

**From *Romer v. Evans* to *United States v. Windsor*: Law as a  
Vehicle for Moral Disapproval in Amendment 2 and the Defense  
of Marriage Act**

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## I. INTRODUCTION

In its 2012-2013 term, the Supreme Court of the United States considered two cases about access to marriage by same-sex couples in which *Romer v. Evans*<sup>1</sup> played a central role. In *United States v. Windsor*,<sup>2</sup> Justice Kennedy employed *Romer* as a template in an opinion on the merits, in which the Court affirmed the Second Circuit judgment that Section 3 of the Defense of Marriage Act (DOMA) was unconstitutional.<sup>3</sup> Hailed as a landmark opinion by supporters of marriage equality and condemned as judicial overreaching in a national “debate” over marriage by dissenting justices Scalia and Alito<sup>4</sup> and by DOMA’s supporters, *Windsor* provided the Obama Administration the final judicial resolution it sought so that it could cease enforcing Section 3 and implement a policy change, under which federal government officials would treat marriages of same-sex couples that were valid under state law as valid for purposes of federal law.<sup>5</sup>

In *Hollingsworth v. Perry*,<sup>6</sup> the Court declined to reach the merits of whether Proposition 8 (Prop 8) offended the constitution, concluding that its proponents were private parties who lacked Article III standing to appeal the federal district

1. 517 U.S. 620 (1996).

2. See 133 S. Ct. 2675, 2693 (2013) (stating that “[i]n determining whether a law is motivated by an improper animus or purpose, “[d]iscriminations of an unusual character” especially require careful consideration” (quoting *Romer*, 517 U.S. at 633) and that “DOMA cannot survive under these principles.”)

3. *Id.*

4. See *id.* at 2710, 2711 (Scalia, J., dissenting) (predicting that the Court’s opinion will result in a “judicial distortion of our society’s debate over marriage” and arguing that the Court should “have let the People decide”); *id.* at 2711 (Alito, J., dissenting) (“Our Nation is engaged in a heated debate about same-sex marriage”; he also states that the Constitution “does not dictate” the choice between understandings of marriage).

5. See Michael R. Gordon, *New U.S. Policy Gives Equal Treatment to Same-Sex Spouses’ Visa Applications*, N.Y. TIMES, Aug. 3, 2013, at A8 (quoting Secretary of State John Kerry’s announcement: “Effective immediately, when same-sex spouses apply for a visa, the Department of State will consider that application in the same manner that it will consider the application of opposite-sex spouses.”)

6. 133 S. Ct. 2652 (2013).

court ruling, in *Perry v. Schwarzenegger*,<sup>7</sup> that Prop 8 was unconstitutional. The Court vacated the Ninth Circuit's opinion,<sup>8</sup> which relied heavily on *Romer* in affirming the district court's conclusions about Prop 8. While there was some initial controversy over the precise impact of the Court's decision not to decide, the practical effect has been that the Ninth Circuit swiftly lifted its stay of the district court ruling, the governor instructed clerks to issue marriage licenses to same-sex couples and such couples began to marry on June 28, 2013.<sup>9</sup>

*Romer* was not about marriage, as such, and yet, it proved an extremely important precedent in both the DOMA and the Prop 8 litigation.<sup>10</sup> The aim of this article is to reflect on *Romer* when it was decided and now as it bears on the use of law as a vehicle to express morality, in particular, "moral disapproval of homosexuality" and moral approval – and the defense and nurture – of "traditional, heterosexual marriage."<sup>11</sup> Looking back to *Romer*, the article will examine arguments made by the parties and their various friends of the court before the U.S. Supreme Court – nearly twenty years ago – about whether or not Amendment 2 was a constitutionally permissible expression of moral disapproval of homosexuality and of support for traditional heterosexual marriage. As Lisa Keen and Suzanne Goldberg observe, in their account of the *Romer* litigation, "[t]he extraordinary array of organizations filing briefs in this case underscored the intensity and scope of the debate prompted by the case."<sup>12</sup> The article will then move forward in time, examining how a far greater number of amici and the courts deployed *Romer* in the recent successful challenge to Section 3 of DOMA.

Both *Romer* and DOMA date back to 1996. Congress enacted DOMA just a few months after the Court decided *Romer*, striking down Amendment 2. As this article elaborates, both proponents of Amendment 2 and of DOMA justified these measures as needed to ward off a threat to traditional morality posed by an aggressive gay rights agenda; in the case of DOMA, the agents to curb were activist courts, while, in Colorado, the problem was successes at the level of municipal anti-discrimination ordinances.<sup>13</sup> The Justice Department advised Congress, even after *Romer*, that DOMA was constitutional.<sup>14</sup> DOMA's

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7. 704 F. Supp. 2d 921, 994 (N.D. Cal. 2010), *aff'd sub nom*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

8. See *Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir. 2012) (holding that Proposition 8 violated the Equal Protection Clause, after comparing Proposition 8 to Amendment 2, which was invalidated in *Romer*).

9. Nanette Asimov, *Same-Sex Couples Flock to SF for Weekend Weddings*, S.F. CHRONICLE, June 29, 2013, <http://www.sfgate.com/lgbt/article/Same-sex-couples-flock-to-SF-for-weekend-weddings-4638139.php>.

10. Because the Court did not reach the merits in the Prop 8 appeal, this article focuses only on *Romer's* role in challenging DOMA.

11. H.R. Rep. No. 104-664, at 12, 15-16 (1996), available at <http://www.gpo.gov/fdsys/pkg/CRPT-104hrpt664/pdf/CRPT-104hrp664.pdf>.

12. LISA KEEN & SUZANNE B. GOLDBERG, *STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL* 196 (1998).

13. See *infra* Part III for discussion.

14. See H.R. Rep. No. 104-664, *supra* note 11, at 34 ("*Romer v. Evans* does not affect the Department's analysis (that H.R. 3396 is constitutionally sustainable)") (letter from Ann M. Harkins,

supporters similarly concluded it was “plainly constitutional under *Romer*,” even as they criticized *Romer* as “difficult to fathom” in light of *Bowers v. Hardwick*, which upheld “criminalizing homosexual behavior” on a belief that “homosexual sodomy is immoral and unacceptable.”<sup>15</sup>

The intertwined fates of DOMA and *Romer* in the most recent Supreme Court term highlight, on the one hand, how the societal and constitutional landscape has changed since 1996. On the other hand, they illustrate some basic continuity both in cleavages over homosexuality and in forms of argument about law, morality, and homosexuality. The *Romer* litigation, and its precursor in the Colorado court system, *Evans v. Romer I* and *II*,<sup>16</sup> took place when *Bowers v. Hardwick*,<sup>17</sup> rather than *Lawrence v. Texas*,<sup>18</sup> reflected constitutional jurisprudence about the permissible scope of legal regulation based on homosexuality or homosexual conduct. In *Romer*, Justice Kennedy’s majority opinion famously (or infamously) never mentioned *Bowers*, which narrowly cabined the scope of Due Process liberty. Instead, his opinion sounded an Equal Protection theme of critical importance to the recent litigation over both DOMA and Prop 8. Through Amendment 2, Colorado “classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else,” making the class “a stranger to its laws.”<sup>19</sup> *United States Department of Agriculture v. Moreno*<sup>20</sup> and *City of Cleburne v. Cleburne Living Center*<sup>21</sup> provided a template for this argument, as I elaborate in Part II. Since *Romer*, the trio of *Moreno*, *Cleburne*, and *Romer* features centrally – including in the DOMA litigation – in challenges to legislation that singles out a historically disfavored group.

In 2003, seventeen years after *Bowers*, *Lawrence*, in an opinion also authored by Justice Kennedy, drew on *Romer* in overruling *Bowers*, declaring it “was not correct when it was decided, and it is not correct today.”<sup>22</sup> *Lawrence* held the Texas law, which criminalized “sexual intimacy by same-sex couples, but not identical behavior by different-sex couples,” invalid under the Due Process Clause, stressing analogies between the liberty of homosexuals and other protected forms of liberty;<sup>23</sup> however, it noted important links between “[e]quality of treatment” and the “due process right to demand respect for conduct protected by the substantive guarantee of liberty.”<sup>24</sup>

Seventeen years proved similarly fateful for DOMA. Edith Windsor, the United States, and Windsor’s amici successfully enlisted *Romer* and *Lawrence* as highlighting the constitutional wrong of singling out and demeaning

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United States Department of Justice, to Hon. Charles T. Canady).

15. *Id.* at 32-33 (“A Short Note on *Romer v. Evans*”) (citing *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)).

16. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993); *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994).

17. 478 U.S. 186 (1986).

18. 539 U.S. 558 (2003).

19. *Romer v. Evans*, 517 U.S. 610, 635 (1996).

20. 413 U.S. 528 (1973).

21. 473 U.S. 432 (1985).

22. *Lawrence*, 539 U.S. at 578.

23. *Id.* at 564, 578.

24. *Id.* at 575.

homosexuals because of moral disapproval and as providing a template, an architectural structure, within which to locate the demand that same-sex couples validly married under state law be accorded the same status – the same dignity and respect – as validly married opposite couples. Those defending DOMA had to work around *Romer* and *Lawrence*, distinguishing, for example, DOMA from Amendment 2; some, by contrast, took issue with those decisions, insisting that Justice Scalia, in his dissents in *Romer*<sup>25</sup> and *Lawrence*,<sup>26</sup> had the better view about the relationship between law and morality. In *Windsor* itself, the Court enlisted both *Romer* and *Lawrence* to hold Section 3 of DOMA unconstitutional.

*Romer*, *Lawrence*, and *Windsor* now make a trio of significant Supreme Court decisions, all authored by Justice Kennedy, that forge important contours of liberty and equality for gay men and lesbians in the federal constitutional order. They set constitutional limits to appeals to moral approval and disapproval and the promotion of “traditional heterosexual marriage” to restrict that liberty and equality.<sup>27</sup>

On the other hand, a look back at *Romer* and a comparison with the recent *Windsor* litigation reveals a continuity of certain controversies and forms of argument. This article explores those themes by analyzing several strands of argument appearing in party and amicus briefs in *Romer* and in *Windsor*. These include: (1) the constitutional limits of using law to signal moral disapproval of homosexuality and moral approval of traditional marriage and Judeo-Christian values; (2) whether Amendment 2 or DOMA reflected animus or antipathy toward homosexuals; (3) rationales for both laws rooted in protecting religious liberty; (4) appeals to freedom of association as a justification for both laws; (5) arguments about a “clash of rights” posed by challenges to Amendment 2 and DOMA, for example, between the expanding rights of gay men and lesbians and the right of “the People” to use law to reflect and protect their moral and religious convictions; and (6) arguments about whether sexual orientation is a suspect or quasi-suspect class, by analogy to race and sex, and which level of review courts should employ when laws classify based on sexual orientation.

This backward glance at themes then and now is also informative as to unfinished business and what may be the next generation of constitutional controversies. Two examples are illustrative. First, in *Windsor*, Justice Kennedy declined to announce that classifications based on sexual orientation warranted intermediate scrutiny, a position urged by the Obama Administration and Edith Windsor and accepted by the Second Circuit. Instead, as in *Romer*, the Court invalidated Section 3 after applying what has come to be called a “rational basis plus” or “rational basis with bite” test: “[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are

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25. *Romer v. Evans*, 517 U.S. 610, 636 (1996) (Scalia, J., dissenting).

26. *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

27. Carlos Ball includes *Romer* and *Lawrence* among several LGBT rights lawsuits that “worked in conjunction with political mobilization and social protests to remake our nation’s political, social, and moral landscape.” CARLOS A. BALL, FROM THE CLOSET TO THE COURTROOM: FIVE LGBT RIGHTS LAWSUITS THAT HAVE CHANGED OUR NATION 1 (2010).

obnoxious to the constitutional provision.”<sup>28</sup> Indeed, one issue in sharp contention between the parties – and the Justices – in *Windsor* was whether, in fact, *Romer* had introduced a new, more intensified form of rational basis review, following on *Moreno* and *Cleburne*, or whether it simply employed traditional, highly deferential review. Second, in the *Romer* litigation, defenders of Amendment 2 made arguments concerning the authority of “the people” to structure the political process and urged the Court not to intrude upon the democratic process. In *Windsor*, the Bipartisan Legal Advisory Group, which defended DOMA before the Court, and their amici urged that the Court should let “the people” decide about marriage and not take sides in an ongoing cultural debate. These arguments, then and now, raise questions about who the relevant people are who should decide. *Windsor* involved the additional issue of the respective authority of states versus the federal government to define marriage. In a powerful rhetorical turn, Justice Kennedy, for example, contrasted New York’s decision, “after a statewide deliberative process,” to remedy a “perceived” injustice and “eliminate inequality” in its marriage laws with DOMA’s “writ[ing] inequality into the entire United States Code.”<sup>29</sup>

This article proceeds as follows. In Part II, I look back at *Romer*. I begin with the successful challenge to Amendment 2 brought in Colorado state court. I then turn to the proceedings before the U.S. Supreme Court, focusing on arguments made in party and amicus briefs. The Colorado Supreme Court struck down Amendment 2 under a different rationale than that adopted by the U.S. Supreme Court: Amendment 2 violated a fundamental right to participate in the political process.<sup>30</sup> Thus, much of the briefing before the Supreme Court argued for or against this political right. My focus, however, is on an alternate strand of argument made by challengers to Amendment 2 more pertinent to the recent marriage equality litigation: that Amendment 2 lacked a rational basis. Moreover, also pertinent are those arguments that, under *United States Department of Agriculture v. Moreno*<sup>31</sup> and *City of Cleburne v. Cleburne Living Center*,<sup>32</sup> it was the singling out of one group, making them strangers to the law, that deeply offended the Constitution. These briefs also stressed the role of stereotypes and falsehoods about homosexuals in the campaign for Amendment 2. Conversely, proponents of Amendment 2 asserted that it had several rational bases, including protecting and preserving traditional morality, protecting religious and associational liberty, protecting the privacy of the family, and preserving the liberty of parents to instruct their children. A basic premise in these briefs was that (on the authority of *Bowers*) the people may express moral disapproval through law. Moreover, they may avoid threats to religious liberty posed by antidiscrimination law simply by barring such laws entirely unless they are obtained through constitutional amendment. I analyze the Court’s decision

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28. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (citing *Romer*, 517 U.S. at 633).

29. *Id.* at 2689, 2694.

30. *Evans v. Romer*, 854 P.2d 1270, 1276-82 (Colo. 1993); *Evans v. Romer*, 882 P.2d 1335, 1339-41 (Colo. 1994).

31. 473 U.S. 432 (1985).

32. 413 U.S. 528 (1973).

in *Romer* and Justice Scalia's blistering and often-quoted dissent. I note some contemporaneous reactions to the *Romer* decision by conservatives and by proponents of gay and lesbian civil rights.

In Part III, I turn back again to 1996, when Congress enacted, and President Clinton signed DOMA. I analyze the House Report to give readers a sense of the types of rationales offered for DOMA and the sense of urgency and threat that lawmakers perceived because of a challenge to state marriage laws proceeding in Hawaii. I also consider accounts of why President Clinton and Democrats in Congress supported DOMA. In Part IV, I turn to the recent legal challenges brought to Section 3 of DOMA by same-sex couples lawfully married under state law. Since the Court granted the petition for certiorari in and reviewed the Second Circuit case, *Windsor v. United States*,<sup>33</sup> I focus primarily on that case. However, because the federal district court in *Windsor* looked to the First Circuit's application of a *Romer*-like heightened rational basis as a helpful template for how to evaluate DOMA, I briefly discuss the First Circuit's reasoning.<sup>34</sup> The rest of Part IV analyzes several themes in the party and amicus briefs filed with the Supreme Court as it considered *Windsor* and then evaluates Justice Kennedy's majority opinion and the three dissenting opinions. The article concludes with some observations about the next likely steps in the debate over law, morality, homosexuality, and marriage, including the import of *Windsor* for challenges to state marriage laws.

## II. ROMER V. EVANS

In this Part, I recount the successful challenge to Amendment 2 brought in state court. The trial about Amendment 2 was "not the first trial" assessing an "antigay attack," but was "the most comprehensive in its attempt to sift through all that was known about gay people—from ancient history through the latest scientific research—to determine where and how gay people fit into the body politic."<sup>35</sup> Informative accounts by scholars and activists capably tell the story of the enactment of Amendment 2, the trial, and the legal victories in Colorado's high court and the U.S. Supreme Court.<sup>36</sup> My focus is on the forms of argument made. Thus, I examine the findings and conclusions of the trial court and the opinions by the Colorado Supreme Court. I then analyze several themes in the friend of the court briefs filed before the U.S. Supreme Court, focusing particularly on arguments about Amendment 2 as a vehicle for preserving morality and expressing moral disapproval. Then, this Part discusses whether and how those themes featured in the majority and dissenting opinions in *Romer*.

### A. Amendment 2

The Colorado voters approved Amendment 2, on November 3, 1992, by a

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33. 699 F.3d 169 (2d Cir. 2012), cert. granted, 133 S. Ct. 2675 (2013).

34. Massachusetts v. United States Dep't of Health & Human Servs., 682 F.3d 1, 9 (1st Cir. 2012); Windsor v. United States, 833 F. Supp. 2d 394, 402 (S.D.N.Y. 2012).

35. KEEN & GOLDBERG, *supra* note 12, at ix.

36. *Id.*; BALL, *supra* note 27, at 99-149.

margin of 53.4% to 46.6%.<sup>37</sup> Amendment 2 provided:

**No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation.**

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.<sup>38</sup>

What was the impetus for Amendment 2? The ballot information provided to Colorado voters stated: “the proposed amendment arises in the context of three decades of increased governmental activity in the areas of civil rights.”<sup>39</sup> Within Colorado, “three home rule cities – Aspen, Boulder, and Denver” had ordinances protecting individuals from “job, housing, and public accommodations discrimination” when based solely on sexual orientation. The Denver law “entirely exempts religious institutions;” the Boulder ordinance had a Mrs. Murphy type housing exemption; and the Aspen ordinance “does not exempt religious institutions.”<sup>40</sup> There was also an executive order, issued in 1990, prohibiting sexual orientation discrimination in the “hiring, promotion, and firing of classified and exempt state employees.” No federal civil rights laws protected against sexual orientation discrimination, although several states included sexual orientation in their antidiscrimination laws. If enacted, Amendment 2 would invalidate these laws and policies within Colorado, but also bar future enactment or enforcement of “civil rights laws and policies” protecting on the basis of sexual orientation. In the future, only voters could enact an antidiscrimination policy through another constitutional amendment.

The ballot information summarized “arguments for” and “arguments against” Amendment 2. Notably absent are arguments about protecting marriage, the traditional family, and public morality – arguments that featured prominently in the litigation. The third argument “for” comes closest: “Granting protected status to homosexual, lesbian, and bisexual persons may compel some individuals to violate their private consciences or to face legal sanctions for failure to comply. For some individuals, homosexuality, or bisexuality conflicts with their religious values and teachings or their private moral values.” For example, a landlord may be asked to “condone a lifestyle of which they do not approve or to be in violation of a local ordinance.”<sup>41</sup> Additional arguments “for” Amendment 2 included the following: (1) “There is no evidence that homosexual, lesbian, and bisexual individuals are sufficiently disadvantaged to warrant designation as a protected class;” (2) “homosexual, lesbian, and bisexual

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37. *Evans v. Romer*, 854 P.2d 1270, 1272 (Colo. 1993).

38. *Evans v. Romer*, 882 P.2d 1335, 1338-39 (Colo. 1994) (citing COLO. CONST. art. II, § 30b).

39. LEGIS. COUNSEL OF THE COLO. GEN. ASSEMB., AN ANALYSIS OF 1992 BALLOT PROPOSALS, GEN. ASSEMB. 58-369, at 9 (1992).

40. *Id.* at 10.

41. *Id.* at 11.

persons” have recourse to other sorts of laws, including tort laws, and receive antidiscrimination protection based on other traits they share with others, such as race, gender, age, and ethnicity. Two other arguments that featured in the litigation were that “a wider spectrum of individuals than just municipalities” should consider civil rights matters and that Amendment 2 avoided dilution of the “original purpose of legislation enacting civil rights protections.”<sup>42</sup>

The “arguments against” appeal to the wrong of discrimination and that “all individuals should be accorded the same basic dignity, right to privacy, privileges, and protections guaranteed to every citizen.”<sup>43</sup> They explain that, without the ordinances that Amendment 2 would overturn, “existing laws inadequately protect” homosexual, lesbian, and bisexual persons from discrimination in employment, housing, and public accommodation.<sup>44</sup> Especially pertinent to the subsequent litigation is the argument that the Amendment may violate the Equal Protection clause “[b]y *singling out* homosexual, lesbian, and bisexual persons in the state constitution and effectively denying them potential remedies for discrimination.” That Clause, the document explains (implicitly referencing *Cleburne*), “prohibits any state from adopting a law which singles out a group for unfavorable or discriminatory treatment without a sufficient basis, or due to prejudice or irrational fears.”<sup>45</sup> The arguments rebut the claim that homosexuals, lesbians, and bisexuals seek “minority status” or “quota preference,” rather than basic protection against discrimination.<sup>46</sup> Finally, countering the argument that such matters should be decided at a state-wide level, the document asserts that “[U]nder the Colorado Constitution home rule cities are empowered to address the needs of their residents as they see fit.”<sup>47</sup>

## B. The Legal Challenge to Amendment 2 in Colorado State Court

### 1. The Preliminary Injunction.

On November 12, 1992, several individual plaintiffs along with several governmental plaintiffs filed suit in Denver District Court to enjoin Amendment 2 as violating the state and federal constitution.<sup>48</sup> On January 15, 1993, the Honorable H. Jeffrey Bayless, in the District Court of Denver, issued a preliminary injunction in favor of the plaintiffs after a four-day hearing. His task, he explained, was not to rule on Amendment 2’s constitutionality, but on whether plaintiffs had a reasonable probability of success on the merits and whether there would be real, immediate, and irreparable harm if the court denied their motion.<sup>49</sup> He concluded, based on his reading of the Supreme

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42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 12 (emphasis added).

46. *Id.*

47. *Id.*

48. *Evans v. Romer*, 854 P.2d 1270, 1272 (Colo. 1993).

49. Petition for Writ of Certiorari, *Romer v. Evans*, 517 U.S. 620 (No. 94-1039, app. E, Transcript of Court Proceeding at E-5; *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (No. 92 CV 7223) [hereinafter Transcript]).

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Court's precedents, that "there is a fundamental right" involved with Amendment 2, which he defined as "the right not to have the State endorse and give effect to private biases."<sup>50</sup> Judge Bayless quoted from *Palmore v. Sidoti*, the famous case in which the Supreme Court ruled that a court could not base a custody ruling on racial considerations: "The Court [says] the Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot directly or indirectly give them effect."<sup>51</sup> He discerned evolution in the Court's approach: *Palmore*, decided in 1984, was a 9-0 opinion, while *Reitman v. Mulkey*, a 1967 opinion striking down a California law passed to permit racial discrimination in housing, was 5-4.<sup>52</sup> Bayless also cited *Cleburne*, which struck down zoning restrictions concerning persons with mental retardation, to show the right was not confined to "instances of racial discrimination reviewed under strict scrutiny."<sup>53</sup>

Judge Bayless ruled that the identifiable class whose right was violated was homosexuals, a class defined principally by status, rejecting defendants' argument that the class be defined by homosexual conduct – under *Bowers*, "behavior which can be criminalized."<sup>54</sup> Thus, because there was a fundamental right, strict scrutiny would be the appropriate standard in evaluating Amendment 2. Under Colorado's law, however, plaintiffs would have the burden of showing Amendment 2 was unconstitutional "beyond reasonable doubt."<sup>55</sup>

The court made a few statements about the political process and defendants' arguments, to which the parties recurred in briefing before the Colorado and U.S. Supreme Court. First, Judge Bayless described the efforts made by "Coloradans for Family Values and the Religious Right and the Political Right" as "exactly in keeping with the political process that this country is based on."<sup>56</sup> Thus, should that process be attacked, he "would vigorously defend those persons" involved in it, since they "followed exactly what democracy urges."<sup>57</sup> Second, he reported defendant's argument that all Amendment 2 does is "make a part of Colorado law that which is existing in the federal law in terms of the treatment of homosexuals, lesbians, bisexuals" and that is the "true intent" of the Amendment.<sup>58</sup> Third, defendants argued that it is not always a denial of equal protection to adopt a law-making procedure that disadvantages a "particular group." Further, defendants asserted that "there is no necessity for the Court to intrude on the private and moral values of citizens, and that is what is [at] the heart of Amendment 2."<sup>59</sup>

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50. *Id.* at E-17.

51. *Id.* (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

52. *Id.* at E-15 (comparing vote in *Palmore* with vote in *Reitman v. Mulkey*, 387 U.S. 369 (1967)).

53. *Id.* at E-17.

54. *Id.* at E-11.

55. *Id.* at E-18.

56. *Id.* at E-10.

57. *Id.*

58. *Id.* at E-10 to E-11.

59. *Id.* at E-10.

## 2. *Evans v. Romer (Evans I)*: The Colorado Supreme Court Affirms

The Supreme Court of Colorado affirmed the lower court's issuance of a preliminary injunction because Amendment 2 "may burden fundamental rights of an identifiable group," but identified a different fundamental right at issue, "the fundamental right to participate equally in the political process."<sup>60</sup> The district court, the Court notes, did not address or rely on this or other of plaintiff's First Amendment claims.<sup>61</sup> The plaintiffs now repeated their previous equal protection argument, contending that the right identified by the trial court was "best construed" - in light of "the arguments actually presented to" the trial court - to mean that Amendment 2 violates the plaintiffs' fundamental right of political participation.<sup>62</sup> The Colorado Supreme Court read the U.S. Supreme Court's precedents in various equal protection cases to "demonstrate that the Equal Protection Clause guarantees the fundamental right to participate equally in the political process and that any attempt to infringe on an independently identifiable group's ability to exercise that right is subject to strict judicial scrutiny."<sup>63</sup> The court invoked language from those cases about statutes impermissibly "fencing out" or "singling out" certain classes, and thus offending Equal Protection.<sup>64</sup> It evaluated Amendment 2 in light of this rule: "the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and . . . any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny."<sup>65</sup> The court rejected defendants' argument that the right "applies only to traditionally suspect classes."<sup>66</sup>

The court then considered whether "amendment 2 has been shown, to a reasonable degree of probability, to infringe on the fundamental right to participate equally in the political process beyond a reasonable doubt."<sup>67</sup> It evaluated Amendment 2 (citing *Reitman v. Mulkey*) "in light of its immediate objective, its ultimate effect, its historical context, and the conditions existing prior to its enactment."<sup>68</sup> Its objective was "to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation."<sup>69</sup> Its effect was "to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures."<sup>70</sup> This, the court concluded, "clearly" affects the "right to participate equally in the political process," because it "bars

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60. *Evans v. Romer*, 854 P.2d 1270, 1273, 1282 (Colo. 1993).

61. *Id.* at 1273.

62. *Id.* at 1274.

63. *Id.* at 1276.

64. *Id.* at 1277, 1282.

65. *Id.* at 1282.

66. *Id.* at 1284.

67. *Id.*

68. *Id.* (citing *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967)).

69. *Id.* at 1284-85 (noting specific laws and orders that would be repealed).

70. *Id.* at 1285.

gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation.”<sup>71</sup> To wit: a “targeted class,” under Amendment 2, may not obtain protection or redress from discrimination “absent the consent of a majority of the electorate through the adoption of a constitutional amendment.”<sup>72</sup>

The court explained that, “[r]ather than attempting to withdraw antidiscrimination issues as a whole from state and local control, Amendment 2 singles out one form of discrimination and removes its redress from, consideration by the normal political process.”<sup>73</sup> It “fences out” an independently identifiable group: “that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden.”<sup>74</sup> The court explained the political options of gay men, lesbians, and bisexuals “prior to” Amendment 2 and how those would be reduced by the Amendment, and concludes there is a “reasonable probability” that Amendment 2 “infringes on a fundamental right” protected by Equal Protection.

The court concluded that “the defendants and their amici have not proffered any compelling state interest to justify the enactment of Amendment 2 at this stage of the proceedings as required under the strict scrutiny standard of review,” and thus plaintiffs had met their burden.<sup>75</sup> The court invoked the stirring anti-majoritarian rhetoric of *West Virginia State Board of Education v. Barnette*.<sup>76</sup> Granting that Amendment 2 “was passed by a majority of voters through the initiative process as an expression of popular will” and thus “mandates great deference,” *Barnette* nonetheless teaches “that ‘[o]ne’s right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”<sup>77</sup>

The court declined to address plaintiffs’ second alternative argument, that Amendment 2 “lacks a rational basis for the burdens it imposes on gay men, lesbians, and bisexuals.”<sup>78</sup>

In dissent, Justice Erickson looked to *Bowers v. Hardwick* as “instructive of the type of analysis” the U.S. Supreme Court uses to “address the substantive due process question of whether a fundamental right exists.”<sup>79</sup> That methodology, he argued, does not support the district court’s identification of a fundamental right and its application of strict scrutiny.<sup>80</sup> To the contrary, neither the Supreme Court nor any other court had every identified or recognized a

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71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 1286.

76. 319 U.S. 624 (1943).

77. *Romer*, 854 P.2d at 1286 (quoting *West Virginia Bd.*, 319 U.S. at 638).

78. *Id.* at 1273.

79. *Id.* at 1291 (Erickson, J., dissenting).

80. *Id.* at 1291-92.

“fundamental right not to have the state endorse and give effect to private biases with respect to an identifiable class.”<sup>81</sup> *Palmore*, Erickson argued, was about a racial classification – a traditional suspect class, not a fundamental right.<sup>82</sup> *Cleburne* did not apply strict scrutiny and “stands only for the proposition that irrational biases cannot, in and of themselves, qualify as a legitimate governmental interest to satisfy rational basis review.”<sup>83</sup>

The dissent also rejected the majority’s gleaning of a “common thread” of a fundamental right to participate in the political process from Supreme Court precedents.<sup>84</sup> Those cases concerned either the right to vote – an established fundamental right – or racially-conscious legislation fencing or singling out for “peculiar and disadvantageous treatment” racial minorities – a traditional suspect class.<sup>85</sup>

### 3. The Trial Court’s Findings and Conclusions of Law

After a nine day bench trial,<sup>86</sup> Judge Bayless issued a permanent injunction.<sup>87</sup> He explained that *Evans I* provided “the guidelines” for his decision: because Amendment 2 expressly fenced out an independently identifiable group and violated a fundamental right to participate equally in the political process, the “burden of proof at the trial” was that defenders of Amendment 2 must demonstrate that it was supported by a compelling state interest and narrowly drawn to achieve the purpose in the least restrictive manner.<sup>88</sup>

Defendants presented “six alleged ‘compelling state interests,’” none of which referred expressly to promoting morality or signaling moral disapproval:

- 1) Deterring factionalism;
- 2) Preserving the integrity of the state’s political functions;
- 3) Preserving the ability of the State to remedy discrimination against suspect classes;
- 4) Preventing the government from interfering with personal, familial, and religious privacy;
- 5) Preventing government from subsidizing the political objectives of a special interest group; and

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81. *Id.* at 1287.

82. *Id.* at 1293.

83. *Id.*

84. *Id.* at 1294.

85. *Id.* at 1294-98, 1300 (quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971)).

86. See BALL, *supra* note 27, at 122. For accounts of the trial, see *id.*; KEEN & GOLDBERG, *supra* note 12.

87. Petition for Writ of Certiorari, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), app. C, Findings of Fact, Conclusions of Law and Judgment, at C-1 to C-20; *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993).

88. *Id.* at C-2 to C-3, C-4 (quoting *Evans I*, 854 P. 2d at 1275 (citing *Plyler v. Doe*, 457 U.S. 202 (1982))).

6) Promoting the physical and psychological well-being of our children.<sup>89</sup>

Most of these asserted interests, the trial court found, were not compelling. With respect to the fourth asserted interest, the court found that defendants “presented evidence of only two compelling state interests that Amendment 2 serves, the promotion of religious freedom and the promotion of family privacy,” but failed to carry their burden to show that Amendment 2 was drawn narrowly to serve those interests “in the least restrictive manner possible.”<sup>90</sup> First I will discuss the court’s rejection of several asserted compelling interests and then focus on his conclusion about narrow tailoring.

Defendants argued Amendment 2 “deters factionalism” because it “simply seeks to ensure that the deeply divisive issue of homosexuality does not serve to fragment Colorado’s body politic.”<sup>91</sup> Settling things at the statewide level “eliminates city-by-city and county-by-county battles over the political issue of homosexuality and bisexuality.”<sup>92</sup> Thus, Amendment 2 “serves a compelling interest by ending political fragmentation and promoting statewide uniformity on this issue.”<sup>93</sup> (As I discuss in Part IV, promoting national uniformity was an asserted rationale in litigation over DOMA.) The district court concluded that the U.S. Supreme Court cases defendants cited to show that “‘factionalism’ means ‘political fragmentation’ over a controversial political issue” actually treated this supposed “factionalism” as “a great strength of the American political process.”<sup>94</sup> Thus, given the Court’s language about how “‘competition in ideas and governmental policies is at the core of our electoral process’”<sup>95</sup> and First Amendment freedoms, “the opposite of defendants’ first claimed compelling interest is most probably compelling.”<sup>96</sup>

The gist of the defendants’ second asserted compelling state interest – preserving the State’s political function – was that Colorado’s political functions were at risk of being “overrun” by the “homosexual agenda” and “the homosexual push for ‘protected status.’”<sup>97</sup> (In Part III, I explore parallel arguments made about the need for DOMA.) Tony Marco, founder of Colorado for Family Values (CFV), testified that Amendment 2 “was his idea” and “was a defensive measure to fend off state-wide militant gay aggression.”<sup>98</sup> Marco used the term “militant gay aggression,” the court noted, “no less than six times in his direct testimony alone.”<sup>99</sup> Other CFV officials testified to Amendment 2’s purpose of preventing government from declaring homosexuals are entitled to protected class status, out of concern that, “absent Amendment 2, affirmative

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89. *Id.* at C-4 (citing Defendants’ Trial Brief pp. 3-4).

90. *Id.* at C-14.

91. *Id.* at C-4 to C-5 (quoting Defendants’ Trial Brief, pp. 60-61).

92. *Id.* at C-5 (quoting Defendants’ Trial Brief, pp. 60-61).

93. *Id.* at C-4 to C-5 (quoting Defendants’ Trial Brief, pp. 60-61).

94. *Id.* at C-5.

95. *Id.* (quoting *Anderson v. Celebreeze*, 460 U.S. 780, 802, (1983)).

96. *Id.* at C-6.

97. *Id.*

98. *Id.* at C-7.

99. *Id.* at C-6.

action programs for homosexuals would somehow be implemented in Colorado.”<sup>100</sup> Defendants contended that the Tenth Amendment of the U.S. Constitution gave them the power to amend their state constitution and, once the people voted for Amendment 2, “that vote should end the discussion.”<sup>101</sup>

Judge Bayless concluded that while Article II of the Colorado Constitution vests political power of the state in the people and gives them the right “to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness,” there is a limit to that power: “provided, such change be not repugnant to the constitution of the United States.”<sup>102</sup> Here Judge Bayless quoted the portion of *Evans I* in which the Colorado Supreme Court invoked *Barnette* and stated that while voter initiatives as an expression of popular will are entitled to “great deference,” fundamental rights “may not be submitted to vote” and do not depend on “the outcome” of elections.<sup>103</sup> The Colorado Supreme Court had also cited to a U.S. Supreme Court case involving a Colorado measure, in which the Court stated: “[a] citizen’s constitutional rights can hardly be infringed simply because a majority of the people choose that i[t]be.”<sup>104</sup>

Applying this framework, Judge Bayless found that “the evidence presented does not satisfy this court that there is a militant gay aggression in this state which endangers the state’s political functions,” or that “homosexuals and bisexuals are going to be found to be a suspect or quasi-suspect class and afforded protections based on these classifications.”<sup>105</sup> Thus, defendants failed to establish that their second asserted interest was compelling.<sup>106</sup>

The third asserted compelling state interest, preserving the ability to remedy discrimination against groups “which had been held to be suspect classes,” also failed. Defendants presented two witnesses “to testify that without Amendment 2 there would be a dilution of protections afforded to existing suspect classes;” another witness testified that adding “gays” to civil rights ordinances “would lessen the public’s respect for historic civil rights categories.”<sup>107</sup> (This appeal to public respect has some resonance for arguments in 2013 (discussed in Part IV) that allowing same-sex marriage would harm the status of marriage as an institution by changing its meaning.) The court, however, found more credible testimony by anti-discrimination law compliance officers who stated that enforcing Denver’s ordinance “does not detract from enforcing other aspects of the same ordinance.”<sup>108</sup> Moreover, evidence from Wisconsin, the first state to “enact statutory prohibitions against discrimination

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100. *Id.* at C-6 to C-7 (describing testimony of Kevin Tebedo, paid executive director of CFV).

101. *Id.* at C-7.

102. *Id.* at C-7 (quoting *Evans I*, 854 P.2d. at 1272) (quoting the Colorado Constitution, Art. 2 § 2).

103. *Id.* at C-8 (quoting *Evans I*, 854 P.2d at 1286 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 US 624, 638 (1943))).

104. *Id.* (citing *Evans I*, 854 P.2d at 1286 (citing *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736 (1964))).

105. *Id.*

106. *Id.*

107. *Id.* at C-9.

108. *Id.*

based on sexual orientation,” was that “sexual orientation cases” under Wisconsin’s statutes “are a very small percentage of the total case load and have not limited enforcement of other parts of the . . . statutes in any way.”<sup>109</sup> By contrast, defendants offered “opinion and theory as to what *would* occur if a Denver type ordinance were adopted as a state statute,” yet, no such statute existed in Colorado or was proposed, and evidence of actual experience with civil rights ordinances contradicted their claims.<sup>110</sup> Judge Bayless also noted “a very real question as to whether fiscal concerns may rise to the level of a compelling interest,” given prior Supreme Court cases rejecting appeals to fiscal concerns as a rationale for denying fundamental rights and even – in *Plyler v. Doe* – for denying less than fundamental rights (e.g., education) to a nonsuspect class (e.g., undocumented aliens).<sup>111</sup>

Of particular interest for subsequent reliance on *Romer* is the trial court’s disposition of defendants’ fourth alleged compelling interest: “prevention of governmental interference with personal, familial and religious privacy.”<sup>112</sup> On the religious privacy claim, the court noted testimony by a pastor from Boulder’s Second Baptist Church about the “possible impact of Boulder’s ordinance on his church in view of the fact that there is no religious exception under that ordinance.”<sup>113</sup> A director of a boys’ ranch in Wisconsin testified about his experience under Wisconsin’s antidiscrimination law “as it related to employment by homosexuals.”<sup>114</sup>

The district court stated that “preserving religious freedom is a compelling state interest,” evident in protections in the federal and Colorado constitutions.<sup>115</sup> Defendants “urged” the “religious belief” that “homosexuals are condemned by scripture,” so that “discrimination based on that religious teaching is protected within freedom of religion.”<sup>116</sup> Plaintiffs, however, had a “competing interest,” the fundamental right to participate in the political process, upon which Amendment 2 infringed. In *Bob Jones University v. United States*, Judge Bayless observed, the Supreme Court discussed “protecting religious freedom in the context of competing governmental interests,”<sup>117</sup> ruling that government had a compelling interest in ending racial discrimination that outweighed any burden denial of a tax exemption posed to a university with racially discriminatory policies.<sup>118</sup> Judge Bayless concluded the two rights at issue could co-exist by adding a religious exemption to the Boulder ordinance, such as those already in the Aspen and Denver ordinances. Thus, Amendment 2 was not narrowly drawn to protect religious freedom.<sup>119</sup>

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109. *Id.*

110. *Id.*

111. *Id.* at C-10 (citing *Plyler v. Doe*, 457 U.S. 202 (1982)).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at C-11.

117. *Id.* at C-10.

118. *Id.* at C-10 to C-11.

119. *Id.* at C-12.

Family privacy was another asserted compelling interest. This interest also lost because Amendment 2 lacked narrow tailoring. In so ruling, the court made some intriguing observations about family definition, family values, and “pro-family” measures. It first notes testimony by Robert Knight, Director of Cultural Studies of the still-active Family Research Council, a “pro-family lobbying organization.”<sup>120</sup> Knight, an “opponent of the gay rights movement,” testified that “gay rights advocates are seeking to destroy the family by, in part, seeking to remove special societal protections from the family.”<sup>121</sup> The court observed that Mr. Knight neither offered a definition of “family” nor was asked to provide one.<sup>122</sup> Assuming the family consists of a married mother and father and their children, what other forms, the court asked, are a “family”? “More importantly,” the court questioned whether Amendment 2, which infringed upon a fundamental right, “narrowly promote[s] the goal of promoting family values,” suggesting that “if one wished to promote family values, action would be taken that is pro-family rather than anti some other group.”<sup>123</sup> Because defendants failed to tie denying gays and bisexuals their right to political participation to protecting the family, they failed to meet their burden on this alleged interest.

Defendants’ personal privacy interest also failed. They did not adequately establish whether it was a compelling state interest, explain what it meant, or how Amendment 2 threatened it, leaving the court to speculate.<sup>124</sup>

The fifth proffered compelling interest was preventing government from “subsidizing the political objectives of a special interest group.”<sup>125</sup> The court observed that defendants’ “strongest argument” was that if a landlord “is forced to rent an apartment to a homosexual couple, the landlord is being forced to accept, at least implicitly, a particular ideology.”<sup>126</sup> However, the defendants offered “no authority. . . for this fairly remarkable conclusion” and this “claimed compelling interest” was not supported by “any credible evidence or “any cogent argument.”<sup>127</sup> Finally, the court considered the sixth interest, “promotion of the physical and psychological well-being of children.”<sup>128</sup> This asserted interest, I elaborate in Part IV, recurs in contemporary debates about marriage equality. The court quoted defendants’ argument: “The state has a compelling interest in supporting the traditional family because without it, our children are condemned to a higher incidence of social maladies such as substance abuse, poverty, violence, criminality, greater burdens upon government, and perpetuation of the underclass.”<sup>129</sup>

The court first observed that, “if the compelling interest relates to protecting

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120. *Id.* FRC has been an active opponent of marriage equality. See *infra* Part IV for discussion of its amicus brief filed in *Windsor*.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at C-13.

125. *Id.*

126. *Id.* (citing Defendants’ Trial Brief p. 69).

127. *Id.*

128. *Id.*

129. *Id.* (quoting Defendants’ Trial Brief p. 74).

children physically from pedophiles” (a concern raised in the campaign for Amendment 2), then testimony by a witness for plaintiffs that “pedophiles are predominantly heterosexuals not homosexual” is “more persuasive than anything presented by defendants.”<sup>130</sup> The court also failed to discern how Amendment 2 promotes the psychological well-being and welfare of homosexual youth by “allowing discrimination against them by virtue of the Colorado Constitution.”<sup>131</sup>

Given that only two of the defendants’ asserted interests were compelling and that Amendment 2 was not narrowly drawn to promote those two interests “in the least restrictive manner possible,” the court therefore concluded that Amendment 2 was unconstitutional.

The court went on to note that plaintiffs requested it to rule on two additional matters still pertinent today: (1) their argument that homosexuals and bisexuals are either a suspect or quasi-suspect class and entitled to strict or heightened scrutiny for that reason; and (2) that Amendment 2 could not survive a rational basis test.<sup>132</sup> The court noted that, “in order to persuade the court” on the first matter, “plaintiffs filled the witness stand with doctors, psychiatrists, genetic explorers, historians, philosophers, and political scientists. Having chosen to present these types of witnesses, defendants felt obliged to respond in kind.”<sup>133</sup> The court turned to the 9th Circuit opinion, *High Tech Gays v. Defense Industrial Security Clearance Office*, and Supreme Court precedents for guidance about whether a class is suspect or quasi-suspect.<sup>134</sup> It found: “in applying these standards to homosexuals and bisexuals, no appellate court has yet found them to be either a ‘suspect’ or quasi-suspect class.”<sup>135</sup>

Turning to the evidence presented, the court observed that all of the “suspect and quasi-suspect classes . . . are inborn,” while defendants countered that homosexuality or bisexuality is “either a choice, or its origin has multiple aspects or its origin is unknown.”<sup>136</sup> The court concluded, however, that “the ultimate decision of ‘nature’ vs. ‘nurture’ is a decision for another forum, not this court, and the court makes no determination on this issue.”<sup>137</sup>

Drawing on similar conclusions in *High Tech Gays*, the court concluded that “there is a history of discrimination against gays,” but it could not conclude, however, “that homosexuals and bisexuals remain vulnerable or politically powerless and in need of ‘extraordinary protection from the majoritarian political process’ in today’s society.”<sup>138</sup> As evidence, the court pointed out that

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130. *Id.* (citing testimony by Dr. Carole Jenny, Denver’s Children’s Hospital).

131. *Id.* at C-13 to C-14.

132. *Id.* at C-14.

133. *Id.* at C-15.

134. *Id.* (citing *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (citing *Bowen v. Giliard*, 483 U.S. 587, 602-603 (1987))).

135. *Id.* at C-16 (citing numerous cases, including *High Tech Gays* and *Ben-Shalom v. March*, 881 F.2d 454 (7th Cir. 1989)).

136. *Id.* at C-17.

137. *Id.*

138. *Id.* at C-17 to C-18.

46% of Coloradans voted *against* Amendment 2.<sup>139</sup> Since “testimony placed the percentage of homosexuals in our society at not more than 4%,” the court reasoned that “if 4% of the population gathers the support of an additional 42% of the population, that is a demonstration of power, not powerlessness.”<sup>140</sup> In brief: “Failure to prevail on an issue in an election, such as Amendment 2 is not a demonstration of political powerlessness.”<sup>141</sup> Further, trial evidence showed “there is no identifiable majority in American politics. . . . [P]olitical majorities are formed through the process of coalition building” issue by issue, or election by election, and “gays and bisexuals though small in number are skilled at building coalitions which is the key to political power.”<sup>142</sup> Thus, “[n]o adequate showing has been made of the political vulnerability or powerlessness of gays.”<sup>143</sup>

The court briefly dispensed with plaintiffs’ argument that homosexuals and bisexuals are a quasi-suspect class. Judge Bayless noted that “[c]ase law has not clearly differentiated between the elements” for suspect and quasi-suspect status, and that plaintiffs failed to show the application of these elements to homosexuals and bisexuals.<sup>144</sup>

Finally, the court declined to honor plaintiffs’ request to evaluate Amendment 2 using the rational basis test. Given the Colorado Supreme Court’s ruling that Amendment 2 “invades a fundamental right of an identifiable group,” triggering strict scrutiny, the court “declines to apply a legally inappropriate test.”<sup>145</sup> Although plaintiffs pointed out that, in two recent cases, federal courts concluded there was “no rational basis for excluding homosexuals from the military,”<sup>146</sup> “[t]hese cases do not impact on the present decision because of the fundamental right involved in the present case and the necessarily different standard of review.”<sup>147</sup>

#### 4. The Colorado Supreme Court Affirms the Permanent Injunction (*Evans II*)

After Governor Romer and the other public defendants appealed Judge Bayless’s issuance of a permanent injunction against Amendment 2, the Supreme Court of Colorado affirmed in *Evans v. Romer (Evans II)*. It reiterated (as in *Evans I*) that Amendment 2 violated the fundamental right to participate in the political process. The court again cited United States Supreme Court precedents to stress that Amendment 2 offended Equal Protection by fencing out or singling out an identifiable class of persons.<sup>148</sup> Thus, it declined defendants’ invitation to reconsider its holding that strict scrutiny was the proper standard by which to

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139. *Id.* at C-18.

140. *Id.* at C-18.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at C-18 to C-19.

145. *Id.* at C-19.

146. *Id.* (discussing *Dahl v. Sec’y of U.S. Navy*, 830 F. Supp. 1319 (E.D. Cal. 1993) and *Steffan v. Apsin*, 8 F.3d 57 (D.C. Cir. 1993)).

147. *Id.* at C-20.

148. *Evans v. Romer*, 882 P.2d 1335, 1339-41 (Colo. 1994) (en banc).

review Amendment 2.<sup>149</sup> It observed that because plaintiffs had not appealed the trial court's rejection of their argument that gay men, lesbians, and bisexuals should be found to be either a suspect or quasi-suspect class, "we do not address it."<sup>150</sup> Noting that the trial court also declined plaintiffs' request to apply a rational basis test, the reviewing court simply observed that because it reaffirmed its conclusion about strict scrutiny, it would not analyze the law under rational basis.<sup>151</sup>

Turning to defendants' assertion that several compelling state interests would sustain Amendment 2 from constitutional invalidity, the Colorado Supreme Court reviewed the trial court's rulings on these interests *de novo*.<sup>152</sup> The court began with defendants' asserted interest in "protecting the sanctity of religious, familial, and personal privacy."<sup>153</sup> Echoing the trial court, the high court acknowledged that "ensuring religious freedom is a compelling governmental interest," protected in the federal and Colorado constitutions, but that Amendment 2 lacked narrow tailoring.<sup>154</sup> Including "exceptions for religiously-based objections" in antidiscrimination laws (as Denver did) would be "an equally effective, and substantially less onerous way" of protecting religious liberty.<sup>155</sup> Even a witness for defendants testified that exemptions "would be less restrictive than Amendment 2 and would adequately address any concerns about religious liberty."<sup>156</sup>

Defendants' asserted compelling interest in "familial privacy" characterized such privacy as "the right 'of some parents to teach traditional moral values' to their children," citing "authority recognizing the sanctity of the family and the central role the family plays in society."<sup>157</sup> Antidiscrimination laws, defendants argued, "'severely undermine[]'" familial privacy because "'[i]f a child hears one thing from his parents and the exact opposite message from the government, parental authority will inevitably be undermined."<sup>158</sup> Essentially, this argument is that the values promoted by government and by families must be congruent and that parents are entitled to have the state reinforce parental values through public laws and education.<sup>159</sup> The court, however, concluded that "this argument fails because it rests on the assumption that the right of familial privacy engenders an interest in having government *endorse* certain values as moral or

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149. *Id.* at 1341.

150. *Id.* at 1341 n.3.

151. *Id.*

152. *Id.* at 1341.

153. *Id.* at 1342.

154. *Id.* at 1342-43.

155. *Id.* at 1343.

156. *Id.* at 1343.

157. *Id.* (citing, for example, *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977) and *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)).

158. *Id.* The claims resonate with the parental and religious liberty objections to marriage equality, discussed *infra* in Part II.D.

159. See JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* 116-45 (2013) (discussing congruence between the values promoted by government and those promoted by families in the context of education).

immoral.”<sup>160</sup> While parents have a constitutionally protected interest in “inculcating their children with their own values,” defendants cited no authority giving parents “the corresponding right of insuring that government endorse those values.”<sup>161</sup> Instead, “[t]he United States Supreme Court has repeatedly held that the individual’s right to profess or practice certain moral or religious beliefs does not entail a right to have government itself reinforce or follow those beliefs or practices.”<sup>162</sup> Further, government “does not burden an individual’s constitutional rights merely because it endorses views with which that individual may disagree.”<sup>163</sup>

The court concluded that, “fully recognizing that parents have a ‘privacy’ right to instruct their children that homosexuality is immoral, . . . nothing in the laws or policies which Amendment 2 is intended to prohibit interferes with that right.”<sup>164</sup> Parents “retain full authority” – with or without Amendment 2 – to “express their views about homosexuality to their children.” Thus, Amendment 2 is “neither necessary nor narrowly tailored to preserve familial privacy.”<sup>165</sup>

The meaning of the “‘personal privacy’” defendants assert as a compelling interest is “not entirely clear,” the court next observed, but seems to refer to the “right of ‘associational privacy’ which will be impaired,” without Amendment 2, “because individuals may be forced to associate with gay men, lesbians, and bisexuals in the rental of housing.”<sup>166</sup> The court looked to *Roberts v. Jaycees* for guidance as to what type of associations this right protects, noting that they are “distinguished by such attributes as relative smallness, a high degree of selectivity in the decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.”<sup>167</sup> The court concluded that “while preserving associational privacy may rise to the level of a compelling state interest, Amendment 2 is not narrowly tailored to serve that interest.”<sup>168</sup> The amendment “would forbid governmental entities from prohibiting discrimination against gay men, lesbians, and bisexuals (because they are gay, lesbian, or bisexual) in *all* aspects of commercial and public life, no matter how impersonal.”<sup>169</sup> Further, it “affects a vast array of affiliations” that lack the qualities *Roberts* noted and seem “remote from the concerns giving rise” to constitutional protection.<sup>170</sup> A narrower way to avoid a conflict between antidiscrimination laws and associational privacy rights “would be to exempt the sort of intimate associations identified in *Roberts* from the scope of such laws,”

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160. *Evans*, 882 P.2d at 1343.

161. *Id.* (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) for the parental interest in inculcating values in children).

162. *Id.* (citing *Bowen v. Roy*, 476 U.S. 693, 699 (1986) as an example of such a holding).

163. *Id.* at 1344 (citing *Block v. Meese*, 793 F.2d 1303, 1312-14 (D.C. Cir. 1986)).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984)).

168. *Id.*

169. *Id.*

170. *Id.* (quoting *Roberts*, 468 U.S. at 620 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967) and *Ry. Mail Ass’n v. Corsi*, 326 U.S. 88, 93-94 (1945)).

e.g., give landlords a “Mrs. Murphy Boarding House” exemption.<sup>171</sup> The court observed that Denver’s antidiscrimination ordinance exempts certain dwelling units.<sup>172</sup>

The court next considered, and rejected, defendants’ assertion that Amendment 2 serves a compelling interest because it “is an appropriate means whereby the people sought to focus government’s limited resources upon those circumstances most warranting attention.”<sup>173</sup> The court stated: “[i]t is well-settled that the preservation of fiscal resources, administrative convenience, and the reduction of the workload of governmental bodies are not compelling state interests.”<sup>174</sup> Nonetheless, even assuming some “legitimate” state interest in “preserving fiscal resources” for enforcing civil rights laws “intended to protect suspect classes,” and recognizing that “combating discrimination against racial minorities and women may constitute a compelling governmental interest,” Amendment 2 is “not necessary to achieve these goals.”<sup>175</sup> As evidence, the court cited testimony by the chief enforcement officers of Denver’s and Wisconsin’s civil rights laws.<sup>176</sup> Finally, the court concluded that “[e]ven if protecting gay men, lesbians, and bisexuals from discrimination has some fiscal impact,” Amendment 2 is “not narrowly tailored to serve that interest,” since measures, such as ear-marking funds, could offer some protection without “denying the right of gay men, lesbians, and bisexuals from participating equally in the political process.”<sup>177</sup>

The court next evaluated an asserted compelling interest with considerable resonance for the marriage equality debates discussed in Part IV: Amendment 2 “promotes the compelling governmental interest of allowing the people themselves to establish public social and moral norms.”<sup>178</sup> Defendants “define[d] two related norms” promoted by Amendment 2: it “preserves heterosexual families and heterosexual marriage and, more generally, it sends the societal message condemning gay men, lesbians, and bisexuals as immoral.”<sup>179</sup> The court noted that there was “some dispute” between the parties about whether the interest in “public morality” was properly before the court since “morality” was not listed either “in the state’s disclosure certificate or the state’s opening statement at trial as a separate interest supporting Amendment 2.”<sup>180</sup> However, the court found “sufficient” to raise the rationale below and on appeal the mention, in defendants’ trial brief, that “the issue of public morality . . . permeates the discussion of compelling interests and indeed, can be regarded as

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171. *Id.* at 1345.

172. *Id.*

173. *Id.* (internal citations omitted).

174. *Id.* (citing *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) and other cases). *Reed* was the first case in the Court’s modern sex discrimination jurisprudence.

175. *Id.* at 1345-46.

176. *Id.* at 1346.

177. *Id.*

178. *Evans v. Romer*, 882 P.2d 1335, 1346 (Colo. 1994) (en banc) (internal citations omitted).

179. *Id.*

180. *Id.* at 1346 n. 11.

a compelling interest in its own right.”<sup>181</sup>

In support of this public morality interest, defendants cited to *Barnes v. Glen Theatre*, where the United States Supreme Court upheld a public indecency statute that prohibited nude dancing.<sup>182</sup> The court rejected the reliance on *Barnes*, since it referred to a “substantial government interest in protecting order and morality” and the fifth vote was provided by Justice Souter, who disavowed reliance “on the possible sufficiency of society’s moral views to justify” the law, instead defining the relevant “substantial interest” as “combating the secondary effects of adult entertainment establishments.”<sup>183</sup> The Colorado Supreme Court concluded that, “at most,” Colorado’s promotion of “public morality” was a “substantial interest,” not compelling; thus, it was “not sufficient to render constitutional a law which infringes on a fundamental right.”<sup>184</sup>

The fit between Amendment 2 and “protecting public morals” was another problem. The court’s reasoning warrants quotation, given a newer generation of arguments about public morality in marriage equality litigation:

[I]t is clear to us that Amendment 2 is not necessary to preserve heterosexual families, marriage, or to express disapproval of gay men, lesbians, and bisexuals. First, we reject defendants’ suggestion that laws prohibiting discrimination against gay men, lesbians, and bisexuals will undermine marriages and heterosexual families because married heterosexuals will “choose” to “become homosexual” if discrimination against homosexuals is prohibited. This assertion flies in the face of the empirical evidence presented at trial on marriage and divorce rates.<sup>185</sup>

The court also rejected defendants’ “endorsement” argument: that antidiscrimination laws undermine “marriage and heterosexual families because” they “implicitly endorse that conduct which is deemed an improper basis for discrimination.”<sup>186</sup> The court countered that “antidiscrimination laws make no assumptions about the morality of protected classes – they simply recognize that certain characteristics, be they moral or immoral – have no relevance in enumerated commercial contexts.”<sup>187</sup> The court gave the example of a law prohibiting “employers from discriminating against anyone engaged in off-duty, legal conduct such as smoking tobacco.”<sup>188</sup> Rather than “an endorsement of any particular sexual orientation or practices,” antidiscrimination law’s message is that certain refusals, denials, and sanctions undertaken “in commercial contexts based on sexual orientation are not

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181. *Id.*

182. *Id.* at 1347 (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) to support the view that “protection of morality constitutes a compelling governmental interest”).

183. *Id.* (quoting *Barnes*, 501 U.S. at 582 (Souter, J., concurring)) (emphasis added by Colorado Supreme Court).

184. *Id.* (citing *Plyler v. Doe*, 437 U.S. 202, 217 (1982)).

185. *Id.* (noting that the divorce rate in Wisconsin declined after the state enacted the “oldest ‘gay rights’ law in the nation”).

186. *Id.*

187. *Id.*

188. *Id.*

appropriate ways of advancing even valid moral beliefs.”<sup>189</sup> This argument about the message law sends takes new forms by the time of the *Windsor* litigation.

The court considered and rejected two proffered interests concerning the political process: Amendment 2 “prevents government from supporting the political objectives of a special interest group” and “serves to deter factionalism through ensuring that decisions regarding special protections for homosexuals and bisexuals are made at the highest level of government.”<sup>190</sup> On the first interest, the court interpreted the defendants’ argument to be that the antidiscrimination laws that Amendment 2 was “intended to prohibit” were “an implicit endorsement of homosexuality” and thus “somehow vitiates the right of individuals ‘to make their own judgments on this question’”<sup>191</sup> The court again rejected the argument that antidiscrimination laws “constitute an endorsement of the characteristics” deemed “an unlawful basis upon which to discriminate against individuals.”<sup>192</sup>

More importantly, defendants lacked supporting authority for their “rather remarkable proposition that government has a compelling interest in seeing that the state does not support the political objectives of a ‘special interest group.’”<sup>193</sup> To the contrary, “the state exists for the very purpose of implementing the political objectives of the governed so long as that can be done consistently with the constitution.”<sup>194</sup> Further, since “virtually any law could be regarded as a benefit to a ‘special interest group,’” if the court found defendants’ argument had merit, then “the compelling state interest defined would justify striking down almost any legislative enactment imaginable.”<sup>195</sup>

The factionalism argument also failed. As did the trial court, the Colorado Supreme Court reasoned that although defendants justified Amendment 2 as ending political fragmentation and shutting down political debate on a “deeply divisive issue” city-by-city and county-by-county by resolving matters, political debate is not an evil but “the foundation of democracy.”<sup>196</sup> Thus, “[w]e fail to see how the state, which is charged with serving the will of the people, can have any legitimate interest in preventing one side of a controversial debate from pressing its case before governmental bodies simply because it would prefer to avoid political controversy or ‘factionalism.’”<sup>197</sup>

Defendants unsuccessfully employed *Bowers v. Hardwick* to attempt to sever from Amendment 2 the provisions pertaining to “sexual orientation,” on the evident logic that *Hardwick* upholds the use of criminal law to ban homosexual conduct.<sup>198</sup> The court instead held that the four characteristics listed in

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189. *Id.* (emphasis added).

190. *Id.* at 1348.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 1350.

Amendment 2 – “sexual orientation; conduct; practices, and relationships” – are “not truly severable from one another because each provides nothing more than a different way of identifying the same class of persons.”<sup>199</sup> It is irrelevant that, pursuant to *Hardwick*, “there is no constitutionally recognized right to engage in homosexual sodomy.”<sup>200</sup> It does not follow that if it is constitutional to criminalize homosexual sodomy, then government may also deny “an independent fundamental right” of “an identifiable group (who may or may not engage in homosexual sodomy) to participate equally in the political process.”<sup>201</sup>

Defendants also unsuccessfully appealed to the Tenth Amendment, contending that, even if Amendment 2 conflicted with the Fourteenth Amendment, it was a “constitutionally valid exercise of the people’s reserved powers under the Tenth Amendment.” The court reiterated: “States have no compelling interest in amending their constitution in ways that violate fundamental federal rights.”<sup>202</sup> In support, the court cited to United States Supreme Court cases rejecting (in *Reitman*) any “reserved power” by the state to make a “right to discriminate a part of the state’s basic charter” and asserting (in *Lucas v. Colorado General Assembly*) that: “A citizen’s constitutional rights can hardly be infringed simply because a majority of the people choose that it be.”<sup>203</sup>

In concurring, Justice Scott argued that the permanent injunction should be upheld under the Privileges or Immunities Clause of the Fourteenth Amendment, a ground asserted in plaintiffs’ initial complaint, because Amendment 2 “impermissibly burdens the right ‘peaceably to assemble and petition the government for redress of grievances,’ a right guaranteed to every citizen.”<sup>204</sup> Particularly striking is that Justice Scott quoted Justice Harlan’s dissent in *Plessy*, which will later appear as the opening line in Justice Kennedy’s majority opinion in *Romer*: “every individual is promised full citizenship under a written Constitution which, as Justice Harlan opined, ‘neither knows nor tolerates classes among citizens.’”<sup>205</sup>

Justice Erickson dissented, as he did in *Evans I*, and on similar grounds: the majority had “crafted a new fundamental right that had never been recognized by the United States Supreme Court” and rested, instead, on a misreading of Supreme Court precedent confined to cases about racial minorities and racial classifications.<sup>206</sup> The majority also overlooked that it was reviewing “a constitutional Amendment adopted by the people of the State of Colorado.”<sup>207</sup>

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199. *Id.* at 1349-50.

200. *Id.* at 1350.

201. *Id.*

202. *Id.* The court also distinguishes the case on which defendants rely, *Gregory v. Ashcroft*, 501 U.S. 452 (1991), because it “applies only to cases involving federal interference with the qualification of constitutional officers.” *Id.*

203. *Id.* (citing *Reitman v. Mulkey*, 387 U.S. 369 (1967) and *Lucas v. Colo. Gen. Assembly*, 377 U.S. 713, 736-37 (1964)).

204. *Id.* at 1351 (Scott, J., concurring) (emphasis omitted).

205. *Id.* at 1351-1352 (Scott, J., concurring (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1895))). *See* Part II. F.

206. *Evans*, 882 P.2d at 1356-57 (Erickson, J., dissenting).

207. *Id.* at 1356.

From *Romer v. Evans* to *United States v. Windsor* 377

Instead, he would have used a rational relation standard, under which Amendment 2's classification should be "upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."<sup>208</sup> Erickson drew on Supreme Court precedents to emphasize the heavy burden of succeeding on a rational basis challenge.<sup>209</sup> He cited *Heller v. Doe by Doe* to assert that a classification "cannot run afoul of the Equal Protection clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."<sup>210</sup>

In light of the Supreme Court's subsequent opinion in *Romer*, it is notable that, to his many citations supporting deferential review, Judge Erickson added a parenthetical "but see" reference to *Cleburne*, where the Court, using "rational basis review," struck down the zoning law in question "because the law was based on the 'bare . . . desire to harm a politically unpopular group."<sup>211</sup> He also quoted Supreme Court precedent explaining the reason for the great deference accorded to articulated reasons: "The Constitution presumes that, *absent some reason to infer antipathy*, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."<sup>212</sup> The quoted passage continues: "[w]e will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination or legitimate purposes that we can only conclude that the legislature's actions were irrational."<sup>213</sup> In briefing before the U.S. Supreme Court, both sides appealed to this same language about antipathy and legitimate purposes, making different arguments as to whether "some reason to infer antipathy" or "irrational" legislative actions existed.<sup>214</sup>

Judge Erickson then concluded that "at least three interests" put forth in support of Amendment 2 satisfied the legitimate state interest/rationally related test: (1) preventing government from interfering with religious privacy; (2) promoting state-wide uniformity; and (3) allocating resources.<sup>215</sup> On the first interest, Justice Erickson began with encomiums to religious freedom.<sup>216</sup> Then, recognizing that "not all burdens on religion are unconstitutional," since "[e]ven the highest values, including religious freedom, must sometimes give way to the greater public good," he argued that substantial burdens on religious practices

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208. *Id.* at 1357-60 (citing *Fed. Commc'ns Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 307 (1993)).

209. *Id.* at 1361 (citing, *inter alia*, *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993) and *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

210. *Id.* at 1360 (citing *Heller*, 509 U.S. at 320).

211. *Id.* at 1361 (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 447 (1985)).

212. *Id.* (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)) (emphasis added) (footnote omitted).

213. *Id.*

214. Compare Brief for Petitioners, *Romer v. Evans* at 19, 39, No. 94-1039, 1995 WL 17008429 (citing *Vance*, 440 U.S. at 97) with Brief for Respondents, *Romer v. Evans* at 17, 36, No. 94-1039, 1995 WL 417786 (citing *Vance*, 440 U.S. at 97).

215. *Romer*, 882 P. 2d at 1362-66.

216. *Id.* at 1363.

require a “compelling governmental interest.”<sup>217</sup> He found that Amendment 2 bears a rational relationship to the state’s legitimate interest in protecting religious freedom, noting that the state gave several examples (from Aspen and Boulder) where individuals or groups “were forced to set aside their religious beliefs based on legislative enactments protecting homosexuals” in hiring decisions and in opening their facilities to homosexual organizations.<sup>218</sup>

The dissent also concluded that statewide uniformity is a legitimate interest rationally advanced by Amendment 2, given that “the public is deeply divided over the issue of homosexuality,” a “matter of statewide concern.”<sup>219</sup> In a footnote, the dissent distinguished matters on which there is a “national consensus” that discrimination is wrong – race and sex – from “the issue of homosexuality and bisexuality,” which is “deeply controversial and divisive.”<sup>220</sup> While “a series of constitutional amendments and acts of Congress have authoritatively settled the place of race and sex in American life,” the “same simply cannot be said of non-traditional sexual orientation.”<sup>221</sup>

The dissent also argued that “civil rights has never been the type of concern reserved exclusively for local governments,” and that the voters of Colorado, through Amendment 2, indicated they “wanted a statewide resolution of the issue that had formerly only been locally regulated and subject to great debate.”<sup>222</sup> The dissent spoke of a “right” of citizens “to the initiative process” to resolve “conflicts between municipal and local governments when the issue is a matter of statewide concern and the process is not repugnant to the constitution.”<sup>223</sup> Indeed, the Supreme Court “has noted that ‘referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice.’”<sup>224</sup> Moreover, Professor Harvey Mansfield testified that using the initiative process to enact Amendment 2 “supported stability and respect for the political process, by giving ‘the people a sense that . . . government is not alien to them, and that they can get together by their own initiative . . . to produce a result that gives them a sense of satisfaction and accomplishment.’”<sup>225</sup>

On the issue of scarce resources, the dissent cited evidence of “steadily increasing demands upon a shrinking budget,” and “complaints from the black community that claims were not being thoroughly investigated and prosecuted.”<sup>226</sup> Thus, “the state . . . reasonably postulates that law requiring the protection of an additional group would further stretch scarce resources, and Amendment 2 protects the civil rights enforcement for traditionally suspect groups.”<sup>227</sup>

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217. *Id.* (citing *Emp’t Div. v. Smith*, 494 U.S. 872, 883 (1990)).

218. *Id.*

219. *Id.* at 1364.

220. *Id.* at 1364 n.6.

221. *Id.*

222. *Id.* at 1364.

223. *Id.*

224. *Id.* (citing *James v. Valtierra*, 402 U.S. 137, 141 (1971)).

225. *Id.* at 1364 n.8.

226. *Id.* at 1365.

227. *Id.*

Erickson also referred to testimony that adding homosexuals to civil rights statutes or ordinances “would lessen the public’s respect for historic civil rights categories,” and thus, Amendment 2 furthered the state’s legitimate interest in “ensuring that the traditionally suspect classes remain respected.”<sup>228</sup> Erickson cited testimony by a former civil rights commission chairman that by contrast to the “traditionally suspect classes, “homosexuals, lesbians, and bisexuals are a relatively politically powerful and privileged special interest group,” and, thus, including them “would represent a ‘drastic departure’ from the historical aims of the civil rights laws.”<sup>229</sup> This theme of power and privilege returns in Justice Scalia’s *Romer* dissent, as well as in much of the briefing in support of the State of Colorado.

### C. Proceedings before the U.S. Supreme Court

The U.S. Supreme Court granted the certiorari petition of the Colorado public defendants. In this section, I analyze several prominent themes in the friend of the court briefs submitted to the Court in support of petitioners and respondents. Because the U.S. Supreme Court did not rely on the fundamental right to participate in the political process as the rationale for invalidating Amendment 2, arguments about this right are not my central concern. Instead, I highlight arguments about law as a vehicle to express moral disapproval and promote morality and family and how they bear on related arguments, such as appeals to religious liberty and disputes over whether sexual orientation is a suspect or quasi-suspect class. This discussion will set the stage for a comparison of amicus briefs submitted in the recent *Windsor* litigation.

### D. Arguments Made in Amicus Curiae Briefs Filed in Support of Petitioners (Supporting Amendment 2)

Petitioners’ amici articulated several lines of argument, which I will discuss thematically, rather than brief-by-brief.<sup>230</sup> Supporters of petitioners rejected the Colorado Supreme Court’s argument that Amendment 2 violated a fundamental right to participate in the political process and contended that the strict scrutiny test was not appropriate, since Amendment 2 did not classify based on race or any other traditionally suspect class. Amici focused especially on the rights of Colorado voters to establish their own laws – and promote moral values – through the political process. *Bowers* featured as a support for this argument. A corollary to this right was a fear that LGBT groups were gaining too much political power in Colorado. Amici argued that Amendment 2 served several legitimate state interests and, thus, could survive constitutional scrutiny.

#### 1. Promoting Morality and Protecting the Family against Homosexuality Colorado for Family Values (CFV) was, as it explained its interest in its

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228. *Id.* at 1365-66 (citing to testimony by Professor Joseph Broadus).

229. *Id.* at 1366 (citing testimony of Ignacio Rodriguez, former Civil Rights Commission Chairman).

230. There were nine amicus briefs filed in support of petitioners.

amicus brief, “the grassroots organization which initiated and campaigned for the passage of Colorado’s Amendment 2.”<sup>231</sup> CFV “believes that states have the power to pass a wide variety of laws to protect the family and community morality . . . .”<sup>232</sup> Thus, after CFV successfully kept a local ordinance “conferring minority status upon homosexuals” from passing in Colorado Springs:

CFV turned its attention to a movement in the State of Colorado to legitimate homosexuality through pro-homosexual municipal ordinances. Concerned with the effect that government legitimization of homosexuality would have on the traditional family and community morality, CFV began a campaign to put on the ballot an initiative which would prevent the state, its agencies, or political subdivisions from granting special protections to homosexuals.<sup>233</sup>

The brief does not elaborate on the “why” of this Amendment beyond the initial assertion that CFV acted to protect the family and morality from the “legitimization” of homosexuality. Other amicus briefs filed in support of petitioners elaborated the argument that the aim of Amendment 2 was to promote or protect traditional morality and the family and that the U.S. constitutional scheme amply supports such use of the law. For example, Concerned Women for America (CWA) argued that Amendment 2 protects public morality because homosexuality encourages “irresponsible liaisons beyond the bonds of marriage,” and a majority of Coloradans believes that homosexual behavior is immoral.<sup>234</sup> Government, CWA argued, may voice approval and disapproval of both conduct (liaisons) and of ideas (quoting Scalia, it may “praise the monogamous family”).<sup>235</sup> Homosexuality cannot be divorced from homosexual conduct, CWA argued, comparing the anti-sodomy law upheld in *Bowers* to laws regulating other actions considered to be immoral, such as prostitution.<sup>236</sup> CWA’s logic will recur in Justice Scalia’s *Romer* dissent: “It follows that if Colorado may criminalize sodomy, and may criticize the morality of homosexual conduct while praising heterosexual marriage, it may constitutionally preclude the adoption of special homosexual rights laws.”<sup>237</sup>

CWA relied on the contention of Professor John Finnis (an expert witness in the Amendment 2 trial) that the “special homosexual rights laws” that Amendment 2 repealed would “preclude any government disapproval of homosexual behavior, with significant consequences for heterosexual marriage

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231. Brief for Colorado for Family Values as Amicus Curiae Supporting Petitioners at 1, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) [hereinafter *CFV Brief*].

232. *Id.*

233. *Id.* at 2.

234. Brief for Concerned Women for America, Inc. as Amicus Curiae Supporting Petitioners at 15–16, *Romer*, 517 U.S. 620 (No. 94-1039) [hereinafter *CWA Brief*]. The quoted language in text is from the Supreme Court’s famous case, *Weber v. Aetna Casualty*, 406 U.S. 164 (1972), which involved classifications based on illegitimacy. This is an odd choice since *Weber* ruled that the state could not pursue that goal of discouraging irresponsibility by punishing children who bore no responsibility for the circumstances of their birth!

235. *Id.* at 15 (citing *Black v. Meese*, 793 F.2d 1303, 1313 D.C. Cir. 1984), *cert. denied*, 478 U.S. 1021 (1986) (Scalia, J.)).

236. *Id.* at 10–11.

237. *Id.* at 15.

and other state policies, such as adoption.”<sup>238</sup> They quoted Finnis’s elaboration of this claim, which has reverberations in the more recent debates over changing marriage laws:

[T]he adoption of a law framed to prohibit “discrimination on grounds of sexual orientation” would require the prompt abandonment of all attempts by the political community to discourage homosexual conduct by means of educational policies, restrictions of prostitution, non-recognition of homosexual marriages, and so forth. It is judged (and in my view soundly) that the law itself would perforce have changed from teaching, in many ways, that homosexual conduct is bad to teaching, massively, that it is a type of sexual activity as good as any other (and per se much less involved with onerous responsibilities than is the sexual union of husband and wife or, in perhaps other ways, the life of those who live in unmarried chastity).<sup>239</sup>

CWA asserted the state’s interest in “protecting public morality” is not only “legitimate,” but “substantial” and “compelling.” It invoked Supreme Court precedents upholding the police power of the states to provide for public health, safety, and *morals*, including through bans on polygamy, obscenity, and public indecency. It quoted at length from Justice Scalia’s concurrence in *Barnes v. Glen Theater* on society’s prohibition of activities not because they are harmful but because they are considered “immoral,” “contra bonos mores” (offering the examples of “sodomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy”).<sup>240</sup> CWA also cited to Lord Devlin as among other “legal philosophers” who have “reached the same conclusion.”<sup>241</sup> Thus, it concluded, “conduct cannot be viewed in isolation from its effect on society’s moral consensus.”<sup>242</sup>

Turning to laws specifically concerning homosexuality, CWA argued that *Bowers* found law based on “moral determination” not only “rational” but “necessary” and concluded that “moral disapproval” was sufficient to sustain Georgia’s criminal ban on sodomy.<sup>243</sup> CWA cited the majority opinion’s famous statement that the “presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable” was a rational basis for Georgia’s sodomy law, since “the law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”<sup>244</sup>

CWA argued that an Equal Protection review of Amendment 2 should yield the same result as in *Bowers*. Quoting a Judge Bork opinion, CWA asserted that

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238. *Id.*

239. *Id.* at 15-16 (quoting Finnis, professor of law and legal philosophy at Oxford University).

240. *Id.* at 11-12 (emphasis added) (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring)).

241. *Id.* at 12 (citing P. DEVLIN, *THE ENFORCEMENT OF MORALS* 8, 13 (Oxford Univ. Press 1959)).

242. *Id.* at 12-13.

243. *Id.* at 12.

244. *Id.* at 13 (citing *Bowers*, 478 U.S. at 196). Georgia’s law banned all forms of sodomy, as Justice Stevens pointed out in his dissent, but the Court construed the law and the moral disapproval rationale as if it specifically expressed condemnation of homosexual sodomy. .

"much of our most valued legislation" reflects "legislative majorities [that] have made moral choices contrary to the desires of minorities," and that the "ultimate justification" for most laws "rest upon the society's morality."<sup>245</sup> CWA argued (relying on Finnis) that "disapproving homosexual conduct" is a legitimate interest and one threatened by "special homosexual rights laws."<sup>246</sup> It is an "empirical fact," CWA asserted, that "a majority of Americans, and obviously a majority of Colorado voters, believe homosexual behavior is immoral."<sup>247</sup> That Amendment 2 passed evidences that the "majority of Colorado voters . . . found it [homosexuality] lacking morality."<sup>248</sup> As discussed below, CWA distinguished characteristics like race or sex from homosexuality because the latter involves a "characteristic or behavior that is subject to moral assessment."<sup>249</sup>

Finally, CWA argued Amendment 2 furthered a "legitimate interest in promoting marriage and heterosexual families," again citing *Weber's* language concerning a society's "right" to condemn "irresponsible liaisons beyond the bonds of marriage" and to attach negative consequences to such liaisons.<sup>250</sup> CWA also cited to cases upholding less favorable treatment of unmarried couples than married ones.<sup>251</sup> Given that same-sex couples were, at that time, precluded from entering into civil marriage throughout the United States, including in Colorado, the analogy is strained. Strikingly, CWA also cited to a California Supreme Court case that that court later cited in its decision holding that California's constitution required *allowing* same-sex couples to marry: "The State's interest in promoting the marriage relationship is not based on anachronistic notions of morality. The policy favoring marriage is 'rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in an organized society.'"<sup>252</sup>

To explain how civil rights for homosexuals "undermine" state policy "in favor of heterosexual marriage and family," CWA cited a Minnesota Supreme Court decision identifying the "major public policy questions" involved in "determining . . . under what circumstances, and to what extent it is desirable to accord some type of legal status to claims arising from [same-sex and opposite-sex cohabiting] relationships."<sup>253</sup> The Minnesota court raised some questions still pertinent to whether to give marriage-like rights to the unmarried or create an equivalent status: "Will the fact that legal rights closely resembling those arising

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245. *Id.* at 14 (quoting *Dronenburg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984)).

246. *Id.* at 15-16.

247. *Id.* at 16. CWA cites to Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 405 n.41 (1994) (referring to a 1992 Gallup Poll and a 1970 Kinsey Institute Survey).

248. *Id.* at 17.

249. *Id.*

250. *Id.* at 21.

251. *Id.* at 21-23.

252. *Id.* at 22-23 (citing *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988). *Compare* *In re Marriage Cases*, 183 P.3d 384 (2008) (citing *Elden*, 758 P.2d 582 to explain the significance of marriage as an institution). *See also* FLEMING & MCCLAIN, *supra* note 159, at 195 (discussing use of this language in *In re Marriage* cases).

253. *Id.* at 23 (citing *Cooper v. French*, 460 N.W.2d 2, 10 (Minn.1990)).

from conventional marriages be acquired by those who deliberately choose to enter into what have heretofore been commonly referred to as ‘illicit’ or ‘meretricious’ relationships encourage formation of such relationships and weaken marriage as the foundation of our family-based society?’<sup>254</sup> The question of what rights to accord cohabiting couples who “deliberately” choose illicit relationships over marriage assumes a baseline of the availability of marriage and a decision to eschew it for something else. This was not the same set of options available to same-sex couples; by definition, their attempted marriages would be “void.”

The Family Research Council’s (FRC) brief warned the Supreme Court about the “perilous task” of “usurp[ing] the legislature as the vehicle for expressing the people’s moral consensus on matters ‘having little or no cognizable roots in the language or design of the Constitution,’ or matters which are not ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty” (citing *Bowers*).<sup>255</sup> It used *Roe v. Wade* as a primary example, suggesting that while it and capital punishment “were milestones for the Court in decades past,” homosexuality is “the issue of the moment.”<sup>256</sup> Thus, the Court should not threaten its “legitimacy” by discovering (as the Colorado Supreme Court purported to do) a fundamental right in the U.S. constitution that would invalidate Amendment 2:

The people of Colorado, by exercising their constitutional rights, have expressed their consensus on homosexuality. And, while surely the Court can claim expertise on learned constitutional matters, the plain fact of the matter is that the public cannot be convinced that the Court knows more than the people of Colorado about the proper response to homosexuality in that state. This credibility gap, which relates directly to the perception of the Court’s legitimacy, is even wider when the mechanism for overcoming the people’s common sense on a moral matter is the discovery of a new fundamental right.<sup>257</sup>

*Roe*, FRC contended, “is the paradigm of the social division and disruption in representative government that results when the judiciary forecloses political choice.”<sup>258</sup> Creating new “rights” and exempting more subjects from “democratic control” causes democracy, the social contract, or “the common moral universe,” and democracy’s institutors to “shrink.”<sup>259</sup> The FRC contended the “analogy” between the aftermath of *Roe* and the “instant case” is “unavoidable” because the right “discovered” by the Colorado Supreme Court has “no firm grounding in the Constitution” and overturns “positive law” and “precludes political choice.”<sup>260</sup> It warned that “the Court can avoid repeating and

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254. *Id.* at 23 (citing *Cooper*, 460 N.W.2d at 10).

255. Brief for Family Research Council as Amicus Curiae Supporting Petitioners at 9, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986)) [hereinafter *FRC Brief*].

256. *Id.*

257. *Id.* at 10.

258. *Id.*

259. *Id.* at 10-11.

260. *Id.* at 12.

exacerbating the public policy mistakes that have harmed the reputation of the law," and must do so by declining "to tell the people of Colorado, or any other state, that they are forbidden from expressing in law their social and moral consensus on homosexuality."<sup>261</sup>

FRC further analogized to the abortion issue by noting that "the moral dynamic of abortion perhaps was the part of the social equation given shortest shrift in *Roe*," even though a "prescient" state court judge warned several years earlier that the centrality of ethical and religious assumptions in arguments about abortion would make the Court's "incursion" into the abortion issue the most "flammable issue in our society."<sup>262</sup> FRC contended: those "in favor of homosexuality" are tempted to "dismiss the importance, indeed the enduring power, of the moral dynamic."<sup>263</sup> By contrast, the lower court in *Evans v. Romer* found that "antidiscrimination law [and presumably anti-discrimination laws] make no assumptions about the morality of [homosexuality]."<sup>264</sup> To the slogan by one "homosexual advocacy group," "[W]e're here, we're queer, get over it," FRC counters, "As the history of public reaction to *Roe* demonstrates, however, people do not 'get over' moral principles."<sup>265</sup> To the contrary, *Roe* indicated that "allegiance to personal moral principles may solidify in the face of a judicial fiat to 'get over it.'"<sup>266</sup> FRC acknowledged that social mores may change in the future. However, "such changes 'must arrive through the moral choices of the people and their elected representatives, not through . . . this court.'"<sup>267</sup> Thus, those judges who have ruled (often in dissent) that moral condemnation of homosexuality is of no legal significance are engaged in "rebellion" against precedent (e.g., *Hardwick's* observation that law "'is constantly based on notions of morality'") but also "in rebellion against the legitimate expression of the legitimate will of the people."<sup>268</sup> FRC cited Robert Bork on the point that modern constitutional interpretation seeks to be "free of democracy in order to impose the values of an elite upon the rest of us."<sup>269</sup>

FRC charged that, on the one hand, the lower court denied Amendment 2 had a moral dynamic, but, on the other, held it "was neither necessary to, nor effective in, promoting public morals."<sup>270</sup> "Uncontroverted evidence," FRC countered, revealed a moral dynamic: Amendment 2 "allows each individual to act according to his own deeply held moral and religious views on an issue that conspicuously engages a 'millennia of moral teaching.'"<sup>271</sup> Through Amendment

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261. *Id.* at 13.

262. *Id.* at 17.

263. *Id.*

264. *Id.* (alteration in original) (quoting *Evans v. Romer*, 882 P.2d 1335, 1347 (Colo. 1994)) (internal quotation marks omitted).

265. *Id.* at 17-18.

266. *Id.*

267. *Id.* (emphasis added) (citing *Dronenburg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984)).

268. *Id.* at 18.

269. *Id.* at 19 (citing Robert H. Bork, *The Case Against Political Judging*, NAT'L REV., Dec. 8, 1989, at 24).

270. *Id.*

271. *Id.* at 19 (citing *Bowers v. Hardwick*, 478 U.S.186, 197 (1986)) (Burger, C.J., concurring)).

2, the “people of Colorado” stated clearly that “they did not consider it wise to start down the road toward affirmative action for homosexuals.”<sup>272</sup>

As a final example of appeals to promoting morality, the brief for Oregon Citizens Alliance et al. (OCA) expressed concern that the Colorado Supreme Court’s decision was “a serious blow to the use of the initiative process in Oregon,” where OCA hoped to put a measure similar to Amendment 2 on the ballot in order to protect morality.<sup>273</sup> OCA invoked former Chief Justice Burger’s statement in *Bowers*: “‘To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.’”<sup>274</sup> A concern motivating the ballot initiative in Oregon was “the trampling of the constitutional rights of conservative Christians at the hands of gay activists.” OCA named two “rights”: (1) “parents’ rights to control the education of their children” and (2) the right to “free expression of religious speech.” OCA viewed these rights as connected to reflecting moral teaching through law. Without Amendment 2, or a similar law in Oregon, schools would be free to indoctrinate children into “the viewpoint of gay activists, specifically that homosexual conduct is to be accepted as a normal and acceptable lifestyle choice.”<sup>275</sup>

## 2. Religious Liberty

Concern for protecting religious liberty intertwined with some of the arguments discussed above about the legitimacy of Amendment 2 promoting morality. Several of the amicus briefs filed in support of Amendment 2 focused more explicitly on its role in protecting religious liberty. Examining these arguments is useful because some contemporary arguments against marriage equality contend that while DOMA and state DOMAS protect religious liberty, redefining marriage in civil law will pose extensive threats to religious liberty and religious exemptions will not be adequate to meet that threat.

Amici contended that the people of Colorado, in voting for Amendment 2, were constitutionally permitted to take sides in favor of protecting religious liberty. For example, a brief submitted by the Christian Legal Society (CLS), several conservative religious denominations, and the conservative Christian group Focus on the Family (CLS brief) argued that Amendment 2 passes rational basis review because it “is justified by the State of Colorado’s compelling interest in protecting religious freedom.”<sup>276</sup> The CLS brief asserted: “There is a veritable explosion of instances where either individuals of faith or religious organizations are being forced to comply with gay-rights ordinances and other nondiscrimination regulations where sexual orientation describes a protected

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272. *Id.*

273. Brief for Oregon Citizens Alliance et al. as Amici Curiae Supporting Petitioners at 10, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) [hereinafter *OCA Brief*].

274. *Id.* at 11.

275. *Id.*

276. Brief for Christian Legal Society et al. as Amici Curiae Supporting Petitioners at 1-2, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) [hereinafter *CLS Brief*]. Among the amici were the National Ass’n of Evangelicals, the Christian Life Commission of the Southern Baptist Convention, and the Lutheran Church-Missouri Synod. *Id.*

class.”<sup>277</sup> The Supreme Court of Colorado “agreed that protecting religious freedom was a compelling governmental interest,” but, the brief contended, mistakenly concluded that Amendment 2 was “not the least restrictive means of achieving that interest,” since “religious exemptions from gay-rights ordinances would be adequate.”<sup>278</sup> CLS argued Amendment 2 was a preferable route since exemptions do not “sufficiently protect” burdens upon religious exercise and “applying such exemptions to religious organizations is extremely difficult.”<sup>279</sup> It noted several infirmities of religious exemptions, such as defining religious institutions and procedurally disadvantaging religious organizations that wish to turn away individuals because of sexual orientation by making them assert and prove their religious status as an affirmative defense.<sup>280</sup> Getting caught up in such litigation could also compromise the public image of a religious institution, which likely depends on public support and donations for survival.<sup>281</sup>

After itemizing several conflicts that local ordinances protecting sexual orientation create for religious institutions, the refrain of the CLS brief in each case was that: “Amendment 2 resolves these conflicts, simply and unequivocally, in favor of religious liberty.”<sup>282</sup> Some examples involved alleged interference with religious organizations’ ordinary practices and with the rights of conscience of individuals of faith, such as a religious landlord forced to rent to homosexuals.<sup>283</sup> The CLS brief offered examples from other states and localities to suggest that *no* set of religious exemptions would be adequate. For instance, it claimed that an antidiscrimination law adopted in New Jersey was so broad that a pastor’s Sunday sermon could get him arrested.<sup>284</sup> It offered hypotheticals to illustrate possible clashes between gay rights ordinances and religious organizations’ autonomy, for example, battered women’s shelters that may want to turn away homosexual individuals and avoid liability for doing so.<sup>285</sup>

This brief also connected religious liberty to a “check [on] expansive government,” such as attempts by governmental institutions to apply public norms of antidiscrimination on the basis of sexual orientation to religious groups that believe homosexual practices are immoral. Given the Supreme Court’s recent decision in *Christian Legal Society v. Martinez*,<sup>286</sup> it is striking that the CLS brief referred to policies by state universities that condition access to “limited public fora . . . on compliance with nondiscrimination on the basis of

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277. *Id.* at 2.

278. *Id.* at 2-3.

279. *Id.* at 3.

280. *Id.*

281. *Id.* at 21.

282. *Id.* at 8, 10, 11.

283. *Id.* at 12. CWA similarly argued that antidiscrimination laws including protections for sexual orientation violate the religious liberties of landlords and employers who may wish to deny housing and jobs to individuals based on sexual orientation and are entitled to do under the Free Exercise Clause. See CWA Brief, *supra* note 234, at 20.

284. CLS Brief, *supra* note 276, at 13.

285. *Id.* at 14.

286. 130 S. Ct. 2971 (2010).

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homosexuality.”<sup>287</sup> The CLS brief explained: “This presents problems for student religious groups, such as Inter-Varsity Christian Fellowship, Campus Crusade for Christ, and the Christian Legal Society, who select their leaders, *inter alia*, on the basis of adherence to Biblical morality, including the avoidance of homosexual practices.” This is but one of the conflicts that Amendment 2 “resolves . . . simply and unequivocally, in favor of religious liberty.”<sup>288</sup>

Interestingly, given this argument for unequivocal resolution, the CLS brief acknowledged that religious denominations and religious people are not uniform in their views about the morality of homosexuality. It enlisted this variation, however, to support “independence” of religious organizations “to pursue their beliefs and practices,” and for each “ecclesiastical body to develop its own doctrine”:

It can hardly be denied that the morality of homosexual conduct is a matter of heated national debate. It is, as well, the subject of impassioned discussion within religious denominations, local churches, the religious social-service sector, and other ecclesial organizations such as seminaries and religious universities. Theologians, clerics, and laypersons all participate in the debate, and on both sides. Because it confronts religious belief and church autonomy, homosexual practice is a matter, which the First Amendment ensures that the confessional communities may work out for themselves and in their own time.<sup>289</sup>

Thus, the CLS brief explained why some religious groups “do discriminate against those who engage in homosexual practices”: “when an interpretation of the scriptural canon is understood to warn against homosexual conduct, obviously a church’s own employment practices, its schools with their attendant curricula and codes of behavior, and its social-outreach programs will reflect that moral stance.” The three “most often advanced” purposes for discriminating are: “(i) correction of the person in error (for his own well-being); (ii) communication within and without the confessional community of the scriptural teaching on homosexuality (that others may not fall into error); and (iii) protection of the traditional family (a foundation stone of civil society).”<sup>290</sup>

In conclusion, the CLS brief asserted that “[t]he social agenda of gays, lesbians, and bisexuals is moral legitimacy for their sexual practices.”<sup>291</sup> Because “religion, at least orthodox and traditional religions, generally deny them moral legitimacy,” this “places religion foursquare in their path.”<sup>292</sup> In saying that “religious persons and religious groups – and hence free exercise and institutional autonomy – are not a mere side issue in this case,” the CLS brief implied they are the targets.<sup>293</sup> Framed this way, what else is there to do but adopt laws like Amendment 2 to protect religious liberty while the “vigorous,

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287. CLS Brief, *supra* note 276, at 9 (discussing policy adopted by University of Michigan).

288. *Id.* at 10.

289. *Id.* at 3-4.

290. *Id.* at 4.

291. *Id.* at 25.

292. *Id.*

293. *Id.* (citing Duncan, *supra* note 247).

often intransigent, debate” about homosexuality continues?<sup>294</sup>

Some amici linked the threat to religious liberty to the threat to the family, deploying familiar language about the family as a building block of civil society. The CLS brief identified protecting “the traditional family (a foundation of civil society)” as a common reason given for discriminating on the basis of “homosexual practices.”<sup>295</sup> In its brief, the American Center for Law & Justice Family Life Project (ACLJ) explained that it is a “public interest law firm and educational organization dedicated to protecting religious liberty, human life, and the family.”<sup>296</sup> Its Family Life Project “recognizes the family as the primary social and religious institution of any just society,” and is committed to “the two-parent, marriage-bound family as the primary mediating institution of civilization.”<sup>297</sup> Thus, ACLJ “is committed to defending the family as long understood within the classical Judeo-Christian tradition as a ‘domestic church,’ or ‘church in the home.’”<sup>298</sup> Amendment 2, it contended, “serves the legitimate purpose of (among others) protecting Colorado citizens’ religious liberties from unnecessary and intrusive government regulation on behalf of a class whose members do not need special government protection and is a class defined by conduct that undermines the traditional marriage-bound, two-parent family.”<sup>299</sup>

ACLJ’s brief summarily mentioned that religious liberty may “come in conflict with anti-discrimination laws,” and that “many people have sincere religious or moral beliefs that would prevent them from hiring or doing certain types of business with homosexuals.” For example, “persons running a religious school may sincerely believe that hiring homosexuals would be wrong because hiring homosexuals would create a harmful influence on students.”<sup>300</sup> The brief did not give an explicit example of a threat to the family. Perhaps the implicit idea is that legitimizing homosexuality through hiring homosexuals in schools might steer children into homosexuality rather than into traditional marriage.

### 3. Freedom of Association

Appeals to freedom of association as a justification for Amendment 2 feature in several briefs. This argument bears a close relationship to morality and religious liberty arguments, since a religious belief that homosexuality and/or homosexuality practices are immoral is often the reason for not wishing to associate. The CWA brief, for example, argued that landlords and employers, exercising their economic and religious liberty, should be able to discriminate against homosexuals because of their freedom of association.<sup>301</sup> CWA also asserted that Amendment 2 permits “more moral freedom” than the civil rights

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294. *Id.* at 26.

295. *Id.* at 4.

296. Brief for American Center for Law & Justice Family Life Project as Amicus Curiae Supporting Petitioners at 1, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) [hereinafter *ACLJ Brief*].

297. *Id.* at 2.

298. *Id.*

299. *Id.*

300. *Id.* at 15.

301. See CWA Brief, *supra* note 234, at 20.

ordinances it precluded because “[t]he citizens of Colorado are more free to make their own moral determinations under Amendment 2 than they were under any special homosexual rights law at the state or local level.”<sup>302</sup> If they believe homosexuality is immoral, they may “choose not to rent to or employ homosexuals;” conversely, “those who see homosexuality as moral or at least neutral are free to rent to or employ homosexuals.”<sup>303</sup> CWA quoted Justice Stevens: “Freedom is a blessing. Regulation is sometimes necessary, but it is always burdensome.”<sup>304</sup> Stevens continued: “A decision *not to regulate* the way in which an owner chooses to enjoy the benefits of an improvement to his own property is adequately justified by a presumption in favor of freedom.”<sup>305</sup> Perhaps CWA’s implication was that freedom to discriminate is a blessing and Amendment 2 is justified because it allows an owner to “choose” how to use his or her property.

Similarly, the CLS brief argued that religious individuals should be free to avoid associating with homosexuals and provided the example of members of a health club who wish to exclude homosexuals from gender-specific locker rooms.<sup>306</sup>

#### 4. Animosity

In the DOMA litigation, one role *Romer* played was to provide precedent for the proposition that legislation based on animus against a class cannot survive Equal Protection scrutiny. This section and the corresponding section on respondents’ briefs looks back at how arguments about animus featured in the briefing in the *Romer* litigation. As I will explain below, amici for respondents pointed to statements about homosexuality made by CFV in the campaign for Amendment 2 and to the amendment itself as evidence of animus and hostility. By contrast, a basic tenet in arguments in favor of Amendment 2 was that, because of the moral issue, homosexuality is different than categories traditionally protected by antidiscrimination law, such as race and sex, where animus against the group may be present.

Amici distinguished discriminating against a racial minority from discriminating against a homosexual individual. Thus, ACLJ’s brief contended: “Discriminating against a black person is irrational and therefore most likely based on animus for the person, because the fact that a person is black tells us nothing about his character. But given the moral controversy surrounding homosexuality, when a person ‘makes a distinction based upon a person’s sexuality, he is making a judgment about the content of the individual’s character.’”<sup>307</sup>

Another argument was that because Amendment 2 is rationally related to legitimate state interests, such as protecting Coloradans’ religious liberty, there is

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302. *Id.*

303. *Id.*

304. *Id.* at 21.

305. *Id.*

306. CLS Brief, *supra* note 276, at 12.

307. ACLJ Brief, *supra* note 296, at 12 (quoting Duncan, *supra* note 247, at 405).

no danger that it is grounded in illegitimate animosity.<sup>308</sup> CFV, sponsor of Amendment 2, argued that Amendment 2 did not purposefully or invidiously discriminate against a suspect class, such as racial minorities. Thus, strict scrutiny did not apply.<sup>309</sup>

### 5. Special Rights Versus Equal Rights

A recurring theme in amicus briefs filed in support of petitioners was that Amendment 2 simply prevented homosexuals from obtaining “special rights.” Arguments about morality also shaped this claim. For example, CWA argued that special rights should not be recognized for homosexuals because homosexuality is not a morally neutral characteristic, such as race or sex.<sup>310</sup> For that reason, Colorado voters were entitled to determine that it is “not entitled to special protections.”<sup>311</sup> As noted above, CWA warned that, without Amendment 2, the state would lose any power to discourage homosexual conduct. CWA further asserted that because homosexuals are politically and economically powerful, Amendment 2 justifiably refused them “special rights”: “Special homosexual rights laws do in fact confer special rights on homosexuals – rights that are not enjoyed by other non-suspect classes who lack the homosexuals’ affluence, their political clout, and their claim to political correctness. . . . Colorado was justified in refusing to capitulate to the homosexual lobby’s demands for special treatment.”<sup>312</sup>

The special rights argument also appealed to the right of the people to require government to be “neutral” about homosexuality. Thus, the Equal Rights, Not Special Rights brief argued: “Amendment 2 represents a perfectly rational determination by the voters of Colorado that government at all levels in that state should remain neutral on the contentious moral and political issue of whether citizens can, in their private associations and pursuits, take homosexuality into account.”<sup>313</sup> The local ordinances Amendment 2 overturned, by contrast, “prohibited state residents from acting on their sincerely held moral and religious beliefs that homosexuality – unlike, for example, race, ethnicity, or gender – is a morally relevant characteristic.”<sup>314</sup> As discussed below, respondents’ amici pointed out that this argument does not address the broad scope of Amendment 2, which also precluded *public* entities and actors from discriminating.

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308. *See id.* at 15-16.

309. CFV Brief, *supra* note 231, at 16.

310. *See* CWA Brief, *supra* note 234, at 16.

311. *Id.*

312. *Id.* at 2-3.

313. Brief of Equal Rights, Not Special Rights, Inc. as Amicus Curiae in Support of Petitioners, at 4, *Romer v. Evans*, 517 U.S. 620 (1996) (No.94-1039) [hereinafter *Equal Rights Brief*]. This group described itself as an “Ohio-based non-profit educational organization devoted to pro-family issues” and explained that its predecessor organization had successfully sponsored a charter amendment to repeal a local human rights ordinance prohibiting various forms of discrimination on the basis of sexual orientation and barring future protection. *Id.* at 1.

314. *Id.* at 4.

## 6. Clash of Rights/The “Right” of the People to Use the Democratic Process

Some amici related the “special rights” argument to a clash of rights argument: any supposed “right” of homosexuals to participate in the political process (securing victories at the local level) must yield to the “right of the people” of Colorado to limit the power of their representatives and bypass them, through the constitutional amendment process.<sup>315</sup> Amici stressed the right of “the people” to constitute themselves and their government – an issue pertinent to the Prop 8 litigation and other controversies over the use of the ballot initiative process.

CFV’s brief, for example, asserted the “inherent right of the people to organize and constitute their government in accordance with the rule of law.”<sup>316</sup> Citing Thomas Paine, it asserted that Colorado’s constitution is “not an act of government, but of a people constituting a government;” that constitution gives “the People of Colorado” “the right to limit the power of their elected representatives,” including “place[ing] the question of special legal protection for homosexuals, lesbians, and bisexuals outside the authority of their elected representatives.”<sup>317</sup>

CFV called “unprecedented and astounding” the Colorado Supreme Court’s Equal Protection ruling that Amendment 2 warranted strict scrutiny because it infringed on “the fundamental right to participate equally in the political process” by “‘fencing out’ and independently identifiable class of persons.”<sup>318</sup> Amendment 2 did not involve “purposeful discrimination against [a] racial or other constitutionally suspect class.”<sup>319</sup> Nor does the U.S. Constitution “require a state to protect persons from discrimination on the basis of sexual orientation,” and thus it posed no limit to the people of Colorado’s “original right” to constitute their government, including requiring that, henceforth, advocates for such protections must proceed by way of constitutional amendment rather than ordinary legislation.<sup>320</sup> On CFV’s theory, “the People of the State of Colorado were within their right to determine ‘to what extent private rights shall be required to yield to the general good.’”<sup>321</sup>

Similarly, the Family Research Council argued that, in enacting Amendment 2, Coloradans exercised their constitutional rights to express their consensus on homosexuality and that those rights should be protected. It analogized to the abortion issue, arguing that neither expression of sexual orientation nor abortion

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315. CFV Brief, *supra* note 231, at 21. *See also* Equal Rights Brief, *supra* note 313, at 9 (asserting that Amendment 2 was constitutionally permissible because there is “nothing in the federal Constitution that prohibits the people from resolving important public policy issues for themselves or that requires them to delegate such important decisions to their employee representatives”). The contemporary analogue to this argument about the power of the people through the initiative process pertains to Proposition 8, not discussed in this article since the Court did not reach the merits in that case.

316. CFV Brief, *supra* note 231, at 5.

317. *Id.* at 11.

318. *Id.* at 4.

319. *Id.* at 16.

320. *Id.* at 12.

321. *Id.* (citing THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 33 (1987)).

are fundamental, constitutionally protected rights.<sup>322</sup> Countering respondents' argument that Amendment 2 deprives homosexuals of access to the political process, FRC asserted that, after the Colorado Supreme Court invalidated Amendment 2, Coloradans *opposing* homosexuality "have *no* effective political forum open to them."<sup>323</sup>

An amicus brief filed by Alabama and several other states (authored by Charles J. Cooper, who would later defend Proposition 8 before the U.S. Supreme Court, and prominent conservative jurist Robert Bork) argued that the Colorado Supreme Court's ruling "creates a right to have political issues decided - finally - at the local, rather than higher levels," which "conflicts with the general power of states to structure their political functions as they see fit, subject only to exceptions based on federally protected interests."<sup>324</sup> The states argued that, because no suspect classifications were involved in the Colorado case, and because the case did not implicate "the central meaning of equal protection - the protection of racial minorities against laws which place unique burdens upon their ability to enact legislation prohibiting racial discrimination," the Colorado high court's ruling was not supported by Supreme Court precedent.<sup>325</sup> This brief offered a clash of rights argument: "rights do not exist in a vacuum, and cannot be recognized without consequence to other constitutional values."<sup>326</sup> Here, the "fundamental right of political participation" the Colorado high court "created" is "inconsistent with the right of the people to enact constitutional provisions to protect civil liberties."<sup>327</sup> That brief argued this new right gives any "independently identifiable class of persons" a right "to have its political agenda insulated against normal democratic processes."<sup>328</sup> However, the brief pointed out ways in which certain constitutional features already discourage political participation by some groups:

Constitutional law routinely discourages groups from seeking to legislate political agendas which the Constitution has taken out of the hands of legislators. Indeed, the central purpose of the Bill of Rights and similar protections in state constitutions is to shelter persons whose liberties are protected against political agendas designed to restrict those rights.<sup>329</sup>

This was an odd use of the familiar *West Virginia Board of Education v. Barnette* argument for withdrawing certain matters from the vicissitudes of shifting majorities. After all, Amendment 2 enshrined a lack of protection of rights. But this brief read it as a clash of rights: the "right of political

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322. FRC Brief, *supra* note 255, at 10-12.

323. *Id.* at 15.

324. Brief of Amici Curiae for Alabama et al. in Support of Petitioners at 3, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) [hereinafter *Alabama Brief*].

325. *Id.* at 5. See also OCA Brief, *supra* note 273, at 4 (asserting that the Colorado Supreme Court's framework of protecting the rights of "independently identifiable groups" expands equal protection law too far).

326. *Alabama Brief*, *supra* note 324, at 10.

327. *Id.* at 18.

328. *Id.*

329. *Id.* at 19.

participation” the Colorado high court created “casts a long shadow over the right of the people to protect their freedom by adopting constitutional liberties.”<sup>330</sup>

Finally, given the significance of *Romer* for marriage equality litigation, it warrants mention that at least one amicus worried about the impact of invalidating Amendment 2 on state marriage laws. Thus, the Special Rights brief contended that if the constitution forbade voters from enacting Amendment 2, homosexuals could lobby at the local level for “homosexual marriage” and argue that state law forbidding it infringed their “fundamental rights.”<sup>331</sup> If the constitution forbade states from controlling the scope of “the lawmaking authority of its political subdivisions,” “all laws restricting homosexual marriage, child custody and adoption would be unconstitutional because the various states have decided all such issues at the state level.”<sup>332</sup>

#### 7. Gender and Race Discrimination Versus Discrimination on the Basis of Sexual Orientation/Why Homosexuality is Not a Suspect Class

Amici, as discussed, distinguished discrimination against homosexuals from race discrimination, arguing that the former were not – and should not be – a constitutionally-protected suspect class. Amici contended that, unlike race and sex, homosexuality involved moral objections. Further, homosexuals are powerful, rather than powerless, and lack other earmarks of a protected class. Therefore, because sexual orientation is not a suspect class, triggering strict scrutiny, the Court need only conduct rational basis review to determine the constitutional validity of Amendment 2.<sup>333</sup>

Amici argued that, by contrast to suspect classes, homosexuals have not historically been politically disadvantaged, and have disproportionate amounts of money and political influence.<sup>334</sup> ACLJ, for example, argued that homosexuals are “economically advantaged compared to similarly situated people, which indicates they have not been the victims of the kind of devastating [sic] discrimination as that faced by racial minorities.”<sup>335</sup> As noted above, CWA also asserted that homosexuals are “affluent and politically powerful.”<sup>336</sup>

CFV painted a David and Goliath type picture of its efforts to put

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330. *Id.* Presumably, that constitutional freedom is to be free from charges of discrimination if they discriminate against homosexuals.

331. Equal Rights Brief, *supra* note 313, at 13–14.

332. *Id.* at 13.

333. *See, e.g.*, CWA Brief, *supra* note 234, at 2; Equal Rights Brief, *supra* note 313, at 6; OCA Brief, *supra* note 273, at 4. One amicus, The Pacific Legal Foundation (PLF), argued against group rights, claiming that fundamental rights are always individual rights and that American government recognizes categories of people based on merit, not immutable characteristics such as race and sexual orientation. It contended that affirmative action is problematic because “group rights permanently pit each group against the others in encounters that are bound to be at least sporadically violent.” *See* Brief of Pacific Legal Foundation as Amicus Curiae in Support of Petitioners at 23, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) [hereinafter *PLF Brief*].

334. ACLJ Brief, *supra* note 296, at 10-11.

335. *Id.*

336. CWA Brief, *supra* note 234, at 2.

Amendment 2 on the ballot: “the opponents of Amendment 2 outspent CFV almost 2 to 1 requiring CFV to rely heavily on citizen volunteers.”<sup>337</sup> Additionally, the Denver television market “refused to run CFV’s advertisements.”<sup>338</sup>

Another distinguishing feature, amici argued, is that “unlike race, national origin, or sex, homosexuality is not an immutable characteristic,” because “what defines the class of homosexuals is conduct.”<sup>339</sup> Thus, the ACLJ brief cited case law rejecting the idea that homosexuality is not centrally defined by conduct and asserting that “[w]hat distinguishes the class of homosexuals is . . . the nature of the member’s sexual proclivities or interests.”<sup>340</sup>

Another argument was that the “independently identifiable groups” identified by the Colorado Supreme Court as burdened by Amendment 2 were much broader than a suspect class, rendering suspect class analysis inapt.<sup>341</sup> For example, Alabama and several other states argued that the Equal Protection cases on which respondents relied, such as *Hunter v. Erickson* and *James v. Val Tierra*, could not be used as precedents for finding Amendment 2 unconstitutional because they rest on an Equal Protection framework that protects race and other suspect classes from discriminatory state action; by contrast, the previously-enacted Colorado antidiscrimination laws nullified by Amendment 2 provided special rights for non-suspect groups such as gays and lesbians.<sup>342</sup> Other amici contended that the political burden homosexuals in Colorado suffered under Amendment 2 was not comparable to the burdens suffered by the plaintiffs in *James* and *Hunter*, Supreme Court precedents involving constitutional amendments.<sup>343</sup>

#### E. Arguments Made in Amicus Curiae Briefs filed in Support of Respondents (opposing Amendment 2)

There were twenty-one amicus briefs submitted in support of the respondents.<sup>344</sup> Some of respondents’ amici argued primarily in support of the Colorado Supreme Court’s holding about Amendment 2 violating a fundamental right to participate in the political process. Some provided support for an alternative ground for invalidating Amendment 2: it lacked a rational basis and did not advance a legitimate state interest. In presenting their arguments, I will attempt to show how the themes in these briefs parallel and offer rejoinders to arguments made by amici for petitioners. It will be evident in Part II.F how some have an analogue in the Supreme Court’s *Romer* opinion. Some of the themes I canvass below are by now familiar parts of the constitutional landscape:

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337. CFV Brief, *supra* note 231, at 1.

338. *Id.*

339. ACLJ Brief, *supra* note 296, at 11.

340. *Id.* at 11-12 (citing *Watkins v. United States*, 847 F.2d 1329, 1361 n.19 (9th Cir. 1988)). (Reinhardt, J., dissenting), *vacated*, 875 F.2d 669 (9th Cir. 1989)).

341. See CFV Brief, *supra* note 231, at 23.

342. Alabama Brief, *supra* note 324, at 4.

343. *Id.* at 12, 14.

344. See generally *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039).

arguments invoking the *Cleburne-Moreno-Romer* trio and *Palmore v. Sidoti*'s language concerning government not giving effect to "private biases." Some other arguments may be less familiar and are a useful window into the evolution of societal views about the legal and moral status of homosexuals.

### 1. Animosity, Antipathy, and the Role of Stereotypes in the Campaign for and Approval of Amendment 2

Arguments about the role that stereotyping, prejudice, and animus played in enacting Amendment 2 were central in the amicus briefs filed in support of respondents. I lead with them because of the relevance of antipathy to the Supreme Court's *Romer* opinion and to contemporary efforts either to apply or distinguish *Romer* in the *Windsor* litigation over DOMA. These arguments also bear on the issues of morality and the proper level of constitutional review, as I discuss below.

The brief submitted by the American Psychological Association, the American Psychiatric Association, and other organizations (APA brief) argued that Amendment 2 "can be invalidated under rational basis review" (citing *Cleburne*) and, in support, presented "the latest research on the nature of sexual orientation" and the "literature on prejudice and discrimination against gay people."<sup>345</sup> It detailed the "history and prevalence of prejudice and discrimination against gay people" based on "ignorance and stereotypes" and the "nature" and effects of "anti-gay prejudice."<sup>346</sup> It concluded: "to the extent that Amendment 2 rests on baseless stereotypes about gay people, and reflects the sort of historically rooted antipathy still common in our society, it threatens to compound the serious problems gay people face as a result of irrational discrimination."<sup>347</sup>

Sexual orientation, the APA Brief stressed, "is distinct from sexual conduct."<sup>348</sup> It reports that "once established, sexual orientation is resistant to change[.]" and "there is little evidence that treatment actually changes sexual attractions."<sup>349</sup> It explained: "The psychiatric, psychological, and social-work professions do not consider homosexual orientation to be a disorder."<sup>350</sup> As proof that homosexuality is not a "psychological maladjustment," it cited the American Psychiatric Association's 1973 decision to remove homosexuality from its list of mental disorders, the American Psychological Association's similar stance in 1975, and its urging "all mental health professionals to help dispel the stigma of mental illness that had long been associated with homosexual orientation."<sup>351</sup> These newer stances differ from adherence earlier in the 20<sup>th</sup> century by mental health professions to the "'illness model' of homosexual orientation," a model

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345. Brief of the American Psychological Ass'n et al. as Amici Curiae in Support of Respondents, at 7–8, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) [hereinafter APA Brief].

346. *Id.* at 18–19.

347. *Id.* at 27.

348. *Id.* at 10.

349. *Id.* at 14.

350. *Id.* at 15.

351. *Id.*

developed “at least partly in an effort to displace the depravity immorality model.”<sup>352</sup>

Amici explained their interest in terms of their public and formal urging of “the elimination of irrational discrimination against gay men and lesbians.”<sup>353</sup> The brief detailed continuing “intense prejudice” against lesbians and gay men and asserted: “Gay people are the subject of strong antipathy.”<sup>354</sup> That antipathy rests on “an entrenched set of negative assumptions” and, particularly, with respect to gay men, in “crude stereotypes,” such that gay men are “disproportionately responsible for child sexual abuse.”<sup>355</sup> The brief reported the absence of “any positive correlation between homosexual orientation and child molestation.”<sup>356</sup>

Given the subsequent role of assertions about child well-being in opposing and supporting marriage equality, it is worth mentioning that the APA Brief reported that “the literature . . . undermines negative assumptions about gay men and lesbians as parents.”<sup>357</sup> A precursor to subsequent arguments about the basic sameness between heterosexuals and homosexuals in their capacity to be responsible parents and rear children successfully, the brief quoted one study: “The most striking feature of the research on lesbian mothers, gay fathers, and their children is the absence of pathological findings. The second most striking feature is how similar the groups of gay and lesbian parents and their children are to the heterosexual parents and their children that were included in the studies.”<sup>358</sup> Moreover: “being raised by gay parents does not appear to cause homosexual orientation.”<sup>359</sup> Finally, in an additional important assertion of sameness, the APA brief reported: “[D]espite stereotypes to the contrary, gay men and lesbians often form committed relationships that share principal elements of heterosexual marital relationships, that are based on deep emotional attachments, and that endure for decades.”<sup>360</sup>

The Human Rights Campaign Fund brief (HRC) argued that, if the Court addresses the level of review question, it should conclude that classifications based on sexual orientation warrant strict scrutiny.<sup>361</sup> Most pertinent to the animus issue is HRC’s discussion of the role of prejudice. HRC argued that a history of discrimination based on sexual orientation and the fact that sexual orientation is unrelated to ability are warning signs that a legislative classification based on homosexuality may not be rooted in legislative rationality, but instead, be (quoting *Plyler v. Doe*) “a reflection of deep-seated prejudice.”<sup>362</sup>

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352. *Id.* at 20.

353. *Id.* at 2.

354. *Id.* at 21.

355. *Id.* at 23.

356. *Id.*

357. *Id.* at 17.

358. *Id.*

359. *Id.* at 18.

360. *Id.* at 24 (internal citations omitted).

361. See Brief of the Human Rights Campaign Fund et al. as Amici Curiae in Support of Respondents, at 30, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) [hereinafter HRCF Brief].

362. *Id.* at 8 (quoting *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982)).

HRC also cited *Cleburne* on the risk that laws based on a characteristic that is “irrelevant to an individual’s ability to perform or participate in society” are “unlikely to be relevant to the achievement of any legitimate state interest.”<sup>363</sup> Instead, “laws based on such characteristics ‘are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others.’”<sup>364</sup>

The HRC Brief detailed a history of discrimination, intensifying in the 1950s but continuing so that, even in the 1990s, “most gay men and lesbians today continue to opt for silence and hiding of their true identities.”<sup>365</sup> Gay people also experience “political powerlessness,” in part because they must “avoid prejudice” by keeping sexual orientation secret.<sup>366</sup> The lengthy history of discrimination against homosexuals in the United States, HRC argued, causes a majority of gays and lesbians to stay in the closet because they fear both public and private discrimination.<sup>367</sup> Thus, these various “red flags indicate to the Court that the ordinary processes of governmental decision making are suspect when applied to classifications based on sexual orientation.”<sup>368</sup>

The National Bar Association (NBA) brief argued that Amendment 2 was unconstitutional because “its actual purpose – to target for harm a politically unpopular group – is based on irrational fear and hatred of that group.”<sup>369</sup> It analogized the fears incited by CFV to “the irrational fear and hatred that were found to be to be constitutionally impermissible in *Moreno* and *Cleburne*.”<sup>370</sup> The NBA brief looked to “the campaign statements and materials of the Amendment’s supporters” to provide evidence that “irrational fear and hatred of homosexuals” prompted passage of Amendment 2.<sup>371</sup>

The NBA brief also suggested that the “actual purpose” of Amendment 2 can be “found in the climate of intolerance surrounding the issue homosexuality in Colorado.”<sup>372</sup> It offered examples from the campaign literature of CFV, the drafter and “a primary promoter” of Amendment 2:

CFV distributed pamphlets containing unsubstantiated allegations that exacerbated an irrational fear and hatred of homosexuals. Certain CFV literature contained the spurious claim that “73 percent of homosexuals admit having sex with minors and 28 percent admit having sex with more than 1,000 partners . . . [and] most gays urinate or defecate on their partners.” . . . Other CFV literature claimed, “gays ‘are 12 times as likely’ as heterosexuals to molest children and are out to ‘destroy’ the American family . . . ; and that “gays [are] sex-crazed, disease-ridden perverts out to destroy the traditional family . . . Another group

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363. *Id.* at 7 (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985)).

364. *Id.* at 7–8 (quoting *Cleburne*, 473 U.S. at 440).

365. *Id.* at 14.

366. *Id.* at 18.

367. *Id.*

368. *Id.* at 15.

369. Brief for National Bar Ass’n as Amicus Curiae Supporting Respondents at 5, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) [hereinafter NBA Brief].

370. *Id.* at 7.

371. *Id.* at 6.

372. *Id.*

supporting Amendment 2, Focus on the Family, issued similar disinformation claiming that “homosexual men ingest, on the average, the fecal material of 23 different men per year.” . . .<sup>373</sup>

The NBA brief also cited to statements made at a CFV-sponsored conference in Colorado Springs to support its claim that the “actual purpose” of Amendment 2 was “to target for harm” a “politically unpopular group,” homosexual citizens.<sup>374</sup> At this conference a Focus on the Family executive stated that “the gay agenda has all the elements of that which is truly evil.”<sup>375</sup> A goal of a “written course of action outlined by conference participants was to [e]xpose that homosexuality . . . [is] . . . criminal. Homosexuals are [the] largest consumers of pornography. Hound-Hound-Hound. Drive it home!!!”<sup>376</sup> The NBA further detailed “threats and acts of persecution against homosexual citizens” before and after passage of Amendment 2.<sup>377</sup> It further argued that the “irrational and unsubstantiated fear of homosexuals” that motivated Amendment 2 was “similar to and . . . even more alarming than [that] found to be constitutionally impermissible in *Moreno* and *Cleburne*.”<sup>378</sup>

The brief submitted by the American Bar Association (ABA) similarly used *Cleburne* and *Moreno* to anchor its argument that the purposes Amendment 2 were said to advance were “illegitimate” and “enshrin[ed] private prejudices in the state constitution.”<sup>379</sup> The ABA used examples from CFV’s campaign literature to illustrate that proponents of Amendment 2 “played upon popular myths equating gay men with child molesters to fuel their campaign,” for example, with literature “urging voters “to say ‘no’ to sexual perversion with children - vote YES! on Amendment 2!”<sup>380</sup> The ABA cited to evidence introduced at trial debunking these spurious representations of “pedophilia” as “an accepted part of the homosexual community.”<sup>381</sup> The ABA concluded that “if the purported state interest in protecting children has any relevance to this case, it is in exposing the fear- and prejudice-based appeals used by supporters of Amendment 2 to provoke a visceral, negative reaction.”<sup>382</sup> (Indeed, both the APA brief and the National Education Association brief worry that, in this climate, homosexual individuals, and adolescents in particular, will continue to hide their sexual orientation and internalize societal homophobia as self-hatred and thus be psychologically damaged by the stigma.<sup>383</sup>)

The ABA Brief concludes that *Cleburne* shows that “mere negative

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373. *Id.* (internal citations omitted)

374. *Id.* at 7.

375. *Id.* at 6.

376. *Id.* at 7.

377. *Id.*

378. *Id.*

379. Brief of the American Bar Ass’n as Amicus Curiae in Support of Respondents at 3, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) [hereinafter ABA Brief].

380. *Id.* at 16.

381. *Id.* at 17.

382. *Id.*

383. See APA Brief, *supra* note 345, at 24; Brief of National Education Ass’n et al. as Amici Curiae in Support of Respondents, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) [hereinafter NEA Brief].

attitudes,' "'private biases'" and 'vague, undifferentiated fears' cannot justify government's disparate treatment of different groups of citizens."<sup>384</sup> The role of such "fearmongering" concerning "pedophilia" and of other "false notions about gay people" in enacting Amendment 2 renders its classification based on homosexuality "constitutionally illegitimate."<sup>385</sup>

## 2. Promoting Morality and (Heterosexual) Marriage and the Family

Petitioners and their amici argued that Amendment 2 served a legitimate purpose - promoting morality and traditional marriage. Conversely, the ABA argued that the purposes asserted for Amendment 2 "sanctify private prejudice."<sup>386</sup> The brief pointed out that at trial, petitioners asserted that Amendment 2 served the State interest in the "well-being of our children" by "recognizing heterosexual marriage as the foundation of a stable family unit," or, in the alternative, by "help[ing] to avert unnecessary suffering for those [young people] who may be influenced relative to their sexual preference by not lending government's voice to the debate."<sup>387</sup> The ABA countered that Amendment 2 "says nothing about marriage or families;" nor does it lend government's "voice" to any "public discussion related to 'unnecessary suffering.'" The trial court, in fact, found that "[i]f the . . . [proffered] interest is in protecting the psychological well-being of homosexual youth, the Court is unable to discern how allowing discrimination against them by virtue of the Colorado Constitution promotes their welfare."<sup>388</sup>

The State indisputably has "a legitimate interest in protecting children," the ABA Brief acknowledged, but "Amendment 2 in no way addresses that concern."<sup>389</sup> Instead, "proponents of the measure exploited the very real problem of child abuse in order to play upon popular fears and myths about gay men."<sup>390</sup> Similarly, the NBA brief contended that CFV's morality arguments - that homosexual individuals are trying to push a dangerous and hypersexual gay agenda on children and the traditional family - and the enactment of Amendment 2 reflected irrational fears and incited violence and hatred.<sup>391</sup>

The ABA brief also took up the argument that the "implicit endorsement of homosexuality fostered by laws granting special protections could undermine the efforts of some parents to teach traditional moral values," and "that Amendment 2, therefore, seeks to protect freedom within the family."<sup>392</sup> The

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384. ABA Brief, *supra* note 379, at 17-18.

385. *Id.* at 18.

386. *Id.* at 15.

387. *Id.* at 16 (citing Def. Trial Brief at pp. 73, 75). The ABA observed that that rationale "has apparently been abandoned by the state." *Id.* at 15.

388. *Id.* at 16 (quoting Petition for Writ of Certiorari, at C-13 to -14, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039)).

389. *Id.* at 15.

390. *Id.* at 15-16 (arguing that proponents of the measure "repeatedly and spuriously represented" that homosexuality was bound up with pedophilia).

391. NBA Brief, *supra* note 369, at 7.

392. ABA Brief, *supra* note 379, at 23 (quoting Brief for Petitioner at 45-46, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039)).

ABA brief pointed out that “neither Amendment 2 nor the laws it prohibits affect the freedom of parents, whatever their values, to teach and raise their children as they see fit.”<sup>393</sup>

The more basic point the ABA asserted about antidiscrimination law and morality comes from the Colorado Supreme Court’s opinion: that “[A]ntidiscrimination laws make no assumptions about the morality of protected classes – they simply recognize that certain characteristics, be they moral or immoral – have no relevance in enumerated commercial contexts.”<sup>394</sup> Thus, those laws “do not imply an endorsement of any particular sexual orientation and practices.”<sup>395</sup> Further, supporters of Amendment 2 testified that it made “no moral statement” and expressed “no moral judgment on homosexuality,” but instead was a “plain injunction against certain types of governmental action.”<sup>396</sup>

To be sure, these arguments about the expressive value of antidiscrimination law and Amendment 2 are in tension with arguments made by some of petitioners’ amici (discussed above) that Amendment 2 promoted and preserved public morality by expressing the consensus that homosexuality is immoral and that heterosexual marriage is favored.

Some amici also disputed the argument that homosexuality is a matter of choice, and hence, subject to moral judgment. For example, both the APA and HRC briefs contended that, even if some voters find homosexual sodomy to be immoral, sodomy does not define the suspect class of homosexuals.<sup>397</sup> In other words, homosexual identity is immutable, not based solely on behavior in which an individual chooses to engage.<sup>398</sup>

### 3. Religious Liberty

Various amici took on the argument put forth by petitioners and their amici that Amendment 2 protects religious liberty. Notably, some religious organizations filed amicus briefs in support of respondents. An amicus brief filed by the U.S.A. Presbyterian Church acknowledged that the Church rejects homosexuality as sinful, but refuses to allow other religious organizations to speak on its behalf.<sup>399</sup> The Church argued that Amendment 2 violates the Establishment Clause because it permits *government* to make decisions affecting religious belief on the behalf of religious organizations and individuals, while also improperly intruding into the private matters of homosexuals’ romantic

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393. *Id.* at 23–24.

394. *Id.* (quoting Petition for Writ of Certiorari at B-15, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039)).

395. *Id.* at 24 (quoting Petition for Writ of Certiorari at B-15, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039)).

396. *Id.* (quoting Brief for Petitioners at 43 n.65, *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) (No. 94-1039)).

397. See ABA Brief, *supra* note 379, at 21; HRCF Brief, *supra* note 361, at 28–30.

398. ABA Brief, *supra* note 379, at 16–17; HRCF Brief, *supra* note 361, at 21.

399. Brief of Amicus Curiae of James E. Andrews as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) in Support of Respondents at 1, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) [hereinafter Presbyterian Brief].

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relationships.<sup>400</sup> The Church cited its own historical tradition of “firmly and consistently recogniz[ing] and support[ing] Biblical principles of justice and equity for all persons, including homosexual persons, as demonstrated by Jesus who welcomed and loved all.”<sup>401</sup>

The American Friends Service Committee et al. brief (AFSC) also rejected discrimination against homosexuals as a universal religious belief, pointing out that such discrimination was “contrary to” religious amici’s “religious beliefs.”<sup>402</sup> Amendment 2 was unconstitutional under the Establishment Clause, AFSC argued, because it “constitutes State endorsement of one set of religious beliefs over all others.”<sup>403</sup> Further, while petitioners may under their own right to freedom of expression find homosexuality objectionable, the Free Exercise Clause does not permit them to “employ the authority of the State of Colorado to carry out that belief.”<sup>404</sup> The AFSC argued that, rather than defending individuals’ religious beliefs, Amendment 2 “creates a special right for . . . anyone . . . to discriminate against another targeted group of citizens they do not like.”<sup>405</sup>

The AFSC brief also argued that the express exemptions “for religiously-held beliefs” included in some antidiscrimination laws “demonstrate that there is a way to protect the religious freedom of Amendment 2’s sponsors without either promoting discrimination or inhibiting the religious freedom of others who do not share the views of Amendment 2’s sponsors.”<sup>406</sup> AFSC further asserted that homosexual Coloradans themselves are having their religious freedom rights violated by Amendment 2 because they refuse to adhere to the religious beliefs of CFV (the drafter of Amendment 2).<sup>407</sup>

The normative good of homosexual relationships featured in the friend of the court brief filed by the United Methodists for Gay, Lesbian and Bisexual Concerns and several other religious groups.<sup>408</sup> Strikingly, they defined loving homosexual relationships as “intimate to the degree of being sacred” just as heterosexual marriages are considered to be sacred by religious institutions.<sup>409</sup> Amici explained they grounded their advocacy for gay rights in the same religious teachings that inspired abolition and the civil rights movement and called human rights “the civic religion of the United States,” guaranteeing “equal dignity of every person.”<sup>410</sup>

The State of Colorado and its amici, recall, contended that

400. *Id.* at 2.

401. *Id.* at 4.

402. Brief Amicus Curiae of the American Friends Service Committee et al. in Support of Respondents at 1, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) [hereinafter AFSC Brief].

403. *Id.*

404. *Id.* at 19.

405. AFSC Brief, *supra* note 402, at 25; *see also infra* Part II.E.5.

406. AFSC Brief, *supra* note 402, at 21.

407. *Id.* at 10.

408. Brief for Amici Curiae of Affirmation: United Methodists for Gay, Lesbian and Bisexual Concerns et al. as Amici Curiae in Support of Respondents at 2, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) [hereinafter United Methodists Brief].

409. *Id.* at 8 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

410. *Id.* at 11.

antidiscrimination laws threatened religious and associational freedom and that Amendment 2 protected such constitutional freedom.<sup>411</sup> The ABA brief challenged petitioner's argument that "anti-discrimination laws interfere with private decisions not to employ or rent to others on religious grounds and with personal choices in forming intimate relationships."<sup>412</sup> Petitioners, the ABA countered, fail to articulate any explanation why, from among the many reasons religious people might not wish to employ or rent to or serve certain people, the state should single out lesbians, gay men, and bisexuals, "when the proffered government interest would implicate many other groups as well."<sup>413</sup> For example, "far from increasing religious and associational freedoms in general, Amendment 2 privileges solely those religious views and associational decisions that reflect private bias against lesbians, gay men, and bisexuals."<sup>414</sup> But the constitution "'places no value on discrimination,' . . . and while '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections.'"<sup>415</sup> This argument by the ABA shows the intertwining of religious and associational freedom claims and provides a good transition to how amici responded to freedom of association rationales for Amendment 2.

#### 4. Freedom of Association

The impermissibility of enlisting the state to further private preferences not to associate is a strong theme in the amici briefs submitted in support of respondents. *Palmore* and *Cleburne* feature prominently in these arguments. The ABA brief observed that petitioners contend that "eliminating anti-discrimination provisions that compel landowners and religious institutions to open their facilities to homosexuals and bisexuals is a rational means of *protecting* the legitimate *prevailing preferences* of the State's population."<sup>416</sup> It also noted that petitioners identify the goal of "the preservation of traditional social norms."<sup>417</sup> The ABA responded by arguing that serving "prevailing preferences" to avoid associations with gay men, lesbians, and bisexuals is not a permissible governmental objective because, while "[p]rivate biases may be outside the reach of the law, . . . the law cannot, directly or indirectly, give them effect."<sup>418</sup> Thus, "[a]lthough the majority may indeed dislike and not wish to associate with gay and bisexual citizens, such prevailing attitudes cannot be used to justify government action."<sup>419</sup> Similarly, the NBA brief argued that Amendment 2

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411. See *infra* Part II•D-2 for discussion of CLS Brief.

412. ABA Brief, *supra* note 379, at 22.

413. *Id.* at 23.

414. *Id.*

415. *Id.* (quoting *Runyon v. McCrary*, 427 U.S. 160, 176 (1976)).

416. *Id.* at 18 (quoting Petition for Writ of Certiorari at 13, *Romer v. Evans* at 13, 517 U.S. 620 (1996) (No. 94-1039) (emphasis in ABA Brief)).

417. *Id.* (quoting Petition for Writ of Certiorari at 47, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) (emphasis in ABA Brief)).

418. *Id.* at 19 (citing *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

419. *Id.* at 18.

“unconstitutionally places the state’s power, authority and sanction behind acts of private discriminations.”<sup>420</sup>

The ABA brief further argued: “Surely, under *Cleburne*, a zoning decision ‘fencing out’ lesbians, gay men, and bisexuals would not be defensible as a means of protecting prevailing preferences;” if that is so, “then fencing them off from the protection of anti-discrimination laws cannot be defended on that basis, either.”<sup>421</sup> The ABA stressed that this constitutionally impermissible fencing out may stem not only from antipathy but also from prejudice rooted in religious and moral beliefs:

Whether prevailing negative attitudes about a group arise from predominant religious beliefs, moral sentiment, tradition or mere habit, or simply an unthinking groundswell of antipathy, such attitudes against a disfavored class are an improper basis for adverse treatment by the state. . . . Indeed, experience teaches that prejudice frequently is clothed in religious and moral terms.<sup>422</sup>

This formulation in the ABA brief has parallels in the marriage equality litigation concerning not only DOMA but also Prop 8.<sup>423</sup>

Public entities who filed amicus briefs raised another concern: following Amendment 2, they would not be permitted to protect individuals from discrimination based on sexual orientation even if they wanted to do so.<sup>424</sup> For example, the amicus brief filed by several U.S. cities (among them Atlanta, Boston, Madison, and New York) argued that, under the Equal Protection Clause, “a state may not enshrine in its constitution a positive privilege for its employees to discriminate with impunity in the performance of their duties.”<sup>425</sup> These cities expressed concern that, because Coloradans cannot be protected from discrimination based on sexual orientation, government officials in Colorado who dislike homosexuals will be encouraged to discriminate against them because they know they can get away with doing so.<sup>426</sup>

Furthermore, the Colorado Bar Association argued that Amendment 2 allows a majority of Coloradans to “fix the very *structure* of government to ensure its own perpetual dominance or at least the perpetual subordination of a disfavored minority.”<sup>427</sup> The Framers intended to “mediate between majority and minority interests . . . [and] to structure a political process that would be duly responsive to each.”<sup>428</sup>

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420. NBA Brief, *supra* note 369, at 8 (citing *Palmore*).

421. ABA Brief, *supra* note 379, at 19 (internal citations omitted).

422. *Id.* (citations omitted).

423. See discussion *infra* Part III.

424. Brief for City of Aspen and City Council of Aspen as Amici Curiae in Support of Respondents at 15, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) [hereinafter Aspen Brief].

425. Brief of the Cities of Atlanta, Baltimore, et al. as Amici Curiae in Support of Respondents at 9, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) [hereinafter Atlanta Brief].

426. See *id.* at 10 (“Amendment 2 seeks to *compel* governments to give effect to the biases of their own employees. Where such employees have been vested with significant discretion, their authority to employ bias arbitrarily is particularly pernicious.” (emphasis in Atlanta Brief)).

427. Brief of the Colorado Bar Ass’n et al. as Amici Curiae in Support of Respondents at 8, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) (emphasis in original) [hereinafter CBA Brief].

428. *Id.*

Finally, the amicus brief filed by The State of Oregon, six other states, and the District of Columbia condemned the “sweep” of Amendment 2 and its “blanket endorsement of discrimination,” noting that the Amendment “indiscriminately lays waste to an entire landscape” of protections against discrimination.<sup>429</sup> The brief noted that while avoiding “interfering with the religious, moral, or associational interests of private citizens,” are, “[i]n the abstract,” rational objectives, the line drawn by Amendment 2 – divesting “all governmental branches of the authority to respond to *any* problem of discrimination based on gay, lesbian, or bisexual status” – was not rational.<sup>430</sup> Instead, “the stated goal” of the law “becomes so attenuated as to render the focus on those characteristics [defined in Amendment 2] irrational, arbitrary, or invidious.”<sup>431</sup>

#### 5. Special Rights Versus Equal Rights/Clash of Rights

While petitioners’ amici contended Amendment 2 prevented homosexuals from obtaining “special rights,” respondents’ challenged this “special rights” frame. They countered that Amendment 2 denied homosexuals equal rights and equal protection under the law and, if anything, gave “special rights” to public officials and private persons to *discriminate*. For example, the City of Aspen argued that individuals’ access to participation in the political process is a fundamental right. Since Amendment 2 curtails that right for homosexuals only, repealing the amendment would serve merely to provide all Coloradans with the chance at equal rights.<sup>432</sup> What is more, the amicus brief filed by the City of Atlanta, nine other cities, and the National Institute of Municipal Law Officers, argued, Amendment 2 *creates* special rights rather than repeals them, since it creates “a positive power and privilege to discriminate against gay, lesbian and bisexual individuals solely on the basis of prejudice.”<sup>433</sup>

The Colorado Bar Association brief argued that “government may not place extra obstacles in the path of any particular group of citizens in seeking to advance their political interests.” This principle, it continued, “appeals to the very idea of equality of political opportunity that democratic government and equal protection of the laws embody.”<sup>434</sup>

Some amici argued for more careful judicial scrutiny because voter initiatives such as Amendment 2 were particularly problematic because they were not subject to representation and separation of power filters in the same way that bills passed by the legislature are and thus are emotionally rather than rationally driven.<sup>435</sup> Initiatives, the Gay and Lesbian Lawyers of Philadelphia

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429. Brief of Amici Curiae States of Oregon et al. in Support of Respondents at 4, 5, 14, *Romer v. Evans*, 517 U.S. 620 (1996), (No. 94-1039) [hereinafter Oregon States Brief].

430. *Id.* at 28.

431. *Id.* at 29 (citing to *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985)).

432. Aspen Brief, *supra* note 424, at 15-18.

433. Atlanta Brief, *supra* note 425, at 4.

434. CBA Brief, *supra* note 427, at 14 (citations omitted).

435. Brief of the Gay & Lesbian Lawyers of Philadelphia, as Amicus Curiae in Support of Respondents at 13-16, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039).

argued, leave “relatively little time for reflection and refinement of particular positions” and “oversimplify[] the issues and appeal[] to the electorate’s worst instincts.”<sup>436</sup>

#### 6. Race and Gender Discrimination and the Analogy to Discrimination on the Basis of Sexual Orientation: Which Level of Review?

Amici took a variety of approaches to the standard of review question. While petitioners’ amici argued that homosexuality was distinct from race and gender and did not warrant treatment as a suspect class or inclusion in antidiscrimination laws, several amicus briefs for respondent stressed analogies among forms of discrimination and similarity in the groups’ need for protection. For example, the brief of the United Methodists for Gay, Lesbian and Bisexual Concerns et al. compared the gay rights movement directly to the civil rights movement, arguing that human rights mandates equal protection for all classes of individuals.<sup>437</sup> Indeed, the brief compared Amendment 2 and the *Bowers v. Hardwick* decision with the “exclusion ‘in law’” codified by the *Dred Scott v. Sanford* decision:

As in *Dred Scott*, the only purported escape from the equality principle would have been a finding of the inferiority of gay people, of their capacity to be loving human beings, and of their intimate relationships of companionship and family. . . . Branded with this Court’s imprimatur [in *Bowers*] of criminality; immorality; and in a word, inferiority, gay people were robbed of an essential part of what it means to be a human being of full and equal dignity.<sup>438</sup>

This brief seems strangely contemporary, given the role of “dignity” in the Supreme Court’s trajectory from *Bowers* to *Lawrence* to *Windsor*.

The NAACP Legal Defense and Educational Fund et al. brief also utilized analogy, comparing the worries of proponents of Amendment 2 about “militant gay aggression” with an earlier societal prejudice “that Jews, who in fact then faced widespread and open discrimination, were somehow covertly exercising control over the nation’s policies.”<sup>439</sup> The Asian American Legal Defense and Education Fund et al. argued that even if Amendment 2 is different from historical racial discrimination, it may just be a newer version of the same type of animus-driven discrimination and therefore is just as constitutionally impermissible.<sup>440</sup> Moreover, it argued that Amendment 2 itself *makes* homosexual individuals a suspect class when it deprives them of the benefit of equal protection “by prohibiting courts and legislature from rectifying discrimination”

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436. *Id.* at 14.

437. United Methodists Brief, *supra* note 408, at 10-12.

438. *Id.* at 11 (citing *Scott v. Sandford*, 60 U.S. 393, 422 (1856)).

439. Brief for the NAACP Legal Defense & Educational Fund, Inc. et al. as Amici Curiae in Support of Respondents at 15, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039).

440. Brief for Amicie Curiae Asian American Legal Defense & Education Fund et al. in Support of Respondents, *Romer v. Evans*, at 10, 517 U.S. 620 (1996) (No. 94-1039) [hereinafter Asian American Brief] (“That this case does not involve racial discrimination says nothing about whether it involves discrimination in the political process.”).

against them.<sup>441</sup> It thus creates “a discrete and insular minority in Colorado whose members are uniquely prohibited from seeking enforcement of the Fourteenth Amendment in their own State.”<sup>442</sup> Because judges are uniquely suited to protect discrete and insular minorities against majoritarian discrimination, the brief continued, homosexual Coloradans must at least be able to access the courts to vindicate their rights following the passage of Amendment 2.<sup>443</sup>

The American Association on Mental Retardation et al. (AAMR) brief argued that neither homosexual individuals nor individuals with disabilities can be characterized as merely “identifiable groups,” as the Colorado Supreme Court has done.<sup>444</sup> Rather, both homosexuals in this case and the mentally retarded in *Cleburne* “were singled out by the state for discriminatory treatment because of who they are, and not because of a political position they have taken or a club they have chosen to join.”<sup>445</sup> Those who have been singled out for such invidious discrimination, but who the Court has not designated as a suspect class, “are in particular need of judicial protection from irrational laws.”<sup>446</sup> The AAMR also critiqued the tier system of Equal Protection analysis because it has left out so many individuals and groups who have experienced invidious discrimination.<sup>447</sup>

The Oregon states brief argued that, even if sexual orientation is not a suspect class, Amendment 2 violates Equal Protection by interfering with states’ “‘compelling’ interest in public accommodation laws addressed to non-suspect as well as suspect groups.”<sup>448</sup> Amici States found this particularly disturbing because they have found that “bias crimes result in particularly great individual and societal harm because they ‘provoke retaliation crimes, inflict distinct emotional harms on their victims, and incite community unrest’” and thus state officials need to be able to enact legislation specifically targeting hate crimes in order to protect public safety and morale.<sup>449</sup>

Some amici stressed that the Court could find Amendment 2 unconstitutional even without moving to heightened scrutiny. Thus, Oregon and other State amici submitted that Amendment 2 was “illegitimate” under *any* level of scrutiny and found *Moreno* and *Cleburne* apt in explaining the policy behind the law was nothing more than “discrimination for discrimination’s

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441. *Id.* at 25.

442. *Id.* at 26.

443. *Id.* at 26-27.

444. Brief of the American Ass’n on Mental Retardation et al. in Support of Respondents at 16, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039).

445. *Id.* at 17 (arguing that, despite the holding in *Bowers v. Hardwick* refusing to invalidate state anti-sodomy laws, classifications based on sexual orientation require strict scrutiny because homosexuals are not defined by their sexual behavior).

446. *Id.*

447. *See id.* at 4 (“Petitioners’ conceptualization of the tiers as the entirety of equal protection law, rather than as a tool, would also mean that the protection of the equal protection clause will increasingly be reserved for those who need it least.”).

448. Oregon States Brief, *supra* note 429, at 19.

449. *Id.* at 19-20 (internal citations omitted).

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sake.”<sup>450</sup> The brief asserted that Colorado’s justifications for the law—to have less government regulation, to have more uniform statewide laws, or to avoid interfering with the religious, moral or associational interests of private citizens—were not actually served by Amendment 2.<sup>451</sup> Indeed, the brief questioned the legitimacy of this last state interest since it seemed to be merely state-sanctioned discrimination.<sup>452</sup>

Finally, in a brief that “ended up having a profound influence on the Court’s understanding of the case,”<sup>453</sup> Laurence Tribe and several constitutional law professors maintained that Amendment 2 was a “*per se* violation of the Equal Protection Clause” because:

[A] state’s constitution *by definition* denies equal protection of the laws when it decrees that homosexuality, or indeed *any* identifying characteristic the state uses to select a person or class of persons from the population at large, may never be invoked as the basis of any claim of discrimination by such persons under any present or future law or regulation enacted by the state, its agencies, or its localities.<sup>454</sup>

This brief put the entire issue of suspect classifications to the side, since homosexuals need not be a suspect classification to warrant the basic protection Equal Protection requires. Such a boldface violation of the Equal Protection Clause failed even rational basis review. The brief used the language of “outlawry” to explain the constitutional evil:

[T]he command of equal protection extends to every person within the state’s jurisdiction, regardless of what that person might have done, and certainly regardless of what that person might be inclined to do. Outlawry may be consistent with some regimes, but it is not consistent with the regime contemplated by the Fourteenth Amendment. . . . Amendment 2 does not literally declare any class of citizens to be *outlaws*; that is, it does not completely strip any set of persons of *all* legal rights, thereby placing them in all respects outside the law. . . . It does, however, deprive them of *equal* protection, and it is this deprivation that should be deemed fatal under the Equal Protection Clause.<sup>455</sup>

As I will now discuss, this notion of “outlawry” finds echoes in the *Romer* majority’s reference to Amendment 2 making a class a “stranger to its laws.”

#### F. The U.S. Supreme Court Rules: *Romer v. Evans*

What is striking about the U.S. Supreme Court’s opinion in *Romer v. Evans*

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450. *Id.* at 14-15.

451. *See id.* at 8-16 (noting that “Amendment 2 is invalid because it lacks a legitimate state objective.”).

452. *See id.* at 29 (noting that “when a law focuses on unpopular personal traits, there is a point at which the law’s loose fit to its purported objectives provides no real confidence that it rests on anything other than prejudice or private bias.”).

453. BALL, *supra* note 27, at 131.

454. Brief of Laurence H. Tribe et al. as Amici Curiae in Support of Respondents at 3, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) (emphasis in original).

455. *Id.* at 10-11 (emphasis in original) (citations omitted).

after reading the state court opinions and all the friends of the court briefs filed in the Supreme Court is how comparatively little attention the Court gives to the campaign for Amendment 2, the rationales asserted for it, and the Colorado courts' evaluation of them. It is also striking how confidently and matter-of-factly the Court was able to rule that Amendment 2 was simply constitutionally out of bounds. As noted above, Justice Kennedy opened the majority opinion with Justice Harlan's admonition that "the Constitution 'neither knows nor tolerate classes among citizens.'"<sup>456</sup> He ended with the Court's often-quoted conclusion that: "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws."<sup>457</sup>

What the Court did not do was to adopt the Colorado Supreme Court's rationale for striking down Amendment 2 (based on that court's reading of U.S. Supreme Court precedents), that it "infringed the fundamental right of gays and lesbians to participate in the political process."<sup>458</sup> It also did not adopt that court's holding that Amendment 2 was subject to strict scrutiny, requiring Colorado to demonstrate a compelling state interest for violating a fundamental right.<sup>459</sup>

One common theme, nonetheless, in both high court opinions is that Amendment 2 "singled out" a class in a way that was constitutionally problematic. Justice Kennedy wrote that a central principle of Equal Protection is that "government and each of its parts remain open on impartial terms to all who seek its assistance." Equal protection "'is not achieved through indiscriminate imposition of inequalities.'"<sup>460</sup> Thus, "[r]espect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare."<sup>461</sup> Perhaps reflecting the influence of the Tribe amicus brief, Kennedy stated that a law like Amendment 2, which "identifies persons by a single trait and then denies them protection across the board" is "not within our constitutional tradition."<sup>462</sup> The Court also rejected the argument that Amendment 2 simply denies homosexuals "special protection," or "special rights," countering that "the amendment imposes a special disability upon those persons alone."<sup>463</sup>

A key issue in the DOMA litigation in the First and Second Circuits was whether *Romer* stands for something other than deferential rational basis review, whether it be called "'rational basis plus or intermediate scrutiny minus."<sup>464</sup>

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456. *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissenting opinion), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

457. *Id.* at 635.

458. *Id.* at 625-26 ("We . . . now affirm the judgment, but on a rationale different from that adopted by the State Supreme Court.").

459. *Id.* at 635.

460. *Id.* at 633.

461. *Id.* (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950)).

462. *Id.*

463. *Id.* at 631.

464. See *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012) (quoting counsel for BLAG's witty characterization).

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*Romer* finds Amendment 2 invalid under both forms of rational basis review. First, Justice Kennedy's opinion articulated the general rule for assessing whether a law offends Equal Protection: "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."<sup>465</sup> He continued: "Amendment 2 fails, indeed defies, even this conventional inquiry." He explained that "the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation."<sup>466</sup> And "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."<sup>467</sup>

Justice Kennedy then stated that "Amendment 2 confounds this normal process of judicial review,"<sup>468</sup> where "a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous."<sup>469</sup> In those cases:

[T]he laws challenged . . . were narrow enough in scope and grounded in a sufficient factual context for us to ascertain some relation between the classification and the purpose it served. By requiring that the classification bear a rational relationship to an independent and *legitimate* legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.<sup>470</sup>

Amendment 2, however, is "at once too narrow and too broad."<sup>471</sup> As quoted above, Justice Kennedy highlighted how Amendment 2 "identifies persons by a single trait and then denies them protection across the board," a "resulting disqualification of a class of persons from the right to seek specific protection from the law [that] is unprecedented in our jurisprudence."<sup>472</sup> Justice Kennedy then cited earlier Supreme Court precedent, in a passage that appears in the *Windsor* briefs and in his majority opinion: "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."<sup>473</sup> He observed that Amendment 2 departs from "our constitutional tradition," in which "laws singling out a certain class of citizens for disfavored legal status or general hardships are rare."<sup>474</sup> This part of the Court's opinion supports reading *Romer*

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465. *Romer*, 517 U.S. at 631.

466. *Id.* at 632.

467. *Id.*

468. *Id.* at 633.

469. *Id.* at 632 (citations omitted).

470. *Id.* at 632-33 (emphasis added) (citing *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 181 (Stevens, J., concurring)).

471. *Id.* at 633.

472. *Id.*

473. *Id.* (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

474. *Id.*

as calling for the notion that courts should take a closer look when facing certain type of class-based legislation.

Justice Kennedy's opinion returned to the issue of animus, on the heels of this call for "careful consideration" of laws with "discrimination of an unusual character." He stated: "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."<sup>475</sup> In support he cited to *Moreno's* language about equal protection requiring that a "'bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."<sup>476</sup> This language, henceforth, will be a staple in arguments about classifying on the basis of sexual orientation, including in the DOMA litigation.

The Court devoted one paragraph to considering and finding constitutionally inadequate the State's proffered rationales. This passage warrants quotation in full precisely because of the economy of words, given the extensive discussion in the amicus briefs discussed above about whether the rationales offered for Amendment 2 were constitutionally sufficient:

The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection clause does not permit. "[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment . . ." <sup>477</sup>

While the Court acknowledged the religious liberty and freedom of association rationales, it does not mention the argument made by Colorado and many of its amici that Amendment 2 permissibly, under *Bowers v. Hardwick*, reflects moral disapproval of homosexuality and protects morality and the family. That theme is central in Justice Scalia's memorable dissent, in which he accused the majority of mistaking "a Kulturkampf for a fit of spite," and contended that Amendment 2 was surely constitutional as a "modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."<sup>478</sup> Colorado long ago had decriminalized sodomy, Justice Scalia pointed out. How, he asked, could the Court say "homosexuality cannot be singled out for unfavorable treatment," when just ten years earlier, in *Bowers*—a case the majority nowhere mentions, let alone overrules — it *upheld* a state law imposing

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475. *Id.* at 634.

476. *Id.* (citing *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

477. *Id.* at 636. (citing *Civil Rights Cases*, 109 U.S. 3, 24 (1883)).

478. *Id.* (Scalia, J., dissenting).

criminal punishment on homosexuals for sodomy.<sup>479</sup> In Scalia's words (similar to those in CWA's amicus brief): "If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct."<sup>480</sup> What's more: "Surely . . . the only sort of 'animus' at issue here [is] moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*."<sup>481</sup>

Amendment 2, Justice Scalia contended, was an example of how a society that eliminated criminal punishment could nonetheless continue to express "moral and social disapprobation of homosexuality," and, in doing so at the state level, "counter" successfully the "disproportionate political power" of homosexuals who resided in "disproportionate numbers" in urban areas.<sup>482</sup> Here, Scalia's dissent echoes claims by amici about the political power of homosexuals. Scalia painted a picture of Coloradan voters exposed to "homosexuals' quest for social endorsement" happening not just in places like New York, Los Angeles, and San Francisco, but right there in the cities of Colorado.<sup>483</sup>

Finally, Scalia accused the majority of taking sides in the culture wars with the knights, "more specifically with the Templars, reflecting the views and values of the lawyer class" - rather than with the "villeins" - evidently the people of Colorado who passed Amendment 2 "to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans."<sup>484</sup> The Court has taken sides, he contended, not only by "inventing a novel and extravagant constitutional doctrine to take the victory away from traditional forces, but even by verbally disparaging as bigotry adherence to traditional attitudes."<sup>485</sup> This accusation that the Court has taken sides in a cultural war and called the losing side bigots - and worse - recurs in Scalia's dissent in *Windsor*, as I will discuss in Part III.G.3.

### G. Reactions to *Romer v. Evans*

Across the ideological spectrum, activists and commentators immediately recognized that the Court's decision in *Romer* was a "watershed" and presented a "new landscape" on which future battles over civil rights for gay men and lesbians would occur.<sup>486</sup> As Keen and Goldberg report, Amendment 2 had "spawned a series of copycat measures all over the country;" one immediate effect of the *Romer* ruling was to "edge[] to a close this era of gay politics in which popular initiatives took direct aim at gay people's ability to obtain

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479. *Id.* (citing to *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003)).

480. *Id.* at 641.

481. *Id.* at 644.

482. *Id.* at 645, 647.

483. *Id.* at 646.

484. *Id.* at 653.

485. *Id.* at 652.

486. KEEN AND GOLDBERG, *supra* note 12, at 235.

protection against discrimination.”<sup>487</sup>

*Romer* drew sharp criticism from conservative critics for usurping the political process, limiting the use of law to preserve traditional morality, and possibly opening the door to judicial imposition of same-sex marriage. The Court’s attribution of animus to Amendment 2 drew particular ire. In 1996, in a famous symposium in *First Things*, Charles Colson warned of “kingdoms in conflict,” and that “the Court in *Romer v. Evans* effectively branded a bigot any citizen who considers homosexuality immoral.”<sup>488</sup> He predicted that, under *Romer*, the Court would “easily find no compelling state interest in confining marriage to a man and a woman.”<sup>489</sup> He also, as he did later in the Manhattan Declaration, discussed the problem of what Christians should do when facing unjust laws.<sup>490</sup>

Hadley Arkes, a conservative social scientist, contended that Amendment 2 simply sought to ensure that “coercions of the law would not be used to punish those people who bore moral objections to homosexuality,” which the Court now characterized as animus or blind prejudice.<sup>491</sup> *Romer*, Arkes argued, pronounced “the traditional moral teaching of Judaism and Christianity as empty, irrational, unjustified.”<sup>492</sup> Arkes, who had recently testified in Congress in support of DOMA, warned that *Romer* opened the door to judges imposing gay marriage, which went contrary to the “natural teleology of the body.”<sup>493</sup>

Marriage would soon become a new focus for conservative and gay rights activists. For, “just two days after the *Romer* ruling,” the Clinton Administration announced that President Clinton would sign the Defense of Marriage Act if Congress passed it.<sup>494</sup>

### III. THE DEFENSE OF MARRIAGE ACT

On September 21, 1996, near the end of his first term, in a closed, after-midnight session to avoid publicity, President Clinton signed DOMA.<sup>495</sup>

487. *Id.* at 226–227, 238.

488. Charles W. Colson, *Kingdoms in Conflict*, *FIRST THINGS* (Nov. 1996), available at <http://www.firstthings.com/article/2007/11/006-the-end-of-democracy-kingdoms-in-conflict-34>.

489. *Id.*

490. *Id.* Colson later was a co-author with Robert George (also a participant in the *First Things* symposium) of “The Manhattan Declaration: A Call of Christian Conscience” (2009), which sounded the alarm about redefining marriage and filed an amicus brief in *Windsor*, discussed *infra* in Part III•E. See Manhattan Declaration: A Call of Christian Conscience, *MANHATTAN DECLARATION* (Nov. 20, 2009), [http://manhattandeclaration.org/man\\_dec\\_resources/Manhattan\\_Declaration\\_full\\_text.pdf](http://manhattandeclaration.org/man_dec_resources/Manhattan_Declaration_full_text.pdf).

491. Hadley Arkes, *A Culture Corrupted*, *FIRST THINGS* (Nov. 1996) available at <http://www.firstthings.com/article/2007/11/005-the-end-of-democracy-a-culture-corrupted-21>.

492. *Id.*

493. *Id.*

494. KEEN AND GOLDBERG, *supra* note 12, at 239 (arguing that, in doing so, Clinton “disregarded the [*Romer*] decision’s clear message”).

495. Peter Baker, *President Quietly Signs Law Aimed at Gay Marriages*, *WASH. POST*, Sept. 22, 1996, at A21; see also Peter Baker, *Now in Defense of Gay Marriage, Bill Clinton*, *N.Y. TIMES*, Mar. 26, 2013, at A1, available at <http://www.nytimes.com/2013/03/26/us/politics/bill-clintons-decision-and-regret-on-defense-of-marriage-act.html?pagewanted=all&r=0> (making the point that President Clinton

Introduced in the House of Representatives in May 1996 by Republican Representative Bob Barr (Georgia),<sup>496</sup> and, in the Senate, by Republican Senator Don Nickles, with presidential candidate Republican Senator Robert Dole as co-sponsor,<sup>497</sup> DOMA's "two primary purposes" were "to defend the institution of traditional heterosexual marriage" and "to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses."<sup>498</sup> To achieve the second purpose, Section 2 provides that no state "shall be required to give effect" to any public act or judicial proceeding of another state with respect to a "relationship between persons of the same sex that is treated as a marriage under the laws of such other State."<sup>499</sup> Section 3, the provision recently struck down by the U.S. Supreme Court in *Windsor*, after successful challenges in federal court, defines marriage, for purposes of federal statute, regulation, or administrative interpretation, as meaning "only a legal union between one man and one woman as husband and wife;" "spouse" shall refer "only to a person of the opposite sex who is a husband or a wife."<sup>500</sup> This federal definition of marriage and spouse meant that none of the over 1000 federal laws referring to marriage<sup>501</sup> – including various governmental benefits and obligations – would apply to marriages between two men or two women – even though such marriages were valid as a matter of state law.

The impetus for DOMA, as the House Report explains, was a "very particular development in the State of Hawaii": "state courts in Hawaii appear to be on the verge of requiring that State to issue marriage licenses to same-sex couples" and that prospect "threatens to have very real consequences both on federal law and on the laws (especially the marriage laws) of the various States."<sup>502</sup> In effect, members of Congress perceived that an "orchestrated legal assault being waged against traditional heterosexual marriage by gay rights

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avoided publicity at the signing of DOMA).

496. For an informative look back at the history of DOMA, see Chris Geidner, *Marriage Wars*, METRO WEEKLY, July 14, 2011, available at <http://www.metroweekly.com/news/?ak=6427> [hereinafter *Marriage Wars*].

497. Chris Geidner, *Double Defeat*, METRO WEEKLY, Sept. 15, 2011, available at <http://www.metroweekly.com/news/?ak=6567>.

498. H.R. REP. NO. 104-664, *supra* note 11, at 2.

499. Defense of Marriage Act of 1996 § 2, 28 U.S.C. § 1738C (2006).

500. *Id.* at § 3.

501. See *Windsor v. United States*, 133 S. Ct. 2675, 2683 (2013) ("The enactment's comprehensive definition of marriage for purposes of all federal statutes and other regulations or directives covered by its terms . . . does control over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law.") (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004), available at <http://www.gao.gov/assets/100/92442.html>). The House Report accompanying DOMA used slightly different numbers: "The word 'marriage' appears in more than 800 sections of federal statutes and regulations, and the word 'spouse' appears more than 3,100 times." H.R. REP. NO. 104-664, *supra* note 11, at 10.

502. H.R. REP. NO. 104-664, *supra* note 11, at 2.

groups and their lawyers” had met with initial success in the Hawaiian courts (by contrast to earlier lawsuits brought in other states) and that “it appears that judges in Hawaii are prepared to foist the newly-coined institution of homosexual ‘marriage’ upon an unwilling Hawaiian public,” and also, ultimately, on other States, as couples married in Hawaii and then demanded that their home States recognize their marriages.<sup>503</sup> A decision by the Hawaiian court, in other words, could spawn a sort of “marriage tourism” that would threaten the sovereignty of individual states.

At the time Congress voted on DOMA, the Hawaii Supreme Court had ruled, in a 1993 opinion, that denying gay and lesbian couples the right to marry presumptively violated the sex discrimination provisions of its state constitution and that the state would have to justify its marriage law under a strict scrutiny standard.<sup>504</sup> A trial was scheduled for September 1996. Hawaiian State Representative Terrance Tom testified that Congress *must* act if they *could* act “to preserve the will of the people as expressed through their elected representatives,” and that congressional “inaction . . . runs the risk that a single judge in Hawaii may re-define the scope of federal legislation, as well as legislation throughout the other forty-nine states,” surely a “dereliction of the responsibility” invested in members of Congress by voters.<sup>505</sup>

Given this article’s dual focus on Amendment 2 and DOMA, it is notable that another state legislator urging Congress to act was Representative Marilyn Musgrave, of the Colorado House of Representatives, who reported on her unsuccessful efforts to enact a state DOMA in Colorado.<sup>506</sup> Although the legislature passed such a law, Governor Romer vetoed it, leaving Colorado, the House Report asserts, “particularly exposed to an argument – sure to be made by gay rights groups – that its laws currently do not evince a public policy sufficiently strong to ward off a Hawaiian same-sex ‘marriage’ license.”<sup>507</sup>

DOMA moved through the House quickly and successfully, perhaps because of the dominance of the Contract with America Republicans.<sup>508</sup> The Senate held just one day of hearings on the DOMA bill. Some Democratic Senators (such as Senator Edward Kennedy) strongly opposed DOMA as unconstitutional., More typical, however, was the stance of Senator Tom Daschle, then Senate Democratic leader, who voted for DOMA as the lesser of two evils, fearing that a proposed federal constitutional marriage amendment was “inevitable.”<sup>509</sup> Moreover, some rationalized that, if they went along on DOMA, they might, as a compromise, get their colleagues to support the Employment Nondiscrimination Act. Dissenters, like Senator

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503. *Id.* at 2–3, 6.

504. *Id.* at 4 (citing *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993)).

505. *Id.* at 17.

506. *Id.* at 10 n.32.

507. *Id.* at 10 n.33.

508. *Marriage Wars*, *supra* note 496.

509. Chris Geidner, *Becoming Law*, METRO WEEKLY, Sept. 29, 2011, available at <http://metroweekly.com/feature/?ak=6613>.

Kennedy, argued that DOMA was unnecessary since states have always had the authority to refuse to recognize out-of-state marriage that offended the strong public policy of the state and it was by no means clear that marriages even fell within the Full Faith and Credit Clause.<sup>510</sup> Dissenters noted that there was no “emergency,” since the trial in Hawaii had not even taken place and, in the meantime, “14 states have enacted laws which in some fashion make explicit those states’ objection to same sex marriages.”<sup>511</sup> Further, some members of Congress and some constitutional law experts questioned DOMA’s constitutionality.<sup>512</sup>

The DOJ consistently gave its opinion that DOMA was constitutional, even reiterating that view *after* the U.S. Supreme Court released its opinion in *Romer*.<sup>513</sup> The House Report was highly critical of *Romer*, calling it, “to put it charitably, an elusive decision” and finding it “difficult to fathom” how “the Court majority,” applying a rational basis standard, could have concluded Amendment 2 was unconstitutional.<sup>514</sup> In particular, the report noted that, as a result of the local antidiscrimination ordinances Amendment 2 sought to halt, “Colorado citizens who have moral, religious, or other objections to homosexuality could be forced to employ, rent an apartment to, or otherwise associate with homosexuals.”<sup>515</sup> Surely, it was “conceivable,” the Report continued, that Amendment 2 “would advance the State’s interest in protecting the associational freedom of such persons.”<sup>516</sup> The Report also found the Court’s failure to mention *Bowers* “unsettling,” asserting (like Scalia’s dissent) that “If (as in *Bowers*) moral objections to homosexuality can justify laws criminalizing homosexual behavior, then surely such moral sentiments provide a rational basis for choosing not to grant homosexuals preferred status as a protected class under antidiscrimination laws.”<sup>517</sup> The report concluded, nonetheless, that “it would be incomprehensible for any court to conclude that traditional marriage laws are (as the Supreme Court concluded regarding Amendment 2) motivated by animus toward homosexuals.”<sup>518</sup> To the contrary, such laws “have been the unbroken rule and tradition in this (and other) countries primarily because they are conducive to the objectives of procreation and responsible child-rearing.”<sup>519</sup> Thus, referring back to the “legitimate government interests” that DOMA advanced, the Report’s “short note” on *Romer* concludes that DOMA is

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510. See Dissenting Views on H.R. 3396, H.R. REP. No. 104-664, *supra* note 11, at 36-37.

511. *Id.*

512. See *id.* at 27-28 (referring to Senator Edward Kennedy introducing Professor Laurence Tribe’s letter into the Congressional Record, at 142 Cong. Rec. S5931-33 (June 6, 1996)).

513. See *id.* at 33-34 (including letter from DOJ Office of Legislative Affairs to Hon. Henry J. Hyde).

514. *Id.* at 32 (“A Short Note on *Romer v. Evans*”).

515. *Id.*

516. *Id.*

517. *Id.* at 32-33.

518. *Id.* at 33.

519. *Id.*

“plainly constitutional under *Romer*.”<sup>520</sup>

Congress, thus, passed DOMA. Later in 1996, the couples challenging Hawaii’s law prevailed at trial when the state failed to demonstrate a compelling state interest to exclude them from marriage.<sup>521</sup> That victory in court was short-lived. While the trial court ruling was on appeal to the Hawaii Supreme Court, Hawaii voters, on November 3, 1998, approved by a substantial margin (69 to 29%) a constitutional amendment, proposed by the Hawaii legislature, that gave the legislature the power to “reserve marriage to opposite-sex couples.”<sup>522</sup> Meanwhile, the Hawaii legislature approved a Reciprocal Beneficiaries Law, giving same-sex couples and various pairs of individuals who could not marry access to a small subset of the benefits and rights linked to marriage.<sup>523</sup>

#### IV. CHALLENGES TO SECTION 3 OF DOMA: *UNITED STATES V. WINDSOR*

At the time Congress enacted DOMA, no state in the United States allowed same-sex couples to marry. In 2004, Massachusetts became the first state to allow such marriages, after the Supreme Judicial Court of Massachusetts, in *Goodridge v. Department of Public Health*, ruled in favor of a state constitutional challenge to Massachusetts’s marriage law brought by several same-sex couples.<sup>524</sup> Issued in 2003, just months after *Lawrence v. Texas* overruled *Bowers*, the *Goodridge* opinion frequently drew on *Lawrence* in articulating how human dignity, respect, liberty, and equality are at stake in matters of sexual intimacy, marriage, and family.<sup>525</sup> Within several more years, several more states would allow same-sex marriage, either as a result of constitutional litigation or legislative enactment.<sup>526</sup> Yet more states (such as New York) indicated they would recognize such marriages, even if they did not (yet) allow them.<sup>527</sup> Because of DOMA, this new era of state marriage law led to practical problems when marriages, valid under state law, were not valid under federal law. Spouses or surviving spouses were ineligible for the numerous federal benefits linked to marital status, such as, in *Windsor*, the exemption from estate tax a surviving spouse enjoys. Lawsuits filed by same-sex couples, surviving spouses, and the states themselves challenged Section 3 as

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520. *Id.*

521. *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996). For an informative account of the trial, see BALL, *supra* note 27, at 151–98.

522. HAW. CONST. art. 1, § 23 (approving HB 117 (1997)). See also BALL, *supra* note 27, at 178–85 (describing political context of Hawaiian ballot initiative).

523. See Reciprocal Beneficiaries, HAW. REV. STAT. § 572C (2011). For a discussion of the problems with this strategy of “partial equality,” see LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 184–87 (2006).

524. 798 N.E.2d 941 (Mass. 2003).

525. *Id.* at 958–59. I elaborate on the role of *Lawrence* in *Goodridge* in MCCLAIN, *supra* note 523, at 162–70; and FLEMING & MCCLAIN, *supra* note 159, at 184–90.

526. For a helpful overview of these legal developments in the District of Columbia and the fourteen states that now permit same-sex couples to marry, see [www.FreedomtoMarry.org/states](http://www.FreedomtoMarry.org/states).

527. See *Windsor v. United States*, 833 F. Supp. 2d 394, 398–400 (S.D.N.Y. 2012), *aff’d*, 699 F.3d 169 (2d Cir. 2012) (concluding that New York, “through its executive agencies and appellate courts, uniformly recognized Windsor’s [out of state] marriage” in 2009, when she paid federal estate taxes).

unconstitutional.<sup>528</sup>

The Department of Justice initially defended DOMA, even though (as did President Obama) it urged Congress to repeal it. On February 2011, the DOJ changed direction. Attorney General Eric Holder wrote a letter to the Speaker of the House, Hon. John A. Boehner, informing him that “after careful consideration, . . . the President of the United States has made the determination that Section 3 of [DOMA] . . . as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment,” and accordingly, that the DOJ will not defend DOMA in the “new lawsuits” brought in the federal district courts of Connecticut and New York.<sup>529</sup> The Second Circuit, he observed, where these suits would ultimately be heard on appeal, had not yet ruled on what standard of review to apply to classifications based on sexual orientation.

Holder explained that he and President Obama had concluded that “classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.”<sup>530</sup> If, however, the district courts in the Second Circuit concluded that rational basis should be the applicable standard for reviewing DOMA, the DOJ would “state that, consistent with the position it has taken in prior cases, a reasonable argument for Section 3’s constitutionality may be proffered under that permissive standard.”<sup>531</sup> However, it would leave it to Congress to make any such defense. Subsequently, Congress did so, through the Bipartisan Legal Advisory Group of the United States House of Representatives (BLAG).<sup>532</sup>

Holder turned to prior Supreme Court precedents identifying four factors indicating that a higher level of scrutiny than rational basis is appropriate for classifications based on sexual orientation.<sup>533</sup> He stressed as particularly important “a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today.”<sup>534</sup> He referred to *Lawrence*, noting that “until very recently, states have ‘demean[ed] the[] existence’ of gays and lesbians ‘by making their private sexual conduct a crime.’”<sup>535</sup>

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528. See, e.g., *Massachusetts v. U.S. Dept. of Health and Human Servs.*, 682 F.3d 1, 6–7, 15–16 (1<sup>st</sup> Cir. 2012) (detailing lawsuits challenging Section 3 brought by Massachusetts couples and by the Commonwealth of Massachusetts; affirming lower court ruling finding Section 3 unconstitutional).

529. Letter from Attorney General Eric Holder to Hon. John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011) [hereinafter Letter from Holder]. All quotes in text from Holder’s analysis of DOMA are from this letter, unless otherwise indicated.

530. *Id.* at 2.

531. *Id.* at 6.

532. This is a bit of a misnomer since the two Democrats in this five-member group have declined to participate in defending DOMA.

533. Letter from Holder, *supra* note 529, at 2 (quoting *Bowen v. Gilliard*, 438 U.S. 587, 602–03 (1987); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441–42 (1985)).

534. *Id.*

535. *Id.* at 2.

Holder noted that “recent evolutions in legislation” (such as the repeal of Don’t Ask, Don’t Tell), “community practices,” “case law” (such as *Romer* and *Lawrence*), and social science “all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives.”<sup>536</sup> Although many circuit courts had concluded that only rational basis review is necessary for sexual orientation, many reasoned from analogy from *Bowers*, a line of argument no longer available since *Lawrence*.

Turning to Holder’s discussion of the constitutional status of expression of moral disapproval through law, he identified “moral disapproval” as a primary purpose of DOMA, contending that “the legislative record underlying DOMA’s passage . . . contains numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships – precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against.”<sup>537</sup> He noted that the DOJ – when it was defending DOMA – had already disavowed two rationales as “unreasonable” two rationales: “responsible procreation and child-rearing.”<sup>538</sup> “As the Department has explained in numerous filings, since the enactment of DOMA, many leading medical, psychological, and social welfare organizations have concluded, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents.”<sup>539</sup>

In support of his conclusion that DOMA fails intermediate scrutiny, Holder cites to *Romer*, *Cleburne*, and *Palmore*.<sup>540</sup> Notwithstanding the President’s conclusion that Section 3 of DOMA was unconstitutional under such scrutiny, Holder informed Congress that the President had instructed executive agencies to “continue to comply with Section 3 of DOMA” until Congress repealed it or “the judicial branch renders a definitive verdict against the law’s constitutionality.”<sup>541</sup> Holder stated that such a stance “respects the actions of the prior Congress that enacted DOMA” and “recognizes the judiciary as the final arbiter of the constitutional claims raised.”<sup>542</sup> As discussed below, this stance of enforcing but not defending Section 3 introduced issues of standing. Because the *Windsor v. United States* challenge to DOMA is the one in which the U.S. Supreme Court granted certiorari, and ultimately decided, it is that case on which I focus my analysis in the rest of this article.

#### A. *Windsor v. United States*: the Federal District Court Ruling

In *Windsor v. United States*, Edith Windsor, the widow of Thea Spyer, challenged Section 3 in federal district because, under it, she did not qualify for the unlimited marital deduction from federal estate tax and had to pay \$363,053 when, “according to her last will and testament, Spyer’s estate passed for

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536. *Id.* at 3.

537. *Id.* at 4.

538. *Id.* at 3-4 n.5 (quoting H.R. REP. NO. 104-664, at 13).

539. *Id.*

540. *Id.* at 4-5.

541. *Id.* at 5.

542. *Id.*

Windsor's benefit."<sup>543</sup> Windsor and Spyer had been in a "committed relationship" since shortly after they met in 1963, and, as Spyer's health deteriorated, they married in Canada in 2007.<sup>544</sup> Spyer died in 2009 and, after paying the estate taxes, Windsor sued in November 2010, seeking a refund of the federal tax paid and a declaration that Section 3 "violates the Equal Protection Clause of the Fifth Amendment."<sup>545</sup> At the time they married, New York did not permit same-sex couples to marry, and its highest court, in *Hernandez v. Robles*,<sup>546</sup> had rejected a state constitutional challenge by same-sex couples to their exclusion from New York's marriage laws. This led BLAG, which had successfully moved to intervene to defend DOMA after the DOJ announced it would no longer do so, to challenge whether Windsor had standing to challenge DOMA.<sup>547</sup> By 2009, the relevant year for tax purposes, however, "all three statewide elected executive official[s] - the Governor, the Attorney General, and the comptroller - had endorsed the recognition of Windsor's marriage,"<sup>548</sup> and more, generally, marriages by New York same-sex couples who validly married in other jurisdictions.

In the federal district court action, the United States argued that the court should apply intermediate scrutiny to Section 3 because it classified based on sexual orientation.<sup>549</sup> Plaintiff Windsor argued that the court should apply strict scrutiny because homosexuals are a suspect class, or, in the alternative, intermediate scrutiny.<sup>550</sup> BLAG contended that rational basis review was the proper test and that, "under that standard, there are ample reasons that justify the legislation."<sup>551</sup>

The federal district court declined Windsor's invitation to decide, "as a matter of first impression in the Second Circuit," whether homosexuals were a suspect class, triggering strict scrutiny.<sup>552</sup> To do so, the court observed, would require distinguishing "precedent" in the eleven federal courts of appeals that had applied rational basis to classifications based on sexual orientation.<sup>553</sup> Nonetheless, the court found Section 3 unconstitutional,<sup>554</sup> applying rational basis review as informed by the First Circuit's reasoning in another DOMA challenge, *Massachusetts v. DHHS*.<sup>555</sup> In a unanimous opinion authored by Judge Michael Boudin, a Republican nominated to the bench by President George H.W.

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543. 833 F. Supp. 2d 394, 397 (S.D.N.Y. 2012).

544. *Id.* They registered as domestic partners in New York City in 1993, "as soon as that option became available." *Id.*

545. *Id.*

546. 855 N.E.2d 1 (2006). The Court of Appeals, however, noted that the legislature could, if it chose to do so, enact a marriage equality law.

547. *Windsor*, 833 F. Supp. 2d at 398.

548. *Id.*

549. *Id.* at 397.

550. *Id.*

551. *Id.*

552. *Id.* at 401.

553. *Id.*

554. *Id.* at 406.

555. 682 F. 3d 1 (1<sup>st</sup> Cir. 2012).

Bush, the First Circuit struck down Section 3 using the “more searching form of rational basis review” that the Supreme Court has applied in circumstances where minorities with a historical pattern of disadvantage are subject to “discrepant treatment,” in contrast with “ordinary economic legislation.”<sup>556</sup> The First Circuit found this pattern in the Court’s Equal Protection jurisprudence in *Romer*, *Moreno*, and *Cleburne*.<sup>557</sup>

The *Windsor* district court also invoked Justice O’Connor’s concurring opinion in *Lawrence*, which cited the *Romer*, *Moreno*, and *Cleburne* trio as illustrating that the Supreme Court’s equal protection decisions “have increasingly distinguished” between “[l]aws such as economic or tax legislation that are scrutinized under rational basis review[, which] normally pass constitutional muster,’ and ‘law[s that] exhibit[] . . . a desire to harm a politically unpopular group,’ which receive ‘a more searching form of rational basis review . . . .”<sup>558</sup> At the same time, the court invoked *Romer* in observing that, whether or not this more “searching” review was required “where a classification burdens homosexuals as a class,” the court must still “insist on knowing the relation between the classification adopted and the object to be attained,” and must evaluate whether government’s asserted interests are legitimate.<sup>559</sup> Applying these principles and “mindful of the Supreme Court’s jurisprudential cues,” it concluded that Section 3 “does not pass constitutional muster.”<sup>560</sup>

Observing that BLAG advanced “some, but not all” of the justifications Congress offered for DOMA and asserted some additional interests, the court asked (following the Supreme Court’s guidance in *Heller v. Doe*) whether *Windsor* had “‘negative[d] every conceivable basis which might support’” Section 3.<sup>561</sup> BLAG did not press the moral disapproval argument; instead, it asserted that Congress rationally might have enacted DOMA: (1) out of “caution,” so Congress could maintain the definition of marriage “universally accepted in American law” while considering whether to embrace some states’ novel definitions of marriage, (2) to promote childrearing and procreation in an ideal family structure, (3) to provide for consistency and uniformity of benefits, and (4) to conserve the public fisc.<sup>562</sup> The approach the court took (similar to the First Circuit) was to conclude that, even assuming the various asserted interests were legitimate, BLAG had not shown how Section 3 advanced them since it “creates a federal definition of marriage” and leaves “the decision of whether same-sex couples can marry” to the states.<sup>563</sup> Thus, as to “caution,” the court noted that DOMA “did not compel” states to “‘wait[ ] for evidence spanning a longer term before engaging in . . . a major redefinition of a foundational social

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556. *Id.* at 11–12.

557. *Id.* at 10.

558. *Windsor*, 833 F. Supp. 2d at 402 (citing *Lawrence v. Texas*, 539 U.S. 558, 579–580 (2003) (O’Connor, J., concurring)).

559. *Id.* (citing *Romer*, 517 U.S. at 632).

560. *Id.* at 402.

561. *Id.* at 403 (citing *Heller v. Doe*, 509 U.S. 312, 320–21 (1993)).

562. *Id.* at 403–06.

563. *Id.* at 403.

From *Romer v. Evans* to *United States v. Windsor* 421

institution;” indeed, “[a] number of states now permit same-sex marriages.”<sup>564</sup> On the second asserted rationale, the court concluded that, although BLAG argued Congress “might have passed DOMA to deter heterosexual couples from having children out of wedlock, or to incentivize couples who are pregnant to get married” (the accidental procreation argument), DOMA “has no direct impact on heterosexual couples at all”: excluding one group of people from federal benefits cannot logically “incentivize[]” another group to marry or procreate.<sup>565</sup> Noting that, at most, DOMA might have an “indirect effect on popular perceptions of what a family ‘is’ and should be” and no effect on “the types of family structures in which children in this country are raised,” the court invoked *Romer*: “Congress’s goal is ‘so far removed’ from the classification, it is impossible to credit its justification.”<sup>566</sup>

The problem with the consistency and uniformity of benefits argument, by contrast, was not a lack of fit between means and ends, but that the means were not legitimate in view of “important principles of federalism.”<sup>567</sup> The court pointed out that, prior to DOMA, “any uniformity at the federal level with respect to citizens’ eligibility for marital benefits was merely a byproduct of the states’ shared definition of marriage,” rather than a result of Congress sponsoring or promoting uniformity.<sup>568</sup> Even assuming Congress had “developed a newfound interest” in such uniformity, DOMA’s method – making a “sweeping federal review” of state decisions concerning same-sex marriage, sanctioning some and rejecting others – was not legitimate in light of federalism’s placing “matters at the ‘core’ of the domestic relations law exclusively within the province of the states.”<sup>569</sup> Concurring with the First Circuit on “the virtue of federalism,” the court observed that, “through their legislative or constitutional processes,” states may make different choices about whether to “preserve traditional marriage or to redefine it.”<sup>570</sup> Historically, as BLAG conceded, “the federal government has not attempted to manage those processes and affairs” unless a state was unable to assume this role.<sup>571</sup>

The district court also found the First Circuit’s opinion instructive on the constitutional status of the appeal, in the House Report on DOMA, to promoting traditional morality. The district court distinguished between an interest in merely preserving tradition for its own sake, which might not be legitimate, and an interest in “preserving the traditional institution of marriage.”<sup>572</sup> The latter, the court stated, “when coupled with other legitimate interests, could be a sound

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564. *Id.* at 404.

565. *Id.* at 404.

566. *Id.* at 405 (citing *Romer*, 517 U.S. at 635).

567. *Id.*

568. *Id.*

569. *Windsor*, 833 F. Supp. 2d at 405. The district court cites a similar conclusion reached by the federal district court in the First Circuit DOMA challenge. *Massachusetts v. U.S. Dept. of Health and Human Servs.*, 698 F. Supp. 2d 234, 249-250 (D. Mass. 2010)).

570. *Windsor*, 833 F. Supp. 2d at 406 (quoting *Massachusetts*, 682 F. 3d at 16).

571. *Id.*

572. *Id.* at 403 n. 3.

reason for a legislative classification.”<sup>573</sup> Indeed, it quoted the First Circuit, evidently agreeing that “[p]reserving th[e] institution [of traditional marriage] is not the same as mere moral disapproval of an excluded group, and that is singularly so in this case given the range of bipartisan support for [DOMA].”<sup>574</sup> The district court drew on Justice O’Connor’s concurring opinion in *Lawrence*, where, on the one hand, she read *Romer* as teaching that “[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause,” but, on the other, asserted that “[u]nlike the moral disapproval of same-sex relations – the asserted state interest in [Texas’s sodomy law] – other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.”<sup>575</sup> (As I will discuss below, Justice O’Connor’s words appear repeatedly in friends of the court briefs filed on both sides in the Supreme Court stage of the *Windsor* litigation.)

Finally, the district court considered whether an “interest in promoting heterosexuality,” asserted by Congress but not by BLAG, might provide a rationale for DOMA. Applying the test (seen in *Romer*) that “a permissible classification must at least ‘find some footing in the realities of the subject addressed by the legislation,’” the court pointed out that Section 3 only affects married homosexual persons and it is “implausible” to believe that it serves to persuade them “to abandon their current marriages in favor of heterosexual relationships.”<sup>576</sup> Citing *Cleburne*, the court found that the goal of promoting heterosexuality is “so attenuated from DOMA’s classification that it ‘render[s] the distinction arbitrary or irrational.’”<sup>577</sup> Thus, the court deployed the *Cleburne*, *Moreno*, and *Romer* framework, but did not explicitly attribute Section 3 to animus.

After the district court’s ruling, BLAG promptly appealed to the Second Circuit. Edith Windsor filed a petition for writ of certiorari before judgment (by the Second Circuit), urging the Supreme Court to resolve the constitutionality of DOMA *before* the Second Circuit ruled, in light of her age (83) and because the U.S. government “continues to enforce [section 3] pending resolution” by the Supreme Court,” causing individuals like her to “continue to suffer serious consequences from the Government’s failure to recognize their lawfully solemnized marriages.”<sup>578</sup> BLAG opposed the certiorari petition, arguing that, due to various problems with Windsor’s case, the First Circuit DOMA case provided a better vehicle for resolving Section 3’s constitutionality.<sup>579</sup> The Solicitor General also urged the Court that the First Circuit case provided a better vehicle for resolving the constitutional questions, but if the Court did not agree,

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573. *Id.*

574. *Id.* (quoting *Massachusetts*, 682 F. 3d at 16).

575. *Lawrence v. Texas*, 539 U.S. 558, 583, 585 (2003) (O’Connor, J., concurring), cited at *Windsor*, 833 F. Supp. 2d at 403.

576. *Windsor*, 833 F. Supp. 2d at 403 n. 4 (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

577. *Id.* (citing *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 446 (1985)).

578. Petition for Writ of Certiorari before Judgment, *Windsor v. United States*, No. 12-63 at 4, 12.

579. See Brief in Opposition (filed by BLAG), *Windsor v. U.S.*, No. 12-63, at 1 (arguing that the Court should grant certiorari in the First Circuit case because of questions of Windsor’s standing and the absence of a Second Circuit ruling).

then it should grant Windsor's petition.<sup>580</sup> As I will now discuss, the Second Circuit ruled before the Court considered Windsor's petition.

B. *Windsor v. United States*: The Second Circuit Calls for Heightened Scrutiny

On October 18, 2012, in another opinion authored by a Republican appointed by President George H.W. Bush, the United States Court of Appeals for the Second Circuit became the second federal appellate court to strike down Section 3.<sup>581</sup> The Second Circuit did so applying intermediate scrutiny, the standard of review urged by the DOJ and Windsor (if the court did not move all the way to strict scrutiny).<sup>582</sup> It noted, but declined to follow, the First Circuit's reasoning for not adopting heightened scrutiny. One reason was that it did not read the Supreme Court's decision in *Romer*, to apply rational basis review as implying a "refusal to recognize homosexuals as a quasi-suspect class," since "the litigants in *Romer* had abandoned their quasi-suspect argument after the trial court decision" and did not press that issue before the Supreme Court.<sup>583</sup> The Second Circuit also disagreed, on two grounds, with the First Circuit's suggestion that moving to intermediate scrutiny would "'imply[] an overruling'" of *Baker v. Nelson*, where the Supreme Court summarily dismissed, "for want of a substantial federal question," an appeal from a Minnesota Supreme Court decision "finding no right to same-sex marriage" and no violation of equal protection.<sup>584</sup> First, the Second Circuit reasoned, *Baker* was decided before "intermediate scrutiny" was in the Court's vernacular and, second, it pre-dated *Romer*, when the Court first ruled that a classification of homosexuals lacked a rational basis.<sup>585</sup> For these reasons, the Second Circuit also rejected BLAG's more far-reaching reading of *Baker* as compelling "the inference that Congress may prohibit same-sex marriage in the same-way [as Minnesota] under federal law without offending the Equal Protection Clause."<sup>586</sup>

While the First Circuit and the federal district court in *Windsor* read the Court's precedents to support a "more exacting rational basis review for DOMA," the Second Circuit observed that the Supreme Court "has not expressly sanctioned such modulation in the level of rational basis review," leaving "some doctrinal instability in this area."<sup>587</sup> To illustrate, it compared Justice O'Connor's

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580. Petition for a Writ of Certiorari before Judgment, *Windsor v. U.S.*, at 10. The U.S. argued that the Court should "hold this petition" pending its consideration of the petition in *DHHS v. Massachusetts* and the petition for certiorari before judgment in *Office of Pers. Mgmt. v. Golinsky*, No. 12-16). It asserted that Windsor's petition raised threshold questions that were potential obstacles to her petition: she sought cert before judgment and BLAG questioned whether New York law recognized her Canadian marriage.

581. *Windsor v. United States*, 699 F.3d 169, 176 (2d Cir. 2012). The judge was Chief Judge Dennis Jacobs.

582. *Id.* at 181.

583. *Id.* at 179.

584. *Id.* at 178-79 (discussing *Baker v. Nelson*, 409 U.S. 810 (1972)).

585. *Id.* (distinguishing *Baker*, 409 U.S. 810).

586. *Id.* at 178.

587. *Id.* at 180-81. The Second Circuit noted that BLAG's counsel had "wittily" referred to this test as "rational basis plus or intermediate scrutiny minus." *Id.* at 180 (quoting Oral Arg. Tr. 16:10-12).

characterization in her *Lawrence* concurrence (cited by the *Windsor* district court) of the “more searching form of review” the Court used in Equal Protection cases such as *Romer* with Justice Marshall’s criticism of the Court, in his *Cleburne* partial concurrence and dissent, for failure to articulate the factors that justify “‘second order’ rational basis review.”<sup>588</sup> The Second Circuit acknowledged that *Romer*’s statement that “a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest”<sup>589</sup> supports the point that, while “indulgent and respectful,” rational basis is not meant to be “‘toothless.’”<sup>590</sup> Nonetheless, it observed that “the existence of a rational basis for Section 3 of DOMA is closely argued” by BLAG and its amici; because rational basis review requires the party challenging a law to “disprove ‘every conceivable basis which might support it,’” such a party takes up a heavy load.”<sup>591</sup> The court continued: “that would seem to be true in this case – the law was passed by overwhelming bipartisan majorities in both houses of Congress; it has varying impact on more than a thousand federal laws; and the definition of marriage it affirms has been long-supported and encouraged.”<sup>592</sup>

The Second Circuit avoided this problem because “fortunately . . . heightened scrutiny is available” and should be used to assess Section 3 of DOMA.<sup>593</sup> Henceforth, classifications based on sexual orientation should be subjected to intermediate scrutiny and “substantially related to an important governmental interest.”<sup>594</sup> The court drew on two famous sex-based discrimination cases, *U.S. v. Virginia* and *Mississippi University for Women v. Hogan*, to explain that “substantially related” means that government’s explanation must be “exceedingly persuasive.”<sup>595</sup>

The Second Circuit’s analysis of the four factors that the Supreme Court has used to decide whether a new classification qualifies as suspect or quasi-suspect was similar to that offered in the Holder letter, discussed above. Thus, on the first factor, “whether the class has been historically ‘subjected to discrimination,’” it noted that *Lawrence* recounted how criminal laws punishing homosexual conduct “demean[ed] [homosexuals’] existence [and] control[led] their destiny.”<sup>596</sup> Indeed, such laws are “perhaps the most telling proof of animus and discrimination,” and (until *Lawrence*) “had the imprimatur of the Supreme Court.”<sup>597</sup> *Windsor* and several friends of the court, the court observed, “labor to

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588. *Id.* at 181 n.3 (comparing *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring) with, among other cases, *Cleburne*, 473 U.S. 432, 459-460 (1985) (Marshall, J., concurring in part and dissenting in part).

589. *Id.* at 180 (citing *Romer v. Evans*, 517 U.S. 620, 634-35 (1996)).

590. *Id.* (quoting *Schweiker v. Vison*, 450 U.S. 221, 234 (1981) (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)).

591. *Id.*

592. *Id.*

593. *Id.* at 181.

594. *Id.* at 185.

595. *Id.* (citing *United States v. Va.*, 518 U.S. 515, 533 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

596. *Id.* at 181-82.

597. *Id.* (citing *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)).

establish and document this history, but we think it is not much in debate.”<sup>598</sup>

On the second, “whether the class characteristic ‘frequently bears [a] relation to ability to perform or contribute to society,’” the Second Circuit utilized *Frontiero v. Richardson*,<sup>599</sup> a sex-based discrimination case, for the point that what distinguishes the characteristic singled out in the legislation from some non-suspect statutes is that the characteristic “‘frequently bears no relation to ability to perform or contribute to society.’”<sup>600</sup> Homosexuality is like sex in that there is “no such impairment” inhibiting an individual’s “ability to contribute to society.”<sup>601</sup> The court stated: “The aversion homosexuals experience has nothing to do with aptitude or performance.”<sup>602</sup> BLAG argued that “same-sex couples have a diminished ability to discharge family roles in procreation and the raising of children.”<sup>603</sup> The court countered that BLAG cited “no precedential application of that standard to support its interpretation” of that factor, which referred to “one’s general ability to contribute to society.”<sup>604</sup> Further, “the abilities or inabilities cited by BLAG bear upon whether the law withstands scrutiny . . . rather than upon the level of scrutiny to apply.”<sup>605</sup>

On the third factor, that the group have a distinguishing characteristic, sometimes couched as “immutability,” BLAG argued that immutability did not apply because sexual orientation is “not necessarily fixed,” but “may change over time, range along a continuum, and overlap.”<sup>606</sup> The Second Circuit referenced a broader test than immutability: “whether there are ‘obvious, immutable, or distinguishing characteristics that define . . . a discrete group.’”<sup>607</sup> The critical point was “whether the characteristic of the class calls down discrimination when it is manifest.”<sup>608</sup> That discrimination occurs, pursuant to Section 3, “when a surviving spouse of a same-sex marriage [Windsor] seeks the benefit of the [federal] spousal deduction” and the federal government refuses to recognize her marriage.<sup>609</sup> Thus, married same-sex couples are “the population most visible to the law, and they are foremost in mind when reviewing DOMA’s constitutionality.”<sup>610</sup>

Finally, on the fourth factor, political powerlessness, the Second Circuit concluded that “homosexuals are still significantly encumbered in this respect,” that is, they “may be unable to protect themselves from discrimination at the

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598. *Id.* at 182.

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

600. *Windsor*, 699 F. 3d at 182 (citing *Frontiero*, 411 U.S. at 686; also citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-442 (1985)).

601. *Id.*

602. *Id.* at 182-83.

603. *Id.* at 183.

604. *Id.* (citing *Frontiero*, 411 U.S. at 686).

605. *Id.*

606. *Id.*

607. *Id.* (emphasis in opinion) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987)).

608. *Id.*

609. *Id.* at 184.

610. *Id.*

hands of the majoritarian political process.”<sup>611</sup> Certainly, homosexuals “clearly” have “achieved political successes over the years,” but the question is whether they can protect themselves from “wrongful discrimination.” The court drew parallels between the “status of women at the time of *Frontiero*” and that of “homosexuals today” to conclude that, even if a group wins some political victories, they may still be powerless for purposes of heightened protection, especially if they are under-represented in positions of power and authority.<sup>612</sup> Noting the risks to gay men and lesbians of identifying their sexual preference publicly, the court concluded that “homosexuals are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public.”<sup>613</sup> Strikingly, it was this fourth factor, political powerlessness, that the trial court in *Evans v. Romer* concluded plaintiffs had *not* demonstrated because of their political success.<sup>614</sup> It is also notable that the Second Circuit’s observations about the risk of identifying as homosexual, made in 2012, closely parallel those made in friends of the court briefs before the Supreme Court nearly twenty years ago in *Romer* (discussed in Part II).

Applying the intermediate scrutiny test, the Second Circuit found that the arguments offered by BLAG for Section 3 failed. It observed that “[a]t argument, BLAG’s counsel all but conceded that these reasons for enacting DOMA may not withstand intermediate scrutiny.”<sup>615</sup> *Romer* played a role in the court’s analysis. First, BLAG argued there was a “unique federal interest[]” in maintaining a “consistent federal definition of marriage,” but the Second Circuit concluded that this emphasis on uniformity was “suspicious” and deserved a “cold eye” cast upon it, given the historical and continuing deference by Congress and the Supreme Court to “state domestic relations laws, irrespective of variations.”<sup>616</sup> As a friend of court brief filed by family law professors explained, DOMA “left standing all other inconsistencies in the laws of the states, such as minimum age, consanguinity, divorce, and paternity.”<sup>617</sup> Under *Romer*, the court observed, “the absence of precedent . . . is itself instructive; [d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”<sup>618</sup> Under the intermediate scrutiny framework, Section 3’s “unprecedented breach” of deference to federalism fails the “exceedingly persuasive justification” test.<sup>619</sup>

BLAG’s other rationales also failed the intermediate scrutiny test. “Preserving traditional marriage as an institution,” the Second Circuit

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611. *Id.*

612. *Id.*

613. *Id.* at 185.

614. *See supra* Part II.B.3.

615. *Windsor*, 699 F. 3d at 185.

616. *Id.* at 185-86.

617. *Id.* at 186 (referring to Brief on the Merits of Amici Curiae Family Law Professors & the American Academy of Matrimonial Lawyers in Support of Respondent Edith Schlain Windsor at 12-13, *Windsor*, 133 S. Ct. 2675 (No. 12-307) [hereinafter Family Law Brief]).

618. *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)). This language will feature in Justice Kennedy’s majority opinion in *Windsor*. *See* Part IV.F.

619. *Id.*

concluded, could not suffice: if “[a]ncient lineage of a legal concept does not give [a law] immunity from attack for lacking a rational basis,”<sup>620</sup> then all the more so under a heightened scrutiny test.<sup>621</sup> In *Lawrence*, it observed, the Supreme Court analogized anti-sodomy laws to anti-miscegenation laws in explaining that appeals to history or tradition alone cannot save a law.<sup>622</sup> Even if, however, preserving marriage were in itself an “important goal,” DOMA does not do so; as the district court observed, Section 3 leaves it to states to define who may marry.<sup>623</sup>

Finally, the Second Circuit rejected a cluster of staple arguments in BLAG’s defense of DOMA: the law advances responsible procreation and childrearing. DOMA does so, BLAG argued, by providing benefits to the only couples who can procreate “naturally” – opposite sex couples; by subsidizing “biological parenting;” and by facilitating “the optimal parenting arrangement of a mother and a father.”<sup>624</sup> Promoting procreation “can be an important governmental objective,” the Second Circuit stated, but DOMA lacked a substantial relationship to that goal.<sup>625</sup> Indeed, noting that the First Circuit and the lower court were not able to find “even a *rational* connection” between DOMA and these asserted interests, the Second Circuit reiterated that DOMA does not provide any “incentives for heterosexual couples” – any “incremental reason” for them to engage in “responsible procreation.”<sup>626</sup>

### C. The *Windsor* Dissent: DOMA Rests on More than “Mere Moral Disapproval”

One judge on the three judge panel, Circuit Judge Straub, issued a lengthy dissent.<sup>627</sup> Justice O’Connor’s assertion, in *Lawrence*, that “other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group” featured prominently in the dissent’s contention that several federal purposes advanced for DOMA – either by Congress or BLAG – readily survived rational basis review.<sup>628</sup> Further, the dissent read *Romer* as employing conventional rational basis review and criticized the First Circuit for “creat[ing] a novel ‘plus’ level of scrutiny applicable to DOMA,” which would “deprive the American people of further consideration of DOMA through their democratically elected representatives.”<sup>629</sup> The dissent also viewed the First Circuit’s move to a heightened form of rational basis review to evaluate classifications based on sexual orientation – and, a fortiori, the Second Circuit majority’s move to

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620. *Id.* at 187 (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 326 (1993)).

621. *Id.*

622. *Id.*

623. *Id.* (referencing *Windsor v. U.S.*, 833 F.Supp.2d 394, 403 (S.D.N.Y. 2012)).

624. *Id.* at 188.

625. *Id.*

626. *Id.* (citing *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 682 F.3d 1, 14-15 (1<sup>st</sup> Cir. 2012); *Windsor*, 833 F.Supp.2d at 404-05; *Pedersen v. Office of Pers. Mngmt.*, 881 F.Supp.2d 294, 2012 WL 3113883, at \*40-43 (D. Conn. July 31, 2012)(emphasis added)).

627. *Id.* at 188-211 (Straub, J., dissenting).

628. *Id.* at 189, 199 (citing *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O’Connor, J., concurring); *id.* at 197-208 (concluding several rationales survive rational basis review)).

629. *Id.* at 209-10 (critiquing *Massachusetts*, 682 F.3d at 9).

intermediate scrutiny—as precluded both by *Romer*, which the Court decided “without a need to employ a more exacting level of review,” and by the precedential effect of *Baker v. Nelson*.<sup>630</sup> While the majority stressed that *Baker* predated the Court’s modern equal protection jurisprudence, the dissent stressed that Edith Windsor’s equal protection challenge to Section 3 was “essentially identical” to the challenge brought to Minnesota’s law; because the Court’s summary affirmance was “a merits decision,” from which the Court “has never walked away,” lower courts must apply traditional rational basis review.<sup>631</sup>

Even under rational basis, the dissent acknowledged, *Romer* teaches that “laws that single out a certain class of citizens for disfavored legal status ‘raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.’”<sup>632</sup> So, too, under *Moreno*, “such animosity cannot constitute a legitimate governmental objective.”<sup>633</sup> The dissent asserted, however, that a discriminatory law may still be valid if it is motivated “both by impermissible purposes (e.g., animus, negative attitudes, malice, fear, the desire to harm a group, moral disapproval, ignorance) and permissible purposes.”<sup>634</sup> Concluding that “any single valid rationale is sufficient to support DOMA’s constitutionality,” the dissent chose to analyze only certain rationales offered by BLAG and not others.<sup>635</sup> This allowed it to steer clear of Congress’s appeal to moral approval and disapproval, instead hewing to Justice O’Connor’s guidance about the existence of reasons for supporting marriage other than “mere moral disapproval.”<sup>636</sup> Other lower courts, the dissent noted, have concluded that “denying same-sex couples federal marriage rights or even the right to marry at all can be grounded in reasons other than animus.”<sup>637</sup>

While the majority found that BLAG’s asserted rationales of promoting responsible procreation and childrearing, even if plausible, lacked a sufficient fit with Section 3, the dissent found them legitimate in light of marriage’s role in “combat[ing] the risk of instability which is characteristic of inherently procreative opposite-sex relationships, but absent from same-sex relationships.”<sup>638</sup> The dissent relied on the “accidental pregnancy” form of the channeling argument elaborated in *Hernandez v. Robles*: marriage addressed the problem that only opposite-sex couples may produce “unintended, unplanned, unwanted children” by “creat[ing] more stability and permanence in the

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630. *Id.* at 209-10. I do not elaborate here on the dissent’s lengthy treatment of *Baker v. Nelson*, which appears at *Windsor*, 699 F. 3d at 192-95, 209-11. By contrast, the First Circuit concluded that *Baker* prevented it from adopting intermediate scrutiny, but not the more searching form of rational basis review. *Massachusetts*, 682 F.3d at 9-10.

631. *Windsor*, 699 F. 3d at 189, 192-93.

632. *Id.* at 197 (citing *Romer v. Evans*, 517 U.S. 620, 633-34 (1996)).

633. *Id.* (citing *U.S. Dep’t of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

634. *Id.* (citing *Bd. of Trs. of Univ. Ala. v. Garrett*, 531 U.S. 356, 367 (2001)).

635. *Id.* at 197, 208.

636. *Id.* at 199 (citing *Lawrence v. Texas*, 539 U.S. 558, 585 (2003)(O’Connor., J., concurring)).

637. *Id.* (citing, *inter alia.*, *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 682 F.3d 1, 7 (striking down Section 3 but observing “we do not rely upon the charge that DOMA’s hidden but dominant purpose was hostility to homosexuality”)).

638. *Id.* at 200.

relationships that cause children to be born.”<sup>639</sup> Similarly, the dissent credited BLAG’s assertion of a Congressional desire “to have children raised in families with only biological mothers and fathers, which same-sex couples cannot provide,” again stressing marriage’s institutional role in “encourage[ing] biological parents to remain together.”<sup>640</sup> Under rational basis, the dissent concluded, where “means and ends need not match,” Congress’s “‘common sense’ regarding the needs of children” need not yield to a lack of scientific evidence showing that children reared by opposite-sex couples fare better than those reared by same-sex couples.<sup>641</sup>

As to the consistency and uniformity of benefits rationales asserted by BLAG, the dissent granted the general force of principles of federalism with respect to domestic relations law, but contended: “that the federal government often defers to state determinations regarding marriage does not obligate it to do so.”<sup>642</sup> Congress “reasonably froze federal benefits policy as it existed in 1996 with respect to same-sex marriage” to wait to see how state law developed, letting states “serve as laboratories of policy development,” and “to avoid federal implications of state-law developments in the area of marriage.”<sup>643</sup> The dissent stressed that Congress may have its own definition of marriage. Indeed, the dissent devoted several pages to quoting passages from over a century of Supreme Court opinions extolling the institution of marriage as the foundation of society to support its conclusion that: “Marriage today, according to the federal government, means what it has always meant – a holy union, essential to the survival of the species, between a man and a woman, the principle purpose of which is to encourage responsible child rearing.”<sup>644</sup> To Windsor’s argument that DOMA “establishes two tiers of married couples in states that permit same-sex marriage” with respect to federal benefits, the dissent countered that Congress could rationally prefer a different kind of uniformity: no same-sex couples would be eligible for federal marital benefits.<sup>645</sup>

The dissent concluded by stressing that, “the American people and their elected representatives,” rather than courts, should settle such matters as “whether connections between marriage, procreation, and biological offspring recognized by DOMA and the uniformity it imposes are to continue.”<sup>646</sup> When courts intervene in “robust political debate” by entertaining claims like

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639. *Id.* (citing *Hernandez v. Robles*, 821 N.Y.S.2d 770 (N.Y. 2006) (plurality opinion)). An influential version of the argument that marriage is the institution that brings order to certain features of heterosexual sex and procreation that could otherwise lead to a chaotic society is Justice Cordy’s dissent in *Goodridge v. Dep’t. of Pub. Health*, 798 N.E.2d 941 (2003).

640. *Id.* at 201 (also citing Brief Addressing the Merits of the State of Indiana and 16 other States as Amici Curiae in Support of Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 24, 35, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter *Indiana Brief*]).

641. *Id.* at 201–02.

642. *Id.* at 202.

643. *Id.* at 204.

644. *Id.* at 205–07.

645. *Id.* at 208.

646. *Id.* at 211.

Windsor's, it "poisons the political well, imposing a destructive anti-majoritarian constitutional ruling on a vigorous debate."<sup>647</sup>

#### D. Moral Disapproval, *Romer*, and More in Friends of the Court Briefs before the Supreme Court

Subsequent to the Second Circuit's ruling, the United States filed a supplemental brief with the Supreme Court, urging the Court to grant certiorari in the *Windsor* case because the Second Circuit's decision "materially strengthens this case as a vehicle for reviewing the constitutionality of Section 3 of DOMA."<sup>648</sup> Windsor filed a short supplemental brief in support of her prior petition, referencing her prior arguments and those of the U.S. in its new brief.<sup>649</sup> BLAG argued that the Court should review DOMA's constitutionality, but that *Windsor* was not the best vehicle for doing so.<sup>650</sup> On December 7, 2012, the Supreme Court granted certiorari in *Windsor* and *Hollingsworth v. Perry*, and, in both cases, requested briefing not only on the merits but also on the question of standing. In *Windsor*, it requested briefing on whether the Court was deprived of jurisdiction, under Article III, to hear the DOMA challenge once the U.S. government agreed with plaintiff Edith Windsor about DOMA's unconstitutionality and whether BLAG had standing.<sup>651</sup> These intensely-watched cases generated numerous amicus curiae briefs filed on both sides by states, members of Congress, medical and psychological organizations, bar associations, religious groups, professors, and individuals. In this section, I will analyze some of the prominent themes in the briefs filed on both sides in *Windsor*, pointing out parallels to and differences from the briefs filed nearly twenty years ago in *Romer*.

There were eighty amicus curiae briefs filed in *Windsor*, thirty two in support of respondent BLAG; forty six in support of respondent Windsor; and two in support of neither party.<sup>652</sup> The *Windsor* majority and dissenting opinions

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647. *Id.*

648. Supplemental Brief of Petitioner United States at 7, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

649. Supplemental Brief of Respondent Windsor, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

650. Supplemental Brief for Respondent Bipartisan Legal Advisory Group of the U.S. House of Representatives at 2, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

651. See Supreme Court Information, *United States v. Windsor*, No. 12-307, available at [www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-307.htm](http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-307.htm). In *Hollingsworth*, it requested briefing on whether the petitioners (proponents of Proposition 8) had standing under Article III. See Proceedings and Orders, <http://www.scotusblog.com/case-files/cases/hollingsworth-v-perry/>.

652. This count is based on reviewing the docket. See Preview of the United States Supreme Court Cases, *U.S. v. Edith Schlain Windsor*, Docket No. 12-307, [www.americanbar.org/publications/preview\\_home/12-307.html](http://www.americanbar.org/publications/preview_home/12-307.html); Supreme Court Information, *U.S. v. Windsor*, [www.supremecourt.gov/Search.aspx?Filename=/docketfiles/12-307.htm](http://www.supremecourt.gov/Search.aspx?Filename=/docketfiles/12-307.htm). In addition, the Court appointed law professor Vicki Jackson as amicus curiae "to argue the position that the Court lacks jurisdiction to hear the dispute." *United States v. Windsor*, 133 S. Ct. 2675, 2684 (2013). The author of this article joined an amicus brief filed in support of Windsor, Brief of *Amici Curiae* Family and Child Welfare Law Professors and in Support of Respondents, as well as amicus briefs

expressly referred to few of the amicus briefs, but arguments made in the briefs find echoes in the various *Windsor* opinions. Even apart from the question of whether one can match judicial opinions to strands of argument by the amici, it is instructive to examine these arguments to identify the different ways amici on opposing sides used *Romer*, and, more generally, the *Cleburne-Moreno-Romer* trio. In addition, by contrast to briefing on *Romer*, which took place when *Bowers* was the Court's last word on the use of law to express moral disapproval of homosexuality, the *Windsor* amici (some of whom also were amici in *Romer*) operated in a legal landscape in which *Lawrence* had, ten years earlier, overruled *Bowers*. Amici took sharply conflicting views about the import of the combination of *Romer* and *Lawrence* for the proper standard of review as well as for DOMA's constitutionality. Since Justice Kennedy wrote both of those opinions, the briefing in *Windsor* might well be viewed as an example of what Susan Estrich and Kathleen, years ago, called "writing for an audience of one," with Justice Kennedy, instead of Justice Sandra Day O'Connor, the "real audience" that the parties and their amici were trying to persuade.<sup>653</sup>

The several themes that I analyze overlap with, but are not identical to, the themes discussed in Part II in the *Romer* briefs. One obvious reason is that *Romer* itself, and its precedential significance for DOMA's constitutionality, especially when combined with *Lawrence*, was a central theme in a large number of the *Windsor* amicus briefs. For that reason, rather than separating out "animus" as a theme, I focus on how amici enlisted it or disavowed it in evaluating various rationales offered for DOMA. In addition, because the Court, in *Windsor*, declined the Second Circuit's invitation to embrace intermediate scrutiny and instead utilized *Romer's* template of careful consideration, I put to the side, for the most part, arguments made about whether sexual orientation or homosexuality meet the criteria for a suspect or quasi-suspect classification except to the extent that these arguments pertain to the issues of moral disapproval and animus. I now turn to these lines of arguments: (1) arguments about the relevance of *Romer* and *Lawrence* to the constitutionality of DOMA; (2) arguments about protecting morality and marriage and about a national debate over marriage; (3) arguments about religious liberty and a clash of rights;<sup>654</sup> and

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filed by this group in lower court proceedings in the DOMA litigations.

653. See Susan R. Estrich and Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 122-23 (1989) (observing that the battle over abortion rights in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), made clear that "eight men may read our briefs, but the real audience is one woman": Justice Sandra Day O'Connor).

654. By contrast to the briefing in *Romer*, there was considerably less argument in *Windsor* about freedom of association. Such argument generally appeared in arguments that contended that same-sex marriage would threaten religious liberty. See, e.g., Brief for the Becket Fund for Religious Liberty as Amicus Curiae Supporting Hollingsworth and the Bipartisan Legal Advisory Group (On the Merits) at 29, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter Becket Brief] (asserting that conflicts resulting from redefining marriage would "implicate the fundamental First Amendment rights of religious institutions, including the rights to freedom of religion and freedom of association"); Brief for the American Jewish Committee as Amicus Curiae Supporting Individual Respondents (On the Merits) at 26, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter AJC brief] (stating that civil recognition of same-sex marriage may pose problems for individuals who do not want to associate with same-sex couples).

(4) argument about “letting the people decide.”

1. Arguments about the Relevance of *Romer* and *Lawrence* to the Constitutionality of DOMA

(a) Arguments made in support of BLAG and for upholding DOMA

Amici who supported BLAG and DOMA generally attempted to enlist *Romer* and *Lawrence* to support the argument that homosexuals are not a suspect class, and therefore traditional rational basis review is the appropriate test for the Court to apply. For example, the Family Research Council (FRC), a repeat player from *Romer*, argued that *Romer* itself did not designate homosexuals as a suspect class, even though the Court “had the opportunity to do so,” and instead struck down Amendment 2 on “rational basis grounds.”<sup>655</sup> Thus, the federal district court in *Windsor* correctly “declined plaintiff’s invitation to apply heightened scrutiny” to Section 3, given *Romer* and the fact that eleven federal circuit courts of appeal “have applied the rational basis test to legislation that classifies on the basis of sexual orientation.”<sup>656</sup> Similarly, an amicus brief filed by the Christian Legal Society and several other organizations asserted that Judge Straub’s dissent from the Second Circuit majority opinion correctly criticized the majority’s break from those eleven circuits in moving to higher scrutiny.<sup>657</sup> FRC denied that *Lawrence*’s overturning of *Bowers* rendered these circuit court opinions distinguishable, since some decisions post-dated *Lawrence*, and, in any case, *Lawrence* itself “employed the rational basis standard of review, the very same standard that was used in the pre-*Lawrence* authorities” that rejected heightened scrutiny.<sup>658</sup> FRC also noted that the *Windsor* district court declined to apply heightened scrutiny because, “as the Supreme Court has observed, ‘courts have been very reluctant, as they should be in our federal system,’ to create new suspect classes.”<sup>659</sup> Therefore, FRC argued: “[P]ublic discrimination towards persons who are not members of a suspect or quasi-suspect class is permissible as long as such official discrimination is rationally linked to the furtherance of some valid public interest.”<sup>660</sup> Thus, under existing precedent, “regardless of animus,” discrimination against homosexuals was constitutional if “rationally related to a legitimate governmental purpose.”<sup>661</sup>

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655. Brief for the Family Research Council as Amicus Curiae Supporting Respondent Bipartisan Legal Advisory Group (Addressing the Merits and Supporting Reversal) at 4, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter FRC Brief] (citing *Romer v. Evans*, 517 U.S. 1 (1992)).

656. *Id.*

657. Brief for Catholic Answers, Christian Legal Society, and Catholic Vote Education as Amici Curiae Supporting Respondent Bipartisan Legal Advisory Group (Addressing the Merits and Supporting Reversal) at 22, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter Catholic Answers Brief].

658. FRC Brief, *supra* note 655, at 19 (citations omitted).

659. *Id.* at 4 (citing Order of June 6, 2012, at 14–15 (quoting *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 442 (1985))).

660. *Id.* at 31 (citing *Equality Foundation of Greater Cincinnati Inc., v. Cincinnati*, 128 F.3d 289, 297 n. 8 (6th Cir. 1997) (citing *Romer v. Evans*, 517 U.S. 629, 632 (1996))).

661. *Id.* at 31–32.

In FRC's view, the *Windsor* district court's conclusion that DOMA failed the rational basis test was flawed in part because "[n]one of the four cases the district court cited" – *Romer*, *Cleburne*, *Moreno*, and *Lawrence* – "supports the proposition that 'law[s] that] exhibit[] . . . a desire to harm a politically unpopular group' should be subjected to 'a more searching form of rational basis review . . . under the Equal Protection Clause;" further, *Lawrence* was decided on due process grounds.<sup>662</sup> Many amicus filing in support of BLAG similarly contended that *Romer* and *Lawrence* showed that rational basis review is "consistent with the level of scrutiny that this Court has applied to legislative classifications on the basis of sexual orientation."<sup>663</sup>

Another frequent claim in briefs filed in support of BLAG was that *Lawrence* did not support an argument that DOMA violates equal protection because Justice O'Connor, in her concurring opinion, stated that "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."<sup>664</sup> For example, the brief filed by United States Senators for BLAG asserts: "It is simply not irrational or bigoted to oppose the redefinition of marriage in a manner 'unknown to history and tradition.'"<sup>665</sup> The amicus brief filed by the Liberty Counsel for BLAG asserted that Section 3 furthers not just legitimate interests, but important governmental objectives "that reinforce the link between marriage and procreation."<sup>666</sup> (I will return to amici's arguments about the ends marriage serves below.)

Amici also distinguished *Lawrence* because it concerned government's infringement upon liberty and privacy, not, as the Court observed, the issue of formal recognition of same-sex relationships.<sup>667</sup> Marriage, after all, is "more than a private act," the Foundation for Moral Law argued; it is "a civil and religious institution that involves child welfare, child-rearing, income tax status (individual, joint, or separate tax returns; deductions; credits)[,] estate and inheritance tax considerations, testamentary rights, privileged communications (husband-wife privilege), Social Security and Medicare benefits, military housing allowances, and a host of other matters."<sup>668</sup> Thus, "DOMA is not simply

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662. *Id.* at 31–32 n. 2.

663. Brief for Liberty Counsel as Amicus Curiae Supporting Respondent Bipartisan Legal Advisory Group at 26, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter Liberty Counsel Brief].

664. Brief of United States Senators Orrin G. Hatch, Saxby Chambliss, Dan Coats, Thad Cochran, Mike Crapo, Charles Grassley, Lindsey Graham, Mitch McConnell, Richard Shelby and Roger Wicker as Amici Curiae Supporting Respondent Bipartisan Legal Advisory Group of the U.S. House of Representatives at 28, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter U.S. Senators Brief].

665. *Id.*

666. Liberty Counsel Brief, *supra* note 663, at 36.

667. Brief for Eagle Forum Education and Legal Defense Fund Inc. as Amicus Curiae Supporting Respondent Bipartisan Legal Advisory Group of the U.S. House of Representatives (On the Merits) at 12, 14, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter Eagle Forum Brief].

668. Brief for Foundation for Moral Law as Amicus Curiae Supporting Respondent Bipartisan Legal Advisory Group of the U.S. House of Representatives at 27, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter Foundation for Moral Law Brief].

*Lawrence* revisited.”<sup>669</sup> The American Civil Rights Union (ACRU) asserted:

The redefinition of marriage involves *public* recognition of a relationship— not privacy or liberty. This case involves no governmental infringement on plaintiffs’ constitutional privacy or liberty rights. The traditional definition of marriage does not limit personal autonomy, and it does not prevent citizens from defining or living according to their own individual concepts of existence.<sup>670</sup>

ACRU further distinguished between government unconstitutionally prohibiting certain conduct and constitutionally declining to “promote or facilitate it.” Analogizing to the Court’s abortion jurisprudence, ACRU asserted:

while the state certainly cannot ban same-sex relationships under *Lawrence*, the government is under no obligation to recognize or facilitate them to the same degree as traditional marriages. The European Court of Human Rights drew this precise distinction in holding that member states could adhere to traditional marriage even though they cannot ban same-sex relationships. Furthermore, the same privacy concerns that animated *Lawrence* preclude the argument (often advanced by same-sex marriage advocates) that traditional marriage cannot serve the interest of responsible procreation unless government limits marriage to fertile couples. Such a bizarre and invasive rule would stand *Lawrence*, and this Court’s privacy jurisprudence, on its head.<sup>671</sup>

Some amici maintained that upholding traditional morality and expressing moral disapproval were a sufficient basis for law, notwithstanding *Lawrence*, since “American history, law, and traditional morality speak with a clear voice that homosexuality is to be opposed and any formal government recognition of a homosexual relationship is to be rejected.”<sup>672</sup> Similarly, amici also contended that *Washington v. Glucksberg* was a “better analog to this case than *Lawrence*,” because there is no “tradition” of same-sex marriage, while “the traditional definition of marriage has existed throughout the world for centuries and has been reaffirmed by a substantial majority of States and the Federal Government.”<sup>673</sup> Thus, ACRU argued:

As in *Glucksberg*, this Court should allow the States and Congress to continue the ongoing democratic debate over the wisdom of extending marriage to same-sex relationships, instead of interpreting the Constitution to mandate a definition of marriage that lacks any support in our nation’s history, traditions, or practices and that tens of millions of Americans fundamentally oppose.<sup>674</sup>

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669. *Id.*

670. Brief for the American Civil Rights Union as Amicus Curiae Supporting Hollingsworth and Respondent Bipartisan Legal Advisory Group (Addressing the Merits and Supporting Reversal) at 6–7, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter ACRU Brief].

671. *Id.* See also Foundation for Moral Law Brief, *supra* note 668, at 27–28 (“Even if we were to agree with *Lawrence*, which *Amicus* does not, that private sexual conduct is an aspect of a person’s right to define one’s own existence, that is far from saying that the person has a right to require that the federal government echo a state’s ‘formal recognition’ of same-sex ‘marriage’ and convey upon it all the benefits and recognitions that usually follow. Not even *Lawrence* requires such a leap.”).

672. Foundation for Moral Law Brief, *supra* note 668, at 26.

673. ACRU Brief, *supra* note 670, at 7 (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

674. *Id.*

Similarly, the Liberty, Life, and Law Foundation and North Carolina Values Coalition Foundation cited to *Glucksberg* – as well as *Romer* – in suggesting that same-sex marriage is a political, and not a judicial, prerogative:

Judicial restraint is imperative because the asserted [fundamental] rights are removed from the arena of public debate and legislative action. . . . Even the right to marry—as the concept has been widely understood for centuries—does not appear in the text of the Constitution. Redefining that right is a radical proposition and a matter of heated debate.<sup>675</sup>

Amici appealed to government’s interest in preserving marriage as a way to defuse charges of animus. Thus, the U.S. Senators brief’s two-step argument was that: first, the charge that DOMA was “allegedly motivated by unconstitutional ‘animus’” is insufficient because “legislative motivation is not a basis for setting aside a federal statute supported by legitimate and rational government interests;” second, “support for traditional marriage cannot be equated to ‘animus.’”<sup>676</sup> (I elaborate on arguments about animus below.) Similarly, amici read Equal Protection precedents like *Moreno* as meaning simply that a law could not rest merely on disapproval of a group (such as “hippies”), but would be constitutional “even if some or all members who voted for it expressed disapproval of [such a group] as their reason for doing so,” so long as the furthered a “legitimate government interest.”<sup>677</sup>

Amici also worked around *Romer* and its conclusions about animus by contrasting Amendment 2 with Section 3, and asserting that, although the Court found Amendment 2 unconstitutional, it should not reach such a conclusion about DOMA. For example, the U.S. Senators brief contended: “[a]lthough the Court noted that ‘laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected,’” the Court’s inference was “based on the structure of the amendment and the absence of ‘any identifiable legitimate purpose or discrete objective’” rather than on a “subjective evaluation of the motives of the . . . people of Colorado.”<sup>678</sup> The brief submitted: “This distinction is of critical importance because judicial scrutiny of legislative motives is fraught with peril.”<sup>679</sup> Similarly, Liberty Counsel contrasted Section 3 with Amendment 2: “Section 3 of DOMA simply provides the definition for how the terms ‘marriage’ and ‘spouse’ will be construed for purposes of federal law. As such, it does not impede access to the political process.”<sup>680</sup> Another amicus contended that *Romer* only guaranteed “political rights to petition government that homosexuals—as individuals—

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675. Brief for Liberty, Life, and Law Foundation and North Carolina Values Coalition as Amici Curiae Supporting Hollingsworth and Respondent Bipartisan Legal Advisory Group (Addressing the Merits and Supporting Reversal) at 2, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307)[hereinafter Liberty, Life and Law Foundation Brief].

676. U.S. Senators Brief, *supra* note 664, at 9 (citations omitted); ACURU Brief, *supra* note 670, at 6.

677. U.S. Senators Brief, *supra* note 664, at 26.

678. *Id.* (citing *Romer v. Evans*, 517 U.S. 620, 635 (1996)).

679. *Id.*

680. Liberty Counsel Brief, *supra* note 663, at 28-29 (referring, as a “compare” cite, to *Romer*, 517 U.S. at 624).

theretofore had shared with all citizens,” and that such political rights do not extend to a right to same-sex marriage.<sup>681</sup>

Some amici resisted the changed landscape brought about by *Romer* and *Lawrence*, favorably invoking Justice Scalia’s dissents in those cases. Thus, the Eagle Forum Education and Legal Defense Fund, Inc. appealed to Justice Scalia’s dissent in *Lawrence* to contend that the people, rather than the judiciary, should decide whether there is a right to same-sex marriage: “people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly.”<sup>682</sup> The brief also invoked Justice Scalia’s warning that, by striking down Texas’s sodomy law, the Court opened the door to attacks on traditional marriage laws and urged the *Windsor* Court to “extricate” itself from (again, invoking Justice Scalia) going down a “slippery slope” to “produc[ing] a result that bears no resemblance to the America that we know.”<sup>683</sup> Westboro Baptist Church referenced Justice Scalia’s criticism of the *Lawrence* majority signing on to homosexuals’ “agenda” in describing the acceptance of homosexuality as “the product of . . . a law-profession culture, that has largely signed on to the so-called homosexual agenda.”<sup>684</sup>

(b) Arguments made in support of *Windsor*

Many amici supporting *Windsor* offered arguments about why heightened scrutiny was the appropriate standard of judicial review by which to assess Section 3. At the same time, amici drew on *Romer* and *Lawrence* to stress that the Court could strike down DOMA even without making such a move. Thus, in their brief, Gay & Lesbian Advocates & Defenders (GLAAD) and Lambda Legal Defense and Education Fund stated: “The focus on heightened scrutiny in the parties’ filings, . . . should not leave the Court with the impression that heightened scrutiny would be required to find DOMA unconstitutional. To the contrary, this Court’s equal protection jurisprudence requires the same result even absent heightened review.”<sup>685</sup> The brief argues that DOMA fails under the heightened *rational basis* review set forth in *Romer*. As GLAAD and Lambda LDEF summarize the Court’s jurisprudence:

[P]articular attention is warranted under equal protection review, including when: (1) the group disadvantaged by a measure is traditionally disliked or misunderstood, (2) important personal or liberty interests are at stake, and (3) the

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681. Eagle Forum Brief, *supra* note 667, at 24 (emphasis in original).

682. *Id.* at 10 (citing *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting)).

683. *Id.* at 12 (citing *Bd. of County Comm’rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 695-96 (1996) (Scalia, J., dissenting)).

684. Brief for Westboro Baptist Church as Amicus Curiae Supporting Neither Party (Suggesting Reversal) at 7, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307)[hereinafter Westboro Baptist Church Brief] (quoting *Lawrence*, 539 U.S. at 603).

685. Brief for Gay & Lesbian Advocates & Defenders and Lambda Legal Defense and Education Fund, Inc., as Amici Curiae Supporting Respondent Edith Windsor and the United States (Addressing the Merits and Supporting Affirmance), *United States v. Windsor*, at 3, 133 S. Ct. 2675 (2013) (No. 12-307)[hereinafter GLAAD & Lambda Brief].

disadvantageous classification arises not in the usual course of governing but as a one-time departure from past practice. Under these circumstances, the usual presumption of constitutionality—that classifications are being drawn in good faith, for genuine purposes, and not arbitrarily or to penalize a disfavored group—is weakened.<sup>686</sup>

DOMA “raises concerns under *all* these criteria,” and, thus, “presents the paradigmatic case for particularly demanding review under this Court’s ‘conventional and venerable’ rational basis test.”<sup>687</sup> Accordingly, “a string of recent lower court decisions,” including the First Circuit’s DOMA opinion, “have each held DOMA unconstitutional even under rational basis review.”<sup>688</sup>

The GLAAD/LAMBDA LDEF brief also turns to Justice O’Connor’s concurrence in *Lawrence* to explain how the *Moreno*, *Cleburne*, and *Romer* trio supports heightened rational basis review of Section 3: “[E]ven absent application of heightened scrutiny, the normal presumption of constitutionality is less conclusive when a measure disfavors a historically disadvantaged or unpopular group. The targeting of such groups raises questions about whether bare antipathy formed the basis for the legislation. . . In such cases, the Court has applied ‘a more searching form of rational basis review.’”<sup>689</sup> The brief drew on *Romer* to assert that “‘animus’ toward gay people is not a legitimate basis for law,” but pointed out, drawing on a concurrence by Justice Kennedy, that the “category of prohibited rationales extends well beyond overt animosity, bigotry, or hatred” to include “a more subtle yet harmful ‘insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves.’”<sup>690</sup> The brief invoked both *Lawrence* and *Romer* for the point that “it is obvious that the persons disadvantaged by DOMA have historically been mistreated and condemned,” and “[f]or that reason alone, laws that selectively disadvantage gay men and lesbians, as DOMA does, merit closer attention.”<sup>691</sup> In a passage that has some parallel in Justice Kennedy’s eventual majority opinion in *Windsor*, amici emphasized the ways in which DOMA places burdens on the marriages of same-sex couples in daily life, and then explicitly framed the injury in *Romer*’s terms:

[I]rrespective of whether the burdens imposed by DOMA on the marriages of same-sex couples are viewed as encroaching on fundamental rights to family relationships, the family and liberty interests at stake are certainly substantial. The burdens of having one’s lawful marriage negated in the many important areas of life touched by the federal government (which range from treatment

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686. *Id.* at 6.

687. *Id.* at 6-7 (citing *Romer v. Evans*, 517 U.S. 620, 635 (1996)).

688. *Id.* at 7 (citations omitted).

689. *Id.* at 7-8 (citing *Romer*, 517 U.S. 620; *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *U.S. Dep’t of Agriculture v. Moreno*, 413 U.S. 528 (1973); and *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring in the judgment)).

690. *Id.* at 17 (citing *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring)).

691. *Id.* at 13 (citing *Lawrence*, 539 U.S. at 571 (“[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral”); *Romer*, 517 U.S. at 633).

under the tax laws to legal protections in federal court, private pension plans, rights under the Family Medical Leave Act, and federal benefits under numerous programs, among others) pervasively disadvantage those relationships and thereby implicate “[c]hoices about marriage, family life, and the upbringing of children.” . . . [E]ven *indirect* burdens on such interests merit close attention. . . . Moreover, DOMA’s wholesale refusal to afford marriages of same-sex couples any legal recognition withdraws a panoply of protections of marriage that cumulatively “constitute ordinary civic life in a free society” taken for granted by other married couples.<sup>692</sup>

In this passage, the brief signals a way the Court could strike down DOMA without engaging in fundamental rights analysis and deciding whether homosexuals have the same fundamental right to marry as heterosexuals.

In another significant amicus brief, New York, along with other states that permitted or recognized same-sex marriage and states that offered legal recognition to same-sex couples’ relationships through civil union or domestic partnerships laws, argued that, under *Romer*, Section 3 of DOMA was “so sweeping” that it fails “any level of scrutiny,” “even rational basis review.”<sup>693</sup> The New York Brief honed in on language in *Romer* that subsequently featured in Justice Kennedy’s *Windsor* opinion as providing the relevant legal framework: “DOMA’s discriminatory treatment of state marriage laws and same-sex couples married under state law requires more than minimal justification. This Court has recognized that laws that impose novel disabilities and ‘[d]iscriminations of an unusual character’ warrant more searching scrutiny even under a rational basis standard.”<sup>694</sup> Amici states, appropriately, stressed that this “unusual” discrimination implicated federalism: “Section 3 of DOMA imposes just such a novel and unusual rule of non-recognition on marriages that are valid under state law, and thereby constitutes a broad, unprecedented intrusion into state regulation of domestic relations.”<sup>695</sup>

The New York Brief further fit Section 3 into the *Romer* template by stressing its sweep, a feature that must lead it to fail the “skeptical examination warranted by its legislative novelty and its substantial federalism costs.” Amici argued, in the alternative, that Section 3 would fail “even if more searching scrutiny” was not used because it “is so unmoored from any concrete federal end that it fails even rational basis review. Like [Amendment 2], DOMA’s staggering breadth ‘confounds [the] normal process of judicial review’ because it lacks even a rudimentary fit between ‘the classification adopted and the object to be attained.’”<sup>696</sup> Contending that “DOMA’s refusal to recognize same-sex marriages

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692. *Id.* at 13–14 (citations omitted).

693. Brief on the Merits for the States of New York et al., as Amici Curiae in Support of Respondent Edith Schlain Windsor at 18, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter New York Brief].

694. *Id.* at 5–6 (citing *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37 (1928))).

695. *Id.* at 6. See also Brief of Amicus Curiae The American Bar Ass’n in Support of Respondent Edith Schlain Windsor on the Merits Question at 25, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter ABA Windsor].

696. New York Brief, *supra* note 693, at 18 (quoting *Romer*, 517 U.S. at 632, 633).

does nothing to conserve federal resources, while inflicting stigmatic harm on married same-sex couples who are excluded from statutory definitions of marriage," amici states appeal to *Romer's* conclusion that a law lacks a legitimate interest when it is "'inexplicable by anything but animus toward the class it affects.'"<sup>697</sup> Amici invoked *Romer's* concluding passage: "At bottom, section 3 accomplishes only one coherent objective: making married same-sex couples 'unequal to everyone else,' . . . an aim that violates equal protection."<sup>698</sup>

The amicus brief filed by 172 Members of the U.S. House of Representatives and 40 U.S. Senators highlighted the contrast between DOMA and ordinary "Acts of Congress" to argue, under *Romer*, that DOMA "must fail even if it does not trigger heightened review."<sup>699</sup> By contrast to amici in support of BLAG who stressed the irrelevance of legislative motive, these legislators highlighted the central role that "moral disapproval" played in enacting DOMA – as evidenced in the House Report – and cited that disapproval as evidence that DOMA was based on impermissible "animus."<sup>700</sup> This excerpt from the brief illustrates how thoroughly these members of Congress enlisted *Romer*, even to the point of Justice Kennedy's opening quotation from Justice Harlan:

Justice Harlan famously said in his dissent in *Plessy v. Ferguson* that "the Constitution 'neither knows nor tolerates classes among citizens.'" . . . That unassailable principle, which lies at the very heart of this Nation's character, dictates the outcome here: DOMA is constitutionally impermissible "class legislation" [*Romer* (quoting Justice Harlan)], plain and simple.

Virtually every feature of DOMA distinguishes it from routine "statutory definitions and other line-drawing exercises." . . . It was enacted without any genuine effort to discern a connection to a legitimate federal interest. It singles out married same-sex couples by one trait alone and denies them protection across the board. And a purpose for its enactment, clearly stated in the House Report and during floor debates, was moral disapproval of the minority group that it burdens. None of the arguments advanced in DOMA's defense comes remotely close to justifying it. Thus, even if the Court does not apply heightened review, DOMA must be struck down. "It is not within our constitutional tradition to enact laws of this sort." [*Romer*]<sup>701</sup>

Amici also enlisted *Lawrence* to frame the constitutional problems with

697. *Id.* at 21 (quoting *Romer*, 517 U.S. at 632).

698. *Id.* at 19 (quoting *Romer*, 517 U.S. at 635).

699. Brief of 172 Members of the U.S. House of Representatives and 40 U.S. Senators as Amici Curiae in Support of Respondent Edith Schlain Windsor, Urging Affirmance on the Merits at 3, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter 172 Members Brief].

700. *See id.* at 20 (explaining that DOMA is different from other Congressional acts because "[a] clearly stated purpose for its enactment was to express moral disapproval of a disfavored minority group.>").

701. *Id.* at 12 (citations omitted) (quoting *Romer*, 517 U.S. at 633); *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J. dissenting)). The amicus brief also stressed Section 3's sweep: "[I]t affects thousands of laws and regulations—many more than the eight laws and policies identified by the petitioners in *Romer* . . . Given the lack of grounding in any of the affected statutes or regulations, it is impossible to discern a rational connection between DOMA and any of the legitimate purposes that those laws are designed to achieve." *Id.* at 18 (citation omitted).

Section 3. First, referencing moral disapproval of homosexuality and concern over defending marriage, the brief filed by members of Congress stated:

Those views no doubt reflect “profound and deep convictions,” reflecting the “ethical and moral principles” of those who hold them. . . . But this Court has made clear that such “considerations do not answer the question before us.” . . . No matter how sincerely held, such beliefs are not a constitutionally valid basis for enacting “a classification of persons undertaken for its own sake” and “den[ying] them protection across the board.”<sup>702</sup>

Amici similarly drew on *Lawrence* in combination with *Romer* to argue for the constitutional insufficiency of appeals to tradition or to “the fact that the governing majority in a State has traditionally viewed a practice as immoral . . . .”<sup>703</sup> They found applicable Justice O’Connor’s statement, in her concurrence in *Lawrence* (discussed above) that, under the Equal Protection clause, “the Court had ‘never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.’”<sup>704</sup> Moreover, amici quoted the *Lawrence* majority’s adaptation of the famous language from the joint opinion (co-authored by Justices Kennedy, O’Connor, and Souter) in *Planned Parenthood v. Casey*: the fact that “for centuries there have been powerful voices to condemn homosexual conduct as immoral . . . shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family . . . do[es] not answer the question before us, however . . . [which is] whether the majority may use the power of the State to enforce these views on the whole society.”<sup>705</sup> Thus, the American Humanist Association also quoted the Court’s declaration, in *Lawrence* (echoing *Casey*), that: “[Our] obligation is to define the liberty of all, not to mandate our own moral code.”<sup>706</sup> The Anti-Defamation League similarly argued:

Religion plays an important role in the lives of many Americans, and many lawmakers are undoubtedly guided in their legislative decision-making by personal religious and moral beliefs. But under a line of cases including this Court’s decision in *Lawrence v. Texas* . . . a law must be rationally related to a legitimate government interest beyond the desire to disadvantage a group on the basis of moral disapproval. DOMA lacks such other interest.<sup>707</sup>

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702. *Id.* at 21 (quoting *Lawrence v. Texas*, 539 U.S. 558, 571 (2003); *Romer*, 517 U.S. at 633, 635).

703. *See, e.g.*, Brief for the Anti-Defamation League et al. As Amici Curiae In Support Of Respondent Edith Windsor On The Merits Question at 20, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter Anti-Defamation League Brief] (quoting *Lawrence*, 539 U.S. at 577).

704. *Id.*

705. Brief Amici Curiae of the American Humanist Ass’n and American Atheists, Inc. et al. in Support of Respondents Addressing the Merits at 15, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter American Humanist Ass’n Brief] (quoting *Lawrence*, 539 U.S. at 571). Amici leave out the concluding words of this passage: “through operation of the criminal law.” *Lawrence*, 539 U.S. at 571.

706. American Humanist Ass’n Brief, *supra* note 705, at 15 (quoting *Lawrence*, 539 U.S. at 571 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992))).

707. Anti-Defamation League Brief, *supra* note 703, at 19.

Amici also classified *Lawrence*, with its limits on moral disapproval as a basis for law, as “consistent with a series of cases in which the Court invalidated laws reflecting a ‘bare desire to harm a politically unpopular group.’”<sup>708</sup> Taking language from the *Cleburne*, *Moreno*, and *Romer* trilogy, for example, the Anti-Defamation League asserted: “In these cases, the Court properly stripped away the rationales proffered in support of such laws to uncover the fact that ‘animus,’ ‘negative attitudes,’ ‘unease,’ ‘fear,’ ‘bias,’ or ‘unpopular[ity]’ actually motivated the legislative action at issue.”<sup>709</sup> In doing so, amici contended that the Court’s Due Process jurisprudence (as in *Lawrence*), which supports the propositions that “moral condemnation of an identifiable group is never a legitimate government interest,” and that “religious and moral beliefs . . . standing alone and directed toward the disparagement of a single identifiable group, cannot survive even the lowest level of constitutional review,” should apply to cases brought under the Fifth Amendment Equal Protection guarantee, like Windsor’s challenge to DOMA.<sup>710</sup>

Some amici directly responded to those amici supporting BLAG who invoked Justice Scalia’s warning, in his *Lawrence* dissent, that “if morality is an insufficient governmental interest, a number of state laws would be ‘called into question,’” such as “‘laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity’”.<sup>711</sup> Thus, the AHA countered:

Even putting aside the repulsive calumny inherent in lumping together marriage equality with bestiality and incest, a careful review of each instance in which this Court has considered such laws reveals that morality has never stood alone as justification for them. In every instance, the decision relied on the governmental interest in preventing other *concrete* harms of the prohibited conduct and not on a bare assertion of immorality.<sup>712</sup>

## 2. Arguments about Promoting Morality and Marriage and the Presence or Absence of Animus

In this section I consider arguments filed by amici on both sides concerning whether protecting marriage as an institution provided a constitutional justification for DOMA. Some of the arguments for DOMA appealed to promoting traditional morality; others appealed to promoting responsible procreation and optimal childrearing. Both strands of argument insisted animus did not underlie DOMA. Amici filing in support of BLAG, for example, framed the issue as one of robust public debate over two competing models of marriage and urged the Court to refrain from interfering in that debate by taking sides (a theme sounded in Justice Alito’s *Windsor* dissent, as I shall discuss below). Amici filing in support of Windsor pointed out the problems in the appeals to

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708. *Id.* at 20 (citations omitted).

709. *Id.* at 20–21 (citations omitted).

710. *Id.* at 2–3.

711. American Humanist Ass’n Brief, *supra* note 705, at 17 (quoting *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting)).

712. *Id.*

procreation and optimal parenting, while also insisting that preserving tradition – including traditional marriage – was insufficient to justify Section 3. Inevitably, amici read and enlisted *Lawrence* different ways, sometimes in combination with *Romer*.

(a) Arguments in favor of DOMA and BLAG

Several amici who filed briefs in support of BLAG framed the litigation over Section 3 as improperly shifting from the democratic to the judicial arena a societal debate over what marriage is and should be. They further argued that the Constitution does not require one vision or the other, and that is all the more reason “the people,” not the judiciary should decide. If, however, the judiciary is to reach the merits, amici insisted, only deferential basis should apply – a test Section 3 readily met. This is, I argue below, the road not taken by the *Windsor* majority, but it is the road taken by Justice Alito’s dissent and, in blunter terms, by Justice Scalia’s.

Robert George, Sherif Girgis, and Ryan Anderson framed the debate over the definition of marriage as between the “conjugal view” of marriage as a “comprehensive union” of spouses “begun by commitment and sealed by sexual intercourse. . . . by which new life is made,” and a “revisionist view,” in which “marriage is essentially an emotional union, accompanied by any consensual activity” and seen “as valuable while the emotion lasts.”<sup>713</sup> They contended that while the conjugal view “has long informed the law,” the revisionist view “has informed certain marriage policy changes of the last several decades.”<sup>714</sup> For these amici, the stakes over striking down or upholding DOMA, which affirms the conjugal view, are serious. They contended that, while prior legal developments in the direction of the revisionist view (such as liberalizing divorce law) have already undermined marriage as an institution, “[r]edefining civil marriage will obscure the true nature of marriage as a conjugal union,” uniquely linked to procreation and childrearing, and, thus, undermine – rather than strengthen – marriage’s “stabilizing norms,” to the detriment of “spouses, children, and others.”<sup>715</sup> As I discuss below, Justice Alito draws on the arguments made by George, Girgis, and Anderson.<sup>716</sup>

The amicus brief filed by the National Association of Evangelicals (NAE) and several other prominent religious denominations similarly framed the issue as a high-stakes debate over models of marriage.<sup>717</sup> They explained their interest

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713. Amici Curiae Brief of Robert P. George et al. in Support of Hollingsworth and Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal at 5–6, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) & *United States v. Windsor*, 133 S. Ct. 2675 (2013) (Nos. 12-144 & 12-307) [hereinafter George brief].

714. *Id.* at 5.

715. *Id.* at 15.

716. In elaborating the idea of “conjugal marriage,” Justice Alito does not cite to their brief but to their book elaborating on the arguments. See discussion *infra* Part IV.G.2.

717. See generally Brief Amici Curiae of National Ass’n of Evangelicals et al. in Support of Bipartisan Legal Advisory Group of the United States House of Representatives Addressing the Merits, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter National Ass’n of Evangelicals Brief].

in the litigation: “Faith communities have the deepest interest in the legal definition of marriage and in the stability and vitality of that time-honored institution.”<sup>718</sup> The NAE brief elaborated two contrasting conceptions of marriage:

The age-old, traditional understanding conceives of marriage as a union between a man and a woman that is inherently oriented toward procreation and childrearing and in which society has a profound stake. A more recent conception views marriage as primarily a vehicle for affirming and supporting intimate adult relationship choices, a vision that is not inherently oriented toward uniting the sexes for the bearing and rearing of children.<sup>719</sup>

The brief further asserted that the newer conception is a “radical break from all human history,” because “gender itself is irrelevant. What matters most is public endorsement of the adults’ chosen relationship, obtaining official status for that relationship, and the official approval that comes with such endorsement and status.”<sup>720</sup>

The NAE brief next argued that “[w]hether the Nation retains the traditional definition of marriage or redefines marriage to include same-sex couples is a social issue with potentially wide-ranging consequences,” and that “such policy questions cannot be definitively answered by science, professional opinion, or legal reasoning alone.”<sup>721</sup> Although NAE has been “persuaded by scholarly opinion supporting traditional marriage,” it acknowledged disagreement among “social science scholars” over things like “the effects of gay parenting on children.”<sup>722</sup> The outcome of that disagreement, however, is irrelevant to what the Court should do:

Whatever the ultimate conclusions may be, “[n]othing in the Constitution requires [government] to accept as truth the most advanced and sophisticated [scientific] opinion.” . . . In part, because such opinions are inherently tentative, especially in the social sciences where conclusions are often laden with values-based assumptions and there is no values-neutral position from which to weigh and judge what is best. But also because in a democratic society the People govern—not philosophers, scientists, or academics.

Hence, whether the Nation should redefine marriage is principally about the People’s values, morals, and policy judgments.<sup>723</sup>

By “the People,” NAE must have been referring to the national electorate, one presumes, since New York’s “people” had made a decision to allow same-sex couples to marry, as a result of a deliberative process.<sup>724</sup>

NAE further argued that Congress may act to protect a “valued moral norm” and that “many congressional enactments reflect unmistakable moral and

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718. *Id.* at 1.

719. *Id.* at 2.

720. *Id.* at 11.

721. *Id.* at 12.

722. *Id.*

723. *Id.* at 12–13.

724. See discussion *infra* Part IV.

value choices.”<sup>725</sup> NAE also warned that “declaring DOMA void because it adheres to traditional moral and religious beliefs would fly in the face of this Court’s teaching that the Constitution ‘does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.’”<sup>726</sup> NAE argued for a form of neutrality toward religion: “DOMA is entitled to be judged on its merits according to settled rules of law – not on a more demanding standard born of suspicion toward religion, religious believers, or their values.”<sup>727</sup>

Amici often anchored their marriage-based arguments for DOMA to Justice O’Connor’s statement, in *Lawrence*, that “‘other reasons exist to promote the institution of marriage beyond mere moral disapproval of the law.’”<sup>728</sup> These reasons, amici asserted, were not unconstitutional animus. Several amici linked DOMA to legitimate governmental purposes associated with encouraging responsible procreation and optimal parenting – arguments BLAG stressed as well. For example, in their brief in support of BLAG, Indiana and sixteen other states asserted that the fundamental Equal Protection question was “whether there is anything wrong with adhering to the traditional definition of marriage,” and answered:

As long as some legitimate governmental purpose exists for conferring exclusive benefits on qualified opposite-sex couples, DOMA is valid in all applications. Such a legitimate rationale is crystal-clear: opposite-sex couples are the *only* procreative relationships that exist, which means that such couples are the only ones the government has a need to encourage. . . . [I]f this innately biological rationale is dismissed, the government has no coherent argument for denying marriage status to any number of persons who desire a committed relationship with each other.<sup>729</sup>

The states disavowed animus: “the traditional definition of marriage has always been about the need to encourage potentially procreative couples to stay together for the sake of the children their sexual union may produce, not about animus toward homosexuals.”<sup>730</sup>

The Manhattan Declaration brief, after invoking Justice O’Connor’s *Lawrence* concurrence, asserted that their position is not rooted in animus, but on “sincere belief and sound public policy considerations,” since heterosexual marriage “encourages and supports responsible procreation and childrearing,” and “redounds to the health and well-being of societies in general.”<sup>731</sup> The

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725. National Ass’n of Evangelicals Brief, *supra* note 717, at 19.

726. *Id.* at 20 (citations omitted).

727. *Id.* at 21.

728. See, e.g., Liberty Counsel Brief, *supra* note 663, at 36; Amicus Curiae Brief of Manhattan Declaration in Support of Respondent Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal at n.15, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter Manhattan Declaration Brief].

729. Indiana Brief, *supra* note 640, at 3-4.

730. *Id.* at 2-3.

731. Manhattan Declaration Brief, *supra* note 728, at 3.

Coalition for the Protection of Marriage similarly distinguished “animus” from “sound public policy”:

The overwhelming international consensus— including among liberal western democracies with established traditions of concern for the rights of gays and lesbians—is that reserving the formal institution of ‘marriage’ to opposite-sex couples while supporting same-sex couples through other rights and legal mechanisms is sound public policy. That consensus is based not on irrationality, ignorance, or animus toward gays and lesbians but on considered judgments about the unique nature and needs of same-sex couples and children.<sup>732</sup>

The Liberty Counsel linked Section 3 to “important governmental objectives that reinforce the link between marriage and procreation,”<sup>733</sup> contending:

Congress could have rationally concluded that marriage is society’s way of recognizing that the sexual union of one man and one woman is unique, and that government needs to support this union for the benefit of society and its children, or that marriage laws are not primarily about adult needs for approbation and support, but about the well-being of children and society. This conclusion is not only rational, but it [is] based on centuries of historical traditions and customs, sociological studies, and common sense.<sup>734</sup>

Amici also asserted that the longstanding tradition of heterosexual marriage undermined any inference that “marriage was invented thousands of years ago as a device to discriminate against homosexuals.”<sup>735</sup> This argument went both to animus and to the lack of any basis for applying heightened scrutiny. Thus, amici states argued that, while DOMA and traditional state definitions of marriage have an impact on homosexuals, they do not “target” them, and thus, the states concluded, heightened scrutiny was not appropriate since “a decision to adhere to that longstanding traditional definition of marriage [does not] betray a purpose to discriminate on the basis of sexual orientation.”<sup>736</sup> The Manhattan Declaration also disavowed any discriminatory purpose: “defenders of marriage are not interested in discrimination but rather in preserving marriage as the objective reality it has always been—for the good of the societal interests it has always served.”<sup>737</sup>

Some amici conceived the different models of marriage at stake as traditional versus “genderless” marriage and warned that society cannot have

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732. Amicus Curiae Brief for Coalition for the Protection of Marriage in Support of Hollingsworth and Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal at 35, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) & *United States v. Windsor*, 133 S. Ct. 2675 (2013) (Nos. 12-144 & 12-307) [hereinafter *Protection of Marriage Brief*] (quoting Brief for Judge Georg Ress and the Marriage Law Foundation as Amici Curiae Supporting Petitioners at 2, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144)).

733. Liberty Counsel Brief, *supra* note 663, at 36.

734. *Id.* at 45.

735. Indiana Brief, *supra* note 640, at 7. The amici states did not take a position on “whether homosexuals constitute a specially protected class in the abstract,” just on whether or not “DOMA, and by extension traditional state definitions of marriage, constitute facial discrimination against homosexuals.” *Id.* at 5.

736. *Id.* at 7.

737. Manhattan Declaration Brief, *supra* note 728, at 13.

both institutions at once. For example, the Coalition for the Protection of Marriage contrasted “man-woman marriage” and “genderless marriage” in terms of the former’s broader vision of marriage as a vital social institution offering social goods:

A fundamental issue in the contest over the constitutionality of man-woman marriage is: What is marriage? All advocacy for genderless marriage is built upon a narrow view that marriage is *no more than* love and friendship, security for adults and their children, economic protection, and public affirmation of commitment. . . . [P]roponents of man-woman marriage advance a broader view of marriage [that] encompasses the social benefits (‘goods’) identified with the narrow view but also much more. . . . the marriage institution’s vital role and social goods (i) centered in children (those now living and for generations to come), including making meaningful the child’s bonding right, providing adequate private welfare to the vast majority of children (those conceived through passionate, heterosexual coupling), and perpetuating the optimal childrearing mode; (ii) essential in the statuses and identities of *husband* and *wife*; and (iii) necessary for protection of the fundamental rights of natural parenthood and family relations.<sup>738</sup>

The Coalition’s brief elaborated on how the “man-woman meaning” is at the “core” of the interrelated meanings that make up marriage as a “vital and fundamental social institution,” and how, because marriage is a social institution, it provides men and women with “statuses, identities, perceptions, aspirations, and projects” and guides their conduct in ways that realize social goods, such as a child’s “knowing and being raised by her own mother and father.”<sup>739</sup> Marriage is the foundation of “the natural family as a buffer between family members and the state,” and also “humankind’s best means for maximizing private welfare to the vast majority of children (those conceived by passionate, heterosexual coupling); and the irreplaceable foundation of the optimal child-rearing mode.”<sup>740</sup>

If society preserves man-woman marriage, even while it “recognizes domestic partnerships,” the Coalition argued, the former “continues to provide society with valuable social goods that it cannot get otherwise.”<sup>741</sup> By contrast, “society cannot have at the same time two institutions denominated *marriage* with different core meanings or a single institution denominated marriage with different, conflicting core meanings.”<sup>742</sup> If society goes the route of permitting genderless marriage,

[T]he reality is that changing the meaning of marriage to that of “any two persons” will transform the institution profoundly, if not immediately then certainly over time as the new meaning is mandated in texts, in schools, and in many other parts of the public square and voluntarily published by the media and other institutions, with society, especially its children, thereby losing the

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738. Protection of Marriage Brief, *supra* note 732, at 4–5.

739. *Id.* at 5.

740. *Id.* at 6.

741. *Id.* at 35.

742. *Id.* at 6.

ability to discern the meanings of the old institution.<sup>743</sup>

Indeed, the Coalition predicted further harmful consequences:

A genderless marriage regime is and will be socially hostile and politically adverse to: the child's bonding interest; natural parenthood as the foundation for the construction of parenthood in our society; the concept that relational rights within the natural family are not created, dispensed, and withdrawn at the will of the state; and the personally and socially valuable statuses and identities of *husband* and *wife*.<sup>744</sup>

As this passage suggests, the Coalition views "the natural family," of which man-woman marriage is the core, as prepolitical, but vulnerable to tampering by the state if the law uses its power to "mandate[e] a genderless marriage regime," which will "over time" suppress and displace the man-woman meaning.<sup>745</sup>

The brief filed by the Manhattan Declaration similarly warned that Edith Windsor's "cavalier project" of requiring the federal government to accept each state's redefinition of marriage

threatens to transform marriage from an organic institution marked primarily by unitive creation and the promotion of life and generational continuity to a manufactured institution marked primarily by the satisfaction to be provided by adult romance. . . . [should] the new marriage regime . . . come to fruition, [it] would inevitably opt for the private over the common good, with predictably deleterious consequences for children and society at large.<sup>746</sup>

The brief framed the issue as a threat to "marriage culture:"

Vast human experience confirms that marriage is the original and most important institution for sustaining the health, education, and welfare of all persons in a society. Where marriage is honored, and where there is a flourishing marriage culture, everyone benefits - the spouses themselves, their children, the communities and societies in which they live. Where the marriage culture begins to erode, social pathologies of every sort quickly manifest themselves.<sup>747</sup>

Some amici appealed to religious and Biblical understandings of marriage in support of Section 3's preserving "traditional" marriage and warned of consequences if the civil law of marriage departs sharply from religious conceptions of marriage. Some amici resisted the very idea that civil and religious understandings of marriage could or should be distinct. For example, the Coalition for the Protection of Marriage asserted: "Although interacting with and influenced by other institutions such as law, property, and religion, marriage in our society is a distinct, unitary social institution and does not have two separate, independent existences, one 'civil' and one 'religious.'"<sup>748</sup> The Manhattan Declaration brief argued that the concept that societies give legal

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743. *Id.* at 7.

744. *Id.* at 8.

745. *Id.* at 7.

746. Manhattan Declaration Brief, *supra* note 728, at 8-9.

747. *Id.* at 4-5 (quoting ROBERT GEORGE ET AL., MANHATTAN DECLARATION 4 (2009)).

748. Protection of Marriage Brief, *supra* note 732, at 6-7.

recognition to marriage to “encourage and support responsible procreation and childrearing” is “remarkably similar to the Christian belief that through marriage man and woman cooperate conjugally in the creative act of God Himself.”<sup>749</sup>

Some amici who stressed the relevance of religious conceptions of marriage insisted that Congress could enact DOMA to defend traditional notions of morality, including disapproval of homosexuality. For example, Westboro Baptist Church argued at length that homosexuality (along with adultery, abortion and the like) is such a serious sin that it will motivate God to punish the U.S. by destroying it, similar to the Flood in Noah’s time.<sup>750</sup> The Foundation for Moral Law asserted: “From Biblical law and other ancient law, through English and American common law and organic law, to recent times, homosexual conduct has been abhorred and opposed; the idea of a ‘marriage’ based on such conduct never even entered the legal mind until very recent times.”<sup>751</sup> Thus:

Congress’s passage of the federal definition of marriage in DOMA had the force of that history behind it and several present-day interests that were asserted when DOMA was enacted in 1996, such as an interest in defending marriage and an interest in defending traditional notions of morality. DOMA easily bears a rational relationship to Congress’s support of traditional marriage as it began to come under attack through the courts in 1993.<sup>752</sup>

The Foundation’s statement of interest in the case reads like a *Bowers*-era, pre-*Lawrence* argument: after declaring that “this nation’s laws should reflect the moral basis upon which the nation was founded,” including “the ancient roots of the common law,” the Founders’ views, and “the views of the American people,” it reported that those views have always “held that homosexual conduct has always been and continues to be immoral and should not be protected or sanctioned by law.”<sup>753</sup> Other amici explicitly referred to *Bowers*’ recognition of the role of religious beliefs in condemning homosexuality in asserting that the DOMA battle involved a clash of rights. After invoking Chief Justice Burger’s *Bowers* concurrence in support of the assertion that “[s]ame-sex intimacy is contrary to centuries of religious teaching. . . . [and] would ‘cast aside millennia of moral teaching’ to convert it to a fundamental right,”<sup>754</sup> the Liberty, Life and Law Foundation and North Carolina Values Coalition argued that, even under *Lawrence*, the privacy rights of homosexuals should not trump the privacy rights of other citizens, since:

even in overruling *Bowers*, this Court acknowledged that: ‘The condemnation [of homosexual conduct] has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as

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749. Manhattan Declaration Brief, *supra* note 728, at 6-7.

750. See Westboro Baptist Church Brief, *supra* note 684, at 13-20.

751. Foundation for Moral Law Brief, *supra* note 668, at 3.

752. *Id.*

753. *Id.* at 1-2.

754. Liberty, Life, and Law Foundation Brief, *supra* note 675, at 3-4, (quoting *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, J., concurring)).

ethical and moral principles to which they aspire and which thus determine the course of their lives.<sup>755</sup>

Finally, in contrast, some conservative amici generally committed to bringing biblical principles to bear on public policy made no overt reference to morality and instead emphasized other reasons for DOMA. Thus, a brief filed by the Beverly LeHaye Institute and National Legal Foundation, affiliated with Concerned Women of America, stated its interest in providing “accurate academic and scientific data with sound analysis to inform and substantiate policy positions on contemporary issues from a traditional pro-family, feminine perspective;” its brief appealed to the dissent in *Windsor*, contending that “Judge Straub “demonstrated just how easy it is to understand how DOMA advances the goals of responsible childrearing.”<sup>756</sup> The brief then detailed scientific studies that allegedly demonstrated that children in same-sex parent households are disadvantaged.<sup>757</sup>

(b) Arguments made for Edith Windsor

As discussed above, amici filing in support of Windsor enlisted *Romer* and *Lawrence* to argue that expressing moral disapproval and promoting traditional morality were insufficient reasons to survive any form of judicial review, be it heightened scrutiny, the more searching form of rational basis review, or even ordinary rational basis review. Amici frequently referred to the House Report language that DOMA’s purpose was “‘to reflect and honor a collective moral judgment about human sexuality’ that ‘entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality,’” and connected this moral approval to impermissible animus, prejudice, and a bare desire to harm.<sup>758</sup> The brief filed by 172 Members of the U.S. House of Representatives and 40 U.S. Senators stressed that under *Lawrence*, the appeal to traditional views of marriage was not enough:

That same-sex couples were previously excluded from marriage, and therefore from federal responsibilities and rights that hinge on marriage, cannot itself justify their *continued* exclusion. After all, there is no guarantee that tradition—which often reflects fallible social norms and biases—is itself rational. Thus, “[t]hat the governing majority. . . has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice” (*Lawrence*, . . .) and “[a]ncient lineage of a legal concept does not give it

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755. *Id.* at 4.

756. Brief Amici Curiae of the Beverly LeHaye Institute, and the National Legal Foundation, in Support of the Respondent, Bipartisan Legal Advisory Group of the United States House of Representatives, Addressing the Merits and Supporting Reversal at 1, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter LeHaye Brief]; *id.* at 5 (citing *U.S. v. Windsor*, 699 F.3d at 199-202).

757. *Id.* at 6-20 (discussing, in particular, Mark Regnerus, *How Different are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 SOC. SC. RESEARCH 752 (2012)).

758. See GLAAD and Lambda Brief, *supra* note 685, at 22-25 (quoting H.R. REP. NO. 1-4-664, *supra* note 11, at 15-16).

immunity from attack for lacking a rational basis" . . . DOMA must rationally serve legitimate federal interests independent of consistency with tradition or historical practice. It doesn't.<sup>759</sup>

The American Humanist Association contended that "DOMA can be justified by no actual governmental interests that can logically be shown to prevent harm or promote welfare," and "[a]ll that is left to its defenders is a moral argument that homosexuals are sinful and therefore not to be permitted to share the institution of marriage with heterosexuals."<sup>760</sup> The Association argued: "This kind of spiteful, self-righteous 'desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."<sup>761</sup>

While amici supporting BLAG framed the issue more in terms of the Court not taking sides in a debate over models of marriage, amici for Windsor stressed that the only couples affected by DOMA were those *lawfully married under state law* and argued that the lack of fit between means and end provided further evidence of the lack of any legitimate purpose. The amicus brief filed by the American Bar Association heavily employed the *Romer* template in arguing that "[t]he governmental interests advanced in support of Section 3 cannot justify the unprecedented exclusion of one group, legally married gay and lesbian couples, from all of the federal benefits and responsibilities of marriage."<sup>762</sup> The ABA brief characterized Section 3 as "discriminations of an unusual character," as evidenced by the practical consequences for those lawfully married couples whom the provision "singles out" in the areas of health care, retirement planning, immigration, military benefits, taxes, and ethical responsibilities.<sup>763</sup> "By 'deem[ing] a class of [married] persons a stranger to [federal] laws,' . . . notwithstanding recognition by a couple's State of their marriage," the ABA argued, "Section 3 denies that class [of] legally married gay and lesbian couples . . . equal protection."<sup>764</sup> The ABA dismissed the several "'unique federal interests'" that BLAG asserted for Section 3: that it "'preserves each sovereign's ability to define marriage for itself,'" "fills the need for a 'uniform federal definition' of marriage," and "permits States to 'act as laboratories of democracy' while the federal government reserves judgment on same-sex marriage."<sup>765</sup> The ABA countered that such justifications "'founder in light of the States' long-standing primacy in defining marriage," referencing other amicus briefs detailing how "the regulation of marriage has always varied from State to State in numerous ways," such as rules concerning minimum age, consanguinity, and recognition of common law marriage.<sup>766</sup> Far from encouraging states to be experimental laboratories, it continued, "Section 3 thwarts the democratic

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759. 172 Members Brief, *supra* note 699, at 22 (quoting *Lawrence v. Texas*, 539 U.S. 558, 560 (2003); *Heller v. Doe*, 509 U.S. 312, 327 (1993)).

760. American Humanist Ass'n Brief, *supra* note 705, at 20.

761. *Id.* (quoting *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

762. ABA Windsor, *supra* note 695, at 25.

763. *See id.* at 6, 8-26 (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

764. *Id.* at 29 (citing *Romer*, 517 U.S. at 635).

765. *Id.* at 30 (quoting Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 30-37, 41-43, *Windsor*, 133 S. Ct. 2675 (No. 12-307)).

766. *Id.* at 30 (citing Family Law Brief, *supra* note 617 at 7-9).

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process by preventing States from allowing their gay and lesbian citizens a truly equal share in the benefits and responsibilities of civil marriage.”<sup>767</sup> As I discuss below, this type of argument about how DOMA creates a regime of unequal benefits and responsibilities features in Justice Kennedy’s majority opinion in *Windsor*.

Amici also responded to arguments that Section 3 promoted governmental interests in responsible procreation and optimal parenting. Drawing on the First Circuit’s DOMA opinion, the ABA, for example, stressed the complete lack of connection between the argument that Section 3 promotes traditional marriage and childrearing and Section 3’s actual impact:

As a purely logical matter, excluding gay and lesbian couples from federal benefits cannot create an incentive for heterosexual couples to marry or raise children responsibly. “This is not merely a matter of poor fit of remedy to perceived problem, but a lack of any demonstrated connection between DOMA’s treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage.”<sup>768</sup>

The American Jewish Committee argued that BLAG’s procreation-based justifications for denying same-sex marriage were misguided, since “[m]arriage is about far more than children.”<sup>769</sup> While the state has an important interest in protecting children, the AJC continued, denying same-sex marriage neither furthered this interest nor kept same-sex couples from having and raising children.<sup>770</sup> Further, the brief made a significant distinction between religious and civil marriage, observing that, while “[s]ex and sexual morality are central to religious marriage,” these same values are “increasingly peripheral to legal provisions for civil marriage.”<sup>771</sup>

In support of their argument that procreation is not “an essential element of marriage,” the Family and Child Welfare Law Professors brief enlisted Justice Scalia’s query and answer in his *Lawrence* dissent: “[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘[t]he liberty protected by the Constitution’? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.”<sup>772</sup> This brief also appealed to the *Lawrence* majority to refute BLAG’s appeal to procreation as a rationale for DOMA: “it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”<sup>773</sup> The brief canvassed state statutes and case law to support the

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767. *Id.* at 32.

768. *Id.* at 33 (quoting *Mass. v. United States Dep’t of Health & Human Servs.*, 682 F.3d 1, 15 (1st Cir. 2012)).

769. See AJC Brief, *supra* note 654, at 2, 8.

770. See *id.* at 8-9.

771. *Id.* at 20.

772. Brief Amici Curiae Family & Child Welfare Law Professors Addressing the Merits & in Support of Respondents at 5, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter Family & Child Welfare Brief] (quoting *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting)).

773. *Id.* at 10 (quoting *Lawrence*, 539 U.S. at 567).

argument that procreation (or intention to procreate) is not a requirement for any marriage, the inability to procreate is not a ground for divorce, and marriage itself offers many social and financial benefits to spouses that have nothing to do with procreation.<sup>774</sup> The brief concluded that “DOMA ‘seems inexplicable by anything other than animus towards the class it affects.’”<sup>775</sup>

Some amici challenged contentions by BLAG’s amici that social science evidence supported continued adherence to traditional marriage. For example, the American Psychological Association, along with the American Medical Association and the American Academy of Pediatrics, filed an amicus brief, just as it did in the *Romer* litigation.<sup>776</sup> Parallel to that earlier brief, the APA brief chronicled a history of prejudice toward homosexuals and the scientific community’s changed view about homosexuality. Pertinent to the DOMA litigation, it argued that numerous studies demonstrate that heterosexual couples are not inherently better parents than same-sex couples, as BLAG and others suggested; instead, “the vast majority of scientific studies . . . has consistently shown” that gay and lesbian parents “are as fit and capable parents” as heterosexual parents.<sup>777</sup> Citing to many studies, the brief countered arguments that homosexuality is a choice and that children of homosexual couples are disadvantaged.

The APA brief argued that DOMA’s legislative history indicates that the Act reflected legislators’ disapproval of homosexuality and that “the beliefs about lesbians and gay men relied on by Congress in enacting DOMA. . . reflect an unreasoned antipathy towards an identifiable minority.”<sup>778</sup> It asserted that, by offering greater privileges and protections to married heterosexual couples and their children, DOMA “conveys the federal government’s judgment that committed intimate relationships between people of the same sex . . . are inferior to heterosexual relationships,” thereby “legitimiz[ing] prejudicial attitudes and individual acts against the disfavored group, including ostracism, harassment, discrimination, and violence.”<sup>779</sup> The APA and other amici asserted that DOMA stigmatized same-sex couples and their children.<sup>780</sup> For example, the Family Equality Council brought forth statements by children raised by same-sex couples to challenge BLAG’s “assertion that marriage must be confined to opposite-sex couples in order to ‘promot[e] an optimal social structure for

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774. *Id.* at 4, 8–9.

775. *Id.* at 36 (quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996)).

776. Brief of the American Psychological Ass’n, et al. as Amici Curiae on the Merits in Support of Affirmance, *Windsor*, 133 S. Ct. 2675 (No. 12-307) [hereinafter APA Windsor]. For discussion of its *Romer* brief, see APA Brief, *supra* note 345.

777. APA Windsor, *supra* note 775, at 18–19.

778. *Id.* at 34.

779. *Id.* at 34–35.

780. *Id.* at 34–35; *id.* at 36 (arguing that DOMA discriminates against same-sex couples by “perpetuating ‘archaic and stereotypic notions’ or by stigmatizing members of the disfavored group as ‘‘innately inferior’’”) (quoting *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984)); Brief of Amici Curiae Family Equality Council et al. in Support of Respondents Perry, Stier, Katami, Zarrillo, City & County of San Francisco, & Edith Schlain Windsor, in her Capacity as Executor of the Estate of Thea Clara Spyer, Addressing the Merits & Supporting Affirmance at 3, *Windsor*, 133 S. Ct. 2675 (No. 12-307) [hereinafter Family Equality Council Brief].

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educating, socializing, and preparing [our] future citizens.”<sup>781</sup> The Council argued that procreation-based justifications for excluding same-sex couples from the definition of marriage “treat the children of same-sex parents as, at best, invisible, and, at worst, non-existent,” adding that “the major challenge most same-sex parented families must surmount is . . . the societal and governmental disapproval that both Proposition 8 and DOMA represent and perpetuate.”<sup>782</sup> Moreover, DOMA and Proposition 8 “exacerbate feelings of hopelessness about the future and perpetual ‘different-ness’ that many LGBT youth already feel and discourage them from aspiring to full participation in civic life.”<sup>783</sup>

### 3. Arguments about Religious Liberty and a Clash of Rights

#### (a) Arguments for BLAG

Some of the arguments concerning DOMA’s role in protecting morality, discussed above, also implicated arguments about preserving religious liberty. Some amici also warned that as civil laws changed their definitions of marriage, religious persons and groups adhering to traditional definitions would face threats to their religious liberty. New civil marriage laws, in other words, would create a clash of rights. Some arguments about how DOMA avoided that clash parallel arguments made in *Romer* about how Amendment 2 resolved the potential clash of rights posed by expansive anti-discrimination laws in favor of religious liberty.<sup>784</sup> For example, the Becket Fund for Religious Liberty argued that “because so many major religious groups center their teachings regarding sexual morality around opposite-sex marriage, changing the definition of marriage itself . . . triggers a distinct set of religious liberty concerns.”<sup>785</sup> For example, “being forced to call a same-sex relationship a ‘marriage’ creates a conflict of conscience for many religious organizations where ‘civil union’ or ‘domestic partnership’ would not.”<sup>786</sup> DOMA, therefore, was a rational response to two religious liberty conflicts caused by marriage equality laws:

*First*, objecting religious institutions and individuals will face an increased risk of lawsuits under federal, state, and local anti-discrimination laws, subjecting religious organizations to substantial civil liability if they choose to continue practicing their religious beliefs. *Second*, religious institutions and individuals will face a range of penalties from federal, state and local governments, such as denial of access to public facilities, loss of accreditation and licensing, and the targeted withdrawal of government contracts and benefits.<sup>787</sup>

The Becket Fund asserted that “DOMA and Proposition 8 were rational responses to court decisions that gave legal recognition to same-sex marriage

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781. Family Equality Council Brief, *supra* note 780, at 3, 16 (quoting Brief of Petitioners at 37, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144)).

782. *Id.* at 8, 24.

783. *Id.* at 33.

784. See *supra* note 276 for discussion of the Christian Legal Society brief in *Romer*.

785. Becket Brief, *supra* note 654, at 29.

786. *Id.*

787. *Id.* at 4.

without addressing the significant church-state conflicts that would result" from "burdens imposed by . . . supposedly neutral, generally applicable laws."<sup>788</sup> This argument seems inapt as applied to *Windsor*, since New York enacted marriage equality through the legislative process and included religious exemptions.

The Christian Legal Society, joined by Catholic Answers and the Catholic Vote Education Fund warned that classifying homosexuals as a suspect or quasi-suspect class would compromise religious liberties:

This Court is being asked to recognize sexual orientation as a suspect or quasi-suspect class for purposes of federal equal protection jurisprudence. But to do so would, at both a theoretical and a practical level, necessarily diminish the ability of our nation's religious individuals and communities to live according to their faith. . . . There is already a broad and intense conflict between the gay rights movement and religious liberty regarding marriage, family, and sexual behavior. If the Court creates a new suspect classification for sexual orientation, it will take sides in that conflict and place millions of religious believers and organizations at a potentially irreversible disadvantage in their efforts to consistently live out their faith.<sup>789</sup>

The brief warned: "[B]y making sexual orientation a new protected class under our Constitution, this Court would hand the government a tremendous tool to constrain traditional churches, synagogues, and mosques to catechism and ceremony, and to force religious believers to restrict the exercise of their faith to those narrow confines."<sup>790</sup> The brief drew a parallel to the impact of antidiscrimination laws on religious organizations: "As this Court observed in [that] context . . . the '[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission."<sup>791</sup>

The CLS brief also disputed the framing of the issue as "the inevitable clash . . . between 'identity liberty' (of homosexuals and bisexuals) and 'belief liberty' (of religious people)" because it wrongly assumed "that many religious persons do not define their identities by their faith."<sup>792</sup> The brief further asserted that, "[t]oo often gay rights advocates equate traditional religious beliefs regarding sexual orientation and sexual conduct to racism, insisting that these traditional religious beliefs should not be tolerated outside a tightly restricted personal sphere," while "many traditional religious believers approach issues regarding sexual orientation as primarily religious questions about sexual behavior, rather than personal identity."<sup>793</sup> The focus of this line of argument was a concern that if the Court recognized sexual orientation as a "new suspect class," then states and municipalities would be "forced to remove their religious

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788. *Id.* at 2, 29.

789. Catholic Answers Brief, *supra* note 657, at 4.

790. *Id.* at 11.

791. *Id.* (quoting Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 336 (1987)).

792. *Id.* at 12 (quoting Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 123, 130 (Douglas Laycock et al. eds., 2008)) (disputing characterization by Civil Rights Commissioner Chai Feldblum).

793. *Id.*

liberty exceptions,” leaving religious individuals and communities “very limited legal recourse to protect their ability to fully live out their faiths.”<sup>794</sup>

The Chaplain Alliance for Religious Liberty asserted that repealing DOMA would impair “military religious liberty,” since “it is very likely that service members who hold traditional religious beliefs on marriage and family will face, for the first time, military policies and duties that sharply [sic] hostile to their beliefs.”<sup>795</sup> For example, “[w]hile there is no question chaplains will continue to serve all service members, if military policy becomes directly antithetical to their beliefs on the fundamental issues of marriage and family, chaplains will find their hands tied as to how they can serve,” since, “[o]n a wide variety of issues, including some that are very important to military families, it seems likely that military policy would directly conflict with a chaplain’s responsibility to provide the full spectrum of religious counsel.”<sup>796</sup> The brief predicted that chaplains and service members who belonged to “faith groups that support traditional marriage” would face a stark, forced choice between “their duty to obey God” and “their chosen vocation of serving their country” if laws “affirming marriage as the union of one man and one woman are invalidated as irrational and unconstitutional.”<sup>797</sup>

Other amici warned that a civil regime recognizing same-sex marriage would create a new governmental orthodoxy at odds with religious liberty. For example, the Manhattan Declaration brief asserted that “redefining marriage imperils religious liberty and oftentimes requires that freedom of conscience be sacrificed to the newly regnant orthodoxy.”<sup>798</sup> A new marriage regime that recognized same-sex marriage, it asserted, would “circumscribe[] the ability of the Christian faithful to put their beliefs into practice.”<sup>799</sup> The brief included various examples, such as Christian adoption agencies shutting down because of their refusal to place children with same-sex couples, religious parents’ inability to remove their children from public school classes advocating marriage equality, and Christian organizations having to end all medical insurance for employees’ spouses because they do not want to cover same-sex spouses.<sup>800</sup> The brief further contended that Christians would be limited in how they could educate their children.<sup>801</sup> The brief asserted that “[r]eligious freedom is our first, most cherished liberty” and should not be infringed upon by same-sex

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794. See *id.* at 30. The brief detailed concerns over diminished protection of conventional religious beliefs under Title VII. *Id.* at 30–32. For a similar concern about the impact of heightened scrutiny, see Brief Amicus Curiae of United States Conference of Catholic Bishops in Support of Respondent Bipartisan Legal Advisory Group, Addressing the Merits, and Supporting Reversal at 16–20, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

795. Brief of Amici Curiae Chaplain Alliance for Religious Liberty, et al., in Support of the Bipartisan Legal Advisory Group Addressing the Merits & Supporting Reversal at 3–4, *Windsor*, 133 S. Ct. 2675 (No. 12-307) [hereinafter Chaplain Alliance Brief].

796. *Id.* at 4.

797. *Id.* at 4–5.

798. Manhattan Declaration Brief, *supra* note 728, at 3–4.

799. *Id.* at 15.

800. *Id.* at 15–19.

801. See *id.* at 17.

marriage.<sup>802</sup>

Some religious amici contended that their religious objections to same-sex marriage were not animus, and that for government to fail to credence those objections infringed upon their religious liberty. For example, the Liberty, Life and Law Foundation and North Carolina Values Coalition similarly warned that marriage equality would infringe upon the “moral code of behavior” typical of religions, including the regulation of sexual conduct, with the result that “[a] state mandate to affirm same-sex marriage would have an explosive impact on religious persons who could easily treat all individuals with equal respect and dignity but cannot in good conscience endorse or facilitate same-sex marriage.”<sup>803</sup> The Foundation further argued that “[a] person’s religiously motivated refusal to recognize same-sex unions is not tantamount to unlawful discrimination, nor is it irrational animosity,” and that, “[t]o hold otherwise would exhibit callous disregard for religion.”<sup>804</sup> The evident logic of the Foundation’s argument is that the Constitution protects religious beliefs and conduct, and, thus, morality based on religion provides a valid rationale for opposing same-sex marriage. The Foundation analogized to case law crediting conscientious religious beliefs in other contexts, concluding: “[t]he government must avoid showing hostility to religion by refusing to acknowledge religious motivation.”<sup>805</sup>

(b) Arguments for Windsor

Amici filing in support of Windsor emphasized the distinction between civil and religious marriage, and that redefining the former did not unconstitutionally burden the latter. They further pointed out that religious exemptions were a means of ensuring religious liberty. For example, the brief submitted by the Bishops of the Episcopal Church in California, New York, and several other states, the Jewish Theological Seminary, and numerous other religious groups noted a growing affirmation by religious faiths of the “dignity” of same-sex relationships and family life:

The American religious panorama embraces a multitude of theological perspectives on lesbian and gay people and same-sex relationships. A vast range of religious perspectives affirms the inherent dignity of lesbian and gay people, their relationships, and their families. This affirmation reflects the deeply rooted belief, common to many faiths, in the essential worth of all individuals and, more particularly, the growing respect accorded within theological traditions to same-sex couples.<sup>806</sup>

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802. *See id.* at 15.

803. Liberty, Life and Law Foundation Brief, *supra* note 675, at 16.

804. *Id.* at 17.

805. *See id.* at 15–16.

806. Brief of Amici Curiae Bishops of the Episcopal Church in the States of California, Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, & Washington & the District of Columbia et al. on the Merits & in Support of Affirmance in Favor of Respondent Edith Schlain Windsor at 3, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter Episcopal Bishops Brief].

The brief insists on the constitutional importance of the distinction between civil and religious marriage:

Certain *amici* supporting reversal have argued that civil recognition for the marriages of same-sex couples would alter a longstanding ‘Christian’ definition of ‘marriage.’ But this and other religiously based arguments for limiting civil recognition of marriage to different-sex couples cannot constitutionally be given weight by this Court. Crediting such arguments would improperly both enshrine a particular religious belief in the law – itself prohibited under the Establishment Clause – and implicitly privilege religious viewpoints that oppose marriage equality over those that favor it.<sup>807</sup>

The brief then argues that “[e]liminating discrimination in civil marriage will not impinge upon religious doctrine or practice,” since “[a]ll religions would remain free – as they are today with nine states and the District of Columbia permitting same-sex couples to marry – to define *religious* marriage in any way they choose.”<sup>808</sup> The brief first points out that “[t]he types of conflicts forecast by certain other *amici* already can and sometimes do arise under public accommodation laws whenever religiously affiliated organizations operate in the commercial or governmental spheres,” and “[c]ourts know how to respond if enforcement of civil rights laws overreaches to infringe First Amendment rights.”<sup>809</sup> “In any event,” the brief concluded, “the issue largely is irrelevant here, because the couples affected by the Defense of Marriage Act (“DOMA”) already are lawfully married under state law.”<sup>810</sup>

Other *amici* also stressed that, under the Establishment Clause, religious groups do not have “the right to have their religious views written into law so that others may be compelled to follow them.”<sup>811</sup> Addressing claims by *amici* that “their ‘religious liberty’ . . . would be violated if this Court confirms a right to legal equality for gays and lesbians,” because of “their Bible’s condemnation of homosexuality,” the American Humanist Association asserted that, “[b]ecause the First Amendment forbids, rather than requires, any law solely grounded in or codifying a religious ‘moral’ commandment, such objections can be accorded no weight.”<sup>812</sup> Other *amici* stressed the insufficiency of moral disapproval, even if rooted in religious belief. Thus, the Anti-Defamation acknowledged the importance of religion in American life and that religious beliefs undoubtedly guided many lawmakers, but explained that, “under a line of cases including this Court’s decision in *Lawrence v. Texas*, a law must be rationally related to a legitimate government interest beyond the desire to disadvantage a group on the basis of moral disapproval.”<sup>813</sup>

Some *amici* urged the Court to “bring healing to the nation by

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807. *Id.* at 5.

808. *Id.* at 4.

809. *Id.*

810. *Id.*

811. American Humanist Ass’n Brief, *supra* note 705, at 4.

812. *Id.*

813. Anti-Defamation League Brief, *supra* note 703, at 19 (citing *Lawrence v. Texas*, 539 U.S. 558, 574–75 (2003)) (citation omitted).

demonstrating that the humanity of gay citizens can be reconciled with respect for religious freedom”:

The Constitution guarantees both the right of gay people to be treated as equals under civil law and the right of individuals and organizations to hold beliefs about homosexuality in accordance with their own consciences. By treating homosexuality in the secular context with neutrality, and by affirming that all people—whether gay or straight—are entitled to equal treatment under the Constitution, this Court can unify the country around our shared values of liberty and justice for all.<sup>814</sup>

One amicus who filed a brief in support of Windsor and Perry, the American Jewish Committee (AJC), supported the state’s authority to redefine civil marriage, but also urged that broad protections of religious liberty were necessary if the state did so.<sup>815</sup> Similar to some amici supporting DOMA, AJC “agree[s] that significant religious liberty issues will follow in the wake of same-sex civil marriage,” but it also argued that the issues could be remedied if “each claim to liberty in our system . . . [is] defined in a way that is consistent with the equal and sometimes conflicting liberty of others.”<sup>816</sup> Thus, there would be “no burden on religious exercise when the state recognizes someone else’s civil marriage,” but there would be if “the state demands that religious organizations or believers recognize or facilitate a marriage in ways that violate their religious commitments.”<sup>817</sup> The AJC saw parallels between the gay rights movement and its own assertion of the need for religious liberties:

Both same-sex couples and religious dissenters also seek to live out their identities in ways that are public in the sense of being socially apparent and socially acknowledged. . . Religious believers. . . claim a right to follow their faith not just in worship services, but in charitable services provided through their religious organizations and in their daily lives.<sup>818</sup>

As did some religious amici supporting BLAG, the AJC identified a variety of situations in which religious liberty might be compromised, including marriage counseling by clergy and housing in religious colleges.<sup>819</sup> As one way to address these conflicts, the AJC also proposed that the Court reconsider *Employment Division v. Smith*, so that religious actors would be exempt from generally applicable laws that infringe on their freedoms unless application of the statute can survive heightened scrutiny.<sup>820</sup>

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814. Amici Curiae Brief of Utah Pride Center, Campaign for Southern Equality, Equality Federation & Twenty-Five State-Wide Equality Organizations at 30, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter Utah Pride Brief].

815. See AJC Brief, *supra* note 654, at 3-4.

816. *Id.* at 10-11.

817. *Id.* at 3, 21.

818. *Id.* at 15.

819. *Id.* at 23-25.

820. *Id.* at 32-34.

#### 4. Arguments about Letting the People Decide/Political Power and Powerlessness

##### (a) Arguments for BLAG

Amici for BLAG made various arguments that the Court should not strike down DOMA because it would interfere with letting the people decide. Above, I discussed the theme that the Nation was involved in a debate over marriage. Additional lines of argument stressed the impact on state sovereignty and state legislative processes. For example, Indiana and sixteen other states argued that “a judicial rejection of DOMA would erode constitutional support for similar state laws.”<sup>821</sup> In a remarkable analogy, the Eagle Forum compared gay rights activists to southern slave owners: just as the slave owners triumphed in *Dred Scott v. Sanford* in forcing free states to recognize slavery, same-sex marriage supporters now “seek to compel the United States and forty-one other states to recognize the same-sex marriage regimes of a few states.”<sup>822</sup> It also insisted that “the claimed right [by same-sex couples to marriage] was in no way conveyed by the People to the Judiciary to dispense,” thus, “[t]o ensure its legitimacy as an arbiter—not author—of our laws, this Court must extricate itself from this slippery slope” of defining marriage.<sup>823</sup>

Concerned Women for America similarly urged the Court not to “cut off” the debate over the definition of marriage, because different viewpoints “should be respected and debated as part of the democratic process.”<sup>824</sup> The gist of CWA’s brief was to chronicle the success of gay men and lesbians in the political process, both at the state and federal level, to demonstrate that they lacked the “political powerlessness” needed to be a suspect or quasi-suspect group.<sup>825</sup> Indeed, CWA contended that, “[i]f anything, they hold disproportionate political power in comparison to their numbers,” noting their ability to attract “the attention of lawmakers,” the President, and others.<sup>826</sup> In seeing the accelerating trend toward victory by gay men and lesbians in the political arena, CWA’s brief stands in remarkable contrast to its brief in *Romer*, which enlisted the vote on Amendment 2 as evidence of the majority’s disapproval of homosexuality.<sup>827</sup> At the same time, there is continuity with the past since proponents of Amendment 2 sought to counter a perceived disproportionate political power of homosexuals in municipalities.

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821. Indiana Brief, *supra* note 640, at 1.

822. Eagle Forum Brief, *supra* note 667, at 5.

823. *Id.* at 10, 12. Eagle Forum also points to the failure of the Equal Rights Amendment, which “might have provided a basis for the claims here” as evidence of the American people’s rejection of same-sex marriage. *Id.* at 5–6 (citing Nat’l Org. for Women v. Idaho, 459 U.S. 809 (1982)).

824. Amicus Curiae Brief of Concerned Women for America, Addressing the Merits & Supporting Respondent Bipartisan Legal Advisory Group of the United States House of Representatives and Reversal at 33, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter CWA Windsor].

825. *See id.* at 3, 8, 11–33.

826. *Id.* at 12, 14.

827. *See* CWA Brief, *supra* note 234, at 2.

## (b) Arguments for Windsor

By contrast to the picture painted by CWA of increasing political power, amici Utah Pride Center contended that the many states with DOMAs and other discriminatory laws “have constructed systems of *de jure* (by law) denigration of gay citizens. Millions of gay citizens live in these states, including many of the states now urging this Court to preserve laws that both offend the Constitution and do harm to the lives of gay Americans.”<sup>828</sup> The enactment of such laws, the brief argued, evidenced the “political vulnerability of gay Americans,” who were “not able to prevent the enactment of laws that demoted them to second-class citizenship,” and “lack both the political power and the realistic prospect of attaining full equality through democratic processes.”<sup>829</sup> The brief observed that although “prejudice against gay people is inherently irrational,” so that “laws burdening them should not be able to survive even rational basis review,” heightened scrutiny was warranted to protect the constitutional rights of “gay Americans” in light of the long history of discrimination against them and because “gay citizens in Utah and other states have been—and will remain, perhaps indefinitely—unable to vindicate their right to legal equality through democratic processes.”<sup>830</sup>

E. *United States v. Windsor*: Justice Kennedy Completes a New Trio

On June 26, 2013, the Supreme Court announced its rulings in both cases. In *Hollingsworth v. Perry*,<sup>831</sup> the Proposition 8 case, the Court held that the proponents of Proposition 8 did not have standing to appeal the district court’s decision, with Justice Kennedy dissenting (joined by three justices). By contrast, in another 5-4 split, the Court did reach the merits in *Windsor v. United States*, in an opinion authored by Justice Kennedy quickly hailed as a landmark by some and decried as judicial overreaching by others. In this section, I highlight the role played by *Romer* in Justice Kennedy’s opinion and how, along with *Lawrence*, it featured as a template for the majority’s conclusion that Section 3 violated Equal Protection and inflicted injury and indignity on lawfully married same-sex couples. Now, in addition to the *Cleburne-Moreno-Romer* trio in Equal Protection jurisprudence, *Windsor* completes a new trio of landmark rulings by the Court, all authored by Justice Kennedy, about the status of gay men and lesbians. Justice Kennedy’s majority opinion struck down Section 3 without moving to the intermediate scrutiny urged by the DOJ and the Second Circuit, and instead confirmed – as the district court in *Windsor* and the First Circuit discerned – that *Romer* supports a more searching form of rational basis review.

I then turn to the dissenting opinions by Justices Alito, Roberts, and Scalia. Justice Alito’s dissent, in particular, suggests the road not taken by the Supreme Court but urged by many amici who supported BLAG: the country is in the midst of a robust debate over competing conceptions of marriage, and which

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828. Utah Pride Brief, *supra* note 814, at 1; *id.* at 2-3.

829. *Id.* at 22.

830. *Id.* at 22-23.

831. 133 S. Ct. 2652 (2013).

view should prevail is a matter for “We the people” to decide, not the Supreme Court.<sup>832</sup> Alternatively, the dissenters argued, on the merits, that ample reasons for Section 3 existed to satisfy an ordinary rational basis test, which was the only test the Court should apply.

### 1. *Romer* Is the Template for Justice Kennedy’s Opinion

In his majority opinion in *Windsor*, Justice Kennedy builds on the foundation laid in *Romer* and expanded in *Lawrence*. Although there are only a few explicit citations to *Romer*, the logic of the *Romer* opinion permeates Kennedy’s majority opinion in *Windsor*. Like Justice Kennedy’s opinion in *Romer*, *Windsor* is a combination of judicial minimalism and avoidance, on the one hand, and, on the other, a robust (or more maximalist) vision of equality and the status of equal citizenship.<sup>833</sup>

First, the minimalism and avoidance: in dissent, Justice Scalia sharply charges: “the opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.”<sup>834</sup> This is not entirely correct, since the majority mentions that the Attorney General, the President, and the Second Circuit concluded that intermediate scrutiny should apply and that Section 3 could not survive such review.<sup>835</sup> More than once, the majority refers to the fact that the Executive reached this conclusion about heightened scrutiny and made the decision not to defend DOMA’s constitutionality, relying on a “definition still being debated and considered in the courts” and “based on a constitutional theory not yet established in judicial decisions.”<sup>836</sup> Scalia is correct, however, that the majority declines to use *Windsor* as a vehicle to establish that constitutional theory.

Scalia’s formulation leaves out, however, the very thing that the *Windsor* majority opinion does do: it enlists *Romer* to support a form of rational basis review that is more than “mere rationality.” Thus, after observing that Section 3 of DOMA, “because of its reach and extent, departs from [the] history and tradition of reliance on state law to define marriage,” Justice Kennedy appeals to *Romer*: “[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”<sup>837</sup> Justice Kennedy returns to that same “careful consideration” formulation in indicating how the Court should determine “whether a law is motivated by an improper animus or purpose.”<sup>838</sup> After observing that “DOMA seeks to injure the very class New York seeks to protect,” he also turns to *Moreno*,

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832. See *infra* Part IV.F for discussion.

833. On the idea of judicial minimalism and the contrast between minimalist and maximalist decisions, see CASS SUNSTEIN, *ONE CASE AT A TIME* (1999).

834. *Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting).

835. *Id.* at 2683–84.

836. *Id.* at 2683–84, 2688.

837. *Id.* at 2692 (citing *Romer v. Evans*, 517 U.S. 610, 633 (1996)).

838. *Id.* at 2693.

on which *Romer* drew in evaluating Amendment 2: “The Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.”<sup>839</sup> His opinion concludes that “DOMA cannot survive under these principles.”<sup>840</sup>

Beyond these explicit references to *Romer*, Justice Kennedy’s opinion also uses *Romer* as a template for the Constitution’s prohibition on adopting a sweeping law that makes a class of persons strangers to its laws. Thus, he states that, while New York sought to “eliminate inequality” by adopting a law to permit same-sex marriage, “DOMA writes inequality into the entire United States Code.”<sup>841</sup> In an echo of *Romer*’s conclusion that Amendment 2 “classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else,” Justice Kennedy concludes: “DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal.”<sup>842</sup> Similarly, he finds that Section 3’s “demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law.”<sup>843</sup> Also reminiscent of *Romer* is the majority’s language that DOMA “singles out a class of persons” and “imposes a disability on the class.”<sup>844</sup> While the conflict in *Romer* concerned an effort to reverse, at the state level, protections secured at the municipal level, in *Windsor*, Kennedy stresses that DOMA refuses “to acknowledge a status the State finds to be dignified and proper.”<sup>845</sup>

There are also echoes, in *Windsor*, of *Romer*’s emphasis upon Amendment 2’s infliction of injuries upon the daily lives of homosexuals that “outrun and belie any legitimate justifications that may be claimed for it.”<sup>846</sup> In *Windsor*, Justice Kennedy states that, under DOMA, “same-sex married couples have their lives burdened . . . in visible and public ways,” because DOMA “touches many aspects of married and family life, from the mundane to the profound.”<sup>847</sup>

Justice Kennedy concludes that “no legitimate purpose overcomes [Section 3’s] purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”<sup>848</sup> Better to appreciate that conclusion, I will now consider how *Lawrence*’s concern for dignity and respect and law not demeaning the personhood of homosexuals contribute to the majority’s analysis, including its account of why the status of marriage matters. Implicitly, *Lawrence* also informs the Court’s evaluation of DOMA as a vehicle for moral disapproval of homosexuality and moral approval

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839. *Id.* (citing *Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534–45 (1973)).

840. *Id.*

841. *Id.* at 2694.

842. *Id.*; see *Romer*, 517 U.S. at 635.

843. *Windsor*, 133 S. Ct. at 2693–94.

844. *Id.* at 2695–96.

845. *Id.*

846. *Romer*, 517 U.S. at 635.

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

848. *Id.* at 2696.

of traditional marriage.

## 2. Dignity, Respect, and the Status of Marriage: The Role of *Lawrence*

One significant aspect of the *Windsor* majority opinion is Justice Kennedy characteristic appeal to “dignity” as he explains the injury that DOMA inflicts on lawfully married same-sex couples. *Lawrence* is a significant template, even though, in that case, the Court cautioned that it was not addressing marriage (that is, “formal recognition of any relationship that homosexual persons seek to enter”).<sup>849</sup> In *Windsor*, formal recognition by the federal government of a relationship permitted and recognized by state law *was* at stake. Justice Kennedy explains that marriage bestows “status and dignity,” but, until recent decades, “many citizens” did not even imagine that same-sex couples, like Edith Windsor and Thea Spyer, “might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage.”<sup>850</sup> Here Justice Kennedy combines minimalism or avoidance with substantive and stirring rhetoric about the goods of marriage and the status it bestows. His opinion is minimalist because, rather than anchor his discussion of the dignity and respect linked to marital status to the fundamental federal constitutional right to marry,<sup>851</sup> he chronicles the evolving understanding of marriage and equality in states, like New York, as they “came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community.”<sup>852</sup> New York, like “11 other states and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons.”<sup>853</sup> New York’s citizens and elected representatives, “after a statewide deliberative process,” acted to “correct” what they now perceived “to be an injustice that they had not earlier known or understood.”<sup>854</sup>

This language resembles Justice Kennedy’s statements in *Lawrence* about evolving understandings of the constitutional status of homosexuals and his concluding statement that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.”<sup>855</sup> In *Windsor*, however, it is an evolutionary process engaged in by citizens and their elected representatives, where “New York was responding ‘to the initiative of those who [sought] a voice in shaping the destiny of their own times.’”<sup>856</sup> In *Lawrence*, persons sought to shape their destiny through

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849. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

850. *Windsor*, 133 S. Ct. at 2689.

851. The Court avoided reaching this issue in *Hollingsworth v. Perry* because it vacated the Ninth Circuit opinion due to a lack of jurisdiction, 133 S. Ct. at 2659, over Justice Kennedy’s strongly-worded dissent. *Id.* at 2668 (Kennedy, J., dissenting) (submitting that “the Article III requirement for a justiciable case or controversy does not prevent proponents from having their day in court”).

852. *Windsor*, 133 S. Ct. at 2689.

853. *Id.*

854. *Id.*

855. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

856. 133 S. Ct. at 2692 (citing *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)).

constitutional litigation about the “components of liberty,” for “[a]s the Constitution endures, persons in every generation can evoke its principles in their own search for greater freedom.”<sup>857</sup>

I do not want to overstate the contrast here between constitutional and legislative change, since Kennedy acknowledges that the process by which some states (like Massachusetts) have reached this new understanding was through state constitutional litigation.<sup>858</sup> Thus, his general point that DOMA refuses to afford dignity and respect to marriages recognized by states and, thus, “demeans” those couples is not confined only to those states who changed their domestic relations law solely through the democratic process, without the spur of constitutional litigation.<sup>859</sup> The relevant point, for Justice Kennedy’s conclusions about DOMA’s constitutional infirmity, is that states had conferred upon same-sex couples the right to marry.

Justice Kennedy’s opinion offers a robust picture of why marriage matters: New York’s decision to give same-sex couples the right to marry “conferred upon them a dignity and status of immense import;” it “enhanced the recognition, dignity, and protection of the class in their own community.”<sup>860</sup> Analogizing to *Lawrence’s* assertion that “[p]rivate, consensual sexual intimacy between two adults persons of the same sex” is “but one element in a personal bond that is more enduring,” Justice Kennedy reasons that, “[t]he States’ interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits.”<sup>861</sup> The marital status conferred by New York on same-sex couples “is a far-reaching legal acknowledgement of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages.”<sup>862</sup> When federal law declines to recognize those marriages, then, it ignores “the [state] community’s considered perspectives on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.”<sup>863</sup>

### 3. DOMA’s Denial of Dignity: Moral Disapproval of a Class

*Romer* and *Lawrence* also shape Justice Kennedy’s treatment of the constitutional status of moral disapproval. In explaining the injury that Section 3 inflicts, Justice Kennedy contrasts New York’s attempt to confer dignity and respect on a class by changing its marriage laws to allow same-sex couples to marry (and, prior to that, recognizing Edith Windsor’s out-of-state marriage) with DOMA’s denial of such dignity and respect. Indeed, Justice Kennedy concludes that “interference with the equal dignity of same-sex

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857. 539 U.S. at 578–79.

858. 133 S. Ct. at 2690 (citing, e.g., *Goodridge v. Dep’t of Public Health*, 798 N.E. 2d 941 (2003)).

859. *Id.* at 2694.

860. *Id.* at 2692.

861. *Id.* (citing *Lawrence*, 539 U.S. at 567).

862. *Id.*

863. *Id.* at 2692–93.

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marriages, . . . conferred by the States in the exercise of their sovereign power” was DOMA’s “essence.”<sup>864</sup> He finds powerful evidence in the House Report’s appeal to defending “the institutional of traditional heterosexual marriage” and its conclusion “that DOMA expresses ‘both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.’”<sup>865</sup> Here, the *Moreno* and *Romer* framework combine with a federalism argument to support Justice Kennedy’s conclusion that DOMA’s “unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage” is “strong evidence of a law having the purpose and effect of disapproval of that class.”<sup>866</sup> Section 3’s “avowed purpose and practical effect” are “to impose a disadvantage, a separate status, and so a stigma” on same-sex couples lawfully married under the “unquestioned authority of the States.”<sup>867</sup>

Justice Kennedy concludes that “the arguments put forward by BLAG are just as candid about the congressional purpose to influence or interfere with state sovereign choices about who may be married,” since “the goal was ‘to put a thumb on the scales and influence a state’s decision as to how to shape its own marriage laws.’”<sup>868</sup> Moreover, Section 3’s constitutionally problematic purpose was to treat “as second-class marriages for purposes of federal law” any same-sex marriages that states decided to recognize.<sup>869</sup> By contrast to the lower courts in *Windsor* (including Judge Straub’s lengthy dissent), Justice Kennedy does not mention, let alone evaluate, rationales such as “caution,” consistency and uniformity of benefits, and responsible procreation and optimal childrearing. He does, however, emphasize a different aspect of uniformity from which DOMA departs: “DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next.”<sup>870</sup>

Turning to DOMA’s effect, Justice Kennedy stresses the sweep of DOMA: it controls “over 1,000 statutes and numerous federal regulations.”<sup>871</sup> Here, the opinion stresses how federal law shapes the lives of persons lawfully married under state law. Articulating an aspect of marriage that I have elaborated

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864. *Id.* at 2693.

865. *Id.*

866. *Id.* Justice Kennedy declines to rest on a pure states rights or federalism rationale, that is, that Congress lacked authority to enact DOMA because it lacks authority to regulate marriage, because domestic relations is the traditional province of state law. Rather, he states “it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance.” *Id.* at 2692. He states that “the State’s power in defining the marital relation is of central relevance in this case quite apart from principles of federalism,” stressing the contrast between states using their “historic and essential authority” to define marriage in a way that enhances the status of same-sex couples, and DOMA imposing “restrictions and disabilities on those couples.” *Id.*

867. *Id.* at 2693.

868. *Id.* (quoting *Massachusetts v. DHHS*, 682 F. 3d at 12–13).

869. *Id.* at 2693–94.

870. *Id.* at 2692.

871. *Id.* at 2694.

elsewhere, the opinion explains that marriage entails rights *and responsibilities*, and that both “enhance the dignity and integrity of the person.”<sup>872</sup> DOMA, however, deprives same-sex couples lawfully married under state law – but not opposite-sex couples – of “both rights and responsibilities.”<sup>873</sup> Later, Justice Kennedy reiterates: “DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that in most cases would be honored to accept were DOMA not in force.”<sup>874</sup> In insisting that the dignity that the status of marriage brings includes responsibilities, and not only rights, Justice Kennedy powerfully, if implicitly, challenges a view that the basic purposes and goods of marriage cannot survive an expanded definition of why may marry.

Emphasizing the broad scope of federal regulations bearing on marriage, Justice Kennedy states that “DOMA touches many aspects of married and family life, from the mundane to the profound.”<sup>875</sup> Not only does its creation of “two contradictory marriage regimes within the same State” diminish “the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect,” but it tells those same-sex couples that “their otherwise valid marriages are unworthy of federal recognition.”<sup>876</sup> DOMA also “humiliates tens of thousands of children now being raised by same-sex couples.”<sup>877</sup> Without explicitly addressing whether such couples have a federal constitutional right to marry, Justice Kennedy appeals to *Lawrence*: “the differentiation demeans the couple, whose moral and sexual choices the Constitution protects . . . and whose relationship the State has sought to dignify.”<sup>878</sup> Several times, Justice Kennedy repeats that DOMA “demeans” persons in “a lawful same-sex marriage,” explaining that the Fifth Amendment’s Due Process Clause bars from government from doing so.<sup>879</sup> Justice Kennedy concludes: “The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State by its marriage laws, sought to protect in personhood and dignity.”<sup>880</sup> The crucial constitutional point is that DOMA seeks to “displace” this state protection by “treating those persons as living in marriages less respected than others.”<sup>881</sup> In a sentence that receives much parsing in the dissents, he further adds: “This

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872. *Id.* See FLEMING & MCCLAIN, *supra* note 159, at 190–205 (elaborating a view of marriage as securing rights and responsibilities and allowing various substantive moral goods).

873. 133 S. Ct. at 2694.

874. *Id.* at 2695.

875. *Id.* at 2694. At oral argument, Justice Ginsburg, who joined the majority opinion, emphasized that the federal laws referencing marriage “touch every aspect of life.” U.S. v. Windsor, Transcript of Oral Argument (March 27, 2013) at 71, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307). She observed, that under DOMA, the state has two kinds of marriage: “the full marriage, and then this sort of skim milk marriage.” *Id.*

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

877. *Id.*

878. *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558, 558 (2003)).

879. *Id.* at 2695.

880. *Id.* at 2696.

881. *Id.*

opinion and its holding are confined to those lawful marriages.”

In sum, both *Romer* and *Lawrence* provide a foundation for the majority’s opinion in *Windsor*. This role is evident both in explicit references by Justice Kennedy to these two cases as well as in the vocabulary and concepts that he employs. These precedents, as well as the “background of lawful same-sex marriage” in some states, shape his evaluation of “the design, purpose, and effect of DOMA.”<sup>882</sup> In sum, given the “moral disapproval” DOMA expressed for homosexuals and its aim of “defending” marriage even by failing to recognize marriages valid under state law, the majority places DOMA in the category of “discrimination of an unusual character,” which cannot survive “careful consideration.”<sup>883</sup>

Does *Windsor* imply, notwithstanding Kennedy’s penultimate sentence about the reach of the majority opinion and holding, that states’ defense of marriage statutes and constitutional amendments violate the federal constitution for the same reasons that Section 3 of DOMA is unconstitutional: that they reflect discrimination of an unusual character, disapprove of and single out a class of relationships, and “demean” and “humiliate” same-sex couples? The dissenters disagreed sharply over the answer to this question. On two points, however, they united: (1) the Court should have let “the people” resolve the debate over marriage and not taken sides; and (2) in striking down Section 3 of DOMA, the majority failed to credence ample and legitimate rationales for DOMA that could survive ordinary rational basis review, thus tarring Congress and persons who adhered to the traditional definition of marriage as “bigots.”<sup>884</sup> I will begin with a brief discussion of Chief Justice Roberts’ comparatively short dissent, and then discuss those by Justices Alito and Scalia.

## F. The *Windsor* dissents

### 1. Chief Justice Roberts

Chief Justice Roberts’s dissent primarily makes the point that the majority should be taken at its word when it confines its ruling to “lawful marriages” (under state law) of same-sex couples and that the Court “does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their ‘historic and essential authority to define the marital relation’ . . . may continue to utilize the traditional definition of marriage.”<sup>885</sup> He views that “logic” as being confined to the situation where a State recognizes same-sex marriages and the federal government intrudes “into an area ‘central to state domestic relations law applicable to its residents and citizens’” by not recognizing those marriages.<sup>886</sup> While the Chief Justice does not agree with the majority’s conclusion, the salient point, he insists, is that it is “based on federalism” and does not address the constitutionality of state

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882. *Id.* at 2689–90.

883. *Id.* at 2693.

884. See discussion *infra* Part IV.F.

885. *Windsor*, 133 S. Ct. at 2696 (Roberts, C.J., dissenting).

886. *Id.* at 2697.

marriage definitions.<sup>887</sup> It is not a departure from federalism, he argues, when states exercise their power and define marriage different ways, so that there is not uniformity from one state to the next.<sup>888</sup> Inapplicable to a “State’s decision whether to expand the definition of marriage from its traditional contours” will be the majority’s concern that, through DOMA, the federal government “undermined” dignity conferred by states exercising their “sovereign power.”<sup>889</sup>

Chief Justice Roberts nowhere mentions *Romer*, *Lawrence*, or the constitutional status of moral disapproval as a rationale for DOMA. He simply indicates that he rejects the majority’s conclusion that DOMA’s “principal purpose” – or lawmakers’ motive for it—was “a bare desire to harm.”<sup>890</sup> The Act’s “banal title” and the “snippets of legislative history” cited by the majority do not make such a showing and, he continues, “without some more convincing evidence that the Act’s principal purpose was to codify malice, and that it furthered *no* legitimate government interests, I would not tar the political branches with the brush of bigotry.”<sup>891</sup>

## 2. Justice Alito’s Dissent and the Road Not Taken: a Debate over Competing Views of Marriage

Justice Alito, joined by Justice Thomas, framed Edith Windsor’s challenge to DOMA and her request that the Court apply heightened scrutiny as asking the Court to “intervene” in a debate about “the nature of the institution” of marriage, and, specifically, between two views of marriage, which he called the “traditional” or “conjugal” view and the “consent-based” view.<sup>892</sup> The Constitution, Justice Alito stated, “does not codify either of these views,” although he offers in an aside that, when the Fifth Amendment and the Constitution were adopted, “it would have been hard . . . to find Americans who did not take the traditional view for granted.”<sup>893</sup> Rather than endorse the “consent-based view,” as Windsor (Alito asserts) asked the Court to do, the Court should leave it to “the people.”<sup>894</sup> I refer to this dissent as the road not taken because Justice Alito sounds themes prominent in several of the amicus briefs, analyzed in Part IV.D, with respect to how to frame the issue and because he addresses the merits of the call for intermediate scrutiny.

While Justice Kennedy’s majority opinion framed the pertinent issue as the clash between efforts by states, through revised marriage laws, to confer status and dignity and DOMA’s purpose and effect of refusing to recognize that status, Justice Alito frames the problem of competing visions of marriage as a question that “philosophers, historians, social scientists, and theologians are better qualified [than the Court] to explore” and that “the people” are entitled to

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887. *Id.*

888. *Id.*

889. *Id.*

890. *Id.* at 2696.

891. *Id.* (emphasis in original).

892. *Id.* at 2718 (Alito, J., dissenting).

893. *Id.*

894. *Id.* at 2718–19.

resolve.<sup>895</sup> Although Alito does not cite to any specific amicus briefs in elaborating the two competing visions he perceives, he cites to works by authors who filed amicus briefs as he describes the “conjugal” view, which “sees marriage as an intrinsically opposite-sex institution,” one “inextricably linked to procreation and biological kinship.”<sup>896</sup> Without any citations, he characterizes the “consent-based” vision, dominant in “the popular understanding of the institution,” as viewing marriage as “the solemnization of mutual commitment – marked by strong emotional attachment and sexual attraction – between two persons,” where “gender differentiation is not relevant.”<sup>897</sup>

Where Justice Kennedy concludes that DOMA unconstitutionally “singles out” a class of persons a State deems entitled to “recognition and protection,” Justice Alito concludes that neither state governments nor the “political branches of the Federal Government” need be neutral “between competing visions of the good, provided that the vision of the good that they adopt is not countermanded by the Constitution;” thus, “[b]oth Congress and the States are entitled to enact laws recognizing either of the two understandings of marriage.”<sup>898</sup> Thus, when Justice Alito asserts that the “ultimate sovereignty” to decide the question about same-sex marriage rests with “the people,” who have a right to “control their own destiny,” he implicitly includes the American people, through their elected federal representatives, and the people of particular states, as in New York.

*Romer* features in his opinion simply to support the idea that, under rational basis review, courts have “long recognized that ‘the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantages to various groups or persons.’”<sup>899</sup> While Justice Kennedy stresses the need for careful consideration, Justice Alito counters (enlisting *Cleburne*) with a longstanding judicial reluctance “to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.”<sup>900</sup> There is no place for the *Moreno-Cleburne-Romer* template in Justice Alito’s vision of equal protection. Additionally, he critiques the request by Windsor and the United States for heightened scrutiny, contending that they request a ruling 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.”<sup>901</sup> To grant such a request, he asserts, “would cast all those who cling to traditional beliefs about the nature

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895. *Id.* at 2719.

896. *Id.* at 2718-19. For example, he cites SHERIF GIGRIS, RYAN ANDERSON, AND ROBERT GEORGE, *WHAT IS MARRIAGE: MAN AND WOMAN: A DEFENSE* (2012) as offering a “philosophical” account of the basis for marriage. *Id.* (“They argue that 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.”). The authors also filed an amicus brief, the George Brief, *supra* note 713, discussed *supra* in Part IV. D.2.

897. *Windsor*, 133 S. Ct. at 2718.

898. *Id.* at 2719.

899. *Id.* at 2717.

900. *Id.* at 2718.

901. *Id.* at 2717-18.

of marriage in the role of bigots or superstitious fools.”<sup>902</sup> Instead, Justice Alito counters, the Court should stay out of the debate (noted above) between two competing views of marriage.

Justice Alito also rejects the majority’s analysis of how Section 3 unconstitutionally singles out a class. Section 3, he concludes, does not “encroach on the prerogatives on the States” to recognize same-sex marriage or extend to same-sex couples “any right, privilege, benefit, or obligation stemming from state law,” but instead “defines a class for purposes to whom federal law extends certain special benefits and upon whom federal law imposes certain special burdens.”<sup>903</sup> Congress, he assumes, did so “because it viewed marriage as a valuable institution to be fostered and in part because it viewed married couples as comprising a unique type of economic unit that merits special regulatory treatment.”<sup>904</sup> Justice Alito’s dissent nowhere mentions the language in the House Report, cited by Justice Kennedy, about Congress seeking to express moral disapproval of homosexuality. He instead seems to embrace, without explicitly citing to, BLAG’s and various amici’s appeal for “caution,” that is, that because “the family is an ancient and universal human institution,” and changes in its structure “can have profound effects,” as evidenced by “far-reaching consequences” of “past changes in the understanding of marriage,” one can expect that there will be long-term consequences “if same-sex marriage becomes widely accepted.”<sup>905</sup> This discussion, however, does not take place in his exposition of the rationales for DOMA, but in his characterization of the stance of Windsor and the United States as seeking recognition of “a very new right.”<sup>906</sup> Strikingly, after first stating that “[t]he Constitution does not guarantee the right to entire into a same-sex marriage,” Justice Alito observes: “Indeed, no provision of the Constitution speaks to the issue.”<sup>907</sup> Of course, no provision speaks to marriage of any sort, and yet the Court has long held that Due Process liberty includes a fundamental right to marry.<sup>908</sup> Justice Alito concedes, without mentioning the right to marry cases, that the Court “has sometimes found the Due Process Clauses to have a substantive component” of liberty, beyond physical restraint, but insists “it is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation’s history and tradition.”<sup>909</sup> In any event, this federal constitutional interpretation question is beside the point: Windsor’s challenge to DOMA did not raise the question of whether the *federal* constitution required that same-sex couples be allowed to marry, for she was validly married *under state law*. By framing the inquiry in terms of the scope of due process liberty under the *federal* constitution, Alito delves into the very issue Justice Kennedy’s majority opinion avoids in focusing on the evolving definition

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902. *Id.*

903. *Id.* at 2720.

904. *Id.*

905. *Id.* at 2715–16.

906. *Id.* at 2715.

907. *Id.* at 2714.

908. *Loving v. Virginia*, 388 U.S. 1 (1967).

909. 133 S. Ct. at 2715.

of marriage in *state* law. But Justice Alito, in turn, avoids giving an adequate answer to the Equal Protection issue: can Congress constitutionally define marriage, for purposes of federal law, in a way that denies recognition to a class of marriages valid under state law?

### 3. Justice Scalia's Dissent: Affirming Law as a Vehicle for Moral Disapproval and Predicting the End of Traditional State Marriage Laws

Justice Scalia accuses the majority of being "*hungry*" to "tell everyone its view of the legal question at the heart of this case," so much so that it leaps over the "technicality" that it does not have Article III power because there is no proper "case and controversy" before the Court.<sup>910</sup> I will not address his jurisdictional argument, because the salient point of Justice Scalia's characterization, for purposes of this article, is his charge that the majority has distorted "our society's debate over marriage" and "by formally declaring anyone opposed to same-sex marriage an enemy of human decency," armed "every challenger to a state law restricting marriage to its traditional definition."<sup>911</sup> Like Justice Alito and various amici supporting BLAG, Justice Scalia frames the issue as a matter of debate that "we the people" should decide without interference by the Court. He states: "Few public controversies touch an institution so central to the lives of so many, and few inspire such attendant passion by *good people* on all sides."<sup>912</sup> He stresses that citizens "have seen victories and . . . defeats," as the democratic system unfolds, and that (using Maine as an example), "the question has come out differently on different occasions."<sup>913</sup> Accusing the majority of lacking the "judicial temperament" to "let the People decide," Justice Scalia charges that "in the majority's telling, this story is black-and-white: Hate your neighbor or come along with us."<sup>914</sup>

Turning to the merits of the majority's analysis of Section 3, Justice Scalia begins by chiding the majority for failing to address the issue of whether more than "mere rationality" review should be applied to "laws restricting marriage to a man and a woman."<sup>915</sup> He argues that "rationality" should apply, but charges that the Court "certainly does not *apply* anything that resembles the deferential framework."<sup>916</sup> Similar to Justice Alito, he observes that the majority does not – and could not – contend that same-sex marriage is "deeply rooted" so that "a world in which DOMA exists is one bereft of 'ordered liberty.'"<sup>917</sup>

Focusing on DOMA as expressing moral disapproval, Justice Scalia quotes his dissent in *Lawrence*: "the Constitution does not forbid the government to

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910. *Id.* at 2698 (Scalia, J., dissenting) (emphasis in original).

911. *Id.* at 2710.

912. *Id.* at 2710.

913. *Id.* at 2710–11.

914. *Id.* at 2711.

915. *Id.* at 2706.

916. *Id.* at 2706 (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993), as supporting the point that "a classification 'must be upheld . . . if there is any reasonably conceivable state of facts' that could justify it.").

917. *Id.* at 2707.

enforce traditional moral and sexual norms.”<sup>918</sup> Like Alito, he then observes that “the Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.”<sup>919</sup> In other words, moral disapproval should be a constitutionally sufficient basis for DOMA. Justice Scalia continues that, “even setting aside traditional moral disapproval of same-sex marriage (or indeed same-sex sex), there are many perfectly valid – indeed, downright boring – justifying rationales for” DOMA, which “ought to be the end of this case.”<sup>920</sup> Scalia characterizes the majority’s opinion, instead, as concluding that “only those with hateful hearts could have voted ‘aye’” for DOMA, and that “the only motive” for it was “the ‘bare . . . desire to harm a politically unpopular group.”<sup>921</sup> Justice Scalia counters that, not only should legislative motive – or what is in “legislators’ hearts” – be irrelevant, but the majority “affirmatively conceal[s] from the reader the arguments that exist in justification for DOMA,” contributing to “the illusion of the Act’s supporters as unhinged members of a wild-eyed lynch mob.”<sup>922</sup> While Justice Kennedy never drew an explicit analogy to race or racial prejudice, Justice Scalia’s intemperate and inflammatory allusion to racially motivated violence here is reinforced by his reference to the Court’s earlier scorn for and condemnation of “some once-Confederate Southern state.”<sup>923</sup> Later, Justice Scalia accuses the Court of “adjudging those who oppose” change in the definition of marriage as “enemies of the human race.”<sup>924</sup>

Justice Scalia casts Justice Kennedy’s conclusion that the purpose and effect of DOMA was to “demean,” “disparage and injure” same-sex couples as saying that DOMA’s supporters “acted with *malice*,” and responds that he is “sure these accusations are quite untrue.”<sup>925</sup> Deploying the majority’s rhetoric, Scalia counters: “To defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements, any more than to defend the Constitution of the United States is to condemn, demean, or humiliate other constitutions. To hurl such accusations so casually demeans this institution.”<sup>926</sup> This is a curious way to frame the issue, since Windsor was asking the federal government to recognize her marriage, not an alternative arrangement, but on Scalia’s logic, Congress may defend “traditional marriage” even if states, the entities empowered to license marriage, now view that definition as unjust and unjustifiable. Justice Scalia explains that all DOMA did was to “codify an aspect of marriage that had been unquestioned in our society for most of its existence – indeed, had been unquestioned in virtually all societies for virtually all of human history.”<sup>927</sup> While Justice Scalia excoriates the majority for characterizing

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918. *Id.*

919. *Id.*

920. *Id.*

921. *Id.*

922. *Id.* at 2707–08.

923. *Id.* at 2707.

924. *Id.* at 2709.

925. *Id.* at 2708 (emphasis in original).

926. *Id.*

927. *Id.* at 2709.

DOMA's purpose in terms injuring and disparaging homosexuals, Scalia's calm and minimalist description of DOMA's purpose simply leaves out the Report's heated warnings of an "orchestrated legal assault being waged against traditional heterosexual marriage."<sup>928</sup> This may simply be the "traditional moral disapproval of same-sex marriage" that Justice Scalia has stated is not forbidden by the Constitution.<sup>929</sup>

Beyond maintaining the traditional definition of marriage or expressing moral disapproval, Justice Scalia contends that BLAG offered ample arguments for DOMA. He focuses on just one: "DOMA avoids difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage."<sup>930</sup> This is BLAG's argument about uniformity of and certainty concerning eligibility for federal benefits. Justice Scalia offers hypotheticals about problems federal agencies will face in sorting out whether a migratory couple is eligible for benefits, and whether the rule will be to follow the law of their "State of celebration" or their "State of domicile."<sup>931</sup>

The majority also fails to mention, Justice Scalia adds, BLAG's caution argument: Section 3 "was enacted to ensure that state-level experimentation did not automatically alter the basic operation of federal law, unless and until Congress made the further judgment to do so on its own."<sup>932</sup> "That is not animus," he asserts, "just stabilizing prudence."<sup>933</sup> Congress, he adds, is capable of revisiting its judgments, "upon due deliberation," as the repeal of Don't Ask Don't Tell indicates.<sup>934</sup>

Perhaps the most scathing part of Justice Scalia's dissent is the connection he makes between the majority's *Lawrence* and *Windsor* opinions with respect to their disclaimers about marriage. Although the majority in *Lawrence* said its opinion did not address formal recognition of same-sex relationship, Justice Scalia famously countered: "Do not believe it."<sup>935</sup> Scalia contended that "if moral disapprobation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing that conduct, . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution?'"<sup>936</sup> The *Windsor* majority, Justice Scalia observes, now appeals to *Lawrence* to say that "DOMA is invalid because it 'demeans the couples, whose moral and sexual choices the Constitution protects.'"<sup>937</sup> He charges that the majority has indicated the view it will take "of state prohibition of same-sex marriage," asserting that its conclusion that DOMA

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928. Compare *Windsor v. U.S.*, 699 F. 3d 169, 191 (2d Cir. 2012) (Straub, J., dissenting) (reporting that the Report "described *Baehr* [v. Lewin, 852 P.2d 44 (1993)] as part of an 'orchestrated legal assault being waged against traditional heterosexual marriage.'").

929. 133 S. Ct. at 2707.

930. *Id.* at 2708.

931. *Id.*

932. *Id.*

933. *Id.*

934. *Id.*

935. *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting).

936. *Id.* at 604-05.

937. 133 S. Ct. at 2708.

“is motivated by ‘bare . . . desire to harm’” can be easily applied to “state laws denying same-sex marital status.”<sup>938</sup> Scalia concludes: “that Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the ‘personhood and dignity’ which state legislatures conferred upon them will of a certitude be similarly appalled by state legislatures’ irrational and hateful failure to acknowledge that ‘personhood and dignity’ in the first place.”<sup>939</sup>

Thus, just as *Windsor* makes a trio of opinions by Justice Kennedy elaborating the constitutional protections due to homosexual persons, Justice Scalia’s dissent joins his *Romer* and *Lawrence* dissents to make a trio of blistering dissents in which he accuses the majority of taking sides in a cultural and political debate about which the Constitution says nothing and coming down in favor of the rights of homosexuals and branding defenders of traditional morality and traditional marriage bigots. In all three, he reaffirms his view that the constitution permits using law as a vehicle to express moral disapproval.

CONCLUSION: LAW, MORALITY, HOMOSEXUALITY, AND MARRIAGE IN THE POST-  
*WINDSOR* LANDSCAPE

This article has looked back at *Romer v. Evans* and then looked forward to its deployment in the successful challenge to the Defense of Marriage Act in *United States v. Windsor* to study the evolution in constitutional law and in society concerning using law as a vehicle to express moral disapproval of homosexuality and to promote and defend traditional heterosexual marriage. The image of a changed landscape is at risk of overuse, given how dramatic the evolution has been, but it is still powerful. It gets at the spatial or territorial dimension of the issue, for example, the enactment of Amendment 2 at the state-wide level to counteract developments at the municipal level or the enactment of DOMA at the federal level to ward off a perceived threat by “activist” judges in particular states. The landscape image also captures, as Justice Kennedy’s majority opinion in *Windsor* illustrates, the evolution within a state on the marriage issue, such as New York’s evolving understanding of the injustice of excluding same-sex couples from marriage. Further, the landscape image capably includes calls, as in the *Windsor* dissents and many amicus briefs filed in support of BLAG, for the Supreme Court to “let the people decide,” rather than to resolve a robust national “debate” over marriage.

By focusing on amicus briefs filed in these two constitutional litigations, I have been able to analyze forms of argument made then, at the time of the *Romer* litigation, about the use of law to express moral disapproval of homosexuality and to preserve traditional morality and traditional heterosexual marriage, and now, in the recent *Windsor* litigation. I have focused on how *Romer* deployed, and then joined, two significant Equal Protection cases, *Cleburne* and *Moreno*, to become part of a trio of cases supporting a more searching form of rational basis review warranted when confronting “discriminations of an unusual

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938. *Id.* at 2709–10.

939. *Id.* at 2710.

character.”<sup>940</sup> That trio, along with *Lawrence*, supported arguments for the unconstitutionality of Section 3 of DOMA. Justice Kennedy’s majority opinion in *Windsor* now joins *Romer* and *Lawrence* to create a new, significant trio of landmark cases about the constitutional status of gay men and lesbians and to identify Justice Kennedy, as Evan Wolfson recently put it, as “the towering giant in the jurisprudence of freedom and equality for gay people.”<sup>941</sup> So, too, Justice Scalia’s *Windsor* dissent completes a trio of excoriating dissents that insist upon the constitutionality of using law to promote traditional marriage and express moral disapproval of homosexuality and that reject the existence or propriety of the more careful form of rational basis review that the majority applied.

One take-away message from this article’s retrospective is the usual one about how significant and outcome-determinative the particular membership of the Supreme Court is, with the caveat that the development of a particular justice’s jurisprudence may confound expectations. This observation is particularly astute given the changing constitutional landscape from *Bowers*, decided one year before President Ronald Reagan nominated Justice Kennedy to the Supreme Court,<sup>942</sup> to *Lawrence* and then to *Windsor*. As Court-watcher Adam Liptak recently observed, at the time of Kennedy’s nomination, he had voted against gay rights claims “every time,” and gay rights advocates considered him a “likely vote against us on most matters to come before the Supreme Court.”<sup>943</sup> On the other hand, one month after *Bowers*, then-Judge Kennedy expressed public reservations about the Court’s ruling, contrasting it with a European Court of Human Rights decision striking down Northern Ireland’s sodomy law – a decision to which he would later refer in his *Lawrence* opinion, striking down Texas’s law.<sup>944</sup> The Court might have followed a very different trajectory had the seat Anthony Kennedy filled gone to Judge Robert H. Bork, Reagan’s initial nominee, famous as a strict constructionist and as a vocal critic of the Supreme Court’s precedents about a constitutional right to privacy.<sup>945</sup> Indeed, Bork was among the contributors to the well-known post-*Romer* *First Things* symposium, discussed in Part II, in which he called *Romer* “indecipherable” and attributed it to “the newly faddish approval of homosexual conduct among the elite classes from which the Justices come and to which most of them respond.”<sup>946</sup>

The trajectory from 1996, the year of both *Romer* and DOMA, to 2013, when *Windsor* struck down Section 3 of DOMA, however, is more than a story about one fateful nomination battle. The changed landscape image is again apt.

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940. *Id.* at 2693 (quoting *Romer*).

941. Adam Liptak, *Surprising Friend of Gay Rights in a High Place*, N.Y. TIMES, Sept. 1, 2013.

942. *Id.*

943. *Id.* (quoting contemporaneous statement in the *New York Native* by Professor Arthur Leonard, gay rights expert at New York Law School).

944. *Id.* Liptak is referring to *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981), cited in *Lawrence v. Texas*, 539 U.S. 558, 573, 576 (2003).

945. Ethan Bronner, *A Conservative Whose Supreme Court Bid Set the Senate Afire*, N.Y. TIMES, Dec. 19, 2012; Mark Sherman, *Bork Nomination Fight Altered Judicial Selection*, [http://www.salon.com/2012/12/19/bork\\_nomination\\_fight\\_altered\\_judicial\\_selection/](http://www.salon.com/2012/12/19/bork_nomination_fight_altered_judicial_selection/)

946. Robert H. Bork, *Our Judicial Oligarchy*, FIRST THINGS, at 21, 22 (Nov. 1996), available at <http://www.firstthings.com/article/2007/11/003-the-end-of-democracy-our-judicial-oligarchy-35>.

The *Windsor* majority avoided reaching the question of whether classifications based on sexual orientation warranted intermediate scrutiny, or even strict scrutiny. Such judicial avoidance might have reflected a pragmatic judgment that *Romer* provided the necessary template for invalidating Section 3 without the need to use *Windsor* as the occasion to announce a new rule about classifications based on sexual orientation. It could also be there were not sufficient votes for a majority of the Court to make such a move. It could be that at least a few justices had some reservations about the “political powerlessness” prong of the test of a suspect or quasi-suspect class in light of the seemingly rapid pace of societal and legal change about homosexuality. During oral argument in *Windsor*, for example, Paul Clement, arguing for BLAG, referred to the “sea change” on the issue of gay rights, brought about by the combination of the Court’s precedents and persuasion in the democratic process.<sup>947</sup> He quipped: “Colorado, the State that brought you Amendment 2, has just recognized civil unions.”<sup>948</sup> For that matter, Colorado, the state where voters approved Amendment 2, now includes “sexual orientation” as a protected category in its anti-discrimination law.<sup>949</sup> Skeptical of the need for heightened scrutiny, Chief Justice Roberts observed to Roberta Kaplan, counsel for *Windsor*: “As far as I can tell, political figures are falling over themselves to endorse your side of the case.”<sup>950</sup> Even though *Windsor*’s counsel and amici made strong arguments about analogies to other forms of discrimination and that political successes in some places did not negate the success in many states of popular initiatives barring marriage equality,<sup>951</sup> the *Windsor* majority did not go down the road of suspect classification. Instead, it focused on the evolution, within New York and a minority of states, to marriage equality and, employing *Romer*’s important ideas about animus and laws targeting a particular class because of moral disapproval, set up a constitutionally impermissible contrast between such states attempting to confer the respect and dignity linked to marital status and DOMA’s denial of that status. A striking example of the evolution within, and changed landscape, of a state from 1996 to 2013 comes from Hawaii itself. On November 13, 2013, Hawaii’s governor signed into law a bill, passed by the state legislature, extending marriage rights to same-sex couples, commenting that, “Now all those who have been invisible will be visible to themselves and the world.”<sup>952</sup>

What will the import of *Windsor* be for the next stage of the national “debate” over defining marriage? Notably, even the framing of such a debate suggests a change from the landscape twenty years ago. To the extent defending marriage featured as a rationale for Amendment 2, amici supporting Colorado urged the Court not to take sides in a debate over the moral and legal status of *homosexuality*. They did not credit the idea that there was a conscientious or

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947. Transcript of Oral Argument, *supra* note 875, at 112–13.

948. *Id.* at 113.

949. COLO. REV. STAT. §§ 24-601 et seq.

950. Transcript of Oral Argument, *supra* note 875, at 108.

951. *Id.*

952. Treena Shapiro, *Hawaii Becomes 15<sup>th</sup> U.S. State to Legalize Gay Marriage*, <http://www.reuters.com/article/2013/11/13/us-usa-gaymarriage-hawaii-idUSBRE9AC15U20131113?feedType=RSS>.

robust debate over visions of marriage itself. To be sure, when some *Windsor* amici asserted that there is robust debate over marriage that the Court should not settle, they also voiced concern about the impact that resolving the debate in favor of a redefinition of marriage would have on society and on their own religious understandings of marriage. While the majority and dissenting opinions made little to no mention of this clash of rights argument about religious liberty, it seems likely that arguments about religious liberty and the need to accommodate it will feature prominently in the ongoing struggles for marriage equality, both in political and judicial fora. That is one reason that it is unfortunate that Justice Scalia, consistent with his *Romer* and *Lawrence* dissents, deployed the terms “bigots” and “enemies of the human race” to characterize the majority’s supposed view of defenders of traditional marriage.

Post-*Windsor* developments have been so rapid and numerous that I can only mention a few here, in closing. Justice Scalia does have a point about the majority opinion providing a blueprint for future challenges to state laws; it is less clear whether his reading of what Justice Kennedy or even the majority of the Court would do if faced with such a challenge is accurate. On the blueprint point, news stories after *Windsor* reported that, although Justice Kennedy “took pains in his majority opinion to say the ruling applied only to legally married couples seeking benefits from the federal government,” “judges and lawyers representing same-sex couples are already using Kennedy’s language and reasoning in other cases about the right to marry.”<sup>953</sup> In the lawsuit brought by several same-sex couples in Pennsylvania, for example, plaintiffs cite to *Windsor* in asserting both that Pennsylvania is excluding them from “a dignity and status of immense import” and that “tradition” and “moral disapproval of same-sex relationships of marriage” are insufficient bases for excluding same-sex couples from marriage.<sup>954</sup> Pennsylvania’s Attorney General, Kathleen Kane, announced that she could not “ethically defend the constitutionality of Pennsylvania’s version of DOMA,” also adopted in 1996, triggering the Governor’s office to announce it would defend the law.<sup>955</sup>

In New Jersey, a state superior court judge emphasized Justice Kennedy’s disclaimer, “This opinion and its holding are confined to those lawful marriages,” in ruling in favor of same-sex couples who asserted that, in light of *Windsor*, that New Jersey’s remedy of civil unions instead of civil marriage was constitutionally inadequate under New Jersey’s Equal Protection clause, since federal agencies, post-DOMA, were declaring they would give federal benefits to married same-sex couples but not to couples in civil unions or domestic partnerships.<sup>956</sup> Noting Justice Kennedy’s disclaimer, the court concluded that

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953. *The Big Story: Gay Marriage Ruling Already in Use in Other Cases*, <http://bigstory.ap.org/article/gay-marriage-ruling-already-use-other-cases>.

954. Complaint for Declaratory and Injunctive Relief, Deb Whitewood and Susan Whitewood et al. v. Thomas W. Corbett, Civil Action No. \_\_\_, United States District Court, Middle District of Pennsylvania, at 4, 40.

955. Trip Gabriel, *Move for Gay Marriage Gets a Lift in Pennsylvania*, N.Y. TIMES (July 11, 2013), [http://www.nytimes.com/2013/07/12/us/pennsylvanias-attorney-general-wont-fight-gay-marriage-lawsuit.html?\\_r=0&pagewanted=print](http://www.nytimes.com/2013/07/12/us/pennsylvanias-attorney-general-wont-fight-gay-marriage-lawsuit.html?_r=0&pagewanted=print).

956. Decision on Motion for Summary Judgment, Garden State Equality et al v. Paula Dow et al.,

New Jersey could not shift responsibility to the federal government to treat civil unions as marriages for purposes of federal benefits, when its own domestic relations law “assigns to same-sex couples a label distinct from marriage,” which “now directly affects the availability of federal marriage benefits to those couples.”<sup>957</sup> When the trial court denied the New Jersey Attorney General’s motion to stay the trial court’s order that same-sex couples be permitted to marry beginning on October 21, 2013, the New Jersey Supreme Court declined to lift the stay after determining that “the State has not shown a reasonable probability it will succeed on the merits,” while “same-sex couples who cannot marry are not treated equally under the law today” and suffer “real” harm.<sup>958</sup> Subsequently, Governor Chris Christie, who initially strongly opposed the trial court’s ruling, announced that the State would not appeal because “the Court has now spoken clearly as to their view of the New Jersey Constitution, and, therefore, same-sex marriage is the law.”<sup>959</sup> Even so, Governor Christie, who had previously vetoed a bill allowing same-sex couples to marry, could not resist sounding the theme, familiar from the DOMA-era, that judicial activism thwarts democracy and letting the people decide, noting that he “strongly disagrees with the Court substituting its judgment for the constitutional process of the elected branches or a vote of the people,” but that he would “do his constitutional duty and ensure his Administration enforces the law as *dictated by* the New Jersey Supreme Court.”<sup>960</sup>

Post-*Windsor*, the demise of Section 3 will make labels matter even more, so that statutory schemes intended to remedy inequality by providing equal rights, benefits, and obligations “of” marriage but not the right “to” marry, as New Jersey initially did,<sup>961</sup> will not succeed if those couples are unequal for purposes of federal law.

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Docket No. L-1729-11, Sept. 27, 2013.

957. *Id.* at 50.

958. Supreme Court Decision on the Motion for a Stay in Garden State Equality Marriage Case, 3-4, 18 (Oct. 18, 2013), <http://www.judiciary.state.nj.us/samesex/Supreme%20Court%20Opinion%20on%20Stay%20Motion.pdf>. All of the court proceedings may be found at: <http://www.judiciary.state.nj.us/samesex/>.

959. James Beattie, *Christie’s Vow to Appeal Court-Imposed Gay Marriage Lasts 3 Weeks*, <http://www.cnsnews.com/news/article/james-beattie/christie-s-vow-appeal-court-imposed-gay-marriage-lasts-3-weeks>. The New Jersey Attorney General withdrew the appeal on October 21, 2013. See <http://www.judiciary.state.nj.us/samesex/AG%20Withdrawal%20of%20Appeal%20102113.pdf>

960. Beattie, *supra* note 959 (emphasis supplied).

961. Decision on Motion for Summary Judgment, Garden State Equality et al. v. Paula Dow et al., Docket No. L-1729-11, Sept. 27, 2013 at 1-4, 6-7. An additional issue is whether civil unions actually produce equality even for purposes of state law. See *id.* at 6-8 (noting that *Lewis* plaintiffs, in subsequent proceeding, relied on report by Civil Union Review Commission that found separate category of civil union “invites and encourages unequal treatment”).