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Beyond Levels of Scrutiny: Windsor and "Bare Desire to Harm"

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BEYOND LEVELS OF SCRUTINY: WINDSOR AND “BARE DESIRE TO HARM”

Andrew Koppelman[†]

ABSTRACT

In *United States v. Windsor*, the Supreme Court left many people unsatisfied when it failed to identify the level of scrutiny to apply to laws that classify by sexual orientation. That question, however, was not even presented. DOMA makes no reference to sexual orientation, but it does speak of “man” and “woman.” It classifies on the basis of sex. Sex-based classifications are presumptively unconstitutional. The Court avoided this rationale for its result, probably because it did not want to reach the question of whether states could deny same-sex couples the right to marry.

The equal protection analysis upon which the Court did rely, the lesser-used “bare desire to harm” doctrine, had nothing to do with levels of scrutiny. It looked past that heuristic device to the underlying purposes of equal protection. This was a rare but appropriate response to an unusual kind of law, one that singles out a particular class and imposes an unprecedentedly broad disability upon it.

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INTRODUCTION

It is a truth universally acknowledged that the big question the Supreme Court evaded in *United States v. Windsor*,¹ which invalidated section 3 of the federal Defense of Marriage Act² (DOMA), is this: what is the appropriate level of scrutiny for classifications based on sexual orientation?³

But it is not true. That question was not even presented in *Windsor*. DOMA did not classify on the basis of sexual orientation. Lower courts were wrong to claim that it did.

DOMA declared, in pertinent part, that the word “marriage,” wherever it appears in the United States Code, “means only a legal union between one man and one woman as husband and wife.”⁴ It made no reference to sexual orientation, but it did speak of “man” and “woman.” It classified on the basis of sex. Sex-based classifications are presumptively unconstitutional. The Court avoided this rationale for its result, probably because it did not want to reach the question of whether states could deny same-sex couples the right to marry. The reasoning the Court did rely on, however, was correct and sufficient to dispose of the case before it.

The equal protection analysis upon which the Court relied had nothing to do with levels of scrutiny.⁵ It looked past that heuristic device to the underlying purposes of equal protection.⁶ This was a rare but appropriate response to an unusual kind of law, one that singles out a particular class and imposes an unprecedentedly broad disability upon it.

Part I of this Article explains why DOMA did not classify on the basis of sexual orientation. Part II explains that it did classify on the basis of sex. Part III examines the cases in which the Court invalidated a statute without expressly elevating the level of scrutiny. One such class of cases is that in which the statute targets a narrowly defined group and then imposes on it disabilities that are so broad and undifferentiated as to bear no discernible relationship to any legitimate

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1. 133 S. Ct. 2675 (2013).
 2. 1 U.S.C. § 7 (2012), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).
 3. See, e.g., Mike Dorf, *A Publicity Update and Then Three Thoughts on Justice Scalia’s Dissent in Windsor*, DORF ON LAW (June 28, 2013, 10:37 AM), <http://www.dorfonlaw.org/2013/06/a-publicity-update-and-then-three.html>; Ariel Chesler, *Some Justice for the Second Sexuality*, HUFFINGTON POST (June 27, 2013, 1:29 PM), http://www.huffingtonpost.com/ariel-chesler/some-justice-for-the-seco_b_3509168.html.
 4. 1 U.S.C. § 7.
 5. See *Windsor*, 133 S. Ct. at 2693–96.
 6. *Id.* at 2693.

governmental interest. Part IV argues that DOMA was such a statute. Part V examines the curious place of federalism in the *Windsor* Court's reasoning.

I. IT'S NOT A SEXUAL ORIENTATION CLASSIFICATION

Many courts have now held that laws denying same-sex couples the right to marry classify on the basis of sexual orientation. Such laws, the courts say, therefore present the question of whether classification on the basis of sexual orientation is subject to heightened scrutiny.⁷ DOMA, which withheld federal recognition from same-sex marriages for all purposes throughout the United States Code, similarly was held by lower courts to classify on the basis of sexual orientation.⁸ The Obama Administration reached the same conclusion,⁹ and that position was urged upon the Court in many of the briefs.¹⁰

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7. See, e.g., *Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 431 n.24 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384, 440–41 (Cal. 2008) (“[T]he marriage statutes, realistically viewed, operate clearly and directly to impose different treatment on gay individuals because of their sexual orientation.”), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, as recognized in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); see also *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866–67 (8th Cir. 2006) (assuming that a challenge to a state marriage statute turns on whether homosexuality is a suspect classification).
 8. *Windsor v. United States*, 699 F.3d 169, 181–85 (2d Cir. 2012) (assuming without argument that DOMA classifies on the basis of sexual orientation), *aff'd on other grounds*, 133 S. Ct. 2675 (2013); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 310–33 (D. Conn. 2012) (same); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 (N.D. Cal. 2012) (“DOMA makes distinctions between legally married couples, by granting benefits to opposite-sex married couples but denying benefits to same-sex married couples. Accordingly, DOMA treats gay and lesbian individuals differently on the basis of their sexual orientation.”). An exception is *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 387 (D. Mass. 2010), which declined to address the level of scrutiny because the statute was invalid as lacking a rational basis.
 9. See Press Release, Dep't of Justice, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (assuming without argument that DOMA classified on the basis of sexual orientation).
 10. See, e.g., Brief on the Merits for Respondent Edith Schlain Windsor at 15, *United States v. Windsor*, 133 S. Ct. 2675 (Feb. 26, 2013) (No. 12-307); Brief for the United States on the Merits Question at 18, *United States v. Windsor*, 133 S. Ct. 2675 (Feb. 22, 2013) (No. 12-307); Brief of 172 Members of the U.S. House of Representatives and 40 U.S. Senators as Amici Curiae in Support of Respondent Edith Schlain Windsor, Urging Affirmance on the Merits at 1, *United States v. Windsor*, 133 S. Ct. 2675 (Mar. 1, 2013) (No. 12-307).

The objection that devastates this reasoning is simple. Respondent Bipartisan Legal Advisory Group of the House of Representatives (BLAG) argued in a footnote in its brief on the merits in *Windsor* that “DOMA does not classify based on a married couple’s sexual orientation” because a gay person could enter into a different-sex union that would fall within DOMA’s definition of marriage.¹¹

BLAG was right.¹² To see why it was right, consider what it means for a law to classify on the basis of a trait.

The Equal Protection Clause of the Fourteenth Amendment states that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹³ The Supreme Court has interpreted this provision as prohibiting arbitrary discrimination or treating similar things dissimilarly.¹⁴ Without more, this produces a very deferential standard of judicial review. “The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”¹⁵ Laws that classify based on “race, alienage, or national origin,” on the other hand, “are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.”¹⁶ Almost no legislation has been able to satisfy that test, whereas almost any legislation can meet “minimal scrutiny,” which asks whether the statute is rationally related to a legitimate state interest. In the 1970s, the Court devised a third, intermediate level of scrutiny: classifications based on sex or illegitimacy are what has been infelicitously called “quasi-suspect”; they “will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest.”¹⁷ This isn’t strict scrutiny, but it comes close. The Court has held that “the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an exceedingly

11. See Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 25 n.7, *United States v. Windsor*, 133 S. Ct. 2675 (Jan. 22, 2013) (No. 12-307) [hereinafter BLAG Brief].

12. It is right about the character of the *classification*. Whether there is impermissible *discrimination* is a different question. A law may be impermissibly discriminatory even if it does not facially classify on a suspect or quasi-suspect basis. See *infra* notes 41–42 and accompanying text.

13. U.S. CONST. amend. XIV, § 1.

14. I am not endorsing this approach to equal protection. For my critique, see ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* (1996). This Article stipulates existing doctrine and works within its parameters.

15. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

16. *Id.*

17. *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982).

persuasive justification for the classification.”¹⁸ “The burden of justification is demanding and it rests entirely on the State.”¹⁹

Everything turns on whether the law employs a suspect or quasi-suspect classification. How do we know when that is happening? *A classification is based on trait T if it requires state officials, in allocating rights and burdens, to determine in specific cases whether T is present.* Legal consequences must turn on the presence or absence of *T*. That is what it means to classify.

The principle should be obvious. Evidently it is not. So here are some examples.

In *Brown v. Board of Education*,²⁰ the state had to determine the race of students in order to decide what school to place them in.²¹ That is how we know that the state was using a race-based classification. *McLaughlin v. Florida*²² unanimously invalidated a criminal statute prohibiting an unmarried interracial couple from habitually living in and occupying the same room at night.²³ The Court found it “readily apparent” that the statute “treats the interracial couple made up of a white person and a Negro differently than it does any other couple.”²⁴ The race of the defendant was an essential element of the crime that the prosecution had to prove.²⁵ Justice Stewart, concurring, declared that “it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor.”²⁶

The principle works similarly with sex discrimination. *Frontiero v. Richardson*²⁷ invalidated a law that automatically allowed male members of the Air Force to claim their wives as dependents and

18. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (internal quotation marks omitted); *see also* *United States v. Virginia*, 518 U.S. 515, 531 (1996) (“Parties who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action.” (internal quotation marks omitted)).

19. *Virginia*, 518 U.S. at 533.

20. 347 U.S. 483 (1954).

21. *Id.* at 487–88.

22. 379 U.S. 184 (1964).

23. *Id.* at 184.

24. *Id.* at 188.

25. *See, e.g.*, *Jones v. Commonwealth*, 80 Va. 538, 542 (1885) (“To be a negro is not a crime; to marry a white woman is not a crime; but to be a negro, and being a negro, to marry a white woman is a felony; therefore, it is essential to the crime that the accused shall be a negro—unless he is a negro he is guilty of no offence.”).

26. 379 U.S. at 198 (Stewart, J., concurring).

27. 411 U.S. 677 (1973).

therefore receive housing and medical benefits but required female members to prove that their husbands depended on them for more than half their support.²⁸ If Sharron Frontiero had been male, she would have received the benefits.²⁹ In order to determine her rights, the Air Force had to determine whether she was male or female. *Weinberger v. Wiesenfeld*³⁰ struck down a provision of the Social Security Act that allowed a widowed mother, but not a widowed father, to receive survivor's benefits based on the earnings of the deceased spouse.³¹ If Stephen Wiesenfeld had been female, he would have received the benefits he was denied.³² Once more, administrators had to determine whether he was male or female. The Court later referred to "the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'"³³

The state is not classifying on the basis of *T* if it classifies on the basis of *X*, which overlaps very largely with *T*. Pregnancy-based classifications are not sex-based classifications, even though only women can become pregnant.³⁴ In order to decide whether a person's medical conditions arise from pregnancy, the state does not need to decide whether that person is male or female. The degree of overlap doesn't matter. The test looks at the classification that appears within the statute, not at its external effects.

Nor is the question but-for causation—whether a person would not be adversely affected by the statute if she did not belong to a protected class. Being female is a but-for cause of pregnancy. The question is whether the person administering the law is instructed by the law to classify on the basis of the characteristic and to allocate rights and duties on the basis of that classification.

28. *Id.* at 680.

29. *See id.*

30. 420 U.S. 636 (1975).

31. *Id.* at 653.

32. *Id.* at 640–41.

33. *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (quoting *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1170 (1971)) (holding that Title VII prohibits assessment of larger pension fund contributions from female than from male employees, even though as a class women do live longer than men).

34. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974); *see also Bray v. Alexandria Women's Health Clinic*, 505 U.S. 263, 271, 272 n.3 (1993) (citing *Geduldig* with approval). I am not here endorsing *Geduldig's* holding that there is no sex discrimination. *See* ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 60 (2002). However, it is correct that pregnancy discrimination does not require any state official to classify persons on the basis of sex.

So here is the problem. Neither a state law denying same-sex couples the right to marry nor DOMA require any official to determine anyone's sexual orientation. Some laws do.³⁵ Under the military's now-abandoned exclusion, officials had to decide whether someone was gay in order to decide whether they were to be thrown out.³⁶ But the marriage laws don't classify on that basis.

The BLAG brief explained:

A marriage between a man and a woman would fall within DOMA's definition even if one or both spouses were homosexual. Similarly, the marriage of two men would fall outside the definition even if both were heterosexual. There is no question, however, that DOMA has a disproportionate impact on individuals with a homosexual orientation.³⁷

The concession in the last sentence of course conceded nothing important. Rather, it characterized the legal claim against DOMA as a clear loser. Disproportionate impact does not trigger heightened scrutiny. Even for African Americans, the group that receives the highest level of constitutional protection against discrimination, disparate impact, without more, does not state a constitutional claim.³⁸ In order to violate the Fourteenth Amendment, state action that does not employ a suspect classification must be taken "because of, not merely 'in spite of,' its adverse effects upon an identifiable group."³⁹

A facially neutral law may nonetheless violate equal protection if the disparate impact reflects a purpose to discriminate. This is not much help for the cause of same-sex marriage. The Iowa Supreme Court held that "[t]he benefit denied by the marriage statute—the status of civil marriage for same-sex couples—is so 'closely correlated with being homosexual' as to make it apparent the law is targeted at gay and lesbian people as a class."⁴⁰ But this is ahistorical fiction. Some facially

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35. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating a Colorado state constitutional measure labeled "No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation").
36. 10 U.S.C. § 654(b) (2006) ("Don't Ask, Don't Tell" statute providing for discharge of a member of the United States armed forces for unconcealed homosexuality), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.
37. BLAG Brief, *supra* note 11, at 25 n.7.
38. *Washington v. Davis*, 426 U.S. 229, 239 (1976).
39. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).
40. *Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009) (quoting *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in the judgment)).

neutral actions do intentionally target gay people,⁴¹ and thus *discriminate* even if they do not facially *classify*. But this cannot reasonably be said of the traditional definition of marriage, which antedates by millennia the modern conception of homosexuality.⁴²

As for the more recent legislative initiatives—statutory and state constitutional bans on same-sex marriage—these do not necessarily reflect a desire to harm gay people as such, or even a disrespectful devaluation of their interests.⁴³ For many opponents of same-sex marriage, gay people are marginal to their view of the world. Justice Alito nicely summarized the position: “marriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so.”⁴⁴ Whatever the merits of this notion,⁴⁵ it is not about gay people. It is focused on the value of a certain kind of heterosexual union.⁴⁶ The existence of gay people is a side issue.⁴⁷ The function of marriage law,

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41. See, e.g., *Lawrence*, 539 U.S. at 583 (O’Connor, J., concurring in the judgment) (“While it is true that the law applies only to conduct, . . . [i]t is . . . directed toward gay persons as a class.”); Christian Legal Soc. Chapter v. Martinez, 130 S. Ct. 2971, 2990 (2010) (“Our decisions have declined to distinguish between status and conduct in this context.”); see also *Lawrence*, 539 U.S. at 575 (“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” (emphasis added)).
 42. The Connecticut Supreme Court reached a similar conclusion by relying on the state’s civil union law, which placed same-sex couples in a separate category, rather than ignoring them altogether. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 431 n.24 (Conn. 2008) (“It is readily apparent, therefore, that the statutory scheme at issue purposefully and intentionally distinguishes between same sex and opposite sex couples.”). But focusing on this produces the strange result that states offering some accommodation of gay couples violate equal protection, while states denying any recognition whatsoever do not.
 43. The contrary view is argued in Susannah W. Pollvogt, Windsor, *Animus, and the Future of Marriage Equality*, 113 COLUM. L. REV. SIDEBAR 204 (2013), <http://columbialawreview.org/wp-content/uploads/2013/12/Pollvogt-113-Colum.-L.-Rev.-Sidebar-204.pdf>.
 44. *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting).
 45. For a critique, see Andrew Koppelman, *More Intuition than Argument*, COMMONWEAL, May 3, 2013, at 23 (reviewing SHERIF GIRGIS ET AL., *WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE* (2012)); Andrew Koppelman, *Judging the Case Against Same-Sex Marriage*, 2014 U. ILL. L. REV. 431.
 46. See, e.g., Rod Dreher, *Sex After Christianity*, AM. CONSERVATIVE, Mar.–Apr. 2013, at 20. Thanks to Maggie Gallagher for calling this article to my attention.
 47. See GIRGIS ET AL., *supra* note 45, at 10–12, 86–93.

on this view, is to protect a human good that gay people happen to be unable to realize: marriage laws do not discriminate against them any more than art museums discriminate against blind people. The Court, Scalia wrote in *Romer*, should not be “verbally disparaging as bigotry adherence to traditional attitudes.”⁴⁸ If the core of equal protection is the right to be treated as an equal, then it is not obvious that this right is violated by these laws.⁴⁹

II. BUT IT IS A SEX-BASED CLASSIFICATION

In a footnote of its brief, BLAG stated that “DOMA classifies based on whether a marriage is . . . between two persons . . . of the opposite sex.”⁵⁰ Here, BLAG was absolutely right. DOMA’s definition was a sex-based classification. Such a classification was unconstitutional absent an “exceedingly persuasive justification.”⁵¹ Such justifications, in the context of discrimination against same-sex couples, evidently are hard to come by.⁵²

All discrimination against gay people is sex discrimination for the same reason that discrimination against members of interracial couples is race discrimination. The fact that a person is sexually attracted to women might trigger discrimination, depending on the target’s sex. So even the military exclusion, now repealed, turns out, on analysis, to be a kind of sex discrimination.⁵³ But this analysis was unnecessary with DOMA, which used a sex-based classification on its face.

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48. *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting).
49. DOMA, which lashed out wildly at gay people, presented a different case. See Andrew Koppelman, *Why Scalia Should Have Voted to Overturn DOMA*, 108 NW. U. L. REV. COLLOQUY 131 (2013), <http://www.law.northwestern.edu/lawreview/colloquy/2013/12/LRColl2013n12Koppelman.pdf>; Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997).
50. BLAG Brief, *supra* note 11, at 25 n.7.
51. *United States v. Virginia*, 518 U.S. 515, 531 (1996).
52. It is conceivable (though unlikely) that a court could decide that the goods associated with heterosexual marriage provide such a justification. See GIRGIS ET AL., *supra* note 45. That position would be far more coherent than the claim that a law targeting same-sex couples is not a sex-based classification.
53. I have argued this for years. See KOPPELMAN, *supra* note 14, at 146–76; Andrew Koppelman, *Sexual Disorientation*, 100 GEO. L.J. 1083 (2012); Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923, 945–49 (2010); Andrew Koppelman, *The Miscegenation Analogy in Europe, or, Lisa Grant Meets Adolf Hitler*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 623 (Robert Wintemute & Mads Andenæs, eds., 2001); Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV.

Windsor presented exactly the same situation as *Frontiero* and *Wiesenfeld*. Had Edith Windsor been a man instead of a woman, the tax exclusion would automatically have been granted. The classification was sex-based because the state official had to determine what sex she was in order to decide how to treat her.

Justices Ginsburg and Kennedy noticed this in the oral argument in *Hollingsworth v. Perry*,⁵⁴ the California same-sex marriage case that was dismissed for lack of standing on the day that *Windsor* was decided.⁵⁵ In *Windsor* itself, Justice Alito wrote in his dissenting opinion

519 (2001); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) [hereinafter Koppelman, *Why Discrimination*]; Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988) [hereinafter Koppelman, Note, *The Miscegenation Analogy*].

54. 133 S. Ct. 2652 (2013).

55. Here is the transcript:

[MR. COOPER:] The issues, the constitutional issues that have been presented to the Court, are not of first impression here. In *Baker v. Nelson*, this Court unanimously dismissed for want of a substantial Federal question.

JUSTICE GINSBURG: Mr. Cooper, *Baker v. Nelson* was 1971. The Supreme Court hadn't even decided that gender-based classifications get any kind of heightened scrutiny.

MR. COOPER: That is—

JUSTICE GINSBURG: And the same-sex intimate conduct was considered criminal in many States in 1971, so I don't think we can extract much in *Baker v. Nelson*.

MR. COOPER: Well, Your Honor, certainly I acknowledge the precedential limitations of a summary dismissal. But *Baker v. Nelson* also came fairly fast on the heels of the *Loving* decision. And, Your Honor, I simply make the observation that it seems implausible in the extreme, frankly, for nine justices to have—to have seen no substantial Federal question if it is true, as the Respondents maintain, that the traditional definition of marriage insofar as—insofar as it does not include same-sex couples, insofar as it is a gender definition is irrational and can only be explained, can only be explained, as a result of anti-gay malice and a bare desire to harm.

JUSTICE KENNEDY: Do you believe this can be treated as a gender-based classification?

MR. COOPER: Your Honor, I—

JUSTICE KENNEDY: It's a difficult question that I've been trying to wrestle with it.

MR. COOPER: Yes, Your Honor. And we do not. We do not think it is properly viewed as a gender-based classification. Virtually every appellate court, State and Federal, with one exception, Hawaii, in a superseded opinion, has agreed that it is not a gender-based classification, but I guess it is gender-based in the sense that marriage itself is a gendered institution, a gendered

that Windsor sought “a holding that enshrines in the Constitution a particular understanding of marriage under which the sex of the partners makes no difference.”⁵⁶

A few judges have accepted the sex discrimination argument for same-sex marriage,⁵⁷ but many more have rejected it. The argument that is always made is that there is no sex-based classification because persons of both sexes are equally forbidden to marry a person of the same sex.⁵⁸ Sex discrimination challenges to DOMA were rejected on

term, and so in the same way that fatherhood is gendered more motherhood is gendered, it’s gendered in that sense.

But we—we agree that to the extent that the classification impacts, as it clearly does, same-sex couples, that—that classification can be viewed as being one of sexual orientation rather than —

Transcript of Oral Argument at 12–14, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (Mar. 26, 2013) (No. 12-144), 2013 WL 1212745 at *12–15. Note how, at the end of the exchange, Cooper tries to argue that a law that has a disparate impact on same-sex couples is a sexual orientation classification. That is an obvious misstatement of equal protection law. See *supra* notes 38–39 and accompanying text. On the possible attractions of the sex discrimination argument for Justice Kennedy, see Sonja West, *What is Anthony Kennedy Thinking?*, SLATE (June 12, 2013, 10:48 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/anthony_kennedy_s_gay_marriage_views_the_supreme_court_justice_may_see_banning_single.html.

56. *United States v. Windsor*, 133 S. Ct. 2675, 2711 (Alito, J., dissenting).
57. *E.g.*, *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013) (dictum); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010); *Hernandez v. Robles*, 855 N.E.2d 1, 29–30 (N.Y. 2006) (Kaye, C.J., dissenting); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 971–73 (Mass. 2003) (Greaney, J., concurring); *Baker v. State*, 744 A.2d 864, 905–07 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *5 (Alaska Super. Ct. Feb. 27, 1998); *Baehr v. Lewin*, 852 P.2d 44, 64–67 (Haw. 1993) (plurality opinion); *Andersen v. King Cnty.*, 138 P.3d 963, 1037–39 (Wash. 2006) (en banc) (Bridge, J., concurring in dissent). See also *Terveer v. Billington*, 2014 WL 1280301 at *9 (D.D.C. 2014) (holding that discrimination against gay employee is based on nonconformity with sex stereotypes).
58. *E.g.*, *Geiger v. Kitzhaber*, 2014 WL 2054264 at *7 (D. Or. 2014) (“Men and women are prohibited from doing the exact same thing: marrying an individual of the same gender.”); *Latta v. Otter*, 2014 WL 1909999 at *15 (D. Idaho 2014) (“[T]wo men have no more right to marry under Idaho law than two women. In other words, Idaho’s Marriage Laws are facially gender neutral and there is no evidence that they were motivated by a gender discriminatory purpose.”); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1005 (D. Nev. 2012) (“The laws at issue here are not directed toward persons of any particular gender”); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1098 (D. Haw. 2012) (the marriage prohibition “is gender-neutral on its face; it prohibits men and women equally from marrying a

the same basis.⁵⁹ The argument is inconsistent with binding Supreme Court precedent, which rejected a structurally identical argument in the context of race,⁶⁰ but set that aside. Imagine a different, equally symmetrical statute, forbidding persons of both sexes to perform a job “traditionally performed by the other sex.”⁶¹ Or here’s another: “a statute that required courts to give custody of male children to fathers

member of the same-sex”); *Hernandez*, 855 N.E.2d at 10–11 (“[w]omen and men are treated alike—they are permitted to marry people of the opposite sex, but not people of their own sex”); *In re Marriage Cases*, 183 P.3d 384, 436 (Cal. 2008) (“[T]he challenged marriage statutes do not treat men and women differently.”), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Conaway v. Deane*, 932 A.2d 571, 597–98 (Md. 2007) (finding that the state ERA is not implicated unless a statute grants “rights to men or women as a class, to the exclusion of an entire subsection of similarly situated members of the opposite sex”); *Andersen*, 138 P.3d at 988 (“Men and women are treated identically” when same-sex marriage is prohibited); *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 706–09 (Cal. Ct. App. 2006) (holding that the opposite-sex marriage requirement is a law that “merely mentions gender,” treats both sexes equally, and so is not discriminatory), *rev’d*, 183 P.3d 384, 436 (Cal. 2008); *Baker*, 744 A.2d at 880 n.13 (“[E]ach sex is equally prohibited from precisely the same conduct.”); *Dean v. District of Columbia*, 653 A.2d 307, 363 n.2 (D.C. App. 1995) (Steadman, J., concurring) (“The marriage statute applies equally to men and women.”); *Phillips v. Wisconsin Pers. Comm’n*, 482 N.W.2d 121, 127–28 (Wis. Ct. App. 1992) (holding that woman with female partner was not discriminated against because men with male partners were similarly denied benefits); *Baehr*, 852 P.2d at 71 (Heen, J., dissenting) (“[A]ll males and females are treated alike.”); *see also Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971) (citing a “clear distinction” without explaining what it is), *appeal dismissed*, 409 U.S. 810 (1972); *Singer v. Hara*, 522 P.2d 1187, 1191–92 (Wash. Ct. App. 1974) (indicating that the discrimination is based not on sex but on the definition of marriage). The *Latta v. Otter* court also deemed it significant that “the Supreme Court has not equated sexual orientation discrimination and sex discrimination despite several opportunities to do so,” 2014 WL 2054264 at *15. However, it is familiar doctrine that a Court does not reject an argument on the merits when it simply finds it unnecessary to address it.

59. *See, e.g., Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 877 (C.D. Cal. 2005), *aff’d in part, vacated in part and remanded with directions to dismiss for lack of standing*, 447 F.3d 673, 686 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307–08 (M.D. Fla. 2005) (“DOMA does not discriminate on the basis of sex because it treats women and men equally.”); *In re Kandau*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004) (“Women, as members of one class, are not being treated differently from men, as members of a different class.”).
60. Even a law student could figure this out. *See Koppelman*, Note, *The Miscegenation Analogy*, *supra* note 53, at 147.
61. Stephen Clark, *Same-Sex but Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L.J. 107, 143 (2002).

and female children to mothers.”⁶² By the argument’s logic, these laws do not impose sex-based classifications. Stephen Clark has observed:

The semantic trick is simply to avoid talking about the sex-based differential in concrete terms of what opportunities women and men are allowed and, instead, to embed that very differential in the supposed single standard, which is recast as a uniformly applicable formula that allocates opportunities to “everyone” by making everyone’s opportunities turn, in the but-for sense, on what their sex happens to be.⁶³

Another strategy for rejecting the sex discrimination argument is importing into the equal protection analysis elements that do not belong there—either a rule that “separate but equal” does not violate equal protection,⁶⁴ or a rule that sex classifications are permissible unless the challenger shows that they were adopted with the purpose of subordinating women.⁶⁵ Neither of these has ever been adopted by the Supreme Court, and both are inconsistent with well-settled precedents. To make matters worse, the courts rejecting the sex discrimination arguments have often relied on sex-based stereotypes to justify the denial of marriage to same-sex couples: that men and women provide distinct role models for children, that the two sexes have complementary roles in marriage, that marriage is a remedy for male

62. *Baker*, 744 A.2d at 906 n.10 (Johnson, J., concurring in part and dissenting in part).

63. Clark, *supra* note 61, at 144.

64. Clark shows that this is a rule that has implicitly been accepted in some sex discrimination cases, but only where the burden is a trivial one, such as a requirement that men and women use separate toilets. It will not work here unless it can be shown that the partner you want is fungible with the partner that the state wants you to have. *Id.* at 174–84. What the California Supreme Court said about race is equally applicable here: “A member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains.” *Perez v. Lippold*, 198 P.2d 17, 25 (Cal. 1948).

65. Clark, *supra* note 61, at 147–53. *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1286 (N.D. Okla. 2014); *Bassett v. Snyder*, 951 F. Supp. 2d 939, 961 (2013). Justice Scalia so argues in his response to the sex discrimination argument in *Lawrence v. Texas*, 539 U.S. 558, 599–600 (2003) (Scalia, J., dissenting). Justice Scalia is right that a discriminatory purpose is sufficient to subject “a facially neutral law that makes no mention of race” to strict scrutiny. *Id.* at 600. But this does not distinguish the miscegenation laws, which were not facially neutral. If challengers had this burden, they would be able to satisfy it, because the homosexuality taboo is, as a matter of cultural fact, closely tied to the subordination of women. See Koppelman, *Why Discrimination*, *supra* note 53, at 234–73.

irresponsibility.⁶⁶ So, far from justifying laws under intermediate scrutiny, these are the very illicit motives that intermediate scrutiny is trying to detect.

Courts have gone to great lengths to resist the sex discrimination argument, which they have regarded as “counterintuitive and legalistic.”⁶⁷ The resistance is puzzling. Any law that discriminates against gay people classifies on the basis of sex, and until recently sodomy laws criminalized some conduct for one sex but not for the other.⁶⁸ It is hard to understand how this aggressive policing of the boundaries of gender could be imagined to have nothing to do with sex discrimination.

The Court could have disposed of *Windsor* on sex discrimination grounds. Why didn't it do that? This would have been doctrinally tidy and would not have required the Court to craft any new law. On the other hand, it would have reached the question that the Court avoided in *Perry*, effectively declaring the presumptive invalidity of every law in the country denying same-sex couples the right to marry. The Court was not eager to reach that issue.⁶⁹

III. BEYOND LEVELS OF SCRUTINY

Instead, the Court relied on a line of cases that hold that a law is invalid if it reflects a “bare desire to harm” a politically unpopular group. None of these cases say what level of scrutiny is being applied. It seems to be minimal, rational basis scrutiny, yet it is rational basis “with bite.” These cases puzzle scholars.⁷⁰

66. This is extensively documented in Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461 (2007).

67. *Wolf v. Walker*, 986 F. Supp. 2d 982, 1008 (W.D. Wisc. 2014).

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

69. *See Andrew Koppelman, Salvaging Perry*, 125 HARV. L. REV. F. 69 (2012). This was emphasized in an amicus brief that I coauthored. *See Brief of Amici Curiae William N. Eskridge Jr., Rebecca L. Brown, Daniel A. Farber, and Andrew Koppelman in Support of Respondents, Hollingsworth v. Perry*, 558 U.S. 183 (Feb. 28, 2013) (No. 12-144), 2013 WL 840011 (advocating for an application of equal protection similar to the Ninth Circuit's equal protection analysis).

70. *See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 704–06 (4th ed. 2011) (attempting to reconcile cases scrutinized under rational basis “with bite” with cases decided according to traditional rational basis scrutiny); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 357–58 (1999) (noting that the cases that have been scrutinized under rational basis “with bite” do not seem to exhibit an obvious pattern).

Is it appropriate thus to discard the scheme of levels of scrutiny? It depends on the reasons for using that judge-made device in the first place.

The Court has repeatedly explained:

the purpose of strict scrutiny is to “smoke out” illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen “fit” this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.⁷¹

The bare desire to harm cases, which I examine in this Part, bypass that heuristic in a few rare cases where the device is unnecessary for inferring such a purpose. In those cases, the Court adopted a different heuristic.

Illegitimate racial prejudice or stereotypes are illegitimate because they devalue the interests of some citizens, treating them as less than full members of the community. Paul Brest observes that one way in which equal protection can be violated is for state actions to reflect “racially selective sympathy and indifference,” meaning “the unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one’s own group.”⁷² John Hart Ely argues that in order for legislation to be legitimate, the citizens must all “be represented in the sense that their interests are not to be left out of account or valued negatively in the lawmaking process.”⁷³ Racial prejudice is one driver of that devaluation. But it is hardly the only one. That is why the Equal Protection Clause does not only forbid racial discrimination.

71. *City of Richmond v. Croson*, 488 U.S. 469, 493 (1989); *see also* *Johnson v. California*, 543 U.S. 499, 506 (2005) (quoting *Croson*, 488 U.S. at 493); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (same); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (same).

72. Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7–8 (1976).

73. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 223 n.33 (1980). Legislation on the basis of stereotyping violates this constraint by massively overgeneralizing: “[T]o disadvantage—in the perceived service of some overriding social goal—a thousand persons that a more individualized (but more costly) test or procedure would exclude, under the impression that only five hundred fit that description, is to deny the five hundred to whose existence you are oblivious *their* right to equal concern and respect, by valuing their welfare at zero.” *Id.* at 157. The theory of equal respect in decision making that these authors rely upon is elaborated and defended in KOPPELMAN, *supra* note 14, at 13–56, and Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 101–03 (1997) [hereinafter Koppelman, *Invidious Intent*].

Certain legislative classifications are so closely associated with prejudice that courts presume an illegitimate purpose. But there are other ways to infer such a purpose. One is to consider whether the law's "purported justifications" make "no sense in light of how the [government has] treated other groups similarly situated in relevant respects."⁷⁴ If that is the case, the Court can reasonably infer that the basis of the law is "irrational prejudice."⁷⁵ The bare desire to harm cases show another path to the same conclusion.

The first of these is *USDA v. Moreno*.⁷⁶ The Court invalidated a 1971 amendment to the Food Stamp Act of 1964⁷⁷ that excluded from participation in the food stamp program any member of a household whose members are not all related to each other.⁷⁸ Congress, the legislative history showed, was attempting to prevent "hippie communes" from receiving any stamps.⁷⁹ The Court—after finding that the law did not fit any of the purposes cited in its defense—held that this purpose (which the government did not argue for) could not provide the needed rational basis: "[I]f the constitutional concept of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."⁸⁰ The law in *Moreno* had no purpose other than to keep federal benefits out of the hands of a group Congress did not like. The Court, however, did not decide that this was the purpose of the law. Rather, if this impermissible purpose was excluded, the law had no purpose at all.

Moreno became relevant to the gay rights question in *Romer v. Evans*,⁸¹ which struck down an amendment to the Colorado Constitution—referred to on the ballot as Amendment 2—declaring that neither the state nor any of its subdivisions could prohibit discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."⁸² The Amendment, Justice Kennedy's opinion for the Court observed, "has the peculiar property of imposing a broad and undifferentiated disability on a single

74. *Bd. of Trs. of Univ. of Alabama v. Garrett*, 531 U.S. 356, 366 n.4 (2001).

75. *Cleburne*, 473 U.S. at 450.

76. 413 U.S. 528 (1973).

77. Pub. L. No. 88-525, 78 Stat. 703 (codified as amended at 7 U.S.C. §§ 2011–2033 (2012)).

78. *Moreno*, 413 U.S. at 529.

79. *Id.* at 534.

80. *Id.* This language is quoted in part in *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

81. 517 U.S. 620 (1996).

82. *Id.* at 624 (quoting COLO. CONST. art. II, § 30b, *invalidated by Romer v. Evans*, 517 U.S. 620 (1996)).

named group.”⁸³ The Amendment seemed to “deprive[] gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings.”⁸⁴ The Court concluded that “Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”⁸⁵ Quoting *Moreno*, it found that the broad disability imposed on a targeted group

raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”⁸⁶

Romer’s holding may thus be summarized:

[I]f a law targets a narrowly defined group and then imposes upon it disabilities that are so broad and undifferentiated as to bear no discernible relationship to any legitimate governmental interest, then the Court will infer that the law’s purpose is simply to harm that group, and so will invalidate the law.⁸⁷

It remains to consider whether the Court properly applied this rule to DOMA.

IV. DOMA, BARE DESIRE TO HARM, AND RECKLESS INDIFFERENCE

DOMA cut off federal benefits to a targeted, politically unpopular group, just like the law in *Moreno*, and it did so in a remarkably broad and undifferentiated way, just like the law in *Romer*.

DOMA’s definitional provision and the amendment invalidated in *Romer* have telling similarities. Like the Colorado amendment, this provision “identifie[d] persons by a single trait [membership in a same-sex marriage] and then denies them protection across the board.”⁸⁸ For the first time in American history, DOMA created a set of second-class marriages, valid under state law but void for all federal purposes. The

83. *Id.* at 632.

84. *Id.* at 630.

85. *Id.* at 635.

86. *Id.* at 634 (quoting *USDA v. Moreno*, 413 U.S. 528, 534 (1973)).

87. KOPPELMAN, *supra* note 34, at 8; Koppelman, *Invidious Intent*, *supra* note 73, at 94. The Court is also evidently influenced by its knowledge of a group’s political unpopularity, but many of these decisions do not mention that.

88. *Romer*, 517 U.S. at 633.

exclusion of a class of valid state marriages from all federal recognition is “unprecedented in our jurisprudence.”⁸⁹

What could justify this broad disability?

Justice Scalia offered this: “DOMA avoids difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage.”⁹⁰ What happens, he asked, to the marriage of a couple who wed in New York and move to Alabama? “DOMA avoided all of this uncertainty by specifying which marriages would be recognized for federal purposes.”⁹¹ Chief Justice Roberts likewise cited “[i]nterests in uniformity and stability.”⁹²

But federal laws and regulations already dealt with those questions, which will still arise with underage marriages, cousin marriages, common-law marriages, and the like.⁹³ Federal agencies have routinely addressed these situations for more than a century.⁹⁴ Justice Scalia did not explain why same-sex marriage is any different.

More important is the question of the proportionality of the response. These conflict of laws problems are rare. That is why, for a long time, almost no one has noticed that federal law is often unclear about what state’s law to apply to determine marriage for federal

89. *Id.*

90. *United States v. Windsor*, 133 S. Ct. 2675, 2708 (2013) (Scalia, J., dissenting).

91. *Id.*

92. *Id.* at 2696 (Roberts, C.J., dissenting). Justice Scalia also claims that “DOMA’s definitional section was enacted to ensure that state-level experimentation did not automatically alter the basic operation of federal law.” *Id.* at 2708 (Scalia, J., dissenting). This is circular: that law’s operation changes in just the same way—incorporating new couples into the existing structure—whenever a marriage takes place, regardless of the gender of the spouses.

93. For example, the Social Security Act states, “An applicant is the wife, husband, widow, or widower . . . if the courts of the State in which such insured individual is domiciled . . . would find that such applicant and such insured individual were validly married” 42 U.S.C. § 416(h)(1)(A)(i) (2006). The Veterans’ Benefits Act directs that “[i]n determining whether or not a person is or was the spouse of a veteran, their marriage shall be proven as valid . . . according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued.” 38 U.S.C. § 103(c) (2006). The Family and Medical Leave Act operates similarly. *See* 29 C.F.R. §§ 825.122(b) (2013) (defining spouse under the Family and Medical Leave Act as “a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized”).

94. *See* Brief of Dr. Donna E. Shalala et al. as Amici Curiae in Support of Respondent at 13–29, *United States v. Windsor*, 133 S. Ct. 2675 (Mar. 1, 2013) (No. 12-307) (collecting cases).

purposes.⁹⁵ In a country with thousands of same-sex marriages, remarkably few such cases have actually arisen.⁹⁶

DOMA's blunderbuss response was to withhold recognition from all of these marriages, even that overwhelming majority of marriages in which the couple never changes their home, and in which no conflict of laws problem arises.

Same-sex spouses could not file joint tax returns.⁹⁷ Pre-tax dollars could not be used to pay for health insurance or health care expenses for a same-sex spouse or that spouse's dependent children.⁹⁸ A same-sex spouse's debts incurred under divorce decrees or separation agreements were dischargeable in bankruptcy, unlike similar debts owed to an opposite-sex spouse.⁹⁹ Same-sex spouses of federal employees were excluded from the Federal Employees Health Benefits Program,¹⁰⁰ the Federal Employees Group Life Insurance program,¹⁰¹ and the Federal Employees Compensation Act, which compensates the widow or widower of an employee killed in the performance of duty.¹⁰² Same-sex spouses were the only surviving widows and widowers who would not have automatic ownership rights in a copyrighted work after the author's death.¹⁰³ Same-sex spouses were denied preferential treatment under immigration law and, therefore, were the only legally married spouses of American citizens who faced deportation.¹⁰⁴ It is a federal

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95. William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371 (2012), which Justice Scalia cites in *Windsor*, 133 S. Ct. at 2708 (Scalia, J., dissenting), is an impressive work of scholarship, but revealingly, the issue it raises had been neglected for decades. See Baude, *supra*, at 1373–74. Unlike Justice Scalia, Baude does not suggest that these problems justify DOMA.
96. I've been on the lookout for them since I wrote *Same Sex, Different States: When Same-Sex Marriages Cross State Lines* (2006). Because same-sex couples' strongest claims will be based on unfair surprise, this is not a kind of test case that can be planned. Andrew Koppelman, *The Limits of Strategic Litigation*, 17 L. & SEXUALITY 1, 2 (2008).
97. See 26 U.S.C. § 6013 (2012).
98. See *id.* § 105(b).
99. See 11 U.S.C. § 523(a)(5) (2012).
100. See 5 U.S.C. § 8901(5) (2012).
101. See *id.* § 8701(d)(1)(A).
102. See *id.* § 8101(6), (11).
103. See 17 U.S.C. § 304(C)(ii) (2012).
104. See, e.g., Julia Preston, *Bill Proposes Immigration Rights for Gay Couples*, N.Y. TIMES, June 3, 2009, at A19 (explaining proposed legislation to give same-sex partners of American citizens and legal immigrants residency in the United States); Editorial, *Reunite This Family*, BOS. GLOBE, Aug. 27, 2007, at A8 (observing that a Brazilian citizen was forced to seek asylum because his same-sex marriage to an

crime to assault, kidnap, or kill a member of the immediate family of a federal official in order to influence or retaliate against that official—but it was not if you did that to a same-sex spouse.¹⁰⁵ With the end of the exclusion of gay people from the military,¹⁰⁶ DOMA made it official policy to withhold any survivor's benefits from the surviving spouse of a soldier killed in the line of duty.¹⁰⁷ And so on.

Once every few years, DOMA might have simplified some federal bureaucrat's job. Everyone else was saddled with enormous burdens.¹⁰⁸ Thousands of employers in states that recognize same-sex marriage were required to maintain two separate administrative regimes for benefits—one handling federal benefits affected by DOMA, and another to comply with state law. Mapping the border between those two regimes was so complex that the task has begotten a small industry of compliance specialists—expensive professionals whose work is a deadweight loss for the American economy. A group of 278 employers and organizations, in an amicus brief to the Court, explained:

Some *amici* have had to pay vendors to reprogram benefits and payroll systems, to add coding to reconcile different tax and benefit treatments, to reconfigure at every benefit and coverage level, and to revisit all of these modifications with every change in tax or ERISA laws for potential DOMA impact. . . . Benefits and human resources departments, facing questions from employees with same-sex spouses regarding workplace benefit selections and coverage, must be adequately trained and prepared to explain the disparate treatment to employees who may later realize (perhaps too late) that their benefits choices and decisions carried unanticipated and significant financial implications.¹⁰⁹

Even large employers were overwhelmed. Yale University had to tell its employees that, because of a programming error, it had failed to withhold taxes for the imputed value of health coverage for same-sex

American citizen was not recognized by the United States government when it came to immigration).

105. *United States v. Windsor*, 133 S. Ct. 2675, 2694–95 (2013) (citing 18 U.S.C. § 115(a)(1)(A) (2006)).

106. *See Don't Ask, Don't Tell Repeal Act of 2010*, Pub. L. 111-321, 124 Stat. 3515.

107. *See* 10 U.S.C. § 1447(9) (2012).

108. Burdens on third parties, other than those facially targeted by a statute, are not normally a part of equal protection analysis. They are, however, relevant to an assessment of a law's rationality. Thanks to Bob Bennett for helpful conversation on this issue.

109. Brief of 278 Employers and Organizations Representing Employers as Amici Curiae in Support of Respondent Edith Schlain Windsor at 28, *United States v. Windsor*, 133 S. Ct. 2675 (Feb. 27, 2013) (No. 12-307).

spouses in 2010, resulting in extra deductions in 2011.¹¹⁰ Because state antidiscrimination laws protect many gay employees, the employer had to determine, at its own risk, where DOMA did and did not supersede state law.

DOMA did not even “eas[e] administrative burdens”¹¹¹ for government actors. For example, it created fiendishly complex problems for bankruptcy courts, which must deal with property rights created by marriages recognized under state law (which, of course, DOMA could not annul without running afoul of the Takings Clause) while somehow withholding recognition for federal purposes.¹¹²

DOMA deemed the interest in nonrecognition of same-sex couples to be so overridingly urgent as to justify sacrificing a huge range of other government interests, some of the highest order. Bankruptcy courts could not accomplish efficient and predictable adjudication. Government employees could not insure their dependents. The Social Security survivor benefits program, “the primary purpose [of which] is to pay benefits in accordance with the *probable needs* of the beneficiaries,”¹¹³ could not accomplish this goal. Retirees could not provide for the security of their dependent spouses. Income taxation could not account for family obligations. National safety itself was compromised because the military could not provide its members’ families with healthcare, housing, and survivorship benefits that are essential to military effectiveness.¹¹⁴

Other conflict of law solutions were available. The most obvious ones are those based on the place of celebration or the domicile of the couple (which, for many couples, are the same state, so the choice between these rules makes no difference).¹¹⁵ Blanket nonrecognition is such an extraordinary overreaction that even the Jim Crow South did not adopt it with respect to interracial marriage.¹¹⁶

110. Tara Siegel Bernard, *Yale Payroll Error Gives Gay Employees a New Year Surprise*, N.Y. TIMES BUCKS BLOG (Jan. 11, 2011, 1:45 PM), <http://bucks.blogs.nytimes.com/2011/01/11/yale-payroll-error-costs-gay-employees-thousands/>.

111. BLAG Brief, *supra* note 11, at 34.

112. See Jackie Gardina, *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage*, 86 B.U. L. REV. 881, 883 (2006).

113. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 644 (1975) (quoting H.R. REP. NO. 728, at 7 (1939)).

114. See Brief of Hon. Lawrence J. Korb et al. as Amici Curiae in Support of Respondent Windsor on the Merits Question at 3, *United States v. Windsor*, 133 S. Ct. 2675 (Mar. 1, 2013) (No. 12-307).

115. ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 82–96 (2006).

116. See *id.* at 28–50.

Note what DOMA did not do. Justice Kennedy claimed that Congress's purpose was "to influence or interfere with state sovereign choices."¹¹⁷ Justice Alito sensibly responded that DOMA "does not prevent any State from recognizing same-sex marriage or from extending to same-sex couples any right, privilege, benefit, or obligation stemming from state law."¹¹⁸ There is no evidence that DOMA influenced any state's decision whether to adopt same-sex marriage, and it is hard to imagine how it could have.¹¹⁹

But Congress's helplessness cut against the law's reasonableness. DOMA was often defended as manifesting moral opposition to same-sex marriage—which, we have stipulated, is a constitutionally permissible purpose. But that purpose cannot justify a statute that does not promote that end in any significant way. The question before Congress was not whether same-sex marriages would exist. It was undisputed that Congress had no power to answer that question, which is reserved to the states.¹²⁰ The real issue was whether to have a set of second-class marriages, denied recognition for all federal purposes, even in contexts in which the whole purpose of the federal classification is defeated by not recognizing the marriage.

A law will fail even rational basis review if the "purported justifications" make "no sense in light of how the [government has] treated other groups similarly situated in relevant respects."¹²¹ DOMA does, however, very effectively "tell[] [same-sex] couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition."¹²²

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

118. *Id.* at 2720 (Alito, J., dissenting).

119. It is unclear from the legislative history whether Congress intended to influence states' deliberations on whether to recognize same-sex marriages. The House Judiciary Committee report says repeatedly that each state will remain free to decide this policy issue for itself. *See, e.g.*, H.R. REP. NO. 104-664 at 3, 17, 24 (1996). The report also indicates, however, that the legislation will provide "assistance" to those states that have no declared public policy against recognition of same-sex marriage. *See id.* at 10 n.33.

120. That is one reason why Paul Clement's argument, on behalf of the House Republicans—nonrecognition is rational because it somehow makes heterosexual couples more likely to marry when unexpected pregnancy occurs—makes so little sense that it was ignored even by Scalia and Alito. *See* BLAG Brief, *supra* note 11, at 47–48. Even if this convoluted causal chain is accepted, DOMA doesn't prevent any same-sex marriages from occurring. For the same reason, even if one accepts Justice Alito's view that there is a legitimate moral view that objects to same-sex marriage as such, that premise can't justify DOMA. *See Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting).

121. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (per Rehnquist, C.J.; Scalia, J., in majority).

122. *Windsor*, 133 S. Ct. at 2694.

The relevant legislative purpose here is not precisely desire to harm. It is more like what the Model Penal Code has in mind when it refers to homicide “committed recklessly under circumstances manifesting extreme indifference to the value of human life.”¹²³ In such cases, death is caused by “the intentional doing of an uncalled-for act in callous disregard of its likely harmful effects on others.”¹²⁴ One element in determining extreme indifference is the social utility of the conduct: speeding through crowded streets for the thrill of it is a paradigmatic case, but doing that to carry a passenger who needs emergency surgery to the hospital may not be a crime at all.¹²⁵

Given current doctrine, can extreme indifference constitute an equal protection violation? The answer is that it can when a group is singled out for unprecedentedly harsh treatment. It is true that, as we already noted, disparate impact does not violate equal protection unless the challenged action was taken “‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”¹²⁶ Doesn’t that mean that extreme indifference raises no constitutional difficulty?

But the disparate impact cases need to be put in perspective. From the standpoint of equal protection theory, a standard that tolerates extreme indifference makes no sense for the reasons we just considered.¹²⁷ The better explanation for this doctrine is that full judicial enforcement of equal protection is institutionally impossible. The Court was unwilling to hold that disparate impact, without more, creates a presumption of unconstitutionality because such a rule “would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes”¹²⁸ This argument is not about the scope of equal protection but rather the consequences of judicial intervention. Some constitutional provisions, notably the Equal Protection Clause, are judicially underenforced because of the Court’s concern about institutional limitations of this kind.¹²⁹

123. MODEL PENAL CODE § 210.2(1)(b) (1980).

124. *Commonwealth v. Malone*, 47 A.2d 445, 449 (Pa. 1946), *quoted in* AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES 23 (1980).

125. 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 14.4(a), at 439 (2d ed. 2003).

126. *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979).

127. The defects of the *Feeney* standard are explained in David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 962–64 (1989).

128. *Washington v. Davis*, 426 U.S. 229, 248 (1976).

129. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1214–20 (1978). The same concern about the Court’s institutional limitations dominate Justice Scalia’s opinion in *Employment Division v. Smith*, 494 U.S. 872 (1990).

What the Court needs is a rule for detecting illicit purpose that respects those limitations. Strict scrutiny is one such rule. The bare desire to harm cases, which I examine in detail in Part III, bypass that heuristic in unusual cases where the device is unnecessary for inferring such a purpose. In those cases, the Court adopted a different heuristic: the fact that a group is singled out for an unprecedentedly harsh treatment. When that happens, the Court will presume that what is going on is a bare desire to harm, rather than mere moral disapproval.¹³⁰ That rule evidently was relied upon, sub silentio, in *Windsor*.

Moreno and *Romer* invalidated laws for lacking a rational basis, but any statute's terms suggest a purpose that the statute rationally serves.¹³¹ A law that bans the driving of blue Volkswagens on Tuesdays is rationally—indeed, perfectly—related to the purpose of preventing blue Volkswagens from being driven on Tuesdays. The real issue is whether some goals are impermissible or too costly to be worth pursuing, a question that cannot be answered on the basis of “rationality.”¹³² David Hume famously wrote: “’Tis not contrary to reason to prefer the destruction of the whole world to the scratching of my finger.”¹³³ But that’s not the sense of rationality that the Court relied on, or should rely on.

Windsor clarifies what can count as a bare desire to harm. A demand that harm be the ultimate goal of the state’s action would be preposterously difficult to satisfy. *Windsor* indicates that the Constitution is violated when a group is deliberately singled out for broad harm for the sake of an insignificant benefit. Singled out: this is not a matter of unintended impact.¹³⁴ In that context, extreme indifference is a constitutional harm that has a remedy. There is no duty to aid a starving infant, but neither may one hurl it through the window in order to get into one’s house.

130. That principle evidently also influenced the outcome in *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the Court invalidated a criminal prohibition of homosexual sex. See Andrew Koppelman, *Lawrence’s Penumbra*, 88 MINN. L. REV. 1171, 1179 (2004).

131. See Robert W. Bennett, “*Mere*” *Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049, 1056–57 (1979); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 345–47 (1949); Robert F. Nagel, Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 124 (1972).

132. Bennett, *supra* note 131, at 1078.

133. DAVID HUME, A TREATISE OF HUMAN NATURE 416 (L.A. Selby-Bigge ed., 1888) (1739–40).

134. The difference here is analogous to the Takings Clause rule that while state action merely diminishing the value of one’s land is not a taking—adverse impact is not enough—any state occupation of even a tiny portion of that land must be compensated.

Recall that a finding of extreme indifference for murder depends on an assessment of the utility of the defendant's conduct.¹³⁵ The exact same behavior will or will not be criminally negligent depending on the value of its object. To trigger liability, it is not necessary that the conduct have no value whatsoever. It really can be thrilling to speed down a crowded street, and pleasure is not valueless. But anyone who thinks that the pleasure is worth it—who endangers others “for his diversion merely”¹³⁶—manifests a “depraved mind, regardless of human life.”¹³⁷

Windsor's conclusion that DOMA was irrational implicitly relied on a similar proportionality analysis. That analysis is only a minor theme in strict scrutiny, though it has some role: the interest in question has to be a truly compelling one. The analysis balances cost and benefit.¹³⁸ Stephen Siegel has shown that cost justification was the original point of strict scrutiny, which was later transformed into a device for discerning illicit motive.¹³⁹ That shift was led by John Hart Ely, who thought it inappropriate for judges to second-guess legislatures' policy decisions.¹⁴⁰ Ely's caution about judicial policymaking is sensible, and the modern Court evidently shares it.¹⁴¹ But deference is not necessarily unlimited. If the benefit is trivial by comparison with the cost, then it is appropriate to infer that the decision has an improper purpose.¹⁴²

DOMA's purpose was to convey a message of disdain for gay couples, with extreme indifference to the human costs. As with the

135. See *supra* notes 123–23 and accompanying text.

136. *Brown v. Commonwealth*, 17 S.W. 220, 221 (Ky. 1891).

137. *State v. Thompson*, 558 P.2d 202, 205 (Wash. 1977).

138. The Court explained:

[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection The application of strict scrutiny . . . determines whether a compelling governmental interest justifies the infliction of that injury.

Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 229–30 (1995).

139. Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 393–401 (2006).

140. *Id.* at 397–401.

141. Most of the time, anyway. Its hostility to racial classifications, when these could not possibly reflect biased decision making, frankly rests on policy objections about the bad consequences of using such classifications. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007).

142. Even Ely concedes this. ELY, *supra* note 73, at 147–48.

“heart void of social duty”¹⁴³ characteristic of extreme indifference murder, this took DOMA outside the range of reasonable disagreement. To say that the tiny administrative inconvenience cited by Scalia is sufficient to justify the enormous burden on gay couples and their employers is crazy. It’s like strangling the baby because you can’t decide what to name it.

V. DISTRACTED BY FEDERALISM

Kennedy’s opinion in *Windsor* would have been sounder if he had simply relied on *Romer*. But instead he felt the need to talk about federalism, for reasons that mystified his fellow judges.¹⁴⁴

He oddly fetishized state law: “The State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import.”¹⁴⁵ The State said, let there be dignity for same-sex couples. And there was dignity. Excuse me, but I thought that same-sex couples had a dignity and status of immense import whether or not the state saw fit to recognize it. Kennedy himself writes that the failure to recognize same-sex couples was seen as “an unjust exclusion,” and that this perception was “a new insight.”¹⁴⁶

The best sympathetic reconstruction of Kennedy’s logic is Randy Barnett’s analysis: it was the fact that the states had recognized same-sex marriage that generated a protected liberty interest giving rise to heightened scrutiny.¹⁴⁷ This gesture toward state law is part of a more general trend in Kennedy’s jurisprudence, toward trying to find some objective referent on which to base judgments about the contours of the unenumerated rights that are protected by the Constitution.¹⁴⁸

If Barnett is right, then state law is a constraint on the exercise of federal power.¹⁴⁹ For example, it might call into question federal

143. *State v. Nueslein*, 25 Mo. 111, 121 (1857).

144. Chief Justice Roberts was not mystified, but used the emphasis on federalism to try to shield state laws prohibiting same-sex marriage from constitutional challenge. *See United States v. Windsor*, 133 S. Ct. 2675, 2696–97 (2013) (Roberts, C.J., dissenting).

145. *Id.* at 2681 (majority opinion).

146. *Id.* at 2689.

147. Randy Barnett, *Federalism Marries Liberty in the DOMA Decision*, SCOTUSBLOG (June 26, 2013, 3:37 PM), <http://www.scotusblog.com/?p=166116>.

148. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) (Kennedy, J.) (invalidating juvenile death penalty on the basis of evolving national consensus).

149. Justice Kennedy declares that “it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance.” *Windsor*, 133 S. Ct. at 2692. But if

marijuana prohibitions, which operate in the teeth of state efforts to legalize the distribution of the drug.¹⁵⁰ It has been suggested that this was a way for the Court to exercise judicial modesty, by avoiding the charged question of whether states could confine marriage to different-sex couples.¹⁵¹ But a pure *Romer* approach, of the kind offered here, would also have avoided that. As Barnett recognizes, the implications of Kennedy's federalism-based approach are hardly modest. If Kennedy's invocation of federalism is taken seriously, then the Court is back in the pre-New Deal business of policing the purposes for which the enumerated powers are exercised, to make sure that they do not interfere with matters that are reserved to the states.¹⁵² And if so, then a lot of other federal programs are in trouble. It was on that basis that the early twentieth-century Court struck down minimum wage and child labor laws.¹⁵³

If federal definitions of marriage must track state law, it is also unclear which state law they should track when these conflict. After *Windsor*, the Internal Revenue Service adopted a place-of-celebration rule for tax purposes, creating a class of couples whose marriages are recognized by federal law but not by their domiciles.¹⁵⁴ Thus, gay couples in Mississippi could have their marriages recognized for federal purposes so long as they are willing to make a quick trip to New York

Barnett is right, then this is a distinction without a difference: Kennedy's liberty-focused analysis is parasitic on federalism concerns.

150. Randy Barnett, *Federalism Marries Liberty in the DOMA Decision*, VOLOKH CONSPIRACY (June 26, 2013, 4:52 PM), <http://www.volokh.com/2013/06/26/federalism-marries-liberty-in-the-doma-decision/>.
151. Rick Pildes, *Why Justice Kennedy's DOMA Opinion Has the Unique Legal Structure It Has*, BALKINIZATION (June 26, 2013, 1:34 PM), <http://balkin.blogspot.com/2013/06/why-justice-kennedys-doma-opinion-has.html>.
152. See ANDREW KOPPELMAN, THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM 52–56 (2013). This is, of course, a result that Barnett would welcome. See *id.* at 80–90. On the other hand, Barnett is admirably immune from the state worship that possesses Justice Kennedy.
153. Linda Greenhouse noted the dangers in the federalism argument before Justice Kennedy adopted it. *Trojan Horse*, N.Y. TIMES OPINIONATOR (Apr. 3, 2013, 9:00 PM), <http://opinionator.blogs.nytimes.com/2013/04/03/trojan-horse/>.
154. Rev. Rul. 2013-17, 2013-38 I.R.B. 201. A bill under congressional consideration would create the same rule throughout the United States Code. Respect for Marriage Act, S. 1236, 113th Cong. (2013). A similar rule is implied, perhaps inadvertently, by this sentence in Kennedy's opinion: "DOMA singles out a class of persons deemed by a State [Kennedy does not say which!] entitled to recognition and protection to enhance their own liberty. . . . This opinion and its holding are confined to those lawful marriages." *Windsor*, 133 S. Ct. at 2695–96.

to marry. Fortunately, the Court did not endorse arguments that would have called this legislation into doubt.

CONCLUSION

The Court thus appropriately concluded that DOMA was unconstitutional: “The Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.”¹⁵⁵

The rule implied in the bare desire to harm cases is one with fuzzy boundaries, and there is plenty of room for disagreement about where it does and does not apply. It lacks the mechanical clarity of the levels-of-scrutiny approach, which simply asks what kind of classification is being made. That is why *Romer* has had little effect in the lower courts, some of which have simply noted that the Court did not speak of strict scrutiny and applied the most deferential possible analysis to laws discriminating against gay people.¹⁵⁶ *Windsor* leaves an even thicker fog by combining the *Romer* analysis with an invocation of federalism and mixing the two analyses incoherently. Justice Scalia correctly observes that the lower courts will probably find *Windsor* easy to distinguish from any case that comes before them in the future.¹⁵⁷ As in *Romer*, the Court finds an equal protection violation, but its holding is unlikely to have much effect.

Still, as a matter of pure equal protection theory, these laws were unconstitutional and the Court was right to get rid of them. Larger questions were postponed for another day.¹⁵⁸ But the equal protection holding of *Windsor* is sound.

155. *Windsor*, 133 S. Ct. at 2693.

156. Kate Girard, *The Irrational Legacy of Romer v. Evans: A Decade of Judicial Review Reveals the Need for Heightened Scrutiny of Legislation That Denies Equal Protection to Members of the Gay Community*, 36 N.M. L. REV. 565, 574 (2006); William C. Duncan, *The Legacy of Romer v. Evans—So Far*, 10 WIDENER J. PUB. L. 161 (2001).

157. *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting).

158. Justice Sotomayor probably spoke for many of the Justices when she asked: “If the issue is letting the States experiment and letting the society have more time to figure out its direction, why is taking a case now the answer?” Transcript of Oral Argument, *supra* note 55, at 64.