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Conferring Dignity: The Metamorphosis of the Legal Homosexual

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CONFERRING DIGNITY: THE METAMORPHOSIS OF THE LEGAL HOMOSEXUAL

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The legal homosexual has undergone a dramatic transformation over the past three decades, culminating in *United States v. Windsor*, which struck down Section 3 of the Defense of Marriage Act (DOMA). In 1986, the homosexual was a sexual outlaw beyond the protection of the Constitution. By 2013, the homosexual had become part of a married couple that is "deemed by the State worthy of dignity." This Article tells the story of this metamorphosis in four phases. In the first, the "Homosexual Sodomite Phase," the United States Supreme Court famously declared in *Bowers v. Hardwick* that there was no right to engage in homosexual sodomy. In the second, the "Equal Homosexual Class Phase," the Court in *Romer v. Evans* cast the legal homosexual as a member of a "class of citizens" whose exclusion from anti-discrimination protections the Constitution could not tolerate. In the third, the "Free Intimate Bond Phase," the Court shifted its focus in *Lawrence v. Texas* to an enduring intimate bond involving private sexual acts protected from government intrusion. In the fourth and current phase, the "Dignified Married Couple Phase," the Court in *United States v. Windsor* validated the decision of several states to "confer" upon homosexuals "a dignity and status of immense import."

The heart of the Article is an analysis of this final phase. Although *Windsor* is an important civil rights victory, the Court's opinion ushers in important consequences for the legal homosexual. In the process of dignifying the same-sex couple, the Court erased the terms "homosexual" and "lesbian," cast marriage as an elevated moral state, and, most importantly, promoted a concept that the Article calls a "weak dignity." *Windsor*'s dignity is weak

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in three ways. First, human dignity was not understood by the Court as inherent in all humans. The Court instead assumed that the State confers dignity upon individuals. Second, *Windsor*'s concept of dignity is much narrower than theories promoted by contemporary moral and legal philosophers. Third, *Windsor* adopted a rhetoric of injury and pity that presents all those in same-sex relationships and their children as the wounded and humiliated victims of DOMA. The Article concludes with suggestions on how advocates and courts applying *Windsor* can employ the concept of equal dignity while moving beyond *Windsor*'s weaknesses.

Introduction

The Supreme Court's historic decision in *United States v. Windsor*[1] is striking for, among other things, the conspicuous absence of the words "homosexual," "lesbian," or "bisexual." In place of these characters, *Windsor* introduces us to the new legal homosexual[2]: the "same-sex couple."[3] In June of 2013, in this much-celebrated decision, the Court invalidated Section 3 of the Defense of Marriage Act (DOMA), which defined marriage, for federal purposes, as "only a legal union between one man and one woman."[4] The Court held that this definition violates the Fifth Amendment and interferes "with the equal dignity of same-sex marriages."[5]

Windsor completed a three-decade transformation of the legal homosexual from an individual whose sexual conduct the state could punish as morally blameworthy,[6] to a couple whose marriage the State can find "worthy of dignity."[7] What enabled this tremendous moral and legal transition? Why have the terms "homosexual," "lesbian," and "bisexual" disappeared with the arrival of *Windsor*'s dignity? This Article explores the remarkable journey of the legal homosexual over the last three decades, with a particular focus on the legal and cultural meanings of the Court's recent *Windsor* decision. The Article reveals how, in three decades, the Court shifted along three key dimensions in its attitude to the legal homosexual: (1) its characterization of the legal homosexual; (2) its moral evaluation of the legal homosexual; and (3) its position on whether and how the state can engage in pure

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[1] 133 S. Ct. 2675 (2013).

[2] The "legal homosexual" in this Article refers to the depiction of the homosexual emerging from judicial rhetoric and decisions about homosexual identity and conduct. The Article uses "homosexual" to refer to both gay men and lesbians and alternates between depictions of the homosexual as male and as female.

[3] *See, e.g.*, *Windsor*, 133 S. Ct. at 2689 ("New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that *same-sex couples* should have the right to marry . . . .") (emphasis added); *id*. at 2692 ("New York sought to give further protection and dignity to that bond. For *same-sex couples* who wished to be married, the State acted to give their lawful conduct a lawful status.") (emphasis added); *id.* at 2693 ("DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive *same-sex couples* of the benefits and responsibilities that come with the federal recognition of their marriages.") (emphasis added); *id.* at 2689 ("Slowly at first and then in rapid course, the laws of New York 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.") (emphasis added).

[4] Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (2012) and 28 U.S.C. § 1738C (2012)), *invalidated in part by Windsor*, 133 S. Ct. 2675. ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

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

[6] Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring).

[7] *Windsor*, 133 S. Ct. at 2692.

morals legislation.[8] In these decades, the Court reversed its approach to the legal homosexual: the *immoral* homosexual sodomite in *Bowers* has changed into a *dignified* "same-sex couple" in *Windsor*. This Article calls this transformation "the metamorphosis of the legal homosexual."

Windsor's declaration that several states had "conferred upon [same-sex couples] a dignity and status of immense import"[9] marks the peak of this legal and moral metamorphosis. This Article argues that while *Windsor* is indeed a critical development for equal citizenship, it comes with a severe impediment. Limping beside the Court's strong concept of equality is what this Article calls a "weak dignity." *Windsor*'s use of dignity is weak for three principal reasons. First, the *Windsor* Court does not present human dignity as inherent in all humans. Instead, dignity is understood by the Court to be conferred by individual states at their discretion. Second, and relatedly, *Windsor*'s concept of dignity is far narrower than theories of dignity offered by contemporary moral and legal philosophers. Third, *Windsor*'s presentation of dignity assumes that all those in same-sex relationships—and their children—have been seriously injured and humiliated by laws such as DOMA. This assumption, I argue, reflects a problematic and self-perpetuating politics of injury and pity.

Three Parts follow this introduction. Part I traces the metamorphosis of the legal homosexual from *Bowers* to *Windsor* in four phases. The first phase of the Court's jurisprudence, the "Immoral Sodomite Phase," is represented by *Bowers v. Hardwick*,[10] where homosexuality was understood primarily through the framework of illicit sex acts and was therefore morally rejected. The *Bowers* Court famously declared that there is no constitutional right to engage in homosexual sodomy.[11] The second phase, the "Equal Homosexual Class Phase," is typified by *Romer v. Evans*,[12] where the legal homosexual, no longer understood as a sexual outlaw, was cast as a member of a "class of citizens" whose exclusion from anti-discrimination protections the Constitution could not tolerate.[13] The *Romer* majority abandoned the rhetoric of moral condemnation in favor of moral neutrality and articulated the anti-animus principle. The third phase, the "Free Intimate Bond Phase," was announced in *Lawrence v. Texas*,[14] where the focus shifted to an enduring intimate bond.[15] The *Lawrence* Court for the first time recognized and validated same-sex intimacy and declared that states can no longer engage in pure morals legislation.

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[8] By "pure morals legislation" I mean state regulation of behavior that does not harm others, based solely on moral disapproval by the majority.

[9] *Windsor*, 133 S. Ct. at 2681.

[10] 478 U.S. 186 (1986).

[11] *Id.* at 191.

[12] 517 U.S. 620 (1996).

[13] *Id.* at 633.

[14] 539 U.S. 558 (2003).

[15] *Id.* at 567.

The metamorphosis culminates in the "Dignified Married Couple Phase" launched by *Windsor*.[16] In this pivotal opinion, the Court validated the decision of several states to "confer" on homosexuals "a dignity and status of immense import."[17] The legal homosexual has now turned into a dignified "same-sex couple," and the terms "homosexual," "lesbian," and "bisexual" have virtually disappeared. These four phases mark the progression of the legal homosexual.[18]

Part II examines three conditions that have enabled this moral progress of the legal homosexual: (1) desexualization; (2) privatization; and (3) coupling and reproduction. It shows how these three conditions crystallized in the three post-*Bowers* cases discussed in Part I. Part III critically examines *Windsor*'s weak dignity, exploring both its role in the opinion and its problematic features. The Article concludes with some reflections on how future courts and advocates can apply the landmark decision of *Windsor* to enhance civil rights while sidestepping the weakness of its dignity.

I. A Moral Metamorphosis: From *Bowers* to *Windsor*

From the moral and legal condemnation of homosexual sodomy in *Bowers*, we have arrived at the moral and legal dignity of "same-sex couples" in *Windsor*. How has the morally bad legal homosexual of *Bowers* turned—in three short decades—into the morally good married couple of *Windsor*? This Part examines, in four steps, the metamorphosis of the legal homosexual.

A. Phase One: The Immoral Sodomite

Bowers is our starting point. This decision has been condemned as a grave mistake[19]—the *Lawrence* majority even declared it incorrect from the moment it was decided.[20] Yet revisiting *Bowers* is critical for our understanding of the present. The current "goodness" of some forms of homosexuality (e.g., same-sex marriage), as reflected in *Windsor*, can be fully understood only through the past legal and historical "badness" of other forms of homosexuality (e.g., homosexual sodomy), as reflected in *Bowers.*

Three overlapping themes in *Bowers* shape the Court's understanding of homosexuality. First, the legal homosexual was understood by the *Bowers*

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

[17] *Id.* at 2681.

[18] For a graphical summary of these four phases, see *infra* at Part I.D.3.

[19] *See, e.g.*, Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 432 (2011) ("The analytic problems of the *Bowers* majority opinion appear almost willful.").

[20] Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent."); *cf.* Jack M. Balkin, *"Wrong the Day It Was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. Rev. 677, 681 (2005) (describing the "anti-canon" as a "set of cases and materials that must be wrong").

majority primarily through his illicit sexuality, as a deviant sodomite. Second, the *Bowers* Court, and especially Chief Justice Burger's concurrence, accepted Georgia's characterization of homosexual conduct as immoral. Third, the Court perceived statutory moral condemnation of homosexual conduct as legitimate.

1. *"Committing that Act"*

The *Bowers* Court viewed the legal homosexual primarily through the lens of sexual conduct.[21] Although sodomy, as defined by the Georgia statute at the time, could have been—and surely was—committed by heterosexual couples,[22] the Court's portrayal of the crime focused on homosexual sodomy.[23] Notably, in *Bowers* the distinction between homosexual acts and homosexual identities is far from clear.[24] The *Bowers* majority at times discussed "the homosexual" as a type of person (an identity),[25] but at other times focused on "homosexual sodomy" (an act).[26] As Janet Halley has argued, *Bowers* reflects multiple strategic slippages between the framework of homosexual sodomy and that of homosexual identity.[27] Under both para-

[21] For a similar perspective, see also Boutilier v. INS, 387 U.S. 118, 118–19 (1967) (affirming the deportation of an immigrant on the ground that federal law barred entry of those "afflicted with psychopathic personality," which the Immigration and Naturalization Service interpreted to include all homosexuals) (quoting Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(a)(4), 66 Stat. 163, 182 (repealed 1990)).

[22] *See* Ga. Code Ann. §16-6-2(a)(1) (1984) ("A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.")

[23] *See* Bowers v. Hardwick, 478 U.S. 186, 200 (1986) (Blackmun, J., dissenting) ("[T]he Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used."); Janet E. Halley, *Romer v. Hardwick*, 68 U. Colo. L. Rev. 429, 439 (1997) (arguing that *Bowers* was written from a heterosexual standpoint, such that heterosexual sodomy could be deemed invisible or forgotten).

[24] For a general distinction between act and identity, see Michel Foucault's now-famous observation in the first volume of his *History of Sexuality*: "As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life . . . [T]he homosexual was now a species." 1 Michel Foucault, The History of Sexuality: An Introduction 43 (Robert Hurley, trans., Vintage Books ed. 1990) (1978).

[25] *See, e.g.*, *Bowers*, 478 U.S. at 190 ("The issue presented is whether the Federal Constitution confers a fundamental right upon *homosexuals* to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.") (emphasis added).

[26] *See, e.g.*, *id.* at 187–88 ("In August 1982, respondent Hardwick . . . was charged with violating the Georgia statute criminalizing sodomy *by committing that act* with another adult male in the bedroom of respondent's home.") (emphasis added) (footnote omitted).

[27] Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After* Bowers v. Hardwick, 79 Va. L. Rev. 1721, 1747 (1993) ("A comparison of the Court's fundamental rights holding with its application of rational basis review reveals the advantages of the majority Justices' labile strategy by exposing the systematic ways in which acts and

digms, discussion of the legal homosexual in *Bowers* was infused with a sense of deviant sexuality.[28]

2. *Moral Condemnation of Homosexual Conduct*

The legal homosexual was portrayed in *Bowers* as an immoral legal persona.[29] This was made most explicit in Chief Justice Burger's famous concurrence, which is dedicated in its entirety to justifying the moral condemnation of homosexual conduct.[30] Chief Justice Burger underscored the majority's finding that "the proscriptions against sodomy have very 'ancient roots,'"[31] and that regulation of "homosexual conduct" has been ongoing "throughout the history of Western civilization."[32] Therefore, he concluded, "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[33] The assumption here was that ancient anti-homosexual moral teachings were still relevant in our times. Otherwise, there would be no problem "casting them aside."

A similar, though less explicit, moral critique of homosexuality underlay Justice White's opinion for the majority. Justice White rejected the claim that the Court's previous privacy jurisprudence should apply to homosexual sodomy.[34] He argued that cases like *Pierce*,[35] *Meyer*,[36] *Griswold*,[37] *Prince*,[38] *Skinner*,[39] *Loving*,[40] and *Roe*[41] should not be extended to protect homosexual sodomy; implicit in his argument was the view that those cases involved desirable social values such as family, marriage, and procreation—a category to which homosexuality did not belong:

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identities generate incoherence and instability."); *see also* Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of* Bowers v. Hardwick, 79 VA. L. REV. 1805, 1813 (1993) ("The Supreme Court's opinion in *Hardwick* is more productively understood as entailing the discursive construction and ideological consolidation of a certain 'heterosexual' identity. In upholding the right of the state of Georgia to police and punish the act of 'homosexual sodomy,' the *Hardwick* Court performs an act of heterosexual identification that produces a distinctive image of heterosexual identity.").

[28] *See, e.g.*, Halley, *Romer v. Hardwick*, *supra* note 23, at 434–37; Nan D. Hunter, *Life After* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531, 531–32 (1992).

[29] *See, e.g.*, *Bowers*, 478 U.S. at 192 (citing a long history of proscriptions against sodomy).

[30] *See id.* at 196–97 (Burger, C.J., concurring).

[31] *Id.* at 196 (quoting *id.* at 192 (majority opinion)); *see also id.* ("Condemnation of those practices is firmly rooted in Judaeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law.").

[32] *Id.*

[33] *Id.* at 197.

[34] *Id.* at 190–91 (majority opinion).

[35] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[36] Meyer v. Nebraska, 262 U.S. 390 (1923).

[37] Griswold v. Connecticut, 381 U.S. 479 (1965).

[38] Prince v. Massachusetts, 321 U.S. 158 (1944)

[39] Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).

[40] Loving v. Virginia, 388 U.S. 1 (1967).

[41] Roe v. Wade, 410 U.S. 113 (1973).

> Accepting the decisions in these cases . . . , we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. *No connection between family, marriage, or procreation* on the one hand and *homosexual activity* on the other has been demonstrated, either by the Court of Appeals or by respondent.[42]

Justice White viewed homosexual activity as distinguishable from the truly valuable human domains that were considered by the Court in earlier decisions. *Pierce* and *Meyer* protected the parent-child relationship;[43] *Loving* and *Griswold* involved marriage and procreation;[44] and *Roe* validated choice in matters of procreation.[45] Homosexual sodomy, by contrast, bears "[n]o connection [to] family, marriage, or procreation,"[46] and therefore was not deemed worthy of the Court's protection.[47]

3. *The Legitimacy of Morals Legislation*

Finally, the Court had to decide whether, in the absence of a "fundamental right to commit homosexual sodomy,"[48] the state could show a rational basis for its law. The plaintiffs had argued that there was none, "other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."[49] But the Court was satisfied with moral disapproval of homosexual conduct as grounds for legislation. "The law," Justice White asserted, "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."[50] Laws, according to *Bowers*, may be legitimate when based on moral beliefs of the majority of the population, even when these laws regulate victimless behavior such as consensual sodomy.

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[42] Bowers v. Hardwick, 478 U.S. 186, 190–91 (1986) (emphasis added).

[43] *See generally* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[44] *See generally Loving*, 388 U.S. 1; Griswold v. Connecticut, 381 U.S. 479 (1965).

[45] *See generally Roe*, 410 U.S 113.

[46] *Bowers*, 478 U.S. at 191.

[47] This narrow definition of privacy was heavily criticized by Justice Blackmun's dissent and in later scholarship. *See, e.g.*, *Bowers*, 478 U.S. at 204–05 (Blackmun, J., dissenting); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 739–40 (1989) ("[T]he fundament of the right to privacy is not to be found in the supposed fundamentality of what the law proscribes. It is to be found in what the law imposes. . . . This affirmative power in the law, lying just below its interdictive surface, must be privacy's focal point."); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1448–60 (1992).

[48] *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring).

[49] *Id.* (majority opinion).

[50] *Id.*

In sum, in three steps the *Bowers* majority affirmed a state prohibition on sexual sodomy. First, the Court centered its discussion on sexual conduct, describing the legal homosexual as one who commits sodomy. Second, the Court accepted the moral condemnation of the legal homosexual, distinguishing homosexual sodomy from socially valuable activities such as marriage, procreation, and the education of children. Third, the Court affirmed Georgia's right to engage in pure morals legislation.

B. Phase Two: The Equal Homosexual Class

One decade later, in *Romer v. Evans*,[51] the Court confronted the legal homosexual again. In this phase, the "Equal Homosexual Class Phase," three related changes occurred. First, the legal homosexual was now recast as a member of a protected class of citizens. Second, the moral evaluation of the legal homosexual significantly shifted from moral condemnation to moral neutrality. Third, the Court's previous deference to pure morals legislation was significantly weakened by the new anti-animus principle. I will examine each aspect in turn.

1. *The Homosexual Class*

A ghost opens the Court's decision in *Romer v. Evans*. It is the ghost of *Plessy v. Ferguson*,[52] invoked through Justice Harlan's dissenting protest that the Constitution "neither knows nor tolerates classes among citizens."[53] At stake in *Romer* was Amendment 2 to the Colorado Constitution,[54] which repealed discrimination protections on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."[55] This, according to the Court, subjected an entire homosexual class to "discrimination on the basis of their sexual orientation."[56] As Justice Kennedy explained, "The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination . . . ."[57] The Court held that Amendment 2 violates the Equal Protection Clause of the Fourteenth Amendment.[58]

Something fascinating happened when the legal homosexual turned into a class of citizens. Sexuality faded into the background. The legal homosex-

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[51] 517 U.S. 620 (1996).

[52] 163 U.S. 537, 543, 550–51 (1896) (upholding the constitutionality of state laws requiring racial segregation in public facilities).

[53] *Id.* at 559.

[54] COLO. CONST. art. II, § 30b (1992), *invalidated by Romer*, 517 U.S. 620.

[55] *Romer*, 517 U.S. at 624 (1996) (quoting COLO. CONST. art. II, § 30b (1992)). Amendment 2 also prohibited all other legal forms of state and local protection of homosexuals. *Id.*

[56] *Id.* at 625.

[57] *Id.* at 627.

[58] *Id.* at 635–36.

ual in *Romer* is no longer the sex criminal imagined in *Bowers*—one who commits deviant sexual acts that have been condemned for millennia. In *Romer*, the homosexual becomes plural, a body of public figures, "a class we shall refer to as homosexual persons or gays and lesbians."[59] Sodomy is not mentioned even once by the *Romer* majority.[60] Indeed, from *Romer* onward, the legal homosexual will be consistently de-sexualized.[61]

In *Romer*, the legal homosexual was transformed from a sexual sodomite into a "class of citizens"[62] and a "single named group."[63] Ten years after *Bowers*, the Court portrayed homosexuality not as individual deviant sex acts, but as a "single trait" that causes a distinct group of people to suffer from animus and discrimination.[64] One could argue that this shift of focus from sex acts to class reflects only the different nature of the legal conflicts in *Romer* and *Bowers*. But as Justice Scalia rightly pointed out, *Romer*'s class of citizens is made of the same individuals whose sex acts the state could legitimately criminalize under *Bowers*.[65] As we shall now see, this shift of focus from homosexual sodomy to a "class of citizens" was not purely semantic—it critically enabled a judicial reassessment of the moral value of homosexuals.

2. *Moral Neutrality Toward the Homosexual Class*

The *Romer* majority did not opine on whether homosexuals are morally good or morally bad people.[66] Instead, the Court declared a "commitment to the law's neutrality where the rights of persons are at stake."[67] This commitment to neutrality, *Romer* explains, is grounded in the Equal Protection Clause.[68] The Court pointed to concrete harms of discrimination against the homosexual class,[69] underscoring that Amendment 2 "imposes a special dis-

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[59] *Id.* at 624.

[60] *But see id.* at 640 (Scalia, J., dissenting) ("The case most relevant to the issue before us today is not even mentioned in the Court's opinion: In *Bowers v. Hardwick*, we held that the Constitution does not prohibit what virtually all States had done from the founding of the Republic until very recent years—making homosexual conduct a crime.") (citation omitted).

[61] Two decades later, in *Windsor*, the word "homosexual" itself would disappear altogether, a point to which I will return. *See infra* Part II.A.

[62] *Romer*, 517 U.S. at 633.

[63] *Id.* at 632.

[64] *Id.* at 633.

[65] *See id.* at 641 (Scalia, J., dissenting).

[66] In addition, the word "dignity" does not appear even once in *Romer*. *See id.* at 620 (majority opinion).

[67] *Id.* at 623.

[68] *Id.* ("Unheeded then, [Justice Harlan's] words [in *Plessy v. Ferguson*] now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution.").

[69] Amendment 2 barred homosexuals from receiving protection through public-accommodations laws, and in transactions involving "housing, sale of real estate, insurance, health and welfare services, private education, and employment." *Id.* at 629 (citing

ability upon those persons alone."[70] While all other citizens enjoyed legal safeguards against discrimination, homosexuals, under Amendment 2, did not.[71] This stance of moral neutrality fits perfectly with the recasting of the legal homosexual as a member of a class. The Court did not have to assess the moral value of individual, physical, sexual homosexuals, and could focus instead on acts of discrimination against an entire amorphous class.

3. *The Anti-Animus Principle*

> A State cannot so deem a class of persons a stranger to its laws.
> — *Romer v. Evans*[72]

A third conceptual shift occurred in *Romer* when the Court famously held that animus toward a political group cannot motivate state legislation.[73] Amendment 2, according to *Romer*, "seems inexplicable by anything but animus toward the class it affects."[74] Thus, "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[75] The will to injure another group via legislation will not be tolerated by the Court.

In 1996, with *Bowers* still a binding precedent, *Romer*'s articulation of the anti-animus principle depended on the premise that homosexuals constitute a class of citizens and not an aggregation of sodomites. Justice Scalia thus objected by shifting the discussion back to sodomy.[76] If moral disap-

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Denver, Colo. Rev. Municipal Code, art. IV, §§ 28-93 to 28-95, 28-97 (1991); Boulder, Colo. Rev. Code §§ 12-1-2, 12-1-3 (1987); Aspen, Colo. Municipal Code §§ 13-98(b), (c) (1977)).

[70] 517 U.S. at 631. The concept of disability is interesting in this context. It seems to imply that having recourse to antidiscrimination laws is a type of "ability," and its denial a "disability." *Cf.* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 750 (2011) (arguing that comparators "constitute, to many courts, a threshold requirement of a discrimination claim and, in that sense, part of discrimination's very definition.").

[71] *Romer*, 517 U.S. at 631.

[72] *Id.* at 635.

[73] *See id.* at 632; *see also* Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 269–70 (1996); Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 89–90 (1997); Cass Sunstein, *The Supreme Court, 1995 Term—Forward: Leaving Things Undecided*, 110 HARV. L. REV. 4, 62 (1996) ("The underlying judgment in *Romer* must be that, at least for purposes of the Equal Protection Clause, it is no longer legitimate to discriminate against homosexuals as a class simply because the state wants to discourage homosexuality or homosexual behavior. The state must justify discrimination on some other, public-regarding ground.").

[74] *Romer*, 517 U.S. at 632.

[75] *Id.* at 633.

[76] *See id.* at 644 (Scalia, J., dissenting) ("Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even 'animus' toward such conduct. Surely that is the only sort of 'animus' at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*.").

proval of homosexual conduct is a legitimate state interest under *Bowers*, Scalia argued, such disapproval should also be viewed as permissible grounds for state laws such as Amendment 2.[77] The majority did not agree.

In short, the second phase of the metamorphosis of the legal homosexual, the "Equal Homosexual Class Phase," involved three interrelated shifts. First, the Court now characterized the legal homosexual as a member of a class and not as an individual sexual sodomite. Second, the moral status of homosexuals in the eyes of the Court improved from condemnation to neutrality. Third, the idea that animus cannot motivate state legislation weakened the deference to state morals legislation established in *Bowers.* We will now see how these factors developed in the third phase of the metamorphosis.

C. Phase Three: The Free Intimate Bond

In *Lawrence*, the Court once again considered the validity of a sodomy statute,[78] and this time found it unconstitutional.[79] The Court recognized the liberty interest in an enduring intimate bond.[80] Three related shifts occurred here. First, the legal homosexual was now represented as an enduring intimate bond. Second, that intimate bond was characterized by the Court as socially valuable. Third, the Court undermined the ability of states to enact pure morals legislation.

1. *The Enduring Intimate Bond*

Lawrence famously opens with the declaration that "[l]iberty protects the person from unwarranted government intrusions into a dwelling or other private places."[81] It is a private liberty.[82] *Lawrence* not only rejected *Bowers*' framing of the legal issue;[83] it also presented the legal homosexual in an entirely new way. The legal homosexual was now understood as "two persons of the same sex . . . engag[ing] in certain intimate sexual conduct."[84]

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[77] *See id.*; *see also* ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 112–13 (1996); Thomas C. Grey, Bowers v. Hardwick *Diminished*, 68 U. COLO. L. REV. 373, 384–85 (1997). Indeed, the *Lawrence* majority, as we will now see, relied on the anti-animus principle when it overruled *Bowers*. *See* Lawrence v. Texas, 539 U.S. 558, 574–75 (2003).

[78] TEX. PENAL CODE ANN. § 21.06(a) (2003) ("A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.").

[79] *Lawrence*, 539 U.S. at 578.

[80] *See id.* at 567 ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.").

[81] *Id.* at 562.

[82] *See infra* Part II.B.

[83] *See Lawrence*, 539 U.S. at 562.

[84] *Id.*

So while the facts and the legal question in *Bowers* and *Lawrence* were seemingly analogous,[85] their characterizations of the legal homosexual were strikingly different. The *Bowers* Court conceptualized sodomy as individual criminal acts. By contrast, the *Lawrence* Court viewed it as an act of sexual intimacy. This recasting of the legal homosexual as an intimate bond is conceptually tied to *Lawrence*'s positing of liberty as a right that protects private conduct from state intrusion.[86] I will return to this point.[87] Let us now see how the new framing of the legal homosexual affected the Court's moral appraisal of homosexuality.

2. *Moral Recognition of the Enduring Intimate Bond*

The shift of attention from "homosexual conduct" to an "enduring intimate bond" laid the groundwork for the Court's rejection of *Bowers*' assumption that homosexuality is not socially valuable.[88] Instead, Justice Kennedy, writing for the majority, emphasized that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[89] Quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[90] Justice Kennedy invoked the dignity to make intimate life choices as articulated in the abortion context:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, *choices central to personal dignity* and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not

[85] For the actual history of the parties involved, see generally Dale Carpenter, *The Unknown Past of* Lawrence v. Texas, 102 Mich. L. Rev. 1464 (2004); Dale Carpenter, Flagrant Conduct: The Story of *Lawrence v. Texas* (2012) [hereinafter Carpenter, Flagrant Conduct].

[86] *Lawrence*, 539 U.S. at 562. This articulation of liberty is a typical instance of a narrow conception of liberty that philosophers have called "negative liberty." For an early distinction between negative and positive liberty, see generally Isaiah Berlin, *Two Concepts of Liberty*, *in* Four Essays on Liberty, at 118 (1969). Many different accounts of both positive and negative liberty have been proposed since Berlin's essay was first published in 1969. *See generally* Charles Taylor, *What's Wrong with Negative Liberty*, *in* The Idea of Freedom: Essays in Honour of Isaiah Berlin, at 175 (Alan Ryan ed., 1979) (distinguishing doctrines of positive liberty, which are concerned with the exercise of control over one's own life, from doctrines of negative liberty, which focus on one's freedom from constraints).

[87] *See infra* Part II.B.

[88] *See* Bowers v. Hardwick, 478 U.S. 186, 191 (1986); *see also supra* text accompanying notes 35–47.

[89] *Lawrence*, 539 U.S. at 574.

[90] 505 U.S. 833, 851 (1992) (upholding the constitutional right to have an abortion).

> define the attributes of personhood were they formed under compulsion of the State.[91]

This vaunted process of intimate self-exploration about the meaning of life is available to the intimate homosexual bond: "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[92] *Bowers* was wrong because it "would deny them this right."[93] Moreover, in Kennedy's rendering here, human dignity is attached to the core definition of liberty, and is possessed by all free persons. The "dignity [of] free persons," according to *Lawrence*, had been violated by sodomy statutes.[94] Interestingly, in *Lawrence*, dignity is paired with the liberty to make intimate personal choices without government intrusion.[95] We will soon see how Justice Kennedy in *United States v. Windsor*[96] articulated a different, weaker conception of dignity—"equal dignity"[97]—that is not inherent in individuals but is conferred by the State.

But not all homosexual conduct was considered socially valuable in *Lawrence*. Justice Kennedy's decision drew a clear line between legitimate and illegitimate sexual conduct. Forms of sex involving minors, injury or coercion, public conduct, or prostitution were all treated as morally and legally blameworthy.[98] By contrast, the private conduct of two consenting adults drew no censure.[99] Indeed, in *Lawrence*, such private conduct rose to a level of moral validation that is more robust than the simple moral neutrality of *Romer*. With terms such as "dignity,"[100] "respect,"[101] and the "mystery of human life,"[102] the Court signaled moral recognition and validation of a certain type of legal homosexual: the one who has entered an intimate bond with another.

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[91] *Lawrence*, 539 U.S. at 574 (emphasis added) (quoting *Casey*, 505 U.S. at 851).

[92] *Id.*

[93] *Id*.

[94] *Id.* at 567; *see also id.* ("The liberty protected by the Constitution allows homosexual persons the right" to choose to enter upon relationships "in the confines of their homes and their own private lives *and still retain their dignity as free persons*.") (emphasis added).

[95] *See* Neomi Rao, *The Trouble with Dignity and Rights of Recognition*, 99 VA. L. REV. ONLINE 29, 33 (2013), http://www.virginialawreview.org/sites/virginialawreview.org/files/Rao.pdf, *archived at* http://perma.cc/WTF4-KDG7.

[96] 133 S. Ct. 2675 (2013).

[97] *See infra* Part III.

[98] *See Lawrence*, 539 U.S. at 578 ("The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution.").

[99] *Id.*

[100] *E.g.*, *id.* at 567.

[101] *E.g.*, *id.* at 575.

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

3. *The "End of Morals Legislation"?*

The *Lawrence* majority thus embraced one of the primary claims of twentieth-century legal positivism: the State should not be in the business of pure morals legislation.[103] Even if condemnation of homosexuality is sometimes based on "profound and deep convictions accepted as ethical and moral principles," the majority of the population can no longer enforce its moral views through criminal law.[104] "The liberty of all" prevails over the moral convictions of the many,[105] and "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[106] Thus *Bowers* was overruled.[107]

Justice Scalia objected.[108] He criticized the majority for taking sides in a "culture war,"[109] and warned that there were many morals-based state laws that would now be hard to defend, including "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity."[110] In fact, he famously protested, "[t]his effectively decrees the end of *all* morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review."[111] At least some of the items on Justice Scalia's list are easily distinguishable from sod-

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[103] *See, e.g.*, H.L.A. HART, LAW, LIBERTY AND MORALITY 1–6 (1963) (distinguishing laws informed by morality from those motivated purely by moral condemnation but no evidence of harm to others). *But cf.* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 113 (1999) ("The harm principle is effectively collapsing under the weight of its own success. Claims of harm have become so pervasive that the harm principle has become meaningless: the harm principle no longer serves the function of a *critical principle* because non-trivial harm arguments permeate the debate. Today, the issue is no longer *whether* a moral offense causes harm, but rather what type and what amounts of harms the challenged conduct causes, and how the harms compare. . . . This is a radical departure from the liberal theoretic, progressive discourse of the 1960s.").

[104] *Lawrence*, 539 U.S. at 571.

[105] *Id.* (quoting *Casey*, 505 U.S. at 850).

[106] *Id.* at 577 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

[107] *Id.* at 578.

[108] *Id.* at 599 (Scalia, J., dissenting).

[109] *Id.* at 602. *But see* Bernard E. Harcourt, *Foreword: "You Are Entering a Gay and Lesbian Free Zone": On the Radical Dissents of Justice Scalia and Other (Post-Queers) [Raising Questions about* Lawrence, *Sex Wars, and the Criminal Law]*, 94 J. CRIM. L. & CRIMINOLOGY 503, 506 (2004) [hereinafter Harcourt, *Gay and Lesbian Free Zone*] ("The fact is, there is today a war of sexual projects that is being fought on American soil, and the federal courts, including the United States Supreme Court, are inextricably caught up in the ongoing battles. But what is missing in Justice Scalia's critique are the important nuances and subtleties that shape these contemporary sex wars, that make them so fascinating and so unpredictable—and that both resignify and ambiguate the purported gay victory in *Lawrence*.").

[110] *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

[111] *Id.* (first emphasis added). Although he joined the dissent of Justice Scalia, Justice Thomas wrote separately. He argued not for the legitimacy of morals legislation but for

omy prohibitions, because legislators can identify potential victims that could be protected by regulating activities such as bigamy and prostitution. But *Lawrence*'s threat to Scalia's pro-morals legislation approach is nonetheless real in that it recognizes a liberty under the Due Process Clause to engage in forms of private sexual activity that the majority of the population may disapprove of.

In sum, in the third phase of our metamorphosis we find three main developments. First, the depiction of the legal homosexual has transformed into an enduring intimate bond that is protected by the Due Process Clause of the Fourteenth Amendment. Second, the moral value of this bond has increased from moral neutrality toward the homosexual class, to a moral validation and recognition of the enduring intimate bond. Third, after *Lawrence*, moral condemnation in and of itself can no longer justify criminal prohibitions on private sexual behavior.[112]

D. Phase Four: The Dignified Married Couple

In 2013, the *Windsor* Court struck down Section 3 of the Defense of Marriage Act as an unconstitutional violation of the Fifth Amendment.[113] *Windsor* is a fascinating social and legal development, even a culmination, in the moral transformation of the legal homosexual. It reflects a three-decade shift of the legal homosexual from a morally condemned persona to a morally good and dignified one. The Court does this mostly through a novel use of the concept of dignity.[114]

Three shifts occurred in *Windsor*. First, the legal homosexual is now consistently represented as a "same-sex couple" or a "same-sex marriage," while the term "homosexual" has virtually disappeared.[115] Second, the moral assessment of the legal homosexual has now crossed over from moral recognition to moral praise. Third, states that issue marriage licenses to same-sex couples are now increasingly understood by the Court to be engaging in the *opposite* of pure morals legislation. Several states now confer dignity—a positive moral value—upon same-sex couples. But before turning to the

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the illegitimacy of judicial invalidation of a statute without sufficient warrant in the Constitution. *See id.* at 605–06 (Thomas, J., dissenting).

[112] *Cf.* Harcourt, *Gay and Lesbian Free Zone*, *supra* note 109, at 503–04 ("For the first time in the history of American criminal law, the United States Supreme Court has declared that a supermajoritarian moral belief does not necessarily provide a rational basis for criminalizing conventionally deviant conduct. The Court's ruling is the *coup de grâce* to legal moralism administered after a prolonged, brutish, tedious, and debilitating struggle against liberal legalism in its various criminal law representations.") (footnote omitted).

[113] United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

[114] Whereas some scholars, as we will now see, have focused on the doctrinal meaning of dignity in *Windsor*, this Article examines dignity as a moral status conferred by the State.

[115] *See Windsor*, 133 S. Ct. 2675.

three key elements of *Windsor*'s contribution to the metamorphosis of the legal homosexual, we must examine the holding of the case.

In the short time since *Windsor*'s publication, a flurry of views has appeared regarding its exact holding and doctrinal underpinnings.[116] Scholars and commentators have focused their analysis on equal protection,[117] dignity,[118] liberty,[119] federalism,[120] and the right to marry.[121] *Windsor*'s complicated holding indeed combines elements of federalism, equal protection, and

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[116] *See, e.g.*, William Baude, *Interstate Recognition of Same-Sex Marriage After* Windsor, 8 N.Y.U. J.L. & LIBERTY 150, 154 (2013); Linda C. McClain, *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*, 20 DUKE J. GENDER L. & POL'Y 351, 461 (2013), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1244&context=djglp, *archived at* http://perma.cc/D82V-LUB8; Douglas NeJaime, Windsor*'s Right to Marry*, 123 YALE L.J. ONLINE 219, 220–21 (2013), http://www.yalelawjournal.org/pdf/1205_3mchpr78.pdf, *archived at* http://perma.cc/67JT-QRPQ; Rao, *supra* note 95, at 30–31; Ernest A. Young, United States v. Windsor *and the Role of State Law in Defining Rights Claims*, 99 VA. L. REV. ONLINE 39, 47 (2013), http://www.virginialawreview.org/sites/virginialawreview.org/files/Young_Final.pdf, *archived at* http://perma.cc/KZT6-SUGQ.

[117] *See, e.g.*, McClain, *supra* note 116, at 353 ("In *United States v. Windsor*, Justice Kennedy employed *Romer*['s Equal Protection rationale] 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.") (footnote omitted); Suzanne Goldberg, *A One-Two Punch to the Nation's Most Prominent Antigay Laws*, SCOTUSBLOG (June 26, 2013, 2:07 p.m.), http://www.scotusblog.com/2013/06/a-one-two-punch-to-the-nations-most-prominent-antigay-laws/, *archived at* http://perma.cc/4WYG-NJEX [hereinafter Goldberg, *One-Two Punch*] ("[W]hat is most striking about the opinion . . . is the direct, clear way that the Court seems to understand why DOMA is such an egregious violation of the constitution's equality guarantee under the Fifth Amendment.").

[118] *See, e.g.*, Rao, *supra* note 95, at 29 (arguing that an "unusual [dignity-based] right to recognition . . . forms the basis of the Court's decision," and that a "right to recognition, standing alone, has never been part of our constitutional jurisprudence"). *But see* Young, *supra* note 116, at 47 ("The right of 'recognition' in *Windsor*, then, was not some untethered judicial creation, but rather an entitlement to federal recognition of state law rights created in the democratic exercise of the states' reserved powers. That right is utterly familiar—and fundamental.").

[119] *See* Baude, *supra* note 116, at 155 ("*Windsor* contains a second theme as well . . . . The idea is that a state law recognizing or creating a marriage also creates a constitutional liberty interest.").

[120] *See id.* at 154 ("Windsor uses two lines of reasoning in invalidating Section 3 of DOMA . . . . The latter line of reasoning is the opinion's much-debated references to federalism."); Courtney G. Joslin, Windsor, *Federalism, and Family Equality*, 113 COLUM. L. REV. SIDEBAR 156, 158 (2013), http://columbialawreview.org/windsor-federalism-and-family-equality/, *archived at* http://perma.cc/9ADD-S9AL ("[C]ivil rights advocates dodged a bullet when the *Windsor* Court declined to embrace the categorical family status federalism theory. While its acceptance would have brought along the short-term gain of providing a basis for invalidating DOMA, it also would have curtailed the ability of federal officials to protect same-sex couples and other families."); Young, *supra* note 116, at 46 ("Contrary to the emerging narrative, then, the federalism arguments in *Windsor* amounted to much more than just 'some blather about traditional state sovereignty and marriage.'" (quoting Sandy Levinson, *A Brief Comment on Justice Kennedy's Opinion in* Windsor, BALKINIZATION (June 26, 2013, 11:50 PM), http://balkin.blogspot.com/2013/06/a-brief-comment-on-justice-kennedys.html, *archived at* http://perma.cc/Q9KS-P2H6).

[121] *See* NeJaime, *supra* note 116, at 220 ("Indeed, if we look more closely at *Windsor*, we see that it is conceptually, if not doctrinally, a right-to-marry case. Justice Ken-

dignity. While equal protection language and precedents appear throughout the decision,[122] these combine with federalism and dignity, as captured in the majority's conclusion:

> 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*. By seeking to displace this protection and treating those persons as living in marriages *less respected than others*, the federal statute is in violation of the Fifth Amendment.[123]

Here we see how these three elements of *Windsor* (federalism, dignity, and equality) merge. This is a federalism decision in the sense that the Court recognizes the historic priority of the states in defining and regulating civil marriages.[124] When a state defines who can enter marriages within its boundaries, the federal government must show deference to such a decision.[125] The concept of dignity is closely tied to this point.[126] The State, according to *Windsor*, can decide whether or not to grant dignity to same-sex couples by recognizing their marriages.[127] A state decision to confer dignity results in

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nedy, writing for the majority, repeatedly sketches the contours of the right to marry in relation to same-sex couples.").

[122] *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) ("What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect."); *see also id.* ("DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State . . . ."). The decision also held that discriminations "of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision," *id*. (citing Romer v. Evans, 517 U.S. 620, 633 (1996)), and that 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," *id.* at 2693 (citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973)).

[123] *Windsor*, 133 S. Ct. at 2696 (emphasis added).

[124] *See id.* at 2691–92.

[125] *See id.* at 2693.

[126] *See id.* at 2695–96; *see also id.* at 2691 ("The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.'") (quoting Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383–84 (1930)).

[127] *Id.* at 2692 ("The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other," and "[w]hen the State used its historic and essential authority to define the marital relation in this way [i.e. marriage equality], its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community."). As of this Article's publication, the following states and the District of Columbia have recognized same-sex marriages: Washington, California, Iowa, New York, Maine, Vermont, New Hampshire, Massachusetts, Connecticut, Maryland, Delaware, Rhode Island, Minnesota, Illinois, New Jersey, and New Mexico. Nat'l Ctr. for Lesbian Rights, *Summary of Laws Regarding Same-Sex Couples*, http://www.nclrights.org/wp-content/uploads/2013/07/Relationship_Recognition_State_Laws_Summary.pdf (last updated Mar. 24, 2014), *archived at* http://perma.cc/W7BS-SEVT. Michigan, Virginia, Texas, Oklahoma, and Utah have also had

equality between same-sex couples and opposite-sex couples. Section 3 of DOMA thus interfered with the equal protection and dignity (i.e., the "equal dignity") of same-sex couples in those states.[128]

Why did the *Windsor* majority need this complicated approach when it could have invalidated Section 3 using a pure equality rationale under the Fifth Amendment? The Court could have held that Section 3 of DOMA violated the equal protection of *all* lesbians, gays and bisexuals in the United States. But it did not.[129] It articulated a much narrower class: "[t]he Class to which DOMA directs its restrictions and restraints are *those persons who are joined in same-sex marriages made lawful by the State.* DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty."[130] The protected class includes only those same-sex couples who married in jurisdictions that had enabled them to do so.[131] This narrow framing of the class allowed the Court to avoid a decision much broader in scope and implication.[132] If the Court had framed the class as *all same-sex couples in the United States* and struck down Section 3 of DOMA as a violation of the Equal Protection Clause of the Fifth Amendment, an identical logic could have arguably applied to existing state marriage exclusions under the Equal Protection Clause of the Fourteenth Amendment. *Windsor*'s combination of principles of federalism, equality, and dignity enabled the Court to invalidate Section 3 of DOMA while leaving its state equivalents intact.[133] Indeed, the dissenters emphasized that, after *Windsor*, it is still legitimate at the state level to confer dignity on opposite-sex couples but not on same-sex couples.[134]

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state constitutional bans on same-sex marriage struck down by federal courts, with appeals pending. *Id.*

[128] *Id.* at 2692 ("[T]he resulting *injury* and *indignity* [from DOMA] is a deprivation of an essential part of the liberty protected by the Fifth Amendment.") (emphasis added).

[129] I thank Linda McClain for a lively discussion of this point with me.

[130] *Windsor*, 133 S. Ct. at 2695 (Kennedy, J.) (emphasis added).

[131] *See id.* at 2696.

[132] *See* Young, *supra* note 116, at 43 ("The beauty of Justice Kennedy's opinion in *Windsor* is that it was able to resolve this difficult issue without resort to judicial fiat. Instead, the Court relied on New York's own resolution of that question, which was ultimately—and appropriately—a political one.").

[133] *See* Michael J. Klarman, Windsor *and* Brown*: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 154 (2013) ("[N]either *Windsor* nor *Hollingsworth* forces any action upon the states, some of which continue to have large majorities opposed to gay marriage. . . . *Windsor* did not challenge the constitutionality of section 2 of DOMA, which authorizes states to decline to recognize same-sex marriages lawfully performed elsewhere. Such rulings are unlikely to generate any significant backlash.").

[134] *See Windsor*, 133 S. Ct. at 2720 (Alito, J., dissenting) ("To the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level, I wholeheartedly agree. I hope that the Court will ultimately permit the people of each State to decide this question for themselves."); *id.* at 2696 (Roberts, C.J., dissenting) ("[W]hile I disagree with the result to which the majority's analysis leads it in this case, I think it more important to point out that its analysis leads no further. 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

Part III will criticize *Windsor*'s "weak dignity" for reasons wholly different from those of the *Windsor* dissenters. Let us see now, however, why *Windsor* should be understood as the culmination of the metamorphosis of the legal homosexual.

1. *The "Same-Sex Couple"*

In *Windsor*, the legal homosexual turned into a "same-sex couple." The majority introduced the plaintiff, Edith Windsor, and her deceased spouse, Thea Spyer, as "[t]wo women then resident in New York [who] were married in a lawful ceremony in Ontario, Canada, in 2007."[135] Edith and Thea appear in *Windsor* by reference to their biological sex ("two women") and not their sexuality (two lesbians). Although their sexual relationship began in the 1960s, many years before they were to become "[t]wo women . . . married in a lawful ceremony,"[136] the Court portrays their 2007 marriage as the landmark of their lives.[137]

The glaring absence of references to sexuality and sexual orientation in the Court's decision is not particular to descriptions of Edith and Thea. Throughout *Windsor*, the terms "homosexual" and "lesbian" are replaced with "same-sex couples" and "same-sex marriage."[138] The word "lesbian" does not appear in the majority's decision even once.[139] With this rhetorical transition to "same-sex couples" and "same-sex marriage," *Windsor* erased the "lesbian" and the "homosexual" in what is, to this point, the most important Court decision in the decade for gay, lesbian, and bisexual rights.

As various scholars have observed, the Court in *Romer* had erased bisexuals, present in the statute at issue, from the definition of the class vindicated by the decision in the case.[140] Although Colorado's Amendment 2

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marriage.") (citing *id.* at 2692 (majority opinion)). *But see* Mike Dorf, *First Takes on DOMA and Prop 8 Rulings*, DORF ON LAW (June 26, 2013, 10:58 a.m.), http://www.dorfonlaw.org/2013/06/first-takes-on-doma-and-prop-8-rulings.html, *archived at* http://perma.cc/J7RY-VX62 ("[Roberts' position] strikes me as technically correct but wrong on the big picture. Justice Kennedy's opinion in *Windsor* is chock full of language that, if taken seriously, would surely invalidate state bans on [same-sex marriages].").

[135] *Windsor*, 133 S. Ct. at 2682.

[136] *Id.*

[137] *See id.* at 2683 ("Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. Windsor and Spyer registered as domestic partners when New York City gave that right to same-sex couples in 1993.").

[138] *E.g. id.* at 2689.

[139] The term appears for the first time in quoted material in Justice Scalia's dissent. *Id.* at 2711 (Scalia, J., dissenting). Likewise, the word "gay" appears only in the dissenting opinions, *e.g. id.* at 2708, and the words "homosexual" and "homosexuality" in the majority opinion appear only in quoted material referring to the House of Representatives' enactment of DOMA in 1996, *id.* at 2693 (majority opinion).

[140] *See, e.g.*, Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415, 452–53 (2012) ("Bisexuality is 'virtually invisible' in same-sex marriage litigation. Though many of the organizations that serve as plaintiffs' advocates or amici purport in their mission statements to represent bisexuals along with gay men, lesbians, and sometimes, transgender people, these are the very

announced that there would be "No Protected Status Based on Homosexual, Lesbian or *Bisexual* Orientation,"[141] Justice Kennedy's decision referred to the "named class" protected by the ordinances "as homosexual persons or gays and lesbians."[142] Bisexuality was left out. The Court's erasure of bisexuals in *Romer* was in keeping with a broader societal trend toward what Kenji Yoshino calls "the epistemic contract of bisexual erasure."[143] In an article by that name, Yoshino argues that self-identified homosexuals and heterosexuals seek to erase bisexual identity because, among other reasons, they have a shared "interest in defending norms of monogamy."[144] *Romer* is just one instance of this widespread phenomenon.

What the Court did in *Windsor* is even more striking. For the Court in *Windsor* to erase the terms "homosexual," "lesbian," and "gay" is culturally anomalous. This move nonetheless fits well within the logic of the Court's decision. *Windsor* seems to leave us with a new binary: married/nonmarried. For this binary, sexual orientation does not matter. Those who are married, as we will now see, are granted dignity through marriage licenses, while those who are not are left without that blessing.

2. *Moral Dignity of Married "Same-Sex" Couples*

> You know the Catholic hierarchy has been awful, but the Catholic people and the families and friends and people who care as Jesus did about the marginalized and treating them with dignity . . . I think Jesus is weeping for joy.
>
> — Andrew Sullivan
> (CNN interview with Anderson Cooper)[145]

Windsor is a pivotal moment in the metamorphosis of the legal homosexual. The legal homosexual, at least in states where same-sex marriage is legally recognized, is portrayed as a *morally dignified person*. As Justice

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groups that most concertedly ignore bisexual existence. If the subject surfaces at all in these cases, it is same-sex marriage opponents who raise it. However fleeting and infrequent, conservative invocations of bisexuality shed light on the reasons for 'LGBT' advocates' meticulous avoidance of the subject.") (footnote and citation omitted); Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 367 (2000).

[141] COLO. CONST. art. II, § 30b (1992)) (emphasis added).

[142] Romer v. Evans, 517 U.S. 620, 624 (1996).

[143] Yoshino, *supra* note 140, at 362; *see also id.* ("It is as if these two groups, despite their other virulent disagreements, have agreed that bisexuals will be made invisible. I call this the epistemic contract of bisexual erasure. To support the existence of such a contract, I adduce evidence that self-identified straights and self-identified gays both deploy the same three strategies of bisexual erasure: class erasure, individual erasure, and delegitimation.").

[144] *Id.* ("[T]he investments that both self-identified straights and self-identified gays have in bisexual erasure . . . are: (1) an interest in stabilizing sexual orientation; (2) an interest in retaining sex as a dominant metric of differentiation; and (3) an interest in defending norms of monogamy.").

[145] *Anderson Cooper 360°* (CNN television broadcast June 28, 2013), *archived at* http://perma.cc/9TQB-B5LQ (interview of Andrew Sullivan and Evan Wolfson) [hereinafter *Anderson Cooper 360°*].

Kennedy explained, "[r]esponsibilities, as well as rights, enhance the dignity and integrity of the person."[146] By granting them the responsibilities and rights of marriage, states "conferred upon [same-sex couples] a dignity and status of immense import,"[147] and "enhanced the recognition, dignity, and protection of the class in their own community."[148] Section 3 of DOMA took all of that away,[149] and was thus declared unconstitutional.[150]

The *Windsor* decision assumes that marriage makes the legal homosexual more moral, and that the State affirms this by granting marriage licenses. Unfortunately, *Windsor* does not explain how marriage licenses elevate the moral status of those who marry. What makes marriage licenses any different from drivers' licenses or fishing licenses?[151] Why do licenses for driving or fishing not confer dignity on those who obtain them? One cannot reasonably claim, for instance, that the "responsibilities, as well as rights," that come with a fishing license "enhance the dignity and integrity of the person."[152] Such a claim would be meaningful only in a legal culture where fishing is an activity of great moral significance.[153]

Two rationales have appeared in the last two decades to support the idea of moral elevation through marriage: One can be characterized as sacralizing (the "sacralizing rationale") and the other as normalizing (the "normalizing rationale"). While *Windsor* does not explicitly rely on either rationale, the repeated assertion that marriage enhances dignity is hardly intelligible without them. I will briefly introduce each rationale.

Under the sacralizing rationale, as Michael Warner has aptly observed, both sides of the same-sex marriage debates "seek from state-sanctioned

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

[147] *Id.* at 2681.

[148] *Id.* at 2692; *see also id.* at 2689 ("[U]ntil recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that as of a man and woman in lawful marriage."); Martha C. Nussbaum, *A Right to Marry?*, 98 CALIF. L. REV. 667, 670 (2010) ("[I]t seems to most people that the state, by giving a marriage license, expresses approval, and, by withholding it, disapproval.").

[149] *Windsor*, 133 S. Ct. at 2694 ("DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities.").

[150] *Id.* at 2695.

[151] *See* Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2082 (2005) ("As an official matter, marriage is no more and no less than a government-run licensing system."); *see also* Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275, 1306–09 (2010) (noting that marriage is one of many statuses that are recognized by law and clarified by adjudication). *See generally* Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758 (2005) (examining ways in which the institution of civil marriage functions as a licensing scheme, and drawing analogies to licensing for drivers of automobiles, owners of dogs, and the provision of corporate charters).

[152] I thank Katherine Franke for pointing this analogy out to me.

[153] For examples of local fishing and lobstering communities that just might qualify, however, see, for example, ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 218–19 (1991); Carol M. Rose, *Response*, 19 WM. & MARY BILL RTS. J. 1057, 1058–59 (2011).

marriage what is essentially a sacralization."[154] By this Warner means that marriage recognition is comparable in rhetoric and substance to the kind of respect that individuals often seek from religious institutions. State-sanctioned marriage is thus understood as providing moral validation to individuals.[155] *Goodridge v. Department of Public Health*,[156] in which the Massachusetts Supreme Court recognized same-sex marriages, provides an excellent example of the sacralizing rationale:

> The union of two people contemplated by [the Massachusetts statute] "is a coming together for better or for worse, hopefully enduring, and intimate to *the degree of being sacred*. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for *as noble* a purpose as any involved in our prior decisions."[157]

In characterizing civil marriage as sacred and noble, *Goodridge* echoed *Griswold*, where the Court justified the constitutional right to privacy through the sanctity of the marital bedroom.[158] *Windsor* does not tell us how or why marriage enhances the dignity of those who enter it, but the perception of marriage as sacred provides one of the strongest conceptual links to human dignity. Under the sacralizing rationale, marriage enhances the moral dignity of the married legal homosexual because *the institution itself is sacred*.[159]

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[154] Michael Warner, *Response to Martha Nussbaum*, 98 CALIF. L. REV. 721, 729 (2010) (explaining that "[t]he opponents of same-sex marriage are generally more explicit—outside the courtroom, at least—that sacralization is what they are after," and that, on the other side, marriage equality advocates "more typically describe an effect of sacralization in nominally secular terms, such as 'special status' and 'transcendent significance'").

[155] *See* Lisa Duggan, *Holy Matrimony!*, THE NATION, Mar. 15, 2004, at 18, *archived at* http://perma.cc/WCV6-A3F6 (arguing for abolition of "state endorsement of the sanctified religious wedding" or for "ending the use of the term 'marriage' altogether").

[156] 798 N.E.2d 941 (Mass. 2003).

[157] *Id.* at 973 (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965)) (emphasis added).

[158] *See Griswold*, 381 U.S. at 485 (1965) ("Would we allow the police to search the sacred precincts of marital bedrooms for the telltale signs of the use of contraceptives?"). A number of other Supreme Court cases also discuss the deep human significance of the institution of marriage. *See* Turner v. Safley, 482 U.S. 78, 96 (1987) ("[M]any religions recognize marriage as having spiritual significance . . . ."); Loving v. Virginia, 388 U.S. 1, 12 (1967) (describing the freedom to marry as a right that "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men" and which is "fundamental to our very existence and survival"); Williams v. North Carolina, 317 U.S. 287, 303 (1942) (describing marriage as "an institution more basic in our civilization than any other").

[159] Accordingly, some critics have suggested that states should abolish civil marriage altogether and leave the business of sacralizing unions to religious institutions. *See, e.g.*, Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1163 (2006) ("[I]t is time to abolish civil marriage. The law should not define, regulate, or recognize marriage. Marriage—the

By contrast, the normalizing rationale is not theological in essence. It is motivated by the more modern necessity to govern large populations effectively. This twofold normalizing rationale centers on how same-sex marriage can potentially (1) facilitate more efficient state governance of same-sex couples and their children, and (2) "improve" the moral behavior of individual homosexual actors. The former is more functional and can hardly be linked with morality or dignity; the latter cannot be understood without them. I will briefly explain.

For the view of marriage as necessary for efficient governance, *Goodridge* is again exemplary:

> Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data.[160]

Civil marriage anchors social order.[161] It helps the government with its primary task of managing the population; it provides a useful structure for distributing property and immigration benefits, ordering the private care of children and adults, and controlling disease.[162]

More importantly, the second part of the normalizing rationale is of crucial significance for the metamorphosis traced here. A well-known argument that marriage could morally improve the sexual behavior of homosexuals was offered by Andrew Sullivan in *Virtually Normal*.[163] Sullivan famously announced a new era of homosexual politics, in which homosexuals will be integrated into the two most important public institutions: the

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structured, publicly-proclaimed, communally-supported relationship of mutual commitment—should become solely a religious and cultural institution with no legal definition or status."); Douglas W. Kmiec & Shelley Ross Saxer, *Equality in Substance and in Name*, S.F. GATE (Mar. 2, 2009, 4:00 a.m.), http://www.sfgate.com/opinion/article/Equality-in-substance-and-in-name-3249218.php, *archived at* http://perma.cc/6W7X-4VT5 (recommending that the California Supreme Court "direct the state to employ non-marriage terminology for all couples—be it civil union or some equivalent" and explaining that this "dovetails with the court's important responsibility to reaffirm the unfettered freedom of all faiths to extend the nomenclature of marriage as their traditions allow.").

[160] *Goodridge*, 798 N.E.2d at 954. *See also id.* at 965 ("That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.").

[161] *Id.* at 954; *see also, e.g.*, MARY LYNDON SHANLEY, JUST MARRIAGE 113–15 (2004).

[162] *Goodridge*, 798 N.E.2d at 954; *see also* Varnum v. Brien, 763 N.W.2d 862, 883 (Iowa 2009); SHANLEY, *supra* note 161, at 113–15.

[163] *See* ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 178–85 (1995).

military and civil marriage.[164] Marriage especially "is the highest public recognition of personal integrity."[165] Without it, sexuality is on the loose.[166] In a disturbing (yet telling) allusion, Sullivan predicted that marriage would be the first step toward the resolution of "the homosexual question."[167] Sullivan's idealization of personal monogamous commitments, which has been subject to extensive scholarly scrutiny,[168] has also echoed in judicial recognition of same-sex marriages.[169]

Without explicitly relying on either the sacralizing or normalizing rationales, *Windsor* articulated a direct causal link between civil marriage and an elevated moral recognition of same-sex couples. *Windsor* thus completed the metamorphosis of the legal homosexual into a morally good legal actor. This did not escape the well-attuned radar of Justice Scalia, who harshly criticized the majority for "clums[il]y" stepping into a debate that should be resolved through democratic means.[170] Justice Scalia criticized the majority's decision

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[164] *See id.* at 178 (arguing that the centerpiece for this new politics, "[t]he critical measure for this politics of public equality—private freedom is . . . equal access to civil marriage.").

[165] *Id.* at 179. *See also id.* at 182 (asserting that marriage "provides an anchor . . . in the maelstrom of sex and relationships to which we are all prone . . . [and it is] a mechanism for emotional stability and economic security").

[166] *Id.* at 182. ("[W]e recognize that not to promote marriage would be to ask too much of human virtue.").

[167] *Id.* at 185 (arguing that gay marriage "is a profoundly humanizing, traditionalizing step. It is . . . more important than any other institution, since it is the most central institution to the nature of the problem, which is to say, the emotional and sexual bond between one human being and another.").

[168] *See, e.g.*, Lisa Duggan, The Twilight of Equality?: Neoliberalism, Cultural Politics, and the Attack on Democracy 55–64 (2003); Michael Warner, The Trouble With Normal: Sex, Politics, and the Ethics of Queer Life 136–41 (1999).

[169] *See Goodridge*, 798 N.E.2d at 954–55 ("Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of *the ideals of mutuality*, companionship, intimacy, fidelity, and family. . . . Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.") (emphasis added). Interestingly, this perception of marriage as a training camp for virtue has been applied to opposite-sex marriages as well. At least two courts since *Lawrence* have rejected same-sex marriage challenges under the theory that homosexuals cannot engage in "accidental procreation," and thus do not need marriage. *See, e.g.*, Morrison v. Sadler, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005); Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006). Under this surprising logic, marriage is a way to tame only those irresponsible actors whose sexual behavior may lead to unwanted pregnancies. *See* Katherine Franke, *Dignifying Rights: A Comment on Jeremy Waldron's* Dignity, Rights, and Responsibilities, 43 Ariz. St. L.J. 1177, 1192 (2011) [hereinafter Franke, *Dignifying Rights*] (commenting, in relation to *Morrison* and *Hernandez*, that "morality, in the form of dignity and responsibility, doesn't obviously cut in any predictable direction when it comes to elaborating the civil rights of gay men and lesbians.").

[170] United States v. Windsor, 133 S. Ct. 2675, 2710 (2013) (Scalia, J., dissenting); *see also id.* at 2707 ("[T]he 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."); *id.* at 2710 ("Few public controversies touch an institution so central to the lives of so many, and few inspire such attendant

for labeling opponents of same-sex marriage as "enemies of the human race"[171] and "haters of the neighbor."[172] Justice Scalia may have anticipated that *Windsor* would be read as the complete inversion of *Bowers* in this regard.[173] If in *Bowers* the legal homosexual was the morally condemned character, in *Windsor* the morally condemned character is the one who does not support same-sex marriage. This scandalous reversal now names as "haters of the neighbor" those who are religiously commanded to "love thy neighbor." Oddly (or perhaps not), in its invocation of that religious command, Justice Scalia's dissent converges with Andrew Sullivan's response to *Windsor* in the epigraph above.[174] "Jesus is weeping for joy," said Sullivan. The marginalized, stigmatized, shamed minority has been granted moral dignity.[175] It is now *unchristian* to oppose same-sex marriage.

3. *"Positive" Morals Legislation*

Like the Wizard of Oz, the State now marks the legal homosexual with dignity.[176] Interestingly, in the aftermath of *Lawrence*'s "end of all morals legislation,"[177] *Windsor* offers a new type of State morals legislation for the legal homosexual—one that comes in the form of moral praise. Under *Windsor*, states have the power to confer dignity by granting marriage licenses, and, by so doing, to confer *positive* moral value upon the legal (married) homosexual. Thus whereas it is no longer legitimate to prohibit some forms of private sexual conduct solely based on moral disapproval by the community,[178] it is quite possible, according to *Windsor*, to convey moral approval through marriage licensing. For many readers, this welcome development may not seem puzzling at all; it fits well with our liberal intuitions. But from a perspective of moral and legal transformation, positive morals legislation

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passion by good people on all sides. . . . Since DOMA's passage, citizens on all sides of the question have seen victories and they have seen defeats. There have been plebiscites, legislation, persuasion, and loud voices—in other words, democracy.").

[171] *Id.* at 2709.

[172] *Id.* at 2711 (Scalia, J., dissenting) ("In the majority's telling, this story is black-and-white: Hate your neighbor or come along with us. The truth is more complicated. It is hard to admit that one's political opponents are not monsters . . . .").

[173] *See id.* at 2707 (Scalia, J., dissenting) ("As I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. . . . I will not swell the U.S. Reports with restatements of that point. It is enough to say 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.") (citing Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting)).

[174] *See Anderson Cooper 360°*, *supra* note 145 and accompanying text.

[175] *See id.*

[176] I thank Bennett Capers for offering this metaphor for the State's role in granting moral dignity, much as the Wizard of Oz distributes essential qualities from his seat on high. *See* THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

[177] Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

[178] *Id.*

is a decisive development and sudden reversal: the sword of the State has turned into a wand. Homosexuals are now blessed with dignity.[179]

Windsor marks the fourth and current phase in the transition of the legal homosexual. In 1986, *Bowers* affirmed the moral condemnation of homosexual sodomy by states.[180] In 1996, *Romer* declared moral neutrality, concluding that homosexuals constitute a class that deserves equal protection under the law.[181] In 2003, *Lawrence* went beyond moral neutrality to protect and validate the private intimate decisions of homosexuals.[182] Finally, in 2013, *Windsor* declared that State recognition of same-sex marriages enhanced the dignity and integrity of same-sex couples.[183] Figure 1 summarizes these four phases.

FIGURE 1
A METAMORPHOSIS OF THE LEGAL HOMOSEXUAL

	Nature of the Legal Homosexual	**Moral Assessment**	**Role of the State**	**Primary Constitutional Right/Principle**
The Immoral Sodomite Phase ***Bowers v. Hardwick* (1986)**	A Sexual Sodomite	Immoral Sexual Conduct	Legitimate Morals Legislation	No Right to Engage in Homosexual Sodomy
The Equal Homosexual Class Phase ***Romer v. Evans* (1996)**	A Member of a Protected Class	Moral Neutrality	No Animus-Based Legislation	Equal Protection (14th Amendment)
The Free Intimate Bond Phase ***Lawrence v. Texas* (2003)**	An Enduring Intimate Bond	Moral Recognition	End of Morals Legislation?	Liberty (14th Amendment)
The Dignified Married Couple Phase ***United States v. Windsor* (2013)**	A Married Couple	Moral Praise	"Positive" Morals Legislation	Federalism & "Equal Dignity" (5th Amendment)

[179] *See infra*, Part III.B. *See also* Jeffrey A. Redding, *Querying Edith Windsor, Querying Equality*, 59 VILL. L. REV. TOLLE LEGE 9, 12–13 (2013), http://lawweb2009.law.villanova.edu/lawreview/wp-content/uploads/2013/10/Redding_FINAL-2.pdf, *archived at* http://perma.cc/DZJ-44A2.

[180] Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

[181] Romer v. Evans, 517 U.S. 620, 631 (1996).

[182] Lawrence v. Texas, 539 U.S. 558, 567 (2003).

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

II. The Conditions of Moral Transformation

In *Thinking Sex*, Gayle Rubin explored the idea that legal and social understandings of "good sex" and "bad sex" shift over time.[184] As Rubin explained, "[m]ost systems of sexual judgment—religious, psychological, feminist, or socialist—attempt to determine on which side of the line a particular act falls."[185] Acts that are considered good—but only those—"are accorded moral complexity."[186] But "sex acts on the bad side of the line are considered utterly repulsive and devoid of all emotional nuance."[187] Over the course of time, some acts or identities may shift over from the "bad sex" to the "good sex" side of the line.[188] For instance, "if [homosexuality] is coupled and monogamous," Rubin wrote in her 1984 essay, "society is beginning to recognize that it includes the full range of human interaction."[189]

Rubin's theory beautifully captured what would happen to the legal homosexual in the decades to follow. As we saw above, in *Bowers* the legal homosexual was perceived by the Court as an immoral sexual sodomite, but by the time *Windsor* was decided, the legal homosexual had become a morally praiseworthy citizen. What did the legal homosexual have to acquire or abandon in order to be accorded moral nuance and complexity? This Part outlines three conditions that proved critical for placing homosexuality on the path to moral praise: (1) desexualization, (2) privatization, and (3) coupling and reproduction. I will discuss each in turn.

A. Bodies: Desexualization

The moral ascent of the legal homosexual over the last three decades has depended on the declining visibility of erotic acts. This reverse relation of sex to morality reflects what has been called "sex negativity," an attitude that treats human sexuality with suspicion, and "[v]irtually all erotic behavior [as] bad unless a specific reason to exempt it has been established."[190]

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[184] Gayle S. Rubin, *Thinking Sex*, *in* Deviations: A Gayle Rubin Reader 137, 151–54 (2011).

[185] *Id.* at 151.

[186] *Id.* ("For instance, heterosexual encounters may be sublime or disgusting, free or forced, healing or destructive, romantic or mercenary. As long as it does not violate other rules, heterosexuality is acknowledged to exhibit the full range of human experience.").

[187] *Id.*

[188] *Id.* ("As a result of the sex conflicts of the last decade, some behavior near the border is inching across it. Unmarried couples living together, masturbation, and some forms of homosexuality are moving in the direction of respectability . . . .").

[189] *Id.* at 154.

[190] *Id.* at 148. ("This culture always treats sex with suspicion. . . . Sex is presumed guilty until proven innocent. Virtually all erotic behavior is considered bad unless a specific reason to exempt it has been established. The most acceptable excuses are marriage, reproduction, and love. Sometimes scientific curiosity, aesthetic experience, or a long-term intimate relationship may serve. But the exercise of erotic capacity, intelligence, curiosity, or creativity all require pretexts that are unnecessary for other pleasures, such as the enjoyment of food, fiction, or astronomy.").

Following this theme along the cases that make up the moral metamorphosis traced here—*Romer*, *Lawrence*, and *Windsor*—enables us to see clearly how the legal homosexual has undergone a process of desexualization.[191]

It began in *Romer*. With the emergence of the homosexual class, sex acts were no longer discussed. The legal homosexual in *Romer* had nothing to do with the crimes of sodomy described in *Bowers*. The homosexual became "a class we shall refer to as homosexual persons or gays and lesbians."[192] As Janet Halley has put it, "*Romer*, after all, is the decision in which a majority of the Supreme Court proposes to take the *sex* out of homo*sex*uals."[193] One of the effects of *Romer*'s failure to mention *Bowers*, according to Halley, is that "*Romer* reconfigures its audience: it asks not for the differentiated, viscerally implicated, embodied, and identified audience of *Hardwick* but for a homogenous, reasoning, intending audience."[194] *Bowers* involved real bodies committing real sex acts,[195] whereas *Romer* created an amorphous, bodiless, class of citizens.[196] Turning the homosexual into an amorphous member of a class of citizens proved to be a successful strategy in *Romer*.

Next was *Lawrence*, perhaps the most dramatic desexualizing decision to date. Here, the "homosexual sodomite" was recast as an "intimate bond."[197] Recall that the *Bowers* Court conceptualized sodomy as an individual criminal act. By contrast, *Lawrence*'s rhetoric involved two people engaging in sexual intimacy. *Lawrence*, in contrast with *Romer*, was actually a case about sex,[198] and Tyron Garner and John Lawrence were far from an "enduring intimate bond."[199] They were not a couple or even lovers.[200] They were only acquaintances, whom police officers claimed to have observed

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[191] For an earlier articulation of this theme, see Mary Anne Case, *Commentary, Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating For Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1659–60 (1993) [hereinafter Case, *Couples and Coupling*] ("[I]t is most interesting that two of the most prominent victories in gay rights litigation, *Braschi* and *Kowalski* are cases in which the court can bless a couple without blessing their sexual activities. In neither case is the couple functioning as a couple—Braschi's lover is dead, Kowalski has emerged from a coma severely impaired—so the court can focus on all the wonderful pair bonding without being threatened by the sexual implications of that pair bonding.") (footnotes and citations omitted).

[192] Romer v. Evans, 517 U.S. 620, 624.

[193] Halley, *Romer v. Hardwick*, *supra* note 23, at 433.

[194] *Id.* at 435.

[195] *Id.* ("Readers of *Hardwick* cannot, I think, negotiate the text without making some reference, however fleeting, to these bodies, investments, and identifications.").

[196] *See, e.g. Romer*, 517 U.S. at 624; *cf.* Boucai, *supra* note 140, at 452–53 (describing the invisibility of bisexuality in same-sex marriage litigation); Yoshino, *supra* note 140, at 395–96 (noting the erasure of bisexuals and their sexuality in *Romer*); *supra* notes 140–144 (examining the erasure of bisexuality from *Romer* in relation to *Windsor*).

[197] *See supra* Part I.C.

[198] *But see* CARPENTER, FLAGRANT CONDUCT, *supra* note 85, at 67–74 (arguing that it is unlikely that John Lawrence and Tyron Garner, the two defendants in *Lawrence*, were actually having sex when the police entered Lawrence's home).

[199] *See id.* at 61–63.

[200] *See id.*

having illicit sex in Lawrence's bedroom.[201] But instead of discussing sex, the Court famously took sodomy out of the picture, asserting that the *Bowers* majority had mischaracterized the issue before it.[202] *Lawrence* reasoned that the problem with sodomy laws was that they "seek to control a *personal relationship* that . . . is within the liberty of persons to choose without being punished as criminals."[203] The issue was the liberty to engage in private intimate conduct.[204] Homosexual sex was now recast by the Court as intimate private acts.

Finally, in *Windsor*, we find the legal homosexual, this time two married women, stripped of their sexuality and sex acts altogether. In the documentary film, *Edie & Thea: A Very Long Engagement*, Edith Windsor and Thea Spyer discuss their long and exceedingly erotic love story.[205] It is crystal clear, throughout this documentary, and in further interviews, that it was important for Edith and Thea to convey that sex was a meaningful part of their relationship.[206] As Edith Windsor tells fans, "Keep it hot!" was one of the couple's secrets to a long relationship.[207] The Supreme Court's version of their lives would not lead the reader to suspect any such thing. The Court's decision centers on the couple's 2007 marriage ceremony and lifelong commitment to each other.[208] The only longing captured by the Court's decision is the couple's "long[ing] to marry."[209]

Whereas sex is utterly absent in *Windsor*, the Court mentioned the couple's concerns about Thea's health, which led them to marry in Canada in 2007.[210] In fact, Thea's disability may have been one of the aspects that made Windsor an appealing plaintiff to challenge DOMA,[211] since her disability

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[201] *Id.* at 67–70.

[202] Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("[The Court's] statement [that *Bowers* concerned whether homosexuals had a right to engage in sodomy], we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.").

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

[204] *See* Teemu Ruskola, *Gay Rights Versus Queer Theory: What's Left of Sodomy After* Lawrence v. Texas*?*, 23 Social Text 235, 236–37 (2005) (discussing the shift from a right to engage in sodomy to a liberty to engage in private intimate conduct, and arguing that *Bowers* got the constitutional question right, even though it answered it wrong).

[205] *See* Edie & Thea: A Very Long Engagement (Bless Bless Productions 2009) [hereinafter A Very Long Engagement].

[206] *See id.* After the decision was published, Windsor told a reporter, "If I didn't have nice breasts, Thea and I never would have gotten together." Ariel Levy, *The Perfect Wife*, New Yorker, Sept. 30, 2013, at 56.

[207] *Id.* at 54.

[208] *See* United States v. Windsor, 133 S. Ct. 2675, 2683 (2013) ("Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. Windsor and Spyer registered as domestic partners when New York City gave that right to same-sex couples in 1993.").

[209] *Id.* at 2689.

[210] *Id.* at 2683.

[211] *See* Levy, *supra* note 206, at 62.

could help to desexualize her.[212] Desexualizing Edith and Thea was apparently a litigation strategy. Shortly after the Court's decision in *Windsor*, Edith Windsor's attorney recalled that when she initially took her client's case pro bono, she made rules for her client: she instructed her not to talk publicly about sex.[213] As Windsor's attorney explained in a *New Yorker* article with the telling title, *The Perfect Wife*, "All I needed was Antonin Scalia reading about Edie and Thea's butch-femme escapades."[214]

B. Space: Privatization

The second condition on the path to moral praise involved a growing emphasis on the *private* legal homosexual. The legal homosexual is perceived as someone who has private (as opposed to public) sex, and lives a private, domesticated life. This perception crystallized in *Lawrence.* The *Lawrence* Court could have declared a liberty to engage in an unfettered sexual life. But it did not. It articulated a liberty to engage in private, consensual, homosexual intimacy.[215] As Justice Kennedy reasoned:

> It suffices for us to acknowledge that adults may choose to enter upon this relationship *in the confines of their homes and their own private lives* and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[216]

The key words here are "their homes," "private lives," "intimate conduct," and "personal bond that is more enduring."[217] The *Lawrence* majority decriminalized homosexual sodomy, and at the same time confined it geographically to non-public spaces. This private notion of liberty, which Katherine Franke has called a "curious form of liberty," is "less expansive, rather geographized, and, in the end, domesticated."[218]

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[212] *See, e.g.*, Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1317 (2009) ("[W]hile law and norms play matchmaker when it comes to sex and race, the norm surrounding disability has typically been one of utter isolation, or *desexualization* . . . .").

[213] Levy, *supra* note 206, at 54.

[214] *Id.*

[215] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

[216] *Id.* at 567 (emphasis added).

[217] *Id.*

[218] Katherine Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1401 (2004). *See also id.* at 1400 ("[I]n *Lawrence* the Court relies on a narrow version of liberty that is both geographized and domesticated—not a robust conception of sexual freedom or liberty, as is commonly assumed. In this way, *Lawrence*

The spotlight on the private legal homosexual has also been prevalent in contemporary same-sex marriage litigation.[219] Interestingly, in *Glorious Precedents: When Same-Sex Marriage Was Radical*, Michael Boucai argues that the gay marriage challenges of the 1970s stand in sharp contrast to our current moment.[220] According to Boucai, these early plaintiffs did *not* advocate private sex, monogamy, or even long enduring commitments.[221] Their goal was not assimilation to bourgeois domesticity.[222] It was liberation. They wanted to pose a political challenge to a discriminatory institution.[223] These "glorious" precedents, all of which failed miserably in courts,[224] teach us that marriage equality litigation was not always pursued through the framework of private sex and domestic lives. Even more to the point, for the metamorphosis traced here, it is vital to see how privatization played a role in making the legal homosexual more intelligible—and at the end more moral—in the eyes of the Court.

C. Relationships: Coupling and Reproduction

In 1993, still in the shadow of *Bowers*, Mary Anne Case aptly observed that "the couple, the missing third term between the individual and the community, is an extremely suggestive absence from the [lesbian and gay] litigation history."[225] Case pointed out that the privacy right in *Griswold v. Connecticut*[226] was originally granted to the married *couple* who had sought to use contraceptives—not to individuals.[227] Accordingly, Case suggested

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both echoes and reinforces a pull toward domesticity in current gay and lesbian organizing.").

[219] *See, e.g.*, Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1199–1200 (D. Utah 2013) ("The right to marry is intertwined with the rights to privacy and intimate association, and an individual's choices related to marriage are protected because they are integral to a person's dignity and autonomy."); Griego v. Oliver, 316 P.3d 865, 885 (N.M. 2013) ("The United States Supreme Court also has described the right to marry as 'of fundamental importance for all individuals' and as 'part of the fundamental "right of privacy" implicit in the Fourteenth Amendment's Due Process Clause.'" (quoting Zablocki v. Redhail, 434 U.S. 374, 384 (1978)).)

[220] Michael Boucai, *Glorious Precedents: When Same-Sex Marriage Was Radical*, 27 YALE J.L. & HUMAN. (forthcoming 2015) (on file with author).

[221] *Id.*

[222] *See id.*

[223] *See id.*

[224] *See* Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal denied*, Baker v. Nelson, 409 U.S. 810 (1972); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App.), *appeal denied*, Singer v. Hara, 84 Wash.2d 1008 (1974).

[225] *See* Case, *Couples and Coupling*, *supra* note 191, at 1648, 1651 ("[B]y 'couple,' I mean two gay men or lesbians together in any intimate capacity, whether it be for a lifetime of domestic partnership or a 'quickie.'").

[226] 381 U.S. 479 (1965).

[227] Case, *Couples and Coupling*, *supra* note 191, at 1654 ("The right of privacy articulated by the majority in *Griswold* was, after all, first and foremost a relational right, not one centered in the autonomy of the individual. For the *Griswold* majority, that 'case . . . concerns a *relationship* lying within the zone of privacy . . . And it concerns a law which . . . ha[s] a maximum destructive impact upon that *relationship*.") (alterations in original) (footnote omitted) (quoting *Griswold*, 381 U.S. at 485).

that to establish a gay and lesbian "intimate association" right, "it may be necessary to go back to *Griswold*, i.e., to a strong pair bond."[228] This is because courts "have seen their enterprise with respect to heterosexuals in earlier cases as promoting pair bonding, not mere copulation."[229]

The legal homosexual, suggested Case, had been losing some cases due to an absent pair bond.[230] In the sodomy cases, in particular, Case underscored that the plaintiffs often challenged sodomy statutes as individuals, not as couples.[231] For example, Hardwick challenged the Georgia statute *by himself* and not with his fellow sex-mate, and "this absence of a pair bond to go along with the copulating is what makes *Hardwick*, otherwise so ideal, an imperfect vehicle."[232] Case concluded that in some contexts, especially sodomy challenges, which are already sexualized, "a greater focus on pair-bonding clearly has benefits that outweigh the risks."[233] Mary Anne Case's analysis indeed predicted the two later couples-oriented decisions in our metamorphosis: *Lawrence* and *Windsor*. As we saw above, these two cases were entirely oriented toward the couple. Gays (*Lawrence*) and lesbians (*Windsor*) now appear in the Court's rhetoric as couples or intimate bonds. This, as Case suggested over twenty years ago, has proved a winning strategy in both the sodomy and marriage contexts.

In addition to the same-sex couple already emergent in *Lawrence*, *Windsor* added children to the mix. Despite the fact that Edith and Thea never had children,[234] the children of same-sex couples are a key presence throughout the *Windsor* decision. The decision discusses, for instance, the humiliating effects of the Defense of Marriage Act on children,[235] the importance of committing in marriage before children,[236] and the difficulty "for the children to understand the integrity and closeness of their own fam-

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[228] *Id.*

[229] *Id.* at 1655.

[230] Case acknowledges though that coupling can serve as a double-edged sword, sometimes leading to defeat. *Id.* at 1666 ("Whether a gay litigant is seen as part of a couple may spell the difference between victory and defeat for him or her. Unfortunately, sometimes being coupled seems to spell victory, at other times defeat.").

[231] *Id.* at 1647–48.

[232] *Id.* at 1653 (footnote omitted) (explaining that "[t]here are understandable reasons for the absence of Hardwick's partner from the litigation—he was a schoolteacher from North Carolina, a married man, and a one-night stand. 'Please don't tell my wife . . . I'll lose my teaching job,' he begged the officer who arrested them. It was not surprising that he 'pleaded to lesser charges and split,' leaving Hardwick alone to fight the case." (alteration in original)).

[233] *Id.* at 1694.

[234] Levy, *supra* note 206, at 57; *see also* Redding, *supra* note 179, at 15 (characterizing Windsor as "queer" for not having children).

[235] United States v. Windsor, 133 S. Ct. 2675, 2694 (2013) (DOMA "humiliates tens of thousands of children now being raised by same-sex couples.").

[236] *Id.* at 2689 ("Slowly at first and then in rapid course, the laws of New York 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.").

ily."[237] So in *Windsor*, in addition to the couple, the Court casts children and reproduction as characteristic of the legal homosexual.[238]

In sum, we see that three conditions are at the core of the transition of the legal homosexual from an immoral sodomite to a dignified married couple. The legal homosexual is commonly perceived as desexualized, privatized, and coupled and reproductive.

III. Incomplete Closure: *Windsor*'s Weak Dignity

> The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence.
>
> — Justice Kennedy, *United States v. Windsor*[239]

The concept of human dignity is not new in the jurisprudence of the Court. It has been especially prominent in decisions authored by Justice Kennedy.[240] As Reva Siegel has observed, the normative meaning of human dignity varies from case to case, such that "[a]t different points . . . dignity concerns the value of life, the value of liberty, and the value of equality."[241] In fact, dignity can sometimes support opposing normative positions. For instance, in *Gonzales v. Carhart*, the Court appealed to human dignity to justify government restriction of abortions,[242] whereas in *Casey*, the Court appealed to human dignity to support a woman's right to terminate her pregnancy.[243]

What work does dignity do in *Windsor*? The discussion of *Windsor* in Part I examined the doctrinal significance of dignity in the Court's holding.[244] This Part argues that *Windsor*'s dignity is weak for three principal

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[237] *Id.* at 2694.

[238] Since the 2000s, children of gay and lesbian couples have also appeared in popular culture. *See, e.g.*, The Kids Are All Right (Focus Features 2010); *The L Word* (Showtime 2004–2009); *The New Normal* (NBC 2012–2013).

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

[240] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567 (2003); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

[241] Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 Yale L.J. 1694, 1701–02 (2008); *see also id.* at 1696 ("[I]n substantive due process and equal protection cases constitutional protections for dignity vindicate, often concurrently, the value of life, the value of liberty, and the value of equality."); *see generally* Mary Anne Case, *Of "This" and "That" in* Lawrence v. Texas, 2003 Sup. Ct. Rev. 75 (2003) (discussing the role of dignity in *Lawrence*).

[242] 550 U.S. 124, 157 (2007).

[243] *Casey*, 505 U.S. at 851; *see also* Siegel, *supra* note 241, at 1696 ("[A] commitment to dignity structures the undue burden test itself, which allows government to regulate abortion to demonstrate respect for the dignity of human life so long as such regulation also demonstrates respect for the dignity of women.") (footnote omitted).

[244] *Supra* Part I.D.1.

reasons. First, it is conferred by the State and at each state's discretion. Second, *Windsor*'s dignity is much narrower in scope than contemporary theories of dignity promoted by legal and moral philosophers. Third, *Windsor*'s State-conferred dignity comes with unnecessary rhetoric of injured subjects, a rhetoric that could perpetuate an attachment to injury by homosexual couples and other rights-seeking legal subjects.

A. Weak Source: State-Conferred Dignity

The *Windsor* decision repeatedly affirms that the State is the source of human dignity. Upon arrival of what the Court calls "a new perspective, a new insight,"[245] some states have decided to dignify same-sex couples by recognizing their marriages. This "conferred upon them a dignity and status of immense import"[246] and "enhanced the recognition, dignity, and protection of the class."[247] This novel theory of State-conferred dignity is problematic for at least two reasons.

First, and more importantly, in contrast with God or his derivative institutions, the source of the State's authority to grant moral dignity is unclear. The State can grant liberal rights such as liberty and equality, but those, at least in their common use, are understood as secular liberal rights. They do not confer moral value on individuals. *Windsor* seems to locate the power to confer dignity in the formation of consensus within communities.[248] Namely, the State confers dignity after the local community has decided to accept a group of previously disapproved-of individuals. But if dignity is a serious human value, it should be guaranteed by the State, like equality and liberty, to all members of society. It should not have to wait for the moral approval of a majority of the population.

Second, it is unclear whether State-conferred dignity can travel across state lines. Under the Court's rendering, a state decision to recognize same-sex marriages enhances the dignity of that class only "in their own community."[249] So if Amy and Emily marry in Iowa, a state that recognizes their marriage, they will be dignified in Iowa. But when they travel to the neighboring Nebraska, or to Georgia or Alabama, that dignity may have to stay behind, and their marriage may once again be undignified.[250] It is strange indeed to imagine losing one's dignity when crossing state lines.

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[245] United States v. Windsor, 133 S. Ct. 2675, 2689 (2013).

[246] *Id.* at 2692.

[247] *Id.*

[248] *Id.* at 2692–93 (discussing "the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other" and "the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality").

[249] *Id.* at 2692.

[250] *See* Baude, *supra* note 116, at 157 (arguing that "even if courts conclude that some form of interstate recognition is constitutionally required, not all recognitions are

B. Weak Scope: A Narrow Theory of Human Dignity

Windsor's theory of State-conferred dignity is significantly narrower than other present and historical conceptions of human dignity. Human dignity has played an important role in international and national human rights movements,[251] and it has provided a basis for much theorizing about social justice.[252] To illuminate just how narrow *Windsor*'s theory of State-conferred dignity is, let us briefly consider how moral philosophers have treated the concept of human dignity.

Dignity has received growing attention in contemporary moral philosophy and legal theory. For example, Martha Nussbaum's approach to justice is based on human dignity. Nussbaum has argued that respect for human dignity requires that governments should support central human "capabilities."[253] Nussbaum defines dignity as follows:

> If something has dignity, as Kant put it well, it does not merely have a price: it is not merely something to be used for the ends of others, or traded on the market. This idea is closely linked to the idea of respect as the proper attitude toward dignity; indeed, rather than thinking of the two concepts as totally independent, so that we would first offer an independent account of dignity and then argue that dignity deserves respect (as independently defined), I

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the same. One important distinction is between already-married couples who move to a new state that does not recognize their marriage (a "migratory" marriage) and couples who live in a state that does not allow them to marry, but get married on a brief trip outside of that state (an "evasive" marriage).").

[251] *See, e.g.*, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW], May 23, 1949, BGBl. 1, art. 1, § 1 (Ger.) ("Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."); Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391, § 2 (Isr.) ("There shall be no violation of the life, body or dignity of any person as such."); Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3(1)(c), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (prohibiting "outrages upon personal dignity"); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, pmbl., U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world").

[252] For a history of the idea of dignity, see generally Martha Nussbaum, *Human Dignity and Political Entitlements*, *in* HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT'S COUNCIL ON BIOETHICS 351 (2008) [hereinafter Nussbaum, *Human Dignity*], *available at* http://bioethics.georgetown.edu/pcbe/reports/human_dignity/chapter14.html, *archived at* http://perma.cc/5QTH-PWLA; *see also id.* at 352 ("According to the Greek and Roman Stoics, the basis for human community is the worth of reason in each and every human being. Reason (meaning practical reason, the capacity for moral choice), is, in the Stoic view, a portion of the divine in each of us.") (footnote omitted).

[253] *See, e.g.*, MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 70–71 (2006); MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 5 (2000). The core capabilities that, according to Nussbaum, should be supported by all democracies are as follows: life, bodily health, bodily integrity, senses, imagination and thought, emotions, practical reason, affiliation, other species, play, and control over one's environment. *Id.* at 78–80.

> believe that we should think of the two notions as closely related, forming a concept-family to be jointly elucidated.[254]

Dignity is ultimately bound up with respect, according to Nussbaum, and it is the responsibility of the liberal state to ensure this respect. The state does not grant dignity. Its only function is to safeguard it.[255]

Jeremy Waldron has argued for a slightly different understanding of human dignity, connected to what he calls "responsibility-rights."[256] Waldron's concept of dignity draws upon the importance of social rank, but with a twist.[257] As he explains, "the idea of general human dignity associated itself [with] the notion that humans as such were a high-ranking species, called to a special vocation in the world, and that in a sense each of us was to be regarded as endued with a certain nobility or royalty, each of us was to be regarded as a creature of a high rank."[258] Waldron conceives current liberal societies as societies not without caste, but rather, "with just one caste and a very high caste at that: every man a Brahmin. Every man a duke, every woman a queen, everyone entitled to the sort of deference and consideration, everyone's person and body sacrosanct . . . ."[259] Given this elevated status of all individuals, a societal commitment to dignity must connect individual rights with social responsibilities toward others.[260]

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[254] Nussbaum, *Human Dignity*, *supra* note 252, at 353–54.

[255] *Id.* at 359–60 ("Respect for human dignity is not just lip service, it means creating conditions favorable for development and choice. . . . [I]t is the task of the 'basic structure' of society to put in place the necessary conditions for a minimally decent human life, a life at least minimally worthy of human dignity, expressive of at least minimal respect. If we accept such an account . . . this yields the conclusion that government (meaning the basic structure of society) should support the central human capabilities.").

[256] Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1107, 1116 (2011). The Second Amendment right to bear arms is one example of a responsibility-right. *Id.* at 1117 ("[T]he way the Second Amendment is drafted presents it as a responsibility right, which admittedly does not obliterate the restraint on government—indeed the citizen militia is supposed to be a potentially anti-government force—but also does not leave it as a simply libertarian entitlement. The responsibility aspect is a way of informing and conditioning the individual possession and exercise of the right."); *see also* Noa Ben-Asher, *Obligatory Health*, 15 YALE HUM. RTS. & DEV. L.J. 1, 18 (2012) (characterizing the individual mandate of the Affordable Care Act as a praiseworthy obligation of citizens towards the basic health needs of other fellow-citizens).

[257] *Id.* at 1118 ("In Roman usage, *dignitas* embodied the idea of the honor, the privileges and the deference due to rank or office, perhaps also reflecting one's distinction in holding that rank or office. And the Oxford English Dictionary still gives as its second meaning for the term 'Honourable or high estate, position, or estimation; . . . degree of estimation, rank' and as its third meaning 'An honourable office, rank, or title; a high official or titular position.'") (footnote omitted).

[258] *Id.* at 1119. *But cf.* Franke, *Dignifying Rights*, *supra* note 169, at 1178 (arguing that linking rights, responsibility, and dignity may at times require some to "behav[e] responsibly," turning dignity into "an accomplishment, a normative practice which requires work. It is something you can, indeed must, earn and can risk losing.").

[259] Waldron, *Dignity, Rights, and Responsibilities*, *supra* note 256, at 1120 (footnote omitted).

[260] *Id.* at 1136 ("And it is a way of connecting rights with socially important functions, not just seeing them as an individualist limit on the ambit of social functions. It is also, as I have said, an important way of connecting rights with dignity. For these rea-

Both of these approaches, despite differences between them, conceptualize human dignity as something that all individuals possess and that society must protect, defend, and enhance. Under Nussbaum's approach, all humans have dignity and this translates into a set of obligations for modern states.[261] Under Waldron's approach, human dignity comes from *dignitas*, which is a rank that all citizens share in liberal democracies.[262] One need not accept either theory of dignity to agree that, if dignity is to be embraced as a social or legal value, it should not be understood to come from the State. Neither theory of dignity derives human dignity from State recognition. Waldron and Nussbaum's views usefully illustrate how far afield the Court's presentation of dignity is from contemporary philosophical accounts.

C. Weak Subjects: Windsor*'s Injured Subjects*

> The word that Kennedy used a lot was dignity . . . and when you are a kid and you figure out you're gay when you're seven years old . . . you don't know about sex or anything like that, but you do know that you'll never be able to have a life like your mom and dad. Be married. And that's a huge wound to some kids' self-esteem, identity, psychological pride, and that wound has been healed a little today. And I think of all the future people who will be less damaged and less wounded, will feel less pain . . . ."
>
> — Andrew Sullivan, CNN interview with Anderson Cooper[263]

United States v. Windsor tells the story of wounded and injured subjects.[264] The Defense of Marriage Act, according to *Windsor*, "demeans the couple, . . . whose relationship the State has sought to dignify."[265] It "imposes a disability on the class";[266] it "places same-sex couples in an unstable

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sons, then, I think the responsibility form of rights is a useful and important resource to add to our analytic repertoire."); *see also* Jeremy Waldron, *Citizenship and Dignity* 10 (N.Y.U. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 12-74, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2196079, *archived at* http://perma.cc/P464-6JBK ("[C]itizenship comprises a bundle of rights, powers, duties, and liabilities, determined in its content and application as a matter of law rather than as a matter of choice and united by an underlying social concern focused on individuals of certain types or in certain predicaments.").

[261] *See* Nussbaum, *Human Dignity*, *supra* note 252, at 359–60.

[262] *See* Waldron, *Dignity, Rights, and Responsibilities*, *supra* note 256, at 1118–20.

[263] *Anderson Cooper 360°*, *supra* note 145.

[264] *See* 133 S. Ct. 2675, 2692 (2013) ("[T]his Court [has] to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment."); *see also* Nussbaum, *A Right to Marry?*, *supra* note 148, at 685 ("[I]f two people want to make a commitment of the marital sort, they should be permitted to do so, and excluding one class of citizens from the benefits and dignity of that commitment demeans them and insults their dignity.").

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

[266] *Id.* at 2695–96; *see also id.* at 2696 ("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.").

position of being in a second-tier marriage."[267] Furthermore, the injury, *Windsor* tells us, extends to the children of same-sex couples. DOMA "humiliates tens of thousands of children now being raised by same-sex couples."[268] DOMA, thus understood, was powerful legislation that caused immense wounds. These wounds, according to *Windsor*, did not occur as a result of recklessness or even negligence by Congress. The injuries were caused by an intentional act of animus,[269] a statute that was meant to "demean" same-sex couples.[270] The majority in *Windsor* claimed that DOMA was designed for that purpose alone: to disadvantage and stigmatize married same-sex couples.[271]

This language of injury resonates with the argument, articulated most fully by Wendy Brown, that contemporary identity politics runs the risk of reinforcing "wounded attachments."[272] Brown explains,

> In locating a site of blame for its powerlessness over its past—a past of injury, a past as a hurt will—and locating a "reason" for the "unendurable pain" of social powerlessness in the present, it converts this reasoning into an ethicizing politics . . . . Politicized identity thus enunciates itself, makes claims for itself, only by entrenching, restating, dramatizing, and inscribing its pain in politics . . . .[273]

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[267] *Id.* at 2694.

[268] *Id.* ("[DOMA] makes it even more difficult for the children to understand the integrity and closeness of their own family . . . .").

[269] *But see id.* at 2708 (Scalia, J., dissenting) ("But the majority says that the supporters of this Act acted with malice. . . . I am sure these accusations are quite untrue.").

[270] *Id.* at 2695 ("The principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage.").

[271] *Id.* at 2693 ("The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."). The Court seems to have drawn much of the rhetoric of injury and stigma from the "the voices of [the] children" amici brief, which was submitted to the Supreme Court by multiple groups, including the Family Equality Council and the Child Rights Project at Emory University School of Law. *See* Brief for Family Equality Council et al. as Amici Curiae Supporting Respondents at 2, *Windsor*, 133 S. Ct. 2675 (No. 12-307) and Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144). One of the brief's main claims was that DOMA and Proposition 8 stigmatized and delegitimized same-sex parented families. *Id*. at 23–31. The brief asserts that children of same-sex parents are "very much demeaned and stigmatized by being 'treated differently,'" and that "these feelings of stigmatization, inferiority, and de-legitimization are common themes heard by the amici who work every day with children raised by same-sex parents." *Id.* at 25. The brief also asserts that this stigmatization "can lead children to have insecurity about their parents' relationship." *Id.*

[272] *See* Wendy Brown, States of Injury 52–55 (1995).

[273] *Id.* at 74 (1995). Brown criticizes identity politics as a psychological reflection of Nietzschian *ressentiment*. Brown sees in the contemporary mobilization of rights claims a troubling directing or channeling of individual feelings of *ressentiment* toward the other, the perceived injurer.

The problem, according to Brown, arises when a past injury becomes an important constituent of individual and group identity.[274] When this happens, the individual and group identity may become attached to—dependent and responsive to—its past wounds.[275] The identity group becomes unable to articulate new values, new ideas, new morality, and new alternatives.[276] *Windsor*'s rhetoric of injury risks creating the type of "wounded attachment" that Brown warned about. *Windsor* posits an entire class of people as demeaned, injured, and humiliated by one piece of legislation that defined marriage as a union between one man and one woman.

Windsor is thus a paradoxical legal moment. At the same time that it cures an injustice, it plants the seed for future feelings of resentment. By invalidating DOMA, the Court has reversed a gross injustice, a law that promoted marriage inequality for seventeen years. But the Court's vigorous rhetoric of indignity, injury, and humiliation also encourages conceptions of injury and shame in present and future LGBT identity politics. *Windsor* sends a message to those who live in states that do not recognize marriage equality that they *should* feel harmed and humiliated.

Advocates should resist this infectious rhetoric of injury in future advocacy and politics by insisting that those who enacted DOMA are the ones who have been humiliated by it. The Court could have avoided this damaging discourse by invalidating the Defense of Marriage Act on straightforward Equal Protection grounds. The Court could have ruled, as it did in *Romer*, and as the Iowa Supreme Court did in *Varnum v. Brien*,[277] that treating classes of people differently for no legitimate purpose violates the Equal Protection guarantees of the Constitution. But it did not.[278] Instead, *Windsor*, hailed as one of the biggest civil rights victories of our times,[279] introduced the prospect of new shame and indignity for those who still cannot marry.

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[274] *See id.* at 68–70.

[275] *See id.* at 70–74.

[276] *See id.* at 52–76; *cf. generally* Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193 (2010) (showing how trauma narratives adopted by feminists in the 1970s in relation to rape have re-emerged in recent abortion cases).

[277] 763 N.W.2d 862, 872 (Iowa 2009) ("In this case, we must decide if our state statute limiting civil marriage to a union between a man and a woman violates the Iowa Constitution, as the district court ruled. On our review, we hold the Iowa marriage statute violates the equal protection clause of the Iowa Constitution.").

[278] For a discussion of the likely reasons for the majority's approach, see *supra* notes 116–134 and accompanying text.

[279] *See, e.g.*, Dorf, *supra* note 134 ("If Bill Clinton was 'the first Black president,' Anthony Kennedy has now firmly secured his place in history as 'the first gay Justice.' . . . A hundred years from now, histories of the Court will treat Justice Kennedy w/r/t gay rights the way we think of Earl Warren w/r/t racial equality."); Goldberg, *One-Two Punch*, *supra* note 117; Scott Lemieux, *Two Cheers for the Supreme Court on LGBT Rights*, AM. PROSPECT (June 26, 2013), http://prospect.org/article/two-cheers-supreme-court-lgbt-rights, *archived at* http://perma.cc/K73S-QXGG (describing *Windsor* as "a historic opinion and a major victory for civil rights").

Windsor's dignity, in sum, suffers from three principal weaknesses: (1) its source as something conferred by the State; (2) its narrow scope; and (3) its rhetoric of wound and injury. Courts, litigators, social movements, and scholars are now charged with rehabilitating *Windsor*'s dignity.

Conclusion

> [I]t should be the questions and shape of a life, its total complexity gathered, arranged and considered, which matters in the end, not some stamp of salvation or damnation which disperses all the complexity in some unsatisfying little decision—the balancing of the scales.
>
> —*Angels in America, Part One: Millennium Approaches*[280]

We have experienced a fascinating legal and moral metamorphosis in the last three decades—from *Bowers*' homosexual sodomite to *Windsor*'s same-sex marriages "deemed by the State worthy of dignity."[281] This Article has traced the road from there to here. In every decade since 1986, the Supreme Court portrayed the legal homosexual with a new and different emphasis. In *Romer*, the legal homosexual became a protected class;[282] in *Lawrence*, an enduring intimate bond;[283] and in *Windsor*, a same-sex couple dignified by marriage.[284] Of course, this is not just a new sport of judicial name-calling. In each of these transformative moments, a constitutional doctrine closely traced the new casting of the legal homosexual. In *Romer* (the "Equal Homosexual Class Phase"), the homosexual class was granted equal protection; in *Lawrence* (the "Free Intimate Bond Phase"), intimate, private conduct was granted liberty from government intrusion; and in *Windsor* (the "Dignified Married Couple Phase"), the married same-sex couple was understood to have been granted "equal dignity" by states who recognize same-sex marriages.

Federal marriage equality is now here. As new marriage equality challenges make their way through the courts, advocates and courts will continue to face the significant task of putting to work *Windsor*'s ruling on "equal dignity." Although *Windsor* will undoubtedly go down in history as a milestone civil rights victory, its concept of human dignity sadly leaves much to be desired. It is a weak dignity. Its source is the State and not the individual. It is narrow in scope, and it comes with rhetoric of injury and humiliation.

What would a stronger dignity look like? It would invoke the concept of human dignity while explicitly resisting the three primary weaknesses of

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[280] 1 Tony Kushner, Angels in America: A Gay Fantasia on National Themes, Part One: Millennium Approaches 38–39 (1993).

[281] United States v. Windsor, 133 S. Ct. 2675, 2692 (2013).

[282] *See* Romer v. Evans, 517 U.S. 620, 632 (1996).

[283] Lawrence v. Texas, 539 U.S. 558, 567 (2003).

[284] *Windsor*, 133 S. Ct. at 2692.

Windsor's dignity. First, and most importantly, advocates and courts applying *Windsor* should clarify that "equal dignity" means that the State must give equal *recognition* to the dignity of all individuals and couples. The State grants marriage licenses, and it should grant them equally to all couples. In so doing, the State does not distribute dignity; it acknowledges dignity equally across citizens. Second, and relatedly, advocates should be careful not to imply that human dignity is enhanced by marriage. If dignity inheres in the individual,[285] then neither the state where one resides nor the state of matrimony increases that dignity. Finally, where possible, past injustices, such as DOMA and sodomy laws, should be condemned without assuming that they have injured. A stronger account of dignity would resist portraying all lesbians, gays, and bisexuals and their children as injured subjects who have been humiliated and shamed by unjust laws. But even if advocates may feel compelled to offer every argument that might persuade a court, judges, in selecting among those arguments, have a choice about the language and the light in which they cast the subjects who appear before them.

In 1962, Edith Windsor asked a friend in New York City to take her to "where the lesbians go."[286] There she met Thea, and they danced for the next forty years. Edith and Thea lived a life of passion and joy. They were engaged in 1967, before any state ever considered recognizing their union. They protested after the 1969 Stonewall riots for justice for lesbians, homosexuals, bisexuals, drag queens, and many others. The sign on their refrigerator said, "Don't postpone joy." In 2007, they married. Marriage did not dignify Edith and Thea. They dignified marriage.

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[285] *See supra* Part III.B (discussing these arguments).

[286] A VERY LONG ENGAGEMENT. Paradoxically, half a century later, in a decision that bears Edith's name, the lesbians will have in some significant way disappeared. *See supra* Part II.A.