues surrounding *Windsor*. As long as cases involving same-sex couples continue to be litigated in state and federal courts of the United States, it is crucial for all sides to consider and understand some of the likely legal arguments, however persuasive or unpersuasive, that each side brings to court with them. These legal arguments will undoubtedly include *Windsor*, and they will undoubtedly be altered if President Trump's Court reverses *Windsor*, whether that reversal is morally justified or not.

[8] *See* United States v. Windsor, 570 U.S. 744, 744 (2013).

[9] *See id.* at 752; *see also* 1 U.S.C.A. § 7 (2012) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

PART I: THE *WINDSOR* DECISION

To see why President Trump's Supreme Court might consider reversing *Windsor*, it is important to survey the facts of the case as well as the way each 2013 Supreme Court Justice voted concerning those facts. After all, with more than twenty percent (and counting) of the Supreme Court replaced under Donald Trump,[10] a 5–4 decision like *Windsor* might be reversed through the presence of more conservative jurists on the Court alone.[11] How those jurists would interpret *Windsor's* facts may be a hypothetical question, but it is an important one, as future cases may bear similarity to *Windsor* if brought for another battle at the Supreme Court level.

A. The Facts

Two women, Edith Windsor and Thea Spyer, were New York residents who married in Canada.[12] Spyer died in 2009 and left all of her possessions to Windsor.[13] Windsor tried to claim the estate tax exemption for surviving spouses.[14] However, federal law at that time did not allow her to do so; the definition of "marriage" provided in DOMA prevented a same-sex partner from being considered a "spouse."[15] Therefore, Windsor did not qualify for the exemption, and had to pay the tax of $363,053 which a man in her position would not have had to pay.[16] She complied with the law, but later challenged its constitutionality in federal court.[17]

B. Procedural History

The United States District Court for the Southern District of New York held that the relevant DOMA section was

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[10] *See* Breuninger & Calia, *supra* note 6.

[11] *See generally Windsor*, 570 U.S. 744 (holding in a 5-4 decision that DOMA was unconstitutional).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

unconstitutional under the implicit Equal Protection provision of the Fifth Amendment Due Process Clause.[18] The district court engaged in an Equal Protection analysis that appeared to involve the searching rational basis standard exemplified in *Romer v. Evans*:[19] The standard was still rational basis, but the government had the burden of showing that the law was logically related to a legitimate government interest.[20] The court considered the government's purposes behind the law, which included:

> 1. Caution against changing the traditional meaning of marriage;
> 2. The desire to promote childbearing and procreation;
> 3. The consistency of the application of federal regulations to married couples; and
> 4. Conserving public finances.[21]

The court found that there was no logical relation between the law and its purported first two purposes.[22] Moreover, the third purpose identified by the government could not save the law, with the Court holding that the purpose violated federalism principles.[23] The court further dismissed the fourth identified purpose by stating that while conserving public funds is a recognized government interest, it cannot be pursued by an arbitrary classification which would conserve finances at the expense of some individuals, but not similarly-situated others.[24]

The Second Circuit Court of Appeals affirmed.[25] Rather than applying a searching rational basis standard, the Second Circuit applied intermediate scrutiny.[26] The court required the government to show that DOMA § 3 advanced an important government interest

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18 Windsor v. United States, 833 F. Supp. 2d 394, 402 (S.D.N.Y. 2012).

19 Romer v. Evans, 517 U.S. 620, 623 (1996).

20 *Windsor*, 833 F. Supp. 2d at 402.

21 *Id.* at 402–06.

22 *Id.* at 403–05.

23 *Id.* at 405–06.

24 *Id.* at 406.

25 Windsor v. United States, 699 F.3d 169, 188 (2d Cir. 2012).

26 *Id.* at 176.

in a manner substantially related to that interest.[27] The court reasoned that:

> 1. There was a history of discrimination against homosexual couples;
> 2. The classification of homosexual couples rarely bears any relation to their ability to contribute to society;
> 3. "Homosexuality is a sufficiently discernible characteristic to define a discrete minority class;" and
> 4. "[H]omosexuals are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public."[28]

These findings justified the application of the intermediate scrutiny to DOMA.[29] According to the Second Circuit, the four purposes the government identified at the district court level for DOMA's definition of "marriage" could not overcome intermediate scrutiny for many of the same reasons they could not survive rational basis review before the court below.[30] Since the searching rational basis standard is a less stringent bar for the federal government to pass than intermediate scrutiny, this was a logically consistent decision.[31] Naturally, then, failure to satisfy the former implied failure to satisfy the latter.[32]

Judge Straub filed a fervent dissent.[33] He made a two-fold argument for sustaining DOMA:

> 1. The standard of review should be rational basis, and the desire to maintain the tradition of procreation and childbearing by heterosexual parents is sufficient rational basis on its own.[34] The government's purpose of uniformity and consistency

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27 *Id.*

28 *Id.* at 182–85.

29 *Id.* at 185.

30 *Id.* at 185–88.

31 *See id.*

32 *See id.*

33 *Id.* at 188.

34 *Id.* at 199–211.

> of federal regulations also constitutes a sufficient rational basis.[35]
>
> 2. *Baker v. Nelson*[36] is governing Supreme Court precedent which mandates that the Second Circuit sustain the challenged portion of DOMA.[37]

The first argument was essentially a value judgment; Judge Straub simply valued the government purposes as more legitimate than the other judges perceived them to be.[38] Judge Straub also asserted, in contrast to his colleagues, that the means Congress employed to achieve those purposes were logically connected to those purposes.[39] Under the rational basis scrutiny standard that Judge Straub called for, the judge would have sustained the law.[40]

The second argument involved the eleven-word *Baker* decision issued by the United States Supreme Court in 1972 finding no federal issue with Minnesota's same-sex marriage ban.[41] Judge Straub argued that *Baker* should be binding on the Second Circuit because despite consisting of only eleven words, it was a decision on the merits and therefore had precedential effect.[42] Since the Supreme Court saw no substantial federal issue with the Minnesota ban on same-sex marriage in *Baker*,[43] Judge Straub's *Windsor* dissent concluded that the state ban on same-sex marriage did not violate the Fourteenth Amendment's Due Process Clause or Equal

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35 *Id.* at 202–08.

36 Baker v. Nelson, 409 U.S. 810 (1972).

37 *Windsor*, 699 F.3d at 192–95.

38 *Id.* at 199–211.

39 *Id.*

40 *Id.* at 210–11.

41 *Id.* at 193–94. *Baker* was a decision by the Supreme Court of the United States that there was no substantial federal question where a homosexual couple challenged a Minnesota statute that banned same-sex marriage under the First, Eighth, Ninth, and Fourteenth Amendment of the United States Constitution. Baker v. Nelson, 409 U.S. 810 (1972), *aff'g* Baker v. Nelson, 291 Minn. 310 (1971). The Supreme Court's decision reads, in its entirety: "The appeal is dismissed for want of a substantial federal question." *Baker*, 409 U.S. at 810.

42 *Windsor*, 699 F.3d at 193–94. Judge Straub did not mention *Romer* and Lawrence v. Texas, 539 U.S. 558 (2003) in his discussion of *Baker*, and he appeared to believe that *Baker* was still good law despite these cases.

43 *Baker*, 409 U.S. at 810.

Protection Clause in the eyes of the 1972 Supreme Court.[44] As the Fourteenth Amendment's Due Process Clause is essentially identical to, if not more expansive than, the Due Process Clause of the Fifth Amendment, the result should have been the same for a federal law which banned same-sex marriage, according to the dissenting judge.[45] Judge Straub argued that the ruling in *Windsor* should have mirrored the ruling in *Baker*: the Second Circuit Court of Appeals should have upheld the challenged statute.[46]

C. The Supreme Court's Opinion

The Supreme Court granted certiorari and affirmed the Second Circuit's decision in a 5–4 ruling, declaring DOMA § 3 unconstitutional.[47] Justice Kennedy delivered the majority opinion, joined by Justices Kagan, Ginsburg, Sotomayor, and Breyer.[48] Justice Roberts filed a dissent.[49] Justice Scalia also filed a dissent, in which Justice Thomas joined and in which Justice Roberts joined with respect to Part I.[50] Justice Alito filed a dissent in which Justice Thomas joined with respect to Part II and Part III.[51]

Notice that two out of the nine justices involved in the opinion have now been replaced: Justice Scalia and Justice Kennedy.[52] Perhaps most important is the replacement of Justice Kennedy after his retirement, since Justice Kennedy authored not only the majority

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44 *Windsor*, 699 F.3d at 194–95.

45 *Id.* at 194; U.S. CONST. amend. V; U.S. CONST. amend. XIV § 1.

46 *Windsor*, 699 F.3d at 195.

47 *Windsor*, 570 U.S. at 775.

48 *Id.* at 747–49.

49 *Id.* at 775.

50 *Id.* at 778.

51 *Id.* at 802.

52 *See* Nina Totenberg, *Senate Confirms Gorsuch To Supreme Court*, NPR (Apr. 7, 2017), https://www.npr.org/2017/04/07/522902281/senate-confirms-gorsuch-to-supreme-court (noting how the Senate confirmed Justice Gorsuch to the Supreme Court); *see also* Dylan Matthews, *America under Brett Kavanaugh: How Trump's Nominee Will Affect Abortion, Prisons, Affirmative Action, and Gay Rights*, VOX (Oct. 5, 2018), https://www.vox.com/2018/7/11/17555974/brett-kavanaugh-anthony-kennedy-supreme-court-transform (discussing President Trump's Supreme Court nomination to replace Justice Kennedy).

opinion in *Windsor*[53] but also the majority opinion in *Obergefell*[54] and *Lawrence*[55] as well, essentially serving as the swing vote in those case. With Justice Brett Kavanaugh replacing Justice Kennedy, and Justice Gorsuch replacing Justice Scalia, the balance may shift from a 5–4 ruling supporting same-sex marriage to a 5–4 ruling opposing it under these circumstances.[56] This is why this decision and its progeny may come under particular scrutiny if the Court, as recomposed by President Donald Trump, takes up the issue again.

1. The Majority Opinion

Justice Kennedy's majority opinion held that the Fifth Amendment Due Process Clause does not permit the kind of unequal treatment of same-sex couples that DOMA's provisions ultimately led to.[57] The Court began by giving a brief history of same-sex marriage, from the time that it was not recognized anywhere in the world until 2013, when twelve states and the District of Columbia had legalized same-sex marriage.[58] The majority opinion then discussed, in great detail, how unusual a federal regulation that defined "marriage" was in the context of federalism considerations.[59] The Court drew attention to the fact that there was some question regarding the power of the federal government to define marriage, and also used this discussion to bolster the idea that Congress crafted DOMA's definition for an improper purpose.[60] This hinted at the possibility that the Court might decide that the

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[53] *See Windsor*, 570 U.S. at 748.

[54] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

[55] Lawrence v. Texas, 539 U.S. 558, 562 (2003).

[56] Provided that Justice Gorsuch votes as Justice Scalia did and Justice Kavanaugh votes, as many expect, more conservatively than Justice Kennedy. *See generally* Matthews, *supra* note 52 (arguing that the Supreme Court with Justice Kavanaugh instead of Justice Kennedy "will be less friendly to LGBT," rights).

[57] *See Windsor*, 570 U.S. at 775.

[58] *See id.* at 763–64.

[59] *See id.* at 764–68.

[60] *See id.*

definition of "marriage" was beyond congressional reach; i.e., that only the states could adequately define the term.[61]

Yet, despite this prolonged discussion, the Court declined to decide the case on federalism grounds and focused instead on the Equal Protection argument.[62] Incorporating its prior discussion of the involvement of the federal government in marital affairs, the majority viewed the federal government's intrusion into an area of life generally regulated by the states as one of many indicators that DOMA had an illegitimate discriminatory purpose.[63] Accordingly, the Court found that the law denied same-sex couples protections offered to straight couples, stripped those couples of the dignity extended to straight married couples, and degraded partners who entered into close same-sex relationships.[64] Since both the purpose and the effect of the law were suspect in the eyes of the Court, and because there was no logical connection between DOMA's definition of "marriage" and a legitimate purpose, the Court declared that provision of the act unconstitutional under the Equal Protection component of the Due Process Clause found implicitly in the Fifth Amendment.[65]

The Court held that DOMA deprived married same-sex couples of rights *and* welcomed responsibilities.[66] The majority stated that DOMA denied married same-sex couples government healthcare benefits, bankruptcy protections, and the protections of the federal penal code.[67] The Court also found that DOMA actually created advantageous conditions for some married same-sex couples

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61 *See id.*

62 *Id.* at 768.

63 *Id.* at 769–73.

64 *Id.* at 769–75.

65 *Id.* at 775.

66 *Id.* at 771–75.

67 *Id.* The Court stated that DOMA deprived homosexual couples of "the Bankruptcy Code's special protections for domestic-support obligations" and the protections of the federal penal code that provide additional penalties for murdering, assaulting, or kidnapping a member of a United States official's family. *Id.* at 771–74. The majority found that DOMA put homosexual married couples in a disadvantageous position with regards to healthcare benefits, bankruptcy proceedings, tax filings, and burial arrangements in veterans' cemeteries. *Id.* at 771–75. The law also imposed special burdens on homosexual married couples and humiliated their children, according to the majority. *Id.*

because it did not recognize their marriages under circumstances where a legally recognized marriage might be disadvantageous.[68] Yet even these technically positive effects of DOMA on same-sex couples were impermissible, the Court said, because these effects, too, led to inequality.[69] The Court stated that DOMA harmed same-sex couples by denying them duties "that they in most cases would be honored to accept."[70] The Court viewed exemptions from certain requirements as part of the discriminatory effect of the law.[71]

While listing the discriminatory effects and purposes of the law, the Court was not clear regarding which standard of scrutiny it applied to determine if the law violated Equal Protection principles.[72] The Court cited *Romer* and *Lawrence*, which are sometimes invoked for the principle that a more searching form of rational basis review applies when the Court reviews laws which differentiate between people on the basis of sexual orientation.[73]

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[68] *Id.* at 773–75. The Court noted that DOMA divested married homosexual couples of welcome responsibilities such as having a spouse's income considered when calculating a student's eligibility for federal financial aid, not receiving high-value gifts when married to a person working for the United States Senate, and disclosing financial records when a spouse obtains a job with the United States Senate. *Id.*

[69] *Id.*

[70] *Id.* at 773.

[71] *Id.*

[72] *Id.* at 769–70. This is particularly unfortunate, both since clear statements of the law can help eliminate surprise and confusion both for the Court and future litigants and since this would not be the first time in recent years that the Supreme Court has complicated matters without apparent benefit. Artem M. Joukov, *Isn't That Hearsay Anyway? How the Federal Hearsay Rule Can Serve as a Map to the Confrontation Clause*, 63 WAYNE L. REV. 337, 380 (2018). *See generally* Artem M. Joukov & Samantha M. Caspar, 39 PACE L. REV. 43, 99 n.326 (2018).

[73] *Windsor*, 570 U.S. at 768; Romer v. Evans, 517 U.S. 620, 633; Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring); Kevin H. Lewis, *Equal Protection After Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175, 180 (1997); Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2770 (2005). A searching rational basis review standard is still deferential in that it allows any rational basis to which the law is reasonably connected to be sufficient justification of the law. Smith, *supra* at 2794. The searching standard does, however, focus on the interests behind the

However, the majority did not explicitly state whether it used the rational basis standard, the searching rational basis standard, or some other standard of review to reach its conclusion (such as intermediate scrutiny or strict scrutiny).[74] Whichever standard of review the Court applied, the government lost under that standard; the majority concluded its analysis by pronouncing DOMA's definition of "marriage" unconstitutional in a decision that would lay the groundwork for *Obergefell* two years later.[75]

Furthermore, the *Windsor* decision prevented the federal government from distinguishing between homosexual and heterosexual married couples through regulation or statute when it came to federal benefits and responsibilities.[76] The Court made it clear that as long as a couple was considered married under state law, that couple had to be considered married for federal law purposes unless some "legitimate purpose over[came]" the States designation of lawful marriage.[77] This applied to the plaintiff, too, who had been married in Canada before returning to the United States.[78]

2. Chief Justice Roberts' Dissent

Chief Justice Roberts filed a dissent, stating that the Court should have upheld DOMA's definition of "marriage" as the legal union of a man and a woman once the Court reached the merits of the case.[79] He found that uniformity of regulations is a legitimate federal purpose, and that the law bore a sufficient logical connection to that purpose.[80] Justice Roberts found it unsurprising that the federal government sought to codify the meaning of "marriage" for the purpose of decisively stating an answer to a fundamental question: which couples were considered "married" under the

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law *identified by the government* rather than leaving the burden on the party challenging the law to establish that no rational basis exists whatsoever. *Id.*

74 *See Windsor*, 570 U.S. at 770.

75 *Id.* at 775.

76 *Id.* at 771–75.

77 *Id.*

78 *Id.* at 749, 774.

79 *Id.* at 775.

80 *Id.*

multitude of federal laws that applied to married couples within the United States.[81] In any case, Chief Justice Roberts made it clear that the evidence of bigotry and discriminative purpose behind the law was slight and therefore insufficient to render unconstitutional the definition of "marriage" contained in DOMA.[82] This may have been particularly true under the application of rational basis review, though Chief Justice Roberts did not specify why this particular definition of "marriage" was a rational way of defining the term in light of the federal laws applying to married couples.[83] This dissent still left room for the argument raised by the majority: that while the definition made the application of federal law consistent, it was consistently unfair toward married couples of the same gender.[84]

3. Justice Scalia's Dissent

Justice Scalia was even much more critical of the Court's decision.[85] Justice Scalia argued that the long discussion of federalism indulged by the majority was at best irrelevant and at worst erroneous: the federal government defining "marriage" does not prevent or abrogate the power of the states in any way relevant to their respective legal structures.[86] Therefore, DOMA did not implicate federalism limitations, and the mention of federalism, Justice Scalia's speculated, constituted a feeble attempt to differentiate the invalidation of DOMA from the invalidation of state laws that define "marriage" as exclusively a heterosexual act.[87]

Justice Scalia continued to critique the decision as one that tried to distinguish between the Equal Protection provided by the Due Process Clause of the Fifth Amendment and the Equal Protection provided by the Equal Protection Clause of the Fourteenth Amendment.[88] He noted that the Court appeared to distinguish

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81 *Id.*

82 *Id*. at 775–76.

83 *See id.* at 775–78.

84 *See id.* at 744–78.

85 *Id*. at 778–818.

86 *Id*. at 791–92.

87 *See id.* at 792.

88 *Id.* at 792–93.

between the two, but failed to state the basis for the distinction.[89] The lack of clarity in the opinion, according to Justice Scalia, arises chiefly from the Court's refusal to address "the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality."[90] Justice Scalia lamented that while it appeared that the majority applied mere rationality review, its opinion lacked the deference associated with this review standard.[91] This particular observation will become relevant later within this Article.

Seeing that the majority was unwilling to properly apply rational basis review to the case at hand, Justice Scalia then engaged in his own rational basis review.[92] He cited his own dissent in *Lawrence,* reiterating that in his view, enforcing moral and sexual norms was a legitimate government purpose.[93] Further, he wrote, even if this was not a legitimate purpose for DOMA's marriage definition, the statute was justified by two other purposes:

> 1. [A]voiding or definitively resolving choice of law issues and
> 2. preserving the intended effects of previous laws against changes in circumstances that were not anticipated at the time those laws were passed.[94]

On both points, Justice Scalia seemed to join Chief Justice Roberts in arguing that the federal government had a legitimate interest in keeping constant a definition of a term widely applied throughout portions of the federal code.[95] Therefore, under rational basis review, Justice Scalia asserted that both of these purposes should have been sufficient to sustain DOMA.[96] Like Chief Justice Roberts, though, Justice Scalia did not quite address the question of why the definition making the application of federal law consistent throughout seemed to lean consistently in an unfair direction when

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89 *See id.*

90 *Id.* at 793.

91 *Id.* at 793–94.

92 *See id.* at 794–95.

93 *Id.* at 795.

94 *Id.* at 796–97.

95 *Id.*

96 *Id.* at 794–95.

it came to same-sex couples (and what rational basis the government could have to maintain that position).[97]

Justice Scalia filled the rest of his dissent with powerful criticisms of the majority's dicta which accused the federal government of attacking the dignity, personhood, and humanity of homosexual couples.[98] He vehemently objected to such a finding about the purpose of DOMA § 3, stating rather that the Court framed the issue with great animosity toward any dissenting voices, in effect proclaiming those who supported DOMA to be "enemies of the human race."[99] After proclaiming his hope that the lower courts distinguish future cases that are similar to *Windsor* from *Windsor*,[100] Justice Scalia concluded:

> In the majority's telling, this story is black-and-white: Hate your neighbor or come along with us. The truth is more complicated. It is hard to admit that one's political opponents are not monsters, especially in a struggle like this one, and the challenge in the end proves more than today's Court can handle. Too bad . . . . We might have covered ourselves with honor today, by promising all sides of this debate that it was theirs to settle and that we would respect their resolution. We might have let the People decide. But that the majority will not do. Some will rejoice in today's decision, and some will despair at it; that is the nature of a controversy that matters so much to so many. But the Court has cheated both sides, robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat. We owed both of them better. I dissent.[101]

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97 *See id.* at 795–802.

98 *Id.* at 794–802.

99 *Id.*

100 *Id.* at 799.

101 *Id.* at 802.

3. Justice Alito's Dissent

Justice Alito also dissented from the majority decision, noting that the Equal Protection framework was ill suited to resolve the definitional issue of what constituted "marriage."[102] Justice Alito then voiced his skepticism that strict or heightened scrutiny review was appropriate in this case.[103] He followed this with the assertion that "neither the political branches of the Federal Government nor state governments are required to be neutral between competing visions of the good, provided that the vision of the good that they adopt is not countermanded by the Constitution."[104] The central question for Justice Alito in this case was whether the Constitution countermanded the vision of the good that prohibited same-sex marriage.[105] He concluded that since the Constitution did not enshrine a specific definition of "marriage," the decision should be left to the people, which in this case became embodied in an Act of Congress.[106]

Justice Alito did not find it strange that the federal government sought to define "marriage," even though it had not tried to do so in the past.[107] According to Justice Alito, the federal government was ever-growing, and it may have been unreasonable to expect it to remain neutral on this issue.[108] Therefore, Congress had the right to make a moral choice under the circumstances, even if the choice clashed with the moral principles of others.[109] Justice Alito stated that DOMA's definition of "marriage" was simply a statement that described the class of people to which certain federal benefits apply.[110] According to Justice Alito, if the government has the right to give people benefits, it should also have the right to say which

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102 *Id.* at 811.
103 *Id.* at 813–14.
104 *Id.* at 816.
105 *Id.* at 813–15.
106 *Id.*
107 *Id.* at 816.
108 *Id.*
109 *See id.*
110 *Id.* at 817–18.

people should receive them.[111] Thus, according to Justice Alito, the majority's decision should have been to uphold DOMA § 3 rather than strike it down.[112]

II. PART II: ANALYSIS OF SAME-SEX MARRIAGE IN LEGAL LITERATURE

Many scholars had weighed in on the potential legalization of same-sex marriage over the two decades preceding the *Windsor* decision.[113] Some of these articles deserve analysis if only to show

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[111] *Id.* (arguing that just like Chief Justice Roberts or Justice Scalia, Justice Alito did not specify a rational basis for *why* the line had to be drawn against same-sex couples as opposed to any others when it came to government benefits of the type involved in this case).

[112] *See id.* at 810–18.

[113] *See generally* Veronica C. Abreu, *The Malleable Use of History in Substantive Due Process Jurisprudence: How the "Deeply Rooted" Test Should Not Be A Barrier to Finding the Defense of Marriage Act Unconstitutional Under the Fifth Amendment's Due Process Clause*, 44 B.C. L. REV. 177 (2002); Joshua Baker & William C. Duncan, *As Goes DOMA . . . Defending DOMA and the State Marriage Measures*, 24 REGENT U. L. REV. 1 (2012) [hereinafter Baker & Duncan, *As Goes DOMA . . . Defending DOMA and the State Marriage Measures*]; Dale Carpenter, *Bad Arguments Against Gay Marriage*, 7 FLA. COASTAL L. REV. 181 (2005); Teresa Stanton Collett, *Constitutional Confusion: The Case for the Minnesota Marriage Amendment*, 33 WM. MITCHELL L. REV. 1029 (2007) [hereinafter Collett, *Constitutional Confusion*]; Teresa Stanton Collett, *Recognizing Same-Sex Marriage: Asking for the Impossible?*, 47 CATH. U. L. REV. 1245 (1998) [hereinafter Collett, *Recognizing Same-Sex Marriage*]; Teresa Stanton Collett, *Restoring Democratic Self-Governance Through the Federal Marriage Amendment*, 2 U. ST. THOMAS L.J. 95 (2004) [hereinafter Collett, *Restoring Democratic Self-Governance Through the Federal Marriage Amendment*]; Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033 (1994); Kevin R. Corlew, *Not on "Shaky Grounds":* Lawrence v. Texas*, 123 S. Ct. 2472 (2003), and the Constitutionality of State DOMAs Such As Nebraska's Marriage Provision, NEB. CONST. art. I, § 29*, 83 NEB. L. REV. 179 (2004); David Crump, *The Dilution Problem and Other Arguments Against Same-Sex Marriage: How Persuasive Are They?*, 9 AVE MARIA L. REV. 221 (2011); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581 (1999) [hereinafter Dent, Jr., *The Defense of Traditional Marriage*]; George W. Dent, Jr., *"How Does Same-Sex Marriage Threaten You?"*, 59 RUTGERS L. REV. 233 (2007) [hereinafter, Dent, Jr., *"How Does Same-Sex Marriage Threaten*

You?"]; Amy Doherty, *Constitutional Methodology and Same-Sex Marriage*, 11 J. CONTEMP. LEGAL ISSUES 110 (2000); Richard F. Duncan, *From Loving to Romer: Homosexual Marriage and Moral Discernment*, 12 BYU J. PUB. L. 239 (1998) [hereinafter Duncan, *From Loving to Romer: Homosexual Marriage and Moral Discernment*]; William C. Duncan, *Constitutions and Marriage*, 6 WHITTIER J. CHILD & FAM. ADVOC. 331 (2007) [hereinafter Duncan, *Constitutions and Marriage*]; William C. Duncan, *DOMA and Marriage*, 17 REGENT U. L. REV. 203 (2005) [hereinafter Duncan, *DOMA and Marriage*]; William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993) [hereinafter Eskridge, Jr., *A History of Same-Sex Marriage*]; William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641 (2000) [hereinafter Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate*]; William N. Eskridge, Jr., *Three Cultural Anxieties Undermining the Case for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 307 (1998) [hereinafter Eskridge, Jr., *Three Cultural Anxieties Undermining the Case for Same-Sex Marriage*]; John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049 (1994); Steven W. Fitschen, *Marriage Matters: A Case for A Get-the-Job-Done-Right Federal Marriage Amendment*, 83 N.D. L. REV. 1301 (2007); Kim Forde-Mazrui, *Tradition As Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281 (2011); Maggie Gallagher, *Keynote Address: The Case for the Future of Marriage*, 17 REGENT U. L. REV. 185 (2005); Robert P. George, *Judicial Usurpation and Sexual Liberation: Courts and the Abolition of Marriage*, 17 REGENT U. L. REV. 21 (2005) [hereinafter George, *Judicial Usurpation and Sexual Liberation: Courts and the Abolition of Marriage*]; Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995) [hereinafter George & Bradley, *Marriage and the Liberal Imagination*]; Bradley P. Jacob, *Griswold and the Defense of Traditional Marriage*, 83 N.D. L. REV. 1199 (2007); Judith E. Koons, *"Just" Married?: Same-Sex Marriage and a History of Family Plurality*, 12 MICH. J. GENDER & L. 1 (2005); Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988) [hereinafter Koppleman, *The Miscegenation Analogy*]; Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) [hereinafter Koppleman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*]; Kathryn E. Kovacs, *Recognizing Gay and Lesbian Families: Marriage and Parental Rights*, 5 LAW & SEXUALITY 513 (1995); Nancy C. Marcus, *Beyond Romer and Lawrence: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355 (2006); Vincent P. McCarthy, *The Necessity of A Federal Marriage Amendment*, 17 REGENT U. L. REV. 211 (2005); Julie A. Nice, *The Descent of Responsible Procreation: A Genealogy of an Ideology*, 45 LOY. L.A. L. REV. 781 (2012); Justin R. Pasfield, *Confronting America's Ambivalence Towards Same-Sex Marriage: A Legal and Policy Perspective*, 108 W. VA. L. REV. 267 (2005); *Report on Marriage Rights for*

the arguments the majority and the dissent chose *not* to adopt in deciding *Windsor*. Yet, these articles also prove important for another reason: they help show some of the reasoning that may come into play if the new Court, partially reconstructed by President Trump, chooses to step away from *Windsor* and its progeny.

Same-Sex Couples in New York the Association of the Bar of the City of New York Committee on Lesbian and Gay Rights, Committee on Sex and Law, and Committee on Civil Rights, 13 COLUM. J. GENDER & L. 70 (2004) [hereinafter *Report on Marriage Rights for Same-Sex Couples in New York*]; Sharon E. Rush, *Whither Sexual Orientation Analysis?: The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RTS. J. 685 (2008); Monte Neil Stewart, *Marriage Facts*, 31 HARV. J.L. & PUB. POL'Y 313 (2008); Mark Strasser, Loving*,* Baehr*, and the Right to Marry: On Legal Argumentation and Sophistical Rhetoric*, 24 NOVA L. REV. 769 (2000) [hereinafter Strasser, Loving*,* Baehr*, and the Right to Marry*]; Mark Strasser, *Loving in the New Millennium: On Equal Protection and the Right to Marry*, 7 U. CHI. L. SCH. ROUNDTABLE 61 (2000) [hereinafter Strasser, *Loving in the New Millennium*]; Mark Strasser, *Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees*, 33 LOY. U. CHI. L.J. 597 (2002) [hereinafter Strasser, *Same-Sex Marriages and Civil Unions*]; Lynn D. Wardle, *The Biological Causes and Consequences of Homosexual Behavior and Their Relevance for Family Law Policies*, 56 DEPAUL L. REV. 997 (2007) [hereinafter Wardle, *The Biological Causes and Consequences of Homosexual Behavior and Their Relevance for Family Law Policies*]; Lynn D. Wardle, *Children and the Future of Marriage*, 17 REGENT U. L. REV. 279 (2005) [hereinafter Wardle, *Children and the Future of Marriage*]; Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. REV. 1 (1996) [hereinafter Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*]; Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the "Loving Analogy" for Same-Sex Marriage*, 51 HOW. L.J. 117 (2007) [hereinafter Wardle & Oliphant *In Praise of Loving: Reflections on the "Loving Analogy" for Same-Sex Marriage*]; Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771 (2001) [hereinafter Wardle, *"Multiply and Replenish"*]; Jay Weiser, *Foreword: The Next Normal-Developments Since Marriage Rights for Same-Sex Couples in New York*, 13 COLUM. J. GENDER & L. 48 (2004); Tyler S. Whitty, *Eliminating the Exception?* Lawrence v. Texas *and the Arguments for Extending the Right to Marry to Same-Sex Couples*, 93 KY. L.J. 813 (2005); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1995).

A. Supporters of Same-Sex Marriage

Quite a few articles appearing in various law journals advocated for the recognition of same-sex marriage under Equal Protection principles prior to 2013.[114] These arguments generally claimed that both heterosexual and homosexual marriage is a fundamental right, that laws curtailing that right must be reviewed under the strict scrutiny standard (both under Due Process and Equal Protection analyses), and that no compelling state interest exists for those laws.[115] Even if some legally recognizable compelling interest for banning same-sex marriage did exist, these authors argue that laws banning same-sex marriage entirely are not narrowly tailored to advance that interest.[116] This is the line of reasoning that *Obergefell*

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[114] *See generally* Abreu, *supra* note 113; Carpenter, *supra* note 113; Doherty, *supra* note 113; Eskridge, Jr., *A History of Same-Sex Marriage*, *supra* note 113; Eskridge, *Three Cultural Anxieties Undermining the Case for Same-Sex Marriage*, *supra* note 113; Koons, *supra* note 113; Koppelman, *The Miscegenation Analogy*, *supra* note 113; Koppelman, *supra* note 113; Kovacs, *supra* note 113; Macedo, *supra* note 113; Nice, *supra* note 113; Pasfield, *supra* note 113; *Report on Marriage Rights for Same-Sex Couples in New York*, *supra* note 113; Strasser, Loving*,* Baehr*, and the Right to Marry*, *supra* note 113; Strasser, *Loving in the New Millennium*, *supra* note 113; Strasser, *Same-Sex Marriages and Civil Unions*, *supra* note 113; Weiser, *supra* note 113.

[115] *See* Abreu, *supra* note 113, at 179, 181 (arguing that the failure to recognize same-sex marriages as a fundamental right and failure to analyze DOMA under strict scrutiny would undermine "notable precedents"); Cox, *supra* note 113, at 1043, 1046, 1048–49, 1051 (urging judges to recognize same-sex marriage as a fundamental right); Doherty, *supra* note 113, at 113, 115; Eskridge, *Three Cultural Anxieties Undermining the Case for Same-Sex Marriage*, *supra* note 113, at 308, 310, 314; Pasfield, *supra* note 113, at 282–83, 284 n.104, 307; *Report on Marriage Rights for Same-Sex Couples in New York*, *supra* note 113, at 71, 81–84; Strasser, *Loving in the New Millennium*, *supra* note 113, at 65, 67, 81–83; Whitty, *supra* note 113, at 813–814, 817–18, 821, 831, 835; Wolfson, *supra* note 113, at 569 n.8, 572 n.20, 574 n.30, 576.

[116] *See* Cox, *supra* note 113, at 1045 (noting how a party must demonstrate a law furthers a compelling state interest to uphold its constitutionality); Doherty, *supra* note 113, at 115 (indicating that "moralistic and historical interests" are insufficient to serve a compelling interest); Eskridge, *Three Cultural Anxieties Undermining the Case for Same-Sex Marriage*, *supra* note 113, at 310, 307 n.1; Pasfield, *supra* note 113, at 293, 296; *Report on Marriage Rights for Same-Sex Couples in New York*, *supra* note 113, at 81–84; Strasser, *Loving in the New Millennium*, *supra* note 113, at 78; Whitty, *supra* note 113, at 831–36.

ultimately adopted,[117] though its doctrinal parent, *Windsor*, refused to take the leap from rational basis scrutiny to the compelling interest analysis associated with a fundamental right.[118]

Other advocates favoring same-sex marriage framed the issue in terms of gender.[119] They argued that in the case of a same-sex couple applying for a marriage license, denial of that license is discrimination because one of the applicants was not a member of the opposite sex.[120] Although some of these authors noted that the Supreme Court has not extended strict scrutiny analysis to gender discrimination cases, they argued that even under intermediate scrutiny (under which a law must further an important government interest through substantially related means), bans on same-sex marriage should not be sustained by the courts.[121]

Finally, some advocates of same-sex marriage argued that even if prohibitions on same-sex marriage did not implicate a fundamental right, or involve a forbidden gender classification, same-sex marriage bans should not survive even rational basis scrutiny.[122] Sharon Rush argued that when certain laws appear to the court to bear animosity toward a certain group, even if that group is not identified on the basis of race or gender, then even rational basis

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[117] *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[118] *See* United States v. Windsor, 540 U.S. 744 (2013).

[119] Cox, *supra* note 113, at 1040–41; Eskridge, *Comparative Law and the Same-Sex Marriage Debate*, *supra* note 113, at 645–46; *see* Eskridge, *A History of Same-Sex Marriage*, *supra* note 113, at 1510; Koppelman, *The Miscegenation Analogy*, *supra* note 113, at 145; Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, *supra* note 113, at 199.

[120] *See* Cox, *supra* note 113, at 1040–41; Eskridge, *Comparative Law and the Same-Sex Marriage Debate*, *supra* note 113, at 645–46; Eskridge, *A History of Same-Sex Marriage*, *supra* note 113, at 1425; Koppelman, *The Miscegenation Analogy*, *supra* note 113, at 147; Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, *supra* note 113, 201–204.

[121] *See* Eskridge, *A History of Same-Sex Marriage*, *supra* note 113, at 1507; Koppelman, *The Miscegenation Analogy*, *supra* note 113, at 161; Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, *supra* note 113, at 204; Pasfield, *supra* note 113; Wolfson, *supra* note 113, at 573. *See generally* Eskridge, *Comparative Law and the Same-Sex Marriage Debate*, *supra* note 113.

[122] Macedo, *supra* note 113, at 261; Rush, *supra* note 113, at 743.

review should result in the invalidation of such laws.[123] This should logically apply to same-sex marriage bans.[124] Still others argue that while moral interests may exist that would justify banning same-sex marriage, these interests are non-secular, and therefore not legally recognizable under the First Amendment's Establishment Clause.[125] Thus, according to these authors, no ban on same-sex marriage should survive even rational basis analysis.[126] Largely, that is the argument that the Court ultimately adopted in *Windsor*.[127]

B. Opposition to Same-Sex Marriage

Others writing prior to the *Windsor* decision advocated against recognizing same-sex marriage, whether under the Constitution or under state and federal laws.[128] Some claimed that there were many compelling reasons to prohibit same-sex marriage, but also argued (perhaps prophetically) that a federal amendment would be

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[123] Rush, *supra* note 113, at 743.

[124] *Id.*

[125] Macedo, *supra* note 113, at 261; Pasfield, *supra* note 113, at 293–97; *see* Wolfson, *supra* note 113, at 608.

[126] *See* Macedo, *supra* note 113, at 261; *see also* Pasfield, *supra* note 113, at 293–97; Wolfson, *supra* note 113, at 608.

[127] United States v. Windsor, 570 U.S. 744 (2013).

[128] *See generally* Baker & Duncan, *supra* note 113; Collett, *Constitutional Confusion*, *supra* note 113; Collett, *Recognizing Same-Sex Marriage*, *supra* note 113; Collett, *Restoring Democratic Self-Governance Through the Federal Marriage Amendment*, *supra* note 113; Corlew, *supra* note 113; Crump, *supra* note 113; Dent, *The Defense of Traditional Marriage*, *supra* note 113; Dent, *"How Does Same-Sex Marriage Threaten You?"*, *supra* note 113; Duncan, *supra* note 113; Duncan, *Constitutions and Marriage*, *supra* note 113; Duncan, *DOMA and Marriage*, *supra* note 113; Finnis, *supra* note 113; Fitschen, *supra* note 113; Forde-Mazrui, *supra* note 113; Gallagher, *supra* note 113; George, *supra* note 113; George & Bradley, *supra* note 113; Jacob, *supra* note 113; McCarthy, *supra* note 113; Rao, *supra* note 113; Stewart, *supra* note 113; Wardle, *The Biological Causes and Consequences of Homosexual Behavior and Their Relevance for Family Law Policies*, *supra* note 113; Wardle, *Children and the Future of Marriage*, *supra* note 113; Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, *supra* note 113; Wardle, *"Multiply and Replenish"*, *supra* note 113; Wardle & Oliphant, *supra* note 113.

necessary to prevent activist judges from ignoring these reasons.[129] Many authors were careful to note that a fundamental right existed only to heterosexual marriage,[130] arguing that *Loving v. Virginia*[131] while recognizing such a right, recognized it between an opposite-sex couple.[132] According to these authors, the Court did not intend to create a right to marry a person of the same sex in the 1967 *Loving* decision, particularly since the case specifically mentioned procreation in close textual proximity to the recognition of the right.[133]

Other opponents of same-sex marriage argued that health concerns,[134] along with the importance of fostering social norms through heterosexual marriage, and the importance of fostering procreational activity are compelling state interests that same-sex marriage bans address.[135] According to these authors, even if the courts recognized a fundamental right to same-sex marriage and applied strict scrutiny, laws banning same-sex marriage should be

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[129] *See generally* Collett, *Constitutional Confusion*, *supra* note 113; Collett, *Recognizing Same-Sex Marriage*, *supra* note 113; Collett, *Restoring Democratic Self-Governance Through the Federal Marriage Amendment*, *supra* note 113; Fitschen, *supra* note 113; Gallagher, *supra* note 113; McCarthy, *supra* note 113.

[130] Corlew, *supra* note 113, at 217; Dent, *"How Does Same-Sex Marriage Threaten You?"*, *supra* note 113, at 237; Duncan, *Constitutions and Marriage*, *supra* note 113, at 338; Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, *supra* note 113, at 27–62; Wardle & Oliphant, *supra* note 113, at 125, 129, 132–33.

[131] Loving v. Virginia, 388 U.S. 1 (1967).

[132] Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, *supra* note 113, at 80–81.

[133] Wardle & Oliphant, *supra* note 113, at 137–40.

[134] Wardle, *The Biological Causes and Consequences of Homosexual Behavior*, *supra* note 113, at 1016–22 (describing studies that show increased risks of sexually transmitted diseases among homosexual individuals). It should be noted that proving something like this to the Supreme Court would require a remarkable amount of expert evidence, which, even if established, may not meet the standards of admissibility set forth by the United States Supreme Court in the *Daubert* Trilogy. Artem M. Joukov, *Who's the Expert?* Frye *and* Daubert *in Alabama*, 47 CUMB. L. REV. 275, 275–76 (2016).

[135] Collett, *Recognizing Same-Sex Marriage*, *supra* note 113, at 1267; Stewart, *supra* note 113, at 365–67; Wardle, *The Biological Causes and Consequences of Homosexual Behavior*, *supra* note 113, at 1016–23; Wardle, *"Multiply and Replenish"*, *supra* note 113, at 784–792.

sustained because these compelling state interests would justify these laws.[136] Consequently, if same-sex marriage bans survived strict scrutiny analysis, they also survived intermediate scrutiny analysis (if the bans were challenged as statues that discriminate on the basis of gender) and rational basis review.[137]

Many advocates did not focus their arguments on the existence of a compelling state interest because they clung fast to the notion that the lowest level of scrutiny, the rational basis test, would apply when same-sex marriage bans came up for review under Equal Protection principles.[138] These scholars argued that rational basis review is a low burden and that bans on homosexual marriage meet this burden for moral, health, and social policy reasons.[139] Thus, in their opinion, the marriage bans should be upheld.[140]

Advocates of same-sex marriage bans recognized that some moral reasons behind the bans may be considered an imposition of religious morality which would be impermissible under *Windsor's* interpretation of the Establishment Clause of the First Amendment.[141] However, those advocates insisted that these reasons, while parallel to certain religious views, were nevertheless sufficiently separate from any particular religion to avoid disqualification under the Establishment Clause.[142] John Finnis, for example, cited as evidence various philosophical texts throughout his article that, independent of religious thought, applied analytical reasoning to reach the conclusion that homosexual relationships

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[136] Stewart, *supra* note 113, at 365–67.

[137] *See id.*

[138] Baker & Duncan, *supra* note 113, at 29; Corlew, *supra* note 113, at 215; Forde-Mazrui, *supra* note 113, at 281; Wardle & Oliphant, *supra* note 113, at 143.

[139] *See* Baker & Duncan, *supra* note 113, at 47; *see also* Corlew, *supra* note 113, at 215–16; Forde-Mazrui, *supra* note 113, at 281; Wardle & Oliphant, *supra* note 113, at 143.

[140] *See* Baker & Duncan, *supra* note 113, at 47; *see also* Corlew, *supra* note 113, at 215–21; Wardle & Oliphant, *supra* note 113, at 143.

[141] Crump, *supra* note 128, at 248–53; Dent, *The Defense of Traditional Marriage*, *supra* note 113, at 589–90; Forde-Mazrui, *supra* note 113, at 337–38; Stewart, *supra* note 113, at 364.

[142] Crump, *supra* note 113, at 248–53; Dent, *The Defense of Traditional Marriage*, *supra* note 113, at 589–90; Forde-Mazrui, *supra* note 113, at 337–38; Stewart, *supra* note 113, at 364.

negatively impact society.[143] Such texts included the philosophical reasoning and conclusions of Socrates, Plato, Aristotle, and Emmanuel Kant.[144]

III. PART III: ANALYSIS OF THE *WINDSOR* DECISION

The *Windsor* decision resolved many of these debates, at least in terms of Supreme Court jurisprudence.[145] The Supreme Court took a position, however divided it might have been, on same-sex marriage in terms of federal law by striking down the DOMA definition of marriage as a heterosexual union.[146] Needless to say, the decision also bore significant impact on state laws, as Equal Protection analysis at the federal level often bears significant impact on (and often sets precedent for) the states as well.[147] What is important, though, is that *Windsor* did *not* declare same-sex marriage to be a fundamental right just like heterosexual marriage, though the Court would do so just two years later in *Obergefell*.[148] In fact, the majority remained strangely silent regarding this question, despite the fact that it had an important impact on the review standard the Court would apply.[149] Although the same Justices joined the majority in both *Windsor* and *Obergefell*, the *Windsor* majority fell short of the *Obergefell* decision by a significant margin,[150] and it is here that President Trump's newly appointed justices can find a foothold to turn the tide of same-sex marriage jurisprudence if they wanted. The more conservative Court

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143 *See generally* Finnis, *supra* note 113 (citing several philosophers such as Socrates, Plato, and Aristotle, who condemned homosexuality).

144 *Id.*

145 United States v. Windsor, 570 U.S. 744, (2013).

146 *Id.* at 775.

147 *See id.*

148 *Compare id.* at 775 (limiting the scope of the decision to a right or class that a State "sought to protect in personhood and dignity"), *with* Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015) (holding that "same sex couples may exercise the fundamental right to marry in all States.").

149 *See Windsor*, 570 U.S. 755.

150 Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (joining Justice Kennedy's majority again were Justices Ginsburg, Breyer, Sotomayor, and Kagan); *Windsor*, 570 U.S. 744.

may exploit the lack of clarity regarding *Windsor's* review standard to try to turn back the clock on same-sex marriage.

A. Rational Basis Review Standard

If the newer Associate Justices appointed by President Trump begin to consider breaking with precedent, they will likely start with the *Windsor* Court's application of the rational basis review standard.[151] The method that the Court applied to reach its decision in *Windsor* may prove unfortunate for proponents of same-sex marriage because the logic of the decision tended to stray from the rational basis review standard, and because the Court seemed to find discriminative purpose behind the law despite relatively unconvincing evidence.[152] If President Trump's Supreme Court can find reasons to undermine *Windsor*'s rationale here, it may then attack the foundations of *Obergefell* too, since that case relied heavily on support from *Windsor*.[153]

In *Windsor*, the majority failed to directly state the standard of review it applied to DOMA's definition of "marriage."[154] Lack of such statement should have placed the analysis of DOMA under the rational basis standard of review, even if it was a searching rational basis standard.[155] After all, rational basis is the default standard if the Court does not raise the review standard to a form of heightened scrutiny.[156]

Under the rational basis standard, which by its design proves deferential, if the government can show *any* legitimate purpose for the law, and that the law is *somehow* logically related to that

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[151] *See generally Windsor*, 570 U.S. at 769–70 (explaining how DOMA cannot survive scrutiny under "improper animus or purpose.").

[152] *See id.*

[153] *Obergefell*, 135 S. Ct. at 2597-601.

[154] *Windsor*, 570 U.S. 744.

[155] *See, e.g.*, United States v. Maryland Sav.-Share Ins. Corp., 400 U.S. 4, 6 (1970) (identifying through legislative history that the government has a rational basis for its treatment of a tax exemption cutoff date, the Court applied he rational basis standard).

[156] *See* United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938) (explaining the break from the default rational basis standard for narrower scrutiny).

purpose, the Court must uphold the law regardless of how imprudent or unwise that law might appear to the majority.[157] The United States Supreme Court may have deviated from that approach in *Windsor*, seemingly ignoring that DOMA's definition of "marriage" may have served at least two legally legitimate purposes, which Justice Scalia listed: decisively resolving choice of law issues regarding married couples and preserving the intended effects of past legislation.[158] This deviation would have been perfectly acceptable under *Obergefell*, since that case raised the standard of review substantially, but in the analysis of *Windsor*, that precedent was not yet available.[159]

Turning to the federal government's potential justifications for DOMA, decisively resolving choice of law questions may be recognized as a legitimate government objective by President Trump's Court as the federal government has an interest in definitively resolving complex legal issues that might surround countless federal cases involving same-sex married couples.[160] DOMA § 3 related directly to that purpose by resolving these legal issues through a clear definition of "marriage."[161] One argument against the *Windsor* decision is that although the *Windsor* Court might have believed that a different law could resolve the complex legal issues better, the Court should have been powerless, under the rational basis standard, to strike down the law.

The current Supreme Court could attack this decision by arguing that the power to pass better laws resides exclusively with Congress, and that the *Windsor* court improperly changed the standard for rational basis review. This change, of course, could prove problematic in application in countless cases involving Equal Protection without any mention of same-sex marriage: if rational basis review suddenly imposes a greater burden on the government, thousands of federal statutes and regulations that met the old burden now face the threat of a successful challenge on the basis of a 5-4

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157 F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

158 *Windsor*, 570 U.S. at 796–97 (Scalia, J., dissenting).

159 *Id.* at 794–95 (Scalia, J., dissenting) (explaining the court in *Windsor* "does not *apply* anything that resembles that deferential framework.").

160 *Id.* at 796 (Scalia, J., dissenting) (citing William Baude, *Beyond DOMA: Choice of State law in Federal Statutes*, 64 STAN. L. REV. 1371 (2012)).

161 *See id.*

decision in a same-sex marriage case. President Trump's court may choose to distance itself from *Windsor* on this basis alone.

Furthermore, the analysis in *Windsor* regarding the other proposed legitimate government purpose of preserving the intended effects of past legislation proves identical both in reasoning and in conclusion.[162] The new Court may hold that government has a legitimate objective in preserving the effects of former laws that were passed by Congressmen that did not anticipate the possibility of those laws being applicable to homosexual married couples.[163] This would allow for consistency within federal law that precludes the possibility of strange results when laws not intended to apply to same-sex couples are applied to them.[164] Again, the new Court could hold that DOMA was logically related to this purpose: by defining "marriage" in the way that would have been understood by Congressmen of the past, the act allows laws whose drafters did not account for same-sex married couples when they wrote them to apply as the drafting legislators intended (a tempting conclusion for textualist judges).[165] Accordingly, the Court could conclude that this rational basis should have been more than enough to sustain DOMA's definition of "marriage" in the past, and the *Windsor* decision may face additional scrutiny on this basis: that the *Windsor* Court overlooked a legitimate rational basis without justifying its ruling through the application of a heightened scrutiny standard of review.[166]

It appears that the *Windsor* majority found DOMA's definition of marriage to have only a discriminatory purpose, which led to its ultimate nullification.[167] The language the Court adopted seemed to emphasize the animosity of the law toward same-sex couples.[168]

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[162] *Id.* at 796–97 (Scalia, J., dissenting).

[163] *See id.*

[164] *See id.*

[165] *See id.*

[166] *Id.* at 772.

[167] *Id.* at 771–72.

[168] *See id.* at 771 ("The House concluded that DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with tradition (especially Judeo-Christian) morality.'") (quoting H. R. REP. NO. 104-664, at 16 (1996)); *id.* at 772 ("[I]t tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition.");

Reasoning along these lines led the Court to ignore the cited reasons behind the federal legislation, which is something the current Court might not do.[169] The Court may have applied the "Ill Motives' Exception" as Sharon Rush predicted in his work, [170] but that "exception," if it exists, does not fall outside the rational basis framework or modify the application of the rational basis standard.[171] The exception, if recognized, would strike a law that may have a rational basis if the record before the Court establishes that ill motives, rather than this rational basis, were the actual impetus behind the legislation.[172] However, it is not clear whether such an exemption existed or whether it could be applied based on the record in *Windsor*.

After all, if *only* ill motives exist to justify legislation, then there would be no rational basis behind it. However, when ill motives for passing a law exist alongside a valid rational basis for that law, the Court will usually uphold the law despite the ill motives.[173] It is possible that the legislature held ill motives when passing DOMA, but the *Windsor* majority seemed to lack direct evidence of improper animus.[174] If such evidence did exist before the Court with respect to legislative intent, the majority neglected to include that in its opinion.[175] Perhaps the Court in *Windsor* found that the law expressed such clear animosity toward same-sex couples that no rational basis could be found to sustain it. If the Court made such a

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id. ("Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways."); *id.* at 773 ("DOMA also brings financial harm to children of same sex couples."); *id.* at 775 ("It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper.").

169 *Id.* at 772.

170 Rush, *supra* note 113, at 721–23.

171 *Id.* at 721–23.

172 *Id.* at 723.

173 *See e.g.*, Palmer v. Thompson, 403 U.S. 217, 224–226 (1971) (holding in favor of city's decision to close swimming pools to everyone rather than desegregate them, even though it was due to the city's racial bias, because the Court found a rational basis in saving operation costs regardless that impermissible motives for the closings also existed).

174 *Windsor*, 470 U.S. at 797 (Scalia, J., dissenting) ("[DOMA] is not animus—just stabilizing prudence.").

175 *See id.*at 776 (Roberts, C.J., dissenting).

finding, this conclusion may be open to attack by the Court's increasingly conservative membership; the Court may now consider this conclusion improper because the *Windsor* Court may have had insufficient evidence before it to reach such an outcome.

Ward & Gow v. Krinsky,[176] for example, held that proof "to a moral certainty, beyond a reasonable doubt that [a] grouping could not possibly be explained on reasonable grounds" is necessary for the invalidation of a statute under rational basis review.[177] The current Court may rule that to satisfy this deferential rational basis standard, the *Windsor* Court's finding that the large number of Congressmen who voted to pass DOMA and the Democratic president that signed it had animosity in mind should be based on something more than conjecture.[178] When it comes to DOMA § 3, there is little explicit evidence that Congress promulgated the statute with the illegal animus toward same-sex couples that Windsor alleged. It is entirely possible that Congress could have passed the law for either of the purposes mentioned by Justice Scalia, or perhaps for some other purpose that did not involve discrimination.

Even if Congress had passed the law for a more controversial purpose, such as promoting procreation or providing better family units for child rearing, President Trump's Court may argue that such an act should be sustained. While neither purpose is guaranteed to be promoted by the law (for example, homosexuals may not be more likely to procreate if they are forbidden to marry their same-sex partners), that argument is not one that the *Windsor* Court's prior rational basis review standard should have allowed it to indulge.[179] "Those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based *could not reasonably be conceived to be true by the governmental decisionmaker*."[180] In the case of enacting DOMA, Congress and President Clinton could have reasonably conceived that DOMA § 3 promoted procreation and provided for better family units for child rearing, even if these conclusions were ultimately

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176 Ward & Gow v. Krinsky, 259 U.S. 503 (1922).

177 *Id.* at 522.

178 *Windsor*, 470 U.S. at 775 (Roberts, C.J., dissenting).

179 *See* Vance v. Bradley, 440 U.S. 93, 111 (1979).

180 *Id.* (emphasis added).

incorrect. The current Supreme Court may therefore decide that because the inferences should have fallen in favor of the legislature, DOMA had a rational basis grounded in the controversial government purposes behind the statute. Thus, *Windsor*'s reversal might be considered appropriate by a new 5-4 majority.

The problem with the *Windsor* opinion is that rather than declaring all marriage a fundamental right to reach its conclusion, the Court refused to move the standard of review but struck down DOMA anyway.[181] The majority spent so much time propounding how obvious its conclusion was that it seemed to forget to justify that with proof.[182] Neither the Court nor Windsor herself could offer statements by the legislators who passed DOMA or by President Clinton to support allegations of animus toward homosexuals.[183] This is despite the fact that Windsor, as the challenger of the statute, had the burden of producing evidence that Congress exhibited animosity toward same-sex couples in passing DOMA and that no other independent rational basis existed for the passage of the law.[184]

The majority seemed to overlook that it was entirely possible that the legislature embraced the legitimate reasons behind the law and passed DOMA for those reasons: a fact that President Trump's Court could capitalize on.[185] The new Court might argue that the *Windsor* Court simply dismissed the possibility of legitimate reasons behind DOMA § 3 without any justification and without any hint of deference that it owed to Congress.[186] Even if some legislators voted for DOMA with an impermissible purpose in mind,

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[181] *See Windsor*, 470 U.S. at 808 (Alito, J., dissenting).

[182] *Id.* at 797 (Scalia, J., dissenting).

[183] *See id.*

[184] New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 17 (1988).

[185] *Windsor*, 570 U.S. at 759–70.

[186] *Id.* at 771–72. The Court stated: "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency." *Id.* However, the only evidence that this was true consisted of inferences made from circumstantial evidence. The current Court may determine that Congress deserved more deference than the *Windsor* Court granted, particularly where no fundamental right was abrogated and no traditionally suspect classification was involved.

that alone should not invalidate the law.[187] Where legitimate purposes exist, and where there is no evidence *beyond a reasonable doubt* that they were not embraced by the legislature, the law should be sustained under rational basis review.[188] This is precisely the position that President Trump's Court could take if a state Defense of Marriage Act or other provision came before the Court on review under the Equal Protection Clause.

The *Windsor* majority devoted a considerable amount of text to the history of discrimination against homosexuals in an apparent effort to bolster its ultimate conclusion of discriminatory purpose behind DOMA.[189] The Court seemed to imply that because of past history of unequal treatment of homosexual individuals, the purposes of the Legislative Branch and the Executive Branch deserved to be examined with a suspicious judicial eye.[190] The Court did not specify whether this approach should apply to all cases reviewed under the rational basis standard, but if *Windsor* remains the precedent of the Court henceforth, such an analysis would be required in *every* case involving an Equal Protection challenge to a statute, regardless of whether the case involves homosexual individuals or not.

The *Windsor* Court also mentioned federalism as a reason behind its suspicion of discriminatory intent.[191] While Justice Scalia seemed to find the discussion of federalism almost entirely irrelevant to a decision reached on Equal Protection grounds,[192] there appeared to be marginal relevance: the majority painted a picture of the federal government going out of its way not to recognize and ban same-sex marriage.[193] The majority appeared to make the argument that the government's discriminatory intent was evident from the fact that it reached to the very limits of its power to pass DOMA.[194] This is a plausible argument, but one that may need more support from other sources of evidence to be maintained

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187 Ward & Gow v. Krinsky, 259 U.S. 503, 522 (1922).

188 *Id.*

189 *Windsor*, 570 U.S. 763–64.

190 *Id.* at 766–68.

191 *Id.* at 762–770.

192 *Id.* at 791–92 (Scalia, J., dissenting).

193 *Id.* at 768–72.

194 *See id.* at 762–63.

upon re-examination by the current Court. Yet the *Windsor* majority cited no such sources.[195] The majority simply concluded that the passage of DOMA involved animosity towards homosexuals and voided the statute.[196]

Under the deferential rational basis review standard, the burden of producing proof of animus rests on the party seeking to invalidate the law.[197] However, the failure to produce sufficient proof of animosity and discriminatory intent behind DOMA did not stop the Court from invalidating § 3 of that statute.[198] Moreover, reexamination of this pivotal decision might yield a different result with a different set of justices. Justice Kavanaugh and Justice Gorsuch may reason that the Court should have realized its decision was limited by the record on appeal. Since that record did not contain the necessary proof of animus, the Trump Court might conclude that the Supreme Court should have sustained DOMA, and new members of the Court may break with precedent for this reason alone.

B. Would Heightened Scrutiny Apply?

Prior to *Obergefell*, a chief source of disagreement regarding how the Court should analyze cases involving the rights of homosexual individuals, and the way it seemed to analyze DOMA, is whether heightened scrutiny should apply.[199] To a large degree,

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[195] *See id.* at 768–72.

[196] *Id.* at 775.

[197] New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 17 (1988).

[198] *Windsor*, 570 U.S. at 775.

[199] Abreu, *supra* note 113; Carpenter, *supra* note 113; Cox, *supra* note 113; Doherty, *supra* note 113; Eskridge, *Comparative Law and the Same-Sex Marriage Debate*, *supra* note 113; Eskridge, Jr., *A History of Same-Sex Marriage*, *supra* note 113; Eskridge, *Three Cultural Anxieties Undermining the Case for Same-Sex Marriage*, *supra* note 113; Koons, *supra* note 113; Koppelman, *The Miscegenation Analogy*, *supra* note 113; Koppelman, *supra* note 113; Kovacs, *supra* note 113; Macedo, *supra* note 113; Marcus, *supra* note 113; Nice, *supra* note 113; Pasfield, *supra* note 113; *Report on Marriage Rights for Same-Sex Couples in New York*, *supra* note 113; Rush, *supra* note 113; Strasser, *Loving, Baehr, and the Right to Marry*, *supra* note 113; Strasser, *Loving in the New Millennium*, *supra* note 113; Strasser, *Same-Sex Marriages and Civil Unions*,

in issues excluding marriage, this question remains. Perhaps in 2013, one could argue that even if DOMA should have survived rational basis review, that was never the appropriate standard of review. Perhaps an argument could be made that the result of *Windsor* was correct because the case should have been analyzed under intermediate or strict scrutiny review, which is exactly what *Obergefell* did in the specific act of recognizing same-sex marriage as a fundamental right.[200]

Up to this point, the Court has not directly moved cases involving differing treatment of homosexuals into the realm of heightened scrutiny except when that treatment concerns a fundamental right.[201] The burden may fall on the government to

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supra note 113; Weiser, *supra* note 113; Whitty, *supra* note 113; Wolfson, *supra* note 113; Baker & Duncan, *supra* note 113; Collett, *Constitutional Confusion*, *supra* note 113; Collett, *Recognizing Same-Sex Marriage*, *supra* note 113; Collett, *Restoring Democratic Self-Governance Through the Federal Marriage Amendment*, *supra* note 113; Corlew, *supra* note 113; Crump, *supra* note 113; Dent, *The Defense of Traditional Marriage*, *supra* note 113; Dent, *"How Does Same-Sex Marriage Threaten You?"*, *supra* note 113; Duncan, *supra* note 113; Duncan, *Constitutions and Marriage*, *supra* note 113; Duncan, *DOMA and Marriage*, *supra* note 113; Finnis, *supra* note 113; Fitschen, *supra* note 113; Forde-Mazrui, *supra* note 113; Gallagher, *supra* note 113; George, *supra* note 113; George & Bradley, *supra* note 113; Jacob, *supra* note 113; McCarthy, *supra* note 113; Rao, *supra* note 113; Stewart, *supra* note 113; Wardle, *The Biological Causes and Consequences of Homosexual Behavior and Their Relevance for Family Law Policies*, *supra* note 113; Wardle, *Children and the Future of Marriage*, *supra* note 113; Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, *supra* note 113; Wardle, *"Multiply and Replenish" supra* note 113; Wardle & Oliphant, *supra* note 113.

[200] Obergefell v. Hodges, 135 S. Ct. 2548, 2607–08 (2015).

[201] Homosexual individuals do not receive any additional protections as a result of the Court's current jurisprudence, which should be a flaw both from the perspective of the old majority and the new majority. For example, the Court did not extend the intermediate scrutiny standard of gender discrimination to same-sex couples despite several opportunities. This might have been the best solution: it would have protected same-sex couples across the board since they were being treated differently merely based on the gender of their partner. *See* Cox, *supra* note 113, at 1040–41; Eskridge, *Comparative Law and the Same-Sex Marriage Debate*, *supra* note 113, at 645–46; Eskridge, *A History of Same-Sex Marriage*, *supra* note 113, at 1510; Koppelman, *The Miscegenation Analogy*, *supra* note 113, at 146–47; Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, *supra* note 113 at 198–99 (critiquing the Court's initial

state the rational basis behind the discriminatory law, but this burden is still less demanding than heightened scrutiny.[202] So why does the Court apply a standard to homosexuality that is more like the standard applied to regulations on businesses and corporations than the standard applied to regulations that discriminate on the basis of gender or race?[203] Why did the Court continue to do so in *Windsor* in 2013 and then rely on *Windsor* in 2015 to apply strict scrutiny instead?[204]

Perhaps the Court does not find that discrimination against homosexual individuals has been so flagrant throughout the history of the United States that same-sex couples should receive the same amount of protection as those who are victims of discrimination on the basis of race. But is this true? And even if it is, then why does the standard of review for gender discrimination not apply? Surely homosexual men are sometimes faced with different treatment because they engage in relationships with men, and they would not be treated differently for engaging in such relationships if they were women. Some complications may arise from the argument that a member of a same-sex couple sufferes discrimination not so much because of his or her own gender but because of the gender of his or her partner. Yet, this argument only complicates the path to the same conclusion. The Supreme Court could have ruled that discrimination against one member of a couple because of the gender of another inevitably harms *both* members (even if the harm is purely psychological), resulting in a clear connection between the harm

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failure to extend protections to same-sex couples despite opportunities to interpret jurisprudence based on either equal protection or a fundamental right to marry under due process). But now, there is a discontinuity between the amount of protection homosexual individuals receive: they receive tremendous protections with respect to marriage, but they receive far less protection with respect to everything else. And as long as the discrimination does not concern a fundamental right (of which there are still few), the jurisprudence of the old Court leaves more to be desired.

202 *See* Romer v. Evans, 517 U.S. 620, 631 (1996).

203 *See* Ry. Exp. Agency v. People of State of N.Y., 336 U.S. 106 (1949).

204 *Obergefell*, 135 S. Ct. at 2597; Windsor v. United States, 570 U.S. 744, 744 (2013).

member of the couple whose gender ultimately leads to the discrimination.[205]

However, the Court did not elect to go this route, which may come to haunt the former majority in the future. After all, the test of any precedential decision is whether it can survive the scrutiny of a less-favorable majority of the Court. For *Windsor*, this test is yet to come. In some sense, the Court's reluctance to adopt this standard, just like its reluctance to apply strict scrutiny in *Windsor*, may be used to show that strict scrutiny and intermediate scrutiny do not apply at all. By remaining silent on the applicable standard of review, without apparent explanation, the *Windsor* majority may have left room for opponents of same-sex marriage to undermine the decision.

Undoubtedly, as some of the law review articles referenced above note, the act of sexual relations between two members of the same gender is different in some important ways from intercourse between heterosexual individuals.[206] Yet, aside from reproductive capabilities, the difference might not appear so major to the new Court as to justify differential treatment by federal or state governments. Even when one considers that homosexual sex is non-reproductive sex, the fact that the sex is non-reproductive in nature does not mean that partners involved in it deserve no legal protection.[207] Justice Scalia specifically outlines this in his dissent in *Lawrence*.[208] Arguments for heightened scrutiny analysis of legislation that treats homosexuals differently have been made on gender discrimination, fundamental right, and impermissible classification grounds.[209] Thus, the Court's reluctance to adopt these

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[205] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (looking to the psychological impacts of discrimination to invalidate segregation in the school setting even when the schools involved were factually equal in terms of physical facilities).

[206] Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, *supra* note 113, at 83–89.

[207] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting).

[208] *Id.*

[209] *See generally* Abreu, *supra* note 113; Carpenter, *supra* note 113; Cox, *supra* note 113; Doherty, *supra* note 113; Eskridge, *Comparative Law and the Same-Sex Marriage Debate*, *supra* note 113; Eskridge, Jr., *A History of Same-Sex*

arguments may be treated as a conscious rejection by future jurists, particularly those wishing to reverse the recent jurisprudence on same-sex marriage.

The reason strict and intermediate scrutiny may not properly fit same-sex marriage analysis is arguably philosophical in nature. The problem that presents itself is one of free will and moral choice: a conservative Court might argue (or at least believe) that even if there is scientific proof that homosexuality is a result of nature, nurture, or both, same-sex couples, just like heterosexual couples, have the choice of acting on their desires or abstaining from such actions. President Trump's Court might then argue that this is precisely what makes the issue appropriate for rational basis review.

Rational basis review often applies to statutes such as commercial or economic regulations.[210] At least part of the reason only rational basis review applies to such regulations is because they regulate *chosen* activity: the people who entered into the businesses being regulated by commercial statutes *choose* to take part in those businesses on their own free will. They can also choose to leave those businesses after the regulations are imposed if those regulations make running such businesses unprofitable or uncomfortable. Thus, the Supreme Court has protected these individuals, companies, and corporations the least because their involvement in the regulated activities occurs purely by choice. President Trump's newly recomposed Supreme Court, fairly or unfairly, may take a similar view when it comes to same-sex

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Marriage, *supra* note 113; Eskridge, *Three Cultural Anxieties Undermining the Case for Same-Sex Marriage*, *supra* note 113; Koons, *supra* note 113; Koppelman, *The Miscegenation Analogy*, *supra* note 113; Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, *supra* note 113; Kovacs, *supra* note 113; Macedo, *supra* note 113; Marcus, *supra* note 113; Nice, *supra* note 113; Pasfield, *supra* note 113; *Report on Marriage Rights for Same-Sex Couples in New York*, *supra* note 113; Rush, *supra* note 113; Strasser, *Loving, Baehr, and the Right to Marry*, *supra* note 113; Strasser, *Loving in the New Millennium*, *supra* note 113; Strasser, *Same-Sex Marriages and Civil Unions*, *supra* note 113; Weiser, *supra* note 113; Whitty, *supra* note 113; Wolfson, *supra* note 113.

[210] *See, e.g.*, *Beach Commc'ns*, 508 U.S. 307, 313; *see also* Sproles v. Binford, 286 U.S. 374, 396 (1932) (listing various commercial or quasi-commercial cases applying the rational basis standard in the early era of Fourteenth Amendment jurisprudence).

couples, putting the rights established by *Windsor*, and perhaps *Obergefell*, in danger of losing constitutional protection.

This "choice" argument for rational basis review is substantially different from the situation faced by people who are of a race or gender that statutes or other government actions disfavor. These individuals do not choose either their gender (in most instances) or their race. Nor can gender and race be easily concealed: a person who speaks face-to-face with a member of a same-sex couple does not necessarily know that he has spoken with a homosexual individual.[211] On the other hand, almost everyone can tell whether the person they have spoken to face-to-face is of a certain race or gender.[212] Thus, the Court could argue that even if scientific proof becomes available that shows that homosexuality is an uncontrollable genetic trait, it will still be a trait that is more easily concealed than race or gender, and so, a lesser level of scrutiny may be applicable.

Furthermore, justices opposing same-sex marriage may take the position that a homosexual person need not enter into same-sex relationships at all. This is a position taken by some religious organizations, notably the Catholic Church, with which a majority of the Supreme Court has significant affiliations (if not outright membership).[213] Even if abstinence is not possible, a justice opposing the constitutional protection of same-sex marriage may

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211 Wardle & Oliphant, *supra* note 113, at 146.

212 *Id.*

213 *See, e.g.*, *Homosexuality*, CATHOLIC ANSWERS: TRACTS (Nov. 19, 2018), https://www.catholic.com/tract/homosexuality ("Homosexual desires, however, are not in themselves sinful. People are subject to a wide variety of sinful desires over which they have little direct control, but these do not become sinful until a person acts upon them, either by acting out the desire or by encouraging the desire and deliberately engaging in fantasies about acting it out. People tempted by homosexual desires, like people tempted by improper heterosexual desires, are not sinning until they act upon those desires in some manner."); Z. Byron Wolf, *Why Do Catholics Hold a Strong Majority on the Supreme Court?*, CNN POLITICS (July 10, 2018), https://www.cnn.com/2018/07/10/politics/catholic-justices/index.html (demonstrating that Associate Justice Neil Gorsuch and Associate Justice Brett Kavanaugh, the Justices appointed by President Trump, have strong Catholic ties. These ties are shared by Associate Justice Clarence Thomas, Associate Justice Samuel Alito, Associate Justice Sonia Sotomayor, and Chief Justice Roberts).

believe that even if a homosexual individual chooses to engage sexual relations with a member of the same sex, that engagement can remain a private matter, unlike race or gender. Thus, President Trump's Court may view *expressing* homosexuality as a choice, and therefore refuse to grant heightened scrutiny protection to same-sex couples wishing to pursue marriage (though this may create another avenue for advancing the rights of same-sex couples, particularly under the First Amendment).[214]

To oppose this logic, some may argue that strict scrutiny should be applied in Equal Protection analysis when homosexual rights are at issue because homosexuals are a historically mistreated group.[215] These advocates may propose that the kind of discrimination which homosexuals have faced is not sufficiently different from racial discrimination to deserve a lesser standard of scrutiny. Some proponents of extending the right to marry to same-sex couples may embrace this logic despite the fact that President Trump's Court might believe that homosexuals could hide their sexual orientation (an onerous burden to be imposed on the homosexual community). Thus, logic in support of a strict scrutiny standard has come under attack in law review articles by more conservative authors and may come under scrutiny in the eyes of a more conservative Supreme Court.[216] Robert Oliver presents a particularly fervent version of the critique:

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[214] *See* Bryan K. Fair, *The Ultimate Association: Same-Sex Marriage and the Battle Against Jim Crow's Other Cousin*, 63 U. MIAMI L. REV. 269, 287 (2008).

[215] *See, e.g.*, Windsor v. United States, 570 U.S. 744, 744 (2013).

[216] Baker & Duncan, *supra* note 113, at 29; Corlew, *supra* note 113, at 22; Crump, *supra* note 113, at 230; Dent, *The Defense of Traditional Marriage*, *supra* note 113, at 585; Duncan, *From Loving to Romer*, *supra* note 113, at 241; Duncan, *Constitutions and Marriage*, *supra* note 113, at 334; Fitschen, *supra* note 113, at 1323; Forde-Mazrui, *supra* note 113, at 319; Jacob, *supra* note 113, at 1219; Stewart, *supra* note 113, at 365; Wardle, *The Biological Causes and Consequences of Homosexual Behavior and Their Relevance for Family Law Policies*, *supra* note 113, at 1214; Wardle, *Children and the Future of Marriage*, *supra* note 113, at 4; Wardle & Oliphant, *supra* note 113, at 143; *see* Collett, *Constitutional Confusion*, *supra* note 111, at 1033–1041. *See generally* Collett, *Restoring Democratic Self-Governance Through the Federal Marriage Amendment*, *supra* note 113; Dent, Jr., *"How Does Same-Sex Marriage Threaten You?"*, *supra* note 113; Duncan, *DOMA and Marriage*, *supra* note 113; Finnis,

> When has a multitude of gays been kidnapped and made to be slaves for 400 years? When was it illegal to teach gays to read and write? . . . When were gays required to say "sah" and "ma'am" to straight people? When were there separated gay and straight water fountains? In public buildings, when were there separate entrances for gays and straights, the gays going out the back? In theaters, have gays been forced to sit in the balcony while straights sit on the main floor? When were there segregated lunch counters based on sexual preference? When was a gay required to give up their seat on a bus to a straight person? . . . Were gays at the bottom of the economic social structure for decades? Where were the poor gay ghettos . . . When were there separate-but-equal schools for gays and straights?[217]

The Court may take the position that racial discrimination is simply different from discrimination against homosexuals, at least in the United States. Unfortunately, the United States has centuries of history where various groups of people, particularly African Americans, were severely mistreated because of their race.[218] Though a history of mistreatment of homosexuals exists, too,[219] the newly recomposed Supreme Court may find it difficult to compare those hardships to those of slavery and the Jim Crow era.[220] Of

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supra note 113 (comparing European regulation of sexual conduct to the U.S.); Gallagher, *supra* note 113 (advocating, generally, for regulations that support marriage only between men and women); George, *supra* note 113; George & Bradley, *supra* note 113; McCarthy, *supra* note 113; Rao, *supra* note 113; Wardle, *Children and the Future of Marriage*, *supra* note 113 (discussing the importance of married parents to the success of children); Wardle, *Multiply and Replenish*, *supra* note 113.

[217] Wardle & Oliphant, *supra* note 113, at 145 (citing Janet M. Larue, *Homosexuals Hijack Civil Rights Bus: Claiming a "Civil Right" to "Marry" the Same-Sex Demeans a Genuine Struggle for Liberty and Equality*, CONCERNED WOMEN FOR AMERICA (Mar. 22, 2004), http://concernedwomen.org/images/content/hhcrb.pdf).

[218] *See, e.g.*, *Slavery in America*, HISTORY.COM, https://www.history.com/topics/black-history/slavery (last visited May 5, 2019).

[219] Windsor v. United States, 570 U.S. 744, 753–54 (2013).

[220] Wardle & Oliphant, *supra* note 113 at 145.

course, strict scrutiny analysis also applies when a statute discriminates against races that were not victims of discrimination over the course of American history, but the Court may believe that the purpose of this is to prevent a race that has not been victimized in the past from becoming victimized in the future, not to extend strict scrutiny analysis of Equal Protection to same-sex couples.[221] However, from the perspective of a more conservative Court, even the application of strict scrutiny to discrimination on the basis of race might not lead to extending strict scrutiny to laws which affect homosexual individuals because homosexuality is not a race.

C. Windsor in Light of Romer, Lawrence, and Baker

The Court's deviation from the rational basis standard of review in *Windsor* may also come under criticism from the recomposed Court because it resulted in the affirmation of the reasoning in *Lawrence*.[222] Particularly, the *Windsor* Court seemingly adopted the *Lawrence* approach that legislation which advances the perceived moral interests of a community should hold almost no weight as a legitimate purpose in the analysis of a statute.[223] President Trump's Court may hold that the reverse should be true: the moral standards of a community should be considered as an important interest in the Court's evaluation. Tradition shows that passing laws to preserve a general sense of morality has been a staple of American democracy.[224] Even if these laws serve no purpose other than to put

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[221] *See* Fisher v. Univ. of Texas at Austin, 570 U.S. 297, 308 (2013).

[222] *Windsor*, 570 U.S. at 768; Lawrence v. Texas, 539 U.S. 558, 571–72 (2003).

[223] *Windsor*, 570 U.S. at 745–46; *Lawrence*, 539 U.S. at 571–72.

[224] Barnes v. Glen Theatre, Inc., 501 U.S. 560, 568–70 (1991); Miller v. California, 413 U.S. 15, 21 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60–61 (1973); Roth v. United States, 354 U.S. 476, 485 (1957); Chaplinsky v. State of New Hampshire, 315 U.S. 568, 572 (1942) (recognizing a "social interest in order and morality" in free speech cases); Meyer v. Nebraska, 262 U.S. 390, 401 (1923); Boston Beer Co. v. State of Massachusetts, 97 U.S. 25, 32–33 (1877); Bowers v. Hardwick, 478 U.S. 186, 196 (1986) *overruled by Lawrence*, 539 U.S. 558. In each of these cases, the Court has held that there is a state interest in preserving morality. The explicit divergence from this view in *Lawrence* and the implicit divergence from this view in *Windsor* (where the majority did not seriously consider morality as a justification for DOMA's definition of marriage)

minds at ease regarding certain social standards, the Court may hold that they should be upheld under the lowest level of constitutional scrutiny.

The Court may decide that preserving moral views in legislation is neither novel nor improper.[225] The justices might decide that Fourteenth Amendment Equal Protection was not intended to eliminate the ability of governing bodies to impose democratically-accepted moral views. Furthermore, the Court may be reluctant to hold that the Equal Protection principle that is implicit in the Due Process Clause of the Fifth Amendment (present in the Constitution well before the Fourteenth Amendment's Equal Protection Clause) is any different. Perhaps President Trump's Court may rely on the *Windsor* Court's earlier claim that the Equal Protection right created by the Due Process Clause is more limited than the right created by the Equal Protection Clause and refuse to allow Due Process Equal Protection principles to curb a government's ability to advance morality-based legislation.[226]

Since an analysis of traditional rights is generally important in Due Process reasoning and not in Equal Protection reasoning, the Court may conclude that the passage of legislation founded in morality considerations does not conflict with the Equal Protection component implicit in the Due Process Clause. This limitation on the Equal Protection component would indeed make it more "specific" than the right created by the Equal Protection Clause of the Fourteenth Amendment.[227] Such a limitation would also allow President Trump's increasingly conservative Court to reach the opposite conclusion concerning *Windsor*: that morality considerations, along with the importance of unambiguous federal

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may be ruled unfounded. The Court may reconcile these cases by holding that if morality can be a state interest that overrides a citizen's explicit constitutional right to free speech, then it must be considered when the government seeks to curtail a person's implicit right to marry a person of the same gender.

[225] *See Barnes*, 501 U.S. at 568–70; *Miller*, 413 U.S. at 21; *Paris Adult Theatre I*, 413 U.S. at 60–61; *Roth*, 354 U.S. at 485; *Chaplinsky*, 315 U.S. at 572; *Meyer*, 262 U.S. at 401; *Boston Beer Co.*, 97 U.S. at 32–33.

[226] *Windsor*, 570 U.S. at 744 ("[T]he equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.").

[227] *Id.*

classifications and the preservation of a law's intended effects, constitutes a sufficient rational basis for DOMA § 3.

Proponents of same-sex marriage may argue in rebuttal that the *Windsor* decision was similar to *Romer* and *Lawrence* because the Court is more skeptical of rational bases offered for a law that impedes the rights of homosexuals.[228] Perhaps some may even proffer the argument that there was not overwhelming direct proof in either *Romer* or *Lawrence* that the government was acting maliciously in passing laws which treated homosexuals differently. After all, the Court arguably relied on circumstantial proof in those cases.[229] Therefore, one could conclude that if the Court did not require greater proof of impermissible animus to invalidate the laws in *Romer* and *Lawrence*, the Court was consistent in not requiring such proof in *Windsor*.

1. Romer

In *Romer*, much of the necessary proof of animus was present in the breadth of the unconstitutional state amendment itself: Colorado sought to deprive homosexuals of all legislative, executive, and judicial protections granted on the basis of sexual preference.[230] The Court saw this as a blatant attempt to allow discrimination against homosexual individuals where all other classes specifically protected by state statutes would receive protection.[231] The Court viewed this broad deprivation of protections as plain evidence of animus.[232] But the broad deprivation of homosexual individuals in Colorado of executive, legislative, and judicial protections is very different from a federal statute that, instead of depriving same-sex couples of all protections on the basis of their sexuality, forbade same-sex couples from entering into a single, specific type of union that has, historically, been reserved for heterosexual couples. The

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[228] Romer v. Evans, 517 U.S. 620, 624–31 (1996); Lawrence v. Texas, 539 U.S. 558, 582–83 (O'Connor, J., concurring).

[229] The Court cited no statements of animus toward homosexuals by the politicians that passed the amendment in *Romer* or the anti-sodomy law in *Lawrence*. *Romer*, 517 U.S. at 635; *Lawrence*, 539 U.S. at 568.

[230] *Romer*, 517 U.S. at 635.

[231] *Id.*

[232] *Id.* at 632.

Court may use this distinction to show that the evidence of malicious discrimination by Colorado in *Romer*, even if it can be considered circumstantial, was far stronger than the evidence of discrimination by the United States legislature in the passage of DOMA.

2. Lawrence

Proponents of same-sex marriage may argue that even if the evidence of malicious discrimination was stronger in *Romer* than it was in *Windsor*, *Lawrence* still provides sound precedent for the Supreme Court's decision. They might point out that the anti-sodomy law challenged in *Lawrence* was not accompanied by statements of malicious discriminative intent made by those that passed the law.[233] However, the Court still declared the law criminalizing sodomy unconstitutional,[234] with Justice O'Connor arguing in her concurrence that the anti-sodomy laws violated Equal Protection.[235] Nevertheless, the majority decided *Lawrence* on Due Process grounds, finding that the anti-sodomy statute was unconstitutional because it infringed upon the fundamental right to sexual privacy of all couples, same-sex or otherwise.[236] The majority did not adopt O'Connor's view that malicious discriminative intent in the Equal Protection context was evident.[237]

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[233] *Lawrence*, 539 U.S. at 567.

[234] *Id.* at 578–79. The Court's reluctance to allow criminal laws to reach same-sex couples had the effect of stopping future prosecutions for at least some victimless crimes, which should have been a welcome ruling to a criminal justice system overflowing with convictions for seemingly harmless acts. William N. Clark & Artem M. Joukov, *The Criminalization of America*, 41 76 AL. LAW. 225 (2015); Artem M. Joukov & Samantha M. Caspar, *Wherefore is Fortunato? How the Corpus Delicti Rul Excludes Reliable Confessions, Helps the Guilty Avoid Responsibility, and Proves Inconsistent with Basice Evidence Principles*, 41 AM. J. TRIAL ADVOC. 459, 522 (2018).

[235] *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring).

[236] *Id.* at 578–79.

[237] *Id.* at 574–75 ("Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."). Some may say that *Lawrence* was also decided by the majority on Equal Protection grounds because it cites to *Romer*. *Id.* However, although the majority acknowledged that an Equal Protection argument spanning

Therefore, *Lawrence* may not help explain why the *Windsor* Court found malicious discriminative intent in *Windsor* to a skeptical conservative panel.

Even if one could argue that hidden in the language of the majority opinion in *Lawrence* exists a critique of the anti-sodomy law on Equal Protection grounds, this may be unlikely to persuade the new conservative majority. Thus, the Court could hold that straying from the rational basis review in *Lawrence* should not justify another misapplication of this review standard ten years later. The Court could backtrack to its standard that to review statutes that implicate the rights of same-sex couples under a stricter standard, the reviewing court must articulate that standard. In the absence of such articulation, and under the framework of rational basis analysis of Equal Protection claims, the new members of the Supreme Court might take a step back and reaffirm DOMA's definition of "marriage" or a similar definition under another statute.

3. Baker

Furthermore, the Court may actually readopt precedent that the *Windsor* Court never addressed but which *Obergefell* specifically overruled.[238] *Baker v. Nelson* served as potentially controlling precedent in both same-sex marriage cases, and following it closely may have required the Court to sustain DOMA § 3 under the principle of *stare decisis*.[239] Surprisingly, the Court's decision in *Windsor* completely omitted *Baker* despite the preoccupation with

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from *Romer* might be "tenable," the Court specifically declined to decide the case on Equal Protection grounds (just because the Court acknowledged that an Equal Protection argument would be *tenable* does not mean that the argument would have been *successful*). *Id.* The Court stated: "Were we to hold the statute invalid under the Equal Protection Clause, some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants." *Id.* at 575. Wishing to avoid these questions, the majority did not analyze the case further on Equal Protection grounds. *Id.* at 574–75.

[238] Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015) (holding that the exclusion of same-sex couples does present a federal question, and overruling the opposite holding in Baker v. Nelson, 409 U.S. 810 (1972)).

[239] *See, e.g.*, Windsor v. United States, 699 F.3d 169, 192–95 (2d Cir. 2012) (Straub, J., dissenting).

that case by both parties in their briefs, and despite Judge Straub's dissenting opinion arguing that this case should be dispositive in the decision of the lower Court of Appeals.[240]

Judge Straub pointed out that *Baker* was controlling precedent on same-sex marriage: in *Baker* case, the Supreme Court saw no federal question in an appeal from a *state* ban on same-sex marriage.[241] Per Judge Straub's reasoning, since Equal Protection was one of the issues raised in the appeal, and the issue did not raise a federal question, that must mean that the state of Minnesota did not discriminate against homosexuals in a way that violated the Fourteenth Amendment Due Process and Equal Protection Clauses.[242] *Baker* was a dismissal on appeal, which is a ruling on the merits, not a denial of certiorari.[243] Thus, *Baker* was binding precedent that President Trump's Court could assert should have applied.

President Trump's Court could reason as follows: Since the Due Process Clause of the Fourteenth Amendment is essentially identical to the Due Process Clause of the Fifth Amendment, and since the Minnesota same-sex marriage ban survived Fourteenth Amendment Due Process scrutiny in *Baker*, the federal ban on same-sex marriage should also have survived Fifth Amendment Due Process scrutiny in *Windsor* if *Baker* was binding. Furthermore, since the Minnesota ban on same-sex marriage survived the Fourteenth Amendment Equal Protection challenge, a federal ban should have survived such a challenge under the implicit Equal Protection provision of the Fifth Amendment. President Trump's Court might resurrect the precedent in *Baker*, arguing essentially that its reversal was inappropriate *prior* to the establishment of a fundamental right in *Obergefell*, and building up all the more the precedent that *Obergefell* broke with in

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[240] *Compare Windsor*, 570 U.S. 744 (omitting *Baker*, 409 U.S. 810), *with Windsor*, 699 F.3d at 192–95 (explaining *Baker* as a decision on the merits that lower courts are bound by until the Supreme Court says otherwise); *see* Jonah J. Horwitz, *When Too Little is Too Much: Why the Supreme Court Should Either Explain Its Opinions or Keep Them to Itself*, 98 MINN. L. REV. HEADNOTES 1, 4–6 (2013); *Windsor*, 699 F.3d at 192–95.

[241] *Windsor*, 699 F.3d at 192–95 (citing *Baker*, 409 U.S. 810).

[242] *See id.* (citing *Baker*, 409 U.S. 810).

[243] Horwitz, *supra* note 240, at 5; *see, e.g.*, Mandel v. Bradley, 432 U.S. 173, 175–76 (1977).

the accepted definition marriage under the guise of a nonexistent fundamental right. Just as a more progressive Court saw *Windsor* as an opportunity to lay the foundation for *Obergefell*, President Trump's Court might see a reversal of *Windsor* as an opportunity to lay the foundation for a reversal of *Obergefell*.

Under *Planned Parenthood of Se. Pennsylvania v. Casey*,[244] the elements ordinarily required to overturn binding precedent like *Baker* likely would not be met in the eyes of the new Court. *Planned Parenthood* established that when the Supreme Court of the United States considers breaking with precedent, the following considerations apply:

> 1. "whether the [precedent] has proven to be intolerable simply in defying practical workability,"[245]
> 2. "whether the [precedent] is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation,"[246]
> 3. "whether related principles of law have so far developed as to have left the [precedent] no more than a remnant of abandoned doctrine,"[247] and
> 4. "whether facts have so changed, or come to be seen so differently, as to have robbed the [precedent] of significant application or justification."[248]

President Trump's Court could decide that the ruling in *Baker* never defied practical workability: both Minnesota and the United States have not been overburdened by the ruling. The rule has certainly been relied upon to some extent, as evidenced by the arguments submitted to the Court by both parties in *Windsor* and also by Judge Straub's dissent.[249] Moreover, President Trump's

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[244] *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (noting specific elements necessary to overturn binding precedent).

[245] *Id.* at 854.

[246] *Id.*

[247] *Id.* at 855.

[248] *Id.*

[249] Windsor v. United States, 699 F.3d 169, 191–95 (2d Cir. 2012) (Straub, J., dissenting).

Court might hold that the law is not developed to such an extent that it antiquates the Court ruling in *Baker*. In fact, the issue in *Baker* was still being heavily debated, even post-*Windsor*.[250] Thus, the new Court may believe that the law did not leave the rule in *Baker* behind to such an extent that it warranted reversal.[251] Finally, though some states now explicitly allow same-sex marriage[252] where none did at the time of *Baker*, the change is not so great that it renders the rule in *Baker* insignificant in application. Rather, President Trump's Court could hold that the *Baker* rule was all the more significant due to the controversy surrounding same-sex marriage and the need for a decisive judicial answer regarding the constitutionality of same-sex marriage bans. Thus, President Trump's Court may overturn *Windsor* by arguing that *Windsor* itself improperly overturned precedent.

The *Windsor* Court left itself open to criticism by future decisions by avoiding mention of *Baker* in the majority holding.[253] If the Court applied the above *Casey* balancing test to *Baker*, it did so privately.[254] Neither the majority opinion, nor the dissents, mention any balancing of the aforementioned factors whatsoever.[255] The reasons for this are unclear, because although Jonah Horowitz suggests there is ambiguity in the *Baker* ruling,[256] the opposite might seem true to the new Supreme Court. If there is no federal question regarding a state ban of same-sex marriage, there must be no Equal Protection argument on which the homosexual appellants could prevail. Furthermore, under the balancing test established in *Planned Parenthood*,[257] President Trump's Court might attempt to

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250 *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2589–91 (2015).

251 Ironically, the Court would be breaking with the precedent in *Casey* by making an effort to overturn *Windsor*, since the causes for reversal likely do not satisfy the requirements of *Casey* much like the causes for reversal of *Baker* also likely did not satisfy the requirements of *Casey*.

252 *See, e.g.*, New York Marriage Equality Act, N.Y. DOM REL. LAW § 10-a (McKinney 2019).

253 Horwitz, *supra* note 240, at 4–6.

254 *See generally Baker*, 409 U.S. 810 (lacking any language to indicate the Court in *Baker* applied the *Casey* balancing test).

255 Horwitz, *supra* note 240, at 4–6.

256 *Id.* at 6.

257 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992).

revive *Baker* as wrongly reversed. The more conservative Court may echo Justice Scalia's dissent in *Lawrence*,[258] asserting that if *Roe v. Wade*[259] could survive the scrutiny of the balancing test in *Planned Parenthood*, *Baker* should have, too. Thus, the Court may conclude that it should have applied *Baker* to the *Windsor* case while *Baker* had not been explicitly overruled, which would have led to sustaining DOMA § 3 in *Windsor*.

CONCLUSION

Windsor left much exposed to attack by a more conservative Court. The *Windsor* Court's failure to state a standard of review theoretically meant that DOMA's definition of marriage failed rational basis review despite the fact that some nondiscriminatory reasons existed for its enactment. There is some difficulty in reconciling this ruling with what has traditionally been understood as the deferential rational basis review standard, and the increasingly conservative Court may use this potential weakness to roll back its jurisprudence on this subject. If the Court decides to reexamine same-sex marriage jurisprudence, the Court could use this to undermine *Windsor* while breaking with the precedent on *Obergefell* based on other grounds. This will prove significant, since *Windsor* functions as one of the doctrinal foundations for *Obergefell* to begin with.[260] Thus, if the new Court determines that same-sex marriage *is not* a fundamental right, then it may also use the weaknesses in *Windsor* to eliminate potential challenges to same-sex marriage bans on Equal Protection grounds as well.

Interestingly, though, a decision reversing *Windsor* may not come from a direct challenge to the constitutional protections for same-sex marriage. Public opinion has shifted on this matter dramatically, with a significant amount of political scrutiny likely to face any politician who would attempt to oppose same-sex marriage

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[258] Lawrence v. Texas, 539 U.S. 558, 586–92 (Scalia, J., dissenting).

[259] Roe v. Wade, 410 U.S. 113 (1973).

[260] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2589–602 (2015) (citing to the United States v. Windsor, 570 U.S. 744 (2013) precedent throughout the opinion).

on the basis of state or federal law.[261] Rather, the Court may face the issue under the guise a party seeking to *expand* the right of same-sex couples. Litigants seeking to impose sanctions on government entities or private businesses that discriminate against homosexual individuals[262] may be in a difficult position in front of President Trump's Court. By invoking their rights under established Supreme Court precedent, they may actually find themselves on the wrong end of a reversal of that precedent. So, some advocates may even consider avoiding the Court for the time being so as to prevent the more conservative justices from considering cases where the reversal of *Windsor* might seem appropriate to them.

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[261] *See* Aamer Madhani, *Poll: Approval of Same-sex Marriage in U.S. Reaches New High*, USA TODAY (May 23, 2018), https://www.usatoday.com/story/news/nation/2018/05/23/same-sex-marriage-poll-americans/638587002/; *Changing Attitudes on Gay Marriage*, PEW RESEARCH CENTER (June 26, 2017), https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/; Justin McCarthy, *U.S. Support for Gay Marriage Edges to New High*, GALLUP (May 15, 2017), https://news.gallup.com/poll/210566/support-gay-marriage-edges-new-high.aspx.

[262] *See, e.g.*, Masterpiece Cakeshop v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018).