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WINDSOR: LOCHNERIZING ON MARRIAGE?

Sherif Girgis[†]

ABSTRACT

This Article defends three insights from Justice Alito’s *Windsor* dissent. First, federalism alone could not justify judicially gutting DOMA. As I show, the best contrary argument just equivocates.

Second, the usual equal protection analysis is inapt for such a case. I will show that DOMA was unlike the policies struck down in canonical sex-discrimination cases, interracial marriage bans, and other policies that involve suspect classifications. Its basic criterion was a *couple’s sexual* composition. And this feature—unlike an individual’s sex or a couple’s racial composition—is linked to a social goal, where neither link nor goal is just invented or invidious.

Third, and relatedly, to strike down DOMA on equal protection grounds, the Court had to assume the truth of a “consent-based” view of the nature of marriage and the social value of recognizing it, or the falsity of a “conjugal” view of the same value and policy judgments. But as I show, nothing in our constitutional tradition—read as broadly as possible, even by non-originalists—deems the first true or the second false; both are reasonable; and it is historically impossible to ascribe the conjugal view to mere animus.

I conclude that the equal-protection ruling against DOMA Lochnerizes—as would equal-protection rulings against traditional state marriage laws—even if we embrace several scholars’ proposals for expanding equal protection jurisprudence. So to defend *Windsor* or decisions against traditional state marriage laws, one must justify Lochnerizing or distinguish it.

CONTENTS

INTRODUCTION.....	972
I. FEDERALISM.....	975
II. CLASSIFICATIONS	983
A. <i>Sexual Orientation</i>	984
B. <i>Sex</i>	985
III. LOCHNERIZING.....	991

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IV. LEGITIMACY	998
A. <i>Value Judgment Defense</i>	999
1. Intellectual and Legal Traditions	1000
2. Philosophical Account	1001
a. <i>Comprehensive Unifying Acts: Mind and Body</i>	1002
b. <i>Comprehensive Unifying Goods: Procreation and Domestic Life</i>	1003
c. <i>Comprehensive Commitment: Norms of Permanence and Exclusivity</i>	1004
3. DOMA's Particular Purposes	1004
B. <i>General Welfare Defense</i>	1007
1. Law, Culture, Practice	1008
2. Marriage, Stability, and the Next Generation	1009
3. Children and the Common Good	1012
V. AVOIDING <i>LOCHNER?</i>	1013
A. <i>Infertility Objection</i>	1013
1. Still Marital	1014
2. Social Effects	1014
B. <i>Windsor's Hybrid Argument</i>	1015
C. <i>Balkin's Stratification Argument</i>	1017
D. <i>Koppelman's Depraved Heart Argument</i>	1022
CONCLUSION	1026

INTRODUCTION¹

There was something tediously familiar—and unsatisfying—about the divide in *United States v. Windsor*.² It featured Justice Anthony Kennedy's dizzying majority opinion against Justice Antonin Scalia's ardent dissent. For Kennedy, section 3 of the federal Defense of Marriage Act³ (DOMA) violated equal protection, or due process, or federalism—or a combination of these, or a hybrid. For Scalia, “downright boring” policy goals could rebut charges of nefarious intent.⁴

For Kennedy, *Windsor* involved a collision of worldviews,⁵ and the fault lay with DOMA for having imposed on same-sex spouses “a

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1. I thank Akhil Reed Amar, Kenji Yoshino, Andrew Koppelman, Michael Stokes Paulsen, and Robert P. George for helpful comments and discussions.
 2. 133 S. Ct. 2675 (2013).
 3. 1 U.S.C. § 7 (2012), *invalidated in part by Windsor*, 133 S. Ct. 2675 (2013).
 4. *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting).
 5. Kennedy observed, for example, that “[t]he stated purpose of the law was to promote an ‘interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws,’” *id.* at 2693 (majority opinion) (quoting H.R. REP. NO. 104-664, at 16 (1996)), while in New York and other states “[t]he limitation of lawful marriage to

separate status, *and so a stigma*.”⁶ But *any* marriage law creates a separate status. That is a crucial point that any constitutional case against a legal definition of marriage must accommodate, as we will see. Yet Kennedy’s reasoning misses it entirely; indeed, even some *Windsor* supporters found his logic wanting.⁷

For Scalia, DOMA was justified as a mundane choice-of-law measure. But surely more was at stake than logistics—as Scalia implicitly grants.⁸

Less discussed than either opinion was Justice Alito’s dissent. Yet it has a satisfying account of the stakes and compelling legal reasoning, and the second thanks to the first. As he tells it, the case raised basic policy and value questions. To hold that DOMA violated equality required the Court to take a stance on reasonably disputed views of what makes a marriage and why marriage law matters.⁹ But on these policy and value judgments, the Constitution is mute. So in Alito’s view, if not his words, the *Windsor* Court did what critics have long faulted the Court for doing in *Lochner v. New York*:¹⁰ it substituted its own policy choices for electorally favored alternatives without a whit of constitutional warrant.

Alito’s dissent, compared to Kennedy’s and Scalia’s opinions, was as compact as it was overlooked. I think it would repay closer study. In particular, I wish to consider its implicit charge of *Lochnerizing*. I will show that the charge sticks—and that it would apply to rulings against any traditional-marriage law¹¹ on equal protection grounds.

Along the way, I will also defend Alito’s supporting details, where they set the stage for my central point or support it: DOMA left state powers untouched, so it violated no principle of federalism; the best

heterosexual couples . . . came to be seen . . . as an unjust exclusion.” *Id.* at 2689.

6. *Id.* at 2693 (emphasis added).
7. See Andrew Koppelman, *Why Scalia Should Have Voted to Overturn DOMA*, 108 N.W. L. REV. COLLOQUY 131, 152 (2013), <http://www.law.northwestern.edu/lawreview/colloquy/2013/12/LRColl2013n12Koppelman.pdf> (“Scalia’s most important claim is that Justice Kennedy’s opinion unfairly conflates opposition to same-sex marriage with hatred of gay people. Here Scalia is right. Opposition to same-sex marriage sometimes has nothing to do with devaluation of gays and lesbians.”).
8. *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting). Thus, Scalia begins by noting that “the Constitution does not forbid the government to enforce traditional moral and sexual norms.” He justifies citing other possible purposes of DOMA on the ground that they “serve to make the contents of the legislators’ hearts quite irrelevant.” *Id.*
9. *Id.* at 2715 (Alito, J., dissenting).
10. 198 U.S. 45 (1905).
11. That is, a law (state or federal) that limits marriage to certain opposite-sex couples.

contrary argument trips on an equivocation. Congress did promote what it judged the best view of marriage and its social value, but it thereby violated no principle of equal protection. The usual equal protection apparatus was, as Alito wrote, “ill suited” to the case anyhow, for (as I will add) DOMA made benefits hinge in the first place on a couple’s sexual composition. And that criterion—unlike an individual’s sex, or a couple’s *racial* composition, or any familiar suspect classification—has an inherent link to a sound social goal. Neither link nor goal is socially invented or invidious. Moreover, to find sexual composition utterly unrelated to marriage or its social purposes would require the Court to choose, as Alito wrote, between two theories of marriage: a consent-based view that would promote any romantic pair-bond or a conjugal view that sees marriage as “a comprehensive . . . union . . . intrinsically ordered to producing new life” and hence “intrinsically opposite-sex.”¹² Alito noted that some of the second view’s champions think enshrining the first would undermine marital norms and their socially stabilizing effects and that some supporters of the former agree and celebrate that prospect. I will offer evidence for both points. I will also show that both views are reasonable and legitimate. The Constitution requires neither; it forbids neither. That is not just an originalist point; as I will show, it holds on quite capacious readings of the Constitution and case law.

I defend these points here, having addressed them variously elsewhere.¹³ And yet, in the most crucial respect, my ambitions are limited. I will not provide a complete defense of traditional marriage laws (including DOMA), even against the equal protection challenge alone. Again, my main concern will be to draw out and defend Alito’s condensed case for the idea that *Windsor* required a judicial choice between reasonably contested value and policy views, without a constitutional basis. If my argument is expansive, it is in showing that the same would hold of traditional *state* marriage laws—and not just by the case law, but on several scholars’ proposals for developing it.¹⁴

So for all I can show here, a sound equal protection approach might exist that would avoid *Lochnerizing*. Or maybe *Lochnerizing*, *pace* generations of critics, is just fine—or was wrong for narrower reasons that would not impugn *Windsor*. Then again, a certain kind of *Lochnerizing* might turn out to be inevitable if courts are to carry

12. *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting).

13. See, e.g., SHERIF GIRGIS ET AL., WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE (2012); Amici Curiae Brief of Robert P. George, Sherif Girgis, and Ryan T. Anderson in Support of Hollingsworth and Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal as Amici Curiae, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144); *Windsor*, 133 S. Ct. 2675 (No. 12-307).

14. I will not address these proposals’ merits here.

their current burden of equal protection enforcement. Then we must either reconcile ourselves to some *Lochnerizing* or shift more of the task of equal protection enforcement to Congress, on an expanded reading of its Section 5 powers.¹⁵ Here I mean only to shift the burden of proof onto *Windsor's* defenders by showing *prima facie* that it *Lochnerizes*.

In Part I, I argue against the most prominent federalism challenge to DOMA, granting along the way that DOMA's primary purpose was to promote a certain view of marriage. In Part II, I examine the arguments that DOMA classifies by sexual orientation and by sex, showing the awkwardness of attempts to apply ordinary equal-protection analysis to traditional marriage laws. Both Parts set up my primary thesis, elaborated in Part III and defended in Part IV, that an equal protection ruling against DOMA or any traditional-marriage law requires the Court to take positions on reasonably disputed, extra-constitutional value and policy judgments. To do so is to repeat the ways of *Lochner*, long decried for having substituted judicial for legislative policy preferences. In Part V, I argue against four ways drawn from cases and commentary that one might try to clear *Windsor* of the *Lochner* charge.

I. FEDERALISM

Federalism plays a supporting role in the Court's opinion, which begins with several pages on our system's reserving to states the power to define domestic relations.¹⁶ While the majority ultimately declines to rule on the federalism challenge to DOMA,¹⁷ it does rely on a hybrid federalism-equal protection argument,¹⁸ which in turn relies (I will argue) on a direct federalism challenge posed by several *amici* in the case (the "Federalism Scholars").¹⁹

I consider the latter here in order to establish a premise later deployed against the Court's actual reasoning, and because addressing

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15. For brief elaboration of each of these possibilities, with appropriate references, see Conclusion.
 16. See *Windsor*, 133 S. Ct. at 2689–93 (majority opinion).
 17. See *id.* at 2692 (“[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution.”).
 18. See discussion *infra* Part V.B and note 40. For an alternative explanation of how *Windsor* is about individual rights despite strong federalist overtones, see Nancy C. Marcus, *When Quacking Like a Duck is Really a Swan Song in Disguise: How Windsor's State Powers Analysis Sets the Stage for the Demise of Federalism-Based Marriage Discrimination*, 64 CASE W. RES. L. REV. 1073 (2014).
 19. Brief of Federalism Scholars as Amici Curiae in Support of Respondent Windsor, *Windsor*, 133 S. Ct. 2675 (No. 12-307) [hereinafter Brief of Federalism Scholars].

it will bring into view the most natural reading of DOMA's purpose, which will guide the rest of my argument.

The Federalism Scholars argued that DOMA's definition of "marriage" for federal law was not pursuant to an enumerated power of Congress.²⁰ Nor was it "necessary and proper" for federal action.²¹ The reason is that DOMA's purpose had nothing to do with any *federal* power. It had to do rather with a state prerogative: preserving a certain vision of marriage (in the House Report's words, promoting the "institution of traditional heterosexual marriage"²²). So it violated principles of federalism, whatever its status under equal protection.

The Federalism Scholars grant that *in general*, "defining who may receive a benefit is incidental to the power of conferring a benefit under the Spending power."²³ After all, if no particular group is constitutionally owed a benefit, Congress must decide who receives it.²⁴ So picking the recipients of a federal benefit is both necessary and proper to creating it. But that is all that DOMA did, for 1,100-some federal benefits.²⁵ What, then, is the harm?

The Federalism Scholars reply that DOMA was improper because it assumed a federal "power to define marital status," which is substantive enough that "we would expect the Constitution to enumerate [it] separately."²⁶

But this equivocates on the meaning of "define marital status." It is important to distinguish between legal and non-legal effects—or what I will call, respectively, policy mechanisms and social goals.

Mechanisms are legal actions and legal effects. They include norms (e.g., federal rules governing interstate commerce); statuses (e.g., permanent residency or marriage); obligations (e.g., the obligation not to commit battery); rights (e.g., the right against unreasonable searches); or instruments for creating or changing other mechanisms (e.g., courts, statutes, or judicial decisions).

20. *Id.* at 2–3 (referring, in part, to Congress's enumerated powers under U.S. CONST. art. I, § 8).

21. *Id.* at 3 (referring to the Necessary and Proper Clause).

22. H.R. REP. NO. 104-664, at 2 (1996).

23. Brief of Federalism Scholars, *supra* note 19, at 18.

24. Of course, Congress is still bound by constitutional norms *other* than federalism. Thus it cannot predicate the benefit on race. But to raise this sort of objection is to change the subject from federalism.

25. DAYNA K. SHAH, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004).

26. Brief of Federalism Scholars, *supra* note 19, at 16.

Social goals, by contrast, are actual or hoped-for non-legal effects of mechanisms. They include “public health, safety, morals, [and the] general welfare”;²⁷ or “the Progress of Science and useful Arts.”²⁸

Both mechanisms and social goals are used to distinguish state and federal power. Article I, Section 8 defines congressional power in terms of mechanisms,²⁹ occasionally limited by a set of permitted social goals.³⁰ But a common slogan defines states’ powers in terms of social goals: “public health, safety, morals, [and the] general welfare.”³¹ We tend to slide between these two ways of delineating state or federal power.

The Federalism Scholars trade on this ambiguity in saying that DOMA usurped the state “power to define marital status.”³² I grant that defining marriage as a mechanism for allocating other state-created mechanisms—regulating admission to marriage as a civil status—is traditionally a state power. But in that sense, the definition of marriage was untouched by DOMA. As far as *state* marriage mechanisms—licenses or legal incidents—go, DOMA did not block any (as Congress blocked state marijuana laws in *Gonzales v. Raich*³³), coerce any (as the Court found that Congress did with Medicaid expansion in *National Federation of Independent Business v. Sebelius*³⁴), or usurp any (as federal law enforcement officials were found to have done in *Bond v. United States*³⁵).

But if DOMA left state marriage mechanisms entirely untouched, it promoted a view of marriage only *socially*—that is, with a view to shaping public opinion—and only by means of *federal* mechanisms.

27. See, e.g., *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

28. U.S. CONST. art. I, § 8, cl. 8.

29. For example, the Constitution grants Congress the power to coin money, raise armies, establish post offices, etc. See U.S. CONST. art. I, § 8.

30. See, e.g., U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States” (emphasis added)); U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries” (emphasis added)). These social-goal specifications of permitted federal mechanisms will make no difference to my argument, so I set them aside.

31. See, e.g., *Euclid*, 272 U.S. at 395. The Bill of Rights limits permitted social goals, but it does so for the federal and state governments alike.

32. Brief of Federalism Scholars, *supra* note 19, at 16.

33. 545 U.S. 1 (2005).

34. 132 S. Ct. 2566 (2012).

35. 572 U.S. ___ (2014).

What the Federalism Scholars find objectionable is not DOMA's use of federal mechanisms. They grant that Congress may use its own marriage standard if the restriction and the benefit are rationally linked, as with the denial of immigration benefits for fraudulent state marriages.³⁶

Their problem with DOMA, rather, is that it tailored federal mechanisms to a traditionally state social goal: promoting lawmakers' moral vision of marriage. The Federalism Scholars infer this purpose from DOMA's legislative history,³⁷ title, and preamble³⁸ and from its sweep: limiting *all* federal benefits to opposite-sex marriages, without a showing that they all have a special link to sexual complementarity.³⁹ And it is to this purpose that the Federalism Scholars object.

Their objection thus exposes their assumption,⁴⁰ which we can now make plain: the Article I, Section 8 powers (mechanisms) that

36. Brief of Federalism Scholars, *supra* note 19, at 18-20 (citing 8 U.S.C. § 1186a(b)(1)(A)(i) (2012) (the immigration antifraud marriage provision)).

37. *See supra* note 22 and accompanying text. One could also infer this from DOMA's apparent inspiration: indications that the Supreme Court of Hawaii would be the first to require state recognition of same-sex marriage. *See Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993) (remanding for trial on whether state can rebut presumption of unconstitutionality under strict scrutiny).

38. *See* Brief of Federalism Scholars, *supra* note 19, at 30 (“[DOMA] was deliberately drafted to express Congress’s policy judgment rejecting same-sex marriage—that is why it is called the ‘Defense of Marriage Act.’ That is why its preamble reads, ‘An act to define and protect the institution of marriage.’” (quoting DOMA, Pub. L. No. 104-199 § 1, 110 Stat. 2419, 2419 (1996))). As Professor Jonathan H. Adler later put it:

[T]he question our brief raises is not whether Congress is generally free to define terms in federal statutes—it is—but whether it is permissible for Congress to do so here for the purpose of advancing a traditional definition of marriage when the federal government lacks any independent federal interest in such matters.

Jonathan H. Adler, *Debating DOMA and Federalism*, VOLOKH CONSPIRACY (Mar. 8, 2013, 11:00 AM), <http://www.volokh.com/2013/03/08/debating-doma-and-federalism/>.

39. *See also* Brief of Constitutional Law Scholars Bruce Ackerman et al. as Amici Curiae Addressing the Merits and Supporting Affirmance, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (Nos. 12-144, 12-307) (arguing that the Court should apply heightened judicial scrutiny to DOMA in part because sexual orientation is irrelevant to an individual's ability to contribute to society).

40. Something like it is avowed by Professor Randy Barnett in a follow-up piece:

entitle Congress to create a policy also fix the range of social goals allowed to shape it. That is, a federal mechanism infringes on state power if its features can be explained only by traditionally state social goals. Or again, any federal policy goal must be ultimately related just to enumerated powers. Call this the Federal Justifications Test.⁴¹

Consider federal permanent residency status. It is a mechanism created pursuant to the Article I power “[t]o establish an uniform Rule of Naturalization.”⁴² So on the Federalism Scholars’ assumption, everything about this status—including its eligibility requirements—must be related to that enumerated federal mechanism.

And everything about it *is* related to establishing a system of naturalization. Permanent residency is a *step toward* naturalization. It is rational to make naturalization available to people somehow close to a U.S. citizen or other permanent resident, for which it makes sense to privilege *spouses* of citizens—on which, in turn, it is reasonable to consult state marriage registries. And finally, it is sensible to exclude those who have contracted state marriages fraudulently, just to obtain the federal benefit. So the immigration antifraud marriage provision, which limits the federal status of permanent residency, is related to the Article I power that entitled Congress to create this status in the first place. The law of permanent residency passes the Federal Justifications Test.

But DOMA failed that test because, again, far from a “targeted limitation,” it was “a sawed-off shotgun” that “indiscriminately applie[d]” across the federal code.⁴³ So it must have limited federal programs for a purpose unrelated to any Article I power: to promote

DOMA’s sweeping and indiscriminate application to over a thousand federal statutes could not pass *any* level of equal protection scrutiny, even the most deferential, because Congress failed to identify a *federal interest* why each of these disparate federal laws should not track state laws defining marriage, as had previously been the case.

Randy Barnett, *Federalism Marries Liberty in the DOMA Decision*, SCOTUSBLOG (June 26, 2013, 3:37 PM), <http://www.scotusblog.com/2013/06/federalism-marries-liberty-in-the-doma-decision/>.

41. Note that the Federal Justifications Test is not about how closely federal action must hew to purposes that are admittedly within bounds for Congress. It is not, for example, about how much or how directly a regulation must affect interstate commerce to be justified ultimately by the Commerce Clause. No, the Federal Justifications Test is about which social goals a congressional policy, granting that it is justified by some enumerated power, may be further tailored to serve at all. *See infra* note 60.

42. U.S. CONST. art. I, § 8, cl. 4.

43. Brief of Federalism Scholars, *supra* note 19, at 20.

socially a certain vision of marriage, which is traditionally a *state* social goal.⁴⁴

Indeed, the Court may have been moved to apply something quite like this test; it grants the “constitutionality of limited federal laws that regulate the meaning of marriage *in order to further federal policy*,” but it questions the “far greater reach” of DOMA.⁴⁵ And on the basis of that reach the Court infers what it considers moral purposes that infringe on State power.⁴⁶ But is the test sound?

As support for the Federal Justifications Test, the Federalism Scholars cite a Federalist Paper:

As Alexander Hamilton recognized, “[t]he propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded.” Hamilton then stated that any attempt by the federal government to “vary the law of descent in any State” would be improper. But DOMA accomplishes just such an improper result by altering marital status conferred by the States.⁴⁷

Hamilton offers two examples of federal overreach that he says the Necessary and Proper Clause cannot justify: changing a state’s inheritance laws, and abrogating one of its taxes. But no matter how one thinks of these examples, both involve blocking a state mechanism. They do not support the Federal Justifications Test, which is about permissible *social* goals of federal mechanisms. Nor do Hamilton’s examples suggest problems with DOMA. In resorting to coercion, they are less like DOMA and more like the law struck down in *New York v. United States*,⁴⁸ which tried to “commandeer the States’ legislative processes by directly compelling them to enact” federal policy.⁴⁹ DOMA did not compel or limit any state mechanism.

Not only is the Federal Justifications Test unjustified by Hamilton’s words or any other historical or legal authority that I can

44. *See Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (“[R]egulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the States.”).

45. *United States v. Windsor*, 133 S. Ct. 2675, 2690 (2013) (emphasis added).

46. *See id.* at 2693 (“The stated purpose of the law was to promote an ‘interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.’”) (quoting H.R. REP. NO. 104-664, at 16 (1996)).

47. Brief of Federalism Scholars, *supra* note 19, at 24 (quoting THE FEDERALIST NO. 33, at 174 (Alexander Hamilton) (Clinton Rossiter ed., (1961))).

48. 505 U.S. 144 (1992).

49. *Id.* at 145.

see.⁵⁰ It is also, I submit, unworkable, contradicted by practice, and unconstitutional. Thus, if a federal policy is justified by an enumerated power and does not aim to block or compel, coerce, or involve any mechanism of the states, then Congress may design it to serve traditionally state *social goals*, consistently with federalism.⁵¹

First, the test is unworkable. It requires a federal policy's justifications to be (in the Federalism Scholars' own words) "related to" the enumerated power that enables Congress to pass it. Most of those powers are means (like the regulation of interstate commerce). But is not *any purpose* of a means related to it, precisely as an end? In that case, may Congress not regulate commerce even to promote "public health, safety, morals, and . . . the general welfare" so long as the regulation really serves these ends?

If it may, then commerce regulation, for example, may be designed to promote any goal that a state may promote, and the Federal Justifications Test excludes nothing. If not, then what *does* make a purpose sufficiently related to commerce regulation that Congress may take it into account? For this and many clearly instrumental enumerated powers, the test would be intolerably ambiguous or toothless.

Moreover, the Federalism Scholars concede that mechanisms are sufficiently related to an enumerated power if they make its exercise *better*—as the antifraud provision makes permanent residency policy a superior exercise of the Article I power to regulate immigration.⁵² But here the meaning of *better* is clearly supplied by ideas about what is healthy or upright or useful for society—about the very police powers related to public health, safety, and morals, and the general welfare that the Federalism Scholars want to prevent federal policy from being shaped to promote. Because Congress has to be free to choose

50. Does *United States. Department of Agriculture v. Moreno* justify it? The Court there laments that the challenged statute (which treats households of related persons differently from households involving unrelated persons) is "irrelevant to the stated purposes of the Act," which have to do with interstate commerce. 413 U.S. 528, 534 (1973). But it goes on to say that the regulation, to be constitutional, must therefore "further some legitimate governmental interest other than those specifically stated in the congressional 'declaration of policy'"—clearly implying that other interests *could* have saved the statute. *Id.* The problem with the purposes found was not that they were off-limits to Congress in particular, but that they violated equal protection by involving a "bare congressional desire to harm a political unpopular group." *Id.*

51. Of course, a federal policy need not meet all these conditions to avoid infringing on state power. I am proposing a merely sufficient condition, minimally drawn to show that DOMA clearly violates no principle of federalism.

52. See *supra* notes 36–43 and accompanying text.

among better and worse ways of exercising its enumerated powers, it has to be free to shape its mechanisms (once properly justified by an enumerated power) by the kinds of social goals available to states. Again, the Federal Justifications Test is unworkable.

Second, it is clear that Congress *does* design policies to achieve purposes normally pursued by the states, and no one faults it for doing so on the basis of anything like the Federal Justifications Test. The Clean Air Act,⁵³ the Affordable Care Act,⁵⁴ the Civil Rights Act,⁵⁵ and the Controlled Substances Act⁵⁶ are all justified by the authority to regulate interstate commerce.⁵⁷ Yet they are clearly designed to promote public health, safety, morals, and the general welfare. We must appeal to such purposes to explain major features of each statute.⁵⁸ Challenges to them have charged that these acts or their related regulations are not, in fact, regulations of commerce.⁵⁹ But none has *granted* that point while challenging the law's having then been shaped to pursue traditionally state social goals: none has invoked the Federal Justifications Test.

Finally, besides being unworkable and ignored, the test is unconstitutional. It is an extra-constitutional limit on federal power. Article I, Section 8 defines the line between federal and state power, and it is framed in terms of mechanisms. So those mechanisms (and

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53. Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C §§ 7401–7671q (2012)).
 54. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 21, 25, 26, 29, and 42 U.S.C.).
 55. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 28 and 42 U.S.C.).
 56. Pub. L. No. 91-513, Title II, 84 Stat. 1242 (1970) (codified at 21 U.S.C. §§ 801–971).
 57. *See* 42 U.S.C § 7402 (Clean Air Act); 42 U.S.C. § 18091 (Affordable Care Act); 42 U.S.C. § 2000a(b)–(c) (Civil Rights Act); 21 U.S.C. § 801(3) (Controlled Substances Act).
 58. *See* 42 U.S.C § 7401(a)(2) (Clean Air Act provision); 42 U.S.C. § 18091(2)(C),(I) (Affordable Care Act provisions); 78 Stat. 241, 243 (Civil Rights Act provisions); 21 U.S.C. § 801(1) (Controlled Substance Act provision).
 59. *See* Nat'l Fed. of Indep. Bus. v. Sebelius 132 S. Ct. 2566 (2012) (adjudicating a challenge to the Affordable Care Act); *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that Congress' power under the Commerce Clause extends to its marijuana rules of the Controlled Substance Act); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (holding that Congress did not exceed its power under the Commerce Clause in applying Title II of the Civil Rights Act of 1964 to public accommodations serving interstate travelers).

anything properly related to them) define the limits of federal power.⁶⁰ Once a policy fits within that scope, it may be shaped to achieve even social goals normally promoted by the states. The traditional formula of the states' police powers is just a gloss on the more authoritative constitutional text; it cannot trump that text in case of conflict.

So if federal powers justify creating the programs affected by DOMA, then Congress may shape their eligibility requirements to promote the view of marriage that it thinks best serves public values and the general welfare. That is what DOMA did. So we can grant the Federalism Scholars' reading of DOMA's real purposes and bracket the "downright boring" ones offered in Justice Scalia's dissent.⁶¹ There is still no objection to DOMA based on federalism.

The real question is whether the social goal behind DOMA was illegitimate in itself—whether socially promoting the traditional view of marriage (by DOMA's mechanisms) violated equal protection.

II. CLASSIFICATIONS

Here I elaborate on Alito's passing suggestion that the Court's equal-protection analysis of suspect classifications is "ill suited" to this case.⁶² I make two points: First, it is much easier to show that DOMA classified by sex than by sexual orientation. But second, DOMA and traditional state marriage laws crucially differ *in structure* from almost every other policy that involves classification by sex. And that difference makes heightened scrutiny less appropriate here than it has been in other sex classification cases.

I admit that these are very modest conclusions. They offer tentative answers to secondary questions—not of constitutionality, but of how to apply the judge-made tools for determining

60. It is standard to think that the Necessary and Proper Clause entitles Congress to enact federal mechanisms distinct from any listed as enumerated powers—so long as those mechanisms are *sufficiently related* to enumerated powers. But note that neither accepting nor rejecting the Federal Justifications Test implies a position on how closely related is close enough. It is one thing to say that any federal action would be consistent with federalism if it were tailored to serve social goal *X*. It is quite another to say whether a given federal policy counts as serving *X* at all. The Federal Justifications Test concerns the first question: which purposes the federal government may shape its policies to serve, without violating federalism. *See supra* note 41 and accompanying text. Many federalism challenges—for example, to federal gun laws in *United States v. Lopez*, 514 U.S. 549 (1995)—concern the second question: when a certain federal policy counts as serving a purpose at all (granting that if the policy *does* serve that purpose, it will be consistent with federalism).

61. *United States v. Windsor*, 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting).

62. *Id.* at 2716 (Alito, J., dissenting).

constitutionality. One could accept both my points and still find DOMA unconstitutional, or reject them and decide the other way. I make them anyway for two reasons. First, as long as the Court applies tiers of scrutiny, it will be pertinent to ask what level it should apply to the state marriage laws no doubt headed for it in *Windsor's* wake. Second, showing the structural difference between traditional marriage laws (including DOMA) and other sex classifications will set the stage for my main argument that any equal protection ruling against the former requires *Lochnerizing*.

A. *Sexual Orientation*

Both Ms. Windsor and the United States argued that DOMA classified by sexual orientation,⁶³ and some judges agreed.⁶⁴ But some on *both* sides of the case demurred, pointing out that DOMA made nothing hinge on orientation—real or imagined, assumed or avowed. If a man and woman married for cold convenience, even though one or both were bisexual or gay, DOMA would not deprive them of a single federal marriage benefit. If two straight men married for the same reason, they would be deprived of benefits.⁶⁵ DOMA clearly affected gay people much more, but under the Court's doctrine, disparate impact does not trigger heightened scrutiny.⁶⁶

Perhaps it should. Maybe the Court's reason for declining to make a trigger of *racially* disparate impact does not generalize.⁶⁷ Maybe disparate impact indicates official classification at an earlier stage anyway—in the choice of policies as opposed to their operation. Indeed, the Court already allows judicial inferences of evil aims from a

63. Brief on the Merits for Respondent Edith Schlain Windsor at 15, *Windsor*, 133 S. Ct. 2675 (No. 12-307); Brief for the United States on the Merits Question at 52, *Windsor*, 133 S. Ct. 2675 (No. 12-307).

64. *Windsor v. United States*, 699 F.3d 169, 181–85 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013).

65. See Brief on the Merits for Respondent Bipartisan Legal Advisory Group of the U.S. House of Representatives at 25 n.7, *Windsor*, 133 S. Ct. 2675 (No. 12-307) [hereinafter BLAG Brief]; see also Andrew Koppelman, *Beyond Levels of Scrutiny: Windsor and "Bare Desire to Harm"*, 64 CASE. W. RES. L. REV. 1045, 1053–58 (2014).

66. See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that the existence of a disparate impact claim alone does not “trigger the rule, that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.” (citation omitted)).

67. The Court feared that making disparate racial impact a basis for higher scrutiny would imperil countless tax, welfare, and regulatory policies, which disproportionately affect the poor, who are predominantly black. *Id.* at 248. But sexual orientation does not similarly track economic status, so arguably there would not be a similar problem with heightened scrutiny of policies that affect gay people more.

policy's overall shape, including disparate impact.⁶⁸ To block such an inference might seem rather formalistic.

Or perhaps, as Professor Andrew Koppelman argues, the Court should (and does) apply heightened scrutiny just when a policy requires "officials, in allocating rights and burdens, to determine" certain traits' presence "in specific cases."⁶⁹ By this standard, as we've seen, DOMA would not have counted as classifying by orientation. But it is equally clear that even on this more restrictive standard, it did classify by sex. What implications can be drawn from that?

B. *Sex*

DOMA more clearly classified by sex because it required federal officials to consider, for instance, Thea Spyer and Edith Windsor's sex in calculating Windsor's federal tax liability.

Of course, levels of equal-protection scrutiny are judges' optional inventions for applying a constitutional requirement. What judges have made, they may remake. So we could still ask whether official advertence to sex *should* suffice for higher scrutiny. Are some kinds of sex-classifications systematically less suspect? Is the kind employed by DOMA meaningfully different?

Koppelman says no: DOMA does just what the sex-based laws struck down in *Frontiero v. Richardson*⁷⁰ and *Weinberger v. Wiesenfeld*⁷¹ did.⁷² The first made benefits unequally available to Air Force members' dependents. Wives of male members were automatically eligible, but a female member like Sharron Frontiero could obtain benefits for her husband only if she could show that he depended on her for more than half his living.⁷³ Under the provision in *Wiesenfeld*, Steven Wiesenfeld, as a widowed father, was ineligible for certain Social Security benefits available to widowed mothers.⁷⁴

Some courts have tried to distinguish such policies from DOMA by pointing out that they treat men and women differently while

68. *Id.* at 242; *see also* Miller v. Johnson, 515 U.S. 900, 913 (1995) ("We recognized in *Shaw* that . . . statutes are subject to strict scrutiny . . . when, though race neutral on their face, they are motivated by a racial purpose or object." (citing *Shaw v. Reno*, 509 U.S. 630, 644 (1993))).

69. Koppelman, *supra* note 65, at 1049.

70. 411 U.S. 677 (1973).

71. 420 U.S. 636 (1975).

72. Koppelman, *supra* note 65, at 1049–50.

73. *Frontiero*, 411 U.S. at 680.

74. *Wiesenfeld*, 420 U.S. at 640–41, 653.

DOMA does not.⁷⁵ The usual reply is that the interracial marriage ban in *Loving v. Virginia*⁷⁶ was defended on analogous grounds, as applying equally to blacks and whites. In response, some defenders and detractors of traditional marriage laws have argued that the history and structure⁷⁷ of the ban in *Loving* showed that it perpetuated white supremacy (as the Court held),⁷⁸ while laws limiting benefits to opposite-sex couples do not perpetuate male supremacy.⁷⁹

Other defenders of DOMA argue that though the law classified by sex, its sort of classification was not problematic. They analogize it to policies that require adverting to sex but merit no higher scrutiny, such as the “mirror-image” sex restrictions on bathroom use.⁸⁰

At least one defender of the sex-classification argument against traditional-marriage laws, Professor Clark, acknowledges that there are constitutional differences between sex and racial classifications and tries to work around this point.⁸¹ And perhaps the most expansive sex-discrimination case, *United States v. Virginia*⁸² (the “VMI” case), supports Clark’s concession when it takes such differences for granted:

The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed “inherent differences” are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring: “[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.”

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75. See, e.g., *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*.”) (emphasis added).
76. 388 U.S. 1 (1967).
77. *Id.* at 11 (“The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications [are] designed to maintain White Supremacy.”).
78. *Id.*
79. See, e.g., David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Mieke and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 82–83 (1997); Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 492–93 (2001) (arguing that the sex-discrimination argument for more liberal LGBT legislation—which the author supports—is mistaken on “sociological,” “theoretical,” and “moral” grounds).
80. Craig M. Bradley, *The Right Not to Endorse Gay Rights: A Reply to Sunstein*, 70 IND. L.J. 29, 30 n.9 (1994).
81. See Stephen Clark, *Same-Sex but Equal: Reformulating the Miscegenation Analogy*, 34 Rutgers L.J. 107, 143 (2002).
82. 518 U.S. 515 (1996).

“Inherent differences” between men and women, we have come to appreciate, remain cause for celebration . . . But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.⁸³

But in debating the merits of easing (or differentiating) scrutiny for sex-based policies, courts and commentators have overlooked one telling structural difference between *Windsor* and the canonical sex-discrimination cases. Whether or not courts should register this difference doctrinally, exploring it will guide the primary step of the equal-protection inquiry into how well DOMA could be justified by reference to legitimate policy goals.

Sharron Frontiero had to clear a higher legal bar to earn benefits for her spouse simply because she was a woman.⁸⁴ Wiesenfeld was ineligible for certain benefits just because he was a man.⁸⁵ Under the challenged laws, neither plaintiff could in any way escape the disadvantage.

By contrast, Ms. Windsor’s ineligibility for a tax break hinged on her sex only *derivatively*. Unlike the benefits in *Frontiero* and *Wisenfeld*, the tax break she sought was equally available to men and women:⁸⁶ being a woman left the eligibility question open. In that sense, Ms. Windsor’s eligibility did not depend solely on her own (or any individual’s) sex.⁸⁷ The basic criterion was a characteristic of a

83. *Id.* at 533–34 (alteration in original) (citations omitted) (quoting *Ballard v. United States*, 329 U.S. 187 (1946)).

84. *Frontiero v. Richardson*, 411 U.S. 677, 680 (1973).

85. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 640 (1975).

86. 26 U.S.C § 2056 (2006).

87. This may explain Justice Alito’s reticence to apply any doctrine on tiers of scrutiny at all:

Our equal protection framework, upon which *Windsor* and the United States rely, is a judicial construct that provides a useful mechanism for analyzing a certain universe of equal protection cases. But that framework is ill suited for use in evaluating the constitutionality of laws based on the traditional understanding of marriage, which fundamentally turn on what marriage is.

. . . .

. . . *Windsor* and the United States thus ask us to rule that the presence of two members of the opposite sex is as rationally related to marriage as white skin is to voting or a Y-chromosome is to the ability to administer an estate. . . .

By asking the court to strike down DOMA as not satisfying some form of heightened scrutiny, [they] are really seeking to have the Court resolve a debate between two competing views of marriage.

pair of persons: the couple to which she belonged. Specifically, it was the couple's sexual composition: same sex or opposite sex.

Of course, determining a couple's sexual composition requires determining individuals' sex; it involves treating sex as Virginia's ban in *Loving* had treated race. But a concern with sexual composition differs from a *direct* concern with individual sex, as in *Frontiero* and *Wiesenfeld*, from a concern with *racial* composition, as in *Loving*; or from other kinds of grouping.

After all, male and female are not just any two sexes, as black and white are just two races. Maleness and femaleness, and a certain social purpose, are *necessarily inter-defined*: one cannot *fully* explain either maleness or femaleness without reference to the other and to a certain social good. The reason is that what differentiates them are not just different anatomical or genetic features, but—at a deeper level of explanation⁸⁸—their joint (basic) physical potential for a biological task: reproduction.⁸⁹ And this task, its social value, and its link to sexual composition are certainly not mere social inventions.

It is important to note that I am not simply skipping ahead to the question of whether DOMA's classification is ultimately justified. For all I have said, it might turn out not to be. My point is about the best level of scrutiny, still a question of *presumptions*. It is that any particular racial (or ethnic, or religious) grouping is *prima facie* arbitrary—and its political relevance, presumptively in need of justification—as the male-female sexual grouping is not. In none of the typically suspect groupings (racial, ethnic, etc.) do the very categories of the group have any inherent positive (or negative) connection to a legitimate political end. They have such a connection, if at all, only in virtue of contingent and changeable social or cultural goals. Those goals have often been malign, so it makes sense not to presume their legitimacy.⁹⁰

But the male-female sexual grouping is necessarily linked, by the concepts involved, to a social purpose we did not simply invent and

United States v. Windsor, 133 S. Ct. 2675, 2716–18 (2013) (Alito, J., dissenting).

88. That is, a biological or evolutionary explanation.

89. To clarify: One can give maleness and femaleness new senses, ones that do *not* refer to the other sex and biological reproduction. But either the new conceptions will not pick out just the same persons or they will be less explanatorily powerful than conceptions that *do* refer to the opposite sex and biological reproduction. In short, any *accurate* and *explanatorily satisfying* account of maleness and femaleness will refer to the opposite sex and to biological reproduction.

90. See, e.g., Massachusetts Board of Retirement v Murgia, 427 U.S. 307, 313 (1976) (suggesting that strict scrutiny applies in cases involving groups with a “history of purposeful unequal treatment” (quoting San Antonio Sch. Dist. v. Rodriguez, 411 US 1, 28 (1973))).

can scarcely do without: society's reproduction.⁹¹ In this way, DOMA's sort of classification was different from any *racial* grouping, even from other sex classifications. If our very concepts of African American and white, for example, ever suggested any particular social harm (or benefit), alone or in combination, it was only because we had created or invented, by our conventions, the harm or the link or both. The same goes for perceived links between maleness or femaleness and most particular professions—but not between the male-female pair and social reproduction.

In light of this, courts might well decide to leave in place heightened scrutiny of individual sexual and racial classifications, and of racial-composition classifications (as in *Loving*), while at least presuming the constitutionality of laws that classify by opposite-sex composition.

Such a scheme would best vindicate Justice Ginsburg's judgment in the *VMI* case that male-female "inherent" and "physical" differences—unlike alleged interracial differences—are a cause for "celebration" (though not oppression or limitation).⁹² What scheme could possibly hew to this standard more precisely than one that heightened scrutiny for any type of sex classification except that classification which targets a *necessarily* "celebrat[ed]"⁹³ social end (survival), to which men and women's physical differences are *inherently* linked?⁹⁴

It might be objected that this move would be in precisely the wrong direction, because it would plant deep in constitutional doctrine diseased ideas the Court has been moving to eradicate: "outmoded"⁹⁵ gender notions like the "pervasive sex-role stereotype," repudiated by the Rehnquist Court, that "caring for family members is women's work."⁹⁶ Or it could entrench what Professor Balkin calls a "system of social meanings" that keeps patriarchy in place by

91. I do not deny what is undeniable: much in our concepts of *male* and *female* is socially constructed. My point is that they necessarily make reference also to a fact that is not (wholly) socially constructed: their complementarity in biological reproduction. See *supra* notes 79–80.

92. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

93. *Id.*

94. Hence, perhaps, the Court's ambivalence about sex classifications. See, e.g., *Craig v. Boren*, 429 U.S. 190, 200 (1976) (opting for intermediate scrutiny, three years after a plurality of the Court had applied heightened scrutiny in *Frontiero v. Richardson*, 411 U.S. 677 (1973)).

95. *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 441 (1985).

96. *Ne v. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003).

“defin[ing] masculinity and femininity in terms of complementary traits and attraction to the opposite sex.”⁹⁷

This is an important concern. We cannot deny that gender stereotypes can be pretexts for subjugating women or unjustly limiting their liberty. Whether all generalizations about sex or gender should be repudiated has been disputed. Against this idea, some feminists (liberal and conservative)⁹⁸ have suggested that trying to uproot even the most physically grounded ideas about sex would actually harm and demean women, by holding up the “unencumbered, wombless male” body as the ideal by which all are judged.⁹⁹

But however that dispute might be resolved, my proposal would not entrench stereotypes about what constitutes proper gender identity or behavior. Its premise is not that men are by definition or essence those attracted to women or fatherhood, so that gay or unattached or childless men are abnormal—nor, *mutatis mutandis*, for women. It is simply that maleness and femaleness are *conceptually* specified by men and women’s *basic physical potential*—not moral

97. J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2361 (1997).

98. For claims along these lines by women across the political spectrum, see, for example, Helen M. Alvaré, *Gonzales v. Carhart: Bringing Abortion Law Back into the Family Law Fold*, 69 MONT. L. REV. 409, 444 (2008) (“Denying that women are drawn to their unborn children, as well as to spending considerable time and effort rearing born children, only results in policies reinforcing an outdated and largely male model of social life and employment—a model in which no institution need ‘flex’ or change to allow women and men to meet children’s needs. On the other hand, recognizing that both men and women feel keen obligations to their children at the same time that they have work or school obligations to meet is both more realistic and a more likely premise for a successful argument in favor of family-friendly work and education policies.” (footnote omitted)); Elizabeth Fox-Genovese, *Wrong Turn: How the Campaign to Liberate Women Has Betrayed the Culture of Life*, in LIFE AND LEARNING XII: PROCEEDINGS OF THE TWELFTH UNIVERSITY FACULTY FOR LIFE CONFERENCE 11, 19 (Joseph W. Koterski, ed., 2003) (lamenting the claim that “to enjoy full dignity and rights as an individual, a woman must resemble a man as closely as possible. It is difficult to imagine a more deadly assault upon a woman’s dignity as a woman. For this logic denies that a woman can be both a woman and a full individual.”); Robin West, *Concurring in the Judgment*, in WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION 121, 141–42 (Jack M. Balkin ed., 2005) (arguing that the equal citizenship argument for abortion rights “legitim[izes], and with a vengeance, the inconsistency of motherhood and citizenship itself”).

99. Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL’Y 889, 941 (2011).

obligation or psychological need but radical physical potential¹⁰⁰—to advance together an interest of any society. This is the kind of “undeniable difference”—like the fact that only mothers give birth—which can justify a policy without constituting a stereotype.¹⁰¹

Whether there are contrary (even overriding) reasons to leave the sex-discrimination doctrine alone should not, in my view, be decisive; I think any ruling against DOMA must *Lochnerize* even if it applies heightened scrutiny. I have nonetheless followed this excursus on DOMA’s form of classification because it orients the next step of our inquiry.

First, it highlights that the primary equal-protection question is not whether the class of gay or straight persons, men or women, or any other set of individuals has a special link to the common good, but whether a certain subset of *couples* does. Second, it shifts the burden of proof onto those who would find no such link, or dismiss any finding of one as stereotyping.

In Part III, I will lay out one defense of such a link—as well as a common (equally value-based and controversial) retort, on which I think the Court implicitly relied in deciding *Windsor*.

III. LOCHNERIZING

Consider two principles regarding the nature and value of marriage that would, if sound, justify state marriage laws that recognize only (certain) opposite-sex couples, as well as laws like DOMA that socially promote¹⁰² this view of marriage:

Value Judgment Defense: Part of what gives marriage its distinctive kind of moral value is that it unites the whole of the partners: not just in heart and mind, but also bodily.¹⁰³ Yet only coitus makes for bodily union in the relevant sense, and it is possible only between a man and woman. So only (certain) male-female bonds can realize the kind of moral value distinctive of marriage, whatever the moral status of other bonds.

100. It is basic or radical (i.e., root) in that other, contingent conditions (of health, age, timeliness, other circumstances, and certain actions) need to be met for it to be realized fully in any particular case.

101. *Nguyen v. INS*, 553 U.S. 53, 68 (2001).

102. Again, by “socially promote” I mean promote with a view to shaping public opinion.

103. It does not follow that relationships not involving such extensive personal (including coital-sexual) union are *immoral*. After all, most of the types of love we value—of parent for child or pupil for mentor; of siblings or best friends—involve nothing of the sort.

General Welfare Defense: A key part of what makes marriage policy socially valuable is that it benefits children, by making them likelier to grow up with their own committed biological parents—something valuable in itself, if not also instrumentally. But this social purpose is better served by a law recognizing only certain opposite-sex relationships, than by one that includes same-sex bonds. Indeed, the wider scheme can undermine that purpose by promoting a vision of marriage that tends to make its stabilizing norms seem like arbitrary impositions. So the former scheme better serves key social purposes of marriage policy. (As I clarify in Part IV.B.2., this Defense entirely prescind from empirical debates about the relative merits of same- and opposite-sex non-biological parenting.)

I call the conjunction of these principles the “Traditional View.”

These are not the only possible bases for traditional-marriage laws or the only ones ever cited by supporters. But the first thing to note is that they are common *kinds* of reasons for *any* marriage policy. After all, parallel arguments for enacting same-sex marriage are common:

Revisionist Value Judgment Defense: Part of what gives marriage its distinctive kind of moral value is that it unites the whole of the partners: not just in heart and mind, but also bodily. Yet any sort of consensual sex can make for bodily union in the relevant sense, and that is possible between any two adults. So any romantic pair bond can realize the kind of moral value distinctive of marriage, whatever the moral status of other bonds.

Revisionist General Welfare Defense: A key part of what makes marriage policy socially valuable is that it benefits children, by making them likelier to grow up in a stable household—something valuable in itself, if not also instrumentally. But this social purpose is better served by laws recognizing any romantic pair bond than by ones that include only opposite-sex bonds. Indeed, the narrower scheme can undermine that purpose by promoting a vision of marriage that makes its stabilizing norms seem irrelevant for some relationships. So the former scheme better serves key social purposes of marriage policy.

Call the conjunction of these views the “Revisionist View.”

I will not establish here that the Traditional View is *true* as a matter of moral or political philosophy or empirical judgment, or that the Revisionist View is false. Instead, I will show two things:

1. The Traditional View is a *reasonable and otherwise legitimate* ground for DOMA.¹⁰⁴
2. Any equal-protection argument against DOMA¹⁰⁵ would have to assume that the Traditional View is false, or the Revisionist true.¹⁰⁶

And I will assume a third point, which is nearly self-evident:

3. However expansively construed, no aspect of constitutional text, structure, history, or precedent¹⁰⁷—nor any underlying

104. See discussion *infra* Part IV.

105. The other grounds I have seen cited for a ruling against DOMA are the Due Process Clause's fundamental right to marry and right to privacy. As for the second, the Court's privacy jurisprudence has always been concerned with criminal bans. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the use of contraceptives by spouses); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (the use of contraceptives by the unmarried); *Roe v. Wade*, 410 U.S. 113 (1973) (abortions); *Webster v. Reprod. Health Serv.*, 492 U.S. 490 (1989) (same); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (same); *Lawrence v. Texas*, 539 U.S. 558 (2003) (consensual sex). These all involved finding constitutional rights to certain kinds of private conduct. There is no clear extrapolation from this line of cases to a constitutional right to affirmative *recognition* of a relationship. As for the fundamental right to marry, any ruling on this basis would require a prior conception of the nature and meaning of marriage, even more obviously than an equal protection ruling against DOMA would. So if, as I will argue, the equal protection argument against traditional-marriage laws inevitably *Lochnerizes*, so would a Due Process argument. But for a response to what I consider the strongest argument that the fundamental right to marry includes more than the Traditional View, see *infra* note 107.

106. See discussion *infra* Part V.

107. Has the Supreme Court already rejected the Traditional View as a matter of constitutional law, in the course of deciding other marriage cases? The most frequently cited (and by far the most useful) case for this claim is *Turner v. Safley*, 482 U.S. 78 (1987). The ruling held, in relevant part, that inmates have the same fundamental right to marry as anyone else because several "important attributes of marriage" remain available to them despite "the fact of [their] confinement" and the state's "pursuit of legitimate correctional goals"; and that forbidding them to marry unless they had the prison superintendent's permission was not reasonably related to the legitimate public purposes of imprisonment.

The "important attributes of marriage" that the Court said were sufficient, "taken together," to "form a constitutionally protected marital relationship in the prison context," were: (i) expressions of commitment; (ii) exercise of religious faith; (iii) the expectation of consummation upon release; and (iv) legal and social benefits (like Social Security benefits and the legitimation of children). Could these, taken together, also "form a constitutionally protected marital relationship" between two people of the same sex?

constitutional value or principle—entails that the Traditional View is false, or the Revisionist true.

Note that I am not taking for granted the (constitutional or legal) *legitimacy* of basing policy on the Traditional View. That would be to beg the question. I am simply assuming that whether the Traditional View (the Value Judgment and General Welfare Defenses) is *true* or *false* is a matter of moral and political philosophy and empirical judgment. It is not and never has been treated as a matter of constitutional law. One can accept this but argue that

No. First, (iii) and (iv) show that if anything, the Court was likely taking for granted the background assumptions of the Value Judgment Defense, long embodied in the common law tradition: consummation was always understood to be satisfied only by coitus, and the legitimation of children born to a relationship is relevant only to opposite-sex couples.

Second and more important, if we did bracket those hints that the Traditional View was being taken for granted, and tried to infer all the contours of the right to marriage from the other “important attributes” picked out by the Court, there would be no limit. Any consensual adult bond—including a group sexual bond, a non-romantic one, a sexually open one, even a deliberately temporary one—can involve some commitment, religious significance, and (if the state government so chooses) legal benefits. Yet the *Turner* majority was clearly not implying that all these bonds, too, came under the constitutionally protected fundamental right to marry.

So it is obvious that *Turner*—a case ultimately about whether certain prison regulations were reasonably related to legitimate penological purposes—did not commit our constitutional system to a rejection of the Traditional View. It took for granted the background understanding of what the fundamental right to marriage was a right to. (It simply added that this right was not forfeited by prisoners and that severely restricting inmate marriage was not closely enough related to goals of rehabilitation and security to be justified.)

Indeed, this is the pattern with most cases cited to defend a fundamental right to same-sex marriage. *Zablocki v. Redhail*, 434 U.S. 374 (1978), for example, merely held that Wisconsin’s restriction of marriage by those charged with paying child support was both over- and under-inclusive, and thus not appropriately tailored, with respect to its asserted goals. It in no way impugned—as same-sex marriage supporters sometimes contend—the legitimacy of the State’s goal of promoting responsible procreation. In this and most cases that someone might cite as committing our constitutional tradition to a rejection of the Value Judgment or General Welfare Defense, I contend, the Court just reads off our history and traditions the basic contours of the fundamental right to marriage, and then examines whether a state has curbed some people’s access to marriage so understood, or imposed restrictions on it that are hard to justify by appeal to the same traditional conception of marriage and its public purposes.

enshrining the Traditional View in policy, whether the view itself be true or false, is unconstitutional.

In any case, together the three points above show that to reach its equal-protection-based decision in *Windsor*, the Court had to assume positions on substantive value and policy judgments on which (a) there are reasonable and legitimate alternatives, and (b) the Constitution is silent. Indeed, I think the same would be true of any ruling against state definitions of marriage as a male-female union.

But it is widely considered problematic for a court to assume positions on reasonably disputed value and policy judgments, without any constitutional basis. This is not just an originalist view. Originalists will quibble over whether “constitutional basis” can include evolving interpretations of constitutional text or structure, or its underlying values. I will argue that even loosely read, the Constitution does not support the value and policy judgments needed to complete the equal-protection argument against DOMA (or against a traditional state marriage law).

I will show, in short, that the Court in *Windsor* was doing what it has been routinely criticized for having done in *Lochner v. New York*.¹⁰⁸ The *Lochner* Court struck down a New York statute setting daily and weekly limits on the number of hours a baker could work. It did so on the ground that the law interfered with the freedom of contract inherent in the liberty component of the Fourteenth Amendment’s Due Process Clause. Justice Holmes’s memorable dissent charged the Court with substituting its conservative economic policy judgments for those of the legislature:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . The Fourteenth

108. *Lochner v. New York*, 198 U.S. 45 (1905). For a summary of common criticisms of *Lochner*, see David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1505–1525 (2005) (discussing “[h]ow *Lochner* [b]ecame [p]art of the [a]nti-[c]anon”) and Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 874 & nn.5–6 (1987) (“The received wisdom is that *Lochner* was wrong because it involved ‘judicial activism’: an illegitimate intrusion by the courts into a realm properly reserved to the political branches of government.”). For an alternate account of *Lochner*’s error from the one identified by Justice Holmes and assumed here, see AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 273–74 & 561 n.26 (2012) (“The Court’s root objection to [maximum-hour] laws was that they were designed to redistribute wealth from employers to laborers.”).

Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . Some [laws upheld by the Court] embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

. . . I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health.¹⁰⁹

Windsor, I will show, did what Holmes accused *Lochner* of having done. It was “decided upon” a moral and political theory of marriage “which a large part of the country does not entertain.”¹¹⁰ After all, “the Fourteenth Amendment does not enact,”¹¹¹ we might say, Mr. Evan Wolfson’s book on marriage.¹¹² “A constitution is not intended to embody a particular [marriage] theory, whether” the Traditional or Revisionist View.¹¹³ “It is made for people of fundamentally differing views,” and “the word liberty”—or equality—is misapplied if used “to prevent the natural outcome of a dominant opinion,” unless any reasonable person “would admit” that the statute was invidious.¹¹⁴ But studying DOMA, “a reasonable man might think it a proper measure on the score of” public norms and the general welfare.¹¹⁵

To defend this charge, I will argue first that the Value Judgment and General Welfare Defenses are reasonable and otherwise legitimate grounds for DOMA. In particular, history disproves the objection that

109. *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting).

110. *Id.* at 75.

111. *Id.*

112. EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE’S RIGHT TO MARRY (2005).

113. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

114. *Id.* at 76.

115. *Id.*

they originated in animus against gays and lesbians,¹¹⁶ coherent philosophical¹¹⁷ and policy¹¹⁸ arguments can be adduced to show that they are not simply irrational, and evidence specific to DOMA shows that it was *in fact* motivated by ideas like these same Defenses.¹¹⁹

But here a question arises. If we oppose having courts take positions on moral issues, and allow statutes to serve public morals, do not we risk making equal protection a dead letter? After all, every law serves *some* purpose.¹²⁰ What's to stop state lawmakers from calling that purpose a matter of public morals? And if they do, how could a court ever strike it down as invidious, without implicitly rejecting as false the lawmakers' moral claim—without, that is, *Lochnerizing*?

For example, to conclude that Virginia's interracial marriage ban had a discriminatory purpose, didn't the *Loving* Court have to reject the trial court's moral defense of the law as respecting God's will to separate the races?¹²¹ In that case, was *Loving* not *Lochnerizing*—assuming a position on disputed moral issues about the nature of marriage and race? If it was not—if it was free to rule the contrary moral positions out of bounds—what makes *Windsor* different?

Framed most generally, the questions raised here are hard: What is the principled difference (if any) between *false but legitimate* moral bases of legislation, and *illegitimate* moral bases? If there is none, how can we expect courts to apply equal protection without *Lochnerizing*—without deeming true or false certain value judgments on which the Constitution is silent?

We can understand various equal protection theories as attempts to answer this question. Rather than defend an account of my own, I will consider four such attempts and show that each either fails to apply to DOMA (and state traditional marriage laws), or cannot justify striking it down apart from extra-constitutional value and policy judgments. So Part IV will defend point 1 above—that the

116. See discussion *infra* Part IV.A.1.

117. See discussion *infra* Part IV.A.2.

118. See discussion *infra* Part IV.B.

119. See discussion *infra* Part IV.A.3.

120. Robert F. Nagel, Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 *YALE L.J.* 123, 124 (1972).

121. The trial court in *Loving* had written:

Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Loving v. Virginia, 388 U.S. 1, 3 (1967) (citation omitted).

Traditional View is a reasonable and legitimate basis for policymaking. And Part V will defend point 2—that there is no way to *avoid* *Lochnerizing* on the equal-protection path to *Windsor*.

Of course, there might be such a route that I have simply overlooked. Or *Lochnerizing* might be permissible after all. Or there might be a more specific charge that applies to *Lochner*—and captures what generations of legal observers have found wanting in that decision—but not to *Windsor*. Or the charge might stick and show that it would be best for at least certain equal protection interests to be secured by Congress, which would recommend a more expansive reading than the Court has allowed of Congress’s powers to enforce equal protection under Section 5 of the Fourteenth Amendment. In short, what I offer here is not a complete constitutional defense of DOMA and other traditional marriage laws. I just aim to show what Alito suggested and many have missed: that there is good reason to see in *Windsor* key features of *Lochner*.

IV. LEGITIMACY

The *Lochner* charge challenges *Windsor* supporters to find a way for the Court to deem the Value Judgment and General Welfare Defenses *illegitimate*, whether or not *true*. A natural option is to claim that they amount to or conceal a discriminatory purpose.¹²² In *Loving*, for example, the Court struck down an interracial marriage ban because it could not be justified by any “legitimate overriding purpose independent of invidious racial discrimination.”¹²³ Do the Value Judgment and General Welfare Defenses just give effect to a purpose to discriminate against gays and lesbians?

While history provided many grounds for ruling Virginia’s defenses of its interracial marriage ban pretextual or illegitimate,¹²⁴ I

122. See e.g., *Washington v. Davis*, 426 U.S. 229, 246–47 (1976) (“[W]hen hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices.”).

123. *Loving*, 388 U.S. at 11 (emphasis added).

124. As the Court in *Loving* explains:

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in *Naim v. Naim*, as stating the reasons supporting the validity of these laws. In *Naim*, the state court concluded that the State’s legitimate purposes were “to preserve the racial integrity of its citizens,” and to prevent “the corruption of blood,” “a mongrel breed of citizens,” and “the obliteration of racial pride,” obviously an endorsement of the doctrine of White Supremacy.

will argue that history *rules out* the possibility that the Value Judgment and General Welfare Defenses originated in animus against gay people. Philosophical and general policy arguments bolster the view that these Defenses are reasonable, and evidence regarding DOMA in particular tends to affirm that something like them in fact motivated it. So the Defenses are legitimate bases for DOMA.

A. *Value Judgment Defense*

The anthropological evidence of a nearly perfect global consensus on sexual complementarity in marriage and certain philosophical and legal traditions support two conclusions.¹²⁵ First, no particular religion is uniquely responsible for the Traditional View. And second, it cannot be ascribed simply to a purpose to discriminate against gays and lesbians, for that view—and the Value Judgment Defense in particular—has prevailed in societies that have spanned the spectrum of attitudes toward homosexuality, including ones favorable toward same-sex acts, and others lacking our concept of gay people as a class. (Whatever suffices to prove discriminatory purpose against a class, ignorance of the class as such surely *disproves* it.) Some philosophical and legal conceptions of marriage have even excluded certain

Loving, 388 U.S. at 7 (citation omitted) (quoting *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955)). Nancy F. Cott provides historical support for this conclusion:

It is important to retrieve the singularity of the racial basis for these laws. Ever since ancient Rome, class-stratified and estate-based societies had instituted laws against intermarriage between individuals of unequal social or civil status, with the aim of preserving the integrity of the ruling class. British imperial policy in Ireland in the fourteenth century included such a ban, and the Spanish crown in 1776 issued a similar decree. But the English colonies stand out as the first secular authorities to nullify and criminalize intermarriage on the basis of race or color designations.

These laws did not concern all mixed marriages. They aimed to keep the white race unmixed—or more exactly, to keep the *legitimate* white race unmixed—and thus only addressed marriages in which one party was white.

NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 41 (2000) (footnote omitted).

125. See, e.g., G. ROBINA QUALE, *A HISTORY OF MARRIAGE SYSTEMS* 2 (1988) (“Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies. Through marriage, children can be assured of being born to both a man and a woman who will care for them as they mature.”); see also EDWARD WESTERMARCK, *A SHORT HISTORY OF MARRIAGE* 1 (1926) (recognizing that marriage across cultures “involves certain rights and duties both . . . of the parties entering the union and . . . of the children born of it,” and “implies the right of sexual intercourse.”).

opposite-sex bonds (through no choice of their own), which further undermines the idea that they were targeting gays and lesbians.

In this Section, then, I offer historical and philosophical points to show that the Value Judgment Defense cannot have arisen out of anti-gay animus, that a reasonable case can be made for it, and that something like it motivated DOMA. In the next Section, I offer a reasoned case for the General Welfare Defense.

1. Intellectual and Legal Traditions

The Value Judgment Defense could not have originated in bigotry. Its history belies that idea. Several classical ancient thinkers—including Xenophanes, Socrates, Plato,¹²⁶ Aristotle,¹²⁷ Musonius Rufus,¹²⁸ and Plutarch¹²⁹—developed ethical frameworks that found special value in bonds embodied in coitus and uniquely apt for family life.¹³⁰

126. See, e.g., PLATO, THE LAWS OF PLATO 232, 840c–841a (Thomas L. Pangle trans., Univ. of Chi. Press, 1988) (1980) (writing favorably of legislating to have people “pair off, male with female . . . and live out the rest of their lives” together).

127. For Aristotle, the foundation of political community was “the family group,” by which he “mean[t] the nuclear family.” Alberto Maffi, *Family and Property Law*, in THE CAMBRIDGE COMPANION TO ANCIENT GREEK LAW 254, 254 (Michael Gagarin & David Cohen eds., 2005). For Aristotle, indeed, “[b]etween man and wife friendship seems to exist by nature,” and their conjugal union has primacy over political union. ARISTOTLE, NICOMACHEAN ETHICS bk. VIII, at 1162a15–19 (W.D. Ross trans., 1925)(ca. 350 B.C.E), *reprinted in* 2 THE COMPLETE WORKS OF ARISTOTLE 1836 (Jonathan Barnes ed., 1984).

128. He wrote that a

“husband and wife . . . should come together for the purpose of making a life in common and of procreating children, and furthermore of regarding all things in common between them . . . even their own bodies,” viewing this form of affectionate and bodily union—and not only its fulfillment in procreation—as desirable.

Musonius Rufus, *Discourses XIII*A, *reprinted in* Cora E. Lutz, *Musonius Rufus “The Roman Socrates,” in* X YALE CLASSICAL STUDIES 3, 89 (Alfred R. Bellinger ed., 1947).

129. Plutarch attributes to Solon the view of marriage as a union of life between man and woman “for the delights of love and the getting of children.” PLUTARCH, LIFE OF SOLON ch. 20, § 4, *reprinted in* 1 PLUTARCH LIVES 403, 459 (G.P. Goold ed., Bernadotte Perrin trans., Harv. Univ. Press. 6th prt. 1993) [hereinafter PLUTARCH, SOLON]. And he himself wrote of marriage as a distinct form of “friendship,” specially embodied in “physical union” of coitus (which he called a “renewal” of marriage). PLUTARCH, THE DIALOGUE ON LOVE § 769, *reprinted in* IX MORALIA 307, 427 (Edwin L. Minar, Jr. trans., T. E. Page et al. eds., Harv. Univ. Press. 1961).

130. And they all denied that any sexual acts but coitus, whatever the sex of the parties, could seal a truly marital relationship. See John M. Finnis,

These thinkers were not influenced by Judaism or Christianity. Nor were they all ignorant of same-sex sexual relations, which were common, for example, between adult and adolescent males in Greece. Quite apart from motives of religion, ignorance, or hostility toward anyone, they reasoned toward the view that male-female sexual bonds have distinctive value.

Indeed, the philosophical and legal principle that only coitus could consummate a marriage arose when the only other acts being considered were ones between a married man and woman. It is virtually impossible that this standard (or the views just mentioned) was motivated by animus against gays and lesbians, especially as these thinkers worked in contexts that lacked our concept of gay identity.¹³¹ Even in cultures favorable to same-sex sexual conduct, the Traditional View has prevailed—and nothing like the Revisionist was imagined.

For hundreds of years at common law, moreover, infertility was not grounds for declaring a marriage void,¹³² and only coitus was recognized as completing a marriage.¹³³ What could make sense of these two practices?

If marriage were regarded as *merely* a legal tool for keeping parents together for children, clear evidence of infertility (like old age) would have been a ground for voiding a marriage. Or if the law were just targeting same-sex bonds for exclusion, it would have counted *any* sexual act between a man and woman as adequate to consummate a marriage. Instead, the law reflected the rational judgment that those unions of hearts and minds extended along the bodily dimension by coitus were valuable in themselves, and different in kind from other bonds: the Value Judgment Defense.

2. Philosophical Account

So history suggests that something besides religion and animus can motivate the Value Judgment Defense. That is reinforced by the fact that arguments can be and have been made to *defend* this view, as reasonable and coherent, not just historically prevalent.¹³⁴

Law, Morality, and "Sexual Orientation", 69 NOTRE DAME L. REV. 1049, 1062–68 (1994).

131. Compare policies like Don't Ask, Don't Tell, which it would have been impossible to enact in a culture that lacked our concept of sexual orientation.

132. See CHESTER G. VERNIER, 2 AMERICAN FAMILY LAWS: A COMPARATIVE STUDY OF THE FAMILY LAW OF THE FORTY-EIGHT AMERICAN STATES, ALASKA, THE DISTRICT OF COLUMBIA, AND HAWAII (to Jan. 1, 1931) § 68, at 38–39 (1931).

133. See 1 *id.* §§ 37, 50, at 170–72, 239–46.

134. See, e.g., PATRICK LEE & ROBERT P. GEORGE, BODY-SELF DUALISM IN CONTEMPORARY ETHICS AND POLITICS 176–217 (2009).

Here I summarize my own (coauthored) philosophical efforts over several years to defend a specific version of the Traditional View, namely, the conjugal view—an effort that draws on some of the classical thinkers mentioned above.¹³⁵

This philosophical account begins with an Aristotelian point: people enter a voluntary relationship by committing to engage in certain cooperative *activities*, which aim at certain shared *goods*. And they do so in the context of a commitment marked by *norms* appropriate to those shared activities and goods.

This is what creates a voluntary relationship, or union, or community: a group's commitment to pursue given goods through certain activities while observing certain norms. What sets the community of *marriage* apart, on this account, is that it is *comprehensive* in these three defining respects: unifying activities, unifying goods, unifying commitments. It is comprehensive, that is,

(a) in the *basic dimensions in which* it unites two people (mind and body);¹³⁶

(b) in the *goods with respect to which* it unites them (procreation, and hence the broad domestic sharing fit for family life);¹³⁷ and

(c) in the kind of *commitment that it calls for* (permanent and exclusive).¹³⁸

a. Comprehensive Unifying Acts: Mind and Body

If marriage unites partners in body as well as mind, what makes for bodily union? Many on both sides of the marriage debate would say sex. But why? It can foster or express emotional closeness, but so can other activities. Why is *sex* crucial for bodily union, and thus for marriage?

On the philosophical view sketched here, the answer begins, again, with a more general account. What makes for unity is “activity toward common ends. Two things are parts of a greater whole—*are one*—if they *act as one*; and they act as one if they coordinate *toward one end that encompasses them both*.”¹³⁹

The same goes for *bodily* union. Thus, your organs form one body because they are coordinated toward the one biological end of sustaining your biological life.

135. GIRGIS ET AL., *supra* note 13.

136. *Id.* at 25–28.

137. *Id.* at 28–32.

138. *Id.* at 32–34.

139. *Id.* at 25.

Just so, two *people* unite bodily when they are “coordinat[ed] toward a common biological end of the whole.”¹⁴⁰ That happens only in coitus. In that first step of the reproductive process, a man and a woman are coordinated toward a biological end (reproduction) of the whole (the couple). Achieving the end would deepen the bodily union, but the coordination is enough to create it.

Yet no other act between two people involves coordination toward a single biological end. So this conception of marriage as comprehensive union—which suggests that marriage must involve the partners’ bodily union, which in turn is modeled on bodily union *within* an individual—provides a basis for affirming (inter alia) that only a man and woman can form a marriage.

b. Comprehensive Unifying Goods: Procreation and Domestic Life

Again, then, marriage unites partners in body *and* mind, and is in that sense uniquely encompassing or comprehensive. But because it is oriented to children and family life, marriage also uniquely calls for the wide-range sharing of domestic life.

The connection between marriage and parenthood is intuitive, but easily misunderstood. Of course children are not sufficient to create marriage, but they are also not necessary. Yet, many think, the prospect of children shapes the norms and expectations of married life. The philosophical account I defend explains why. “Procreation . . . fulfills and extends a marriage, because it fulfils and extends the act that most embodies a marriage: [coitus], the generative act.”¹⁴¹

That is, coitus by its nature (i.e., apart from people’s subjective goals) is a coordination toward procreation. So the act that makes marital love is also the kind of act that makes new life. Thus marriage itself—the relationship most embodied by that act—is extended by children where they come, and in all cases by the wide-range sharing of domestic life uniquely apt for family life.

But this *inherent* orientation to family and domestic life is unique to male-female conjugal bonds. Any connection to family life in other pairings or groups is just a matter of the partners’ *choice* to band together to rear children—which can occur even in non-romantic bonds (say, between a widowed mother and her sister who moves in to help rear the child). Only for male-female conjugal bonds is there an inherent connection to fulfillment in family life.¹⁴²

So this second sense in which marriage is reasonably seen as comprehensive—that it is inherently oriented to the comprehensive

140. *Id.* at 25.

141. *Id.* at 30.

142. *See id.* at 31–32.

sharing of domestic life—also provides a reasonable basis for affirming that only a man and woman can form a marriage.

c. Comprehensive Commitment: Norms of Permanence and Exclusivity

Finally, on this account, the kind of commitment people should pledge in a given bond, depends on its defining forms of cooperation and shared goods. Thus, a bond *comprehensive* in the above two senses—in the dimensions of the partners united (body and mind), and in the range of goods toward which they are united (all domestic life)—inherently calls for comprehensive commitment. Through time, that means permanence; at each time, exclusivity.¹⁴³

This requirement of comprehensive commitment rationally fits the idea of marriage as comprehensive union, but it also serves a crowning good of marriage—procreation—by excluding infidelity and divorce.

Other groups (two men, two women, any three or more) cannot form a bond comprehensive in the two senses mentioned, and hence have no *objective basis* to decide to pledge total commitment (as opposed to whatever they might prefer).¹⁴⁴

In short, a single concept—comprehensive union—can give coherence to the features of marriage that many people on both sides of the debate want any account to preserve: permanence, exclusivity, sexual union, a link to family life. Yet that same conception of marriage also implies that marriage is possible only in male-female bonds.

This makes it even less likely that various cultural and intellectual traditions converged on the special value of opposite-sex bonds only by religion or animus or accident. Rather it suggests reasonable grounds for affirming that value, based on understandings of marriage shared by both sides of the traditional-revisionist debate.

3. DOMA's Particular Purposes

Of course, the fact that traditional-marriage laws were enacted centuries before the rise of the modern concept of gay identity, when anti-gay animus could not possibly have motivated them, does not prove that the available benign motives led to DOMA's enactment in 1996. Even if traditional-marriage laws *can* have legitimate aims, were DOMA's purposes yet illegitimate?

To suggest that DOMA's drafters had illegitimate subjective motives, critics point to a House Report statement that Justice Kagan quoted to great effect during oral arguments: "Congress decided to reflect an honor of collective moral judgment and to express moral

143 *Id.* at 34.

144. *Id.*

disapproval of homosexuality.”¹⁴⁵ But as we have seen, the same House Report—as well as the statute’s title, preamble, and generality—supports the judgment that its drafters were motivated at least as much by the desire to affirm and socially promote the traditional view of marriage as such.¹⁴⁶ And we have already seen that this goal, in itself, is neither off-limits to Congress nor illegitimate.

Now it is contentious enough to hold that a law can be struck down for its drafters’ actual motives, even if an identical law could have been passed on legitimate grounds. Then Congress could reenact the same law the next day, following only a change of heart. Constitutionality, it seems, should not hinge on acts of contrition, and the Court has held as much.¹⁴⁷ But even if one thinks that lawmakers’ actual motives can make their policies unconstitutional, and that moral disapproval of private conduct is an illegitimate motive, it cannot be enough that the law’s drafters had constitutionally *mixed* motives. That would threaten a policy whenever any of its voters was motivated by, say, desire for revenge against political foes. But as we’ve seen, the same forms of evidence that DOMA’s opponents cite as indications of bad motives also suggest perfectly legitimate ones.

Andrew Koppelman takes the more promising tack of arguing that apart from its drafters’ subjective goals, a law can have an “objective purpose,” and that it was DOMA’s purpose in this sense that was illegitimate. Objective purpose, Koppelman argues, can be gleaned from the law’s text, read against historical context and the body of then-existing laws. Of DOMA, he says:

The most pertinent context is the fact that when the law was enacted, gay people were still the objects of pervasive, and more importantly, unquestioned prejudice. A few years before, when newly elected President Bill Clinton tried to end their exclusion from the military, the public reaction was so negative that he had to settle for the lousy, and now abandoned, “don’t ask, don’t tell” compromise. That prejudice is easily inferred from “the text itself, consistently with the other aspects of its context.” Read in light of the entire U.S. Code that it amends and the culture in which it was enacted, the law’s central

145. Transcript of Oral Argument at 74, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12–307) (internal quotation marks omitted).

146. *See supra* notes 32–41 and accompanying text.

147. *See, e.g., United States v. O’Brien*, 391 U.S. 367, 383 (1968) (“It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.”).

purpose is “to disparage and to injure” gay people at every opportunity, by any available means, heedless of the cost.¹⁴⁸

Here Koppelman aims to assimilate *Windsor* in a certain respect to *Loving*. Just as the latter relied on context to find illegitimate purposes in Virginia’s marriage ban, without having to search the hearts of Virginia lawmakers, so could the *Windsor* Court have done with DOMA. How well does the comparison hold up?

Koppelman’s proposed standard could not really be as general as this: if a policy disadvantages a group (e.g., economically), and it was passed at a time of significant popular hostility toward that group, then the policy is unconstitutional. For this would prove too much.

Take a simple example. Say an act repeals scholarships meant to enable students from low-income backgrounds to attend local private schools.¹⁴⁹ No one disputes that the repeal puts poor—and disproportionately minority—students and families at a disadvantage. It does so when appreciable segments of the population still harbor prejudice against the same groups. Is the act unconstitutional? Of course not. That is not simply because the legislature had no obligation to provide funds in the first place. The problem is that there is no uniquely tight fit between the repeal and the concurrent cultural prejudice. Support for public schools is an entirely plausible and complete explanation of the repeal.

So someone seeking to apply Koppelman’s objective-purpose analysis against DOMA must produce evidence not just of concurrent hostility toward gays and lesbians, but of a very tight fit between DOMA’s objective features and such hostility—the sort of fit that the Court rightly found in *Loving* between Virginia’s marriage ban and the social goal of “White Supremacy.”

Assume, in other words, that all the evidence Koppelman points to indicates that many in 1996 harbored animus against gay people. It remains to be argued that this animus shaped DOMA—that any believable construal of DOMA’s (objective) purpose, based on its

148. Koppelman, *supra* note 7, at 142–143 (footnotes omitted) (quoting ANTONIN SCALIA & BRIAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 33 (2012)). I note that while in this last sentence, Koppelman echoes Justice Kennedy’s judgment that the law’s purpose was to injure and disparage gay people, in the very next he says “[t]he impact on gay people was far from Congress’s mind when [DOMA] was enacted.” *Id.* at 143.

149. Of course, the case is not far from real life. President Barack Obama and congressional Democrats have sought to limit and eventually end congressional support for tuition vouchers to low-income families in the District of Columbia. Bill Turque and Shailagh Murray, *Obama Offers Compromise on D.C. Tuition Vouchers*, WASHINGTON POST, May 7, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/06/AR2009050603852.html>.

objective features, would have to cite a desire to denigrate gay people. Indeed, as we have seen, perfectly legitimate alternative bases exist: the Value Judgment and General Welfare Defenses. They are not just abstract possibilities but *had* to be purposes of traditional marriage laws at some point. They are consistent with the cultural and legal context of DOMA's passage and were even reflected in its prefatory materials and legislative history. Nothing of the sort could be said in defense of the marriage ban in *Loving*—which, for one thing, could not have been created in cultures ignorant of the concept of race, as traditional marriage laws were in ignorance of sexual orientation. For many reasons, then, a benign reading of that ban's purpose was, as Koppelman writes, simply not “*believable*.” And *that* is why the *Loving* Court was entitled to find in it an invidious objective purpose.

Koppelman, implicitly aware of these disanalogies, ends up resting his case against DOMA on its effects—in particular, on an alleged wild mismatch between its hoped-for legal effects and its legal disadvantages for gay people. But as I will show, this argument must either overlook DOMA's social effects or implicitly reject the Value Judgment and General Welfare Defenses—i.e., *Lochnerize*.¹⁵⁰ This bodes ill for the claim that while traditional-marriage laws can be legitimate, DOMA in fact had fatally malign purposes.

B. *General Welfare Defense*

In many lower-court cases striking down DOMA, the judgment hinged on the idea that between DOMA and asserted state interests, there is no rational link. So the courts in question *granted*:

- (a) That (some of) the purposes of DOMA asserted by the Bipartisan Legal Advisory Group (“BLAG”) are *legitimate*.
- (b) That (federally) recognizing opposite-sex relationships (“OSR”) *does advance* those purposes.
- (c) Perhaps even that (federally) recognizing OSR advances them *more* than recognizing same-sex relationships (“SSR”) would.

But the same courts then *denied* that *excluding SSR* itself advances those interests (more than including SSR would). How the state treats one relationship, it was supposed, cannot affect the decisions or behavior of another.¹⁵¹

150. See discussion *infra* Part V.D.

151. See, e.g., *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 337 (D. Conn. 2012) (“[T]he Court finds that no rational relationship exists between the denial of federal marital benefits to same-sex married couples and the objective of discouraging extra-marital procreation.”); *Windsor v. United States*, 833 F. Supp. 2d 394, 404 (S.D.N.Y.), *aff'd*

The General Welfare Defense, of course, flies in the face of this assertion. Here is a quick defense of that Defense.

It is reasonable to think the following: (i) the law shapes culture, which shapes individual choices; (ii) legally recognizing same-sex bonds for federal *or* state purposes would culturally promote the ideas that what defines marriage is a certain emotional union for the partners' personal fulfillment; and that biological parenting is not special or ideal; and (iii) the more people embraced and lived by these ideas, the less of a chance children would have of growing up with their own, committed biological parents—which is a loss in itself, if not also harmful in other ways.

So it is reasonable for lawmakers to think that legally recognizing same-sex bonds as marriages might undermine important social goals—just as the General Welfare Defense holds.

1. Law, Culture, Practice

It is a truism that the law teaches. It shapes culture, which shapes our expectations and, ultimately, our choices.

Any marriage policy, in particular, can teach a view of marriage by its choices of which bonds to include and which to exclude. It may encourage people to think that marriage is most set apart, or defined, by what the marriage-eligible relationships have in common and what the ineligible ones lack. And the more people absorb the law's lessons about what marriage is and requires, the more their behavior will tend to match those lessons.

Thus, Joseph Raz, an Oxford philosopher who opposes traditional-marriage laws, argues:

[O]ne thing can be said with certainty [about recent changes in marriage law]. They will not be confined to adding new options to the familiar heterosexual monogamous family. They will change the character of that family. If these changes take root in our culture then the familiar marriage relations will disappear. They will not disappear suddenly. Rather they will be transformed into a somewhat different social form, which responds to the fact that it is one of several forms of bonding, and that bonding itself is much more easily and commonly dissoluble. All these factors are already working their way into the constitutive conventions which determine what is

699 F.3d 169 (2d Cir. 2012), *aff'd* 133 S. Ct. 2675 (2013) (“Yet DOMA has no direct impact on heterosexual couples at all; therefore, its ability to deter those couples from having children outside of marriage, or to incentivize couples that are pregnant to get married, is remote, at best. It does not follow from the exclusion of one group from federal benefits (same-sex married persons) that another group of people (opposite-sex married couples) will be incentivized to take any action, whether that is marriage or procreation.”).

appropriate and expected within a conventional marriage and transforming its significance.¹⁵²

Several scholars corroborate this by noting that the introduction of another policy—no-fault divorce laws—yielded “new norms and expectations for marriage and family commitments in our society.”¹⁵³ They not only *reflected previous* social changes but “opened the door for some couples who would not have taken that step [into divorce] without the new liberalization.”¹⁵⁴ A recent review of two dozen empirical studies found evidence that no-fault divorce laws increased rates of divorce.¹⁵⁵ In short, empirical findings, reasoned reflection, and common sense converge: marriage law can affect social behavior.

2. Marriage, Stability, and the Next Generation

Changes in policy toward the revisionist view might undermine the stabilizing norms of marriage in the public mind and hence, over time, children may be less likely to grow up knowing the committed love of their own biological parents.

If marriage is revised to include—whether for federal or state purposes—gay and lesbian partnerships, it will include the romantic union of two men or two women, but not (say) the platonic bond of a widow and her sister living together to raise the widow’s child. So its distinguishing feature—what any romantic pair has that these sisters lack—will be emotional (romantic) union. As the law promotes that new vision, people will over time absorb and come to live by it.

But if romantic attachment is what defines a marriage, how could it be healthy or authentic to remain married once attachment waned, or grew for another? Why could not three or more be united in a single emotional bond? If some people felt that their emotional bond was enhanced by sexual openness, would not it (on the revised view of marriage) be harmful for them to pledge sexual exclusivity?

152. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 393 (1986). For more, consult the work of Nancy Cott, a same-sex marriage advocate and historian. See NANCY COTT, *supra* note 124, at 8 (arguing that “[i]n shaping an institution like marriage, public authorities work by defining the realm of cognitive possibility for individuals as much as through external policing”).

153. Lenore J. Weitzman, *The Divorce Law Revolution and the Transformation of Legal Marriage*, in *CONTEMPORARY MARRIAGE: COMPARATIVE PERSPECTIVES ON A CHANGING INSTITUTION* 301, 305 (Kingsley Davis ed., 1985).

154. WILLIAM J. GOODE, *WORLD CHANGES IN DIVORCE PATTERNS* 144 (1993).

155. See Douglas W. Allen & Maggie Gallagher, *Does Divorce Law Affect the Divorce Rate? A Review of Empirical Research, 1995–2006*, iMAPP (July 2007), <http://www.marriagedebate.com/pdf/imapp.nofault.divrate.pdf>.

Thus, changing civil marriage might further entrench what Johns Hopkins sociologist and same-sex marriage supporter Andrew Cherlin, among others, calls the “expressive individualist” model of marriage.¹⁵⁶ On this model, he says, a relationship that no longer fulfills you personally is “inauthentic and hollow,” and you “will, *and must*, move on.”¹⁵⁷ So it is no surprise when another study finds evidence that “conflict and divorce” tend to be higher where spouses internalize this view of marriage as primarily about emotional union.¹⁵⁸

After all, the more people think that what sets marriage apart is emotional regard (which can be inconstant), or that marriage is for individualist expression (which can be hampered by sexual fidelity), the harder it may be for them to see reason to pledge or live by permanence or exclusivity. In other words, reasoned reflection suggests that these norms have no basis of principle if marriage is an emotional union. So they might come to seem just as arbitrary to expect of all types of marriages as sexual complementarity now seems to same-sex marriage advocates.

But if law and its cultural effects often shape people’s behavior, then these changes might further erode people’s adherence to marital norms. That is, promoting the Revisionist View of marriage might risk further undermining the stabilizing norms that justify state involvement in marriage at all. At least, it could undercut social efforts to increase observance of these norms—by more formally promoting a view of marriage that cannot make sense of them.

In fact, it is not just reflection on the implications of promoting the revisionist view of marriage (or the sociology of no-fault divorce or of expressive individualism) that supports this concern. The basis for anticipating harmful consequences becomes still more reasonable when we consider revisionists’ own arguments and recent legal and policy developments, as well as preliminary social science.

Thus, since the rise of same-sex marriage advocacy, prominent gay writers (like Andrew Sullivan,¹⁵⁹ Dan Savage,¹⁶⁰ and Michelangelo Signorile¹⁶¹) have argued—even in mainstream venues like the *New York Times*—that redefining marriage could and should encourage

156. ANDREW J. CHERLIN, MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY 29 (2009).

157. *Id.* at 31 (emphasis added).

158. W. Bradford Wilcox & Jeffrey Dew, *Is Love a Flimsy Foundation? Soulmate Versus Institutional Models of Marriage*, 39 SOC. SCI. RES. 687, 697 (2010).

159. ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 202–03 (Vintage Books ed., 1996) (1995).

160. Mark Oppenheimer, *Married, with Infidelities*, N.Y. TIMES, July 3, 2011, § MM (Magazine), at 22.

161. Michelangelo Signorile, *Bridal Wave*, OUT, Dec.–Jan. 1994, at 68, 161.

sexually “open” marriages throughout society. Temporary renewable marriage licenses have been advocated¹⁶²—and considered by lawmakers.¹⁶³ “Throuples,” or committed three-person bonds, have been sympathetically profiled in magazines.¹⁶⁴ More than 300 LGBT and allied activists and scholars (some quite prominent) have advocated legally recognizing multiple-partner, sexually open, and expressly temporary bonds.¹⁶⁵ Some have *expressly embraced* the goal of weakening the institution of marriage by the recognition of same-sex bonds.¹⁶⁶ One respected philosopher has argued for a “minimal marriage” policy allowing any number and mix of partners to determine their own rights and duties.¹⁶⁷ Thus, the efforts of same-sex marriage supporters to work out the implications of their own views, and steady trends in their advocacy, lend still further rational support to the concern that enacting same-sex marriage would undermine, in principle and in practice, other stabilizing norms of marriage.

These developments in advocacy and policy do not prove decisively that promoting the Revisionist View of marriage would weaken norms like permanence or exclusivity. But they make it ever more reasonable to think that it might.

By a similar mechanism, promoting the Revisionist View might discourage (further) the view that there is any distinct value to being reared by one’s own biological parents. For the law would be treating as similar in every relevant respect, relationships that by nature and quite conspicuously *cannot* provide a child with her own biological parents. But the obscuring of these ideals might diminish the social pressures and incentives for husbands to remain with their wives and children, or for men and women having children to marry first—much as previous policy changes arguably have done.¹⁶⁸

That is, both the promotion of marriage as distinguished by emotional union and the demotion of the ideal of biological parenting

162. Paul Rampell, *Till Wedleases Do Us Part*, WASH. POST, Aug. 5, 2013, at A13.

163. Christina Ng, *Mexico City Considers Temporary Marriage Licenses*, ABC NEWS, Sept. 30, 2011, <http://abcnews.go.com/blogs/headlines/2011/09/mexico-city-considers-temporary-marriage-licenses/>.

164. Molly Young, *He & He & He*, N.Y. MAG., Aug. 6, 2012, at 30.

165. *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships*, BEYONDMARRIAGE.ORG (July 26, 2006), <http://beyonddmarriage.org/BeyondMarriage.pdf>.

166. Ellen Willis, *Can Marriage Be Saved?*, THE NATION, July 5, 2004, at 16 (“[C]onferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart.”).

167. Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 ETHICS 302, 303 (2010).

168. See Allen & Gallagher, *supra* note 155.

might lead to fewer stable households led by biological parents. But if there is distinctive value in growing up with one's own biological parents, then this is a harm in itself—even if studies end up showing *no difference between same- and opposite-sex adoptive parenting*. So this is a point that prescind from those empirical debates.

3. Children and the Common Good

Finally, it is reasonable to think that there is distinctive value in being reared by one's biological parents.

Aside from empirical studies suggesting that married biological parenting produces, on balance, the best outcomes, there are cogent reasons for thinking that it has value in itself. Thus, New York University philosophy Professor J. David Velleman asks us to imagine “a woman who would like to have the experience of conception and childbirth without incurring the responsibility for raising a child.”¹⁶⁹ On his view, she would be wronging the child.

Velleman defends this idea by arguing that it is valuable—better for us, other things being equal—to grow up tied to our biological kin and history. For these are critical, he thinks, to most people's “identity formation,” “the telling of [their] life-story.”¹⁷⁰ He continues:

I opened with the story of my Russian ancestors, whose search for something better I imagined to have culminated in my writing this essay. My family background includes many such stories, whose denouement I can see myself undergoing or enacting.

...

... Of course, my own life provides narrative context for many of the events within it; but my family history provides an even broader context, in which large stretches of my life can take on meaning, as the trajectory of my entire education and career takes on meaning in relation to the story of my ancestors.¹⁷¹

169. J. David Velleman, *Family History*, 34 PHIL. PAPERS 357, 374 n.10 (2005). The context is worth providing:

Children can of course be successfully reared by single mothers, if necessary. But children can be successfully reared, if necessary, in orphanages as well—a fact that cannot justify deliberately creating children with the intention of abandoning them to an orphanage. . . . Just as the serviceability of orphanages cannot justify procreation in reliance on their services, so the serviceability of single parenting cannot justify the creation of children with the intention they grow up without a father of any kind.

Id.

170. *Id.* at 375.

171. *Id.* at 375–76.

Velleman's philosophical account has some empirical backing.¹⁷² Of course, it is possible to disagree with his claim. What is not plausible is to dismiss it as a cover for bigotry. It is, after all, encoded in the presumption of our law, and that of nearly every culture, that parents are responsible for their biological children.¹⁷³ So the General Welfare Defense is, like the Value Judgment Defense, reasonable and legitimate, whether true or not.

V. AVOIDING *LOCHNER*?

Here I consider four attempts to rule against DOMA on equal protection grounds without ruling the Traditional View of marriage true, or the Revisionist View false—without *Lochnerizing*.

The first attempt would grant the truth and rationality of the Traditional View, but infer discriminatory intent from DOMA's apparent lack of fit with that view, in light of its recognition of infertile opposite-sex marriages ("Infertility Objection"). The second would grant the same things but infer discriminatory intent from DOMA's failure to defer to state definitions ("*Windsor's* Hybrid Argument"). The third would aim to bracket the truth of the Traditional View, its compatibility with federalism, and even the subjective goals of its proponents, but argue that DOMA is an example of class or caste legislation ("Balkin's Stratification Argument"). And the last would grant the truth and rationality of the Traditional View, its compatibility with federalism, its drafters' benign purposes, and even its general compatibility with social equality, but infer unconstitutional callousness toward gays and lesbians from the alleged disproportion between DOMA's avowed benefits and its costs ("Koppelman's Depraved Heart Argument").

A. *Infertility Objection*

Even if the Value Judgment and General Welfare Defenses are legitimate, of course, they might be mere pretexts for DOMA and other traditional-marriage laws. In *Loving*, for example, the interracial marriage ban's true purpose was inferred partly from its structure: "The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy," and could not have been intended to promote, say, the

172. See, e.g., ELIZABETH MARQUARDT ET AL., INSTIT. FOR AM. VALUES, MY DADDY'S NAME IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED THROUGH SPERM DONATION 5, (2010) (seeking "to learn about the identity, kinship, well-being, and social justice experiences of young adults who were conceived through sperm donation.").

173. See QUALE, *supra* note 125, at 2.

“racial integrity” touted by the statute’s title as a general goal.¹⁷⁴ Similarly, might DOMA’s inclusion of infertile opposite-sex couples not prove that the real purpose is to oppress gay people?

But by the ethical framework rationally defended in Part IV.A.2. and traced in Part IV.A.1 through centuries of philosophical and legal reflection, (1) an infertile man and woman can still form a comprehensive (bodily as well as emotional) union, which differs only in degree from fertile ones before or after children. So that framework provides a basis for thinking that recognizing such infertile unions has (2) none of the costs of recognizing same-sex bonds, most of the benefits of recognizing fertile ones, and at least one *extra* benefit.

1. Still Marital

To form a true marriage on the philosophical view explored in Part IV.A.2., a couple needs to establish and live out the (1) comprehensive (i.e., mind-and-body) union that (2) would be completed by, and be apt for, procreation and domestic life and so (3) inherently calls for permanent and exclusive commitment.

Every male-female couple capable of consummating their commitment can have all three features. With or without children, on the wedding night or years later, these bonds are all comprehensive in the three senses specific to marriage, with its distinctive value. No same-sex or multiple-partner union is.

After all, even an infertile couple can pursue bodily union, by bodily coordination: by engaging in the first stage of the reproductive process, whether or not later stages lead to conception. Such a couple’s bond, too, being sealed by the kind of act that makes new life, would be fulfilled by procreation and family life. And being comprehensive in both these senses, it would still, on this account, objectively call for comprehensive commitment.

Accordingly, among the ancient philosophers covered in Part IV.A.1., Plutarch affirmed that infertile coitus could seal or embody a marriage,¹⁷⁵ which the others never denied. So neither the contemporary philosophical view articulated above, nor its philosophical predecessors, would deny that infertile bonds are marital.

2. Social Effects

For this reason, recognizing infertile conjugal unions would, on the reasonable views described above, have none of the costs of redefining marriage. Since infertile couples can form a marital bond, recognizing them need not be expected to have the social costs of

174. *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (invalidating a Virginia anti-miscegenation statute titled “An Act to Preserve Racial Integrity”).

175. PLUTARCH, SOLON, *supra* note 129, at ch. 20, § 3.

recognizing same-sex or other non-marital unions. It need not undermine the public's grasp of the nature of marriage as a comprehensive union. Nor need it undermine the *norms* grounded in that nature, by socially defining marriage by romantic attachment.

Moreover, many couples believed to be infertile end up having children, who are served by their parents' marriage; and trying to determine fertility would require unjust invasions of privacy.

But even an obviously infertile couple can for reasons of principle grounded in objective features of their union live out all the essential features of conjugal marriage. Their example in doing so may encourage *fertile* couples to live out such a comprehensive union (including its stabilizing norms), thus benefitting children.

Finally, and perhaps most critically, recognizing only fertile marriages might promote the idea that marriage is valuable only as a means to create children—and not good in itself, as it is common and reasonable to think based on the views described above.¹⁷⁶ So from this perspective, extending recognition to infertile marriages serves one purpose *better* than recognizing only fertile ones: to teach the view contained in the Value Judgment Defense that marriage (conjugal union) is valuable in itself. In fact, even the institution's instrumental benefits for children (captured in the General Welfare Defense) recommend recognizing infertile conjugal unions as marriages, since couples seeing marriage as purely instrumental to children might well have a less stable bond, which harms any resulting children.

Thus, neither the affirmative philosophical views of what marriage is, nor the policy arguments against redefining marriage, would urge excluding infertile opposite-sex bonds.

B. Windsor's *Hybrid Argument*

Of course, the *Windsor* majority did not expressly adopt a position on either the Value Judgment or the General Welfare Defense. Did it find a route around these two principles to an equal protection violation?

Randy Barnett—one of the Federalism Scholars—has convincingly argued that it relied on a hybrid of federalism and equal protection concerns (the “Hybrid Argument”).¹⁷⁷ It held that DOMA violated equal protection principles to which the Fifth Amendment subjects federal policy¹⁷⁸ because DOMA sought “to injure the very class New

176. See Musonius Rufus, *supra* note 128; Part IV.A.1.

177. Barnett, *supra* note 40. In fact, I have omitted part of his analysis, which I find less convincing, but the main outlines of the arguments stated here can be attributed to Barnett.

178. See U. S. CONST. amend. V; *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), *supplemented*, 349 U.S. 294 (1955) (holding that although the Fifth Amendment does not contain an equal protection clause, as does

York seeks to protect”—couples in same-sex marriages.¹⁷⁹ But this judgment was based on an application of heightened equal protection scrutiny. And what justified higher scrutiny was a federalism concern: i.e., the fact that DOMA departed from the federal government’s practice of deferring to state marriage definitions.¹⁸⁰

Indeed, the Court’s summary statements of DOMA’s infirmity always combined mentions of harm or illicit purpose with federalism talk. It observed that DOMA “impose[d] a disadvantage . . . upon all who enter into same-sex marriages *made lawful by the unquestioned authority of the States.*”¹⁸¹ And it faulted DOMA for “diminishing the stability and predictability of basic personal relations *the State has found it proper to acknowledge and protect.*”¹⁸²

The Court concluded, in short, that DOMA was discriminatory because it served no legitimate purpose, for Congress had no (sufficiently) legitimate reason to deviate from New York’s decision about the Windsor-Spyer marriage.¹⁸³

But this charge is ambiguous, and it faces a dilemma: Either (1) Congress had no legitimate reason to deviate from *whatever* New York happened to decide, or (2) it had no legitimate reason to deviate from what New York *actually* decided: i.e., from the recognition of same-sex couples in particular.

the Fourteenth Amendment which applies only to the States, the federal government is effectively bound by both).

179. *See* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (“The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”).

180. “In determining whether a law is motivated by an improper animus or purpose, ‘[d]iscriminations of an unusual character’ especially require careful consideration.” *Id.* (alteration in original) (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)). The Court continues by noting that:

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.

Id.

181. *Id.* (emphasis added).

182. *Id.* at 2694 (emphasis added).

183. *See id.* at 2692 (“What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect.”).

The case for (2) must be just that it is invidious for law (federal or state) to promote the Traditional View—an argument which, I have argued, inevitably *Lochnerizes*. This leaves (1).

But if the Court cannot, without *Lochnerizing*, show the Traditional View invidious, that View is legitimate in itself. Then the only basis for (1) is that the Traditional View is an illegitimate ground for *federal* action—namely, the federalism argument rejected in Part I. Apart from something like the Federal Justifications Test, what reason would there be for *requiring* the federal government to forfeit its chance to promote a vision of marriage? An even more free-floating requirement that the federal government defer to state action within any sphere of common interest would be even less defensible.

So Justice Kennedy’s dual reasoning does not, after all, avoid *Lochnerizing*. It cannot *really* rely on federalism, so it must rely entirely on equal protection—which requires *Lochnerizing*.

C. Balkin’s Stratification Argument

Another attempt to vindicate *Windsor* on equality grounds might rely on the idea that the Constitution prohibits—or even requires disruption of—*social* inequality and stigma in many forms. Thus, several theorists have argued that the Fourteenth Amendment contains an anti-caste principle;¹⁸⁴ among them, Professor Balkin has perhaps the most expansive account of the kinds of social stratification that courts are entitled to strike down on this basis. I will show that his view cannot enable the Court to strike down DOMA (or traditional state marriage laws) without *Lochnerizing*, a point that will likely apply to other anti-caste accounts.

First, Balkin thinks that the Fourteenth Amendment prohibits class legislation—laws that “denigrate[] or demean[] a group of persons and [hold] them as less equal than others.”¹⁸⁵ Are traditional-marriage laws premised on the idea that gays and lesbians matter less? We can assume so *only* (as Balkin concedes)¹⁸⁶ if such a

184. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (Harlan, J., dissenting) (“But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens.”); KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 3 (1989) (explaining that “the principle of equal citizenship” leads to “individual[s] . . . presumptively entitled to be treated by the organized society as . . . respected, responsible, and participating member[s]”). *But see* Paul R. Dimond, *The Anti-Caste Principle—Toward a Constitutional Standard for Review of Race Cases*, 30 WAYNE L. REV. 1, (1983) (discussing race discrimination), Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2429 (1994) (limiting the anti-caste principle to race, sex, and disability).

185. Balkin, *supra* note 97, at 2348.

186. See Jack M. Balkin, *Windsor and the Constitutional Prohibition against Class Legislation*, BALKINIZATION (June 26, 2013), <http://balkin.blogspot>

devaluing is the only possible basis for denying same-sex partnerships recognition—only, that is, if the Value Judgment and General Welfare Defenses are unsound. But to suppose so is to *Lochnerize*. So this route to *Windsor* faces the same problem. Moreover, it is—again—impossible for a legal norm to have been premised on the inferior dignity of a group that no one knew existed when the norm emerged.

Balkin also thinks that various constitutional provisions—the bans on titles of nobility and bills of attainder and religious establishment, the Republican Government Clause, and Reconstruction Amendments¹⁸⁷—give effect to a broader principle that opposes unjust social hierarchies. This principle is not primarily about classifications, or equal governmental treatment,¹⁸⁸ nor is it “an open invitation” to courts “to disregard moral values we dislike.”¹⁸⁹ Does it offer a path to *Windsor* that avoids the *Lochner* charge?

First, some background on the picture that Balkin paints. Social groups are ever competing in a zero-sum game for social status. This rivalry often takes the form of moral claims against others—not, Balkin hastens to add, as subterfuge for bigotry, but as honest disputes about what forms of life are morally worthy and honorable.¹⁹⁰

ot.com/2013/06/windsor-and-constitutional-prohibition.html (“Class legislation is legislation that picks out a group of people for special benefits or special burdens *without adequate public justification*. The idea was that laws should be general, not special, and serve a public purpose, not simply the interests of some powerful group in society. . . . Of course, the judgment that a law is class legislation is ultimately a normative judgment. All laws classify and have some kind of differential impact; whether a law singles out a group for special and unjustified burdens or stigma is an interpretive question and a question of values.”).

187. Balkin, *supra* note 97, at 2359 (“[T]he constitutional principle of opposition to unjust status hierarchies is partially vindicated by the Equal Protection Clause, but it is also the concern of many other clauses as well.”).

188. *Id.* at 2358 (“I have been urging a shift from a model that focuses on discrimination and equal treatment to a model that focuses on the existence and dismantling of unjust status hierarchy. This inquiry does not remove normative questions. It simply asks them in different ways. Instead of asking whether certain classifications should be regarded as suspect, I am asking whether certain status hierarchies exist that are so unjust that the Constitution demands their disestablishment.”).

189. *Id.* at 2365.

190. Balkin explains that:

Because status competition is tied to competing conceptions of morality, it is tempting to assume that moral discourse and moral condemnation in cultural struggles are merely a cover for status competition. But this view is mistaken. . . . [S]truggles

Thus, not only does Balkin's argument purport not to rely on bare value or policy judgments—it also avoids assuming malign intent. But this sort of social strife does sometimes shade into judgments of inferior personal worth and, in extreme cases, less subtle forms of hostility and hatred.

For Balkin, the Constitution does not require special protection for social groups as such,¹⁹¹ or the toppling of every status hierarchy. (How could it? Total egalitarianism is impossible without despotism.) To be constitutionally infirm, the hierarchy must be ordered around traits central to social identity; a distinction with widely ramifying effects—on “wealth, social connections, political power, employment prospects, the ability to have intimate relationships and form families, and so on.”¹⁹² And it must be an *unjust* consequential hierarchy—which means, not necessarily that its basis is immutable, but that it rests on and hardens unjust “social meanings.”¹⁹³

Gays and lesbians, Balkin argues, are on the lower end of just such a hierarchy, because “they and their lifestyle are routinely condemned as immoral, abnormal, deviant, and against the laws of God and Nature”; they suffer both “social disapproval” and “de jure discrimination.”¹⁹⁴ And unlike being a waiter, say, or the driver of a hybrid, being gay or lesbian affects most of life. Either gays and lesbians hide their desires, which takes a high personal toll; or they face the far-reaching consequences of self-disclosure: “[T]hey cannot have homosexual marriages, their relationships are not sanctioned by law, and they are subject to discrimination, harassment, and moral denunciation.”¹⁹⁵

Moreover, Balkin writes, their social subordination is unjust because it depends on unjust social ideals. We oppress gays and lesbians because they threaten another subordination, of women to men. It is because the gay man flouts gender stereotypes, threatening the masculinity and, hence, dominance of men; it is because lesbians flout feminine ideals and, hence, the subordination of women, that we deprive them socially in multiple and overlapping ways. Again, the same web of meanings traps women in their (inferior) place, sustains

over status are struggles over what forms of life should be honored and receive general moral approval.

Id. at 2332.

191. *See id.* at 2359 (“Gamblers, sluggards, gossips, opticians, and MTV watchers may be groups in the ordinary sense . . . [but] they are not currently status groups in an ongoing status hierarchy . . .”).

192. *Id.* at 2360.

193. *Id.* at 2361.

194. *Id.* at 2360.

195. *Id.*

men in their dominance, and chokes the social lives of men or women whose romantic lives threaten either status by flouting gender norms. The dominance of heterosexuality is unjust because another form of social stratification—patriarchy—is “*the source*” of it.¹⁹⁶

Balkin’s account flirts with circularity. He says that status hierarchies are not the problem; unjust ones are. What makes the orientation-based hierarchy unjust is the injustice of its supporting social meaning. And what makes that “social meaning[]” unjust is that it is itself “part of an unjust status hierarchy.”¹⁹⁷ At points Balkin says that unjust hierarchies are ones that “dominate and oppress” people, but on its face that is something that any unjust hierarchy does *by definition*.¹⁹⁸ It cannot tell us how to identify one.

In short, Balkin’s argument for the injustice of the orientation-based hierarchy takes for granted the injustice of the gender-based one to which he says the first contributes. We will agree, of course, that the subjugation of women (or anyone else) is unjust; but Balkin’s reliance on that agreement deprives us of a *general* account of how, on his view, we can identify unjust social meaning. (And we need such an account because, as I have tried to show, the Value Judgment and General Welfare Defenses do not themselves rely on oppressive stereotyping.)

He hints at an answer where he discusses what would have to be shown to impugn the social subordination of another group—pedophiles—as constitutionally suspect.¹⁹⁹

It would not be enough, he says, to believe that pedophilia is morally licit. Rather, to show that the norm against pedophilia imposed an unjust social hierarchy, we would have to show that:

1. That norm is “systematically connected to the oppression” of an identifiable social group”;
2. The idea of children as sexually innocent is “unjustified”;
3. Their sexual relations with adults are not “unfair relationships of power”;

196. *Id.* at 2363. (emphasis added). Balkin argues that a set of social meanings about gender “organizes social structure, distributes dignitary and material benefits, and shapes and justifies people’s life chances through systematic privileging of things associated with being male over those associated with being female.” *Id.* at 2361. Gays “transgress this set of meanings.” *Id.*

197. *Id.* at 2361.

198. *Id.* at 2366.

199. *Id.* at 2363–64.

4. Such sexual relations impose no “psychological, physical, or emotional harm”;

and *therefore*,

5. “[T]he reason for the taboo lies elsewhere: that it is part and parcel of a system that attempts to preserve a monopoly on sexual activity for adults alone, wrongfully oppresses children who stray from this prohibition, and wrongfully subjugates the adults who attempt to facilitate their sexual liberation, particularly fathers who attempt to ‘liberate’ their daughters.”²⁰⁰

Now point 1 does little more than restate the conclusion: a norm oppresses a group if it is connected to group oppression. (This point adds only that the group must be “identifiable.”) The same is true of the second half of point 5 (“wrongfully oppresses . . . wrongfully subjugates”).

What does that leave? We can tell that a taboo against an identifiable group unconstitutionally oppresses, on Balkin’s view, if (1) its moral premises are unjustified (points 2 and 3) and (2) flouting it causes no harm to health or welfare (point 4), thus leaving (3) no *reasonable* basis for the taboo (point 5). (Of course, a taboo is also unjust (and unconstitutional) if it *contributes to* a taboo that meets these criteria—as Balkin thinks the Traditional View of marriage does with regard to patriarchy.)

But now Balkin’s account seems to collapse, almost entirely, into the ones rejected above as *Lochnerizing* when deployed against DOMA. Those other accounts deemed differential treatment or status unjust when there was no reasonable basis for it. Balkin adds only the condition that this treatment or status be “systematically connected to” *multiple* disadvantages for a single identifiable group.²⁰¹ So on Balkin’s account, spelled out, it turns out that an unconstitutional caste is created wherever several policies disadvantage one group for no good reason.²⁰² It follows, of course, that if any given policy has *good* reasons for differential treatment, it cannot be “systematically connected to” a caste in the relevant sense.

A policy *clearly* stratifies in this unjust sense if it is based on the idea (behind Jim Crow laws, for example)²⁰³ that some people have less dignity than others—i.e., that there would be less moral value in benefitting them, than there would be in equally benefitting others.

200. *Id.* at 2365.

201. *Id.*

202. Even the requirement that the trait be central to their identity now looks purely derivative—a mere implication of the fact that the trait is the basis of many forms of discrimination.

203. *Id.* at 2324.

But we have already seen, on historical grounds, that this cannot possibly explain the genesis of traditional-marriage laws, which preceded the modern concepts of gay and lesbian identity (as Jim Crow could not possibly have preceded social awareness of racial categories).

The only remaining basis for finding that traditional-marriage laws create a caste in Balkin's sense is if their purposes, though not premised on anyone's inferiority, are yet unreasonable. But this means that we cannot, after all, decide that traditional-marriage laws of themselves violate the anti-caste principle, without rejecting the Value Judgment and General Welfare Defenses. For if these defenses identify grounds for DOMA, then DOMA imposes no unjustified disadvantage. And if that is so, then DOMA cannot be part of a *network* of unjust burdens.

Even if such a network exists, in that case, attacking it by striking down DOMA would be to use a blunt instrument. It would imprecisely cure the harms, while undermining DOMA's (by stipulation legitimate) benefits. The same goes for judging DOMA unjust on the ground that it perpetuates patriarchy²⁰⁴—which depends, of course, on denying that it has any other, legitimate basis.

D. Koppelman's *Depraved Heart Argument*

Consider, finally, Koppelman's attempt to justify a court's constitutional ruling against DOMA without impugning anyone's potential value or policy judgments in favor of it, or assuming that its proponents are animated by a "desire to harm gay people" or even "a disrespectful devaluation of their interests" such as might motivate creating a caste system.²⁰⁵

Indeed, Koppelman even sides with Justice Alito in supposing that these laws' real purpose might be to promote the conjugal view that my coauthors and I have sketched in a book.²⁰⁶ And Koppelman

204. Or, as Balkin puts it, that "*the source*" of such laws is the desire to maintain patriarchy. *Id.* at 2363 (emphasis added).

205. Koppelman, *supra* note 65, at 1052.

206. As Koppelman himself explains:

Alito nicely summarizes 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." Whatever the merits of this notion, it is not about gay people. It is focused on the value of a certain kind of heterosexual union. The existence of gay people is a side issue. The function of marriage law, on this view, is to protect a human good that gay people happen to be unable to realize

Id. at 1052–53 (footnotes omitted) (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting)). Koppelman does distinguish such laws from DOMA, which he thinks "presents a different

agrees that courts generally should not impose their policy judgments,²⁰⁷ or fire their own salvos in the culture wars.²⁰⁸ Yet he finds a basis in equal protection for striking down DOMA.

How? By expanding, or perhaps reinterpreting, the “bare desire to harm” test for equal protection violations. That standard would be “preposterously difficult to satisfy,” says Koppelman, if it required “that harm be the ultimate goal of the state’s action.”²⁰⁹ To exhibit harmful purpose, rather, it must be enough that the law inflicts harm on a group “wildly” out of proportion to the law’s benefits. Just as specific intent to kill is not necessary for criminal punishment—recklessness toward life will do—so discriminatory purpose is not necessary for finding an equal protection violation: callousness toward a group should do.²¹⁰

And if the court need not show a discriminatory purpose to DOMA, it need not deem any alleged purpose of DOMA illicit, or to read behind it to some secret malign purpose—any more than a conviction for reckless homicide requires the lethal act to have been utterly pointless, or intended to kill. It will be enough to note that DOMA’s alleged purposes are dwarfed by its harms to gay people, as the reckless killer’s thrill from a joyride is dwarfed by its cost in lives.

But this will not avoid the challenge facing every other proposal we have considered. Even with Koppelman’s new test for equal protection violations, there is no path to *Windsor* that avoids the *Lochner* charge. Grant that a huge gap between costs and benefits violates equal protection principles. The problem remains that we will consider DOMA’s costs high and its benefits low only if we reject the Value Judgment and General Welfare Defenses.

As Koppelman sees DOMA, it imposed burdens on just about everyone: It required bankruptcy courts to distinguish state from

case” because it “lashes out wildly at gay people”—despite the fact that it merely defines marriage for federal purposes as Koppelman has just said state laws may do. *Id.* at 1053 n.49.

207. *Id.* at 1069 (“[John Hart] Ely’s caution about judicial policymaking is sensible . . .”).

208. Koppelman, *supra* note 7, at 153.

209. Koppelman, *supra* note 65, at 1068.

210. This broader standard, moreover, fits an alternate understanding of the purpose of tiers of equal protection scrutiny, according to which they are meant to ensure that laws imposing burdens serve not just any legitimate interests, but ones weighty enough to justify their cost. See Balkin, *supra* note 97, at 2363–64; Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 394 (2006) (“In addition, strict scrutiny is a tool to determine whether there is a cost-benefit justification for governmental action that burdens interests for which the Constitution demands unusually high protection.”).

federal property interests in cases involving a same-sex marriage.²¹¹ By saddling employers with the administrative burden of separate administration of their employees' federal and state family benefits, it even hurt our economy.²¹² And it burdened same-sex couples by denying them tax, Social Security, veterans' and other benefits.²¹³

All this—Koppelman asks—*for what?* The choice-of-law problems DOMA supposedly solved were vanishingly rare. It “ease[d] administrative burdens”²¹⁴ for some “federal bureaucrat[]” only “once every few years.”²¹⁵ It did not even “influence[] any state’s decision whether to adopt same-sex marriage”²¹⁶ So even if we stipulate the legitimacy of these goals—including the moral goal of opposing same-sex marriage—DOMA could not pass muster. Its benefits were slim compared to the costs.

All that DOMA did effectively was to “tell [same-sex] couples . . . that their otherwise valid marriages are unworthy of federal recognition.”²¹⁷ Its “purpose [wa]s to convey a message of disdain for gay couples.”²¹⁸ And because none of the purported benefits was even nearly proportionate to its costs, DOMA accomplished this purpose “with extreme indifference to the human costs.”²¹⁹

So while Koppelman is happy to grant that state traditional-marriage laws promote a well-meaning (if, to him, mistaken) value judgment, rather than devaluing gay people, he thinks DOMA only expressed disdain for gays.²²⁰ Why the radically different analyses of such laws' purposes? He never explains.

Let me grant, *arguendo*, that DOMA did little to advance the “downright boring” federal purposes that Justice Scalia lists in his *Windsor* dissent—uniformity, choice of law, etc.²²¹ Still, Koppelman slips in describing differently the moral purposes of federal and state marriage laws, and this throws off the rest of his analysis.

Koppelman describes support for traditional *state* marriage laws as “focused on the value of a certain kind of heterosexual union”—i.e.,

211. Koppelman, *supra* note 65, at 1065.

212. *Id.* at 1064–65.

213. *Id.* at 1065.

214. BLAG Brief, *supra* note 65, at 34.

215. Koppelman, *supra* note 7, at 139.

216. *Id.* at 142.

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

218. Koppelman, *supra* note 7, at 151.

219. *Id.*

220. *See id.* at 141–43.

221. *Windsor*, 133 S. Ct. at 2707–08 (Scalia, J., dissenting).

on the Value Judgment Defense.²²² These laws are meant “to protect a human good that gay people happen to be unable to realize.”²²³ Koppelman does not say explicitly *how* they do so. But it seems clear that one way is by trying to shape mores, and hence practice, in accord with the underlying value judgment.

Koppelman’s description of the purpose cited for DOMA, by contrast, refers not to promotion of the Traditional View of marriage but to “opposition to same-sex marriages”—i.e., to *state recognition* of same-sex bonds.²²⁴ Yet of course, it did not actually prevent that recognition, or even seriously hamper it. So this characterization of DOMA’s social goal allows Koppelman to find that DOMA did not fit even *this* alleged purpose well enough to justify its costs, even while he grants the legitimacy of the Traditional View. In short, Koppelman slips into the error of the Federalism Scholars seen above: he confuses intended legal and non-legal effects of DOMA.

But there *is* a purpose that DOMA fit perfectly: not discouraging or suppressing a certain kind of state action, but socially promoting (insofar as it is within Congress’s power to promote), say, the Value Judgment Defense. After all, if the federal government is going to be involved in marriage at all, its involvement (like that of the states) will likely shape our nation’s mores.

Indeed, Koppelman and DOMA’s other critics implicitly admit as much, when they decry DOMA’s great expressive power.²²⁵ So there is no question that DOMA promotes a certain set of value judgments. But if (as Koppelman grants) state marriage laws can and do convey the Traditional View, why not DOMA? He presents no evidence at all that DOMA was predicated on the idea that gay people matter less, as opposed to the idea (which he grants might underlie state laws) that the sexual relationships of men and women have a value distinct in kind from that of any other bond: the Value Judgment Defense.

Moreover, what Koppelman cites as a cost of DOMA—depriving same-sex couples of federal marriage benefits—is judged disproportionate only against a baseline assumption that same- and opposite-sex couples are owed the same status: that is, the Revisionist assumption. After all, no one would say that DOMA crushingly disadvantages (with *or* without justification) people committed to multiple-partner bonds, or deep platonic bonds with an adult sibling, on the ground that it deprives poly- or platonic sibling relationships of federal benefits. That is because we tend to take monogamy as a

222. Koppelman, *supra* note 65, at 1052.

223. *Id.* at 1053.

224. *Id.* at 1066.

225. *See id.* at 1069 (“DOMA’s purpose was to convey a message of disdain for gay couples, with extreme indifference to the human costs.”).

default, a norm, for recognized sexual bonds, and sexual bonds as the default for adult cohabitation generally. So in Koppelman's "depraved heart" constitutional analysis, even the characterization of the alleged harm—not just of the opposing benefit—depends on substantive value judgments that would equate all romantic pair bonds.

In fact, more than fifteen years ago, Koppelman considered a defense of DOMA's definition of marriage much like the one I have mounted and concluded, on its basis, that "[a]n equal protection challenge to the definitional provision of DOMA, standing alone, would be a hard case."²²⁶ And in a footnote in his piece on *Windsor*, he grants that it is "conceivable (though unlikely) that a court could decide that the goods associated with heterosexual marriage" justify such laws, citing in this connection my book defending this view. Yet Koppelman says nothing about why this route would be *wrong*, noting only that it "would be far more coherent than the claim that a law targeting same-sex couples is not a sex-based classification."²²⁷ So he acknowledges the possibility of an argument for traditional-marriage laws like the one I have made, says nothing directly to impugn it, and says much to undermine his own argument against DOMA.

CONCLUSION

Someone keen to save the equal-protection argument against DOMA (or, *mutatis mutandis*, against a traditional state marriage law) could always leave it intact and argue that *Lochnerizing* is justified. Or she could reject *Lochner* but specify its problem differently, so that *Windsor* is exonerated. (Some argue, for instance, that *Lochner's* problem was not its assumption of extra-constitutional judgments, but its *anti*-constitutional rejection of redistribution.²²⁸)

But as I have applied the *Lochner* charge, it is hard enough to satisfy, which makes it hard to excuse when satisfied.

For I have not simply shown that *Windsor's* equal protection argument relied on substantive moral assumptions. I have shown that

226. Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 8–9 (1997) ("The discrimination against same-sex couples may be unprecedented, a defender of DOMA could say, but so is the situation that called the law forth. If there is any positive value to the tradition of restricting marriage to one man and one woman, then this positive value provides a rational basis for DOMA. One cannot confidently infer, simply by considering the definitional provision on its face, that its purpose is a desire to harm the group. That *might* be the purpose, but an innocent explanation is available." (footnote omitted)).

227. Koppelman, *supra* note 65, at 1053 n.52.

228. See AMAR, *supra* note 108, at 273–74.

on perfectly plausible readings of DOMA's history, cultural and legal context, and structure, its purpose was not malign or demeaning; its means fit its alleged ends and imposed no disproportionate costs; and its underlying value or policy judgments could not be deemed unreasonable or reliant on invidious stereotypes. For all I have argued here, disproving any of these claims could have saved the equal-protection argument against *Windsor* from the *Lochner* charge. Surely disproving some combination of these factors would save the logic of *Brown* and *Loving*, and of the canonical sex-discrimination cases.

But there is no guarantee that every plausible equal-protection challenge to a policy would find protection against the *Lochner* charge in one of these factors. Perhaps judgments that a policy treats like cases unlike will always presuppose a normative view about which cases are 'alike', and some such views might be as resilient as the Value Judgment and General Welfare Defenses. This opens up the possibility that some implications of the Equal Protection Clause are best enforced not by the courts, with all the constitutional or prudential limits on their competence to apply moral and policy judgments, but by Congress.²²⁹ The Fourteenth Amendment does, after all, commit its own enforcement to our first branch. In that respect, at least, some shift in responsibilities would have—as key premises of the *Windsor* decision lack—a clear constitutional basis.

229. See, e.g., Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (discussing the far-reaching, legal implications of when the federal judiciary declines to enforce fully constitutional norms out of concerns of institutional incompetence, separation of powers, or federalism).