Kentucky Law Journal

Volume 104 | Issue 2 Article 2

2015

Once We're Done Honeymooning: *Obergefell v. Hodges*, Incrementalism, and Advances for Sexual Orientation Anti-Discrimination

Jeremiah A. Ho
University of Massachusetts School of Law

Kentucky Law Journal

VOLUME 104 2015 - 2016 NUMBER 2

ARTICLES

Once We're Done Honeymooning: *Obergefell v. Hodges*, Incrementalism, and Advances for Sexual Orientation Anti-Discrimination

Jeremiah A. Ho[1]

Undoubtedly, the Supreme Court's marriage equality decision in Obergefell v. Hodges *is the watershed civil rights decision of our time. Since* United States v. Windsor, *each recent victory for same-sex couples in the federal courts evidenced that the legal recognition of same-sex marriages in the United States was becoming increasingly secure. Meanwhile, momentum was growing for the visibility of sexual minorities nationally. Yet, is marriage equality the last stop in the pro-LGBTQ movement, or should we expect sexual minorities to advance in other legal arenas? Should we expect that the recent strides in marriage equality from* Windsor *to* Obergefell *can somehow leverage broader protections for LGBTQ individuals beyond their marital relationships?*

*This Article begins from the perspective that the marriage equality movement is an increment in the longer process for securing legal protections for sexual minorities. Recently advancements in sexual orientation have been somewhat successful, and now that marriage equality is finally secured, progress for protecting sexual minorities should navigate toward reforms in federal anti-discrimination laws. Although many of the judicial victories in the marriage cases have been specifically effective toward recognizing the relationships of same-sex couples, there have also been some significant judicial strides from post-*Windsor *cases and* Obergefell *that could be*

[1] Assistant Professor of Law, University of Massachusetts School of Law. Many thanks to Margaret Drew, Eric Mitnick, and Richard Peltz-Steele for advice and comments. I am also grateful for the research support and assistance of Felicia Carboni, Albert Marks, Megan Beyer, Kurt Hagstrom, Emma Wood, Jessica Almeida, and Cathy O'Neill. Much thanks to the University of Massachusetts for funding this research. Lastly, much gratitude for the work of Joseph Sherman and the staff at the *Kentucky Law Journal*.

instrumental for furthering progress in areas of sexual orientation anti-discrimination. This Article discusses how such judicial advances ultimately bolster autonomy rights in sexual identity that anti-discrimination laws, specifically Title VII, ought to protect, but currently do not.

INTRODUCTION

Despite some segments of the social consciousness reeling from the gravity of victory after *Obergefell v. Hodges*,[2] the period that recently led to *Obergefell* and marriage equality has been part of a larger enduring transition, where social and legal norms about same-sex couples are still rapidly readjusting from a not-so-distant past where discrimination, exclusion, and inequality were all stagnantly commonplace.[3] For guidance on pondering this moment normatively, a glimpse at history toward other critical periods of transition can prove helpful as a starting place to give us perspective on how to characterize the meaning of this particular time for sexual minorities and on what we ought to consider for sexual orientation in the next incremental progression toward equality and recognition.

Borrowing from presidential campaign history, an interesting but unexpected example comes from Ronald Reagan's road to reelection in 1984. Reagan's campaign capitalized on the strength of his first term in the White House with an effective metaphor that signified both his achievements and what ought to continue so long as his reelection was assured.[4] Calling the moment "a morning" from the domestic turbulence of the 1970s and hitching on the notion that what Reagan brought to the country in the 1980s was a new age,[5] this idea of a new dawn from

---

[2] Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) (holding that same-sex couples may not be denied the fundamental right to marry); *see generally* The Associated Press, *Historic Gay Marriage Ruling Stirs Emotion Across US*, ASSOCIATED PRESS: THE BIG STORY (June 26, 2015, 8:06 PM), http://bigstory.ap.org/article/12a175ff5e0a4f5d8542d3861d219431/look-gay-marriage-reaction-across-us.

[3] *See, e.g.*, Defense of Marriage Act (DOMA) § 2(a), 28 U.S.C. § 1738C (2011) ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage . . . ."), *invalidated by* United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013); 10 U.S.C. § 654(a)(13) (1993) ("The prohibition against homosexual conduct is a longstanding element of military law that-continues to be necessary in the unique circumstances of military service."), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321 § 2(f)(1)(A), 124 Stat. 3515, 1516; Bowers v. Hardwick, 478 U.S. 186, 191 (1986) ("Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do."), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[4] *See* ROBERT E. DENTON, JR., THE PRIMETIME PRESIDENCY OF RONALD REAGAN: THE ERA OF THE TELEVISION PRESIDENCY 64 (1988) ("By the reelection of 1984, the advertisers who had produced Pepsi commercials brought their skills to Reagan the product. The spots proclaimed that 'It's morning again in America' . . . .").

[5] *See* GIL TROY, MORNING IN AMERICA: HOW RONALD REAGAN INVENTED THE 1980S 12 (2005) ("The first part [of Reagan's storyline] tells the sad tale of America in the 1960s and 1970s, a

the Reagan-Bush campaign crystallized into an ad titled, "Morning in America."[6] From the first few seconds of the ad, "Morning in America" wastes no time stoking an atmosphere of prosperity in the 1980s, a triumph from the suggested economic and social darkness of the 1970s, through tranquil images of dawn's gilded early light shimmering across boats, piers, and tall buildings along a quiet harbor; of middle-class Americans suited up and earnestly going to work; and of a family of four pulling up in their station wagon to a new white-picket home and moving their belongings inside.[7] Meanwhile, statistics carefully woven into a sobering voice-over message explained why it was exactly that moment, at the end of Reagan's first term, that was politically and metaphorically "morning" again in America: "Today more men and women will go to work than ever before in our country's history. With interest rates at about half the record highs of 1980, nearly 2,000 families today will buy new homes, more than at any time in the past four years."[8]

Hard to ignore, from this Article's perspective, is the next set of images that marries both social and economic prosperity by depicting a handsome, white opposite-sex couple engaged in a classic church wedding celebration, while we are told that "this afternoon 6,500 young men and women will be married. And with inflation at less than half of what it was just four years ago, they can look forward with confidence to the future."[9] The initial exposition of a new morning juxtaposed with the ad's use of this marriage scene as one of its centerpiece observations suggests both the progression of norms that political conservatives at the time valued and found worth bolstering—or protecting—in a possible second Reagan term.[10] The ad smartly proposes that this is the norm that the new morning unapologetically has in store for the rest of this new ensuing day: a return to a conventional family-values rhetoric that might have been temporarily forgotten in the interim of the 1970s.[11]

---

country demoralized, wracked by inflation, strangled by big government . . . . The result [of Reagan's revolution] was Morning in America . . . .").

[6] *Reagan-Bush '84: Prouder, Stronger, Better* (Tuesday Team: Hal Riney Sept. 17, 1984), http://www.livingroomcandidate.org/commercials/1984/prouder-stronger-better. This reelection spot became known more popularly as "Morning in America." *Presidential Campaign Commercials 1952–2012, 1984: Reagan v. Mondale*, MUSEUM OF THE MOVING IMAGE, http://www.livingroomcandidate.org/commercials/1984/prouder-stronger-better (last accessed Apr. 4, 2016).; *see also* Daniel R. Ortiz, *The Difference Two Justices Make:* FEC v. Wisconsin Right to Life, Inc. II *and the Destabilization of Campaign Finance Regulation*, 1 ALB. GOV'T L. REV. 141, 158–59 (2008) (describing images portrayed by Reagan's campaign advertisement).

[7] *Reagan-Bush '84, supra* note 6.

[8] *Id.*

[9] *Id.*

[10] *See id.*

[11] *See* Ronald Reagan, Republican National Convention Acceptance Speech (July 17, 1980) ("[W]ith the virtues that are our legacy as a free people and with the vigilance that sustains liberty, we still have time to use our renewed compact to overcome the injuries that have been done to America these past three-and-a-half years.") (transcript available at

It is not until the ad finally fixates over an image of a stately view of the Capitol Building at daybreak, stoically white and alabaster, that the statistics give way to whom or to what the ad intended to sell: "Under the leadership of President Reagan, our country is prouder and stronger and better. Why would we ever want to return to where we were less than four short years ago?"[12] Beyond fulfilling campaign goals, the message embedded in the morning-after metaphor was also self-congratulatory. As the Reagan-Bush campaign portrayed, this morning in America represented not just mere progress from the late 1970s,[13] but significant evisceration of some kind of shadowy, night-time turmoil left by the Carter administration and what the Democrats in this election cycle were meant to signify.[14] This new morning, within the age of social and political conservatism, had possibilities and norms symbolized by family station wagons and white heteronormative church weddings that could all be wrecked if Reagan's streak was cut prematurely short—norms that, according to the ad, bore the possibility of bringing the nation relief and tranquility.[15] This observation was the implicit promise in exchange for reelection.

As far as that morning was concerned, Reagan had substantive reasons for being able to manipulate the realities of prosperity to construct the ad's narrative. The commercial's messages and images reflected some of the social and economic realities of the day while it tried to positively associate such realities with romantic, updated notions of American middle-class values, patriotism, and tranquility.[16] Simultaneously, Reagan was taking credit for the victories during his first term and leveraging for the next step, setting up what that step could look like. Yet 1984 was not without its troubles.[17] The Cold War between the United States and the then-Soviet Union was still being waged,[18] and in 1986, two years after Reagan's reelection, the Iran-Contra Affair would break out.[19] The American economy was only gradually correcting itself from what was then the worst recession since the

---

http://millercenter.org/president/speeches/speech-3406); *see also National Family Week, 1982*, Proclamation No. 4999, 47 Fed. Reg. 51,547 (Nov. 16, 1982), *reprinted in* 96 Stat. 2789–90 (1982).

[12] *Reagan-Bush '84*, *supra* note 6.

[13] *See id.* ("Why would we ever want to return to where we were less than four short years ago?").

[14] *See* TROY, *supra* note 5, at 12 ("The first part [of Reagan's storyline] tells the sad tale of America in the 1960s and 1970s, a country demoralized, wracked by inflation, strangled by big government, humiliated by Iranian fundamentalists, outmaneuvered by Soviet communists, betrayed by its best educated and most affluent youth.").

[15] *See Reagan-Bush '84*, *supra* note 6.

[16] *See id.*

[17] *See infra* notes 18–24 and accompanying text.

[18] *See* JOHN LEWIS GADDIS, THE COLD WAR: A NEW HISTORY 224–25 (2005) ("Reagan accelerated Carter's increase in American military spending: by 1985 the Pentagon's budget was almost twice what it had been in 1980.").

[19] *See generally* REPORT OF THE CONG. COMMS. INVESTIGATING THE IRAN-CONTRA AFFAIR WITH SUPPLEMENTAL, MINORITY, AND ADDITIONAL VIEWS, S. REP. NO. 100-216, H.R. REP. NO. 100-433, at 285 (1987) ("On [November 2, 1986], a Lebanese magazine, Al-Shiraa, reported that the United States had sold arms to Iran . . . .").

Depression,[20] and only three years later, in October 1987, the stock market would crash.[21] The treatment of AIDS was still at its early stages,[22] and its associative stereotypes with the gay community were resonating loudly.[23] And finally, it is important not to forget that 1984 was only two years before the United States Supreme Court criminalized same-sex intimacy in *Bowers v. Hardwick*.[24]

Still, there were enough substantive domestic achievements for Reagan to employ his morning-after metaphor for leveraging his ideas and agendas. Not slow to marry symbolic American iconography with conservative values, the ad ends with the raising of the American flag, allowing the campaign to appropriate Americanism with Reagan's norms, as the voice-over firmly declares with self-assurance and promise, "It's morning again in America."[25]

The period after *United States v. Windsor*,[26] the decision that found Section 3 of the Defense of Marriage Act unconstitutional,[27] could be conceived as a metaphorical morning for sexual minorities in the United States. Calling this moment such is a self-congratulatory move—as self-congratulatory as Reagan's advertisement, with his idealized day of prosperity in 1984.[28] Yet, the metaphor of the "morning after" also serves a critical and normative purpose beyond the laudatory; affixing this moniker both acknowledges and reifies that a sense of light is now cast upon a grave period of uncertainty for same-sex couples in the United States[29] and anticipates what is to come. What will the rest of that day look like? In the year after *Windsor*, the movement behind sexual minority rights in the United States had reason to reflect upon its progress, vindication and triumph, relief, and the possibility of continuing progress for marriage equality for sexual minorities and sexual orientation anti-discrimination on the whole. President Obama echoed this

---

[20] *See* Victor Zarnowitz & Geoffrey H. Moore, *The Recession and Recovery of 1973–1976*, 4 EXPLORATIONS IN ECON. RES. 471, 473 (1977) ("In terms of overall decline in output and the rise in unemployment, the 1973–1975 recession was more severe than any of the five earlier recessions of the post-World War II period.").

[21] *E.g.*, Tim Metz et al., *Stocks Plunge 508 Amid Panicky Selling*, WALL STREET J., Oct. 20, 1987, at A1.

[22] *See* James W. Curran & Harold W. Jaffe, *AIDS: The Early Years and CDC's Response*, CDC MORBIDITY & MORTALITY WKLY. REP. (SUPP.) 64, 64 (2011).

[23] *See* Lawrence K. Altman, *New Homosexual Disorder Worries Health Officials*, N.Y. TIMES, May 11, 1982, at C1 ("Federal health officials are concerned that tens of thousands more homosexual men may be silently affected and therefore vulnerable to potentially grave ailments").

[24] *See* Bowers v. Hardwick, 478 U.S. 186, 192 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[25] *Reagan-Bush '84*, *supra* note 6.

[26] *See* United States v. Windsor, 133 S. Ct. 2675 (2013).

[27] *See id.* at 2695.

[28] *See Reagan-Bush '84*, *supra* note 6.

[29] *See* Jess Bravin, *Supreme Court to Decide Whether States Must Recognize Same-Sex Marriage*, WALL STREET J. (Jan. 16, 2015, 7:09 PM), http://www.wsj.com/articles/supreme-court-to-decide-whether-constitution-requires-states-to-recognize-same-sex-marriage-1421440632 ("A ruling against marriages could cast legal uncertainty over thousands of marriages, particularly in states where officials would like to reinstate bans that have been struck down in the courts, and create a split in [the] country between states that allow same-sex unions and those that don't.").

sentiment in his statement following *Windsor*, indicating that a direction for gay rights was achieved through triumph over adversity:

> This ruling is a victory for couples who have long fought for equal treatment under the law; for children whose parents' marriages will now be recognized, rightly, as legitimate; for families that, at long last, will get the respect and protection they deserve; and for friends and supporters who have wanted nothing more than to see their loved ones treated fairly and have worked hard to persuade their nation to change for the better.[30]

Since then, a new day has dawned for same-sex couples federally—and it has subsequently dawned across various states. By January 2014, roughly six months after *Windsor*, six states had moved to legalize same-sex marriage.[31] And then, by the beginning of 2015, thirty-seven states were permitting same-sex couples to marry, compared to only ten states prior to *Windsor*.[32] Finally, the victories in the morning after *Windsor* progressed onto the larger victory of marriage equality nationwide in the figurative afternoon with *Obergefell*. Normatively, the law has moved toward recognition of sexual minorities, their relationships, and their rights.

But, like Reagan's 1984 ad,[33] the morning after *Windsor* that led up to the afternoon of *Obergefell* has not been without its realities. Within the entirety of the LGBTQ rights movement,[34] and beyond the recent progress for same-sex marriage, much remains to be accomplished federally. Though the Supreme Court has decided on the recognition of same-sex couples in marriage, the protections for sexual minorities are still not the same as those for other minority groups expressly covered under federal laws, such as Title VII of the Civil Rights Act of 1964.[35]

---

[30] Press Release, Office of the White House Press Sec'y, Statement by the President on the Supreme Court Ruling on the Defense of Marriage Act (June 26, 2013), http://www.whitehouse.gov/doma-statement.

[31] *See* Richard Socarides, *The Growing Impact of the Supreme Court's Gay-Marriage Ruling*, NEW YORKER (Jan. 27, 2014), http://www.newyorker.com/news/news-desk/the-growing-impact-of-the-supreme-courts-gay-marriage-ruling (reporting that New Jersey, Hawaii, Illinois, New Mexico, Utah, and Oklahoma were moving to legalize same-sex marriage).

[32] *See* Freedom to Marry, Inc., *Winning the Freedom to Marry: Progress in the States*, FREEDOM TO MARRY (Jan 26, 2015), https://web.archive.org/web/20150126190222/http://www.freedomtomarry.org/states/; *see also Rhode Island Becomes 10th State to Legalize Gay Marriage*, NBC NEWS (May 2, 2013, 4:39 PM), http://usnews.nbcnews.com/_news/2013/05/02/18023197-rhode-island-becomes-10th-state-to-legalize-gay-marriage?lite (reporting ten states with marriage equality legally in effect at the time *Windsor* was decided).

[33] *See Reagan-Bush '84*, *supra* note 6.

[34] In this article, I use the terms "LGBTQ," "gay," and "homosexual" interchangeably.

[35] *See generally* Civil Rights Act of 1964, Pub. L. 88-352, §§ 701–16, 78 Stat. 241, 253–66 (codified in scattered sections U.S.C). The Civil Rights Act of 1964 prohibits employers from discriminating on the basis of sex, religion, race, color, and national origin, but it does not prohibit discrimination based on sexual orientation. *See id.* § 703(a), 78 Stat. 255 (codified at 42 U.S.C. § 2000e–2 (2011).

Sexual orientation is still not a classification recognized consistently and uniformly for protection under the highest constitutional scrutiny.[36]

And then there have been what seem like setbacks. Progress for the passage of the Employment Non-Discrimination Act (ENDA)[37] has been stalled, first by the conflict caused by its religious exemption,[38] and then by complications from the Supreme Court's 2014 ruling in *Burwell v. Hobby Lobby*.[39] Thus, it is significant to pause upon the recent "new day" for sexual-orientation rights in the marriage cases via *Windsor*, post-*Windsor*, and *Obergefell* to study how possibly and normatively the advances in marriage equality should prove helpful to the law's conceptualization of sexual orientation as a protected category and within anti-discrimination law federally, such as Title VII. Specifically, in the post-*Windsor* same-sex marriage cases, the narrative of marriage discrimination against sexual minorities has been refined, not merely as a story of inequality, but more so as one of indignity brought about through animus that the law now must rectify.[40] This jurisprudential development must continue in order to deem the setbacks small for future progress regarding how the law treats sexuality. In the wake of the many successes on the marriage equality front, we cannot forget that one of the original goals of marriage equality was the protection of sexual orientation and sexual minority identities.[41] So far this stretch between *Windsor* and *Obegerfell* was momentous for same-sex marriage recognition, but the moment and the period after ought to be about LGBTQ rights ultimately. What must we do after achieving marriage equality, when we are essentially done honeymooning? We must recognize the advancements before us, provided by the recent marriage cases, and see their incremental potential for eventual objectives and accomplishments beyond same-sex marriages and into sexual orientation anti-discrimination.

This Article seeks to bring together the recent triumphs of the marriage equality movement from *Windsor* to *Obergefell* with the next possible moments for sexual orientation anti-discrimination. Beyond this Introduction, Part I

---

[36] *See, e.g.*, Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1207 (D. Utah 2013) (declining to analyze equal protection claim by same-sex couples under heightened scrutiny because sexual orientation was not recognized by the Tenth Circuit as a suspect class).

[37] Employment Nondiscrimination Act of 2013, H.R. 1755, 113th Cong. (2013).

[38] *See* Jennifer Bendery & Amanda Terkel, *Gay Rights Groups Pull Support for ENDA Over Sweeping Religious Exemption*, HUFFINGTON POST (Aug. 5, 2014 10:59 AM), http://www.huffingtonpost.com/2014/07/08/enda-religious-exemption_n_5568736.html

[39] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014) (finding a contraceptive mandate of the Patient Protection and Affordable Care Act to violate the Religious Freedom Restoration Act as applied to a closely held corporations).

[40] *See, e.g.*, Susannah W. Pollvogt, Windsor, *Animus, and the Future of Marriage Equality*, 113 COLUM. L. REV. SIDEBAR 204, 206 (2013) ("[W]ith *Windsor*, the Court declared that animus remains a relevant concept in the Court's equal protection jurisprudence and confirmed that proving the presence of animus is a viable strategy for winning a marriage equality challenge.").

[41] *See* Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK: NAT'L LESBIAN & GAY Q., Fall 1989, at 8, 12 (arguing that marriage litigation would "most fully test[] the dedication of people who are *not* gay to full equality for gay people, and [and it is] also the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men").

provides an incrementalist perspective on the developments in *Windsor* that have then shaped further advances in post-*Windsor* cases—exemplifying, in particular, the convergence of Justice Kennedy's animus and dignity concepts into a mediating principle. Part II will then trace the role of this mediating principle in post-*Windsor* cases that have been helpful, not just for marriage equality, but also for finding sexual orientation worthy of heightened scrutiny and suspect classification under equal protection theory—especially how animus and dignity concepts have persuaded courts to view sexual orientation favorably as an immutable trait. Part III will then look at how this developed view of immutability in post-*Windsor* cases should reflect an increased importance on autonomy for sexual identities. Part IV will discuss *Obergefell* and how its doctrinal resolution for same-sex marriage dovetails with prior advances for autonomy and immutability from the post-*Windsor* cases, despite falling short of endorsing sexual orientation as a quasi-suspect or suspect classification. And consequently, before concluding, Part V will discuss normatively what such progress between *Windsor* and *Obergefell* should leverage in the development of sexual orientation anti-discrimination. Specifically, this development could justify broadening Title VII to be more inclusive of sexual-orientation discrimination.

Like the victory observed and expressed in Ronald Reagan's "Morning in America" ad in 1984,[42] the post-*Windsor* moment offers a stopping point of reflection. The morning after *Windsor* should look progressively for the possibilities that lie within this entirely new day for LGBTQ rights.

I. INCREMENTALISM WITHIN THIS INCREMENT: DEVELOPMENTS IN THE NIGHT BEFORE

In characterizing the developmental nature of the marriage equality movement in the United States, it would be easy (though not entirely inaccurate) to describe the progress as slow and stagnant for quite a lengthy duration in the early days. Same-sex marriage cases in the 1970s, such as *Baker v. Nelson*,[43] only nascently attracted attention for the issue, but they did not reach merited success. Progress has only hastened within the past fifteen years, once recognition for same-sex couples was achieved through civil unions in *Baker v. State*,[44] and then finally through making marriage legally available to same-sex couples in cases such as *Goodridge v. Department of Public Health*,[45] *Varnum v. Brien*,[46] *Kerrigan v. Commissioner of Public Health*,[47] and *Windsor*.[48] Describing the movement summarily in this way would obscure a more watchful study of how the details

[42] *See Reagan-Bush '84*, *supra* note 6.
[43] *See* Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971).
[44] Baker v. State, 744 A.2d 864, 867 (Vt. 1999).
[45] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).
[46] Varnum v. Brien, 763 N.W.2d 862, 907 (Iowa 2009).
[47] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 481–82 (Conn. 2008).
[48] United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

within that narrative of success and setbacks helped shift legal perceptions about same-sex couples, but also more broadly, describing the movement in this way would demonstrate how sexuality should be regarded in the law, and how all of it has eventually led to this "morning after." The following discussion focuses on the recent trend toward marriage equality with an incrementalist methodology and extends my previous examination of these issues[49]—both of which help us track and posit the leveraging of sexual minority rights beyond marriage equality.

A. Parameters for Incrementalist Thinking

A more detailed narrative would consider how the night-and-day shift between earlier decades denying same-sex marriages and the recent successes brought on by cases that recognized marriage between same-sex couples had between them one long incremental period of progress for the perception of sexual minorities that fits within the classic path often needed for a society to legally accept the idea of same-sex marriage. It is often a three-step process to reach the inevitability of marriage equality.[50] Studied comparatively by Kees Waaldijk,[51] William Eskridge,[52] and Yuval Merin,[53] this particular three-step process is one that I have previously termed as "marriage equality incrementalism,"[54] and one that I have found coincides well within political philosopher David Braybrooke's and economist Charles Lindblom's classic studies on the characteristics of disjointed incrementalism.[55] Within marriage equality incrementalism, Waaldijk, Eskridge, and Merin have identified that for a society to begin legally recognizing same-sex couples in marriage the following must happen: (1) same-sex intimacy must be decriminalized; (2) efforts toward anti-discrimination for sexual minorities must be instituted; and (3) recognition of same-sex relationships must arise.[56] Once these three steps have been reached, marriage equality is possible—if not inevitable.[57] In

---

[49] *See generally* Jeremiah A. Ho, *Weather Permitting: Incrementalism, Animus, and the Art of Forecasting Marriage Equality After* U.S. v. Windsor, 62 CLEV. ST. L. REV. 1 (2014) (exploring "*Windsor*'s animus-focused jurisprudence as the convergence of both marriage equality and incrementalism").

[50] *See id.* at 7.

[51] Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 437, 439–40 (Robert Wintemute & Mads Andenæs eds., 2001).

[52] WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS xiii–xiv (2002).

[53] YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 326 (2002).

[54] Ho, *supra* note 49, at 7.

[55] DAVID BRAYBROOKE & CHARLES E. LINDBLOM, A STRATEGY OF DECISION: POLICY EVALUATION AS A SOCIAL PROCESS 82 (1963).

[56] *See* Ho, *supra* note 49, at 7 (citing Waaldijk, *supra* note 51, at 439–40; ESKRIDGE, *supra* note 52, at xiii–xiv; MERIN, *supra* note 53, at 308–09).

[57] *See id.*

my previous work, I revised Waaldijk, Eskridge, and Merin's original conceptions of Step Three from strictly marriage to also same-sex relationships and noted that *Windsor* brought us into Step Three federally.[58] As Waaldijk, Eskridge, and Merin each have noted, for a society with a history of heavy intolerance toward sexual minorities and for its political consciousness in gradually accepting the concept of same-sex marriage, these steps are significant—not merely for the concept itself, but also for recognizing and elevating the identities of sexual minorities at the same time.[59] Indeed, this simultaneous outcome of accepting the identities of sexual minorities within the achievement of marriage equality is what makes this process so "necessary," as Merin puts it:

> [T]he fight of gays for inclusion in the institution of marriage should not be examined as an independent claim; rather, it should be assessed in light of the status of gay men and lesbians in Western societies in general and in fields of law other than marriage. The recognition of same-sex couples, I argue, is dependent upon and connected to the status of gays in fields other than family law. Developments such as the repeal of sodomy laws and the enactment of antidiscrimination statutes are required for the later recognition of same-sex couples in family law.[60]

Waaldijk concurs by observing similarly that "once a legislature has provided that it is wrong to treat someone differently because of his or her homosexual orientation, it becomes all the more suspect that the same legislature is preserving rules of family law that do precisely that."[61] Eskridge illustrates the same sentiment with a cause-and-effect analysis:

> Repeal of sodomy laws emboldens some gay people to come out of their closets and emboldens the uncloseted to organize themselves politically and press for other equality assurances. The more openly gay people there are *and* the better organized they are politically, the greater attention officials will pay to their arguments for equal legal entitlements, even if popular attitudes are otherwise unaffected.[62]

Hence, assuming there is legal and historical intolerance toward sexual minorities, a society's recognition of both its sexual minorities and their rights to marry those of

---

[58] *See id.* at 53.
[59] *See id.* at 6–9.
[60] MERIN, *supra* note 53, at 308–09.
[61] Waaldijk, *supra* note 51, at 440.
[62] ESKRIDGE, *supra* note 52, at 117.

their sexual preference seems to progress in complimentary fashion. This pairing shares observations about underlying goals of the marriage equality movement as well as reminds us that the original strategies for litigating over marriage had in mind legal protections for sexual minorities.[63]

Beyond the elevation of the societal perceptions of sexual minorities, another observation can be made about incrementalism in marriage equality that looks to the *shape* of that progress. Unintentionally, these three steps might create a straightforwardly linear progression. However, one can clarify how each step is actually reached and surpassed by referring to Braybrooke's and Lindblom's original thesis on disjointed incrementalism,[64] as well as to theoretical refinements later made by Andrew Weiss and Edward Woodhouse.[65] The evolutionary and incremental progression of a political issue is often fraught with ways in which successes and setbacks push and pull to reach from one major step to the next, which reflects almost a collective back-and-forth mental processing of a significant issue—conservative at times in speed and yet democratic in nature for securing majoritarian or popular confidence and almost predictively progressive once the outcome of this issue processing has been reached.[66]

According to Braybrooke's and Lindblom's theory, disjointed incrementalism is preoccupied with gradual, "synoptic" changes that propel the status quo, rather than drastic overnight changes that occur instantaneously.[67] There are no "one fell swoop" movements here.[68] Instead, at the societal level, these synoptic changes are products of bounded rationality that is mimetic of a cyclical process of thought that slowly ruminates forward on a complex issue with stops and starts in between, rather than a swift and facile journey from one goal to another.[69] In the study of incrementalism, Braybrooke and Lindblom liken such a journey to "embark[ing] on a course of mental activity more circuitous, more complex, more subtle, and perhaps more idiosyncratic than [] perceive[d]."[70] The resulting progress and insight is produced after messy and unhastened vetting that Braybrooke and Lindblom anthropomorphize as "[d]odging in and out of the unconscious, moving back and forth from concrete to abstract, trying chance here and system there, soaring, jumping, backtracking, crawling, sometimes freezing on point like a bird dog."[71] Lindblom's attempts to characterize incrementalism as a science of

---

[63] *See* Stoddard, *supra* note 41, at 12.

[64] *See* BRAYBROOKE & LINDBLOM, *supra* note 55, at 82.

[65] Andrew Weiss & Edward Woodhouse, *Reframing Incrementalism: A Constructive Response to the Critics*, 25 POL'Y SCI. 255, 255–56 (1992).

[66] *See* Ho, *supra* note 49, 17–18.

[67] *See* BRAYBROOKE & LINDBLOM, *supra* note 55, at 81–88.

[68] *See* J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrate State: A Guide for Whittling Away*, 98 CALIF. L. REV. 59, 72 (2010) (discussing Lindblom's incrementalism theory as one that is antithetical to "'one-fell-swoop' approaches").

[69] *See* BRAYBROOKE & LINDBLOM, *supra* note 55, at 81–82.

[70] *Id.* at 81.

[71] *Id.*

"muddling through"[72] and to illustrate it as if it were a mental struggle to process a complicated issue reiterate the importance of recognizing the journey as a highly nuanced one—emphasizing the "increment" aspect of the process. Weiss and Woodhouse have since taken his expressive descriptions of those circuitous moments of decision-making and identified actual political processes—or what they call, "stratagems"—that happen in that development, partly to bolster Lindblom's theory, but also to respond to criticism that incrementalism mistook for a more simplified path from one step to the next.[73]

In furthering the study on marriage equality incrementalism, my previous work married these stratagems to examples of the political process in between the three steps in marriage equality incrementalism that demonstrate why, despite appearances, the path to marriage equality has climbed more circuitously than linearly and why a study regarding incrementalism must be more forgiving toward the lack of simple linearity from one step in the progress to the next.[74] So it is expected that, even with same-sex marriage, an incremental climb up the three steps, from decriminalizing same-sex intimacy to recognizing same-sex coupling, has not been one smooth transition, but one with trials and errors that still hopefully push toward progress for sexual minorities.[75] In this way, it also makes sense that when progress reaches a "step," that this "step" might itself include trial and errors and revisions.[76] This back-and-forth, start-and-stop attribute of incrementalist progress also explains, in the long haul, why the goal of sexual orientation anti-discrimination figures as the second step in marriage equality incrementalism but is likely an issue for which marriage equality should help leverage once same-sex marriages are uniformly recognized. If protection of sexual orientation from discrimination was one of the ultimate goals of the marriage equality movement, then this logically suggests that the three steps of marriage equality incrementalism themselves likely amount to an "increment" that fits within a larger, more encompassing incrementalist journey toward full recognition and acceptance for sexual minorities and their rights. Knowing this characteristic, Weiss and Woodhouse's stratagems facilitate understanding of the post-*Windsor* moment to see how the development can leverage further progress. This Article will demonstrate that this kind of involved and "messy" movement noticeably buttresses accomplishments that facilitate progress from one step to another.

As to *Windsor*, I have previously asserted that, within the particular events in our modern consciousness since the early 1970s, all three steps for marriage equality incrementalism identified by Waaldijk, Eskridge, and Merin have finally been reached on the federal level in order to bring us this morning-after.[77] First, the

---

[72] *See* Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79, 88 (1959).

[73] *See* Weiss & Woodhouse, *supra* note 65, at 256.

[74] *See* Ho, *supra* note 49, 12–19.

[75] *See id.* at 18–19.

[76] *See id.* at 11–14.

[77] *See id.* at 53–55.

Supreme Court in *Lawrence v. Texas* in 2003 decriminalized same-sex intimacy by overturning *Bowers v. Hardwick* (Step One).[78] Then, Congress repealed Don't Ask, Don't Tell in the military in 2011 (Step Two).[79] And lastly, the decision in *Windsor* that overturned Section 3 of the Defense of Marriage Act (DOMA) initiated recognition of married same-sex couples on the federal level (Step Three).[80] It is important to note that the state (and not the federal) governance over marriage in the United States qualifies for a revision of Step Three to recognize not only same-sex marriages, but also same-sex relationships, and that *Windsor* only started the venture into Step Three but did not fully complete the journey to solidify a footing that allows for progress that fully recognizes same-sex matrimonial unions on the federal level.[81] *Obergefell* completes Step Three. Between the two Supreme Court cases (*Windsor* and *Obergefell*), it was the patchwork incrementalism among the states themselves[82]—with more than forty federal district and/or circuit cases on same-sex marriage, mostly following *Windsor*—that brought the issue back to the Supreme Court for more extensive treatment that furthers the trip in Step Three.[83] Now, the question is where we are headed once the moment for marriage equality has been reached. If further developments for anti-discrimination are where we are going, then what ends, other than marriage equality, do these recent post-*Windsor* achievements accomplish?

B. The Essentialist-Constructivist Continuum

Noting Lindblom's characteristics for disjointed incrementalism within the process in which recognition of same-sex marriage incrementally progressed toward quickened inevitability, I have argued that, at least federally, the evolution of the perception of same-sex couples in the law also brought about a major recalibration of the push-pull between essentialist-versus-constructivist notions about sexual orientation.[84] By decriminalizing same-sex intimacy, *Lawrence* began that recalibration.[85] But a very notable stride in this shift is how *Windsor* continued this recalibration by perpetuating pro-gay essentialist-constructivist ideas about sexual identity as it relates to same-sex couples. After the federalism issue, when he began

---

[78] *See id.* at 33; *see also* Bowers v. Hardwick, 478 U.S. 186, 191 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[79] *See* Ho, *supra* note 49, at 33–34; *see* 10 U.S.C. § 654(a)(13) (1993), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

[80] *See* Ho, *supra* note 49, at 53–55; *see* Defense of Marriage Act (DOMA) § 2(a), 28 U.S.C. § 1738C (2011), *invalidated by* United States v. Windsor, 133 S. Ct. 2675, 2683, 2695–96 (2013)

[81] *See* Ho, *supra* note 49, at 53–55.

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

[83] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2608–10 (2015) (containing a list of state and federal judicial decisions addressing same-sex marriage in Appendix A).

[84] *See* Ho, *supra* note 49, at 53–61.

[85] *See id.* at 33; *see also* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

to critique DOMA substantively, Justice Kennedy's opinion in *Windsor* analyzes the animus-filled impetus that led to the passage of DOMA in 1996 and to his determination that DOMA could not survive constitutionally.[86] In order to find animus, the opinion reaches toward the congressional House Report during the legislation of DOMA and cites specific portions that helped to highlight that "[t]he House concluded that DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.'"[87] Those specific portions of the congressional House Report reflected debates over homosexuality and its incongruity within the heteronormative and religiously moral family setup.[88] Because of the argument that procreation was readily possible, in the most "natural" sense, to opposite-sex couples from intimate engagement, but not readily possible from intimate engagement for same-sex couples, the Report construed same-sex relationships as something biologically deviant from opposite-sex relationships.[89] All of this problematic logic was aligned with what the House Report called the "natural teleology of the body."[90] Thus, what troubled Kennedy in *Windsor*, it seemed, was a skewed anti-gay argument based on biology that was narrowly focused to exclude same-sex couples from legal recognition of marriage and reached vacant biological conclusions about same-sex relationships, which was used symbolically to represent the identity.[91] Under the Report's line of reasoning, choosing to be in a same-sex relationship, one that is not premised in an opposite-sex union, would seem irrational and contrary to the procreative goals of traditional marriage, and that choice would be morally condemned. Personal choice and autonomy in this area of marriage had to be subordinated to biological goals. Intrinsically, the logic and message of the House Report was simple: an individual could still naturally procreate in marriage so long as that individual belonged within an opposite-sex marriage, rather than *choosing* a same-sex relationship, and as far as gay identities were concerned at the time, judgments about choice figured largely in assumptions about the etiology of "being gay" and was usually negative.[92]

In essence, this emphasis on biology could be prescribed as an admonishment for homosexual orientation and how the choosing of that sexuality over a heterosexual one also affords no favor in the law. Framed in that way, there was very little space in that premise to accept a broader perspective about relationships and sexuality that validated decisions made by same-sex couples. As a result, sexualities other than those that would reinforce heteronormative and Judeo-

---

[86] *See* United States v. Windsor, 133 S. Ct. 2675, 2693, 2695–96 (2013).

[87] *Id.* (quoting H.R. REP. NO. 104-664, pt. 5, at 16 (1996)).

[88] *See* H.R. REP. NO. 104-664, pt. 5, at 15–16.

[89] *See id.* at 12–13.

[90] *Id.* at 13.

[91] *See* Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1215–16 (2012) (discussing Kennedy's opinion in *Lawrence* as based on similar principles).

[92] *See* discussion *infra* Part II.

Christian preferences were aberrant according to this scheme. This justification for DOMA, which used biology to create an anti-gay essentialist view of same-sex couples, later came under fire in *Windsor* when Kennedy read within it a moral blameworthiness that led to both the practical and symbolic effect of DOMA on same-sex couples:

> DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class.[93]

With that connection, he uncovered the appropriate level of animus to determine unconstitutionality.[94]

It is merely one thing to find animus, but it is another to tie this animus to perspectives on sexual orientation within the law. Justice Kennedy's finding of animus in *Windsor*, and the outcome of his majority opinion, rejects the possible narrowness and exclusivity of an essentialist perspective that was harnessed in an anti-gay way by DOMA's proponents, because not only did it exclude benefits and rights to same-sex couples, but it also ultimately demeaned them on both legal and societal levels. It was by arriving at this result that *Windsor* overturned DOMA to allow states to craft outcomes that emphasize a possible broader perspective on relationships—one that could let individual goals of marriage remain untouched.[95] Although Kennedy did not explicitly weigh in on the nature of sexuality in *Windsor*, he recognized that "[r]esponsibilities, as well as rights, enhance the dignity and integrity of the person"[96] and that autonomy in forming identities—even through coupling—needs to be protected in order to avoid indignity: "In acting first to recognize and then to allow same-sex marriages, New York [state] was responding 'to the initiative of those who [sought] a voice in shaping the destiny of their own times.'"[97] With its anti-gay, essentialist philosophies, DOMA's pre-emption of New York's response rendered the conclusion that DOMA "seek[s] to injure the very class New York seeks to protect" and was "strong evidence of a law having the purpose and effect of disapproval of [that] class."[98] In other words, Kennedy's opinion asserted a broadened respect for the ability of individuals to make choices beyond DOMA's heteronormative and anti-gay essentialist paradigms and to protect the dignity of couples, same-sex or otherwise.

---

[93] United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).

[94] *See id.* at 2696.

[95] *See* Ho, *supra* note 49, at 54–55.

[96] *Windsor*, 133 S. Ct. at 2694.

[97] *Id.* at 2692 (quoting Bond v. United States, 131 S. Ct. 2355, 2359 (2011)).

[98] *Id.* at 2681.

C. *The Animus-Dignity Connection*

The connection between animus and dignity in *Windsor* has been a significant one because it reflects incrementalism and serves as a device to leverage from *Windsor* to other marriage cases in many respects. First, the pairing itself reflects not only an incrementalist climb, but also serves important purposes in the negotiation of further incrementalist progress in pro-LGBTQ protections. Up until *Windsor*, within the significant gay rights cases at the Supreme Court, all written by Justice Kennedy, the use of animus and dignity rights have had their incremental and assorted appearances. Animus was first raised within the context of sexual orientation in *Romer v. Evans*,[99] in which Colorado's Amendment 2, a voter approved referendum to ban any specified legal protections of gays and lesbians from discrimination, was found to be constitutionally challenging because "the amendment seems inexplicable by anything but animus toward the class it affects."[100] Kennedy imported this animus from other equal protection cases outside of sexual orientation, like *United States Department of Agriculture v. Moreno*,[101] and then identified it in Amendment 2 in order to construct his holding that such animus made the legislative process irrational enough to fail a test for rational basis.[102] There was no explicit mention of the concept of dignity in *Romer*; Kennedy's preoccupation with the animus that led to the passage of Amendment 2 was that it served to represent disapproval of a class and that the purpose of this animus was to disadvantage the group that Amendment 2 was intended to burden.[103] Only a small shadow of the idea of dignity was hinted at in *Romer*, when Kennedy wrote that the way Amendment 2 was constructed "inflicts on [gays and lesbians in Colorado] immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it."[104] Certainly dignitary harms could constitute some of the "injuries" within those Kennedy saw resulting from Amendment 2; but Kennedy did not single out or prioritize dignitary harms in *Romer*, and so, the injuries to which he referred could also encompass the actual denial of certain rights more concretely than rights to human dignity. Part of the reason for keeping a connection between animus and dignity submerged in *Romer* could have been that Kennedy had to write more narrowly in *Romer*, as his opinion would still be living in the shadow of *Bowers v. Hardwick*, which was still in effect at the time and permitted the criminalizing of same-sex intimacy.[105] Since *Bowers*

---

[99] Romer v. Evans, 517 U.S. 620 (1996).

[100] *Id.* at 632.

[101] *See id.* at 634 (citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

[102] *Id.* at 632 ("[T]he amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.").

[103] *See id.* at 634 ("A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.").

[104] *Id.* at 635.

[105] *See* Bowers v. Hardwick, 478 U.S. 186, 196–97 (1986) (Burger, J., concurring), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

allowed states to brand sexual minorities as criminals for engaging in behavior that might reflect orientation, then discussing the dignity rights of sexual minorities in *Romer* would have created a visible paradox.

Indeed, it was not until Kennedy's opinion in the context of overruling *Bowers* in *Lawrence v. Texas* that he officially brought to attention the dignitary harms inflicted upon sexual minorities from state sodomy statutes. However, even in decriminalizing same-sex intimacy, the concept of animus was sufficiently relegated to the background—in historical accounts of sodomy laws in America[106] and in locating the root of modern sodomy laws against same-sex intimacy—as Kennedy framed the *Bowers* ruling as "making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral" and that such "condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family."[107] Kennedy's language here, describing the "condemnation," was reminiscent of his discussions of animus in *Romer* as a moral disapproval of a class.[108] Still, animus was not directly raised as a predominant reason to overrule *Bowers* in *Lawrence*; rather, the court based its ruling on the harms to dignity in regulating private conduct.[109] Kennedy spoke of animus and the *Romer* analysis as a "tenable argument," but also as problematic doctrinally to resolve with *Bower*'s continuing validity.[110] Instead, dignity was at the forefront of the discussion, appearing in the case's preoccupation with overruling *Bowers* on liberty concerns rather than equal protection ones.[111] After all, *Lawrence* was framed within autonomy and privacy interests from the outset, and the invocation of *Planned Parenthood of Southeastern Pennsylvania v. Casey* and its application to the case made the dignitary harms concerned more easily extrapolated from the context of privacy and contraceptives into the realm of same-sex intimate conduct.[112] Citing the passage in *Casey* regarding the use of contraceptives as "choices central to personal dignity and autonomy"[113] and that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, and of the universe, and of the mystery of human life,"[114] the court noted that these choices "are central to the liberty protected by the Fourteenth

---

[106] *Lawrence*, 539 U.S. at 570 ("American laws targeting same-sex couples did not develop until the last third of the 20th century. The reported decisions concerning the prosecution of consensual, homosexual sodomy between adults for the years 1880–1995 are not always clear in the details, but a significant number involved conduct in a public place." (citing Brief Amici Curiae of the ACLU and the ACLU of Texas as in Support of Petitioner at 14–15 n.18, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102)).

[107] *Id.* at 571.

[108] *See Romer*, 517 U.S. at 632.

[109] *See Lawrence*, 539 U.S. at 567–68.

[110] *See id.* at 574–75.

[111] *See id.* at 567–68.

[112] *See id.* at 573–74.

[113] *Id.* at 574 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

[114] *Id.* (citing *Casey*, 505 U.S. at 851).

Amendment."[115] Kennedy then articulated that likewise "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right."[116] Kennedy's preoccupation here was with the stigmatizing effect of sodomy laws—even those that were not readily enforced in certain states:

> If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.[117]

This criminalizing effect—couched in terms of "stigma" and "demean"—solidified the connection to *Casey* and autonomy when Kennedy observed that "[t]he stigma [the Texas] criminal statute imposes, moreover, is not trivial"[118] and that it was "a criminal offense with all that imports for the dignity of the persons charged."[119] Thus, animus remained within the backdrops of the *Lawrence* reasoning, while dignity was introduced and extensively used to contextualize the type of harm justifying *Bower*'s overruling.

The connection between the two concepts was later fully illustrated when Kennedy wrote the majority opinion in *Windsor*.[120] While discussing DOMA's discriminatory effect against sexual minorities in *Windsor*, Kennedy linked animus and dignity together more explicitly than he did in *Romer* or *Lawrence*.[121] First, DOMA was borne of legislative animus—a moral disapproval that was reinforced by anti-gay essentialist notions about same-sex relationships—that had an intolerable purpose, which Kennedy found was "to impose inequality."[122] But he further located the dignity rights implications by illustrating that the inequality created by animus in DOMA spoke to the identity of same-sex individuals in the society—stigmatizing them in their relationships and the families they created.[123] The furtherance of the two concepts in *Windsor* was not Kennedy's original

---

[115] *Id.*
[116] *Id.*
[117] *Id.* at 575.
[118] *See id.*
[119] *Id.*
[120] *See* United States v. Windsor, 133 S. Ct. 2675, 2682 (2013).
[121] *See id.* at 2693.
[122] *Id.* at 2694.
[123] *See id.* at 2696.

invention, as lower courts that perpetuated the same-sex marriage issue between *Lawrence* and *Windsor* had made the connection before.[124] But with *Windsor*, the connection between animus and dignity in the context of marriage discrimination against sexual minorities was highlighted federally at the highest judicial level.[125] Kennedy fit the connection doctrinally and centrally into his calculation of DOMA's unconstitutionality under equal protection.[126] Although others have couched this case as more of a federalism case,[127] the appearance and connection of animus and dignity were undeniable, serving several purposes and reflecting an incrementalist gesture. From *Romer* to *Lawrence*, the individual concepts were introduced in the sexual orientation context;[128] and in *Windsor*, the connection was more fully galvanized into the reason why such discrimination is unconstitutional.[129] In many of these post-*Windsor* cases, this stated connection between animus and dignity has since served as a template for discussions in lower courts and has percolated into further variations that persuaded courts to permit and recognize same-sex marriages. For instance, as Cary Franklin has pointed out, the animus-dignity connection is what she refers to as an anti-stereotyping or mediating principle that not only contextualizes the narrative of sexual orientation discrimination, but also helps courts further justifiably doctrine that protects sexual minorities.[130] The next part of this Article will explore the use of the animus-dignity connection as such a negotiating device in how heighted scrutiny and suspect classification for sexual orientation has been reached in the post-*Windsor* morning. Part IV will then evaluate the continued use of animus and dignity as an anti-stereotyping device in *Obergefell*.

II. ELEVATION AND EXTENSION OF ANIMUS AND DIGNITY CONCEPTS POST-*WINDSOR*

This continuing incrementalist progression has brought the same-sex marriage debate into a moment where the probability of equality has become less of a debate, partly through the developments in the recent lower and circuit marriage equality rulings since *Windsor*, and partly through how the animus-dignity connection has illustrated the effect of marriage inequality on sexual minorities and their humanity. Post-*Windsor* and pre-*Obergefell*, lower courts began to import into and elaborate upon Kennedy's animus-dignity connection in their own resolutions concerning

---

[124] *See, e.g.*, Windsor v. United States, 699 F.3d. 169, 197–99 (2d Cir. 2012) (Straub, J., dissenting in part and concurring in part), *aff'd sub nom.* United States v. Windsor, 133 S. Ct. 2675, 2682 (2013).

[125] *See Windsor*, 133 S. Ct. at 2693.

[126] *See id.*

[127] *E.g.*, *id.* at 2697 (Roberts, C.J., dissenting).

[128] *See* Romer v. Evans, 517 U.S. 620, 632 (1996) (finding animus by the state); Lawrence v. Texas, 539 U.S. 558, 560, 567 (2003) (discussing personal dignity).

[129] *See Windsor*, 133 S. Ct. at 2693.

[130] *See* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 119–22 (2010).

such discrimination and have particularly utilized the broadness of Kennedy's language in *Windsor* to explore the animus-dignity connection in marriage and sexual orientation discrimination even further.[131] Just as the federalism issue in *Windsor* could be seen as a way that Kennedy was able to force a discussion on marriage inequality[132]—a discussion that ultimately lead to that focus on animus and on dignity rights—the post-*Windsor* moment was an interesting one for incrementalist study even merely for observing how subsequent courts and litigants have used some of the open-endedness of the animus-dignity connection in *Windsor* to reinterpret doctrinally how denying same-sex couples the right to marry constitutes discrimination. Essentially, courts in post-*Windsor* marriage cases have picked up where Justice Kennedy left off. Some federal cases in this vein have been more hermeneutical, so to speak, than others. For instance, some have utilized the opportunity for importing influence from *Windsor*'s animus-dignity connection not merely to resolve the inequality stemming from marriage discrimination, but to push the boundaries of sexual orientation protection further.

In this fashion, two instances come to mind. First is a post-*Windsor* case by the Ninth Circuit that has become noteworthy for this leveraging: *SmithKline Beecham Corp. v. Abbott Laboratories.*[133] This case exemplifies the incrementalist progressive spiral as it applied *Windsor* to determine that sexual orientation was worthy of heightened scrutiny protection in a case outside of the marriage equality debate.[134] The second instance involves post-*Windsor* lower court development within marriage equality to determine, among other constitutional theories, that state same-sex marriage bans violate federal equal protections of sexual orientation and classified sexual orientation as a protected trait. *Obergefell v. Wymyslo,*[135] a district court case from Ohio, bears direct importance for Supreme Court inquiry as it was one of the federal cases consolidated for the appeals that eventually led to *Obergefell v. Hodges.*[136] The judicial holding that sexual orientation was appropriate for heightened equal protection. *Wymyslo* differed from the large plurality of other post-*Windsor* marriage equality cases that rendered due process and equal protection violations based on fundamental rights and/or other equal protection theories but did not hold sexual orientation as worthy of heightened scrutiny. Both instances on the federal level—*SmithKline* and *Wymyslo*—offer an

---

[131] *See, e.g.*, DeBoer v. Snyder, 772 F.3d 388, 420–21(6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015); *see also Obergefell*, 135 S. Ct. at 2608–10 (listing lower court cases addressing marriage equality between *Windsor* and *Obergefell*, as well as some earlier cases).

[132] *See generally* Neil S. Siegel, *Federalism as a Way Station:* Windsor *as Exemplar of Doctrine in Motion*, 6 J. LEGAL ANALYSIS 87, 127–40 (2014) (arguing in part that federalism in *Windsor* helped rhetorically nudge the opinion's discussions on equality and liberty).

[133] SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 483 (9th Cir. 2014).

[134] *See id.*

[135] Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013), *rev'd sub nom. DeBoer*, 772 F.3d 388, *rev'd sub nom. Obergefell*, 135 S. Ct. at 2608. For the remainder of this Article, this opinion in *Obergefell v. Wymyslo* from the Southern District of Ohio will be referred to in passing as *Wymyslo* in order to avoid confusion with its later Supreme Court appeal, *Obergefell v. Hodges.*

[136] *Obergefell*, 135 S. Ct. at 2604–05.

opportunity for rich incrementalist study into the use of the animus-dignity connection post-*Windsor* to elevate notions of sexual orientation and identity in the law federally as we continue to linger in Step Three of the marriage equality incrementalism.

A. SmithKline *and Heightened Scrutiny*

The level of scrutiny in *Windsor* was never expressly articulated.[137] Indeed if such silence by *Windsor* has been the focus of much scholarly debate, then it also seems plausible that courts have offered different interpretations of that silence as well—although mostly in ways favorable to same-sex couples.[138] This slippage is exactly what provokes collective ruminations that hopefully result in incrementalist evolutions on an issue. A conservative and exegetical reflection over previous animus cases at the Supreme Court-level (including *Romer*) would likely render the conclusion that the level of scrutiny that the animus-dignity connection triggered in *Windsor* was a more "searching" or "toothful" form of rational basis.[139] There is room to debate this determination, and the marriage cases after *Windsor* have interpreted *Windsor*'s silence by protecting sexual orientation on different levels of scrutiny.[140]

In a move that some might find more hermeneutical, *SmithKline*, a non-marriage equality case, read *Windsor* as applying heightened scrutiny.[141] It reached this interpretation through the use of Justice Kennedy's animus-dignity connection.[142] By doing so outside of the marriage equality context and purely in a sexual orientation discrimination context, the *SmithKline* case arguably played a part in incrementally pushing progress forward from the marriage equality movement and back into the broader steps for protecting sexual orientation from discrimination. At minimum, this transition demonstrates the observation reflected in one of Weiss and Woodhouse's stratagems that the incrementalist path sometimes encompasses a sequencing of trials, errors, and revisions over a political

---

[137] *SmithKline*, 740 F.3d at 480 ("*Windsor*, of course, did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case, but an express declaration is not necessary.").

[138] *E.g.*, Wolf v. Walker, 986 F. Supp. 2d 982, 1010 (W.D. Wis. 2014) ("It may be that *Windsor*'s silence is an indication that the Court is on the verge of making sexual orientation a suspect or quasi-suspect classification. . . . Alternatively, it maybe that *Romer* and *Windsor* suggest that '[t]he hard edges of the tripartite division have . . . softened,' and that the Court has moved 'toward general balancing of relevant interests.'" (citations omitted)).

[139] *See, e.g.*, De Leon v. Perry, 975 F. Supp. 2d 632, 652–56 (W.D. Tex. 2014) (declining to apply a heightened scrutiny analysis for a rational basis analysis, but citing, *inter alia*, *Romer* to find a state marriage ban violated equal protection).

[140] *E.g.*, *compare id.* (applying rational basis), *with* Whitewood v. Wolf, 992 F. Supp. 2d 410, 428, 431 (M.D. Pa. 2014) (applying heightened scrutiny).

[141] *See SmithKline*, 740 F.3d at 484 ("[W]e are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection.").

[142] *See id.* at 481–83, 486–87 (discussing *Windsor*'s animus and dignity concepts as reasons for applying heightened scrutiny).

issue.[143] This also makes sense to both the leveraging up to heightened scrutiny from *Windsor*'s silence and the return to anti-discrimination, even after some of the advances there were met to accomplish Step Two in marriage equality incrementalism when Don't Ask, Don't Tell was repealed in 2011.[144] Again, the illusion of incrementalism is linear, but progress is often realized in a more wayward, win-some-lose-some shape.[145] This observation from Woodhouse and Weiss might explain why *SmithKline*'s finding of heightened scrutiny as appropriate for sexual orientation discrimination cases could be considered a revisiting of the issue of anti-discrimination by the Ninth Circuit, but at the same time be considered a forward-looking revision of the circuit's own previously established level for protecting sexual orientation under Fourteenth Amendment equal protection theory that takes *Windsor* and marriage equality advances to something broader for sexual minorities.

SmithKline dealt with the dismissal of a potential male juror from voir dire in a suit over HIV pharmaceuticals.[146] During the interview of the candidate, his responses made evident an easy inference that he might be gay through his mentioning of a male partner.[147] Based on this inference, the attorneys for the defendant, pharmaceutical Abbot Laboratories, dismissed the candidate by using a peremptory strike.[148] Almost immediately, opposing counsel for SmithKline Beecham made the inference from the strike that the candidate's dismissal was due to the candidate's perceived sexual orientation,[149] and challenged that strike based on *Batson v. Kentucky*.[150] However, unsure whether *Batson* prohibited a peremptory strike based on sexual orientation, the court allowed the strike to remain in effect.[151] Trial continued and eventually concluded in favor of Abbott, and SmithKline appealed on the basis that its *Batson* challenge should have been sustained.[152]

On appeal to the Ninth Circuit, this issue of whether this *Batson* challenge would have precluded Abbott's peremptory strike based on a perceived sexual orientation brought forth an examination of whether sexual orientation was a classification that fell under heightened scrutiny in equal protection.[153] Although *Batson* would have prohibited strikes based on race and gender, it was not known whether such challenges could also apply to prohibit strikes based on sexual orientation.[154] However, *Batson* progeny proved helpful to direct the Ninth Circuit

---

[143] *See* Weiss & Woodhouse, *supra* note 65, at 256.
[144] Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).
[145] *See* Weiss & Woodhouse, *supra* note 65, at 256.
[146] *SmithKline*, 740 F.3d at 474.
[147] *Id.*
[148] *Id.* at 475.
[149] *Id.*
[150] *See id.* (citing Batson v. Kentucky, 476 U.S. 79 (1986)).
[151] *See SmithKline*, 740 F.3d at 475.
[152] *Id.*
[153] *See id.* at 479.
[154] *Id.*

in knowing that beyond race and gender, a *Batson* challenge would not at least not prohibit a peremptory strike against a jury candidate based on a classification normally subject to rational basis.[155] Hence, as the Ninth Circuit put it, "if sexual orientation is subject to rational basis review, Abbott's strike does not require reversal"[156] and an inquiry into the classification of sexual orientation in equal protection would have to commence.[157]

In doing so, the *SmithKline* court also found that decades-old Ninth Circuit cases applying rational basis to sexual orientation discrimination in equal protection were already destabilized by a recent Ninth Circuit precedent, *Witt v. Department of the Air Force*,[158] that had interpreted *Lawrence* as requiring heightened scrutiny for a substantive due process claim hinging on sexual orientation.[159] Two prior controlling Ninth Circuit cases over sexual orientation discrimination, *High Tech Gays v. Defense Industrial Security Clearance Office*[160] and *Philips v. Perry*,[161] cases that predated *Lawrence*, were presumably within the guiding signature of now-defunct *Bowers*.[162] This destabilization helped *SmithKline* deal with *Windsor*'s silence because *Lawrence* and *Witt* gave the court the doctrine to interpret that silence. Because *Lawrence* had also been quiet about the applicable scrutiny level when it decriminalized same-sex intimacy on due process grounds,[163] *Witt* developed factors to determine that *Lawrence* had used heightened scrutiny.[164] The *Witt* factors are: (1) whether there were the kind of post-hoc rationalizations for the law in question that usual rationality inquiry requires; (2) whether there was discussion of a legitimate state interest for justifying the harm inflicted by the law in question as required by heightened scrutiny; and (3) whether the level of scrutiny of the cited or mentioned cases in the analysis leaned in favor of lower or heightened scrutiny.[165] The interesting incrementalist observation here is how the *SmithKline* court's weighing of these factors also captured Kennedy's animus-dignity connection to firmly leverage a step upward toward heightened scrutiny.[166]

---

[155] *Id.*

[156] *Id.* at 480.

[157] *See id.*

[158] *See id.* (discussing prior precedent, Witt v. Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008)).

[159] *See Witt*, 527 F.3d at 816–17 (finding and concluding "that *Lawrence* applied something more than traditional rational basis review").

[160] High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990).

[161] Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997).

[162] Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003). Both *High Tech Gays* and *Philips* were decided in the 1990s.

[163] *See Witt*, 527 F.3d at 814 ("*Lawrence* is, perhaps intentionally so, silent as to the level of scrutiny that it applied . . . .").

[164] *See id.* at 816–17.

[165] SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 480–81 (9th Cir. 2014) (citing *Witt*, 527 F.3d at 817).

[166] *See SmithKline*, 740 F.3d at 480–83.

Animus and dignity concepts featured significantly in *SmithKline*'s analysis of the first and second factors. The first *Witt* factor allowed the *SmithKline* court to hone in on Kennedy's finding and use of legislative animus for the passage of DOMA to discount for any showing of post-hoc rationalizations of DOMA by Justice Kennedy.[167] Building off *Windsor*'s analysis of the legislative design, purpose, and, lastly, effect of DOMA on same-sex couples,[168] the *SmithKline* court retraced Justice Kennedy's study into the animus behind DOMA's legislative history and intent (notably paraphrasing that animus as "immorality of homosexuality") to conclude upon the "moral disapproval" that Justice Kennedy spoke of in *Windsor*.[169] Paired with the observation that Kennedy used this finding of animus to demonstrate that the actual purpose of DOMA was "to impose inequality, not for other reasons like governmental efficiency,"[170] the *SmithKline* court found that such unfavorable analysis toward DOMA could not sufficiently evidence any post-hoc rationalization of DOMA in the opinion.[171] In other words, this is not the kind of analysis that would have evinced a typical rational basis inquiry: "*Windsor* thus requires not that we conceive of hypothetical purposes, but that we scrutinize Congress's actual purposes. *Windsor*'s 'careful consideration' of DOMA's actual purpose and its failure to consider other unsupported bases is antithetical to the very concept of rational basis review."[172] Actual purpose would intimate heightened scrutiny rather than the deferential rational basis review that could be supported by connections between a law and a conceivable, yet hypothetical purpose; *Windsor*, as *SmithKline* noted, did not entertain hypotheticals.[173]

SmithKline's discussion of a finding of a congressional purpose fueled by animus to justify DOMA's differentiated treatment of same-sex couples in the first factor also led to dignity harms that the court used to balance the second *Witt* factor in favor of heightened scrutiny. The second *Witt* factor required the *SmithKline* court to find a legitimate state interest to justify the harm that DOMA inflicted on same-sex couples:

> Just as *Lawrence* required that a legitimate state interest justify the harm imposed by the Texas law, the critical part of *Windsor* begins by demanding that Congress's purpose "*justify* disparate treatment of the group." *Windsor* requires a "legitimate purpose" to "overcome[ ]" the "disability" on a "class" of individuals. As we explained in *Witt*, "[w]ere the Court applying rational basis

---

[167] *See id.* at 481–82.
[168] *See id.* at 481.
[169] *Id.* at 481–82 (citing United States v. Windsor, 133 S. Ct. 2675, 2689, 2693 (2013)).
[170] *Id.* at 482 (citing *Windsor*, 133 S. Ct. at 2694).
[171] *Id.*
[172] *Id.* (citing *Windsor*, 133 S. Ct. at 2693).
[173] *See id.* at 481–82.

> review, it would not identify a legitimate state interest to 'justify' . . . ." the disparate treatment of the group.[174]

By distilling *Windsor* through analysis of this factor, the dignitary harms that Kennedy had drawn from the animus behind DOMA helped further the direction in which *SmithKline* would complete its analysis of the second factor. Because "[r]ational basis is ordinarily unconcerned with inequality that results from the challenged state action,"[175] the *SmithKline* court observed that

> words like *harm* or *injury* rarely appear in the Court's decisions applying rational basis review. *Windsor*, however, uses these words repeatedly. The majority opinion considers DOMA's "effect" on eight separate occasions. *Windsor* concerns the "resulting injury and indignity" and the "disadvantage" inflicted on gays and lesbians.[176]

What the *SmithKline* court read from *Windsor* was the lack of any mentioning of a legitimate state interest that would allow a rational basis review to survive in evaluating DOMA's disparate treatment of same-sex couples, and such reading was built upon Justice Kennedy's identification of the dignitary harms DOMA imposed upon same-sex couples in place of what the Supreme Court believed would have been a legitimate interest that passed scrutiny.[177] Citing *Brown v. Board of Education*,[178] *SmithKline* held that "*Windsor*'s concern with DOMA's message follows our constitutional tradition in forbidding state action from 'denoting the inferiority' of a class of people."[179] For the *SmithKline* court, none of this exemplified the use of rational basis in *Windsor*, but rather pointed to heightened scrutiny.[180] Inequality in and of itself in *Windsor*—i.e. the exclusion of same-sex couples from enjoying recognized marriage rights—did not solely trigger *SmithKline*'s upward ascent from rational basis to heightened scrutiny;[181] only when inequality is purposefully brought on by a legislative animus designed to inflict dignitary harms on a relegated class is stepping up toward heightened scrutiny then possible.[182] In this way, the *SmithKline* court relied on the animus-dignity connection as it found for heightened scrutiny and as it made an important

---

[174] *Id.* at 482 (citations omitted) (alterations in original).

[175] *Id.*

[176] *Id.*

[177] *See id.* at 480–82 ("*Windsor* was thus concerned with the public message sent by DOMA about the status occupied by gays and lesbians in our society. This government-sponsored message was in itself a harm of great constitutional significance . . . .").

[178] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[179] *SmithKline*, 740 F.3d at 482 (citing *Brown*, 347 U.S. at 494).

[180] *Id.* at 483.

[181] *See id.*

[182] *See id.*

distinction regarding the specific animus-dignity connection that Kennedy fashioned in *Windsor*: dignity is possibly antithetical to rational review.[183]

SmithKline's analysis of the third and last factor from *Witt*—whether *Windsor* used a heightened scrutiny analysis because it cited and relied on heightened scrutiny cases—was the weakest in the Ninth Circuit's balancing toward heightened scrutiny as *Windsor* cited to cases that used various levels of scrutiny: *Romer* (rational basis),[184] *Moreno* (a more searching form of rational basis that, according to *SmithKline*, has been read in the Ninth Circuit as heightened scrutiny),[185] and *Lawrence* (heightened scrutiny, at least according to *Witt*).[186] This was self-propelling for *SmithKline* to say the least, but *SmithKline* attempted to be evenhanded by reasoning that "[b]ecause *Windsor* relies on one case applying rational basis and two cases applying heightened scrutiny, *Witt*'s final factor does not decisively support one side or the other but leans in favor of applying heightened scrutiny."[187] Yet with the other factors tipping in favor of heightened scrutiny, a converse result that balanced this final factor the other way would likely not have been fatal to *SmithKline*'s eventual heightened scrutiny determination.[188]

To initiate the upward leveraging of heightened scrutiny to evaluate under equal protection a claim of sexual orientation discrimination, the *SmithKline* court relied on doctrinal instability in the Ninth Circuit precedents regarding sexual orientation discrimination.[189] But once past this hurdle, it was Kennedy's connection between animus and dignitary harms in *Windsor* that became significant for *SmithKline*'s actual leveraging.[190] As a mediating principle, both animus and dignity concepts helped dismiss any possibility that *Windsor* employed a rationality review, pushing forward the Ninth Circuit's doctrine on sexual orientation anti-discrimination.[191] Essentially, with *Witt* and *Lawrence* in the periphery of the doctrinal framework of its analysis, *SmithKline* retraced Kennedy's animus-dignity connection in *Windsor* to justifiably reach heightened scrutiny review for sexual orientation discrimination, elevating protection of sexual minorities at least within Ninth Circuit cases.[192] What resulted from all of this textual intertwining was enough room and momentum for the *SmithKline* court to engage in an incremental development that resulted in saying, at least from the Ninth Circuit's purview, what remained unspoken in *Windsor*.

Of course other post-*Windsor* federal cases have not followed in *SmithKline*'s footsteps, but stayed closer to a narrower, and supposedly exegetical reading of

---

[183] *See id.* at 484–85.

[184] *See* Romer v. Evans, 517 U.S. 620, 631 (1996).

[185] *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 532–33 (1973); *SmithKline*, 740 F.3d at 483.

[186] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003); *SmithKline*, 740 F.3d at 483 (citing Witt v. Dep't of the Air Force, 527 F.3d 806, 816 (9th Cir. 2007)).

[187] *SmithKline*, 740 F.3d at 483.

[188] *See id.* at 484.

[189] *See supra* text accompanying notes 160–162.

[190] *See SmithKline*, 740 F.3d at 483.

[191] *See id.* at 483–84.

[192] *See id.* at 481–84.

Windsor—sometimes pondering, but always leaving intact and undissected, the possibility that *Windsor*'s unspoken level of scrutiny was a heightened one.[193] The courts in such cases have been more restrained by doctrine.[194] However, despite using the lowest form of scrutiny for sexual orientation and sketching their pro-gay decisions to conform closer within a cautious signature of *Windsor* rather than drawing from a perspective that broadened the boundaries Justice Kennedy had drawn, these courts still demonstrate incrementalism at work, making smaller progress—but progress, nonetheless—in refining the reasoning within the current doctrine of lower scrutiny in regard to same-sex relationships. In contrast, *SmithKline* breaks out of that cycle—partly because of its non-marriage subject matter, but also partly because it used animus and dignity from *Windsor* to justify a broad reading that effected a different incrementalist reach, one that bears more normative importance for the furthering of protections and recognition of sexual identity beyond marriage equality.

B. Wymyslo *and Suspect Classification in the Post-*Windsor *Marriage Cases*

Soon after *Windsor*, a collection of federal same-sex marriage cases viewed marriage bans as discriminating against sexual orientation then addressed such discrimination by classifying sexual minorities as a suspect class and prompting heightened scrutiny review; these cases would seem to offer another strand of momentum in pushing the incremental progression of sexual orientation protections further along.[195] Similarly, these cases have reached as far as *SmithKline* did in application, but validate heightened scrutiny for sexual orientation discrimination in equal protection by using the animus-dignity connection from *Windsor* differently.[196] And similar to *SmithKline*, the animus-dignity connection served to negotiate the doctrinal advances that were sought after.

Other than the Sixth Circuit's negative ruling toward marriage equality,[197] and district courts in Louisiana and Puerto Rico, which found that same-sex marriage bans were constitutionally permissible,[198] the large and fairly predictable consensus in the marriage cases post-*Windsor* were predicated on the outcomes for same-sex marriage in Justice Kennedy's landmark decision overturning DOMA—whether

---

[193] *See, e.g.*, De Leon v. Perry, 975 F. Supp. 2d 632, 652–56 (W.D. Tex. 2014).

[194] *See* Douglas NeJaime, *Doctrine in Context*, 127 HARV. L. REV. F. 10, 14 (2013) ("Fearful of reversal and, for some, concerned about potential elevation, these judges experience constraints on decisionmaking that Supreme Court Justices do not.").

[195] *See, e.g.*, Wolf v. Walker, 986 F. Supp. 2d 982, 1009–14 (W.D. Wis. 2014) (finding sexual orientation a protectable trait as "suspect" or "quasi-suspect classification"); *see also* Whitewood v. Wolf, 992 F. Supp. 2d 410, 424–30 (M.D. Pa. 2014) (finding sexual orientation a protectable trait and "quasi-suspect classification").

[196] *See Walker*, 986 F. Supp. 2d at 1009–14; *see also Whitewood*, 992 F. Supp. 2d at 424–30.

[197] DeBoer v. Snyder, 772 F.3d 388, 420–21 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

[198] Robicheaux v. Caldwell, 2 F. Supp. 3d 910, 913 (E.D. La. 2014); Conde-Vidal v. Garcia-Padilla, 54 F. Supp. 3d 157, 163–64, 168 (D.P.R. 2014).

those successful outcomes were in the realm of substantive due process, federalism, and/or equal protection.[199] The repetitive successes of adjudication, case after case, for same-sex couples in federal courts seems to be a recurrent theme. Many of the litigants sued for similar recognitions under the same theories with the same uphill battles against state oppositions, and most were resolved in similar judicial fashion: by invoking or mentioning dignitary harms implications.[200] This cycling back-and-forth again exhibits the sequencing of trials and revisions from one increment to the next in Lindblom, Weiss, and Woodhouse's combined theory of disjointed incrementalism.[201] However, further critical and normative satisfaction can be extracted from a more detailed study focusing on the differences between some of these cases. Although most post-*Windsor* marriage cases advance the issue of equality, only a handful of these cases—the ones that actually try to resolve the issue of sexual orientation discrimination—truly and meaningfully help propagate the legal recognition and protection of sexual minority identities outside of the marriage context while using *Windsor*'s animus-dignity connection as a mediating principle. One such leading example has been *Wymyslo*.[202]

Like *SmithKline*, some post-*Windsor* marriage cases that were unobstructed by circuit precedents from re-classifying sexual orientation had the opportunity to leverage up, but they declined to do so and often relied on *Romer* to qualify *Windsor*'s silence on an expressed level of scrutiny used to overturn Section 3 of DOMA. In the daybreak provoked by *Windsor*, such speculative opportunities would seemingly prompt more daring courts to launch new doctrinal inquiries for firmer protections against discrimination for sexual minorities under equal protection.

In *Wymyslo*, an early post-*Windsor* same-sex marriage case from a federal district of Ohio that narrowly pre-dates *SmithKline*, plaintiffs' challenged the Ohio marriage ban as violating equal protection and requested that the court render a decision under heightened scrutiny, prompting the court to classify sexual orientation as a protectable trait under suspect or quasi-suspect classification.[203] The court's use of animus and dignity ran throughout the portions of the case in

---

[199] *See generally Marriage Rulings in the Courts*, FREEDOM TO MARRY, http://www.freedomtomarry.org/pages/marriage-rulings-in-the-courts (last updated Mar. 2, 2015) (tallying marriage litigation successes since *Windsor*).

[200] *See id.*; *see also* Austin R. Nimocks, *History and Recent Developments in Same-Sex Marriage Litigation*, ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS, Feb. 2014, at 22 ("And although the litigation is voluminous and geographically diverse, the nature of the various cases, and the arguments presented in each one, do not vary significantly. The arguments made in the post-*Windsor* federal challenges are primarily threefold: (1) substantive due process; (2) equal protection; and (3) full faith and credit.").

[201] *See* discussion *supra* Part I.

[202] Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 973–74 (S.D. Ohio 2013), *rev'd sum nom.* DeBoer v. Snyder, 772 F.3d 388, 420–21(6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

[203] *See id.* at 972–74, 987.

which such elevation occurred.[204] The plaintiffs in *Wymyslo* were surviving spouses of same-sex marriages legally obtained outside of Ohio who had been refused recognition of their marriages on their deceased spouses' death certificates by the state of Ohio.[205] In seeking declaratory and permanent injunctive relief compelling Ohio to recognize those same-sex marriages, plaintiffs sued under both the due process and equal protection theories of the Fourteenth Amendment.[206] In preamble-like fashion, the *Wymyslo* court made clear that its position on both due process and equal protection grounds direct Ohio to recognize the plaintiffs' valid out-of-state same-sex marriages on Ohio death certificates was taken from *Windsor*:

> This conclusion flows from the *Windsor* decision of the United States Supreme Court this past summer, which held that the federal government cannot refuse to recognize a valid same-sex marriage. And now it is just as Justice Scalia predicted—the lower courts are applying the Supreme Court's decision, as they must, and the question is presented whether a state can do what the federal government cannot—*i.e.*, discriminate against same-sex couples . . . simply because the majority of the voters don't like homosexuality . . . . Under the Constitution of the United States, the answer is no, as follows.[207]

Textually, the court revealed how it would read and apply *Windsor* by appropriating and paraphrasing Justice Scalia's sentiment to frame its present issue: that the discrimination against same-sex couples was based on a dislike for the inherent trait of homosexuality that these same-sex couples bore.[208] A close review of a footnote in the quoted passage qualifies *Wymyslo*'s mention of lower court decisions that relied on *Windsor*—especially with its citation to *Griego v. Oliver*,[209] a post-*Windsor* state-level case from the Supreme Court of New Mexico that applied intermediate scrutiny to an equal protection claim predicated on sexual orientation discrimination to overturn the New Mexico same-sex marriage ban.[210] But also just how profoundly the *Wymyslo* court extended—and how incrementally further this extension is—from cases that hesitated to apply heightened scrutiny can be observed in *Wymyslo*'s treatment of plaintiffs' theory of

---

[204] *See, e.g.*, *id.* at 992–97 (using *Windsor*'s finding that DOMA's exclusion of same-sex couples "demeans" them to frame its Equal Protection Clause analysis and relying on *Windsor*'s finding of animus in DOMA to similarly render that Ohio's ban was promulgated by animus).

[205] *Id.* at 972–73.

[206] *Id.* at 973, 977, 983.

[207] *Id.* at 973–74 (citations omitted).

[208] *See id.* at 973–74 & 973 n.1.

[209] *See id.* at 973 n.2; Griego v. Oliver, 316 P.3d 865 (N.M. 2013).

[210] *Griego*, 316 P.3d at 885 ("Plaintiffs prevail when we apply an intermediate scrutiny level of review under an equal protection analysis.").

sexual orientation discrimination in Ohio's same-sex marriage ban.[211] Again, the animus-dignity connection had a mediating role in bringing about this doctrinal advancement.

Although in the earlier development in *Wymyslo* this ruling ultimately would have narrow effect as an as-applied challenge upon just the litigants in the case, its opinion and influence would eventually carry across other post-*Windsor* same-sex marriage decisions. Interestingly, in the portion from *Wymyslo* on sexual orientation discrimination on equal protection, the court inserted another extensive preamble before weighing in on the actual merits.[212] This preamble served as more than the court's throat-clearing as it unilaterally carved a significant precedential line between what merits were about to be revealed and the sexual orientation and animus decisions, *Windsor* and *Romer*, from the Supreme Court.[213] The *Wymyslo* court began with the recognition of same-sex marriages resulting from *Windsor* and traced the equal protection theory used in *Windsor* back to the *Romer* decision against Colorado's Amendment 2, recounting particularly that *Romer* was a case decided under rational basis on the issue of sexual orientation discrimination under the Equal Protection clause.[214] It seemed as if the *Wymyslo* court was about to use *Romer* to also fill the silence left by *Windsor* on the level of scrutiny.[215] However, what differed in *Wymyslo* was the use of *Romer* in particular for framing the issue around sexual orientation discrimination. While other cases used *Romer* predominately to match its application of rational basis in qualifying *Windsor*,[216] *Wymyslo* pressed more at the animus against sexual minorities that *Romer* found at the heart of Colorado's Amendment 2's passing, emphasizing in *Romer*'s own words that the amendment had been a "status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake."[217]

Using *Romer*, the *Wymyslo* court also carefully connected the animus against sexual minorities to the indignities that existed but were still nascent in *Romer*, harms that Kennedy later sketched more fully in *Lawrence*. The *Wymyslo* court highlighted a passage from *Romer* that described the effect of Amendment 2:

---

[211] *See Wymyslo*, 962 F. Supp. 2d at 987 ("As a result, lower courts, without controlling post-*Lawrence* precedent on the [equal protection] issue, should now apply the criteria mandated by the Supreme Court to determine whether sexual orientation classifications should receive heightened scrutiny.").

[212] *See id.* at 983–86.

[213] *See id.* at 984–86.

[214] *See id.* at 984 ("In reality, the decision of the United States Supreme Court in *Windsor* was not unprecedented. The Court relied upon its equal protection analysis from a 1996 case holding that an amendment to a state constitution, ostensibly merely prohibiting any special protections for gay people, in truth violated the Equal Protection Clause under even a rational basis analysis." (citing *Romer v. Evans*, 517 U.S. 620 (1996)).

[215] *See id.*

[216] *See, e.g.*, De Leon v. Perry, 975 F. Supp. 2d 632, 652–53 (W.D. Tex. 2014) (citing *Romer* merely as the standard for the kind of scrutiny to be used for sexual orientation discrimination in equal protection).

[217] *Wymyslo*, 962 F. Supp. 2d at 984 (quoting *Romer*, 517 U.S. at 635) (alterations in original).

> As the Supreme Court held so succinctly in *Romer*: "[Colorado law] classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause[.]"[218]

At the time, due to *Bowers*,[219] *Romer* might not have been as forthcoming with what inequality did to the dignity rights of sexual minorities, but the *Wymyslo* court's next immediate line observing *Windsor* drew out what harms that a comparable act of discrimination with a similar type of animus could bring about:

> As the Supreme Court explained in striking down Section 3 of DOMA, "[t]he avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[220]

The same harm and effect that were merely "unequal" and that classified sexual minorities as "strangers" to the law in *Romer* were now evident in *Windsor*—by incremental shift, likely through *Lawrence*, though not mentioned by the Court—and were revisited as "stigma" with negative dignitary implications. Focusing less on rational basis, the *Wymyslo* court's recitation of *Romer* and *Windsor* illustrated one way the Court was relying on Kennedy's animus-dignity connection, while setting up the analogy and impetus for its present adjudication.[221] This connection was what permitted the *Wymyslo* court to determine, at a threshold level, that the Ohio ban differentiated between out-of-state marriages that were comprised of same-sex couples and those that were comprised of opposite-sex couples.[222] And it is also the animus-dignity connection that the *Wymyslo* court observed between *Romer* and *Windsor* that would then be emulated within issues of sexual orientation discrimination the court similarly framed.[223]

In *Wymyslo*'s application of the factor test for determining protectable traits for suspect or quasi-suspect classifications, the concepts of animus and dignity

---

[218] *Id.* (quoting *Romer*, 517 U.S. at 635–36).

[219] *See* Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[220] *Wymyslo*, 962 F. Supp. 2d at 984–85 (quoting United States v. Windsor, 133 S. Ct. 2675, 2693 (2013)).

[221] *See id.* at 984.

[222] *Id.* at 985 ("Here, in derogation of law, the Ohio scheme has unjustifiably created two tiers of couples: (1) opposite-sex married couples legally married in other states; and (2) same-sex married couples legally married in other states. This lack of equal protection of law is fatal.").

[223] *See id.* at 979–80, 984–85.

appeared in various deconstructed incarnations.[224] After destabilizing the Sixth Circuit's existing precedents that controlled the appropriate level of scrutiny for sexual orientation, classifications under equal protection were not difficult for the court in *Wymyslo*.[225] The *Wymyslo* court, in a move reminiscent of *SmithKline*, simply found that the controlling cases that read such claims under rationality were all predicated on one progenitor case,[226] *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*.[227] Because *Equality Foundation of Greater Cincinnati* relied on *Bowers*,[228] the *Wymyslo* court seemed unimpeded from applying the Supreme Court factors that would justify sexual orientation classifications under heightened scrutiny.[229] In doing so, it differed from *SmithKline*, which never used the Supreme Court factors of suspect classification in reaching heightened scrutiny appropriate for sexual orientation classification.[230] But it also represents an incrementalist "spiraling up" within Step Three that was made possible by the extensions of the animus-dignity connection afforded by *Windsor* in staking new doctrinal ground. That connection was realized throughout the *Wymyslo* analysis of the four Supreme Court factors determining protected classes: (1) history of discrimination; (2) the ability of that class to perform or contribute to society; (3) the political powerlessness of the class; and (4) the immutability of the defining characteristic of the class.[231] As we will see, the animus-dignity connection here both contextualized discrimination and at the same time permitted the court to adopt standards against that discriminating context.

With historical discrimination, the first factor, the *Wymyslo* court's finding was premised on the historical anti-gay animus it highlighted from trial documents to demonstrate the high probability of this factor.[232] At the same time, the court ran through a quick history of anti-gay animus to build a history of discrimination, illustrating how the characterization of that animus changed from the version in *Windsor*, which was mainly premised on moral disapproval.[233] In doing so, the court considered: (1) congressional bans of gay and lesbian travelers; (2) Eisenhower's executive order discharging federal employees who were gay and requesting the firing of federal contractors who were gay; (3) examples of discrimination from the U.S. military; (4) exclusion of sexual minorities from places

---

[224] *See, e.g., id.* at 987–90, 995 ("[N]o hypothetical justification can overcome the clear primary purpose and practical effect of the marriage bans . . . to disparage and demean the dignity of same-sex couples in the eyes of the State and the wider community." (emphasis omitted)).

[225] *See id.* at 986–87.

[226] *See id.* at 986 (citing Davis v. Prison Health Servs., 679 F.3d 433 (6th Cir. 2012) and Scarbrough v. Morgan Cty. Bd. of Educ., 470 F.3d 250 (6th Cir. 2006)).

[227] Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997).

[228] *Id.* at 292; *Wymyslo*, 962 F. Supp. 2d at 986.

[229] *See Wymyslo*, 962 F. Supp. 2d at 987.

[230] *See* SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 480 (9th Cir. 2014).

[231] *See Wymyslo*, 962 F. Supp. 2d at 987.

[232] *See id.* at 987–88.

[233] *See id.*; *see also* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (noting that the animus behind DOMA was moral disapproval of homosexuality).

of business; and (5) a 2013 comparison made by Pennsylvania Governor Tom Corbett between same-sex marriage and incest.[234] The *Wymyslo* court's version of minorities in this observation was in some way a more menacing cruelty untethered to a peculiar morality. It was a societal animus that, without moral justification, however incorrect, seemed even more hateful and unnecessary. Although quickly depicted, it was a secular animus that the *Wymyslo* court relayed with no lesser impact than the kind of stigmatizing harm against sexual minorities. The way in which the court described the acts here motivated by animus exemplified such indignity. For instance, because of the animus within Eisenhower's executive order, private companies with federal contracts had to "ferret out" gay employees[235] (as if they were dehumanized, animal-like pests); or because of the historical animus toward sexual minorities in the military, gay servicemembers were refused GI Bill benefits and restoration of undesirable discharges and could still be criminalized for sodomy.[236] The animus is perhaps secularized, but these descriptions all still resonate with the stigmatizing harm that *Windsor* had observed was suffered by sexual minorities as a result of negatively differentiating them from the general society through an animus-filled act.[237] Of all of these illustrations provided by the *Wymyslo* court, the worst (and most indignant) was the mention of the Pennsylvania governor's comparison that demeaned same-sex marriage by comparing it to incest[238]—and by doing so, also demeaned same-sex couples. Each of these animus-dignity illustrations effectively helped the court to describe and contextualize the history of sexual orientation discrimination.

In its analysis of the second factor—whether sexual minorities could be a differentiated suspect classification because their specific distinction was related to an ability to perform or contribute to society—the *Wymyslo* court found that sexual orientation had no bearing on whether an individual's performance or contribution would be impeded or improved.[239] Though a bit cursory, the court accomplished this analysis in favor of sexual orientation by a comparison and contrast of sexual orientation with other traits that might hinder societal performance or contribution (age and mental handicap) and traits that would not (race, gender, alienage, and national origin).[240] In likening sexual orientation to the latter grouping, the animus-dignity connection was exhibited in two places in the court's analysis. First, in dislodging associations between homosexuality and a trait that could hinder societal performance or contribution, the court carefully and specifically chose to differentiate sexual orientation from mental illness and placed

---

[234] *Id.* at 987–88; *see also* Catalina Camia, *Pa. Governor Compares Gay Marriage to Incest*, USA TODAY (Oct. 4, 2013, 2:01 PM), http://www.usatoday.com/story/onpolitics/2013/10/04/corbett-gay-marriage-incest-pennsylvania/2921793/.

[235] *Wymyslo*, 962 F. Supp. 2d at 987.

[236] *Id.* at 988.

[237] *Windsor*, 133 S. Ct. at 2693.

[238] *See Wymyslo*, 962 F. Supp. 2d at 988.

[239] *Id.* at 988–89.

[240] *Id.*

homosexuality as "a normal expression of human sexuality."[241] The court's gestures worked in tandem here, with one breaking away the negative stigma of homosexuality while another accorded it a normalized connotation that in the end "*has no inherent association with a person's ability to lead a happy, healthy, and productive life or to contribute to society.*"[242] Essentially, the court dignified same-sex sexuality in order to find no relationship to societal performance or contribution.

The other place in this analysis that drew upon the animus-dignity connotation was at the end of this second factor analysis, when the court concluded explicitly that "sexual orientation is akin to race, gender, alienage, and national origin,"[243] and quoted the Supreme Court's ruling in *City of Cleburne v. Cleburne Living Center, Inc.*,[244] to note that those traits just mentioned "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect *prejudice and antipathy.*"[245] The emphasis specifically added by the court to "prejudice and antipathy" drew upon recollection of animus-motivated laws that have historically plagued other groups in a suspect class (e.g. anti-miscegenation and racially-based laws), but could also remind us of laws that have been at the center of recent marriage equality rulings, as well as Amendment 2 from *Romer.*

The *Wymyslo* court was careful in weighing the third factor, political powerlessness, to not fall into the snare of thinking that this factor would not balance favorably for sexual minorities because of their growing presence in society and political achievements in recent decades.[246] Rather, the inquiry was more encompassing, asking whether sexual minorities had "the strength to politically protect themselves from wrongful discrimination."[247] Out of the many examples the court cited of how the law had not afforded direct political and legal protections for sexual minorities—including mentioning the failed attempts to pass the Employment Non-Discrimination Act[248]—an attempt to explain the causes of such political failings allowed the *Wymyslo* court to include animus toward sexual minorities in different forms, such as physical violence against gays and lesbians, various types of hostility (public, political, and social), prejudice, and condemnation on moral and political levels.[249] Here was where the court used the animus-dignity connection to explain away the root of political powerlessness for sexual minorities. As the court exemplified in one instance, "violence against gay and lesbian people

---

[241] *Id.* at 988.

[242] *Id.*

[243] *Id.* at 989.

[244] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

[245] *Wymyslo*, 962 F. Supp. 2d at 989 (citing *Cleburne*, 473 U.S. at 440).

[246] *See id.* at 989.

[247] *Id.* (citing Windsor v. United States, 699 F.3d 169, 184 (2d Cir. 2012), *aff'd sub nom.* United States v. Windsor, 133 S. Ct. 2675, 2682 (2013)).

[248] *Id.*

[249] *Id.* at 989–90.

engenders intimidation, which can 'undermine the mobilization of gays and lesbians and their allies to limit their free exercise of economic and social liberties.'"[250] The animus inflicted upon sexual minorities can then inhibit their ability to access and exercise their rights with dignity.

Lastly, of these four factors, immutability is often the most controversial one for sexual minorities as it parallels frequent societal and cultural debates about whether the root of a person's sexual orientation is nature or nurture—a biological one or one based on choice.[251] But with animus and dignity concepts as a mediating guide, the *Wymyslo* court sidestepped that debate by adopting a different standard for immutability, one in which the requirement "is not whether a characteristic is strictly unchangeable, but whether the characteristic is a core trait or condition that one cannot or should not be required to abandon."[252] This standard is a seemingly "softer" one than a standard predicated on a trait that was biologically unwavering and one that other marriage equality courts had recognized only recently prior to *Wymyslo*.[253] It is a standard for immutability that also aligns itself better with the animus-dignity connection. Although the *Wymyslo* court found that scientific evidence was convincing that sexual orientation was biologically immutable, the court was more interested in the concept of sexual orientation having both emotional and biological aspects that stem from a person's physical and sexual attraction:

> There is now broad medical and scientific consensus that sexual orientation is immutable. "Sexual orientation refers to an enduring pattern of emotional, romantic, and/or sexual attractions to men, women, or both sexes. Most adults are attracted to and form relationships with members of only one sex. Efforts to change a person's sexual orientation through religious or psychotherapy interventions have not been shown to be effective."[254]

In fact, the court found it persuasive that "there is significant evidence to show that interventions to change sexual orientation can be harmful to patients, and no major

---

[250] *Id.* at 990.

[251] *See* Tiffany C. Graham, *The Shifting Doctrinal Face of Immutability*, 19 VA. J. SOC. POL'Y & L. 169, 185 (2011) (noting that early gay rights cases viewed sexuality not rooted in biology, because of insufficient evidence, but rather in choice).

[252] *Wymyslo*, 962 F. Supp. 2d at 990 (citing Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000); Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring in the judgment)).

[253] *See, e.g.*, Windsor v. United States, 699 F.3d 169, 183–84 (2d Cir. 2012), *aff'd sub nom.* United States v. Windsor, 133 S. Ct. 2675, 2682 (2013); Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 320–26 (D. Conn. 2012); Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 986–87 (N.D. Cal. 2012).

[254] *Wymyslo*, 962 F. Supp. 2d at 991.

mental health professional organization has approved their use."[255] Then the court commented upon sexual orientation normatively: "Even more importantly, *sexual orientation is so fundamental to a person's identity that one ought not be forced to choose between one's sexual orientation and one's rights as an individual—even if such a choice could be made.*"[256] The court cited to a passage in *Lawrence* on privacy and personal intimate decision-making to imply the dignitary harms that would implicitly arise if the converse were to happen—indeed the cost to sexual minorities if they were forced to change their sexual orientations.[257] Although not explicitly mentioned, the court's finding here about sexual orientation in regard to immutability brings about the question: what would or could "force" someone to change or choose involuntarily between orientations in a way that is harmful to dignity? In the subtext of this court's finding here, one implicit answer—but not necessarily the only answer—would be an act of animus. After using the animus-dignity connection to contextualize the etiology and the results of the discrimination felt by sexual minorities, the court adopted a new standard for immutability—one that addressed that context of discrimination while also finding sexual orientation conducive for suspect or quasi-suspect classification. Here, the standard for immutability is not one that is closely tied to biological permanence, but one that reaches through to personal, private significance that reflects fundamental individual choice and autonomy. This standard for immutability accomplishes this through the animus-dignity connection so prevalent in pro-marriage equality cases in the post-*Windsor* morning. One of the implicit conclusions of *Wymyslo* is that law and (likely) policy can interfere with people's autonomy to make or force them to hide their traits.[258] If particular laws and policies, from a heteronormative vantage, can assert this pressure, then the effect of interference is not only an example of "compulsory heterosexuality" on the operational level, but also an example of what should trigger larger dignity concerns.[259] The question that this "softer" immutability standard raises to help define a suspect classification is whether doing so would provoke the kinds of personal dignitary violations recognized by *Lawrence* and *Windsor*, and thus, this standard seems to prohibit compulsion. In effect, this is the mediation by the animus-dignity connection that helps *Wymyslo* leverage doctrine at the same time as contextualizing and narrating the discrimination of LGBTQ individuals.

Part III will elaborate on the substantial results of this mediation, but what is helpful to note here, in understanding *Wymyslo*'s gesture to leverage higher sexual

---

[255] *Id.*

[256] *Id.*

[257] *See id.*

[258] *See id.* (noting that "sexual orientation is so fundamental to a person's identity that one ought not be forced to choose between one's sexual orientation and one's rights as an individual" (emphasis omitted)).

[259] *See generally* Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631, 632–41 (1980) (coining the term to illustrate how heterosexuality is often presumed as normative for the existence of women).

orientation protection, is how animus and dignity were instrumental in both humanizing discrimination and allowing the court to move toward a fundamental approach in immutability to address the kind of concerns that discrimination raises. All in all, it was the contours of the animus-dignity connection that helped craft and bolster this factor in favor of sexual minorities in *Wymyslo*, and it was this reasoning that induced another progressive increment for the protection of sexual minorities within this Step Three moment. With that, heightened scrutiny in *Wymyslo* was appropriate for sexual orientation discrimination under federal equal protection, and thus sexual minorities became a protected class[260]—at least until its reversal in *DeBoer v. Snyder*.[261] The application of that higher level of scrutiny, among other theories, settled the marriage recognition issue in *Wymyslo* for the plaintiffs.[262] In its own distinctive way, it seemed that *Wymyslo* was reinforcing the original goal of sexual orientation protection that marriage litigation had been premised upon.

In sum, the animus-dignity connection facilitated the outcomes of *SmithKline* and *Wymyslo* and prompted this furtherance for sexual identity within the law. Part III of this Article will briefly explore and interpret the meaning of these advances, particularly *Wymyslo*'s immutability standard and analysis and the potential of *SmithKline*. Both provide promising developments for sexual orientation beyond marriage if harnessed strategically and incrementally.

III. CHANGING WHAT'S UNCHANGEABLE: IMMUTABILITY & AUTONOMY

If one were to take a snapshot to memorialize that moment in the post-*Windsor* dawn when both *SmithKline* and *Wymyslo* leveraged sexual orientation into heightened scrutiny review under equal protection, the picture could have easily located a bright and optimistic trajectory in marriage incrementalism's Step Three at the time. Yet, the trajectory that post-*Windsor* marriage equality cases brought to the goal of protecting sexual orientation was more complex than merely chasing an upward jurisprudential climb. The use of *Windsor*'s animus-dignity connection in these cases and the continued regard for sexual orientation as a protected class revealed a new significant development in the legal recognition of sexual identities on the federal level: autonomy in defining sexual identity is key to protecting sexual orientation under suspect or quasi-suspect classification. At this point in the morning after *Windsor*, autonomy, as refined and contextualized by the animus-dignity connection, has risen to become an animating idea behind recognizing sexual orientation as a protected category in discrimination cases under equal protection. Among other constitutional ideas in regard to sexual minorities,

---

[260] *Wymyslo*, 962 F. Supp. 2d at 991.

[261] DeBoer v. Snyder, 772 F.3d 388, 402–03, 421 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

[262] *Wymyslo*, 962 F. Supp. 2d at 991.

this revelation has been what Step Three of marriage equality incrementalism has helped jurisprudentially innovate.

One place to see this is in the way that *Wymyslo* regarded immutability for the purposes of finding sexual orientation as a protectable trait. As discussed above, animus and dignity concepts likely influenced the Ohio federal district court in adopting this standard—a standard that was predicated on personal liberty. Not only did that connection between animus and dignity serve as a mediating device to contextualize the specific narrative of discrimination against sexual minorities and also to broaden doctrine that addressed it, but the connection also exists to negotiate essentialist and constructivist concerns in the standard itself to highlight and protect personal autonomy interests in forming sexual identities. All of it was, in turn, useful for convincing the court itself to think about why sexual orientation was worthy of suspect or quasi-suspect classification in equality jurisprudence.

Although the *Wymyslo* court adopted an approach to immutability that seemed to be a "softer" one (at least according to both Edward Stein[263] and Zachary Kramer[264]), what seems "softer" is partly because immutable qualities were suddenly no longer tethered to biology; rather they are dependent on a test of personal liberty. Certainly parallels can be drawn between this recalibration of immutability that is favorable for protecting sexual orientation and Justice Kennedy's gesture in overturning Section 3 of DOMA by finding that DOMA had hindered the legitimacy and dignity of the personal relationship choices of same-sex couples.[265] After all, Kennedy had highlighted that one of the reasons DOMA was able to restrict same-sex couples was facilitated by a legislative animus premised on biology.[266]

But there is some difference too from that perspective. What seemed "softer" in *Wymyslo*'s immutability standard was something that helped move the court away from prior doctrine that justified regulating sexual minorities through slippery arguments based on anti-gay sensibilities that reinforced heteronormative essentialism and, in turn, moved the court toward valuing sexual minorities' autonomy. This standard for immutability is not a new one in federal courts. Its application for finding sexual orientation as a trait for suspect or quasi-suspect classification was imported from a line of asylum cases that notably culminated in

---

[263] Edward Stein, *Immutability and Innateness Arguments about Lesbian, Gay, and Bisexual Rights*, 89 CHI.-KENT L. REV. 597, 633–34 (2014) (calling the alternative definition of immutability similar to *Wymyslo*'s definition as "soft immutability").

[264] *See* Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 949 (2014) (describing an immutability standard similar to *Wymyslo*'s as "a softer definition of immutability") [hereinafter Kramer, *The New Sex Discrimination*].

[265] *See* United States v. Windsor, 133 S. Ct. 2675, 2694 (2013) (finding that DOMA "demeans" same-sex couples and their relationship and familial choices).

[266] *See id.* at 2693–95 (citing specific legislative history and intent that was premised on procreation and child-rearing as a protectable interests for opposite-sex only marriage); *see also* H.R. REP. NO. 104-664, at 13 (1996) ("At its core, it is hard to detach marriage from what may be called the 'natural teleology of the body': namely, the inescapable fact that only two people, not three, only a man and a woman, can beget a child.").

the Ninth Circuit case *Hernandez-Montiel v. Immigration and Naturalization Service*,[267] which *Wymyslo* referenced.[268] In *Hernandez-Montiel*, there was a noteworthy valuation of autonomy in regard to viewing sexuality as immutable in the way that the court specifically phrased that sexual orientation and identity "are so fundamental to one's identity that a person should not be required to abandon them."[269] *Hernandez-Montiel* determined that sexual identity had a strong physiological component,[270] but then emphasized psychological and constructive components of sexual identity—personality, appearance, and dress, which are reflective of orientation—as well as that it was also important to a person's overall identity, suggesting a volitional, expressive reaction to physiology that rounds out the experience of sexuality.[271] Interestingly, however, despite opining on how "fundamental" sexual orientation and identity are to personhood in *Hernandez-Montiel*, the court never clearly or strongly articulated its sentiment into a standard for immutability that values the trait of sexuality as one that ought not to be changed, but instead left it implicit.[272] Later cases, such as *Wymyslo*, drew the sentiment of immutability out more explicitly.[273]

So again we see the importance of the animus-dignity connection in mediating an outcome in which the *Wymyslo* court decided to use this "softer" approach, an approach that protects autonomy, a trait that otherwise has been plagued with nature-versus-choice debates. The narrative and experience of sexual orientation discrimination, which the concepts of animus and dignity help illustrate, had its role in justifying the adoption of a standard that regarded neither the importance of whether being a sexual minority had a biological etiology nor whether it was pure choice. The court was more concerned with how fundamental sexual identity is to an individual's existence and whether the answer to that question warrants the highest equal protection.[274]

We see this shift in focus within the way the standard subordinates biology in *Wymyslo*'s immutability inquiry. Previously, the rule that courts used to determine

---

[267] Hernandez-Montiel v. INS, 225 F.3d 1084, 1093–94 (9th Cir. 2000); *see also* Anthony R. Enriquez, Note, *Assuming Responsibility for Who You Are: The Right to Choose "Immutable" Identity Characteristics*, 88 N.Y.U. L. REV. 373, 395–96 (2013) (discussing development of the immutability definition in asylum cases).

[268] *See* Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 990 (S.D. Ohio 2013), *rev'd sum nom.* DeBoer v. Snyder, 772 F.3d 388, 420–21(6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

[269] *See Hernandez-Montiel*, 225 F.3d at 1093.

[270] *See id.* ("Many social and behavioral scientists 'generally believe that sexual orientation is set in place at an early age.'") (citing Suzanne B. Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 CORNELL INT'L L.J. 605, 613 n.55 (1993)).

[271] *Id.* ("Sexual identity goes beyond sexual conduct and manifests itself outwardly, often through dress and appearance.").

[272] *See id.* at 1093–94

[273] *Wymyslo*, 962 F. Supp. 2d at 990–91.

[274] *Id.*

the immutability factor had a larger predication on biology.[275] This predication manifested specifically in the requirement that the protectable trait had to be something of an "accident of birth."[276] This focus opened the door for anti-gay essentialist arguments. A predication on biology paired well with debates on the root of homosexuality, and the existing scientific evidence that was too inconclusive to declare that homosexuality was something based in the body led to a slippery tautology that if homosexuality was not biologically rooted, then homosexuality must have been a choice, and to choose in this way deviated from what heteronormative values considered "natural."[277] This tautology, this assumption about homosexuality, is incompatible with *Frontiero*'s rule that equality jurisprudence shields constitutionally-protected classes from discrimination based on involuntary traits—in other words, traits that a person could not change.[278] Moreover, this tautology led to anti-gay essentialism because the more it seemed that homosexuality was not rooted in biology but was a personal choice against dominant and heteronormative values, the easier it was to qualify anything that had a relationship to the body—for instance, sexual conduct between same-sex individuals—as degenerate.[279] In contrast to being heterosexual, this choice would be considered a bad one.[280] Once that connotation was in place, the idea of being homosexual as purely a personal lifestyle choice without a biological cause could then be susceptible to disapproval based on moral or legal grounds[281]—in other words: animus.

But with this standard that the *Wymyslo* court imported from cases that evaluated religion and alienage as protected traits, the court's attention was drawn away from an inquiry about the significance of biology.[282] This focus-shift is why when the *Wymyslo* case talked about biology it could make a determination that orientation was biologically immutable because that conclusion was no longer relevant for debate. It could have cited to more scientific studies and written a lengthy treatise on the biological root of sexual orientation and still in the end reached the same conclusion that sexual identity is protectable. Instead, in regard to orientation, the standard that *Wymyslo* used required only a distinctive trait that is tied to biology, not in a causal way necessarily, but in a way that makes sexual orientation and sexual attraction something involuntary.

Within *Wymyslo*'s softer standard for immutability, once the notion that sexual orientation is involuntary was accepted, then the court's preoccupation focused on

---

[275] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 686 (1973); *see also* Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1512 (2011).

[276] *See Frontiero*, 411 U.S. at 686; Hoffman, *supra* note 275, at 1512.

[277] *See* Graham, *supra* note 251, at 187–95.

[278] *See Frontiero*, 411 U.S. at 686.

[279] *See* Graham, *supra* note 251, at 192–95.

[280] *See id.*

[281] *See id.*

[282] *See* Obergefell v. Wymyslo, 692 F. Supp. 2d. 968, 990–91, 996 (S.D. Ohio 2013).

the individual and personal reaction to that involuntariness and how meaningful it was to one's identity.[283] Whether or not the person reacts in a way that references his or her sexual orientation is an act that reflects that individual's personal autonomy and one that the law should protect from interference. In this manner, the debate between nature and choice was then recalibrated so that choice stood less susceptible to denigrating arguments that lump judgments over the subject matter of that choice with the ability to make that choice.[284] The focus was instead on personal freedom itself. Laws that interfere with the individual freedom to choose something regarded as constitutive of identity would necessarily restrict personal autonomy in a way that could marginalize, hide, or obscure sexual identity. The effect of this would be stigmatizing or, alternatively, harmful to dignity.

This is a furtherance of *Windsor*'s realignment of essentialist and constructivist concerns in laws regulating same-sex relationships. The shift is not simply one that is moving from one end of identity theory (essentialism) to another (constructivism). Rather, like *Windsor*, any shift in the axis that straddles between essentialism and constructivism here is a shift from the anti-gay ideologies of both essentialism and constructivism over to positive versions of essentialism and constructivism that furthers the interests of sexual minorities. In choosing this standard for immutability, *Wymyslo* strikes a middle ground—something Janet Halley spoke of in evaluating the effectiveness of essentialist and constructivist arguments in sexuality and the law.[285] This recalibration is simple to see in the standard because the standard abandons biological causation that could lead to anti-gay essentialism and conversely takes up the idea of sexuality as something innate biologically or something involuntary that, from the essentialist vantage point, does not readily cast judgment but has more potential to broach a better understanding of sexual minorities. At the same time, the standard transfers significance from anti-gay ideas about choice and construct in being homosexual that led from moral approbation and blameworthiness to ideas about sexuality as a personal construct and choice that, first and foremost, reflects the value of autonomy of the individual, but also has the effect of possibly characterizing the identities of sexual minorities as positive reflections on humanity. The result of all of this traversing is ultimately a conclusion by the *Wymyslo* court that autonomy in sexual identity formation based on orientation is to be protected equally. Thus, the reach toward immutability here contributes to the rise of autonomy that has

---

[283] *Id.* at 990–91; *see also* Hoffman, *supra* note 275, at 1513 (noting this concept of immutability "is sensitive to the importance of self-concept and embraces the idea that certain characteristics are core to an individual's sense of self").

[284] *See* Graham, *supra* note 251, at 173 ("This alternative understanding of immutability expands the concept for equal protection purposes, while also accomplishing two important goals: (1) it moves past a fault-based model of immutability that generally seeks to exclude from protection groups whose moral culpability or personal responsibility are the cause of their condition, and (2) it moves toward an autonomy-based model of immutability that is premised on a respect for human dignity, which protects critical constitutive aspects of personhood . . . .").

[285] *See* Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 568 (1994).

emerged in sexual orientation anti-discrimination since *Lawrence* and *Windsor*. And the importance here is that autonomy under *Wymyslo* is not being raised narrowly in the realm of same-sex conduct or relationships, but instead it is tied to an explicit declaration of heightened scrutiny protection for sexual orientation.[286] Herein lies the significant incremental development.

In the district court cases within the Sixth Circuit's provenance post-*Wymyslo*, the modified approach to immutability was continuously referenced in bringing about marriage recognition for same-sex relationships, with all of them at least reflecting and encouraging protecting sexual orientation as a suspect or quasi-suspect class. *Henry v. Himes* allowed the same court from *Wymyslo* to revisit the issue of heightened scrutiny and cement its prior ruling in regard to that level of protection for sexual orientation.[287] *Wymyslo* was an as-applied challenge against the Ohio marriage ban, and the litigants in *Henry* challenged the same ban facially.[288] But the results were no different. Citing *Wymsylo* for direct influence and *SmithKline* for persuasive guidance,[289] the district court was able to cling to precedent to use heightened scrutiny in recognizing out-of-state same-sex marriages under equal protection, indirectly validating its prior justifications of using choice and autonomy to change the outlook on immutability.[290]

Only one case in the post-*Windsor* canon of lower federal district cases in the Sixth Circuit did not examine sexual orientation under immutability in ruling favorably for marriage for same-sex couples.[291] But other marriage cases that shared the same circuit as *Wymyslo* had their own respective levels of acknowledgment for the *Wymyslo* ruling in regard to the new immutability standard. One federal district court in Kentucky appeared less direct in following *Wymyslo*—at least at first, when it visited the issue in *Bourke v. Beshear*[292]—and only acknowledged *Wymyslo* and the possibility of suspect class protection for sexual orientation.[293]

---

[286] *Wymyslo*, 962 F. Supp. 2d at 991.

[287] Henry v. Himes, 14 F. Supp. 3d 1036, 1053–54 (S.D. Ohio 2014), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

[288] *See id.* at 1039, 1043.

[289] *See id.* at 1053–54.

[290] *See id.* at 1052–54.

[291] *See* Tanco v. Haslam, 7 F. Supp. 3d 759 (M.D. Tenn. 2014), *rev'd sum nom. DeBoer*, 772 F.3d at 420–21, *rev'd sub nom. Obergefell*, 135 S. Ct. at 2608. The case followed *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014), *rev'd sum nom. DeBoer*, 772 F.3d at 420–21, *rev'd sub nom. Obergefell*, 135 S. Ct. at 2608, but predated *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014), and examined *Bourke*'s analysis for declining heightened scrutiny and resolving its marriage ban suit upon rational basis. *Tanco*, 7 F. Supp. 3d at 769. Yet, in doing so, the *Tanco* court took note of recent developments, implicitly highlighting the concepts of animus and dignity by referring specifically to the "animating principles in *Windsor*" and "the relationship between discriminatory state marriage laws and the United States Constitution's guarantees." *Id. Tanco* was a very favorable case for same-sex couples, and had the *Tanco* court rendered its decision after *Love*, perhaps it would have had more impetus to step up to recognizing sexual orientation as a suspect class through the same gestures upon autonomy since it relied so heavily on *Bourke*. *Id.*

[292] *Bourke*, 996 F. Supp. 2d at 548.

[293] *See id.* at 548 & 548 n.12.

The *Bourke* court declined to follow *Wymyslo* and was not willing to proceed any further doctrinally from prior Sixth Circuit cases that had denied suspect classification to sexual orientation.[294] Yet the *Bourke* court did note that "a number of reasons suggest that gay and lesbian individuals do constitute a suspect class,"[295] including "immutable or distinguishing characteristics that define them as a discrete group."[296] Subsequently, when this same court revisited the issue in its next same-sex marriage case, *Love v. Beshear*,[297] the court followed in *Wymyslo*'s steps by invalidating Sixth Circuit precedent that precluded heightened scrutiny and then by applying the factor test to determine suspect or quasi-suspect classification.[298] In doing so, the *Love* court analyzed the factors fairly swiftly, but paused at length at immutability, where again the standard for immutability was altered from a firm standard that could have biological ties to one that reflected the contours of *Windsor*'s animus and dignity concepts in order to underscore the importance of individual choice and autonomy:

> [S]trictly speaking, a person *can* change her citizenship, religion, and even gender. Legislative classifications based on these characteristics nevertheless receive heightened scrutiny because, even though they are in a sense subject to choice, no one should be forced to disavow or change them. That is, these characteristics are "an integral part of human freedom" entitled to constitutional protection, as is sexual expression.[299]

At minimum, the *Love* court's analysis here merely redefined the standard to reflect a leaning toward personal autonomy. But the borrowing of ideas from *Wymyslo* to *Love* was also notice and affirmation of these preferences toward autonomy. Moreover, like *Wymyslo*, the contours of the animus-dignity connection appeared in *Love*'s articulation of the immutability standard. Within its reference to legislation that regulated citizenship, religion, and gender statuses in heightened scrutiny purview, the court likened sexual orientation, which is often regulated by legislation that is based on animus, to traits such as citizenship, religion, or gender and the court here cited to *Lawrence* to observe what the Supreme Court had taken note of previously—that sexuality similarly resides within a person's identity so integrally that to force change, meaning to infringe upon one's personal autonomy, would implicitly result in harms to dignity.[300]

In the Ninth Circuit, discussions about protected classes and the broader application of the immutability factor in regard to sexual orientation—with

---

[294] *See id.* at 548–49.
[295] *Id.* at 548.
[296] *Id.* at 549.
[297] Love v. Beshear, 989 F. Supp. 2d 536 (W.D. Ky. 2014).
[298] *Id.* at 545–46.
[299] *Id.* at 546 (citing Lawrence v. Texas, 539 U.S. 558, 577 (2003)).
[300] *See id.*

autonomy in mind—were already underway. Although after *SmithKline* there was a brief incremental pause with one federal district court case, *Geiger v. Kitzhaber*,[301] declining to follow *SmithKline*'s use and application of heightened scrutiny to Oregon's same-sex marriage ban, this pause was attributable to a pending request by a Ninth Circuit judge for an *en banc* rehearing of *SmithKline* that rendered the ruling not yet final and binding.[302] *Geiger* nonetheless did overturn the Oregon marriage ban, but on other grounds.[303] In the rest of the Ninth Circuit, similar outcomes were taking place. District courts in Arizona summarily determined their cases in favor of marriage equality.[304] A Montana federal marriage case, *Rolando v. Fox*,[305] applied *SmithKline* very readily in its equal protection portion,[306] as did a later Alaska federal case, *Hamby v. Parnell*.[307]

In this way, *SmithKline*'s reach toward heightened scrutiny seems different mainly because it did not directly touch upon immutability and foreclosed connecting autonomy and immutability in the way *Wymyslo* did. But the Ninth Circuit had already seen such factor analysis before in other sexual orientation anti-discrimination cases that led to similar autonomy considerations in both asylum and marriage equality cases.[308] For instance, *Golinski v. U.S. Office of Personnel Management*[309]—one of the DOMA appeals simultaneously pending while *Windsor* was being heard that was decided at the Supreme Court and then subsequently dismissed as a result of *Windsor*—was a district court opinion that analyzed the factors in favor of protecting sexual orientation as a suspect class.[310] Particularly with regard to the immutability factor, the ideas of individual choice and autonomy changed the standard for evaluating immutability to one that evaluated sexual orientation as a trait "so fundamental to one's identity that a person should not be required to abandon it."[311] Here, the standard resembles *Wymyslo*'s in emphasizing choice, and only the lack of *Windsor*'s animus and dignity concept in the *Golinski* passage is noticeable. The court noted that the harm would be "abhorrent"[312] but without elaborating in any way that involved dignitary harms the way *Windsor* did.[313] Moreover, unlike *Wymyslo*, the reasoning in *Golinski* also did not rely on *Lawrence*, but looked either directly at precedent

---

[301] Geiger v. Kitzhaber, 994 F. Supp. 2d 1128 (D. Or. 2014).

[302] *Id.* at 1141.

[303] *Id.* at 1147.

[304] *See* Connolly v. Jeanes, 73 F. Supp. 3d 1094, 1096 (D. Ariz. 2014); Majors v. Jeanes, 48 F. Supp. 3d 1310, 1313–14 (D. Ariz. 2014).

[305] Rolando v. Fox, 23 F. Supp. 3d 1227 (D. Mont. 2014).

[306] *Id.* at 1233.

[307] Hamby v. Parnell, 56 F. Supp. 3d 1056, 1063 n.34 (D. Alaska 2014).

[308] *See, e.g.*, Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000).

[309] Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968 (N.D. Cal. 2012).

[310] *Id.* at 985–87.

[311] *Id.* at 987.

[312] *Id.*

[313] *Compare id with* United States v. Windsor, 133 S. Ct. 2675, 2696 (2013).

that pre-dated *Lawrence*[314] or persuasively at cases that muted the dignity implications from *Lawrence*.[315]

Also, after *SmithKline*, *Latta v. Otter*,[316] a post-*Windsor* marriage case from the Federal District Court of Idaho, analyzed *SmithKline*'s adoption of heightened scrutiny for sexual orientation discrimination under equal protection and noted that such standard applied beyond animus and irrational stereotyping cases.[317] Though the Idaho district court did not evaluate the suspect classification factors directly, it did refer to the Second Circuit's analysis of the factors in its appellate opinion in *Windsor v. United States*,[318] which had rendered sexual orientation a protected class.[319] The Second Circuit's *Windsor* decision did reflect autonomy in the margins when it refined the immutability standard. That decision used a standard that emphasized "distinguishing characteristics" in helping identify sexual orientation as an immutable trait, but also disregarded the relevance of physical changeability as something problematic to the definition of immutability, footnoting examples with alienage and national origin that reflected how considerations of immutable traits could involve the idea that " changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity."[320] Thus, the opinion indirectly valued personal autonomy: "[T]hese characteristics do not declare themselves, and often may be disclosed or suppressed as a matter of preference. What seems to matter is whether the characteristic of the class calls down discrimination when it is manifest."[321] And so when *Latta* arrived at the Ninth Circuit, a renewed application of *SmithKline* was not hard to reach.[322]

What *SmithKline* did in breaking the door open for heightened scrutiny in sexual orientation discrimination cases in equal protection was to allow that opened door to usher in other decisions that might affirm and reflect the idea of autonomy in immutability standards. Though the application of heightened scrutiny had been explored in the Ninth Circuit, it was not until *SmithKline* (and also *Windsor*) that

---

[314] *Golinski*, 824 F. Supp. 2d at 987 (citing Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000)).

[315] *See id.* (citing Karouni v. Gonzales, 399 F.3d 1163, 1173 (9th Cir. 2005); Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring); *In re* Marriage Cases, 183 P.3d 384, 442 (Cal. 2008)).

[316] Latta v. Otter, 19 F. Supp. 3d 1054 (D. Idaho 2014).

[317] *Id.* at 1076.

[318] *Id.* (citing Windsor v. United States, 699 F.3d 169, 181–82 (2d Cir. 2012), *aff'd sub nom.* United States v. Windsor, 133 S. Ct. 2675 (2013)).

[319] *Windsor*, 699 F.3d at 181–82.

[320] *Id.* at 183 n.4 (quoting *Watkins*, 875 F.2d at 726).

[321] *Id.* at 183; *see also id.* at 184 ("[The Bipartisan Legal Advisory Group of the United States House of Representatives] argues that a classification based on sexual orientation would be more 'amorphous' than discrete. It may be that the category exceeds the number of persons whose sexual orientation is *outwardly* 'obvious, immutable, or distinguishing,' and who thereby predictably undergo discrimination. But that is surely also true of illegitimacy and national origin. Again, what matters here is whether the characteristic invites discrimination when it is manifest.").

[322] Latta v. Otter, 771 F.3d 456, 464–65 (9th Cir. 2014).

there was any meaningful consideration of the issue that had precedential weight. *SmithKline*'s significance was as an intermediary between those earlier cases and the post-*Windsor* cases, using *Windsor*'s animus-dignity connection to rationalize heightened scrutiny and in effect facilitate future sexual orientation discrimination cases that would latch onto an evolving view of immutability. Despite this difference from *Wymyslo*, *SmithKline* still relied on animus-dignity concepts to ultimately make heightened scrutiny available for sexual orientation discrimination cases under equal protection in a way that emphasized autonomy—just not as directly.

Thus, in the post-*Windsor* cases, following *SmithKline* and *Wymyslo* progression up to heightened scrutiny, both Ninth Circuit and Sixth Circuit marriage cases showed promise in taking that arrival at autonomy and incrementally affirming, refining, or commenting upon it within the context of *Windsor*'s animus-dignity connection. Despite the fact that progress was varied from case-to-case and from circuit-to-circuit, that gradual progress is indicative of incrementalist rumination as the cases seem more forward-looking for the rights of sexual minorities in general. Even with the Sixth Circuit's later reversal of *Wymyslo* in *DeBoer v. Snyder*, the set-back could be something that appears to incrementalist thinking as an event that does not warrant alarm for the eventual progress of pro-LGBTQ protections—although in the short term it seemed as if the reversal could appear damaging. We are in Step Three and not Step One after all. All of this seemingly unstable back-and-forth has its place in the political and legal evolution of the issue of sexual orientation discrimination. So far, it is what this leveraging in the post-*Windsor* cases has arrived upon that matters most for the rest of the metaphoric day after *Windsor*. The significant affirmation not just about the law's widening acceptance of sexual identity and its amenability for placing sexual orientation at higher levels of protection in equality jurisprudence bear attention. However, specifically there is even more significance in the idea of locating sexual orientation as a fundamental component of individual personhood by illustrating that harms of indignity could arise if laws otherwise continued to interfere with the right for someone to engage autonomously in self-identification based on sexual orientation. Part IV of this Article will comment normatively about that development involving autonomy and what it poses for the challenges to sexual orientation and the law in the future after marriage equality.

IV. *OBERGEFELL V. HODGES:* THE NEW AFTERNOON

In Ronald Reagan's "Morning in America" ad, there was a key statistic about the domestics of his envisioned America that reminded audiences of the lowered inflation rate that his administration purportedly secured up to 1984.[323] Although one could argue that the point of observing that "6500 young men and women will

[323] *Reagan-Bush '84, supra* note 6.

be married"[324] later in the afternoon of Reagan's metaphoric day was merely a Madison-Avenue device for raising awareness of Reagan's first-term economic accomplishments in his first term, the prolonged use of the traditional white chapel wedding and the pastoral scenes, with the young opposite-sex couple kissing at the altar before clergy and then leaving the chapel steps with rice being tossed above their heads, could also be taken as a calculated re-enforcement of American family values and norms at a time when social mores about co-habitation and families were changing—and had been changing since the 1970s.[325]

Two decades later, after so many literal days in America have rotated incrementally past Reagan's 1984 campaign, the morning after *Windsor* is not quite the "morning *again*"—as Reagan's ad had portrayed its moment, preserving retrospective norms[326]—but a morning *anew* that pushed forward into its afternoon, with same-sex marriages now finally possible nationwide with *Obergefell v. Hodges*.[327] Because of *Obergefell*, the constitutional preservation of marriage as a fundamental right is no longer just for those represented by Reagan's white church weddings. And while some state marriage schemes have included same-sex couples, this afternoon with *Obergefell* must be an opportunity not to be cabined by just the goals of marriage equality; it must also be used to focus on what else the movement ought to do normatively for the protection of sexual identity under the law.

Despite the Sixth Circuit's reversal of district court cases that had reached heightened scrutiny protection for sexual orientation, the same-sex marriage movement progressed on to the Supreme Court.[328] The reversal of *DeBoer* by *Obergefell*[329] further solidified Kennedy's animus-dignity connection as an anti-stereotyping principle to combat discrimination against same-sex couples. But as same-sex couples marry in this symbolic afternoon, one cannot lose sight of the idea that progress does not end at the altar. As marriage equality was propelled by the incremental strides in sexual orientation protection—i.e. decriminalizing same-sex intimacy[330] and making disparate treatment of same-sex couples unlawful[331]—it should continue to further protections for sexual minorities. What has brought those marriages to their legal inevitability should persist to meet larger purposes of LGBTQ equality.

---

[324] *Id.*

[325] *See* ANDREW J. CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE 11–13 (Harv. Univ. Press rev. ed. 1992).

[326] *Reagan-Bush '84*, *supra* note 6.

[327] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[328] *See, e.g.*, Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 991 (S.D. Ohio 2013), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. at 2608.

[329] *DeBoer*, 772 F.3d 388, *rev'd sub nom. Obergefell*, 135 S. Ct. 2584.

[330] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[331] *See* United States v. Windsor, 133 S. Ct. 2675, 2696 (2013).

One of the earlier strategies in gay activism was to use marriage as a way to protect orientation at the highest level.[332] But in the post-*Windsor* cases, achievements in equality jurisprudence, such as those in *SmithKline* and *Wymyslo*, that brought heightened scrutiny and protected classifications to sexual orientation discrimination, are not as common. Instead, the majority of courts have merely noted the Supreme Court's silence on heightened scrutiny for sexual orientation in equal protection and have reached marriage equality through rational basis review or through heightened scrutiny, though only in due process theories that were not based explicitly on sexual orientation discrimination—theories in which state marriage bans were judged to infringe on the fundamental right of same-sex couples to marry. Of course, each of these theories has furthered the rights of sexual minorities. The fundamental rights arguments, for instance, have perpetuated victories for same-sex couples in the context of the state's recognition of their marriages, and even for their families.[333] Outside of the marriage and family context, however, one wonders how directly pliable some of these doctrinal successes can be for sexual orientation discrimination that does not involve same-sex relationships or adopting children. In this sense, if sexual orientation anti-discrimination is not explored beyond the marriage and family context, we may be slowing down at a ceiling that stops at marriage and same-sex relationships, and we may lag in opening up to developments that further anti-discrimination as a whole for sexual orientation.[334]

The observation above is a potentially disconcerting effect of Justice Kennedy's majority opinion in *Obergefell*. The opinion, marking his fourth decision for the advancement of gay rights rights,[335] reversed the decision in *DeBoer*, the consolidated Sixth Circuit ruling that had overturned federal district cases, including *Wymyslo*.[336] *DeBoer* had denied same-sex couples the right and recognition of marriage through robust discussions under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[337] Although at the Supreme Court the issues in *Obergefell* were also framed under the Fourteenth

---

[332] *See* William N. Eskridge Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 315–16 (2013).

[333] *See, e.g.*, *Obergefell*, 135 S. Ct. at 2601, 2604–05.

[334] Introduction, *Developments in the Law: Sexual Orientation & Gender Identity*, 127 HARV. L. REV. 1682, 1689–90 (2014) (citing examples from the Netherlands and Canada which support a concern that "once the marriage equality fight is won nationwide, the urgency of fighting for other LGBT rights will diminish").

[335] *See* Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003); *Windsor*, 133 S. Ct. 2675; *Obergefell*, 135 S. Ct. 2584.

[336] DeBoer v. Snyder, 772 F.3d 388, 421 (6th Cir. 2014) (reversing Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013), *rev'd sub nom. DeBoer*, 772 F.3d 388, *rev'd sub nom. Obergefell*, 135 S. Ct. 2584).

[337] *DeBoer*, 772 F.3d at 410–13 (discussing why the Fourteenth Amendment's Due Process Clause does not permit same-sex couples to marry); *id.* at 413–16 (discussing why same-sex couples lack a claim under the Fourteenth Amendment's Equal Protection Clause).

Amendment to allow both due process and equal protection theories,[338] Kennedy took an approach that located his historic ruling for the recognition of the marriage rights of same-sex couples mostly within an exhaustive fundamental rights analysis.[339] In doing so, his decision upheld the due process rationales of many of the post-*Windsor* marriage equality rulings in the lower courts[340]—but with Kennedy's own championing of basic human dignity as the social and legal impetus for recognizing same-sex marriages.[341] Kennedy identified and framed the issue as whether to extend the fundamental right to marry to same-sex couples, and thus, the first doctrinal part of the decision led with a discussion of the already-established fundamental right to marriage and how same-sex couples have been excluded from partaking in that right under state laws.[342] From this perspective, Kennedy's task was to justify the recognition of same-sex couples' lawful abilities to exercise the already-existing fundamental right to marry.[343] This approach was consistent with the position of the same-sex couples that served as petitioners in *Obergefell*.[344] On the contrary, all of the dissenting Justices in *Obergefell*—Roberts, Scalia, Thomas, and Alito—rejected this framing of the issue as an existing fundamental right to marriage available to same-sex couples; rather, they approached their dissenting opinions from the perspective that same-sex couples were seeking to create a new and separate fundamental right to same-sex marriage

---

[338] *Obergefell*, 135 S. Ct. at 2593 ("This Court granted review, limited to two questions. The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.") (citation omitted).

[339] *See id.* at 2604–05.

[340] *See id.* at 2599 ("This analysis compels the conclusion that same-sex couples may exercise the right to marry."); *see also, e.g.*, Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014) (ruling for marriage equality based on fundamental rights for both Due Process and Equal Protection violations under the Fourteenth Amendment); Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014) (ruling similarly for same-sex couples seeking marriage based on fundamental rights for both Due Process and Equal Protection violations under the Fourteenth Amendment).

[341] *See Obergefell*, 135 S. Ct. at 2601–02 (articulating that the indignity imposed upon same-sex couples from exclusion of marriage warranted the extension of marriage to same-sex couples and noting that "[a]s the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.").

[342] *See id.* at 2597–99 (noting that "the Court has long held the right to marry is protected by the Constitution" and that [i]t cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners").

[343] *See id.* at 2599 (holding summarily before more elaboration that "same-sex couples may exercise the right to marry" based on "four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples").

[344] *See* Brief for Petitioners at 19, *Obergefell*, 135 S. Ct. 2584 (No. 14-556).

exclusively.[345] Framing the issue narrowly in this way, the dissenting opinions were more easily able to dodge or deny notions of discrimination and more able to expound more legalistically on the matter.[346]

However, according to Kennedy and the majority, withholding the right to marry from same-sex couples did result in substantial and invidious discrimination because such exclusion restricted personal choice and self-determinism,[347] perpetuated a second-class citizenship,[348] demeaned the families created by same-sex unions,[349] and precluded benefits of marriage accorded to opposite-sex couples

---

[345] *Compare Obergefell*, 135 S. Ct. at 2602 (rejecting the respondents' framing of the issue that petitioners were asking to exercise "a new and nonexistent 'right to same-sex marriage' "), *with id.* at 2625–26 (Roberts, C.J., dissenting) (referring to potential faith-based conflicts posed by "the new right to same-sex marriage), *id.* at 2629 (Scalia, J., dissenting) (criticizing the majority for "discover[ing] in the Fourteenth Amendment a 'fundamental right' overlooked by every person alive at the time of ratification [of the U.S. Constitution], and almost everyone else in the time since"), *id.* at 2636– 37 (Thomas, J., dissenting) (distinguishing previous Supreme Court marriage cases relied upon by the *Obergefell* petitioners for demonstrating the expansion of rights or "liberty" as merely instances of an unlawful governmental burden on the existing right of marriage and interpreting the majority's characterization of the *Obergefell* petitioners as seeking to "find . . . liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex" as a sign of "concession" to the petitioners for creating a new right to same-sex marriage, which is impossible, according to Thomas, "as a philosophical matter" and is the crux of his dissent) (quoting *id.* at 2593 (majority opinion)), *and id.* at 2640–41 (Alito, J., dissenting) (noting that "[f]or today's majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in the majority claim the authority to confer constitutional protection upon that right simply because they believe it is fundamental.").

[346] *See e.g.*, *id.* at 2615–22 (Roberts, C.J., dissenting) (arguing that substantively the right to same-sex marriage was not deeply-rooted in the nation's history and criticizing the majority's supposed creation of a new fundamental right as an act reminiscent of the now-defunct *Lochner* era); *id.* at 2627 (Scalia, J., dissenting) (viewing the majority's decision as an "extension" of "the Court's claimed power to create 'liberties' that the Constitution and its Amendments neglect to mention," a premise to criticize the majority's ruling as an example of violating the will of the public); *id.* at 2635–37 (Thomas, J., dissenting) (criticizing the majority's decision as anathema to his notions of due process jurisprudence in which fundamental rights issues should only be adjudicated if there were violations of negative liberty and not adjudicated as seeking the creation of a new right); *id.* at 2640–41 (Alito, J., dissenting) (arguing that the creation of a new right to same-sex marriage by the majority drives against the democratic process and should involve state legislatures and the public).

[347] *See id.* at 2599 (majority opinion) ("A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy."); *see also id.* ("There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.").

[348] *See id.* ("A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."); *see also id.* ("Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.").

[349] *See id.* ("A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."); *see also id.* ("Without the recognition, stability, and predictability marriage offers, [the] children [of same-sex couples will] suffer the stigma of knowing their families are somehow lesser.").

that otherwise were indicative of social order.[350] All of this had led to the deprivation of the dignity of same-sex couples. As Justice Kennedy summarized:

> The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.[351]

Once the fundamental rights issue was reached,—that indeed the basic but unenumerated right to marriage encompassed same-sex marriages[352]—the equal protection claim was resolved doctrinally and summarily by analyzing whether state marriage bans discriminated against same-sex couples by impinging on their fundamental right to marriage, rather than whether such bans discriminated against same-sex couples based on sexual orientation or gender arguments: "Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[353] Further highlighting that "unjustified inequality," Kennedy found that "[i]t is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality."[354] It was hard to deny from that doctrinal vein within equal protection jurisprudence that if marriage is a fundamental right available to those desiring to enter same-sex relationships, then state marriage bans restricting in-state and out-of-state marriages of same-sex couples are a violation of the Fourteenth Amendment. Thus, because the Supreme Court did not have to discuss sexual orientation discrimination directly in a discussion over tiered scrutiny or even within an animus-focused reasoning as previously seen from *Romer* and *Windsor*, the Court avoided the question.

The Court's silence regarding a protected classification for sexual orientation was even more pronounced in *Obergefell* than in *Windsor*. This silence made the issue into an even bigger elephant in the room than when *Windsor* had applied its animus-focused scrutiny, delineating that DOMA should be overturned because of

---

[350] *See id.* at 2601 ("Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order."); *see also id.* ("[B]y virtue of their exclusion from [the institution of marriage], same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives.").

[351] *Id.* at 2602.

[352] *Obergefell*, 135 S. Ct. at 2603–04.

[353] *Id.*

[354] *Id.* at 2604.

animus toward sexual minorities.[355] Settling the issue regarding sexual orientation in equality jurisprudence more concretely than the Supreme Court's previous gay rights cases was, and has been, in part the long-term goal in marriage litigation.[356] For Kennedy to resolve the marriage issue without venturing into inequality based on sexual orientation was a seemingly short-sighted move that has frustrated commentators.[357] In addition, the silence seemed to ignore the clamor over this issue from the litigants themselves, who argued back and forth on this in their briefs.[358] The silence bypassed several amici, who pointed out that marriage bans could be resolved in the context of sexual orientation discrimination.[359] It also ignored the lower court rulings, including *Wymyslo* and *DeBoer*, both of which had diametric holdings that relied on reasoning the issue of marriage discrimination in equal protection with a determination of whether sexual orientation deserved heightened scrutiny or rationality protection.[360] Finally, in

---

[355] United States v. Windsor, 133 S. Ct. 2675, 2694–95 (2013).

[356] *See* Stoddard, *supra* note 41, at 12 ("[M]arriage is . . . the political issue that most fully tests the dedication of people who are *not* gay to full equality for gay people, and also the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men.").

[357] *See, e.g.*, David Bernstein, *Justice Kennedy's Opinion in the Gay Marriage Case May Upend Fifty-Plus Years of Settled Equal Protection and Due Process Jurisprudence*, WASH. POST: VOLOKH CONSPIRACY (June 26, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/justice-kennedys-opinion-in-the-gay-marriage-case-may-upend-fifty-plus-years-of-settled-equal-protection-and-due-process-jurisprudence ("Kennedy does not even address the possibility that homosexuals are a suspect class (which to my mind would have been the strongest rationale for the Court's decision). Instead he points out that the Court has consistently held that marriage is a fundamental right, and then basically says that if you combine due process liberty interests with equal protection concerns, the proponents of constitutional protection for gay marriage win."); *see also* Richard Lempert, Obergefell v. Hodges: *Same Sex Marriage & Cultural Jousting at the Supreme Court*, BROOKINGS (June 29, 2015, 9:45 AM), http://www.brookings.edu/blogs/fixgov/posts/2015/06/29-obergefell-same-sex-marriage-lempert ("Perhaps the greatest failure of Kennedy's opinion is its refusal to recognize same sex marriage bans as either a form of gender-based discrimination, albeit based on pair relationships, or to recognize that homosexual orientation is the largely immutable characteristic of a long discriminated against group.").

[358] *Compare* Brief for Petitioner at 38–49, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) (arguing Ohio's marriage bans violated Equal Protection based on sexual orientation discrimination theory that also urged heightened scrutiny review), *with* Brief for Respondent at 43–49, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) (arguing the contrary that Ohio's marriage ban did not violate Equal Protection, in part, because the ban was not subject to heightened scrutiny since sexual orientation is not a suspect or quasi-suspect class).

[359] *See, e.g.*, Brief of Constitutional Law Scholars Ashutosh Bhagwat, et al. as Amici Curiae in Support of Petitioners at 5–24, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574) (arguing heightened scrutiny applies when determining if a law discriminations against gays and lesbians); Brief of Humans Rights Watch and the New York City Bar Ass'n, et al. as Amici Curiae Supporting Petitioners at 24–28, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574) (arguing that sexual minorities are a suspect class); Brief of 167 Members of the U.S. House of Representatives and 44 U.S. Senators as Amici Curiae in Support of Petitioners at 7–12, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574) (arguing that state marriage bans against gays and lesbians should be subject to heightened scrutiny based, in part, on *SmithKline*'s reading of *Windsor*).

[360] *See* Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 986–91 (S.D. Ohio 2013) (classifying sexual orientation as suspect or quasi-suspect for heightened scrutiny under the Equal Protection Clause), *rev'd*

regard to *SmithKline*, *Obergefell*'s silence consequently bypassed any potential to discuss the validity of that case—leaving it untouched for now, but without the high court's official blessing. In anticipation of the *Obergefell* ruling, there was some consensus that "a decision applying heightened scrutiny would be an unprecedented triumph for gays and lesbians,"[361] and that "[a]n explicit decision requiring heightened scrutiny would change things in an instant. It would hardwire into the law—and our broader legal culture—the recognition that distinctions on the basis of sexual orientation are almost always invidious and wrong."[362] That kind of a ruling would have offered a new touchstone that normatively would have reset everything.

In terms of Step Three of marriage equality incrementalism, *Obergefell* no doubt fulfills the final step that *Windsor* had commenced. Yet the question remains: what do the accomplishments of these three steps in this incrementalist journey further beyond marriage equality? Despite the observation that *Obergefell* fell short in finding protected class status for sexual minorities, Kennedy's opinion did leave some significant and very helpful developments in characterizing the impressions and experiences of sexual minorities that in themselves incrementally further advancement for sexual orientation anti-discrimination. The developments may not be as immediate or as far reaching as hoped, but within the collective, societal bounded rationality that needs to reach the social acceptance of sexual minorities before legal acceptance can occur, the smaller developments in *Obergefell* strike a slower progressive pace that comports with a more cautious processing very indicative of incrementalist thinking. There may be some silver linings after all.

Textually in *Obergefell*, Kennedy expounded on his previous motif of weaving animus and dignity concepts together to further the marriage holding itself. Because marriage equality issues incidentally precipitate larger legal issues regarding sexual orientation—such as discrimination protectable under suspect or quasi-suspect classifications—the import here of Kennedy's animus-dignity connection into *Obergefell* serves to also mediate forward gay rights advocacy. The animus-dignity correlation helped Kennedy describe the equal marriage issues within a narrative of discrimination against sexual minorities in law and society that allowed the Court to continue a modernized regard for sexual minorities and transcend its previous perfunctory and dismissive treatment of sexual minorities in *Bowers v.*

---

sum nom. DeBoer v. Snyder, 772 F.3d 388, 420–21(6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015); *DeBoer*, 772 F.3d at 413–16 (holding conversely that sexual orientation is subject to rational basis review under the Equal Protection Clause), *rev'd sub nom. Obergefell*, 135 S. Ct. at 2608.

[361] Chanakya Sethi, *How the Supreme Court Could Make Everyone Happy with Its Same-Sex Marriage Decision*, SLATE (June 16, 2015 9:59 AM), http://www.slate.com/blogs/outward/2015/06/16/gay_marriage_at_the_supreme_court_heightened_scrutiny_would_be_a_win_win.html.

[362] *Id.*

Hardwick and *Baker v. Nelson*.[363] Despite not achieving the affirmative doctrinal pronouncement that would place sexual orientation in a higher equal protection classification, the channeling functions of Kennedy's animus-dignity connection in *Obergefell* illustrated the anti-stereotyping possibilities that reflect a normative change for sexual minorities beyond marriage. In *Obergefell*, the incremental difference in Kennedy's continued use of animus and dignity was not just in its application in recognizing same-sex marriages federally, as it was more specifically confined to addressing in *Windsor*. The difference was in how Kennedy illustrated the broader application of the animus-dignity connection to the rest of the current rights struggle for sexual minorities—particularly in the furtherance of personal autonomy. This leaves future litigants in other contexts fertile judicial sentiments for imparting reasons of how and why the experiences of sexual minorities have been marked with invidious discrimination and for holding sexual orientation out as a protectable trait without officially or doctrinally classifying it as such. The three areas in *Obergefell* in which Kennedy did this occurred first, in his historicism of the modern gay rights movement and his fundamental right analysis; second, in the opinion's actual Equal Protection Clause analysis; and, lastly, in two very sparse but specific instances where *Obergefell* links up with *Wymyslo* in regard to the immutability of sexual identities.

A. Historicism and Due Process

Kennedy began his opinion with sweeping historicisms on both the institution of marriage and the modern gay rights movement, drawing resemblances in both histories from a common theme that underscored how significant changes in both have been brought about incrementally. As the two histories crossed over very quickly to set the context for the same-sex marriage issue, we can see that this entire portion between sections II and III of Kennedy's *Obergefell* opinion, from historicism to due process, was actually one carefully labored narrative that is book-ended by animus at its beginning and dignity at its conclusion, with both concepts mediating progress in the middle.[364]

1. Animus—After an introductory preamble about marriage and noting broadly its "transcendent importance" through "the annals of human history"[365] and how it "is essential to our most profound hopes and aspirations,"[366] Kennedy shifted to the exclusiveness of marriage, stating that all of these benefits and conditions of

---

[363] *See generally* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding a Georgia law that criminalized certain homosexual acts), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003); Baker v. Nelson, 490 U.S. 810 (1972) (mem) (dismissing appeal because the exclusion of same-sex couples from marriage did not present a substantial federal question).

[364] *See Obergefell*, 135 S. Ct. at 2593–97.

[365] *Id.* at 2593–94.

[366] *Id.* at 2594.

marriage have only been open to opposite-sex relationships.[367] Why is that so? Kennedy quickly introduced the animus at the heart of excluding same-sex relationships in marriage practices, which he revealed as a pithy stance on an adherence to tradition that conveyed an irony in the exclusion of same-sex couples from what he had described as the vast, centralized condition of human existence that is marriage.[368] This stance on tradition seemed almost conclusory by the way he articulated it: "That history [of marriage] is the beginning of these cases. The respondents say it should be the end as well."[369] Kennedy depicted the respondents' reason for excluding same-sex couples from marriage as a biased one: "To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman."[370] Implicit within Kennedy's observation here was the rhetorical question: *Why would legal inclusion of same-sex couples "demean" the institution of marriage?* Herein lies the animus. Although Kennedy did not explicitly answer this question, the pattern of marginalization from previous gay rights cases—*Romer*, *Lawrence*, and *Windsor*—suggested that the source of this intellectualized stance is a hardened disapproval of same-sex couples and sexual minorities. In *Romer*, Kennedy found that Amendment 2 was promulgated by moral disapproval against gays and lesbians in Colorado.[371] In *Lawrence*, Kennedy hinted that animus was at the root of sodomy laws in the later Twentieth Century.[372] And from his inquiry into the House Report in *Windsor*, Kennedy extrapolated and discussed at length the legislative animus that created DOMA.[373] Reading all these cases, including *Obergefell*, as a tetralogy, all written by Kennedy, the subtext is clear that behind the intellectualized stance against same-sex marriages is a long-standing disapproval of sexual minorities, a view that might be held "in good faith by reasonable and sincere people here and throughout the world,"[374] but it is one that could not help sustain the exclusion of same-sex couples from the right to marry any longer.

By contrast, it was the petitioners—and by extension same-sex couples—who had been "demeaned" by this intellectualized but animus-filled exclusion from the institution of marriage. Countering that intellectualized version of animus, Kennedy addressed the result of being excluded from marriage initially with the deprivation of "its privileges and responsibilities,"[375] but then more profoundly through the deprivation of dignity when he immediately "recounts" personal

---

[367] *See id.* ("It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.").

[368] *Id.*

[369] *Id.*

[370] *Id.*

[371] *See* Romer v. Evans, 517 U.S. 620, 635 (1996).

[372] *See* Lawrence v. Texas, 539 U.S. 558, 570 (2003).

[373] *See* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).

[374] *Obergefell*, 135 S. Ct. at 2594.

[375] *Id.*

examples of exclusion from the petitioners in order to humanize the indignity from animus.[376] First, there was petitioner Obergefell and how he and his ailing spouse, Arthur, were forced marry inside a medical transport plane on a tarmac in Baltimore, Maryland, because their home state of Ohio did not permit same-sex couples to marry.[377] Later, this same home state would not recognize their out-of-state marriage even after Arthur had passed: "By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems 'hurtful for the rest of time.'"[378] Kennedy also drew a sympathetic account of petitioners DeBoer and Rowse, a Michigan lesbian couple who could not marry in their home state, and whose unmarried status would jeopardize their parental rights over their foster children in case "tragedy" were to befall either woman.[379] Lastly, Kennedy featured petitioners DeKoe and Kostura, a gay male couple who married in New York, but whose marriage was not recognized once the pair settled in Tennessee.[380] DeKoe had served in the military and had been deployed to Afghanistan soon after the couple's marriage.[381] Kennedy observed the irony of the situation by remarking how the couple's "marriage is *stripped* from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden."[382]

The indignity in each example was personalized—showing exactly the human burden: the cost of exclusion, both legally and symbolically—and it stemmed directly from animus that, by contrast, Kennedy personified within the respondents as an impersonal and unsympathetic rhetorical question about why the law should allow same-sex marriages.[383] Whether Kennedy's literary strategy here was heavy-handed or not, the structure of the animus-dignity connection helped him demonstrate the invidiousness behind the exclusion—that from a longstanding disapproval of sexual minorities in the law of marriage, real-life people have been denigrated, and their relationships were kept in limbo. His message was clear in *Obergefell*: philosophized animus based on mere tradition has long-lasting legal and personal consequences that, as he was willing to show, are unjustified.

Kennedy's historicism continued as he ventured into a narrative outlining how the animus-dignity connection has mediated progress for both gay rights and marriage equality.[384] We see several of Lindblom's incrementalist stratagems exhibited in Kennedy's version of recent developments in gay rights and marriage equality history. First, Kennedy recounted changes to marriage itself, from religious

---

[376] *Id.*
[377] *Id.*
[378] *Id.* at 2594–95 (citing Brief for Petitioners at 7, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556).
[379] *Id.* at 2595.
[380] *Id.*
[381] *Id.*
[382] *Id.* (emphasis added).
[383] *See id.* at 2594.
[384] *Id.* at 2596–97.

to secular and finally, to something recognized contractually by the state.[385] He noted how the institution of marriage abandoned coverture when womens' rights and the stature of women began to change and "society began to understand that women have their own equal dignity."[386] Such changes were the products of bounded rationality, processing the nuances of marriage and how to comport with societal changes: "These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential."[387] Thus, bounded rationality might give hope to finding the exclusion of same-sex couples from the right and recognition of marriage unnecessary: "Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process."[388] Kennedy's descriptions of change here resemble Lindblom's figurative journey of incremental changes in the political process.[389]

When Kennedy's historicism of marriage transitioned to historicism of the modern gay rights movement, it became clear that his recount of how the changing status of women affected the doctrine of coverture in marriage was not merely an incidental example of past evolutions of marriage. Instead, the overturning of coverture was an example used to set up an eventual parallel to the current evolution of marriage toward same-sex couples. In the meantime, this historicism also set up an immediate parallel to gay rights developments, which have also endured gradual social and legal changes based on evolving views on sexuality. More profoundly for gay rights in *Obergefell*, the animus-dignity connection was used in basically a short account of the *Lawrence v. Texas* issue in order to liken the narrative struggles of sexual minorities in this historicism to that Kennedy's previous discussion on the animus that led to excluding same-sex couples from marriage. Animus was behind such laws against sodomy: "[S]ame-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law."[390] Moral disapproval brought about criminalization of same-sex sexual behavior, and, as a result, branded sexual

---

[385] *Id.* at 2594. ("For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and woman.") (citing STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 15–16 (2005); NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 9–17 (2000)).

[386] *Id.* (citing Brief of Historians of Marriage and the American Historical Association as Amici Curiae in Support of Petitioners at 16–19, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574)).

[387] *Id.* at 2595–96 (citing generally COONTZ, *supra* note 385; COTT, *supra* note 385; HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY (2000)).

[388] *Id.* at 2596.

[389] *See* discussion *supra* Part I.

[390] *Obergefell*, 135 S. Ct. at 2596.

minorities as outlaws, a status that lacked dignity: "For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity."[391] However, this pattern of animus and indignity was not merely relegated to sex acts; the theme of animus and indignity appeared beyond criminalization of same-sex intimacy and had a hand in examples of discrimination toward sexual minorities beyond privacy. Such animus was so widespread and entrenched in law and society that it conflicted with notions "that gays and lesbians had a just claim to dignity"[392] and sustained the inequality and discrimination they endured as they "were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate."[393]

But then views on sexual orientation changed. To demonstrate this transition, Kennedy first inserted a quick summary of the transition by American psychologists from categorizing homosexuality as a pathology in the 1950s to how the mental health community now "recognize[s] that sexual orientation is both a normal expression of human sexuality and immutable."[394] What had been an anti-gay essentialism has become an understanding that homosexuality perhaps embodies both constructivist ("normal expression of human sexuality") and essentialist ("immutable") notions that relinquish anti-gay attachments.[395] In a subsequent passage that reminds us of Eskridge's take on incrementalism,[396] Kennedy commented also on the changed visibility of same-sex couples that coincided with improving public and political sentiments regarding "greater tolerance" of sexual minorities.[397] As a result, Kennedy suggested, "questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law."[398] Such discussion manifested itself in the progress of sexual minorities under the law that carried the theme of dignity. Initially, there was the *Bowers* ruling against sexual minorities with its affirmance of sodomy statutes that potentially branded sexual minorities as outlaws.[399] Then, however, *Romer* shifted toward progress for sexual minorities by defeating animus-fueled legislation that would have left sexual minorities in Colorado unprotected from discrimination.[400] And finally, in *Lawrence*, the decriminalization of same-sex

---

[391] *Id.*

[392] *Id.*

[393] *Id.*

[394] *Id.* (citing Brief of Am. Psychological Ass'n et al. as Amici Curiae in Support of Petitioners at 7–17, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574)).

[395] *Id.*

[396] *See* ESKRIDGE, *supra* note 52, at 117.

[397] *Obergefell*, 135 S. Ct. at 2596 ("This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance.").

[398] *Id.*

[399] *See generally* Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[400] *See generally* Romer v. Evans, 517 U.S. 620 (1996).

intimacy countered that historical animus against such intimacy and championed the dignity rights of sexual minorities by no longer allowing the law to stigmatize them through consensual sex acts.[401]

Kennedy's observation here also highlighted the spiraling changes of gay rights incrementalism that brought us specifically into Step One of the Eskridge-Merin-Waaldijk theory of marriage equality incrementalism,[402] and it capped this section of gay rights history as one that moved from animus of sexual minorities, which was reflected and externalized in condemnation of an act that could be indicative of sexual identity, to *Lawrence*'s judicial protection and affirmation of their dignity rights.

Turning back to same-sex marriage, Kennedy's next example of animus and dignity was within a narrative that reflected some limited progress in marriage equality litigation as a result of the correlative effects of the two concepts. Kennedy described the past outcomes of the issue within the various judicial and legislative bodies that were involved.[403] This description not only coincides with the stratagem in Lindblom's disjointed incrementalism that characterizes the process as "[a] sequence of trials, errors, and revised trials,"[404] but it also continues to demonstrate the mediating role that both animus and dignity precipitate in terms of garnering progress for same-sex couples. First, Kennedy described the various significant milestones in the journey of the marriage equality issue, notably in the state courts of Hawaii[405] in 1993 and Massachusetts[406] in 2003 and DOMA's federal enactment in 1996 in between, which *Windsor* later vitiated.[407] The post-*Windsor* cases in federal circuits received mentioning and were particularly observed as having adhered to their "judicial duty to base their decisions on principled reasons and neutral discussions" by "writ[ing] a substantial body of law considering all sides of these issues."[408] From one event to another, from progress and set-back and progress again, the changing discourse in the law over same-sex marriages discussed here exhibits the features of bounded rationality over the issue of same-sex marriages—processing the issue in various venues, judicially and legislatively, incrementally spinning between examples of animus and dignity. For instance, Kennedy noted that DOMA had been passed by Congress over states' "concerns" about the potential impact of *Baehr v. Lewin*,[409] which was another instance of an intellectualized animus influencing legislative restrictions on sexual minorities. Similarly, DOMA was later defeated by *Windsor*, in part, through a redress of dignity concerns: "DOMA, the [*Windsor*] Court held, impermissibly disparaged

---

[401] *See generally Lawrence*, 539 U.S. 558.
[402] *See supra* text accompanying notes 51–61.
[403] *Obergefell*, 135 S. Ct. at 2596–97.
[404] Weiss & Woodhouse, *supra* note 65, at 256.
[405] Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).
[406] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).
[407] *See Obergefell*, 135 S. Ct. at 2596–97.
[408] *Id.* at 2597.
[409] *Id.*

those same-sex couples 'who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.'"[410]

Only one slight deviation from Kennedy's depiction of dignity triumphing over animus exists in the opinion—but one that is later rectified by his fundamental rights analysis. Within Kennedy's historicism, the intellectualized animus toward same-sex couples in marriage had not yet been completely overcome as, up until this ruling, state marriage restrictions had still existed. Of course, this deviation was also what had led to the litigation before the Court in *Obergefell*. As to the post-*Windsor* moment, Kennedy noted that decisions at the Courts of Appeals were favorable to same-sex couples and that "many thoughtful District Court decisions addressing same-sex marriage" had followed in similar suit.[411] And yet, all of these various decisions were still a mere but growing consensus reacting to that historical intellectualized disapproval of same-sex relationships. Other courts had weighed in on the same animus against same-sex couples with some adherence to tradition.[412] In essence, under Kennedy's perspective, we have moved into a collective moment where the animus-fueled restriction on marriage was no longer uniform, but rather patchworked—as "the States are now divided on the issue of same-sex marriage."[413] But despite the favorable trend toward same-sex couples, Kennedy's rhetoric carved out the space for another incremental, albeit very significant, moment by suggesting that there was nothing definitive for this issue—yet. Although this description of the successes for same-sex marriage in the moment between *Windsor* and *Obergefell* arguably downplayed the soaring momentum for same-sex couples that actually transpired during that time, Kennedy's characterization here is an important dialogic precursor to his pro-gay fundamental rights rationale. In this way, this slight deviation was not a deviation at all, but a description of the post-*Windsor* morning that tied the cold, hard, and biased animus he explored at the beginning of the opinion to the next part of his opinion addressing and rectifying that animus through a Fourteenth Amendment due process rationale steeped in dignity rights.

2. Dignity—Since *Windsor*, animus and dignity in Kennedy's gay rights cases have been more expressly exhibited as having a correlative effect. In *Obergefell*, this effect was drawn out more openly through the animus-dignity connection as an anti-stereotyping principle. Upon establishing that a stony disapproval of same-sex couples was at the core of keeping same-sex relationships outside of the categorization of marriage, Kennedy moved onto redressing this exclusion by articulating his analysis primarily via fundamental rights, the doctrinal vehicle that allowed him to fully book-end this section of the opinion with the other spectrum

---

[410] *Id.* (quoting United States. v. Windsor, 133 S. Ct. 2675, 2689 (2013)).

[411] *Id.*

[412] *See id.* at 2593, 2597 (referencing DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. at 2608; Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 864–68 (8th Cir. 2006)).

[413] *Id.* at 2597.

of his anti-stereotyping principle: dignity. He characterized fundamental rights as facilitating "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[414] What then followed was a set of four specific reasons, or "premises," from Kennedy that are all associated with dignity and that precipitated a fundamental rights application. For example, the first premise that Kennedy gave related to how the restriction impinged on the autonomy of sexual minorities to make choices that shape individual destinies.[415] Bound up in the right to marry are choices that Kennedy believes "are among the most intimate that an individual can make."[416] The concept of dignity figured into this association between marriage and personal choice when the exclusion of marriage—already fueled by animus—purported to externalize the sentiment against sexual minorities by enforcing the law in a way that categorized their personal choices differently from the rest of society. Large sweeping tenets of self-determinism were siphoned into the context of privacy, and suddenly Kennedy revisited the identity politics of the bedroom that he had summoned in *Lawrence*, except this time he noted the marital bedroom. Out of this first premise, it was clear in Kennedy's view that restricting same-sex couples from marriage infringed upon their dignity because it affected individual autonomy that shapes personhood and identity, an autonomy historically made available to opposite-sex couples.

Kennedy's second premise also aligned with dignity, and had to do with the expressive aspects of marriage on personal identity based on intimate association.[417] The category of marriage itself is one that has been dignified by society and honored, even in situations such as incarceration.[418] Wrapped up in emotional and psychological significance, marriage offers an existential self-definition: "Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other."[419] By finding that the fundamental right to marry applied to same-sex couples, sexual minorities would have liberty to partake in this important associative self-definition; otherwise, they would have continued to be outcasts from this universal institution.[420]

In his third premise for allowing same-sex couples to marry under fundamental rights, Kennedy focused on the children and families affected by the exclusion of same-sex couples from the institution of marriage and the indignities that had

---

[414] *See id.* at 2597–98 (citing Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965)).

[415] *See id.* at 2599 ("The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation.") (citing United States v. Windsor, 133 S. Ct. 2675, 2693–95 (2013)).

[416] *Id.* at 2599 (citing Lawrence v. Texas, 539 U.S. 558, 574 (2003)).

[417] *Id.*

[418] *Id.* at 2599–600 (discussing Turner v. Safley, 482 U.S. 78, 95–96 (1987)).

[419] *Id.* at 2600.

[420] *See id.* ("Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.").

arisen from that exclusion.[421] This passage reflects the law's changing attitudes about same-sex parenting, equating same-sex couples with opposite-sex couples on ability to rear children.[422] Then the dignity-rights impact—a common theme in *Windsor* and the post-*Windsor* lower courts—emerged in Kennedy's observation that "[w]ithout the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. . . . The marriage laws at issue here thus harm and humiliate the children of same-sex couples."[423] Other than the dignity-rights implications for families anchored by same-sex unions, the interesting thought here was how Kennedy debunked one of the original main premises for excluding same-sex couples: procreation. Unlike the way in which the Vermont Supreme Court in *Baker v. State*[424] famously discredited the procreation reasoning when it ruled that same-sex couples were entitled to civil unions,[425] Kennedy did not weigh in on the biology of it all. Instead, he restructured the argument to focus on the creation of families, biological or not,[426] and de-emphasized the importance of biology: "An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State . . . . The constitutional marriage right has many aspects, of which childbearing is only one."[427] What was once a powerful presumption about marriage—procreation—was relegated to just one reason for marriage, but not the only one. Rather, it is the familial situation created by same-sex parents and children that beckons the right of marriage. The slight shift in perspective is another example of legal thought on this issue moving away from anti-gay essentialism and toward a more neutral position between the biology and construct of families. This shift seemed to parallel the change in the conversation over sexual orientation immutability in *Wymyslo*, where the issue was no longer a debate over nature versus choice, but rather over the essential function of sexual identity in one's personhood and autonomy.

The last premise found indignity by the inferences reasonably drawn from the deprivation of rights and benefits that this exclusion from marriage created despite there being "no difference between same- and opposite-sex couples."[428] In categorizing the harm suffered by same-sex couples from being "denied the constellation of benefits that the States have linked to marriage,"[429] Kennedy reached for "more than just [the] material burdens" and characterized the level of harm as a societal one—an "instability many opposite-sex couples would deem intolerable in their own lives."[430] According to Kennedy, through the attachment of

---

[421] *Id.*

[422] *See id.*

[423] *Id.* at 2600–01.

[424] Baker v. State, 744 A.2d 864 (Vt. 1999).

[425] *See id.* at 882.

[426] *Obergefell*, 135 S. Ct. at 2600 ("As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted.").

[427] *Id.* at 2601.

[428] *Id.*

[429] *Id.*

[430] *Id.*

certain rights and benefits, marriage is an institution that engenders a particular status within a societal hierarchy for those allowed to participate.[431] Excluding same-sex couples from it through the denial of those rights, in part, demoted and demeaned real-life same-sex couples and same-sex relationships in general.[432] Both rights and benefits have material and symbolic value, enough to impose stigma and to damage dignity without it.

3. Anti-stereotyping—The fundamental rights section of *Obergefell*, where Kennedy discussed the indignities created by excluding same-sex couples from marriage, symbolically book-ended and redressed the lengthy historicism where animus toward same-sex couples appeared as the root of marriage inequality and the ultimate denial of dignity. All four "premises," or reasons why Kennedy found that the fundamental right to marry is applicable to same-sex couples, drew upon the deprivation of human dignity on various levels to justify the ruling that the right to marry should not be excluded from same-sex relationships. As a set, they were juxtaposed against that prejudicial animus against same-sex couples to serve two important purposes that both demonstrate the animus-dignity connection as an anti-stereotyping principle.

First, the four premises helped continue to establish the correlation between animus and dignity—building upon the connection Kennedy made in his previous gay rights rulings and examples. We see this correlation literally when Kennedy illustrated it at the end of his due process analysis when he recapitulated that intellectualized animus: "[M]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises."[433] Such "conclusions" are the same as those reached by philosophy or religion in ways that make people question if the inclusion of same-sex couples would "demean" the institution of marriage; in other words, the conclusions and premises manifested intellectualized animus toward sexual minorities and their relationships. The constitutional problem occurred "when that sincere, personal opposition [became] enacted law and public policy, [and] the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."[434] The exclusion of the right to marry was both caused by animus and resulted in indignity of a kind that had be redressed.

The second significance of setting up animus and dignity together was to show the injustice that resulted from that correlation in regard to the rights of same-sex couples. Against an animus that appeared intellectualized, hollow, and pithy because it adhered to exclusion for no other apparent reason but tradition, Kennedy demonstrated that the significance of excluding same-sex couples from the right to

---

[431] *See id.*
[432] *Id.* at 2602.
[433] *Id.*
[434] *Id.*

marriage meant that "it would disparage their choices and diminish their personhood."[435] Normative ideals about autonomy and self-determination available to opposite-sex couples but not same-sex ones are linked through the ability to marry to create a sense of dignity, whether through the status that marriage confers or the rights attached to marriage. In the face of such animus, a decision to continually perpetuate it would create overwhelming personal costs to the liberty, autonomy, and self-determination of sexual minorities in a way that not only seemed unnecessary, but also unjustified and harmful enough to violate our constitutional ideals. This was ultimately how the animus-dignity connection operated as an anti-stereotyping principle in *Obergefell*.

Thus, Kennedy's animus-dignity connection in sections II and III of *Obergefell* mediated, as an anti-stereotyping principle, the significance of marriage restrictions in order to elevate the issue as one that infringed upon the constitutional rights of same-sex couples to marry. On one hand, illustrations of indignity contextualized the inequality and marginalization of same-sex couples within the marriage issue. But within the rights and benefits that were unavailable to same-sex couples, which externalized this inequality and marginalization, we can also see that exclusion of marriage denied same-sex couples important aspects of liberty that resonate with self-expression, self-definition, and personhood. Through this connection between animus and dignity, Kennedy made a ruling that demonstrated inequality without a tiered-scrutiny analysis, but on a functional level, he also rectified that tradition of animus and exclusion through furthering the autonomy of same-sex individuals in the marriage context using fundamental rights. This furtherance of autonomy, as we will see, is another important incremental step in the advancement of the rights and protections of sexual minorities.

B. Equal Protection

Whereas, with the due process analysis in *Obergefell*, the animus-dignity connection appeared in the narrative structure of the opinion largely to allow Kennedy to humanize indignities and mediate toward his fundamental rights ruling, the animus-dignity connection was used more subtly in Kennedy's equal protection analysis. After a preamble in which he discussed the mediating principles of both the liberty and equality concepts together under the Fourteenth Amendment[436] and excerpted examples from other cases, such as *Loving v. Virginia*,[437] *Zablocki v. Redhail*,[438] and *Lawrence*,[439] Kennedy arrived at the heart of his equality analysis. He analyzed the issue, not in a tiered-scrutiny analysis involving traits, but rather from a doctrinal requirement that because the

---

[435] *Id.*

[436] *See id.* at 2602–04.

[437] *Id.* at 2603 (discussing Loving v. Virginia, 388 U.S. 1 (1967)).

[438] *Id.* (discussing Zablocki v. Redhail, 434 U.S. 374 (1978)).

[439] *Id.* at 2604 (discussing Lawrence v. Texas, 539 U.S. 558 (2003)).

fundamental right to marriage applies to same-sex couples, the equal protection analysis should view whether there had been any impingement of that right against same-sex couples through state marriage bans.[440] On the surface, "marriage laws enforced by the respondents are in essence unequal [because] same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right."[441] Essentially this reasoning was how Kennedy got around a suspect classification analysis, through a mediation of the due process issue as he attempted to evaluate its equal accessibility to both same-sex and opposite-sex couples. Marriage laws against same-sex unions thwarted that equality and had to necessarily be undone. Here was where the animus-dignity connection again emerged—as an ancillary reason noted by Kennedy that further pushed or validated his previous findings in his due process section in *Obergefell*. He drew out a connection between animus and dignity that underscored the urgency of this inequality: "Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm."[442] Again, Kennedy contextualized and historicized the inequality of same-sex couples under traditional marriage laws, conjuring up again the animus toward same-sex couples and showing the result of that animus, which eventually externalized into dignitary harm that sexual minorities had faced: "The imposition of this disability on gays and lesbians serves to disrespect and subordinate them."[443] Unequal treatment both denied same-sex couples the rights and benefits of marriage and cabined sexual minorities from personal choices and liberties enjoyed by the majority.

The equal protection issue could have been resolved on the doctrine alone, but the use of the animus-dignity connection here drew out the discriminatory effect of that inequality and was used to humanize the specific nature of marriage inequality among the states. In addition, the use of animus and dignity reiterated the kind of harms that Kennedy discussed previously in *Obergefell* under due process—harms that encompassed not only loss of material aspects (rights and benefits) but also infringement of personhood liberties (privacy and autonomy) and social stigmatization linked to animus toward sexual orientation and that encroached upon dignity. Although a determination based on sexual orientation and perhaps heightened scrutiny likely would have been preferred, the more cursory equal protection analysis here has a silver lining, as it serves to highlight Kennedy's previous rationale in fundamental rights. What Kennedy's opinion did in its analysis under the impingement of fundamental rights, whether this was his intention or not, highlighted the previous section's emphasis on liberty, made salient through discussions of indignity suffered by same-sex couples when state

---

[440] *See id.* at 2604 ("It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality.").

[441] *Id.*

[442] *Id.*

[443] *Id.*

marriage bans curtailed their rights to personal choice and autonomy. In this way, Kennedy's equal protection analysis also redressed exclusion from marriage through an affirmance of personal autonomy.

C. Immutability

The last important development in *Obergefell* that offers an incremental "step-up" for sexual orientation anti-discrimination, in lieu of elevating sexual orientation to quasi-suspect or suspect classification, is surprisingly in Kennedy's identification of sexual orientation as an immutable trait. Unlike *Wymyslo*, the *Obergefell* opinion, in comparison, mentioned immutability of sexual orientation only in mercurial—nearly incidental—fashion. However, such fleeting incidence does not diminish its importance as a significant advancement for sexual minorities. Instead, Kennedy's observation that sexual orientation is immutable could be likened to *Wymyslo*'s adoption of previous redefinitions of immutability that eventually led to the classifying of sexual orientation as quasi-suspect or suspect and relied on a connection between animus and dignity—where the inquiry was recalibrated from a finding based on the source of sexual orientation to how fundamental sexual identity is as part of personhood. The connection between immutability in *Obergefell* and *Wymyslo* has been facilitated by the animus-dignity connection in both opinions.

In *Obergefell*, the two instances where Kennedy mentioned the immutability of sexual orientation occurred in his historicism early on in the opinion. First, Kennedy raised the immutability of sexual orientation at the start of his historicism section just as he voiced the respondent's cold, hard intellectualized disapproval—that animus—toward same-sex couples.[444] Beyond the rights and benefits conferred in marriage, immutability was a secondary reason why same-sex couples should be allowed the freedom to marry. Other than the need for same-sex couples to receive the "privileges and responsibilities"[445] of marriage under the law, "their *immutable nature* dictates that same-sex marriage is their only real path to this profound commitment."[446] Without entering into as elaborate an analysis as the one required and taken by the *Wymyslo* court, Kennedy suggested at least two important sentiments regarding the immutability of sexual orientation: one, that sexual orientation is unchangeable and unwavering; and two, that this immutability is one underlying reason to abolish marriage restrictions and finally permit same-sex couples to marry in all states. In other words, the immutability of sexual orientation was so strong and essential that Kennedy used it to counter the historical animus toward same-sex couples and reveal the exclusion as something animated by severe, but hollow, prejudice. Immutability was used to show how ironically the laws against same-sex marriage produced an injustice by working an artificiality—a legal

---

[444] *See id.* at 2594.

[445] *Id.*

[446] *Id.* (emphasis added).

fiction—that deprived same-sex couples the autonomy to choose how to identify their relationships and to exert the fundamental nature of their sexual identity. Ultimately, in Kennedy's view, such deprivation would lead to the indignities he discussed in his due process analysis.[447] This interpretation also shares overlap with *Lawrence*, as the privacy and autonomy issues in that case were linked to the expression of sexual identity and the marginalization of sexual identity through sodomy laws.[448] At the same time, Kennedy's use of immutability to denote the nature of sexual orientation also resembled the overall functional definition of immutability from the *Wymyslo* decision that had led similarly to an idea that it is something basic and fundamental to a person's self-determinative core.[449]

Kennedy made a second mention of the immutability of sexual orientation when he narrated the changing views on homosexuality and sexual orientation by the U.S. psychiatric and medical community over the past several decades. Initially categorizing homosexuality as a "mental disorder" in the 1950s, the same professional community now "recognize[s] that sexual orientation is both a normal expression of human sexuality and immutable."[450] Here, "immutable" imbues sexual identity with unwavering characteristics that are also universal—negating both connotations of biological pathology and morally blameworthy choice. Although Kennedy was citing to the amicus brief filed by the American Psychological Association,[451] this passing mention of immutability did not seem to be merely an observation he was specifically affixing to amici psychiatric professionals, but rather an observation about the nature of sexual orientation that he seemed to endorse. This second mentioning of sexual orientation and immutability was immediately followed by Kennedy's own notice of the growing and positive visibility of same-sex relationships and families and served as a rhetorical transition toward bolstering changed sentiments about sexual minorities that he ultimately used to leverage his pro-gay ruling on fundamental rights.[452] At the same time, the unwavering characteristic of sexual orientation again supported reasons why orientation is so fundamental to one's identity that the law ought not to force one to change or curtail it because to do so would violate autonomy rights connected to self-determinism and personhood and lead to gross societal indignities. Thus, this use and mention of immutability also resembled *Wymyslo*'s, and was well-suited for addressing the marriage discrimination issue here within Kennedy's animus-dignity

---

[447] *See id.* at 2597–2605.

[448] *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).

[449] *See* Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 990–91 (S.D. Ohio 2013), *rev'd sum nom.* DeBoer v. Snyder, 772 F.3d 388, 420–21(6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. at 2608.

[450] *Obergefell*, 135 S. Ct. at 2596 (referring to the Brief of the American Psychological Ass'n et al. as Amici Curiae in Support of Petitioners at 7–17, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574)).

[451] *See* Brief of the American Psychological Ass'n et al. as Amici Curiae in Support of Petitioners at 7–17, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574).

[452] *See Obergefell*, 135 S. Ct. at 2596 ("In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families.").

connection. However, going forward, this mention could carry a larger resonance for addressing sexual orientation discrimination further.[453]

Short of a full treatment of sexual orientation as a trait deemed for quasi-suspect or suspect classification using the factor-test as *Wymyslo* did, both instances where Kennedy discussed sexual orientation as an immutable trait appear consistent, or, at least, compatible with *Wymyslo*'s result. The brief observations here in *Obergefell* that support the immutability of sexual orientation take on the idea that this inquiry has become a non-issue—at least in the mind of Kennedy, and perhaps with the rest of the *Obergefell* majority. The short but declarative way in which the opinion depicted the immutability of sexual orientation seemed as if the majority was taking judicial notice that sexual orientation is a basic and fundamental part of human identity that should not be easily abridged by the law. Additionally, the mention of immutability in *Obergefell* is connected to concepts of animus and dignity that are working together as an anti-stereotyping principle here, as well as in *Wymyslo*. This is where important ideas converged in *Obergefell*—where immutability and the anti-stereotyping principle in Kennedy's animus-dignity connection have united for future leveraging of rights issues of sexual minorities. Although immutability was not used explicitly here in an analysis for heightened scrutiny, it nonetheless has the resonance to reinforce a connotation that sexual orientation deserves higher constitutional protections.

In sum, despite falling short of an equality analysis that would have launched sexual orientation protection under heightened scrutiny review, the three ways in which Kennedy used the animus-dignity connection in reaching his fundamental rights holding, in ruling on equal protection, and in noting the immutability of sexual orientation all serve as increments for pushing forward the progressive views of sexual orientation within the law. In this afternoon of same-sex marriages made possible by *Obergefell*, this progress—especially in each instance's furtherance of personal autonomy of sexual minorities—is not merely as small or insignificant as it seems.

Future litigation concerning sexual orientation discrimination ought to capture and use these incremental developments from post-*Windsor* cases such as *Wymyslo* and *Obergefell* that strengthen legal perceptions regarding the trait of sexual orientation for the purposes of constitutional protection. They should continue to use animus and dignity together to impart a cohesive context of discrimination and to reframe the discussion of sexual orientation immutability that persuasively captures the struggles of sexual minorities and leverages further advances in anti-discrimination. This is what the afternoon with *Obergefell* and same-sex marriages have brought us.

V. POST-*OBERGEFELL*: WHAT THE EVENING POTENTIALLY HOLDS

[453] *See* discussion *supra* Part V.

When juxtaposed with *SmithKline* and *Wymyslo*, *Obergefell* appears more restrained in its underlying ideology of elevating the protection of sexual minorities to heightened scrutiny. The two lower cases provided major steps in recognizing sexual orientation as a quasi-suspect or suspect class, while the Supreme Court decision, however historically important, dodged the issue by choosing to base its recognition of same-sex marraige on fundamental rights theory. Nevertheless, despite its normative shortcoming for the equal protection of sexual orientation, *Obergefell*, with both Kennedy's perpetuation of the animus-dignity connection as an anti-stereotyping principle and its incremental furtherance of the autonomy rights of sexual minorities, still offers jurisprudential significance.

As an anti-stereotyping principle, the animus-dignity connection serves as a vehicle to contain the narrative of discrimination and marginalization based on sexual orientation. Rhetorically, it identifies the disapproval of sexual minorities, shows how such disapproval manifests into legal and political maneuvers against them, and illustrates the humanity-based grievances endured by them as a result. The animus-dignity connection accessibly frames the marginalization of sexual minorities as a narrative of discrimination that can be conceivably used beyond the marriage context—and even beyond sexual orientation discrimination generally. The connection between animus and dignity humanizes history and experience for substantial judicial redress. Harnessed together by Kennedy for his fourth gay rights opinion at the Supreme Court, the animus-dignity connection in *Obergefell* arrived at the marriage equality ruling. Yet more importantly, by tying the significance of the marriage right to human dignity, Kennedy was able to voice saliently that the right to marriage should be legally available to same-sex couples because otherwise it bears harmful implications for deep constitutional ideals. Specifically in *Obergefell*, Kennedy's continuous use of and reliance on the animus-dignity connection reveals an emphasis on the autonomy of sexual minorities. Abridging the personal autonomy harbored within a fundamental right is something that many of the gay rights cases discussed in this Article have had as a common theme. As Kennedy noted in *Obergefell*, "the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights."[454] In this way, autonomy is applicable outside of marriage.

Such underlying implications in *Obergefell* consequently place *SmithKline* and *Wymyslo* somewhat in alignment. After all, under *SmithKline* and *Wymyslo*, the potential increase in recognizing autonomy was already a major incremental step in raising the level of federal protection against sexual orientation discrimination—not just because it facilitated leveraging toward suspect classification, but because such recognition bolstered and developed constitutional ideas regarding privacy and individual personhood in the realm of sexual identity into actual doctrine. The courts there were not engaged in an over-simplified debate about essentialism versus constructivism; they were not venturing into the nature-versus-nurture

[454] *Obergefell*, 135 S. Ct. at 2605.

discussion over sexuality in popular culture. The refinement of the issue into one regarding autonomy—starting from a fault-based, biological emphasis to a focus on involuntariness and finally fundamental personal choice—illustrates how consensus is not needed over the biological source of sexual orientation, but is needed about how individuals respond to that biology in a way that should also not be encroached upon by involuntary coercion (perhaps based in animus or otherwise) that leads to violations of human dignity. From an incrementalist perspective, *SmithKline* and *Wymyslo* were not concerned primarily with theories of identity, but rather, in the long haul, with affording justice. They did so by attempting to safeguard individual and personal autonomy, and their shift to higher doctrine served as means to pursue these ends. In its various ways of underscoring the importance of autonomy using the animus-dignity connection, *Obergefell* concurs.

One of the ultimate leveraging advancements from the recent marriage cases, post-*Windsor* to *Obergefell*, should be an increased recognition between personal autonomy and sexual identity. Autonomy, after all, resides significantly in modern theories of democratic rights because individualism and self-determinacy has figured into the concept of humanity. Eric Mitnick, in rendering his concept of "constitutive autonomy," notes how political philosophers—Joseph Raz and John Stuart Mill, among others—have idealized autonomy in regard to an individual's creation of the self and that not having such autonomy would subvert an individual's humanity.[455] "In this sense," Mitnick writes, "liberalism envisions individual constitutive autonomy as essential to the fulfillment of basic human dignity. Exercising constitutive autonomy, on this view, is what it means to be free, to be human."[456] Relating all of this back to sexual orientation anti-discrimination, autonomy helps leverage advances within equality, because inequality here is still concerned with the distribution of rights—even if the right involves something as intangible as self-determinism but is externalized by personal choice.[457] In that sense, *Wymyslo*'s immutability standard, specifically, and *SmithKline*'s leveraging of heightened scrutiny, contextually, should have the potential to contribute towards expanding protections for sexual minorities. Henceforth, the developments in the post-*Windsor* morning, up to the afternoon with *Obergefell*, must serve legal purposes beyond furthering the legal protections and recognitions of same-sex relationships. They ought to be expanded for sexual identity in the LGBTQ movement's next increment of advancement.

Although American anti-discrimination law—as represented emblematically by the famous phrase from well-known Footnote 4 from *United States v. Carolene*

---

[455] *See* ERIC J. MITNICK, RIGHTS, GROUPS, AND SELF-INVENTION: GROUP-DIFFERENTIATED RIGHTS IN LIBERAL THEORY 140–44 (2006).

[456] *Id.* at 142.

[457] *See* Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 874 (2014) ("[D]ue process prohibits the enforcement of this prescriptive conception of sexuality and the family, as it infringes people's liberty to make certain 'deeply personal choices about love and family.'") (quoting Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1203 (D. Utah 2013)).

Products[458]—has historically harbored its interests in protecting "discrete and insular minorities"[459] based on protected group traits rather than on individual liberties,[460] existing tensions between the protection of traits and the weight of individual autonomy have for some time called into question the workability of various anti-discrimination protections. For instance, in the context of race discrimination, the historical group-minded theory behind anti-discrimination laws has been challenged by multiracial individuals and the concept of elective race that reinforces an individual's right to racial self-identification.[461] Likewise, in the current state of affairs, a person's intersectionality within a discrimination claim may pose issues regarding how his or her identity is regarded by discrimination categories in a way that results in the law interfering with a person's own self-determinative right to identify with one group over another.[462]

In another way, however, these tensions do not necessarily pose a problem for our concepts of equality and liberty in a modern democratic state—but merely show us how to delineate regulations that accurately reflect those ideas and promote anti-discrimination. In the constitutional realm, autonomy and equality have often been intertwined in cases dealing with sexual orientation discrimination.[463] One of the most notable examples of this was *Lawrence*, where the rights of privacy and intimacy were equally extended to individuals practicing same-sex intimacy, with the underlying idea that previous criminalization of such conduct was geared to targeting homosexuals.[464] In the post-*Windsor* marriage cases, a similar framework that intertwined liberty and equality was used to extend the fundamental right to marry that has always been available to opposite-sex

---

[458] United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

[459] *Id.*

[460] *See* Julie Chi-hye Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295, 341 (2007) ("U.S. law tends to limit antidiscrimination law to problems that look like, or are analogous to, the historic problems of race-based slavery and segregation, emphasizing the historic harm to groups rather than individuals.").

[461] *See* Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1517 (2014) ("[S]cholars argue that elective-race plaintiffs' insistence on using antidiscrimination law to vindicate autonomy or self-expression interests threatens to distract us from the primary purpose served by antidiscrimination law: disrupting historically established patterns of racial subordination and inequality. As these scholars explain, established racial inequality patterns are more often attributable to involuntary racial assignment based on a person's physical characteristics rather than the autonomous racial-identification choices of individual citizens.") (citations omitted).

[462] Kramer, *The New Sex Discrimination*, *supra* note 264, at 933–35.

[463] *See* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 3 (1996) (noting that in antidiscrimination protection movements, sexual minorities specifically "are asking not only for protection against discrimination but also for legal recognition of their right to marry and raise children").

[464] Lawrence v. Texas, 539 U.S. 558, 574 (2003) ("Persons in a homosexual relationship may seek autonomy . . . just as heterosexual persons do. The decision in *Bowers* would deny them this right."); *see also* Graham, *supra* note 251, at 198.

couples to same-sex couples.[465] Kennedy later devoted an explicit section in *Obergefell* that touched upon how "[r]ights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other."[466] What appears as tension can also perhaps be viewed in the same way as the animus-dignity connection could be viewed: as a negotiation or mediating device that allows for contemporary intertwining of these concepts to contextualize current issues within discrimination and signal how to resolve them doctrinally, as well as incrementally signal reforms.

This observation is promising for incrementalism and the elevation of protections that envelop sexual orientation in the political afternoon after *Windsor* and *Obergefell*. If one of the underlying goals of marriage equality was to effectuate and pave a path to heightened protections for sexual minorities, then further developments that play into this negotiation will continue these discussions after the legalities of the same-sex marriage issue has been definitively resolved. Further advances in anti-discrimination protection for sexual orientation could benefit from the recent *SmithKline*, *Wymyslo*, and *Obergefell* developments of autonomy in conceptualizing sexual orientation as a protected class.

For instance, placing sexual orientation firmly within the category of protected traits in Title VII could be the next step in the incrementalist climb after marriage equality that constructively leverages the developments from the same-sex marriage movement forward as means to an even larger political end. Although Title VII does not expressly include sexual orientation as a protectable category,[467] there is already some slippage within what "because of sex" means in claims addressing gender-stereotyping that allows some individuals to assert arguments that factually involve sexual orientation discrimination and also qualify as gender-stereotyping.[468] Originally, Congress intended to enact Title VII on the basis of protecting race,[469] but other categories, such as gender, were added in subsequent amendments.[470] The complex interplay between the characteristics of sex and gender has gradually carved out a line of cases, including Supreme Court precedent in *Price Waterhouse v. Hopkins*,[471] that have adjudicated Title VII cases in situations where gender-stereotyping was at play under the Act's definition of discrimination "because of sex."[472] Couching this idea in Judith Butler's terms,[473] the performative or

---

[465] *See, e.g.*, Kitchen v. Herbert, 755 F.3d 1193, 1229–30 (10th Cir. 2014) (holding that "those who wish to marry a person of the same sex are entitled to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex").

[466] Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015).

[467] *See* 42 U.S.C. § 2000e-2(a) (2010) (including only race, color, religion, sex, or national origin as traits protected from discriminatory acts by an employer or potential employer).

[468] *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

[469] *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 202 (1979).

[470] *See, e.g.*, 110 CONG. REC. 2577–81 (1964) (proposing to add sex as a category).

[471] *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[472] *See id.* at 251; *see also Oncale*, 523 U.S. 75.

expressive aspects of gender have broader—and perhaps fuzzier—borders than biological sex-determinacy or inferences.[474] Although other gender-stereotyping cases have articulated that the gender-stereotyping theory cannot not be utilized to "bootstrap protection for sexual orientation into Title VII,"[475] sexual minorities have been able to lodge discrimination claims in situations where they were marginalized harmfully when the expressive aspects of their personal identity based on their sexual orientation belied conventional expectations about their biological sex; however, such results have varied.[476]

This notion of marginalization or discrimination against individual gender expressions based on dominant expectations of sex—harnessing aspects of essentialism to bolster one idea of what it means "to be a man or a woman" in order to eclipse other ideas—takes a toll on personal autonomy. In this way, such harms resemble the context of discrimination that the animus-dignity connection illustrated in *Wymyslo*, which was helpful for evaluating the immutability of sexual orientation—i.e. the idea that sexual orientation plays a fundamental part in shaping personal choice and identity, so discrimination targeted against sexual orientation would hinder autonomy and lack constitutional support.[477] Both instances share concerns for personal autonomy in the midst of safeguarding against discrimination, and both have associations with marginalization based on sexual orientation. In a side-by-side comparison, there could be enough overlap between gender-stereotyping cases in Title VII and *Wymyslo*'s rendering—and

---

[473] JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY xv (1999) ("The view that gender is performative sought to show that what we take to be an internal essence of gender is manufactured through a sustained set of acts, posited through the gendered stylization of the body. In this way, it showed that what we take to be an 'internal' feature of ourselves is one that we anticipate and produce through certain bodily acts, at an extreme, an hallucinatory effect of naturalized gestures.").

[474] *See* Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 485 (2004) ("The central idea of the gender stereotyping theory is that an employee is being judged against the standard of how a stereotypical person of the same sex should look and act. In the same way, the gender stereotyping theory compares a person's anchor and expressive gender.").

[475] *See* Swift v. Countrywide Home Loans, Inc., 770 F. Supp. 2d 483, 488 (E.D.N.Y. 2011) (citing Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (quoting Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000))); *see also* DiPetto v. U.S. Postal Serv., 383 F. App'x 102, 104 n.1 (2d Cir. 2010); Pagan v. Holder, 741 F. Supp. 2d 687, 695 (D.N.J. 2010); Ceslik v. Miller Ford, Inc., 584 F. Supp. 2d 433, 444 (D. Conn. 2008); Benson v. N. Shore-Long Island Jewish Health Sys., 482 F. Supp. 2d 320, 329 (E.D.N.Y. 2007); Graziano v. Village of Oak Park, 401 F. Supp. 2d 918, 927 n.12 (N.D. Ill. 2005).

[476] *See, e.g.*, *Dawson*, 398 F.3d at 218 (staying within bootstrapping doctrine in gender-stereotyping case). *But see, e.g.*, Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 291–92 (3d Cir. 2009) (holding that as long as an employee—regardless of his or her sexual orientation—has sufficient evidence that a reasonable jury could conclude harassment occurred "because of sex," summary judgment would not be appropriate for the case).

[477] *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 990 (S.D. Ohio 2013), *rev'd sum nom.* DeBoer v. Snyder, 772 F.3d 388, 420–21(6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

Obergefell's loose bolstering—of sexual orientation as an immutable trait to eventually broaden the interpretation of "because of sex" in Title VII.

Also, because Title VII protects groups based on common traits, the immutability of traits features importantly into Title VII's calculation over which members of society to protect.[478] This could provide another way in for adding protection for sexual orientation in Title VII. In essence, protected Title VII categories reflect characteristics of identity that have been rendered immutable, and courts have recognized this aspect of Title VII anti-discrimination.[479] Despite the sometimes-waning reliance on the immutability factor, even by the Supreme Court, and despite the existence of other factors for determining protected classes in equal protection cases,[480] at some level both equality jurisprudence and Title VII rely on immutability as a criterion for higher levels of anti-discrimination protection.[481] All of these observations seem to build toward an idea based on the momentum and sentiments from the *Obergefell* ruling on marriage and the sentiments from the post-*Windsor* marriage cases that reached suspect classification and heightened scrutiny for sexual orientation, which consequently ought to provoke a normative response to expand Title VII's perspective to include sexual orientation. As Nancy Levit notes, "Employment discrimination law is also most successful when it calls attention to normative changes."[482] A new norm is now upon us. Perhaps a

---

[478] *Cf.* Mark R. Bandsuch, S.J., *Ten Troubles with Title VII and Trait Discrimination Plus One Simple Solution (A Totality of the Circumstances Framework)*, 37 CAP. U. L. REV. 965, 986 (2009).

[479] *See id.* at 987 (noting that "[c]ourts have continued to rely almost exclusively—and thus incorrectly—on the immutability standard in Title VII cases"); Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1418 (2014) (acknowledging that "Title VII prohibits discrimination only on the basis of immutable characteristics" while also critiquing the immutability criterion); *see also* Lyng v. Castillo, 477 U.S. 635, 638 (1986) (holding that close relatives are not a suspect class because, "[a]s a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"); Dean v. District of Columbia, 653 A.2d 307, 330 (D.C. 1995) (discussing constitutional rights by determining "the extent to which sexual orientation is immutable"); Jacobson v. Dep't of Pub. Aid, 646 N.E.2d 949, 953 (Ill. App. Ct. 1994), *aff'd*, 664 N.E.2d 1024 (Ill. 1996) (holding that parents of children aged eighteen to twenty-one who live at home do not "constitute a suspect class" using the immutable characteristic argument from *Lyng*).

[480] *See* Stein, *supra* note 263, at 626 ("After the immutability factor first emerged in the Supreme Court's equal protection jurisprudence, the Court has sometimes included immutability as among the factors it considers in determining whether to apply heightened scrutiny. However, the Court does not always talk about immutability when it is determining the level of scrutiny a classification deserves.") (citations omitted).

[481] *See* Bandsuch, *supra* note 478, at 981–82 ("The courts, in both Title VII and equal protection cases, began using 'immutability' (i.e., the ease or difficulty of changing a trait or characteristic) as another measure of the needed 'materially adverse affect' [sic] upon a protected class. The courts, in fact, went so far as to classify immutability as a 'requirement' for Title VII coverage, rather than just recognizing it as another factor among many to consider when determining adverse impact and protected class status.") (citing Frontiero v. Richardson, 411 U.S. 677 (1973); Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980); Roberto J. Gonzalez, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195, 2217 (2003)).

[482] Nancy Levit, *Changing Workforce Demographics and the Future of the Protected Class Approach*, 16 LEWIS & CLARK L. REV. 463, 496 (2012).

response to this shift will eventually result in the protection of sexual orientation based on an immutability standard that underscores personal autonomy.

However, given the current delay and mixed results with efforts to pass the Employment Non-Discrimination Act (ENDA) in Congress,[483] any advancements for furthering sexual orientation protection in Title VII will likely not come from a congressional amendment to the Act;[484] political and congressional actors are not aligned enough to reach a consensus on LGBTQ rights, even with recent leveraging of marriage equality—again, a ceiling in the incremental path. The less-than-favorable congressional environment for ENDA, however, does not mean that pro-LGBTQ changes in Title VII will necessarily fail as well. Thus, with the expansions of protected categories in other federal anti-discrimination laws, Levit has also observed that "[i]n the interim, doctrinal advances may be the best way to expand the reach of the categories of people protected."[485] To that effect, Levin asserts that "[o]ne way to enlarge protections under existing statutes is to redefine the boundaries of the protected categories."[486] In this vein, Levin also offers gender-stereotyping as a possible example of how doctrinal advances might help expand Title VII protections for sexual orientation.[487] Tying this notion back to recent post-*Windsor* judicial advancements, the developments from *SmithKline*, *Wymyslo*, and *Obergefell* might have given some starting traction to future judicial advances by LGBTQ litigants. Thus, if courts are the first route, then the post-marriage equality advances therein must continue to stoke the discussion of the immutability of sexual orientation and find influence in the marriage cases that have adopted a better anti-stereotyping approach to immutability than the approach that emphasized biological mutability, such as *Wymyslo*, and cases that found heightened scrutiny suitable for sexual orientation, such as *SmithKline*. Sex discrimination in Title VII needs an expansion; this expanision is warranted by a reflection from the successes in marriage equality and the norms for sexual minorities envisioned by same-sex marriages.

In another legal realm, the emerging emphasis on personal autonomy in sexual orientation from *Wymyslo* and *Obergefell* can also stoke an interesting tension when instances of progress in sexual orientation anti-discrimination potentially encroach on the boundaries of religious liberty. With marriage, where regulation is in the purview of state governments, autonomy and fundamental rights of same-sex couples trumped the beliefs, including religious ones, that "[m]arriage . . . is by its nature a gender-differentiated union of man and woman."[488] How will this strengthened view on the autonomy of same-sex couples and sexual minorities play

---

[483] *See* Ed O'Keefe, *Gay Rights Groups Withdraw Support of ENDA After Hobby Lobby Decision*, WASH. POST (July 8, 2014), http://www.washingtonpost.com/blogs/post-politics/wp/2014/07/08/gay-rights-group-withdrawing-support-of-enda-after-hobby-lobby-decision/.

[484] *See* Levit, *supra* note 482, at 485.

[485] *Id.*

[486] *Id.*

[487] *Id.* at 486.

[488] Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015).

into conflicts in other legal arenas, private and public, when sexual minorities are singled out or marginalized based on the exercise of religious beliefs that find homosexuality morally blameworthy? Shortly after *Obergefell*, there were various discussions about possible incidents of small business owners falling back on religious beliefs as a reason for denying services to same-sex couples.[489] In the public sphere, the most prominent conflict was exhibited by Kim Davis, the county clerk in Rowan County, Kentucky, who refused to recognize and process the marriage applications of same-sex couples by resorting to a religious accommodation defense based on conscience when she declined to place her signature on marriage licenses.[490] In Utah, a juvenile court judge ordered a lesbian couple to give up their infant foster daughter so that the daughter could be sent to a home with heterosexual parents.[491] Can the animus-dignity connection from *Obergefell* be adequately imported here to effectuate similar arguments about discrimination? Economics might eventually take care of the frequency of these incidences over time in private businesses.[492] Kentucky Governor Steve Beshear eventually declared valid all the otherwise noncompliant marriage applications of same-sex couples filed in Rowan County during the Davis incident.[493] The Sixth Circuit denied Davis' request to delay issuing marriage licenses to same-sex couples.[494] And, after a week of controversial media coverage that condemned the Utah judge's decision, Judge Scott N. Johansen eventually retracted his decision to remove a foster child from the care of her lesbian parents.[495] These repeated incidents of post-*Obergefell* marginalization stoke the conversation over

---

[489] *See e.g.* W.W., *Must Religious Bakers Bake Cakes for Gay Weddings?*, THE ECONOMIST (July 16, 2015, 3:01 PM), http://www.economist.com/blogs/democracyinamerica/2015/07/gay-rights-and-religious-freedom; Danielle Weatherby, *Why America's Small Businesses Aren't Cheering Same-Sex Marriage*, FORTUNE (July 15, 2015, 10:36 AM), http://fortune.com/2015/07/15/why-americas-small-businesses-arent-cheering-same-sex-marriage/; Dennis Byrne, *Same-Sex Marriage Ruling A Dire Threat to Religious Groups*, CHI. TRIB. (July 6, 2015, 3:04 PM) http://www.chicagotribune.com/news/opinion/commentary/ct-gay-same-sex-marriage-obergefell-abortion-perspec-0707-jm-20150706-column.html.

[490] *See* Mariano Castillo & Kevin Conlon, *Kim Davis Stands Ground, But Same-Sex Couple Get Marriage License*, CNN (Sept. 14, 2015, 4:24 PM), http://www.cnn.com/2015/09/14/politics/kim-davis-same-sex-marriage-kentucky/.

[491] Justin Wm. Moyer, *Utah Judge Removes Lesbian Couple's Foster Child, Say's She'll Be Better Off with Heterosexuals*, WASH. POST. (Nov. 12, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/11/12/utah-judge-removes-foster-child-from-lesbian-couple-saying-shell-be-better-off-with-heterosexuals/.

[492] *Cf.* Benjamin Snyder, *Here's How Much Gay Marriage Could Add to the Economy*, FORTUNE (June 26, 2015, 10:29 AM), http://fortune.com/2015/06/26/legalizing-gay-marriage-economy/.

[493] *See Governor: Marriage Licenses in Kentucky County Are Valid*, ASSOC. PRESS: THE BIG STORY (Nov. 17, 2015, 1:51 PM), http://bigstory.ap.org/article/6b0b9adbae124417867ebe6532ae5e16/governor-marriage-licenses-kentucky-county-are-valid.

[494] *See* Assoc. Press, *Kentucky: Defiant Clerk Loses Again*, N.Y. TIMES (Nov. 5, 2015), http://www.nytimes.com/2015/11/06/us/kentucky-defiant-clerk-loses-again.html.

[495] *See* Richard Pérez-Peña, *Utah Judge Drops Order on Lesbians' Foster Child*, N.Y. TIMES (Nov. 13, 2015), http://www.nytimes.com/2015/11/14/us/utah-lesbian-couple-foster-child-ruling.html.

discrimination based on sexual orientation and are apt to serve as the back-and-forth progress in a movement that relies heavily on incremental gesturing. Post-*Obergefell*, such episodes are holding patterns in the national consciousness to the next image of significant progress. Over and over, each incident can be characterized more easily along the arch of Kennedy's animus-dignity narrative in *Obergefell*—using animus and dignity concepts continuously to convince us that exclusion based on sexual orientation is not just an example of marginalization of a particular group that is merely offensive, but such marginalization that could be or ought to be considered redressable discrimination because such episodes share such themes as *Obergefell*.

Particularly in the aftermath of *Burwell v. Hobby Lobby*,[496] in which the Court held that private entities have some right to religious freedom,[497] the underscoring of the autonomy of sexual minorities, especially using the concept of immutability from *Wymyslo* and from the fundamental rights discussions from *Obergefell*, could cause tension in the debate regarding sexual orientation anti-discrimination and religious freedom. In other words, there could be a battle between autonomy and autonomy—the autonomy of sexual minorities to be who they are, and the autonomy of those whose religious beliefs may not have accepting views of sexual minorities being who they are.

What is interesting here is that there are some strong similarities between the two autonomies. Taking a page from how religion receives a special status under the law and is mutable in a literal sense, as one can change religious affiliations, Kramer notes that within current notions about sex and gender, particularly with transgender individuals, sex and gender are more like religion in terms of immutability.[498] Religion, of course, is immutable based on a standard closer to the one from *Wymyslo*. So, in his comparison between religion and sex as protected traits, Kramer advocates that "[m]aybe we need a softer definition of immutability."[499] The effect would be an emphasis on autonomy, which we have seen this standard to be capable of ascribing: "Under this view, immutability is more about the effect of changing one's identity rather than the ability to change it."[500] Freedoms do have limits. How the use of this standard would adjudicate

---

[496] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[497] *See id.* at 2772 ("While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. Many examples come readily to mind. So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits. If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.").

[498] *See* Kramer, *The New Sex Discrimination*, *supra* note 264, at 949.

[499] *Id.*

[500] *Id.*

instances of sexual orientation discrimination based on conduct that also reflects constitutionally protected religious freedom remains to be seen. But moving toward this notion of immutability for sexual minorities in the future of anti-discrimination would seem to incrementally strengthen the case against discrimination.

Lastly, the developments here for recognizing autonomy in sexual identity and its emphasis in these recent marriage cases, particularly in Kennedy's equal protection rationales in *Windsor* and *Obergefell*, may also be a way that legal developments in equality jurisprudence are taking nascent steps to shift away from traditional application and interpretation of Fourteenth Amendment equality, away from categorical thinking about diversity that manifests in tiered-scrutiny, and toward a regime and a language that is more workable. Perhaps, in contrast to how our anti-discrimination laws address discrimination, trait discrimination is, as many have echoed, becoming increasingly outdated or non-functional, and ideas about discrimination are becoming more focused on individuals rather than group identities.[501]

To reiterate constitutional ideals about self-determinism, the autonomy of sexual minorities must then be necessarily protected to be continually safeguarded. Such autonomy must be brought into equal recognition and fortification under our laws and not be made malleable to discrimination. The "softer" immutability standard used by *Wymyslo* and endorsed by *Obergefell* and the spotlight on the autonomy of sexual minorities would seem to both further an increment toward reflecting those changing norms about the way society regards identity construction and self-invention, while serving to protect those norms at the same time. Admittedly, using a different standard of immutability that could help successfully evaluate sexual orientation as a protectable trait in order to reify further protections for sexual orientation under Title VII, which cabins autonomy in traditional equality language and relegates it as only a compromise in the face of changing norms about how we think of identity. But advances in incrementalism always have externalities.[502] Identity is more slippery than our current laws suppose and should defy categorical thinking.[503] As Kramer has observed, "[W]hen it comes to developing anti-discrimination protections, the lived experience of discrimination

---

[501] *See id.* at 899 ("But the new sex discrimination demands a vision of equality that is rooted in difference rather than sameness, a vision of equality that understands that no two women (and no two men) are the same.").

[502] *See* Weiss & Woodhouse, *supra* note 65, at 256.

[503] Holning Lau, *An Introduction to Intragroup Dissent and Its Legal Implications*, 89 CHI.-KENT L. REV. 537, 539 (2014) ("To be sure, not all individuals feel a strong sense of membership in racial, ethnic, and religious groups, but these groups have been socially constructed in such a way that they are often salient to people's identity. Other social groups may have much weaker connections to identity.") (citing Natasha J. Silber, Note, *Unscrambling the Egg: Social Constructionism and the Antireification Principle in Constitutional Law*, 88 N.Y.U. L. REV. 1873, 1879–82 (2013); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 282–89 (1995)).

should determine the doctrine and not the other way around."[504] Indeed, from these cases we can see that our lived experiences have changed and ought to be reflected in the law as improved protection for sexual minorities. The use of autonomy here would likely reflect the change in such lived experiences.

CONCLUSION

In 1984, Ronald Reagan took his metaphorical "morning after" re-election victory for a second term. In 2015, *Windsor*'s morning after eventually led to a success in *Obergefell* for marriage equality. Yet unlike presidential terms of office, the LGBTQ political movement does not have term limits. Progress for the movement is coming continually, with starts and stops at each increment. In this regard, the recent developments for sexual orientation in equal protection claims from the post-*Windsor* cases and *Obergefell* are notable for their potential to push beyond marriage equality and leverage for changes in federal anti-discrimination laws that favor protecting sexual minorities. These developments provide momentum not only for the law to recognize the significance of sexual identities, but also for us to uncover how individual autonomy rights, so regularly valued in modern concepts of self-determinism, are hindered when such recognition is refused.

Hence, the particular morning after *Windsor* and the afternoon of *Obergefell* may be one bright, sunny, daytime period of revel, but it is also another increment of strategizing toward the next set of progresses that awaits. For if we have some doctrinal momentum, then these recent developments must move us forward into an evening when we can put sexual orientation discrimination to bed and then hopefully onto future days of normalization.

---

[504] Kramer, *The New Sex Discrimination*, *supra* note 264, at 896.