

Volume 64 | Issue 3

2014

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Recommended Citation

Maggie Gallagher and William C. Duncan, *The Kennedy Doctrine: Moral Disagreement and the "Bare Desire to Harm"*, 64 Case W. Res. L. Rev. 949 (2014)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol64/iss3/9>

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THE KENNEDY DOCTRINE: MORAL DISAGREEMENT AND THE “BARE DESIRE TO HARM”

Maggie Gallagher[†] & William C. Duncan^{††}

Is there a distinctive Kennedy Doctrine in Fourteenth Amendment jurisprudence?

We believe so.

True, it is not clear who else on the Supreme Court adheres to the Kennedy Doctrine aside from Justice Anthony Kennedy himself: In the substantive analysis of *United States v. Windsor*,¹ Justice Kennedy cited six Supreme Court precedents, three of which he authored,² and one decision out of the First Circuit Court of Appeals.³

The Kennedy Doctrine, as it has emerged in a series of opinions drafted by Justice Anthony Kennedy culminating in the *Windsor* decision striking down the Defense of Marriage Act⁴ (“DOMA”), represents a startling conceptual departure not only from constitutional theories of limited government and textual originalism, but from standard equal protection jurisprudence as well.

In *Windsor*, Justice Kennedy abandoned the established standard equal protection doctrine, which defines a small set of protected classes for special scrutiny. He declined in other words to decide that sexual orientation is now a protected class requiring strict scrutiny, and then apply standard equal protection doctrines to his legal analysis. Under standard equal protection analysis, the classes that may receive (in this sense) unequal or “heightened” Constitutional protection are cabined by requiring the class shows a combination of (1) a history of legal marginalization for (2) the unchosen and largely unchangeable nature of the category of people affected.

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1. 133 S. Ct. 2675 (2013).
2. The three non-Kennedy opinions are: *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973); and *Bolling v. Sharpe*, 347 U.S. 497 (1954). The opinions by Justice Kennedy are: *Bond v. United States*, 133 S. Ct. 2355 (2011); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Romer v. Evans*, 517 U.S. 620 (1996).
3. See *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2884, 2887 (2013).
4. 1 U.S.C. § 7 (2012), *invalidated by Windsor*, 133 S. Ct. 2675.

Instead of using this framework, Justice Kennedy set sail into the uncharted territory of a new doctrine suggesting that “unusual” new legislative acts must be scrutinized for their effects on the human dignity of minorities. As Justice Kennedy wrote in *Windsor*:

In determining whether a law is motivated by an improper animus or purpose, “[d]iscriminations of an unusual character” especially require careful consideration. DOMA cannot survive under these principles. The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State’s classifications have in the daily lives and customs of its people. 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. 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.⁵

In this hallmark passage of the Kennedy Doctrine, Justice Kennedy treats the moral concerns of the majority as the equivalent of animus; in other words, he translates moral disagreement into the “bare desire to harm,” as Justice Scalia noticed:

The sum of all the Court’s nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a “bare . . . desire to harm” couples in same-sex marriages.⁶

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5. *Windsor*, 133 S. Ct. at 2693 (alteration in original) (quoting *Romer*, 517 U.S. at 633). What Justice Kennedy found unusual was not changing the basic definition of marriage to include same-sex couples, but codifying in federal law the understanding of marriage in place when every federal statute referencing marriage was enacted. Federal “intrusions” on state marriage laws are not new. Conditioning new states’ entrance to the union on forbidding polygamy is an example, *see, e.g.*, Utah Enabling Act, ch. 138, sec. 3, 28 STAT. 107, 108 (1894), and that provision was very similarly motivated and grounded in the idea that marriage was part of the basic social and moral order. *See also* *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (“[N]o legislation can be supposed more wholesome and necessary . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony.”).
 6. *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting) (alteration in original) (quoting *id.* at 2693 (majority opinion)).

The Kennedy Doctrine thus conceptually defines animus upwards, and in a way, we argue, which intensifies rather than defuses the winner-take-all aspect of the moral conflicts over gay marriage in American society.

With the advent of the Kennedy Doctrine, the law’s failure to affirm all values equally (at least in any “unusual” law recently passed) becomes the equivalent of stigmatizing those values not actively affirmed by law.

The Kennedy Doctrine collapses the negative and positive poles of moral community. The absence of equal affirmation is the presence of stigmatization. For the government to uphold that the family ideal is a mother and a father is the equivalent of the government stigmatizing gay people as bad parents.

In this scheme, there is one moral value alone that becomes the trump card, the moral value that says we must affirm all life choices equally unless those choices involve direct measurable harm to others (although this classical liberal underpinning is more assumed than articulated).⁷ Indeed, in this conceptual universe the difference between a liberty interest and an equality interest almost collapses, since it suggests the right to define the mystery of one’s life must also mean the right not only to act on it equally with other citizens, but to have those life choices equally esteemed at least by law.⁸

The difference between a desire to harm and a desire to affirm, between the wish to punish and the impulse to idealize, becomes invisible in this constitutional ideology.

Let us here state what is probably obvious: gay people have experienced a great deal of animus in our society, and incivility, and open hatred, and sometimes violence. It is quite likely that some people who supported DOMA did so at least partly out of animus, classically understood. But, under the Kennedy Doctrine, the desire to protect a traditional moral understanding of marriage became *in itself* animus.⁹ The effects of the law became the motivations of the lawmakers, by Justice Kennedy’s doctrinal redefinition.

7. See *infra* notes 41–46 and accompanying text.

8. Cf. Maggie Gallagher, *Why Accommodate? Reflections on the Gay Marriage Culture Wars*, 5 NW. J.L. & SOC. POL’Y 260, 270–71 (2010) (defining a “liberty interest” as “the right to live as they choose, to express affection, to be who they are in public unmolested by harassment, to visit each other in hospital rooms, etc.” while an “equality interest” is a right “to be protected from knowledge of civil and moral disagreement with the choices one has made in everyday life, in the interests of advancing equality”).

9. *Windsor*, 133 S. Ct. at 2693 (majority opinion).

Justice Kennedy’s *Lawrence v. Texas*¹⁰ decision began with this description of the right involved: “Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”¹¹ Later, Justice Kennedy wrote: “adults may choose to enter upon [a sexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”¹² The opinion said, referring to the defendants, that the sodomy law “demean[s] their existence.”¹³ He was speaking here, not just of the practical effects of criminality on the defendant’s lives and rights, but of a new concern for their moral feelings. And this concern did not, it turns out (as Scalia accurately predicted)¹⁴ rest upon the obvious stigmatizing effect of criminalizing gay sexual relations.

In *Windsor*, Kennedy rests much of his case on the moral meaning of marriage, which he sees as conferred by the State. In *Windsor*, Justice Kennedy wrote:

Here the State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. “[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”¹⁵

It is hard to see how to cabin in a principled way such a “human dignity” provision to the U.S. Constitution, especially if defining marriage as one man and one woman is viewed as “departing from” our “history and tradition.”¹⁶

10. 539 U.S. 558 (2003).

11. *Id.* at 562.

12. *Id.* at 567.

13. *Id.* at 578.

14. *Id.* at 604 (Scalia, J., dissenting) (“Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”).

15. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (alteration in original) (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

16. As noted by both dissenting opinions, Justice Kennedy was not saying that same-sex marriage was part of our “history and tradition.” *See id.* at 2706–07 (Scalia, J., dissenting) (noting that such a claim would be

DOMA’s definition of marriage was consistent with the definition of marriage in all fifty states when it was passed;¹⁷ it is the traditional and historic definition of marriage. Moreover, federal defenses of this definition of marriage, or intrusions into state family law, are not new.

The federal government went to fairly extraordinary lengths to stamp out polygamy in the nineteenth century,¹⁸ to give just one example, and has conditioned federal money on states altering their family law to suit the federal government’s priorities,¹⁹ to give another.

Since virtually all laws with any kind of practical impact single out a minority for differential treatment in either giving or withholding of some benefit or penalty, it is hard to understand what recently passed law could not, if Justice Kennedy so preferred, provoke the under-defined heightened constitutional scrutiny of the Kennedy Doctrine’s human dignity provisions. For example, is imposing tax penalties on the minority of people who choose not to buy health insurance departing from our history and tradition? And if so, by what standard do we judge whether or not such actual civil penalties detract from the human dignity of those mostly lower income Americans so singled out for unequal punishment?

Justice Kennedy will know it when he sees it.

But the Kennedy Doctrine so understood poses a challenge not only to clearly defined constitutional limits on the Court’s powers, but to the idea of pluralism in a democratic society. It is this latter feature of the Kennedy Doctrine and its impact on dissenters to the Court’s views on same-sex marriage that is our principal concern here.

One of us is a lawyer, a legal participant who has watched the legal debate unfold, helping craft countless briefs both to state courts and to federal courts over the last fifteen years to make the case for the rationality and constitutionality of the traditional understanding of marriage. The other of us writes not as a legal scholar but as an acute observer and participant in this intellectual and political debate on the nature, meaning, and public purpose of marriage, as well as the status in the public square of those who adhere to classic understanding of marriage.

“absurd”); *id.* at 2715 (Alito, J., dissenting) (cautioning against recognizing same-sex marriage as a new right).

17. See H.R. REP. NO. 104-664, at 3 (1996) (“No State now or at any time in American history has permitted same-sex couples to enter into the institution of marriage.”).

18. See *supra* note 5.

19. See, e.g., Henry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FAM. L.Q. 1 (1990) (providing an overview of how Congress shaped child-support policies in the states).

Our goal in engaging in this public debate is “achieving disagreement”²⁰ to make intelligible to the majority of elite and academic commentators the concerns of millions of Americans who hold the increasingly judicially-disfavored view that marriage is intrinsically—that is by its nature—a union of husband and wife.

In this great task of doing the first work of democracy, understanding one another where we disagree on deeply held moral values, Justice Anthony Kennedy’s stigmatization of the views of millions of Americans as “animus”²¹ and the “bare desire to harm”²² is deeply counterproductive.

The most disturbing part of the Kennedy decision is its cavalier dismissal—indeed, failure to take notice—of the concerns of millions of Americans for whom including same-gender couples in the definition of marriage requires surrendering a core understanding of what marriage is and what it is for.²³ This understanding of marriage is not just a personally or religiously derived moral norm, but has been the clear understanding of the law about the public purposes of marriage for generations.²⁴

For example, New York’s highest court noted: “Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex.”²⁵ In Henri de Bracton’s

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20. George Weigel, *Achieving Disagreement: From Indifference to Pluralism*, 8 J.L. & RELIGION 175 (1990).
 21. *Windsor*, 133 S. Ct. at 2693 (majority opinion).
 22. *Id.* at 2696.
 23. See JOHN CORVINO & MAGGIE GALLAGHER, *DEBATING SAME-SEX MARRIAGE* (2012); SHERIF GIRGIS ET AL., *WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE* 24–36 (2012) (defining the “Traditional View” of marriage as a “comprehensive” union comprising (a) unifying activities, (b) unifying goods, and (c) unifying commitments). For a shortened version of Sherif Girgis’s efforts, see Sherif Girgis, *Windsor: Lochnerizing on Marriage?*, 64 CASE W. RES. L. REV. 971, 1002–04 (2014).
 24. See Amici Curiae Brief of Scholars of History and Related Disciplines in Support of Petitioners at 3, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (No. 12-144) (“Before 2003, same-sex marriage had never existed in the United States and it is still comparatively rare. Indeed, before 2000 it had never existed in human history.”) [hereinafter Brief of Scholars of History].
 25. *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006); see also *Windsor*, 133 S. Ct. at 2689 (“It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization.”).

thirteenth-century treatise—a treatise that functioned as the basis to case law for jurists that would follow, de Bracton included in the “law which men of all nations use . . . the union of man and woman, entered into by the mutual consent of both, which is called marriage,” and from marriage, de Bracton observed, “there also comes the procreation and raising of children.”²⁶

As John Bouvier explained in a legal encyclopedia from 1851, “[t]he end of marriage is the procreation of children and the propagation of the species.”²⁷ Joel Prentiss Bishop, arguably the most prominent treatise author in the mid-nineteenth century United States, wrote that “[m]arriage between two persons of one sex could have no validity, as none of the ends of matrimony could be accomplished thereby.”²⁸

Not only voters, but many judges have found these reasons why marriage is intrinsically a male-female union perfectly intelligible.

For example, from the New York Court of Appeals:

Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. Despite the advances of science, it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman, and the Legislature could find that this will continue to be true. The Legislature could also find that such relationships are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.

The Legislature could find that this rationale for marriage does not apply with comparable force to same-sex couples. These couples can become parents by adoption, or by artificial insemination or other technological marvels, but they do not become parents as a result of accident or impulse. The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more. This is one reason why the

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26. HENRI DE BRACON, 2 ON THE LAWS AND CUSTOMS OF ENGLAND 27 (George E. Woodbine ed., Samuel E. Thorne, trans., Harvard Univ. Press 1968); *see also* Brief of Scholars of History, *supra* note 24, at 17–18.
27. JOHN BOUVIER, 1 INSTITUTES OF AMERICAN LAW No. 238, at 102 (Philadelphia, Peterson 1851); *see also* Brief of Scholars of History, *supra* note 24, at 22.
28. JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, AND EVIDENCE IN MATRIMONIAL SUITS § 225, at 175 (1st ed., Brown, Little, Brown 1852); *see also* Brief of Scholars of History, *supra* note 24, at 22.

Legislature could rationally offer the benefits of marriage to opposite-sex couples only.

There is a second reason: The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule—some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes—but the Legislature could find that the general rule will usually hold.²⁹

The Eighth Circuit similarly ruled as follows:

The State argues that the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in “steering procreation into marriage.” By affording legal recognition and a basket of rights and benefits to married heterosexual couples, such laws “encourage procreation to take place within the socially recognized unit that is best situated for raising children.” The State and its supporting amici cite a host of judicial decisions and secondary authorities recognizing and upholding this rationale. The argument is based in part on the traditional notion that two committed heterosexuals are the optimal partnership for raising children, which modern-day homosexual parents understandably decry. But it is also based on a “responsible procreation” theory that justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot. Whatever our personal views regarding this political and sociological debate, we cannot conclude that the State’s justification “lacks a rational relationship to legitimate state interests.”³⁰

Similarly, the Maryland Court of Appeals addressed the issue in the following way:

We agree that the State’s asserted interest in fostering procreation is a legitimate governmental interest. As one of the fundamental rights recognized by the Supreme Court as a matter of personal autonomy, procreation is considered one of the most

29. *Robles*, 855 N.E.2d at 7.

30. *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867–68 (first and second citations omitted) (8th Cir. 2006) (quoting *Morrison v. Sadler*, 821 N.E.2d 15, 24–26 (Ind. Ct. App. 2005); *Romer v. Evans*, 517 U.S. 620, 632 (1996)).

important of the fundamental rights. In light of the fundamental nature of procreation, and the importance placed on it by the Supreme Court, safeguarding an environment most conducive to the stable propagation and continuance of the human race is a legitimate government interest.

The question remains whether there exists a sufficient link between an interest in fostering a stable environment for procreation and the means at hand used to further that goal, i.e., an implicit restriction on those who wish to avail themselves of State-sanctioned marriage. We conclude that there does exist a sufficient link. As stated earlier in this opinion, marriage enjoys its fundamental status due, in large part, to its link to procreation. This “inextricable link” between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding). Acceptance of this notion is found in the clear majority of opinions of the courts that have considered the issue.³¹

Similar arguments for marriage presented to the Supreme Court that many other courts have been able to acknowledge, are not so much disputed by or refuted by Justice Kennedy as simply ignored.

The Court was presented with these arguments by the Bipartisan Legal Advisory Group (BLAG), representing the interests of the United States House of Representatives. For instance, the authors of the BLAG brief on the merits wrote:

Although much has changed over the years, the biological fact that opposite-sex relationships have a unique tendency to produce unplanned and unintended offspring has not. While medical advances, and the amendment of adoption laws through the democratic process, have made it possible for same-sex couples to raise children, substantial advance planning is required. Only opposite-sex relationships have the tendency to produce children without such advance planning (indeed, *especially* without advance planning). Thus, the traditional definition of marriage remains society’s rational response to this unique tendency of opposite-sex relationships. And in light of that understanding of marriage, it is perfectly rational not to define as marriage, or extend the benefits of marriage to, other relationships that, whatever their other similarities, simply do not have the same tendency to produce unplanned and potentially unwanted children. Indeed, Congress recognized as much. *See* House Rep. 14 (“Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no

31. *Conaway v. Deane*, 932 A.2d 571, 630 (Md. 2007) (citations omitted).

particular interest in encouraging citizens to come together in a committed relationship.”).³²

This point was also made by various prominent amici, including Professor Helen Alvaré, who argued the point in the following manner:

The disappearing of children’s interests in marriage, both at law and in culture, and the vaulting of adults’ emotional and status interests, are, today, associated with a great deal of harm, particularly among the most vulnerable Americans. This, in turn, has led to a growing gap between the more and less privileged in the United States, threatening our social fabric. Recognizing same-sex marriage would confirm and exacerbate these trends. Consequently, states legitimately may wish to reconfirm their commitment to opposite-sex marriage on the grounds of its procreative aspects, and refuse to grant marriage recognition to same-sex couples.³³

But in the course of a fifteen-page majority opinion,³⁴ Justice Kennedy responded to these arguments only in this way:

The history of DOMA’s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that “it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . . H. R. 3396 is appropriately entitled the ‘Defense of Marriage Act.’ The effort to redefine ‘marriage’ to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.” The House concluded that DOMA expresses “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.” The stated purpose of the law was to promote an “interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.” Were there any doubt of this

32. Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 45–46, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (quoting H.R. REP. 104-664, at 14 (1996)).

33. Brief of Amicus Curiae Helen M. Alvaré in Support of Hollingsworth and Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal at 23, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144); *Windsor*, 133 S. Ct. 2675 (No. 12-307).

34. *Windsor*, 133 S. Ct. 2675.

far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.³⁵

This is not a refutation or an argument, it is a moral dismissal, a pronouncement by the Court that caring about the traditional understanding of marriage is on its face evidence of moral turpitude. The law, its legislators, and those advocating for legislation are no longer required merely to view all people as equal; we are required to view people’s intimate relationships and sexual behavior as having equal dignity in order to escape the charge of animus.

Justice Kennedy could believe this classic understanding of marriage is objectively wrong and so openly impose his own morally better understanding of marriage. He could rule the values underlying the classic understanding of marriage are outmoded, although that would seem to imply the updating process ought to be left to the People themselves. He could rule the government’s interest in creating families in which children are raised by mothers and fathers is less important than the human right of same-sex couples to have their relationships validated as equal.

But for Justice Kennedy and the Court to fail to acknowledge that this classic understanding of marriage exists, apart from a history of dislike of gay people, is an intellectual and moral lacuna of the first order. It is to depart from reality, and to express profound contempt for the views of half of the American people.

Animus and Pluralism

In the name of “human dignity,” the Kennedy Doctrine thus collapses the distinction between liberty interests and equality interests, and between reason and sexual desire.³⁶

So the Kennedy Doctrine is an open invitation to subjective court interference. Human dignity is a concept so broad that predicting when it will trump a law is exceedingly difficult.

Secondly, it involves a lack of reciprocity. Of all judicial values, fairness is surely one of the most basic. And the Kennedy Doctrine suggests (perhaps further litigation will disabuse us of the notion) the idea that the message of marriage demeans gay people but the demotion of supporters of the classic understanding of marriage into people motivated by animus sends no constitutionally significant message.³⁷

35. *Id.* at 2693 (quoting H.R. REP. 104-664, at 12–13, 16 (1996)).

36. While no human beings, including gay human beings, can be reduced to their sexual desires, sexual orientation as a concept is defined by the object of one’s sexual passions, including romantic and affectionate ones, or it has no clear conceptual meaning.

37. Manya A. Brachear, *Church Agencies Probed on Gay Foster Parent Ban*, CHI. TRIB., Mar. 2, 2011, at 6; Manya A. Brachear, *Rockford Charity Ends Foster Care*, CHI. TRIB., May 27, 2011, at 9; Joseph Erbentraut,

Put another way, the classic understanding of marriage sends a message to gay people, but the mandatory legal inclusion of gay people sends no message about marriage or faith that need concern adherents of the classic understanding of marriage.

Third, it demeans as unintelligible the concerns of supporters of our marriage traditions. The Court’s refusal to provide a rationale for why the classic understanding of marriage has been constitutionally superseded by a new understanding of marriage, and Kennedy’s assertion instead that the classic understanding of marriage is rooted in animus aimed at undermining the human dignity of gay people, sends a powerful new “unusual” message of stigmatization to people who adhere to the traditional understanding of marriage.

Accepting into our Constitution the Kennedy Doctrine’s core thesis that the idealization of unions of husband and wives constitutes irrational hatred of gay people will encourage a variety of harms to traditionalist marriage believers and to their mediating institutions in society.

In just the past few years, we have seen a federally chartered university punish an employee for signing a petition putting same-sex marriage to a vote.³⁸

Other institutions and people will be encouraged if the Supreme Court embraces the Kennedy Doctrine’s views to punish and stigmatize moral disagreement with the new law.

We saw 65,000 people put their name to a petition calling for the board of Mozilla to fire Brendan Eich if he did not recant his support for Proposition 8.³⁹ Media reports suggest many workers are now afraid to make their views known, however civilly expressed.⁴⁰

What Counts as an Argument? Intelligibility and Moral Disagreement

Liberalism as a cultural and moral system contains certain unexamined presumptions about what “counts” as a moral argument.

Foster-Care Agencies that Deny Gay Parents Under Review, WINDY CITY TIMES, Mar. 9, 2011, at 7.

38. See Jenna Johnson, *Gallaudet Official Angela McCaskill Says She Will Seek Compensation in Anti-Gay Marriage Petition Dispute*, WASH. POST, Oct. 16, 2012, http://www.washingtonpost.com/blogs/campus-overload/post/gallaudet-president-wants-angela-mccaskill-to-return-following-gay-marriage-petition-controversy/2012/10/16/c068cda6-179e-11e2-8792-cf5305eddf60_blog.html.
39. Emma Margolin, *Mozilla Under Fire for New CEO’s Anti-Gay Past*, MSNBC, Mar. 31, 2014, <http://www.msnbc.com/msnbc/new-mozilla-ceo-prop-8-backlash>.
40. Warner Todd Huston, *Witch Hunt of Mozilla CEO Brendan Eich Still Haunts Silicon Valley*, BREITBART, June 15, 2014, <http://www.breitbart.com/Big-Journalism/2014/06/13/Intolerance-For-Christian-Views-Causing-Supporters-of-Mozilla-s-Eich-to-Stay-Mum>.

These are often stated in terms that suggest this legally privileged point of view is one of moral neutrality between competing moral views.⁴¹ But the gay marriage debate reveals an intellectual and moral hole in the center of this presumption of neutrality. What Western liberals find “intelligible” as a rational moral argument is strikingly different from what the majority of humanity finds a reasoned argument.⁴²

Intelligible is not the same as “true.” We are not arguing that these alternative conceptions of what counts as a moral argument must be true, but we are disputing the claim, repeatedly elevated in the gay marriage debate that these arguments do not exist, that no rational person can hold them. Only people deeply indoctrinated in WEIRD moral presumptions, “Western Educated Industrial Rich and Democratic,”⁴³ find the idea that marriage is the union of husband and wife unintelligible.

Others may find it wrong—that is another matter—but the inability of Western liberals to perceive the arguments for marriage should be—we argue—taken as a sign of a failure of their moral and intellectual imaginations to comprehend diverse views (including views they disagree with) rather than as a scientific fact.

We have a certain set of empirical foundations for this view. (Again it is not a view of what is true, but of what counts as an “intelligible argument” worthy of consideration, even if it is rejected.)

Social psychologist Jonathan Haidt, who has written about the psychological foundations of morality, found that self-described liberals, especially those who called themselves “very liberal,” were worse at predicting the moral judgments of moderates and conservatives than moderates and conservatives were at predicting the moral judgments of

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41. See John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 795 (1997).
42. Cf. Jonathan Haidt, *The Moral Roots of Liberals and Conservatives*, TED.COM (Feb. 2008), http://www.ted.com/talks/jonathan_haidt_on_the_moral_mind.html. For a more formal treatment of Professor Haidt’s research findings, see JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012) [hereinafter HAIDT, *RIGHTEOUS MIND*]; Jonathan Haidt & Jesse Graham, *When Morality Opposes Justice: Conservatives Have Moral Intuitions that Liberals May Not Recognize*, 20 SOC. JUST. RES. 98 (2007). The moral matrix for American liberals ranks Care, Liberty, and Fairness as the important foundations. HAIDT, *RIGHTEOUS MIND*, *supra* note 42, at 297 fig.12.2. In contrast, American social conservatives value all six foundations (care/harm, liberty/oppression, fairness/cheating, loyalty/betrayal, authority/subversion, and sanctity/degradation) equally. *Id.* at 306 fig.12.4.
43. HAIDT, *RIGHTEOUS MIND*, *supra* note 42, at 96–98; see Rob Moll, *Views of the WEIRD (Western Educated Industrial Rich and Democratic)*, CHRISTIANITY TODAY (July 19, 2012), <http://www.christianitytoday.com/ct/2012/julyweb-only/views-of-the-weird.html> (reviewing HAIDT, *RIGHTEOUS MIND*, *supra* note 42).

liberals. Liberals don't understand conservative values. And they can't recognize this failing, as the culturally empowered elites (intellectual and otherwise) necessarily invest less intellectual and moral resources in understanding alternative and minority views.⁴⁴

In the interests of “achieving disagreement,” we offer the following analysis of what millions of traditional-marriage supporters may care about (aside from animus) that the liberal worldview does not (unless stretched seriously to consider intellectual and moral diversity) count as a rational, i.e. “nonreligious” argument.⁴⁵

The concerns of millions of Americans, including Congress that passed DOMA, are literally invisible to Justice Kennedy.

This is, in part, because marriage as a system does not easily fit into the liberal, including the classical liberal or libertarian, understanding of the state and morality, which is focused on individuals, their rights and their benefits.⁴⁶

Marriage in the views of traditional believers around the globe is not only and not primarily an individual right to access government benefits. It represents a moral ideal that is part of a system intended to achieve the difficult goal of influencing (in America, without coercions) the sexual behavior of adults. It is part of a sexual order that protects children and protects the ability of a good society to reproduce itself successfully by privileging certain kinds of relationships (not people) over others: lifelong, sexually faithful partnerships between men

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44. See Haidt & Graham, *supra* note 42, at 114 (“One psychological universal (part of the ingroup foundation) is that when you call someone evil you erect a protective moral wall between yourself and the other, and this wall prevents you from seeing or respecting the other’s point of view.”); William Saletan, *Why Won't They Listen?*, N.Y. TIMES, Mar. 25, 2012, § BR (Book Review), at 12, 13 (reviewing HAIDT, *RIGHTEOUS MIND*, *supra* note 42) (“[I]n a survey of 2,000 Americans, Haidt found that self-described liberals, especially those who called themselves ‘very liberal,’ were worse at predicting the moral judgments of moderates and conservatives than moderates and conservatives were at predicting the moral judgments of liberals. Liberals don’t understand conservative values. And they can’t recognize this failing, because they’re so convinced of their rationality, open-mindedness and enlightenment.”).
45. Maggie would like to report as an active participant in the gay marriage debate that she has had the repeated experience of making the public argument “marriage is grounded in the reality society has a special and distinct interest in bringing together male and female to make and raise the next generation, so that children have their mother and father” and being told “she has to make something other than a religious argument.” Maggie has a religion and is perfectly willing to make religious arguments, but the intellectual puzzle is how to explain how a rational argument with no religious referent is experienced by many people as a religious argument.
46. See HAIDT, *RIGHTEOUS MIND*, *supra* note 42, at 146–54 (discussing the “Sanctity/Degradation Foundation”).

and women in which they precommit to not having sex or children outside this relationship, and in which they commit to raising any children they have together.

A sexual order tends to hang together. It is always possible to debate which pieces of it can be dismantled without affecting the whole order, in pursuit of competing values. But that debate, if it is to be rational, must begin by recognizing what the order is, and what it is trying to accomplish.

If one sees marriage as part of sexual order, rooted in the overwhelming reality of sex difference, family structure, and the need to create a next generation protected by mothers and fathers in one unitary family system, then the oft-repeated claim that elderly or infertile couples are similarly situated to same-sex couples becomes hard to take seriously intellectually. The inclusion of older couples in the pool of marrieds has been the condition of marriage from its inception, including all the many years in which judges, like ordinary people, understood marriage to be primarily about procreation.⁴⁷ Surely it is not so hard to see that the inclusion of two men in the definition of marriage ruptures marriage from its historic roots, changes something that many (if not you) see as important to the nature of marriage?

If one sees marriage as part of a (non-coercive) sexual order, which permits many other kinds of relationships, sexual and otherwise, but in which government and society attempt to idealize and support the one kind of relationship (husband and wife), which is important for children and for the community’s well-being, one could decide nonetheless to support gay marriage. Indeed, one could decide it is worthwhile to “take the risk” of changing one of the nearly universal pillars of marriage (rooted in sexual difference and the capacity to create new life) in pursuit of other goals. But one would be de-barred from the irrationality of Justice Kennedy in *Windsor*, the cavalier dismissal of competing concerns, or of the sweeping negative moral judgment pronounced on these concerns by five Justices of the Supreme Court.

Systems or “orders” produce both meanings and values that are separate from the individuals’ motives and experiences.

Sexual order is a particular problem, both because passion is hard to order, and because our ideas of individual liberty prevent us from accepting some older forms of sexual order. We hesitate above all else to stigmatize, which is to exclude from good citizenship and moral concern, people who violate sexual norms (apart from violence).

In the context of constitutional law, the Court has made a sharp distinction between stigmatization and idealization when it comes to

47. See Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 33, 43–45 & nn.32–34 (2004) (citing various examples of authorities stating that marriage is for procreation).

abortion. The law can prefer childbearing to abortion, as long as it does not prevent individuals from accessing abortion if they prefer.⁴⁸

But in *Windsor*, Kennedy collapsed this distinction, arguing that any preference or idealization of one kind of family necessarily stigmatizes the alternatives: “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.”⁴⁹

Our embrace of sexual liberty is heightened, of course, by technological changes that make the equation of sex and babies more problematic.

For millions of educated and disciplined people, sex can be indulged in for a fairly-long period of time without producing children more than half the time.⁵⁰

We would argue that common elite experience should rationally be balanced against what we observe generally from the collapse of sexual norms and order. Without marriage as a serious moral ideal and norm regulating sexual behavior, sexual relationships of male and female regularly produce children. These children are either (a) killed in utero or (b) disproportionately raised in tumultuous families dominated by their parents’ aching romantic and erotic desires.⁵¹

The single mothers who raise successful children do so largely by disciplining themselves sexually, erotically, and romantically in ways that married people can only admire and emulate: these successful single mothers prioritize their children over their own romantic and sexual drives.

48. See *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (“The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.”).

49. *United States v. Windsor*, 133 U.S. 2675, 2693 (2013).

50. Half of all pregnancies in the United States remain unintended despite the legal right to contraceptives and their widespread availability. See Haishan Fu et al., *Contraceptive Failure Rates: New Estimates from the 1995 National Survey of Family Growth*, 31 FAM. PLAN. PERSP. 56, 56 (1999) (48%); Stanley K. Henshaw, *Unintended Pregnancies in the United States*, 30 FAM. PLAN. PERSP. 24, 28 tbl.3 (1998) (47.7%); see also James Trussell & Barbara Vaughn, *Contraceptive Failure, Method-Related Discontinuation and Resumption of Use: Results from the 1995 National Survey of Family Growth*, 31 FAM. PLAN. PERSP. 64, 71 (1999) (9% contraceptive failure).

51. See Maggie Gallagher, Essay, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 225, 236–37 (2004) (discussing the signaling and channeling functions of marriage).

Or these single mothers are lucky enough to find new spouses who can overcome the problems of baby-mama dramas and disparate loyalties to build happy new stepfamilies.

These successful non-intact families are common, but they are by no means the norm.⁵² And successful stepfamilies are most likely going to be formed by people who value and idealize marriage (and the personal sacrifices it requires, including forging relationships with stepchildren) as a norm and ideal which it is worth making sacrifices for.

In the absence of a sexual system that idealizes and endorses marriage as a childrearing norm, the default condition are sexually less-committed relationships that create children subjected to multiple and enduring baby-mama dramas and that do not produce the sense that mothers and fathers can be counted on to raise children together.⁵³

It is not necessary to have a religion to see this truth, although many who have experienced it personally (like Maggie, and like Phil Robertson, who turned from substance abuse, sex, drugs, and rock and roll, to fidelity, Jesus Christ, and paternity) have turned to religion as embodying the rational truth in a way that secularist theories often deny.

The collapse of sexual order is doing immense harm to children and to women. The family is a system that by its nature constrains “self-determination and individual autonomy.” To make the family fit into our preconceived liberal norms of choice and autonomy we have to do violence to its essential nature. A liberal critique of sexual liberalism includes the reality that the decline of a marriage culture creates huge gendered inequalities in opportunities, as women increasingly shoulder the burden of both supporting and nurturing children alone.⁵⁴

Some same-sex marriage advocates may seek to be part of a conservative sexual order,⁵⁵ but getting to gay marriage requires overturning the first principle of our historic sexual order: that marriage

52. See Pew Research Ctr., *A Portrait of Stepfamilies*, PEW RES. SOC. & DEMOGRAPHIC TRENDS (Jan. 13, 2011), <http://www.pewsocialtrends.org/2011/01/13/a-portrait-of-stepfamilies/> (reporting that step relatives are present in four-out-of-ten American households).

53. See *id.* (finding that among adults with biological and step or half siblings, 64% are very obligated to help a biological sibling but only 42% would feel the same obligation to step or half siblings).

54. Susan Shell, *The Future of the Liberal Family*, in AMERICA AT RISK: THREATS TO LIBERAL SELF-GOVERNMENT IN AN AGE OF UNCERTAINTY 117, 131–34 (Robert Faulkner & Susan Shell eds., 2009).

55. See, e.g., JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 66–67 (2004) (arguing that same-sex marriage would “the greatest step toward maturity” for gay culture).

is the social ideal because it brings together mothers and fathers for children.

Liberals, including most libertarians or classical liberals⁵⁶ who are identified in modern ideological parlance as “conservatives,” have an extremely difficult time acknowledging a threat to the sexual order as a “harm” unless it is simultaneously a harm to every individual. In particular, they have an emotionally and intellectually difficult time countenancing any concrete harm to a particular individual in defense of an abstract sexual or social order.

This is what the oft-repeated claim that there is no possible argument against gay marriage means.

It begins with the creation of an abstract and unlikely analogy: redefining marriage to accommodate same-sex couples will have no more effect on marriage as an idea and ideal than allowing infertile opposite-sex couples to marry. If the latter can be a marriage, there is no reason to suppose two men in a marriage will make any difference.

And it ends with intellectual blindness, with an inability to even see the ways in which gay marriage changes marriage for millions of American who hold the classic understanding.

There is one great exception to this generalization that liberalism cannot tolerate a concrete harm to an individual in defense of a public moral “system” or “order.” When the moral ideal of “equality” is at stake, liberals are prepared to witness disproportionate and very concrete personal harms to individuals enforced by the law in defense of the abstract notions of equality.

In the name of equality, whole swaths of professions are being closed to people who do not share in Justice Kennedy’s moral views. You cannot be a judge in the state of Washington, for example, if you privately state you are unwilling to perform gay marriages for religious reasons.⁵⁷

Let us put before you one such individual. Melissa Klein of Gresham, Oregon, who violated the moral order of “equality” by politely declining to bake a wedding cake for a lesbian couple.⁵⁸ The

56. There are some exceptions; for example, see Susan M. Shell, *The Liberal Case Against Gay Marriage*, 156 PUB. INT. 3 (2004) (critiquing the liberal view on marriage); Seana Sugrue, *Soft Despotism and Same-Sex Marriage*, in *THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS* 172, 172–196 (Robert P. George & Jean Bethke Elshtain eds., 2006) (“Same-sex marriage undermines core civil institutions so as to better gratify consenting adults. . . . The cost of same-sex marriage, and the privacy rights upon which it is based, is soft despotism, not simply for oneself but also for one’s children.”).

57. *In re Tabor*, CJC No. 7251-F-158, 2013 WL 5853965, at *2 (Wash. Comm’n on Judicial Conduct, Oct. 4, 2013).

58. Chelsea Kopta, *Sweet Cakes Owners Respond to Firestorm Over Wedding Cake Decision*, KATU.COM, <http://www.katu.com/news/inves>

couple went to the state of Oregon with their discrimination complaint. In January of 2014, the Bureau of Labor Standards agreed their complaint was justified and found that Melissa violated the law.⁵⁹

In defense, Melissa’s husband, Aaron Klein, asserted: “Discrimination is really the wrong terminology for what took place[.] I didn’t want to be a part of her marriage, which I think is wrong.”⁶⁰

The couple’s discrimination claim led to press stories, which led to hate mail, death threats, and even minor, but ominous vandalism.

Once, the couple discovered the bakery van parked in the driveway in front of their home had been ransacked. Nothing was taken, not even cash. The couple lived in a rural home off-the-beaten track, so some spontaneous skullduggery by outraged passersby seemed unlikely. “Somebody came up into our driveway and rummaged through our truck and took stuff out,” Melissa told the press.⁶¹ “The really strange thing is, they didn’t steal anything, they just made a mess. It kind of was a little creepy.”⁶²

But some same-sex marriage folks were not content with sending threats directly, according to the Kleins; they also threatened anyone willing to buy their cakes, or vendors that even referred customers to their cakes, leading to a large loss of business.

As Aaron Klein explained:

There’s a lot of close-minded people out there that would like to pretend to be very tolerant and just want equal rights[.] But on the other hand, they’ve been very, very mean-spirited. They’ve been militant. The best way I can describe it is they’ve used mafia tactics against the business. Basically, if you do business with Sweet Cakes, we will shut you down.⁶³

tigators/Sweet-Cakes-responds-to--222094901.html (last updated Oct. 30, 2013, 9:04 AM).

59. Molly Young, *Sweet Cakes by Melissa Violated Same-Sex Couple’s Civil Rights When it Refused to Make Wedding Cake, State Finds*, OREGONIAN (Jan. 17, 2014), http://www.oregonlive.com/business/index.ssf/2014/01/sweet_cakes_by_melissa_investigation_wraps_up_as_state_finds_evidence_that_bakery_violated_civil_rights_for_refusing_to_make_same-sex_wedding_cake.html.

60. Kopta, *supra* note 58.

61. Billy Hallowell, *Baker Who Lost Shop After Refusing Gay Couple’s Wedding Cake Has Surprise Reaction to Ongoing Attacks: “My Eternal Home Is What Matters,”* BLAZE, (Sept. 5, 2013, 7:41 AM), <http://www.theblaze.com/stories/2013/09/05/burn-in-hell-you-racist-pigs-christian-baker-who-refused-to-make-lesbian-couples-wedding-cake-details-creepy-alleged-break-in-ongoing-challenges/>.

62. *Id.*

63. Kopta, *supra* note 58.

Is the point of this story to suggest that what Melissa and Aaron and their family has gone through is somehow worse than what LGBT people experienced for decades? No, we say, explicitly not that.

The point we wish to make here is that the abstract legal doctrine generated by the real, not-abstract, and pressing need to combat powerful Jim Crow segregation are now being swung into action against the Melissa Kleins of the world, even though the cases are sharply different.

Melissa is not seeking to rigorously repress, exclude, and hurt gay people. She will happily serve gay people delicious desserts in her shop. Melissa is merely trying to lead her own life, consistent with her own faith. She does not want to give false testimony by personally participating in a marriage her faith teaches her is contrary to God-given natural order.

Let us agree at least to notice: the new liberal moral order is willing to tolerate an immense concrete harm to Melissa’s livelihood, and the livelihood of five children, in defense of an abstract moral order of equality.

The lesbian couple, Rachel Cryer and Laurel Bowman, certainly experienced a kind of harm when they learned their local baker doesn’t believe in gay marriage. They learned their joy over their happy day is not shared by their bakers. Millions of Americans do not see same-sex unions as marriages. The Oregon Equality Act of 2007 permits the Bureau of Labor and Industries to sanction up to \$50,000 in civil damages for housing discrimination violations,⁶⁴ a sum that clearly is intolerable for a small, personal business to bear. Simply refusing service in a “place of public accommodation”⁶⁵ could lead to significant

64. See OR. REV. STAT. § 659A.885 (2013) (providing for a penalties to be assessed by the Commissioner of the Bureau of Labor and Industries). The \$50,000 penalty is assessed for an initial violation of either section 659A.145 or 659A.421 of the Oregon Revised Statute as well as violations of federal housing law. Section 659A.421 forbids discrimination when selling, buying, or leasing real property. The Oregon Administrative Rules further provides remedies for housing discrimination, which may include “[c]ompensation for emotional distress and impaired dignity.” OR. ADMIN. R. 839-003-230(d) (2014). If a small-business owner knowingly practices prohibited conduct such as “refus[ing] to buy from, sell to or trade with any person because of . . . discrimination based upon the . . . sexual orientation . . . of the person,” OR. REV. STAT. § 30.860(1) (2013), which harms that person’s “business or property,” the small-business owner could stand to lose “threefold the damages sustained” along with reasonable attorney’s fees. *Id.* § 30.860(2).

65. A “place of public accommodation” includes “[a]ny place or service offering to the public accommodations, advantages, facilities or privileges whether into the nature of goods, services, lodgings, amusements, transportation or otherwise.” OR. REV. STAT. § 659A.400(1)(a) (2013).

judgments against small businesses,⁶⁶ including a recent order that a bar owner pay over \$400,000 to eleven transgendered persons whom he told to not return to his bar.⁶⁷

But truthfully, the lesbian couple could have easily gone to the bakery next door and gotten a wedding cake. Their right to live as they choose does not really require putting Melissa’s family’s livelihood at risk.

But, consistent with the Kennedy Doctrine, the emotional discomfort of learning that people have seriously different moral point of view gets upgraded and translated into an assault on human dignity.

The pathway from there to pluralism, or tolerance, or mutual respect in a democracy across deep moral divides, is very hard to see.

66. For “deny[ing] full and equal accommodations, advantages, facilities and privileges of any place of public accommodation,” *id.* § 659A.403(a), or for providing notice that service may be denied, *id.* § 659A.409, small business owners or their employees, *id.* § 659A.406, may face compensatory and punitive damages. *Id.* § 659A.885(7)(1).

67. Blachana, LLC, 32 BOLI Orders 220, 238–39, 256 (2013).